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## Internal Jus ad Bellum

Eliav Lieblich

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# Internal *Jus ad Bellum*

ELIAV LIEBLICH\*

*In 1945, the United Nations Charter famously set out “to save succeeding generations from the scourge of war.” Having in mind traditional interstate wars, the Charter’s Article 2(4) outlawed, for the first time, interstate uses of force. However, nowadays, international wars are relatively rare, while civil wars are both more numerous and increasingly destructive. Still, international law has yet to develop a regime regulating the resort to war (jus ad bellum) within a state, either by governments or opposition groups. Contemporary jus ad bellum, thus, fails to address one of the most atrocious forms of war in the modern international system.*

*This Article puts forward a novel theory of internal jus ad bellum, equally applicable to governments as well as opposition groups. It demonstrates that the current blind spot in international law concerning this issue is incoherent and unwarranted. By applying the revisionist approach to just war theory, this Article argues that internal resort to armed force can only be morally acceptable if undertaken in self (or other) defense against grave threats.*

*Applying this notion to the international legal sphere, this Article claims that collectivist doctrines such as self-determination, sovereignty, or democratic entitlement are not appropriate venues for an acceptable standard of internal jus ad bellum. It proceeds to locate such a possible standard in international human rights law (“IHRL”), which enshrines everyone’s right to life. However, as the Article demonstrates, IHRL, as currently understood, fails to serve as an effective framework for internal jus ad bellum, since it collapses, during armed conflict, into international humanitarian law. The Article concludes by suggesting an understanding of IHRL that can overcome these limitations and thus serve as a working doctrine of internal jus ad bellum.*

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## INTRODUCTION

In 1945, the United Nations (“U.N.”) Charter famously set out “to save succeeding generations from the scourge of war.”<sup>1</sup> Undoubtedly, the Charter’s framers had in mind, when phrasing this ambitious goal, the two World Wars that have brought “untold sorrow to mankind” during the twentieth century.<sup>2</sup> Accordingly, the Charter’s Article 2(4) laid down the first comprehensive legal prohibition on the interstate use of force, providing that “[a]ll Members shall refrain in their international relations from the threat or use of force against . . . any *state*[.]”<sup>3</sup>

However, nowadays, interstate wars are by no means the main cause of the human suffering that the framers wished to prevent. Of the 254 armed conflicts recorded between 1946 and 2013 by a leading database, only twenty-four have been categorized as interstate conflicts, while a staggering number of 153 *intrastate* conflicts were recorded.<sup>4</sup> Civil wars are not only more numerous, but are also extremely violent, intractable, and often accompanied by mass atrocities. In Syria, for instance, as of late 2015, the U.N. estimated that over 200,000 people have died in almost five years of strife, with no end in sight. In Europe and across the Middle East, the Syrian civil war accounts for one of the worst refugee crises in recent history.<sup>5</sup>

Yet, seventy years after the conclusion of the U.N. Charter, mainstream international legal doctrine still remains awkwardly silent regarding the decision to resort to force within state borders—whether by governments or opposition groups.<sup>6</sup> Oddly, this has been the case *although* international law has made significant strides, in the past decades, into issues long considered strictly matters of internal affairs.<sup>7</sup> Indeed, the U.N. Charter itself reflects a compromise between idealism and post-war realism: during its formation, utopian visions of a cosmopolitan world order were reconciled with enduring notions of state sovereignty.<sup>8</sup> The significant achievement of Article 2(4) was thus not

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1. U.N. Charter pmb1.

2. *Id.*

3. *Id.* art. 2(4) (emphasis added).

4. The rest were mixed conflicts. See *World Map*, UPPSALA CONFLICT DATA PROGRAM, [www.ucdp.uu.se/database](http://www.ucdp.uu.se/database) (last visited Apr. 10, 2016).

5. *About the Crisis*, OCHA, <http://www.unocha.org/syrian-arab-republic/syria-country-profile/about-crisis> (last visited Apr. 10, 2016); Ariane Rummery, *Worsening Conditions Inside Syria and the Region Fuel Despair, Driving Thousands Towards Europe*, UNHCR NEWS STORIES (Sept. 8, 2015), <http://www.unhcr.org/55eed5d66.html>.

6. The same awkwardness is found in the study of the ethics of war. See CÉCILE FABRE, *COSMOPOLITAN WAR* 131 (2012).

7. Namely, through the growth of international human rights law. For a comprehensive overview, see PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* (2013).

8. See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 45–46 (2010).

extended to internal resorts to force, leaving intact the pre-Charter legal regime on the issue.

Pre-Charter law, being statist and sovereignty-centered, assumed freedom of action within state borders, even concerning decisions to resort to force. The general norm of nonintervention in internal affairs, supplemented by the perception that international law cannot regulate actions by individuals, resulted in the view that both governments, when asserting their sovereignty, and individuals, when embarking on rebellion, were free to resort to force. Since the U.N. Charter did not alter this approach, the question of intrastate resort to force—or internal *jus ad bellum*—remained a “blank spot” of international law throughout the post-war legal order.<sup>9</sup> Surprisingly, the vast majority of international legal discourse—usually keen on expanding the reach of international law—proved consistently deferential in this context. In 1947, Hersch Lauterpacht wrote that internal *jus ad bellum* was a matter for future development.<sup>10</sup> Sixty-seven years later, Yoram Dinstein still concedes that international law’s silence on internal resorts to force remains the “indisputable, albeit grim, reality.”<sup>11</sup> Indeed, virtually all of the writing on *jus ad bellum* and internal strife, throughout the years, tended to focus on the question of *intervention*, meaning, the extent to which *external* parties may support this or that party, and *not* on the resort to force by the internal parties themselves.<sup>12</sup>

International legal discourse thus refrains from addressing the legality of the decision to resort to internal force, although civil wars are the worst form of mass violence in the contemporary international system. This Article argues that this cannot be justified either in jurisprudential terms or in terms of policy. As it demonstrates, the

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9. See Inger Österdahl, *The Gentle Modernizer of the Law of Armed Conflict?*, in *Jus Post BELLUM: MAPPING THE NORMATIVE FOUNDATIONS* 207, 227 (Carsten Stahn et al. eds., 2014).

10. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 93 (1947).

11. YORAM DINSTEIN, *NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW* 5 (2014); see also Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion 997, I.C.J. 141, ¶ 80 (July 22, 2010) [hereinafter Kosovo Advisory Opinion]; Olivier Corten, *The Russian Intervention in the Ukrainian Crises: Was Jus Contra Bellum Confirmed Rather than Weakened?*, 2 *J. USE FORCE & INT'L L.* 17 n.43 (2015) (arguing that Article 2(4) has not been extended to the internal realm, and although some governmental resort to force is condemned, this simply reflects expansion of Security Council powers and not a primary prohibition; arguing that international law does not prohibit resort to force by opposition groups); see also Claus Kress, *Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force*, 1 *J. USE FORCE & INT'L L.* 11, 13–14, 25, 41–42, 51–52 (2014). But see Kirsti Samuels, *Jus ad Bellum and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict in Sierra Leone*, 8 *J. CONF. & SEC. L.* 315 (2003) (arguing that international practice concerning the conflict in Sierra Leone might foreshadow emerging norms of *jus ad bellum* in “civil conflicts”).

12. Countless works focus mainly on intervention. See, e.g., *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* (J. L. Holzgrefe & Robert O. Keohane eds., 2003); *THE INTERNATIONAL LAW OF CIVIL WAR* (Richard A. Falk ed., 1971).

current legal situation, in which external use of force is regulated under the U.N. Charter while internal resort to force remains in legal limbo, is a peculiar moment in the history of international legal theory. It undercuts the coherence of the international legal system and thus also its legitimacy.

This Article therefore attempts to break the deadlock on internal force by suggesting a theory that can be ethically justified; is equally applicable to *both* governments and opposition groups; *and* can be grounded in reasonable interpretation of existing legal standards. The basic argument is that internal resorts to full-fledged hostilities—whether by governments or opposition groups—are generally prohibited, and can only be undertaken in self-defense or in defense of others against a threat to life or limb, of the scale and effect that usually emanates only from a prior resort to armed hostilities. Should this theory be accepted, it could usher in a new sphere of legal responsibility, not only for violations of international humanitarian law (“IHL”) during internal armed conflicts, but also for the mere resort to armed force within state borders.

This Article locates the theoretical grounds for such a rule in revisionist just war theory. As detailed later on, revisionist just war theory is a school in the study of the ethics of war, which proceeds from the basic proposition that all acts of killing—whether individual or collective—are subjected to the same morality. Revisionists first make the widely accepted claim that individuals are permitted to kill only in defense of self or others (“self-or-other-defense”) from grave threats, subject to necessity and proportionality limitations. They then move to make the radical (yet still intuitive) claim that individuals cannot shake off these limitations simply by acting through a collective, such as by the “people” or even the “state.”<sup>13</sup>

Applying this reasoning to international legal concepts reveals that a morally coherent standard on internal resort to force must conform to three mutually complementing rules. First, it cannot presume that different morality governs collective action versus individual action, which must result in similar standards for governments, peoples, and individuals. Second, since resort to force is about killing, it cannot be more permissive than the self-or-other-defense standard. Third, a standard on the internal resort to force cannot conflate the right to something (such as sovereignty, self-determination, or democracy) with the right to use armed violence—essentially, *to kill*—to achieve it.

After laying down the ethical point of departure described above, this Article locates the legal grounding for such self-or-other-defense rule in the right to life, as enshrined in positive international human

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13. For a short overview of the debate, see Cécile Fabre & Seth Lazar, *Introduction*, in *THE MORALITY OF DEFENSIVE WAR 1–3* (Cécile Fabre & Seth Lazar eds., 2014).

rights law (“IHRL”). The right to life is a proper venue for the regulation of internal resorts to force since IHRL, in general, deals with intrastate relations. In this context, the right to life sets out to protect the lives of *everyone* affected by a decision to employ armed force: soldiers, members of opposition groups, or civilians likely to get caught in the crossfire. By regulating this decision, the right to life can serve as a complementing defense even for persons that might *lawfully* lose their lives under the law of armed conflict, if a decision to resort to force is made. To emphasize the point further, since the question of *resort* to force deals with the mere *decision* to embark on hostilities, it is distinct from the manner in which the hostilities are actually conducted (*jus in bello*). The right to life, if understood as a prohibition on internal resort to force, can therefore add an additional layer of legal analysis, even if the forcible acts themselves are conducted lawfully under *jus in bello*. However, as this Article demonstrates, the current understanding of IHRL requires significant development in order for this task to be fulfilled.

This Article does not presume to outline each and every aspect of the prohibition on internal force and its self-defense exception. A myriad of questions can be asked: How do we define an “armed attack” on the internal level, considering that it is often difficult to identify the relevant actors, operating in informal frameworks? Should the concept of anticipatory self-defense apply in internal settings? What role, if any, should be reserved for collective self-defense in the internal sphere? What part would the U.N. Security Council play? Should the strict separation between *jus ad bellum* and *jus in bello*—still the prevalent view concerning international uses of force—be maintained in the internal realm? How well positioned is the international community in assessing internal resorts to force? When referring to nonstate actors, should their actions be assessed according to individual or collective, corporate-like responsibility? Such questions are all important and merit further study. This Article, however, aims to set the general baseline for the assessment of internal resort to force, hopefully sparking further discussion of this long, averted issue.

Before moving on, some distinctions are required to clarify the boundaries of our discussion. Mainly, we need to define the meaning of “resort to force,” to which the suggested prohibition applies. Indeed, the power to coerce in a defined territory is a basic tenet of sovereignty, to some even its defining element.<sup>14</sup> Coercion, of course, implies a wide

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14. See, e.g., Max Weber, *Politics as a Vocation*, in *THE VOCATION LECTURES* 32, 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004) (stating famously that “the state is the form of human community that (successfully) lays claim to the monopoly of legitimate physical violence within a particular territory”); see also LASSA OPPENHEIM, 1 *INTERNATIONAL LAW: A TREATISE* § 123 (2d ed. 1912) (defining sovereignty as “supreme authority”).

spectrum of actions. Obviously, some level of coercion is a given within a state, not every form of which could possibly amount to a prohibited use of force. For instance, the use of law enforcement agencies and adjudicatory bodies for securing the public interest is not the type of force envisioned here. Chiefly, this is because coercive force in the form of law enforcement does not usually entail intentional killing, but only the use of physical force necessary for the arrest and trial of a suspected individual. When lethal force is undertaken during a law enforcement action, it is only as a last resort, in defense against a specific, imminent threat. Importantly, that threat is assessed *individually*, and would result in a permission to kill in very narrow circumstances.<sup>15</sup> Citizens, too, may in fact engage in what could be described as coercion against the state. Such actions can consist of wide-scale, nonviolent civil resistance, which might diminish the state's capacity to act;<sup>16</sup> or of demonstrations that involve some level of random violence, which occasionally occur in even the most stable of democracies.<sup>17</sup> Just as this Article does not deal with every form of state coercion, it is not concerned with all forms of citizen-induced coercion.

When discussing internal resorts to force, this Article refers only to coercive power in the form of *hostilities*, whether undertaken by governments or opposition groups. It also excludes all other “non-forcible” coercive actions, such as those routinely undertaken by states in the context of law enforcement action, or by citizens in nonviolent resistance or random rioting. Hostilities, as a matter of fact, differ from “regular” coercive acts in several aspects. Namely, during hostilities, persons are lethally attacked in light of their status or function, and not necessarily in light of an imminently materializing threat. Further, the degree and type of force used in hostilities is not subjected to a use-of-force continuum, and, in general, arrest is not attempted prior to attack.<sup>18</sup> Coercive power is employed without previous adjudication, and

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15. See Eliav Liebllich, *Quasi-Hostile Acts: The Limits on Forcible Disruption Operations Under International Law*, 32 B.U. INT'L L.J. 355, 365–70 (2014) (outlining the law enforcement paradigm).

16. See, e.g., M. K. GANDHI, NON-VIOLENT RESISTANCE (1961); Gene Sharp, *The Meanings of Non-Violence: A Typology*, 3 CONF. RESOL. 41, 42 (1959).

17. See, e.g., Carl-Ulrik Schierup & Aleksandra Ålund, *The End of Swedish Exceptionalism? Citizenship, Neoliberalism and the Politics of Exclusion*, 53 RACE & CLASS 45 (2011).

18. I reserve the question whether there is also a legal *obligation* to capture rather than kill during hostilities. See, e.g., HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 62(1) PD 507 ¶ 40 [2006] (Isr.); NILS MELZER, INT'L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 77 (2009); Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69, 115 (2010); Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819 (2013). But see W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 799–812 (2010).

proportionate incidental harm to uninvolved civilians is tolerated.<sup>19</sup> When violence is undertaken by nonstate actors, a factual threshold of intensity, protraction, and organization must be crossed, in order for the acts to constitute *hostilities*—as opposed to “regular” acts of violence associated with “normal” criminal activity.<sup>20</sup> The focus on hostilities, as opposed to other forms of coercion, can be justified on two main counts. First, the resort to coercive force short of hostilities is relatively well-regulated under human rights law.<sup>21</sup> Second, since the resort to hostilities is about intentional killing, it differs morally from any other form of coercion. Obviously, it is the most detrimental to human life and security.

A further distinction must be made. Sometimes, citizen coercion can result in regime change. This could be achieved either through an extra-constitutional revolution, or by a coercive removal of a government in circumstances permitted under the state’s own constitutional order.<sup>22</sup> The legality of such outcomes, in international law, is all too often conflated with the lawfulness of force employed to achieve them. Lauterpacht, for instance, argued that as long as international law does not prohibit revolutions “it cannot condemn the means, necessarily violent, by which they are achieved.”<sup>23</sup> However, this is a fundamental mistake, since it obfuscates objectives and means. Overthrowing a government can be an *outcome* of civil unrest,<sup>24</sup> but it does not necessarily require the use of armed force.<sup>25</sup> In legal terms, thus, it is perfectly possible that in certain

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19. See Lieblich, *supra* note 15, at 366; see also Jens David Ohlin, *Acting as a Sovereign Versus Acting as a Belligerent* 11–15 (Cornell Legal Studies Research Paper, No. 14–21, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2456754](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456754) (providing a theoretical distinction between situations in which states act as “sovereigns” and as “belligerents”).

20. The widely accepted definition of “armed conflict” espoused by the International Criminal Tribunal of the Former Yugoslavia (“ICTY”) is helpful in this context. See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Trial Chamber Judgment, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (holding that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state”); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), June 8, 1977, 1125 U.N.T.S. 609, art. 1(2) [hereinafter Protocol II] (excluding from the definition of armed conflict “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”).

21. See, e.g., Basic Principles on the Use of Force and Firearms by Law Enforcement Officials arts. 6, 9, 10, 12, 15, 18, U.N. Doc. A/CONF.144/28/Rev.1 (Sept. 7, 1990) [hereinafter Basic Principles]; *McCann v. U.K.*, 21 Eur. Ct. H.R. 97 ¶¶ 146–50 (1995).

22. Tom Ginsburg et al., *When to Overthrow Your Government: The Right to Resist in the World’s Constitutions*, 60 UCLA L. REV. 1184, 1193 (2013).

23. LAUTERPACHT, *supra* note 10, at 107.

24. See Ted Gurr, *Psychological Factors in Civil Violence*, 20 WORLD POL. 245, 246 (1968) (“[R]evolutions are but one of an extraordinarily numerous variety of interrelated forms of strife.”).

25. See Jack A. Goldstone, *Toward a Fourth Generation of Revolutionary Theory*, 4 ANN. REV. POL. SCI. 139, 142 (2001); WALTER BENJAMIN, *Critique of Violence*, in REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277, 277–78 (Peter Demetz ed., Edmund Jephcott trans., 1986) (noting a common problem in certain legal philosophies in which violence is always viewed as justified when

circumstances, revolution, as an outcome, would be permitted, but resort to hostilities to achieve it would not. Analytically speaking, therefore, the legality of revolutions and the measures that bring them about should be discussed separately.

The Article is structured as follows. Part I offers historical context for the current international legal discourse concerning internal resorts to force. As it demonstrates, in the legal order established by the U.N. Charter, the law concerning external and internal resorts to force became divergent: for the first time, external resort to force was legally regulated, while internal force remained beyond the reach of law. The Part criticizes this doctrinal divergence as a peculiar and incoherent moment in international legal history.

Part II introduces revisionist just war theory as a possible ethical framework to inform the construction of a legal doctrine concerning internal resorts to force. This framework rejects collectivist justifications for killing and suggests the right of self-or-other-defense as the proper baseline for the assessment of internal *jus ad bellum*.

Part III discusses several possible “collective” visions for internal *jus ad bellum* and proceeds to demonstrate that these are unsatisfactory. It shows that self-determination, sovereignty, territorial integrity, or democratic legitimacy are in themselves insufficient as proper justifications for killing—unless we adopt a collectivist (and thus wrong) view of permissions to kill. This Part discusses other specific shortcomings of these possible frameworks.

Part IV suggests IHRL, and in particular the right to life, as a proper international legal basis for both the prohibition on the internal resort to hostilities and its exceptions. However, it also demonstrates that positive IHRL, as currently applied in leading judicial decisions, is not developed enough to support a workable doctrine of internal *jus ad bellum*. In particular, this Part highlights that in practice, once an internal armed conflict erupts, the right to life collapses into IHL, which severely limits IHRL’s potential to regulate the resort to force itself. International legal discourse is thus preoccupied with the question of whether an “armed conflict” exists, as a proxy for *jus ad bellum* questions. This interaction between IHRL and IHL replicates the pre-Charter relations between the law of “peace” and the law of “war,” which assumed that sovereigns had a prerogative to move freely between these realms. The Part then proceeds to demonstrate why this situation is unsatisfactory: chiefly, it

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undertaken for seemingly just ends); *see also* ARISTOTLE, *THE POLITICS* 198 (Benjamin Jowett trans., 1908) (noting that “[r]evolutions are effected in two ways, by force and by fraud”). A recent example for an outcome of revolution without use of armed force is the 2011 “Jasmine Revolution” in Tunisia. *See generally* Nouri Gana, *Introduction: Collaborative Revolutionism*, in *THE MAKING OF THE TUNISIAN REVOLUTION: CONTEXTS, ARCHITECTS, PROSPECTS* (Nouri Gana ed., 2013) (providing a backdrop and history behind the Tunisian revolution).

results in a circular situation in which the factual existence of an armed conflict becomes a normative justification for the resort to hostilities.

Part V presents a preliminary working doctrine of internal *jus ad bellum*, which branches out from the right to life, but which refrains from collapsing into IHL once hostilities commence. It argues that the right to life should be read as a prohibition on the first resort to internal hostilities, qualified only by a right to self-and-other-defense, and subject to necessity and proportionality requirements. It further posits that such a standard can and should be applied to governments, but also to nonstate actors. Finally, the Part maintains that although, in general, similar standards of resort to force apply to governments and opposition groups, it is possible to envision a system of factual presumptions to provide some flexibility in the application of this rule.

#### I. EXTERNAL AND INTERNAL *JUS AD BELLUM* IN INTERNATIONAL LAW

The modern law on *jus ad bellum* can best be described as reflecting an uneasy doctrinal split, signifying a peculiar moment in the history of international law. This Part surveys how this divergence came to be, from the pioneering era of international law until today's post-U.N. Charter legal order, and offers a critique of the current understanding of the law.

##### A. POSITIVE UNIFICATION: NATURAL LAW REGULATING ALL REALMS OF FORCE

The roots of modern international law lie in natural law thought, its basic premise being that morality determines law's validity and content.<sup>26</sup> Natural law, of course, could not be blind to internal resorts to force: since it was based on universal truths applicable to all spheres of human activity, natural law covered both external and internal uses of force, whether by rulers or subjects. As every sovereign conduct could be assessed in light of laws derived from morality, and because natural law bound kings as well as individuals,<sup>27</sup> there was no reason to *a priori* exclude internal wars from the moral legal discourse.

The ruling natural law framework for the assessment of resort to force was provided by traditional just war theory. An amalgamation of Greco-Roman and Catholic ideas going back to authorities such as

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26. See STEPHEN C. NEFF, *JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW* ch. 2 (2014).

27. See *id.* at 163 (noting that "natural law was applicable to kings, as well as to ordinary people"). This perception was rooted in the late-medieval *jus commune*. See Randal Lesaffer, *The Nature and Sources of Europe's Classical Law of Nations* 6 (June 25, 2015) (unpublished manuscript, Tilburg University), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2623086](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2623086) ("Canon and Roman law [*jus commune*] embodied the ideal of divine justice and translated it into myriads of concrete rules . . . Princes and rulers, as well as any common man, were equally subject to their commands.").

Aristotle, Cicero, Augustine, and Aquinas,<sup>28</sup> just war theory outlined conditions for a resort to war to be morally just.<sup>29</sup> War, to be just, had to fulfill several well-known criteria: just cause, right intention, proper authority, last resort, probability of success and proportionality.<sup>30</sup>

Now, it remains debatable whether classic just war criteria were meant to be applied as such to internal wars. Some commentators argue that the theory did not at all constrain internal resort to force by *rulers*.<sup>31</sup> Regarding resort to force by subjects, conversely, the precondition that a just war could only be conducted by a proper (or legitimate) authority—meaning, by the sovereign—served as the most significant barrier.<sup>32</sup>

Nonetheless, it would be imprecise to say that “law” was *silent* on internal resorts to force, although it did not address them in just war language.<sup>33</sup> It would be more accurate to say that such law in fact existed, but was simply heavily skewed in favor of rulers. Indeed, Catholic doctrine explicitly condoned internal force by rulers without clear restrictions. This outcome was justified on moral grounds: the ruler, after all, was “God’s minister.”<sup>34</sup> Additionally, if the ruler represents the deity, and the deity is of course just, it is only a logical result that subjects could never undertake a *just* war against him.<sup>35</sup> To Augustine, thus, “rebellion” was an evil motive per se and, as such, a true sin.<sup>36</sup>

But what if the sovereign unjustly threatened the lives of its subjects? Although Catholic doctrine recognized self-defense as a natural right, it could not be understood as such to justify hostilities against the

28. See JOHN EPPSTEIN, *THE CATHOLIC TRADITION OF THE LAW OF NATIONS* 65–68 (1935); Brian Orend, *War*, *STAN. ENCYCLOPEDIA OF PHIL.* (July 28, 2005), <http://plato.stanford.edu/entries/war/>.

29. In ancient Rome, for instance, a regular procedure was even laid down in which “independent” priests, known as *fetials*, would determine, even if only symbolically, the justness of this or that decision to wage war. See NEFF, *supra* note 26, at 32–33.

30. Orend, *supra* note 28.

31. JAMES TURNER JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY* 49–59 (1981).

32. AUGUSTINE, *AGAINST FAUSTUS* bk. XII, ch. LXXV, reprinted in EPPSTEIN, *supra* note 28, at 69–70; Thomas Aquinas, *Question 40: War*, *SUMMA THEOLOGICA*, <http://www.newadvent.org/summa/3040.htm> (last visited Apr. 10, 2016) (“[I]t is not the business of a private individual to declare war,” and conversely, it is the business of “those in authority . . . to have recourse to the sword . . . against internal disturbances.”).

33. See FABRE, *supra* note 6, at 131 (arguing that in fact, just war theory is relevant to internal as well as external conflicts).

34. Aquinas, *supra* note 32.

35. See Francisco de Vitoria, *On Civil Power* § 10, in VITORIA: *POLITICAL WRITINGS* 3, 18–19 (Anthony Pagden & Jeremy Lawrance eds., 1991) (“[P]ublic power is of God . . . as such it is just and legitimate . . .”). Indeed, this understanding led, for instance, the Austrian Episcopate, to declare—as late as 1933—after the rise of the totalitarian Dollfuss regime—that since the state is the “representative of God,” “[r]evolution and any attempt to upset authority by force are condemned.” *Contemporary Errors Relating to the Totalitarian Nation-State*, Letter of the Austrian Episcopate, Vienna (Dec. 21, 1933), reprinted in EPPSTEIN, *supra* note 28, at 375.

36. AUGUSTINE, *supra* note 32, at 84.

sovereign.<sup>37</sup> Employing the famous doctrine of double effect, Aquinas recognized the lawfulness of killing in self-defense, but only when the *intention* was to save one's own life rather than killing the aggressor.<sup>38</sup> Conversely, acting with an intention to *kill*—such “as in the case of a soldier fighting against the foe”—could only be justified if performed for the *public* good, a task strictly entrusted to the sovereign.<sup>39</sup> Thus, even if individuals could act in individual self-defense, resort to hostilities, as commonly understood, was beyond what natural law allowed them.

The explicit idea of a (limited) right of organized resistance came about only with the Reformation of the sixteenth century. At first, Calvin's teachings followed the old Christian doctrine of “turning the other cheek,” by implying that Christian subjects must respond to persecution by prayer and patience.<sup>40</sup> However, after the St. Bartholomew Massacre of 1582,<sup>41</sup> a major reconstruction of Reformist “resistance theory” was needed. The emerging framework for such theory was through the idea of the social contract, the breach of which would entail some right of resistance.<sup>42</sup> Simply put, such theories presumed a tri-partite contract between God, the ruler, and the people, requiring obedience to the laws of God and nature in return, so to speak, for divine protection. If the ruler violated the contract by becoming a tyrant, active resistance was permitted, even by warfare.<sup>43</sup> However, even in such cases, the right to resist was not granted to private *individuals*, but rather to public representatives (lesser magistrates), who would be charged with conducting orderly resistance.<sup>44</sup>

These ideas were further developed by the post-Westphalian pioneers of international law, such as Grotius, Pufendorf, and later on Vattel, who attempted to deduce a coherent system of international legal norms from principles of natural law.<sup>45</sup> In terms of internal use of force, these thinkers adopted a conciliatory stance, in which obedience remains

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37. Cf. NEFF, *supra* note 26, at 70 (noting that right to self-defense was available to ordinary subjects against superiors, but was narrowly confined to warding off attacks).

38. Thomas Aquinas, *Question 64: Murder*, SUMMA THEOLOGICA art. 7, <http://www.newadvent.org/summa/3040.htm> (last visited Apr. 10, 2016).

39. *Id.* (“[I]t is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe.”). For the same reasons, private individuals were prohibited from killing sinners, since “the care of the common good is entrusted to . . . public authority.” *Id.* art. 3.

40. See JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* 85 (2007).

41. The massacre was ordered by King Charles against French Calvinists. *Id.* at 84–87.

42. *Id.* at 86.

43. *Id.* at 84–87, 105, 115.

44. *Id.*

45. For a historical overview of the transformation of natural law into “international” law, see NEFF, *supra* note 26, chs. 3–4.

the nearly absolute norm, yet some form of rightful resistance was recognized.<sup>46</sup> Like natural law thinkers before them, early international lawyers took for granted, or at least did not categorically reject, the power of sovereigns to resort to internal armed force (a “mixed” public-private war, in Grotius’ terms).<sup>47</sup> However, social-contractarian thought delineated, to some extent, this right to use force, implying that sovereigns must use force only within the confines of the social contract. To Vattel, for instance, as long as the prince acted for the public good—as required by the contract<sup>48</sup>—he was perfectly justified to use proportional force to quell “unjust” rebels.<sup>49</sup>

Nonetheless, even to the social-contractarian pioneers of international law, the right to use force for the “public good” was not granted as such to subjects.<sup>50</sup> Citizens generally owed a “duty of nonresistance” to the sovereign. Thus, to Grotius, even if ordered to act contrary to the law of nature or the “Commands of God,” subjects could at most practice disobedience, but could not actively resist by force.<sup>51</sup> Being a rationalist, Grotius justified this rule mainly through consequentialist reasoning: a too “promiscuous” right to resist would destroy the state, and even an unjust state is preferable, from the point of view of the citizen, to no state at all.<sup>52</sup> However, the obligation of nonresistance could not be absolute if natural law was to remain coherent: a total obligation to submit would be tantamount to suicide. Thus, early international lawyers recognized a cautious and muffled right of internal self-defense. As Grotius conceded, resistance might be justified in case of “extreme and inevitable danger,”<sup>53</sup> when the threat was undeniable or when the sovereign assaults first.<sup>54</sup>

46. To Kant, their modest attempts at constraining power, which could always be used to justify any attack, earned Grotius, Pufendorf, and Vattel the unflattering label “miserable comforters.” Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EUR. J. INT’L REL. 395, 411–12 (2009); see also IMMANUEL KANT, PERPETUAL PEACE § II (1795).

47. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE bk. III ch. 3, § 1, ch. 4 §§ 1–2 (Richard Tuck ed., 2005).

48. EMER DE VATTEL, THE LAW OF NATIONS ch. IV, §§ 38–39 (Béla Kapossy & Richard Whatmore eds., 2008).

49. *Id.* ch. XVIII, §§ 287–90.

50. This is despite the fact that Grotius, for instance, embraced the idea of “private war,” but not by peoples against sovereigns. See GROTIUS, *supra* note 47.

51. *Id.* at 337–38.

52. *Id.* at 346–47. This consequentialist reasoning was common. See SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS 716 (Basil Kennett trans., 1729). This was also the view of Hobbes, to whom the return to the state of nature and civil war was deemed worse than any suffering possibly caused by the sovereign. THOMAS HOBBS, LEVIATHAN ch. XVIII (1651) (“[T]he greatest that in any form of government can possibly happen to the people in general is scarce sensible, in respect of the miseries and horrible calamities that accompany a civil war, or that dissolute condition of masterless men without subjection to laws.”).

53. GROTIUS, *supra* note 47, at 356–57.

54. *Id.* at 359 (“David did not do this [gathered armed men to defend himself] till he was assured . . . [by] many infallible Proofs, that Saul really sought his Life.”); see also *id.* at 360 (noting that the Maccabees, like David, did not use their arms “unless first assaulted”).

Pufendorf also recognized—albeit with visible reluctance—that “upon the approach of extreme danger” subjects could take up arms strictly for self-defense.<sup>55</sup> Similarly, to Vattel, when a prince “attacks the constitution of the state” the social contract is broken and resistance is justified,<sup>56</sup> but he nevertheless stressed that the scope and nature of the response depended on the gravity of the prince’s violation.<sup>57</sup>

Thus, the early roots of international law, derived from the law of nature and social-contractarianism, explicitly addressed *both* external and internal uses of force. As such, early international legal thought was coherent: it reflected a positive *unification* of legal doctrine, in the sense that both realms of force were not perceived as beyond any form of legal judgment.

#### B. FROM NEGATIVE UNIFICATION TO DOCTRINAL DIVERGENCE

The positive unification of external and internal uses of force did not survive, however, the decline of natural law theory. Throughout the nineteenth century, naturalist thinking in international law gradually weakened, as international legal positivism reached its pinnacle of influence in the turn of the century.<sup>58</sup> Responding, to a major extent, to Austin’s famous critique of international “law” as mere morality,<sup>59</sup> international legal positivism was mostly concerned with pinpointing the “sources” of binding international norms. In its most common form, it asserted that in absence of accepted notions of “natural law,” there could be no binding law beyond the explicit or tacit consent of states.<sup>60</sup> International legal positivism was augmented by two complementing, longstanding processes of the Westphalian order: (1) the weakening of the authority of the church, and (2) the consolidation of the secular state

55. PUFENDORF, *supra* note 52, at 721–23.

56. VATTEL, *supra* note 48, ch. IV, § 51.

57. *Id.* at 105–06 (distinguishing between a situation in which the ruler “violates the fundamental laws” in which resistance is permissible but the person of the sovereign must be spared, and situations in which the prince uses “extreme violence” and “manifestly tends to the ruin of the nation” in which the prince himself can be targeted).

58. See MÓNICA GARCÍA-SALMONES ROVIRA, *THE PROJECT OF POSITIVISM IN INTERNATIONAL LAW* 25 (2013); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINN. L. REV. 99, 113 (1996); Hersch Lauterpacht, *Westlake and Present Day International Law*, 15 ECONOMICA 307, 309 (1925) (noting that “undisputed domination of the positivist method” in the early twentieth century).

59. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 176–77 (Sarah Austin ed., 1861). Much of the early twentieth century positivist writing responded to that challenge. See, e.g., OPPENHEIM, *supra* note 14, § 2; cf. Kennedy, *supra* note 58, at 117 (noting that international law positivists were ultimately describing “a self-evident system of rules”).

60. As stated by Oppenheim, “[t]he so-called Law of Nations is nothing else than a body of customary and conventional rules regulating the conduct of the individual States with each other.” OPPENHEIM, *supra* note 14, § 7. These rules are only those established by “common consent.” *Id.* §§ 11–12.

as the main political actor, which in turn strengthened the notion of sovereignty.<sup>61</sup>

Of course, this process affected the relations between law and just war theory.<sup>62</sup> As long as there was no “judge” among nations, wars could not be discussed in terms of objective justice.<sup>63</sup> As phrased by Henry Wheaton, “A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides.”<sup>64</sup> Many positivists thus accepted war as a given, a factual “condition” that international law merely attempted to regulate.<sup>65</sup> Oppenheim, for instance, even rejected the obligation to present *any* justification for war, as it was a complete sovereign prerogative.<sup>66</sup> The system of international law was thus organized on an axis between “war” and “peace.” It was a system not of justice but of consequence: states could virtually always choose to wage war, if they were willing to pay the practical—rather than legal—price.<sup>67</sup> External resorts to force were thus excluded from the legal discourse.

In its essence, this approach was replicated in the internal realm, although not strictly in such terms. As absolute state sovereignty and its derivative of *nonintervention* became the chief organizing principles of international law, it became impossible to discuss *internal* resort to force in international legal terms.<sup>68</sup> In fact, just as international wars were

61. See ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* 150 (2011).

62. See generally Kress, *supra* note 11 (reflecting on the development on the international law by identifying post-Westphalian shifts and hesitations).

63. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* § 290 (Richard Henry Dana ed., 1866). Indeed, some maintained the view that there are applicable moral criteria of just war, but these could only be assessed by the participants themselves in absence of an external judge. See THEODORE D. WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* § 111 (1860). This approach can be found in Grotius’ reasoning—following medieval thought—according to which natural law bound “in conscience” and was enforced by God, while positive law was enforceable by humans. See Lesaffer, *supra* note 27, at 11–12.

64. WHEATON, *supra* note 63, § 295. For similar reasons regarding internal wars, see *id.* § 296.

65. OPPENHEIM, *supra* note 14, § 53 (“[W]ar is not inconsistent with, but a condition regulated by, International Law.”); see WOOLSEY, *supra* note 63, § 110 (“International law assumes that there must be ‘wars and fightings’ among nations, and endeavors to lay down rules by which they shall be brought within the limits of justice and humanity.”); see also WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* §§ 15–17 (2d ed. 1884).

66. OPPENHEIM, *supra* note 14, §§ 54, 61 (“[A]ll such rules [of just war] laid down by writers . . . are rules of writers, but not rules of International Law.”).

67. ELIAV LIEBLICH, *INTERNATIONAL LAW AND CIVIL WARS: INTERVENTION AND CONSENT* 74 (2013); see, e.g., OPPENHEIM, *supra* note 14, § 53 (discussing “war” and “peace” as choices that states make, each condition regulated by a different set of rules). It should also be added that in general, war was perceived not only as beyond legal regulation, but also positively a legitimate mean of redress and punishment. See David Luban, *War as Punishment*, 39 *PHIL. & PUB. AFF.* 299 (2012). On the internal level, dueling was *de facto* perceived as a legitimate means to settle disputes even well into the nineteenth century. See MARTIN J. WIENER, *MEN OF BLOOD: VIOLENCE, MANLINESS AND CRIMINAL JUSTICE IN VICTORIAN ENGLAND* 42–45 (2004).

68. See Kennedy, *supra* note 58, at 123–28 (detailing the development of the absolute understanding of sovereignty throughout the nineteenth century). Robert Lansing, later Secretary of State, defined sovereignty in the early twentieth century as “the power . . . to do all things in a state

understood as a given fact of external relations, civil strife was a given fact of internal relations. Thus, Woolsey, for instance, stated bluntly “[w]ith civil wars international *jus* has nothing to do.”<sup>69</sup> Wheaton contended that like its approach toward international wars, international law made no distinction “between a just and unjust” civil war.<sup>70</sup> At best, international law sought to regulate the *effects* of civil wars on third parties; it was not concerned by the rights of the *internal* parties themselves.<sup>71</sup> In this context, the American Civil War provides a striking example: although slavery was perceived as a glaring immorality by Britain, the latter—as well as other major European powers—maintained strict neutrality toward both parties.<sup>72</sup>

The triumph of this approach was born through the political struggle between competing visions of sovereignty in nineteenth century Europe—pitting “legitivist” perceptions of sovereignty, espoused by the conservative powers of the Holy Alliance, against those based on factual effective control, championed by Britain.<sup>73</sup> Legitivism presumed the existence of essential, inherent rights of legitimate sovereignty, and thus rejected any revolution or forcible resistance, while justifying intervention to maintain beleaguered monarchs. Unsurprisingly, the Holy Alliance was viewed as a “union of despotic sovereigns” by the emerging liberal order.<sup>74</sup> Legitivism and its attendant doctrine of intervention eroded with the growing predominance of Britain, which condemned it as inconsistent with international law, and specifically with the principle of nonintervention.<sup>75</sup> A nineteenth century commentator noted that the

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without accountability;” its exercise “is simply the application of the menace of *brute force*.” Robert Lansing, *Notes on Sovereignty in a State*, 1 AM. J. INT’L L. 105, 110 (1907); see also MONTAGUE BERNARD, ON THE PRINCIPLE OF NON-INTERVENTION (1860); AUGUSTUS GRANVILLE STAPLETON, INTERVENTION AND NON-INTERVENTION: THE FOREIGN POLICY OF GREAT BRITAIN FROM 1790 TO 1865, at 3–15 (1866). In the context of civil wars, see Samuels, *supra* note 11, at 319.

69. WOOLSEY, *supra* note 63, § 136.

70. WHEATON, *supra* note 63, § 23.

71. LIEBLICH, *supra* note 67, at 6 (arguing that in traditional international law the key question asked by states was “how does the conflict affect *us*” rather than “how does the conflict affect the political and humanitarian rights of *internal* parties”).

72. See *id.* at 99–106; MONTAGUE BERNARD, A HISTORICAL ACCOUNT OF THE NEUTRALITY OF GREAT BRITAIN DURING THE AMERICAN CIVIL WAR 122–50 (1870) (detailing the Europeans’ declarations of neutrality, including original texts of declarations); see also JOHN STUART MILL, THE CONTEST IN AMERICA 6 (1862).

73. THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AN EVOLUTION 8–9 (1999).

74. See, e.g., STAPLETON, *supra* note 68, at 28 (“[T]here can be no doubt that in fact this [Holy] Alliance was nothing else but a union of despotic sovereigns in order to aid each other in protecting their absolute authority.”); see also EDWARD PAYSON POWELL, NULLIFICATION AND SECESSION IN THE UNITED STATES: A HISTORY OF THE SIX ATTEMPTS DURING THE FIRST CENTURY OF THE REPUBLIC 243 (1897); WHEATON, *supra* note 63, §§ 64–65.

75. POWELL, *supra* note 74, at 243 (labeling Britain’s turn against legitimism as “the greatest event of the nineteenth century”); STAPLETON, *supra* note 68, at 27–37 (contrasting the view of continental powers of the Holy Alliance and Britain regarding the question of legitimism and intervention);

principle of nonintervention became so dominant that “British statesmen had proclaimed it [as a principle of international law] not once, not twice, but on every imaginable occasion.”<sup>76</sup> Divine or historic right thus gave way to effective control over territory as the key determinant of sovereign power, and effectiveness—being a question of fact—could be gained (or maintained) by brute power, whether exercised by governments or rebels.<sup>77</sup>

Despite this harsh outcome, effectiveness has some liberal appeal: it is based on the premise that peoples should be left alone to establish (or abolish) their own governments, without external interference, by the means they choose.<sup>78</sup> With the solidification of the principle of self-determination in the twentieth century, the principle of nonintervention thus found support also among liberal internationalists. Oscar Schachter, for instance, argued that the use of internal force was a corollary of peoples’ right to “decide for themselves what kind of government they want, and that this includes the right . . . to carry on armed conflict between competing groups.”<sup>79</sup>

A further legal corollary of the predominance of sovereignty and nonintervention was the negation of *individuals* as subjects of international law: if state sovereignty is paramount, individuals must be subject only to the domestic system and thus remain beyond the reach of international regulation.<sup>80</sup> Now, if international law could not impose duties, nor confer rights, upon individuals, it per se could not legalize nor prohibit resistance.<sup>81</sup> Precisely for this reason Oppenheim stated that international law “is not *competent* to forbid private individuals to take up arms.”<sup>82</sup>

WHEATON, *supra* note 63, §§ 65–67 (detailing the British position regarding several internal conflicts in the 1820s).

76. STAPLETON, *supra* note 68, at 35.

77. GRANT, *supra* note 73, at 9; LIEBLICH, *supra* note 67, at 22–23.

78. BERNARD, *supra* note 68, at 9; HALL, *supra* note 65, § 94; STAPLETON, *supra* note 68, at 3–15; WHEATON, *supra* note 63, § 72.

79. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1641 (1984); see also Falk, *supra* note 12, at 1, 5–6.

80. See, e.g., OPPENHEIM, *supra* note 14, § 13 (“Subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.”); cf. Lauterpacht, *supra* note 58, at 309–10 (describing this doctrine critically).

81. In the context of civil wars, international law only “kicked in” upon recognition of belligerency or insurgency, but this regulation, too, did not refer to the *resort* to force itself but only to the conduct of hostilities and rights vis-à-vis third parties. LIEBLICH, *supra* note 67, at 76–80. The earliest systematic exposition of the belligerency doctrine can be found in Richard Dana’s 1866 notes to Wheaton’s *Elements of International Law*. See WHEATON, *supra* note 63, § 23 n.15.

82. OPPENHEIM, *supra* note 14, § 57, at 92. This remains true although in the *in bello* level, individuals can be punished for fighting by the enemy. See *id.* It should be noted that Oppenheim discusses here the participation of individuals in international wars, but the reasoning applies of course also to internal wars.

However, saying that international law does not regulate armed resistance, or is “neutral” toward it,<sup>83</sup> is not only doubtful in terms of legal theory,<sup>84</sup> but also for all practical purposes, amounts to a recognition of a freedom to act.<sup>85</sup> Thus, this “gap” in international law is in fact a legal *carte blanche* for resort to force both by sovereigns and subjects. As phrased by Hall:

International law professes to be concerned with the relations of states to each other. Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war . . . are acts which have nothing to do directly or indirectly with such relations. . . . To some minds the excess of a revolution would seem more scandalous than the tyranny of a sovereign. *In strictness they [tyranny and resistance] ought, degree for degree, to be precisely equivalent in the eye of the law.*<sup>86</sup>

In sum, the positivist, pre-Charter approach could be described as “negative unification” of *jus ad bellum*: international law assumed freedom to act both externally or internally. It reflected a coherent—even if objectionable—view about what international law can and cannot do.

The international system finally moved to curtail (but not abolish) the war power of states after World War I, through the elaborate system enshrined in the Covenant of the League of Nations.<sup>87</sup> The Covenant, however, remained silent on internal resort to force, by excluding matters “solely within the domestic jurisdiction” of a state party from the jurisdiction of the League.<sup>88</sup> Later on, the Kellogg-Briand Pact manifestly renounced war only in relations between states,<sup>89</sup> and the U.N. Charter, as discussed above, followed suit. Here, the foundations were made to a curious inconsistency in the modern international legal order—the divergence of external and internal *jus ad bellum*. While the former is strictly regulated, complete freedom is implied regarding the latter.

### C. A CRITIQUE OF DOCTRINAL DIVERGENCE

That the divergence discussed above raises significant problems is obvious. While earlier approaches—natural law and positivism—were upfront in their (positive or negative) attitudes toward all forms of force, it is increasingly difficult to defend a system that sets out to prohibit

83. See, e.g., Malcolm N. Shaw, *Self-Determination and the Use of Force*, in MINORITIES, PEOPLES AND SELF-DETERMINATION 35, 44 (Nazila Ghanea & Alexandra Xanthaki eds., 2005) (“The UN Charter neither confirms nor denies a right of rebellion. It is neutral.”).

84. See HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 304–07 (1952) (discussing so-called “gaps” in international law).

85. See *id.* at 305.

86. HALL, *supra* note 65, at 264–65 (emphasis added).

87. Covenant of the League of Nations, June 28, 1919, 4 U.K.T.S. 153 arts. 10–16.

88. *Id.* art. 15. The exclusion of internal conflicts from the League system was the main legal excuse for the League’s inaction toward the Spanish Civil War. See LIEBLICH, *supra* note 67, at 115–16.

89. General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57.

external resorts to force, yet turns a blind eye to internal ones. If a key objective of the contemporary legal order is to prevent the “scourge” of war,<sup>90</sup> and it is a consensus that this scourge is no less grave in internal wars, a gross incoherency is revealed, which in turn affects the legitimacy of the legal order.<sup>91</sup> In fact, this incoherency also undermines the prohibition on *external* force itself, given the tendency of internal conflicts to internationalize.<sup>92</sup>

Moreover, the traditional jurisprudential explanations for the nonregulation of internal resort to force have become blatantly unconvincing. While in the past, sovereignty and nonintervention served as bulwarks for any international legal regulation of internal relations, contemporary international law reaches deep into spheres long considered at the core of state authority. Indeed, the protection of human rights,<sup>93</sup> the regulation of national treatment of goods,<sup>94</sup> and the protection of investors<sup>95</sup> are not only pragmatic results of increasing interdependence, but also reflect the ever-changing understanding of sovereignty.<sup>96</sup> In practice, international law’s extension to such fields weakens any claim that sovereignty in itself can serve as a shield against regulation of internal resorts to force; this is *especially* true considering the effects of civil wars on human life and well being. Conceptually, sovereignty itself was rephrased as a “responsibility” in contemporary international discourse,<sup>97</sup> which further weakens the thrust of nonintervention as a justification for nonregulation. Similarly, the liberal, self-determination based justification for the freedom to resort to force internally is also unappealing. At its core, it requires us to concede that self-determination is a corollary of the ability to use effective violence—a view that depletes the idea of any substantive content.<sup>98</sup>

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90. U.N. Charter pmb1.

91. On the importance of coherence to normative legitimacy see THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 150–82 (1990).

92. See generally Patrick M. Regan, *Interventions into Civil Wars: Literature, Contemporary Policy and Future Research*, in *ROUTLEDGE HANDBOOK OF CIVIL WARS* 313 (Edward Newman & Karl DeRouen Jr., eds., 2014) (discussing both intervention by diplomatic and military or economic means in civil wars).

93. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

94. See, e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 art. III.

95. See, e.g., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 575 U.N.T.S. 159.

96. Cf. Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295, 295–301 (2013) (noting that due to modern global interconnectedness, sovereigns must take into account the external effects of their decisions).

97. G.A. Res. 60/1, 2005 World Summit Outcome, (Sept. 16, 1948).

98. LIEBLICH, *supra* note 67, at 139; see also Dapo Akande & Zachary Vermeer, *The Airstrikes Against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars*, EJIL: TALK! (Feb. 2, 2015), <http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>.

Additionally, the orthodox claim that actions by individuals are *per se* beyond the reach of international law—and thus it is conceptually impossible, as a matter of legal theory, to restrict resorts to force by opposition groups—has long been discredited not only in jurisprudential terms,<sup>99</sup> but also by modern practice. For instance, the growing body of international criminal law imposes obligations on individuals and confers rights on victims.<sup>100</sup> Likewise, it is nowadays a consensus that during hostilities, treaty and customary IHL binds not only states, but also nonstate actors.<sup>101</sup> Indeed, if international law presumes to regulate the *conduct* of hostilities in noninternational armed conflicts, there is no conceptual barrier to regulation of noninternational *resort* to hostilities. Both levels require assessment of highly complex decisions undertaken by states and nonstate actors alike. In this context, the reach of international law into the substate levels is also evident in the practice of the U.N. Security Council. The Security Council's imposition of sanctions on individuals and nonstate entities has become a regular feature of the international system.<sup>102</sup> Recently, however, the Council has gone further: not only did it single out certain opposition groups as culprits, and call upon governments to act against them,<sup>103</sup> but it has also urged *nonstate actors* to “commit to combating” *other* armed groups.<sup>104</sup>

In sum, considering the detrimental effects of civil wars, the current legal regime's incoherence with regard to the use of force is glaring. As demonstrated above, nowadays, there are no substantial theoretical barriers to extend the law on the use of force to the internal sphere. This is because the traditional challenges to the international regulation of internal resort to force—sovereignty, self-determination, and the

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99. See, e.g., HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 97 (1952) (“Like all law, international law, too, is a regulation of human conduct. It is to men that the norms of international law apply; it is against men that they provide sanctions . . . [the traditional view that only states are subjects of international law] is untenable.”); HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* ch. 2 (1950) (discussing individuals as subjects of international law).

100. See, e.g., Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (granting the Court jurisdiction over persons); *id.* art. 75 (concerning reparations to victims).

101. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135; see also DINSTEIN, *supra* note 11, at 63–73 (explaining “why” IHL binds nonstate actors).

102. See, e.g., S.C. Res. 1267, ¶ 4 (Oct. 15, 1999).

103. See S.C. Res. 1746, ¶ 25 (Mar. 23, 2007) (calling upon the Afghan government and the international community to “address the threat” of the Taliban, Al-Qaida, and other groups); see also Ezequiel Heffes et al., *Addressing Armed Opposition Groups Through Security Council Resolutions: A New Paradigm?* 18 *MAX PLANCK Y.B. U.N. L.* 32 (2014).

104. S.C. Res. 2139, ¶ 14 (Feb. 22, 2014) (“Strongly condemns the increased terrorist attacks . . . carried out by organizations and individuals associated with Al-Qaeda, its affiliates and other terrorist groups, *urges* the opposition groups to maintain their rejection of these organizations and individuals which are responsible for serious violations of international humanitarian law . . . *calls upon* the Syrian authorities and opposition groups to commit to combating and defeating organizations and individuals associated with Al-Qaeda, its affiliates and other terrorist groups.”).

exclusion of individuals as international legal subjects—are no longer convincing in themselves.

## II. A REVISIONIST APPROACH TOWARD INTERNAL *JUS AD BELLUM*

### A. REVISIONIST JUST WAR THEORY AND INTERNAL RESORT TO HOSTILITIES

The previous Part argued that an international legal regime which presumes a freedom of internal resort to force is untenable. What, then, are the proper theoretical and ethical grounds through which to assess possible legal restrictions on such actions? In terms of just war theory, the key question is how to define a *just cause* for internal hostilities, whether by governments or opposition. Before formulating a response, we first have to address a preliminary question: whether different basic rules on resort to force should apply to governments, peoples, groups, or individuals. This discussion invokes a major clash in the field of just war theory in the past two decades, between traditionalists and revisionists.

Traditional just war thought assumes that the state possesses special transcendental rights, perhaps best explained as a form of political theology.<sup>105</sup> These essential characteristics might allow the state to resort to force where it would be morally dubious for any other actor to do so. International legal orthodoxy, accordingly, holds that on the interstate level, a state is entitled to (proportionately) repel any forcible encroachment upon its sovereignty or territorial integrity<sup>106</sup>—presumably, even when the first aggression does not result in loss of life.<sup>107</sup> Possible examples could be “aerial incursions,”<sup>108</sup> cross-border minesweeping activities,<sup>109</sup> or situations in which an empty territory is occupied. How can such a right to kill, with no clear-cut threat to life, be justified as necessary and proportional? While some philosophers offer competing, ever complex justifications for countering such “lesser aggressions” by force,<sup>110</sup> others outright deny its moral plausibility.<sup>111</sup>

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105. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 36 (George Schwab trans., 2005); PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 1–30 (2011).

106. See Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus ad Bellum: Are “Minimal” Uses of Force Excluded from the UN Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 189 (2014).

107. For instance, when an “invasion” occurs. G.A. Res. 3314 (XXIX) art. 3(a) (Dec. 14, 1974).

108. See ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 240 (1994).

109. The Corfu Channel Case (Merits), 1949 I.C.J. 4, 13 (Apr. 9).

110. The most convincing of which, in my eyes, being that in the usual course of events, when an aggressor in fact invades a state’s territory by force, the chances are so high that it would use lethal force to protect its gains, that force is justified in anticipation of the aggressor’s imminent forcible reaction. See Jeff McMahan, *War as Self-Defense*, 18 ETH. & INT’L AFF. 75, 77–79 (2004) [hereinafter McMahan, *War as Self-Defense*] (discussing self-defense in cases of “lesser aggression”). But see Jeff McMahan, *What Rights May Be Defended by Means of War*, in *THE MORALITY OF DEFENSIVE WAR*, *supra* note 13, at 115, 148 [hereinafter McMahan, *What Rights May Be Defended*] (modifying his

Nonetheless, the legal orthodoxy resolves this question through a simple analogy between the state and a physical person. Sovereignty and territorial integrity are thus fictionalized as the personal autonomy and physical body of the state, any violation of which justifies forcible repelling.<sup>112</sup> Now, since under most conventional thought, individuals are not permitted to kill for *every* violation of autonomy or even of physical integrity, the orthodox view assigns to states broader rights than those enjoyed by the sum of the physical persons forming them. It thus presumes that a state exists independently of the persons that comprise it and thus enjoys additional rights they do not possess as individuals.<sup>113</sup> Granted, it is possible to argue that states bear different rights since they, as opposed to individuals, are in an anarchic “state of nature.”<sup>114</sup> But even if that would be true, this can only explain why they are entitled to resort to self-help to secure their rights (as a secondary norm), *not* why they are entitled to resort to hostilities even when no life is immediately threatened (as a primary norm).<sup>115</sup>

That human beings, by operating collectively—and particularly in the context of *war*—become subject to a different moral paradigm, is indeed a common trait of traditional just war reasoning.<sup>116</sup> Some of this reasoning is rooted in duty-based doctrines that afforded special moral status to rulers and holders of public office,<sup>117</sup> perhaps as representatives of God.<sup>118</sup> Newer approaches tend to emphasize the *political*, arguing that rules governing the resort to force by individuals, groups, peoples, or

argument); HELEN FROWE, DEFENSIVE KILLING ch. 5 (2014); *see also* Cécile Fabre, *Cosmopolitanism and Wars of Self-Defence*, in THE MORALITY OF DEFENSIVE WAR, *supra* note 13, at 90; Seth Lazar, *National Defence, Self-Defence and the Problem of Political Aggression*, in THE MORALITY OF DEFENSIVE WAR, *supra* note 13, at 11. For a justification based on states as protectors of individual rights, *see* MICHAEL WALZER, JUST AND UNJUST WARS 54 (4th ed. 2006), which grounds national self-defense on the claim that states protect the rights of their citizens and thus attack on the state is an attack on individual rights, and *see* Yitzhak Benbaji, *Distributive Justice, Human Rights, and Territorial Integrity: A Contractarian Account of the Crime of Aggression*, in THE MORALITY OF DEFENSIVE WAR, *supra* note 13, at 159, which examines the rationale of the limited permissibility of waging war only to defend legitimate state borders or on behalf of national defense.

111. David Luban, *The Romance of the Nation-State*, 9 PHIL. & PUB. AFF. 392 (1980); David Rodin, *The Myth of National Self-Defence*, in THE MORALITY OF DEFENSIVE WAR, *supra* note 13, at 81.

112. *See* WALZER, *supra* note 110, at 58 (discussing “the legalist paradigm”). For a critical overview of this approach in international law, *see* DAVID RODIN, WAR AND SELF-DEFENSE 103–10 (2002).

113. *See* KELSEN, *supra* note 113, at 100–14 (vigorously deconstructing this perception).

114. For a classic view on interstate relations as anarchic, *see* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS ch. 6 (1979).

115. That is, unless we adopt the Hobbesian position of the state of nature as a per se state of war. *See* HOBBS, *supra* note 52, ch. 13. But if this is our view of the international system, we must reject the plausibility of international law to begin with.

116. JEFF McMAHAN, KILLING IN WAR 15, 35–37, 79–84 (2009).

117. *See, e.g.*, PUFENDORF, *supra* note 52, at 718 (justifying a duty of nonresistance based on the Prince’s “high and noble office”). For a critique, *see* Cécile Fabre, *Cosmopolitanism, Just War Theory and Legitimate Authority*, 84 INT’L AFF. 963 (2008).

118. *See supra* notes 34–35 and accompanying text.

states are intrinsically different, since collective action implies political motivation. As put by Christopher Kutz, “[w]hen individuals’ wills are linked together in politics . . . this affects the normative valence of what they do individually as part of that politics.”<sup>119</sup> Such collectivist views would find no special problem in formulating different rules on resort to lethal force based on political standing. For instance, while individuals would only be permitted to kill in defense of life against imminent unlawful threats, armed groups can fight for democracy, peoples can kill to achieve self-determination, and states can resort to internal hostilities in order to safeguard their sovereignty as such.

However, the collectivist underpinnings of traditional just war theory have been increasingly challenged by a *revisionist* approach, spearheaded by Jeff McMahan. The revisionists’ basic claim is that war, simply by virtue of being an act of mass violence, is not governed by a morality different from any other human action, and thus, when it comes to killing, the same ethics apply to individuals *and* collectives.<sup>120</sup> This view has dramatic consequences in many aspects of just war theory. Most importantly, it affects the traditional assumption of a moral equality—and thus the equal liability to attack—of “just” and “unjust” combatants.<sup>121</sup> For us, however, the relevant point is that revisionists convincingly reject collectivist approaches to the morality of war. As McMahan points out, that people merely by acting “politically” through groups, are morally entitled to do what they are prohibited from as individuals is an unacceptable form of “moral alchemy.”<sup>122</sup> Now, if collectives and individuals are subject to the same “morality of killing,” this must mean that the same moral standards concerning resort to hostilities should apply to governments *and* rebel groups.<sup>123</sup>

119. Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFFAIRS 148, 156 (2005), cited in McMAHAN, *supra* note 116, at 81.

120. See FROWE, *supra* note 110, at 2; McMAHAN, *supra* note 116, ch. 2.

121. McMAHAN, *supra* note 116, at 1–15, 35. McMahan suggests that liability to attack must follow moral responsibility, and thus challenges the traditional approach, mainly represented by Michael Walzer. See WALZER, *supra* note 110. Walzer assumes that “just” combatants can be killed by “unjust” combatants merely because they represent a threat, without reference to the justness of their cause. *Id.*

122. McMAHAN, *supra* note 116, at 82. Of course, there are those who disagree. See, e.g., RODIN, *supra* note 112, at 6 (challenging the reductive approach to self-defense). *But see* McMahan, *supra* note 110 (rebutting these challenges).

123. Interestingly, traces of the equality of rulers and rebels, for this purpose, is found already in John Locke, to whom once force is used, “war levels the parties” and cancels out any relations of “reverence, respect, and superiority.” JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 235 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1689) (“But to resist force with force, being the state of war that levels the parties, cancels all former relation of reverence, respect, and superiority: and then the odds that remains, is, that he, who opposes the unjust aggressor, has this superiority over him, that he has a right, when he prevails, to punish the offender, both for the breach of the peace, and all the evils that followed upon it.”). Nonetheless, I set aside, for now, second-order epistemological considerations that might advantage governments in such situations. Indeed, epistemological considerations have significant pedigree in writings that embrace the preference of rulers in the

## B. REDUCTIVE INDIVIDUALISM AND THE SELF-DEFENSE STANDARD

Having established the view that internal *jus ad bellum* should be discussed under the assumption of equal moral rules, we still need to address the question of *just cause*: when are individuals, groups, peoples, or states justified in resorting to hostilities? Most revisionist theorists approach this issue through the technique of “reductive individualism.” First, they inquire when *individuals* are permitted to resort to lethal force. Unsurprisingly, the most widely accepted answer, in ethics and law, is that individuals are only allowed to kill in self-or other-defense against an unjustified grave harm, subject to necessity and proportionality limitations.<sup>124</sup> Once establishing this baseline, revisionists proceed to apply this standard to collectives. Using increasingly complex factual scenarios, they describe war as nothing more than a web of forcible actions in self-or-other-defense.<sup>125</sup> Importantly, revisionists do not deny that war carries with it especially difficult conditions. They concede that during war, the right to self-defense might materialize in wider circumstances than in “regular” scenarios, namely because the nature of the threat emanating from the enemy’s combatants is continuous,<sup>126</sup> and the fog of war results in significant epistemological challenges.<sup>127</sup> But these are *factual*, not ethical distinctions.

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context of resort to internal armed force. See, e.g., PUFENDORF, *supra* note 52, at 718, 720–21 (“[T]he acts of civil government are for the most part so obscure, that the multitude cannot apprehend the equity or the necessity of them.”). This argument is also made by Hobbes, who claimed that subjects are incapable of understanding complex and long-term policy. See HOBBS, *supra* note 52, ch. XVIII (“[A]ll men are by nature provided of notable multiplying glasses (that is their passions and self-love) through which every little payment appeareth a great grievance, but are destitute of those prospective glasses (namely moral and civil science) to see afar off the miseries that hang over them and cannot without such payments be avoided.”). But see McMAHAN, *supra* note 116, at 66–70 (questioning the epistemological advantages of governments). Yet, even if epistemological considerations should be taken into account, it would at most result in a factual *presumption* in favor of governments, but would not challenge the primary rule itself. See *infra* Part V.

124. See FROWE, *supra* note 110, at 1–3. It is beyond the scope of this Article to offer a lengthy defense of the self-defense standard itself, both as an enabling and constraining one. As an enabling standard, it is recognized as a basic law of nature even in the dark state of nature of Hobbes. See HOBBS, *supra* note 52, ch. 14. In its constraining role, it can be justified both through deontological reasoning and consequentialist analysis, which would emphasize the negative results of a more permissive rule. For a discussion in light of Kantian ethics, see WHITLEY R.P. KAUFMAN, JUSTIFIED KILLING: THE PARADOX OF SELF-DEFENSE 2, 50–52 (2009).

125. See FABRE, *supra* note 6, at 65–71; FROWE, *supra* note 110, at 1–3, 123–24; McMahan, *supra* note 110, at 75–76. For a critique, see David Luban, *Human Rights Thinking and the Laws of War, in THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS* 32–33 (Jens David Ohlin ed., forthcoming).

126. McMahan, *War as Self-Defense*, *supra* note 110, at 76 (arguing that it is permissible, for instance, to kill sleeping soldiers since “[w]ar involves threats that consist of activities organized in phases over extended periods of time”).

127. McMAHAN, *supra* note 116, at 157. Janina Dill thus refers to war as an “epistemically cloaked forced choice” regarding the protection of individual rights. Janina Dill, *Should International Law Ensure the Moral Acceptability of War?*, 26 LEIDEN J. INT’L L. 253, 254 (2013).

This standard can be adapted to the internal realm as well and accordingly shape international legal doctrine. As convincingly argued by Cécile Fabre, when it comes to killing, “the geographical location of a conflict (as within or across borders) and the political status of its actors are irrelevant to the determination of the latter’s rights, duties and liabilities.”<sup>128</sup> Granted, conflicts within a single political community—in particular considering the asymmetry between governments and other actors—might raise some complex and salient issues that might not be relevant to interstate contexts.<sup>129</sup> Arguably, these can require some modifications in our reasoning, when moving from the individual to the collective, and from the external to the internal. However, in legal terms, these modifications would be in the form of presumptions in favor of this or that factual or legal conclusion: it would not modify the basic rule that internal resort to hostilities is prohibited, unless undertaken for self-or-other-defense.

Additionally, when constructing the *scope* of the right to self-defense, further adaptations must be made when moving from the realm of ethics to that of law. In ethics, some claim that killing in self-or-other-defense could be permitted even against several grave *nonlethal* threats, including perhaps, “theft of property if the effect on the owner’s well-being would be profound,”<sup>130</sup> forms of “political” aggression,<sup>131</sup> and threats emanating not from direct lethal force but from severe deprivation of material resources.<sup>132</sup> When applying utilitarian ethics, some might even justify the resort to force in other circumstances, provided it would constitute a “lesser evil.”<sup>133</sup> However, in law, considerations of legal policy such as the need for clarity, the problem of slippery slope, potential of abuse and manipulation, and the danger of false subjective judgment play a constraining role in the normative design.<sup>134</sup> In other words, when

128. FABRE, *supra* note 6, at 131. At this point an objection can be made that this reasoning invalidates the basic idea that a state must enjoy a monopoly over the use of violence, thereby leading to anarchy. See Weber, *supra* note 14. However, if we recognize any form of a legitimate right to self-defense by individuals—as all legal systems do—then we actually admit that this monopoly is not really absolute to begin with. That is to say, my suggestion does not really challenge the prevailing Weberian idea of state monopoly on violence since that monopoly never precluded self-defense. Indeed, even under Hobbes’ unlimited *Leviathan* individuals retained the right to self-defense. See Glenn Burgess, *On Hobbesian Resistance Theory*, in XLII POLITICAL STUDIES 62, 63–65 (1994); Peter J. Steinberger, *Hobbesian Resistance*, 46 AM. J. POL. SCI. 856, 856–57 (2002).

129. FABRE, *supra* note 6, at 135–48 (discussing and rejecting the claims that a “special relationship” between the state and individuals, or the fact that insurgents have no formal political status, substantially affects the question of resort to force).

130. McMahan, *War as Self-Defense*, *supra* note 110, at 79.

131. See, e.g., FROWE, *supra* note 110, at 139–45.

132. FABRE, *supra* note 6, ch. 3 (discussing “severe deprivation” as a just cause for war).

133. Cf. DILL, *supra* note 127, at 259–60.

134. For these reasons, the U.N. Charter’s Article 51 restricts interstate self-defense to situations of an “armed attack” and not to other types of nonphysical threats. See, e.g., TOM RUYS, “ARMED

resort to force is involved, law should be more wary of a system that opens the door for false positives. Perhaps, this is even more so in the complex, asymmetric environment of intrastate relations. This is not to say that the full spectrum of morality has no place in the legal discourse: in law, the distinction between what is permissible legally and what could be permissible morally is and ought to be reflected in the distinction between *ex ante* permission versus *ex post* defenses.<sup>135</sup> This Article, however, focuses on the general rule, not on possible *ex post* excuses.

### III. COLLECTIVIST VISIONS OF INTERNAL *JUS AD BELLUM*

We are now in the position to explore international legal doctrine in light of the general ethical standard suggested above, as well as other relevant considerations. This Part discusses doctrines that might reflect collectivist visions of internal *jus ad bellum* and reveals why these are unsatisfactory as legal standards.

#### A. SELF-DETERMINATION

In the post-Charter years, the international system was plagued by Cold War struggles and heightened tensions between crumbling empires and anticolonialist movements.<sup>136</sup> In this environment, the prohibition on the use of force, as enshrined in the Charter's Article 2(4), clearly failed to provide answers to one of the most pressing question of the times—chiefly, the role of force in the relations between stability and revolution, and between the principles of territorial integrity of states versus self-determination of peoples.<sup>137</sup> Simply reiterating that the Charter reaffirmed the preexisting silence toward noninternational resorts to force could not satisfy the complex interests concerning these questions, neither those of anticolonial movements nor of states. Complete silence could not serve anticolonial movements, since it meant that states were free to forcibly suppress any struggle for self-determination, without international legal consequence. Accordingly, they pressed for rules to prohibit such forcible actions; rules that can be understood as correlating with aspects of *jus ad bellum*.<sup>138</sup> But silence was also problematic for major Cold War

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ATTACK" AND ARTICLE 51 OF THE UN CHARTER 55–56, 183, 324 (2010). One would be hard-pressed to argue for a wider standard when discussing *internal* self-defense.

135. See, e.g., George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 958 (1985) (discussing excuse and justification defenses in criminal law). In the international context, see INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 164 (2000) (differentiating between *ex ante* unlawfulness and possible *ex post* legitimacy in the discussion of unilateral humanitarian intervention).

136. See MOYN, *supra* note 8, at 94.

137. See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 197 (1995).

138. See, e.g., G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations (Oct. 24, 1970) ("Every State has the duty to refrain from any forcible action which deprives

powers, since it assumed the freedom to forcibly repress democratic change on the one hand, and socialist revolution on the other.<sup>139</sup> To further complicate the map of interests, both bloc powers *and* anticolonial movements—which envisioned themselves as future sovereigns—were well aware that limiting resort to force by rulers, for whatever reason, is a double-edged sword: indeed, armed rebellion could also be directed against themselves or their allies.<sup>140</sup>

These mutually offsetting interests prompted international lawyers to construct ways to control noninternational resorts to force *without* explicitly regulating intrastate armed violence. The chief method to do so was to dodge the question by excluding certain conflicts from the internal realm to begin with. Repeatedly, therefore, rival blocs condemned internal conflicts as inauthentic proxy wars. If a certain conflict was not *truly* internal, preferring one side over the other—governments or rebels—could be justified *without* making a clear determination on the limits of internal *jus ad bellum*.<sup>141</sup> The Reagan Doctrine, for instance, was constructed as a response against “Soviet supported aggression,”<sup>142</sup> and was phrased by one of its key theorists, Jeane Kirkpatrick, as a counterintervention in a case where a totalitarian government was maintained by “foreign forces.”<sup>143</sup> Similarly, the Soviet Brezhnev Doctrine, which was used to bolster or contain internal revolutions or resorts to force, frequently relied on previous Western intervention in order to discredit the “authenticity” of the conflict.<sup>144</sup>

Like proxy wars, anticolonial struggles for self-determination were also excluded from the internal sphere. This granted them some measure of legitimacy, without jeopardizing sovereignty or territorial integrity and without saying anything about internal resort to force. Thus, for instance, the U.N. General Assembly, in its 1970 Declaration on Friendly Relations, stated that “[t]he territory of a colony or other Non-Self-Governing Territory has . . . a status separate and distinct from the

peoples referred to in the elaboration of the principle of equal rights and self-determination.”); G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, ¶ 4, (Dec. 16, 1960) (“All armed action . . . directed against dependent peoples shall cease . . .”); *see also* CASSESE, *supra* note 137, at 194–97; Shaw, *supra* note 83, at 44.

139. *See* Falk, *supra* note 79, at 6–7 (exemplifying during the Cold War that “[i]n a period of revolutionary ferment any given government . . . will sometimes favor the incumbent and sometimes the insurgent, depending on the setting”).

140. *See* MOYN, *supra* note 8, at 84–119 (discussing the preoccupation of anticolonialist movements with sovereignty).

141. LIEBLICH, *supra* note 67, at 169–72; Falk, *supra* note 79, at 3.

142. Ronald Reagan, President of the U.S., Address Before a Joint Session of Congress on the State of the Union (Feb. 6, 1985).

143. Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 19, 20 (Louis Henkin et al. eds., 1991).

144. This was the case, for instance, in the 1956 Soviet intervention in Hungary. *See* 1956 U.N.Y.B. 67–69, U.N. Sales No. 1957.I.1.

territory of the State administering it.”<sup>145</sup> Similarly, in a 1975 resolution, the Institut de Droit International, excluded from the term “civil war” “conflicts arising from decolonization.”<sup>146</sup> This tendency was reflected also in Article 1(4) of Additional Protocol I, which classified international armed conflicts for the purpose of IHL as “armed conflicts in which peoples are fighting . . . in the exercise of their right of self-determination.”<sup>147</sup> To further shield the internal realm against self-determination struggles, international discourse made clear that generally, in situations beyond anticolonial struggles, the conservative principles of national unity, territorial integrity, nonintervention, and sovereignty still held sway.<sup>148</sup>

However, the exclusion of anticolonial struggles from the internal realm cannot end the debate on self-determination and internal force. This is because the right to self-determination applies to *all* peoples, even beyond the colonial context.<sup>149</sup> Can peoples thus resort to internal force when the right to self-determination is deprived of them? It is helpful to note that even concerning anticolonial self-determination struggles, this point proved controversial. The Declaration on Friendly Relations, as well as other relevant documents, recognized that peoples have a right to resist *forcible* action depriving them of self-determination, and that they are entitled to receive support in such resistance, but only in accordance with the principles of the U.N. Charter.<sup>150</sup> While most “Third World” states understood this formulation as recognizing the right to use force against the mere *existence* of colonial regimes, many Western states maintained that it only goes as far as to acknowledge that such a right exists in response to forcible suppression actions by the colonial power.<sup>151</sup>

Although it is tempting to deride the Western approach as the dying breath of empire—and this would be at least partially true—it has its ethical merits. As discussed earlier on, assuming that equal morality applies to individuals and collectives, merely having a primary “right” to

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145. G.A. Res. 2625, *supra* note 138. Until the mid-twentieth century, anticolonial struggles were considered, for the purpose of international law, as internal conflicts. See LIEBLICH, *supra* note 67, at 220–21; Shaw, *supra* note 83, at 43–44.

146. Institut de Droit International, The Principle of Non-Intervention in Civil Wars art. 1(2)(c) (Aug. 14, 1975).

147. 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), 1125 U.N.T.S. 3 (June 8 1977).

148. G.A. Res. 1514, *supra* note 138, arts. 6–7; see also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 54 (1992) (noting the self-determination “evolved in a way that did not legitimate self-determination of minorities *within* a colony”).

149. *All* peoples enjoy the right to self-determination. See ICCPR, *supra* note 93, art. 1(1).

150. G.A. Res. 2625, *supra* note 138; G.A. Res. 3314, *supra* note 107, art. 7 (referring to the right to “struggle” for self-determination); see also Shaw, *supra* note 83, at 44.

151. See Shaw, *supra* note 83, at 44–45; see also CASSESE, *supra* note 137, at 197–98; Corten, *supra* note 10, at 22. For a comprehensive discussion, see HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* (1988).

something—self-determination or otherwise—does not necessarily entail also a secondary right to kill to acquire it. For instance, we might agree that if country *A* deprives people *B* of education in their native language, *A* violates *B*'s right to self-determination. But we would most certainly object that *B* is thereby justified to spark a civil war due to this deprivation. This hypothetical reveals a key limitation of self-determination as an independent baseline for internal *jus ad bellum*: the fact that in actuality, it encompasses a *spectrum* of rights, the violation of which is of varying degrees of severity. Indeed, in the post-colonial era, this feature of self-determination was made abundantly clear, as the principle was constructed as a bundle of liberal democratic human rights.<sup>152</sup> Assigning a right to resort to force, thus, for any violation of self-determination, seems too permissive.<sup>153</sup>

What violation of the rights comprising self-determination would, if at all, justify internal resort to force? Clearly, it would be needed to demonstrate that a threat emanating from a particular deprivation of self-determination would be so grave as to justify the right to kill. Granted, even some revisionist philosophers concede that sometimes it is morally justified to use force against deprivation of political self-determination.<sup>154</sup> However, I have already noted that due to considerations of abuse and the danger of false positives, when constructing *ex ante* permissions to use force, a *legal* regime should be more restrictive. Phrased in this manner, it becomes clear that a deprivation of internal self-determination must be so severe as to constitute an imminent grave threat, which actually merges with the self-defense standards suggested above.

In sum, while it is rather obvious to conclude that states are *prohibited* from resorting to force in violation of the right to self-determination—both in positive international law and *a fortiori* according to the restrictive, self-defense standards suggested here—it is equally problematic to invoke self-determination, in itself, as an enabling norm for armed rebellion in the absence of a threat giving rise to the right to self-or-other-defense.

## B. SOVEREIGNTY AND TERRITORIAL INTEGRITY VERSUS SECESSION

What about situations outside the context of colonial struggles—which are generally understood as *international*—or in which a party attempts unilateral secession? Does the international law concerning

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152. Reference re Secession of Quebec [1998] 2 S.C.R. 217 (Can.); Franck, *supra* note 148, at 52–56, 58–59; see also MOYN, *supra* note 8, at 208 (situating the shift from anticolonial perceptions of self-determination to individual rights-based perceptions).

153. Cf. McMahan, *What Rights May Be Defended*, *supra* note 110, at 134–35.

154. See Fabre, *supra* note 110, at 99–114 (justifying war against deprivation of self-determination where it is clear that severe human rights violations are imminent, or when the deprivation amounts to a “conditional threat”). Note, however, that this approach essentially deconstructs deprivation of self-determination into self-defense. See also FABRE, *supra* note 6, at 138–39.

secession tell us something also about the right to resort to force? Today, it is fairly settled that international law does not recognize a right to unilateral secession, and that the principle of territorial integrity trumps most countervailing interests.<sup>155</sup> This is clearly reflected in the international outrage concerning Crimea's recent attempt to secede from Ukraine, *even* if we assume that it was the genuine will of Crimea's Russian majority.<sup>156</sup> Likewise, although the International Court of Justice ("ICJ"), in a 2010 Advisory Opinion, opined that Kosovo's 2008 unilateral declaration of independence was not contrary to international law, the grounds for the opinion were very narrow: it focused on the *act* of declaring independence itself, *not* on the broader issue of Kosovo's right to secede from Serbia.<sup>157</sup>

But what if, in a certain instance, there *is* a collective right to secede under international law? Does this also entail a right to use force to fulfill it? Assume that province *B* within State *A* seeks to secede. Assume further that the U.N. Security Council adopted a binding Chapter VII Resolution recognizing, in principle, *B*'s right to secede, and that the Security Council was acting within its powers to do so.<sup>158</sup> State *A* does not comply with the Resolution; however, being an otherwise reasonable state, it does not resort to hostilities to prevent it, but rather uses its justice system to prosecute separatists. Does this grant *B* a right to resort to hostilities to give effect to the Resolution? The answer must be no, since a positive reply again conflates a right to *something* with a right to *kill* in order to secure it.<sup>159</sup> Just as individual residents of province *B* would not have a right to kill upon *every* violation of international norms by *A*, they cannot do so collectively through their political representation as a province. Of course, our analysis might change completely if we accept the (controversial) doctrine of "remedial secession," which recognizes a right of unilateral secession in cases of grave human rights violations by the rump state.<sup>160</sup> In facts giving rise to such a right, we might accept that *B* resort to force to effect secession; but this resort would not be permissible because of the right to secede itself, but rather

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155. Reference re Secession of Quebec, *supra* note 152; G.A. Res. 2625, *supra* note 138; *see also* Christian Walter, *Postscript: Self-Determination, Secession and the Crimean Crisis 2014*, in *SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW* 293, 306 (Christian Walter et al. eds., 2014).

156. *See, e.g.*, G.A. Res. 68/263, Territorial Integrity of Ukraine (Apr. 1, 2014). *But see* Vladimir Putin, President of Russia, Address by President of the Russ. Federation (Mar. 18, 2014).

157. Kosovo Advisory Opinion, *supra* note 11, ¶¶ 78–121.

158. The closest "real life" situation can be found in Resolution 1244, in which the U.N. Security Council effectively transferred the administration of Kosovo to the international community. Whether this amounted to recognition of a right to secede is of course debatable. *See* S.C. Res. 1244 (June 10, 1999).

159. Indeed, this conclusion seems to conform to state practice in recent decades, condemning forcible attempts at secession. For a brief analysis, *see for example* Antonello Tancredi, *Secession and Use of Force*, in *SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW*, *supra* note 155, at 68, 72–75.

160. *See* Reference re Secession of Quebec, *supra* note 152, ¶ 134; Walter, *supra* note 155, at 306–07.

due to the nature of the threat caused by *A*, which also gives rise to a right to self-defense.

Now let us assume that *B* fails to receive a Security Council authorization, but unilaterally declares independence, and even moves to organize its governmental agencies, including by establishing rudimentary security forces. Can State *A* attack *B* to stop such actions? Even if we assume that *B* has no right to secede under international law, there is no reason to assume *a priori* that its actions militate a *forcible* response.<sup>161</sup> Indeed, some international jurisprudence implies that governments, in certain circumstances, are under a *duty* to regain control over their territories in order to fulfill their human rights obligations.<sup>162</sup> But this cannot be construed as a duty or an unqualified authorization to resort to hostilities to do so—as the proper choice of means must be heavily dependent on the circumstances.<sup>163</sup> For instance, the proper choice of means can hinge on the question of whether loss of control is a factual, passive product of state failure, or conversely, of *active* forcible action by rebels against government forces.<sup>164</sup> Returning to our hypothetical, perhaps State *A* can use its police or judiciary to restore law and order, and thus refrain from killing; that is, unless *B* resorts to hostilities first, and therefore *A*'s hostilities can be justified in self-or-other-defense. This seems entirely commonsensical. Recall, that even in the American Civil War, the Union formally resorted to hostilities against the seceding Confederacy not in response to the secession itself, but only when the Confederacy resisted Union presence by force, famously by attacking Fort Sumter in April 12, 1861.<sup>165</sup>

In sum, assuming a collective right to secession exists, a right to resort to force does not necessarily follow—unless the right to secede is a result of grave human rights violations. But in such case we are really talking about force in self-defense, not force for the purpose of secession *per se*. In the same vein, the legitimacy of a resort to force to *prevent* secession would hinge on a first resort to hostilities by the seceding party—meaning, on the existence of a just case of self-defense—not on

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161. In a sense, such a situation mirrors the theoretical problem of “bloodless aggression” on the international level. See Fabre, *supra* note 110, at 103–09.

162. See *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 1134, ¶¶ 331–33, 340 cited in Tancredi, *supra* note 159, at 69–70.

163. Cf. *Ilaşcu*, 2004-VII Eur. Ct. H.R. ¶¶ 340–52. In general, the Court referred to the duty to “act by taking all the political, judicial, and other measures at its disposal to reestablish its control.” *Id.* ¶ 340.

164. See Lieblich, *supra* note 15, at 138.

165. See GARY GALLAGHER ET AL., *CIVIL WAR: FORT SUMTER TO APPOMATTOX* 31–33 (2014); see also STEPHEN C. NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 16–17 (2010); Quincy Wright, *The American Civil War*, in *THE INTERNATIONAL LAW OF CIVIL WAR*, *supra* note 12, at 30, 42; see also *The Prize Cases*, 67 U.S. (2 Black) 635, 669 (1863) (stressing the hostile nature of Confederate action as a trigger to the Civil War).

the right to safeguard territorial integrity as such. Any other result assumes a discontinuity of morality when moving from the individual to the collective.

### C. DEMOCRATIC LEGITIMACY

Does the character of a regime affect the question of internal *jus ad bellum*? Indeed, governmental legitimacy is a tempting prism through which to analyze internal resorts to force. In liberal discourse, legitimacy interacts closely with the idea of rule by consent. Applied to the issue at hand, such an approach would equalize a totalitarian regime with an aggressor. Accordingly, a democratic government would be entitled to resort to various measures—including, perhaps, to force—to protect itself against antidemocratic elements, while nondemocratic regimes would be prohibited from taking such measures against democratic opposition.<sup>166</sup> Taken seriously, such an approach would also justify armed rebellion against nondemocratic regimes and prohibit such force against democratic governments. In short, the principled question under democratic theory is whether the existence of democracy or authoritarianism *alone* can affect the law on internal resort to force, or whether something additional is needed.

Of course, to argue for such a *legal* rule requires saying something about the status of democratic governance as a right under international law, and also about the consequences of its breach. Indeed, in the 1990s, just after the collapse of the iron curtain, the triumph of the liberal democratic order seemed absolute, as the nations of the former Warsaw Pact emerged as reborn democracies.<sup>167</sup> These (and other) developments have famously led Thomas Franck to proclaim that a “right to democratic governance”—a “democratic entitlement”—was emerging under customary international law.<sup>168</sup> In essence, Franck celebrated a new *Pax Americana* built around the “almost-complete triumph of the democratic notions of Hume, Locke, Jefferson and Madison.”<sup>169</sup>

Although, in hindsight, the celebratory tone was a tad immature, Franck was careful enough to remain vague about the legal implications of his claim. Although some suggested that the democratic entitlement spawned a right of unilateral armed intervention by third parties when a

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166. For a general discussion, see Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 389 (Gregory H. Fox & Brad R. Roth eds., 2000) (discussing the powers under international law of democracies to protect themselves through political exclusion, but not focusing on the issue of hostilities).

167. For a general account, see *CENTRAL AND EAST EUROPEAN POLITICS: FROM COMMUNISM TO DEMOCRACY* (Sharon L. Wolchik & Jane L. Curry eds., 2011); see also Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and its Implications for International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 166, at 1.

168. Franck, *supra* note 148.

169. *Id.* at 49.

democratic government was deposed,<sup>170</sup> Franck mainly argued that the democratic entitlement meant that “only democracy and rule of law will be capable of validating governance”<sup>171</sup> and that citizens would look to international law to guarantee that entitlement.<sup>172</sup> Namely, this understanding implied a substantive theory of governmental recognition based on democratic credentials;<sup>173</sup> yet, like the mainstream writing on the issue, Franck refrained from addressing the relations between democratic governance and internal resorts to force.<sup>174</sup>

Indeed, if a democratic entitlement exists, it could be deduced that such an entitlement must *prohibit* antidemocratic *coup d'états*, as well as the repression of democratic opposition.<sup>175</sup> If this is true, it must follow that armed activities undertaken for the purpose of achieving antidemocratic objectives would also be prohibited. In this sense, the democratic entitlement would entrench a general prohibition on the first resort to force, at least within the *democratic* order. This of course fits nicely with the general approach suggested here, that in any case force can be used only in self-or-other-defense. The democratic entitlement does not, however, say much about *positive* rights to use force, either by democratic governments for the purpose of protecting democracy, or by pro-democratic opposition in order to achieve it.

Now, that democracies are entitled to defend their political systems—if needed by employing coercive measures—is beyond doubt.<sup>176</sup> However, this does not imply the right to resort to hostilities. Indeed, the situations in which democracies could be allowed to resort to internal hostilities—to *killing*—must be very narrowly defined, if they are not to lose their democratic character to begin with. It thus becomes clear that any rule regulating the resort to force would be less concerned with the existence of a threat to democracy, but rather with its gravity, or the means through which it is carried out. And the answer to the question

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170. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 166, at 239.

171. Franck, *supra* note 148, at 49.

172. *Id.* at 50.

173. Fox & Roth, *supra* note 167, at 9–12 (discussing the democratic entitlement and the international law on recognition of governments).

174. See, e.g., *id.* at 11–13.

175. This notion is reflected in pro-democratic sanctions clauses entrenched in regional arrangements. See, e.g., Constitutive Act of the African Union arts. 4(m), 4(p), July 11, 2000, 2158 U.N.T.S. 3; Protocol Relating to the Establishment of the Peace and Security of the African Union art. 4(j) (2002); Economic Community of West African States, Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security art. 25 (Dec. 10, 1999). For an analysis of these instruments and others, see LIEBLICH, *supra* note 67, at 198–99, 210–11.

176. For instance, in the European Convention on Human Rights, coercive restrictions on rights are usually limited to what is necessary in a *democratic society*. See Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6(1), 8(2), 10(2), 11(2), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

when such means could merit a forcible response cannot be phrased by reference to democracy itself, but to other first principles.

Similarly, that oppressed people bear the right to overthrow authoritarian government is long entrenched in liberal political theory.<sup>177</sup> This is also undisputed under international law, even under traditional doctrine, not least because the latter presupposes an unlimited right of revolution.<sup>178</sup> Nonetheless, even if a democratic entitlement exists, this in itself does not necessarily entail a right to resort to *hostilities* in order to achieve democracy. This is because even if the democratic entitlement implies a positive right to act, personally or collectively, and perhaps engage in civil disobedience in order to bring about democratic transition, it is debatable at best whether the permission to resort first to armed hostilities is inherent in such right. The contrary position would be to conflate the primary norm and the secondary norm meant to enforce it: the right to something with the right to kill to acquire it. If justified only on account of the political or collective nature of pro-democratic rebellion, it assumes that separate morality governs “political” actions—a notion already rejected. Again, we need other, first principles, to explain when violations of democratic principles spawn a right to use armed force.

The separation between ends and means, in this context, seems to conform to our intuitions. For instance, while the Egyptian pro-democratic revolution of 2011 was (almost) universally lauded,<sup>179</sup> it is doubtful whether similar reactions would follow if instead of peacefully occupying Tahrir Square, the revolutionaries would have initiated a campaign of hostilities against the Egyptian military. This intuition is rooted precisely in the notion that the absence of democracy is not *sufficient* in itself to justify resort to massive killing. This intuition also correlates with the practice of democratic opposition movements as rational actors. Unsurprisingly, in the first (democratic) stages of the Arab Spring, neither in Egypt and Tunisia on the one hand, nor in Syria and Libya on the other, were organized hostilities initiated by the opposition. Rather, the organized armed opposition in Syria and Libya commenced only after the regimes *themselves* attacked the protesters with significant force.<sup>180</sup> Perhaps these

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177. See, e.g., Fox & Nolte, *supra* note 166, at 432. For a theoretical survey, see Ginsburg et al., *supra* note 22, at 1191–1207; see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948) (“Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”).

178. LAUTERPACHT, *supra* note 10, at 106–07.

179. See *Hosni Mubarak Resigns: World Reaction*, BBC NEWS (Feb. 12, 2011), <http://www.bbc.com/news/world-middle-east-12435738>.

180. For a timeline of the events in Syria, see *Syria Profile—Timeline*, BBC NEWS (Dec. 9, 2015), <http://www.bbc.com/news/world-middle-east-14703995>; see also David Poort & Ismael Naar, *Timeline:*

dynamics are unavoidable in practice: it is likely that authoritarian regimes will *always* resort to escalating levels of force when confronting even nonviolent challenges, since non-toleration of dissent is part and parcel of what makes them authoritarian to begin with.<sup>181</sup>

Intuition, however, is not enough, as the idea of a right of armed rebellion against authoritarian regimes enjoys considerable pedigree in social-contractarian liberal thought. John Locke, for instance, did not constrain the right of forcible resistance only to cases of imminent and tangible threat to life, but also to situations of tyranny. To Locke, the state was a product of a social contract that aimed, by transferring executive power to the public, to lift individuals from the state of nature.<sup>182</sup> The state rescues human society from the state of nature by functioning as a “judge on earth” between individuals.<sup>183</sup> An absolute sovereign, conversely, cannot provide such redress and thus remains in the state of nature with his subjects.<sup>184</sup> By appropriating absolute power, the ruler furthermore enters a *state of war* with the subjects.<sup>185</sup> Thus, Locke does not substantively differentiate between cases of extreme danger caused by the ruler, usurpation or tyranny<sup>186</sup>: subjects have the right to resist in all of these cases, and such resistance must include aggressive force in order to be effective.<sup>187</sup>

Importantly, Locke’s reasoning hinged on the idea that even if an absolutist prince has yet to endanger my person concretely, he might do so later on, if he manages to take my liberty<sup>188</sup> or my property,<sup>189</sup> and therefore I can act against him *before* a specific threat to life materializes. Should international law follow the Lockean idea of the right to resort to force when the democratic entitlement is violated? Returning to the reductivist approach, some contemporary philosophers claim that theoretically, individuals as well as collectives can resort to lethal force against severe deprivation of freedom or subsistence as defense against aggression.<sup>190</sup> However, in truth, the vast majority of totalitarian regimes—abhorrent as they might be—do not exercise the same level of oppression that would justify killing in an individual setting. Most models

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*Three Years After Libya’s Uprising*, ALJAZEERA (May 19, 2014, 2:29 PM), <http://www.aljazeera.com/indepth/interactive/2014/02/timeline-three-years-after-libya-uprising-201421691755192622.html>.

181. See LIEBLICH, *supra* note 67, at 219.

182. LOCKE, *supra* note 123, chs. 8–9.

183. *Id.* ch. 7, § 89.

184. *Id.* ch. 7, §§ 90–93.

185. *Id.* ch. 3, § 17, ch. 19, § 222.

186. *Id.* ch. 18, § 199 (defining usurpation and tyranny).

187. *Id.* ch. 19, § 235 (“He therefore who may resist, must be allowed to strike.”).

188. *Id.* §§ 16–18 (“I have no reason to suppose, that he, who would take away my liberty, would not, when he had me in his power, take away everything else. And therefore it is lawful for me to treat him as one who has put himself into a state of war with me, i.e. kill him if I can.”).

189. *Id.* ch. 19, §§ 221–22.

190. See, e.g., FABRE, *supra* note 6, at 105–10, 118–26; McMAHAN, *supra* note 116, at 79–81.

of totalitarian regimes, except the few outright murderous ones, can be better described as collective forms of “conditional threats”: the regime directly deprives its citizens of certain political rights, while indirectly threatening them that resistance would result in a much graver violation.<sup>191</sup> Whether it would be justified to resist upon such “lesser” threats when knowing that resistance will prompt escalation and thus cause further harm, is an unresolved question in just war theory.<sup>192</sup> Nonetheless, we can *at least* agree that when facing such conditional threats, the victim should attempt a lesser form of resistance—such as civil disobedience and other nonviolent approaches—before embarking on hostilities as a last resort.<sup>193</sup>

In international legal terms, Locke’s reasoning is reminiscent of the idea of preventive self-defense on the international level, which justifies a right to act preventatively against emerging threats.<sup>194</sup> However, this doctrine was rejected by contemporary international legal discourse for good reasons, chiefly because it raises severe problems of unclear necessity, subjective judgment, abuse, and dangers of escalation.<sup>195</sup> The Lockean idea clearly raises the same problems. Interestingly, these concerns were not lost on other classic thinkers who distinguished, when considering internal force, between cases of illegitimate rule versus cases of concrete and imminent danger. Grotius, for instance, argued that force could not be used against usurpers, when the latter do not present an extreme danger.<sup>196</sup> Confronting usurpation, he argued, raises acute epistemological problems, since such situations are often too complex and “controverted” to allow sound factual judgment.<sup>197</sup> In terms of cost-benefit, Grotius argued that it might be preferable to leave the usurper

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191. A “conditional threat” is a situation in which *A* demands of *B* to suffer harm *C*, under the threat that resistance will generate much greater harm *D*. A classic example of this type of conditional threat is a simple “your money or your life” street mugging. See Rodin, *supra* note 111, at 79–88.

192. Rodin claims, for instance, that it could be immoral to resist a lesser threat if we know that the indirect grave threat would materialize, since that would make resistance disproportionate in terms of a cost/benefit analysis. See Rodin, *supra* note 111, at 81–82. *But see* Frowe, *supra* note 110, at 129–45 (arguing that merely “foreseen” conditional harms should be discounted when discussing proportionality of self-defense; and in collective scenarios, the lesser harms should be considered in aggregation).

193. See, e.g., Fabre, *supra* note 110, at 109–11.

194. See MICHAEL W. DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT (Stephen Macedo ed., 2008).

195. See Ruys, *supra* note 134, at 322–24. Interestingly, Locke responds to the problems associated with preventive use of force by invoking the wisdom of the crowds. Locke believed that people are capable of such judgments just as private beneficiaries are capable of judging their trustee. Locke, *supra* note 123, ch. 19, § 240. Moreover, people are likely to rebel (or to support rebellion) only when faced with genuine and grave wrongs. *Id.* ch. 19, §§ 224–25, 230.

196. *But see* Grotius, *supra* note 47, at 378–80 (exploring the legality of deposing or killing an usurper).

197. *Id.* at 381–83.

“in quiet possession, than engage his country in dangerous troubles and bloody wars.”<sup>198</sup>

Beyond the theoretical legal aspects above, there are additional practical reasons to reject democracy as the ultimate yardstick to assess internal resort to force both by states and opposition movements. The first is the likely objection that the term democracy might be understood as implying Western hegemony.<sup>199</sup> This in itself can irreparably harm the concept’s legitimacy. Furthermore, even orthodox liberal theory recognizes that nowadays the democracy and authoritarianism dichotomy is too simplistic when constructing international relations, and that some gray areas of legitimacy exist—most notably in the form of the Rawlsian idea of “decent peoples.”<sup>200</sup> But even if we reject such gray areas, the conceptual ambiguity of democracy remains. Indeed, defining democracy is far from simple, even if we can agree on its basic tenets.<sup>201</sup> As the world is abundant with “flawed” democracies,<sup>202</sup> it is not always clear when the threshold is crossed. History teaches us to be suspicious concerning the use of the term “democratic” as an empty vessel.<sup>203</sup> Since any rule on the use of force—considering the stakes at hand—must aim to minimize the space for subjective interpretation, it should not be constructed around vague concepts.

Finally, democratic entitlement is a weak analytical tool due to its collapse into other concepts; that is, unless we mythicize it as a collective, transcendental right. The term “democracy,” however defined, includes both procedural (electoral) aspects as well as substantive (rights-based) ones.<sup>204</sup> If we focus on the existence of electoral democracy as a determinant for a right to use internal force, the resulting rule is unattractive, since majority rule is not sufficient, in itself, to secure human rights. If on the other hand, by democracy we do not mean only electoral process but also the protection of individual rights, then we inevitably venture into the open textured, culturally sensitive territory of human rights.<sup>205</sup> Absent further elaboration, “human rights” is far too ambiguous a concept for the regulation of resort to hostilities and, in any

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198. *Id.* at 381. Furthermore, the usurper’s acts might have binding (*de facto*) power, if not by law (*de jure*), simply by the fact that this would be preferable to “anarchy.” *Id.* at 377; *see also* PUFENDORF, *supra* note 52, at 724–26.

199. *See* Fox & Roth, *supra* note 167, at 13–15.

200. JOHN RAWLS, *THE LAW OF PEOPLES* 59–88 (1999).

201. Jan Knippers Black, *What Kind of Democracy Does the “Democratic Entitlement” Entail?*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 166, at 517; Martti Koskenniemi, *Intolerant Democracies: A Reaction*, 37 *HARV. INT’L L.J.* 231, 231–32 (1996).

202. *See, e.g., Democracy Index 2013*, ECONOMIST INTELLIGENCE UNIT, [http://www.eiu.com/public/topical\\_report.aspx?campaignid=Democracy0814](http://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0814) (last visited Apr. 10, 2016).

203. *See* LIEBLICH, *supra* note 67, at 216.

204. *See id.* at 210.

205. *See id.* at 217.

case, reveals that “democratic entitlement” is not an entirely distinct concept.<sup>206</sup>

#### IV. INDIVIDUALIST VISIONS: INTERNATIONAL HUMAN RIGHTS AND ARMED CONFLICT AS A STATE OF EXCEPTION

Having demonstrated the failure of several international legal doctrines to form a basis for a theory of internal *jus ad bellum*, we can proceed to discuss ideas rooted in the protection of the *individual*. International human rights law seems better situated to control the resort to force, as it specifically sets out to prevent and curb *intrastate* violence. Since it is concerned with the protection of individuals, it fits more naturally with the revisionist just war ideas underlying our discussion. As shown in this Part, some contemporary human rights jurisprudence implies the adoption of the logic of reductivist individualism by applying, in general, the same norms of resort to force on the micro and macro levels of violence.<sup>207</sup> However, IHRL’s effectiveness in this context is curbed both by doctrinal underdevelopment and its troubled relations with international humanitarian law.

##### A. THE RIGHT TO LIFE AND INTERNAL HOSTILITIES

IHRL’s potential to prohibit and regulate resort to internal force is mainly rooted in its protection of *everyone’s* right to life. Article 6 of the International Covenant on Civil and Political Rights (“ICCPR”), for instance, provides that “no one shall be arbitrarily deprived of his life.”<sup>208</sup> While no derogation from this right is permitted,<sup>209</sup> the term “arbitrarily” implies that some exceptions are possible, such as deprivation of life during war.<sup>210</sup> Article 2 of the European Convention on Human Rights (“ECHR”) presents a slightly different approach. It entrenches “everyone’s right to life,” but subjects it to several explicit exceptions.<sup>211</sup> Thus, Article 2(2) excludes deprivations of life resulting from defense of persons from unlawful violence;<sup>212</sup> from action taken “in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;”<sup>213</sup> or from “action lawfully taken for the purpose of quelling a riot or insurrection.”<sup>214</sup> These legitimate aims are limited by a means-ends

206. *See id.* at 217–19.

207. *See* William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT’L L. 741, 742–43 (2005).

208. ICCPR, *supra* note 93, art. 6(1); *see also* American Convention on Human Rights art. 4(1) Nov. 22, 1969, 1144 U.N.T.S. 123.

209. ICCPR, *supra* note 93, art. 4(2).

210. *See infra* Part V.

211. ECHR, *supra* note 176, art. 2(1).

212. *Id.* art. 2(2)(a).

213. *Id.* art. 2(2)(b).

214. *Id.* art. 2(2)(c).

proportionality constraint: the force used cannot be more “than absolutely necessary.”<sup>215</sup> Furthermore, Article 15 of the ECHR allows derogations in times of emergency, including from the right to life, only “in respect of deaths resulting from lawful acts of war.”<sup>216</sup> It should already be clear that the “war” exceptions reflect a dichotomy between internal peace and war, *without* clearly regulating the movement between these realms. I treat this problem in the next section. For now, it suffices to note that this mirrors the pre-Charter law on international resort to force, which treated peace and war as two spheres between which a state could move freely.<sup>217</sup>

IHRL can be used to assess the conduct of *every* state (and as we shall see, perhaps *nonstate*). Moreover, even those that deny IHRL’s application during armed conflict cannot rule out that it applies *before* armed conflict erupts. Therefore, there is no doubt that IHRL can regulate the *initial* decision to resort to armed force. However, this potential has been fulfilled only partially, if at all. Granted, IHRL has been extended to situations of internal armed conflicts by major human rights courts, notably the European Court of Human Rights (“ECtHR”).<sup>218</sup> In a string of cases relating to the Russian-Chechen conflict, the court moved to apply IHRL even in relation to core issues of *jus in bello*.<sup>219</sup> Nonetheless, as demonstrated below, IHRL was not taken so far as to explicitly regulate the resort to force itself, meaning, the *ad bellum* level. If the issue was touched upon, it was only in passing references. In fact, the move by courts to assess the conduct of hostilities in light of human rights norms is more than anything a pragmatic solution to *competence* problems: IHRL is applied since it is unclear to what extent human rights courts are authorized to apply IHL directly.<sup>220</sup>

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215. *Id.* art. 2(2).

216. *Id.* art. 15(2).

217. LIEBLICH, *supra* note 67, at 74–75.

218. By “extension” I do not refer to the joint application of IHL and IHRL during armed conflict but rather to the assessment of the conduct of hostilities in light of human rights law in lieu of IHL. See Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict*, in PAS DE DEUX: INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 201, 203 (Orna Ben Naftali ed., 2011) (noting that the ECtHR has often ignored IHL altogether, applying IHRL instead).

219. *Id.* at 218–20, 224–49.

220. Oona Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1909–10 (2012) (arguing that human rights courts exclude IHL due to jurisdictional issues). For a discussion of the jurisdictional problem in the Inter-American human rights system, see Shana Tabak, *Armed Conflict and the Inter-American Human Rights System: Application or Interpretation of International Humanitarian Law?*, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS 219 (Derek Jinks et al. eds., 2014), and see Gioia, *supra* note 218, at 215–18. Some claim that at least in internal conflicts, applying IHRL can be desirable, because IHL is less developed than human rights law when it comes to noninternational armed conflict. Abresch, *supra* note 207, at 747.

Moreover, by applying IHRL in lieu of IHL, courts could sidestep the often controversial question of whether an internal armed conflict existed in a particular situation.<sup>221</sup>

The leading case, in this context, is the ECtHR's *Isayeva v. Russia*.<sup>222</sup> In *Isayeva*, the applicant alleged, *inter alia*, that Russia violated Article 2 (the right to life) of the ECHR, by indiscriminately bombing the Chechen village of Katyr-Yurt and killing her family members.<sup>223</sup> Russia responded by invoking Article 2(2)(a), claiming that the bombing was absolutely necessary in defense of persons.<sup>224</sup> It did not, however, claim that an armed conflict existed; nor did it make any derogation from the right to life,<sup>225</sup> although Article 15's derogations regime is relevant also to civil wars.<sup>226</sup> This framing allowed the court to analyze the dispute as a "regular" human rights case.

The court ruled first that the basic values of democratic societies must restrict the circumstances in which deprivation of life can be justified.<sup>227</sup> In essence, this reflects a baseline of nonuse of force within intrastate relations, emanating from the general idea of human rights law. The question then was whether the Katyr-Yurt bombings were *absolutely necessary* in defense of persons, as Russia claimed, since in such a case, deprivation of life might be justified. The court's analysis of the question followed a three-tiered approach reflecting, to some extent, *jus ad bellum* thinking.<sup>228</sup> First, "absolutely necessary" consists, as per the court, of the need "to minimise, to the greatest extent possible, recourse to lethal force,"<sup>229</sup> and that force must be "strictly proportionate to the achievement of the permitted aims."<sup>230</sup> This reasoning mirrors traditional *jus ad bellum* considerations of necessity and proportionality.<sup>231</sup> The second tier, albeit only implicitly referred to in *Isayeva*, holds that even when force can be generally justified, less harmful means must be considered prior to each attack, even when the targeted individual is

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221. Gioia, *supra* note 218, at 222. IHRL application allows for this sidestep because the existence of an armed conflict is a precondition for IHL's application, whereas that is not the case for IHRL. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 101, art. 3.

222. 41 Eur. Ct. H.R. 791 (2005).

223. *Id.* ¶¶ 3, 162.

224. *Id.* ¶ 170.

225. *Id.* ¶¶ 133, 191.

226. Gioia, *supra* note 218, at 204.

227. *Isayeva*, 41 Eur. Ct. H.R. ¶ 172.

228. See Abresch, *supra* note 207, at 764-65.

229. *Isayeva*, 41 Eur. Ct. H.R. ¶ 175.

230. *Id.* ¶ 173.

231. See, e.g., Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence and Proportionality in the Law of Self-Defense*, 107 AM. J. INT'L L. 563, 564-68 (2013).

participating in combat.<sup>232</sup> This view essentially breaks down the conduct of hostilities to a continuous series of *ad bellum* decisions; there is no formal “threshold” that once crossed allows the “wholesale” targeting usually associated with armed conflict under IHL. The third tier correlates with traditional *jus in bello* obligations to take precautionary measures, requiring that once recourse is made to lethal force, steps should be taken to minimize incidental harm to civilians.<sup>233</sup>

The *Isayeva* court analyzed the first and second tiers in a laconic manner, which implies significant deference to state discretion. It ruled that the situation in Chechnya called for “exceptional measures,” in order to “regain control” over the state and “to suppress the illegal armed insurgency.”<sup>234</sup> Given the circumstances, those measures could include “the deployment of army units” with heavy weaponry such as warplanes and artillery.<sup>235</sup> At first glance, this seems like a sovereignty-centered, collectivist view of internal resort to force. However, the court also noted the presence of many Chechen fighters in the village, and their *active resistance* to law enforcement, which implied the logic of self-defense according to individualist standards.<sup>236</sup> The court thus ruled that Russia might have been justified in resorting to force in the circumstances at hand.<sup>237</sup> Nonetheless, the court’s analysis leaves much to be desired, as it made only a passing, one-paragraph reference to these complex issues, before moving on to analyze in greater detail the civilian harm caused by the specific bombing.<sup>238</sup>

Thus, despite the ECtHR’s cautious steps toward limiting internal resorts to force, its jurisprudence does not fully resolve the issue.<sup>239</sup> First, there is much that remains ambiguous about the inner workings of Article 2. In terms of just causes for internal force, the court did not clarify the relation between the collectivist and individualist understandings of the “absolutely necessary” standard, which it simultaneously offered when discussing Russia’s resort to force.<sup>240</sup> More

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232. *Isayeva*, 41 Eur. Ct. H.R. ¶¶ 172–75; see Abresch, *supra* note 207, at 758 (“Even with respect to persons taking active part in hostilities, the ECHR only permits the use of lethal force when capture is too risky.”).

233. *Isayeva*, 41 Eur. Ct. H.R. ¶ 175.

234. *Id.* ¶ 180.

235. *Id.*

236. *Id.* Likewise, the court held that the primary objective of the deployment of heavy weapons should be “to protect lives from unlawful violence.” *Id.* ¶ 191.

237. *Id.* ¶ 180.

238. Specifically, the court considered that no effective warning was given to civilians, that the weapons used were indiscriminate, and that safe passage for civilians escaping the village was not ensured. *Id.* ¶¶ 183–200.

239. See Abresch, *supra* note 207, at 765–67.

240. The court ruled that “a balance must be achieved between the aim pursued and the means employed to achieve it,” but it did not make clear whether the “aim pursued” to be assessed is on the macro (regaining control) or micro (unit self-defense) levels. *Isayeva*, 41 Eur. Ct. H.R. ¶ 181.

generally, the court has yet to elaborate on the interaction between the “defense of persons” exception—explicitly relied upon by Russia in *Isayeva*—and the other exceptions under Article 2(2). While the “defense” exception conforms to the reductive approach, it is doubtful whether deprivation of life during arrest or quelling a riot or insurrection can be reconciled with the view that killing could only be justified in self-or-other-defense. Additionally, the court’s reference in *Isayeva* to “illegal” insurgency as a justification for force raises the question of whether it was the *specific* Chechen uprising which was illegal, or rather any insurgency per se, and further, whether illegality is to be determined strictly in light of domestic law or also by reference to international norms.

Second, it should be remembered that human rights jurisprudence mainly concerns *state* action. Although it is obvious that the right to life must apply in some form between private individuals, existing case law does not tell us much about the limitations on resort to force by nonstate actors.<sup>241</sup>

Third, and most importantly, it must be recalled that in all relevant ECtHR cases, the impugned states *themselves* refrained from claiming that an internal armed conflict existed within their territories; they did not file a “civil war” derogation under Article 15. Thus, it is debatable whether the cautious regulation of resort to force described above would survive if states choose to act otherwise.<sup>242</sup> Recent ECtHR jurisprudence gives cause for pessimism in this context. In 2014’s landmark *Hassan v. United Kingdom*, the court was called to rule on the relation between the right to liberty entrenched in Article 5 of the ECHR and the rules regulating detention under IHL.<sup>243</sup> The case’s special importance was that for the first time, the State asked the court to disregard Article 5 in favor of relevant IHL provisions, or alternatively, to interpret the Article as accommodating the detention powers provided for in the Third and Fourth Geneva Conventions.<sup>244</sup> Although Article 5’s language is exhaustive, the court interpreted it as *allowing* the more expansive detention powers available under IHL, even absent derogation by the State to that effect.<sup>245</sup> Importantly, the court emphasized that such an

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241. See Abresch, *supra* note 207, at 753.

242. See Gioia, *supra* note 218, at 224 (“In situations where Article 15 ECHR is invoked, there can be no doubt that IHL may be applied in order to determine what constitutes a ‘lawful act of war.’”). Even absent derogations, some understood the court’s “necessary in a democratic society” limitation as correlating with the IHL concept of “military necessity” rather than *jus ad bellum* necessity. See Abresch, *supra* note 207, at 766; see also Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 80 INT’L REV. RED CROSS 519 (1998).

243. *Hassan v. United Kingdom*, App. No. 29750/09 Eur. Ct. H.R. (2014).

244. *Id.* ¶ 99.

245. *Id.* ¶ 104.

interpretation is only possible when the State appeals to IHL to justify its actions.<sup>246</sup>

Granted, the court stressed that the ruling was limited to *international* armed conflicts—where rules of detention are relatively clear.<sup>247</sup> In internal armed conflicts, presumably, the state would *at least* be required to lodge a formal derogation in order to justify forms of detention not envisioned by Article 5. Nonetheless, considering the power that the court attributed to the existence of an armed conflict in shaping its interpretation, we can definitely envision a situation in which for the first time, a state would invoke IHL in an *internal* conflict—or lodge a derogation—and thus bypass even the modest steps the court has made in *Isayeva* in favor of limiting internal resorts to force.

The implication of the above is that under positive IHRL, the existence of an internal armed conflict could be used as a proxy for the lawfulness of resorting to force. This is because the *factual* existence of an armed conflict is commonly understood to effect a switch between the spheres of “peace” and “war,” which in turn ushers in a *normative* change. However, under this understanding, IHRL does not regulate the terms of the paradigm switch itself: it merely recognizes it.<sup>248</sup> In a sense, when these dynamics occur, normative issues of *jus ad bellum* collapse into factual questions of *jus in bello*; and *jus in bello*, in turn, undermines the possibility of an IHRL-based regulation of internal *jus ad bellum*. The next subpart elaborates on this problematic outcome.

## B. THE COLLAPSE INTO THE “ARMED CONFLICT” DISCOURSE

### I. *The Emergence of the “Armed Conflict” Discourse as a Proxy for Jus ad Bellum in Noninternational Armed Conflicts*

Following the 2001 attacks on the World Trade Center and the ensuing U.S.-led “global war on terror,” the legal regulation of the use of force between states and nonstate actors became a dominant issue in international discourse. At first, the key question was whether states enjoyed the right, under *jus ad bellum*, to exercise transnational self-defense against nonstate actors.<sup>249</sup> While some controversy still remains,<sup>250</sup>

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246. *Id.* ¶ 107.

247. *Id.* ¶ 104; see also Lawrence Hill-Cawthorne, *The Grand Chamber Judgment in Hassan v. UK*, EJIL TALK! (Sept. 16, 2014), <http://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/>.

248. See, e.g., Abresch, *supra* note 207, at 745 n.11 (citing G.I.A.D. Draper, *Human Rights and the Law of War*, 12 VA. J. INT'L L. 326, 338 (1972) (arguing that war is an “exceptional situation” resulting in derogation from the human rights system)).

249. For an outline of state practice regarding this question before 9/11, see RUY, *supra* note 134, at 421–33; see also Carsten Stahn, *Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER FORUM WORLD AFF. 35 (2003) (discussing the impact of the events of September 11th on the right to self-defense).

state practice and most mainstream writers now accept that in some cases, cross-border forcible action against nonstate actors can be justified under the right to self-defense.<sup>251</sup>

However, as the “war on terror” lingered, it became increasingly difficult to trace this or that forcible action to any previous or imminent armed attack, and to define the geographical boundaries of this so-called “war.”<sup>252</sup> The main question became whether the law of armed conflict applied at all in the various arenas where the United States operated. Two conflicting interest groups answered this question in the negative. The Bush administration argued that transnational conflicts—being neither international nor internal—are not subject to the constraints of the law of armed conflict to begin with.<sup>253</sup> It suffices to point out, for our purposes, that the U.S. Supreme Court soon discarded this approach.<sup>254</sup> Nonetheless, many in the international human rights community *also* argued that IHL did not apply to the war on terror—but from an entirely different angle: it did not apply because the various struggles comprising it did not amount to an *armed conflict*.<sup>255</sup>

The focus of the international human rights community on the existence of an armed conflict for the purpose of drawing normative conclusions—a tendency that I call the “armed conflict” discourse—reflects a significant shift in the general role of IHL within the international legal system. Shortly put, the shift is between viewing IHL as a *constraining* normative system (in relation to a generally enabling,

250. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) [hereinafter Wall Advisory Opinion]. *But see id.* Separate Opinion of Judge Higgins ¶ 33; Declaration of Judge Buergenthal ¶ 6; Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the I.C.J.?* 99 AM. J. INT’L L. 62 (2005); see also Iain Scobbie, *Words My Mother Never Taught Me—“In Defense of the International Court,”* 99 AM. J. INT’L L. 76 (2005).

251. S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2001); see also Ruys, *supra* note 134, at 443–510; Daniel Bethlehem, *Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Attack by Nonstate Actors*, 106 AM. J. INT’L L. 1 (2012); Kress, *supra* note 11, at 43–51. At least one commentator raised the possibility that the right to self-defense against nonstate actors is mirrored by a prohibition on the use of force by such actors. See Nicholas Tsagourias, *Non-State Actors in International Peace and Security: Non-State Actors and the Use of Force*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM 326, 326–33 (Jean d’Aspremont ed., 2011). Others have argued for such a prohibition, but only on targeting of civilians. See Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L. J. 1, 2 (2002).

252. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PENN. L. REV. 675, 677–80 (2004).

253. *Id.* at 682.

254. In the *Hamdan* case, the U.S. Supreme Court ruled that the struggle between the United States and Al-Qaeda in Afghanistan was a noninternational armed conflict, subject to the provisions of Article 3 Common to the Geneva Conventions. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006).

255. See Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Study on Targeted Killings*, ¶¶ 53–56, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010); see also Ehrenreich Brooks, *supra* note 252, at 679–80; Luban, *supra* note 125, at 29.

*Lotus*-based freedom to act)<sup>256</sup> and its perception as an *enabling* system (in relation to the constraining background of IHRL). Since this point is paramount to understanding how IHL undermines internal *jus ad bellum*, it is worthwhile to elaborate on this process further.

Indeed, the distinction between civil unrest, regarding which the laws of war do not apply, and civil wars—in which these laws kick in—is as old as IHL itself.<sup>257</sup> However, in the past, this distinction mainly served to entrench state sovereignty. The default rule was that domestic strife, as an issue between the state and its subjects, was beyond the reach of international law altogether.<sup>258</sup> Only when the opposition exhibited state-like qualities—namely, by conducting organized hostilities and exercising effective control over territory—could sovereignty be compromised by subjecting an otherwise internal situation to international law.<sup>259</sup> This was the backdrop for the *factual* criteria for the existence of noninternational armed conflicts, adopted later in Protocol II,<sup>260</sup> and by the International Criminal Tribunal for Yugoslavia.<sup>261</sup> Since the alternative was freedom of action, states were incentivized *not* to recognize that an armed conflict existed, while rebels were motivated to do exactly the opposite.<sup>262</sup>

Nowadays, however, when an armed conflict does *not* exist, international law is not mute. Rather, the more *restrictive* normative framework of IHRL applies alone. Under IHRL, institutional violence is restricted to the “law enforcement” paradigm, which severely restricts deprivation of life to situations where an imminent threat is determined.<sup>263</sup> Conversely, during armed conflict the more permissive paradigm of “hostilities,” regulated by IHL, steps to the fore.<sup>264</sup>

256. The famous *Lotus* principle holds that in general, states are free to act in absence of an express constraining norm. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 ¶ 44 (Sept. 7).

257. *See supra* note 81.

258. *See supra* Part I.B.

259. *See supra* note 81.

260. Protocol II, *supra* note 20, art. 1.

261. Prosecutor v. Tadic, Case No. IT-94-1-I, Trial Chamber Judgment, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

262. *See* SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 200–04 (2012). As Baxter stated in 1974 “the first line of defense against international humanitarian law, is to deny that it applies at all.” Richard Baxter, *Some Existing Problems in Humanitarian Law*, in THE CONCEPT OF INTERNATIONAL ARMED CONFLICT: FURTHER OUTLOOK 1, 2 (Proceedings of the International Symposium on Humanitarian Law, 1974), reprinted in *Commemoration of the Centenary of the Brussels Declaration of 1874 on the Laws and Customs of War*, 14 MIL. L. & L. WAR REV. 271 (1971). This explains, for instance, the reluctance by the Union, during the American Civil War to recognize that the conflict was a “war” in the legal sense, while the Confederacy claimed full belligerent rights. *See* NEFF, *supra* note 165, at 7, 15–16. This also explains why the belligerency doctrine has generally fallen into desuetude. *See* LIEBLICH, *supra* note 67, at 82–83, 122.

263. Basic Principles, *supra* note 21, art. 9.

264. I set aside the general question of the relation between IHRL and IHL during hostilities. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶¶ 24–25 (July 8) [hereinafter Nuclear Weapons Advisory Opinion]; Wall Advisory Opinion, *supra* note 250, ¶¶ 102,

Combatants and other unprotected persons can be lethally targeted, and collateral damage to uninvolved civilians is tolerated in circumstances much wider than the conventional understanding of IHRL allows.<sup>265</sup> The factual existence of armed conflict was thus phrased as a precondition for the switch between the ordinary human rights law of peacetime and the “state of exception” of the laws of war.<sup>266</sup> IHL, then, becomes a defense: as stated bluntly by the Inter-American Commission on Human Rights—“humanitarian law may be a defense available to a State to rebut charged violations of human rights during internal hostilities.”<sup>267</sup> As the international human rights regime becomes stronger, the traditional incentive system will be reversed. Under these circumstances, it becomes clear that to enhance their freedom of action, states have at least some incentive to classify a situation as an armed conflict, while nonstate actors might argue the opposite.<sup>268</sup>

Arguably, the roots of this reversal of incentives can be traced to the ICJ’s 1994 Nuclear Weapons advisory opinion.<sup>269</sup> There, among many other questions, the court considered the relations between IHL and Article 6(1) of the ICCPR, which prohibits, as discussed above, the

105 (Jul. 9, 2004). For a discussion and critique see Marko Milanović, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, in PAS DE DEUX, *supra* note 218, at 95–125.

265. Ehrenreich Brooks, *supra* note 252, at 676, 692; Luban, *supra* note 125, at 29; *see also* Liebllich, *supra* note 15, at 364–72 (detailing the differences between the law enforcement and hostilities paradigms); Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the “Fog of Law”*, 13 Y.B. INT’L HUM. L. 311, 319 (2010); *see, e.g.*, Laurie R. Blank & Benjamin R. Farley, *Characterizing U.S. Operations in Pakistan: Is the U.S. Engaged in an Armed Conflict*, 34 FORDHAM INT’L L.J. 151 (2011); Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263, 290–91 (Simon Bronitt ed., 2012) (arguing that targeted killings by the United States in Pakistan were unlawful, *inter alia*, since there was no armed conflict); Mary Ellen O’Connell, *When Is War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT’L & COMP. L. 535 (2006); INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC (STANFORD LAW SCHOOL) AND GLOBAL JUSTICE CLINIC (NYU SCHOOL OF LAW), *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN* 110–118 (2012); *see also* NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 224, 243–47 (2008).

266. *See* Jens David Ohlin, *The Crime of Bootstrapping*, in THE CRIME OF AGGRESSION: A COMMENTARY (Claus Kress & Stefan Barriga eds., forthcoming) (on file with author).

267. *Avilán v. Colombia*, Case 11.142, Inter-Am. Comm’n H.R., Report No. 26/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 168 (1998). As Ohlin argues, therefore, once IHL kicks in, critics of armed violence “have largely lost the legal debate” and that the choice of legal framework is usually “outcome determinative.” Ohlin, *supra* note 19, at 2 (making this claim in the context of targeted killings).

268. *See* David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 8, 39 (2009) (noting that given the development of IHRL, categorization of a situation as an armed conflict may grant states more leeway). When considering this incentive system, it is also noteworthy that once “war” exists, executives also enjoy significant leeway according to some domestic systems. In the American context, *see for example*, Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. 143, 143–50 (2014).

269. Nuclear Weapons Advisory Opinion, *supra* note 264.

*arbitrary* deprivation of life.<sup>270</sup> The court famously set forth a *lex specialis* test, holding that during armed conflict, the term “arbitrary” is determined by reference to what is lawful under IHL.<sup>271</sup> When this reasoning is applied in the internal sphere, however—absent another rule of internal *jus ad bellum*—the existence of an armed conflict becomes also a measure for the decision to resort to armed force. For all practical purposes, *jus in bello* becomes a proxy for questions of *jus ad bellum*.

Indeed, although most of the “armed conflict” discourse took place in the context of *transnational* forcible actions conducted by the United States, it quickly became interwoven with the question of *internal* forcible action. This is because once a territorial government was involved in an armed conflict against opposition groups, it could, in general, consent to forcible intervention by third parties.<sup>272</sup> Thus, for instance, even if there was no direct, armed conflict between the United States and militants in other states, consensual forcible actions by the former could still be justified if there was an armed conflict *inside* the target state.<sup>273</sup> Under this paradigm, external *jus ad bellum*, too, becomes subordinated to a *jus in bello* determination on the internal level.

The famous *Abella v. Argentina* case,<sup>274</sup> decided by the Inter-American Commission on Human Rights (“Commission”), is a clear example for the obfuscation of *ad bellum* and *in bello* considerations in internal settings.<sup>275</sup> In 1989, forty-two armed individuals stormed an Argentinian infantry base, La Tablada. Fighting lasted thirty hours and resulted in over thirty casualties, as Argentinian forces took back the base by military force.<sup>276</sup> The petitioners, among them relatives of the attackers who lost their lives, challenged the lawfulness of the forcible response by the State.<sup>277</sup> Interestingly, one of the petitioners’ main arguments strongly corresponded with a *jus ad bellum* argument: a *coup d’etat* was planned in La Tablada, and in such case, the Argentinian Constitution authorized citizens to take up arms, while the State’s forcible response was unlawful.<sup>278</sup> The forcible response by the State was “unnecessary” and “disproportionate,” as the government should have

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270. *Id.*

271. *Id.* ¶ 25.

272. LIEBLICH, *supra* note 67, at 3.

273. *Id.* at 157–58.

274. *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. (1998).

275. The Inter-American Human Rights System, in general, was more willing to apply or interpret IHL norms than other systems. For a useful analysis, see Tabak, *supra* note 220.

276. *Abella*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97 ¶ 1.

277. They also claimed that after the fighting, captured attackers were executed, tortured, or disappeared, in violation of their right to life and due process guarantees. *Id.* ¶¶ 3–6. See Tabak, *supra* note 220, at 234–37.

278. *Abella*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97 ¶¶ 1–2, 7, 172.

addressed the situation by law enforcement measures and not by hostilities.<sup>279</sup>

As common in the “armed conflict” discourse, the Commission first determined whether an armed conflict existed in order to determine whether IHL kicks in or whether IHRL applies alone.<sup>280</sup> It quickly concluded that the incident at La Tablada amounted to an armed conflict, despite its brief duration<sup>281</sup>:

What differentiates the events at the La Tablada base from these situations [internal disturbances] are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. More particularly, the attackers . . . executed an *armed attack*, i.e., a military operation, against a quintessential military objective—a military base. The officer in charge of the La Tablada base sought, as was his duty, to *repulse* the attackers, and President Alfonsín, exercising his constitutional authority . . . ordered that military action be taken to recapture the base and subdue the attackers.<sup>282</sup>

In its determination of the existence of an armed conflict, the Commission, besides applying standard IHL tests of intensity, adopted language that implied a *jus ad bellum* discourse: the petitioners conducted an “armed attack,” and the government sought to repel it, perhaps in self-defense.<sup>283</sup> One cannot but notice the Commission’s approval of such action, by its emphasis on the duty to “repulse” the attackers. The petitioners conversely, “clearly assumed the risk of a military response.”<sup>284</sup> Arguably, *jus ad bellum* considerations informed the Commission’s decision that, in fact, an armed conflict existed—but since internal *jus ad bellum* remains a blank spot in positive law, this reasoning is concealed in *jus in bello* discourse.

This concealment allowed the Commission, when moving to apply the law, to summarily reject the petitioners’ internal *jus ad bellum* claims on the basis that once an armed conflict exists, IHL steps in, and as such, it is blind to “the legitimacy of the reasons or the cause” for which arms

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279. *Id.* ¶¶ 10–11.

280. *Id.* ¶¶ 147, 151.

281. *Id.* ¶ 156.

282. *Id.* ¶ 155 (emphasis added).

283. *Id.* The Commission has followed a similar route in the Avilán case. See Avilán v. Colombia, Case 11.142, Inter-Am. Comm’n H.R., Report No. 26/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 133 (1998) (holding that since an internal armed conflict exists in Colombia, “the Colombian State has the full right to defend itself from violent actions that may be taken against it, and to take military actions against . . . irregular armed groups”).

284. *Abella*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97 ¶ 179.

were taken up.<sup>285</sup> It thereafter proceeded to assess the state's conduct in light of IHL, finding, in general, no fault.<sup>286</sup>

Indeed, this reasoning could seem like an elegant solution. After all, its underlying logic is compelling: armed hostilities are undertaken where a state, in fact, cannot resort to its regular justice system to confront the challenge and establish order. Already in the seventeenth century, Edward Coke observed that the interruption of “the peaceable course of justice” was precisely the watershed between internal peace and war.<sup>287</sup> However, relying on factual *jus in bello* determinations as a proxy for *jus ad bellum* muddles the discourse. On its own, *jus in bello* is ill-equipped to address questions of this order both in its structure and theoretical underpinnings; most notably, it pays no mind to the ethical standards for killing, explored earlier on. Because of the centrality of the “armed conflict” discourse in international legal argument, it is worthwhile to explore these problems in some detail.

## 2. *The Circularity of the “Armed Conflict” Discourse*

The first problem of the “armed conflict” discourse is its circularity: the existence of an armed conflict is determined through thresholds established by IHL itself, without explicit reference to an external Archimedean point. Now, because these thresholds are strictly factual, IHL's normative potential to supplant questions of *jus ad bellum* is severely limited.<sup>288</sup> At most, they can only *identify*, but not regulate, the switch between the legal paradigms of law enforcement and hostilities. In a sense, using IHL as a proxy for *jus ad bellum* is a legal exception that establishes itself without regard to the general rule or the values it is purposed to ensure. Deducing a *right* to resort to force from an existence of an armed conflict, simply put, confuses “is” with “ought,” fact and norm.<sup>289</sup> Indeed, this situation brings about an awkward, circular result: a state is justified to resort to hostilities when hostilities exist. This, of course, enhances the risk of abuse. States could unilaterally raise the intensity of internal unrest, and then proceed to invoke the fact that an armed conflict exists in order to justify the hostilities, thus bypassing

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285. *Id.* ¶ 173. The Commission has also ruled that the motives of the petitioners, as individuals, are issues of domestic law. *Id.* ¶ 175.

286. *Id.* ¶¶ 176–89. It should be added that the Commission's competence to directly apply IHL was heavily criticized in later rulings, and might not reflect the *lex lata* in the Inter-American system. Tabak, *supra* note 220, at 230–32.

287. NEFF, *supra* note 165, at 40.

288. See Abresch, *supra* note 207, at 765 (“[H]umanitarian law is agnostic regarding the legality of the aims [of the resort to force] themselves.”).

289. See, e.g., Stanley L. Paulson, *Hans Kelsen's Earliest Legal Theory*, in *NORMS AND NORMATIVITY: CRITICAL REFLECTIONS ON KELSENIAN THEMES* 23, 29 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., 1998).

their human rights commitments.<sup>290</sup> Under such an incentive system, states can manipulate their way into an armed conflict through acts on the ground, thus gaining the *de facto* right to conduct hostilities while bearing no material legal costs.<sup>291</sup>

The problem of circularity reaches further. As aforementioned, it spawns consequences for *external jus ad bellum*, since when an internal armed conflict exists within a state, it can generally consent to third-party forcible intervention.<sup>292</sup> This is the case, for instance, in the recent action by the United States against the Islamic State of Iraq and the Levant (“ISIL”) in Iraq, conducted upon the request of the Iraqi Government,<sup>293</sup> as well as the ongoing campaign in Yemen against Houthi rebels, in which Arab states explicitly invoked the consent of Yemen’s embattled president.<sup>294</sup> Now, although intervening states might provide additional justifications for such actions—for instance, invoking an ambiguous claim of self-defense<sup>295</sup>—in legal terms, governmental consent can often act as a standalone justification for transnational use of force, at least as long as the requesting government is recognized. If the existence of an armed conflict is enough to justify internal uses of force, and consequentially also *external* involvement, external parties do not need to substantively justify their intervention beyond the governmental consent they have received.<sup>296</sup> The potential of external forcible support, in turn, generates further incentives for governments to abuse the armed conflict discourse.

### 3. *The Normative Limitations of Jus in Bello as a Proxy for Jus ad Bellum*

Circularity is not the only shortcoming of the “armed conflict” discourse. Another is IHL’s limitations as a normative system, which

290. Alston, *supra* note 255, ¶¶ 47–48; *see also* LIEBLICH, *supra* note 67, at 50 (pointing out such possible dynamics in the early stages of the Syrian crisis).

291. Indeed, nowadays, being recognized as a party to an internal armed conflict—beyond in narrow circumstances—does not result in *any* material advantage to opposition groups, but only to states. Members of armed groups can be targeted under the hostilities paradigm, but have no right to participate in hostilities and can thus be prosecuted in accordance with domestic law. *See, e.g.*, NILS MELZER, INT’L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 84 (2009).

292. *See supra* note 268.

293. *U.S. Military Conducts Airstrikes in Support of Dam Operations*, U.S. DEP’T OF DEF. (Sept. 7, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=123103>.

294. *Saudi and Arab Allies Bomb Houthi Positions in Yemen*, ALJAZEERA (Mar. 26, 2015), <http://www.aljazeera.com/news/middleeast/2015/03/saudi-ambassador-announces-military-operation-yemen-150325234138956.html>.

295. *See, e.g.*, *U.S. Military Conducts Airstrikes in Support of Dam Operations*, *supra* note 293 (arguing that the strikes were conducted also “to protect U.S. personnel and facilities”). On the relations between self-defense and consent as *jus ad bellum* justifications, *see* LIEBLICH, *supra* note 67, at 14–18.

296. For a critique of this result and a suggestion for reform, *see* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. J. INT’L L.J. 1 (2013).

emanates from its relatively modest aspirations. Indeed, since they deal with killing, both *jus ad bellum* and *jus in bello* are *nonideal theories*—meaning, they aim to minimize the evil of a given problematic situation.<sup>297</sup> However, a key difference between them remains. Assuming full compliance, *jus ad bellum* achieves a morally ideal situation in which resort to war is eliminated. Conversely, *jus in bello*—even if universally followed to the letter—still remains the lesser evil, since it only aims to *regulate* wars and mitigate their harm, rather than to prevent them.<sup>298</sup> If the international law on the use of force sets out to “save succeeding generations from the scourge of war,”<sup>299</sup> IHL does not attempt to do so. Rather, it seeks to alleviate “*as much as possible* the calamities of war.”<sup>300</sup>

Indeed, under *jus in bello*, it is possible to envision an atrocious war in terms of harm to combatants and civilians, which would nevertheless be perfectly legal if the principles of distinction and proportionality are followed.<sup>301</sup> Following the work of David Kennedy, Gabriella Blum dubbed these dynamics as the “numbing effects” of IHL.<sup>302</sup> Once entering the realm of IHL, the discussion takes violence as a given and reverts to a seemingly technical discussion: Which rules govern detention?<sup>303</sup> What constitutes effective warning?<sup>304</sup> What are the limits of lawful collateral damage?<sup>305</sup> However, questions relating to the necessity or proportionality of the resort to force itself do not even surface.<sup>306</sup> Indeed, these dynamics can occur also in international conflicts—in which *jus ad bellum* is part of positive law. This might be due to the heavily politicized nature of *jus ad*

297. See JOHN RAWLS, *A THEORY OF JUSTICE* 7–8 (6th ed. 2003).

298. See MARCO SASSÒLI ET AL., *HOW DOES LAW PROTECT IN WAR?* chs. 1–2 (3d ed. 2011); Luban, *supra* note 125, at 2.

299. U.N. Charter pmbl.

300. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November/11 December 1868 pmbl. [hereinafter St. Petersburg Declaration] (emphasis added).

301. This is because IHL traditionally holds that combatants can always be targeted (unless they are *hors de combat*), while civilians and civilian objects can only be harmed as proportional “collateral damage.” See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 251, 272–80 (2010); see also Dill, *supra* note 127, at 262 (“[IHL] cannot guarantee a moral standard in the outcome of the confrontation or even prejudge that outcome . . . [it] leaves the moral question about war unanswered.”).

302. See Blum, *supra* note 18, at 74 n.6.

303. See, e.g., Ryan Goodman, *Editorial Comment: The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48 (2009). For a recent case, see *Serdar Mohammed v. Secretary of State for Defence* [2015] EWCA (Civ) 843 ¶¶ 164–251 (Eng.).

304. Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack Under International Law: Theory and Practice*, 87 INT’L LEGAL STUD. 359 (2011).

305. Ziv Bohrer & Mark Osiel, *Proportionality in Military Force at War’s Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers*, 46 VAND. J. TRANSNAT’L L. 747 (2013).

306. See Chase Madar, *Short Cuts*, 37 LONDON REV. BOOKS 16 (2015) (arguing that “*jus in bello* has swallowed *jus ad bellum* whole”).

*bellum*<sup>307</sup> and the famous “flight from politics” prevalent in international legal discourse.<sup>308</sup> However, international law at least provides the language to discuss such issues on the interstate level, while evading them entirely internally.

It is important to understand, in this context, the difference between necessity and proportionality in the *jus ad bellum* and *jus in bello* levels, as these differences highlight the weakness of using the latter as a proxy for the former. Traditionally, necessity under *jus ad bellum* pertains chiefly to considerations of last resort and immediacy; namely, it asks whether peaceful means to resolve the conflict are reasonably available.<sup>309</sup> Necessity under *jus in bello*, conversely, accepts force as a given and only aims to ensure that it is used for legitimate ends of warfare, meaning, weakening the military forces of the enemy.<sup>310</sup> As such, it is generally oblivious to the killing of combatants. Proportionality, under *jus ad bellum*, scrutinizes the amount of force employed when countering the armed attack.<sup>311</sup> *Jus in bello* proportionality, on the other hand, is oblivious to the scope of military operations on the whole and focuses on the incidental harm to civilians caused by a specific attack.<sup>312</sup> Owing to these material differences, it is hard to see how *in bello* can effectively substitute *ad bellum* on the internal level. Of course, one method to bypass these limitations is by interpreting IHL in such a constraining manner, which if followed, would severely restrict military operations to begin with, thus achieving effects similar to a prohibition on the use of force.<sup>313</sup> But this route has its own significant costs. As Michael Walzer notes, such constraints taken to the extreme essentially introduce pacifist considerations into the conduct of armed forces—a clear contradiction in terms.<sup>314</sup> If IHL becomes perceived by belligerents in such a manner, there is significant danger that it will be discredited altogether.<sup>315</sup>

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307. See, e.g., Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 102 (2009). For instance, as is well known, the U.N. Security Council found that an international use of force amounted to an aggression only in rare instances. See, e.g., CARRIE MCDUGALL, *THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 83–87 (2013). Interestingly, it has also been the policy of leading human rights NGOs to refrain from dealing with *jus ad bellum*. See Madar, *supra* note 306, at 16.

308. Cf. Martti Koskeniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4–7 (1990).

309. See, e.g., RUYS, *supra* note 134, at 95.

310. St. Petersburg Declaration, *supra* note 300 (“[T]he only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.”).

311. RUYS, *supra* note 134, at 110 (“[I]n terms of the *jus ad bellum*, it is the forceful response as a whole that must be scrutinized.”).

312. Protocol I, *supra* note 147, arts. 51(5)(b), 57(2)(ii).

313. See, e.g., Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan, Decision to Terminate Proceedings, 157 I.L.R. 722, 745 (2013) (Ger.) (claiming that “the underlying spirit” of IHL includes imposing “maximum possible constraints on war per se”).

314. MICHAEL WALZER, ARGUING ABOUT WAR 13–14 (2004); Michael Walzer, *Coda: Can the Good Guys Win?* 24 EUR. J. INT'L L. 433, 439 (2013) (arguing that a restrictive view of *in bello*

#### 4. *Equal Application, the Absence of Fault, and Accountability Gap*

Last, the “armed conflict” discourse effectively silences any meaningful legal discussion on the fault and accountability of leaders and senior commanders concerning the resort to force. First, assuming that parties adhere to IHL during the conflict, then according to *positive* law, any discussion of responsibility is quashed, owing to the basic principle of equal application of IHL: in order to minimize war’s inherent inhumanity and for the practical need to prevent a race to the bottom,<sup>316</sup> IHL (generally) applies equally to all parties, whether “just” or “unjust.”<sup>317</sup> Thus, absent a true doctrine of internal *jus ad bellum*, once an armed conflict exists, parties can proceed with the killing, and as long as they do not violate the laws of war, nobody can be held accountable on the international level for instigating the conflict, either on the level of state responsibility or on that of criminal liability. This results in a glaring gap in the protection of the right to life of both soldiers and armed opposition members, as well as civilians that can be incidentally harmed: their lives are simply not a matter for international law to consider. In interstate conflict, conversely, there is at least the conceptual possibility of state responsibility—through the prohibition on the use of force<sup>318</sup>—and, in the long run, also of criminal accountability, through the international crime of aggression.<sup>319</sup> Only a theoretical understanding of internal *jus ad bellum* could fill this gap on the internal level.

Even when violations of IHL *do* take place, relying on *jus in bello* alone results in an accountability gap in relation to political leaders of states as well as of armed groups. As most *jus in bello* decisions are taken on an operational level, keeping the analysis on this level “kicks-down” the level of accountability. This is true not only regarding reputation costs—leaders and senior commanders can always deny involvement in war crimes committed by armed forces and thus distance themselves from atrocities—but also concerning the possibility of criminal liability. This is especially so when considering the recent weakening of doctrines

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proportionality “sometimes serves as the functional equivalent of pacifism”); *see also* Luban, *supra* note 125, at 29–31 (criticizing the “overextension” of human rights thinking which amount to the denial of armed conflicts’ salient characteristics).

315. *See* Walzer, *supra* note 314, at 433–34, 439 (noting military lawyers often argue that the “credibility” of IHL is crucial for its application). *See, e.g.*, Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, at 690–91 (2010).

316. *See, e.g.*, Walzer, *supra* note 314, at 439.

317. Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT’L L.J. 163, 168 (2011). The principle of equal application has been heavily criticized, on the *moral* level, by revisionist theorists. *See* McMAHAN, *supra* note 116, at 1–19. However, even they concede that as a matter of pragmatics and positive law the principle is currently indispensable. *Id.* at 104–10.

318. U.N. Charter art. 2, ¶ 4.

319. Assuming the Rome Statue’s definition of the crime of aggression enters into force. For an overview, *see* McDougall, *supra* note 307, at 1–31.

such as “joint criminal enterprise” and aiding and abetting (the “specific direction” requirement) in some of the recent rulings of the International Criminal Tribunal of the Former Yugoslavia (“ICTY”).<sup>320</sup>

In sum, as demonstrated in this Part, while IHRL provides a possible conceptual framework for an ethically defensible doctrine of internal *jus ad bellum*, there is a constant threat of collapse into the “armed conflict” discourse. The latter, unfortunately, cannot serve as an effective proxy. It is clear thus that more work must be done in order to augment IHRL as a relevant regime for the prohibition and regulation of internal force.

#### V. TOWARD A WORKING DOCTRINE OF INTERNAL *JUS AD BELLUM*

So far, this Article has outlined the general ethical framework for a theory of internal *jus ad bellum*, equally applicable to states and opposition, based on the idea that resort to hostilities can only be permitted in self-defense. Moving to international law, I then demonstrated that collectivist doctrines do not satisfy this framework and also raise a host of other problems. Moving to the individualist discourse of IHRL, I pointed out its potential to regulate the resort to internal hostilities through its defense of the right to life, but also noted why contemporary doctrine and jurisprudence raise concerns as to its effectiveness in this context. Finally, I addressed the problematic dynamics between IHRL and IHL that further undermine IHRL’s potency to fulfill this role. In this final Part, I explore what would be needed in order for IHRL to do so. Of course, these suggestions are by no means exhaustive, rather they serve as a departure point for further discussion and development.

#### A. THE RIGHT TO LIFE AS A PROHIBITION ON THE FIRST RESORT TO HOSTILITIES

First, for IHRL to serve as a functional doctrine of internal *jus ad bellum*, it should be clarified that resort to internal hostilities can only be undertaken in self-or-other-defense against a prior use of force amounting to hostilities. In terms of legal technique, this poses no special challenges. Article 6(1) of the ICCPR can easily serve as a baseline for the prohibition on the resort to internal hostilities, as it protects *every* human being, including soldiers, members of opposition groups, as well as

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320. Prosecutor v. Gotovina, Case No. IT-06-90-A, Judgment, ¶¶ 89–98 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (regarding joint criminal enterprise); Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶¶ 25–36 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (requiring “specific direction” in aiding and abetting crimes). *But see* Prosecutor v. Sainović, Case No. IT-05-87-A, Judgment, ¶¶ 1649–50 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) (ruling the opposite). For an analysis of these decisions, see Marko Milanović, *The Self-Fragmentation of the ICTY Appeals Chamber*, EJIL: TALK! (Jan. 23, 2014), <http://www.ejiltalk.org/the-self-fragmentation-of-the-icty-appeals-chamber/>.

uninvolved persons that might suffer the consequences of any armed conflict, *even* if conducted lawfully under IHL. Considering the object and purpose of the ICCPR,<sup>321</sup> there is no reason to analyze the exception to the right to life manifested in the “arbitrarily” caveat, by reference only to the norms of IHL during *active* hostilities and not to the decision to *resort* to hostilities itself. If the right to life is understood this way, we can phrase the following normative conclusion: If a decision is made to resort to hostilities in absence of a threat to life or limb comparable in its scale and effects to that emanating from armed hostilities, then the ensuing killings could be considered as arbitrary deprivations of life—even if they do not violate IHL *per se*.<sup>322</sup>

The situation is more complicated when considering IHRL treaties such as the ECHR, which permit the deprivation of life in specific circumstances. Nonetheless, a similar understanding is not beyond conventional legal reasoning. Article 2(1) of the ECHR, which entrenches the right to life, can be viewed as establishing the prohibition on the resort to internal hostilities, while Article 2(2) provides exceptions. Article 2(2)(a) refers to the “defence of any person from unlawful violence,” which fits neatly with the idea that resort to hostilities can be conducted only in self-or-other-defense. The term “unlawful” provides enough interpretational leeway to argue that first resort to hostilities, by *any* person or entity is prohibited, and that *only* such cases give rise to the right to act in self-defense. The main challenge, however, is posed by the exceptions outlined in Articles 2(2)(c) and the derogations regime enshrined in Article 15(2). Article 2(2)(c) refers to the “action lawfully taken for the purpose of quelling a riot or insurrection.”<sup>323</sup> As discussed earlier, the ECtHR glossed over the question of whether a state is effectively entitled to resort to hostilities to quash *every* insurrection, even if instigated by acts of the state itself.<sup>324</sup> Nonetheless, the term “lawfully” can play a key role here also, if interpreted in its context, and in light of the provisions of said Article 2(2)(a), which require that deprivation of life be a result of self-or-other-defense.<sup>325</sup> Thus, the “insurrection” exclusion can be reasonably understood as excluding decisions to resort to hostilities in order to quell an insurrection, only if the resort to force is a *defensive* action. In the same vein, Article 15(2), which addresses derogations from the right to life in times of war, refers to the “lawful” acts of war. Again, there is no reason to restrict the

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321. Vienna Convention on the Law of Treaties art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 331.

322. *Cf.* Basic Principles, *supra* note 21, art. 9.

323. ECHR, *supra* note 176, art. 2, ¶ 2(c).

324. *See supra* p. 730.

325. Vienna Convention on the Law of Treaties, *supra* note 321, art. 31 ¶¶ 1–2. The same reasoning can apply to the interpretation of Article 2, ¶ 2(b) of the ECHR, *supra* note 176, which permits deprivation of life when attempting to effect a “lawful” arrest.

understanding of the term to lawful *in bello* actions, as it can be plausibly constructed to refer also to the decision to resort to hostilities itself.

#### B. NECESSITY, PROPORTIONALITY, AND THE MEANING OF THRESHOLDS

Furthermore, the exceptions to right to life are limited by necessity and proportionality limitations, which mirror, to a large extent, the same limitations applying in external *jus ad bellum*. The term “arbitrarily,” enshrined in Article 6(1) of the ICCPR, has been understood as implying a “last resort” requirement—essentially, a necessity condition—as well as means-end and less-extreme-measures proportionality standards.<sup>326</sup> Similarly, as discussed above, Article 2(2) of the ECHR restricts the exceptions to the right to life to “use of force which is no more than absolutely necessary,” which implies the same standards.<sup>327</sup>

Applied to the issue at hand, the key question is under which circumstances can resort to massive armed violence in the form of hostilities be viewed as a necessary and proportionate action for the purpose of self-or-other-defense. The answer must be that these circumstances can only include situations in which the threat to self or others emanates from actions amounting to hostilities themselves. Possibly, a viable rule of thumb, already existing in international law, is that the scale and effects of such actions must at least mirror that of an “armed attack”—whether against civilians or armed forces—on the international level.<sup>328</sup> A recent example could be the July 2015 highly sophisticated assault by ISIL-linked militants against the Egyptian army in north Sinai.<sup>329</sup> In other cases, either law enforcement measures, or— from the point of view of opposition—nonviolent resistance can suffice.<sup>330</sup>

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326. See Basic Principles, *supra* note 21, arts. 3–4, 9. For an elaboration on necessity and proportionality in the context of the use of force under the right to life, see Philip Alston (Special Rapporteur), *Extrajudicial, Summary or Arbitrary Executions*, ¶¶ 33–45, U.N. Doc. A/61/311 (Sept. 5, 2006).

327. ECHR, *supra* note 176, art. 2, ¶ 2.

328. For the scale and effect test in relation to actions by nonstate actors, see *Military Aid and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 195 (June 27); see also Stahn, *supra* note 249, at 45–46. Of course, massive “peacetime” violence against civilians in the form of genocide or crimes against humanity would fulfill the scale and effects test.

329. Ashraf Sweilam & Brian Rohan, *Scores Killed as Militants Attack Egyptian Troops in Sinai*, ASSOCIATED PRESS (July 1, 2015, 5:57 PM), <http://bigstory.ap.org/article/1b81eb41285047158770af1e3772aaf7/militants-attack-egyptian-army-checkpoints-sinai-kill-30>.

330. These limitations on internal resorts to force are well established in classic theory, namely in the works of Grotius, Vattel, and Pufendorf. As they posited, not every violation of the contract gives rise to a right of active, unlimited forcible resistance. The latter is limited by considerations of necessity and proportionality: the sovereign must present an extreme danger; the danger must be clear and manifest; and nonviolent means must be unavailable. Even in such cases, forcible action must abide by means-ends requirement and be justified according to a cost-benefit analysis. The latter has generally been disregarded in the positive international law of self-defense. GROTIUS, *supra* note 47, at 337–38, 346–47, 356–59; PUFENDORF, *supra* note 52, at 716–23; Vattel, *supra* note 48, ch. XVIII, §§ 287–90, 292–94.

Phrased in this manner, we can better conceptualize the three-tiered approach implied by the ECtHR in *Isayeva* as setting forth a preliminary *jus ad bellum* requirement.

The notions of necessity and proportionality also allow us to understand better the logic of the “threshold” approach prevalent in positive international law, which holds that during armed conflict a shift occurs between the law enforcement and hostilities paradigms. Only when confronted with a threat amounting to armed hostilities it becomes possible, in principle, to understand the massive violent response that characterizes hostilities as a web of actions in self-or-other-defense against ongoing and imminent threats, and to accordingly understand IHL as the main normative framework that governs such factual situations. However, by no means does IHL *replace* the judgment of the mere decision to resort to hostilities. As opposed to the “armed conflict” discourse discussed above, under the suggested construction, the existence of an armed conflict would not in itself regulate the *normative* movement between the paradigms; the latter would be subject only to the right to life and its exceptions. Understood this way, the relation between the right to life and IHL becomes parallel to that between the U.N. Charter’s prohibition on the use of force and IHL. Both realms regulate different levels of decisionmaking and both apply simultaneously. If returning to the ICJ’s Nuclear Weapons opinion, when analyzing the meaning of *arbitrary* deprivation of life under Article 6(1) of the ICCPR, we will now ask two questions: first whether the general decision to resort to hostilities was justified, and second whether this or that action was lawful under IHL.

### C. APPLICATION TO NONSTATE ACTORS

IHRL is primarily understood as a body of law protecting individuals against states.<sup>331</sup> Therefore, it is not obvious that the right to life, as enshrined in positive IHRL, applies also to the resort to force by opposition groups—which are essentially groups of *individuals*.<sup>332</sup> Thus, in order to make the doctrine suggested here plausible, something must be said about human rights obligations of nonstate actors. Of course, this issue cannot be fully resolved here,<sup>333</sup> but some preliminary directions can be offered.

As discussed earlier, there is nothing in international law that inherently negates subjecting nonstate actors to any field of international

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331. LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 38–39 (2002).

332. *See id.* at 39–46.

333. For a comprehensive exploration see ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed., 2005).

law, including IHRL,<sup>334</sup> even if such actors might not be under the jurisdiction of this or that enforcement mechanism.<sup>335</sup> Conceptually, just as nonstate actors are bound by IHL, although they do not formally enjoy an international legal personality, they could be bound also by IHRL when they exercise control, in the wide sense, over individuals.<sup>336</sup> This is especially true considering that the ultimate objective of IHRL is to protect individuals against *any* source of arbitrary power, not only power exercised formally by states.<sup>337</sup>

Some recent international practice supports such a view, perhaps stemming from an emerging customary understanding of human rights law. For instance, U.N. Special Rapporteur Philip Alston noted, when referring to the Tamil Tigers (“LTTE”) in Sri Lanka, that

Human rights law affirms that both the [Sri Lankan] Government and the LTTE must respect the rights of every person in Sri Lanka. Human rights norms operate on three levels—as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community. The Government has assumed the binding legal obligation to respect and ensure the rights recognized in the International Covenant on Civil and Political Rights (ICCPR). As a non-State actor, the LTTE does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.<sup>338</sup>

It seems that a similar realization is behind recent U.N. Security Council practice, which refers to the international human rights obligations of *all*

334. See Yaël Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 CORNELL INT’L L.J. 21, 21 (2013) (noting that there is “nothing in human rights theory that precludes the imposition of legal obligations on actors other than states”).

335. *Id.* at 33–35.

336. There is at least the theoretic possibility that control, interpreted widely, is engaged when an individual is subject to lethal force. Human Rights Commission, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) [hereinafter *General Comment 31*]; see also *Andreou v. Turkey*, App. No. 45653/99, Eur. Ct. H.R. at 9–11 (2009). For an analysis of these questions, see ELIAV LIEBLICH WITH OWEN ALTERMAN, *TRANSNATIONAL ASYMMETRIC ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW: KEY CONTEMPORARY CHALLENGES* 46–51 (2015); see also Ronen, *supra* note 334, at 26 (“There is a growing acceptance that any control may give rise to obligations, whether or not that control is territorial.”); cf. ZEGVELD, *supra* note 331, at 54.

337. Robert McCorquodale, *Non-State Actors and International Human Rights Law*, in *RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW* 97, 111–12 (Sarah Joseph & Adam McBeth eds., 2010); Ronen, *supra* note 334, at 21 (stating that “[o]ptimally, protection of human rights should . . . extend to all situations in which these rights are threatened, irrespective of who puts them in jeopardy”).

338. Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Mission to Sri Lanka*, ¶ 25, U.N. Doc. E/CN.4/2006/53/Add.5 (Mar. 27, 2006).

parties to internal armed conflicts,<sup>339</sup> even if not always in specific legal terms.<sup>340</sup>

Nonetheless, despite the hints of practice asserting the application of human rights norms to nonstate actors, a consensus remains elusive.<sup>341</sup> Yet still, in fact, there is ample doctrinal leeway to bring resorts to force by nonstate actors within the ambit of human rights law.<sup>342</sup> Namely, human rights law includes a duty not only to respect, but also to act positively to *ensure* respect for human rights.<sup>343</sup> The duty to ensure respect stems from the understanding that in practice, human rights can be violated by private individuals just as by states; its upshot being that states must exercise due diligence to protect individuals against violations of rights committed by nonstate entities.<sup>344</sup> For all practical purposes, this means that the right to life, as enshrined in positive IHRL, applies—albeit indirectly—to acts of opposition groups. Indeed, this construction might have convoluted results, in which the resort to armed force by opposition groups, if recognized as a human rights violation, would result in the liability of the “victimized” state itself.<sup>345</sup> Nonetheless, if in practice the due diligence requirement implies that states must react against violations of the right to life by nonstate actors, and if when these violations amount in scale and effects to armed hostilities, a strong defensive action might be called for, then arguably there is in fact a barrier imposed by human rights law on resort to hostilities by opposition groups.

Furthermore, even if IHRL might not apply directly to nonstate actors, it is unclear to what extent this actually spawns significant

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339. S.C. Res 2191, pmb., ¶ 1 (Dec. 17, 2014); S.C. Res 2139, ¶ 2 (Feb. 22, 2014); *see also* S.C. Res. 1265, pmb. (Sept. 17, 1999); S.C. Res. 1193, ¶¶ 12, 14 (Aug. 28, 1998).

340. *See, e.g.*, S.C. Res. 2165, pmb. (July 14, 2014) (“Strongly condemning the continuing widespread violations of human rights and international humanitarian law by the Syrian authorities, as well as the human rights *abuses* and violations of international humanitarian law by armed groups.”) (emphasis added). *But see id.* ¶ 1. The tendency to view human rights obligations of nonstate actors as “societal expectations” rather than law in the strict sense has been evident in the international community’s attempts to apply human rights standards to corporations. *See Ronen, supra* note 334, at 24.

341. *See ZEGVELD, supra* note 331, at 47–51; *see also* McCorquodale, *supra* note 337, at 112–14 (suggesting ways in which human rights law could be made applicable to nonstate actors).

342. For instance, human rights bodies have clarified that actions by private individuals can amount to “torture.” *See* Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 2, at 30, U.N. Doc. HRI/GEN/1/Rev.1 (1994); *see also* David Kretzmer, *The Prohibition on Torture*, MAX PLANCK ENCYCLOPEDIA ON PUBLIC INTERNATIONAL LAW ¶ 24 (2010). Similarly, it is must be true that actions by private individuals can amount to a violation of the right to life.

343. ECHR, *supra* note 176, art. 1; ICCPR, *supra* note 93, art. 2(1).

344. General Comment 31, *supra* note 336, ¶ 8. It seems that Article 17 of the ECHR, *supra* note 176, goes one step further by stipulating that “[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights” protected in the Convention. For a helpful overview, *see* McCorquodale, *supra* note 337, at 104–09.

345. *Cf. McCorquodale, supra* note 337, at 108–09 (offering ways to ensure greater protection of human rights regardless of who is violator); Ronen, *supra* note 334, at 28.

consequences under positive law, at least in most cases. Let us assume that opposition group *B* resorts to force against regime *A* without a valid self-defense justification. If *B* loses the war, then in any case its members might be punished through the domestic criminal system. Of course, international law has no objection to such a result, since *B* violated the putative prohibition on internal force, which—at least concerning rebel activity—is mirrored in criminal offenses in most jurisdictions. If, conversely, *B* wins, and succeeds either in substantially taking power or in effecting secession, then *B* might incur *state* responsibility for actions it undertook while still an opposition group, including its unlawful decision to resort to force.<sup>346</sup> The only scenario in which the problem of the attribution of responsibility remains is where *A* and *B* establish a joint government following the cessation of hostilities.<sup>347</sup>

In sum, even if as of now, a formal recognition of the direct application of IHRL to nonstate actors remains *de lege ferenda*, it is indeed possible to envision such a regime,<sup>348</sup> whether based on treaty interpretation or customary law, emanating from recent Security Council practice,<sup>349</sup> or as some recent writing suggests, on models of *shared* responsibility.<sup>350</sup> What is nonetheless clear is that ultimately, nonstate actors must respect the right to life, an obligation reflected—albeit indirectly—in states’ positive duties to *protect* human rights from violations by private individuals. Perhaps the realization that nonstate actors can affect the lives of millions not only by committing atrocities, but also by deciding to *resort* to hostilities, might usher a further legal development in this context.

#### D. A SYSTEM OF PRESUMPTIONS

Last, it should be noted that my suggestion for an equal legal standard to assess resort to force both by states *and* opposition groups does not necessarily result in the absolutely identical *application* of the standard. Indeed, the problem of internal *jus ad bellum* is especially sticky because of the starting point of intrastate relations, as opposed to that of international relations. Since the latter presume horizontal “sovereign equality” between states, it is conceptually easier to identify illegitimate international use of force. This is because when freedom

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346. This rule is entrenched in customary international law of state responsibility. See Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10 (2001) (providing that acts of insurrectional movements that become governments or succeeds in establishing a new state become attributable to the state); see also *id.* at 50–52.

347. See *id.* at 51, ¶ 7.

348. See Ronen, *supra* note 334, at 25–30.

349. Cf. Heffes, *supra* note 103, at 45–52.

350. See Veronika Bílková, *Armed Opposition Groups and Shared Responsibility*, 62 NETH. INT’L L. REV. 69 (2015); Jean d’Aspremont et al., *Sharing Responsibility Between Non-State Actors and States in International Law: Introduction*, 62 NETH. INT’L L. REV. 49 (2015).

between states is the baseline, forcible coercion clearly stands out.<sup>351</sup> Intrastate relations, conversely, presume coercion as a legitimate point of departure: states differ from one another only by the *level* of coercion they employ internally. Identifying just exactly at what point this coercion, or a challenge to it, amounts to the type of threat that would justify a forcible response is a complex factual question.

It might be necessary, thus, as a matter of legal technique, to differentiate between parties through a system of presumptions. For instance, it could be argued that states are generally more accountable and possess epistemic advantages, and therefore a factual (rebuttable) presumption should be made in favor of governments when resorting to armed force.<sup>352</sup> However, the presumption should not be too powerful, since we might also agree that sovereigns have a special duty of restraint when confronting internal resistance.<sup>353</sup>

Moreover, this presumption can be further “tempered” by several flexible, fact-intensive considerations in accordance with the circumstances at hand. For instance, consideration can be given to the nature of the regime. Arguably, some weight should be given to the state’s overall human rights record: there is no reason that egregious violators of human rights would enjoy the exact same presumption as those that generally respect human rights.

Of course, the exact nature of the presumption should be considered further. For the purposes of this Article, it suffices to point out that concerns that we might have regarding the implementation of the standard suggested here can be addressed by relatively simple legal techniques at the stage of application.

#### CONCLUSION

Given the prevalence of internal armed conflicts and their price in human life and security, the complex problem of internal resort to force cannot continue to remain a blind spot of international law. Indeed, the current doctrinal divergence in which external force is prohibited, while internal force remains all but unaddressed, is not only a peculiar moment in the history of international law, but is also incoherent in terms of legal policy.

Since it is about killing, any legal standard regulating the resort to hostilities must be structured around the right of self-or-other-defense—whether on the individual, collective or international levels. In intrastate

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351. See, e.g., James N. Rosenau, *Intervention as a Scientific Concept*, 13 J. CONFLICT RESOL. 149, 163 (1969) (arguing that interstate interventions can be identified by their “convention breaking” nature).

352. For a comparable use of presumption in favor of governments in the related context of external assistance, see LAUTERPACHT, *supra* note 10, at 233.

353. Cf. FABRE, *supra* note 6, at 135–48 (discussing the unique devastation caused by civil wars).

settings, the natural normative framework for such a prohibition (and its exceptions) is the right to life, as entrenched in IHRL. Due to the ethical appeal of revisionist just war theory, this framework must apply equally to governments as well as to opposition groups.

Nonetheless, the theory suggested here does not assume anarchy, on the one hand, nor is it conservative, on the other. It leaves space for second-order adjustments—in the form of factual presumptions—to give due consideration both to states' duty to maintain law and order, and to peoples' right to shake off oppression. But these considerations do not amount to a primary recognition that people, when acting through groups or states, are somehow permitted to kill in situations in which they would not be allowed to do so as individuals.

All in all, the question of internal resort to force raises a plethora of problems in ethics, legal theory, doctrine and policy that should be further addressed. This Article, hopefully, proposes a promising baseline for discussion.