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## ARTICLE

### CONSENT IS NOT ENOUGH: WHY STATES MUST RESPECT THE INTENSITY THRESHOLD IN TRANSNATIONAL CONFLICT

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*It is widely accepted that a state cannot treat a struggle with an organized non-state actor as an armed conflict until the violence crosses a minimum threshold of intensity. For instance, during the recent standoff at the Oregon wildlife refuge, the U.S. government could have lawfully used force pursuant to its domestic law enforcement and human rights obligations, but President Obama could not have ordered a drone*

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*strike on the protesters. The reason for this uncontroversial rule is simple—not every riot or civil disturbance should be treated like a war.*

*But what if President Obama had invited Canada to bomb the protesters—once the United States consented, would all bets be off? Can an intervening state use force that would be illegal for the host state to use itself? The silence on this issue is dangerous, in no small part because these once-rare conflicts are now commonplace. States are increasingly using force against organized non-state actors outside of the states' own territories—usually, though not always, with the consent of the host state. What constrains the scope of the host state's consent? And can the intervening state always presume that consent is valid?*

*This Article argues that a host state's authority to consent is limited and that intervening states cannot treat consent as a blank check. Accordingly, even in consent-based interventions, the logic and foundational norms of the international legal order require both consent-giving and consent-receiving states to independently evaluate what legal regime governs—this will often turn on whether the intensity threshold has been met. If a non-international armed conflict exists, the actions of the intervening state are governed by international humanitarian law; if not, its actions are governed instead by its own and the host state's human rights obligations.*

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## INTRODUCTION

On the afternoon of January 2, 2016, a group of activists occupied the headquarters of the Malheur National Wildlife Refuge, a facility managed by the U.S. Fish and Wildlife Service that had been left empty for the holiday weekend.<sup>1</sup> The armed activists,<sup>2</sup> led by brothers Ammon and Ryan Bundy, announced that “they had as many as 100 supporters with them.”<sup>3</sup> Ammon Bundy indicated that the group “plann[ed] on staying [at the Refuge] for years,” and its members would be willing to fight and die for its cause.<sup>4</sup> While the Oregon occupiers cited local concerns, they also questioned the authority of the federal government on myriad issues.<sup>5</sup> And they are not alone: there are over 200 armed militia groups in the United States, many of them with similar antigovernment views.<sup>6</sup>

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<sup>1</sup> Liam Stack, *Wildlife Refuge Occupied in Protest of Oregon Ranchers’ Prison Terms*, N.Y. TIMES (Jan. 2, 2016), <http://www.nytimes.com/2016/01/03/us/oregon-ranchers-will-return-to-prison-angering-far-right-activists.html> [https://perma.cc/3APG-RAWT].

<sup>2</sup> *Id.*

<sup>3</sup> Les Zaitz, *Militia Takes Over Malheur National Wildlife Refuge Headquarters*, OREGONIAN (Jan. 2, 2016), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/drama\\_in\\_burns\\_ends\\_with\\_quiet.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/drama_in_burns_ends_with_quiet.html) [https://perma.cc/PU52-H92U].

<sup>4</sup> *Id.*

<sup>5</sup> See Judy L. Thomas, *Experts: Oregon Standoff May Be Small, but It’s Just the Tip of a Growing Militia Iceberg*, KAN. CITY STAR (Jan. 6, 2016, 3:29 PM), <http://www.kansascity.com/news/government-politics/article53351000.html> [https://perma.cc/K786-HRYC] (discussing militants’ demands for the government to cede control of the Refuge to ranchers, outcry against a judicial ruling that some ranchers serve out their prison sentences, and opposition to gun control laws).

<sup>6</sup> *Id.*; see also *Antigovernment Militia Groups Grew by More than One-Third in Last Year*, S. POVERTY L. CTR. (Jan. 4, 2016), <https://www.splcenter.org/news/2016/01/04/antigovernment-militia-groups-grew-more->

Although the Oregon events may seem far removed from the concerns of international law, they help illustrate a potential loophole in international humanitarian law. An international armed conflict commences as soon as one state uses military force against another. But conflicts between states and organized non-state actors are different. Such conflicts must meet a minimum intensity threshold before they become non-international armed conflicts (NIACs), as opposed to riots or civil disturbances. And, until a NIAC is established, a state's actions are governed by its domestic laws and human rights obligations, rather than international humanitarian law. The threshold requirement may appear to be a mere technicality, but it is vitally important: without it, the rhetoric of the Oregon occupiers, the rise of associated militias, and the growing threat of domestic terror might have been enough for the U.S. government to conclude that it was in a NIAC with the organized militia group and employ military force in response.

The intensity threshold for establishing the existence of a NIAC is well-established and uncontroversial; clearly, not every riot or civil disturbance should be treated like a war. But what if the state in which the organized non-state actor is located invites another state to intervene? Are all bets off? Can the intervening state use force that would be illegal for the host state to use itself? Thus far, international lawyers have not adequately confronted this dilemma.<sup>7</sup> The silence is dangerous, as it leaves a potential loophole that states may use to avoid legal rules that constrain the use of violence by states against organized non-state actors.

The idea that President Obama might have invited Canada to use military force against the Oregon occupiers may seem ludicrous, but the legal dilemma the scenario poses is not simply academic. States are increasingly inviting or consenting to the use of force by outside states against organized non-state actors in their territories.

One of the most notable recent cases is in Syria: In September 2015, Russia began conducting air strikes against various non-state actor groups at the request of Syrian President Bashar al-Assad.<sup>8</sup> Kremlin Chief of Staff Sergey Ivanov emphasized that Russia had received consent for the intervention, stating that Assad had “turned to [Russia’s] leadership, requesting military assistance.”<sup>9</sup> Russia initially claimed to be targeting only the Islamic State

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one-third-last-year [<https://perma.cc/F4XQ-EXNN>] (identifying 276 militia groups, typically with “extreme antigovernment doctrines” and conspiracy theory beliefs).

<sup>7</sup> The best work to date is Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT’L L.J. 1 (2013), but it focuses more broadly on international consent to the use of force.

<sup>8</sup> *Russia Carries Out First Air Strikes in Syria*, AL JAZEERA (Sept. 30, 2015), <http://www.aljazeera.com/news/2015/09/russian-carries-air-strikes-syria-150930133155190.html> [<https://perma.cc/Q32Z-UA2T>].

<sup>9</sup> *Lawmakers Authorize Use of Russian Military Force for Anti-IS Airstrikes in Syria*, TASS (Sept. 30, 2015, 10:54 AM) (alteration in original), <http://tass.ru/en/politics/824795> [<https://perma.cc/83R4-XLLT>].

(sometimes also referred to as ISIS), but later explained that it would target “all terrorists” in the country.<sup>10</sup> The United States and the European Union, along with representatives of the Syrian rebels, alleged that Russia’s true targets were antigovernment opposition groups.<sup>11</sup> As of mid-2016, Russian strikes had reportedly killed over two thousand civilians.<sup>12</sup>

Or consider the Gulf Cooperation Council’s (GCC) intervention in Bahrain. In mid-February 2011, protesters began occupying Pearl Square in the Bahraini capital of Manama.<sup>13</sup> On March 14, 2011, roughly 1500 troops—approximately 1000 from Saudi Arabia and another 500 from the United Arab Emirates<sup>14</sup>—entered Bahrain at the invitation of the Bahraini government.<sup>15</sup> Bahrain’s King Hamad declared a state of emergency on May 15, and security forces forcibly cleared the square the following day.<sup>16</sup> At least six people died in the March 16 crackdown,<sup>17</sup> and at least thirty civilian deaths have occurred in total.<sup>18</sup> The Bahrain Independent Commission of Inquiry found that many of these deaths “resulted from the use of excessive and unnecessary lethal force.”<sup>19</sup>

In the Mediterranean Sea, the European Union continues to conduct “Operation Sophia,” a naval operation intended to combat people-smugglers

<sup>10</sup> *Russia Joins War in Syria: Five Key Points*, BBC (Oct. 1, 2015), <http://www.bbc.com/news/world-middle-east-34416519> [<https://perma.cc/4GVY-7NWJ>].

<sup>11</sup> Anne Barnard, *Syrian Rebels Say Russia Is Targeting Them Rather than ISIS*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/world/middleeast/syrian-rebels-say-russia-targets-them-rather-than-isis.html> [<https://perma.cc/6369-SU23>]; *Russia Joins War in Syria: Five Key Points*, supra note 10; *Syria Conflict: Putin Defends Russia’s Air Strikes*, BBC (Oct. 12, 2015), <http://www.bbc.com/news/world-middle-east-34502286> [<https://perma.cc/GTU5-HC62>].

<sup>12</sup> Emma Graham-Harrison, *Russian Airstrikes in Syria Killed 2,000 Civilians in Six Months*, GUARDIAN (Mar. 15, 2016, 2:28 PM), <https://www.theguardian.com/world/2016/mar/15/russian-airstrikes-in-syria-killed-2000-civilians-in-six-months> [<https://perma.cc/2MB6-H5HA>]; *About 1100 Children and Women Between 2766 Civilians Killed by Russian Airstrikes During 10 Months*, SYRIAN OBSERVATORY FOR HUM. RTS. (July 30, 2016), <http://www.syriahr.com/en/?p=48923> [<https://perma.cc/B74V-X73U>].

<sup>13</sup> INT’L CRISIS GRP., *POPULAR PROTESTS IN NORTH AFRICA AND THE MIDDLE EAST (III): THE BAHRAIN REVOLT 8* (2011), <https://d2071andvipowj.cloudfront.net/105-popular-protests-in-north-africa-and-the-middle-east-iii-the-bahrain-revolt.pdf> [<https://perma.cc/T5P4-SMB8>].

<sup>14</sup> Ethan Bronner & Michael Slackman, *Saudi Troops Enter Bahrain to Help Put Down Unrest*, N.Y. TIMES (Mar. 14, 2011), <http://www.nytimes.com/2011/03/15/world/middleeast/15bahrain.html> [<https://perma.cc/QKB5-B4PF>].

<sup>15</sup> Kelly McEvers, *Bahrain: The Revolution That Wasn’t*, NPR (Jan. 5, 2012, 12:01 AM), <http://www.npr.org/2012/01/05/144637499/bahrain-the-revolution-that-wasnt> [<https://perma.cc/AR2C-SK5H>].

<sup>16</sup> *Curfew Follows Deadly Bahrain Crackdown*, AL JAZEERA (Mar. 16, 2011), <http://www.aljazeera.com/news/middleeast/2011/03/201131643831976772.html> [<https://perma.cc/3V3L-RLUF>].

<sup>17</sup> *Id.*

<sup>18</sup> *Arab Uprising: Country by Country - Bahrain*, BBC (Dec. 16, 2013, 3:28 PM), <http://www.bbc.com/news/world-12482295> [<https://perma.cc/QL3M-NUQH>].

<sup>19</sup> MAHMOUD CHERIF BASSIOUNI ET AL., *BAHR. INDEP. COMM’N OF INQUIRY, REPORT OF THE BAHRAIN INDEPENDENT COMMISSION OF INQUIRY 223* (2011), <http://www.bici.org/bh/BICReportEN.pdf> [<https://perma.cc/B79X-7G7K>].

off the Libyan coast.<sup>20</sup> In addition to interdiction efforts, the operation also includes training for the Libyan Coast Guard.<sup>21</sup> But, as of September 2016, all anti-smuggling operations and training must take place on the high seas because the Libyan government has not yet granted permission for EU forces to enter its territorial waters.<sup>22</sup> If the European Union eventually secures Libya's consent—which has been anticipated for months—it will be deploying military forces to conduct what are essentially police actions inside Libya's borders.<sup>23</sup>

The rise of interventions by consent is due in part to the fact that organized armed non-state actors are gaining power globally. In addition to al Qaeda, the Islamic State, and their affiliates across the globe, there are also drug cartels in Latin America, the Free Papua Movement in Indonesia, the Kurdistan Freedom Party in Iran, the FARC in Colombia, and countless others.<sup>24</sup> Many of these non-state groups are in armed conflicts with both their host states and extraterritorial states. In fact, conflicts between non-state actors and extraterritorial states have become so common that they now have their own label: “Transnational Non-International Armed Conflicts,” or TNIACs for short.

Does the intensity threshold requirement for establishing a NIAC still apply to these conflicts? The answer, this Article concludes, is yes. Host state consent solves the *jus ad bellum* concern for the intervening state, insofar as it makes permissible what would otherwise be an unlawful violation of the host state's sovereignty. But host state consent does not require that an armed conflict exists, a distinct analysis that will often turn on whether the intensity threshold has been reached.

We argue that the logic and foundational norms of the international legal order require the intervening state to independently evaluate whether a NIAC exists between the host state and the organized non-state actor. Host states violate international law by consenting to actions that their own human rights obligations or domestic laws would prevent them from taking themselves. The corollary principle holds that intervening states cannot rely on host state consent to provide the legal basis for their use of force if that consent is a manifest violation of international human rights law. If a non-international armed conflict exists, the host state could act pursuant to international humanitarian law, and

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<sup>20</sup> Laurence Norman & Valentina Pop, *EU to Help Libya Fight Smugglers with Naval Mission*, WALL ST. J. (May 23, 2016, 12:25 PM), <http://www.wsj.com/articles/eu-to-help-libya-fight-smugglers-with-naval-mission-1464020730> [https://perma.cc/6XXM-NFTK].

<sup>21</sup> Chris Stephen, *British Warship Sent to Libya to Target People-Smugglers*, GUARDIAN (Sept. 3, 2016, 7:05 PM), <http://www.theguardian.com/politics/2016/sep/03/uk-warship-to-tackle-libya-people-smugglers> [https://perma.cc/UYQ4-EE3Z].

<sup>22</sup> *Id.*

<sup>23</sup> Norman & Pop, *supra* note 20.

<sup>24</sup> For a partial list of over one hundred armed non-state actors, see *Armed Non-State Actors*, GENEVA CALL, <http://www.genevacall.org/how-we-work/armed-non-state-actors> [https://perma.cc/6YNZ-ZRLD].

thus the intervening state may do so as well. If a NIAC does not exist, however, then the intervening state's lawful actions are limited by its own and the host state's human rights obligations.<sup>25</sup>

This Article proceeds in four parts. Part I explains the logic and purpose of the requirement that clashes between states and organized non-state actors must meet a minimum intensity to be treated as armed conflicts. Before a threat by a non-state actor may be deemed a NIAC, international law requires a two-pronged test that has become standard across state military manuals, international jurisprudence, and academic commentary. These entities all rely on the same formulation: ordinary violence becomes a NIAC when the state faces a sufficiently organized non-state actor whose violence meets a particular intensity threshold. Part I explains that this articulation of the rule traces to *Prosecutor v. Tadić*, a decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>26</sup> But the ICTY did not create the test out of whole cloth. The test rests on a solid and longstanding foundation in international treaty and case law, and it is broadly recognized as authoritative by states, scholars, and practitioners.

Part II explains that, although the test for evaluating whether a NIAC exists is widely accepted, there is a dangerous potential loophole: Host state consent to intervention may be treated as a substitute for an analysis of whether the intensity threshold for a NIAC has been met and armed force against the non-state actor is appropriate. Indeed, intervening states usually legitimate their actions by citing either the need to act in self-defense or the host state's consent; in short, they focus on clarifying that their actions are lawful under *jus ad bellum*. But, absent evidence that the intensity threshold has been met and a determination that an armed conflict exists, it is not clear that the use of military force against non-state actors is lawful. Hence, the exclusive focus on the *ad bellum* requirements threatens to undermine the intensity threshold.

Part III highlights the stakes of leaving this loophole open. The intensity threshold separates instances in which a state may respond to a rising insurgency with force governed by human rights law and other domestic law applicable in peacetime from instances in which a state may respond to such an insurgency with military force governed by international humanitarian law. The consent loophole would allow intervening states to ignore this distinction. In the Oregon example, the loophole would allow the Canadian government to carry out a

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<sup>25</sup> Of course, in either case, the intervening state's actions will also be limited by the scope of the host state's consent.

<sup>26</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<https://perma.cc/6JVJ-A6Q6>].

drone strike against the protesters as long as it had U.S. consent, even though the U.S. government could not itself use military force against the protesters.

Part IV describes how to close the loophole. First, the host state may only lawfully consent to uses of force against organized non-state actors that it could itself legally undertake. Second, the intervening state may not rely on consent manifestly given in violation of international law, which means that it must independently evaluate whether the host state has the lawful authority to take the actions to which it has consented. Both states involved must independently determine whether the intensity threshold for a NIAC has been met, which in turn triggers the application of international humanitarian law. Applying the intensity threshold to consent-based interventions in this way is not only consistent with general principles of international law, this Part argues, but it is also dictated by principles of common sense.

This Article concludes by showing that applying the intensity threshold does not prevent states from effectively responding to threats posed by organized non-state actors. States continue to have access to a wide array of law enforcement tools with which they can address such threats.

## I. THE INTENSITY THRESHOLD

In the 1995 case *Prosecutor v. Tadić*, the ICTY defined a NIAC as a situation in which there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>27</sup> This formulation is regularly cited as authoritative in state military manuals, international legal instruments, international jurisprudence, and expert and academic commentary.<sup>28</sup> It has become such a familiar formulation for determining whether a NIAC exists that some have suggested it is customary international law.<sup>29</sup>

This Part begins by outlining the *Tadić* test and the intensity threshold it established. Although the test was famously formulated by the *Tadić* court in 1995, it was not invented by the court out of thin air. The test is deeply rooted in the 1949 Geneva Conventions and while the legal implications of satisfying its threshold have changed over time, the threshold itself has remained constant.

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<sup>27</sup> *Id.* ¶ 70.

<sup>28</sup> See *infra* subsection I.B.2.

<sup>29</sup> See, e.g., Noëlle Quénivet, *Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict* (“This minimum threshold that allows a distinction between armed conflicts and other situations as well as the factors adopted by the ICTY to ascertain whether a conflict is taking place—intensity of conflict and organisation of the armed groups—are now widely accepted by the ICTR, the SCSL and the ICC.”), in *APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES* 31, 57 (Derek Jinks et al. eds., 2014).

### A. *The Tadić Test*

The *Tadić* test includes two prongs, each of which must be met to establish the existence of a NIAC. First, the non-state actor must have a minimum level of organization.<sup>30</sup> At the least, the non-state actor must operate with a command structure sufficient to enable it to implement obligations under the two main international humanitarian law instruments governing NIACs: Common Article 3 of the Geneva Conventions<sup>31</sup> and Additional Protocol II to those Conventions.<sup>32</sup>

Second, the *Tadić* test requires “protracted armed violence” for a conflict to qualify as a NIAC.<sup>33</sup> This prong is universally understood as an intensity requirement or intensity threshold, and it is “used solely for the purpose . . . of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”<sup>34</sup> In subsequent cases, the ICTY articulated factors to help gauge whether the level of violence is sufficient to meet *Tadić*’s intensity threshold. These include the seriousness of the conflict; the increase and spread of clashes over territory and time; the distribution and type of weapons employed; the presence of government forces and their use of force; the number of casualties; the incidence of civilians fleeing from the combat zone; the extent of destruction; the blocking, besieging, and heavy shelling of towns; the existence and change of front lines; the occupation of territory; the imposition of road closures; and the attention of the U.N. Security Council.<sup>35</sup> Where an organized non-state actor engages in conflict with a state, it is this second prong that determines whether the conflict has become a NIAC.

To the extent academics have evaluated the *Tadić* formulation, they have largely focused on the organizational prong. Some argue that states do not pay

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<sup>30</sup> *Tadić*, Case No. IT-94-1-I, ¶ 70.

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

<sup>32</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

<sup>33</sup> *Tadić*, Case No. IT-94-1-I, ¶ 70.

<sup>34</sup> Prosecutor v. *Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> [<https://perma.cc/QV5U-BYUE>].

<sup>35</sup> *E.g.*, Prosecutor v. *Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 177 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008), [http://www.icty.org/x/cases/boskoski\\_tarulovski/tjug/en/080710.pdf](http://www.icty.org/x/cases/boskoski_tarulovski/tjug/en/080710.pdf) [<https://perma.cc/5WDX-VZTZ>].

sufficient attention to the organizational prong;<sup>36</sup> indeed, some suggest that the U.N. Security Council wrongly ignored it when addressing the Libyan conflict.<sup>37</sup> Others have raised concerns about whether the organizational prong has been applied correctly<sup>38</sup> and even whether it remains relevant.<sup>39</sup>

In contrast, this Article focuses on the intensity prong, which has thus far received much less attention. Unlike the organizational prong, the intensity threshold may be conflated—unlawfully and dangerously, we argue—with the *jus ad bellum* inquiry.<sup>40</sup> The intensity prong is also likely to be decisive in looming legal challenges, including whether it is appropriate to try Abd al-Rahim al Nashiri by military commission rather than in federal court.<sup>41</sup> In focusing on the

<sup>36</sup> See, e.g., Kevin Jon Heller, *The DoJ White Paper's Fatal International Law Flaw—Organization*, OPINIO JURIS (Feb. 5, 2013, 12:05 AM), <http://opiniojuris.org/2013/02/05/the-doj-white-papers-fatal-international-law-flaw> [<https://perma.cc/K8ZY-GSLW>] (arguing that the United States “completely ignore[d] the organization requirement of the *Tadić* test when justifying targeted killing of “al-Qa’ida and its associated forces”).

<sup>37</sup> LOUISE ARIMATSU & MOHBUBA CHOUDHURY, CHATHAM HOUSE, *THE LEGAL CLASSIFICATION OF THE ARMED CONFLICTS IN SYRIA, YEMEN AND LIBYA* 36-39 (2014), [https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public\\_html/sites/default/files/2014300ClassificationConflictsArimatsuChoudhury1.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/2014300ClassificationConflictsArimatsuChoudhury1.pdf) [<https://perma.cc/TZT4-235D>] [hereinafter CHATHAM HOUSE REPORT].

<sup>38</sup> See, e.g., Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANSNAT’L L. 693, 726-31 (2013) (criticizing the Independent International Commission of Inquiry established by the U.N. Human Rights Council for relying on “an overly technical conception of the conditions triggering” the application of the law of armed conflict in Syria under *Tadić*’s framework).

<sup>39</sup> See Arne Willy Dahl & Magnus Sandbu, *The Threshold of Armed Conflict*, 45 MIL. L. & L. WAR REV. 369, 374 (2006) (stating that the focus on defining armed conflict in terms of “whether the armed opposition groups are organized and the intensity of the armed violence” is misplaced and arguing that the focus should instead be “more on how the government behaves and relates to basic human rights”).

<sup>40</sup> See *infra* note 88 and accompanying text.

<sup>41</sup> Trial by military commission is an option available under U.S. law only for crimes committed after the commencement of hostilities. 10 U.S.C. § 950p(c) (2012). Al Nashiri, who is affiliated with al Qaeda, is accused of complicity in the October 2000 bombing of the U.S.S. Cole and an earlier attempt on another American warship. See Robert Loeb, *Will the Federal Court Address Whether We Were at War with al Qaeda Prior to 9/11?*, LAWFARE (Feb. 19, 2016, 11:30 AM), <https://www.lawfareblog.com/will-federal-court-address-whether-we-were-war-al-qaeda-prior-911> [<https://perma.cc/6J2C-GLKL>] (discussing oral argument in a D.C. Circuit case challenging a military commission’s ability to try defendants for crimes that predated the incidents of September 11, 2001); Peter Margulies, *DC Circuit in Al-Nashiri: All Clear for Military Commission Trial*, LAWFARE (Aug. 31, 2016, 9:30 AM), <https://www.lawfareblog.com/dc-circuit-al-nashiri-all-clear-military-commission-trial> [<https://perma.cc/EQ46-CRSE>] (discussing a divided D.C. Circuit panel’s decision to allow a military commission to proceed); see also Kevin Jon Heller, *No, the Attack on the USS Cole Did Not Take Place in Armed Conflict*, OPINIO JURIS (May 6, 2014, 5:42 PM), <http://opiniojuris.org/2014/05/06/attack-uss-cole-take-place-armed-conflict> [<https://perma.cc/WSB9-TZB6>] (arguing that there was no NIAC between the United States and al Qaeda at the time of the U.S.S. Cole bombing); Peter Margulies, *Al-Nashiri, the Cole Bombing, and the Start of the Conflict with Al-Qaeda*, LAWFARE (May 6, 2014, 10:00 AM), <https://www.lawfareblog.com/al-nashiri-cole-bombing-and-start-conflict-al-qaeda> [<https://perma.cc/K54K-HEXB>] (arguing the converse). See generally Marty Lederman & Steve Vladeck, *The CMC’s Latest (Non)Decision in al-Nashiri [Updated with Links to Supplemental Briefs]*, JUST SECURITY (July 8, 2016, 8:05

intensity threshold, we do not mean to dismiss the relevance of the organizational requirement. Our aim is instead to rebalance the scales by acknowledging the longstanding importance of the intensity threshold and to argue for its maintenance and protection in situations where states might prefer to ignore it.

### B. *The History of the Intensity Threshold*

*Tadić* is just over two decades old, but the intensity requirement it articulated is far older. This Section traces the development of the intensity threshold from its emergence in Common Article 3 to its consolidation in *Tadić* and subsequent state practice, international jurisprudence, and academic commentary. This history confirms that the intensity threshold was based on principles that have defined the NIAC assessment since the Geneva Conventions were first adopted.

#### 1. Common Article 3

Historically, states have resisted applying international humanitarian law in wholly domestic situations. While negotiating the 1949 Geneva Conventions, states initially opposed proposals for the Conventions to govern domestic conflicts, including full-fledged civil wars.<sup>42</sup> This was in keeping with the international legal environment at the time. After all, the human rights revolution, with its focus on the behavior of states within their own territories, had not yet occurred.<sup>43</sup>

Given this context, Common Article 3—so called because it is common to all of the four 1949 Geneva Conventions—was groundbreaking.<sup>44</sup> Although it does not apply to internal unrest, such as sporadic riots or criminal activities,<sup>45</sup> it mandates that “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to

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AM), <https://www.justsecurity.org/31888/cmcrs-decision-mv-limburg-charges-al-nashiri> [<https://perma.cc/QLC4-8WJK>] (discussing the Court of Military Commission Review’s decision regarding al Nashiri).

<sup>42</sup> JEAN DE PREUX, COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (Jean S. Pictet ed., A.P. de Heney trans., 1960) [hereinafter PICTET COMMENTARY].

<sup>43</sup> See Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1822 (2003) (“Over the last half-century, the number of treaties that address issues of human rights has grown from a handful to hundreds.”). The first modern human rights treaty, the U.N. Convention on the Prevention and Punishment of the Crime of Genocide, was approved on December 9, 1948 and entered into force in 1951. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 77 U.N.T.S. 277.

<sup>44</sup> Common Article 3, *supra* note 31.

<sup>45</sup> PICTET COMMENTARY, *supra* note 42, at 28-31.

the conflict shall be bound to apply, as a minimum” certain protections.<sup>46</sup> By imposing obligations on state conduct in internal conflicts, Common Article 3 has justly been described as “a revolutionary inroad into traditional notions of State sovereignty.”<sup>47</sup>

Common Article 3’s radical nature necessitated strict constraints—including the intensity threshold—to alleviate state concerns.<sup>48</sup> States were reluctant to sacrifice elements of their sovereignty by allowing international law to regulate their internal behavior,<sup>49</sup> and states were concerned that Common Article 3 might tacitly legitimize organized non-state actors as “[p]art[ies] to [a] conflict,”<sup>50</sup> rather than simply illegitimate criminals or rebels.<sup>51</sup> Indeed, prior to the development of the human rights regime, recognizing non-state actors as parties to a conflict imposed new legal constraints on state action.<sup>52</sup>

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<sup>46</sup> Common Article 3, *supra* note 31. The International Court of Justice has recognized the protections of Common Article 3 as customary international law. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 218 (June 27) (explaining that Common Article 3’s rules are “elementary considerations of humanity”).

<sup>47</sup> Gabor Rona, *Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?*, 91 INT’L L. STUD. 32, 36 (2015).

<sup>48</sup> The radical nature of Common Article 3 also helps explain the more limited scope of the obligations it imposes, relative to the much more extensive and developed rules governing international armed conflicts. *See id.* (“[International armed conflict] rules are extensive, while NIAC rules are minimal, reflecting a traditional perspective on sovereignty: States are much more willing to establish international law rules for their mutual relations—even war—than for their internal affairs or their relations with non-State entities.”). While states eventually acceded to Common Article 3 after an extensive lobbying by the International Committee of the Red Cross, the protections extended to NIACs were far less expansive than those the ICRC initially envisaged. *See* PICTET COMMENTARY, *supra* note 42, at 28-35.

<sup>49</sup> *See* Jonathan Horowitz, *Transferring Wartime Detainees and a State’s Responsibility to Prevent Torture*, 2 NAT’L SECURITY L. BRIEF 43, 51 n.45 (2012) (“The law of non-international armed conflict is limited in scope because States wish to protect their sovereignty . . .”).

<sup>50</sup> Common Article 3, *supra* note 31.

<sup>51</sup> *See* Kenneth Roth, *The Human Rights Movement and International Humanitarian Law* (“There also was a concern—much more in the past than these days—about legitimizing rebel groups by addressing them. The question here was whether the application of [international humanitarian law] to a rebel group in and of itself constituted a political act, with the effect of raising the stature of the . . . group.”), in HUMAN RIGHTS: FROM PRACTICE TO POLICY 25, 30 (Carrie Booth Walling & Susan Waltz eds., 2011); Marko Milanovic, *Footnote Filching and Other Unsavory Practices in the US Supreme Court, Part III*, OPINIO JURIS (May 2, 2007, 5:51 AM), <http://opiniojuris.org/2007/05/02/footnote-filching-and-other-unsavory-practices-in-the-us-supreme-court-part-iii> [<https://perma.cc/Q5YC-WQA4>] (“States have always feared that applying [international humanitarian law] to rebels might somehow legitimize them . . .”).

<sup>52</sup> Even in today’s altered legal order, states often resist classifying their internal struggles as NIACs—as France did in Algeria, the United Kingdom did in Northern Ireland, and Russia did in Chechnya—because the “armed conflict” label implicitly legitimates the organized non-state actors’ cause. Milanovic, *supra* note 51; *see also* Katherine Draper, Note, *Why a War Without a Name May Need One: Policy-Based Application of International Humanitarian Law in the Algerian War*, 48 TEX. INT’L L.J. 575, 585 (2013) (discussing France’s refusal to characterize its Algerian conflict as an armed conflict).

States' reluctance to recognize the existence of a NIAC necessitated a clear means of distinguishing NIACs from internal disturbances of lesser severity.<sup>53</sup> Accordingly, from its inception, Common Article 3 was understood to apply only once an internal conflict reached a certain level of intensity. This understanding was further elaborated in the 1977 Additional Protocol II, which noted that "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature," are not "armed conflicts."<sup>54</sup>

## 2. Supporting State Practice, International Jurisprudence, and Scholarship

Recent state practice suggests that the intensity threshold is still widely regarded as a mandatory condition for establishing the existence of a NIAC. Several states' military manuals routinely cite *Tadić* and its two prongs as the prevailing test for when a NIAC exists,<sup>55</sup> and states as well as non-governmental organizations commonly employ it. For example, both the U.S. State Department and Human Rights Watch identified the same month, May 2011, as the "start date" for a NIAC in Yemen,<sup>56</sup> notwithstanding the fact that the non-state opposition had appeared to be sufficiently organized and had engaged in some skirmishes prior to that date. A representative of the NGO Saferworld later explained in a Chatham House report,

Despite the excessive use of force by government forces against the demonstrators . . . [, h]uman rights law continued to apply exclusively . . . primarily because the attacks against the demonstrators, albeit lethal at times, were sporadic for the most part and because those armed groups that sided with the pro-democracy protesters appeared to limit their use of force to defending the demonstrators against attacks rather than proactively engaging

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<sup>53</sup> Even today, as a legal matter, a state's subjective classification of strife is irrelevant to determining whether a NIAC exists; the existence or non-existence of a NIAC depends instead on objective facts. *E.g.*, YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 2 (2014).

<sup>54</sup> Additional Protocol II, *supra* note 32, art. 1(2). The Second Additional Protocol articulates a distinct threshold from Common Article 3, as it includes a territorial control component. *Id.* Nevertheless, the Second Additional Protocol's definition of a NIAC builds on Common Article 3, and it is regarded by many as a clarification of the scope of application of international humanitarian law to such conflicts. *See, e.g.*, DEREK JINKS, INT'L HUMANITARIAN LAW RESEARCH INITIATIVE, THE TEMPORAL SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW IN CONTEMPORARY CONFLICTS 5 (2003), <http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf> [<https://perma.cc/AP8M-J8C6>] (noting that Protocol II purports to not modify existing applications of Common Article 3).

<sup>55</sup> *E.g.*, MINISTÈRE DE LA DÉFENSE, MANUEL DE DROIT DES CONFLITS ARMÉS 34 (2012) (Fr.); FED. MINISTRY OF DEF., LAW OF ARMED CONFLICT MANUAL 186-87 (2013) (Ger.); UK MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT 384-86 (2004) (U.K.); OFFICE OF THE GEN. COUNSEL OF THE DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 1010-13 (2015) (U.S.).

<sup>56</sup> CHATHAM HOUSE REPORT, *supra* note 37, at 28.

with government loyalists or state forces . . . . The evidence appears to suggest that it was not until May 2011 that armed clashes between the defecting units and those that remained loyal to former president Saleh reached the requisite threshold of intensity to trigger an armed conflict.<sup>57</sup>

It appears likely that the State Department and Human Rights Watch also both employed the intensity requirement to identify May as the “start date” for the NIAC in Yemen.

International legal instruments and international judicial opinions also support this reading. *Tadić* has been cited as the prevailing test not just in subsequent ICTY cases,<sup>58</sup> but also by the International Criminal Tribunal for Rwanda,<sup>59</sup> the Special Court for Sierra Leone,<sup>60</sup> and the International Criminal Court.<sup>61</sup> Indeed, the Rome Statute establishing the International Criminal Court draws on *Tadić* in defining its jurisdiction over crimes committed in NIACs.<sup>62</sup>

Finally, academic and expert commentary recognizes the *Tadić* test as authoritative.<sup>63</sup> For example, the *Tallinn Manual*, the result of a NATO-led

<sup>57</sup> *Id.* at 28-29.

<sup>58</sup> *See, e.g.*, Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008), <http://www.icty.org/x/cases/boskoski/tjug/en/080710.pdf> [<https://perma.cc/5WDX-VZTZ>] (reiterating the *Tadić* test for finding an armed conflict).

<sup>59</sup> *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 619-21 (Sept. 2, 1998), <http://www.unict.org/sites/unict.org/files/case-documents/ict-96-4-trial-judgements/en/980902.pdf> [<https://perma.cc/M3EU-DQWB>] (applying *Tadić* to find that the civil war in Rwanda constituted an armed conflict).

<sup>60</sup> *E.g.*, Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, ¶ 124 (Aug. 2, 2007), <http://www.rscsl.org/Documents/Decisions/CDF/785/SCSL-04-14-T-785.pdf> [<https://perma.cc/22DW-H79N>].

<sup>61</sup> *E.g.*, Prosecutor v. Gombo, ICC-01/05-01/08, Decision pursuant to Art. 61(7)(a) and (b) of the Rome Statute, ¶ 229 (June 15, 2009), [https://www.icc-cpi.int/CourtRecords/CR2009\\_04528.pdf](https://www.icc-cpi.int/CourtRecords/CR2009_04528.pdf) [<https://perma.cc/E8UA-L9ZS>]. Only one case appears to openly challenge the *Tadić* framework, but it does so in the context of determining the applicability of European Union refugee law. The Court of Justice of the European Union held that “it must be acknowledged that an internal armed conflict exists, for the purposes of applying [a] provision [of refugee law], if a State’s armed forces confront one or more armed groups or if two or more armed groups confront each other” and that the Court need not engage in an analysis of organization and intensity. Case C-285/12, *Diakité v. Commissaire Général aux Réfugiés et aux Apatrides*, ¶ 35 (Jan. 30, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147061&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=541586> [<https://perma.cc/7667-AV5L>]. The Court’s decision was based on the notion that the “EU legislature wished to grant subsidiary protection not only to persons affected by ‘international armed conflicts’ and by ‘armed conflict not of an international character’, as defined in international humanitarian law, but also to persons affected by internal armed conflict, provided that such conflict involves indiscriminate violence.” *Id.* ¶ 21.

<sup>62</sup> *See* Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90 (providing that its war crimes jurisdiction “applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”).

<sup>63</sup> *E.g.*, INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 4 (2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> [<https://perma.cc/5FLM-BXEZ>]; PROGRAM ON HUMANITARIAN

process to clarify the law applicable to cyberwar that included “distinguished international law scholars and practitioners,”<sup>64</sup> employs the *Tadić* test. The *Tallinn Manual* repeatedly identifies issues on which these experts and practitioners disagreed,<sup>65</sup> but no one appears to have questioned the *Tadić* formulation; rather, the *Tallinn Manual* states that the *Tadić* holding is “widely accepted as setting forth the two key criteria for qualification as a non-international armed conflict.”<sup>66</sup> Meanwhile, there is little scholarly appetite for challenging the intensity prong. There appear to be only two academic articles that question *Tadić* or its subsequent application, and each debates the relevance of the organizational prong far more than the intensity prong.<sup>67</sup> As noted above, the standard has become so well-established that some scholars identify it as customary international law.<sup>68</sup>

Put simply, *Tadić*’s articulation of an intensity threshold to separate NIACs from internal unrest is affirmed by the history and text of international humanitarian law instruments governing NIACs, as well as by state practice, international jurisprudence, and academic scholarship.

### C. The Intensity Threshold and the Prohibition on the Use of Force

The intensity threshold serves a foundational goal of the modern international legal order: minimizing states’ unilateral use of force. The U.N. Charter represented a watershed moment for international law for several reasons, chief among them its prohibition—articulated in Article 2(4)—against the threat or use of force.<sup>69</sup> Previously, states regularly resorted to using force to settle a wide range of disputes.<sup>70</sup> Article 2(4) reaffirmed a commitment first

POLICY & CONFLICT RESEARCH AT HARVARD UNIV., COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 58-59 (2010), <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf> [<https://perma.cc/3RAK-RPZG>]; Quéniwet, *supra* note 29.

<sup>64</sup> *Tallinn Manual Process*, NATO COOPERATIVE CYBER DEF. CTR. EXCELLENCE, <https://ccdcoe.org/tallinn-manual.html> [<https://perma.cc/J6XZ-7KFQ>].

<sup>65</sup> *See, e.g.*, INT’L GRP. OF EXPERTS AT THE INVITATION OF THE NATO COOP. CYBER DEF. CTR. OF EXCELLENCE, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 57 (Michael N. Schmitt ed., 2013), [https://issuu.com/nato\\_ccd\\_coe/docs/tallinn\\_manual?e=0/1803379](https://issuu.com/nato_ccd_coe/docs/tallinn_manual?e=0/1803379) [<https://perma.cc/Y8MS-JN6K>] [hereinafter TALLINN MANUAL] (exemplifying a situation when the experts were divided on a legal point).

<sup>66</sup> *Id.* at 87.

<sup>67</sup> *E.g.*, Blank & Corn, *supra* note 38; Dahl & Sandbu, *supra* note 39.

<sup>68</sup> *See, e.g.*, Quéniwet, *supra* note 29, at 47 (claiming the *Tadić* case is “ingrained in customary international law”).

<sup>69</sup> *See, e.g.*, Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 148 (Dec. 19) (“The prohibition against the use of force is a cornerstone of the United Nations Charter.”).

<sup>70</sup> *See* OONA A. HATHAWAY & SCOTT SHAPIRO, THE INTERNATIONALISTS (forthcoming 2017).

made in 1928 to collectively limit this right.<sup>71</sup> Article 2(4) provides, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>72</sup>

This general prohibition is subject to an express exception for actions taken in self-defense.<sup>73</sup> Article 51 provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs . . . .”<sup>74</sup> According to the text, an armed attack must have already occurred for a state to take defensive measures. Under the customary right to self-defense, however, states may also have the ability to respond anticipatorily to attacks that are imminently threatened and that are “instant, overwhelming, and leav[e] no choice of means, and no moment for deliberation.”<sup>75</sup> Responsive defensive force must be necessary to end the threat and proportional to that used in the armed attack: it need not be a mirror image of the initial attack, but rather must reflect a congruency between the threat and the responsive military strategy.<sup>76</sup>

Article 2(4) and the self-defense exception simultaneously acknowledge that states may sometimes need to employ unilateral defensive force and attempt to minimize when states will use such force. The intensity threshold serves a similar purpose with regard to the force states use against organized non-state actors by ensuring that only states facing significant levels of violence can respond in ways appropriate to an armed conflict. In both situations, a state must experience a certain level of violence before it uses responsive force pursuant to international humanitarian law, and in both cases, that force must be necessary and proportionate.

As this Part has demonstrated, the intensity threshold is well-established and congruent with the normative aims of the U.N. Charter. But its relevance is less obvious when the state in which an organized non-state actor is located consents to another state using force in its territory. The next Part considers this complication.

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<sup>71</sup> *Id.*

<sup>72</sup> U.N. Charter art. 2, ¶ 4.

<sup>73</sup> *Id.* arts. 39, 51.

<sup>74</sup> *Id.* art. 51.

<sup>75</sup> Letter from Daniel Webster, U.S. Sec’y of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), reprinted in 2 A DIGEST OF INTERNATIONAL LAW 412, 412 (1906); see also Rebecca Crootoof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT’L L. 237, 252-55 (2016) (discussing how the teleological approach to treaty interpretation has allowed understandings of Article 51 “to evolve in tandem with new developments in warfare and weaponry”).

<sup>76</sup> Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8); see also Daniel Bethlehem, *Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 1, 3 (2012) (noting that responsive state action must be necessary and proportional).

## II. A POTENTIAL LOOPHOLE

The *Tadić* test is the legal standard for the initiation of a NIAC contained within a state. Yet armed conflicts increasingly involve extraterritorial states using force against organized non-state actors, justified on the basis of host state consent. In such cases, there is a potential loophole created by overlapping legal regimes.

This Part examines the legal rules that make the loophole possible. First, when an intervening state acts with the consent of the host state, there is no need for an independent *ad bellum* legal basis for intervention. Furthermore, the law of international armed conflict is not triggered because there is no direct conflict between the two states. Second, under international law, sovereign state consent is presumed to be legitimate unless it constitutes a manifest violation of the state's domestic law. Finally, states using force outside their own territory face fewer human rights constraints than they would if they were deploying force within their own territories.

Each of these rules, taken individually, is unobjectionable. But together, they create a potential loophole in the legal regulation of the use of military force that could leave consent-based interventions dangerously under-regulated.

### A. *The Ad Bellum Inquiry*

An intervening state that wishes to use force against an organized non-state actor in another state's territory must comply with the prohibition on armed interference. As noted above, Article 2(4) prohibits states from threatening or using force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>77</sup>

The prohibition does not apply, however, if the host state consents to use of force on its territory, presuming that the appropriate state authority grants such consent and the intervening state operates within the scope of that consent. Voluntary consent renders a state's use of force lawful under *jus ad bellum*, the law governing when one state may use force in another state's territory,<sup>78</sup> and therefore obviates the need to pursue other lawful exceptions

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<sup>77</sup> U.N. Charter art. 2, ¶ 4. Additionally, there is an independent customary international law—the norm of non-intervention—that prohibits states from interfering in "matters in which each State is permitted, by the principles of State sovereignty, to decide freely." See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 205 (June 27) (observing that the principle of state sovereignty "forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States"); see also *id.* ¶ 209 (holding that, where interference takes the form of a use or threat of force, Article 2(4) and the customary norm of non-intervention are coterminous).

<sup>78</sup> See YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 118-23 (5th ed. 2011); Ademola Abass, *Consent Precluding State Responsibility: A Critical Analysis*, 53 INT'L & COMP. L.Q. 211 (2004) (describing circumstances that would allow use of force on another state). Intervening states must operate within the scope of the consent and desist if consent is withdrawn. DINSTEIN, *supra*, at 121-22.

to Article 2(4)'s prohibition on the use of force.<sup>79</sup> The lawfulness of interventions not otherwise authorized thus hinges upon the consent or request of the government of the host state: "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."<sup>80</sup> Military assistance may be "rendered by one state to another at the latter's request and with its consent, which may be given *ad hoc* or in advance by treaty."<sup>81</sup>

In the past decade and a half, dozens of armed interventions have been authorized on the basis of consent—sometimes in the context of an ongoing NIAC, sometimes not.<sup>82</sup> As the local and global threats posed by organized non-state actors show no signs of abating, host states will increasingly ask for assistance, and extraterritorial states will increasingly intervene on the basis of host state consent.

### B. *The Presumption of Lawful Consent*

Under international law, a state may generally presume that another state's consent is legitimately granted under the consenting state's domestic law. In the treaty context, for instance, unless the error is glaring and highly significant, a state cannot argue that an agreement is invalid either because the approval process was flawed under domestic law or because the substantive content of the agreement is inconsistent with domestic law.<sup>83</sup> Defects in consent under domestic law abrogate a treaty only if "that violation [of internal law] was manifest and concerned a rule of its internal law of fundamental importance."<sup>84</sup> A violation of the state's internal law is considered manifest "if it would be

<sup>79</sup> See Deeks, *supra* note 7, at 15 n.43 (providing sources to support this conclusion).

<sup>80</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 20, in Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles].

<sup>81</sup> 1 OPPENHEIM'S INTERNATIONAL LAW 435 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) (footnote omitted); see also *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶¶ 42-54 (Dec. 19) (analyzing the issue of consent between two countries).

<sup>82</sup> Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT'L L.J. 337, 339 (2011) (outlining both types of interventions—those with and without force).

<sup>83</sup> Vienna Convention on the Law of Treaties arts. 27, 46, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Although not party to the Vienna Convention, the United States recognizes that most of its provisions constitute binding customary international law. See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 721 n.71 (2005) (providing support for the U.S. view that the Vienna Convention reflects international law). Additionally, insofar as the Vienna Convention describes customary international law, it applies to all "international agreements." See Lieblich, *supra* note 82, at 362-63 (citing Vienna Convention art. 3). Thus, even if consent is not formalized in a treaty, the Vienna Convention's provisions provide useful, and potentially binding, guidance on the interpretation of the agreement.

<sup>84</sup> Vienna Convention, *supra* note 83, art. 46, at 343.

objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”<sup>85</sup>

This presumption of domestic legal validity extends beyond international treaties to state consent more generally.<sup>86</sup> Ashley Deeks explains,

International law allows one state to take at face value the commitments made to it by another state. A state need not search behind another state’s consent to unearth tensions between the international arrangement and the consenting state’s domestic law. Nor may a state invoke its own domestic law as a reason to breach its international obligations.<sup>87</sup>

Hence, in most circumstances, a state may lawfully act on consent from another state, even if it was unlawfully given as a matter of the consenting state’s domestic law.

Unfortunately, the presumptive validity of state consent has led many to conflate state consent for the purpose of the *ad bellum* inquiry with the question of whether the use of military force is appropriate under *jus in bello*. This leads some to incorrectly conclude that an intervening state acting with consent of the host state need not interrogate whether there is sufficient violence to meet the intensity threshold for establishing a NIAC. Summarizing the scholarly debate, Anders Henriksen writes,

[T]here is not universal agreement with regard to the role of consent in instances involving the use of force, and some scholars reject consent as a valid basis in those instances where the use of force would have been unlawful if the consenting state had been acting. The better view, however, seems to be that consent *does* preclude the unlawfulness of the use of force by one state in another state, even in cases where the use of force would have been unlawful if carried out by the consenting state. The existence of a valid consent from the host state will therefore always absolve the state from international legal responsibility under *jus ad bellum* as long as the use of force is conducted within the boundaries of that consent. Furthermore, international law currently does not require a state to ascertain whether or not the consent given by another state for the use of force on its territory violates the latter state’s domestic laws.<sup>88</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> See Deeks, *supra* note 7, at 7-8 (discussing the spectrum of viewpoints on consent).

<sup>87</sup> *Id.* at 3.

<sup>88</sup> Anders Henriksen, *Jus Ad Bellum and American Targeted Use of Force to Fight Terrorism Around the World*, 19 J. CONFLICT & SECURITY L. 211, 220 (2014); see also Deeks, *supra* note 7, at 26-27 (“International law today does not clearly prohibit states from using consent as a partial or complete rationale for their forcible actions in another state’s territory, even where that consent purports to authorize an activity that the host state legally could not undertake. It is therefore reasonable to expect that states will continue to take advantage of the current ambiguity about consent to the use of force to evade or ignore host state domestic laws that otherwise might limit that force.”).

In short, Henriksen argues that intervening states are not accountable for actions taken pursuant to host state consent, even if such action “*would have been unlawful if carried out by the consenting state.*”<sup>89</sup> As the next Section shows, this problematic reading of the law has consequences for the legal protections a state using force must observe.

### C. *The Extraterritorial State’s Limited Direct Human Rights Obligations*

Does international human rights law limit the actions that an intervening state may take against an organized non-state actor when the intervening state is acting pursuant to a host state’s consent? The extent to which an intervening state’s human rights obligations apply to its extraterritorial use of force turns on two inquiries: first, whether human rights laws apply extraterritorially and, second, what conditions trigger their application. Both of these assessments are highly contested by international bodies and international legal scholars.<sup>90</sup> But even under the most aggressive reading, the human rights obligations of states acting outside their own territory are significantly more limited than those that apply to states acting within their own territory.<sup>91</sup> Accordingly, international human rights law imposes fewer constraints on a state when it uses force against an organized non-state actor in another state’s territory.

As an initial matter, an intervening state must determine whether and which of its human rights obligations, under domestic and international law, may have legal effect outside of its territorial borders. Many international bodies have stated that various human rights treaties apply extraterritorially in certain circumstances.<sup>92</sup> The United States, which uses armed force outside its borders more frequently than any other state,<sup>93</sup> has taken a more

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<sup>89</sup> Henriksen, *supra* note 88 (emphasis added).

<sup>90</sup> See Beth Van Schaack, *The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now Is the Time for Change*, 90 INT’L L. STUD. 20, 20-25 (2014) (describing the history of the dispute and the different viewpoints in modern context).

<sup>91</sup> For more on the extraterritorial application of human rights law, see generally Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389 (2011).

<sup>92</sup> See Van Schaack, *supra* note 90, at 31-33 (describing the jurisprudence on extraterritorial application of human rights).

<sup>93</sup> See David Vine, *The United States Probably Has More Foreign Military Bases than Any Other People, Nation, or Empire in History*, NATION (Sept. 14, 2015), <https://www.thenation.com/article/the-united-states-probably-has-more-foreign-military-bases-than-any-other-people-nation-or-empire-in-history/> [<https://perma.cc/QU88-YQU5>] (noting that “the United States has approximately 95% of the world’s foreign bases” and arguing that “the global collection of bases has generally enabled the launching of military interventions, drone strikes, and wars of choice”); *The Uses of Force*, ECONOMIST (Dec. 12, 2013), <http://www.economist.com/news/special-report/21590103-two-difficult-wars-offer-compelling-lessons-uses-force> [<https://perma.cc/C3AV-JLS4>] (“Modern America has shown an unrivalled appetite for battle. During more than half the years since the end of the cold war it has been in combat. That is not just

conservative view. For example, the United States currently maintains that the International Covenant on Civil and Political Rights (ICCPR) does not apply outside its sovereign territory,<sup>94</sup> although this position is hotly debated.<sup>95</sup> The United States also rejected the extraterritorial application of the Convention Against Torture until 2014, but it now acknowledges that the Convention applies outside of U.S. borders in areas where it exercises control as a governmental authority.<sup>96</sup>

Next, the intervening state must evaluate whether the human rights obligations that apply extraterritorially apply in the given situation. Even under the most expansive interpretation of extraterritorial application of human rights law adopted by relevant international bodies and courts, human rights obligations are generally limited to situations in which a state exercises “effective control.” Different international bodies explicating different treaties have developed variations on the effective control test, but they have converged around the same central principles. As Beth Van Schaack explains, “[A] longitudinal review of the cases reveals a distinct trend toward an understanding that States’ human rights obligations follow their agents and instrumentalities offshore whenever they are in a position to respect—or to violate—the rights of individuals they confront abroad.”<sup>97</sup> This control test is grounded in the text of human rights instruments.<sup>98</sup>

Most cases involving state extraterritorial action against an organized non-state actor will not meet the effective control standard. International bodies have proven reluctant to apply human rights law to extraterritorial

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because of the war in Iraq, which lasted from 2003 to 2011, and that in Afghanistan, which began two years earlier and is still unfinished. Even before that, between 1989 and 2001 the United States intervened abroad on average once every 16 months—more frequently than in any period in its history.”).

<sup>94</sup> See Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARV. INT’L L.J. 81, 102 (2015) (“The United States has argued that the [ICCPR’s] text precludes any kind of extraterritorial application . . . . But the U.S. views on the extraterritorial application of the ICCPR have not been as clear, long-standing or principled as some claim.”).

<sup>95</sup> See, e.g., Jordan J. Paust, *Operationalizing Use of Drones Against Non-State Terrorists Under the International Law of Self-Defense*, 8 ALB. GOV’T L. REV. 166, 190 (2015) (arguing that the ICCPR has an extraterritorial and global reach); Van Schaack, *supra* note 90, at 53-65 (analyzing the issue and the U.S. requirements vis-à-vis the ICCPR’s reach).

<sup>96</sup> See Sarah Cleveland, *The United States and the Torture Convention, Part I: Extraterritoriality*, JUST SECURITY (Nov. 14, 2014, 11:18 AM), <https://www.justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality> [<https://perma.cc/C5TL-WTRB>] (describing the United States’ changing position on the Convention Against Torture).

<sup>97</sup> Van Schaack, *supra* note 90, at 32; see also SIKANDER AHMED SHAH, INTERNATIONAL LAW AND DRONE STRIKES IN PAKISTAN: THE LEGAL AND SOCIO-POLITICAL ASPECTS 121-38 (2015) (surveying various standards for assessing the extraterritorial application of human rights laws and evidencing, in general, a common preliminary requirement that the state exercise some level of control over the territory before human rights obligations apply to its behavior).

<sup>98</sup> See, e.g., International Covenant on Civil and Political Rights art. 2, *opened for signature* Dec. 19, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR] (prohibiting the arbitrary deprivation of life and obligating a state to ensure human rights for all persons “within its territory and subject to its jurisdiction”).

targeting.<sup>99</sup> While limited authority suggesting otherwise exists,<sup>100</sup> in most cases involving extraterritorial intervention, intervening states lack the control necessary to trigger their human rights obligations.<sup>101</sup>

#### D. *The Potential Loophole*

The intersection of varied legal regimes in consent-based extraterritorial interventions against non-state actors risks creating a dangerous legal loophole. Consider the following scenario: An organized non-state actor poses a threat to both its host state and a nearby, would-be intervenor state, but there has not yet been violence of sufficient intensity to meet the intensity threshold. Nonetheless, concerned about the threat, the host state consents to the nearby state using force that would be appropriate to an armed conflict, which obviates the need for the intervening state to consider other *jus ad bellum* justifications for its forceful intervention. The intervening state assumes that the host state's consent to armed intervention is valid as a matter of its domestic law, which includes its human rights obligations toward individuals in the territory. At the same time, the limited extraterritorial application of human rights law means that the intervening state is likely to determine that it has few or no human rights obligations to people located in territory over which it exercises no effective control. The intervening state then deploys armed force that the host state would have been legally prohibited from using itself.

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<sup>99</sup> See, e.g., *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 355 (“In sum, the case-law of the Court demonstrates that its recognition of the exercise of extraterritorial jurisdiction by a Contracting State is exceptional . . .”). For an argument that *Banković* has been “all but limited . . . to its facts,” see Van Schaack, *supra* note 90, at 44-48.

<sup>100</sup> See, e.g., *Alejandro v. Cuba*, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 25 (1999) (“[W]hen agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues . . .”); Jake William Rylatt, *An Evaluation of the U.S. Policy of “Targeted Killing” Under International Law: The Case of Anwar al-Aulaqi (Part II)*, 44 CAL. W. INT'L L.J. 115, 137 (2014) (surveying the academic literature and arguing that “targeting someone with the intention to take their life is the very definition of controlling an individual, body and fate, even for the split second before their life ends”).

<sup>101</sup> See, e.g., Van Schaack, *supra* note 90, at 35-40 (arguing that a strict definition of control is problematic because states are able to violate rights of individuals abroad without “fully controlling” the places those violations occur); see also Paust, *supra* note 95, at 190-91 (“[T]he global human right to freedom from arbitrary deprivation of life under the International Covenant will only apply to persons who are either within the territorial jurisdiction of the United States (including U.S. occupied territory) or within its actual power or effective control. It is evident, therefore, that persons being targeted by a high-flying drone in a foreign country will not be entitled to protection with respect to the human right to life that is otherwise guaranteed in the International Covenant.” (footnotes omitted)).

As the events discussed in the Introduction suggest, this scenario is not a mere hypothetical.<sup>102</sup> The opportunities for states to exploit this potential loophole in the law have become all too frequent.

### III. THE STAKES

Although states originally intended to limit the influence of international law on their internal affairs by setting a high intensity threshold for recognizing a NIAC, the international legal environment has since changed dramatically. In the wake of the human rights revolution, international legal obligations regulate states' conduct toward persons in their territories in both peacetime and times of armed conflict. In this new context, the intensity threshold helps determine which international legal regime governs a state's internal conflicts with organized non-state actors. Above the threshold, international humanitarian law applies; below the threshold, domestic law and the state's human rights obligations apply.

The loophole threatens this important distinction. If intervening states are not required to act consistent with the host state's human rights obligations in below-the-threshold conflicts, individuals in the host states are left underprotected. As discussed above, states using force outside their own territories have fewer direct human rights obligations than they would if they were acting within their own territories—and fewer than the host state itself, which is clearly obligated to apply human rights law to conflicts with non-state actors below the intensity threshold.<sup>103</sup> Additionally, the law applicable to NIACs in some cases offers less robust protections than does international human rights law. Here we outline the international human rights law and international humanitarian law governing deadly force and detention to illustrate some of the protections that are at risk if the distinction between low intensity unrest and NIACs disappears.

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<sup>102</sup> Ashley Deeks also suggests this potential loophole is far from imaginary. *See* Deeks, *supra* note 7, at 27 (“It is therefore reasonable to expect that states will continue to take advantage of the current ambiguity about consent to the use of force to evade or ignore host state domestic laws that otherwise might limit that force.”).

<sup>103</sup> Fully addressing whether and to what extent human rights law applies in armed conflict is beyond the scope of this Article. However, two of the authors have previously addressed this issue. In many situations—and not entirely surprisingly, given their common interest in protecting human life and dignity—international humanitarian law and international human rights law are complementary and may coexist. For a more extensive discussion, see generally Oona A. Hathaway, Rebecca Crootof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis & Julia Spiegel, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883 (2012).

### A. Use of Deadly Force

The right not to be arbitrarily deprived of life is a *jus cogens* norm—a peremptory, non-derogable norm binding on all states.<sup>104</sup> However, international human rights law and international humanitarian law define an “arbitrary” deprivation of life differently.

#### 1. International Human Rights Law

A number of human rights instruments constrain state parties’ use of lethal force.<sup>105</sup> International bodies have set minimum standards of respect for the right to life in law enforcement operations. Additionally, human rights committees and courts—including the U.N. Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights, and the United Nations Congress on the Prevention of Crime and the Treatment of Offenders—have elaborated international human rights constraints on the use of lethal force. Taken together, these constraints illustrate a general consensus that states are obligated to protect the right to life in law enforcement operations.

At least two of these bodies have arrived at each of the following principles: First, legality governs the use of deadly force. Since “[t]he deprivation of life by the authorities of the State is a matter of the utmost gravity . . . the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”<sup>106</sup> Second, relevant

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<sup>104</sup> See, e.g., Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411, 431 (1989) (noting the prominent position provided to the right to life in “virtually every major international human rights instrument”).

<sup>105</sup> See, e.g., American Convention on Human Rights art. 4(1), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention] (“No one shall be arbitrarily deprived of his life.”); ICCPR, *supra* note 98, art. 6(1) (“No one shall be arbitrarily deprived of life.”); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] (“No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”). Furthermore, most mandate that courts construe exceptions narrowly. See U.N. Human Rights Comm., General Comment No. 6, Article 6 (Sixteenth Session, 1982), ¶ 1 [hereinafter HRC Comment No. 6] (observing that the right to life “should not be interpreted narrowly”), reprinted in U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994); see also *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 46 (1995) (noting that exceptions to the right to life “indicate[] that a stricter and more compelling test of necessity must be employed from that normally applicable”).

<sup>106</sup> HRC Comment No. 6, *supra* note 105, ¶ 3; see also *Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, ¶ 85 (Inter-Am. Ct. H.R. Oct. 24, 2012), [http://corteidh.or.cr/docs/casos/articulos/seriec\\_251\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_251_ing.pdf) [<https://perma.cc/XSC5-FW2S>] (requiring the use of force to abide by the principles of “legality, absolute necessity, and proportionality”); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ¶¶ 1, 11 [hereinafter Basic Principles] (requiring law enforcement rules to “[e]nsure that firearms are used only in appropriate circumstances

national laws or regulations must only permit the use of lethal force when it is necessary. Law enforcement officers may only use lethal force “in their own defence or that of others, or . . . [when] necessary to effect the arrest or prevent the escape of the persons concerned,”<sup>107</sup> if the potential escapee poses a serious safety threat to others.<sup>108</sup> Third, the use of deadly force must be proportional. Specifically, law enforcement must “[e]xercise restraint in such use [of force] and act in proportion to the seriousness of the offence and the legitimate objective to be achieved.”<sup>109</sup> Fourth, states must use care when executing plans involving the potential use of deadly force. States must exercise the “degree of caution expected from a law-enforcement body in a democratic society,” and their actions must be “compatible with the standard of care prerequisite to an operation . . . involving the use of lethal force by State agents.”<sup>110</sup>

While there is no per se prohibition on the use of military force to achieve law enforcement ends, the use of military personnel without proper law enforcement training may reflect a failure to exercise “the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society.”<sup>111</sup> Similarly, the use of military-grade weaponry without a prior evacuation of civilians may, depending on the circumstances, violate the right to life, as “[t]he massive use of indiscriminate weapons” does not reflect the requisite care required by human rights law.<sup>112</sup>

Moreover, experts generally understand the right to life to require that states adhere to a progressive use of force and distinguish moments when states initiate law enforcement actions from moments when violence crosses

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and in a manner likely to decrease the risk of unnecessary harm”), in U.N. Secretariat, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Doc. A/Conf.144/28/Rev.1 (Aug. 27–Sept. 7, 1990).

<sup>107</sup> U.N. Human Rights Comm., View Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, *Communication No. 45/1979: Husband of Maria Fanny Suarez de Guerrero v. Colombia*, ¶ 13.2, U.N. Doc. CCPR/C/OP/I (Mar. 31, 1982).

<sup>108</sup> See *McCann*, 324 Eur. Ct. H.R. (ser. A) at 45 (noting that a level of force no stronger than “absolutely necessary” may be used to “prevent the escape of a person lawfully detained” (internal quotations omitted) (quoting European Convention, *supra* note 105, art. 2)).

<sup>109</sup> Basic Principles, *supra* note 106, ¶ 5(a); see also *Dorzema*, Inter-Am. Ct. H.R., ¶ 85 (requiring the use of force to abide by the principles of “legality, absolute necessity, and proportionality”).

<sup>110</sup> *Isayeva v. Russia*, App. No. 57950/00, ¶ 191 (Eur. Ct. H.R. Feb. 24, 2005). While *Isayeva* dealt with a situation in Chechnya that is almost certainly a NIAC, the principles included in this discussion are human rights law principles. See *McCann*, 324 Eur. Ct. H.R. (ser. A) at 62 (“[T]he Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence . . . .”); Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT’L REV. RED CROSS 737, 742-44 (2005) (stating that *Isayeva*’s “assessment has strong foundations in human rights law, but perhaps is not exactly the same formulation as would be used for military operations in an armed conflict”).

<sup>111</sup> *McCann*, 324 Eur. Ct. H.R. (ser. A) at 61-62 (noting the difference between the standard of care taken by the police when using firearms and that used by soldiers).

<sup>112</sup> *Isayeva*, App. No. 57950/00, ¶ 191.

the intensity threshold and creates a NIAC.<sup>113</sup> Initially, states must act in accordance with domestic law enforcement policies and relevant human rights law, which includes attempting to arrest or disarm the non-state actor without using lethal force. If, however, the non-state actor responds by threatening the lives of law enforcement officers or civilians, the state may use lethal force. When the state gradually increases force in response to the organized non-state actor's reactions, it may eventually convert the situation into a NIAC.<sup>114</sup> Yet classifying the situation as a NIAC and triggering the application of international humanitarian law does not retroactively apply international humanitarian law to the state's initial action. This is the logical corollary of the intensity threshold: until a state crosses the intensity threshold, a NIAC does not exist and domestic laws governing law enforcement apply.

## 2. International Humanitarian Law

Once armed conflict begins, the rules change. As some of us have noted elsewhere, "Humanitarian law permits state agents to intentionally kill combatants and incidentally kill civilians (within clearly proscribed limits) in circumstances that human rights law does not countenance."<sup>115</sup>

International humanitarian law allows state parties to armed conflict to use deadly force against enemy combatants. On first look, this may appear similar to the right of law enforcement to use deadly force: the right of a soldier to kill an enemy soldier that poses a deadly threat is similar, after all, to the self-defensive right under international human rights law of a law enforcement officer to kill a criminal who poses a deadly threat to the officer. But under international humanitarian law, the right to kill enemy combatants goes further. Under international humanitarian law, "[e]nemy combatants do not have to pose a specific threat at the time they are targeted, nor do state agents have to attempt to arrest them before killing them."<sup>116</sup> In short, international humanitarian law

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<sup>113</sup> See, e.g., U.N. High Comm'r for Human Rights, *Human Rights Standards and Practice for the Police*, 34, U.N. Doc. HR/P/PT/5/Add.3 (2004); INT'L COMM. OF THE RED CROSS, *THE USE OF FORCE IN LAW ENFORCEMENT OPERATIONS 2* (2015), <https://www.icrc.org/en/download/file/12747/the-use-of-force-in-law-enforcement-icrc-eng.pdf> [<https://perma.cc/DL6E-P6FD>].

<sup>114</sup> For example, the Inter-American Commission on Human Rights held that a thirty-hour battle between a state and an insurgent group constituted a NIAC due to the intensity of the fighting. *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. ¶¶ 147, 154-56 (1997).

<sup>115</sup> Hathaway, Crootof, Levitz, Nix, Perdue, Purvis & Spiegel, *supra* note 103, at 1926.

<sup>116</sup> *Id.* at 1927; see also Michael N. Schmitt, *Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'*, 24 EUR. J. INT'L L. 855, 860 (2013). *But see* Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819, 824-826 (2013).

recognizes the right of states engaged in armed conflict to kill enemy combatants, subject to humanitarian exceptions.<sup>117</sup>

The dividing line between international human rights law and international humanitarian law affects civilians as well. The latter “permits state agents to kill noncombatant civilians in the course of attacking enemy combatants as long as the attack is aimed at a concrete and direct military objective and the resulting harm to civilians is necessary and proportionate to that objective.”<sup>118</sup> Additionally, international humanitarian law arguably permits states to target civilians who are “directly participating in hostilities,”<sup>119</sup> even if they are not members of the organized non-state actor.

To be sure, a variety of constraints limit the use of lethal force under international humanitarian law. These constraints include distinction, necessity, and proportionality. The principle of necessity in international humanitarian law, for example, permits the use of force only to the extent that it “is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”<sup>120</sup> The proportionality requirement prohibits attacks when “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof . . . would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>121</sup> Moreover, commanders must “take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.”<sup>122</sup> This requires commanders to take steps to protect civilian life even when an attack is proportionate.

Notwithstanding these important limitations on the use of force in armed conflict, it is clear that the limitations differ from—and are sometimes less protective than—those imposed by human rights law. These differences can have consequences for individuals on the ground in conflict zones and thus illustrate the importance of maintaining the intensity threshold even in consent-based interventions.

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<sup>117</sup> See, e.g., 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 164-70 (reprt. 2009).

<sup>118</sup> Hathaway, Crootof, Levitz, Nix, Perdue, Purvis & Spiegel, *supra* note 103, at 1927.

<sup>119</sup> NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 69 (2009).

<sup>120</sup> *Id.* at 79.

<sup>121</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(5)(b), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

<sup>122</sup> HENCKAERTS & DOSWALD-BECK, *supra* note 117, at 56-58.

## B. Detention

The intensity threshold also shapes a state's ability to detain suspected members of an organized non-state actor without derogating from human rights agreements.<sup>123</sup> Although scholars continue to debate whether international humanitarian law authorizes detention in NIACs, they agree that international humanitarian law regulates detention when it occurs—and, moreover, that these rules differ from those under international human rights law. Here, we briefly explore the different rules of the two bodies of law to once again illustrate the stakes of applying the intensity threshold in NIACs.

### 1. International Human Rights Law

International human rights law guarantees the right to liberty and constrains states' ability to detain individuals.<sup>124</sup> First, it prohibits states from "arbitrarily" detaining individuals,<sup>125</sup> requiring that the basis for detention be established in law and safeguarded by procedural protections.<sup>126</sup> Second, several multilateral human rights conventions require states to promptly inform arrested and detained persons of the reasons for the arrest and detention;<sup>127</sup> they also require states to bring detainees before a court for either timely trial or release.<sup>128</sup> Third, these conventions also confer on detainees the right to a fair trial.<sup>129</sup> With some narrow exceptions,<sup>130</sup> this requires a criminal trial that entitles the detainees to a public hearing before

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<sup>123</sup> There is a clear distinction between a state's detention authority under human rights law and under international humanitarian law governing international armed conflicts (conflicts between two or more states). *See* Hathaway, Crootof, Levitz, Nix, Perdue, Purvis & Spiegel, *supra* note 103, at 1930-35.

<sup>124</sup> *See, e.g.*, American Convention, *supra* note 105, art. 7 (securing the "right to personal liberty"); ICCPR, *supra* note 98, art. 9 (providing the "right to liberty and security of person"); European Convention, *supra* note 105, art. 5 (outlining the "right to liberty and security").

<sup>125</sup> American Convention, *supra* note 105, art. 7(3); ICCPR, *supra* note 98, art. 9(1); European Convention, *supra* note 105, art. 5(1).

<sup>126</sup> U.N. Human Rights Comm., General Comment No. 35: Liberty and Security of Person (Article 9), ¶ 11, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014). Moreover, the U.N. Human Rights Committee interprets the prohibition against arbitrary detention "to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality." *Id.* ¶ 12 (footnote omitted).

<sup>127</sup> American Convention, *supra* note 105, art. 7(4); ICCPR, *supra* note 98, art. 9(2); European Convention, *supra* note 105, art. 5(2).

<sup>128</sup> American Convention, *supra* note 105, art. 7(5); ICCPR, *supra* note 98, art. 9(3); European Convention, *supra* note 105, art. 5(3).

<sup>129</sup> American Convention, *supra* note 105, art. 8; ICCPR, *supra* note 98, arts. 9(4), 14(1); European Convention, *supra* note 105, art. 6(1).

<sup>130</sup> Detention without trial is permissible in some cases pending trial, for reasons related to the detainee's physical or mental health and for reasons related to immigration. *See* Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II.116, doc. 5 rev. ¶¶ 118, 124 (2002) (allowing the deprivation of liberty without trial in limited, pre-legislated circumstances).

an impartial tribunal, the right to be informed of charges against them,<sup>131</sup> the right to defend themselves,<sup>132</sup> the right to an interpreter,<sup>133</sup> the right to cross-examine witnesses,<sup>134</sup> the presumption of innocence until proven guilty,<sup>135</sup> the right to appeal,<sup>136</sup> the right to appointed counsel,<sup>137</sup> and the right to prepare a defense.<sup>138</sup> The regional European and American human rights instruments include similar protections.<sup>139</sup>

In short, international human rights law allows the state to detain an individual only when the basis for that detention is established by law, is subject to substantial procedural protections, and comports with broader principles of justice.

## 2. International Humanitarian Law

There is debate about the precise scope of detention authority under international humanitarian law governing NIACs. Despite this continuing debate, it is clear that the law regulates detention authority far differently than does international human rights law.

International humanitarian law distinguishes between detention of combatants and civilians. When a state captures members of the enemy's armed forces, it is entitled to intern them as prisoners of war (POWs) without trial for the duration of the conflict.<sup>140</sup> POW status immunizes detainees from lawful combat activities<sup>141</sup> and allows post-conflict detention only when a detainee has been convicted of a war crime or of crimes committed during internment.<sup>142</sup> POW

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<sup>131</sup> ICCPR, *supra* note 98, art. 14(3)(a).

<sup>132</sup> *Id.* art. 14(3)(d).

<sup>133</sup> *Id.* art. 14(3)(f).

<sup>134</sup> *Id.* art. 14(3)(e).

<sup>135</sup> *Id.* art. 14(2).

<sup>136</sup> *Id.* art. 14(5).

<sup>137</sup> *Id.* art. 14(3)(d).

<sup>138</sup> *Id.* art. 14(3)(b).

<sup>139</sup> See American Convention, *supra* note 105, art. 8 (outlining minimum guarantees provided to each person accused of a criminal offense); European Convention, *supra* note 105, art. 6 (securing the right to be presumed innocent, have access to counsel, use an interpreter, receive adequate time to prepare, and examine witnesses).

<sup>140</sup> See Geneva Convention Relative to the Treatment of Prisoners of War art. 21, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] (providing guidelines for the treatment of Prisoners of War).

<sup>141</sup> See *id.* art. 23 (forbidding Detaining Powers from sending a POW to "areas where he may be exposed to the fire of the combat zone").

<sup>142</sup> See *id.* arts. 95–96, 99, 103–07 (permitting POWs to be tried or sentenced only for acts forbidden by local domestic law or by international law); see also Additional Protocol I, *supra* note 121, art. 75(4)(d) (requiring that POWs be "presumed innocent until proved guilty according to law"); Additional Protocol II, *supra* note 32, art. 6(5) (requiring the "authorities in power" to "endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict").

status also entitles detainees to decline to answer questions.<sup>143</sup> A state in international armed conflict may detain civilians as well, but only in instances where “security . . . makes it absolutely necessary”<sup>144</sup> or for “imperative reasons of security.”<sup>145</sup> In such instances, civilians are entitled to have a competent tribunal review the basis for their internment.<sup>146</sup> Because they do not benefit from POW immunity, civilian detainees may be tried and detained for crimes committed pursuant to their participation in hostilities.<sup>147</sup> In such cases, the state is constrained by some procedural guarantees, but these guarantees are limited vis-à-vis the constraints of human rights law; for example, a military tribunal, rather than a civilian court, may hear the case, and there is no right to appointed counsel for the defendant.<sup>148</sup>

While the international humanitarian law governing international armed conflict clearly confers detention authority to states, the international humanitarian law governing NIACs presents a trickier case. Indeed, as one commentator has explained, this area of law “is utterly silent on the question of who can be interned, for what reasons, for how long and in accordance with which procedures.”<sup>149</sup> This silence has spurred efforts to articulate principles governing detention in a NIAC,<sup>150</sup> and there is significant scholarly debate about how to read the absence of any explicit authorization or prohibition on detention in international humanitarian law governing NIACs.<sup>151</sup> On one side, scholars argue that the treaty- and custom-based international humanitarian law of NIACs does include such implicit power distinct from detention

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<sup>143</sup> In response to questioning, POWs need only respond with their name, rank, serial number, and date of birth. Geneva Convention III, *supra* note 140, art. 17.

<sup>144</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>145</sup> *Id.* art. 78.

<sup>146</sup> *Id.* arts. 43, 78 (requiring a court or administrative board to review the internment at least two times per year).

<sup>147</sup> *Id.* arts. 71–74 (permitting arrest for actions “which, according to the law of the occupied State, would have justified extradition in time of peace”).

<sup>148</sup> *Id.* art. 66 (permitting the Occupying Power to “hand over the accused to its properly constituted, non-political military courts”).

<sup>149</sup> ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNMENT IN ARMED CONFLICT 451 (2013).

<sup>150</sup> See generally THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INT’L MILITARY OPERATIONS: PRINCIPLES & GUIDELINES (2012), <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf> [<https://perma.cc/AU4X-7RN2>] [hereinafter COPENHAGEN PROCESS] (outlining “principles to guide the implementation of . . . existing obligations with respect to detention in international military operations”).

<sup>151</sup> This Article necessarily includes an abbreviated discussion of the debate. For a detailed analysis, see YALE LAW SCH. CTR. FOR GLOB. LEGAL CHALLENGES, STATE RESPONSIBILITY FOR NON-STATE ACTORS THAT DETAIN IN THE COURSE OF A NIAC 3-11 (2015), [https://www.law.yale.edu/system/files/yls\\_glc\\_state\\_responsibility\\_for\\_nsas\\_that\\_detain\\_2015.pdf](https://www.law.yale.edu/system/files/yls_glc_state_responsibility_for_nsas_that_detain_2015.pdf) [<https://perma.cc/AD75-USH5>].

authority established under domestic law.<sup>152</sup> In particular, this camp argues that “the legal basis for status-based detention is both implicit in the scheme of [Common Article 3] and [the Second Additional Protocol]” and that customary international humanitarian law governs detention in a NIAC.<sup>153</sup> These scholars have argued, for example, that customary international humanitarian law allows status-based detention in NIACs.<sup>154</sup>

On the other side of the debate, the English Court of Appeals and several scholars suggest that the international humanitarian law of NIACs does not include any independent detention authority.<sup>155</sup> Moreover, representatives

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<sup>152</sup> See, e.g., Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 INT'L L. STUD. 60, 93 (2015) (arguing that a legal basis for detention can be found in treaties and customary law); Sean Aughey & Aurel Sari, *IHL Does Authorise Detention in NIAC: What the Sceptics Get Wrong*, EJIL: TALK! (Feb. 11, 2015), <http://www.ejiltalk.org/ihl-does-authorise-detention-in-niac-what-the-sceptics-get-wrong> [<https://perma.cc/FBX9-2UX7>] [hereinafter Aughey & Sari, *International Humanitarian Law*] (arguing that “the legal basis for status-based detention is both implicit in the scheme of CA3 and AP II . . . and founded in customary international law”); Kubo Mačák, *No Legal Basis Under IHL for Detention in Non-International Armed Conflicts? A Comment on Serdar Mohammed v. Ministry of Defence*, EJIL: TALK! (May 5, 2014), <http://www.ejiltalk.org/no-legal-basis-under-ihl-for-detention-in-non-international-armed-conflicts-a-comment-on-serdar-mohammed-v-ministry-of-defence> [<https://perma.cc/9UPP-6ZMF>] (arguing that “the best of the three possible conceptualisations of the applicable provisions is that they provide an implied permission to detain in NIACs”); cf. CHATHAM HOUSE & INT'L COMM. OF THE RED CROSS, EXPERT MEETING ON PROCEDURAL SAFEGUARDS FOR SECURITY DETENTION IN NON-INTERNATIONAL ARMED CONFLICT 1, 3-4 (2008), <https://www.icrc.org/eng/assets/files/other/security-detention-chatham-icrc-report-091209.pdf> [<https://perma.cc/W5NT-7A9C>] (describing a group of experts convened by Chatham House and the International Committee of the Red Cross who “quite easily” agreed that although there is no right to detain in NIAC, international humanitarian law contains an “inherent power . . . to intern” that belongs to “any party to a NIAC”).

<sup>153</sup> Aughey & Sari, *International Humanitarian Law*, *supra* note 152.

<sup>154</sup> *Id.*

<sup>155</sup> See, e.g., *Mohammed v. Ministry of Def.* [2014] EWHC (QB) 1369, [239]–[268] (Eng.) (refusing to accept arguments that “IHL provides a legal basis for detention by UK armed forces operating in Afghanistan”); Ryan Goodman, *Authorization vs. Regulation of Detention: What Serdar Mohammed v. MoD Got Right and Wrong*, JUST SECURITY (Feb. 5, 2015, 8:15 AM), <https://www.justsecurity.org/19755/authorization-vs-regulation-detention-serdar-mohammed-v-mod-wrong> [<https://perma.cc/QA55-ADY8>] (“[I]nternational human rights, as a body of law, does not provide the source of authority to detain.”); Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, EJIL: TALK! (May 7, 2014), <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts> [<https://perma.cc/QC65-DBFG>] (“If either the applicable treaty provisions or customary international law could be said to provide a legal basis for detention in NIACs, one would expect practice generally to confirm this. This does not, however, seem to be the case.”); Lawrence Hill-Cawthorne & Dapo Akande, *Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari*, EJIL: TALK! (June 2, 2014), <http://www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari> [<https://perma.cc/QRK3-L8Y4>] (arguing that there is “a distinction between authorising and not prohibiting conduct in international law”); Jonathan Horowitz, *Guest Post: IHL Doesn't Regulate NIAC Internment—A Drafting History Perspective*, OPINIO JURIS (Feb. 9, 2015, 8:41 AM), <http://opiniojuris.org/2015/02/09/guest-post-ihl-doesnt-regulate-niac-internment-drafting-history-perspective> [<https://perma.cc/AJ4T-48YD>] (arguing that the drafting record of the IHL

from several states and international bodies participated in the so-called Copenhagen Process in an attempt “to develop principles to guide the implementation of the existing obligations with respect to detention in international military operations,”<sup>156</sup> which might be viewed as implicitly suggesting that international humanitarian law does not authorize detention in NIACs. According to scholars and courts in this camp, the state may still detain individuals in a NIAC, but its authority to do so is derived from its domestic law and thus subject to human rights law constraints.

In short, the extent to which the intensity threshold affects the state’s detention authority depends on one’s view of this unsettled debate. To the extent that the former group is correct, the state’s authority to detain members of the organized non-state actor increases significantly once a NIAC is established and may mirror the detention authority of international armed conflicts.

To be sure, a state can derogate from some (but not all) international human rights law commitments regarding detention, whether or not it is in a NIAC;<sup>157</sup> however, derogation must be proclaimed openly, notice must be given to the relevant international bodies, and derogation is only permissible with proper justification due to public emergency.<sup>158</sup> As a result, states are often reticent to derogate as a functional matter, depending on the intricacies of the political situation on the ground.

In sum, although the debate over the precise rules that govern detention in a NIAC remains unsettled, the different rules governing detention in international humanitarian law and international human rights law illustrate the importance of the intensity threshold’s distinction between NIACs and ordinary violence.<sup>159</sup>

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indicates “an overarching IHL structure that resisted bringing IAC internment rules into the IHL of NIAC”).

<sup>156</sup> COPENHAGEN PROCESS, *supra* note 150, ¶ II.

<sup>157</sup> States may derogate from certain detention norms. *See, e.g.,* *Lawless v. Ireland (Merits)*, 1961 Eur. Ct. H.R. (ser. A) at 62. Other norms, such as habeas corpus, are non-derogable. *See, e.g., Customary IHL Rule 99. Deprivation of Liberty*, INT’L COMMITTEE RED CROSS, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule99](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule99) [<https://perma.cc/ZFK9-6RKC>] (describing habeas corpus as an essential right that is non-derogable under the American Convention on Human Rights).

<sup>158</sup> *See, e.g.,* ICCPR, *supra* note 98, art. 4 (allowing states to derogate from their obligations in “time of public emergency”); European Convention, *supra* note 105, art. 15 (allowing limited derogations from the Convention during times of emergency, “provided that such measures are not inconsistent with [a state’s] other obligations under international law”); U.N., Econ. & Soc. Council, Human Rights Comm., *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN/4/1985/4, annex (Sept. 28, 1984) (outlining circumstances in which derogation is permitted and providing guidelines for such derogation); U.N. Human Rights Comm., General Comment No. 29, Article 4: Derogations During a State of Emergency, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (limiting a state’s measures derogating from its obligations “to the extent strictly required by the exigencies of the situation”).

<sup>159</sup> For more such examples, see Hathaway, Crootof, Levitz, Nix, Perdue, Purvis & Spiegel, *supra* note 103, at 1930-35.

#### IV. CLOSING THE LOOPHOLE

Having described a potential loophole raised by consent-based interventions and its associated dangers, we now consider how best to close the loophole. We argue that both states involved in an extraterritorial conflict have an independent obligation to evaluate whether the intensity threshold has been met when deciding what level of force may appropriately be used against an organized non-state actor. A host state must determine what legal regime governs to know to what actions it may lawfully give its consent. At the same time, an intervening state must evaluate whether the consent given is a manifest violation of the host state's human rights obligations to individuals in its territory.

Where violence between the host state and an organized non-state actor has not satisfied the intensity threshold, the intervening state may still use force, but it must do so consistent with the human rights obligations of the host state. Both states may still use the full panoply of law enforcement tools that states deploy to address violent threats that do not constitute armed conflicts situations.

This approach is rooted in principles of international law: International humanitarian law and international human rights law are both designed, at their core, to protect the dignity and fundamental rights of persons. It would therefore undermine both if the interaction of the two bodies of law created a legal vacuum. The approach offered here relies, moreover, on simple logic: states cannot give away what they do not possess, particularly when doing so has the effect of undermining fundamental commitments of international law.

##### *A. How to Close the Loophole: Independent Obligations to Evaluate the Lawfulness of Consent*

###### 1. Limits on the Host State's Ability to *Give* Consent

States are required to safeguard the human rights of individuals in their territory. The Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights found, respectively, that the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights include positive obligations on states to protect individuals' right to life, including an obligation to protect individuals from terrorism and violence by non-state actors.<sup>160</sup>

Accordingly, as a legal matter, a state may not lawfully consent to actions that would violate the human rights of the very people the state is supposed

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<sup>160</sup> See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, HUMAN RIGHTS, TERRORISM AND COUNTER-TERRORISM 8 nn.10-12 (2007), <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> [<https://perma.cc/79XS-ALJY>] (surveying the approach of various international organizations to the right to life).

to protect.<sup>161</sup> As the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions has observed,

States cannot consent to the violation of their obligations under international humanitarian law or international human rights law. A State that consents to the activities of another State on its territory remains bound by its own human rights obligations, including to ensure respect for human rights and thus to prevent violations of the right to life, to the extent that it is able to do so.<sup>162</sup>

This positive obligation to safeguard human rights includes the responsibility to withhold consent to uses of military force that would be unlawful in situations that do not meet the intensity threshold and therefore do not constitute armed conflicts.<sup>163</sup>

A state should be prohibited from consenting to an action it cannot lawfully take itself because a state cannot delegate authority it does not have. If it were to do so, that should be considered a breach of its human rights obligations. This approach has an intuitive, logical appeal. Indeed, the principle that no one can transfer a greater right than one holds—*nemo plus iuris ad alium transferre potest, quam ipse habet*—undergirds many legal regimes.<sup>164</sup> Just as a principal cannot delegate authority to an agent that the principal does not have, a host state cannot grant an extraterritorial state permission to act in contravention of the host state’s human rights obligations.

While admittedly sparse in this area, case law supports the principle that a state’s consent cannot exceed its own authority. In *Kadi v. Council*, the Court of First Instance of the European Communities stated, “By concluding [that the Treaty establishing the European Economic Community] between them[, Member States] could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under [the

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<sup>161</sup> See ICCPR, *supra* note 98, art. 2(1) (requiring states to ensure that their citizens receive the rights guaranteed by the ICCPR); see also U.N. Human Rights Comm., General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (requiring states to “adopt legislative, judicial, administrative, educative, and other appropriate measures in order to fulfil[] their legal obligations”).

<sup>162</sup> Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. on Extrajudicial, Summary or Arbitrary Executions*, ¶ 38, U.N. Doc. A/68/382 (Sept. 13, 2013).

<sup>163</sup> Louise Doswald-Beck, *Unexpected Challenges: The Increasingly Evident Disadvantage of Considering International Humanitarian Law in Isolation*, 11 SANTA CLARA J. INT’L L. 1, 11 (2012) (“[A] State has human rights obligations toward those within its jurisdiction and normally extra-judicial executions are a violation of the right to life. . . . Asking or allowing another State to attack . . . is a violation of the asking State’s human rights obligations, and the attacking State is complicit in that violation.” (footnote omitted)).

<sup>164</sup> Terry D. Gill, *Military Intervention with the Consent or at the Invitation of a Government*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 253 & n.7 (Terry D. Gill & Dieter Fleck eds., 2d ed. 2015).

United Nations] Charter.”<sup>165</sup> Following a similar principle, in *Soering v. United Kingdom*, the European Court of Human Rights prevented the transfer of a juvenile from the United Kingdom to the United States because of the possibility that the juvenile might face the death penalty in violation of U.K. human rights commitments.<sup>166</sup> According to Deeks, this decision exemplifies the European Court of Human Rights’ doctrine that “a Council of Europe member state may not consent to certain actions (or risk of actions) by another state that the member state itself could not undertake.”<sup>167</sup>

The few scholars who have considered related issues reach similar conclusions. Deeks argues that “[c]onsent—at least when it is used to affect legal relationships—generally contemplates a transfer only of those rights, privileges, powers, or immunities that the consenting entity itself possesses.”<sup>168</sup> For support, she points to property law,<sup>169</sup> contract law,<sup>170</sup> agency law,<sup>171</sup> and the separation-of-powers doctrine.<sup>172</sup> Terry Gill concurs, writing that a state’s inability to consent to more than it can do is “a logical consequence of the fact that a State’s government may not grant more authority than it itself possesses under international law.”<sup>173</sup> Michael Schmitt has also intimated this argument in discussing the use of drones in Pakistan.<sup>174</sup> By implicitly limiting the scope of consent before an armed conflict to circumstances in which the host state “requests the other state’s assistance in complying with its obligation to police its own territory” or “seeks assistance with its own law enforcement operation against terrorists,” Schmitt suggests that a state cannot consent to an action it could not itself lawfully take.<sup>175</sup>

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<sup>165</sup> Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-3659, ¶ 195; *see also* Deeks, *supra* note 7, at 33 n.134 (discussing *Kadi*).

<sup>166</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 44-45 (1989); *see also* Deeks, *supra* note 7, at 34 n.137 (discussing *Soering*).

<sup>167</sup> Deeks, *supra* note 7, at 34.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 34 n.136 (citing the common law property rule of *nemo dat quod non habet*).

<sup>170</sup> *Id.* (quoting Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 292 (1986) for the proposition that “the enforceability of all agreements is limited by what rights are capable of being transferred from one person to another”).

<sup>171</sup> *Id.* (quoting W. EDWARD SELL, *SELL ON AGENCY* 8 (1975) for the proposition that “[i]n general, a principal can authorize an agent to perform any act or enter into any transaction which he himself could do, and with the same results and legal consequences”).

<sup>172</sup> *Id.* (quoting *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447, 450 (W.D. Wash. 1978) for the proposition that “the rule-making power delegated by Congress to the Supreme Court is limited in scope to those which Congress could have rightfully exercised”).

<sup>173</sup> Gill, *supra* note 164, at 253.

<sup>174</sup> *See* CHATHAM HOUSE, *MEETING SUMMARY: INTERNATIONAL LAW AND THE USE OF DRONES* 6 (2010), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il2110iodrones.pdf> [<https://perma.cc/Y7XM-DHHQ>] (summarizing Schmitt’s comments).

<sup>175</sup> *Id.*; *see also id.* (observing that, in law enforcement operations, human rights law applies); John Lawrence Hargrove, *Intervention by Invitation and the Politics of the New World Order* (“In general, conduct involving the threat or use of force by one state, in derogation of the sovereign prerogatives of another, is unlawful. Such conduct may, however, be made lawful by the consent of the latter state—provided it does

In situations where a host state cannot use force itself, it cannot lawfully consent to the use of force by an intervening state to sidestep its international human rights obligations.<sup>176</sup> But what are the intervening state's obligations if a host state ignores this rule and nevertheless consents to unlawful uses of force against organized non-state actors in its territory?

## 2. Limits on the Intervening State's Ability to *Accept* Consent

The intervening state's ability to presume valid consent should be limited. An intervening state should continue to be permitted to assume valid consent under the host state's domestic law: it need not "look under the hood" to determine if the host state's consent was made via the legitimate domestic law processes. However, an intervening state can be expected to recognize manifest violations of shared international human rights law obligations, and it should be held internationally responsible if it contributes to such violations by acting pursuant to consent given in manifest violation of those obligations.

### a. *Requirement to Assess Consistency of Consent with International Law*

Treaty and customary law indicate that reliance on consent is not justified when such reliance would clearly aid a state in violating its human rights obligations.<sup>177</sup> The Vienna Convention on the Law of Treaties recognizes that states may not invariably presume that another state's consent is valid; the Draft Articles on State Responsibility (Draft Articles) emphasize that states may not facilitate others' commission of internationally wrongful acts.<sup>178</sup> Taken together, these authorities suggest that intervening states have an obligation

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not entail activities which would have been unlawful by the latter state if acting alone. (The last point has nothing peculiarly to do with forcible intervention, but follows from the fact that states, being sovereign, have the capacity to consent to restrictions on their sovereign rights if they find it useful to do so, and that moreover, they can lawfully do together what—but only what—one of them might lawfully do alone.)" (emphasis omitted)), in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 113, 116-17 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

<sup>176</sup> See, e.g., Deeks, *supra* note 7, at 27-32 (arguing that a state should not ask another state to use levels of force that the requesting state is not permitted to use); Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 267 (1999) ("International law is designed to make each state responsible for the human rights protection of its own population . . .").

<sup>177</sup> Deeks has observed, "An overriding goal in developing international human rights law over the last half-century has been to respond to perceived inadequacies in the way states protect individual rights under their own laws. As a result, it has been salutary to rely on . . . [un-interrogated] consent to allow new international legal protections to trump inconsistent domestic laws." Deeks, *supra* note 7, at 11 (footnote omitted).

<sup>178</sup> The Draft Articles are non-binding; they purport "to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States." Draft Articles, *supra* note 80, at 59. The ICJ has recognized Article 16 as reflecting customary international law, while the status of Article 41(2) has not been resolved. HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 3, 343 (2011).

to avoid becoming instruments, via consent, of a host state's breach of international law.

Article 46 of the Vienna Convention provides that consent cannot be presumed valid when it is given in violation of the consenting state's laws and "that violation was manifest and concerned a rule of its internal law of fundamental importance."<sup>179</sup> Article 46 further states that "[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."<sup>180</sup> The "manifest and fundamentally important" language also appears in the Draft Articles on the Law of Treaties Between States and International Organizations or Between International Organizations.<sup>181</sup> If the intensity threshold has not been met, it should be "objectively evident to any State conducting itself in the matter" that force may not be used pursuant to international humanitarian law, regardless of the host state's consent.

In such situations, intervening states must avoid aiding the host state in its attempt to evade its human rights law obligations. Article 16 of the Draft Articles provides:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.<sup>182</sup>

The Commentary to the Draft Articles explains that Article 16 applies to situations in which "a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question."<sup>183</sup> Article 16 is therefore not directly applicable to consent-based intervention—it anticipates a situation in which the third-party state plays a facilitating, rather than active role, and it only applies when the third-party state could not lawfully take the action itself. Nonetheless, it highlights that states must refrain from knowingly enabling the breach of another state's international law obligations and implies that situations will occur in which one state has been able to appraise itself of another state's international

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<sup>179</sup> Vienna Convention, *supra* note 83, art. 46(1).

<sup>180</sup> *Id.* art. 46(2).

<sup>181</sup> Draft Articles on the Law of Treaties Between States and International Organizations or Between International Organizations with Commentaries art. 46, *in* Int'l Law Comm'n, Rep. on the Work of Its Thirty-Fourth Session, U.N. Doc. A/37/10 (1982) [hereinafter IO Treaties Commentaries].

<sup>182</sup> Draft Articles, *supra* note 80, art. 16.

<sup>183</sup> *Id.* art. 16 cmt. 1.

obligations. Commentary to Article 16, for example, points to General Assembly Resolution 3314, which defines unlawful aggression to include a situation in which a state “allow[s] its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.”<sup>184</sup> The Commentary also emphasizes the unlawfulness of knowingly facilitating human rights violations:

[A] State may incur responsibility if it . . . provides material aid to a State that uses the aid to commit human rights violations. . . . [T]he particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.<sup>185</sup>

Article 41 of the Draft Articles also imposes liability on third-party states who assist in “serious breaches”:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.<sup>186</sup>

Article 41 is more limited in its application than Article 16, but in those more limited situations, it holds states to a higher standard. While Article 16 applies to any internationally wrongful act, Article 41 applies only to “serious breach[es] by a State of an obligation arising under a peremptory norm of general international law.”<sup>187</sup> These are defined as involving “a gross or systematic failure by the responsible State to fulfil[1] the obligation.”<sup>188</sup> What counts as a peremptory norm is not firmly established, but there is reason to believe that they are violated by inappropriate uses of force. In *Barcelona Traction*, the International Court of Justice (ICJ) recognized prohibitions on acts of international aggression and genocide, and “principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”<sup>189</sup> The prohibition against torture<sup>190</sup> and the

<sup>184</sup> G.A. Res. 3314 (XXIX), art. 3(f) (Dec. 14, 1974).

<sup>185</sup> Draft Articles, *supra* note 80, art. 16 cmt. 9.

<sup>186</sup> *Id.* art. 41(1)–(2).

<sup>187</sup> *Id.* art. 40(1).

<sup>188</sup> *Id.* art. 40(2).

<sup>189</sup> *Barcelona Traction, Light & Power Co. (Second Phase) (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5).

<sup>190</sup> See AUST, *supra* note 178, at 36; see also Abass, *supra* note 78, at 212 (stating that the prohibition against torture has become a peremptory norm).

right to self-determination<sup>191</sup> also are likely peremptory norms. In the context of the use of force, it is also likely that the arbitrary deprivation of life violates a peremptory norm.<sup>192</sup> If a peremptory norm is at stake, a state must neither recognize the situation creating its violation nor assist in its violation. Unlike Article 16, Article 41 does not ask whether the act would be wrongful if committed by the assisting state, and it does not contain a “knowing” standard.

Two ICJ advisory opinions clarify the duty of states not to recognize an unlawful situation. In the *Namibia* case,<sup>193</sup> the ICJ found that U.N. Member States had an obligation not to enter into treaties with South Africa that recognized its unlawful claim to its former territory Namibia.<sup>194</sup> In the *Wall* case, the ICJ explained that states had an obligation “not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory.”<sup>195</sup> Under the nonrecognition standard set by these cases, states are required to deny legal effect to state actions that are in violation of *jus cogens*.<sup>196</sup> If states must treat such violations as “null and void,”<sup>197</sup> then by extension states cannot give legal weight to consent to a serious breach of a peremptory norm.

b. *Complying with the Obligation in Practice*

States do not have a general obligation to inquire into the validity of consent as a matter of the consenting state’s domestic law, but they also cannot be willfully blind to the obvious.<sup>198</sup> Violations of *jus cogens* are per se obvious,

191 See Zaha Hassan, *Building Walls and Burning Bridges: Legal Obligations of the United States with Respect to Israel’s Construction of the Wall of Separation in Occupied Palestinian Territory*, 13 WILLAMETTE J. INT’L L. & DISP. RESOL. 197, 200 (2005) (listing self-determination as a right belonging to the Palestinian people); David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 619 (1995) (stating that self-determination is “embodied in the UN Charter”). The scope and meaning of the right to self-determination, however, remain ambiguous and contested. For a discussion of the legal status of self-determination, see Zora Ahmed, *Strengthening Standards for Consent: The Case of U.S. Drone Strikes in Pakistan*, 23 MICH. ST. INT’L L. REV. 459, 472-78 (2015).

192 See SHAH, *supra* note 97, at 86-87 (arguing that drone strikes may violate *jus cogens* and, as a result, that consent to such strikes may be void under Article 26 of the Draft Articles and Article 53 of the Vienna Convention); see also Eliav Lieblich, *Quasi-Hostile Acts: The Limits on Forcible Disruption Operations Under International Law*, 32 B.U. INT’L L.J. 101, 145 (2014) (stating that the right to life is non-derogable).

193 Legal Consequences for States of Continued Presence of South Africa in Namibia (Sw. Africa) Notwithstanding Sec. Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

194 AUST, *supra* note 178, at 308-09, 332-33.

195 Legal Consequences of Constr. of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 159 (July 9).

196 See Lea Brilmayer & Isaias Yemane Tesfalidet, *Third State Obligations and the Enforcement of International Law*, 44 N.Y.U. J. INT’L L. & POL. 1, 30 (2011) (“In some circumstances, it might be argued, the actions of a State are so completely contrary to international law as to have no legal effect.”).

197 *Id.*

198 Deeks proposes a “duty to inquire,” which may be a somewhat higher standard. Deeks, *supra* note 7, at 35-38.

and even in the absence of *jus cogens* violations, the consent-receiving state must not willfully ignore facts that suggest the host state's consent was given in violation of its international law obligations.

This obligation requires the intervening state to independently and objectively determine whether the host state is engaged in a NIAC with the organized non-state actor. Below the intensity threshold, the host state must comport itself under a law enforcement framework and, by extension, so must the intervening state. When a NIAC exists, the host state may lawfully consent to any action that it could itself take under international humanitarian law. Operating within the lawful bounds of the host state's consent, the intervening state may treat members of the organized non-state group as belligerents. Consider, for example, that the United States has engaged in drone strikes against non-state actors such as al Qaeda in the Arabian Peninsula and al-Shabaab. Even if the United States is not engaged in a NIAC with these groups, the valid consent from Yemen and Somalia, who are engaged in a NIAC with these non-state actors, allows the United States to treat members as combatants instead of civilians.<sup>199</sup>

In summary, the intervening state's actions are limited by its own human rights obligations, to the extent that they apply extraterritorially;<sup>200</sup> the host state's actual consent, to the extent it contains any conditions or limitations; and the manifest limits on the validity of the host state's consent given peremptory norms of international law.

### B. *Why Closing the Loophole Is "Good Law"*

Using the 2016 Oregon standoff as a case study, this Section shows that recognizing the applicability of the intensity threshold to consent-based interventions is consistent with common sense and general principles of international law. Moreover, respecting the threshold does not prevent states from effectively responding to threats posed by organized non-state actors.

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<sup>199</sup> See, e.g., Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SECURITY J. 225, 281-83, 281 n.129 (2014) ("[T]he U.S. may be operating within a given territorial state, such as Yemen or Pakistan, with that state's consent. That consent may take the form of inviting the U.S. to support that nation in its own preexisting NIAC with a particular purported branch or associated force of al Qaeda or the Taliban."); Michael N. Schmitt, *Narrowing the International Law Divide: The Drone Debate Matures*, 39 YALE J. INT'L L. ONLINE 1, 6 (2014) ("Targeting the Afghan and Pakistani Taliban comprises assistance to Afghanistan and Pakistan in their respective NIACs with those groups. Targeting al Qaeda assets is an aspect of a separate NIAC between the United States and the organization.").

<sup>200</sup> See *supra* Section II.C.

1. The Oregon Standoff: Highlighting the Importance of the Intensity Threshold in NIACs

On the morning of January 2, 2016, the headquarters of the Malheur National Wildlife Refuge near Burns, Oregon—a facility managed by the U.S. Fish and Wildlife Service—was empty for the holiday weekend.<sup>201</sup> By that afternoon, a group of armed activists, led by brothers Ammon and Ryan Bundy, had occupied it.<sup>202</sup> The activists announced that “they had as many as 100 supporters with them.”<sup>203</sup> The Bundy name was familiar to many Americans: Ammon and Ryan’s father, rancher Cliven Bundy, had been engaged in a two-decade-long dispute with the federal government over cattle grazing fees on federal land.<sup>204</sup> That dispute had culminated in a standoff in April 2014, during which news media published pictures of Bundy supporters with rifle sights locked on federal agents.<sup>205</sup>

Now, less than two years later, Cliven Bundy’s sons “occupied” a federal building in protest of federal criminal charges against two other ranchers and gave no indication that they would desist.<sup>206</sup> Indeed, Ammon, Ryan, and their supporters made clear that they had a specific goal in mind: to “uphold the Constitution” by securing the relinquishment of the Wildlife Refuge from federal to local control and by ensuring the release of the imprisoned ranchers.<sup>207</sup> Ammon Bundy indicated that the group “plann[ed] on staying [at the Refuge] for years” and would be willing to fight and die for its cause.<sup>208</sup> At least one of the occupiers, LaVoy Finicum, crowed that he would rather die than surrender to the authorities.<sup>209</sup> Another, Jon Ritzheimer, had been tracked by authorities for months preceding the occupation and officially had been called a “potential threat to law enforcement.”<sup>210</sup>

While the Oregon occupiers cited localized concerns, there is little doubt that they represented a broader ideology that questioned the authority of the

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<sup>201</sup> Stack, *supra* note 1.

<sup>202</sup> *Id.*

<sup>203</sup> Zaitz, *supra* note 3.

<sup>204</sup> Jonathan Allen, *After Nevada Ranch Stand-off, Emboldened Militias Ask: Where Next?*, REUTERS (Apr. 17, 2014, 5:37 PM), <http://www.reuters.com/article/us-usa-ranchers-nevada-militia-insight-idUSBREA3G26620140417> [<https://perma.cc/9YXY-P5WJ>].

<sup>205</sup> *See, e.g., id.*

<sup>206</sup> Zaitz, *supra* note 3.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Michael E. Miller, *LaVoy Finicum, Ore. Occupier Who Said He’d Rather Die than Go to Jail, Did Just That*, WASH. POST (Jan. 27, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/01/27/lavoy-finicum-ore-occupier-who-said-hed-rather-die-than-go-to-jail-did-just-that> [<https://perma.cc/93C9-WLUW>].

<sup>210</sup> Peter Holley, *The ‘Unhinged’ Oregon Protester that the FBI Has Been Tracking for Months*, WASH. POST (Jan. 5, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/01/05/why-a-notorious-anti-islam-radical-turned-on-the-federal-government-in-oregon> [<https://perma.cc/J2ML-ND5D>].

federal government on myriad issues.<sup>211</sup> During the same week that the occupation began, the Southern Poverty Law Center issued a report identifying nearly 276 armed militia groups in the United States, a thirty-seven percent increase from 2012.<sup>212</sup> In 2009, the Department of Homeland Security issued an intelligence assessment expressing concern about the potential rise of domestic antigovernment terror<sup>213</sup> and, several months before the Oregon standoff, the Department of Justice created a new position—Domestic Terrorism Counsel—to combat the growing threat.<sup>214</sup>

The armed Oregon standoff, in which occupiers pledged to die before being captured and questioned the authority and legitimacy of the federal government, highlights the importance of an intensity threshold for establishing the existence of a NIAC. Absent such a threshold, the rhetoric of the occupiers, the rise of militias, and the growing threat of domestic terror might have been enough for a government to suggest that it was in a NIAC with the militia group and to operate accordingly. As a practical matter, this would have allowed the government to use military force against the occupiers. If the Wildlife Refuge headquarters were located in an urban area, the absence of an intensity threshold would have perhaps even allowed the government to tolerate some civilian casualties as “collateral damage.”

Instead, with the intensity threshold in place, and human rights law clearly binding below that threshold, the government was legally obligated to act under different constraints. It was only entitled to use progressive force as necessary.<sup>215</sup> The law enforcement authorities waited, negotiated, and set traps to arrest the occupiers.<sup>216</sup> When the standoff ended several weeks after the initial occupation, only Finicum had died, allegedly after drawing a weapon on an FBI agent.<sup>217</sup>

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<sup>211</sup> Thomas, *supra* note 5.

<sup>212</sup> *Id.*; *Antigovernment Militia Groups Grew by More than One-Third in Last Year*, *supra* note 6.

<sup>213</sup> U.S. DEP’T OF HOMELAND SEC., OFFICE OF INTELLIGENCE & ANALYSIS, RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 8 (2009), <http://fas.org/irp/eprint/rightwing.pdf> [<https://perma.cc/HGJ4-YF7U>].

<sup>214</sup> Wesley Bruer, *DOJ Pivots from ISIS to U.S. Anti-government Groups with New Position*, CNN (Oct. 15, 2015, 4:49 PM), <http://www.cnn.com/2015/10/14/politics/justice-department-domestic-terror-council> [<https://perma.cc/8TM9-KFDP>].

<sup>215</sup> See *supra* subsection III.A.1.

<sup>216</sup> Dave Seminara, Richard Pérez-Peña & Kirk Johnson, *Oregon Standoff Ends as Last Militant Surrenders*, N.Y. TIMES (Feb. 11, 2016), <http://www.nytimes.com/2016/02/12/us/oregon-standoff.html> [<https://perma.cc/8R9X-YJVV>].

<sup>217</sup> Kirk Johnson, Julie Turkewitz & Richard Pérez-Peña, *F.B.I. Releases Video Showing Death of Oregon Refuge Occupier*, N.Y. TIMES (Jan. 28, 2016), <http://www.nytimes.com/2016/01/29/us/oregon-standoff.html> [<https://perma.cc/GP9Q-76Q4>]. Ammon and Ryan Bundy were subsequently charged with and acquitted of federal conspiracy and weapons charges in connection with the Oregon standoff; as of October 2016, several other protestors involved in the standoff had pled guilty to federal crimes or were awaiting trial. See Mark Berman, *Ammon Bundy Was Acquitted for the Oregon*

This scenario illustrates the value of applying human rights law below the intensity threshold. Even when organized non-state actors resort to illegal and violent actions against the government, states must take action pursuant to their domestic law and their human rights obligations, rather than pursuant to international humanitarian law, at least before a minimum level of intensity is reached. The intensity threshold separating ordinary anti-state violence from a NIAC prevents ordinary civil disturbances from being treated like a war, preserving civilians' fundamental human rights.

## 2. The Canadians Strike: Highlighting the Importance of the Intensity Threshold in TNIACs

Imagine that President Obama, after determining either that the United States was unwilling or unable to use military force against the occupiers, called Canadian Prime Minister Trudeau to request and consent to the Royal Canadian Air Force taking military action.<sup>218</sup> Alternatively, imagine that Canada, concerned that the insurrection might spread across the border, requested and received U.S. consent to intervene forcefully. Absent the constraints that we advocate above, there would be little to prevent Canada from taking action and, if questioned, leaning on the consent as a legally sufficient justification.

Host state consent, in other words, is not legally sufficient to justify a use of force. Just as the U.S. government could not have ordered an airstrike against the armed Oregon occupiers, the United States could not have lawfully consented to a Canadian bombing raid. Moreover, Canada would be obligated to exercise self-restraint if it ever received such obviously illegitimate consent.

## 3. From Fiction to Reality

The thought of a Canadian bombing raid against U.S. citizens seems so implausible as to be absurd. The United States would never give such permission, and Canada would never accept it. But there are a number of recent, real-world interventions that parallel this hypothetical scenario all too closely.

In just the past few years, Russia conducted air strikes against Syrians at the request of President Bashar al-Assad,<sup>219</sup> Saudi and Emirati troops marched

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*Refuge Takeover. Now He's Facing Another Federal Trial*, WASH. POST (Oct. 28, 2016, 12:04 PM), [https://www.washingtonpost.com/news/post-nation/wp/2016/10/28/ammon-bundy-got-acquitted-for-the-oregon-refuge-takeover-now-hes-facing-another-federal-trial/?utm\\_term=.d56259e54cc1](https://www.washingtonpost.com/news/post-nation/wp/2016/10/28/ammon-bundy-got-acquitted-for-the-oregon-refuge-takeover-now-hes-facing-another-federal-trial/?utm_term=.d56259e54cc1) [<https://perma.cc/KKE6-JC7T>]; Courtney Sherwood & Kirk Johnson, *Bundy Brothers Acquitted in Takeover of Oregon Wildlife Refuge*, N.Y. TIMES (Oct. 27, 2016), <http://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html> [<https://perma.cc/R7PH-YY2V>].

<sup>218</sup> Obviously, this example is offered purely for hypothetical purposes. We do not believe that anything we describe here would have transpired.

<sup>219</sup> *Lawmakers Authorize Use of Russian Military Force for Anti-IS Airstrikes in Syria*, *supra* note 9.

into Bahrain to help put down protests,<sup>220</sup> and European countries continue to press the Libyan government for permission to conduct anti-smuggling naval operations in their territorial waters.<sup>221</sup>

EU operations in Libyan waters would not be the first of their kind. In May 2012, Somalia's government allowed the European Union's anti-piracy force to attack pirate bases on the Somali coast.<sup>222</sup> The European forces engaged in small arms fire from a helicopter in what was "expected to be the first of many [attacks] along the thousands of miles of Somali coastline."<sup>223</sup> The EU had both Somali consent and authorization from the United Nations Security Council.<sup>224</sup> But, as discussed above, a *jus ad bellum* justification does not answer the *jus in bello* inquiry: Had the conflict with Somali pirates crossed the intensity threshold? Was the European Union applying human rights law or international humanitarian law?

Or consider a subset of U.S. targeted killings that some call "side payment strikes."<sup>225</sup> According to these commentators, the United States sometimes agrees to target non-state actors involved in conflict with U.S. allies—but not necessarily with the United States—in exchange for those allies' permission to enter their airspace and strike U.S.-selected targets.<sup>226</sup> Such arrangements are not necessarily illegal; U.S. allies can request and consent to U.S. assistance in fighting their NIACs, and the United States can request and receive permission to enter allies' sovereign borders to strike non-state actors in a NIAC with the United States. But some of these side-payment strikes are not far removed, legally speaking, from the imagined Canadian military strikes on the Bundy brothers.

<sup>220</sup> McEvers, *supra* note 15.

<sup>221</sup> *Curfew Follows Deadly Bahrain Crackdown*, *supra* note 16.

<sup>222</sup> Chris Stephen, *British Warship Sent to Libya to Target People-Smugglers*, *GUARDIAN* (Sept. 3, 2016, 7:05 PM), <http://www.theguardian.com/politics/2016/sep/03/uk-warship-to-tackle-libya-people-smugglers> [<https://perma.cc/M3BT-LGEEK>].

<sup>223</sup> Robert Wright & Katrina Manson, *EU Raid Targets Somali Pirates Onshore*, *FIN. TIMES* (May 15, 2012), <https://www.ft.com/content/bo8d9800-9e7f-11e1-a24e-00144feabdco> [<https://perma.cc/RF2G-73QG>].

<sup>224</sup> *Id.*

<sup>225</sup> S.C. Res. 1851, ¶ 2 (Dec. 16, 2008).

<sup>226</sup> *E.g.*, MARK DANNER, *SPIRAL: TRAPPED IN THE FOREVER WAR* 119 (2016) (internal quotations omitted); Gregory McNeal, *How to Make a Kill-List*, *LAWFARE* (Feb. 25, 2013, 7:05 AM), <https://www.lawfareblog.com/how-make-kill-list> [<https://perma.cc/5U7Z-GY5T>]; Marcy Wheeler, *David Barron and the Other Missing Memos*, *JUST SECURITY* (May 22, 2014, 4:20 PM), <https://www.justsecurity.org/10723/guest-post-david-barron-confirmed-questions-remain> [<https://perma.cc/H9N8-FX48>]; Micah Zenko, *An Inconvenient Truth*, *FOREIGN POL'Y* (Apr. 10, 2013), <http://foreignpolicy.com/2013/04/10/an-inconvenient-truth> [<https://perma.cc/MB23-Q65E>].

<sup>227</sup> *E.g.*, John Knefel, *Did the CIA's Drone Program in Pakistan Begin with a 'Bargaining Chip' Killing?*, *ROLLING STONE* (Apr. 8, 2013), <http://www.rollingstone.com/politics/news/did-the-cias-drone-program-in-pakistan-begin-with-a-bargaining-chip-killing-20130408> [<https://perma.cc/2EUT-EWNE>]; Mark Mazzetti, *A Secret Deal on Drones, Sealed in Blood*, *N.Y. TIMES* (Apr. 6, 2013), <http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html> [<https://perma.cc/LT62-V45D>].

C. *Effectively Responding to Threats from Organized Non-State Actors*

A skeptical reader might wonder why a state, under threat of an attack, should have to wait to see whether the organized non-state actor's actions cross the intensity threshold before taking defensive measures. Have states completely ceded the power to engage in an armed conflict to non-state actors? And if so, is this appropriate?

However, this is an inaccurate portrayal of the state's relationship to an organized non-state actor. A state need not sit on its hands waiting for the violence to cross the intensity threshold before taking defensive measures. Just as international humanitarian law does not provide a state with *carte blanche* during armed conflict, neither does human rights law impose handcuffs. Rather, each legal framework uses differing constraints—the debate is about *how*, rather than *whether*, a state may act.

The Oregon standoff once again illustrates the point. Because the intensity threshold was not met, as a matter of international law, the U.S. government had a legal obligation to pursue nonviolent means of resolution before resorting to force and otherwise take action in accordance with its domestic and human rights law obligations. The U.S. government still had a wide array of law enforcement tools at its disposal. The same is true in consent-based interventions. Had the United States required assistance in its law enforcement against the Bundy brothers and their followers, it could have invited Canada or another state to assist it in its law enforcement. That would be true even if the Bundy brothers and their followers threatened to attack Canada: The United States might utilize its own criminal law enforcement tools to effect the arrest and trial, or extradition, of the Bundy brothers. The United States could also consent to a Canadian law enforcement intervention that comports with human rights law.

Requiring intervening states to act consistent with the host-state's human rights obligations when they participate in conflicts below the intensity threshold ensures that non-state actor members do not lose human rights protections prematurely. When the Bundy brothers and their followers took the Malheur National Wildlife Refuge, they (presumably) knowingly subjected themselves to criminal prosecution, but they did not start an armed conflict and rightly were not treated as if they had. To be sure, a skeptic may have little sympathy for an insurgent non-state actor and might argue that allowing Bundy to hold the refuge while law enforcement sought to peacefully resolve the situation rather than calling in the military put Bundy in the proverbial driver's seat. But international human rights law is founded on a presumption that the state owes its residents—even those who engage in violence—a variety of human rights protections. They should not be treated as parties to an armed conflict and lose those protections until the violence they commit satisfies the longstanding intensity threshold.

## CONCLUSION

Since the Geneva Conventions took effect in 1949, international law has drawn a sharp line between internal armed conflicts and more ordinary civil violence. In situations of armed conflict, states are permitted to deploy military force, governed by the law of armed conflict. In situations of more ordinary civil violence, by contrast, states are bound to rely instead on the tools of criminal law enforcement, governed by domestic law and international human rights law, to address violent threats. The rise of transnational non-international armed conflicts—in which states use force in territory not their own—has raised a pressing new question: does the fact that the host state has consented to the use of force mean that the intervening state may use force in ways that would not be permitted for the host state itself?

This Article argues that the answer is no. Consent is not enough. Host states cannot consent to actions that they could not have lawfully undertaken themselves, and intervening states cannot rely on consent that is given in manifest violation of a host state's human rights obligations. Both the host state and the intervening state have an independent obligation to determine if a conflict is, indeed, an armed conflict to which the law of armed conflict applies or, instead, a lower-intensity civil disturbance governed by domestic law and human rights law.

This approach is consistent with the spirit of international humanitarian law and international human rights law. If the intensity threshold dividing civil disturbance from armed conflict did not apply to transnational non-international armed conflicts, a state could easily evade the law's protections by outsourcing its security operations to a less-constrained foreign state. But international human rights law and international humanitarian law are not meant to be so easily outwitted, holes in the law's protections so easily manufactured. Rather, the law is meant to create a web of safeguards. Both bodies of law are devoted to allowing states to deploy force against threats to the state and its citizenry, but both require them to do so in ways that are attentive to basic human rights and humanitarian values. Some legal protections are most appropriate to situations of more ordinary governance, others more appropriate to armed conflict. But clever maneuvers cannot be used to manufacture legal loopholes without violating the deepest commitments of both bodies of law and thus of the international legal order as a whole.

The dangers faced today by states are real: Organized non-state actors pose threats previously unimagined. In the face of these threats, states may understandably be drawn to seek ways to respond without regard for restraints imposed by law. But this is a false siren. The organized non-state groups that engage in violence are dangerous precisely because they reject state authority and the rules that states together formulated after World War

II to jointly regulate their behavior. If states invent legal loopholes or exploit unresolved ones to combat these groups unrestrained by those same laws, they do the work of the non-state groups for them. These laws are only meaningful if they are observed even in times of real crisis.

This Article points to a larger truth about international law. The world is constantly changing: new threats arise, new technologies emerge, and new patterns of state practice develop. All this change produces potential gaps in the law, and questions constantly arise as to how those gaps should be addressed. Should they be treated as legal black holes to which no law applies? Or when new situations create new legal ambiguities, should academics and practitioners seek to resolve them in ways that give effect to the deep commitments of the international legal order? This Article argues that efforts to address the potential legal gaps must reinforce, not erode, the foundational tenants of international law. Here, in the case of consent-based interventions, ignoring the distinction between civil unrest and armed conflict would undermine the principle that force should be used as a last resort. Requiring states to respect the intensity threshold in transnational conflicts is essential not only to protecting the people caught in the midst of such conflicts, but also to defending the deepest commitments of the international legal order.

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