THE UNPLEASANT RESPONSIBILITIES OF INTERNATIONAL HUMAN RIGHTS LAW

ARIEL ZEMACH*

The prevailing view in the legal literature on the fight against terrorism is that the current structure of international law–the law enforcement/armed conflict dichotomy–is ill-suited to address large-scale hostilities between a state and a terrorist organization. The law enforcement model is governed by international human rights law. The armed conflict model is primarily governed by the law of war. Human rights law, it is argued, allows states too little in their struggle against terrorist organizations while the law of war allows them too much.

Hence, many advocate the development of a new body of law, a normative middle ground between the law of war and human rights law, applicable to armed conflicts between a state and a terrorist entity. According to this approach, large-scale hostilities between a state and a terrorist organization are considered armed conflict. Yet the application of the law of war to such conflicts is qualified by the principles of international human rights law. The interaction between the law of war and human rights law produces a new, distinct set of norms. The permission to use lethal force afforded to a state under these norms is broader than the one afforded to it under human rights law yet narrower than the one available to the state under the law of war.

This article rejects the normative middle ground approach and defends the traditional law enforcement/armed conflict dichotomy. It advances a very high threshold for the existence of armed conflict, arguing that only hostilities that border on full-scale war amount to an armed conflict. Within the sphere of armed conflict, properly constructed, the law of war does not allow states too much. On the contrary, it offers the best bargain from a humanitarian perspective, and therefore its application should not be qualified.

This article further argues that grave, large-scale violence that falls short of a full-scale war is governed exclusively by human rights law. This argument is tenable provided that human rights law presents realistic standards of conduct for states in the face of such violence. The author argues that it does. The liberties to exercise lethal force required in order to contain grave, large-scale violence are, and should be, available to a state under human rights law. In the course of this inquiry, the author addresses two questions concerning the scope of permission to kill suspected terrorists afforded to a state under human rights law:

* Lecturer, Ono Academic College, Israel. J.S.D., Columbia University School of Law, 2007; LL.M., Columbia University School of Law, 2003; LL.M., The Hebrew University of Jerusalem, 2000; LL.B., The Hebrew University of Jerusalem, 1997.

1. When is the threat sufficiently proximate to justify the use of lethal force against the suspected terrorist?

2. Can a state engage in counter-terrorism operations that are likely to result in the unintentional killing of innocent persons?

I. INTRODUCTION

The prevailing view in the legal literature is that the current structure of international law–the law enforcement/armed conflict dichotomy–is ill-suited to address large-scale hostilities between a state and a terrorist organization.[1] The law enforcement model is governed by international human rights law.[2] This body of law, the argument goes, is simply not up to the task. The liberties to exercise lethal force required in order to contain grave, large-scale violence are not, and should not be, available to a state under human rights law.[3] Yet, it is argued, while human rights law allows states too little in their struggle against terrorist organizations, the law of war, which governs armed conflicts, allows them too much.[4] Indeed, the permission granted to a state to exercise lethal force is much broader under the law of war than it is under international human rights law. The main difference concerns the objects of permissible use of force. Human rights law allows the targeted killing of individuals only on the basis of their personal dangerousness.[5] By contrast, the law of war is governed by the principle of distinction between combatants and civilians,[6] which allows targeting combatants on the basis of their status as members of an armed force, regardless of whether their actions endanger the lives or interests of the other party to the conflict.[7] Moreover, the principle of proportionality in the law of war grants states a relatively broad permission to launch attacks that are likely to result in incidental killings of uninvolved civilians.[8] Under human rights law the permission to cause collateral damage is much narrower.[9]

1. *See* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 171, 174 (2005); Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 289 (2003).

2. Kretzmer, *supra* note 1, at 176.

3. Kretzmer, *supra* note 1, at 181, 201; Ben-Naftali & Michaeli, *supra* note 1, at 286.

4. *See* Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQ. 195, 195, 213 (2004); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 719-20 (2004); Kretzmer, *supra* note 1, at 200.

5. Kretzmer, *supra* note 1, at 181-82.

6. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) [hereinafter ICJ Advisory Opinion on Nuclear Weapons].

7. Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 DUKE J. COMP. & INT'L L. 281, 310 (2005); Kretzmer, *supra* note 1, at 190-91.

8. David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 HARV. INT'L L.J. 231, 236 (2005) ("The principle of proportionality permits the destruction of civilians

Warning against the application of the law of war to the conflict between the United States and al-Qaeda, Marco Sassoli thus observes that such application would have allowed the United States to kill the suspected terrorist Jose Padilla by an ambush attack "when he left his plane at a Chicago airport or at his grandmother's birthday party."[10] Hypothesizing potential aerial attacks against terrorists in the United States, Canada, or Germany, Sassoli concludes, "[t]his absurd result, permitting targeted assassinations in the midst of peaceful cities, proves once more that all those suspected to be 'terrorists' cannot be classified as combatants."[11]

There is also a formal obstacle to applying the law of war to the fight against terrorism. The application of the law of war depends on the existence of either an international armed conflict or a non-international armed conflict.[12] Yet large-scale hostilities between a state and a terrorist organization, which transcend the territory of the state involved–the recent conflict between Israel and Hamas in Gaza and the conflict between the United States and al-Qaeda represent such conflicts–do not fall neatly within the customary definitions of either an international or a non-international armed conflict. The conduct of parties to a non-international armed conflict is regulated under Common Article 3 of the Geneva Conventions,[13] as well as under the Second Additional Protocol to the Geneva Conventions[14] (Protocol II). The definitions of a non-international armed conflict contained in those treaties refer to a conflict occurring *within* the territory of a state party.[15] Some commentators thus argue that a conflict between a state and a non-state actor, which transcends the territory of the state party to the conflict, cannot be regarded as a non-international armed conflict.[16] Considering

or civilian objects in attacks against a legitimate military objective."); COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 187 (Otto Triffterer ed., 1999) ("The fact that civilian casualties are caused during an attack does not, of itself, render the attack unlawful as proportional incidental casualties caused during an attack on a military objective are legally acceptable.").

9. Ben-Naftali & Michaeli, *supra* note 1, at 286 ("Human rights law cannot sustain actions that result in so high a death toll."). Regarding the scope of permission to engage in counter-terrorism operations that are likely to result in the unintentional killing of innocent individuals, see *infra* notes 174-188 and accompanying text.

10. Sassoli, *supra* note 4, at 213.

11. *Id*.; *see also* Brooks, *supra* note 4, at 719-20 ("[I]f the law of armed conflict is applicable even to actions taken by the United States on U.S. territory, there seems to be no legal bar to preemptive government killings of suspected al Qaeda operatives in the U.S. (including U.S. citizens) . . . . If such governmental . . . killings are permissible, this virtually eliminates the rule of law as we have come to know it.").

12. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 67 (Oct. 2, 1995).

13. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

14. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art 1, ¶ 1, *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

15. Fourth Geneva Convention, *supra* note 13, art. 3; Protocol II, *supra* note 14, art. 1, ¶ 1.

16. *See* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal*

such conflict an international armed conflict is also problematic since, according to the prevailing definition of an international armed conflict, such conflict is waged between two or more states.[17]

The bulk of authority nevertheless favors the view that large-scale hostilities between a state and a terrorist organization should be considered armed conflict.[18]

Construction of War, 43 COLUM. J. TRANSNAT'L L. 1, 32 (2004) ("The [9/11] attacks seemed too trans-border in nature to be non-international."); Roy S. Schondorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 32, 35 (2004) (arguing that the law of non-international armed conflict only concerns purely internal conflicts.); Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2472 (2008).

17. INT'L COMM. OF THE RED CROSS, COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet ed., 1952) [hereinafter COMMENTARY OF THE FIRST CONVENTION]; U.N. Comm'n on Human Rights, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000, ¶ 39 , U.N. Doc. E/CN.4/2001/121 (Mar. 16, 2001) ("Clearly, there is no international armed conflict in the region, as Palestine, despite widespread recognition, still falls short of the accepted criteria of statehood."); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER F. WORLD AFF. 55, 58 (2003); Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 20 (2003); Chris Downes, *'Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SECURITY L. 277, 283 (2004); Balendra, *supra* note 16, at 2472.

In an effort to equate the legal status of members of national liberation movements with that of the soldiers of a state, Article 1(4) of the First Additional Protocol to the Geneva Conventions broadens the definition of an international armed conflict to include "conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(4), *adopted* June 8, 1977, 1125 U.N.T.S. 3, *in* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 33 (Yves Sandoz et al. eds., 1987) [hereinafter Protocol I].

However, Article 1(4) generated much controversy. Thus, it is widely agreed that:

> [T]he considerable body of opposition in State practice to treating such conflicts, for the purposes of the *ius in bello*, as though they were conflicts between States suggests that Article 1(4) went well beyond customary law . . . and has not met the criteria for being absorbed into customary law since its inclusion in Protocol I.

Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 93, 112 (Astrid J. M. Delissen & Gerard J. Tanja eds., 1991). In discussing Article 1(4), Aldrich noted that "in effect, the provision is a dead letter." George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L 1, 7 (1991). As it does not represent a rule of customary international law, Article 1(4) is inapplicable, for example, to the cases of the Israeli occupation of the Palestinian territories and the recent American occupation of Iraq, those occupying powers not being parties to Protocol I. *Id.* at 6, 19.

18. See, *e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 629-30 (2006) (concluding that the conflict between the United States and al-Qaeda was a non-international armed conflict to which Common Article 3 of the Geneva Conventions applied). The Israeli Supreme Court observed that hostilities between Israel and Palestinian armed groups amount to an international armed conflict. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (2) IsrLR 459, 479, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf. *See also*, William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 320 (2003)

To that end, both courts and commentators have stretched the customary definition of either an international armed conflict (beyond inter-state conflicts) or a non-international armed conflict (beyond conflict occurring strictly *within* the territory of a particular state) to encompass such hostilities. Others advocate the development of a third, distinct category of armed conflict–that of "extra-state armed conflict"–to accommodate hostilities between a state and a transnational terrorist organization.[19]

The rationale underlying this approach turns on the alleged impracticality of the law enforcement model. All agree that a legal regime that imposes on states unrealistic law enforcement standards in the face of grave, large-scale violence will inevitably be ignored.[20] In reality, where law enforcement is impractical states will abandon the law enforcement model regardless of the requirements of international law. Commentators thus caution that unless international law presents realistic standards of conduct for states, "they will act in an environment infected by the lawlessness that characterizes terrorism."[21] According to this view, the purpose of recognizing the existence of an armed conflict is to provide governments with certain means-of-last-resort to control especially threatening violence. The law of war steps in, then, when law enforcement is not up to the task.[22]

Moreover, under the jurisprudence of both international and domestic courts, the threshold for the existence of an armed conflict between a state and a terrorist or guerrilla organization, in terms of the intensity of the violence and its level of organization, is relatively low.[23] Indeed, the sphere of armed conflict has come to

("The law of armed conflict provides the most appropriate legal framework for regulating the use of force in the war on terrorism."); Jinks, *supra* note 17, at 9 ("I argue that the laws of war applicable in non-international armed conflict govern the September 11 attacks and that the attacks violated these laws."); Ben-Naftali & Michaeli, *supra* note 1, at 271 (arguing that the hostilities between Israel and Palestinian armed groups amount to a non-international armed conflict); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 327-28 (2004); Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 204-05 (2001); Norman G. Printer, Jr., *The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L. & FOREIGN AFF. 331, 359 (2003) (applying the law of war to U.S. military operations against al-Qaeda members); Downes, *supra* note 17, at 283-84 (arguing that hostilities between al-Qaeda and the U.S. constitute a non-international armed conflict).

19. Schondorf, *supra* note 16, at 5-7 (naming such conflicts extra-state armed conflicts, distinguishing them from inter-state armed conflicts on the one hand, and from purely internal armed conflicts on the other hand).

20. *Id.* at 21. The author observes that imposing a legal regime that strictly adheres to the law enforcement model regardless of the gravity of terrorist threats "will lead states to reject this legal regime as a whole." *Id.* at 22; Kretzmer, *supra* note 1, at 212 (warning against the adoption of "idealistic standards of behaviour" that cannot reasonably be demanded of states).

21. Kretzmer, *supra* note 1, at 212.

22. Commentators who view the hostilities between Israel and the Palestinians as an armed conflict contend that "[d]efining a conflict as war . . . has to do with the gravity of the threat to the vital interests of a given community and the absence of any other option for this community to defend itself against this threat." Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES L. 179, 197 (2004).

23. It was the International Committee of the Red Cross ("ICRC") that tried to lower the threshold

encompass hostilities that are far short of a full-scale war. Some courts take this approach in order to provide states with the broad liberties to exercise lethal force available under the law of war. [24] Others aim to bring into play the humanitarian protections afforded to the civilian population under the law of war.[25] Under the prevailing view, the law of war's field of application is thus very broad.

for the existence of an armed conflict as much as possible. *See* COMMENTARY OF THE FIRST CONVENTION, *supra* note 17, at 32. Thus, the ICRC defined an international armed conflict as "[a]ny difference arising between two States and leading to the intervention of armed forces . . . . It makes no difference how long the conflict lasts, or how much slaughter takes place." *Id.* A commission of experts established by the ICRC to examine the issue of aid to the victims of internal conflicts concluded that the existence of a non-international armed conflict "cannot be denied if the hostile action, directed against the legal government, is of a collective character and consists of a minimum amount of organization." THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 121 (1987). Similarly, in its Commentary on the Geneva Conventions the ICRC advocated wide application of Common Article 3. COMMENTARY OF THE FIRST CONVENTION, *supra* note 17, at 50.

The criteria for the existence of a non-international armed conflict, pronounced by the International Criminal Tribunal for the Former Yugoslavia, concern the scale of the violence, its duration and the level of organization of the rival parties. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995); Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 562 (May 7, 1997). Yet in applying the said criteria the Tribunal considered internal violence that was far short of a full-scale war as a non-international armed conflict. *See, e.g.*, Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 244, 247 (July 10, 2008). The Tribunal concluded that hostilities between the forces of the Macedonian government and a guerrilla group amounted to an armed conflict despite the fact that "there remained relatively few casualties on both sides and to civilians (the highest estimates put the total number of those killed as a result of the armed clashes at 168), and material damage to property and housing was of a relatively small scale." *Id.* ¶ 244.

In *Abella v. Argentina*, the Inter-American Commission on Human Rights concluded that a violent confrontation of brief duration (30 hours) between rebels and Argentinean government forces amounted to an armed conflict under Common Article 3. Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 147, 156 (1997). This case concerned an armed attack by an organized armed group against a government military base, which was an isolated incident. *Id.* ¶ 155. The Commission concluded that "application of Common Article 3 does *not* require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory." *Id.* ¶ 152.

24. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (2) IsrLR 459, 475, 529, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf.

25. Hamdan v. Rumsfeld, 548 U.S. 557, 628-30 (2006) (concluding that the conflict between the United States and al-Qaeda was a non-international armed conflict to which Common Article 3 of the Geneva Conventions applied). The Court subscribed to the position of the International Committee of the Red Cross that "'nobody in enemy hands can be outside the law,"' and hence joined its conclusion that the scope of application of Common Article 3 '"must be as wide as possible.'" *Id.* at 631 (*quoting* COMMENTARY, CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR. GENEVA, 12 AUGUST 1949 51 (Int'l Comm. of the Red Cross ed. 1958); COMMENTARY, CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR. GENEVA, 12 AUGUST 1949 36 (Int'l Comm. of the Red Cross ed. 1960). It seems that the main concern of the Court was to ensure that Hamdan, assuming he is not entitled to a prisoner of war status, enjoys a minimum of humanitarian law protections granted under Common Article 3. *See id* at 628-630.

See also, *Abella*, Inter-Am. C.H.R., Report No. 55/97, ¶ 148. In an attempt to promote the "purpose of protecting human life and dignity" the Inter-American Commission on Human Rights subscribed to the view that the law of internal armed conflicts "should be applied as widely as possible." *Id.* ¶ 152,158.

Several commentators argue, however, that the existence of an armed conflict between a state and a terrorist group does not entail *full* application of the law of war.[26] Addressing situations such as the violent confrontation between Israel and the Palestinians (the "al-Aqsa Intifada"), David Kretzmer advocates the adoption of a normative middle ground between the law of war and international human rights law[27] (hereinafter "mixed model"[28]). According to the mixed model, conflicts such as the al-Aqsa Intifada should be recognized as armed conflicts and members of Palestinian terrorist organizations should be considered combatants.[29] However, Israel's war rights are qualified by the principles of international human rights law. The interaction between the law of war and human rights law produces new norms that differ substantially from those of the law of war. Other commentators share this view.[30]

Under this normative model, the relatively broad permission to exercise lethal force embodied in the law of war's principles of distinction and proportionality becomes much narrower. The mixed model departs from the law of war in allowing the targeting of combatants only on the basis of their personal dangerousness, rather than on the basis of their status. Thus, while the law of war allows attacking a combatant "whether or not he or she *personally* endangers the lives or interests of the other party to the conflict,"[31] according to the proposed mixed model lethal force may be used against terrorists who do not pose an imminent threat "only when a high probability exists that if immediate action is not taken another opportunity will not be available to frustrate the planned terrorist attacks."[32] Moreover, the mixed model allows the use of lethal force against terrorists only where there is no feasible possibility of arresting them (that is, where the suspected terrorist is not in a territory under the effective control of the victim state, and the state in which he stays is either unwilling or unable to thwart the threat he poses).[33] According to its proponents, the mixed model departs from

According to the Commission, an approach that allows the application of humanitarian law protections, in addition to human rights law, is captured by the "most-favorable-to-the–individual-clause." *Id*. ¶ 164.

26. *See* Kretzmer, *supra* note 1, at 204.

27. *Id.* at 201-04.

28. *Id*. at 204.

29. *Id*. at 208-09.

30. *See* Ben-Naftali & Michaeli, *supra* note 1, at 288; s*ee also* Schondorf, *supra* note 16, at 32, 64; Balendra, *supra* note 16, at 2468, 2480-81. In addressing the application of the armed conflict model to the fight against terrorism Brooks argues that "international human rights law provides some benchmarks . . . for developing a new analytical framework that can successfully balance the need to respond to new kinds of security threats with the equally important need to preserve and protect basic human rights." Brooks, *supra* note 4, at 684.

31. Kretzmer, *supra* note 1, at 191.

32. *Id* at 203. *See also* Ben-Naftali & Michaeli, *supra* note 1, at 280 ("[T]he laws of war seem to accept the legitimacy of targeting combatants and . . . it is not necessary for Israel to resort to alternative means in order to prevent them from carrying out their hostile plans or actions."). However, the new norm that emerges under the mixed model provides that "[c]ombatants are only legitimate targets if all other means to apprehend them fail." *Id*. at 290.

33. Kretzmer, *supra* note 1, at 203.

the norms of human rights law mainly in relaxing the requirement that the threat posed by the suspected terrorist be *imminent* as a condition for targeting him.[34]

Kretzmer further submits that "according to the demands of international human rights law, in every case of targeted killing a thorough legal investigation should be conducted."[35] Similarly, other commentators submit that the permission to cause collateral damage is more limited in the context of an armed conflict between a state and a terrorist group than in the context of other types of armed conflict.[36]

The Israeli Supreme Court has recently applied a legal regime tantamount to the mixed model, examining the legality of the Israeli policy of targeted killing of Palestinian suspected terrorists.[37]

The mixed model clearly rests on the assumption that the liberties to use force available to a state under this model are not available to it under human rights law. Under this approach the law of war and human rights law play fundamentally different, complementary roles in the fight against terrorism. It is the task of the law of war to provide states with the liberties to exercise lethal force required in order to contain grave, large-scale violence.[38] It is the task of human rights law to qualify those liberties beyond the limitations contained in the law of war itself. The law of war is the engine of a state's struggle against terrorism; human rights law is the brakes.

This article defends the traditional law enforcement/armed conflict dichotomy. Contrary to the prevailing view, I argue that the threshold for the existence of an armed conflict is very high (i.e., the purview of the law of war is very narrow). Only where the manifestations of the hostilities border on full-scale war can a conflict be properly termed armed conflict. Hostilities that do not meet the threshold for the existence of armed conflict–such as the conflict between the United States and al-Qaeda–are governed by human rights law, which can and should be imposed with the unpleasant burden of presenting realistic standards of conduct for states with regard to the targeting of suspected terrorists. Indeed, this article advances a view of human rights law that is fundamentally different from that presented by the proponents of the mixed model. The argument presented here is largely premised on the view that the liberties to use force afforded to a state under the mixed model (i.e., a permission to target terrorists who pose a lethal

34. *Id.* at 202-04.

35. *Id.* at 212.

36. Schondorf, *supra* note 16, at 66-67. Schondorf argued that in the cases of the al-Aqsa Intifada and the fight against al-Qaeda "the approach towards collateral damage should be informed, at least to a certain extent, by the approach applicable to the question of collateral damage in law enforcement operations . . . . [A] higher standard of care, and maybe even a more demanding proportionality test, should apply."

37. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (2) IsrLR 459, 515-16, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf. Also see *infra* notes 62-91 and accompanying text.

38. *See* Brooks, *supra* note 4, at 692.

threat that is not imminent; a narrow permission to cause the death of uninvolved civilians as collateral damage) are also available to it under human rights law.

This article further submits that the law of war applies fully whenever a conflict between a state and a non-state actor amounts to an armed conflict. This article thus rejects the approach that advocates the development of a normative middle ground between the law of war and international human rights law.

The proponents of the mixed model submit that there are armed conflicts governed by a body of law that is more humanitarian than the law of war.[39] Part II shows that this assertion is conceptually flawed as the contours of the sphere of armed conflict are drawn by reference to the law of war: the sphere of armed conflict encompasses only those factual realities in which the law of war offers the best bargain from a humanitarian perspective, that is, only those situations in which violence allowed under the law of war is inevitable.

Part II further argues that the law of war presents the best bargain from a humanitarian perspective only where the manifestation of the hostilities borders on full-scale war. Only then can a conflict be properly termed an armed conflict.

Part III argues that while the proponents of the mixed model advocate its application to *armed conflicts* between a state and a non-state aggressor,[40] the mixed model cedes the legitimate aims of a just war, which include obtaining reasonable guarantees of future security. Such a concession seems unwarranted.

Part IV argues that the mixed model is inconsonant with the principle of equality in the application of the law of war, as it is only applicable to the conduct of states, while non-state actors would be allowed to exercise all of the war rights granted under the law of war.

None of the proponents of the mixed model advocate its application to traditional inter-state armed conflicts. The mixed model is presented in the literature mainly in the context of an armed conflict between a state and a terrorist group.[41] Part V argues that there is no sound basis for distinguishing an armed conflict between a state and a terrorist group from traditional inter-state armed conflict.

Part VI argues that human rights law presents realistic standards of conduct for states in the face of grave, large-scale violence that falls short of a full-scale war. It addresses two questions concerning the scope of permission to kill suspected terrorists afforded to a state under human rights law:

1. When is the threat sufficiently proximate to justify the use of lethal force against the suspected terrorist?

2. Can a state engage in counter-terrorism operations that are likely to result in the unintentional killing of innocent persons?

39. *See* Kretzmer, *supra* note 1, at 185-86.

40. *Id.* at 171.

41. *Id.* at 201-202; Ben-Naftali & Michaeli, *supra* note 1, at 288-89.

In the course of this inquiry, Part VI explores the relationship between domestic criminal defenses and international human rights law. It concludes that the liberties to use force afforded to a state under the mixed model are also available to it under human rights law.

II. A CONCEPTUAL DIFFICULTY: CAN THERE BE AN ARMED CONFLICT TO WHICH THE LAW OF WAR DOES NOT APPLY FULLY?

A. The Nature and Purview of the Law of War

The proponents of the mixed model submit that there are armed conflicts to which the law of war does not apply fully.[42] Yet the contours of the sphere of armed conflict are drawn by reference to the law of war.

Some commentators posit that the law of war's role "is primarily not one of opposition [to war] but of construction–the facilitation of war through the establishment of a separate legal sphere immunizing some organized violence from normal legal sanction."[43] Yet the prevailing view is that the primary purpose of the law of war is promoting humanitarian protections.[44] The law of war exists mainly in order to set limits to wartime violence. According to the International Committee of the Red Cross ("ICRC"), the law of non-international armed conflict "has a purely humanitarian purpose and is aimed at securing fundamental guarantees for individuals in all circumstances."[45]

But why doesn't the law of war offer a better bargain from a humanitarian perspective? Why did it set the limits of wartime violence where they are now, rather than further constraining such violence?

War represents a reality in which large-scale violence is inevitable. Indeed, "[w]ar necessarily places civilians in danger; that is another aspect of its hellishness."[46] The law of war recognizes that the law cannot "unhell" the factual reality of war. Rather, it is designed to allow only that violence which is inevitable. It is tailored around a core of wartime violence that the law cannot realistically prevent. As stated by Yoram Dinstein:

> The paramount precept of the [Law of International Armed Conflict]–to reiterate again the language of the St Petersburg Declaration . . .–is 'alleviating as much as possible the calamities of war' . . . . However,

42. *See* Ben-Naftali & Michaeli, *supra* note 1, at 255; Kretzmer, *supra* note 1, at 201-204.

43. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 1 (2004).

44. Christopher J. Greenwood, *International Humanitarian Law (Laws of War): Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899*, *in* THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE: REPORTS & CONCLUSIONS 161, 229 (Frits Kalshoven ed., 2000) (observing that the provisions on the conduct of hostilities contained in Protocol Additional II to the Geneva Conventions "are intended exclusively for the benefit of the civilian population."); INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1350 (Yves Sandoz et al. eds., 1987) (observing that the protection granted to victims of non-international armed conflicts is the *raison d'etre* of Protocol II).

45. *Id*. at 1344.

46. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 156 (4th ed. 2000).

> the thrust of the concept is not absolute mitigation of the calamities of war (which would be utterly impractical), but relief from the tribulations of war 'as much as possible' . . . .[47]

In other words, the law of war was tailored to offer the best bargain, from a humanitarian perspective, in a factual reality in which widespread violence is inevitable. This bears on the construction of the sphere of armed conflict: the function of the definition of an armed conflict is to delineate the boundaries of a factual reality in which the law of war represents the best *realistic* bargain from a humanitarian perspective; that is, the boundaries of a reality in which the violence allowed under the law of war is inevitable.

In severing, at least in part, the definition of an armed conflict from the law of war the mixed model is thus conceptually flawed. Simply put, a factual reality in which the law of war's principles of distinction and proportionality do not offer the best bargain from a humanitarian perspective (i.e., a reality in which the mixed model is realistic), cannot be characterized as armed conflict.

The humanitarian nature of the law of war informs its relationship with human rights law: the law of war applies as *lex specialis*, taking precedent over human rights law,[48] only where it offers the best bargain from a humanitarian perspective. Some commentators posit that the application of the law of war has become much less attractive from a humanitarian perspective since the rise of human rights law, which applies to armed conflicts as well.[49] Those commentators observe that most of the humanitarian protections contained in the law of war are also available under human rights law.[50] However, the law of war has no alternative from a humanitarian perspective, not because it offers protections that cannot be found in human rights law but, rather, because it presents the strictest *realistic* limitations on violence in the face of the factual reality of war. It is the

47. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 17 (2004).

48. *See infra* notes 99-101 and accompanying text.

49. Balendra, *supra* note 16, at 2470 ("When the provisions of the Geneva Conventions were drafted, the protections available under [human rights law] were not taken into account. Nor had the ICCPR and the ICESR, the first legally binding human rights instruments of universal applicability, been adopted yet. At that time, [international humanitarian law] was probably viewed as the only source of protection for individuals during times of violent conflict. However, if [human rights law] is also applicable in armed conflict, as appears to be the case, then individuals might be protected even in the absence of [international humanitarian law]. Therefore the humanitarian goals of the Geneva Conventions are not always furthered by a broad interpretation of the term 'armed conflict.'"); David Kretzmer, *Rethinking Application of IHL in Non-International Armed Conflicts*, 42(1) ISR. L. REV. 32 (2009) ("With the development of [international human rights law], we no longer need to introduce elements of [international humanitarian law] in order to place constrains on the use of force by States faced with internal armed conflicts . . . . While the original intention behind extension of [international humanitarian law] to non-international armed conflicts was to enhance the protection granted to potential victims of such conflicts, given the dramatic development of [international human rights law], categorization of a situation as one of armed conflict, rather than internal unrest, may serve to weaken the protection offered to potential victims rather than to strengthen it."). Kretzmer, *supra* note 1, at 202.

50. *Id*.

inevitability of wartime violence that renders the law of war the best bargain from a humanitarian perspective.

But *how* is violence that triggers the application of the law of war inevitable? How do we draw the line between situations in which violence allowed under the law of war is inevitable and situations in which it is not? Here I return to the main feature that distinguishes the mixed model from the law of war, which concerns the permissible basis for attacking people. While the law of war allows attacking combatants on the basis of their status, under both the mixed model and human rights law persons may only be targeted on the basis of their personal dangerousness.

Yet it is not entirely accurate to say that the law of war is indifferent to the question of the personal dangerousness of combatants. The warring parties are always bound by the requirement of military necessity.[51] An unnecessary killing of *any individual*, that is, a killing that does not tend to undermine the war effort of the enemy, and thereby facilitate victory, is always prohibited.[52] In other words, the law of war only allows the killing of individuals who are dangerous in the sense that they lend a meaningful contribution to the war effort of the enemy. This is the reason why soldiers who are wounded, and therefore are unable to fight, may not be attacked.[53]

A strict application of the military necessity requirement would preclude the killing of soldiers solely on the basis of their status. However, a reality of actual warfare–a clash of two armies–does not lend itself to individualized assessment of the dangerousness of each person. Under the pressure of actual warfare, an extra-judicial individualized assessment of dangerousness–the second best to due process–is also not feasible. It is this feature of war that renders the indiscriminate targeting of soldiers inevitable. The principle of military necessity was relaxed to allow the killing of combatants at all times *because* of this lack of capacity to determine, with regard to each enemy soldier, whether and to what extent he actually contributes to the enemy's war effort.[54]

Yet not all situations of grave violence between organized parties preclude an individualized assessment of dangerousness. The criteria for distinguishing situations that are amenable to such assessment from those that are not mainly concern the size of the parties' armed forces as well as the volume and intensity of the violence. The violence allowed under the law of war's principle of distinction is inevitable only in situations that are not amenable to an individualized assessment of dangerousness. Only such situations can be properly termed armed conflict.

51. DINSTEIN, *supra* note 47, at 18.

52. Id.

53. Fourth Geneva Convention, *supra* note 13, art. 3.

54. Similarly, the permission granted to a state engaged in an inter-state armed conflict to detain *all* captive enemy combatants for the duration of the conflict presupposes lack of capacity for an individualized assessment of the dangerousness of each combatant. Curtis A. Bradley, *The United States, Israel and Unlawful Combatants*, 12 GREEN BAG 2d 397, 409-410 (2009).

The inevitability of violence allowed under the law of war inheres in a violent clash of two armies. The author submits that the reality of Israel's confrontations with the Hezzbullah in Lebanon (2006) and Hamas in Gaza (2009) precluded individualized assessment of dangerousness. The Israeli army that entered Lebanon and Gaza was facing thousands of fighters simultaneously engaging in an intense war effort.[55] The manifestations of the hostilities between Israel and those organizations bordered on full-scale war.[56] Under such circumstances, the targeting of individuals on the basis of their affiliation to the military forces of Hamas or Hezzbullah was inevitable. Those conflicts are situations in which the law of war's principle of distinction between combatants and civilians represents the best bargain from a humanitarian perspective, and they must therefore be termed armed conflicts.

By contrast, it seems that the violent conflict between the U.S. and al-Qaeda, notwithstanding its high death toll, cannot be characterized as an armed conflict, as it does not produce the unique pressure of warfare that precludes individualized assessment of dangerousness.

My analysis presents a very high threshold for the existence of an armed conflict: for a conflict to be considered an armed conflict, it must not stray far from the paradigm of a full-scale war, that is, a clash of two armies.

The conflict between Israel and the Palestinians in the years 2001-2007 (the "al-Aqsa Intifada"), prior to the Hamas takeover of Gaza, is a difficult, borderline case. Considering the scale and organization of the violence in the case of the al-Aqsa Intifada, commentators observed that the said conflict "is a full-scale 'armed conflict,' even under the harshest of terms."[57] Relying in particular on the scale

55. *See* Jill Lawless, *Hezbollah Arsenal Growing in Size and Punch*, SEATTLE TIMES, July 20, 2006, *available at* http://seattletimes.nwsource.com/html/nationworld/2003137807_webhezbollah19.html; Amos Harel & Avi Issacharoff, *Analysis: A Hard Look at Hamas' Capabilities*, HAARETZ, Dec. 26, 2008, http://www.haaretz.com/hasen/spages/1050282.html.

56. Hostilities between Israel and the Hezbollah lasted for one month. During this period, nearly 4,000 Hezbollah rockets hit northern Israel. According to Lebanese officials, one million people were displaced by the conflict. The conflict resulted in approximately 1200 Lebanese deaths and 159 Israeli deaths, according to authorities in the two countries. Maher Chmaytelli & Daniel Williams, Hezbollah, *Israel Try to Play Down Lebanon Rockets, For Now*, BLOOMBERG.COM, Jan. 9, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=aa8phfEhs3.M (last visited Feb. 20, 2010). In the course of this conflict, the Israeli Air Force launched more than 7,000 air strikes on targets in Lebanon. Amnesty Int'l, *Lebanon: Deliberate Destruction or "Collateral Damage"? Israeli Attacks on Civilian Infrastructure*, AI Index MDE 18/007/ 2006, Aug. 22, 2006, *available at* http://www.amnesty.org/en/library/info/MDE18/007/2006/en [hereinafter Report by Amnesty International]. With regard to the size of Hamas' military forces in Gaza, which took part in the fighting during the confrontation in January 2009, *see* ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS, ¶¶ 73-80 (2009), *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_Gaza_Context_of_Operation_5_Aug_2009.htm#E.

57. Ben-Naftali & Michaeli, *supra* note 1, at 259. Ben-Naftali and Michaeli elaborate:

> There can be little doubt that the Palestinian Authority qualifies as an "organized armed group." The Palestinian Authority, far from resembling an unorganized insurrection group, is as close to a State as an entity can be. It is the undisputed leader of the Palestinian people, retaining control over the Palestinian population

and duration of the violence, the Israeli Supreme Court observed with regard to the al-Aqsa Intifada, "[s]ince the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. This is not police activity. It is an armed conflict. Within this framework, approximately 14,000 attacks have been made against the life, person and property of innocent Israeli citizens . . . . The Palestinians have also experienced death and injury."[58]

Indeed, it seems that the manifestations of the hostilities between Israel and the Palestinians throughout the years 2001-2003 warrant the application of the law of war. Yet, as noted by one commentator, hostilities between an occupant and guerrilla forces "often go through a variety of phases, involving greater or lesser resemblance to military conflict, ranging from organized to disorganized actions, from violent to non-violent confrontations, from war-like periods marked by high intensity violence to less turbulent periods marked by erratic violence, civil disobedience, or even relative quiescence."[59] Indeed, the scale of hostilities between Israel and the Palestinians has been substantially reduced since 2003.[60] It thus seems that the later phases of the al-Aqsa Intifada (2004-2007) prior to the Hamas takeover of Gaza did not meet the threshold for the existence of armed conflict advanced here.

The conceptual difficulty arising with regard to the mixed model's severing of the definition of an armed conflict from the law of war only underscores the main problem with the mixed model: it fails to provide realistic standards of conduct for states where the manifestation of the hostilities between the state and a terrorist entity borders on full-scale war, as were the cases of Israel's confrontations with the Hezzbullah in Lebanon (2006) and Hamas in Gaza (2009). Applied to such conflicts, which clearly qualify as armed conflicts, the mixed model would prohibit violence that is inevitable. As proponents of the mixed model themselves observe, an international legal regime that does not present realistic standards of conduct for states will inevitably be ignored.[61]

> and, at least until the recent reoccupation of the territories, it exercised control over most of the Palestinian designated territory, especially the "A" territories. Note that while only the Tanzim Organization is officially affiliated to the Palestinian Authority, all other military organizations operating in the Palestinians territories are united by the same goals of self-determination and compose a united front of resistance. These groups are highly organized, thus fulfilling the condition of "organized military force under responsible command." There can also be little doubt as to the severity of the conflict, as indicated by the high number of casualties and the massive use of arms on both sides.

Id. at 258.

58. HCJ 7015/02 Ajuri v. IDF Commander in West Bank [2002] IsrSc 56(6) 352, ¶ 1, *available at* http://elyon1.court.gov.il/files_eng/02/150/070/A15/02070150.a15.pdf.

59. Berman, *supra* note 16, at 26.

60. Hostilities between Israel and the Palestinians in the year 2002 resulted in the killing of 1,019 Palestinians and 420 Israelis. Hostilities between Israel and the Palestinians in the year 2005 resulted in the killing of 190 Palestinians and 50 Israelis. *See* B'tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Statistics: Fatalities, http://www.btselem.org/English/Statistics/Casualties.asp (last visited Feb. 8, 2010).

61. Kretzmer, *supra* note 1, at 212.

B. The Israeli Supreme Court's Construction of the Law of War: The Equivalent of the Mixed Model

A decision of the Israeli Supreme Court seems to implicitly adopt the mixed model. In *Public Committee Against Torture in Israel v. Government of Israel*[62] the Court examined whether the Israeli policy of targeted killing of Palestinian suspected terrorists, carried out in the course of the al-Aqsa Intifada, was lawful under international law.[63] Concluding that the hostilities characterizing the al-Aqsa Intifada amounted to an armed conflict, the Court opined that this conflict is of *international* character.[64] It then proceeded to examine the status of Palestinians taking part in the hostilities.[65]

The customary definition of combatants in international armed conflicts is provided by the Hague Regulations Respecting the Laws and Customs of War on Land ("Hague Regulations").[66] According to Article 1 of the Hague Regulations, the category of combatants extends beyond the regular armed forces of a state and includes members of "militia and volunteer corps" provided that they fulfill all of the following conditions:

> a. being under responsible command;
>
> b. wearing a fixed distinctive sign recognizable at a distance;
>
> c. carrying arms openly; and
>
> d. conducting their operations in accordance with the laws and customs of war.[67]

The same definition of "combatants" may be inferred from the categories of persons who have the right to prisoner of war status pursuant to Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War.[68]

The Court observed that members of Palestinian terrorist organizations do not meet all of the above conditions, as they do not wear a fixed distinctive sign recognizable at a distance and, moreover, as they do not refrain from targeting civilians and therefore do not meet the requirement that their operations be "in accordance with the laws and customs of war."[69] The Court thus concluded that members of Palestinian terrorist organizations cannot be considered combatants, and must therefore be considered civilians.[70] The law of war prohibits attacks

62. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (2) IsrLR 459, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf.

63. *Id.* at 464.

64. *Id*. at 476-77.

65. *Id.* at 486-90.

66. Regulations Annexed to the Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295, T.I.A.S. No. 539, art. 1 [hereinafter Hague Regulations].

67. *Id*.

68. Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; *see also* Kretzmer, *supra* note 1, at 191.

69. HCJ 769/02 *Pub. Comm. Against Torture in Isr*. at 485.

70. *Id.* at 486-88.

directed at civilians "unless and for such time as they take a direct part in hostilities."[71] Applying this rule, the Court broadly interpreted the circumstances under which a member of a terrorist organization should be viewed as directly participating in hostilities and thus subject to targeting.[72] The Court reasoned that this concept includes not only persons who carry out terrorist attacks but also those who recruit them and provide them with weapons as well as those who plan and direct the attacks.[73] The Court further concluded that persons involved in ongoing terrorist activities are subject to targeting even during the time in between hostile acts.[74]

Finally, the Court concluded that the law of war permits the targeted killing of civilians who are, at the time, directly participating in hostilities only where the following cumulative requirements are fulfilled. First, reliable and verified information is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities, which places a heavy burden of proof on the attacking army.[75] Second, even a civilian who is taking a direct part in hostilities cannot be attacked if less harmful means, such as arrest, interrogation and trial, can be employed.[76] Third, after each targeted killing, a retroactive, thorough and independent investigation must be conducted regarding the precision of the identification of the target and the circumstances of the attack.[77] And fourth, any collateral damage inflicted must withstand the proportionality test.[78]

The Court did not explicitly accept the main argument advanced by the proponents of the mixed model, namely, that the application of the law of war is qualified by its interaction with human rights law. Having concluded that an armed conflict exists between Israel and the Palestinian organizations, the Court observed that the law of war applies fully as *lex specialis*, taking precedent over human rights law.[79] At the end of the day, however, the liberties to use lethal force afforded to the state by the Court are similar, if not identical, to those available to it

71. Protocol I, *supra* note 17, art. 51 (providing that civilians "shall not be the object of attack . . . unless and for such time as they take a direct part in hostilities."). This rule is now considered a customary norm of international humanitarian law. *See, e.g.* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1: RULES 19 (2005).

72. HCJ 769/02 *Pub. Comm. Against Torture in Isr*. at 494-98.

73. *Id.* at 496-99.

74. *Id.* at 499-500.

75. *Id.* at 500-01.

76. *Id.* at 501.

77. *Id.* at 502.

78. *Id.*

79. *Id.* at 476-77. The Court observed that "[t]he normative arrangements that apply to the armed conflict between Israel and the terrorist organizations . . . [is the] international law concerning an international armed conflict . . . . These laws constitute a part of the laws of the conduct of war (*jus in bello*). From the humanitarian viewpoint, they are a part of international humanitarian law." *Id.* The Court emphasized that "humanitarian law is a special law (*lex specialis*) that applies in an armed conflict," and that *only* "[w]here this law has a lacuna, it can be filled by means of international human rights law." *Id.* Throughout its analysis, the Court exclusively applied the customary norms of the law of war. *Id.*

under the mixed model: members of the enemy's armed forces may only be targeted on the basis of their personal dangerousness, rather than on the basis of their status; they may be targeted even when the threat they pose is not imminent, provided that use of lethal force is the only way to thwart that threat; and an independent, retroactive investigation must follow each targeted killing operation. The legal regime laid out by the court is clearly the equivalent of the mixed model.

The classification of the terrorists by the Court as civilians resulted from the Court's decision to consider the hostilities an international, rather than a non-international, armed conflict.[80] There is no doubt that in applying the principle of distinction in *non-international* armed conflict, all full-fledged members of the armed forces of parties to the conflict are considered combatants, regardless of whether they distinguish themselves from the civilian population and abide by the laws of war.[81] Indeed, the U.S. Supreme Court considers large-scale hostilities between a state and a transnational terrorist organization–al-Qaeda–a non-international armed conflict, and therefore regards members of this organization as combatants.[82] This seems to be the prevailing view among commentators.[83]

It is striking, then, that the Israeli Court failed to provide any reasoning to its decision to consider the conflict an international, rather than a non-international, armed conflict. As noted by one commentator:

> [T]he Court's preliminary assumption that the targeted killing of Palestinian non-State actors must be governed by [international humanitarian law] applicable to international, rather than non-international, armed conflict remains largely unsubstantiated and alternative approaches, though mentioned, are discarded without discussion. The very same assumption subsequently forces the Court to qualify all Palestinian armed actors as civilians.[84]

Moreover, the Court failed to provide any reasoning to its holding that civilians who are taking a direct part in hostilities may only be targeted when there is no feasible possibility of arresting them, as well as to its determination that an attack directed at a civilian who is taking a direct part in hostilities must be

80. *Id*. at 516.

81. Ben-Naftali & Michaeli, *supra* note 1, at 271; Watkin, *supra* note 7, at 313; Protocol I, *supra* note 17, at 1453; Kretzmer, *supra* note 1, at 197-198 ("The logical conclusion of the definition of a non-international armed conflict as one between the armed forces of a state and an organized armed group is that members of both the armed forces and the organized armed group are combatants. While these combatants do not enjoy the privileges of combatants in an international armed conflict, they may be attacked by the other party to the conflict. This is indeed the view adopted in the ICRC Commentary on [Additional Protocol II], which states that '[t]hose who belong to armed forces *or armed groups* may be attacked at any time'. According to this view, if an armed conflict exists between the United States and al-Qaeda, active members of al-Qaeda are combatants who may be targeted. Similarly, if an armed conflict exists between Israel and Hamas, Islamic Jihad and the Fatah/Tanzim in the West Bank and Gaza, active members of these groups are combatants who may legitimately be attacked.").

82. Hamdan v. Rumsfeld, 548 U.S. 557, 629-32 (2006).

83. Jinks, *supra* note 17, at 9; Ben-Naftali & Michaeli, *supra* note 1, at 258-59; Downes, *supra* note 17, at 282-83; Kretzmer, *supra* note 1, at 204.

84. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 35 (2008).

followed by a retroactive investigation regarding the circumstances of the attack. Such requirements are not contained in any of the humanitarian law conventions and are not mentioned in the Commentary of the ICRC on Customary International Humanitarian Law.[85]

Clearly, the Court took the view that the liberties to use lethal force afforded to a state engaged in an armed conflict with a terrorist organization should be narrower than those available to a state engaged in a "traditional" inter-state war, subscribing to the view of the proponents of the mixed model regarding the scope of permissible use of lethal force. While the Court purported to fully apply the law of war, it endeavored to construct it in a manner that produces a legal regime equivalent to that of the mixed model. The Court opted for an *international* armed conflict legal regime, as only such regime allows the classification of Hamas militants as civilians. The central feature of the law of war–the permission to target combatants on the basis of their status–was taken from it, simply because under the Court's construction of the law of war, an armed conflict between a state and a terrorist group is one in which only one party to the conflict has combatants. This construction seems peculiar. As noted by David Kretzmer, "[w]hen the armed conflict is essentially between a state and the terrorist group, the theory that the terrorists are civilians simply does not make sense. An armed conflict model of law . . . cannot be applicable if only one party to the conflict has combatants."[86] Curtis Bradley further observes that the Israeli Court's construction of the law of war "may create perverse incentives. One of the central purposes of the laws of war is to encourage fighters both to distinguish themselves from civilians and to avoid attacking civilians."[87] Yet under the approach taken by the Israeli Court, "a nation engaged in an armed conflict has *less* ability to target and detain fighters who fail to wear uniforms or who purposefully target civilians than if those fighters observe the principles of distinction." [88] This approach thus "seems to reward the very conduct that the laws of war are designed to prevent."[89]

85. *See, e.g.*, HENCKAERTS & DOSWALD-BECK, *supra* note 71, at19-23.

86. Kretzmer, *supra* note 1, at 194; Curtis A. Bradley, *The United States, Israel, and Unlawful Combatants* 276 (Duke Law School Public Law & Theory Paper No. 249, 2009), *available at* http://ssrn.com/abstract=1408135. Professor Curtis Bradley elaborates that:

> [T]he conception of 'civilians' in the Geneva Conventions does not fit well with the reality of an armed conflict with a terrorist organization. While the Conventions envision that civilians might sometimes take part in hostilities, they envision that this combatancy is a temporary deviation for these individuals, and that there is some separate group of full-time fighters. For a terrorist organization engaged in an armed conflict with a nation, however, the involvement of the members of such an organization in hostilities is not some temporary deviation from their normal circumstances . . . . Nor is there any separate set of full-time fighters – the members of the terrorist organization are themselves the full-time fighters.

Id.; s*ee also*, Watkin, *supra* note 7, at 312-13.

87. Bradley, *supra* note 86, at 275.

88. *Id.*

89. *Id.* at 275-76.

But more importantly for the purposes of this article, the legal regime laid out by the Court, which is premised on a perception of the terrorists as civilians, crumbled under the weight of hostilities between Israel and Hezzbullah in Lebanon ("Second Lebanon War") and between Israel and Hamas in Gaza ("Operation Cast Lead"), which followed the Court's holding. In the face of a reality bordering on full-scale war, which was not amenable to an individualized assessment of dangerousness, the official rules of engagement issued by the Israeli army during Operation Cast Lead explicitly considered Hamas fighters as combatants that can be targeted at all times.[90] Applying the law of war's principle of distinction, the Rules of Engagement stated, "[s]trikes shall be directed against military objectives and combatants only. It is absolutely prohibited to intentionally strike civilians or civilian objects (in contrast to incidental proportional harm)."[91]

Those experiences prove that the legal regime envisioned by the proponents of the mixed model–or any other equivalent legal regime–is unrealistic where hostilities between a state and a non-state actor resemble a traditional, inter-state war.

III. THE MIXED MODEL AND THE AIMS OF A JUST WAR

The proponents of the mixed model advocate its application to *armed conflicts* between a state and a non-state aggressor. Yet the mixed model cedes the legitimate aims of a just war.

The purpose of a wartime military operation is to facilitate victory. Exploring the meaning of victory in a just war (*i.e.*, the legitimate ends of a just war), Michael Walzer concludes:

> 'The object in war is a better state of peace.' And *better*, within the confines of the argument for justice, means more secure than the *status quo ante bellum*, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic self-determinations. The key words are all relative in character: not invulnerable, but less vulnerable; not safe, but safer. Just wars are limited wars. [92]

This means that "[i]n responding to an armed invasion, one can legitimately aim not merely at a successful resistance but also at some reasonable security against future attack."[93] Reasonable guarantees of future security include "disengagement, demilitarization, arms control, external arbitration, and so on. Some combination of these, appropriate to the circumstances of a particular case, constitutes a legitimate war aim."[94]

90. ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶ 245 (2009), *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects .htm.

91. *Id.* at ¶ 222.

92. WALZER, *supra* note 46, at 121-22.

93. *Id.* at 118.

94. *Id.* at 121.

These ends obviously extend far beyond short-term cost-benefit analysis that concerns the loss of lives. A state fighting a just war is entitled to sacrifice the lives of its own soldiers, intentionally kill enemy combatants and cause the incidental death of non-combatants in order to obtain reasonable long-term guarantees of its future security.

Whilst it is doubtful whether there exists a *jus ad bellum* of non-international armed conflicts,[95] the legitimate purposes of a just war arguably apply to armed conflicts between a state and a non-state aggressor. Note that obtaining guarantees of its future security was the main aim of Israel's military operations throughout its recent large-scale confrontations with the Hezzbullah in Lebanon (2006) and Hamas in Gaza (2009).

When it comes to the grounds for using lethal force, human rights law stands in sharp contrast with the law of war. While the purpose of the use of lethal force under the law of war is to facilitate the winning of the war, under human rights law "the primary aim of the operation should be to protect lives from unlawful violence."[96]

With regard to the purpose of the use of force, the mixed model is not really mixed. Rather, it is indistinguishable from human rights law. The mixed model allows the killing of a terrorist only where such action is necessary to thwart a concrete plan to commit a terrorist attack and where the benefit in terms of saving human lives outweighs the risk to human lives inherent in the operation.[97] In other words, the mixed model allows resorting to lethal force on no other basis than short-term cost-benefit analysis that concerns the loss of human lives.

The permission to resort to lethal force granted to a state under the mixed model does not correspond with the legitimate purposes of a just war as described by Walzer. Under the mixed model, a state fighting a just war is not entitled to exercise lethal force in order to advance aims such as obtaining guarantees of future security (through, say, disarmament of the terrorist entity). In other words, the mixed model cedes even the limited concept of victory defined by Walzer's Just War Theory.

Such concession seems unwarranted. "In a just war, its goals properly limited, there is indeed nothing like winning. There are alternative outcomes, of course, but these are accepted only at some cost to basic human values."[98]

Indeed, one could argue that even the limited aims of a just war presented by Walzer are largely unrealistic in the context of an armed conflict between a state and a terrorist organization. Such factual assertion is debatable. However, it is important to note that only under such view is the mixed model tenable.

95. William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 765 (2005).

96. Isayeva v. Russia, App. No. 57950/00, 41 Eur. H.R. Rep. 791, 836 (2005).

97. Kretzmer, *supra* note 1, at 203-05, 211.

98. WALZER, *supra* note 46, at 122.

IV. THE PRINCIPLE OF EQUALITY IN THE APPLICATION OF THE LAW OF WAR

The mixed model represents a departure from a basic principle of international law: The International Court of Justice ("ICJ") has repeatedly held that the law of war governs within its field of application as *lex specialis*, taking precedent over the norms of international human rights law.[99] The ICJ's decisions do not distinguish between international and non-international armed conflicts. The International Criminal Tribunal for the Former Yugoslavia has recently relied on the jurisprudence of the ICJ in concluding that the law of war governs non-international armed conflicts as *lex specialis*.[100] Importantly, in the Israeli Wall Advisory Opinion, the ICJ expressly recognized the status of international humanitarian law as *lex specialis* in the context of the al-Aqsa Intifada.[101] Hence, while the law of war may be interpreted in light of the general principles of international human rights law, it is not amenable to substantial amendments as a result of its interaction with the latter. The mixed model is inconsistent with the superiority of the law of war as *lex specialis*. There is, however, a substantive argument for maintaining such superiority.

Recognizing the law of war as *lex specialis* is an essential guarantee of the principle of equality in the application of the law of war. A fundamental principle of the law of war is the equal application of its rules (i.e., *jus in bello*) to all parties to an armed conflict.[102] This principle applies to both international and non-international armed conflicts.[103] As noted by Lindsay Moir:

> [T]he humanitarian laws of internal armed conflict are equally binding upon the government and insurgents, and can also . . . apply to a conflict

99. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 240 (July 8) (observing that, while human rights law applies in principle to armed conflicts, the war rights embodied in humanitarian law are *lex specialis*, taking precedent over general human rights norms); s*ee also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177-78 (July 9); Jochen Abr. Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, *in* 28 ISR. Y.B. HUM. RTS. 9-10 (1998); Balendra, *supra* note 16, at 2482 ("The consensus among many international tribunals and international organizations appears to be that both [human rights law] and [international humanitarian law] are directly applicable in armed conflict but when the two sets of laws conflict, [international humanitarian law] takes priority as the more specialized law or the lex specialis.").

100. Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 178 (July 10, 2008). The tribunal observed that in situations falling short of an armed conflict human rights law restricts the usage of lethal force by state agents "to what is no more than absolutely necessary and which is strictly proportionate to certain objectives." *Id.* However, when hostilities amount to an armed conflict "the question what constitutes an arbitrary deprivation of life is interpreted according to the standards of international humanitarian law, where a different proportionality test applies." *Id.*

101. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177-78 (July 9); s*ee also* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 593 (2006). Roberts explains that where the provisions of the Fourth Geneva Convention are inconsistent with those of the ICCPR, the former "has to be considered the *lex specialis* for occupations."

102. Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 394 (1993); Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism"*, 22 LAW & INEQ. 195, 196 (2004).

103. Sassòli, *supra* note 102, at 196.

> between two parties, neither of which is the government of the State concerned. There is therefore a degree of reciprocity as far as the application of humanitarian law is concerned.[104]

Such equality between state and non-state actors does not exist, however, in the context of international human rights law. The obligations contained in this body of law are binding on governments only.[105] As noted, the mixed model contains norms inconsistent with the law of war, which are largely based on principles of international human rights law. Thus, the mixed model can only apply to the conduct of states, while non-state actors would be allowed to exercise all of the war rights granted under the law of war. This would render the principle of equality in the law of war meaningless. Upholding this principle requires rejecting the mixed model.

V. ARMED CONFLICT BETWEEN A STATE AND A TERRORIST ORGANIZATION V. INTER-STATE ARMED CONFLICT

None of the proponents of the mixed model advocate its application to traditional inter-state armed conflicts. The mixed model is presented in the literature mainly in the context of an armed conflict between a state and a terrorist group.[106] Kretzmer views the al-Aqsa Intifada as such a conflict, defining terrorism as "the deliberate causing of death, or other serious injury, to civilians for political or ideological ends,"[107] and a terrorist group as one that "regularly employs terror as a means of achieving its aims."[108] The proponents of the mixed model generally classify a conflict between a state and a terrorist group as a non-international armed conflict.[109]

But what is the basis for distinguishing an armed conflict between a state and a terrorist group from traditional inter-state armed conflict? Commentators mainly proffer a practical argument in support of such distinction.[110] This argument points to risks in the application of the law of war that are unique to a conflict between a state and a terrorist group.[111] According to such an argument, the application of the law of war to such a conflict would result in adverse consequences that were not contemplated by the framers of the laws of war. Presenting the practical argument, Kretzmer argues:

104. LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 194 (2002).

105. *Id*. ("[H]uman rights obligations are binding on governments only, and the law has not yet reached the stage whereby, during internal armed conflict, insurgents are bound to observe the human rights of government forces."); Abresch, *supra* note 95, at 752-53 ("Under humanitarian law, the rules apply to all parties to a conflict - government forces and dissident armed groups alike. Under human rights law, the rules apply only to the government.").

106. *See* Kretzmer, *supra* note 1, at 201-204; s*ee also* Ben-Naftali & Michaeli, *supra* note 1, at 287-91.

107. Kretzmer, *supra* note 1, at 175.

108. *Id.*

109. *Id.* at 210; Ben-Naftali & Michaeli, *supra* note 1, at 257-59.

110. *See* Kretzmer, *supra note* 1, at 200; *See* Ben-Naftali & Michaeli, *supra* note 1, at 257-58.

111. Kretzmer, *supra* note 1, at 200.

> How can we be sure that the targeted persons are indeed real terrorists? Doesn't this licence [sic] [to target terrorists] create an incentive for victim states to jump as soon as possible from the law-enforcement to the non-international armed conflict model, thus allowing them to ignore due process guarantees and to enjoy almost unrestricted discretion in targeting their suspected enemies?[112]

Other commentators submit that as counter-terrorism operations are often carried out in densely populated areas, such operations involve an especially high risk of incidental injuries to innocent civilians.[113]

Yet the assertion that an "almost unrestricted discretion in targeting . . . suspected enemies"[114] is more dangerous in the context of the war on terror than in other types of armed conflict seems unfounded. The experience of recent traditional wars demonstrates that the number of uninvolved civilians either erroneously targeted or killed as collateral damage in such wars exceeds the number of innocent civilians erroneously targeted or collaterally killed in the war on terror.[115] The argument that soldiers of regular armies wear uniforms or other distinguishing marks that preclude erroneous targeting of civilians weakens in an age where thousands are killed by long-range precision weapons. As for collateral damage, the targeting of a suspected terrorist in the heart of a Palestinian residential area obviously entails a high risk of such damage. Such a risk must be brought into account in applying the proportionality requirement under the law of war. However, such a risk by no means exceeds the risk of collateral damage that existed (and materialized) in the cases of the American aerial bombardments of

112. *Id.*

113. Ben-Naftali & Michaeli, *supra* note 1, at 291 ("In light of the fact that the Palestinian territories are densely populated, and that most [targeted killing] operations can only take place within these territories, only exceptional circumstances will enable the execution of such operations that have little harmful effects."); *see* Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 888 (2005); *see also*, Schondorf, *supra* note 16, at 66-67.

114. Kretzmer, *supra* note 1, at 200.

115. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 43-44 (2005) (reviewing surveys indicating that at least 3,420 civilians were killed as collateral damage in the course of the American invasion of Iraq in spring of 2003); Human Rights Watch, *Needless Deaths in the Gulf War: Civilian Casualties During the Campaign and Violations of the Laws of War*, Introduction, (1991), *available at* http://www.hrw.org/legacy/reports/1991/gulfwar/INTRO.htm (alleging up to 3,000 civilians were killed during the 1991 Gulf War); Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, Summary, The Civilian Deaths, *available at* http://www.hrw.org/legacy/reports/2000/nato/index.htm (concluding that as few as 488, and as many as 527 civilians were killed in approximately ninety incidents of collateral damage during the three months of NATO operations against Serbia); Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, 54 INT'L COMP. L. Q. 411, 420 (2005) ("[T]he Iraqi Al Firdos bunker was bombed by the Allied forces on 13 February 1991 as it was thought to be the headquarters of the Ba'ath Party's secret police: unfortunately, also their wives and children were there and 200-300 civilians died in the attack"). It should be noted, however, that the military operations carried out by Israel in the course of its recent conflicts with the Hezbollah in Lebanon (2006) and Hamas in Gaza (2009) resulted in a number of civilian casualties characteristic of a full scale inter-state war.

Baghdad in the course of the two Gulf wars, and in the case of the NATO bombardments of Belgrade.[116]

VI. THE PERMISSION TO USE DEADLY FORCE UNDER HUMAN RIGHTS LAW

Under the mixed model, a state may use lethal force against terrorists who pose a threat that is not imminent when there is no feasible possibility of arresting them and it is likely that "if immediate action is not taken another opportunity will not be available to frustrate the planned terrorist attacks."[117] The author agrees that this standard of conduct is both realistic and desirable with regard to situations such as the confrontation between the United States and al-Qaeda. Yet the author argues that the unpleasant burden of sanctioning such killings should be placed on international human rights law.

This part rejects the assumption, which underlies the mixed model, that the liberties to use force available to a state under the mixed model are not available to it under human rights law. The analysis below addresses two questions concerning the scope of permission to kill suspected terrorists afforded to a state under human rights law:

> 1. When is the threat sufficiently proximate to justify the use of lethal force against the suspected terrorist?
>
> 2. Can a state engage in counter-terrorism operations that are likely to result in the unintentional killing of innocent persons?

A. The temporal requirement

Human rights law allows a state to exercise lethal force against a suspected terrorist where such use of force is "no more than absolutely necessary" in order to protect the lives of other persons.[118] Exploring the scope of this permission, David

116. *See supra* text accompanying note 115.

117. Kretzmer, *supra* note 1, at 203.

118. Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

Article 2

> (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defense of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

Article 6(1) of the International Covenant on Civil and Political Rights prohibits deprivation of life only where such deprivation is "arbitrary." International Covenant on Civil and Political Rights, Dec. 16, 1966 art. 6, 999 U.N.T.S. 171 [hereinafter ICCPR]. It was observed that Article 2 of the European Convention "provides a fair statement of cases in which such force may be regarded as non-arbitrary."

Kretzmer subscribes to the view that such permission is limited to "cases in which lethal force is used to thwart an imminent attack. Absent imminency, pre-emptive targeting of a suspected terrorist will be regarded as not being absolutely necessary, or as an arbitrary deprivation of life, no matter how strong the evidence that he is planning further terrorist attacks and how high the probability that there may not be another opportunity to prevent such attacks."[119]

Yet neither the language of the main human rights conventions nor the jurisprudence of international human rights tribunals provides ample support for such conclusion.

1. The Approach Taken By Human Rights Treaty-Bodies

The Jurisprudence of the European Court of Human Rights has produced extensive case law regarding the limitations on the use of lethal force imposed on a state under human rights law. Applying Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[120] ("European Convention"), which allows a state to use lethal force "which is no more than absolutely necessary . . . in defense of any person from unlawful violence," the Court has stressed that "[t]he circumstances in which deprivation of life may be justified must therefore be strictly construed."[121] Hence, use of lethal force against an aggressor is only permitted when absolutely necessary in order to thwart a lethal threat he poses to others.[122] Such use of force must be "strictly proportionate" to the achievement of this aim.[123] The Court has repeatedly held that use of lethal force against a person whom it is possible to arrest would never be "absolutely necessary."[124] Yet the Court has never held that a state's use of deadly force against a person who poses a lethal threat that is not imminent violates human rights law even where there is no feasible possibility of arresting him and there is a high probability that if action is delayed there will not be another opportunity to thwart that threat.[125]

In its periodic report of Israel in July 2003, the U.N. Human Rights Committee addressed the question of whether Israel's policy of targeted killing of suspected terrorists violates Israel's obligations under human rights law.[126] Israel's representative submitted to the Committee that "[i]t would, of course, be preferable to arrest such persons, but in areas like the Gaza Strip, over which Israel had no

Kretzmer, *supra* note 1, at 177.

119. Kretzmer, *supra* note 1, at 183.

120. European Convention, *supra* note 118, at art. 2.

121. Isayeva v. Russia, App. No. 57950/00, 41 Eur. H.R. Rep. 791, 832 (2005).

122. *Id.* at 836 ("[T]he primary aim of the operation should be to protect lives from unlawful violence.").

123. *Id.* at 832; McCann v. United Kingdom, App. No. 18984/91, 21 Eur. H.R. Rep. 97, 98 (1996).

124. *See McCann*, App. No. 18984/91, 21 Eur. H.R. Rep. at 97-98; *see also* Ergi v. Turkey, App. No. 23818/94, 32 Eur. H.R. Rep. 388, 430-31 (1998).

125. *See McCann*, App. No. 18984/91, 21 Eur. H.R. Rep. at 97-98; *see also* Ergi v. Turkey, App. No. 23818/94, 32 Eur. H.R. Rep. 388, 430-31 (1998).

126. U.N. Human Rights Comm. [U.N.H.R.C.], *Concluding Observations of the Human Rights Committee: Israel*, ¶ 15, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003), [hereinafter UNHRC].

control, his Government did not have that option."[127] Israel's representative further assured the Committee that Israel carried out targeted killing operations against suspected terrorists "only if there was reliable evidence linking them directly to a hostile act" and only "when no less harmful alternative was available to avert the danger posed by the terrorists."[128] Israel's description of the circumstances underlying its targeted killing operations clearly provided the Committee with ample opportunity to state plainly and explicitly, had it chosen to do so, that human rights law always prohibits the targeted killing of a terrorist who poses a lethal threat that is not imminent, "no matter how strong the evidence that he is planning further terrorist attacks and how high the probability that there may not be another opportunity to prevent such attacks." [129] The Committee, however, clearly chose to refrain from such determination. In its Concluding Observations the Committee stated: "The Committee is concerned by what the State party calls 'targeted killings' of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6."[130]

The Committee then proceeded to recommend:

> The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. *Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted*.[131] (emphasis added)

The first part of the Committee's observation seems to suggest that the exercise of lethal force against a terrorist, which is not used as a deterrent or punishment but, rather, as a means of preventing an attack that cannot be otherwise thwarted, does not violate human rights law. In its recommendation, the Committee refers to use of deadly force against a "person suspected of being in the process of committing acts of terror."[132] Yet this does not suggest that the Committee took the view that under human rights law preventive lethal force may only be used in the face of an imminent attack. It is important to recall that the Israeli practice of targeted killing of suspected terrorists, addressed by the Committee, was largely directed against individuals who recruited suicide bombers, planned or ordered the suicide attack, or manufactured the explosives

127. MELZER, *supra* note 84, at 31 (*quoting* U.N. Human Rights Comm., *International Covenant on Civil and Political Rights, Summary Record of the 2118th Meeting*, ¶ 40, U.N. Doc. CCPR/C/SR.2118 (July 23, 2003)).

128. *Id.*

129. Kretzmer, *supra* note 1, at 183.

130. UNHRC, *supra* note 126, ¶ 15.

131. *Id.*

132. *Id.*

used by the suicide bombers.[133] It seems that those individuals are "in the process of committing acts of terror"[134] when performing their part in the terrorist scheme, even though their role is typically performed when the threat is not yet imminent. It is hardly arguable that those who are "in the process of committing acts of terror" are only the suicide bombers themselves.

In its *Report on Terrorism and Human Rights*,[135] the Inter-American Commission on Human Rights addressed the limitations on the use of lethal force against suspected terrorists under Article 4 of the American Convention on Human Rights, which provides that "[n]o one shall be arbitrarily deprived of his life."[136] Even proponents of a strict imminence-of-harm requirement in human rights law concede that the Commission's observations regarding this matter were "ambiguous."[137] The Commission stated:

> [I]n situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate. [138]

The first example of permissible use of lethal force provided by the Commission seems to suggest that in the Commission's view the targeted killing of a suspected terrorist is generally allowed only where the terrorist poses an imminent threat. The second example (" . . . to otherwise maintain law and order"), with regard to which the Commission does not mention the imminence requirement, seems to imply, however, that in the face of large-scale, organized violence between a government and a terrorist or guerrilla group, or other types of large-scale violence, the imminence requirement is relaxed.

The Commission then proceeded to provide examples of impermissible use of lethal force against suspected terrorists:

> [T]he state may resort to the use of force only against individuals that threaten the security of all . . . in their law enforcement initiatives, states must not use force against individuals who no longer present a threat as described above, such as individuals who have been apprehended by authorities, have surrendered, or who are wounded and abstain from hostile acts. The use of lethal force in such a manner would constitute

133. Kretzmer, *supra* note 1, at 172.

134. UNHRC, *supra* note 126, ¶ 15.

135. Inter-American Comm'n on Human Rights, *Report on Terrorism and Human Rights*, at ¶ 22, OEA/Ser.L/V/II.116 (Oct. 22, 2002), *available at* http://www.cidh.oas.org/Terrorism/Eng/exe.htm.

136. American Convention on Human Rights art. 4, Nov. 22, 1969, 9 I.L.M. 673.

137. Kretzmer, *supra* note 1, at 180.

138. Inter-American Comm'n on Human Rights, *supra* note 135, at ¶ 87.

> extra-judicial killings in flagrant violation of Article 4 of the Convention and Article I of the Declaration. [139]

The Commission's observations "left matters unclear."[140] Kretzmer notes that "[t]he examples given are impeccable. However, what about suspected terrorists who have not been apprehended or wounded and have not surrendered? If there is an assessment that they 'threaten the security of all' may lethal force be used against them?"[141]

2. The Relationship Between International Human Rights Law and Domestic Laws

The author submits that the construction of the right to life under human rights law should be informed by the domestic laws of the various states.

The prevailing interpretive approach to human rights conventions looks to the standards and values commonly accepted by Member States. The European Court of Human Rights has thus noted that in determining the scope of the prohibition on "degrading punishment" contained in Article 3 of the European Convention,[142] "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."[143] Commentators have observed that the European Court's interpretive approach "is closely linked to a search for common European standards on the basis of domestic law and practice in the Member States of the Council of Europe,"[144] and that the Court interprets the Convention "to accommodate changing social attitudes."[145] This interpretive approach also applies to the human right to life.[146] As noted by one commentator, the legal regime applicable to the use of force by law enforcement agents should not be examined "from an either/or perspective–either as an international law issue or as one of domestic law. In fact, it is an issue that resides equally in both spheres, and decisions made as to legal characterizations and authorizations in each sphere are neither independent nor discrete. Such issues must be looked at holistically and the consequences of a legal characterization in one sphere must be traced through the other."[147]

The domestic law of self-defense is indicative of the social attitudes in the various states toward the use of lethal force. The criminal defense of self-defense

139. *Id.* at ¶¶ 90-91.

140. Kretzmer, *supra* note 1, at 182.

141. *Id.* at 181.

142. European Convention, *supra* note 118, art. 3.

143. Tyrer v. United Kingdom, 2 Eur. H.R. Rep. (ser. A No. 26) at 10 (1978); RICHARD CLAYTON & HUGH TOMLINSON, THE LAW OF HUMAN RIGHTS 270 (2000); *see also* P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 78 (1998).

144. VAN DIJK & VAN HOOF, *supra* note 143, at 78.

145. CLAYTON & TOMLINSON, *supra* note 143, at 270.

146. Rob McLaughlin, *The Legal Regime Applicable to Use of Lethal Force When Operating Under A United Nations Security Council Chapter VII Mandate Authorizing 'All Necessary Means,'* 12 J. CONFLICT & SECURITY L. 389, 395-97 (2007).

147. *Id.* at 392.

is a justificatory, rather than an excusing, norm.[148] Hence, the availability of the defense of self-defense with regard to certain killings indicates that society considers the conduct that resulted in such killings a desirable conduct.[149] Explaining the nature of justificatory norms, Antonio Cassese observes that:

> When the law provides for a justification, an action that would per se be considered contrary to law because it causes harm or damage to individuals or society is regarded instead as lawful and thus does not amount to a crime. Society, and the legal system it has created, positively wants a person to do the otherwise illegal act . . . . [S]ociety and its legal system make a positive appraisal of what would otherwise be misconduct.[150]

To be sure, a state's domestic law of self-defense may simply violate human rights law.[151] Yet where numerous democracies parties to a human rights treaty pronounce a certain conduct desirable, by affording it a self-defense justification, such conduct can hardly be considered contrary to the standards and values commonly accepted by Member States. Hence, such conduct should not be considered a violation of the human right to life. This view is also supported by the status of the human right to life as a customary norm of international law.[152] Customary international norms are only those that have gained broad acceptance, which is largely reflected in domestic laws.[153] Hence, any assessment of the scope of permission to use lethal force available to states under human rights law should be informed by the domestic laws of self-defense.[154]

Some domestic jurisdictions recognize a right to use force in self-defense only where the threat posed by the aggressor is imminent.[155] Other jurisdictions,

148. GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 132-133 (1998).

149. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 255 (2nd ed. 2008).

150. *Id.*

151. *See, e.g.*, FIONA LEVERICK, KILLING IN SELF-DEFENSE 192-94 (2006) (arguing that English law, which affords the defense of self-defense to a person who killed another in the unreasonably mistaken belief that the latter was an aggressor, violates the United Kingdom's obligation under human rights law to take appropriate steps to safeguard the lives of those within its jurisdiction).

152. With regard to the status of the human right to life as customary international law, *see* MELZER, *supra* note 84, at 189; Kretzmer, *supra* note 1, at 184-85 ("some of the substantive norms in human rights treaties that have been ratified by the vast majority of states in the world, have now become peremptory norms of customary international law. The duty to respect the right to life is surely one of these norms."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702(c) (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages or condones . . . the murder . . . of individuals.").

153. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (7th ed. 2008).

154. McLaughlin, *supra* note 146, at 389 ("The 'law enforcement' paradigm . . . essentially countenances the use of lethal force within the limitations of self-defense.").

155. LEVERICK, *supra* note 151, at 88. An imminence of harm requirement exists in Scotland. Thus, the Scottish Appeal Court held that "self-defense is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds." Owens v. HM Advocate 1946 J.C. 119, 125. A requirement that harm be imminent can also be found in the self-defense laws of some US states. *See* Whipple v. Indiana 523 N.E.2d 1363, 1367 (1988); ALA. CODE § 13A-3-23(a) (1975); ARK. CODE ANN. § 5-2-606(a)(1)

however, do not introduce an imminence requirement and only require that force used in self-defense be "necessary."[156] This is the approach taken in English law where imminence of harm is one factor for the jury to take into account in deciding whether or not defensive action was reasonably necessary.[157] This approach also prevails in Canadian law. [158] The Supreme Court of Canada thus held in *R. v. Petel*: "There is . . . no formal requirement that the danger be imminent. Imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself otherwise than by killing the attacker."[159]

The holding in *Petel* addressed a case involving a battered woman.[160] Yet in a later case, *R. v. Cinous*, the Supreme Court held that the approach taken in *Petel* represented the law in all cases of self-defense.[161]

Similarly, the American Model Penal Code ("MPC") as well as the Israeli Penal Code substituted a requirement that the use of force in self-defense be "immediately necessary" for a requirement of imminence.[162] The approach taken in the MPC was followed by a number of U.S. states.[163] Many commentators believe that "immediately necessary" will encompass those cases in which the violence is not imminent, but the need to use lethal force in order to prevent that violence is immediate, since if such force is not used now it may not be possible to prevent the violence later.[164]

Yet even proponents of a strict imminence requirement agree that this requirement presupposes the availability of non-lethal law-enforcement measures when the danger is not imminent. George Fletcher argues that what underlies the imminence requirement is the notion that the citizen may use force in self-defense only when the state lacks the opportunity to do so.[165] Hence, according to Fletcher,

(1975); COLO. REV. STAT. § 18-1-704(1) (1975); GA. CODE ANN. § 16-3-21(a) (2001); ME. REV. STAT. ANN. tit. 17-A, § 108(1) (2006); MONT. CODE ANN. § 45-3-102 (2009); NY PENAL LAW § 35.15(1) (McKinney 2009); OR. REV. STAT. § 161.209 (2003); UTAH CODE ANN. § 76-2-402(1) (1953).

156. *See* LEVERICK, *supra* note 151, at 96.

157. *Id.*; Shaw v. R [2001] UKPC 26, 19; Palmer v. R [1970] A.C. 814, 831.

158. LEVERICK, *supra* note 151, at 96.

159. R. v. Petel, [1994] 1 S.C.R. 3 (Can.); s*ee also* R. v. Lavallee, [1990] 1 S.C.R. 852 (Can.).

160. *See* Petel, 1 S.C.R. 3.

161. R. v. Cinous [2002] 2 S.C.R. 3, 40 (Can.); LEVERICK, *supra* note 151, at 97.

162. MODEL PENAL CODE § 3.04(1) (2001); Penal Law of Israel § 34(J) (1996).

163. TEX. PENAL CODE ANN. § 9.31(a) (Vernon 2003); ARIZ. REV. STAT. ANN. § 13-404(A) (1977); DEL. CODE ANN. tit. 11, § 464(a) (1972); NEB. REV. STAT. § 28-1409(1) (1972); 18 PA CONS. STAT. § 505(a) (1972).

164. *See, e.g.*, Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL`Y 105, 127 (1990); PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 78-79 (1984); Peter D.W. Heberling, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 932 (1975).

165. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996) ("[T]he imminence requirement expresses the limits of governmental competence: when the danger to a protected interest is imminent . . . the police are no longer in a position to intervene and exercise the state's function of securing public safety. The individual right to self-defense kicks in precisely because immediate action is necessary.").

the imminence requirement "properly falls into the domain of political rather than moral theory. The issue is the proper allocation of authority between the state and the citizen."[166]

This fundamental premise of the imminence requirement is invalid, however, where the suspected terrorist is not in a territory under the effective control of the victim state, and the state in which he stays is either unwilling or unable to thwart the threat he poses. Commenting on the conditions for a state's right of self-defense (which are similar to the conditions for a right of self-defense under domestic law[167]), Mordechai Kremnitzer argues that under such circumstances the imminence requirement ought to be replaced by a more relaxed requirement that the use of lethal force by the state be "immediately necessary" in order to thwart the threat.[168] The latter requirement allows the state to act even where the threat posed by the terrorist is temporally remote if there is a high probability "that delaying action will prevent the possibility of eliminating the threat later on."[169]

In *Tennessee v. Garner*, the U.S. Supreme Court examined the constitutional limitations on the use of lethal force by law enforcement agents attempting to apprehend a fleeing suspect.[170] The Court held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others . . . deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."[171] The Court determined that a law enforcement officer may conclude that a suspect poses such threat not only where "the suspect threatens the officer with a weapon,"[172] but also where "there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm . . ."[173] The author submits that permission to use lethal force against a fleeing suspect in order to thwart a threat inferred solely from her alleged past conduct is inconsistent with an imminence-of-harm requirement.

B. Collateral Damage

1. The Approach Taken By the European Court of Human Rights

The issue of collateral damage in the course of anti-insurgency operations was discussed by the European Court of Human Rights in the case of *Isayeva v. Russia*.[174] Engaging a group of over a thousand Chechen insurgents, the Russian military resorted to air bombardment using heavy, free-falling, high-explosive bombs with a damage radius exceeding 1,000m, notwithstanding the proximity of

166. *Id.*

167. *Id.* at 557.

168. Mordechai Kremnitzer**,** *Are All Actions Acceptable in the Face of Terror? Israel's Policy of Preventative (Targeted) Killing in Judea, Samaria and Gaza* (Israel Democracy Institute, Policy Research Paper 60, 2005).

169. *Id.*

170. Tennessee v. Garner, 471 U.S. 1, 3 (1985).

171. *Id.* at 11-12.

172. *Id.* at 11.

173. *Id.*

174. *See* Isayeva v. Russia, App. No. 57950/00, 41 Eur. H.R. Rep. 791, 791 (2005).

the fighters to civilian population.[175] There is little doubt that the large-scale hostilities in Chechnya qualified as an armed conflict. However, as neither Russia nor the Applicants in those cases argued for the existence of an internal armed conflict, the Court did not recognize the existence of such conflict.[176] Applying human rights law, the Court observed that the Russian military activity was carried out "outside wartime"[177] and thus "has to be judged against a normal legal background." [178] The Russian military, held the Court, was bound to exercise "the degree of caution expected from a law enforcement body in a democratic society."[179]

Article 2 of the European Convention, which protects the right to life, permitted Russia to use deadly force against the Chechen fighters provided that such force was "no more than absolutely necessary" in order to protect either the lives of the Russian soldiers or the lives of Chechen civilians in the hands of the insurgents.[180] The Court observed that Article 2 further requires that the use of force be "strictly proportionate" to the achievement of this aim.[181]

Yet, while the Court concluded that the indiscriminate use of lethal force by Russia violated Article 2 of the European Convention[182]–indeed, the Russian operation stood in clear violation of the law of war as well[183]–its judgment implies that human rights law does not always prohibit military operations that involve significant risk to the lives of innocent persons. Applying the "strict proportionality" standard, the Court held that human rights law requires a state to "take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, *in any event, minimizing*, incidental loss of civilian life"[184] (emphasis added – A.Z.). The Court recognized that "the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency."[185] These measures, the Court added, "could presumably include employment of military aviation equipped with heavy combat weapons," as well as artillery.[186] The limited requirement merely to "minimize" incidental loss of civilian lives, read together with the permission to use weapons that inherently create substantial risk of collateral damage, is inconsistent with the view that any foreseeable incidental

175. *Id.* at 794, 817.

176. *See id.* at 824-30.

177. *Id*. at 836.

178. *Id.*

179. *Id.*

180. *Id.* at 832; European Convention, *supra* note 118, art. 2(2).

181. *Isayeva*, App. No. 57950/00, 41 Eur. H.R. Rep. at 832.

182. *Id.* at 791.

183. David Kaye, *Khashiyev & Akayeva v. Russia; Isayeva, Yusupova & Bazayeva v. Russia, Isayeva v. Russia*, 99 AM. J. INT'L L. 873, 881 (2005).

184. *Isayeva*, App. No. 57950/00, 41 Eur. H.R. Rep. at 832.

185. *Id.* at 833; Isayeva, Yusopova and Bazayeva v. Russia, App. Nos. 57947/00, 57948/00, 57949/00, 41 Eur. H.R. Rep. 847, 884 (2005) [hereinafter Isayeva II].

186. *Supra* note 185; *See* also Kaye, *supra* note 183, at 879.

death of an innocent person in the course of a military operation amounts to a violation of Article 2.[187]

The Court emphasized that "the primary aim of the operation should be to protect lives from unlawful violence."[188] The Court's holding is not inconsistent with the view that, in situations of large-scale violence such as the Chechnya conflict, human rights law allows foreseeable incidental killing of innocent persons in the course of a military operation that is guided by a cost-benefit analysis in terms of loss of innocent lives. Such permission is not narrower than the one afforded under the mixed model.

The author submits that where a law enforcement operation is likely to result in the unintentional killing of innocent bystanders, human rights law requires a society to cede its interests in preserving law and order only to a certain point. Indeed, asserting the contrary would render most hostages rescue operations a violation of human rights law, as the risk to the lives of innocent individuals inherent in such operations can often be avoided simply by yielding to the demands of the hostage-takers.

Thus, no international tribunal has ever suggested that human rights law requires state law enforcement agencies to refrain altogether from confronting a guerrilla group, a criminal organization, or any other armed group illegally operating within the borders of the state, where there is no possibility to conduct such law enforcement operations without a high risk to the lives of innocent individuals. All that is required from state forces initiating a military operation against guerrilla forces is to plan and conduct such operations in a manner that minimizes as far as possible incidental injuries to uninvolved individuals.[189] Only where law enforcement operations do not demonstrate such an effort does a violation of the right to life occur.

2. Domestic Laws

The domestic laws of the various states do not reveal a *commonly accepted* attitude toward law enforcement operations that are likely to result in the incidental death of innocent persons, and which are carried out on the basis of cost-benefit analysis in terms of the loss of human lives. The German Federal Constitutional Court seems to have taken the position that such operations are never permissible in situations not governed by the law of war.[190] Following the terrorist attacks of September 11, 2001, the German legislature passed a new aerial security law which expressly authorized the German armed forces, as a law enforcement measure of last resort, to shoot down civil aircraft which have come under the control of individuals intending to use them as weapons by deliberately causing

187. *Id.* Kaye notes that the language of the Isayeva Court "could just as well come from a court doing the typical balancing of military requirements and humanitarian concerns required under [international humanitarian law]." *See also* Abresch, *supra* note 95, at 762.

188. *Isayeva*, App. No. 57950/00, 41 Eur. H.R. Rep. at 836.

189. *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L. L. 1, 18 (2004).

190. Melzer, *supra* note 84, at 17-18.

them to collide with selected targets.[191] The German Federal Constitutional Court declared the said law unconstitutional to the extent that it permitted the incidental killing of innocent crew and passengers on board of the "renegade" aircraft. The Court reasoned that such killing would degrade the innocent individuals on board of the airplane to mere objects of state actions, and would thus be incompatible with the notion of human dignity, enshrined in the German Basic Law.[192]

Moreover, in some jurisdictions no criminal justification applies to unintentional injuries suffered by innocent third parties in the course of self-defense.[193] This, however, is not the prevailing approach in U.S. criminal law. Under the laws of most U.S. jurisdictions, a person using a firearm in the exercise of self-defense is not liable for an injury unintentionally inflicted on a bystander unless he acted carelessly or negligently.[194] In this regard, the fact that the defending party knew of the presence of the bystander does not of itself render his conduct careless or negligent.[195] The defense available to the defending party relies on the doctrine of transferred intent.[196] According to this doctrine, "the fact

191. *Id.* at 16.

192. *Id.* at 17-18.

193. This is the position taken by German law as well as by English law. *See* Klaus Bernsmann, *Private Self-Defense and Necessity in German Penal Law and in the Penal Law Proposal – Some Remarks*, 30 ISR. L. REV. 171, 176 (1996); *Re: A (Conjoined Twins Case)* [2001] 2 WLR 480.

194. Ferdinand S. Tinio, Annotation, *Unintentional Killing Of or Injury to Third Person During Attempted Self-Defense*, 55 A.L.R. 3d 620 (2008):

> If, then, the perpetrator of the homicide or of the assault had no criminal intent in attempting to injure or kill another person, as where the perpetrator was lawfully defending himself from the harm sought to be inflicted upon him by such other person, the fact that, on that occasion, a third person was unintentionally injured or killed by the perpetrator would not make him liable, unless the perpetrator acted carelessly or without regard to the safety of innocent bystanders. This view has been applied in a variety of circumstances in which the perpetrator of the homicide or assault has been prosecuted for murder, manslaughter, or assault, based upon injury to, or death of, a third person.

See also 13 AM JUR. 3D *Proof of Facts* 219, § 7 (comment).

195. 13 AM. JUR. 3D *Proof of Facts* 219, §7 (comment):

> A person using a firearm or other weapon in the exercise of self-defense is not liable for an injury unintentionally inflicted on a bystander unless he is guilty of some negligence or folly in the use of the weapon. Thus, when a person, in lawful self-defense, shoots at an assailant, and, missing him, accidentally wounds an innocent bystander, he is not liable for the injury if not guilty of negligence. *It has been held in such circumstances that the fact that the person knew or was chargeable with knowledge of the presence of the bystander does not of itself constitute want of due care or actionable negligence per se*. (emphasis added – A.Z.)

196. Tinio, *supra* note 194:

> The general rule in criminal law that one who does an unlawful act is liable for the consequences even though they may not have been intended may have a more specific counterpart in the rule in homicide and assault cases that a homicide or assault partakes of the quality of the original act, so that the guilt of the perpetrator of the crime is exactly what it would have been had the blow fallen upon the intended victim instead of the bystander. Under this rule the fact that the bystander was killed or injured instead of the intended victim becomes

that the bystander was killed or injured instead of the intended victim becomes immaterial, and the only question at issue is what would have been the degree of guilt if the issue intended had been accomplished; the intent is transferred to the person whose death or injury has been caused."[197] It thus seems that the defense available to the defending party is the criminal justification of self-defense. In the words of one commentator, "[i]n essence, the defendant's privilege of self-defense is transferred from the attacker to an innocent bystander injured by the defendant's response."[198]

A similar approach prevails in American tort law. It has been observed that "[u]nder established tort principles, the reasonable use of force in self-defense does not create liability for any resultant bodily injuries, even if suffered by an innocent bystander."[199] In this context, Mark Giestfeld noted that "as a matter of law, abnormally dangerous activities involve reasonable risks."[200] Indeed, the jurisprudence of U.S. courts indicates that a substantial risk to the life of an innocent third party is not necessarily an unreasonable one: if shooting at an aggressor is a *necessary* means of self-defense, such use of force does not create liability for resultant injuries suffered by an innocent bystander, even if the risk of such injuries was foreseeable and substantial.[201] It seems, then, that "tort law has

> immaterial, and the only question at issue is what would have been the degree of guilt if the issue intended had been accomplished; the intent is transferred to the person whose death or injury has been caused.

197. *Id.*

198. Alan Calnan, *The Fault(s) in Negligence Law*, 25 QUINNIPIAC L. REV. 695, 712 n.91 (2007).

199. Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585, 596 (2003); DAN B. DOBBS, THE LAW OF TORTS 77 (2000) ("[T]he defendant must not be held liable if his conduct was protected by a privilege and the plaintiff is injured without fault. For example, the defendant may act intentionally in justified self-defense; if his act of self-defense causes injury to a bystander, there is no reason to impose liability unless the defendant was negligent.").
Section 75 of the Restatement (Second) of Torts (1965) thus provides:

> An act which is privileged for the purpose of protecting the actor from a harmful or offensive contact or other invasion of his interests of personality subjects the actor to liability to a third person for any harm unintentionally done to him only if the actor realizes or should realize that his act creates an unreasonable risk of causing such harm.

RESTATEMENT (SECOND) OF TORTS § 75 (1965).

200. Mark Geistfeld, *Tort Law and Criminal Behavior (Guns)*, 43 ARIZ. L. REV. 311, 335 (2001).

201. Whittington v. Levy, 184 So. 2d 577, 579 (La. Ct. App. 1966) ("If, in defending himself, the defendant accidently shoots a stranger, there is no liability in the absence of some negligence, and on the issue of negligence, the necessity of defending against the assailant must be considered in determining whether he has acted reasonably.").
The example provided in the Comments on Section 75 of the Restatement (Second) of Torts (1965) is illuminating:

> A points a pistol at B, threatening to shoot him. B attempts to shoot A, but his bullet goes astray and strikes C, an innocent bystander. B is not liable to C unless, taking into account the exigency in which A's act placed B, B fired his self-defensive shot in a manner *unnecessarily* dangerous to C. (emphasis added – A.Z.).

RESTATEMENT (SECOND) OF TORTS § 75 cmt. (1965).

> This example clarifies that if shooting at an aggressor is a *necessary* means of self-defense, such use of force does not create liability for resultant injuries

decided in favor of self-defense,"[202] so that "[t]he interest in self-defense has priority, for purposes of tort liability, over the competing security interest of a third party."[203] Importantly, some decisions indicate that this also applies to the use of defensive force by a law enforcement agent.[204]

It seems, then, that domestic laws do not reflect a common sentiment in the international community that regards an attack directed at an aggressor, which involves a substantial risk of unintentional injury to an innocent third party, as always unreasonable. At the very least, it can be said that domestic laws do not preclude an interpretation of human rights law that grants a state the same permission to kill afforded to it under the mixed model.

C. Should We Keep Human Rights Law "Unstained"?

The language of the human rights conventions allows us a choice: we can place the burden of relaxing the imminence requirement either on human rights law or on a new body of law–the mixed model–created in order to shield human rights law.

We saw that classifying hostilities between a state and a terrorist group as an armed conflict requires stretching the customary definition of either an international armed conflict or a non-international armed conflict. As indicated above, there is a good reason to stretch the definition of armed conflict to encompass violence that borders on full scale war. In such situations it is essential to apply the law of war as it represents the strictest realistic limitations on violence. But what about conflicts characterized by a scale of violence that is somewhere in between peace and full scale war, such as the conflict between the U.S. and al-Qaeda? Is there a good reason to stretch the definition of an armed conflict in order to apply the mixed model to such conflicts?

In the wake of September 11th, human rights law was hurried to a secured location, while other bodies of international law–the law of war or the mixed model–were dispatched to do the dirty work. The proponents of the mixed model go long way in order to keep human rights law unstained. Is there a good reason to relieve human rights law of the unpleasant responsibility to sanction realistic standards of conduct in the fight against terrorism?

One could argue that sanctioning targeted killing under the mixed model rather than under human rights law is necessary in order to protect the legal

suffered by an innocent bystander, even if the risk of such injuries was foreseeable.

202. Geistfeld, *supra* note 200, at 313.

203. *Id*. at 335. *See also* Calnan, *supra* note 198, at 712 ("In cases of self-defense, the imperiled party is entitled to use whatever force is necessary to stop an aggressor in her tracks. However, her entitlement does not stop there. She also may commandeer the interests of innocent bystanders. For example, a party claiming self-defense may endanger or even injure a passerby. The only limit is that she act reasonably under the circumstances. In this situation, the passerby cannot recover damages for her harm. Instead, she must sacrifice her interests for those of the privilege-holder.").

204. Gordon v. City of New Orleans, 363 So. 2d 235, 241 (La. Ct. App. 1978); Gordon v. City of New Orleans, 371 So. 2d 768, 768 (La. 1979).

structure of "due process – rule, extrajudicial killings – exception." Removing a norm that relaxes the imminence requirement with regard to targeted killing from the body of law that mainly regulates situations of normalcy, and confining it to a body of law that regulates armed conflicts, emphasizes the norm's status as the exception. It provides a buffer between that norm and situations of normalcy.

Yet this argument presupposes the exceptional nature of large-scale violence that renders due-process law enforcement measures impractical. It relies on "a vision of spasms of crises–episodic and sporadic events, albeit very serious in nature–that last for a relatively brief period of time before the restoration of normalcy."[205] Such vision hardly comports with reality. As observed by Oren Gross with regard to the Derogation Regime in human rights law, "the exception has swallowed the general rule . . . . Crisis and emergency are no longer sporadic episodes in the lives of many nations; they are increasingly becoming a permanent fixture in the unfolding story of humanity." [206] Gross further observes that "a substantial number of states of emergency in the modern world do not follow the 'normalcy-rule, emergency-exception' paradigm. Rather than provisional and temporary emergencies, the world increasingly faces de facto, permanent, institutionalized, or entrenched emergencies."[207]

Grave, large-scale hostilities between a state and terrorist or guerrilla organizations have become in many regions of the world the rule, not the exception.[208] It seems, therefore, that a careful yet *realistic* application of the concepts of "absolute necessity" and "strict proportionality" in human rights law would not compromise the legal structure of "due process–rule, extrajudicial killings–exception" more than a model that stretches the definition of an armed conflict so that it encompasses conflicts such as the one between the U.S. and al-Qaeda.

The main rationale for the mixed model turns on the impracticality of due process law enforcement measures in the face of grave, large-scale violence. Opting for the mixed model on the basis of this rationale seems to be precluded by the derogation regime applicable in international human rights law: The main international human rights conventions allow a signatory state to derogate from some of its human rights obligations "in time[s] of public emergency which threatens the life of the nation . . ."[209] Such derogation must be limited "to the extent strictly required by the exigencies of the situation."[210]

An adoption of the mixed model triggered by the impracticality of due process law enforcement measures would circumvent the derogation regime. The

205. Oren Gross, *"Once More Unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437, 453 (1998).

206. *Id.* at 443.

207. *Id.* at 455.

208. *See* Savitri Taylor, *Guarding the Enemy from Oppression: Asylum-Seeker Rights Post-September 11*, 26 MELB. U. L. REV. 396, 406 (2002).

209. ICCPR, *supra* note 118, art. 4; European Convention, *supra* note 118, art. 15(1); American Convention on Human Rights art. 27, Nov. 22, 1969, 9 I.L.M. 673.

210. *See* ICCPR, *supra* note 118, art. 4.

derogation regime contained in human rights law was conceived precisely for situations such as large-scale violence that threatens the life of the nation (i.e., violence that renders the law enforcement model impractical).[211] It implies a judgment, made by the framers of the human rights conventions, that such violence does not warrant a shift from a legal regime governed by human rights law to any other legal regime. Rather, such violence should be tackled within the contours of human rights law and its derogation regime. This judgment also suggests the confidence of the framers of the human rights conventions that human rights law and its derogation regime present realistic standards of conduct for states in the face of violence that threatens the life of the nation.[212]

In this regard, it is of no significance that the right to life is not subject to the special derogation regime.[213] Article 6 of the International Covenant on Civil and Political Rights, which protects the right to life, prohibits only "arbitrary" killings.[214] Given the loose language of this provision, it is clear why the derogation regime does not apply to it. Obviously, no emergency justifies arbitrary killings.

The analysis in this part suggests, then, that international human rights law allows states to target and kill terrorists who pose a lethal threat that is not imminent, provided that there is no feasible possibility of arresting them and there is a high probability that delaying action will prevent the possibility of thwarting the threat later. Moreover, human rights law does not contain an absolute prohibition on law enforcement operations that are likely to result in the unintentional killing of innocent persons. Rather, state forces engaging a terrorist or guerrilla group are required to plan and conduct their operations in a manner that *minimizes*, as much as possible, incidental injuries to uninvolved individuals. Hence, the liberties to use force afforded to a state under the mixed model are also available to it under international human rights law.

VII. CONCLUSION

This article argues that terrorism should be tackled within the contours of the traditional armed conflict/law enforcement dichotomy. The application of the law of war is triggered where hostilities border on full-scale war. Within the law of war's proper field of application it does not allow a state too much. It represents

211. The derogation regime contemplates the harshest of circumstances. See Gross, *supra* note 205, at 453-54 ("[T]he emergency must threaten the very existence of the nation, that is, the 'organized life of the community constituting the basis of the State."); *see also* Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 2 (1981).

The derogation regime may apply to the conduct of security forces only where normal due-process measures are impractical. *See* Gross, *supra* note 205, at 453 (Addressing the conditions for the application of the derogation regime to situations of grave violence, Gross observed, "normal measures available to the state should be manifestly inadequate and insufficient to respond effectively to the crisis.").

212. Ariel Zemach, *Taking War Seriously: Applying the Law of War to Hostilities Within an Occupied Territory*, 38 GEO. WASH. INT'L. L. REV. 645, 677 (2006).

213. *See, e.g.*, ICCPR, *supra* note 118, art. 4(2).

214. *Id.* art. 6.

the best bargain from a humanitarian perspective regardless of whether the conflict is an inter-state conflict or a conflict between a state and a non-state entity. Outside the purview of the law of war, human rights law does not allow states too little. It provides states with realistic standards of conduct even in the face of grave, large-scale violence, so long as the reality of hostilities lends itself to an individualized assessment of dangerousness.

The development of a new body of law, a normative middle ground between the law of war and human rights law applicable to armed conflicts between a state and non-state actors, is therefore superfluous. Furthermore, such new body of law would suffer from a number of inherent flaws: it cedes the legitimate ends of a just war, compromises the principle of equality in the application of the law of war, and is, most importantly, unrealistic where hostilities between a state and a non-state actor resemble a full-scale war, as it requires an individualized assessment of dangerousness in a reality that is not amenable to such assessment.