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The Humanization of Jus ad Bellum: *Prospects and Perils*

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Abstract

*In its recent General Comment no. 36 (GC 36), the Human Rights Committee (HRC) engaged for the first time, in a substantial manner, with the relations between the law on the use of force (*jus ad bellum*) and the right to life. This article uses the HRC's position on these relations as a platform for a long-needed discussion on the theoretical underpinnings, and implications, of a possible human rights law on the resort to force between states. This article identifies and conceptualizes three pillars in GC 36's position, which subject traditional questions of* jus ad bellum *to international human rights law considerations: first, the view that aggression is not only a violation of* jus ad bellum *but also that the killings it entails are* ipso facto *violations of the right to life, even in cases where these killings would be lawful under the laws of armed conflict (*jus in bello*); second, that states bear the 'responsibility' to oppose aggression as a matter of human rights; and, third, that a state's failure to reasonably attempt to resolve disputes peacefully could amount to a violation of the duty to ensure the right to life of its people. The article analyses these pillars doctrinally and then moves to discuss the theoretical commitments required to accept each of them as well as their costs. Namely, they all require breaking with the traditional view that* jus ad bellum *is strictly an interstate issue. Although, as the article argues, this development is based on sound ethical premises, the humanization of* jus ad bellum *through human rights law carries risks that should not be overlooked: chiefly, the securitization of human rights and the depoliticization of war. The prospects and perils of the humanization of* jus ad bellum, *as this article demonstrates, open a new area of theoretical inquiry and legal possibilities.*

1 Introduction

In the recent two decades, much emphasis has been placed, in international legal discourse, on the 'humanization' of international humanitarian law (IHL) – a process through which IHL has shifted, in the latter half of the 20th century, from emphasizing

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sovereign interests to the protection of the individual.[1] In recent years, legal scholars have further – and more critically – conceptualized this trend as the 'individualization' of war, meaning the breaking down of war, for better or for worse, to a series of human interactions, regulated not only by IHL but also by international human rights law (IHRL).[2] Yet, as opposed to questions arising from the individualization of IHL (or *jus in bello*), relatively scant literature and practice exists on the possible intersection of the individualization of war, IHRL and the law on the resort to interstate force (*jus ad bellum*).[3]

This intersection is of much importance because the discourse on the humanization of IHL has largely overlooked those individuals that can be lawfully killed under *jus in bello*: chiefly, combatants and civilians incidentally killed as 'proportionate' collateral damage. In this sense, the humanization of IHL has not challenged the idea that, owing to the principle of belligerent equality – meaning, the equal application of IHL to all belligerents, regardless of the lawfulness of their cause – all killings that are not prohibited under IHL would be lawful under international law. The traditional assumption that harming such individuals raises no legal issues has allowed the relegation of violations of *jus ad bellum* strictly to the interstate level, while excluding from legal scrutiny a significant part of their effects over individuals.[4]

Whether *jus in bello* exhausts the question of wrongful killing during war has been at the heart of a vibrant debate in contemporary philosophy of war. In recent years, a 'revisionist' approach is gaining ground, according to which belligerent equality under international law does not imply moral equality, and, therefore, even killings that conform to *jus in bello* can be morally wrong, for instance when they occur in the course of aggression. The revisionist approach ties into a broader view, to which all state action – whether in war or peace – can be judged by the same principles that

1 Meron, 'The Humanization of Humanitarian Law', 94 *American Journal of International Law* (*AJIL*) (2000) 239.

2 See, e.g., Blum, 'The Individualization of War: From War to Policing in the Regulation of Armed Conflicts', in A. Sarat, L. Douglas and M.M. Umphrey (eds), *Law and War* (2014) 48; Dill, 'Do Attackers Have a Legal Duty of Care? Limits to the Individualization of War', 11 *International Theory* (2019) 1; see also project founded by the European University Institute: *The Individualisation of War: Reconfiguring the Ethics, Law and Politics of Armed Conflict*, available at https://iow.eui.eu/welcome/.

3 Notable exceptions are Mégret, 'What Is the Specific Evil of Aggression?', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2016) 1398, at 1445; Pobjie, 'Victims of the Crime of Aggression', in *ibid.*, at 816, 825; T. Dannenbaum, *The Crime of Aggression, Humanity and the Soldier* (2018); Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum', 40 *Israel Law Review* (2007) 592, at 607–612. Mégret explains this reluctance as stemming from international human rights law's (IHRL) 'tragic deference to the reality of war as an abnormal state wherein the totality of rights can no longer be guaranteed'. Mégret, *ibid.*, at 1425.

4 For an analysis, see Pobjie, *supra* note 3, at 821–826. For instance, in the recent request for interim measures by Armenia against Azerbaijan in the context of the 2020 Nagorno-Karabakh escalation, the former requested only interim measures relating to allegedly unlawful attacks on civilians but not in relation to attacks that would be considered lawful under international humanitarian law (IHL). See ECtHR, Press Release, *Request for Interim Measures Lodged by Armenia Against Azerbaijan*, Appl. no. 42521/20, 20 September 2020.

apply in 'everyday' morality.[5] Until very recently, this debate had little purchase in international law, not only because of interdisciplinary lag but also because even philosophers that advance the revisionist view usually accept that, for pragmatic reasons, law should still apply equally to all sides.[6] However, some recent international law scholarship has nevertheless pointed out ways in which the moral asymmetry of killing in war, and the subjection of war to 'everyday' morality, can have legal implications – even without arguing against belligerent equality altogether.[7]

This article picks up on this debate on the occasion of the Human Rights Committee's (HRC) recent publication of General Comment no. 36 (GC 36) on the interpretation of the right to life under the International Covenant on Civil and Political Rights (ICCPR).[8] GC 36 addresses, for the first time in a substantial manner, the possible interaction between the resort to war and the right of life under IHRL, presumably even in relation to killings that are not prohibited under IHL. It does so by identifying three distinct obligations (called here 'pillars'). Perhaps most importantly, GC 36 pronounces that killings in the course of aggression are *per se* violations of the right to life (Pillar 1). Furthermore, GC 36 opines that the right to life entails the responsibility to oppose aggression (Pillar 2). Finally, it recognizes a duty to take all reasonable measures to prevent wars (Pillar 3).[9]

Common to these three pillars – which this article labels collectively the humanization of *jus ad bellum* – is that they challenge the traditional view that decisions on resort to force should only be assessed on the interstate level. In this sense, they seem to correspond with the revisionist approach that all state action, including quintessential 'acts of state' such as resort (or non-resort) to war, should be subject to the same ethical framework that applies in other contexts. Still, each pillar raises significant ethical, theoretical and doctrinal questions of its own. Since most of these questions are not sufficiently addressed in positive law, this article conceptualizes these pillars, exposes the theoretical commitments they require and discusses them normatively.

Of course, this article does not conclusively resolve all the questions raised by the three pillars nor does it aim to do so. Granted, some aspects of the humanization of *jus ad bellum* are more determinate than others, both in terms of their legal content

5 The term 'revisionist' is usually used in contra-distinction to the 'traditional approach' espoused by Michael Walzer, in M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, 2015). I expand on both the traditional approaches and revisionism later on. For the leading revisionist text, see J. McMahan, *Killing in War* (2009); for a major recent objection, see Y. Benbaji and D. Statman, *War by Agreement: A Contractarian Ethics of War* (2019).

6 McMahan, *supra* note 5, at 105–110.

7 For example, Dannenbaum argues that, even without abandoning belligerent equality under IHL, soldiers harmed during an aggressive war should be recognized as victims in the International Criminal Court's (ICC) proceedings. See Dannenbaum, *supra* note 3, at 312–339.

8 United Nations Human Rights Committee (HRC), General Comment no. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (GC 36), UN Doc. CCPR/C/GC/36, 30 October 2018. The HRC is a treaty body established by the International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, and is mandated, *inter alia*, to issue general comments (Art. 40(2)(b) of the ICCPR). These comments are not binding *per se* but enjoy high standing and are referred to frequently by human rights courts.

9 GC 36, *supra* note 8, para. 70.

and their normative desirability. For example, as this article shows, there are no convincing reasons to conclude that the prohibition on the use of force, as enshrined in Article 2(4) of the UN Charter, excludes – as the *lex specialis* – the application of IHRL to resorts to interstate force. Additionally, this article demonstrates that recognizing that killings in aggression are violations of the right to life would not necessarily undermine the *jus in bello* regime since the violations would be attributed to states, not to the aggressor's soldiers *qua* individuals. The resolve of many other questions, however, requires sustained engagement that goes beyond any single article. Accordingly, while this article does not shy away from normative assessment, it does not presume to exhaust the debate: it seeks, rather, to set an agenda for a much-needed in-depth engagement with the prospects and perils of the humanization of *jus ad bellum*.

Hovering above any normative discussion of the application of IHRL to questions traditionally reserved to *jus ad bellum* is the constant concern that IHRL is not a fitting environment, both institutionally and substantively, for discussions on issues of war and peace. Additionally, due attention must be given to the persistent critical insight that, due to the well-documented limitations of rights discourse, subjecting these questions to IHRL might further, rather than limit, the legitimation of force. In the same vein, it is arguable that infusing *jus ad bellum* with an overly moralistic rights discourse would only serve to naturalize and depoliticize war, portraying it as a moral necessity to protect rights, even if there are other options. This article recognizes these concerns. The key dilemma, therefore, involves the dialectics between what might be ideally justified and the messy, non-ideal reality.[10] An overarching argument of this article is that traces of this dilemma are found in GC 36 itself, where, in certain points, after subjecting resort to war to ethical considerations of human rights, a step back is taken and some space for politics and discretion is reserved.

Beyond theory, if IHRL were applied to questions concerning resort to interstate force, there would be both institutional-procedural and substantive implications. Concerning the former, international human rights courts might gain jurisdiction over such decisions. For example, in her concurring opinion in the recent *Georgia v. Russia (II)* ruling, Judge Keller of the European Court of Human Rights (ECtHR) cited GC 36 in support of her view that, in future cases, the Court might be called upon to apply *jus ad bellum* in its interpretation of the European Convention of Human Rights (ECHR).[11] Similarly, treaty bodies would require states to report on resorts to war, and, perhaps, commissions of inquiry established by the Human Rights Council as well as special rapporteurs might be mandated to address such questions. For instance, in a recent report, UN Special Rapporteur Agnes Callamard applied GC 36 to the targeted killing of Iranian General Qassem Soleimani.[12] In terms of remedies, wide

[10] I follow the Rawlsian distinction between ideal and non-ideal. J. Rawls, *A Theory of Justice* (1999), at 7–8.

[11] ECtHR, *Georgia v. Russia (II)*, Appl. no. 38263/08, Judgment of 21 January 2021, paras 26–31 (concurring opinion of Judge Keller). Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

[12] United Nations Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary of Arbitrary Executions (Report of the Special Rapporteur), UN Doc. A/HRC/44/38 (2020), Annex, para 81. Special Rapporteur Callamard applied the first pillar of GC 36 – according to which acts of aggression *ipso facto* violate the right to life – to the US targeting of Soleimani, who was a combatant

categories of victims could be recognized. The most straightforward case would be victims of aggression, who might acquire standing to demand individual reparations in front of human rights bodies. But the humanization of *jus ad bellum*, if adopted as a whole, could also open the door to claims by citizens against their own state. It might result in standing where a state refrained from using force to protect citizens as well as in cases where it occasioned harm to its soldiers and civilians in an unnecessary war. While these procedural aspects are of much practical importance, raise questions of institutional competencies and highlight the stakes and complexity involved, most of this article addresses the substantive implications.

The article is structured as follows. Section 2 introduces the basic tension that inheres in the humanization of *jus ad bellum* between its ideal assumptions, on the one hand, and the non-ideal risks it entails, on the other. In this section, the article explains the ethical underpinnings reflected in GC 36 and juxtaposes them against the risks of the depoliticization of war and the securitization of human rights. Section 3 moves to analyse GC 36's approach in more detail, first by distilling the 'three pillars' reflected in GC 36's approach and then by discussing the threshold objections advanced by states during the comment's drafting stages. Thereafter, Sections 4, 5 and 6 analyse these three pillars in greater detail. Concerning each, the article shows the manner in which the pillar reflects ideal normative commitments, yet ultimately recognizes the centrality of politics by reserving ample, yet not unlimited, space for state discretion.

2 A Human Rights Law on the Resort to Force: Between Humanization and Securitization

To discuss *jus ad bellum* decisions through any framework of individual rights, a significant theoretical commitment must first be made. Such a commitment is required because the contrary view – that decisions to resort to war are not subject to human rights considerations, but only to the interstate law on *jus ad bellum* – is based on an influential pedigree of arguments, both on the nature of war and of the state. According to this 'traditional' view, war is normatively different from other forms of violence. First, unlike other forms of violence, wars are contentions between states *qua* collectives,[13] and, in this sense, they are political in a manner that 'regular' violence cannot be.[14] If this is true, judging them by the same standards that apply in day-to-day life

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at the time. It should be emphasized, however, that the special rapporteur refrained from concluding that the strike triggered or constituted an armed conflict and that IHL applied. Accordingly, she did not analyse the strike as targeting a 'combatant' per se. *Ibid.*, paras 15–39. For the opposite view, see E. Lieblich. 'Targeted Killing of General Soleimani: Why the Laws of War Should Apply, and Why It Matters', *Just Security* (13 January 2020), available at www.justsecurity.org/68030/targeted-killing-of-general-soleimani-why-the-laws-of-war-should-apply-and-why-it-matters/.

[13] See L. Oppenheim, *International Law* (1912), vol. 2, para. 56 ('to be considered war, the contention must be going on *between states*').

[14] See generally Kutz, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War', 33 *Philosophy and Public Affairs* (2005) 148; the specific political nature of war ties into Carl Schmitt's perception of the possibility of war as the only truly political distinction: C. Schmitt, *The Concept of the Political* (1932), at 19.

– which is the usual environment of IHRL – is a category mistake. Second, states are unique collectives. Their existence is a precondition for the 'common life' of a political community – a common life that itself justifies dying and killing for.[15] As such, states might enjoy rights to resort to war in situations much wider than those that would permit violence in regular, ordinary life and in complex circumstances that cannot be judged under the supposedly rigid framework of IHRL.[16] In sum, there is something special in war: deciding to pursue it – and perhaps, to refrain from it – cannot be subjected to the same norms that would apply to peacetime activities.

Analysing resort to war as a human rights matter requires breaking with this tradition. The theoretical backdrop for such a move can be found in an influential current approach to the ethics of war, which challenges the presumptions above on the nature of wars and of states. In general, 'revisionist' just war theory calls for the demystification of war as a unique form of violence; its subjection to norms that govern violence in any other circumstance; and its deconstruction from a primarily collective concept to an action that is both conducted by, and destructive to, individuals as moral agents.[17] In this sense, this approach can also be called individualist. As discussed in more detail later in this article, one key implication of this approach is the recognition that casualties of attacks that might be lawful under IHL – such as soldiers and civilians caught as 'proportionate' collateral damage' – may nevertheless be victims of wrongful killings, if they are killed in pursuit of an unjust cause. Yet the implications of this individualist approach are wider: it might also affect the way in which we assess positive obligations to resort to force to protect individuals as well as decisions to put soldiers in harm's way.

The core of the revisionist argument is as simple as it is compelling: it is extremely difficult to explain in normative terms why an armed confrontation between large groups of individuals organized as 'states' should be assessed under moral terms that are different from those that apply to violence between other individuals or groups. As Jeff McMahan has argued, to say otherwise amounts to 'moral alchemy': it requires belief in a transcendental, magical moment in which a group of individuals establishes a collective entity that enjoys more rights than they possess as individuals.[18] Importing comparable thinking to the legal realm, Frédéric Mégret has argued that aggression is best conceived as a crime against human rights, *inter alia*, of those that can be lawfully killed under *jus in bello*.[19] Tom Dannenbaum augments this reasoning by claiming that this approach is already reflected in positive law. Namely, he claims, it emanates from the realization that the key wrong addressed by the crime of aggression must be the harm inflicted on individuals rather than on state sovereignty. To

[15] Walzer, *supra* note 5, at 53–55.

[16] For a leading critique, see Rodin, 'The Myth of National Self-Defense', in C. Fabre and S. Lazar (eds), *The Morality of Defensive War* (2014) 64.

[17] See generally Lazar, 'Just War Theory: Revisionists versus Traditionalists', 20 *Annual Review of Political Science* (2017) 37. On the methodology of 'reductive individualism' to assess morality in war, see H. Frowe, *Defensive Killing* (2014), at 13–17. For an application of reductive individualism to law, see A.A. Haque, *Law and Morality at War* (2017), at 9–10.

[18] McMahan, *supra* note 5, at 82.

[19] Mégret, *supra* note 3, at 1445.

Dannenbaum, this conclusion is rooted in the internal logic of law itself: if the main evil of aggression would have been found in its violation of sovereignty, then other forms of violations of sovereignty – some even more intrusive than some acts of aggression – would have also been criminalized.[20]

Yet moving from the ideal to the non-ideal, a human rights law on the resort to force carries its own risks.[21] Generally speaking, most of these involve the fear that, in the clash between idealism and realism, subjecting the resort to war to human rights discourse can end up legitimating more wars. Several objections of this nature can be advanced. First, IHRL is intrinsically connected to natural law. As consistently pointed out by critical international lawyers, appeals to natural law and universalism have been, and still are, deployed in the service of power.[22] A related argument concerns the indeterminacy of rights in general, which makes any rights-based discourse especially liable to manipulation.[23] These two characteristics raise particular concern, considering that IHRL obliges states not only to respect rights but also to act positively to protect these rights.[24]

This idea places IHRL in a significantly enabling position, which can expand, rather than constrain, situations in which state violence would be justified. Indeed, in recent years, critics have pointed out that the 'securitization' of human rights in the age of the war against terror has supplied states with grounds for enacting far-reaching security measures, allegedly for the protection of the human rights of potential victims.[25] Indeed, human rights discourse is not inherently progressive; one only needs to point out the establishment of the 'Commission on Unalienable Rights' by the Trump administration, which applied rights discourse in furtherance of conservative agendas.[26] When human rights are both securitized and applied to resorts to force, war can be naturalized and depoliticized: resorts to force might cease to be discussed and criticized as a political choice but presented and accepted as a natural duty.

[20] Dannenbaum, *supra* note 3, at 79–93.

[21] These risks are usually discussed in the context of the individualization of IHL, but they are also relevant to the humanization of *jus ad bellum*. See, e.g., Blum, *supra* note 2; S. Moyn, 'Toward a History of Clean and Endless War', *Just Security* (9 October 2015), available at www.justsecurity.org/26697/sanitizing-war-endlessness/; D. Kennedy, *Of Law and War* (2006).

[22] For the definitive claim, see A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2007), at 13–31; see also Koskenniemi, '"The Lady Doth Protest Too Much" Kosovo, and the Turn to Ethics in International Law', 65 *Modern Law Review* (2002) 159.

[23] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), at 71–95.

[24] Compare Blum, *supra* note 2, at 77 (expressing the opposite concern that the individualization of IHL might expose individuals to risk if states would choose not to resort to force to protect them).

[25] For an extensive discussion of the right to security, and the abovementioned risk, see Lazarus, 'The Right to Security', in R. Cruft, M. Liao and M. Renzo (eds), *The Philosophical Foundations of Human Rights* (2015) 423; A.M. Gross, *The Writing on the Wall: Rethinking the Law of Occupation* (2017), at 338–396; N. Perugini and N. Gordon, *The Human Right to Dominate* (2015).

[26] C. Morello, 'State Department Launches Panel Focused on Human Rights and Natural Law', *Washington Post* (8 July 2019), available at www.washingtonpost.com/world/national-security/state-department-to-name-panel-focused-on-human-rights-and-natural-law/2019/07/06/3bfe001e-9f54-11e9-b27f-ed2942f73d70_story.html.

Last, applying human rights law to resort to force might run the risk of overextending the reach of human rights to a domain in which they are unlikely to have much constraining purchase.[27] Human rights might be ineffective in constraining interstate force because the thin language of human rights might not encompass the political, historical and emotional complexity that drives wars. Pushing IHRL into a realm in which it is unlikely to be effective might discredit, rather than empower, the global human rights regime.[28]

Above all, these concerns require refraining from a celebratory tone when discussing the prospects of the humanization of *jus ad bellum*. Yet this does not necessarily mean that the trend should be rejected altogether. The problem of legitimation is not the predicament of IHRL alone but, rather, haunts law in general, particularly where state violence is involved. *Jus ad bellum* is already somewhat depoliticized through the concept of the 'inherent' right to self-defence.[29] Furthermore, to the extent that it is accepted that law, through IHL, is equipped to tame the raw emotions of those actually fighting, it is unclear why law – whether through *jus ad bellum* or through IHRL – would not be capable of regulating the decisions of statespersons in boardrooms. Yet the key reason for not discarding offhand the possible humanization of *jus ad bellum* is that, in its absence, international law can be said to produce the 'rightslessness' of those harmed 'lawfully' in an unlawful war: their deaths might be wrongful, but they are neither recognized as such nor provided with a remedy.[30] Arguably, such rightslessness results in an incoherence that is at least as harmful to law as the adverse effects noted above.[31]

This tension will underlie the analysis of the humanization of *jus ad bellum* throughout this article. But, before embarking on that analysis, the next section demonstrates how this trend is reflected in GC 36 and discusses the main doctrinal objections levelled by states against it.

3 GC 36 and the Humanization of *Jus ad Bellum*: Content and Threshold Objections

A *The Three Pillars of the Humanization of* Jus ad Bellum

Article 6(1) of the ICCPR provides that '[e]very human being has the inherent right to life' and that '[n]o one shall be arbitrarily deprived of his life'. The general legal question raised at the intersection between Article 6 and *jus ad bellum* is when, if at all, it

[27] For a recent claim of this order, see J. Tasioulas, 'Are Human Rights Taking over the Space Once Occupied by Politics?', *New Statesman* (26 August 2019), available at www.newstatesman.com/2019/08/are-human-rights-taking-over-space-once-occupied-politics; compare S. Moyn, *The Last Utopia: Human Rights in History* (2012), at 213–214.

[28] Compare Tasioulas, 'Saving Human Rights from Human Rights Law', 52 *Vanderbilt Journal of Transnational Law* (2019) 1167, at 1195.

[29] Charter of the United Nations, Art. 51.

[30] The concept of rightslessness is broadly borrowed here from H. Arendt, *The Origins of Totalitarianism* (1951). A close concept can be found in Giorgio Agamben's *Homo Sacer*, specifically in the fact that such individuals are included in the legal regime mainly through their capacity to be killed with impunity. G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998); see also Dannenbaum, *supra* note 3, at 37–51.

[31] See T. Franck, 'Legitimacy in the International System', 82 *AJIL* (1988) 82, at 741.

could be said that resorts to interstate force cause or occasion arbitrary losses of life. In October 2018, the HRC adopted GC 36, which refers, among many other issues, to the relations between war and the right to life. This section of the article introduces the three pillars that constitute GC 36's treatment of the latter relationship. The next three sections focus on each pillar in a more detailed manner.

Concerning the relations between the right to life and the resort to interstate force, GC 36 sets forth three obligations – or, to be precise, two duties and one 'responsibility' – the contravention of which would violate the right to life. Paragraph 70 reads as follows:

> States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant [Pillar 1]. At the same time, all States are reminded of their responsibility … to protect lives and to oppose widespread or systematic attacks on the right to life, including acts of aggression [Pillar 2]. … States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life [Pillar 3].[32]

In fact, GC 36 was not the first time in which the HRC addressed this issue. In General Comment no. 6 (GC 6), which was published in 1982, the committee opined that war was 'already prohibited' by the UN Charter. It continued to hold that states 'have the supreme duty to prevent wars … causing arbitrary loss of life' and that such prevention is the most important condition to safeguard the right to life.[33] Yet GC 6 reads more like a general condemnation of war as a 'scourge of humanity' and an emphasis of a vague duty to 'prevent' wars. General Comment no. 14, published in 1984, repeated the same approach, while emphasizing the threat posed by nuclear weapons to the right to life.[34]

Between the 1980s and today, two significant developments in law and moral philosophy have taken place, which have ushered in a more robust engagement with these questions by the HRC. First, voluminous literature and jurisprudence – including rulings by the International Court of Justice (ICJ) – have addressed the interaction between IHRL and IHL during armed conflict.[35] Second – and as mentioned earlier on – since the 1990s, major works in the ethics of war have begun to question the traditional perception that the assessment of killing in war is exhausted by *jus in bello*.[36] These trends are also reflected in GC 36.

In Pillar 1, therefore, GC 36 posits that '[s]tates parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate *ipso facto* article 6 of the Covenant'.[37] This phrasing strongly suggests that all killings in

[32] GC 36, *supra* note 8, para. 70.

[33] HRC, ICCPR General Comment no. 6: Article 6 (Right to Life), 30 April 1982, para. 2.

[34] HRC, ICCPR General Comment no. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life, 9 November 1984, paras 2, 4.

[35] The sources are numerous. For one helpful analysis, see Hathaway *et al.*, 'Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law', 96 *Minnesota Law Review* (2012) 1883.

[36] See Section 2.

[37] GC 36, *supra* note 8, para. 70.

aggressive war, even if complying with IHL, are arbitrary deprivations of life. Now, it is important to read Pillar 1 in light of GC 36's approach concerning the relations between IHRL and IHL. While the relations between the right to life and IHL are not the subject of this article, some elaboration is needed here. This elaboration is required because, as explained below, GC 36's approach to this issue has bearing also on its view concerning the relations between the right to life and *jus ad bellum*. GC 36 reiterates, in paragraph 64, that the right to life continues to apply in armed conflict, alongside IHL, and that both normative frameworks are 'complementary, not mutually exclusive'.[38] Importantly, it adds that '[u]se of lethal force consistent with international humanitarian law and other applicable international law norms is, *in general*, not arbitrary'.[39] On its face, this is reminiscent of the ICJ's view in the *Nuclear Weapons* advisory opinion, which held that, during armed conflict, the contours of 'arbitrary' killings are determined by IHL, not by the right to life under the ICCPR.[40]

Yet careful readers will surely notice two interrelating points. First, mentioning IHL along with 'other applicable international law norms' implies that, for killings not to be arbitrary, they have to comply with IHL as well as with other norms, presumably *jus ad bellum*. Additionally, by inserting the qualification 'in general', the HRC leaves the door open to the possibility that killings consistent with IHL might still be considered arbitrary under IHRL.[41] While GC 36 does not spell out precisely when this would be so,[42] these points set the stage for the claim under Pillar 1 that killings resulting from aggression are arbitrary, even if not prohibited under IHL.[43]

A complex normative framework therefore emerges from the conjunction of GC 36's paragraph 64, and its approach under Pillar 1, that killings in aggression are *ipso facto* violations of the right to life. To fully understand this framework, some further explanation is needed. Broadly speaking, there are two approaches to the regulation of the resort to lethal force under IHRL.[44] On the *threshold approach*, IHRL regulates all

38 *Ibid.*, para. 64.

39 *Ibid.* (emphasis added).

40 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 25; see also J. Dill, 'General Comment 36: A Missed Opportunity?', *Just Security* (11 February 2019), available at www.justsecurity.org/62473/general-comment-36-missed-opportunity (criticizing this and other aspects of GC 36's understanding of the IHL/IHRL relationship).

41 For a defence of this position, see Haque, *supra* note 17, at 35–38. For a discussion, see Lieblich, 'The Facilitiative Function of Jus in Bello', 30 *European Journal of International Law* (*EJIL*) (2019) 321, at 333–334. Shany and Heyns corroborate this possibility. See R. Goodman, C. Heyns and Y. Shany, 'Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36', *Just Security* (4 February 2019), available at www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/ ('the Committee has taken the view that arbitrariness may also be construed in the light of other relevant norms of international law, including jus ad bellum, there may be circumstances where an act would be lawful under IHL and yet internationally unlawful, and thus arbitrary').

42 See Dill, *supra* note 40.

43 Lieblich, *supra* note 41, at 334.

44 For an in depth analysis, see Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication', in Z. Bohrer, J. Dill and H. Duffy, *Law Applicable to Armed Conflict*, Max Planck Trialogues (2020) 15, at 71–93.

resorts to force until the level of armed conflict is reached, after which force is governed strictly by IHL. The latter is usually understood to be laxer than IHRL by allowing, for instance, the status-based targeting of all combatants.[45] This approach, for instance, is espoused in the *Nuclear Weapons* opinion, as mentioned above.[46] Conversely, on the *continuum approach*, once there is an armed conflict, IHL kicks in, but IHRL continues to hover above and provide an additional framework to assess force, regardless of what IHL tolerates.[47] In essence, the latter view breaks down the conduct of hostilities to a continuous series of decisions, denying a formal 'threshold' in which human rights considerations cease to apply altogether.[48] Interestingly, GC 36 seems to adopt an asymmetric model, in which the threshold approach applies when the resort to force is lawful, and, in such cases, killings that comply with IHL would presumably not be considered arbitrary. Concerning aggression, conversely, the continuum approach applies, and all killings resulting from the aggression would be considered arbitrary.

The second pillar of the humanization of *jus ad bellum* 'reminds' states of their 'responsibility' to protect lives and to oppose attacks on the right to life, including acts of aggression. Perhaps to clarify that it does not suggest an extra-charter, human rights-based justification to use force – such as unilateral humanitarian intervention – GC 36 adds that this responsibility is subject to all existing obligations under international law.[49] Interestingly, by choosing the term 'responsibility' rather than 'duty', the HRC seems to have followed the underlying logic of the 'responsibility to protect' doctrine,[50] with all of its ambiguities.[51] A 'responsibility', in the legal context, seems to imply a duty to exercise proper administrative discretion rather than an absolute duty to act.[52]

Third, it is suggested in paragraph 70's last pillar that states that fail 'to take all reasonable measures' to peacefully settle their disputes 'might fall short of complying with their positive obligation to ensure the right to life'. As we shall see later on, by emphasizing that, by such failure, states might contravene their duties to ensure the right to life, the HRC implies that states might be held accountable to deprivations of

45 See Lieblich, *supra* note 41, at 332–334.

46 *Ibid.*

47 See Haque, *supra* note 17, at 35–38; Mégret, *supra* note 3, at 1436. This approach is implied in the practice of the European Court of Human Rights (ECtHR), which occasionally assesses resorts to force during hostilities according to human rights standards – although there are some idiosyncrasies in these cases. See ECtHR, *Isayeva v. Russia*, Appl. no. 57950/00, Judgment of 24 February 2005, paras 172–175; Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *EJIL* (2005) 741.

48 See Lieblich, 'Internal Jus ad Bellum', 67 *Hastings Law Journal* (2016) 687, at 727.

49 For a critique of unilateral humanitarian intervention, see Heller, 'The Illegality of "Genuine" Unilateral Humanitarian Intervention', *European Journal of International Law (Int. J. Int'l L.)* (2021), 613.

50 2005 World Summit Outcome, GA Res. 60/1, 24 October 2005, paras 138–139.

51 See Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm', 101 *AJIL* (2007) 99. The same language of 'responsibility' is also central to the United Nations' (UN) Guiding Principles on Business and Human Rights. See United Nations Office of the High Commissioner of Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011).

52 Compare Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice', 34 *Review of International Studies* (2008) 445, at 451–453.

life inflicted on those under their jurisdiction by others as a result of their failure. Later sections of this article address each of these pillars in more detail. But, before that, I discuss some of the threshold objections advanced by states to the HRC's approach that, if accepted, would pre-empt the application of IHRL to resorts to force to begin with.

B *Threshold Objections*

Indeed, not all states welcomed GC 36's approach. Members of the North Atlantic Treaty Organization (NATO) were particularly critical. The United Kingdom was 'rather surprised' that paragraph 70 was included and considered the content unhelpful and beyond the committee's mandate.[53] The USA presented three main objections that would bar the application of IHRL questions of resort to force altogether. First, it argued that the duty to ensure and respect rights enshrined by the ICCPR does not apply extraterritorially.[54] Since aggression (usually) occurs outside of the attacker's territory, it would mean that its results could not be violations of the ICCPR. Additionally, the USA claimed that *jus ad bellum* is the *lex specialis* concerning the resort to force.[55] On this view, when aggression is perpetrated, the only legal regime that would apply is *jus ad bellum*.[56] Finally, it added that, in any case, a determination that an act of aggression has occurred is a matter for the UN Security Council (UNSC) and not for human rights bodies.[57] Relatedly, France added that Article 6 of the ICCPR is not intended to regulate the use of force between states.[58] Germany conceded that aggression 'may' entail violations of human rights but somewhat cryptically called for a clear distinction between *jus ad bellum* and IHRL 'in order to allow for an adequate attribution of responsibilities in international law'.[59]

[53] HRC, Comments of the Government of the United Kingdom of Great Britain and Northern Ireland, 6 October 2017, para. 34, available at www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedKingdom.pdf; see also HRC, Information Note Regarding 'General Comment No. 36 (2017) on Article 6 of the International Covenant on Civil and Political Rights on the Right to Life', Comments by the Republic of Turkey (2017), para. 2, available at www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Turkey.docx.

[54] HRC, Observations of the United States of America On the Human Rights Committee's Draft General Comment No. 36 On Article 6 – Right to Life, 6 October 2017, para. 20, available at www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedStatesofAmerica.docx.

[55] *Ibid.*

[56] Canada shared the latter view. HRC, Human Rights Committee, Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to life: Comments by the Government of Canada, 23 October 2017, para. 22, available at www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Canada.docx; see also HRC, Submission of the Australian Government Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights: Right to Life (2017), para. 7, available at www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Australia.docx.

[57] Observations of the United States of America, *supra* note 54, para. 20.

[58] HRC, Commentaires du Gouvernement français à propos du projet d'Observation générale n° 36 sur l'article 6 du Pacte international relatif aux droits civils et politiques, concernant le droit à la vie (2017), para. 42, available at www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/France.docx.

[59] HRC, Submission from Germany on the Draft General Comment on Article 6 of the International Convenant on Civil and Political Rights – Right to Life, 6 October 2017, para. 24, available at www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Germany.docx.

Yet these threshold objections cannot end the legal debate. The argument on extraterritoriality is indeed consistent with the long-standing US position that IHRL only applies within the territory of states.[60] However, this view has been explicitly rejected by the vast majority of authorities, and it is nowadays widely accepted that, in some cases, jurisdiction for the purpose of the application of IHRL can be extraterritorial.[61] Nevertheless, it must be conceded that, even if the possibility of extraterritorial application of IHRL is accepted in general, aggression still raises particular difficulties in this context. Chiefly, the question is whether the potential victims of aggression can be said to be under the jurisdiction of the aggressor before the former assumes, if at all, physical control over their persons or the territories in which they happen to be.[62] In 2001, in its (in)famous *Banković* case, the ECtHR ruled that aerial bombing does not trigger the jurisdiction of the attacking state over potential victims, mainly because it does not acquire effective control over the territory.[63] In its recent ruling in *Georgia v. Russia (II)*, the ECtHR's majority returned to this logic, holding that a state does not acquire extraterritorial control over an area or individuals during the phase of active combat since 'the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos' excludes such control.[64] To the extent that this approach gains ground, it would place a significant limitation on GC 36 because it would exclude the argument that persons killed during the active combat phase of an aggression were thereby brought under the jurisdiction of the aggressor.

However, the majority's reasoning in *Georgia v. Russia (II)* is fraught with difficulties, *inter alia*, considering the ECtHR's previous jurisprudence. In its 2011 *Al-Skeini* ruling, the Court held that 'as an exception to the principle of territoriality, a Contracting State's jurisdiction … may extend to acts of its authorities which *produce effects* outside its own territory'.[65] In other cases, the Court found jurisdiction where individuals were not under the physical control of another state but were nevertheless harmed by cross-border gunfire and so brought under state-agent authority and control.[66] In *Georgia v. Russia (II)*, the Court distinguished the latter cases from situations of active hostilities since, as opposed to wide-scale hostilities, these cases involved 'isolated and specific acts involving an element of proximity'.[67] Yet it seems counter-intuitive

[60] Office of the General Counsel, Department of Defense (DoD), Law of War Manual, 31 May 2016, para. 1.6.3.3.

[61] See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, paras 102–112; ECtHR, *Al-Skeini v. UK*, Appl. no. 55721/07, Judgment of 7 July 2011, paras 1–3, 9–10, 12, 19, 21, 72, 95, 101, 114, 125, 130–139, 143–150.

[62] Concerning extraterritorial jurisdiction over a state's own soldiers, for the purpose of the duty to ensure their rights, see section 6.B.

[63] ECtHR, *Banković v. Belgium*, Appl. no. 52207/99, Decision as to the Admissibility of 12 December 2001, paras 67–82.

[64] *Georgia v. Russia (II)*, *supra* note 11, para. 137.

[65] *Al-Skeini*, *supra* note 61, para. 133 (emphasis added).

[66] See cases cited in *Georgia v. Russia (II)*, *supra* note 11, para. 131.

[67] *Ibid.*, para. 132.

to argue that jurisdiction is diminished, rather than enhanced, when acts are not isolated and specific or to conclude that all acts during combat lack an element of proximity.[68] In sum, the approach in *Georgia v. Russia (II)* is problematic both in terms of consistency and of substance.

Clearly, not every act that impacts rights beyond a state's territory can or should trigger extraterritorial jurisdiction. The standard emerging from ECtHR rulings prior to *Georgia v. Russia (II)* and from the practice of other human rights bodies is that, in cases where physical control is absent, jurisdiction can be triggered but only where effects on rights are 'direct and reasonably foreseeable'.[69] It seems that killings resulting from aggression would satisfy this standard: in the context of intentional attacks against defending combatants, and in most cases of collateral damage to civilians, the impact on rights would indeed be direct and foreseeable.[70]

The threshold objection that IHRL cannot apply to resorts to war since *jus ad bellum* is the *lex specialis* raises interesting questions, but it is also ultimately unconvincing. As conceded by the USA, this is an extension of its traditional argument that IHL is the *lex specialis* in armed conflict and therefore displaces IHRL entirely.[71] However, the 'displacement model' is only shared by a few other states and has been notably rejected by the ICJ and most commentators in favour of this or that model of parallel application.[72] The question that remains is whether there are grounds to argue that the displacement model should be accepted nevertheless concerning the relations between IHRL and *jus ad bellum*. The answer seems to be negative.[73] First, just like in

[68] These and other issues were pointed out in partly dissenting opinions. See, e.g., *Georgia v. Russia (II)*, *supra* note 11, in the partly dissenting opinion of Judge Lemmens and joint partly dissenting opinions of Judges Yudkivska, Wojtycjek and Chanturia; see also M. Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos', *EJIL: Talk!* (25 January 2021), available at www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/.

[69] See *Georgia v. Russia (II)*, *supra* note 11, para. 12 (partly dissenting opinion of Judge Chanturia); GC 36, *supra* note 8, para. 63; this standard was recently employed by the Human Rights Council's fact-finding commission concerning the protests along the Gaza fence, where it held that clashes between protestors and soldiers across the fence trigger jurisdiction because of the significant and foreseeable effects of the soldiers' response. HRC, Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, UN Doc. A/HRC/40/CRP.2, 18 March 2019, paras 43, 56.

[70] See Report of the Special Rapporteur, *supra* note 12, paras 41–43 (adopting this view on extraterritorial application); see also S. Fatima, 'Targeted Killing and the Right to Life: A Structural Framework', *Just Security* (6 February 2019), available at www.justsecurity.org/62485/targeted-killing-life-structural-framework; compare M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), at 209–212 (suggesting a 'third model' whereby negative obligations – such as the duty to refrainin from arbitrary killing – would apply exraterritorially without regard to the question whether 'jurisdiction' was acquired).

[71] DoD, *supra* note 60, para. 1.3.2.1. On the displacement model, see Hathaway *et al.*, *supra* note 35, at 1894–1898.

[72] See *Legal Consequences of the Construction of a Wall*, *supra* note 61, paras 102–112; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168, para. 216; Droege, 'Elective Affinities? Human Rights and Humanitarian Law', 90 *International Review of the Red Cross* (*IRRC*) (2008) 501; Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict', 87 *IRRC* (2005) 737.

[73] Compare Mégret, *supra* note 3, at 1426–1428.

regard to the relations between IHRL and IHL, there is nothing in the text of human rights instruments that precludes their application to the initial decision to resort to force simply because it would be of a greater scale. Indeed, it would be paradoxical that resorts to force would be beyond the reach of IHRL precisely when the destructive capacity of force is at its greatest.[74]

Furthermore, the case for displacement is arguably even weaker concerning the relations between IHRL and *jus ad bellum* than in the context of the interaction between IHRL and IHL. First, when discussing the latter, the argument on displacement is usually deployed to give effect to the enabling aspects of IHL, such as its rules on targeting.[75] The concern that animates these positions seems to be that the application during armed conflict of IHRL standards, such as a use of force continuum, would unduly constrain military operations.[76] However, even if this concern is accepted, it is not relevant to the relations between IHRL and *jus ad bellum*. This concern is irrelevant because at hand is not an imposition of a more restrictive regime through IHRL; rather, the application of IHRL to situations of aggression simply adds another level of illegality to an already recognized international wrong. In other words, since there is no 'relationship of conflict' between these normative frameworks, there is no need for one to displace the other.[77]

A related argument for the displacement model concerning IHL is that, as a legal framework designed to regulate peacetime activities, IHRL is ill fitting to apply to ongoing military operations. Namely, it could be said that IHRL imposes significant burdens on real-time decision-making under fire. However, even if this were true, the application of IHRL in relation to *jus ad bellum* does not raise this problem. In contrast to the application of IHRL in armed conflict, its application to decisions to resort to force does not affect the manner in which military operations are undertaken in the field. This is because decisions to resort to war are almost by definition taken *ante bellum* and by those individuals far removed from the battlefield.

Still another argument for the displacement model – whether concerning entire legal frameworks or specific norms – presumes that, when one norm enjoys greater specificity over the other, it is better suited to address the particular situation. Therefore, in situations of conflict between norms, the norm 'more specifically tailored to the situation prevails'.[78] Concerning the relations between IHRL and IHL, as

74 See Lieblich, *supra* note 48, at 725.

75 See, e.g., Aviv Yeini, 'The Law Enforcement Paradigm under the Laws of Armed Conflict: Conceptualizing Yesh Din v. IDF Chief of Staff', 10 *Harvard National Security Journal* (2019) 461.

76 A use of force continuum would require, for instance, an attempt to capture before targeting. For a critique against the practicality of such a standard, see generally Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', 42 *New York University Journal of International Law and Politics* (2010) 769, at 799–812; for more on this issue, see Goodman, 'The Power to Kill or Capture Enemy Combatants', 24 *EJIL* (2013) 819; Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"', 24 *EJIL* (2013) 855.

77 Compare Hathaway *et al.*, *supra* note 35, at 1902–1906.

78 *Ibid.*, at 1910; DoD, *supra* note 60, para. 1.3.2.1.

the argument goes, the framework that would prevail would be the latter. Whether this is the best way to understand specificity is beyond our scope.[79] The important thing is that here, too, there is no conflict between norms that would require that *jus ad bellum* exclude IHRL; rather, IHRL reinforces the law on the use of force that already prohibits aggression.

The last threshold objection is that questions of resort to force are in the exclusive province of the UNSC and are accordingly beyond the competence of human rights bodies. A similar claim was raised by the USA and some like-minded states regarding the crime of aggression at the International Criminal Court (ICC), where it was argued that the ICC should not exercise jurisdiction over aggression before the UNSC determines that such an act has occurred.[80] Yet this approach did not prevail, and the ICC can nowadays exercise jurisdiction over aggression even without such a determination.[81] Indeed, there is nothing in the UN Charter that grants the UNSC exclusive competence to recognize that aggression took place.[82] Its unique powers are only in deciding which universally binding enforcement measures should be taken if aggression occurs.[83] Nor is it clear why it should have such an exclusive competence: to the extent that such a decision requires both factual and legal determinations, it is hardly the case that the UNSC, as an intensely political body, is in the best position to make them. The question remains whether there are specific grounds, principled or practical, to exclude such a question from the competence of human rights bodies specifically.[84] Without exhausting this institutional debate, it would be difficult to defend such a view, considering that, in recent years, human rights bodies quite regularly address violations of 'neighbouring' normative frameworks such as IHL, sometimes with the support of the members of NATO.[85]

[79] For example, it could be argued that the more specific norm is the one that is more concrete, rather than the one that was 'specifically tailored' to the situation. Concerning possible relations between IHRL and *jus ad bellum*, it seems hardly the case that *jus ad bellum* is more concrete because of its vagueness. Compare Lieblich, *supra* note 48, at 328–329.

[80] Koh and Buchwald, 'United States', in Kreß and Barriga, *supra* note 3, at 1290, 1291–1292. For an analysis of this problem in the run up to the activation of the crime, see Kreß, 'Introduction: The Crime of Aggression and the International Legal Order' in Kreß and Barriga, *supra* note 3, 1, at 10–11.

[81] Kreß, 'Introduction', at 15–16; Blokker and Barriga, 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals', in Kreß and Barriga, *supra* note 3, 646, at 651.

[82] See also Kreß, *Introduction, supra* note 80, at 15–16.

[83] UN Charter, Art. 39.

[84] See A. Haque, 'Aggression, Armed Conflict, and the Right to Life: Does UN Human Rights Committee Get It Right?', *Just Security* (11 August 2017), available at www.justsecurity.org/44040/aggression-armed-conflict-life-human-rights-committee-right/ (noting, while reserving judgment, that applying IHRL to resorts to force would require human rights bodies to 'monitor compliance with the UN Charter' and would put them 'at the center of legal controversies'). But see Goodman, Heyns and Shany, *supra* note 41 (noting that although treaty bodies are competent to determine whether a state has engaged in an act of aggression, such evaluation would have to be 'very careful').

[85] This has been the case, for example, concerning Syria. See, e.g., UK Mission to the UN, UN Human Rights Council 41: Introductory Statement on Syria, 12 July 2019, available at www.gov.uk/government/news/un-human-rights-council-41-introductory-statement-on-syria; see also M. Sassòli, *International Humanitarian Law* (2019), at 442–443.

In sum, it seems that the threshold objections above are not convincing. But this by no means implies that the substance of the three pillars is straightforward. The following sections delve deeper into these three pillars, seeking to uncover their theoretical underpinnings, ambiguities and normative dilemmas. We begin with the most intuitive of these three pillars: that killings pursuant to aggression are violations of the right to life.

4 Aggression as an *Ipso Facto* Violation of the Right to Life

A *Aggression as Non-Defensive Killing: Combatants and Civilians*

GC 36 opines, in Pillar 1, that '[s]tates parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate *ipso facto* article 6 of the Covenant'. As discussed earlier, to open the door to such a possibility, one first needs to depart from the view that aggression is strictly an interstate issue. As we have seen, at least a preliminary argument to that effect can be made: aggression involves killing, and it seems unreasonable to suggest that law *per se* excludes the rights of those killed.[86] Pillar 1, however, raises many questions of theoretical and practical concern. This section first asks whether it is indeed true that all killings of combatants resulting from aggression are *ipso facto* arbitrary in terms of the right to life. It then moves to ask whether defending combatants can be 'victims' to begin with, in light of prevailing approaches to the moral status of combatants. Last, this section conceptualizes the manner in which proportionate incidental killing of civilians, which might be lawful under IHL, can still amount to the arbitrary deprivation of life under IHRL.

1 *Are All Killings During Aggression Ipso Facto Violations of the Right to Life?*

First, what is needed to assume that killings in aggression are *ipso facto* arbitrary under IHRL? In general, non-arbitrary killings are only those that can be justified as necessary and proportionate acts of self-or other-defence against an imminent threat to life.[87] If killings in aggression cannot, in any case, satisfy these conditions, they could be said to be arbitrary *per se*. A key question when considering Pillar 1 is whether this is indeed the case. Is it true that all killings resulting from aggression are *per se* non-defensive and thus arbitrary? Answering this question is not as straightforward as it might seem. This is particularly the case when aggressors defend their own civilians in real time against an immediate and otherwise unpreventable harm inflicted by the defender – whether lawfully or unlawfully in terms of *jus in bello*. A historical example could be, perhaps, German attempts to defend cities against allied carpet bombings during the later stages of World War II. Could it be said that in such cases the original defender becomes the 'micro-aggressor', for lack of a better term, allowing

[86] See Dannenbaum, *supra* note 3, at 34, 312–339.

[87] GC 36, *supra* note 8, paras 12–13; J.A. Hessbreugge, *Human Rights and Personal Self-Defense in International Law* (2017), at 92–213.

the initial aggressor to act defensively in that particular instance? This question remains unresolved in the ethics of war. In ethical terms, it is difficult to argue that in such cases the defending aggressor must stop in its tracks, even if the consequence would be the immediate loss of civilian life.[88] In practical, commonsensical terms, it is highly unlikely that IHRL would be constructed to impose such a duty. Perhaps, Pillar 1 could be understood to apply to killings that specifically occur in furtherance of the aggressive cause.

The picture is also complex when considering killings during a defensive action. Consider a case where a state engages in lawful self-defence on the *ad bellum* level. Here, it could be said that at least some of its intentional killings of combatants are defensive in the sense that IHRL requires. Likewise, its incidental killings, if proportionate, could be viewed as side effects of this defensive action, which might be (at least) excused. However, concerning killings in defensive wars that cannot be squared as defensive in any reasonable sense – think, for example, of opportunistic killings such as diversion attacks[89] – it seems that GC 36 offers significant deference to the defending state, by establishing the asymmetric threshold model discussed above.[90] Whether this is a normative or pragmatic approach is up for debate.[91] Be that as it may, to argue that all killings of combatants in a war of self-defence are presumably defensive, and thus non-arbitrary, requires that IHRL accept IHL's presumption that all of the aggressor's combatants are threatening in a manner that justifies attacking them on the basis of their status.[92]

In sum, any approach that bases *ipso facto* conclusions on the right to life on the status of the parties under *jus ad bellum* would have to take into account that the category of arbitrary killing becomes blurry when analysing attacks on the micro level. This calls for refining the understanding of Pillar 1, as suggested above.

2 Can Defending Soldiers Be Victims?

Even in the most straightforward case where an aggressor launches attacks against defending combatants in furtherance of the aggressive cause, a key question arises: can soldiers who die fighting be victims? Indeed, to construct their killing as a violation of the right to life, it is first needed to establish that combatants killed in a war of self-defence are innocent victims rather than dangerous people that can be justifiably

88 See Steinhoff, 'Debate: Jeff McMahan on the Moral Inequality of Combatants', 16 *Journal of Political Philosophy* (*JPP*) (2008) 220; see also Haque, *supra* note 17, at 79–80 (arguing that civilians, and, consequently, their armed forces, retain the right to defend themselves even against the incidental results of lawful attacks).

89 Lazar, 'Associative Duties and the Ethics of Killing in War', 1 *Journal of Practical Ethics* (2013) 3, at 35–36.

90 See section 3.A.

91 See generally Dill, 'Towards a Moral Division of Labour between IHL and IHRL during the Conduct of Hostilities', in Bohrer, Dill and Duffy, *supra* note 44, at 197.

92 This conclusion is indeed contestable. In recent years, several scholars have argued that, because not all combatants are equally threatening, international law should abandon the assumption that all members of armed forces can be attacked at all times. See Blum, 'The Dispensable Lives of Soldiers', 2 *Journal of Legal Analysis* (2010) 69; Haque, *supra* note 17, at 85–104; compare Goodman, *supra* note 76.

killed. It is in this sense that Pillar 1 ties into one of the most contentious questions in the ethics and law of war: that concerning the moral status of combatants. To be sure, according to the prevailing IHL principle of belligerent equality, all combatants are legally equal (belligerent equality).[93] They all possess the 'right to fight',[94] which implies – at its most thin understanding – at least immunity from prosecution when they fight in accordance with IHL.[95] The sticky question is whether this reflects merely a pragmatic compromise or is somehow in line with morality. If, in normative terms, combatants belonging to aggressors and defenders are morally equal, and, accordingly, possess an equal moral right to kill each other, then, arguably, it would be problematic to construe dead combatants as victims under any legal regime.

Michael Walzer famously argued, in this context, that all combatants are morally equal mainly because of the mutual threat they pose to one another.[96] On his view, all soldiers either consent to fight or are coerced to do so, and, in both cases, 'their war is not a crime'.[97] Now, if merely being under mutual threat spawns an equal right to kill, it cannot be said that combatants of either side are more or less victims than those of the other. However, this 'traditional' view on moral equality has been significantly undermined in recent years by the revisionist approach to the ethics of war. Recall that revisionists argue that there is nothing morally special in war. Since, in regular human interactions, mutual threat alone does not create moral symmetry – after all, an armed robber and a resisting victim are by no means of equal moral standing – it would be a leap of logic to claim that combatants are equal regardless of the justness of their war. Therefore, defending soldiers remain innocent victims, although they are 'dangerous' to their enemy.[98]

Surely, by articulating the moral status of defending soldiers as innocent victims, the revisionist approach strengthens the claim that killing in aggression may *ipso facto* be a violation of rights. Importantly, however, it is not needed to adopt revisionism as a whole to reach this conclusion. Even if Walzer's traditional view on the moral equality of combatants is accepted, the killing of defending soldiers can still be a violation of their right to life. This is the case because the argument on moral equality is partly about the distribution of responsibility: it is the state (or its leaders), rather than individual combatants, that is morally responsible for plunging soldiers on both sides into the dire situation of mutual threat. Accordingly, moral equality of combatants *qua* individuals does not breed the moral equality of leaders and states. Since claims under IHRL are not levelled between or against individual combatants but, rather, against the aggressing state, the humanization of *jus ad bellum* does not require, as a precondition, discarding the notion of the moral equality of combatants.[99]

[93] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relation to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977, 1125 UNTS 3, Arts 50–51.

[94] *Ibid.*, Art. 43(2).

[95] Compare Haque, *supra* note 17, at 23–30, with Lieblich, *supra* note 48, at 335–338.

[96] Walzer, *supra* note 5, at 36.

[97] *Ibid.*, at 37. For a summary of Walzer's approach, see Frowe, *supra* note 17, at 123–127.

[98] McMahan, *supra* note 5, at 82.

[99] Compare Mégret, *supra* note 3, at 1444, n. 101.

Importantly, the realization that claims under IHRL are levelled against states, and not against combatants *qua* individuals, explains why it is perfectly possible to accept Pillar 1 without undermining positive IHL. While states might be responsible under IHRL for violations of the right to life resulting from aggression, individual combatants may still enjoy immunity from prosecution if they fight in accordance with *jus in bello*. In this sense, Pillar 1 is much less radical than it initially seems.

Yet, there might be other objections against the victimhood of defending soldiers. One prominent counter-argument is 'role based'. On this view, soldiers, by enlisting and fighting, waive their rights to claim a violation of their rights if they are killed – even by an aggressor.[100] These are the rules of the game, the argument goes, the so-called 'war convention'.[101] While, admittedly, this view might reflect the way many people intuitively understand soldiering, it raises significant problems. Indeed, the role of consent in assessing rights in war has been heavily challenged by philosophers. McMahan argues, for instance, that, to the extent that combatants consent to anything, it is to their own society to defend it, even at the price of their lives. However, this cannot be understood as granting third party aggressors an *ex ante* permission to kill them.[102] Furthermore, McMahan claims, even if they did so consent, such consent does not amount to a waiver that negates the responsibility of the other side, because a person's consent does not alone provide a justification to kill them, absent an objectively just reason to do so.[103] This argument is in line, it seems, with the legal principle that the right to life is non-derogable.[104] This principle implies that any attempted waiver of rights – by combatants or otherwise – would not release the state from its obligation to respect and ensure the right to life.[105]

Last, one can argue that the waiver of rights is irrelevant because states do not owe any duties towards enemy soldiers to begin with. Simply put, waiver is redundant because there is no claim to waive. This is, in essence, a version of the Schmittian argument: the opposing combatant is the quintessential enemy and, as such, is totally excluded from the protection of the adversary.[106] But, if we accept Carl Schmitt in this context, we also undermine a vast body of other laws. Contemporary international law already regulates the relations between a state and enemy soldiers in many other aspects.[107] The legal relations between states and opposing combatants are definitely not of total exclusion.

[100] See Hurka, 'Liability and Just Cause', 21 *Ethics and International Affairs* (2007) 199.

[101] See Benbaji, 'The War Convention and the Moral Division of Labour', 59 *Philosophical Quarterly* (2009) 593, at 598; Benbaji, 'The Moral Power of Soldiers to Undertake the Duty of Obedience', 122 *Ethics* (2011) 43.

[102] McMahan, 'On the Moral Equality of Combatants', 14 *JPP* (2006) 377, at 381.

[103] *Ibid.*, but see Benbaji, 'Moral Power', *supra* note 101, at 45–46.

[104] ICCPR, *supra* note 8, Art. 4(2).

[105] And I set aside, of course, the question of Euthanasia. See GC 36, *supra* note 8, para. 9. Even if euthanasia could be justified on account of a waiver of rights, this does not reflect on consent to being killed in an aggressive war. This is because the former is presumably for a good cause, while the latter is not. See Dannenbaum, *supra* note 3, at 211.

[106] Schmitt, *supra* note 14.

[107] For instance, IHL imposes duties relating to prisoners of war, to injured enemies and those *hors de combat*. See, respectively, Geneva Convention (III) Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Additional Protocol I, *supra* note 93, Art. 41. *Jus ad bellum*, too,

To sum up this section, it is debatable whether all killings during aggression can be said to be *ipso facto* arbitrary – the main exception being, it seems, immediate defensive action to protect civilians against attacks by the defender. Accordingly, it might be helpful to refine the understanding of Pillar 1 as referring to killings that take place specifically in furtherance of the aggressive cause. Concerning the latter, it seems that defending soldiers can indeed be construed as victims of the aggressing state, both on the traditional and revisionist views on the moral standing of combatants.

3 Incidental Killings of Civilians During Aggression

But what about civilians? Clearly, the intentional killing of civilians, or disproportionately killing them incidentally, are violations of IHL, and are reasonably also violations of IHRL, whether perpetrated by aggressors or defenders.[108] The question of interest to us, however, is whether proportionate incidental harm to civilians inflicted by the aggressor could be an *ipso facto* violation of the right to life under IHRL, although it is not prohibited under IHL.[109] In this context, a few words on the nature of proportionality under IHL are required. In just war theory, the notion that proportionate incidental harm to civilians can be justified as a side effect of achieving a greater good goes back to the doctrine of double-effect.[110] In such situations, it could be said that rights are unjustly – but justifiably so – overridden.[111] The doctrine of double-effect has been the subject of much criticism in recent years, the discussion of which is beyond our scope.[112] Important for us is that, even if the idea of double-effect is accepted, proportionality under IHL deviates from it significantly.

How so? In a sense, proportionality under IHL is a moral hybrid: on the one hand, it speaks the language of double-effect, but, on the other, it does not pit incidental harm against a greater good but, rather, against the amoral 'concrete and direct military advantage' resulting from the attack.[113] Owing to the pragmatic principle of belligerent

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in its requirement that self-defence be necessary and proportionate, can also be said to protect the other party's soldiers. See T. Ruys, '*Armed Attack*' *and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), at 91–126.

108 Compare V. Todeschini, 'The Human Rights Committee's General Comment No. 36 and the Right to Life in Armed Conflict', *Opinio Juris* (21 January 2019), available at http://opiniojuris.org/2019/01/21/the-human-rights-committees-general-comment-no-36-and-the-right-to-life-in-armed-conflict (noting that if 'an attack … results in a violation of Article 6 ICCPR, the victims … may seek redress under the ICCPR against the responsible state').

109 A further complex question is whether civilians killed as proportionate collateral damage in an unlawful, but 'just', war, such as an ideal case of humanitarian intervention, can be said to have had their right to life violated. In ethical terms, the answer seems to be no, if we accept the doctrine of double effect. See Frowe, *supra* note 17, at 21–26. In such a case, their right to life would be perhaps infringed but not violated and would be overridden. See Haque, *supra* note 17, at 7. In legal terms, it might be that in such cases, assuming the attack is lawful according to IHL, it would not be deemed a violation of IHRL. See GC 36, *supra* note 8, para. 69. For a discussion of humanitarian intervention, see Section 4B.

110 T. Aquinas, *Summa Theologica*, IIa IIae, q. 64, a. 7.

111 See Haque, *supra* note 17, at 7; Steinhoff, *supra* note 88, at 222.

112 *Ibid.*

113 Additional Protocol I, *supra* note 93, Art. 51(5)(b).

equality, this means that, even when the military advantage is ultimately meant to promote the unjust cause of aggression, proportionate collateral damage would be lawful. Still, since this harm is inflicted in pursuit of an unjust cause, it is not ultimately justifiable. Accordingly, the rights of those harmed remain violated rather than overridden.[114] It is here that Pillar 1 can play a significant role. The recognition that civilians caught as 'proportionate' collateral damage during an aggression might have a claim under IHRL rescues them from a situation akin to rightslessness.[115]

Ultimately, it seems that Pillar 1, in its recognition of the victimhood of those killed in aggression, pushes law closer to morality. However, as we see in the next section, its framing still reserves some space for politics and discretion. Chiefly, this is reflected in the fact that Pillar 1 *does not* establish that *all* unlawful resorts to force would be violations of the right to life.

B *Aggression, the Right to Life and Other Unlawful Resorts to Force*

Indeed, Pillar 1 does not refer to killings resulting from all violations of Article 2(4) of the UN Charter as *ipso facto* violations of the right to life but only to those that result from aggression, as the term is defined in international law.[116] The reference to an 'act of aggression', rather than the crime of aggression, implies that the act does not need to cross the heightened gravity threshold of international criminal liability in order to constitute a violation of the right to life.[117] What is clear, however, is that, even

[114] I set aside the question of whether incidental harm in the general context of aggression, but specifically in the course of an attack that is meant to protect civilians from immediate harm, can be justified. I briefly address this question in section 4A.

[115] Indeed, positive international law does not recognize a right of reparations to individuals caught as lawful collateral damage, whether during aggression or otherwise. See Blum, *supra* note 2, at 69.

[116] See generally Akande and Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression', in Kreß and Barriga, *supra* note 3, at 214. Importantly, mainstream international law on the use of force holds that there is a hierarchy of at least three types of violations of Article 2(4): 'less grave uses of force' generally refer to indirect uses of force (provision of military assistance to direct uses of force). See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 191. Grave uses of force are, in general, direct uses of military force against a state, and these usually also constitute 'armed attacks' that give rise to a right of self-defence (para. 195); Akande and Tzanakopoulos, *supra* note 116, at 220–221; Compare C. Henderson, *The Use of Force and International Law* (2108), at 63–64. 'Aggression' requires a further threshold of gravity, as discussed below. I set aside here the question of whether there is a de minis threshold for acts that constitute use of force to begin with. See Ruys, 'The Meaning of "Force" and the Boundaries of the *Jus ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?', 108 *AJIL* (2014) 159; also, it is not needed for our purposes to discuss the question of whether there is such a minimum requirement for armed attacks. Hakimi and Cogan, 'The Two Codes on the Use of Force', 27 *EJIL* (2016) 257, at 269–271. Also, some are of the view that 'aggression' is a wider concept than armed attack. See Henderson, *supra* note 116, at 64–65.

[117] Specifically, criminal liability, at least in the ICC, requires that an act of aggression, to constitute a crime, must, 'by its character, gravity and scale, constitute[] a manifest violation of the Charter of the United Nations'. On the thresholds for criminal liability for acts of aggression, see Rome Statute of the International Criminal Court 1998, 2187 UNTS 90, Art. 8bis(1). For the particularities of this definition, see Coracini and Wrange, 'The Specificity of the Crime of Aggression', in Kreß and Barriga, *supra* note 3, 307, at 321–323 ('[a]n act of aggression already constitutes the most serious violation of the prohibition of the use of force. The crime of aggression now seems to target the most serious of these most serious violations'); see also Ruys, 'Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC', 29 *EJIL* (2018) 887, at 892–893.

below the threshold of criminal liability, not every form of unlawful force constitutes an act of aggression.[118] An act of aggression, as defined by the UN General Assembly, 'is the most serious and dangerous form of the illegal use of force',[119] considered as such in light of all 'relevant circumstances', including the gravity of the act or its consequences.[120]

Accordingly, by referring specifically to aggression, GC 36 implies that there could be unlawful wars that would not, in and of themselves, result in violations of the right to life. The clearest case where this might be so concerns unilateral humanitarian intervention, without authorization by the UNSC. Ideally speaking, humanitarian interventions are uses of force that aim to protect individuals against atrocities perpetrated by their own government.[121] Assuming a genuine case of such intervention, an interesting split takes place that perhaps mirrors the distinction between the law and ethics on the use of force.[122] On the *ad bellum* level – at least according to the majority of opinions – the intervention contravenes the prohibition on the use of force.[123] Yet it could be said that a specific humanitarian intervention, although unlawful, can still be just.[124] It would be difficult to argue that combatants belonging to a state engaged in atrocities – not least those directly involved in such actions – would have a claim that their right to life was violated if they were killed in a humanitarian intervention. This clam would be unavailable to them because, in such a case, their killing would be defensive (other defence) and thus not arbitrary.[125]

A more perplexing question concerns unlawful resorts to force that, unlike humanitarian intervention, are also unjust but still do not amount to aggression. One could think of acts that might not fulfil the gravity criteria of aggression, such as a 'frontier incident' that results in deaths of soldiers[126] or, without exhausting the legal complexity of such situations, the engagement in 'less grave' uses of force such as a provision of military aid to opposition groups.[127] Similarly, it is reasonable that force that begins as a lawful act of self-defence might become unlawful if the response is no longer necessary or proportionate, but it is unclear whether it would now constitute

[118] Coracini and Wrange, *supra* note 117, at 322.

[119] Definition of Aggression, GA Res. 3314 (XXIX), 14 December 1974, Art. 3(g), preamble.

[120] *Ibid.*, Art. 2.

[121] See Holzgrefe, 'The Humanitarian Intervention Debate', in Holzgrefe and Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 15.

[122] But see Heller, *supra* note 49 (arguing that unilateral humanitarian intervention is indeed an act of aggression and that 'just' humanitarian interventions do not exist in practice).

[123] See D. Akande, 'The Legality of the UK's Air Strikes on the Assad Government in Syria', *Pressenza London* (16 April 2018), available at www.pressenza.com/2018/04/legality-uks-air-strikes-assad-government-syria/.

[124] See Independent International Commission on Kosovo, The Kosovo Report 4 (2000); but see also Koskenniemi, *supra* note 22, at 170–171; Heller, *supra* note 49.

[125] Here again, the question arises whether all killings of combatants of states involved in atrocities are indeed defensive. See Section 4A.

[126] On frontier incidents, see Nicaragua, *supra* note 116, para.195.

[127] *Ibid.*, para.191.

aggression.[128] The tough question is why, as a threshold matter, killings resulting from such acts would not constitute violations of the right to life. If, as discussed in the previous section, aggression is an *ipso facto* violation because it involves non-defensive killings, the same should apply to unlawful acts beneath the threshold of aggression.

A critical response would be that by focusing on aggression alone, and considering the high threshold for such determinations, the HRC adopted a standard that is unlikely to ever be applied.[129] A more charitable reading would be that, in cases of aggression, the wrongful circumstances of the violation should be clearer both to the state and to those assessing its conduct. Last, by restricting the argument to aggression only, it might be that the HRC has decided to reserve some space for politics, in the sense that some unlawful resorts to force would still be insulated from the legal regime of IHRL. For better or worse, this is an implied recognition of the limits of human rights discourse when assessing resorts to war. Yet it comes at the cost of significantly narrowing the application of Pillar 1. As we shall see, similar dynamics underlie Pillar 2 of the humanization of *jus ad bellum*: the responsibility to oppose aggression.

5 The Responsibility to Oppose Aggression

In Pillar 2, GC 36 'reminds' all states 'of their responsibility as members of the international community to protect lives and to oppose widespread or systematic attacks on the right to life, including acts of aggression, [and] international terrorism … while respecting all of their obligations under international law'.[130] Thus, while Pillar 1 stems from the negative duty to respect human rights, the 'responsibility' under Pillar 2 should be understood as part of the corresponding positive requirement to ensure human rights.[131]

The responsibility to oppose aggression must be read in conjunction with GC 36's position that '[s]tates parties must take appropriate measures to protect individuals

[128] See Lieblich, 'On the Continuous and Concurrent Application of *ad Bellum* and *in Bello* Proportionality', in C. Kreß and R. Lawless (eds), *Necessity and Proportionality in Peace and Security Law* (2021) 41.

[129] Compare Heller, 'Who Is Afraid of the Crime of Aggression?', 18 *Journal of International Criminal Justice* (forthcoming), available at https://ssrn.com/abstract=3440408.

[130] GC 36, *supra* note 8, para. 70. Interestingly, it seems that Pillar 2 equates acts of aggression with systemic attacks on the right to life. However, it is conceptually possible than an aggression would not include deprivations of life; for example, where the invasion begins and the victim state does not respond ('bloodless' of 'political' invasion). In such cases, it could be that at hand, beyond the violation of sovereignty, is a latent threat to kill if the victim responds ('conditional threat'). In such cases, aggression could involve a foreseeable threat to life rather than a deprivation, strictly speaking. On bloodless invasions, see Dannenbaum, *supra* note 3, at 102–108. In the ethics of war, there is an ongoing debate whether it would be justified to kill and risk lives in order to thwart a bloodless invasion, and this might have bearing also on the question whether there could be a duty to respond against such acts under IHRL. Yet, I set aside this question for the sake of brevity. On this debate, compare, e.g., Rodin, *supra* note 16, at 74–83, with Frowe, *supra* note 17, at 142–148.

[131] ICCPR, *supra* note 8, Art. 2(1); GC 36, *supra* note 8, para. 21.

against deprivation of life by other States'.[132] Additionally, GC 36 holds that states are under a 'due diligence obligation' to take 'reasonable positive measures' to protect life against 'reasonably foreseeable threats to life' originating from private persons and entities and are therefore obliged to take 'preventive measures', *inter alia*, against reasonably foreseeable threats from 'armed groups'.[133] Taken together, these statements seem to establish that, at least in some cases, opposing aggression as well as threats by non-state actors might require states to resort to interstate force.[134] Importantly, however, like all positive measures, states must only take such measures insofar as they 'do not impose on them disproportionate burdens'.[135]

It is important to recall at this point that by referring to 'all of their obligations under international law', GC 36 makes it clear that Pillar 2 does not presume to add justifications for force beyond what *jus ad bellum* already allows. It simply adds an additional normative framework to situations where force is already permitted. Indeed, a possible duty to resort to interstate force in defence of individuals would be the flipside of viewing aggression as an *ipso facto* violation of the right to life.[136] Like Pillar 1, Pillar 2 is in line with the revisionist (or individualist) approach to war: if there is nothing 'special' in war, positive duties to protect lives remain unaltered when the threat emanates from a forcible act by another state. In other words, the fact that, at hand, is a question of war and peace does not, in itself, change moral obligations. In ideal terms, the existence of such duties is hardly objectionable. When refraining from defending against an attack that threatens lives, the state essentially lets people die for the purpose of safeguarding other interests.[137] Ethically, such a decision can be defended only in cases in which the response would cause or occasion disproportionate harm.[138]

Recall, however, the concerns about the possible securitization of human rights and the depoliticization of war. These seem to be most apparent in the context of a possible duty, or responsibility, to resort to defensive force. In this context, Pillar 2 revives the age-old question whether self-defence or 'self-preservation' of states is a Hohfeldian privilege or a duty. Emer de Vattel, for example, writing in the tradition of the primacy

[132] *Ibid.*, para. 22.

[133] *Ibid.*, para. 21. Of course, mentioning non-state actors in this context raises the controversial *ad bellum* question on the legality of self-defence against non-state actors, which is an issue beyond our scope. See recently M.E. O'Connell, C.J. Tams and D. Tladi, *Self-Defence against Non-State Actors*, Max Planck Trialogues (2019).

[134] Presumably, this will be the case in which the threat to life would require, in terms of necessity and proportionality, a forcible response and, from the perspective of the defender's soldiers and citizens, that a forcible response would not occasion unnecessary harm (see discussion of Pillar 3 in Section 6). In other cases, the obligation can be to take legal or political measures or, perhaps, to take 'defensive precautions' against the effects of possible attacks such as building bomb shelters. This duty is already required by IHL. See Additional Protocol I, *supra* note 93, Art. 58. For a relevant case, see High Court of Justice (Israel) 8397/06, *Wasser v. Minister of Defense*, 62(2) PD 198 (ruling that the state has a positive duty to protect classrooms near the Gaza Strip against the effects of rocket fire).

[135] GC 36, *supra* note 8, para. 21.

[136] *Cf.* Hessbruegge, *supra* note 87, at 100–103 (on this duty on the individual level).

[137] Note that I refer here to attacks that threaten lives, not attacks that threaten only sovereignty or territorial integrity ('bloodless invasions'). See note 130 above.

[138] *Cf.* Haque, *supra* note 17, at 151.

of duty over right, based the right of self-preservation on the dual obligation of a nation towards its citizenry: to preserve the state *qua* political association as well as the lives of its individuals.[139] Modern positive international law, conversely, understands self-defence as a privilege, the exercise of which is subject – for better or for worse – to absolute state discretion.[140] Accordingly, states are not criticized on international legal grounds for not defending themselves, even when the attacks result in deprivations of lives. Historically, when states have failed to oppose aggression, this only solidified their positions as victims rather than as culprits.[141] Usually, when clashes erupt, the international community urges 'restraint' rather than the full exercise of defensive rights.[142] For example, for several years, Syria refrained from firing at Israeli aircraft attacking in its territory, presumably for strategic reasons. Even if we assume that the Israeli attacks were unlawful, it would seem absurd to criticize Syria for that particular decision.[143]

Any duty to oppose aggression can contribute to the transformation of the currently recognized privilege of self-defence to a form of a positive duty to act defensively. This, in turn, can have two problematic effects. First, it narrows the political space in which law-abiding states can decide not to respond: framing resort to force as a duty might naturalize and depoliticize such decisions, which can result in widening situations where resort to force is expected. Second, securitizing human rights by constructing resort to force as a human rights obligation enriches the legal vocabulary available to states in order to legitimate force,[144] also in dubious circumstances. In other words, the existence of an 'obligation' to use force can be used as pretext even when other options are available.

The first problem mentioned above – of narrowing the political space available to states when deciding whether to respond – is perhaps why GC 36 takes a step back. Pillar 2 stops short of an absolute duty to resort to defensive force through several 'exit points', which can be said to introduce a margin of appreciation to the question. First, opposing aggression is ultimately defined as a 'responsibility', which is closer to a duty

[139] E. de Vattel, *The Law of Nations Book* (1758), vol. 2, paras 16–18.

[140] Y. Dinstein, *War Aggression and Self-Defense* (2017), para. 531 ('[a] State subjected to an armed attack is vested with a right, hence an option, to resort to counter-force. A prudent State may decline to exercise this right').

[141] See, for instance, the cases of non-resistance to German invasions in World War II, such as in Denmark and Bohemia and Moravia. See International Committee of the Red Cross, Commentary on the First Geneva Convention (2016), para. 286.

[142] See, e.g., 'U.N. Chief Condemns Saudi Attacks, Calls for Restraint', *Reuters* (15 September 2019), available at www.reuters.com/article/us-saudi-aramco-attacks-un/un-chief-condemns-saudi-attacks-calls-for-restraint-idUSKBN1W00M2.

[143] In 2017, after the Syrian regime consolidated its power, Syria began to respond to Israeli aerial incursions more frequently. William Booth, 'Syria Fires Missiles at Israeli Warplanes on Bombing Run', *Washington Post* (17 March 2017), available at www.washingtonpost.com/world/syria-fires-missiles-at-israeli-warplanes-on-bombing-run-in-syria/2017/03/17/5481dbb4-0afb-11e7-a15f-a58d4a988474_story.html.

[144] See, e.g., National Security Strategy of the United States of America, December 2017, at 42 ('[t]here can be no greater action to advance the rights of individuals than to defeat jihadist terrorists and other groups that foment hatred and use violence to advance their supremacist Islamist ideologies').

to exercise reasonable administrative discretion whether to respond by force. Second, all positive duties, including the duty to protect life, require only taking 'reasonable' positive measures that do not impose 'disproportionate burdens'.[145] For example, a state could decide to refrain from embarking on an act of self-defence if it would likely result in significantly more death than it would prevent, or, perhaps, when it has no reasonable prospects of success.[146]

The latter conclusion is supported by international case law. For instance, in *Ilaşcu v. Moldova*, the ECtHR held that, in order to ensure the protection of human rights, Moldova might be under the positive obligation to re-establish control over its territories held by Russian-supported rebels.[147] However, this obligation was subjected to a 'fair balance that has to be struck between the general interest and the interests of the individual' and cannot be understood to impose 'an impossible or disproportionate burden'.[148] Accordingly, the Court ruled that, at least for a certain time, because the rebels were sustained by a much more powerful state, there was little Moldova could do to re-establish its authority.[149]

Indeed, like the confinement of Pillar 1 only to situations of aggression, the 'exit points' discussed above may serve to counterbalance Pillar 2's turn to ethics, by recognizing the role of state discretion and politics within the decision whether to engage in forcible self-defense. Still, this does not imply that Pillar 2 makes no difference. Exit points notwithstanding – and as opposed to traditional *jus ad bellum* – if Pillar 2 is accepted state discretion would never be unfettered. States would be at least under the obligation to justify and perhaps give reasons why they refrained from resorting to defensive force in this or that instance. In this sense, even with the margin of discretion reserved for states, the humanization of *jus ad bellum* still limits the prerogative to refrain from defensive force.

In sum, there are costs inherent in framing defensive force as a possible human rights obligation. These include, namely, the transformation of self-defence from a privilege to a duty and the danger that human rights discourse be securitized to legitimate dubious resorts to force. While the former is counter-balanced to an extent by the margin of discretion that Pillar 2 recognizes, the risk of securitization remains. This requires, above all, that relevant actors exercise special vigilance when assessing justifications for force that utilize human rights language. Ultimately, the desirability of Pillar 2 lies in the balance between its ethically sound premises and the risks of depoliticization and securitization that it entails.[150]

[145] GC 36, *supra* note 8, para. 21.

[146] On the different accounts concerning the relations between the classic just war tradition requirement that war have a 'reasonable prospect of success' and proportionality, see Frowe, *supra* note 17, at 147–161.

[147] ECtHR, *Ilaşcu v. Moldova*, Appl. no. 48787/99, Judgment of 8 July 2004, paras 339–340.

[148] *Ibid.*, para. 332.

[149] *Ibid.*, para. 342. For a recent case, see ECtHR, *Mangîr and Others v. Republic of Moldova and Russia*, Appl. no. 50157/06, Judgment of 17 July 2018, paras 39–40.

[150] To decide on this question would ultimately require answering the empirical question of whether Pillar 2 is likely to be used as a pretext for wars in a manner that worsens the *status quo ante*. For a similar mode of inquiry in the context of humanitarian intervention, see Goodman, 'Humanitarian Intervention and Pretexts for War', 100 *AJIL* (2006) 107.

6 The Duty to Prevent and Refrain from Unnecessary War

A *Occasioning Unnecessary Harm*

Pillar 3 of the humanization of *jus ad bellum* is perhaps the most open ended. According to GC 36, '[s]tate parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life'. Crucially, failing to take such peaceful means would not constitute a failure to respect the right to life but, rather, a failure to *ensure* that right. Accordingly, the victims here cannot be those killed directly by the acts of the state that fails to resolve its disputes but, rather, those killed by the other side to the escalating dispute. In other words, Pillar 3 refers to omissions – or actions – that occasion harm to persons to which the state owes an obligation to ensure their rights.[151] In such situations, the state is not the direct cause of the harm but, rather, induces foreseeable harm by others.[152] The bearers of the right in such cases would presumably be the state's own soldiers and civilians, who are killed in war by another state.[153]

To be sure, a major difficulty derives from the fact that GC 36 does not stipulate which disputes would require attempts at peaceful resolve to begin with. On an extreme view, the duty can be understood as encompassing even situations in which a state faced an unlawful threat of force but did not attempt to solve the crisis peacefully and, thus, is partly responsible for the harm that followed.[154] On another understanding, the duty would be violated only when the state occasions harm by actively embarking on a non-defensive war – thereby, *a fortiori*, also failing to solve the dispute peacefully.

It seems that, in legal terms, the latter possibility is more practicable. As long as *jus ad bellum* is understood to confer on states a virtually absolute right of self-defence at least once an armed attack occurs and is ongoing, it would be contradictory that a state would be at once justified in resorting to force in self-defence yet held accountable under human rights law for the deaths that it suffers. This seems to hold even if, before the armed attack, the victim did not exhaust all options to prevent the attack through diplomatic or other means. At work here seems to be the intuition that the victim's refusal to engage with the aggressor's demands prior to its attack does not relieve the latter from its wrongdoing. It is therefore safe to assume, for our purposes,

[151] On occasioning harm in another context, see Haque, *supra* note 17, at 167. Dannenbaum identifies, in addition to occasioning physical harm to soldiers, inflicting 'moral' harm by requiring them to kill unjustly. Dannenbaum, *supra* note 3, at 37–51.

[152] It is beyond our scope to discuss the complex modalities of inducing or occasioning harm. This question has been frequently addressed in common law torts. *Cf.* Wright, 'Causation in Tort Law', 73 *California Law Review* (1985) 1735, at 1748; H.L.A. Hart and T. Honoré, *Causation in The Law* (2nd edn, 1985), at 194–204.

[153] See Mégret, 'State Responsibility for Aggression: A Human Rights Approach', 58 *Harvard International Law Journal* (2017) 62, at 65.

[154] In effect, this is but another manifestation of the 'conditional threat' dilemma. If we believe that it is disproportionate to respond with force to a conditional threat, we might agree with the position that states must refrain from engaging in defensive force in such situations. See Rodin, *supra* note 16 at 79–88.

that Pillar 3 aims to establish an indirect violation of the right to life only when a state engages in a war in absence of a valid defensive claim and, thereby, places its people in unnecessary risk.[155]

Before delving deeper into Pillar 3, another preliminary question should be mentioned: should soldiers and civilians that knowingly and actively support an unnecessary war be barred from invoking their right to life against their own state, for harm occasioned by the fulfilment of their own wish? Perhaps an 'unclean hands' exception can be envisioned in such situations. It could even be said that all soldiers that do not refuse to fight in such cases accrue some moral responsibility that would deny them such a claim.[156] For simplicity, however, the discussion here concerns those led by the state to believe, or otherwise subjectively believe, that the war is indeed necessary.

B *Risking Soldiers and Civilians and the Limits of 'Reasonable Measures'*

To evaluate the possible challenges to Pillar 3, a helpful point of reference can be found in several British cases, brought in the wake of the 2003 Iraq invasion. The legal backdrop in these cases was the interpretation of Article 2(1) of the ECHR, which – like Article 6 of the ICCPR – requires states to take positive duties to prevent harm to life. Under the jurisprudence of the ECtHR, this duty is understood to imply that, 'in certain well-defined circumstances', a state incurs the positive obligation 'to take preventive operational measures' to protect individuals,[157] whether civilians or soldiers.[158]

In *Smith v. MoD* (2013), the question involved the decision to deploy soldiers in lightly armoured vehicles in a hostile environment, a decision that allegedly led to their death. The UK Supreme Court held that, in principle, there is no bar to soldiers' claims against their states for harm occasioned to them during combat.[159] As 'citizens

[155] Mirroring the question whether all killings in aggression are *per se* violations of the right to life is the question whether all occasioning of harm to your own soldiers during an unnecessary war is a violation of their right. For example, an argument can be made that a state that risks some of its soldiers to protect civilians from attacks during an aggressive war does not put them in unnecessary risk. Compare Steinhoff, *supra* note 87.

[156] Compare Mégret, *supra* note 3, at 1442–1443. On the moral responsibility of soldiers to inquire on the justness of their war, see McMahan, *supra* note 102, at 95–103. In a sense, accepting that soldiers might be entitled to reparations from their state seems to require also that soldiers are not morally responsible for their war. To an extent, Pillar 3 fits neatly with the traditional view on the moral equality of combatants.

[157] ECtHR, *Osman v. United Kingdom*, Appl. no. 23452/94, Judgment of 28 October 1998, para. 115.

[158] ECtHR, *Stoyanovi v. Bulgaria*, Appl. no, 42980/04, Judgment of 9 November 2010, paras 59–61. Indeed, it seems that there is no general principle excluding liability for harming members of one's own forces during war. Indeed, in recent years, the ICC applied the law of war crimes to 'intra-party' offences – namely, against children. See Longobardo, 'The Criminalisation of Intra-Party Offences in Light of Some Recent ICC Decisions on Children in Armed Conflict', 19 *International Criminal Law Review* (2019) 600.

[159] One issue that came up in the case law is whether soldiers are under the jurisdiction of their state for the purpose of the extraterritorial application of human rights law. While this issue proved controversial in British courts, the UK Supreme Court ultimately ruled that such a jurisdictional link exists because such soldiers are under 'state agent control and authority' when operating abroad. See ECtHR, *Smith and Grady v. United Kingdom*, Appl. nos 33985/96 and 33986/96, Judgment of 20 July 2000, paras 27–55.

in uniform', the Court held that there was nothing that *a priori* excluded them from the human rights protections of their own state.[160] Yet the Court limited these cases only to middle-ground situations that, on the one hand, do not concern battlefield operational decisions but, on the other, do not involve high politics.[161] Presumably, decisions to resort to force would fall under the latter. It seems that domestic courts would be reluctant to place such decisions under judicial scrutiny. As a matter of judicial policy, this might be understandable. Yet some of the substantive reasoning provided by British courts for their decisions is problematic and, at the end of the day, fails to be convincing.

The possible human rights implications of the mere decision to resort to force came up, a few years before *Smith*, in *Gentle v. PM*.[162] In simplified terms, the applicants in *Gentle* attempted to engage the state's responsibility by arguing that by failing to seek competent legal advice on the (un)lawfulness of the Iraq war, the state violated its positive duty to protect its soldiers. This framing pushed the House of Lords to phrase the question as one that hinged on the relations between the mere unlawfulness of war and the resulting deaths of soldiers and on whether, by engaging in an unlawful war as such, a state fails to discharge its duties to protect troops against real and immediate risks.[163] As we shall see, focusing on the issue of lawfulness was central to the failure of the applicants' argument.

The House of Lords unanimously rejected this claim. As they noted, as a matter of precedent, Article 2 of the ECHR has never been applied to questions of resort to force.[164] Perhaps the most interesting explanation given by the lords for this fact was that the lawfulness or unlawfulness of war has no immediate bearing on the risk to soldiers. In Lord Bingham's words, 'a flagrantly unlawful surprise attack such, for instance, as that which the Japanese made on the US fleet at Pearl Harbor, is likely to minimize the risk to the aggressor'.[165] On this view, a state would sometimes minimize the harm to its soldiers precisely by embarking on an unlawful war rather than by waiting for the conditions required for a lawful war.[166] If this is true, there is no necessary connection between unlawfulness and the harm occasioned to soldiers.

As elegant as that argument might seem at first, it actually begs the question. This is because the constitutive core of the duty at hand requires refraining from an unnecessary war, not from an unlawful war as such. When a state embarks on an unnecessary war, it fails to ensure the rights of its soldiers not because it did so in violation of the UN Charter. Rather, it is so because the harm it occasioned to its soldiers is unjustified and, therefore, arbitrary.[167] If, generally speaking, a state is justified in risking its

[160] *Ibid.*, para. 63.
[161] *Ibid.*, para. 76.
[162] *R. (Gentle) v. The Prime Minister and Others*, [2008] UKHL 20.
[163] *Osman*, *supra* note 157; see *Gentle*, *supra* note 162, para. 55.
[164] *Ibid.*, para. 8.
[165] *Ibid.*
[166] This reasoning was shared by several other lords.
[167] *Cf.* Mégret, *supra* note 3, at 1443. Note that GC 36 understands the term 'arbitrary' widely 'to include elements of inappropriateness, injustice, lack of predictability and due process of law'. GC 36, *supra* note 8, para. 12.

soldiers only at last resort and for a good cause (for example, defence of others or of the state), then, obviously, it wrongs them when it does so not as last resort or absent such a cause. Understood as such, the duty suggested under Pillar 3 does not derive from the prohibition on the use of force under the UN Charter; rather, the duties are parallel, albeit they might stem from similar first principles.

Beyond that, the House of Lords presented several traditional objections to subjecting resorts to force to human rights as a whole, some reminiscent of states' threshold objections to GC 36. For instance, they held that resort to force is an interstate matter, and, as such, it is regulated by the UN Charter, and, in any case, courts have traditionally shown restraint towards decisions relating to 'peace and war'.[168] It seems, however, that, like the threshold objections advanced by states, this reasoning has its shortcomings. The first of these statements repeats the traditional view that war, to the extent that IHL is not violated, does not implicate individual rights but only those of sovereigns. As already noted, this approach is highly questionable unless we argue that soldiers waive their rights altogether.[169]

The argument on the primacy of the UN Charter adopts the *lex specialis* approach, the limitations of which were explored earlier on.[170] It is especially questionable, it should be added, when raised in the context of the relations between a state and its own soldiers – relations that were never contemplated by the UN Charter's provisions on the resort to force. Additionally, the issue of judicial restraint is relevant mostly when it comes to domestic courts, in which separation of power is implied, and some decisions require deference to the executive. International bodies, however, sometimes are precisely there to decide cases of extreme political contention. Indeed, the whole premise of the crime of aggression is based on the recognition that courts can make such determinations.

A further, role-based objection to the duty encapsulated in Pillar 3 was advanced by Lord Hope. On his view, Article 2 is not an absolute guarantee against being exposed to risk, and '[t]hose who serve in the armed forces do this in the knowledge that they may be called upon to risk their lives in the defence of their country or its legitimate interests at home or overseas'.[171] According to Lord Hope, therefore, Article 2(1) is not violated simply by deploying troops in war as long as they are in a force 'properly equipped and capable of defending itself, even though the risk of their being killed is inherent in what they are being asked to do'.[172] Now, this view seems to imply that soldiers have waived their right not to be put at risk in war. However, as discussed earlier, such arguments are inherently problematic.[173] Not all soldiers make a free choice to

[168] *Gentle*, *supra* note 162, para. 8. Lords Hoffman and Hope added that Article 2 was never meant to apply in situations governed by the UN Charter, which are exclusively matters between states (paras 13, 24 of their respective opinions).

[169] *Gentle*, *supra* note 162, para. 8.

[170] *Ibid.*

[171] *Ibid.*, para. 18.

[172] *Ibid.*, para. 19.

[173] Dannenbaum, *supra* note 3, at 210–217.

serve in the armed forces, and, even when they do, one is hard-pressed to argue that they truly consent to risk their lives in unnecessary wars.[174]

Of course, unnecessary wars also expose a state's own civilians to harm. In terms of *jus in bello*, this harm can be caused either by unlawful or lawful attacks by the other party. When the attacks are *in bello* unlawful, the straightforward route is to argue that the state embarking on the specific attack is the main violator of the right to life, even if its war is lawful. Where Pillar 3 is salient, however, is in the potential duty of the state to compensate its own civilians, even if they were harmed lawfully (as proportional collateral damage) because it exposed them to unnecessary harm. Granted, some states guarantee to their own civilians a right to compensation for damage they suffer during war;[175] yet, as of today, there is no international duty to do so. Be that as it may, if the objections set forth in *Gentle* are not convincing concerning soldiers, the same would be *mutatis mutandis* true concerning civilians.[176]

Last, it should be noted that Pillar 3 suggests that, in order to discharge its obligations, a state must only take 'reasonable measures' to settle disputes peacefully. This article does not aim to define the limits of reasonableness in this context,[177] beyond pointing out that, to an extent, this caveat once again reinserts politics into the question whether or not to occasion harm to a state's own people. From a theoretical standpoint, however, perhaps the most controversial question is whether IHRL can be understood as imposing a duty to surrender or to refrain from responding in self-defence, at least when it is clear that there are no prospects of success.[178] Arguably, in such cases, the state occasions harm to its soldiers and civilians unnecessarily since there is no rational connection between the action and a legitimate aim of self-defence.

While, in ethical terms, such an argument might be plausible,[179] it is highly unlikely that GC 36 would be taken that far. This is perhaps because *contra* the ethics of war, under the positive law of *jus ad bellum*, reasonable prospects of success are not a restriction on the right to self-defence. As opposed to the claim under Pillar 1 that this aggression is *per se* a violation of human rights or, under Pillar 2, that states should oppose aggression, such an argument does not piggyback on existing law but, rather, would introduce an obligation that seems to contradict existing law. Therefore, even if in ethics human rights may also limit the discretion to respond, its adoption

[174] One could raise the objection that soldiers do, in fact, consent to risking their lives in unnecessary wars. This consent might be manifested in oaths of allegiance, in which soldiers commonly pledge not only to defend their states but also to obey all orders – presumably, also orders to fight in unnecessary wars. In my view, however, such 'consent' can be viewed at best as an agreement to suspend individual judgment on the necessity of the war when an order is given. If it turns out later on that the war was unnecessary, it seems quite strained to argue that the soldier – merely by pledging to obey orders in real time – waived all *ex post* claims in such cases.

[175] See Blum, *supra* note 2.

[176] See, e.g., *Smith*, *supra* note 159, para. 71 (holding that soldiers take obligations and risks unlike civilians).

[177] Perhaps some analogy can be made to the content given by the ICJ to the duty to negotiate disputes. See generally K. Wellens, *Negotiations in the Case Law of the International Court of Justice: A Functional Analysis* (2014).

[178] Hessbruegge, *supra* note 87, at 7, n. 16 (raising this question).

[179] See generally Rodin, *supra* note 16.

as a legal standard would require a radical transformation of the international law on self-defence.[180]

7 Conclusion

GC 36 presents an important opportunity to discuss the possibility of a human rights law on the resort interstate force. As this article demonstrates, the humanization of *jus ad bellum* comprises three distinctive pillars, each raising its own prospects, concerns and dilemmas. Common to all is that they require a basic commitment to subject decisions to resort to war to the same normative and legal considerations that apply to all human relations. In regular human interactions, killing people without justification is a violation of their right to life. Pillar 1 establishes that this is also true when the killing takes place in interstate aggression. In everyday life, the state is obligated to protect persons under its jurisdiction from threats to their lives. Pillar 2 holds that this is also the case when the threat emanates from decisions of other states to resort to war. Last, in human relations, it is wrongful to occasion unnecessary harm to others. Pillar 3 posits that this remains so even when at hand is a state occasioning harm to its soldiers and civilians by embarking in unnecessary wars. By adopting these premises, GC 36 embraces strands in just war theory that seek to demystify and individualize decisions to resort to war. As this article has argued, this move is theoretically sound and is indeed in line with contemporary, and compelling, approaches to the ethics of war.

The detailed analysis of the three pillars reveals tensions and challenges unique to each one, which, for the sake of brevity, will not be repeated here. Common to the three, however, is the basic tension between their ideal ethical underpinnings and the intensely political nature of decisions to resort to force (or to refrain from it). This tension is ultimately reflected in GC 36, as it frames each pillar in a manner that reserves space for significant state discretion. First, only aggression – and not other forms of force – would be considered a *per se* violation of the right to life; second, the positive duty to oppose aggression is expressed as a 'responsibility' and, third, the duty to refrain from unnecessary wars only imposes on states the obligation to take reasonable measures to do so. This might be an implicit recognition by the HRC of the limits of human rights, which is perhaps an attempt to pre-empt critiques of over-legalization and juridification. In our current moment, in which the cosmopolitan underpinning of human rights are being challenged, this reflects an understandably pragmatic approach.[181] Moreover, reserving space for discretion might also reduce the risk that decisions on resort to force would become depoliticized, by being perceived as products of 'natural' necessity rather than of political choices.

However, these nods to state discretion do not mitigate another risk inherent in the humanization of *jus ad bellum*: the concern that, through a human rights discourse on war and, in particular, the framing, under Pillar 2, of the resort to force as a possible

[180] This is not to say that Pillar 3 cannot provide language for various actors – in civil society or otherwise – to delegitimize risking lives in war, whether in general or in specific instances.

[181] See generally Ginsburg, 'Authoritarian International Law?', 114 *AJIL* (2020) 221.

human rights obligation, human rights would be increasingly securitized and used as pretext to legitimate war. In light of these potential costs, the question whether the humanization of *jus ad bellum* would cause more harm than good is ultimately an empirical one, which cannot be resolved here. This is only one direction for further research that the humanization of *jus ad bellum* calls for.

It remains to be seen whether GC 36's approach will be widely adopted. Be that as it may, any discussion of the humanization of *jus ad bellum* requires clear theoretical commitments as well as an awareness of its limitations and perils. As this article has demonstrated, many important questions require further attention. For example, even in the broader context of aggression, how do we best conceptualize the difference between the type of killings that would be *ipso facto* violations of the right to life versus those that might not? What should be the content of a 'responsibility' to oppose aggression, and how does it interact with traditional standards of necessity and proportionality under *jus ad bellum?* How do we understand 'reasonableness' in the context of the duty to refrain from unnecessary wars? These and other questions demonstrate that the possible humanization of *jus ad bellum* opens a new area of theoretical inquiry and legal possibilities.