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The Geneva Conventions in 21st Century Warfare: How the Conventions Should Treat Civilians' Direct Participation in Hostilities

Lex Lacunae: The Merging Laws of War and Human Rights in Counterinsurgency

Iain D. Pedden

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LEX LACUNAE:* THE MERGING LAWS OF WAR AND HUMAN RIGHTS IN COUNTERINSURGENCY

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The views expressed in this Article are those of the Author, and do not necessarily represent the views of the Marine Corps, the Department of the Navy, the Department of Defense, or the United States.

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I. INTRODUCTION

“[I]t has become common in some quarters to conflate human rights and the law of war/international humanitarian law. Nevertheless, despite the growing convergence of various protective trends, significant differences remain.”¹

The purpose of war is to compel human submission through the application of violence in the name of state power; the purpose of human rights law is to prevent this.² These conflicting paradigms are on a collision course in modern armed conflict, often waged amid civilian populations whose support is essential to success in counterinsurgency.³ The lack of clarity in how these norms interact is confusing, prolongs conflict, and diminishes protections for combatants and civilians alike. This Article explores the gap between the laws of war and human rights in light of the counterinsurgency in Afghanistan, and proposes an approach to begin reconciling the two norms.

The laws of war and human rights have fundamentally different origins and historical application.⁴ Despite this, human rights law has trended toward expansive reading of its applicability, including

¹ Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 240 (2000) (emphasis added).

² Eminent law of war scholar and retired Marine Colonel Hays Parks has contrasted the warfighting and law enforcement paradigms in the context of when force may be used, and how much force is appropriate. See W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 INT’L L. & POL. 769, 778-80 (2010) (distinguishing the rights of combatants and civilians in peacetime and during armed conflict). As will be discussed below, current U.S. military doctrine draws these concepts uncomfortably close together in counterinsurgency warfare. U.S. DEP’T OF ARMY, FM 3-24/MCWP 3-33.5, COUNTERINSURGENCY 7-5, ¶¶ 7-26 (2006) [hereinafter FM 3-24], available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf> (“In counterinsurgencies, warfighting and policing are dynamically linked. The moral purpose of combat operations is to secure peace. The moral purpose of policing is to maintain the peace.”).

³ Retired Air Force Officer Bard O’Neill, a professor of international affairs at the National War College in Washington, D.C., lectures and writes extensively on counterinsurgency type and method. See BARD E. O’NEILL, *INSURGENCY & TERRORISM: FROM REVOLUTION TO APOCALYPSE* 110 (2d ed. 2005) (viewing popular support from the perspective of the insurgent, and noting that “[o]f all the factors influencing the progression of insurgencies, popular support probably receives the most attention in the literature and oratory of the participants”).

⁴ See, e.g., Meron, *supra* note 1; see YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (2004).

extending human rights obligations into armed conflict.⁵ This expansion is largely accomplished by blurring the distinction between legal requirements—concerned with mechanical compliance with rules—and policy objectives—focused on thematic adherence to aspirational ideals. Pursuing policy objectives, these arguments pass from one system of laws into another, crossing a field of argument grounded in “soft law.”⁶

Merging the laws of war and human rights carries legal and tactical risks in current counterinsurgency operations in Afghanistan. Those operations constitute state practice, an element of customary international law, and what is now doctrine may in the future be interpreted as law, thereby restricting our warfighting capabilities. Increased tactical risk is already evident in the Tactical Directives issued by the International Security Assistance Force (“ISAF”), which restricts conduct permitted under the law of war in an effort to minimize civilian casualties.⁷

As both a superpower and prime state proponent of human rights, the United States has a heightened duty to reconcile the conflict between the laws of war and human rights. That reconciliation is a logical extension of our duties to civilians and combatants alike, and must include two main elements: The use of inherent executive authority to harmonize the expression of the *opinio juris* in documents related to armed conflict,⁸ and a “minilateral” treaty approach that provides for both the security interests of specially-affected states and a critical mass of legitimacy to further future treaty practice.⁹ While the recent Executive Order regarding Guantánamo Bay detainees employs executive authority,¹⁰ its welcome issuance is overshadowed by the contemporaneous announcement that the United States would apply the

⁵ Professors Delahunty and Yoo believe that efforts to press human rights into the law of war began with the United Nations (“UN”) Conference on Human Rights in 1968. Robert J. Delahunty & John C. Yoo, *What Is the Role of International Human Rights Law in the War on Terror?*, 59 DEPAUL L. REV. 803, 817 (2010).

⁶ The separation of these two branches of law, and the area through which an argument would pass in transiting from one to the other, is depicted in a diagram attached to this Article as Appendix A.

⁷ See generally Tactical Directives of Generals McKiernan, McChrystal, and Petraeus, at apps. B-D.

⁸ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. c (1987) (noting the term comes from the Latin *opinio juris sive necessitatis*, a practice undertaken by a state out of a sense of legal obligation).

⁹ Moisés Naim, *Minilateralism: The Magic Number to Get Real International Action*, FOREIGN POL’Y, July/Aug. 2009, available at <http://www.foreignpolicy.com/articles/2009/06/18/minilateralism>.

¹⁰ Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

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human rights principles,¹¹ which are found in Article 75 of Additional Protocol I as a matter of “*legal obligation*,”¹² a pronouncement generating as many questions as answers.

Part II of this Article examines the historical underpinnings and evolution of these two branches of public international law. In Part III, the expansion of human rights norms into armed conflict is viewed through the lens of counterinsurgency, arguing that current operations in Afghanistan have set a baseline of state practice, which may ripen into customary law. Part IV takes note of recent presidential actions, which may cement this transference of human rights norms in armed conflict, and proposes domestic and international approaches toward reconciling these two competing branches of the law.

II. THE FRICTION BETWEEN HUMANITY AND HUMANITARIAN

*Unlike human rights law, the law of war allows . . . the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law. . . . It permits far-reaching limitations of freedoms of expression and assembly.*¹³

The law that protects *in war* is the law of war: the *lex specialis* of armed conflict.¹⁴ However, the aspirational language of human rights law provides strong temptation to bridge the gap between the laws of war and peace, and differing opinions are often drawn sharply on how, or whether, to reconcile the laws of war and human rights.¹⁵ This

¹¹ Protections in Article 75 of Additional Protocol I are distilled from the International Convention on Civil and Political Rights. See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AT 865 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY].

¹² Press Release, Office of the Press Sec’y, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011) [hereinafter Fact Sheet] (emphasis added), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guantanamo-and-detainee-policy> (“The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 [of Additional Protocol I] as applicable to any individual it detains in an international armed conflict . . .”).

¹³ Meron, *supra* note 1, at 240.

¹⁴ Nancie Prud’homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISR. L. REV. 356, 367 (2007) (“[L]ex specialis derogat legi generali conveys that specific law prevails over general law.”).

¹⁵ Compare Cordula Droeger, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT’L REV. RED CROSS 501, 548 (2008) (maintaining that “there is no going back to a complete separation” of human rights law and the law of armed conflict), and Francoise J.

dissonance is compounded by the commonality of some terms to both branches of law,¹⁶ making it “easy to assume—wrongly—that it is ‘a law concerning the protection of human rights in armed conflicts’ [sic].”¹⁷ What was once referred to simply as the law of war became the law of armed conflict, and later international humanitarian law (“IHL”), a “label [that] has the marked disadvantage of masking the role military necessity plays in the law governing armed conflict.”¹⁸

A. *Law in War and Peace*

Long before these modern humanitarian ideals were formally expressed in the law of war, scholars and clergymen examined the use and conduct of war.¹⁹ The customs of war became more structured in the nineteenth century, first in military orders,²⁰ and later by treaty.²¹

Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INT’L REV. RED CROSS 549 (2008) (exploring how human rights law applies in armed conflict and concluding, *inter alia*, that additional training and resources will be required for international courts and human rights bodies to process what are likely to be difficult cases in an unresolved area of law), with Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SEC. L.J. 45, 48 (2010) (arguing for new definitions of different types of combatants to make the law easier to apply and highlighting Mr. Guiora’s views, as he is a retired Israeli military officer), and Major Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MIL. L. REV. 1, 7 (2007) (arguing that the United States should take a lead position in objecting to the expansion of human rights law into armed conflict).

¹⁶ Professor Solis notes that the merger of norms in their terms is, in part, related to the perspective of the writer: “The conflation of LOAC/IHL terminology reflects a desire of humanitarian-oriented groups and nongovernmental organizations to avoid phrases like ‘law of war’ in favor of more pacific terms, perhaps in the hope that battlefield actions may someday follow that description.” GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 23 (2010). Given the observation, Dr. Solis’ choice of terms for the title of his book is noteworthy in that it incorporates all the constituent elements of this argument: law, armed conflict, humanitarianism, and war. See generally *id.*

¹⁷ DINSTEIN, *supra* note 4, at 20 (“Although the expressions ‘human’ and ‘humanitarian’ strike a similar chord, it is essential to resist . . . them as intertwined or interchangeable.”).

¹⁸ See Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 806 (2010) (briefly summarizing the evolution of international humanitarian law, noting that the grafting of the term “humanitarian” into the descriptive term for this body of law is largely due to the International Committee of the Red Cross (“ICRC”), and discussing the “trend toward according greater weight to the humanitarian features of the law”).

¹⁹ See, e.g., DAVID KENNEDY, *OF WAR AND LAW* 47–48 (2006) (summarizing the work of Hugo Grotius and other ancient authors as milestones in the evolution of the “just war” theory).

²⁰ See Parks, *supra* note 2, at 771 n.6 (recognizing that U.S. Army General Orders No. 100 art. 22, Apr. 24, 1863 is also known as the “Lieber Code”).

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Early agreements in the *Hague* tradition focused on the means and methods of war, whereas later treaties in the *Geneva* tradition shifted focus from regulating *process* to protecting *people*.²²

Human rights law is much more recent, emerging with the formation of the United Nations (“UN”) after World War II.²³ The human rights framework focuses on the “freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives” in peacetime.²⁴ Thus, protecting people from abuses at the hands of their own government is the core of human rights law,²⁵ an endeavor less focused on the might of states than the rights of citizens:

[h]uman rights law is designed to operate primarily in normal peacetime conditions, and within the framework of the legal relationship between a state and its citizens. The [LOAC], by contrast, is chiefly concerned with the abnormal conditions of armed conflict and the relationship between a state and the citizens of its adversary, a relationship otherwise based upon power rather than law.²⁶

²¹ See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV]; Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681 [hereinafter Hague IX]; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague V], cited in INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 9 (2010) [hereinafter OPERATIONAL LAW HANDBOOK].

²² See Parks, *supra* note 2, at 771 (“While Geneva law is concerned with protection of war victims . . . Hague law deals in large measure with the conduct of hostilities.”).

²³ See, e.g., Delahunty & Yoo, *supra* note 5, at 816 (“[I]n an internationalized form [human rights law] can be said to have originated as recently as the 1948 Universal Declaration of Human Rights . . .”); see OPERATIONAL LAW HANDBOOK, *supra* note 21, at 43.

²⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. a (1987); see also Delahunty & Yoo, *supra* note 5, at 812 n.14 (“In fact, Human Rights represent the most generous principles in humanitarian law, whose laws of war are only one particular and exceptional case, which appears precisely at times when war restricts or harms the exercising of human rights.” (citing JEAN PICTET, THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 32 (1996))).

²⁵ See Delahunty & Yoo, *supra* note 5, at 821 n.87 (“[IHRL is] a different sphere. It is no longer a question of protecting man against the evils of war, but against the abuses of the State and the vicissitudes of life.” (alteration in original) (citing JEAN PICTET, THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 32 (1966))).

²⁶ *Id.* at 812 (alterations in original) (quoting CHRISTOPHER GREENWOOD, HISTORICAL DEVELOPMENT AND LEGAL BASIS, IN THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1, 12 (Dieter Fleck, 2d ed. 2008)).

These divergent “historical . . . roots [have] not prevented the principle of humanity from becoming the common denominator of both systems.”²⁷

Slow to emerge, human rights law has not been slow to expand. The establishment of the UN in 1945 was followed in short order by the Universal Declaration of Human Rights,²⁸ followed by other human rights treaties,²⁹ the most controversial of which in the context of armed conflict is the International Convention on Civil and Political Rights (“ICCPR”).³⁰ Because the ICCPR addresses the deprivation of life and liberty—circumstances of unfortunate frequency in war—its application in war would have a profound effect on the conduct of hostilities.³¹ The following section will explore the theories which seek to reconcile the two systems.

B. *Displacement or Reconciliation?*

While the laws of war and human rights are nested in different branches of public international law, the vacuum between the two archetypes has drawn elements of each into discussion of the other. On one end of the spectrum, some believe the two paradigms are “diametrically opposed,”³² because the law of war permits “a degree of

²⁷ Meron, *supra* note 1, at 245; *see id.* (“Current trends point to even greater reliance on that principle.”).

²⁸ Universal Declaration of Human Rights, Preamble, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

²⁹ *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

³⁰ International Covenant on Civil and Political Rights, Preamble, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at <http://www2.ohchr.org/english/law/pdf/ccpr.pdf>.

³¹ The view that the ICCPR applies in armed conflict is gaining favor. *See, e.g.*, Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 14 (Brookings Inst., Georgetown Univ. Law Ctr., Hoover Inst., Working Paper No. 9, 2009), available at http://www.brookings.edu/papers/2009/0511_counterterrorism_anderson.aspx (discussing “the growing belief that human rights law, and the ICCPR particularly, continue to apply in some fashion even during hostilities”).

³² Compare Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT’L HUMANITARIAN LEGAL STUD. 52, 76 (2010) (observing that the legal standard under the law of war “for depriving someone of life is diametrically opposed to the authority of state actors to employ deadly force in a peacetime context”), with G.I.A.D. Draper, *Humanitarian Law and Human Rights*, 1979 ACTA JURIDICA 193, 205 (1979) (“The attempt to confuse the two regimes of law is insupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed. . . . At the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things, be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized armed groups . . .”).

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overbreadth that is inconsistent with human rights law.”³³ That overbreadth includes practices that human rights would not systematically bear, such as “a willingness to kill people in the pursuit of political ends,”³⁴ and also “the infliction of death on enemy personnel irrespective of the actual risk they present.”³⁵ Such status-based targeting, agnostic to the issue of threat, is faulted by those on the other end of the spectrum who suggest that a human rights-based paradigm should be required, regardless of what the law of war has historically permitted.³⁶

Attempts to reconcile these two extremes generally fall into one of two broad categories: *lex specialis* and complementarity. The United States has long held the view that the law of war is not only the *lex specialis* displacing a less particular human rights rule, but the *lex specialis maximus*,³⁷ displacing the entire regime of human rights law on commencement of armed conflict.³⁸ This interpretive position was forming even as human rights law began emanating from the UN, at a time when American sentiment disfavoring human rights treaties was so strong that it nearly resulted in an amendment to the Constitution.³⁹ This interpretive stance endures, and the United States still does not

³³ Corn, *supra* note 32, at 77; *see also id.* (explaining that human rights law in peacetime does not permit the use of force based on status, but rather focuses on conduct and threat in determining the legitimacy of any use of force).

³⁴ Anderson, *supra* note 31, at 5.

³⁵ Corn, *supra* note 32, at 77.

³⁶ *See, e.g.,* Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69 (2010).

³⁷ This term, undefined elsewhere, was used by a Department of State official at a recent academic conference. That official spoke in his personal capacity, and on a non-attribution basis. The Author is grateful to use the term, and regrets the inability to accord by-name recognition in this case.

³⁸ *See* INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DESKBOOK 189-90 (2010) [hereinafter LAW OF WAR DESKBOOK]. Another interpretive maxim, *expressio unius est exclusio alterius* (the expression of one thing means the exclusion of others), also counsels separation of these fields of law. *See, e.g.,* Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 CHI. J. INT’L L. 283, 292 (2003) (“[T]he canon makes the most sense when, as with GATT, the express exceptions are numerous, carefully drafted, and detailed. The case for *expressio unius* is also stronger when the subject matter of the proposed implicit exception was within the contemplation of the drafters.”).

³⁹ *See* Louis Henkin, *Commentary, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 349 (1995) (noting that the amendment was proposed by Ohio’s Senator Bricker, and its purpose was “to bury the so-called Covenant on Human Rights so deep that no one holding high public office will ever dare to attempt its resurrection”). The measure was defeated by a single vote in the Senate. *See* Joel R. Paul, *The Rule of Law is Not For Everyone*, 24 BERKELEY J. INT’L L. 1046, 1060 (2006) (reviewing PHILIPPE SANDS, *LAWLESS WORLD* (2005)).

apply the ICCPR extraterritorially,⁴⁰ and much less in armed conflict.⁴¹ Despite its historical primacy and the support of the United States and Israel,⁴² *lex specialis* has become the minority view.⁴³

Complementarity, a less expansive view of the *lex specialis* theory, suggests the laws of war and human rights are not in contradiction, but rather are “based on the same principles and values, [and] can influence and reinforce each other mutually.”⁴⁴ Complementarity offers the “possibility . . . that IHL prevails where it contains an express provision which addresses a similar field to that of a human rights norm.”⁴⁵ Practical difficulties with this theory include the strong aversion under human rights law to practices that are common and protected in war, such as targeted killing and the killing of civilians.⁴⁶ Also unresolved is the question of whether and to what extent states may employ their armed forces in coordination with other states with different obligations under other treaties.⁴⁷ Nonetheless, some scholars conclude it is

⁴⁰ The United States reaffirmed this position in its response to certain recommendations from the UN Human Rights Committee. See, e.g., *U.S. Follow-up Report on Implementation of ICCPR: United States Responses to Selected Recommendations of the Human Rights*, U.S. DEP’T STATE (OCT. 10, 2007), <http://2001-2009.state.gov/s/1/2007/112673.htm> (“The United States takes this opportunity to reaffirm its long-standing position that the Covenant does not apply extraterritorially. States Parties are required to ensure the rights in the Covenant only to individuals who are (1) within the territory of a State Party and (2) subject to that State Party’s jurisdiction. The [U.S.] Government’s position on this matter is supported by the plain text of Article 2 of the Covenant and is confirmed in the Covenant’s negotiating history (*travaux préparatoires*).”).

⁴¹ See LAW OF WAR DESKBOOK, *supra* note 38, at 189–90.

⁴² Hampson, *supra* note 15, at 550.

⁴³ Rep. of the Study Group of Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/CN.4/L.682, available at http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf.

⁴⁴ Droege, *supra* note 15, at 521.

⁴⁵ Hampson, *supra* note 15, at 560.

⁴⁶ See Anderson, *supra* note 31, at 14 (analyzing the strategic, moral, and humanitarian logic that supports targeted killings); see also Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], reprinted in INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 197–231 (2010), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-of-war-documentary-supplement_2010.pdf (noting that while Article 51(1)–51(3) prohibit intentional targeting of civilians “unless and for such time as they take a direct part in hostilities,” the proportionality test found in Article 51(5)(b) makes express allowance for *intentional* attacks resulting in “incidental loss of civilian life” provided that such loss is not excessive “in relation to the concrete and direct military advantage anticipated”). Human rights law provides no such advance permission to kill the innocent.

⁴⁷ This is the case in Afghanistan, where little has been said about the extraterritorial applicability of the human rights norms in effect for other North Atlantic Treaty Organization (“NATO”) troop-contributing nations who are parties to the European Court

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“beyond argument that the majority of the international community views [the laws of war and human rights] as complementary.”⁴⁸

Teleological difficulties associated with the merger of these two bodies of law do not, however, imply that human rights have no influence in war or that use of some human rights-based terms cannot be successful. An example of effective importation of a widely-known legal standard from the human rights law framework into the law of war is found in the Standing Rules of Engagement, which authorize use of force in self-defense based on “all facts and circumstances known to U.S. forces at the time.”⁴⁹ This use of a law enforcement “totality-of-the-circumstances” standard on the battlefield is appropriate and serves the interests of both paradigms well.⁵⁰ However, importing even seemingly innocuous terms from one framework into the other requires caution, as those terms can inadvertently import broader policy considerations.⁵¹

Those policy considerations can be problematic. As a practical matter, the policies at issue in armed conflict are approached by different actors in different ways. States have interests and considerations that international organizations do not. These perspectives are distorted further as they enter the competitive dialogue, which invariably accompanies formation of treaties, and pass through the gap depicted in Appendix A.⁵²

of Human Rights (“ECHR”). See VINCENT MORELLI & PAUL BELKIN, CONG. RESEARCH SERV., RL33627, NATO IN AFGHANISTAN: A TEST OF THE TRANSATLANTIC ALLIANCE 11 (2009) (citing Leo Shane III, *NATO Commander Asks Member Nations to Drop Troop Limits*, STARS & STRIPES (Oct. 25, 2006), <http://www.stripes.com/news/nato-commander-asks-member-nations-to-drop-troop-limits-1.55918>).

⁴⁸ Major J. Jeremy Marsh, *Rule 99 of the Customary International Humanitarian Law Study and the Relationship Between the Law of Armed Conflict and International Human Rights Law*, ARMY LAW., May 2009, at 22.

⁴⁹ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES, AT ENCL. A, ¶2e (2005) [hereinafter SROE], reprinted in OPERATIONAL LAW HANDBOOK, *supra* note 21, at 76 (“The determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.”).

⁵⁰ *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983).

⁵¹ See Matthew C. Waxman, *Guantánamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT’L L. 245, 245–63 (2009) (discussing practical implications of importing standards of proof and other legal terms and evidence for detention decisions).

⁵² Some might argue that this “gap” is not a gap at all. As discussed further below, many believe that the application of human rights law in armed conflict is already clear. It is equally clear that others hold a different view, and those differing views largely regard matters of state practice, *opinio juris*, and advocacy.

In general, states argue that the gap between the laws of war and human rights is the stuff of policy, and that states are free to do as they please to the extent that no express treaty or customary law governs.⁵³ By contrast, non-sovereign actors—such as international organizations—argue that the gap between the norms is filled with human rights obligations, sometimes even when the express language at issue seems contrary.⁵⁴ Because non-sovereign actors risk nothing in taking such expansive readings of the law, the weight accorded to their views must be viewed in the proper context. These non-sovereign actors are the subject of the next section.

C. *Confluence of Norms by Non-Sovereign Actors*

Confluence of the law in war and human rights is also found in the efforts of inter- and non-governmental organizations (“NGOs”). Two prominent yet controversial research efforts undertaken by the ICRC, the *Customary International Humanitarian Law Study* (“CIHL Study”) and the *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (“DPH Guidance”) blur distinctions between the two bodies of law.⁵⁵

The CIHL Study proved flawed from the outset by presuming complementarity and failing to comment on significant criticism of that very merger.⁵⁶ This presumption is highly problematic, given the weight

⁵³ Capt. Brian J. Bill, *Human Rights: Time for Greater Judge Advocate Understanding*, ARMY LAW., June 2010, at 55–59 (discussing the current and historical U.S. position on application of human rights law in armed conflict, and summarizing the UN response to that position within the context of the ICCPR).

⁵⁴ *Id.* at 58 (noting that the UN Human Rights Committee has adopted the position that the ICCPR applies to persons within a state’s territory *or* subject to its jurisdiction—the disjunctive “and”—despite the terms of Article 2 of the ICCPR, which apply the treaty’s protections to persons within its territory *and* subject to its jurisdiction).

⁵⁵ See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005); Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175, 179 (2005), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0860.pdf (summarizing the study’s purpose and product); see also INT’L COMM. OF RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereinafter INTERPRETIVE GUIDANCE], available at http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf.

⁵⁶ In scoping the CIHL Study, the authors noted:

Where relevant, practice under international human rights law has been included in the study. This was done because international human rights law continues to apply during armed conflicts, as indicated by the express terms of the human rights treaties themselves, although some provisions may, subject to certain conditions, be derogated from in time of public emergency. The continued applicability of human rights law during armed conflict has been

domestic and international tribunals will likely accord the ICRC's work when interpreting international obligations.⁵⁷ The CIHL Study also fails to properly distinguish and identify the two essential elements of custom: *usus* and *opinio juris*.⁵⁸ While acknowledging the requirement for *opinio juris*, the CIHL Study's methodology effectively dismisses it,⁵⁹ thereby removing the most articulate and nuanced expression of state sovereignty—the privilege of the sovereign to express the will of the state. Combined with the CIHL Study's excessive reliance on military manuals as sources of *opinio juris*—less indicative of a sense of a state's legal obligation than its policy execution—the methodology of the CIHL Study creates a risk that customary international legal obligations may be determined by military action alone.⁶⁰ Bridging the gap between

confirmed on numerous occasions by the treaty bodies that have analysed State behaviour, including during armed conflict, and by the International Court of Justice . . .

HENCKAERTS & DOSWALD-BECK, *supra* note 55, at xxxvi-xxxvii.

⁵⁷ This appears to be part of the ICRC's purpose in publishing the CIHL Study: Knowledge of the rules of customary international law may also be of service in a number of situations where reliance on customary international law is required. This is especially relevant for the work of courts and international organisations. Indeed, courts are frequently required to apply customary international law. This is the case, for example, for the International Criminal Tribunal for the Former Yugoslavia . . .

Id. at xxxv-xxxvi (2005).

⁵⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(4) cmt. c (1987) ("For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law.").

⁵⁹ HENCKAERTS & DOSWALD-BECK, *supra* note 55, at xlvi ("During work on the study it proved very difficult and largely theoretical to strictly separate elements of practice and [*opinio juris*]. More often than not, one and the same act reflects [both] . . . When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*.").

⁶⁰ See Letter from John B. Bellinger III, Legal Adviser, U.S. Dep't of State, & William J. Haynes II, Gen. Counsel, U.S. Dep't of Def., to Dr. Jakob Kellenberger, President, Int'l Comm. of the Red Cross (Nov. 3, 2006), available at <http://www.state.gov/s/1/2006/98860.htm>. Ironically, the Study goes on three pages later to emphasize the vital importance of *opinio juris* by quoting the *Continental Shelf Case*:

It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.

HENCKAERTS & DOSWALD-BECK, *supra* note 55, at xlix (quoting *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, 1985 I.C.J. 13, 29-30 (June 3)).

what the law *is* and what the ICRC believes the law *should be*,⁶¹ the CIHL Study distorts the formative method of customary law.

The ICRC's DPH Guidance also merges the fields of law in war and human rights.⁶² The DPH Guidance draws its title and subject matter from Article 51 of Additional Protocol I ("AP I"),⁶³ which addresses the protection of civilians from attack "unless and for such time as they take a direct part in hostilities."⁶⁴ Despite broad consensus on most issues, the members of the panel of civilian and military experts convened to formulate the recommendations in the DPH Guidance parted company with each other on Recommendation IX of the final report:

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.⁶⁵

Careful deconstruction of this language reveals the reason for the disagreement: Despite assertions that the DPH Guidance focused exclusively on the law of war,⁶⁶ Recommendation IX is based on graduated use of force derived from human rights law,⁶⁷ where the use of graduated force tailored to specific risk is common in law enforcement circles.

⁶¹ See Major J. Jeremy Marsh, *Lex Lata or Lex Ferenda? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116 (2008) (discussing one rule within the CIHL Study as part of broader critique that the Study states not what the law is, but what the ICRC wants it to be).

⁶² See INTERPRETIVE GUIDANCE, *supra* note 55.

⁶³ Additional Protocol I, *supra* note 46, art. 51(3).

⁶⁴ *Id.*

⁶⁵ INTERPRETIVE GUIDANCE, *supra* note 55, at 77.

⁶⁶ See *id.* at 11 ("Moreover, although the Interpretive Guidance is concerned with IHL only, its conclusions remain without prejudice to an analysis of questions related to direct participation in hostilities under other applicable branches of international law, such as human rights law . . .").

⁶⁷ This recommendation deeply divided the panel of experts on whose advice and contributions the ICRC so heavily relied in creating the Guidance. In fact, when Dr. Melzer proceeded with the recommendation despite vocal objection from members of the panel, many members requested that their names not be associated with the work. See generally Parks, *supra* note 2 (providing a first-hand account of this disagreement).

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Similar transference of human rights norms occurs within deliberative bodies at the UN, which have commissioned significant reports that fail to properly apply the correct body of law. The UN Human Rights Committee has received reports assimilating a complementary view of the laws of war and human rights.⁶⁸ Likewise, the UN Human Rights Committee, responsible for monitoring State compliance with the ICCPR, has long viewed the interplay between the laws of war and human rights as complementary.⁶⁹ As demonstrated by the international and domestic court cases discussed in the next section, merging the laws of war and human rights is underway in the judiciary as well.

D. International and Domestic Court Interpretations

Convergence of the laws of war and human rights is also rising in international and American judicial landscapes. In the *Nuclear Weapons Case*, the International Court of Justice (“ICJ”) held that the protections against arbitrary deprivation of the right to life under Article 6 of the ICCPR did “not cease in times of war,” except as specifically provided for under the treaty.⁷⁰ The court further noted that the law of war would operate as *lex specialis* in determining whether a deprivation of life is arbitrary under the ICCPR.⁷¹ However, the court provided little meaningful guidance on resolving conflict between the two norms, noting that the identified right applies “[i]n principle,”⁷² and leaving aside the vital questions of how, to what extent, and whether other provisions of the ICCPR might also reach armed conflict. The vagueness

⁶⁸ Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 29, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by PHILIP ALSTON) (“Both IHL and human rights law apply in the context of armed conflict; whether a particular killing is legal is determined by the applicable *lex specialis*. To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law.” (footnote omitted)).

⁶⁹ See U.N. Office of the High Comm’r. for Hum. Rts., *General Comment No. 06: The Right to Life (Art. 6)* (Apr. 30, 1982), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument) (analyzing state obligations to prevent arbitrary deprivation of life).

⁷⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8) [hereinafter *Nuclear Weapons Case*].

⁷¹ *Id.*

⁷² *Id.* The resulting confusion means advocates for both broad reading of *lex specialis* and complementarity can cite this case with confidence—still another reason to clarify the law in this area.

left some to speculate that, when the more specific of the two, human rights law – and not the law of war – might be the *lex specialis*.⁷³

The court addressed similar questions in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (“the *Wall Case*”),⁷⁴ after Israel had denied application of several human rights instruments due to ongoing armed conflict in the occupied territory.⁷⁵ Here, the ICJ fragmented the application of human rights law in armed conflict into three scenarios:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁷⁶

Other than reaffirming its position in the *Nuclear Weapons Case*, the ICJ opinion in the *Wall Case* did little to clarify the issue in a meaningful way.⁷⁷ Rather, the *Wall Case* identified an already-plain practical overlap between the two paradigms that the law has yet to reconcile.

This permissive but unstructured judicial approach to reconciling human rights norms in cases before international courts made it inevitable that similar problems would migrate into U.S. courts.⁷⁸

⁷³ Nancie Prud’homme puts it this way:

[I]nternational humanitarian law and international human rights law could both be either the *lex specialis* or *lex generalis*, depending on the situation at hand. Practically speaking, *lex specialis* and *lex generalis* would be interpreted or applied in such a way that, for instance, human rights law would prevail over humanitarian law as regard to judicial guarantees.

Prud’homme, *supra* note 14, at 374.

⁷⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter the *Wall Case*].

⁷⁵ Prud’homme, *supra* note 14, at 377.

⁷⁶ *Wall Case*, 2004 I.C.J. at 178.

⁷⁷ See Prud’homme, *supra* note 14, at 378.

⁷⁸ The bedrock documents on which the United States was founded—the Declaration of Independence and the Constitution—are human rights documents with international reach of their own. See, e.g., Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 54 (2004) (“The U.S. Constitution served as a principal inspiration and model

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Detainees captured on the battlefield, or otherwise subject to U.S. efforts in the war on terror, have turned to the traditional human rights mechanism of the courtroom in droves, bringing cases involving targeted killing,⁷⁹ detention,⁸⁰ and adjudicative rights.⁸¹ In *Hamdi v. Rumsfeld*, the Supreme Court held that U.S. citizens have a right to bring *habeas corpus* petitions to challenge detention that originated during armed conflict.⁸² Two years later, the Court found similar access to the courts was required for a Yemeni national who also had been seized in combat.⁸³ Again in 2008, the Court held in *Boumediene v. Bush* that a prisoner at Guantánamo Bay had the right to challenge his detention through *habeas* proceedings.⁸⁴

These cases are less remarkable for their individual holdings than for the general proposition that a human rights framework was used to reach boldly (and successfully) into the armed conflict architecture. The outcome of this litigation, on the merits of individual cases and as a trend,⁸⁵ is further indication of the need for nuanced reconciliation of the laws of war and human rights. It seems apparent that a significant body of law will emerge from that process.⁸⁶ However, given that those cases are pending before courts accustomed to balancing competing interests in a human rights law paradigm, it seems equally apparent that the historical tactical concerns in the law of war will be underrepresented.

“Nature abhors a vacuum, and will act to fill it.”⁸⁷ But the United States stands to lose more than empty space when these competing normative frameworks are reconciled with soft law and the advocacy of non-sovereign actors whose interests are rooted in advocacy or the

for many foreign and international constitutions and covenants, including the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.”).

⁷⁹ See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

⁸⁰ See *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁸¹ See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁸² 542 U.S. 507, 597–99 (2004).

⁸³ *Hamdan*, 548 U.S. at 557.

⁸⁴ *Boumediene*, 553 U.S. at 723.

⁸⁵ See, e.g., BENJAMIN WITTES ET AL., *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* (2010), available at http://www.brookings.edu/~media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf (summarizing cases, outcomes, and trends in detainee habeas litigation).

⁸⁶ See *id.* at 3 (“The rules the judges craft could have profound implications for decisions in the field concerning whether to initially detain, or even target, a given person . . .”).

⁸⁷ BENEDICTUS DE SPINOZA, *ETHICS* 15 (G.H.R. Parkinson ed., Andrew Boyle trans., The Guernsey Press Co. 1993).

academy.⁸⁸ Ultimately, the influence of human rights law in armed conflict shifts more risk onto combat personnel, the result of which will invariably include more casualties.⁸⁹ Nowhere is this pattern more evident than in counterinsurgency operations.

III. THE CALCULUS OF COUNTERINSURGENCY IN AFGHANISTAN

“As long as the rules of the game are observed, it is permissible [in armed conflict] to cause suffering, deprivation of freedom, and death.”⁹⁰

Professor Meron’s pronouncement of law is technically correct but at tactical odds with counterinsurgency warfare,⁹¹ which closes the gap between the laws of war and human rights dramatically at the tactical level. The tempo of convergence is illustrated by the differences between tactics employed in Kosovo in the late 1990s, and the conduct of counterinsurgency operations in Afghanistan less than ten years later.⁹²

Commanders in Kosovo avoided North Atlantic Treaty Organization (“NATO”) casualties by employing an air campaign conducted at high altitude to avoid enemy air defenses. Operational focus on protecting coalition forces, while ultimately effective in compelling Yugoslavia’s

⁸⁸ See Anderson, *supra* note 31, at 25–27 (discussing the legal, diplomatic, and practical costs of complacency in the face of various pressures applied on the United States’ interpretation of legal rights and obligations).

⁸⁹ U.S. forces already assume risk in combat as part of the “basic bargain” for those engaged in international armed conflict:

Engage lawfully in combat and, if captured, you will receive the comprehensive treatment protections of the Convention. Ignore the laws of war, and you cannot seek the status given to lawful combatants. POW status is perhaps best seen then as an incentive to follow the rules in armed conflict. It also is a way to protect civilians more effectively: [W]hen combatants masquerade as civilians to mislead the enemy and avoid detection, civilian suffering increases as a tragic consequence of the failure of these combatants to adhere to the fundamental law of war principle of distinction between combatants and the civilian population.

John B. Bellinger, III, Legal Adviser, *Postings on Opinio Juris Blog*, STATE.GOV (Jan. 2007), <http://www.state.gov/s/1/2007/116111.htm>.

⁹⁰ Meron, *supra* note 1, at 240 (emphasis added).

⁹¹ See FM 3-24, *supra* note 2 (“Counterinsurgency is military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency.” (citation omitted)).

⁹² Paul Robinson, ‘Ready to Kill But Not to Die’: NATO Strategy in Kosovo, 54 INT’L J. 671, 672 (1999). (“The main characteristic of NATO’s conduct of the war in Kosovo was a desire to avoid friendly casualties.”) This method was reviled as “a coward’s strategy.” *Id.* at 673 (quoting Gwynne Dwyer, MONTREAL GAZETTE, May 11, 1999, at B3).

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submission to NATO demands,⁹³ was later criticized on grounds that it shifts “the war away from military targets and onto civilian ones.”⁹⁴ That pendulum has come full swing in Afghanistan, where ground troops are the favored method of combat, subject to heavy restrictions in the employment of air and artillery assets to avoid civilian casualties.⁹⁵ This doctrine shifts risk, much as human rights advocates have encouraged, with significant implications for the state practice necessary to formation of customary international law.

A. *Human Rights as Military Doctrine*

“We’re attacking to seize control of the population from the Taliban. The people are our objective.”⁹⁶

In traditional armed conflict, talk of making civilians “the objective” would generate immediate uproar; in counterinsurgency, it is a mantra.⁹⁷ Counterinsurgency dominates the doctrinal approach to fighting in Iraq and Afghanistan.⁹⁸ Although counterinsurgency itself is nothing new, its meteoric rise to prominence in military doctrine in recent years has brought about a “radical revolution in warfare” that draws together the laws of war and human rights.⁹⁹ The works of Kilcullen,¹⁰⁰ Nagl,¹⁰¹ and O’Neill¹⁰² all contributed in some measure to the current

⁹³ *Id.* at 678.

⁹⁴ *Id.* at 681.

⁹⁵ See, e.g., apps. B-D (Tactical Directives of Generals McKiernan, McChrystal, and Petraeus).

⁹⁶ See *Obama’s War*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/obamaswar/etc/script.html> (last visited Apr. 9, 2012) (emphasis added) (presenting a transcript of comments of Lieutenant Colonel Christian Cabaniss, speaking to the Marines of 2d Battalion 8th Marines in early July 2009, the night prior to a heliborne assault into territory held by the Taliban).

⁹⁷ FM 3-24, *supra* note 2, ¶ 2-4 (“Regaining the populace’s active and continued support for the [host nation] government is essential to deprive an insurgency of its power and appeal. The military forces’ primary function in [counterinsurgency] is protecting that populace.”).

⁹⁸ While the law of war and counterinsurgency are relevant topics to combat operations in both of these countries, this Article is focused on applying these principles in Afghanistan.

⁹⁹ Commander Matthew L. Beran, *The Proportionality Balancing Test Revisited: How Counterinsurgency Changes “Military Advantage,”* ARMY LAW., Aug. 2010, at 10.

¹⁰⁰ DAVID KILCULLEN, COUNTERINSURGENCY (2010).

¹⁰¹ JOHN A. NAGL, COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM: LEARNING TO EAT SOUP WITH A KNIFE (2002). Mr. Nagl is a retired U.S. Army officer and contributed to the Field Manual on counterinsurgency.

¹⁰² O’NEILL, *supra* note 3.

counterinsurgency doctrine of the Army and Marine Corps, which devotes an entire chapter to the merger of civilian and military efforts.¹⁰³

Those efforts make many traditional human rights issues part and parcel of the military mission.¹⁰⁴ Current counterinsurgency doctrine cites some aspect of human rights normative language nearly twenty times: presuming application of human rights in war,¹⁰⁵ assigning counterinsurgents to train host nation personnel on interrogation techniques,¹⁰⁶ and addressing ethics in treatment of detainees.¹⁰⁷ This doctrine is implemented (and publicized) in Afghanistan through the Tactical Directives. The next section examines that implementation.

B. Human Rights in the Tactical Directives

The first Tactical Directive to merge counterinsurgency in Afghanistan with human rights norms was issued in December 2008,¹⁰⁸ and identified “[t]he support of the Afghan people for the [Government of the Islamic Republic of Afghanistan] and their collective support for ISAF [as] critical to defeating the insurgency.”¹⁰⁹ The Directive limited ISAF searches of Afghan homes, mandated respect for Afghan culture and religious practices, required special training and equipment to avoid civilian casualties during the escalation of force incidents, and mandated investigations of all civilian casualty incidents.¹¹⁰

¹⁰³ FM 3-24, *supra* note 2, ¶ 2-2 (“The integration of civilian and military efforts is crucial to successful COIN operations. All efforts focus on supporting the local populace and HN government.”).

¹⁰⁴ The following issues sound more similar to domestic governance than warfare:

Counterinsurgents take upon themselves responsibility for the people’s well-being in all its manifestations. These include . . .

- Security from insurgent intimidation and coercion, as well as from nonpolitical violence and crime,
- Provision for basic economic needs,
- Provision of essential services, such as water, electricity, sanitation, and medical care,
- Sustainment of key social and cultural institutions, [and]
- Other aspects that contribute to a society’s basic quality of life.

Id. ¶ 2-6.

¹⁰⁵ *Id.* ¶ 1-132 (“Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world.”).

¹⁰⁶ *Id.* ¶ 6-100 (“[Host nation] personnel should be trained to handle and interrogate detainees and prisoners according to internationally recognized human rights norms.”).

¹⁰⁷ *Id.* ¶ 7-25 (“Soldiers and Marines treat noncombatants and detainees humanely, according to American values and internationally recognized human rights standards.”).

¹⁰⁸ See *infra* McKiernan Tactical Directive, app. B.

¹⁰⁹ *Id.* at app. B, at B-834.

¹¹⁰ The implementation of this requirement as doctrine imposes a much heavier standard than the customary obligation to investigate war crimes found at Rule 158 of the ICRC

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On replacing General David McKiernan in May 2009,¹¹¹ General Stanley McChrystal issued a much more restrictive Tactical Directive, which further embedded human rights concepts into counterinsurgency operations *and* indexed those norms to legal obligations.¹¹² Describing excessive damage and civilian casualties as “strategic defeats,”¹¹³ the Directive mandates additional scrutiny and limitations on the use of close air support on residential compounds, prohibiting the employment of these fires except under specified conditions.¹¹⁴ This Directive had a significant impact on combat operations in Afghanistan.¹¹⁵ Less than one year later, General Petraeus assumed command and continued this trend,¹¹⁶ *prohibiting* certain fires unless “the commander . . . determine[s] that *no civilians are present*.”¹¹⁷

This momentous shift toward a law enforcement human rights paradigm is not solely theoretical: Restrictions on the employment of fires allocates additional risk to the counterinsurgent,¹¹⁸ making combat significantly more dangerous than it would be if only the law of war

Study. See HENCKAERTS & DOSWALD-BECK, *supra* note 55, at 607 (identifying a requirement under customary law mandating states investigate war crimes committed by its nationals, on its territory, or otherwise subject to its jurisdiction).

¹¹¹ General McKiernan, “viewed as somewhat cautious and conventionally minded,” was replaced less than one year into his tour as Commander of ISAF (“COMISAF”). Ann Scott Tyson, *Top U.S. Commander in Afghanistan is Fired*, COMMON DREAMS (May 12, 2009), <http://www.commondreams.org/headline/2009/05/12-0>. General McChrystal was favored for the Afghan counterinsurgency command due to his extensive Special Operations background. *Id.*

¹¹² See *infra* McChrystal Tactical Directive, app. C, at C-836.

¹¹³ *Id.*

¹¹⁴ *Id.* at C-837.

¹¹⁵ This assertion is based on the Author’s professional experiences as Battalion Judge Advocate, 2d Battalion, 8th Marine Regiment, during combat operations in Helmand Province, Afghanistan from May 26 to November 15, 2009. The Author was personally responsible for training Marines on the applicable Tactical Directives. Some of those Marines believed that the requirements of the Tactical Directives in place at the time were excessively procedural, and might result in unacceptable delays in delivery of artillery and close air support in combat operations, especially in cases involving imminent hostile threats. It merits mention that a single minute exposed to enemy fire is infinitely longer than a minute in the safety of one’s own kitchen.

¹¹⁶ See generally *infra* Petraeus Tactical Directive, app. D.

¹¹⁷ *Id.* at D-840 (emphasis added). But see Additional Protocol I, *supra* note 46, at art 51(5)(b). Of note, this restriction forecloses a commander’s authority under the law of war to balance the loss of civilian lives in light of the concrete and direct military advantage to be gained.

¹¹⁸ U.S. doctrine also recognizes Rules of Engagement such as the Tactical Directives as a potential source of combat operational stress, a separate element of delayed risk. See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 60 (2010).

applied.¹¹⁹ The driving focus on the protection of that population has required counterinsurgent forces to forego latitude offered by the law of war and assume more risk for themselves by restricting the use of force—both in offensive targeting and in self-defense.¹²⁰

This tactical merger of the laws of war and human rights may result in “operationalizing” the law in armed conflict,¹²¹ but imposing rules significantly more stringent than required by the law of war carries a separate scheme of risk: “Tactical goals of reducing or eliminating civilian casualties in Afghanistan have led the United States to forego the balancing inherent in a proportionality assessment in favor of a mandate to protect civilians at all cost.”¹²² This is precisely the case with the Tactical Directives issued by the last three ISAF commanders, and is a fundamental shift not just in how we regard the enemy, *but in how we regard ourselves*. Counterinsurgency has also called into question the method by which we calculate advantage in combat—an essential element of proportionality.¹²³

While the proportionality test has never amounted to a simple stacking of bodies or benefits on either side of a scale,¹²⁴ counterinsurgency’s focus on protection of the local population makes even the *unintentional* killing of a civilian the close companion of defeat. Commander Matthew Beran suggests that the nature of counterinsurgency essentially doubles the weight to be accorded a civilian death.¹²⁵ While it may be difficult to precisely measure the shift in weights on this balance, it is equally important to observe that the practice of applying this different method of weighing collateral damage—regardless of quantum—may amount to an aspect of state practice in the context of customary international law.

¹¹⁹ FM 3-24, *supra* note 2, at ¶¶ 7-27-7-29.

¹²⁰ See Int’l Sec. Assistance Force, *ISAF Revises Tactical Directive*, NATO (July 6, 2009), <http://www.nato.int/isaf/docu/pressreleases/2009/07/pr090706-tactical-directive.html> (“Protecting Afghan civilians is ISAF’s top priority. The tactical directive continues the long-standing ISAF focus on protecting civilians and operating in a manner that is respectful of Afghan culture.”); see also HEADQUARTERS, INT’L SEC. ASSISTANCE FORCE, KABUL, AFGHANISTAN, TACTICAL DIRECTIVE OF July 6, 2009, available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (providing tactical guidance and listing the ISAF’s goals). The versions reproduced at the appendices to this Article are those available to the public and are the unclassified summaries of the Tactical Directives.

¹²¹ Blank & Guiora, *supra* note 15, at 48.

¹²² *Id.* at 68.

¹²³ See Beran, *supra* note 99, at 10.

¹²⁴ OPERATIONAL LAW HANDBOOK, *supra* note 21, at 12.

¹²⁵ Beran, *supra* note 99, at 9.

C. *Counterinsurgency as Custom*

To ripen into customary international law, a state practice must be consistent and anchored in the belief that such practice is what the law requires.¹²⁶ State actions undertaken as policy do not meet this standard.¹²⁷ In this regard, international law is inherently positivist in nature—absent an affirmatively identified binding custom or treaty, “[r]estrictions upon the independence of [s]tates cannot therefore be presumed.”¹²⁸

This maxim has been memorialized in the celebrated “Martens Clause” of Additional Protocol I, which resolves gaps in the positive language of the laws of war by permitting both civilians and combatants to resort to custom for guidance.¹²⁹ The ICRC commentary on this issue is helpful:

In other words, when the Parties to the conflict do not clash with a formal prohibition of law of armed conflict, they can act freely within the bounds of the principles of international law, i.e., they have the benefit of a freedom which is not arbitrary but within the framework of law. When they come up against a formal prohibition, they cannot invoke military necessity to derogate from it. When this possibility is explicitly provided for, the Parties to the conflict can only invoke it to the extent that it is provided for.

This principle and these concepts are meant to be applied in practice. This is almost always where the

¹²⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. c (1987) (“For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law.”).

¹²⁷ *Id.*

¹²⁸ *SS. Lotus Case (Fr. v. Turk.)*, 1927 P.C.I.J., (ser. A) No. 10, ¶ 44 (Sept. 7). “International law governs relations between independent [s]tates. The rules of law binding upon [s]tates therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . .” *Id.*

¹²⁹ The “Martens Clause” is found in Article I, paragraph 2 of Additional Protocol I:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

COMMENTARY, *supra* note 11, at art. 1, ¶ 2.

difficulties begin. It has been argued that the principle is clear but the concepts are vague.¹³⁰

Current counterinsurgency operations in Afghanistan are establishing affirmative state practice, proving the ability to apply normative human rights law concepts on the battlefield. In addition, the Tactical Directives in some cases make reference to a sense of legal obligation in doing so.¹³¹ Considering the methodology of the CIHL Study and the DPH Guidance, the ICRC and others would likely argue these operations have already established customary obligations to some extent. This is cause for some concern, given the ICRC's intent that tribunals should weigh its studies in allocating international obligation.¹³²

That is not to say, however, that the point is or should be conceded. Counterinsurgency doctrine and practice in Afghanistan may, over time, ripen into a set of rules of customary international law. However, current mission requirements should not dictate future mission capabilities—the fact that we fight this way *now* should not require us to fight this way *forever*.¹³³ To clarify the applicable legal framework and foreclose current practice from ripening into rules of customary law, the United States should take this opportunity to revisit the gaps between these norms. The next section proposes means and methods of doing so.

IV. U.S. RESPONSE TO MERGER IN TREATY AND CUSTOM

*"The United States would be best served if the Obama Administration did that exceedingly rare thing in international law and diplomacy: Getting the United States out in front of the issue by making plain the American position, rather than merely reacting in surprise when its sovereign prerogatives are challenged by the international soft-law community."*¹³⁴

¹³⁰ See *id.* at art. 35, ¶¶ 1389–90.

¹³¹ See *infra* McChrystal Tactical Directive, app. C, at C-836.

¹³² See HENCKAERTS & DOSWALD-BECK, *supra* note 55; see also *supra* text accompanying note 59.

¹³³ While non-state terrorism remains an imminent threat to national security, it is far from certain that all future conflicts will engage this type of enemy. As the Director of National Intelligence has recently indicated, nations with conventional forces remain threats as well. See Eli Lake, *China Deemed Biggest Threat to U.S.*, WASH. TIMES (Mar. 11, 2011), <http://www.washingtontimes.com/news/2011/mar/10/china-deemed-biggest-threat-to-us/?page=all>.

¹³⁴ Anderson, *supra* note 31, at 32.

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The conceptual merger of the laws of war and human rights may be fruitful both in terms of extending the humanitarian objectives of both regimes and in clarifying the applicable framework in a meaningful and utilitarian way. As this Article has shown, merging these two systems piecemeal carries unacceptable tactical and legal risks. The best path forward includes harmonized employment of domestic law, custom and treaty, and reconsideration of the traditional view that multilateralism is the *sine qua non* of legitimacy.¹³⁵

A. *Minilateralism*

Minilateralism is the practice of “bring[ing] to the table the smallest possible number of countries needed to have the largest possible impact on solving a particular problem.”¹³⁶ Fewer competing interests increases negotiation tempo and precludes dilution of the treaty’s purpose, a common concern in multilateral negotiations.¹³⁷ The multilateral dilution effect and its tactical consequences are on prominent display with the ISAF in Afghanistan,¹³⁸ where a multitude of Troop Contributing Nations (“TCNs”) with varying Rules of Engagement have established a practice that is as unwieldy as it is unfair.¹³⁹ The ISAF structure is less representative of sovereign equality than the strategic security forming the motivational base for the specially-affected states contributing troops.

¹³⁵ This Article refers to “multilateralism” as a treaty regime that includes a large number of states as a party; the more apt term is likely “megalateralism,” referring to large regimes organizations such as NATO and the UN.

¹³⁶ Naim, *supra* note 9.

¹³⁷ Other regimes have been discussed in the past to overcome similar differences:

“[Á] *la carte* multilateralism” involves coalitions that will vary in size and composition depending on the issue at hand, with the only constant being that the coalitions are formed and led by the United States. From Washington’s perspective, this approach would seem to offer several advantages: it largely avoids problems of institutional blockage, such as those that can occur within the UN Security Council; it allows for the limitation of new initiatives to small groups of like-minded states, with the group then being expanded once momentum has been achieved; and it enables the United States to focus its persuasive efforts on those most able and willing to assist with respect to any given matter.

Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 543–44 (2004) (footnote omitted). Minilateralism has similar objectives but as a term is more descriptive of goals of the approach.

¹³⁸ ISAF was formed by a resolution of the UN Security Council in late 2001. See S.C. Res. 1386, U.N. Doc. S/RES1386 (Dec. 20, 2001).

¹³⁹ As of March 4, 2011, ISAF currently totals 132,203 troops, of which 90,000 are U.S. forces. *Int’l Sec. Assistance Force: Key Facts and Figures*, ISAF, <http://www.isaf.nato.int/images/stories/File/Placemats/20100303%20Placemat.pdf> (last visited Mar. 13, 2011).

Specially-affected states are those, which, by virtue of geography or some other factor closely related to the question of law at issue, have a heightened interest in the outcome of that question as compared to other states.¹⁴⁰ This doctrine is recognized by international courts and has been asserted by the United States in response to the CIHL study.¹⁴¹ In fact, the CIHL Study expressly recognizes the concept of specially-affected states in its introduction,¹⁴² and implicitly recognizes this doctrine in the methodology of its conduct of the study.¹⁴³

Recent commentary reveals how specially-affected states are especially well-suited to be agents of change through the institution of successful unilateral regimes:

The pattern is clear: Since the early 1990s, the need for effective multicountry collaboration has soared, but at the same time multilateral talks have inevitably failed; deadlines have been missed; financial commitments and promises have not been honored; execution has stalled; and international collective action has fallen far short of what was offered and, more importantly, needed. These failures represent not only the perpetual lack of international consensus, but also a flawed obsession with multilateralism as the panacea for all the world's ills.¹⁴⁴

¹⁴⁰ *But see* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 13 (1985) (questioning the doctrine of specially-affected states).

¹⁴¹ Bellinger & Haynes, *supra* note 60; *see also* Anderson, *supra* note 31, at 32 (“International law traditionally, after all, accepts that states with particular interests, power, and impact in the world, carry more weight in particular matters than other states. The American view of maritime law matters more than does landlocked Bolivia’s. American views on international security law, as the core global provider of security, matter more than do those of Argentina, Germany or, for that matter, NGOs or academic commentators. But it has to speak—and speak loudly—if it wishes to be heard.”).

¹⁴² HENCKAERTS & DOSWALD-BECK, *supra* note 55, at xxxix.

¹⁴³ The introduction notes the selection method of the states involved in the CIHL Study: “On the basis of geographical representation and experience of armed conflict, [certain states] were selected for an in-depth study of national practice on international humanitarian law by a local expert.” HENCKAERTS & DOSWALD-BECK, *supra* note 55, at lv. That list of states included: Algeria, Angola, Argentina, Belgium, Bosnia and Herzegovina, Botswana, Brazil, Canada, Chile, China, Colombia, Croatia, Cuba, Egypt, El Salvador, Ethiopia, France, Germany, India, Indonesia, Iran, Iraq, Israel, Italy, Japan, Jordan, Republic of Korea, Kuwait, Lebanon, Malaysia, Netherlands, Nicaragua, Nigeria, Pakistan, Peru, Philippines, Russian Federation, Rwanda, South Africa, Spain, United Kingdom, United States, Uruguay, Yugoslavia, and Zimbabwe. *Id.* *But see* Bellinger & Haynes, *supra* note 60 (criticizing the CIHL Study for not properly accounting for specially-affected states).

¹⁴⁴ Naim, *supra* note 9.

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This observation stands in stark contrast to the continued diplomatic pursuit of legitimacy through consensus—a “fool’s errand” writ large across the current battlefield in Afghanistan.¹⁴⁵ Rather than seek broad consensus, U.S. policy should focus on achieving a critical mass of legitimacy that is lawful and rooted in an operational approach.

This approach is not without its limitations. Minilateralism has previously been criticized as “a fig leaf for unilateralism.”¹⁴⁶ Prudent minilateral regimes must therefore build an effective consensus among states with clear and legitimate policy objectives. From the United States’ perspective, any minilateral solution must likewise preserve not only the inherent right to self-defense under the UN Charter, but must also preserve the inherent right to self-defense on which the United States has relied in the past.¹⁴⁷ As noted academic and scholar Kenneth Anderson has explained, past attempts to establish a statutory framework for targeted killing “have come and gone without fruition with regularity over the decades.”¹⁴⁸ There is no reason to believe that the establishment of a multilateral solution will be any less politically or diplomatically difficult. It remains a worthy undertaking nonetheless.

Finally, it merits mention that a minilateral solution (or a multilateral one, for that matter) might find acceptance among a body of states who, though currently bound to some aspects of the law of war as custom, might seek to supersede those obligations by treaty. Withdrawing from customary international law is controversial,¹⁴⁹ whereas it is well-established that states may override customary obligations by executing a treaty with contrary provisions.¹⁵⁰ In the meantime, the President may use inherent constitutional authority to establish a demonstrative

¹⁴⁵ *Id.*

¹⁴⁶ See David Rothkopf, *Roll Up Your Pants, Time to Wade Back into “Minilateralism” . . .*, FOREIGN POL’Y (June 25, 2009), http://rothkopf.foreignpolicy.com/posts/2009/06/25/roll_up_your_pants_time_to_wade_back_into_minilateralism (“Bush ‘minilateralism’ was just a fig leaf for unilateralism, ‘coalitions of the willing’ simply described the small group of countries we managed to pull together to help advance U.S. policy to create the illusion of something truly multilateral and thus ok in the eyes of the international community. But of course, these coalitions were shallow, half-hearted and had a half-life roughly akin to that of a basket of raspberries. (Which last, mold-free, in my experience here in Washington, almost until you get them from the store into your car.”)).

¹⁴⁷ See generally Anderson, *supra* note 31 (arguing that the use of targeted killings is proper in self-defense).

¹⁴⁸ *Id.* at 34.

¹⁴⁹ Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 211 (2010).

¹⁵⁰ *Id.* at 211 n.34 (“Clearly a treaty, when it first comes into force, overrides customary law as between the parties to the treaty . . .” (quoting PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 56 (7th rev. ed. 1997) (alteration in original)).

framework for that unilateral regime. Regrettably, recent executive issuances have proceeded both toward *and* away from a functional approach.

B. Executive Authority and Custom

While merger of the laws of war and human rights by treaty or custom may seem inevitable to some, executive authority provides the most responsive means to begin incorporating terms and norms in a way best calculated to serve both operational requirements and national sovereignty.¹⁵¹ Executive Orders and documents such as the *National Security Strategy* (“NSS”) offer significant opportunity to both command the various aspects of the national security instruments and express *opinio juris* as head of state.¹⁵²

Executive Orders offer an effective means of direct presidential communication on matters of international law. On his first full day in office, President Obama issued three Executive Orders bearing directly on the lawfulness of detention policy,¹⁵³ two of which employed a definitions section to invoke, and thereby restrict, their scope to the law of war. The President’s more recent Executive Order directing periodic review of detention at Guantánamo both repeats and expands that restriction,¹⁵⁴ making the Order applicable in cases under review as “law of war detention” or those being referred for prosecution.¹⁵⁵ Collectively, these orders express the United States’ view that its detention practices are governed by the law of war, but retain the possibility of civilian prosecution.

However, the announcement,¹⁵⁶ which accompanied Executive Order 13,567, sends a different message that may carry more force under international law than the Executive Order itself. That the President

¹⁵¹ See, e.g., Proclamation No. 2667, 64 Fed. Reg. 48,701 (Sept. 28, 1945). The “Truman Proclamation” launched a trend of significant extension of coastal state jurisdiction. See MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY* 549–52 (2d ed. 2001).

¹⁵² THE WHITE HOUSE, *NATIONAL SECURITY STRATEGY* (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

¹⁵³ See Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009) (invoking military regulations, domestic laws, and treaty provisions under the law of war in imposing standards for interrogation); Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009) (invoking law of war treaties in directing review of cases involving detainees held at Guantánamo Bay, Cuba); Exec. Order No. 13,493, 74 Fed. Reg. 4,901 (Jan. 22, 2009) (establishing an interagency task force to review detention policy options).

¹⁵⁴ See Exec. Order 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

¹⁵⁵ *Id.* § 1.

¹⁵⁶ Fact Sheet, *supra* note 12.

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encouraged the Senate to provide its advice and consent to Additional Protocol I is no surprise.¹⁵⁷ But the distinct language of the announcement employs terms of art appear to bind the United States to Article 75 of Additional Protocol I as a matter of customary international law.¹⁵⁸ Given that much of this provision is distilled from the ICCPR,¹⁵⁹ the customary application of Article 75 would represent a profound departure from the longstanding national policy noted elsewhere in this Article, and would significantly expand the nation's legal obligations. The nature and scope of that expansion is uncertain.

To some extent, the President's statement that the United States will regard Article 75 (and the corresponding portions of the ICCPR) as a matter of legal obligation answers the questions of some critics who objected that there was "no intelligible principle for determining which provisions [of the ICCPR] are incorporated [into the law of war] and which are not."¹⁶⁰ It is far from certain that the announcement answers those critics in a constructive way, as there remains significant confusion on the meaning of these changes. This announcement has already

¹⁵⁷ See John Bellinger, *Further Thoughts on the White House Statement About Article 75*, LAWFARE (Mar. 13, 2011), <http://www.lawfareblog.com/2011/03/further-thoughts-on-the-white-house-statement-about-article-75/> (noting that, despite rejection of the remainder of Additional Protocol I on other grounds, it had long been the position of the United States that the provisions of Article 75 were sound).

¹⁵⁸ Compare Fact Sheet, *supra* note 12 ("The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 [of Additional Protocol I] as applicable to any individual it detains in an international armed conflict . . ."), with RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. c (1987) ("For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation . . .").

¹⁵⁹ The drafting of Article 75:

was guided by the work done on Protocol II during the second session of the Conference. Committee III decided to include in Article 65 (which has become Article 75) the text drawn up for Articles 4 (*Fundamental guarantees*) and 6 (*Penal prosecutions*) of Protocol II, except where there was a good reason to change the wording in view of the fact that Protocol I deals with international and not non-international conflicts. It should be recalled that Articles 4 (*Fundamental guarantees*) and 6 (*Penal prosecutions*) of Protocol II reproduce, in some cases word for word, the corresponding provisions of the Covenant on Civil and Political Rights

COMMENTARY, *supra* note 11, at 865, art. 75, ¶ 3005.

¹⁶⁰ Delahunty & Yoo, *supra* note 5, at 832.

Selected provisions of the ICCPR are held to be applicable to situations of armed conflict, but no intelligible principle for determining which provisions are incorporated and which are not is apparent, and no evidence seems to suggest that the state parties to the ICCPR intended some, but not others, of its provisions to apply in those circumstances.

Id.

generated vigorous discussion among legal scholars, not all of whom agree with this Author's reading of the President's remarks.¹⁶¹

Former legal adviser to the Department of State John Bellinger concludes that while the President's statement accompanying Executive Order 13,567 was significant, it did not conclusively establish that Article 75 now constituted binding customary international law.¹⁶² Rather, Mr. Bellinger argued that the President has chosen as a matter of policy to establish a leadership role in "attempting to create customary international law through state practice."¹⁶³ Commenting further on the matter, Mr. Bellinger maintained his position with respect to the non-customary nature of Article 75, but encouraged the President to clarify the meaning of the statement and whether its language indicates that this treaty language from the law of war would apply to detainees *currently* held at Guantánamo because its "ambiguity has confused both the [a]dministration's supporters and critics."¹⁶⁴

One might argue whether Mr. Bellinger correctly concludes that the body of practice is insufficient to establish Article 75 as customary law, given 170 states are party and an extensive body of state practice to interpret. However, the President's statement leaves this and other questions unanswered. What remains abundantly clear is that piecemeal incorporation of human rights obligations through Executive Order 13,567 and the statement that accompanied it have *increased* confusion, even among notable experts, as to which body of law will apply—the law of war, or the law of human rights.

V. CONCLUSION

The laws of war and human rights do not share the same world view, and no amount of fighting—on the battlefield *or* in the academy—will change that. Despite the fundamental differences between their

¹⁶¹ See, e.g., Jack Goldsmith, *My Last Word on Article 75*, LAWFARE (Mar. 14, 2011), <http://www.lawfareblog.com/2011/03/my-last-word-on-article-75/> (summarizing various arguments on the precise meaning of the terms used in the Fact Sheet, whether Article 75 is applicable to non-international armed conflict, and whether current U.S. practices are already in keeping with Article 75).

¹⁶² John Bellinger, *Obama's Announcements on International Law*, LAWFARE (Mar. 8, 2011), <http://www.lawfareblog.com/2011/03/obamas-announcements-on-international-law/#more-1523>. Many in the international community will take issue with Mr. Bellinger's conclusion as to the customary nature of Article 75, given that there are 170 states that are party to Additional Protocol I. See *International Humanitarian Law – Treaties & Documents*, INT'L COMM. RED CROSS, <http://www.icrc.org/ihl.nsf/INTRO?OpenView> (last visited Mar. 14, 2011) (providing a list of states that are party to treaties, including Additional Protocol I).

¹⁶³ Bellinger, *supra* note 157.

¹⁶⁴ *Id.*

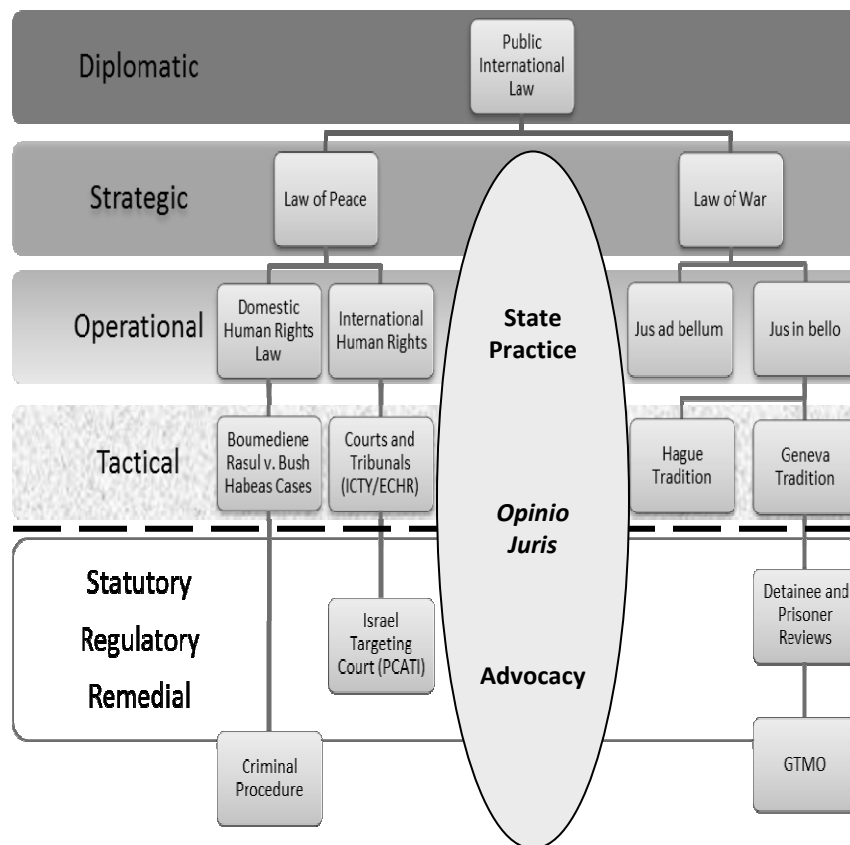
respective fields of application, the two paradigms stand shoulder to shoulder in current counterinsurgency operations in Afghanistan. Such close proximity has done much to erode the distinction between the laws of war and human rights. Given that current operations are the stuff of which state practice is made, blurring the distinction between the two fields is more than merely academic—it carries with it the threat of ripening into a matter of binding customary international law.

Examples of this state practice abound both on the battlefield and the home-front. In combat, military forces apply normative concepts of human rights in the execution of missions, and standards for traditional law of war decisions now contain terms derived from legal systems, which are inextricably rooted in human rights law. Detainees captured on the battlefield petition, not commanders, but domestic civilian courts—institutions whose conceptual framework is drawn from human rights law. Likewise, recent pronouncements by the president also merge these two fields of law.

Unfortunately, all of these actors merge the laws of war and human rights in different and therefore confusing ways. As the lead state contributor of combat power in the Afghan counterinsurgency, the United States has vital security, policy, and international legal interests at stake. Those interests are not well-served permitting the haphazard merger of two disparate bodies of law. Ultimately, it is the warfighters and civilians at the tactical level of war who pay the price for this lack of clarity.

To protect those persons and better serve the purpose of existing treaties and customary international law, the United States should take a leadership role in clarifying the law in those areas in which a merger of norms is appropriate, and steadfastly objecting to the imposition of human rights norms where the law of war will admit no compromise. Our nation's heroes, and the civilians they are often called upon to protect, are well-deserving of law and policy as clear as the dangers they face in combat.

Appendix A. Public International Law Framework: Influence and Gaps¹⁶⁵



¹⁶⁵ This diagram is derived from a lecture delivered by Colonel William K. Lietzau, USMC (Ret.), at the International Humanitarian Law conference hosted by the International Committee of the Red Cross at Santa Clara University in January 2011. Colonel Lietzau currently serves as Deputy Assistant Secretary of Defense (Detainee Policy), and appeared at the conference in his capacity as a private citizen. Accordingly, the diagram represents his personal views, and not necessarily those of the United States. The author is grateful for Colonel Lietzau's permission to incorporate that diagram into this Appendix and Article.

Appendix B. Tactical Directive—General McKiernan



Headquarters
International Security Assistance Force
Kabul, Afghanistan



HQ ISAF/COM/08

SUBJECT: Tactical Directive

DATE: 30 December 2008

1. We are here to win and that victory is an Afghan victory; a victory which creates a secure population which enjoys freedom of movement, effective governance, viable institutions, and economic progress. We must always keep in mind that what we do and how we do it must support the Afghan people and the Government of the Islamic Republic of Afghanistan (GIRoA). We must continue to take the fight to the enemy in partnership with the ANSF to defeat the insurgency and provide security to the population. The way we act, the techniques we use, and the means we employ must serve to protect and defend the Afghan public and reinforce their confidence in GIRoA and the forces fighting on their behalf. We will take a comprehensive approach wherein ISAF operates in a complementary way with GIRoA and the ANSF. With that as background, I direct as follows:
2. The support of the Afghan people for the GIRoA and their collective support for ISAF are critical to defeating the insurgency we are fighting. We have that public support at the national level. We cannot take it for granted and must strive to deepen and broaden it.
3. We must partner and conduct combined operations with Afghan National Security Forces (ANSF) in support of Afghan objectives to the maximum extent possible. ISAF independent operations must be the exception.
4. Our actions both on and off the battlefield are important to our success. We must maintain our professionalism at all times, and always keep in mind the consequences of our actions. Respect for the Afghan people, their culture, their religion, and their customs is essential:
 - a. Unless there is a clear and identified danger emanating from a building and to do otherwise would threaten our ANSF partners and ourselves, all searches and entries of Afghan homes, mosques, religious sites or places of cultural significance will be led by ANSF. All responses must be proportionate and the utmost of care should be taken to minimize any damage.
 - b. All personnel will demonstrate respect for Afghans, Afghan culture, Afghan customs, and Islam in their actions and words. On the road and in vehicles, ISAF personnel will demonstrate respect and consideration for Afghan traffic and pedestrians.

c. In order to minimize death or injury of innocent civilians in escalation of force engagements, Commanders are to set conditions through the employment of techniques and procedures and, most importantly, the training of forces to minimize the need to resort to deadly force. Signals, signs, general and specific warnings (visual and audible) must be unambiguous and repeated to ensure the safety of innocent civilians.

5. We are engaged in a counterinsurgency in an extremely demanding environment. We are fighting an enemy that often cannot be identified before he has struck and then once he has, he hides among the civilian population. The battle is often waged among civilians and their property. We must clearly apply and demonstrate proportionality, requisite restraint, and the utmost discrimination in our application of firepower. No one seeks or intends to constrain the inherent right of self defense of every member of the ISAF force. However, Commanders must focus upon the principles which attach to every use of force – be that self defense or offensive fires. Good tactical judgment, necessity, and proportionality are to drive every action and engagement; minimizing civilian casualties is of paramount importance.

6. Whenever we believe we may have caused civilian casualties or civilian property damage we will immediately investigate the incident. If it is determined ISAF caused those casualties or that damage, ISAF will immediately acknowledge that fact. Acknowledgement by media, key leader engagement, by shura or other means, must happen at each level of command as appropriate. There must be a battle drill in place at each tactical level of the organization, and all investigations will be in cooperation with our Afghan partners.

7. We presently have the momentum on the battlefield and should endeavor to maintain it. In equal measure we must maintain the support of the Afghan people. We must remember that ultimately the solution in this war will be political, not military action. As such, we must always be cognizant of the consequences of our actions and public perceptions. I have every confidence in the dedication and competence of the members of our force to operate effectively within this challenging environment. Do not hesitate to pursue the enemy, but stay true to the values of integrity and respect for human life. Living these values distinguishes us from our enemies. There is no tougher endeavor than the one in which we are engaged. I direct this guidance to be briefed and explained to every Soldier, Sailor, Airman, Marine, and Civilian (including contractors) of the force as soon as practical.



DAVID D. McKIERNAN
General, U.S. Army
Commander,
United States Forces – Afghanistan/
International Security Assistance
Force, Afghanistan

Appendix C. Tactical Directive—General McChrystal



NATO/ISAF UNCLASS
Headquarters
International Security Assistance Force
Kabul, Afghanistan



HQ ISAF 6 July 2009
TO: See Distribution
SUBJECT: Tactical Directive

The Commander of NATO's International Security Assistance Force (ISAF), General Stanley McChrystal, issued a revised Tactical Directive on 02 July 2009. The Tactical Directive provides guidance and intent for the employment of force in support of ISAF operations and updates the previous version issued by the previous commander in October 2008. This directive also applies to all U.S. forces operating under the control of U.S. Forces-Afghanistan (USFOR-A).

Although the Tactical Directive has been classified for the protection of our own forces, portions of the directive are being made public in order to ensure a broader awareness of the intent and scope of General McChrystal's guidance to ISAF and USFOR-A forces.

Our strategic goal is to defeat the insurgency threatening the stability of Afghanistan. Like any insurgency, there is a struggle for the support and will of the population. Gaining and maintaining that support must be our overriding operational imperative—and the ultimate objective of every action we take.

What follows are the releasable portions of the Tactical Directive:

We must fight the insurgents, and will use the tools at our disposal to both defeat the enemy and protect our forces. But we will not win based on the number of Taliban we kill, but instead on our ability to separate insurgents from the center of gravity—the people. That means we must respect and protect the population from coercion and violence—and operate in a manner which will win their support.

This is different from conventional combat, and how we operate will determine the outcome more than traditional measures, like capture of

terrain or attrition of enemy forces. We must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people.

While this is also a legal and a moral issue, it is an overarching operational issue—clear-eyed recognition that loss of popular support will be decisive to either side in this struggle. The Taliban cannot militarily defeat us—but we can defeat ourselves.

I recognize that the carefully controlled and disciplined employment of force entails risks to our troops—and we must work to mitigate that risk wherever possible. But excessive use of force resulting in an alienated population will produce far greater risks. We must understand this reality at every level in our force.

I expect leaders at all levels to scrutinize and limit the use of force like close air support (“CAS”) against residential compounds and other locations likely to produce civilian casualties in accordance with this guidance. Commanders must weigh the gain of using CAS against the cost of civilian casualties, which in the long run make mission success more difficult and turn the Afghan people against us.

I cannot prescribe the appropriate use of force for every condition that a complex battlefield will produce, so I expect our force to internalize and operate in accordance with my intent. Following this intent requires a cultural shift within our forces – and complete understanding at every level—down to the most junior soldiers. I expect leaders to ensure this is clearly communicated and continually reinforced.

The use of air-to-ground munitions and indirect fires against residential compounds is only authorized under very limited and prescribed conditions (specific conditions deleted due to operational security).

(NOTE) This directive does not prevent commanders from protecting the lives of their men and women as a matter of self-defense where it is determined no other options (specific options deleted due to operational security) are available to effectively counter the threat.

We will not isolate the population from us through our daily conduct or execution of combat operations. Therefore:

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Any entry into an Afghan house should always be accomplished by Afghan National Security Forces (ANSF), with the support of local authorities, and account for the unique cultural sensitivities toward local women.

No ISAF forces will enter or fire upon, or fire into a mosque or any religious or historical site except in self-defense. All searches and entries for any other reason will be conducted by ANSF.

The challenges in Afghanistan are complex and interrelated, and counterinsurgencies are difficult to win. Nevertheless, we will win this war. I have every confidence in the dedication and competence of the members of our force to operate effectively within this challenging environment. Working together with our Afghan partners, we can overcome the enemy's influence and give the Afghan people what they deserve: a country at peace for the first time in three decades, foundations of good governance, and economic development.

Appendix D. Tactical Directive – General Petraeus

Headquarters

International Security Assistance Force – Afghanistan

2010-08-CA-004

KABUL, Afghanistan (Aug. 4) – International Security Assistance Force Commander, General David Petraeus has issued his updated Tactical Directive, providing guidance and intent for the use of force by ISAF and USFOR-A units operating in Afghanistan.

The Tactical Directive reinforces the concept of “disciplined use of force” in our partnership with Afghan Security Forces to defeat the insurgency in Afghanistan.

The updated directive is classified; unclassified portions of the document are included below.

“This directive applies to all ISAF and US Forces-Afghanistan (USFOR-A) forces operating under operational or tactical control Subordinate commanders are not authorized to further restrict this guidance without my approval.

Our counterinsurgency strategy is achieving progress in the face of tough enemies and a number of other challenges. Concentrating our efforts on protecting the population is having a significant effect. We have increased security in some key areas, and we have reduced the number of civilian casualties caused by coalition forces.

The Afghan population is, in a number of areas, increasingly supportive of the Government of the Islamic Republic of Afghanistan and of coalition forces. We have also seen support for the insurgency decrease in various areas as the number of insurgent-caused civilian casualties has risen dramatically. We must build on this momentum.

This effort is a contest of wills. Our enemies will do all that they can to shake our confidence and the confidence of the Afghan people. In turn, we must continue to demonstrate our resolve to the enemy. We will do so through our relentless pursuit of the Taliban and others who mean Afghanistan harm, through our compassion for the Afghan people, and through the example we provide to our Afghan partners.

We must continue—indeed, redouble—our efforts to reduce the loss of innocent civilian life to an absolute minimum. Every Afghan civilian death diminishes our cause. If we use excessive force or operate contrary to our counterinsurgency principles, tactical victories may prove to be strategic setbacks.

We must never forget that the center of gravity in this struggle is the Afghan people; it is they who will ultimately determine the future of Afghanistan

Prior to the use of fires, the commander approving the strike must determine that no civilians are present. If unable to assess the risk of civilian presence, fires are prohibited, except under of the following two conditions (specific conditions deleted due to operational security; however, they have to do with the risk to ISAF and Afghan forces).

(NOTE) This directive, as with the previous version, does not prevent commanders from protecting the lives of their men and women as a matter of self-defense where it is determined no other options are available to effectively counter the threat.

. . . Protecting the Afghan people does require killing, capturing, or turning the insurgents. Indeed, as I noted earlier, we must pursue the Taliban tenaciously. But we must fight with great discipline and tactical patience. We must balance our pursuit of the enemy with our efforts to minimize loss of innocent civilian life, and with our obligation to protect our troops. Our forces have been striving to do that, and we will continue to do so.

In so doing, however, we must remember that it is a moral imperative both to protect Afghan civilians and to bring all assets to bear to protect our men and women in uniform and the Afghan security forces with whom we are fighting shoulder-to-shoulder when they are in a tough spot.

We must be consistent throughout the force in our application of this directive and our rules of engagement. All commanders must reinforce the right and obligation of self-defense of coalition forces, of our Afghan partners, and of others as authorized by the rules of engagement.

We must train our forces to know and understand the rules of engagement and the intent of the tactical directive. We must give our troopers the confidence to take all necessary actions when it matters most, while understanding the strategic consequences of civilian casualties. Indeed, I expect our troopers to exert their best judgment according to the situation on the ground. Beyond that, every Soldier, Sailor, Airman, and Marine has my full support as we take the fight to the enemy.

... Partnering is how we operate. Some civilian casualties result from a misunderstanding or ignorance of local customs and behaviors. No individuals are more attuned to the Afghan culture than our Afghan partners. Accordingly, it is essential that all operations be partnered with an ANSF unit and that our Afghan partners be part of the planning and execution phases. Their presence will ensure greater situational awareness. It will also serve to alleviate anxiety on the part of the local population and build confidence in Afghan security forces.

I expect every operation and patrol to be partnered. If there are operational reasons why partnership is not possible for a particular operation, the CONOP approval authority must be informed

Partnership is an essential aspect of our counterinsurgency strategy. It is also an indispensable

element of the transition of security responsibility to ANSF.

Again, we need to build on the momentum we are achieving. I expect every trooper and commander to use force judiciously, especially in situations where civilians may be present. At the same time, we must employ all assets to ensure our troopers' safety, keeping in mind the importance of protecting the Afghan people as we do.

This is a critical challenge at a critical time; but we must and will succeed. I expect that everyone under my command, operational and tactical, will not only adhere to the letter of this directive, but—more importantly—to its intent.

Strategic and operational commanders cannot anticipate every engagement. We have no desire to undermine the judgment of tactical commanders. However, that judgment should always be guided by my intent. Take the fight to the enemy. And protect the Afghan people and help our Afghan partners defeat the insurgency."