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# Understanding When and How Domestic Courts Apply IHL

Laurie R. Blank

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## UNDERSTANDING WHEN AND HOW DOMESTIC COURTS APPLY IHL

*Laurie R. Blank*\*

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### I. INTRODUCTION

Detention at Guantanamo, targeting of individuals with drones, use of civilians to warn the targets of military operations, use of military commissions—courts in the United States and abroad have grappled with these and other questions extensively over the past decade and more. These issues, and others that arise in the course of armed conflict and counterterrorism operations, bring the role of national courts in the implementation and enforcement of international humanitarian law into direct relief. Courts faced with wartime cases encounter two critical determinations before even reaching the merits of the case: whether to apply international humanitarian law, and if so, to what extent. The answers to those two questions will likely have a major impact on the disposition of the case.

International humanitarian law (IHL)—otherwise known as the law of armed conflict or the law of war—governs the conduct of both states and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.<sup>1</sup> A variety of courts and judicial mecha-

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\* Director, International Humanitarian Law Clinic, Emory University School of Law.

<sup>1</sup> See Int'l Comm. of the Red Cross [ICRC], *What is International Humanitarian Law* (July 2004), [http://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf). The law of armed conflict is set forth primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention

nisms apply and enforce IHL during and after armed conflict: national courts; courts-martial; military commissions; regional courts; international tribunals; and hybrid tribunals, to name a few. With the exception of national and regional courts, the remaining courts and tribunals are specifically designed or constituted to apply the law of war to persons and actions during wartime. Regional courts will usually operate within the human rights paradigm, such as the Inter-American Court of Human Rights or the European Court of Human Rights. In contrast, national courts have no special jurisdiction over law of war issues or over military personnel. Understanding when, why and how they apply—or perhaps refuse to apply—IHL is thus an essential task.

Any actors engaged in the implementation or enforcement of IHL—whether lawyers, military operators, political leaders, or others—must have a clear understanding of how their national courts will approach cases involving IHL. This essay will analyze what factors courts choose to apply—or not apply—IHL and how much of it they will apply. Knowing how the law actually applies to the facts at hand is, of course, critical to the preparation of any case, military operation, advocacy campaign, or other action. In the IHL paradigm, however, this analysis must go beyond the specific substantive law. A court's initial decision about whether to apply IHL or to what extent it applies, relative to national human rights law, for example, will have a significant effect on the merits of the case. Because the process—which law and how much law—is substantively determinative, on a broad strategic level, predicting or understanding how courts will approach the legal framework as cases arise is important for effective advocacy, operational and political decision-making and long-term legal analysis.

This analysis plays an important role in three main areas. First, litigation strategy requires that lawyers know more than simply how the law applies to the facts. Knowing how the court will approach a relevant legal regime impacts a range of strategic issues in litigation, from the choice of court (if applicable) to decisions about how to present the case and which issues to emphasize. For example, courts in the United States tend to be reluctant to interfere in wartime decision-making and frequently invoke the political question doctrine in declining to adjudicate such cases. Courts in

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Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. This essay will use the terms law of war and IHL interchangeably.

Israel, for example, take the opposite approach, implementing robust judicial review and hearing cases in real time during military operations. European courts often have a different focus, driven by the binding oversight and jurisprudence of the European Court of Human Rights, which leads to a more human rights-based approach to national security issues. There is little doubt that to pursue an effective litigation strategy in any of these courts, parties must understand and take advantage of that court's specific motivation, past trends and likely focus, in order to be effective.

Second, jurisprudential predictability has significant value as well. Lower courts will generally seek guidance on how the highest court or courts will rule, not only in terms of specific decisions on the merits, but with regard to what law they apply and how they view the overall legal paradigm. Judges therefore can benefit from a framework or set of factors that offer a more nuanced understanding of how other courts treat IHL. This jurisprudential predictability extends outside the judiciary as well, however. Any relevant individuals or organizations—lawyers trying cases, military lawyers advising commanders, political leaders debating strategy or legislation, advocates and others—rely on regular and predictable application of the law for effective decision-making and advocacy.

Finally, the third area in which a strategic analytical approach to the way that courts approach IHL is useful is the overall development of IHL. As the debates and controversies of the past decade demonstrate, new types of conflict, new weapons and new tactics all stretch the law in various directions and demand continuing reaffirmation of key principles and reconsideration of how to apply the law most effectively to meet its goals. When courts simply refuse to apply IHL or apply it in a limited manner in conjunction with other legal regimes—for a variety of reasons analyzed below—the failure to tackle new challenges can stunt the development of the law. IHL's development and effectiveness will be richest when courts of all kinds, whether national, regional or international, address current complexities and controversies head-on and grapple with how to maintain IHL's central goals of civilian protection and lawful conduct of hostilities even in the face of new challenges. In the broadest sense, therefore, understanding how and why courts do or do not apply IHL, and to what extent, in particular situations can help trigger deeper understandings of how the law is likely to develop and what its impact will be in the future.

Many scholars have analyzed the substantive manner in which courts have applied IHL in particular cases.<sup>2</sup> These analyses are critical to

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<sup>2</sup> See, e.g., Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241 (2008); David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339 (2011); Dominic McGoldrick, *Human Rights and Humanitarian Law in the U.K. Courts*, 40 ISR. L. REV. 527 (2007); Tristan Ferra-

understanding both the past and future path of the law. However, they do not offer the broader strategic understanding necessary to fulfill the three goals above. Doing so requires a threshold analysis of: 1) when and whether national courts will hear cases involving conflict, national security and IHL issues; and 2) whether courts will apply IHL rather than, or in conjunction with, other applicable legal regimes, such as human rights law or specific domestic legal paradigms.

The first section will address three categories of legal regimes that raise questions regarding the application of IHL in domestic courts. In essence, these form either a threshold analysis for identifying prime opportunities for courts to contribute to the development of IHL or, from the opposite perspective, missed opportunities where courts refrain from engaging with the law of war altogether. The second section will highlight and develop a range of considerations that inform how we can analyze the role of national courts in the application and implementation of IHL. Together, these two levels of analysis offer tools for understanding both the likelihood of national court decisions on law of war matters and the effectiveness, at home and abroad, of such decisions.

## II. THRESHOLD FOR ANALYSIS

Just as courts need to assess when IHL applies in a particular case, so any analysis of judicial trends must start with that question. The first step is to identify the types of cases that pose or potentially pose IHL issues before national courts. The three main areas for consideration are: the existence of a conflict; the type of conflict; and key issues that stem from conflict situations. Each of these will produce different degrees of willingness on the part of national courts to tackle IHL. In addition, some will require that courts apply IHL in order to reach any type of determination at all; others will seem amenable to resolution in the absence of any reference to IHL. In all situations, this threshold analysis helps in understanding whether and how a relevant court will address IHL in the context of a particular case and in using that information effectively.

### A. *Existence of a Conflict*

States deploy military forces in a wide range of situations encompassing far more than what might traditionally be termed “war.” Disaster relief, peacekeeping, humanitarian relief, counterterrorism operations—these can all involve significant commitment of human, materiel and technological military resources—and yet such operations will not necessarily

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ro, *Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities*, 41 ISR. L. REV. 331 (2008).

engage legal obligations under IHL. The law of armed conflict applies only during armed conflict, not during peacetime, so any court faced with potential IHL questions must first determine whether there is an armed conflict that will trigger the applicability of IHL. The Geneva Conventions create a framework of law applicable based on the situation on the ground, not based on the claims or objectives of the parties to the conflict.<sup>3</sup> Even before the current Geneva Conventions framework was in place, when states often argued that there was no conflict in the absence of a declaration of war, determinations about the applicability of the law of war generally turned on an objective determination of the facts rather than on the subjective pronouncements of states.<sup>4</sup> Notably, the Geneva Conventions adopted the term “armed conflict” specifically to avoid the technical legal and political pitfalls of the term “war.”<sup>5</sup> As such, determination of the existence of an armed conflict does not turn on a formal declaration of war—or even on how the participants characterize the hostilities—but rather is based on the facts of a given situation.<sup>6</sup> In most cases, the key analytical question will generally be

<sup>3</sup> See generally OSCAR M. UHLER ET AL., COMMENTARY: GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean S. Pictet ed., 1958).

<sup>4</sup> For example, during World War II, the Japanese claimed that their operations in China and Manchuria were “police operations” and therefore did not trigger the law of war. See *International Military Tribunal for the Far East: Judgment of 12 November 1948*, in 22 TOKYO WAR CRIME TRIALS 49,594 (John Pritchard & Sonia M. Zaide eds., 1998), available at <http://werle.rewi.hu-berlin.de/tokio.pdf>.

From the outbreak of the Mukden Incident till the end of the war, the successive Japanese Governments refused to acknowledge that the hostilities in China constituted a war. They persistently called it an ‘Incident.’ With this as an excuse, the military authorities persistently asserted that the rules of war did not apply in the conduct of the hostilities.

*Id.*; see also *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. 635, 646–98 (1862) (discussing the U.S. Supreme Court’s assessment of the existence of a war based on the facts on the ground, referring explicitly to the law of nations); *Montoya v. United States*, 280 U.S. 261, 267 (1901).

We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to despatch [sic] a military force for their subjugation, is sufficient to constitute a state of war.

*Id.*

<sup>5</sup> See generally UHLER ET AL., *supra* note 3, at 17–25 (addressing Common Article 2 to the Geneva Conventions).

<sup>6</sup> See, e.g., Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 85 (2005) (“[I]t is worth emphasizing that recognition of the existence of armed conflict is not a matter of state discretion.”); see also UHLER ET AL., *supra* note 3, at 17 (“[T]he [Geneva] Convention[s] . . . apply to all cases of declared war or . . . armed conflict . . . between two or more [states] . . . even if the state of war is not recognized by one of them.”).

whether the hostilities or situation at issue rises above internal disturbances, riots and banditry, which do not constitute armed conflict.<sup>7</sup>

For these reasons, cases in which the existence of an armed conflict is in dispute or uncertain are the first category of situations in which national courts encounter IHL. As the International Criminal Tribunal for Rwanda (ICTR) declared, in a statement that applies as much to national courts as to an international tribunal:

If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, [IHL] will apply once it has been established there exists an . . . armed conflict which fulfills [the] predetermined criteria.<sup>8</sup>

The question of the existence of an armed conflict can manifest itself in a national court environment in various ways beyond a straightforward preliminary jurisdictional analysis. For example, a court may declare the existence of a conflict that triggers the application of IHL in direct contravention to the executive's statements to the contrary.<sup>9</sup> In other situations, courts may simply follow the lead of the executive and ignore the potential application of IHL, such as in the numerous cases addressing questions arising from the conflict in Northern Ireland.<sup>10</sup> The consequences of different

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<sup>7</sup> See, e.g., *Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.98 doc. 6 rev. ¶¶ 148–52 (1997), available at <http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm> (characterizing the armed confrontation in La Tablada as an “armed conflict of a non-international character” rather than an internal disturbance).

<sup>8</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 603 (Sept. 2, 1998), <http://www.un.org/ict/english/judgements/akayesu.html>.

<sup>9</sup> See, e.g., Constantin von der Groeben, *The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces*, 16 J. CONFLICT & SECURITY L. 141, 145 n. 18 (2011) (discussing judgments of the Constitutional Court of Colombia holding that the Colombian government is engaged in an armed conflict with the FARC and other guerrilla groups); see also Paola Gaeta, *The Armed Conflict in Chechnya Before the Russian Constitutional Court*, 7 EUR. J. INT'L L. 563, 566–70 (1996) (discussing Constitutional Court of the Russian Federation July 13, 1995 decision on the application of Additional Protocol II to the conflict in Chechnya).

<sup>10</sup> See Noelle Quéniwet, *The Application of International Humanitarian Law to Situations of a (Counter-) Terrorist Nature*, in INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY'S CONFLICTS 25, 31 (Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005). The Russian Government has also consistently denied that the hostilities in Chechnya constitute an armed conflict. See William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 754 (2005). In a third approach, “[t]he situation in Colombia is . . . one in which the State does not recognize the existence of an armed conflict, but still acts as if it were the case, including as regards the application of IHL.” von der Groeben, *supra* note 9, at 149.

court approaches to the existence of an armed conflict are clear: if courts do not engage the issue at all, the executive's determination will govern regarding both the absence of any conflict and thus the applicable law; if courts engage the issue and find that an armed conflict does exist, IHL will be the governing legal regime. On a range of issues, from detention to trial to status of persons, outcomes will differ depending on the applicable legal regime.

From a strategic perspective, if a court demonstrates a propensity to follow the executive's lead, relying solely on IHL for the substantive legal arguments would likely not be the most effective approach because the court will likely conclude that there is no armed conflict—consistent with the executive's argument—and reject any IHL-based arguments. The consequences for the long-term development of the law are obvious: when national courts refrain from applying IHL in relevant situations, they are effectively abdicating their responsibility to implement and enforce IHL, leaving the executive to be the driving force in the development of the law, a highly problematic result.

#### B. *Types of Conflicts*

The 1949 Geneva Conventions established a two-pronged approach to armed conflict and the application of IHL to the parties and events so engaged. Under the Geneva Conventions framework, any armed conflict will be either an international armed conflict falling within Common Article 2 or a non-international armed conflict falling with Common Article 3.<sup>11</sup> The former conflicts trigger the full panoply of the law of war, including the four Geneva Conventions and customary international law.<sup>12</sup> In non-international conflicts, only Common Article 3 and the customary international law applicable in such conflicts will apply, including the principles of humanity, proportionality, distinction, and necessity.<sup>13</sup> States, courts, and

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<sup>11</sup> See Common Articles 2 and 3 to the four Geneva Conventions. Geneva Convention I, *supra* note 1, arts. 2–3; Geneva Convention II, *supra* note 1, arts. 2–3; Geneva Convention III, *supra* note 1, arts. 2–3; Geneva Convention IV, *supra* note 1, arts. 2–3; UHLER ET AL., *supra* note 3, at 17–25.

<sup>12</sup> See Geneva Convention I, *supra* note 1, art. 2; Geneva Convention II, *supra* note 1, art. 2; Geneva Convention III, *supra* note 1, art. 2; Geneva Convention IV, *supra* note 1, art. 2.

<sup>13</sup> See Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 102–27 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) (highlighting the development and applicability of necessity, distinction, humanity, and proportionality to internal armed conflict); Abella v. Argentina, *supra* note 7, ¶¶ 176–77 (discussing applicability of customary law to all armed conflicts); LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 133–34 (2002) (arguing that customary law is the only authority that can temper internal conflicts based on the principle of humanity and proportionality); Christopher Greenwood, *International Law and the Tadic Decision*, 7 EUR. J. INT'L L. 265, 275–78 (1996). In the case of non-international conflicts occurring in the territory of a



organizations such as the International Committee of the Red Cross (ICRC) have frequently characterized situations as armed conflict and specified whether they constituted international or non-international armed conflict in the years after 1949.<sup>14</sup> Just as the existence of an armed conflict triggers the application of IHL to govern the status of persons and the rights and obligations of parties to the conflict, so the nature of the conflict—whether international or non-international—determines the extent of the applicable law.

The definition of armed conflict, as set forth by the International Criminal Tribunal for the former Yugoslavia (ICTY) is the “resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”<sup>15</sup> The first portion of the definition refers to international armed conflict; the second to non-international armed conflict. International tribunals, whose jurisdiction depends solely on the existence of armed conflict and the nature of the conflict, naturally devote considerable judicial energy to the determination of conflict and conflict status. But national courts also play an important role here. Whereas distinguishing between international and non-international armed conflict may have been reasonably straightforward in the past, the advent of conflict between states and non-state actors across state borders has begun to blur the lines and create confusion regarding the nature of the conflict and thus the applicable law. For example, the U.S. conflict with al Qaeda and other terrorist groups has been characterized alternatively as: not a conflict; a transnational armed conflict; a non-international armed conflict; and an international armed conflict.<sup>16</sup> Ultimate-

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State party to Additional Protocol II where the situation on the ground meets the requirements of Article 1 of Additional Protocol II, the more detailed provisions of Protocol II will apply. *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 1995, Sentencia C-225/95, Gaceta de la Corte Constitucional [G.C.C.] (p. 104) (Colom.), <http://www.corteconstitucional.gov.co/relatoria/1995/c-225-95.htm> (highlighting the importance of the principle of distinction in internal armed conflict); *see also* Prosecutor v. Akayesu, *supra* note 8, ¶ 601 (noting that Common Article 3 extends a minimum threshold of protection to all persons in non-international armed conflict).

<sup>14</sup> *See, e.g.*, Int'l Comm. of The Red Cross [ICRC], *Summary Report: Afghanistan, Colombia, Democratic Republic of the Congo, Georgia, Haiti, Lebanon, Liberia, and the Philippines* 10–25 (2009), [http://www.icrc.org/eng/assets/files/other/our\\_world\\_-\\_views\\_from\\_countries\\_-\\_summary\\_report\\_-\\_part\\_2\\_bkmrk.pdf](http://www.icrc.org/eng/assets/files/other/our_world_-_views_from_countries_-_summary_report_-_part_2_bkmrk.pdf) (identifying various armed conflicts in Afghanistan and non-international armed conflict in Colombia); Tom Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of International Armed Conflict* 71 COLUM. L. REV. 37, 57–58 (1971) (addressing ICRC categorization of the Vietnam War beginning in 1965 as international armed conflict).

<sup>15</sup> Prosecutor v. Tadic, *supra* note 13, ¶ 70.

<sup>16</sup> Compare Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror,”* 87 INT'L REV. RED CROSS 39, 45–46 (2005), available at [http://www.icrc.org/eng/assets/files/other/irc\\_857\\_borelli.pdf](http://www.icrc.org/eng/assets/files/other/irc_857_borelli.pdf) (arguing that the “war on terror” cannot in and of itself constitute an armed conflict within the meaning of the law of war), and Gabor Rona, *Interesting Times for International Humanitarian Law: Chal-*

ly, the U.S. Supreme Court held in *Hamdan v. Rumsfeld* that the conflict with al Qaeda constitutes an armed conflict of a non-international character governed by Common Article 3.<sup>17</sup> Note, however, that the appeals court in *Hamdan* held that the Geneva Conventions did not apply to the conflict with al Qaeda because it did not fit within either the Common Article 2 or Common Article 3 paradigms.<sup>18</sup> The difference in how post-*Hamdan* jurisprudence and legislation would look if that holding were the final holding is dramatic. In a different approach, the Israeli Supreme Court characterizes Israel's conflict with Hamas and other armed Palestinian groups as an international armed conflict.<sup>19</sup> Each of these determinations then affects how the law is applied to individuals and to state action during conflict. The status of individuals, such as prisoner of war status and protected person status, offers a prime example of the difference in legal application between the two categories of conflict,<sup>20</sup> as does the nature of the detaining party's obliga-

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enges from the "War on Terror," 27 FLETCHER F. WORLD AFF. 55, 57–58 (2003), available at [http://www.icrc.org/eng/assets/files/other/rona\\_terror.pdf](http://www.icrc.org/eng/assets/files/other/rona_terror.pdf) (noting that while certain aspects of the "war on terror" do fall within the category of armed conflict, others do not; such that using the terminology of "war" does not make automatically make it an armed conflict), with Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 33–35 (2003) (arguing that the law of war governs the September 11th attacks and the military operations in response); compare MICHAEL W. LEWIS ET AL., THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 9 (2009) (discussing the application of the law of armed conflict to a range of military operations and concluding that, at a minimum, the conflict between the U.S. and al Qaeda and other groups constitutes a transnational armed conflict triggering fundamental principles of the law of war), and *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (holding that the conflict with al Qaeda is a non-international armed conflict within the definition of common Article 3), with U.S. GOV'T, REPLY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE REPORT OF THE FIVE UNHCR SPECIAL RAPPORTEURS ON DETAINEES IN GUANTANAMO BAY, CUBA 4 (Mar. 10, 2006), available at <http://www.asil.org/pdfs/ilib0603212.pdf> ("The United States is engaged in a continuing armed conflict against Al Qaida, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations.").

<sup>17</sup> *Hamdan*, 548 U.S. at 631.

<sup>18</sup> *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005) (explaining *arguendo* that even if the Geneva Convention could be enforced in this court, it would not help *Hamdan*).

<sup>19</sup> HCJ 769/02, *Public Committee Against Torture in Israel v. The Government of Israel*, ¶16 [Dec. 11, 2005] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf) (describing the situation between Israel and various terrorists groups as one of continuous international armed conflict).

<sup>20</sup> See Waldemar Solf, *Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict*, 13 GA. J. INT'L & COMP. L. 291, 291–93 (1983) (discussing the differences in the rules governing international and non-international conflicts pertaining to prisoners of war).

tions or the judicial mechanism used for trying alleged perpetrators of law of war violations.<sup>21</sup>

The role that courts can play in identifying the nature of the conflict thus expands in today's world of complex conflict situations. National courts that hear cases potentially triggering the application of the law of war are in a position to analyze how the law applies to counterterrorism operations, humanitarian interventions, operations in collective self-defense and other equally challenging situations. In this way, courts have a unique opportunity to further the development of IHL and to help continue to define and understand the geographic, temporal and other parameters of conflict.

### C. *Issues Arising During Conflict*

Among the wide range of issues that arise during armed conflict, national courts will usually be willing to adjudicate some rather than others. The likelihood of a court decision infringing on executive authority or supremacy in a particular area is often a deciding factor in how courts choose to treat these cases. For example, courts will usually refrain from hearing cases regarding the targeting of specific enemy property, on the theory that such decisions are wholly within the parameters of the executive's war-making authority.<sup>22</sup> And yet a court's involvement—or lack thereof—will have major consequences for the protection of individual rights and the enforcement of obligations. Parties to a case will need to strategize, based on an assessment of the court's receptivity to certain issues, regarding how best to present their case; while IHL may offer the strongest substantive case, if a court is reluctant to apply IHL—such as in targeting cases—then the arguments must rest on other legal bases as well. Political and military leaders will also take their cue from the judiciary's approach, knowing, in some countries, that in certain areas they will have nearly complete freedom of action without any judicial oversight. From a systemic perspective, this judicial deference is highly problematic for the enforcement and future development of the law, as seen in the contrast between the unwillingness of U.S. courts to engage the executive with judicial review and the robust judicial activism of the Israeli Supreme Court.

The following six issues offer prime examples:

In the area of *detention*, IHL provides the legal framework in both international and non-international armed conflicts. In an international

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<sup>21</sup> See Laura Lopez, Note, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 918 (1994) (discussing four major inadequacies of the Geneva Convention when applied to internal armed conflict).

<sup>22</sup> See, e.g., *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1365–66 (Fed. Cir. 2004) (holding that the decision to destroy property was a “strategic matter of war-making belonging [to the President],” as a part of his executive authority).

armed conflict or an occupation, IHL—particularly the Third and Fourth Geneva Conventions—provides for the detention of combatants, civilians who directly participate in hostilities, and civilians not directly participating in hostilities but who pose a threat to the security of the occupying power.<sup>23</sup> The Third and Fourth Geneva Conventions provide extensive safeguards and procedures for such detention.<sup>24</sup> Authority to detain in non-international armed conflict, while not delineated specifically in any treaty provision, is based on the fundamental principle of military necessity.<sup>25</sup> Such detention is governed by domestic law, which may incorporate or be informed by human rights provisions and the due process requirements set forth in the International Covenant on Civil and Political Rights, for example.<sup>26</sup> Similarly, in non-conflict scenarios, the domestic law of the host state regulates detention, but human rights law provides minimum standards of conduct.<sup>27</sup>

The *trial* of detainees—and the nature and amount of process afforded to them—depends both on the character of the conflict and status of the detainee. In international armed conflicts, including occupation, the trial of prisoners of war is strictly regulated by the Third Geneva Convention.<sup>28</sup> IHL applicable during a non-international armed conflict, on the other hand, including Common Article 3, Additional Protocol II and customary international humanitarian law, offers little guidance for trials of either persons who are fighting or other individuals.<sup>29</sup> One significant difference is that individuals engaged in a non-international armed conflict are not protected

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<sup>23</sup> See Geneva Convention III, *supra* note 1, art. 4 (setting forth the categories of persons who qualify for prisoner of war status); Geneva Convention IV, *supra* note 1, arts. 42, 78 (providing for the internment of protected persons for imperative reasons of security).

<sup>24</sup> See Geneva Convention III, *supra* note 1; Geneva Convention IV, *supra* note 1.

<sup>25</sup> See CHATHAM HOUSE & INT'L COMM. RED CROSS, PROCEDURAL SAFEGUARDS FOR SECURITY DETENTION IN NON-INTERNATIONAL ARMED CONFLICT 5–6 (2008); Geoffrey S. Corn, *The Problem with Law Avoidance*, NAT'L SEC. L. REP., Winter 2010, at 4–8.

<sup>26</sup> See Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 413 (2009); International Covenant on Civil and Political Rights art. 9, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 26, 1976) [hereinafter ICCPR]. Note also that the law of international armed conflict can provide useful analogies and guidance for exploring the parameters of detention in non-international armed conflict. See, e.g., Ryan Goodman, “Article” *The Second Annual Solf-Warren Lecture in International and Operational Law*, 201 MIL. L. REV. 237, 240–42 (Fall 2009).

<sup>27</sup> See ICCPR, *supra* note 26, art 9.

<sup>28</sup> Geneva Convention III, *supra* note 1, arts. 99–108.

<sup>29</sup> See Laura M. Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulations of Internment in Non-International Armed Conflict*, 40 CASE W. RES. J. INT'L L. 437, 442 (2009) (“The Second Additional Protocol applicable in non-international armed conflict briefly mentions internment, but provides no guidance regarding procedures either to assess the decision to intern or to terminate captivity. Again, Common Article 3 does not speak to the issue.”).

by combatant immunity, meaning they may be tried under domestic law for murder for engaging in acts which, had they been committed by a combatant, would be considered lawful.<sup>30</sup>

During armed conflict, IHL permits the *targeting* of enemy persons and military objectives with lethal force as a first resort.<sup>31</sup> IHL's fundamental principles of distinction, proportionality and precautions in attack guide the use of force and targeting considerations in all situations.<sup>32</sup> Outside of an armed conflict, human rights law governs and the use of lethal force is severely restricted, limited to situations of necessity or self-defense in accordance with traditional law enforcement principles.<sup>33</sup> As noted above, the U.S.

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<sup>30</sup> YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 28 (2004) (citing A. ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS* 82 (1976)); see also Geneva Convention III, *supra* note 1, arts. 87, 99; *United States v. John Walker Lindh*, 212 F. Supp. 2d 541, (E.D. Va. 2002).

Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets. Belligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict. This doctrine has a long history, which is reflected in part in various early international conventions, statutes and documents.

*Id.*; see also John P. Cerone, *Status of Detainees in Non-International Armed Conflict, and Their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld*, AM. SOC'Y OF INT'L L. INSIGHTS (July 14, 2006), <http://www.asil.org/insights060714.cfm> (noting that "non-state combatants in a non-international armed conflict may be prosecuted for all hostile acts, including violations of ordinary domestic law, irrespective of whether they have violated any norms of international law.").

<sup>31</sup> See Geoffrey S. 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 (2010).

<sup>32</sup> Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 39 ISR. YBK. HUM.RTS. 99 (2009) ("Although the conflict [in Afghanistan] has become non-international, it must be understood that the IHL norms governing attacks in international armed conflicts, on one hand, and non-international armed conflicts, on the other, have become nearly indistinguishable.").

<sup>33</sup> ICCPR, *supra* note 26, art. 6; Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2), *opened for signature* Nov. 4, 1950, preamble, 213 U.N.T.S. 222 (Council of Europe) (entered into force Sept. 3, 1953); see also U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9, G.A. Res. 45/166 (Dec. 18, 1999).

[Force can only be used] in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when the less extreme means are insufficient to achieve these objectives.

and some other domestic courts are reluctant to address targeting questions at all, leaving them to executive discretion.<sup>34</sup>

The *status of persons* depends greatly on the applicable law, whether IHL or human rights law, and also whether it is the law of international armed conflict or non-international armed conflict. In order to determine a person's rights, a court must first analyze the person's status—and here domestic courts have often been willing to engage in precisely that determination.<sup>35</sup> For example, the post-*Boumediene* litigation in the U.S. District Court for the District of Columbia has focused extensively on the status of persons captured and detained in the course of the conflict with al Qaeda and other terrorist groups; the authority for detention depends directly on such status determinations.<sup>36</sup> In addition, the reluctance or willingness of courts to address status questions is a clear indicator of the likelihood of the court applying IHL. For decades, the Israeli Supreme Court has assessed the status of persons detained and tried in the course of its conflicts with Palestinian armed groups, using IHL to determine how to categorize such persons and the rights to which they are entitled.<sup>37</sup> In contrast, courts in the United

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*Id.*; see also David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 EUR J. INT'L L. 171, 176 (2005).

Under [international human rights law,] the intentional use of lethal force by state authorities can be justified only in strictly limited conditions. The state is obliged to respect and ensure the rights of every person to life and to due process of law. Any intentional use of lethal force by state authorities that is not justified under the provisions regarding the right to life, will, by definition, be regarded as an 'extra-judicial execution.

*Id.*

<sup>34</sup> Compare *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (holding that the plaintiff lacked standing to challenge, on behalf of his adult son, the government's authority to engage in targeted killings of U.S. citizens outside of armed conflict zones and noting that the issue would likely not survive a political question analysis), with *H CJ 769/02, Public Committee Against Torture in Israel v. The Government of Israel*, ¶ 10 (analyzing the legality of targeted killing as a counterterrorism policy).

<sup>35</sup> See, e.g., *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992); *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009); *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009).

<sup>36</sup> E.g., *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 208 (D.D.C. 2009).

[T]he Court concludes that these petitioners are virtually identical to the detainees in *Boumediene*—they are non-citizens who were (as alleged here) apprehended in foreign lands far from the United States and brought to yet another country for detention. And as in *Boumediene*, these petitioners have been determined to be 'enemy combatants,' a status they contest.

*Id.*

<sup>37</sup> See, e.g., *Military Prosecutor v. Omar Mahmud Kassem and Others*, 42 I.L.R. 470 (Israeli Mil. Ct. Ramallah, 1969) (holding that the accused were not prisoners of war and there-

Kingdom, which apply human rights law and domestic criminal law to cases stemming from both the conflict in Northern Ireland and the current conflict against terrorist groups, traditionally have not engaged in such status determinations.<sup>38</sup>

One area in which courts take decidedly different approaches to judicial involvement is the *conditions* of detention and treatment of persons. Unlike the above issues, treatment does not differ in any significant way across the different types of conflicts: international law protects all individuals, including those who have been detained, from cruel or inhuman treatment, or torture, whether in international armed conflict, non-international armed conflict, or non-conflict situations. However, the conditions of detention and treatment of individuals often involves direct challenges to individuals within the top echelon of government and for that reason can spark interesting interplays between the courts and the executive.<sup>39</sup>

Finally, a topic that has proven to be relevant in the past decade or more involves the role courts can play in *definitions* under international law and IHL. The most prevalent example appears in the Guantanamo detainee litigation in the U.S. federal courts, when numerous judges had to interpret the term "enemy combatant" and then provide further definition for use in judicial analysis.<sup>40</sup> Other terms that have sparked debate regarding definitions include direct participation in hostilities and even torture, in some in-

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fore not entitled to combatant immunity); HCJ 6659/06, *Anonymous v. State of Israel* [2008] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf) (upholding the constitutionality of the Incarceration of Unlawful Combatants law).

<sup>38</sup> See, e.g., *R v. Sec'y of State for Def.*, [2007] UKHL 58 (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm> (basing the dismissal of appellant's claim, that the detention of the appellant by U.K. forces in Iraq was unlawful, on the finding that U.N. Security Council Resolution 1546 took primacy over the U.K.'s obligations under the European Convention on Human Rights); *Al-Skeini v. Sec'y of State for Def.* [2007] UKHL 26 (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm> (determining that the extraterritorial meaning of "jurisdiction" applied to U.K.-run detention facilities, but not areas where U.K. soldiers were temporarily present).

<sup>39</sup> See, e.g., *Ali v. Rumsfeld*, 649 F.3d 762, 765 (D.C. Cir. 2011) (addressing the qualified immunity of government officials which shields them from civil liability if their conduct doesn't violate clearly established statutory or constitutional rights of which a reasonable person would have known). See generally *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006) (involving a former detainee's action against Secretary of State, Donald Rumsfeld, for alleged mistreatment while in U.S. military detention).

<sup>40</sup> E.g., *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008).

[An enemy combatant is an] an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

*Id.*

stances.<sup>41</sup> Here the interplay between the willingness of courts to address the existence of an armed conflict or the type of armed conflict relates directly to the likelihood that a court will apply IHL to the definition of terms. Once a court passes the threshold of application of IHL after finding that a conflict exists, or determining the type of conflict, parties can feel a greater sense of confidence in the court's use of IHL to flesh out the definitions at issue. From a different angle, an executive branch that can contain the application of IHL by the judiciary and promote the supremacy of domestic law will have significantly greater success with judicial application of its own definitions even when they conflict with IHL.

### III. FACTORS TO ANALYZE AND ANTICIPATE JUDICIAL BEHAVIOR

The threshold analysis above helps identify the types of cases where IHL does or may play a role. But that is only the first step. Once a court takes a case, and even after the court seems amenable to the application of IHL, a host of additional factors bear on when the court will apply IHL and how the court will apply it. Here, the nuances of how IHL relates to domestic law and human rights law and how national courts interact with and look to other countries' courts, regional courts and international courts can well be determinative of the court's use of IHL and, as a result, the outcome of the case.

#### A. *When Courts Do—or Should—Apply IHL*

One primary factor that often arises in situations that involve IHL is whether IHL is the only applicable law or whether human rights law, domestic criminal law, constitutional law or other legal regimes also have an important contribution to the adjudication of the case. Understanding when courts choose to apply IHL alone or in concert with other legal paradigms has a direct effect on both litigation strategy and jurisprudential predictability and continuity. These considerations also contribute to effective advocacy to press for more frequent and more robust judicial application of IHL.

A first factor is the *suitability* of IHL for the analysis at issue in the case. Looking back to the categories set forth briefly in the previous section, the question of the existence of an armed conflict is highly suitable for the application of IHL, which sets forth a framework for determining when an armed conflict exists to trigger the law of war. Even in situations in which the question arising in the case does not then involve the application of IHL, such as appropriations of funds or the tolling of a statute of limitations during wartime, IHL gives a clear picture of when events on the ground consti-

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<sup>41</sup> See *Hamlily*, 616 F. Supp. 2d at 77 (stating that the scope of the term “direct participation” remains unsettled).



tute an armed conflict.<sup>42</sup> Although it is not the only relevant body of law for such determinations—domestic law does indeed have an important contribution to make in the constitutional sphere regarding the existence of armed conflict—IHL is the *lex specialis* and the most directly on point.<sup>43</sup> In other areas, such as treatment, fair trial rights and, potentially, detention in non-international armed conflict or counterterrorism operations, human rights law and other domestic or international legal frameworks have important contributions that inform how IHL applies to a particular situation. Here, we might thus see courts showing greater reluctance or uncertainty about incorporating IHL into their analysis and decisions.

Second, some of the categories and issues highlighted in the first section above may pose greater *challenges* for a domestic court's application of IHL. These challenges can arise when IHL is not as well developed in a particular area—such as the parameters of detention in non-international armed conflict, for which the authority derives from the principle of military necessity, but treaty law offers little in the way of comprehensive details. Alternatively, some courts may view the application of IHL to complex questions that arise in the intersection between counterterrorism and armed conflict as more challenging than the application of domestic criminal law or human rights law in such situations, even if IHL is equally or more appropriate.

A third consideration is the *range of legal regimes* that apply to a given case before a domestic court and how they relate to each other. This factor is closely related to the suitability factor above, but has a broader perspective. In addition to other legal frameworks, this analysis should also take into account whether there are judicial or other legal doctrines that impact how a court views a case, such as state secrets or the political question doctrine. While some alternative sources of law can be helpful in the adjudication or resolution of a particular issue, some can also be potentially problematic for the protection of individual rights and the fulfillment of fundamental principles. A first level of analysis therefore would consider how many other legal regimes are relevant and how they all interrelate, which can offer some clues into not only how a court would and should view the contribution IHL can make to the case's resolution, but also how many other legal principles are central to the issues at hand. At a second level, we can look to the centrality of the IHL principles at the heart of the

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<sup>42</sup> See e.g., *United States v. Prospero*, 573 F. Supp. 2d 436 (D. Mass. 2008) (finding there was an armed conflict in existence in Afghanistan for the purposes of determining whether the statute of limitations for fraud was tolled by the Wartime Suspension of Limitations Act).

<sup>43</sup> See Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *ISR. L. REV.* 310, 347 (2007) (stating as a general rule humanitarian law is the most appropriate for the conduct of hostilities).

case in viewing how a court should approach political question determinations. In the U.S. at least, courts tend to defer to the executive on wartime matters;<sup>44</sup> however, it is precisely when wartime cases strike at the very core principles of IHL that a court should rethink that automatic deference and focus on the rights and obligations demanding protection and fulfillment. At the opposite end of the spectrum, the Israeli Supreme Court is the epitome of robust judicial engagement during wartime, hearing cases in real-time on issues ranging from the conduct of military operations to the protection of civilians to detention of suspected terrorists.<sup>45</sup>

Finally, while some cases invoke strictly—or at least predominantly—IHL concepts and principles, such as the treatment of prisoners of war, others will trigger central *domestic law principles* that perhaps trump the relevant IHL principles. The lessons of the past decade's conflict between states and terrorist groups demonstrates that, in fact, IHL principles will most often come up against domestic political considerations that simply overrun or circumvent the basic law of war tenets. For example, the U.S. has charged some detainees at Guantanamo Bay with the offense of murder in violation of the law of war. This crime does not exist within the corpus of the international law of war,<sup>46</sup> but such arguments have been denied, perhaps due to the desire to find a way to criminalize enemy participation in hostilities against U.S. servicemen and women. Understanding how domestic law and interpretive doctrines, as well as political considerations, will impact how courts incorporate IHL or defer in such cases.

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<sup>44</sup> WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 223–24 (1998) (recognizing that the Supreme Court generally gave the executive branch more leeway during times of crisis). See generally Amos N. Guiora & Erin M. Page, *Going Toe to Toe: President Barack's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51, 56–57 (2005) (reviewing U.S. Supreme Court decisions in wartime and comparing to the approach of the Israeli Supreme Court).

<sup>45</sup> HCJ 3239/02 Marab v. IDF Commander in the West Bank 57 (2) PD 349 [2002] (Isr.) (mandating increased safeguards for detainees during the course of the operation); HCJ 3799/02 Adalah – The Legal Center for Arab Minority Rights in Israel v. The Minister of Defense (2) IsrLR 206 [2005] (Isr.) (holding that the consensual use of a civilian to warn suspected terrorists before a military operation to detain them is unlawful under the Fourth Geneva Convention).

<sup>46</sup> See Geoffrey Corn, *Understanding the Limitations on Involving the Courts-Martial Option for Trying Captured Terrorists*, 17 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 18 (2009).

There is simply no basis to assert that the mere participation in a non-international armed conflict by a non-state actor violates international law. Instead, those individuals become *internationally* liable for their acts or omissions only when those acts or omissions violate norms of conduct applicable to this type of armed conflict.

*Id.*

*B. How Do—and Should—Courts Apply IHL?*

Once a court does incorporate IHL into its analysis, either as the dominant legal paradigm or as one of multiple sources that bear on the case at hand, a range of additional factors are relevant for understanding how courts will approach this task. As noted above, IHL is fundamentally international law but also forms part of the domestic law of most states. How a court chooses to address IHL's key provisions, principles and obligations will vary widely depending not only on the categories of issues detailed in the first section above, but also on how the court relates to other courts in the international system, how it views international law in general, and other considerations.

The first, and most foundational, factor is how international law is incorporated into or viewed *in relation to a state's domestic law*. For example, states with a monist system treat international treaties as automatically incorporated into national law;<sup>47</sup> in states with a dualist tradition, international law must be translated into national law through legislation.<sup>48</sup> In the U.S., another consideration is whether a particular treaty—and concomitant international obligation—is self-executing, meaning it has direct effect as law in domestic courts.<sup>49</sup> In the case of the Geneva Conventions, the primary modern law of war treaties, states take different approaches to how these treaty obligations are incorporated into national law. Some states have legislation implementing the Geneva Conventions and the obligations therein;<sup>50</sup> some have national traditions—such as monism—that automatically give

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<sup>47</sup> See Myres S. McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S.D. L. REV. 25, 26 (1959); see also John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561 (1952).

<sup>48</sup> See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 14–16 (1986) (claiming that international law must bow to domestic authority); MICHAEL AKEHURST, *MODERN INTRODUCTION TO INTERNATIONAL LAW* 45 (1982) (elaborating on the English law doctrine of transformation which rules that international customary law forms a part of English law only so far as parliament and judicial decisions recognize).

<sup>49</sup> See generally Frederic L. Kirgis, *International Agreements and U.S. Law*, AM. SOC'Y OF INT'L LAW INSIGHTS (Sept. 29, 2011), <http://www.asil.org/insigh10.cfm> (explaining that a self-executing treaty provision is the supreme law of the land in the same sense as a federal statute that is judicially enforceable by private parties and that even a non-self-executing provision of an international agreement represents an international obligation that courts are very much inclined to protect against encroachment by local, state or federal law).

<sup>50</sup> See Michael Bothe, *The Role of National Law in the Implementation of International Humanitarian Law*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES* 301, 304–05 (Christophe Swinarski ed., 1984) (describing the different mechanisms a country may use to enact a treat into its domestic laws).

the Conventions the full force of domestic law.<sup>51</sup> In others, such as in the U.S., the approach to the Geneva Conventions has proven more complex, with courts debating the applicability of the Conventions and Congress passing legislation declaring that the Geneva Conventions cannot be used as a source of rights in U.S. domestic courts.<sup>52</sup>

IHL is more than the Geneva Conventions and other treaties, however. *Customary law* plays a substantial role in the law of war and the obligations of states to conduct hostilities in a lawful manner and protect civilians from the ravages of war.<sup>53</sup> Understanding how particular courts view customary law is therefore an important part of anticipating how the law of war will be incorporated into national court decisions and jurisprudence. Beyond the willingness—or unwillingness—of courts to contemplate customary international law, the manner in which such courts explore and determine the content of customary law is central to this analysis as well. Is the court conservative in its understanding of the content and development of customary international law or does it take an expansive view, one that might encapsulate modern trends in conflict and still burgeoning developments in the law? These questions arise in a range of international legal issues, such as Alien Tort Statute litigation in the U.S., but are particularly important in the IHL arena, where the pace of developments on the ground is extremely quick and customary law often develops “in the reverse”, based on reactions to violations rather than on statements of *opinio juris*.<sup>54</sup>

Finally, examining how courts treat *comparative, regional and international jurisprudence* can help determine both how welcoming courts are to the application of IHL in general and, more specifically, how courts are likely to view and interpret the content of IHL. A greater comfort level with non-national jurisprudence will likely correspond with a less rigid fo-

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<sup>51</sup> See Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 469, 480 (2002); see also MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 71 (1988) (explaining that some monist countries automatically enforce treaties while other dualist countries have a more common two-step process).

<sup>52</sup> Military Commission Act of 2006, 10 U.S.C.A. § 948b (2009); see also e.g., *Hamdan*, 415 F.3d at 40 (holding, in part, that the 1949 Geneva Conventions do not give an enemy combatant the right to enforce its provisions in court), *rev'd*, *Hamdan*, 548 U.S. at 560 (holding that the Military Commissions Act failed to satisfy the Geneva Conventions); *Noriega v. Pastrana*, 564 F.3d 1290, 1297 (11th Cir. 2009) (holding that the Military Commissions Act prevented former Panamanian leader Manuel Noriega from using the Geneva Conventions to challenge his extradition to France).

<sup>53</sup> See generally Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 348–49 (1987).

<sup>54</sup> See Jonathan B. Lancton, *The Alien Tort Statute and Customary International Law: The Judicial Albatross Hanging Around the Executive's Neck*, 47 HOUS. L. REV. 1081, 1100–09 (2010) (explaining the difference between a state's actions and its statements, or *opinio juris*).

cus on the singularity of domestic law and greater ease in incorporating international law in general. In the area of IHL, this translates into a broader interpretation of IHL beyond the domestic lens, raising the potential of a richer treatment of the issues in the case and how the law can be applied. The relationship between regional or international courts and national courts is an important piece of this analysis as well. Within the European system, governments and national courts are bound by decisions of the European Court of Human Rights (ECHR). Any analysis of how domestic courts within Europe are incorporating or will incorporate IHL must therefore take into account how IHL issues arise and are or may be addressed in the ECHR.<sup>55</sup> The role of the *ad hoc* international criminal tribunals and special courts is far less defined with regard to the force of their jurisprudence as precedent in national courts, but understanding how various domestic courts treat this international jurisprudence is helpful in analyzing whether and how they will incorporate the content of the legal analysis and determinations in those cases.

#### IV. CONCLUSION

The effective implementation and enforcement of IHL in national courts does not begin and end with the matching of legal rights and obligations to facts on the ground. A more nuanced and sophisticated analysis of how, when and whether courts are likely to engage in IHL-specific legal analysis is critical to legal advocacy, jurisprudential predictability and operational decision-making. Thus, the strategic approach set forth above highlights a set of circumstances and factors that delineate when a court will take one approach rather than another, decisions that have direct impact on the outcome of cases and the future implementation of the law by political and military actors. Finally, this analysis helps to identify which courts are contributing to the continued development of IHL both through active judicial engagement with complex and challenging issues and by imposing judicial review on the executive branch.

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<sup>55</sup> See Michele D'Avolio, *Regional Human Rights Courts and Internal Armed Conflicts*, 2 INTERCULTURAL HUM. RTS. L. REV. 249, 284–85 (2007) (explaining although the ECHR is a human rights court, it has heard numerous cases addressing situations arising in armed conflict—such as in Chechnya—and therefore the relationship and its jurisprudence are a highly relevant factor).