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# WHAT IS THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN THE WAR ON TERROR?

Robert J. Delahunty\*  
John C. Yoo\*\*

## INTRODUCTION

What role, if any, does international human rights law (IHRL) have to play in situations of armed conflict? More specifically, does IHRL have any application to the conduct of the “war on terror”?<sup>1</sup> More specifically still, does IHRL partly or wholly displace the traditional law of armed conflict—as embodied, for instance, in the Hague and Geneva Conventions—in regulating the armed conflict that arises in the “war on terror”? We focus here on the last of these questions.

The predicate of that question is of course that the “war on terror”—meaning specifically, the conflict between the United States and al Qaeda and its affiliates—is an armed conflict subject to the Laws of Armed Conflict (LOAC), which are the rules of international law that regulate international armed conflicts.<sup>2</sup> The assumption that

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1. Although it appears that the leadership of the Obama Administration does not wish to speak of the “war on terror,” we shall use that term here and elsewhere. See *Clinton: Administration Has Stopped Using “War on Terror” Term*, FOX NEWS, Mar. 30, 2009, <http://www.foxnews.com/politics/first100days/2009/03/30/clinton-administration-stopped-using-war-terror-term/> (last visited Nov. 19, 2009). Regardless of the name that is preferred for it, an armed conflict between the United States and al Qaeda and its affiliates continues to be fought now, as in the Bush Administration, in Afghanistan, Pakistan, and elsewhere.

2. For discussion of this assumption, compare, for example, PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 128–34 (2008) (arguing that “the phrase ‘a war on terror’ is not an inapt metaphor, but rather a recognition of the way war is changing”), JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 1–17 (2006), Christopher Greenwood, *International Law and the “War Against Terrorism,”* 78 INT’L AFF. 301, 307–09, 314–16 (2002), and Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES L. 179, 183–85 (2004), available at <http://www.bepress.com/til/default/vol5/iss1/art7/>, with ROBERT JERVIS, *AMERICAN FOREIGN POLICY IN A NEW ERA* 46–51 (2005), Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457, 458–66 (2002), and Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT’L L. 369, 376–79 (2008). For a review of recent case law and legal scholarship on the circumstances in which an “armed conflict” exists, see MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* 114–23, 130

the “war on terror,” so understood, is such a conflict—and is not, or not only, a matter of domestic law enforcement—has been recognized by Congress,<sup>3</sup> the U.S. Supreme Court,<sup>4</sup> the UN Security Council,<sup>5</sup> and the North Atlantic Treaty Organization (NATO).<sup>6</sup> Other courts reviewing the legality of military actions in situations of terror that are similar to the United States’ conflict with al Qaeda have also concluded that the LOAC—as distinct from domestic criminal law—provides the appropriate rules of decision.<sup>7</sup> Yet the correct legal categorization of the conflict with al Qaeda is not obvious. It is plainly not a civil war or other “internal” armed conflict, such as the conflicts to which Additional Protocol II paradigmatically applies.<sup>8</sup> It

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(2009). We use the term “law of armed conflict” (LOAC) in preference to the term “international humanitarian law” (IHL), which was introduced by the International Committee of the Red Cross in the early 1950s and has since largely supplanted the older term “law of war.” See Dieter Schindler, *Significance of the Geneva Conventions for the Contemporary World*, 81 INT’L REV. RED CROSS 715, 715 (1999). While “international humanitarian law” alludes, quite properly, to the humanitarian considerations reflected in the legal regime that the term designates, it is apt to convey the belief that IHL is subsumed within, or derived from, international *human rights* law. That, of course, is the very question at issue here. To avoid skewing the analysis from the outset, therefore, we have used the still-common term “LOAC.”

3. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

4. Hamdan v. Rumsfeld, 548 U.S. 557, 594–95 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

5. S.C. Res. 1368, ¶4, U.N. Doc. S/RES/1368 (Sept. 12, 2001); U.N. Doc. S/RES/1373 (Sept. 28, 2001) (recognizing and reaffirming “the inherent right of individual or collective self-defense”); see also Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) (explaining and defending the U.S. position); Christopher Greenwood, *International Law and the Pre-Emptive Use of Force*, 4 SAN DIEGO INT’L L.J. 7, 17 (2003) (arguing that international law recognizes that the concept of armed attacks is not limited to state actions, and that al Qaeda’s September 11 attacks on the U.S. triggered a right of lawful self-defense).

6. See Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (Sept. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm> (last visited January 11, 2009).

7. See HCJ 769/02 Public Comm. Against Torture in Israel v. Gov’t of Israel [2006], ¶¶ 16–18, 21, available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/d14f3f94989b702fc12572d80043927b1?OpenDocument>; see also *id.* ¶ 2 (Rivlin, V.P., concurring); *id.* ¶ 7 (Beinisch, P., concurring). The Supreme Court of Israel rejected the plaintiffs’ argument that domestic Israeli criminal law should apply in the circumstances of the Second Intifada, and held instead that the LOAC provided the appropriate rules for deciding on the legality of Israel’s “targeted assassinations” policy.

8. See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 I.L.M. 1442 [hereinafter Protocol II]. Protocol II restricts its scope to conflicts in the territory of a state party between its armed forces and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” *Id.* art. I(1) (emphasis added). It is well understood that the coverage of Protocol II does not extend to all internal armed conflicts. See R.R. Baxter, *Modernizing the Law of War*, 78 MIL. L. REV. 165, 169 (1977); Captain Daniel Smith, *New Protections for Victims of International Armed Conflicts:*

is also not an “international” armed conflict in the sense of Common Article 2 of the Geneva Conventions,<sup>9</sup> nor is it a “war of national liberation” in the sense of Additional Protocol I.<sup>10</sup> Nonetheless, under the U.S. Supreme Court’s ruling in *Hamdan v. Rumsfeld*, it is an armed conflict “not of an international character” to which at least some elements of the LOAC apply.<sup>11</sup> We shall assume, then, that the conflict is best described as a “transnational” one between a nation state (the United States) and its allies, and a transnational terrorist group and its non-state affiliates.<sup>12</sup> Our question can thus be framed more precisely: what is the relationship between the LOAC and IHRL with regard to a transnational armed conflict of this kind?<sup>13</sup>

There are at least three reasons for narrowing the scope of the question, rather than attempting to address, in anything like a comprehensive fashion, the general topic of the relationship between the LOAC

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*The Proposed Ratification of Protocol II by the United States*, 120 MIL. L. REV. 59, 66–69 (1988). Customary international law relating to such “internal” armed conflicts is still evolving. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia gave a significant impetus to the development of rules for such conflicts in *Prosecutor v. Tadic*, Case No. IT-94-I, Judgment (July 15, 1999). See Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EURO. J. INT’L L. 265 (1996). For a summary and appraisal of the Appeals Chamber’s rulings, see CHRISTOPHER GREENWOOD, *International Humanitarian Law and the Tadic Case*, in *ESSAYS ON WAR IN INTERNATIONAL LAW* 457, 472–74 (2006).

9. See Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.T.S. 3316, 75 U.N.T.S. 135.

10. See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. I(4), June 8, 1977, 16 I.L.M. 1391 [hereinafter Additional Protocol I].

11. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006).

12. The conflict has many of the characteristics of what some scholars call “the new wars.” E.g., HERFRIED MÜNKLER, *THE NEW WARS* 10–16, 28 (Patrick Camiller trans., 2005); see also Robert J. Delahunty, *Is the Geneva POW Convention “Quaint”?*, 33 WM. MITCHELL L. REV. 1635, 1637–38 (2007); Robert J. Delahunty & John C. Yoo, *Thinking About Presidents*, 90 CORNELL L. REV. 1153, 1177–78 (2005) (reviewing *PRESIDENTIAL LEADERSHIP: RATING THE BEST AND THE WORST IN THE WHITE HOUSE* (James Taranto & Leonard Leo eds., 2004)). See generally AZAR GAT, *WAR IN HUMAN CIVILIZATION* 637–57 (2006) (discussing the changing nature of contemporary warfare); ARCHER JONES, *THE ART OF WAR IN THE WESTERN WORLD* 709–11 (1987) (analogizing contemporary terrorism to raiding strategies from earlier, “non-conventional” armed conflicts in which low ratios of force to space prevailed, and suggesting that “conventional” military campaigns will have significantly less effectiveness in the future than they enjoyed during the Napoleonic wars or World War II).

13. We realize that our decision not to examine the question of the applicability of IHRL to internal armed conflicts limits the scope of the present Article. In the post-1945 world, civil wars have been the most deadly form of armed conflict. One study has estimated the 1945–1999 direct death toll for 127 civil wars at 16.2 million, or about five times the count for the 3.3 million battle deaths in 25 international armed conflicts of that period. James D. Fearon & David D. Laitin, *Ethnicity, Insurgency and Civil War*, 97 AM. POL. SCI. REV. 75, 75 (2003). Another study has found that of the 111 armed conflicts recorded for the period 1989–2000, only 7 were international. Peter Wallensteen & Margareta Sollenberg, *Armed Conflict, 1989–2000*, 38 J. PEACE RES. 629, 632 tbl.II (2001).

and IHRL. First, we shall be concerned here primarily with that part of the LOAC that deals with *jus in bello*, the regulation of the *conduct* of hostilities and belligerent occupations—or, as it is still often called, “Hague/Geneva law”<sup>14</sup>—rather than with the part that deals with *jus ad bellum*, the decision to initiate or respond to hostilities.<sup>15</sup> Likewise, we do not attempt to deal here with the part of the LOAC—sometimes called *jus post bellum*—that deals with the place of IHRL in belligerent occupations.<sup>16</sup> Second, the field of IHRL has simply become too extensive to permit useful generalizations. For example, some international human rights treaties, such as the Genocide Convention, are plainly and uncontroversially applicable in situations of armed conflict.<sup>17</sup> More debatably, human rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>18</sup> have been held applicable to international armed conflicts through judicial decision making.<sup>19</sup> Third, some significant provisions of the LOAC can themselves fairly be characterized as “human rights law.” For example, Common Article 3 of the Geneva Conventions, which has widely been understood to “regulate[ ] the relationship between governments and their own nationals in the event of an internal armed conflict,” could well be said to “con-

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14. See, e.g., L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 30–36 (2d ed. 2000); JEAN PICTET, *THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 8–10 (1966).

15. On the distinction and overlap between contemporary *jus ad bellum* and *jus in bello*, see Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 *REV. INT’L STUDIES* 221 (1983). See also Yoram Dinstein, *Comments on War*, 27 *HARV. J.L. & PUB. POL’Y* 877 (2004).

16. For a survey of earlier views on that topic and an original analysis of the issue, see Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 *AM. J. INT’L L.* 580, 589–95 (2006).

17. Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (declaring that genocide “whether committed in time of peace or in time of war” is an international crime).

18. See International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

19. See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georg. v. Russ.), 2008 I.C.J. 4 (Oct. 15), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=GR&case=140&k=4d>. A narrowly divided court held, by an 8-7 vote, that it had jurisdiction over Georgia’s complaint, which alleged that Russia had engaged in violations of the International Convention on the Elimination of All Form of Racial Discrimination (CERD) while providing military assistance to secessionist forces in South Ossetia and Abkhazia. The court rejected Russia’s arguments that (1) its dispute with Georgia arose not under the CERD but under the LOAC, and (2) the ostensibly relevant provisions of the CERD did not apply extraterritorially, meaning that the International Court of Justice (ICJ) was without jurisdiction. Seven dissenting judges agreed with Russia; they would have held that the Court did not have jurisdiction and that the case was properly controlled by the LOAC rather than the CERD. See Cindy Galway Buys, *Introductory Note to the International Court of Justice’s Order for Provisional Measures, in Georgia v. Russian Federation*, 47 *I.L.M.* 1010, 1010–11 (2008).

stitute[ ] a kind of human rights provision.”<sup>20</sup> And Article 75 of Additional Protocol I, which sets forth certain fundamental guarantees for enemy captives in the hands of a party to a conflict, is derived from the landmark 1966 International Covenant on Civil and Political Rights (ICCPR).<sup>21</sup>

To sharpen the discussion, therefore, we will concentrate on the applicability of the ICCPR to the conduct of hostilities in the “war on terror.” More narrowly still, we will consider the applicability of ICCPR Article 6(1)—which guarantees that “[n]o one shall be arbitrarily deprived of his life”—to combat operations in the “war on terror” by U.S. Armed Forces outside the United States.

One advantage of this specific focus is that it will enable us to examine, within the brief compass of this Article, the legality of the United States’ use of unmanned Predator drone missiles to kill suspected al Qaeda targets, such as the incident involving the killing in Yemen on November 3, 2002 of Qaed Salim Sinan al-Harethi—reput-

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20. Schindler, *supra* note 2, at 715, 717; *see also* Stefan Oeter, *Civil War, Humanitarian Law and the United Nations*, 1 MAX PLANCK Y.B. U.N. L. 195, 201–02 (1997) (asserting that Common Article 3 embodies “a minimum standard that restricts the freedom of states to use force against civil war opponents by guaranteeing a series of safeguards for wounded, prisoners and members of the civilian population”); Smith, *supra* note 8, at 64–65 (arguing that Common Article 3 “provides some minimum protections for victims of internal armed conflicts, while avoiding any recognition of the rebel forces or any rebel entitlement to prisoner of war status. . . . It represented the first internationally accepted law that regulated a state’s treatment of its own nationals in internal armed conflicts.”); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 25 (2004). To be sure, the U.S. Supreme Court in *Hamdan* extended the application of Common Article 3 beyond “internal” armed conflicts to include transnational conflicts (and, indeed, to *all* non-international armed conflicts) such as that with al Qaeda. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006). Previously, however, the term “non-international armed conflicts” in Common Article 3 had been interpreted specifically to mean “civil wars, internal disorders or political unrest.” JEAN PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* 53 (1975).

[T]he view that Common Article 3 “applies automatically to [non-international] armed conflict is simply not accepted in practice,” wrote one disinterested scholar some years before the *Hamdan* litigation. In that case, the U.S. Supreme Court saw fit to resolve ambiguities over Common Article 3 by reference to Article 75 of the Geneva Additional Protocol II. However, America has not ratified this treaty, and though the United States regards portions of Article 75 as reflective of customary law, this concession is not dispositive of the matter where evidence of state practice indicates otherwise. In any event, the Additional Protocol confers its rights only contingently, upon a display of some reciprocity by nonstate actors.

OSIEL, *supra* note 2, at 52–53; *see also* Robert J. Delahunty, *supra* note 12, at 1639–41 (marshaling evidence supporting the traditional pre-*Hamdan* interpretation of Common Article 3); Michael Schmitt, *Rethinking the Geneva Conventions, in Crimes of War Project* (Jan. 30, 2003) (observing that the law of non-international armed conflict under Common Article 3 does not neatly fit the conflict with al Qaeda), available at <http://www.crimesofwar.org/expert/geneva-conventions/gc-schmitt.html>.

21. *See International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171. For an analysis of the derivation, *see Roberts, supra* note 16, at 591.

edly a senior al Qaeda operative—while he was traveling with five companions in a car.<sup>22</sup> Citing the ICCPR, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions took the position that the attack constituted a clear case of extrajudicial killing. The United States, in reply, maintained that the ICCPR had no application to the incident on the grounds that “[t]he conduct of a government in legitimate military operations, whether against al Qaeda operatives or any other legitimate military target, would be governed by the international law of armed conflict,” rather than by IHRL.<sup>23</sup> The United States’ position was consistent with its longstanding view that during armed conflict, “[a]ttacks on individual [military] officers have been authorized and their legality has been accepted without significant controversy.”<sup>24</sup> The Bush Administration’s practice was also consistent with the policy of the United States well before the attacks of 9/11: on August 20, 1998, President Bill Clinton ordered Tomahawk cruise missiles to attack al Qaeda training camps in Khost, Afghanistan, where intelligence information indicated that Osama bin Laden and other senior al Qaeda leaders would be meeting. The Clinton Administration justified the attacks as lawful self-defense under Article 51 of the UN Charter.<sup>25</sup> Other Western nations, including Austra-

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22. See David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16; James Risen & David Johnston, *Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, at 11; James Risen & Judith Miller, *C.I.A. Is Reported to Kill a Leader of Qaeda in Yemen*, N.Y. TIMES, Nov. 5, 2002, at A1. The use of unmanned drones by the United States to kill al Qaeda and Taliban suspects has continued since that incident. U.S. drones were reported to have targeted and killed two al Qaeda operatives, Rashid Rauf and Abu Zubair al-Masri, in northern Pakistan. See Zahid Hussain & Matthew Rosenberg, *Officials Say U.S. Strike Kills British Militant in Pakistan*, WALL ST. J., Nov. 24, 2008, at A14. Likewise, U.S. drone missiles are thought to have killed Pakistani Taliban commander Haji Omar Khan in a raid in October 2008. See *Pakistani Taliban “Commander Killed”*, AL JAZEERA, Oct. 27, 2008, available at 2008 WLNR 20460431.

23. See U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶¶ 611–12, U.N. Doc. E/CN.4/2004/7/Add.1 (Mar. 24, 2004). See generally NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* (2008), reviewed in Michael N. Schmitt, *Books Reviews*, 103 AM. J. INT’L L. 813 (2009).

24. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 120 (1989). As former Judge Sofaer went on to point out, “[A]mong the most famous of these [killings] was the deliberate downing by the United States on April 18, 1943, of a Japanese military aircraft known to be carrying Admiral Yamamoto.” *Id.* at 120–21.

25. The missile strikes in Afghanistan were accompanied by simultaneous attacks on the al Shifa pharmaceutical plant in Sudan, which was suspected of being a link in an al Qaeda nerve gas manufacturing plant. The Clinton Administration argued that the attacks were justifiable as lawful self-defense under Article 51 of the UN Charter, thus implicitly assuming the applicability of a “war” paradigm to the conflict with al Qaeda. Indeed, then-National Security Adviser Sandy Berger described the attack in Afghanistan as directed against “a military target,” and anonymous Administration sources stated that the attack was designed to kill Osama bin Laden

lia, have engaged in targeted killings of suspected Taliban leaders and have also defended the practice as lawful.<sup>26</sup> Indeed, “[m]ost states decline to condemn the successful targeting of terrorist leaders, thereby indicating their view that the practice is permissible. Even Human Rights Watch declined to condemn the 2002 U.S. killing of an Al Qaeda leader and his associates in Yemen.”<sup>27</sup>

The Obama Administration has continued the practice of using missiles to target and kill suspected al Qaeda and Taliban figures.<sup>28</sup> President Obama’s Defense Secretary, Robert Gates, testified in January 2009 before the Senate Armed Services Committee that “both President Bush and President Obama have made clear that we will go after al Qaeda wherever al Qaeda is. And we will continue to pursue this [policy].”<sup>29</sup> It is reported that unmanned drones have become among the U.S. military’s favorite weapons in the conflicts in Iraq and Afghanistan—including for use in targeting suspected terrorist compounds—and the Obama Administration is said to be preparing a

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and as many of his associates as possible. Several states expressed support, or at least understanding, for the attacks, including Australia, France, Germany, Japan, Spain, and the U.K. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT’L L. 161, 163 (1999). For legal analyses close in time to the events, see W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT’L L. 3, 47–49 (1999); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT’L L. 559 (1999).

26. See *ADF’s Taliban Assassinations Revealed*, AUSTL. BROADCASTING COMPANY NEWS, Nov. 27, 2008, <http://www.abc.net.au/news/stories/2008/11/27/2431153.htm> (last visited Nov. 19, 2009).

This body of international law is not pacifist law. It does allow killing of enemy combatants and civilians who take a direct part in hostilities. . . . Just as it’s also legal for the Taliban to hunt down an Australian SAS person or anybody on the Australian side, or any of the allied sides.

*Id.* (quoting Tim McCormack, Professor of Humanitarian Law at Melbourne University); see also Emma Rogers, *Aust Forces Killed “High-Ranking” Taliban Commander*, AUSTL. BROADCASTING COMPANY NEWS, Dec. 11, 2008, <http://www.abc.net.au/news/stories/2008/12/11/2443966.htm> (last visited Nov. 19, 2009) (“On at least one occasion we have been accused of assassinations—I reject this vehemently. . . . What we do is lawful in war, it is conducted in a moral, ethical and legal framework and our actions are always subject to constant review.” (quoting Major-General McOwan, Australian commander of Special Operations Task Group)).

27. OSIEL, *supra* note 2, at 55.

28. See Chris Brummitt, *Suspected US Missile Strike Kills 18 in Pakistan*, ABC NEWS, Jan. 23, 2009, available at <http://abcnews.go.com/print?id=6714183>; Zahid Hussain & Matthew Rosenberg, *Missile Strike Kills Taliban Militants in Pakistan*, WALL ST. J., Feb. 17, 2009, at A8; R. Jeffrey Smith, Candace Rondeaux & Joby Warrick, *2 U.S. Airstrikes Offer a Concrete Sign of Obama’s Pakistan Policy*, WASH. POST, Jan. 24, 2009, at A1; Nahal Toosi, *Suspected US Missiles Kill 7 in Northwest Pakistan*, ABC NEWS, Mar. 1, 2009, <http://abcnews.go.com/print?id=6983224>.

29. *Gates Says Missile Attacks in Pakistan Will Continue*, CNN, Jan. 28, 2009, <http://edition.cnn.com/2009/POLITICS/01/27/gates.pakistan.afghanistan/>.



budgetary request for the development of new drone systems.<sup>30</sup> Indeed, as the strategic analyst Andrew Bacevich has written, unmanned drone missiles have become President Obama's "weapon of choice for an expanded Israeli-style program of targeted assassination in Pakistan."<sup>31</sup> And as of late 2009, the Obama Administration had used drone strikes more frequently than the Bush Administration—a matter on which the Obama Administration prided itself.<sup>32</sup> We therefore think it is illuminating to consider the relationship of IHRL to the "war on terror" in the specific context of cases such as this.<sup>33</sup>

In Part II, we survey the origins and growth of the LOAC and IHRL, and we discuss the beginnings of their asserted "convergence."<sup>34</sup> In Part III.A, we restate and defend the traditional view that the LOAC and IHRL fundamentally differ in their scope, purposes, and protective concerns.<sup>35</sup> Then, in Part III.B, we argue that the ICCPR, in particular, was not intended, and should not be understood, to regulate the conduct of armed conflicts that are otherwise governed by the LOAC.<sup>36</sup> In Part III.C, we address certain objections that have been raised against this construction of the ICCPR.<sup>37</sup> Finally, in Part IV, we apply the results we have reached to the controversy over the incident involving Qaed Salim Sinan al-Harethi.<sup>38</sup>

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30. See Christopher Drew, *Despite Shortcomings, Drones Now Among Military's Favorite Weapons*, STAR-TRIB., Mar. 17, 2009, at A9.

31. Andrew J. Bacevich, Op-Ed, *Obama's Sins of Omission*, BOSTON GLOBE, Apr. 25, 2009.

32. See Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer#ixzz0fiFqU5zy](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer#ixzz0fiFqU5zy).

According to a just completed study by the New America Foundation, the number of drone strikes has risen dramatically since Obama became President. During his first nine and a half months in office, he has authorized as many C.I.A. aerial attacks in Pakistan as George W. Bush did in his final three years in office. The study's authors, Peter Bergen and Katherine Tiedemann, report that the Obama Administration has sanctioned at least forty-one C.I.A. missile strikes in Pakistan since taking office—a rate of approximately one bombing a week. So far this year, various estimates suggest, the C.I.A. attacks have killed between three hundred and twenty-six and five hundred and thirty-eight people. Critics say that many of the victims have been innocent bystanders, including children.

33. See Yoo, *supra* note 2, at 48–69 (analyzing the legality of this incident).

34. See *infra* notes 39–86 and accompanying text.

35. See *infra* notes 87–101 and accompanying text.

36. See *infra* notes 102–142 and accompanying text.

37. See *infra* notes 143–166 and accompanying text.

38. See *infra* notes 167–171 and accompanying text.

## II. A SURVEY OF ARMED CONFLICT AND INTERNATIONAL HUMAN RIGHTS LAW

The basic relationships between the LOAC and IHRL, though much studied, remain unsettled.<sup>39</sup> Whether, as is sometimes asserted,

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39. See GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 68–79 (1994); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF ARMED CONFLICT* 25–29 (2004); OSIEL, *supra* note 2, at 111–48; CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 241–66 (2003); George H. Aldrich et al., *Human Rights and Armed Conflict: Conflicting Views*, 67 AM. SOC. INT'L L. PROC. 141 (1973); Philip Alston, Jason Morgan-Foster & William Abresch, *The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"*, 19 EUR. J. INT'L L. 183 (2008); Kenneth Anderson, *U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms*, 30 FORDHAM INT'L L.J. 455 (2007); R.R. Baxter, *Modernizing the Law of War*, 78 MIL. L. REV. 165 (1977); Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RTS. Q. 703 (1997); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72 (Louis R. Henkin ed., 1981); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005); Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 1993 INT'L REV. RED CROSS 94; Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 INT'L REV. RED CROSS 881 (2006); G.I.A.D. Draper, *Humanitarian Law and Human Rights*, 1979 ACTA JURIDICA 193, 199; G.I.A.D. Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflicts*, 1 ISRAELI Y.B. HUM. RTS. 191 (1971); Asbjørn Eide, *The Laws of War and Human Rights—Differences and Convergences*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET* 675 (Christophe Swinarski ed., 1984); Gerhard von Glahn, *The Protection of Human Rights in Time of Armed Conflicts*, 1 ISRAEL Y.B. HUM. RTS. 208 (1971); Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 86 INT'L REV. RED CROSS 789 (2004); Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 1998 INT'L REV. RED CROSS 409; Heike Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 265 (2006); Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L REV. RED CROSS 737 (2005); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000); H. Meyowitz, *Le Droit de la Guerre et les Droits de l'Homme*, 88 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER 1059 (1972); Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 1998 INT'L REV. RED CROSS 481; R. Quentin-Baxter, *Human Rights and Humanitarian Law—Confluence or Conflict?*, 9 AUST. Y.B. INT'L L. 94 (1985); Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11 (1995); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006); A.H. Robertson, *Humanitarian Law and Human Rights*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET* 793 (Christophe Swinarski ed., 1984); Dietrich Schindler et al., *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AM. U. L. REV. 935 (1982); Dietrich Schindler, *The International Committee of the Red Cross and Human Rights*, 1979 INT'L REV. RED CROSS 3; Sabine von Schorlemer, *Human Rights: Substantive and Institutional Implications of the War Against Terrorism*, 14 EUR. J. INT'L L. 265 (2003); Waldemar A. Solf, *Human Rights in Armed Conflict: Some*

they are rooted in a common principle of respect for humanity,<sup>40</sup> the two bodies of law grew up independently, and only in recent decades have they been seen as “converging.” The traditional view of their relationship was succinctly described by Jean Pictet, the eminent legal expert for the International Committee of the Red Cross (ICRC), when he stated that the LOAC “is valid only in the case of armed conflict while human rights are essentially applicable in peacetime.”<sup>41</sup> Likewise, the British legal scholar Christopher Greenwood has explained that traditionally

[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.<sup>42</sup>

According to the great Dutch historian Johan Huizinga, the rules of war have ultimately stemmed from war’s “agonistic or ludic” quality: in contrast to “the very earliest phases of culture,” in which violence expressed itself “in predatory expeditions, assassinations, man-hunts,

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*Observations on the Relationship of Human Rights Law to the Law of Armed Conflict*, in *WORLD IN TRANSITION: CHALLENGES TO HUMAN RIGHTS, DEVELOPMENTS AND WORLD ORDER* 41 (Henry Hyunwook Han ed., 1979); Federico Sperotto, *Targeted Killings in Response to Security Threats: Warfare and Humanitarian Issues*, 8 *GLOBAL JURIST* art. 10 (2008); Dale Stephens, *Human Rights and Armed Conflict—The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 *YALE HUM. RTS. & DEV. L.J.* 1 (2001); Raúl Emilio Vinuesa, *Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*, 1 *Y.B. INT’L HUMANITARIAN L.* 69 (1998); Watkin, *supra* note 20; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion and Protection of Human Rights, *Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law*, U.N. Doc. E/CN.4/Sub.2/2005/14 (June 21, 2005) (prepared by Fancoise Hampson & Ibrahim Salama); Steven Haines et al., *Human Rights: Their Place on the Battlefield*, in *THE LAW OF ARMED CONFLICT: PROBLEMS AND PROSPECTS* (2005), available at [http://www.chathamhouse.org.uk/files/3252\\_ilarmedconflict.pdf](http://www.chathamhouse.org.uk/files/3252_ilarmedconflict.pdf); Yuval Shany, *Human Rights and Humanitarian Law As Competing Legal Paradigms for Fighting Terror* (Hebrew Univ. of Jerusalem Faculty of Law, Research Paper No. 23-09, Nov. 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1504106](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1504106).

40. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Dec. 10, 1998), 38 *I.L.M.* 317 (1999); Theodore Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT’L L.* 239, 245 (2000) (“The fact that the law of war and human rights law stem from different historical and doctrinal roots has not prevented the principle of humanity from becoming the common denominator of both systems.”); OSIEL, *supra* note 2, at 127–28 (criticizing the claim that both LOAC and IHRL are rooted in a common idea of human dignity).

41. PICTET, *HUMANITARIAN LAW AND PROTECTION OF WAR VICTIMS* 15 (1975); see also PICTET, *supra* note 14, at 12 (“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.”).

42. Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 1, 12 (Dieter Fleck 2d ed. 2008).

head-hunting” and the like, Huizinga contends that the “idea of warfare” arose only when “a special condition of general hostility solemnly proclaimed is recognized as distinct from individual quarrels and family feuds.”<sup>43</sup> In archaic society, this idea elevated mere violence “to the level of holy causes . . . ; it now forms part of that complex of ideas comprising justice, fate, and honour.”<sup>44</sup> Huizinga finds that “rules” limit the nature and degree of violence even among small boys and young dogs at play.<sup>45</sup> Not remarkably, therefore, such rules are to be found throughout human history and in a great variety of places and circumstances. The LOAC is in its origins a centuries-old body of law,<sup>46</sup> evidence of which can be identified in the ancient world,<sup>47</sup> including the societies of Israel,<sup>48</sup> Greece,<sup>49</sup> Rome,<sup>50</sup> China,<sup>51</sup>

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43. J. HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* 95 (1950).

44. *Id.* at 95.

45. *Id.* at 1, 89.

46. See generally *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 478–82 (Weeramantry, J., dissenting); MARTIN VAN CREVELD, *THE CULTURE OF WAR* 129–49 (2008) (surveying rules of war in different periods and societies); Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 1, 12–23 (Dieter Fleck ed. 1995) (summarizing the history of *jus in bello*).

47. For a survey of the law of war in the ancient Mediterranean civilizations of Israel, Greece, and Rome, see DAVID J. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* 242–49 (2001). A more skeptical approach is found in ARTHUR M. ECKSTEIN, *MEDITERRANEAN ANARCHY, INTERSTATE WAR, AND THE RISE OF ROME* 37–42, 79–80 (2009).

48. See *Deuteronomy* 20:19–20; *2 Kings* 6:22–23; see also GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 149–52 (1953) (discussing Biblical *jus in bello* as rabbinically elaborated); Rabbi Michael J. Brody, *Battlefield Ethics in the Jewish Tradition*, 95 *PROC. AM. SOC. INT’L L.* 92 (2002); Major Guy B. Roberts, *Judaic Sources of and Views on the Laws of War*, 37 *NAVAL L. REV.* 221, 230–33 (1988). See generally 2 WALTHER EICHRODT, *THEOLOGY OF THE OLD TESTAMENT* 336 (J.A. Baker trans., 1967) (arguing that Israelite laws of war mark “a weakening of the tendency to ascribe autonomous validity to the political sphere”). For the modern *Ethical Code of Israeli Defense Forces*, see [http://www.jewishvirtuallibrary.org/jsource/Society\\_&\\_Culture/IDF\\_ethics.html](http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/IDF_ethics.html).

49. See RICHARD NED LEBOW, *THE TRAGIC VISION OF POLITICS: ETHICS, INTERESTS AND ORDERS* 164 (2003) (summarizing Thucydides’ account of common Greek customs of war); J.E. LONDON, *SOLDIERS & GHOSTS: A HISTORY OF BATTLE IN CLASSICAL ANTIQUITY* 41–57 (2005) (analyzing the conventions of hoplite warfare); Adriaan Lanni, *The Laws of War in Ancient Greece* (Harvard Law Sch. Pub. Law Research Paper, Paper No. 07-24, 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1069874](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1069874). In *The Republic*, Plato’s Socrates, when addressing the question “How shall our soldiers treat their enemies?,” lays down certain laws of war applicable to conflicts between Greek city-states: that Greeks not enslave each others’ cities or citizens; that they not despoil enemy dead, except of armor; that spoils not be offered at temples; and that enemy territory and houses not be devastated. See *THE REPUBLIC OF PLATO* 165–68 (Benjamin Jowett trans., 3d ed. 1888). Socrates makes clear that these rules apply to conflict between Greeks and other Greeks, which he considers a kind of “civil war,” but not (at least in full force) to war with “barbarians,” which he takes to be “war” in the proper sense. In warring against non-Greeks, Socrates says, Greeks may treat their enemies as they treat other Greeks in actual practice. See *id.*

50. See ALAN WATSON, *INTERNATIONAL LAW IN ARCHAIC ROME: WAR AND RELIGION* 50–52 (1993) (noting that different legal rules were applied to the treatment of a conquered people or

and India,<sup>52</sup> as well as in classical Islam<sup>53</sup> and in medieval Christian Europe.<sup>54</sup> Beginning in the second half of the nineteenth century, *jus in bello* came to be codified in such landmark instruments as the 1863 Lieber Code (which was used by the Union Army in the American Civil War<sup>55</sup> and which is regarded as the origin of “Hague Law”), the 1864 Geneva Convention for the Amelioration of the Condition of the

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city depending on whether it surrendered “in trust” [“in fidem”] or “into the dominion” [“in dicionem”]). The great Roman orator and politician Cicero expounded certain rules of war in his *De Officiis* (*Of Moral Duties*). See generally THOMAS L. PANGLE & PETER J. AHRENSDORF, *JUSTICE AMONG NATIONS: ON THE MORAL BASIS OF POWER AND PEACE* 66–70 (1999). Of relevance here, Cicero distinguishes between lawful and unlawful combatants:

Popilius, as commander, held control of a province. A son of Cato served his first campaign in his army. When Popilius saw fit to discharge one of the legions, he discharged also Cato’s son, who served in that same legion. But when the youth remained in the army for love of military service, Cato wrote to Popilius that if he permitted his son to stay, he must make him take a second oath of military duty, else, the term of the first oath having expired, he could not lawfully fight with the enemy. . . . There is, indeed, extant a letter of Marcus Cato the elder to his son Marcus, in which he writes that he has heard of his son’s discharge by the consul, after service in Macedonia in the war with Perseus, and warns him not to go into battle, inasmuch as it is not right for one who is no longer a soldier to fight with the enemy.

1 ETHICAL WRITINGS OF CICERO 24 (Andrew Peabody trans., 1887); see also *id.* 385 (asserting that pirates are not belligerents but “common foe of all”).

51. See Huizinga, *supra* note 43, at 97.

52. See Nagendra Singh, *Armed Conflicts and Humanitarian Laws of Ancient India*, in Swinarski, *supra* note 39, at 532; see also JOHN FERGUSON, *WAR AND PEACE IN THE WORLD’S RELIGIONS* 30–31 (1977); K.N. Upadhyaya, *The Bhagavad Gītā on War and Peace*, 19 PHIL. E. & W. 159 (1969).

53. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 2 (May 24) (Tarazi, J., dissenting); Sohail H. Hashmi, *Interpreting the Islamic Ethics of War and Peace*, in ISLAMIC POLITICAL ETHICS: CIVIL SOCIETY, PLURALISM AND CONFLICT 194 (Sohail H. Hashmi ed., 2002); JAMES TURNER JOHNSON, *THE HOLY WAR IDEA IN WESTERN AND ISLAMIC TRADITIONS* 115–27 (1997); JOHN KELSAY, *ISLAM AND WAR: A STUDY IN COMPARATIVE ETHICS* 57–76 (1993); MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 102 (1955) (quoting the instructions of Abu Bakr on the first Syrian expedition); RUDOLPH PETERS, *JIHAD IN CLASSICAL AND MODERN ISLAM* 9–17 (1996) (collecting *ahādīth* [sayings of the prophet Muhammad]); Ella Landau-Tasseron, “Non-Combatants” in *Muslim Legal Thought* (Hudson Institute, Paper No. 3, Dec. 2006), [http://www.currenttrends.org/docLib/20061226\\_NoncombatantsFinal.pdf](http://www.currenttrends.org/docLib/20061226_NoncombatantsFinal.pdf).

54. See PHILIPPE CONTAMINE, *WAR IN THE MIDDLE AGES* 260–302 (Michael Jones trans., 1984); L. C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 23–25 (2d ed. 2000); JOHNSON, *supra* note 53, at 102–12; RICHARD W. KAEUPER, *CHIVALRY AND VIOLENCE IN MEDIEVAL EUROPE* 169–85 (1999) (discussing the differing implications of ideals of chivalry for knights and for non-combatants); RICHARD NED LEBOW, *A CULTURAL THEORY OF INTERNATIONAL RELATIONS* 257 (2008); THEODORE MERON, *Medieval and Renaissance Ordinances of War: Codifying Discipline and Humanity*, in *WAR CRIMES LAW COMES OF AGE* 1, 1–10 (1998); PANGLE & AHRENSDORF, *supra* note 50, at 73–88.

55. See General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code], reprinted in 2 FRANCES LIEBER, *CONTRIBUTIONS OF POLITICAL SCIENCE* 245, 247–74 (1881), available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

Wounded in Armies in the Field<sup>56</sup> (from which later “Geneva Law” derives), and the 1868 Declaration of St. Petersburg<sup>57</sup> (which first introduced restrictions on the use of certain types of weapons in war). The Hague Conferences of 1899 and 1907 issued important conventions that regulate the conduct of warfare and the use of weaponry, including the 1907 Convention (IV) with Respect to the Laws and Customs of War on Land.<sup>58</sup> The four Geneva Conventions of 1949<sup>59</sup> (replacing the two Geneva Conventions of 1929)<sup>60</sup> introduced new and more extensive protections for the victims of armed conflicts, including especially non-combatants in enemy or occupied territory. Owing largely to the demands of Third World and Communist bloc nations,<sup>61</sup> the 1949 Conventions were significantly modified by two “Additional Protocols” in 1977.<sup>62</sup> The LOAC continues to undergo active development, as for instance in the draft convention regulating the use of cluster bombs, to which 110 nations agreed in May 2008.<sup>63</sup>

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56. Aug. 22, 1864, 22 Stat. 940, 129 Consol. T.S. 361. As Pictet notes, this convention marks the point at which the rules of *jus in bello* began to become multilateral. See PICTET, *supra* note 14, at 10–11.

57. See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297, available at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument>.

58. Convention (IV) Respecting the Laws and Customs of War on Land and in Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, available at <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6>.

59. See 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 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 II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva 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 IV].

60. See Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303.

61. See Antonio Cassese, *Wars of National Liberation and Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET, *supra* note 39, at 313.

62. See Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

63. See Convention on Cluster Munitions, May 30, 2008, available at [http://www.clusterconvention.org/downloadablefiles/ccm77\\_english.pdf](http://www.clusterconvention.org/downloadablefiles/ccm77_english.pdf).

IHRL also has a long and distinguished pedigree,<sup>64</sup> although in an internationalized form it can be said to have originated as recently as the 1948 Universal Declaration on Human Rights (Universal Declaration).<sup>65</sup> The Universal Declaration provided “for the first time a common comprehensive international standard” of human rights.<sup>66</sup> The drafting history of the Universal Declaration shows that the delegates understood that the Declaration would apply only in time of peace.<sup>67</sup> For the first two decades of the post-war period, IHRL had little or no discernible relationship to the LOAC, in part because United Nations bodies believed that by promoting the development of the LOAC, they would undermine hopes for a peaceful, Charter-governed world, and in part because the ICRC wished to preserve its independence.<sup>68</sup>

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64. See, e.g., MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 18–27 (2004) (surveying ancient sources); JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* 23–37 (2007) (providing a “thumbnail sketch” of the main western sources of IHRL, with an emphasis on the Calvinist tradition). Scholarly opinions on the question of the “foundations” of contemporary human rights doctrine in the early modern period are surveyed in Victoria Kahn, *Early Modern Rights Talk*, 13 *YALE J.L. & HUMAN.* 391 (2001).

65. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (Dec. 12, 1948) [hereinafter *Universal Declaration*]. For a discussion on the drafting and adoption of the Universal Declaration, see generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

66. Gérard Cohen Jonathan, *Human Rights Covenants*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 915, 915 (Rudolf Bernhardt ed., 1995).

67. See Kolb, *supra* note 39, at 412 (quoting the statement of Jiménez de Aréchaga that human rights “govern, in time of peace, an international community based on the principles of the United Nations”). Kolb finds that

[t]he absence of any discussion of the problem of war can be explained by the general philosophy which prevailed within the United Nations at the time. There seemed to be a tacit but nevertheless general consensus that the Declaration was intended for times of peace, of which the United Nations was the guarantor.

*Id.* at 412–13.

Parce que les auteurs de la Déclaration ont considéré le respect des droits de l’homme à l’intérieur de chaque État comme une condition capitale de la sauvegarde de la paix, c’est dans le seul cadre de la paix qu’ils ont envisagé ces droits et qu’ils se sont attachés à les définir. . . . [T]outes ces dispositions, qu’il faut compter parmi les clauses principales de la Déclaration . . . sont radicalement inapplicable aux rapports ennemis. Ces formules montrent que l’objet essentiel de la Déclaration . . . est de promouvoir l’établissement d’un droit constitutionnelle minimum uniforme . . . . [Because the authors of the Declaration considered the importance of human rights in each state as an essential condition to safeguarding peace, it was within the framework of peace that they envisioned these rights and that they defined these rights. . . . All of these provisions, that one must count among the most central in the Declaration . . . are completely inapplicable to enemy relations. These expressions show that the essential goal of the Declaration is to promote a minimally uniform constitutional law.]

MEYROWITZ, *supra* note 39, at 1082–83 (author’s translation).

68. See Kolb, *supra* note 39, at 410–11; Schindler, *supra* note 2, at 717.

It was understood from the early stages of the drafting of the Universal Declaration that it would not be self-executing, but rather would be implemented by a later treaty (or, as it turned out, a pair of treaties).<sup>69</sup> These implementing treaties—the 1966 ICCPR and its companion, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>70</sup>—were nearly two decades in the making, and they entered into force only in 1976.<sup>71</sup> Not long after these two Covenants were adopted by the UN General Assembly in 1966,<sup>72</sup> parts of the international community sought to introduce the norms propounded in these IHRL documents into the LOAC. This process—which Professor Theodor Meron has styled the “humanization” of the LOAC<sup>73</sup>—seems to have begun with the UN International Conference on Human Rights in 1968 in Teheran.<sup>74</sup> In a series of periodical resolutions dating from the same period, the UN General Assembly began to thread together the humanitarian requirements of the LOAC and the doctrines of IHRL.<sup>75</sup> The original “humanization” project may have reflected the belief that the then-nascent ICCPR

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69. See GLENDON, *supra* note 65, at 121, 139; see also 19 DEP'T STATE BULL. 751 (1948) (asserting that the Declaration “is not and does not purport to be a statement of law or of legal obligation”).

The *travaux préparatoires* [preparatory work] make it clear that the overwhelming majority of the speakers in the various organs of the United Nations did not intend the Declaration to become a statement of law or of legal obligations, but a statement of principles devoid of any obligatory character, and which would have moral force “only.”

Egon Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 1959 PROC. AM. SOC. INT'L L. 217, 218; see also Frede Castberg, *Natural Law and Human Rights: An Idea-Historical Survey*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 13, 31 (Asbjørn Eide & August Schou eds., 1968) (stating that the Universal Declaration “is not a binding agreement of international law but a proclamation of morally binding norms”). Indeed, the Preamble to the Declaration makes its non-binding character clear: “[E]very individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms. . . .” Universal Declaration, *supra* note 65 (emphasis added).

70. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

71. On the preparation of the ICCPR, see Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 39, at 32; Egon Schwelb, *Some Aspects of the International Covenants on Human Rights of December 1966*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *supra* note 69, at 103, 104–06.

72. See ICESCR, *supra* note 70; ICCPR, *supra* note 70.

73. Meron, *The Humanization of Humanitarian Law*, *supra* note 39, at 239.

74. See International Conference on Human Rights, Apr. 22–May 13, 1968, *Proclamation of Teheran*, at 3, U.N. Doc. A/CONF.32/41 (Apr. 13, 1968), reprinted in U.N. Pub. No. E.68.XIV.2 (1968); see also Kolb, *supra* note 39, at 419; Meyrowitz, *supra* note 39, at 1061–69.

75. See, e.g., Respect for Human Rights in Armed Conflicts, G.A. Res. 2444 (XXIII), U.N. Doc. A/RES/2444 (XXIII) (Dec. 9, 1968); G.A. Res. 2675 (XXV), sec. 1, U.N. Doc. A/RES/2675 (XXV) (Dec. 9, 1970) (“Fundamental human rights, as accepted in international law and laid



and ICESCR might be invoked to ameliorate armed conflicts such as the 1965 Indo-Pakistan war or the 1967–1970 Nigerian civil war. Equally, it may have stemmed from the desire of some of its proponents to constrain or embarrass militarily powerful nations such as the United States, then at war in Vietnam,<sup>76</sup> or Israel, whose regional dominance had just been demonstrated by its decisive victory in the 1967 Six-Day War.<sup>77</sup>

Whatever the original sources of the “convergence” of LOAC and IHRL, the United Nations Human Rights Committee (UNHRC)—the organ originally charged with monitoring compliance with the ICCPR—was extraordinarily aggressive in seeking to alter the LOAC.<sup>78</sup> In 1982, the UNHRC had the “supreme duty to prevent wars,” and it termed measures to avert nuclear war in particular to be

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down in international instruments, continue to apply fully [sic] in situations of armed conflict.”). According to Frits Kalshoven, Resolution 2444 gave

the starting shot . . . for an accelerated movement which brought the three currents: Geneva, The Hague and New York, together in one main stream. Governments, the United Nations Organization and the ICRC participated in it, and the debate concerned the rules of combat in the sense of The Hague and the protection of the victims of war in the sense of Geneva, as much as the promotion of the idea of international protection of human rights in armed conflicts.

FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 22–23 (1987).

76. As Kalshoven notes, Resolution 2444 was adopted “precisely in the year that the American bombardments of North Vietnam commenced.” KALSHOVEN, *supra* note 75, at 22.

77. See Draper, *Humanitarian Law and Human Rights*, *supra* note 39, at 194–95.

[T]he resolution [ ] adopted at Teheran purporting to weld human rights with the humanitarian law of armed conflict . . . was politically charged and primarily directed against the Israeli “occupation” of “Arab lands”. . . . In the period between 1968 and 1971 we witness in the organs of the UN a mounting endeavour to effect a fusion of the humanitarian law of war with human rights, which is not the outcome of accident. This movement . . . reflects the political currents flowing through the UN in those years. The junction of human rights and the humanitarian law of war was . . . profitable to the . . . Arab states in their perennial confrontation with Israel . . . .

*Id.*

78. The UNHRC was succeeded in 2006 by the United Nations Human Rights Council. See G.A. Res. 60/251, U.N. Doc. A/RES/60/25 (Mar. 15, 2006). See generally LAW AND PRACTICE OF THE UNITED NATIONS 461–69 (Simon Chesterman, Thomas M. Franck & David M. Malone eds., 2008); JAMES TRAUB, *THE BEST INTENTIONS: KOFI ANNAN AND THE UN IN THE ERA OF AMERICAN WORLD POWER* 413–14 (2006). The work of both the UNHRC and its successor, the Human Rights Council, has been severely criticized by commentators of various persuasions, including then-UN Secretary General Kofi Annan, who declared that the performance of the UNHRC “cast a shadow on the reputation of the United Nations system as a whole.” Warren Hoge, *Dismay over New Human Rights Council*, N.Y. TIMES MAG., Mar. 11, 2007, at 1.18. Likewise, a UN High-Level Panel reported that

[i]n recent years, the [Human Rights] Commission’s capacity to perform [its] tasks has been undermined by eroding credibility and professionalism. Standard-setting to reinforce human rights cannot be performed by States that lack a demonstrated commitment to their promotion and protection. We are concerned that in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others.

the “most important condition and guarantee for the safeguarding of the right to life” that is protected by ICCPR Article 6(1).<sup>79</sup> The leading commentator on the ICCPR has noted that this position entails that any killing in a war not permissible under the UN Charter is a

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U.N. Doc. A/59/565, ¶ 283 (Dec. 1, 2004). Others also argued that the UNHRC “routinely fell victim to gross human rights violators who gained a position on the body and devoted themselves to quashing resolutions criticizing anyone among their number.” James Traub, *Ban Ki-Moon vs. the Bad Guys*, N.Y. TIMES MAG., Nov. 5, 2006, at 6.17. Dissatisfaction with the UNHRC eventually led to demands for major reforms. Secretary General Annan proposed an overhaul of the UNHRC in 2005. His proposal included a requirement that an applicant for membership on the new Human Rights Council receive two-thirds support from UN member states in order to serve on that body. But Annan’s idea was rejected. Thus, the new Human Rights Council continues to include many states with poor human rights records, and it has again been selective in its monitoring activities. See Warren Hoge, *New Human Rights Council Brings Limited Change*, N.Y. TIMES, June 20, 2007, at A6; see also Ken Levine & Robert Leikind, *Keeping the Commitment to Dignity for All*, BOSTON GLOBE, Nov. 9, 2008, at A15.

The UN Human Rights Council . . . —a body that includes some of the world’s most repressive regimes, including Cuba, Saudi Arabia, and Sudan—has dedicated itself to the vilification of Israel. In the last two years, it has passed 22 resolutions condemning Israel, four criticizing Burma, and one directed at North Korea. In the same period, it has not passed a single resolution calling attention to human rights abuses in Zimbabwe, Iran, Tibet, the Congo, or Saudi Arabia, or to concerns in any of the 184 UN member states.

*Id.* Despite its short existence, disappointment with the Human Rights Council is already widespread. Václav Havel—the former Czech President, playwright, and human rights activist—recently derided the Council as “a farce.” See Václav Havel, Op-Ed., *A Table for Tyrants*, N.Y. TIMES, May 10, 2009, at A23. The *New York Times* has editorialized that the Council “ha[s] already fallen into the shameful pattern.” In contrast, “[t]he old, unreformed United Nations Human Rights Commission was selective and one-sided, but occasionally managed to do some good work.” Editorial, *A Discredit to the United Nations*, N.Y. TIMES, Nov. 21, 2006, at A28. U.S. Under-Secretary of State R. Nicholas Burns flatly stated that “[t]he Human Rights Council is a discredited institution. All it has done is to bash Israel; it has ignored North Korea, it has ignored Sudan and it has ignored Burma.” Warren Hoge, *U.S. Rebuke to Myanmar Is Defeated by U.N. Vetoes*, N.Y. TIMES, Nov. 13, 2007, at A6. Likewise, Kenneth Roth, the Executive Director of Human Rights Watch, has said that the Council has been “enormously disappointing, and the opponents of human rights enforcement are running circles around the proponents.” Hoge, *Dismay over New Human Rights Council*, *supra*. The Human Rights Council is not without its defenders. For example, when the international law scholar Richard Falk was asked whether “the Human Rights Council [has] established itself as an organization that investigates human rights abuses in a broad range of conflict zones, or is there some truth to the assertion that it singles out Israel?,” he replied,

There is no doubt that any political institution will establish priorities based on the concerns of its membership. From this perspective it’s not surprising that a focus should be placed on Israel and the Palestinian plight. . . . Limitation[ ] of resources, geopolitical pressures and blind spots help explain why some other situations involving serious human rights abuse are not addressed with comparable seriousness.

Linda Mamoun, *A Conversation with Richard Falk*, NATION, June 17, 2008. For a devastating critique of the Council, see Kenneth Anderson, *The Past, Present, and Future of the United Nations: A Comment on Paul Kennedy and the Parliament of Man* (Wash. Coll. of Law Research Paper No. 2008-70, 2008), available at <http://ssrn.com/abstract=1265833>.

79. See U.N. Hum. Rts. Comm’n., *General Comment 6*, § 2 (July 27, 1982), reprinted in U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003).

violation of Article 6(1)<sup>80</sup>—a conclusion plainly in tension with the pre-Charter LOAC developed at the Nuremberg Trials.<sup>81</sup> Further, in 1984, the UNHRC opined that the “designing, testing, manufacturing, possession and deployment of nuclear weapons are among the greatest threats to life which confront mankind,” and therefore, “[t]he production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.”<sup>82</sup> Under such interpretations as these, the ICCPR would subsume the law of weaponry—traditionally and currently a core element of the LOAC, which is hammered out in difficult and protracted negotiations among states, their militaries, and non-governmental organizations. Setting apart the question of the truth of the UNHRC’s assertions regarding nuclear weapons (there is considerable debate whether nuclear arsenals have tended to *reduce* the incidence of major war),<sup>83</sup> it is a far cry from the ICCPR’s original purposes to treat it as though it is authorized to regulate nuclear weaponry. Were that so, important international instruments—such as the 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water<sup>84</sup> or the 1968 Treaty on the Non-Proliferation of Nuclear Weapons<sup>85</sup>—would seem to have been pointless.<sup>86</sup>

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80. See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 124–25 (1993).

81. See *United States v. Wilhelm List*, in 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS, Case No. 47 (1949); HOW DOES LAW PROTECT IN WAR? 679, 681–82 (Marco Sassòli & Antoine A. Bouvier eds., 1999) (arguing that even assuming that German armed forces were waging an illegal war of aggression in World War II, “it does not follow that every act by the German occupation forces against person or property is a crime or that any and every act undertaken by the population of the occupied country against the German occupation thereby became legitimate defense”).

82. U.N. Hum. Rts. Comm’n., *General Comment 14*, §§ 4, 6 (Nov. 2, 1984), reprinted in U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003).

83. See, e.g., SCOTT D. SAGAN & KENNETH N. WALTZ, *THE SPREAD OF NUCLEAR WEAPONS: A DEBATE RENEWED* (2002).

84. Oct. 10, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

85. Mar. 5, 1970, 21 U.S.T. 483, 729 U.N.T.S. 161.

86. In general, even in a period that has seen persistent efforts to pull the LOAC into the gravitational orbit of IHRL, states have continuously provided for the regulation of weaponry by discrete LOAC treaties, such as by two protocols (1995 and 1996) to the 1980 Weapons Convention, a 1995 protocol on blinding laser weapons, a 1996 treaty amendment on land mines, and the very recent 2008 agreement on cluster bombs. See *Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, Oct. 13, 1995, 2024 U.N.T.S. 163; *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices*, as amended May 3, 1996, 2048 U.N.T.S. 133. In these circumstances, the UNHRC’s assumption that weaponry is regulated by the ICCPR is plainly belied by ongoing state practice.

III. INTERNATIONAL HUMAN RIGHTS LAW, AND THE ICCPR IN PARTICULAR, DOES NOT REGULATE ARMED CONFLICTS THAT ARE OTHERWISE GOVERNED BY THE LAW OF ARMED CONFLICT

A. *The Fundamental Differences Between the Law of Armed Conflict and International Human Rights Law*

Contrary to the views of the UNHRC, there are powerful reasons to conclude that while the ICCPR does indeed regulate a state party's dealings with its own nationals—and others subject to its jurisdiction, such as aliens on its territory—it does not apply to the relations between a state party and the nationals of a state with which the former is engaged in armed conflict. This conclusion is hardly surprising in light of the fact that the ICCPR was designed to implement the Universal Declaration which, as discussed above, was intended to apply in peacetime.

We start from the once-universal view that human rights treaties are primarily addressed to protecting *a state's own nationals* (and others, like resident aliens, in its territory and under its jurisdiction) *from that state*, rather than to protecting the nationals *of a state with which it is or has been at war*.<sup>87</sup> The underlying conceptions of the state in the two bodies of law fundamentally differ.<sup>88</sup> In IHRL, the state exists principally to further the objectives and well-being of those who are subject to it; consequently, it is an object of suspicion insofar as it may exalt its own purposes over those of the individuals who it governs. By contrast, the LOAC characteristically imposes few or no duties on a state with respect to its own subjects (whom it is protecting from a *foreign* threat); rather, the state is an object of suspicion only because of the unnecessary harms that it may inflict *on others*, most especially the subjects *of its enemies*.<sup>89</sup> As Colonel G.I.A.D. Draper, a leading British scholar of the LOAC, once said,

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87. See, e.g., ПИСТЕТ, *supra* note 14, at 32 (“[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.”); Meyrowitz, *supra* note 39, at 1095–98.

88. See Shany, *supra* note 39, text accompanying nn.74–78 (outlining fundamental differences between IHRL and LOAC).

89. See Eide, *The Laws of War and Human Rights—Differences and Convergences*, *supra* note 39, at 675, 683 (“[According to the model of sovereignty] which stems from human rights thinking, . . . ‘the sovereign’ simply is a coordinator and the executive agent of the common concern, exercising authority only because and to the extent this is desired by the members of society.”); see also Meyrowitz, *supra* note 39, at 1099–1101 (arguing that whereas the LOAC is based in large part on the feeling of compassion for enemies who have become *victims* (through capture, sickness, wounding, and the like), IHRL places the individual face-to-face with his or her *own* state “in a situation that can be antagonistic”; further, while the LOAC also upholds the rights of prisoners of war and the population of territories occupied by a belligerent, the rights it pro-

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 . . . [A]t 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 armed groups, and in internal rebellions.<sup>90</sup>

These underlying differences between the two bodies of law help explain why it makes good sense that most IHRL norms are “derogable” in times of armed conflict or other public emergency, while those of the LOAC are not. IHRL permits derogations of many (though not all) of its norms because in proper circumstances those derogations can be considered to be in the interest of the affected population, that is, the state’s *own* population.<sup>91</sup> By contrast, the requirements of the LOAC generally may *not* be suspended, however grave the emergency, because the affected parties—non-nationals—would *not* benefit from a hostile power’s derogation.<sup>92</sup> Moreover, even when a hostile power may abridge or suspend a LOAC requirement, the law typically places severe restrictions on the breadth and duration of that action.<sup>93</sup>

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texts—unlike those of IHRL—are “the rights of an enemy citizen,” and typically reflect “the military interests and sovereignty of the enemy State”).

90. Draper, *Humanitarian Law and Human Rights*, *supra* note 39, at 199.

91. For example, ICCPR Article 12(1) ensures to “[e]veryone lawfully within the territory of a State” the “right to liberty of movement and freedom to choose his residence” “within that territory.” ICCPR, *supra* note 70, at 176. Yet Article 12(3) permits restrictions on the right of free movement, for example, when necessary to protect “national security, public order, public health or morals or the rights and freedoms of others.” *Id.* More importantly, the “derogation” clause of the ICCPR, Article 4(1), permits derogations from the right to free movement “to the extent strictly required by the exigencies of the situation” “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.” *Id.* at 175. This clause has been understood to permit derogations during particular armed conflicts (including internal ones), even if the emergency is geographically limited. *See* NOWAK, *supra* note 80, at 89–91. Thus, if bio-terrorists caused a “public emergency” by causing the outbreak of a highly contagious and virulent disease in a particular part of the country, the public authorities might well be permitted to quarantine that part of the country without violating the ICCPR. Such a derogation from the right to free movement is ultimately justifiable on the grounds that the general interest of the country’s own population is best served by the quarantine.

92. *See, e.g.*, Meron, *The Humanization of Humanitarian Law*, *supra* note 39, at 267 (“[H]umanitarian law does not permit derogation on grounds of emergency, a rule that was developed precisely for situations of the highest emergency.”).

93. A good example is found in Article 49 of the Fourth Geneva Convention. That provision flatly forbids “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country . . . regardless of their motive.” Geneva IV, *supra* note 59, art. 49. The prohibition is aimed primarily against the forcible removal of an enemy’s civilian population from its usual abode, and it plainly serves to protect that population from the animus, however disguised, of a hostile occupying force. *See, e.g.*, HCJ 785/87 Affo v. Commander of IDF Forces in the West Bank

The difference between IHRL's focus on protecting a state's domestic population and the LOAC's focus on protecting non-nationals is underscored in the case law. For example, the Judicial Committee of the Privy Council (U.K.) correctly held in *Public Prosecutor v. Oie Hee Koi*<sup>94</sup> that the protections of the Third Geneva Convention relative to the Treatment of Prisoners of War did not extend to captured enemy combatants who are either nationals of the detaining power or non-nationals who owe a duty of allegiance to the detaining power. Broadly speaking, whereas the LOAC is not concerned with protecting individuals who belong to those two classes, they are the very *foremost* concerns of IHRL.

The fundamental divergences between IHRL's and the LOAC's protective focuses also underlie the very different roles that the concept of "proportionality" plays in the two bodies of law.<sup>95</sup> Both require a "proportionality" (or cost-benefit) analysis with respect to the use of lethal force. But in the case of IHRL, as also in constitutional law, the interest of the target—as well as those of other, unintended victims—must be weighed against the attacker's use of force, whereas in the case of the LOAC, only the interests of civilian third parties can be weighed against the attacker's, and the interests of a legitimate target do not enter into the calculus at all. In *Tennessee v. Garner*, the U.S. Supreme Court evaluated the "fleeing felon" rule, which had permitted the police to use lethal force against an unarmed suspected felon who, when ordered to submit to arrest, took flight.<sup>96</sup> The Court balanced the fugitive's interest in his own life—an interest the Court found so "fundamental" that it "need not be elaborated upon"—against society's interest in a judicial determination of guilt and in crime prevention, and it found that the balance tilted decidedly against the government.<sup>97</sup>

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[1988] IsrSC 42(2) 4, translated at 29 I.L.M. 140 (1990). Article 49 further includes an extremely limited carve-out from this otherwise unqualified prohibition. That exception attests to the general prohibition's scope and power:

[T]he Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased . . . .

Geneva IV, *supra* note 59, art. 9.

94. [1968] A.C. 829, reprinted at 42 I.L.R. 441 (1971).

95. See ПИЧЕТ, *supra* note 14, at 27-30; Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

96. 471 U.S. 1, 12 (1985).

97. *Id.* at 9.

Although *Garner* was a case decided under the Fourth Amendment rather than IHRL, its reasoning is also characteristic of the latter.<sup>98</sup> For instance, in its 2005 decision in *Nachova v. Bulgaria*—in which Bulgarian nationals challenged the killing of unarmed Romani deserters by Bulgarian military policeman—the European Court of Human Rights (ECHR) stated,

There can be no [necessity to place human life at risk] where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.<sup>99</sup>

Under the LOAC, however, while the proportionality analysis requires a commander to appraise the “collateral damage” that his use of lethal force may impose on unintended victims of the attack,<sup>100</sup> he does not need to give any weight to the legitimate target’s interests in remaining alive or unwounded. As Colonel Kenneth Watkin rightly puts it,

An important distinction between [IHRL] and [the LOAC] in terms of controlling the use of force is that the former seeks review of

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98. The strong (and intended) similarities between IHRL and constitutional law (especially that of the United States) have often been noted. See, e.g., Draper, *Humanitarian Law and Human Rights*, *supra* note 39, at 198–99.

99. App. Nos. 43577/98, 43579/98, 2005-VII Eur. Ct. H.R. 1, ¶ 95 (sitting as Grand Chamber) available at <http://portal.coe.ge/downloads/Judgments/CASE%20OF%20NACHOVA%20AND%20OTHERS%20v.%20BULGARIA.pdf>; see also Note, *European Court of Human Rights Finds Bulgaria Liable for Failure to Investigate Racially Motivated Killings*, 119 HARV. L. REV. 1907 (2006). Similar is the ECHR’s decision in *Isayeva v. Russia*, Case Nos. 57947/00, 57949/00, Eur. Ct. H.R. (2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=825661&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. *Isayeva* involved an attack by Russian airplanes on a convoy of vehicles in the Chechen conflict, which might be regarded as an internal armed conflict subject to Additional Protocol II and Common Article 3. Although the attack resulted in civilian deaths, the Russian government argued that the pilots were targeting armed men who had fired on the planes from the vehicles. There was contrary testimony that there were no vehicles of that kind and that no one had previously fired on the planes. In deciding the case, the Court made no reference to the LOAC but relied instead entirely on IHRL. “[I]t is necessary to examine whether the operation was planned and controlled by the authorities so as to minimize to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimized.” *Id.* ¶ 175. In *Isayeva*, as in *Garner*, the interests of all the victims of the attack were considered. Had the Court relied on the LOAC, however, it would have had to consider whether some of the occupants of the vehicles were combatants, and thus legitimate targets. Because of the paucity of LOAC rules governing internal conflict, it is unclear whether LOAC was in fact relevant to the incident. For commentary, see Lubell, *supra* note 39, at 744.

100. “An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” is an indiscriminate attack. Additional Protocol I, *supra* note 10, art. 51(5)(b).

every use of lethal force by agents of the state, while the latter is based on the premise that force will be used and humans intentionally killed. In practical terms, a human rights supervisory framework works to limit the development and use of a shoot-to-kill policy, whereas [the LOAC] is directed toward controlling how such a policy is implemented.<sup>101</sup>

*B. The ICCPR Does Not Regulate Armed Conflicts That Are Governed by the LOAC*

These general observations are confirmed by an examination of the ICCPR (along with other IHRL and LOAC instruments). Consider first the plain language of the ICCPR.<sup>102</sup> Under Article 2 of that treaty, each state party undertakes “to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant.” The conjunctive reference both to a state’s “territory” and to its “jurisdiction” plainly implies that the ICCPR is not extraterritorially applicable and does not regulate the state’s dealings with the nationals of another power with which it is in armed conflict, unless they happen to be on its territory. Given that the ICCPR, in express terms, “applies only to individuals within the territory of a state that is a party to it,” it follows directly that the treaty “is not applicable to acts of armed forces executed outside the national territory of a party state.”<sup>103</sup> This conclusion is buttressed by the interpretive rule that even a human rights treaty “cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.”<sup>104</sup>

Further, even though the text of ICCPR Article 2 is unambiguous on the point in question, the International Court of Justice (ICJ) had recourse to the *travaux préparatoires* [preparatory work] in its Advisory Opinion, *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*,<sup>105</sup> and we shall follow the ICJ’s lead.

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101. See Watkin, *supra* note 20, at 32.

102. A treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 340 [hereinafter VCLT]; see also U.N. Doc. A/ES\_10/L.18/Rev.1, ¶ 94 (July 9, 2004).

103. Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, *supra* note 39, at 939; see also Dennis, *supra* note 39. But see Lubell, *supra* note 39; Meron, *Extraterritoriality of Human Rights Treaties*, *supra* note 39, at 79.

104. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 183 (1993).

105. U.N. Doc. A/ES\_10/L.18/Rev.1, ¶ 109 (July 9, 2004). Under the VCLT Article 32, the ICJ should not have used the *travaux préparatoires* as an interpretative aid unless reliance on the ICCPR’s “ordinary meaning” and other considerations mentioned in Article 31 “le[ft] the meaning ambiguous or obscure” or “le[d] to a result which [was] manifestly absurd or unreasonable.” VCLT, *supra* note 102, art. 32. Neither of those conditions was met here.



Unfortunately, the ICJ's discussion is both cursory—less than a full numbered paragraph—and mistaken.<sup>106</sup> Michael Dennis of the U.S. State Department Legal Adviser's Office has reviewed the *travaux préparatoires* more carefully and has shown that “[t]he preparatory work cited by the [ICJ] actually establishes that the reference to ‘within its territory’ was included in Article 2(1) of the Covenant in part to make clear that states were not obligated to ensure the rights therein in territories under military occupation.”<sup>107</sup> Eleanor Roosevelt, the U.S. representative and then-Chair of the Commission on Human Rights—the body that drafted the ICCPR—sought to add the language “within its territory” to the draft of the Article, stating that the United States was “particularly anxious” not to assume “an obligation to ensure the rights recognized in [the draft ICCPR] to the citizens of countries under United States occupation,” which then included Germany, Austria, and Japan.<sup>108</sup> Despite opposition, the American view prevailed, and later attempts to delete “within its territory” were defeated.

The UNHRC,<sup>109</sup> joined by some legal scholars,<sup>110</sup> has argued, however, for giving the ICCPR a broader scope, and its views were adopted by the ICJ in the *Wall Case*.<sup>111</sup> In effect, these arguments read the territorial restriction out of ICCPR Article 2 altogether. Despite the fact that it has received the ICJ's blessing, we find that interpretation wholly unpersuasive.

First and most obviously, it violates the general rule of construction that no word or phrase of a treaty should be considered to be meaningless or idle.<sup>112</sup> Furthermore, even a cursory comparison of the language of ICCPR Article 2 with that of comparable human rights instruments indicates that Article 2's reference to “territory” is not

106. Scholars have heavily criticized the *Wall* opinion on a variety of grounds. See, e.g., David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88 (2005); Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62 (2005).

107. Dennis, *supra* note 39, at 123.

108. *Id.* at 124.

109. See *General Comment No. 31*, § 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

*Id.* (emphasis added).

110. See, e.g., TOMUSCHAT, *supra* note 39, at 109–11.

111. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9, 2004).

112. See *Factor v. Laubenheimer*, 290 U.S. 276, 303–04 (1933).

mere surplusage. For example, Article 1 of the 1967 Optional Protocol to the ICCPR refers only to allegations of violations from “individuals subject to [a state party’s] jurisdiction,” thus eliminating any territorial element for jurisdiction.<sup>113</sup> The omission seems clearly purposeful. Article 1 of the 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms binds the state parties to “secure to everyone *within their jurisdiction* the rights and freedoms” that are defined in that treaty.<sup>114</sup> Indeed, even though the key jurisdictional provision in Article 1 of the European Convention lacks any express territorial limitation, the ECHR’s case law “is quite plain that liability for acts taking effect or taking place outside the territory of a member state is exceptional and requires special justification.”<sup>115</sup> In other words, even though the European Convention

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113. Mar. 23, 1976, 999 U.N.T.S. 302.

114. Sept. 3, 1953, 213 U.N.T.S. 221.

115. *Al-Skeini v. Sec’y of State for Defence*, [2008] 1 A.C. 153, 204 (H.L. 2007) (opinion of Baroness Hale of Richmond). In *Al-Skeini*, the U.K. House of Lords considered suits brought by survivors of five Iraqi civilian decedents allegedly wrongfully killed by British troops during military operations in Iraq and of a sixth Iraqi civilian who had died while in British military detention, allegedly after torture. *Id.* at 153. The cases implicated the question of whether the European Human Rights Convention and the U.K. Human Rights Act of 1998 (which implemented that Convention) applied extraterritorially to the British military’s actions in Iraq. *Id.* The House of Lords denied relief to the first five claimants but remitted the sixth case to the lower courts for further consideration. *Id.* at 154. A majority of the Lords considered the sixth claimant’s action sustainable on the theory that although the European Convention reflected a territorial concept of jurisdiction, there were other, exceptional bases for extraterritorial jurisdiction in the particular circumstances of individual cases, and that although the United Kingdom’s military presence in Iraq did not pose such an exceptional case, the death of the sixth Iraqi civilian while in detention at a British military base in Iraq could be analogized to the exception that applies to purely territorial jurisdiction issues for incidents occurring at a state party’s embassies or consulates abroad. The opinions of several Law Lords examined the ECHR (or “Strasbourg”) case law on the extraterritorial scope of the Convention, including most importantly the ECHR’s leading decision in *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 335. Lord Bingham of Cornhill (who, unlike the majority, would have ruled that the U.K. Human Rights Act did not apply to any of the deaths at issue in the cases) did not reach the question of the Convention’s application to those events, but noted in dictum that

[a]lthough there have been a number of military missions involving contracting states acting extra-territorially since their ratification of the convention (inter alia, in the Gulf, in Bosnia and Herzegovina and in the [Federal Republic of Yugoslavia]), no state has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of article 1 of the Convention by making a derogation pursuant to article 15 of the Convention. *So it does not appear that military action abroad has generally been regarded as giving rise to an exception* [from the general rule of territoriality].

*Id.* at 189 (opinion of Lord Bingham) (emphasis added). Further, while noting that some Strasbourg case law had permitted extraterritorial applications of the Convention, Lord Bingham opined that “these bases of exception can[not] be described as clear-cut, and the[ir] application . . . to the situation of British troops operating in Iraq must, in my opinion, be regarded as problematical.” *Id.* Lord Rodger, while disagreeing with Lord Bingham on the extraterritorial applicability of the U.K. Human Rights Act, followed *Bankovic* with regard to the scope of the

makes no express reference to a territorial limitation, it should, absent special justification, be construed to apply only within the territories of the contracting parties. Likewise, Article 1 of the 1989 Convention on the Rights of the Child<sup>116</sup> refers to the protection of children “within [the state parties’] jurisdiction,” also omitting any reference to “territory.” Again, the intent to give these treaties a broader field of application than the ICCPR is manifest. Thus, Egon Schwelb wrote that

[t]he words “within its territory” amount to a limitation of the scope of the [ICCPR] in regard to which the [ICCPR] differs, e.g., from the European Convention on Human Rights, by Art. 1 of which the High Contracting Parties undertook to secure the rights and freedoms “to everyone within their jurisdiction.” Misgivings about this restriction [in the ICCPR] were felt both in the United Nations Commission on Human Rights and in the General Assembly. In a separate vote on the words “within its territory” these words were retained, however.<sup>117</sup>

Moreover, if the ICCPR was indeed applicable to the extraterritorial actions of a state party’s military in situations of armed conflict, or

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Convention. As he explained, the principal question in *Bankovic* was whether the Serbian victims of a NATO airstrike during the war in Kosovo were, by virtue of that attack alone, brought within the “jurisdiction” of the state parties to the Convention who had participated in it. He pointed out that the ECHR had

held that there was *no* jurisdictional link between the victims and the respondent states. So the victims could not come within the jurisdiction of those states. . . . The decision in *Bankovic* shows . . . that an act which would engage the Convention if committed on the territory of a contracting state does not ipso facto engage the Convention if carried out by that contracting state on the territory of another state outside the Council of Europe.

*Id.* at 199 (opinion of Lord Rodger of Earlsferry) (emphasis added). Baroness Hale’s opinion with respect to the ECHR case law is quoted in the text above. Lord Carswell agreed with the opinions of Lords Rodger and Brown with respect to the extent of the Convention’s jurisdiction, but he noted that

such extraterritorial jurisdiction should be closely confined. It clearly exists by international customary law in respect of embassies and consulates. It has been conceded by the Secretary of State [for Defence] that it extended to a military prison in Iraq occupied and controlled by agents of the United Kingdom. Once one gets past these categories, it would in my opinion require a high degree of control by the agents of the state in an area of another state before it could be said that that area was within the jurisdiction of the former. The test for establishing that is and should be stringent, and in my judgment the British presence in Iraq falls well short of that degree of control.

*Id.* at 206 (opinion of Lord Carswell). Finally, Lord Brown of Eaton-under-Heywood analyzed *Bankovic* and other Strasbourg case law very closely, and he concluded that the case law in its entirety “should not be read as detracting in any way from the clear—and clearly restrictive—approach to article 1 jurisdiction adopted in *Bankovic*.” *Id.* at 215 (opinion of Lord Brown).

116. Convention on the Rights of the Child art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

117. Egon Schwelb, *Some Aspects of the International Covenants on Human Rights of December 1966*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *supra* note 69, at 109.

even in post-conflict situations of belligerent occupation, anomalies would soon arise. Most obviously, Article 6 of the ICCPR lays down the nonderogable norm that “[n]o one shall be arbitrarily deprived of his life.”<sup>118</sup> But the intentional targeting of enemy forces engaged in combat is plainly licensed by the LOAC—indeed, that very license is the essence of such law. In *The Social Contract*, Jean-Jacques Rousseau stated what has since become the generally accepted doctrine: “The object of the war being the destruction of the hostile State, the other side has the right to kill its defenders, while they are bearing arms . . . .”<sup>119</sup> As Articles 14 and 15 of the Lieber Code put it,

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war . . . .<sup>120</sup>

Or, in the less forthright formulation of the contemporary LOAC, combatants “have the right to participate directly in hostilities.”<sup>121</sup>

Of course, these basic principles of the LOAC might be reconciled with the ICCPR’s prohibition on the “arbitrary” deprivation of life if the intentional killing of legitimate human targets in situations of armed conflict—by forces licensed under the LOAC—were considered to be non-arbitrary. This seems, in effect, to have been the position of the ICJ in the *Nuclear Weapons Case*<sup>122</sup>—a point to which we shall return in Part IV below.<sup>123</sup> But to concede that is tantamount to

118. ICCPR, *supra* note 70, art. 6.

119. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 171 (G.D.H. Cole trans., 1973) (1762), available at <http://www.constitution.org/jjr/socon.htm>.

120. Lieber Code, *supra* note 55, arts. 14–15.

121. Additional Protocol I, *supra* note 10, art. 43; see also Stefan Oeter, *Methods and Means of Combat*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* ¶ 443(2) (Dieter Fleck ed., 2d ed. 2008) (“At the heart of the category of military objectives are the armed forces of the adversary . . . .”). Further, combatants “receive immunity from prosecution, often termed as ‘combat immunity,’ for killing carried out in accordance with the law.” Watkin, *supra* note 20, at 15. The privilege of combatants to kill lawfully during armed conflict underlies the LOAC’s fundamental “principle of distinction,” which distinguishes combatants from civilians. It also underlies the traditional LOAC distinction between “lawful” and “unprivileged” or “unlawful” combatants, such as al Qaeda. *Id.* at 29 (“In international humanitarian law terms, [al Qaeda combatants’] status is that of unprivileged belligerents and it does not change whether they are operating outside or inside a state.”).

122. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 ¶ 25 (July 8) (“The test of what is an arbitrary deprivation of life . . . falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”).

123. See *infra* notes 167–172 and accompanying text.

saying that the LOAC, rather than ICCPR Art. 6, regulates such uses of lethal force.

Other provisions of the LOAC would also appear to be inapplicable if the ICCPR were held to reach all the extraterritorial activities of a state party's military. Consider, for example, the assumption that the ICCPR governs the activities of a state party's armed forces during a belligerent occupation.<sup>124</sup> Were that so, then presumably the occupying power would be bound to apply the provisions of the ICCPR, unless they were derogable under Article 4(1). The standard for derogability is high under the latter clause: among other conditions, a derogation is permissible only "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." In most circumstances, therefore, the occupying power will have to ensure to the population of the occupied territory "the rights recognized in the [ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." However, the LOAC rules that deal with occupied territories generally require the occupying power to maintain the pre-occupation legal regime.<sup>125</sup> Thus, Article 43 of the Annex to the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land<sup>126</sup> provides that the occupying power "shall . . . respect[ ], unless absolutely prevented, the laws in force in the country."<sup>127</sup> But an occupying power would be hard put to comply with both the ICCPR norm of nondiscrimination and the LOAC norm of maintaining the occupied territory's prior legal system intact when the ousted government's laws had discrimi-

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124. This assumption might be defended either on the grounds that territoriality was simply not a jurisdictional predicate for the applicability of the ICCPR (the UNHRC position we have hitherto been examining) or on the more plausible grounds that Article 2's reference to territoriality has to be interpreted functionally, so that militarily occupied territory—at least if the occupation is prolonged—would have to be deemed a state party's "territory" within the meaning of the Article.

125. See, e.g., *The Krupp Trial: Trial of Alfred Alwyn Krupp von Bohlen und Halbach and Eleven Others*, in *HOW DOES LAW PROTECT IN WAR?*, *supra* note 81, at 666. See generally Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 *HARV. INT'L L.J.* 65, 86–93 (2003). This "conservationist" principle undoubtedly applies in cases of belligerent occupations such as that of Iraq. See S.C. Res. 1483, ¶ 5, U.N. Doc. S/RES/1483 (May 22, 2002); see also *Al-Jedda v. Sec'y of State for Defence*, [2008] A.C. 332, ¶¶ 10, 32 (H.L. 2007) (lead opinion of Lord Bingham) Whether it also applies to what Professor Adam Roberts calls "transformative" military occupations is a question we need not discuss here. See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 *AM. J. INT'L L.* 580, 589–95 (2006).

126. Oct. 18, 1907, T.S. No. 539, reprinted in 1 *BEVANS* 631 (entered into force Jan. 26, 1910).

127. The ICJ considers these Hague rules to be customary law as well. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 135, 172 ¶ 89 (July 9).

nated with respect to ICCPR-guaranteed rights on the basis of race, sex, language, religion, or some other forbidden characteristic. As Lord Brown pointed out in his opinion in the House of Lords' 2007 decision in *Al-Skeini*, it was mistaken to argue that the United Kingdom, as a belligerent occupier of Iraq, was bound to apply the European Human Rights Convention throughout the areas that it occupied; on the contrary,

the occupants' obligation is to respect "the laws in force", not to introduce laws and the means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention. Often (for example, where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied.<sup>128</sup>

There are also other points at which the ICCPR could readily collide with the LOAC if both were held to govern the conduct of an occupying power. For example, ICCPR Article 8(3)(a) provides that "[n]o one shall be required to perform forced or compulsory labour."<sup>129</sup> Under Article 51 of the Fourth Geneva Convention, however, the occupying power may compel protected persons over the age of eighteen to perform work "which is necessary . . . for the needs of the army of occupation."<sup>130</sup> In all such cases of conflicting duties, moreover, it would appear that the ICCPR would prevail over the LOAC rules of belligerent occupation because Article 5 of the ICCPR states that "[n]othing in the present Covenant may be interpreted as implying for any State . . . any right to engage in any activity or perform any act aimed at . . . the[ ] limitation [of the rights and freedoms recognized herein] to a greater extent than is provided for in the present Covenant."<sup>131</sup> But that conclusion contradicts the ICJ's assumption that in the event of a conflict, the LOAC, as a *lex specialis* adapted to belligerent occupation, should be followed.<sup>132</sup>

Starting from the premise that the ICCPR applies to the extraterritorial activities of a state party's military in situations of armed conflict or belligerent occupation, therefore, one appears to be irresistibly driven to a choice between two equally implausible alternatives. One is that the ICCPR displaces the LOAC altogether. The other is that

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128. *Al-Skeini v. Sec'y of State for Defence*, [2008] 1 A.C. 153, 215 (opinion of Lord Brown).

129. ICCPR, *supra* note 70, art. 8(3).

130. Geneva IV, *supra* note 59, art. 51.

131. ICCPR, *supra* note 70, art 5(1).

132. See Dale Stephens, *Human Rights and Armed Conflict—The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 YALE HUM. RTS. & DEV. L.J. 1, 2 (2001) (noting that the *Nuclear Weapons Case* "gave formal primacy to the law of armed conflict when interpreting the applicability of specific provisions of the ICCPR").

the international legal regime governing armed conflict is a *pastiche*. 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.

The ICJ's Advisory Opinion in the *Wall Case*<sup>133</sup> clearly illustrates the difficulties of the latter alternative.<sup>134</sup> In holding the ICCPR to be applicable along with the LOAC in Palestinian territory under Israel's belligerent occupation, the court stated that "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."<sup>135</sup> Yet the court failed to provide any guiding principles as to when IHRL rules applied in a situation of armed conflict (or post-conflict occupation) instead of, or in addition to, the LOAC rules.<sup>136</sup>

The older understanding of the relationship of the LOAC and the ICCPR seems to us, therefore, far more plausible and coherent than the newer one. We conclude that the LOAC constitutes the legal regime governing situations of armed conflict, and that the ICCPR is a territorial legal regime broadly applicable to the relations between a

133. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 135 (July 9).

134. See also Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L REV. RED CROSS 737, 740-41 (2005) ("[A]cceptance that human rights law may extend to extraterritorial actions does not rule out the consideration that if these actions are taking place in the context of an armed conflict, the content of the rights may need to be interpreted in light of applicable rules of [the LOAC]."). What is missing is a coherent principle for deciding how to modify or displace the relevant LOAC rules.

135. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. at 178, ¶ 106.

136. See Dennis, *supra* note 39, at 133. Yet another example of such a *pastiche* can be found in Lord Bingham of Cornwall's lead opinion for the House of Lords in its decision in *Al-Jedda v. Secretary of State for Defence*, [2008] A.C. 332 (lead opinion of Lord Bingham). The key question there was whether Article 5 the European Convention on Human Rights and its implementing U.K. statute applied to the allegedly wrongful internment by U.K. military forces in British-occupied Iraq of a suspected terrorist of dual U.K.-Iraqi nationality. *Id.* ¶¶ 1-3. The House of Lords dismissed the complaint. *Id.* ¶¶ 44, 120, 129, 137. Noting the conflict between the United Kingdom's responsibilities as an occupier acting under the authorization of the Security Council and its duty to secure fundamental human rights to those—like the plaintiff-internee—under its "jurisdiction," Lord Bingham wrote that "the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain . . . , but must ensure that the detainees's rights under article 5 are not infringed to any greater extent than is inherent in such detention." *Id.* ¶ 39. The result is that the protections of Article 5 are to be merged, to some undetermined extent, with the Hague/Geneva rules relating to internment, at least where the internee is a national of the occupying power.

state party and its own population (broadly defined), except when certain of its provisions are expressly (or by ineluctable inference) applicable to armed conflict.<sup>137</sup>

Again, however, we must stress that we are *not* speaking here of “internal” armed conflicts or of belligerent occupations, especially prolonged ones. It may well be that IHRL is applicable, at least to some degree, in conflicts of an “internal” nature. For one thing, such conflicts may occur entirely within the territory of an ICCPR state party, and those involved in the conflict may all (or nearly all) be subject to the state’s jurisdiction. Absent a valid derogation, therefore, the ICCPR would seem to continue to apply in full. Furthermore, the conventional LOAC governing “internal” armed conflicts is rather meager. Additional Protocol II is the most developed body of treaty law relating to conflicts of this nature, but it covers only a small segment of internal conflicts, and its substantive provisions are few.<sup>138</sup> Common Article 3 of the Geneva Conventions is also a conventional LOAC that applies to “internal” armed conflicts, but it too has very limited substantive implications. In these circumstances, it may seem sensible to assume that the IHRL applies. Furthermore, as a practical matter, a state engaged in armed conflict against insurgents, rebels,

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137. See Dennis, *supra* note 39, at 139 (“[T]he best reading of the interrelationship between the ICCPR and [the LOAC] is the more traditional view that [the LOAC] should be applied as the *lex specialis* in determining what a state’s obligations are during armed conflict or military occupation.”).

[A]cts of terrorism on the scale now threatened bring new challenges to the traditional human rights concepts regarding the use of force. Moreover, the attempt to apply human rights standards to a situation of armed conflict could have an adverse impact on the integrity and strength of peacetime norms. Rather than attempt to extend human rights norms to an armed conflict scenario, the appropriate approach is to apply the *lex specialis* of humanitarian law.

Watkin, *supra* note 20, at 22; see also Al-Skeini v. Sec’y of State for Defence, [2008] 1 A.C. 153, 187–88 (opinion of Lord Bingham) (noting that even if remedies under the U.K. Human Rights Act are unavailable for misconduct by British military towards Iraqi civilians, remedies exist under the LOAC and service discipline acts). We do not of course mean to say that the ICCPR has no relevance in wartime situations whatsoever. On the contrary, as we have noted, the norms of the ICCPR remain generally applicable even in wartime in what may be called the “home front,” and Article 4 of the ICCPR permits wartime derogations from some (but not all) of its norms only in restricted conditions. But to say that the ICCPR applies to the home front in wartime is not to say that it reaches the battlefield or occupied territory.

138. See Oeter, *supra* note 20, at 204–05 (stating that Protocol II is “a strange torso . . . . In substantive part . . . the Protocol is extremely poor.”); Smith, *supra* note 8, at 77 (“The protections in Protocol II are minimal in comparison with the humanitarian laws governing the United States during an international armed conflict.”). Draper asserts that Protocol II is

a debilitated replica of Protocol I. The material field of application of Protocol II . . . is virtually commensurate with a classical civil war, but without the need for belligerent recognition. The rules established in the protocol, however, unlike common article 3, are not express obligations imposed upon parties to the internal conflict . . . .

Draper, *Humanitarian Law and Human Rights*, *supra* note 39, at 202.



secessionists, or other “internal” opponents may well find it advantageous to follow IHRL norms in that conflict because a pattern of violating such norms will be likely both to alienate its own population and to cost it international support. The difficulty is, however, that the obligations of IHRL are asymmetrical: the state party to the internal conflict will be bound by the ICCPR, but its opponents will not be, and indeed they may even lack the *competence* to become parties to that or any other treaty.<sup>139</sup> Moreover, even if an insurgent group were able to enter into a “special agreement” of the kind contemplated by Common Article 3 (or of other kinds),<sup>140</sup> and were thus in a position to bind itself to ICCPR-type norms, would it usually have the *incentives* to do so?<sup>141</sup> Thus, even if IHRL can be said to extend—on the state’s side—to internal armed conflicts, it is hard to see how it could reach *all* of the parties to such a conflict.<sup>142</sup>

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139. See Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT’L L. 131, 140–41 (2005). We note, however, that some state practice evidences a willingness to regard agreements with particular national liberation movements, if they have received international recognition, as international treaties. See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 168–69 (1995).

140. See Oeter, *supra* note 20, at 211 (citing the example of a Common Article 3 “special agreement” in an internal Yugoslav conflict).

141. We should emphasize that differently situated insurgent groups are likely to have significantly different motivational structures, especially with regard to their treatment of civilian populations. See JEREMY M. WEINSTEIN, *INSIDE REBELLION: THE POLITICS OF INSURGENT VIOLENCE* (Margaret Levi ed., 2007) (arguing that recruitment patterns for insurgent groups differ in resource-rich and resource-poor contexts, with consequent differences in groups’ attitudes towards and treatment of civilians). Nonetheless, our basic point still stands: even accepting that the contexts in which insurgent groups operate will differentiate their attitudes towards civilians, many such groups would seem to have little or no incentive to observe general IHRL norms. On the other hand, it is plausible to argue that insurgents will often have incentives to comply with LOAC norms; and, if so, why not with IHRL norms as well? See MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, *THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 1* (2006).

Compliance with this Manual will benefit every party to the hostilities. . . . First, the provisions that the Manual contains are compatible with effective and efficient conduct of operations. . . . Second, non-compliance through harsh and inhumane behaviour will alienate potential allies, both on the domestic and international level. . . . Third, compliance will facilitate ending the hostilities and promote resolution of the conflict. . . . Finally, “winning the peace” in the long term following a non-international conflict presupposes national reconciliation.

*Id.*

142. See Draper, *Humanitarian Law and Human Rights*, *supra* note 39, at 203–04.

[O]nce the international law of armed conflicts is applicable to an internal conflict, the regime of human rights, applicable in time of normality, is not adequate to provide a system of rules for regulation of the conflict situation. . . . [IHRL] rights operate in times of normality, on the basis of harmony and cohesion between government and governed and are neither designed for nor adequate to control an armed conflict between government and dissident armed or unarmed, elements of the population.

*Id.*

### C. Response to Counterarguments

As well as enjoying the support of the UNHRC and, more recently, of the ICJ, the interpretation of the ICCPR that we are criticizing has also been advanced by legal scholars. Our evaluation and critique would therefore be incomplete unless we addressed those scholars' writings. We shall single out two in particular: Professor (now ICJ Judge) Thomas Buergenthal's highly influential 1981 essay, *To Respect and to Ensure: State Obligations and Permissible Derogations*,<sup>143</sup> and a 2006 article by the ICRC legal expert, Professor Louise Doswald-Beck, entitled *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*<sup>144</sup>

#### 1. Buergenthal

Buergenthal argues for the extraterritorial application of the ICCPR. He maintains that ICCPR Article 2(1)'s phrase "within its territory and subject to its jurisdiction" is "clearly" disjunctive rather than conjunctive.<sup>145</sup> The conjunctive reading, he asserts, "is specious and would produce results that were clearly not intended."<sup>146</sup> He reasons,

[The conjunctive reading] would compel the conclusion, for example, that a person who is temporarily outside his country no longer enjoys the right proclaimed in Article 12(4) not to be "deprived of the right to enter his own country," although that provision is plainly designed to protect only individuals who happen to be outside their country. It would be equally absurd to assume that one who avails himself of the right to leave his country, established in Article 12(2), gives up all the other rights that the Covenant ensures, including, *inter alia*, the right to reenter his country. Similarly Article 14(3)(d) provides for "the right to be tried in his presence" and outlaws *in absentia* criminal trials. Interpreting the Covenant as providing that a criminal defendant is entitled to protection against *in absentia* trials only when he is in the territory of the state, but not when he is outside, is patently absurd.<sup>147</sup>

We agree, of course, that these results are absurd. And it is a well-established rule that "[g]eneral terms should be so limited in their application as not to lead to . . . an absurd consequence."<sup>148</sup>

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143. Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* (Louis Henkin ed., 1981).

144. Doswald-Beck, *supra* note 39, at 881.

145. Buergenthal, *supra* note 143, at 74.

146. *Id.*

147. *Id.*

148. *United States v. Kirby*, 74 U.S. 482, 486 (1868).

But it is an obvious fallacy to conclude, as Buergenthal does, that the ICCPR *in its entirety* must be given extraterritorial application. The absurdity that arises when *particular* clauses are not applied extraterritorially (in some or all instances) does not entail that *every* clause in the ICCPR is (or is presumptively) extraterritorial in scope. His exceptions would swallow the rule. The fact that it would be absurd to apply the medieval Bolognese law, which prohibited the drawing of blood on a street, to a surgeon who was performing an emergency, life-saving operation does not mean that the statute could not be applied to a duelist. Likewise, the fact that it would be absurd to apply a law forbidding interference with the delivery of the mail to a sheriff serving an arrest warrant on a mail carrier who had been charged with murder<sup>149</sup> does not make that statute inapplicable to a defendant who was seeking to steal the mail.

Further, by reasoning akin to Buergenthal's, it would be possible to show that the ICCPR also cannot apply in full *within* the territory of a state party. Suppose that a large group of al Qaeda terrorists made their way by force into the United States and began committing acts of violence on a mass scale. They would be "within the territory" of the United States and, at least arguably, "subject to its jurisdiction." Does it follow that they are clothed with all the protections of the ICCPR? Or would not *that* result be "absurd"? Or consider a captured al Qaeda combatant who was brought within United States territory and detained here by the government for compelling reasons of national security. Would that detainee enjoy all the protections of the ICCPR? Or would not such a reading of the ICCPR produce "results that were clearly not intended"?

Buergenthal also argues that

[t]he terms "territory" and "jurisdiction" as used in Article 2(1) may take on special meaning in special situations—for example, where a state party to the Covenant is in actual control of all or a part of the territory of another state and is alleged to be violating the rights of individuals in that territory.<sup>150</sup>

For support, he cites the 1975 decision of the European Commission on Human Rights in *Cyprus v. Turkey*,<sup>151</sup> which interpreted Article 1

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149. *See id.*

150. Buergenthal, *supra* note 143, at 76.

151. 1975 Y.B. Eur. Conv. H.R. 83 (Eur. Comm'n on H.R.). The Commission's conclusion that the Turkish occupation of northern Cyprus brought Turkey's actions within the "jurisdiction" of Article 1 of the European Convention has subsequently been accepted by the European Court of Human Rights. *See, e.g.,* *Loizidou v. Turkey*, 1995 Y.B. Eur. Conv. H.R. 245, 247 (Eur. Ct. of H.R.); *see also* *Al-Skeini v. Sec'y of State for Defence*, [2008] 1 A.C. 153, 210 ¶ 114 (opinion of Lord Brown).

of the European Convention on Human Rights. As discussed above, that Article provides that state parties—which included both Cyprus and Turkey—“shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention.”<sup>152</sup> Turkey contended that although it had invaded Cyprus, it had neither annexed it nor established a military or civil government there, and that it could be held liable only for violations of the Convention within its own territory.<sup>153</sup> The Commission rejected Turkey’s argument, interpreting the term “jurisdiction” functionally, so as to include all persons under Turkey’s “actual authority and responsibility, whether [its] authority is exercised within [its] own territory or abroad.”<sup>154</sup> Buergenthal deduces that “just as a sound test for determining ‘jurisdiction’ is actual authority, the test for determining what is a state party’s ‘territory’ should also take into account the reality of ‘authority’ or ‘control.’”<sup>155</sup>

One problem with Buergenthal’s analysis is that if he were correct, the United States would have been liable for any ICCPR violations it committed in the territories—Germany, Japan, and Austria—that the U.S. military was occupying as the drafting of ICCPR Article 2(1) was taking place. As we have seen, however, the *travaux préparatoires* make perfectly clear that the United States’ delegation sponsored the incorporation of the phrase “within its territory” into Article 2(1) precisely to *avoid* the possibility of being held liable for ICCPR violations there. The United States’ position—which Buergenthal’s brief review of the *travaux préparatoires* does not discuss—prevailed. Consequently, Buergenthal’s proposed reading of Article 1 would negate the intentions of the states who drafted and voted on Article 2(1), and of those in the General Assembly who approved those intentions.

Furthermore, Buergenthal’s analysis overreads the decision in the *Cyprus* case. It was entirely reasonable for the Commission to hold Turkey liable for any Convention violations that it committed in the parts of Cyprus that the Turkish military was occupying, given that (1) the Convention would have applied to *the whole* of Cyprus in the absence of Turkey’s occupation of part of it, and (2) Turkey, like Cyprus, was a party to the Convention.<sup>156</sup> It would have been incongruous in those circumstances to hold that Turkey’s invasion and occupation of

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152. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 114, art. 1.

153. *Cyprus v. Turkey*, 1975 Y.B. Eur. Conv. H.R. at 116.

154. *Id.* at 118.

155. Buergenthal, *supra* note 143, at 77.

156. See Juliane Kokott & Beate Rudolf, *Loizidou v. Turkey*, 90 AM. J. INT’L L. 98, 101 (1996).

northern Cyprus *relieved* Turkey from observing the obligations of the Convention in Cyprus. As the ECHR itself has subsequently recognized, the extension of the jurisdictional provision of the European Convention on Human Rights to the situation in Cyprus was intended

to avoid a “vacuum in human rights’ protection” when the territory “would normally be covered by the Convention” . . . (*i.e.* in a Council of Europe country) where otherwise (as in Northern Cyprus) the inhabitants “would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed.”<sup>157</sup>

The original *Cyprus* case therefore has been sharply limited by later ECHR case law and cannot be used to defend Buergethal’s revisionary interpretation of ICCPR Article 2(1).

## 2. *Doswald-Beck*

In a wide and illuminating review of recent thinking about the relationships between the LOAC and IHRL, Professor Louise Doswald-Beck raises the question of “whether human rights law adds extra conditions to the [LOAC] prohibitions on attack, that is, in addition to the prohibition of attacking combatants *hors de combat* [outside of combat]. . . .”<sup>158</sup> Assuming that the answer is “clearly” *yes* in the cases of belligerent occupation and non-international armed conflicts, she then asks whether the same might be true of *international* armed conflicts, and she remarks,

Theoretically, from the point of view of human rights law, there is no reason why not, provided that there is jurisdiction. It would make most sense in the case of civilians taking “a direct part in hostilities”, since it is unclear under [the LOAC] what this encompasses exactly. It would be more difficult, however, in the case of combatants. [LOAC] treaties do not provide a rule that . . . a combatant

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An interpretation restricting the Convention to acts by state authorities within their own territory would have prevented the protection of human rights where it is most needed: in the territory of Northern Cyprus, where the authorities of one high contracting party cannot exercise their jurisdiction because of the intervention of another state party to the Convention.

*Id.*

157. Al-Skeini, [2008] 1 A.C. at 209 (opinion of Lord Brown) (internal citations omitted) (quoting and paraphrasing *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 335).

[I]t would appear that the [ECHR] regards extraterritorial military operations to come within the jurisdiction of a contracting state only in cases similar to the Northern Cyprus situation; not only must that state have effective control over a territory, but the territory must itself have enjoyed the protection of the Convention prior to the military operation.

Alexandra R  th & Mirja Trilsch, *Bankovic v. Belgium (Admissibility)*. *App. No. 52207/99*, 97 *AM. J. INT’L L.* 168, 171 (2003)

158. Doswald-Beck, *supra* note 39, at 900 (author’s translation).

may not be attacked if he or she may be arrested. However, in this author's opinion, the reason for this absence should be looked at more carefully, in particular in the light of the old rule concerning the prohibition of assassination, in order to see whether the human rights rule is so very different from the original rules and philosophy of [the LOAC].<sup>159</sup>

Doswald-Beck then reviews the traditional LOAC prohibitions on assassinations. As representative of this older thinking, she cites Article 148 of the Lieber Code:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

Doswald-Beck argues that the material basis for the older ban on assassinations lay in the fact that the hostilities were normally carried out by close fighting between combatants in land battles or by sieges. Arrest was not a realistic option in those circumstances because unless an enemy combatant was killed or severely incapacitated by wounding, he might well continue fighting. The ban on assassinations arose in those conditions because and insofar as it involved *treachery*. In contemporary international armed conflict, however, "hostilities now occur not only during battles on the ground but also from a distance by aircraft and missiles."<sup>160</sup> Consequently (she appears to say), the ban on assassination no longer survives in international armed conflict. It appears (although she does not spell this out) that the reason for its disappearance must be that aerial warfare, unlike land warfare, precludes the possibility of treachery.

Doswald-Beck seems to argue, however, that the reasons for the traditional LOAC ban on assassinations continue to hold true in the contexts of non-international war and belligerent occupation. Her chief reason appears to be that in those circumstances, government forces can arrest suspected insurgents or other enemy combatants with no greater risk to themselves than the police normally encounter in arresting dangerous persons. She concludes,

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159. *Id.*

160. *Id.* at 902. Oddly, Doswald-Beck appears to overlook the use of artillery during traditional land warfare, which, no less than aircraft and missiles, involved killing at a distance.

[U]nder the traditional law of war, killing combatants in such situations [that is, where arresting them was possible] would have been considered an assassination. Is human rights law therefore so incompatible, at least with the original rules and philosophy of the law of war? In the view of this author, the specific rules of human rights law as they apply to the right to life, and as these have been interpreted in practice, are not incompatible.<sup>161</sup>

We find Doswald-Beck's arguments unconvincing. Contrary to her view, we agree with the view that "the legitimacy of the killing and destruction in a conventional war necessarily entails accepting the legitimacy of targeted killings in the war against terror."<sup>162</sup>

To begin with, the LOAC simply does not forbid the use of lethal force even against an unsuspecting enemy combatant, and even if he is not actively participating in hostilities and poses no immediate danger.<sup>163</sup> Consider here the use of snipers. Sniping is a lawful method of warfare in international armed conflict, even though there is an element of surprise or "treachery" in it.<sup>164</sup> Moreover, a sniper may law-

161. *Id.*

162. Statman, *supra* note 2, at 180.

163. See Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, 78 J. INT'L L. STUD. 139, 153-54 (2002).

As a rule, when a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack (even if he does not participate in actual hostilities and does not pose an immediate threat to the enemy). The *jus in bello* prohibits treacherous assassination, yet nothing prevents singling out as a target an individual enemy combatant (provided that the attack is carried out by combatants). The prohibition of assassination does not cover "attacks, by regular armed military forces, on specific individuals who are themselves legitimate military targets." The United States was, consequently, well within its rights during World War II when it specifically targeted the Commander-in-Chief of the Japanese Fleet, Admiral Yamamoto, whose plane was ambushed (subsequent to the successful breaking of the Japanese communication codes) and shot down over Bougainville in 1943.

*Id.* (citation and footnotes omitted). Likewise, the Czechoslovakian government-in-exile was within its rights when, with British assistance, it enabled two Czechoslovakian commandos to target and kill Reinhard Heydrich, the Nazi "viceroy" of the Protectorate Bohemia and Moravia, in May 1942. See CALLUM McDONALD, *THE KILLING OF REINHARD HEYDRICH: THE SS "BUTCHER OF PRAGUE"* (1998).

164. See W. Hays Parks, *Memorandum of Law—The Legality of Snipers*, ARMY LAW., Dec. 1992, at 3, 3.

Enemy combatants are lawful targets at all times, wherever they may be located, regardless of the activity in which they are engaged when they are attacked. . . .

. . . .

Soldiers lawfully may be attacked behind their lines by any lawful means. A sniper's work is indistinguishable from a law of war standpoint from other lawful means. . . .

. . . .

. . . [S]niping does not afford an enemy combatant an opportunity to run, fight, surrender, or die. Neither does an artillery barrage or rocket attack, a land mine, an ambush, a commando raid, or an airstrike. Attack of enemy personnel by any lawful means, including sniping, is neither assassination nor murder—it is lawful killing. The element

fully take an enemy combatant's life even without affording him the opportunity to surrender, and sniper fire is allowed even when the target is not present in the zone of hostilities. But if snipers may be used lawfully in international armed conflict to kill an unsuspecting Army cook while he is peeling potatoes in a camp that is far from the front, why may they not be used, for example, to kill an al Qaeda leader in the mountains of Afghanistan? And if snipers may be used, why not drones armed with Predator missiles?

We see no reason why these general LOAC rules should vary depending on the nature of the armed conflict. Thus, while we agree with Doswald-Beck that the contemporary LOAC related to *international* conflicts plainly does not ban what might be seen as the "assassination" of enemy combatants, we see no reason to distinguish that situation from *non-international*—including transnational—armed conflict. In all these types of conflict, it may sometimes be possible to arrest an enemy combatant rather than to kill or wound him. But the LOAC governing international conflicts does not prohibit the use of lethal force against such an enemy even then.<sup>165</sup> Why then should the LOAC for non-international conflicts do so? Moreover, the fact that an armed conflict is "internal," or that it is occurring during a military occupation, hardly entails that it will be easier to arrest enemy combatants than it usually is in international conflicts. Indeed, arrests may frequently be *more* difficult to make in internal conflicts because an enemy combatant will often be non-uniformed, and hence harder to visibly distinguish from the surrounding civilian population.<sup>166</sup>

Second, to the extent that the traditional ban on assassination rested on the detestation of treachery—rather than the difficulty or unlikelihood of making an arrest—the advent of aerial warfare should not have resulted in the disappearance of the ban because aerial warfare, no less than land warfare, may involve killing persons who have no reason to put themselves on guard. The use of unmanned drones equipped with missiles surely illustrates that fact. But if for some reason the traditional ban on assassination has been eroded by the wide-

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of surprise is a fundamental principle of war, and does not make an otherwise legitimate act of violence unlawful.

*Id.*; accord UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 62, ¶ 5.12 (2005).

165. See Parks, *supra* note 164, at 3 ("Enemy combatants are lawful targets at all times, wherever they may be located, regardless of the activity in which they are engaged when they are attacked.").

166. See HCJ 3799/02 Adalah v. GOC Central Command IDF [2005] IsrSC ¶ 16 (opinion of Barak, P.), available at <http://www.icrc.org/ihl-nat.nsf/0/7FFDDA5378172C9CC12573870052330F> (discussing the difficulties of arresting terrorist suspects during the Intifada).



spread use of aircraft and missiles in contemporary armed conflict, that ban should be as inapplicable in non-international conflicts as it is in international ones.

Third, if we are to resurrect the older law of war, as Doswald-Beck recommends, why should we not revive that part of it that permits the summary killing of saboteurs? Answering Doswald-Beck's citation to the Lieber Code with one of our own, we would point to Article 82, which states,

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

#### IV. ANALYSIS OF THE AL-HARETHI INCIDENT

In light of the preceding analysis, we now turn to the particular point at issue: whether the United States' use of an unmanned drone armed with a Predator missile to kill suspected al Qaeda terrorist leader Qaed Salim Sinan al-Harethi and his traveling companions in Yemen was a violation of the ICCPR. We shall consider here the recent article by Professor Philip Alston, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, and his co-authors, dealing with that subject.<sup>167</sup>

Our treatment can be brief, both because our prior analysis has defended many of the core claims that we would make in response to Alston, and because Alston's argument hinges crucially on the ICJ's jurisprudence, most especially its construction of the ICCPR in the *Nuclear Weapons* case. If the ICJ's reasoning fails there, then the centerpiece of the Special Rapporteur's argument fails as well.

The key paragraphs in his article are as follows:

In the *Nuclear Weapons* Advisory Opinion, the Court stated that the arbitrary deprivation of life in armed conflict "falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities". The United States position appears to be that this statement affirms the notion that the humanitarian law regime completely dis-

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167. See Alston et al., *supra* note 39.

places the human rights law regime in the context of armed conflict. This is a misreading of the ICJ's statement on *lex specialis* because it takes that statement out of context and disregards the rest of the paragraph within which it is couched. Taken in full, that paragraph of *Nuclear Weapons* says:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

Thus, the Court asserts in its opening sentence the overriding principle that in fact the Covenant does continue to apply during armed conflict and specifically reiterates that "the right not arbitrarily to be deprived of one's life applies also in hostilities." The Court then makes clear that its statement on *lex specialis* applies at the level of interpreting individual human rights law provisions, such as the prohibition on the arbitrary deprivation of life. The United States has read the *lex specialis* test to apply so that the entire legal regime of international humanitarian law replaces the entire regime of human rights law during armed conflict, a position not justified by the text of the Advisory Opinion.<sup>168</sup>

Thus, the Special Rapporteur assumes that the question of the legality of the United States' action in killing al-Harethi reduces to a dispute over the construction of the ICJ Advisory Opinion in *Nuclear Weapons*—an opinion that he further assumes to be both correct on the law and controlling in its application. But even if the Special Rapporteur's construction of the ICJ's language in *Nuclear Weapons* is sound, while the construction that he attributes to the United States is mistaken, the question whether the ICJ's language, so construed, is *legally correct* demands to be considered. In light of our previous analysis, we believe that the understanding of the ICCPR, which the Special Rapporteur takes the ICJ to have adopted, is plainly erroneous.

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168. *Id.* at 192–93 (footnotes omitted).

The language that the Special Rapporteur quotes from *Nuclear Weapons* starts, uncontroversially enough, with the proposition that the protection of the ICCPR “does not cease in times of war,” except when a proper derogation is made. We, of course, concur. The ICCPR covers the relations between a state and those both in its territory and also subject to its jurisdiction even in wartime, and the possibility of derogation would make little sense if this were not so. The ICJ next observes, again uncontroversially, that the ICCPR’s prohibition on the arbitrary killing of those whom it protects is nonderogable, even in wartime; and again, we of course agree. But from those unexceptionable premises, the ICJ—as the Special Rapporteur reads *Nuclear Weapons*—then affirms that the ICCPR’s prohibition on arbitrary killing extends to conditions *in combat*, traditionally regulated by the LOAC, in which the military forces of a state use lethal force to kill or wound *an enemy combatant*. That deduction is a flat and obvious *non sequitur*.

Moreover, the ICJ—on the Special Rapporteur’s account—makes that wholly unwarranted inference with no reference whatsoever to the jurisdictional language of Article 2 of the ICCPR; to the intent of the state parties that ratified that clause of the ICCPR, or to the decisions of the General Assembly with respect to it; to any ensuing state practice (including derogations);<sup>169</sup> to the general purposes of the ICCPR, as distinct from those of the LOAC; to the traditional understanding of the fundamental divergences between the ICCPR and the LOAC; to the language of the jurisdictional provisions of other comparable IHRL instruments, including the European Convention and both the national and international case law construing those provisions; or to any legal scholarship. In short, in the Special Rapporteur’s view, the ICJ has superimposed the ICCPR on all cases of armed conflict by the merest judicial fiat.

Further, the practical applications of the ICCPR to the combat situations that the United States faces in the conflict with al Qaeda—so far as the ICJ can be understood to give any intelligible instruction on those matters at all—are absurd. It would seem, for example, that the U.S. military would have had an obligation to arrest al-Harethi, even at some risk to its own personnel, had that been feasible, rather than to have fired on him at sight. As we have seen, the LOAC has never

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169. Cf. *Al-Jedda v. Sec’y of State for Defence*, [2008] A.C. 332, ¶ 38 (lead opinion of Lord Bingham), available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm> (arguing that the state practice of not derogating from a provision of European Convention on Human Rights when conducting overseas peacekeeping operations tended to show that the provision was “inapplicable” in such cases).

laid down such a rule; on the contrary, enemy combatants may lawfully be slain, whatever the circumstances in which they are found. If the Special Rapporteur is right, however, IHRL would apparently forbid the United States to kill even Osama bin Laden while he was asleep or at breakfast, if by some undefined standard there were a chance of capturing him alive.<sup>170</sup>

The United States might well prefer to capture high-value al Qaeda targets alive, rather than killing them.<sup>171</sup> For one thing, such captives could yield intelligence information of extraordinary importance; for another, their being simply held captive rather than killed would prevent them from being considered “martyrs”; for a third, if they were killed rather than captured, doubts might arise whether the United States had identified them correctly.<sup>172</sup> Furthermore, given the risk that innocent non-combatants may be targeted by mistake or killed as an unintended effect of a strike, the policy of capturing rather than killing plainly has a great deal to be said in its favor. But in the remote regions of Afghanistan, Yemen, and Pakistan, where high-value al Qaeda targets are likely to be found, capturing rather than killing may well be a practical impossibility. The circumstances of combat may force a choice between the alternatives of killing these targets during a very brief window of opportunity or letting them escape. In our view, it is nothing less than a perversion of IHRL to fault the United States for choosing, in those circumstances, to kill them.

## V. CONCLUSION

Fundamental to both the LOAC and IHRL is the regulation and restraint of state violence. In the case of the LOAC, the law seeks to abate the violence and hardship of armed conflict and to prevent unnecessary suffering, even on the part of the combatants. In the case of IHRL, the law seeks to prevent violence, injustice, and oppression on the part of a state, especially when inflicted upon those who are under its domination and control.

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170. Cf. Doswald-Beck, *supra* note 144, at 886 (claiming that IHRL precludes targeting a person who is “not [actively] dangerous”).

171. On the other hand, demonstrated success in killing targeted terrorist leaders might reinforce the belief among terrorists in the United States’ “intelligence dominance” (as it is said to have done with Israel’s), and thus deter future terrorist acts. See Shmuel Bar, *Deterring Terrorists: What Israel Has Learned*, 149 POL’Y REV. 29, 34 (2008).

172. Despite the merits, from an intelligence-gathering perspective alone, of capturing such terrorists rather than killing them in missile strikes, it appears that the Obama Administration prefers the latter course. See Marc A. Thiessen, *Dead Terrorists Tell No Tales: Is Barack Obama Killing Too Many Bad Guys Before the US Can Interrogate Them?*, FOREIGN POL’Y, Feb. 8, 2010, available at [http://foreignpolicy.com/articles/2010/02/08/dead\\_terrorists\\_tell\\_no\\_tales](http://foreignpolicy.com/articles/2010/02/08/dead_terrorists_tell_no_tales).

But the state is not the only source of violence. As political theorists have often reminded us, the state exists primarily to *prevent* the violence and depredation at the hands of foreign enemies and local criminals that would arise in its absence. Consequently, even constraints on state violence must have their limits, or the state would be unable to perform its indispensable protective functions. *Both* bodies of law reflect what the French thinker Jacques Ellul has called “the order of necessity” under which humanity lives.<sup>173</sup>

The LOAC and IHRL differ essentially in the nature of the considerations that they recognize as counterweights to the interest in restricting state violence. As a general matter, the LOAC represents an effort to achieve a realistic and sustainable balance between the countervailing imperatives of “military necessity” and the humanitarian imperatives of avoiding or mitigating the hardships, suffering, and death caused by armed conflict.<sup>174</sup> By contrast, IHRL seeks to equilibrate the state’s need to provide security against crime, maintain public order, and administer legal justice to the individual’s interests in life, liberty, and property.

The chief error committed by those who seek to merge the LOAC into IHRL is the collapse of the balance that the LOAC seeks to achieve into the different kind of balance whose attainment is IHRL’s chief objective. As Professor Doswald-Beck succinctly puts it, “[H]uman rights law does not make a distinction between armed conflict and peace.”<sup>175</sup> In consequence of that error, the proponents of this idea minimize the extent to which the state may deploy violence as a matter of “military necessity,” and maximize the extent to which the state must undertake precautionary legal process before committing such violence. The conditions of armed conflict—especially, of course, when the life of the nation is at stake—permit and indeed require the state to practice violence on a scale, of a lethality, and with an intentionality that make it wholly different from the violence that the state may inflict when performing its common policing functions.<sup>176</sup> The failure to acknowledge this fact condemns to futility the project of assimilating the LOAC into IHRL.

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173. JACQUES ELLUL, *VIOLENCE: REFLECTIONS FROM A CHRISTIAN PERSPECTIVE* 127–28 (1969).

174. See *Public Comm. Against Torture in Israel*, *supra* note 7, ¶ 22 (surveying judicial and scholarly materials); see also Draper, *Humanitarian Law and Human Rights*, *supra* note 39, at 201 (“From 1868, in the St. Petersburg Declaration on Small Projectiles, the accommodation of military necessities and the requirements of humanity has been the principal objective in international incidents relating to conduct in warfare.”).

175. Doswald-Beck, *supra* note 144, at 886.

176. See Shany, *supra* note 39, text accompanying n.78, arguing that the LOAC

The extension of IHRL to armed conflict has also set human rights doctrine on a collision course with itself. On the one hand, there is an emerging IHRL-based doctrine of *jus ad bellum*, called “humanitarian intervention.” Under this doctrine, states may or must intervene in the internal affairs of other countries—with or without authorization from the UN Security Council—in order to correct and prevent human rights abuses within those countries.<sup>177</sup> The doctrine of humanitarian intervention underlaid Western involvement in several recent armed conflicts, including those in Kosovo (1999) and Somalia (1992), and it played some part—if only an incidental or *post hoc* one—in the Iraq War (2003). On the other hand, we have seen throughout this Article that there is an emerging IHRL-based *jus in bello* that would, for instance, make the lethal targeting of enemy combatants far more problematic than it is under the ordinary rules of the law of war. To put the matter starkly, then, the conflict between the two emerging branches of IHRL is this: on the one hand, it drives nations into wars to vindicate human rights; on the other hand, it makes it harder to fight and win those wars.

This conflict has the potential to influence operational decisions. Consider NATO’s decision to wage a human rights-based war against Serbia in 1999 chiefly by means of high-altitude bombing.<sup>178</sup> That decision was made because NATO’s political leaders believed that their electorates would not tolerate the heavy casualties that would likely be incurred from a land war in the Balkans. Moreover, the same desire to avoid casualties led them to order their aviators to attack Serbia at altitudes that generally put them out of range of Serbian anti-aircraft defenses. But this very method of warfare may have posed greater hazards to Serbia’s civilian population, thus creating the risk of violating human rights norms (assuming their applicability). Indeed, “the International Criminal Tribunal for the former Yugoslavia seriously considered prosecuting U.S. leaders for NATO

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governs situations of massive violence employed by collectives, often under conditions of considerable uncertainty (i.e., “the fog of war”) and resource constraints. In such a factual circumstance, it is difficult, if not impossible, to engage in the same rigorous right-based analysis that human rights law requires at times of peace.

177. See, e.g., W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT’L L. 57, 80–84 (2007) (arguing that the ICJ’s 2007 decision in *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)* establishes a binding “duty to prevent” genocide on potential interveners).

178. For discussion, see IVO H. DAALDER & MICHAEL O’HANLON, *WINNING UGLY: NATO’S WAR TO SAVE KOSOVO* 122–23, 221–25 (2000).

peace operations against Slobodan Milosevic in 1999.”<sup>179</sup> Thus, the use of IHRL as the governing legal discourse for all aspects of war—both *jus ad bellum* and *jus in bello*—threatens to lapse into incoherence.

Finally, the extension of IHRL to armed conflict may have significant consequences for the success of international law in advancing global welfare. Rules of the LOAC represent the delicate balancing between the imperatives of combat and the humanitarian goals in wartime. The LOAC has been remarkably successful in achieving compliance from warring nations in obeying these rules. This is most likely due to the reciprocal nature of the obligations involved. Nations treat prisoners of war well in order to guarantee that their own captive soldiers will be treated well by the enemy; nations will refrain from using weapons of mass destruction because they are deterred by their enemy’s possession of the same weapons. It has been one of the triumphs of international law to increase the restrictions on the use of unnecessarily destructive and cruel weapons, and to advance the norms of distinction and the humane treatment of combatants and civilians in wartime.

IHRL norms, on the other hand, may suffer from much lower rates of compliance. This may be due, in part, to the non-reciprocal nature of the obligations. One nation’s refusal to observe freedom of speech, for example, will not cause another country to respond by depriving its own citizens of their rights. If IHRL norms—which were developed without much, if any, consideration of the imperatives of combat—merge into the LOAC, it will be likely that compliance with international law will decline. If nations must balance their security

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179. Osiel, *supra* note 2, at 188–89. On the other hand, some “human rights” advocates seem to have little sympathy for the sufferings that NATO’s bombardment inflicted on Serbian non-combatants. The British human rights author and activist Geoffrey Robertson writes,

[I]s it not . . . legitimate to undermine the morale and disrupt the comfort of “innocent” civilians who are guilty of supporting—indeed, electing—a government which criminally persecutes minorities? . . . Most of Serbia’s eight million citizens were guilty of indifference towards atrocities in Kosovo. The only answer that can be given . . . is that “punishing the people” can be justified if those people have real power to remove the rulers for whose decisions they are to be punished. . . . [Serbia was] a country where, despite a courageous opposition, the majority of the public supported Milosevic and his commanders throughout the Kosovo events albeit without full knowledge (although they could have found out) about the brutality with which they implemented their popular plan for ethnic cleansing.

GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 483–84 (3d ed. 2006). If Robertson’s views were accepted, then concern for the enforcement of human rights norms would override the basic distinction between civilians and combatants. We invite the reader to reflect on which position—Robertson’s “human rights” stance or the LOAC’s traditional protection for noncombatants—is the more humane.

needs against ever more restrictive and out-of-place international rules supplied by IHRL, we hazard to guess that the latter will give way. Rather than attempt to superimpose rules for peacetime civilian affairs on the unique circumstances of the “war on terror,” a better strategy for encouraging compliance with international law would be to adapt the legal system already specifically designed for armed conflict.



