PREVENTING THE EMASCULATION OF WARFARE: HALTING THE EXPANSION OF HUMAN RIGHTS LAW INTO ARMED CONFLICT

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

BY MAJOR MICHELLE A. HANSEN
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES ARMY

55TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 2007

PREVENTING THE EMASCULATION OF WARFARE: HALTING THE EXPANSION OF HUMAN RIGHTS LAW INTO ARMED CONFLICT

MAJOR MICHELLE A. HANSEN*

---

* Judge Advocate, United States Army. Presently assigned as an Assistant Staff Judge Advocate, Deployed Command. L.L.M. 2007, The Judge Advocate General's Legal Center and School; J.D. 1997, Regent University School of Law; B.A. 1994, Saint Leo College; A.A. 1992, Hawaii Pacific University. Previous assignments include Chief of Administrative Law, 24th Infantry Division, Fort Riley, Kansas, 2005–2006; Defense Counsel, Fort Gordon, Georgia, 2004–2005; Administrative Law Attorney, 3d Infantry Division, Fort Stewart, Georgia, 2003–2004; Operational Law Attorney, 3d Infantry Division, Fort Stewart, Georgia, 2001–2003 (including deployment for Operation Iraqi Freedom One); Chief of Military Justice, Fort Eustis, Virginia, 2000–2001; Trial Counsel and Special Assistant United States Attorney, Fort Eustis, Virginia, 1999–2000; Legal Assistance Attorney, Fort Eustis, Virginia, 1998–1999; French Horn Player, 25th Infantry Division, Schofield Barracks, Hawaii, 1990–1992 (enlisted service). Member of the bars of Virginia, the Supreme Court of the United States, and the Court of Appeals for the Armed Forces. This article was submitted in partial completion of the Master of Laws requirements of the 55th Judge Advocate Officer Graduate Course. The writer would like to thank MAJ Sean Watts for his invaluable assistance in developing this topic and in reviewing, editing, and improving earlier drafts of this article.

Table of Contents

I. Introduction 1

II. Background 8

A. International Human Rights Law 9

1. Customary Human Rights Law 10

2. Treaty-based Human Rights Law 14

B. International Humanitarian Law 16

1. Treaty-based International Humanitarian Law 17

2. Customary International Humanitarian Law 19

C. Parallels and Differences Between International Human Rights Law and International Humanitarian Law 25

III. International Humanitarian Law and International Human Rights Law Should Remain Distinct Regimes 33

A. The Importance of State Consent in Determining a State's Obligations Under International Law 33

B. The Normative Frameworks of Human Rights and Humanitarian Law 43

IV. International Human Rights Law Should Not Apply During Armed Conflict, But Such Expansion Is Already Underway 47

A. International Court of Justice Opinions 48

B. Decisions of Human Rights Tribunals 56

C. Military Cases from Iraq 60

D. Cases Involving Terrorism 63

E. Advocacy for Expansion by Writers 65

V. Humanitarian Law Is Uniquely Equipped to Regulate Armed Conflict 69

A. Use of Force 72

B. Security Restrictions 75

C. Detention 77

D. Occupation 79

VI. Halting the Expansion of International Human Rights Law 80

VII. Conclusion 85

The reasons why the United States has maintained its distance from the international human rights agreements are not obvious . . . . [T]here is resistance to accepting international standards, and international scrutiny, on matters that have been for the United States to decide.[1]

I. Introduction

The United States ratified the International Covenant on Civil and Political Rights[2] (ICCPR) fifteen years after President Jimmy Carter signed it and twenty-six years after the United Nations General Assembly unanimously adopted it.[3] The reluctance to join the ICCPR was partly rooted in fears that costs to U.S. sovereignty would be too high.[4] When eventually ratifying the ICCPR in 1992, the United States entered several reservations, declarations, and understandings to ensure that its obligations under the ICCPR would not conflict with U.S. domestic law.[5] Fears that ratifying the ICCPR would threaten American institutions and practices at home were never realized.[6] However, a growing trend toward

---

[1] Louis Henkin, *The Age of Rights, in* INTERNATIONAL LAW CASES AND MATERIALS 626 (3d ed. 1993).

[2] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR].

[3] *See generally* Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence,* 3 NW. J. INT'L HUM. RTS. 7 (2005) (providing an overview of the history of U.S. ratification of the ICCPR, global reactions to U.S. reservations to the ICCPR, and the effect those reservations have had on U.S. foreign relations).

[4] Henkin, *supra* note 1, at 626. For an interesting perspective on United States treaty practices, see Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003) (offering perspectives on U.S. practices of non-ratification, ratification with reservations, and the non-self-executing treaty doctrine).

[5] *See* ICCPR, *supra* note 2. For example, the United States included reservations regarding capital punishment, criminal penalties, and the prohibition on war propaganda and inciting speech; declarations regarding the non-executing nature of the ICCPR and derogations in times of emergency; and understandings regarding rights to counsel, equal protection, and compensation for illegal arrests. *Id.* For a compilation of all ICCPR party declarations and reservations, see Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, Declarations and Reservations, http://www2.ohchr.org/english/bodies/ratification/4.htm#reservations (last visited Dec. 17, 2007).

[6] Henkin, *supra* note 1, at 626.

expanding the reach of international human rights law (human rights law) into armed conflict postures to assault U.S. sovereignty in a way that few could have envisioned. The United States needs to object to this expansion and take the lead in influencing the international community to join in preserving the importance of state sovereignty and consent in international humanitarian law (humanitarian law).

Humanitarian law has been the primary regulator of armed conflict for U.S. soldiers since the American Civil War,[7] when President Abraham Lincoln issued the *Instructions for the Government of Armies of the United States in the Field,* commonly referred to as the "Lieber Code."[8] Humanitarian law, which is often called the "law of armed conflict,"[9] delineates the obligations of states toward one another as contracting parties, and often these obligations afford protections to the victims of armed conflict.[10] It is based upon the "direct

---

[7] *See* Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 243 (2000). For an overview of the development of humanitarian law, see Major Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors,* ARMY LAW., Dec. 1997, at 4.

[8] U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863) [hereinafter Lieber Code], *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).

[9] Some consider international humanitarian law to be a subset of the law of war or law of armed conflict. *See, e.g.,* Geoffrey S. Corn, *Filling The Void: Providing A Framework For The Legal Regulation Of The Military Component Of The War On Terror Through Application Of Basic Principles Of The Law Of Armed Conflict,* 12 ILSA J. INT'L & COMP. L. 481, 489 note 3 (2006); Alexander R. McKlin, *The ICRC: An Alibi for Swiss Neutrality?*, 9 DUKE J. COMP. & INT'L L. 495, 503 (1999). Using the term "humanitarian law" synonymously with, and instead of, the term "law of armed conflict" arguably shows the influence of human rights law on the regulation of warfare and could be viewed as support for further expanding the role of human rights law in armed conflict. However, for the sake of clarity and ease in comparison, the writer prefers to use the term "international humanitarian law" or "humanitarian law" to refer to the entire body of the law of armed conflict, encompassing both treaties and customary law.

[10] *See* LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW CASES AND MATERIALS 1025 (3d ed. 1993); *See generally* Eric Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297 (2003) (providing an explanation of the nature and theory of humanitarian law).

imposition of obligations on the individual," rather than "the granting of rights to the individual."[11]

Conversely, human rights law historically has governed the relationship of a state and its own citizens.[12] It is premised upon the notion that citizens hold individual rights, which often may be enforced against the state.[13]

The reasons proponents espouse for expanding human rights law into armed conflict are varied. Although humanitarian law has effectively balanced the demands of military necessity against the desire to minimize human suffering in past armed conflicts,[14] some advocate the increasing applicability of human rights law in war to further reduce human suffering and protect human dignity.[15] Theodore Meron, Chief Judge of the International Tribunal for the Former Yugoslavia, refers to the developments in humanitarian law that are

---

[11] RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 13 (2002).

[12] *See id.* at 18–24.

[13] *See id.*

[14] *See* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175, 176 (2005) (stating that: "The general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public.").

[15] *See, e.g.*, Karima Bennoune, *Towards a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 180 (2004); David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War,* 46 HARV. INT'L L.J. 231 (2005); Meron, *supra* note 7.

driven by human rights and principles of humanity as the "humanization of humanitarian law."[16]

Undoubtedly, the reduction of human suffering in all contexts is a laudable goal. However, moderating warfare through the application of the human rights regime, if not filtered through the lens of humanitarian law and tempered by reference to the realities of modern armed conflict, will result in the eventual "emasculation of warfare."[17] That is, it will unnecessarily restrict warfighters to a point never envisioned by those who framed and ratified the major instruments designed to regulate warfare. It could make winning wars nearly unachievable for those who try to comply with its strict requirements, and "'[e]xcessive' humanization might exceed the limits acceptable to armed forces, provoke their resistance, and thus erode the credibility of the rules."[18] Furthermore, humanization also could serve to unnecessarily prolong armed conflict, and thereby increase the evils of

---

[16] Meron, *supra* note 7.

[17] The use of the gendered-term "emasculation" is deliberate here and in the title of this article. Professor Hilary Charlesworth, the Director of the Centre for International and Public Law at the Australian National University, proposes that stereotypical imagery matters in international law and that society "giv[es] priority to things that are coded culturally as masculine traits. *See* Amanda Morgan, *The State and International Law* (May 31, 2004), http://info.anu.edu.au/MAC/Media/Research_Review/_articles/_Charlesworth.asp (quoting Professor Hilary Charlesworth). "Society codes certain attributes as masculine or feminine, and current events—for example tough leadership, taking action and military security—are coded as 'masculine' traits . . . . Conciliation, negotiation and human security, associated with 'feminine' traits, are seen as weak." *Id.* (paraphrasing the words of Professor Hilary Charlesworth). This writer agrees that gendered-discourse matters in international law and believes that warfare is "emasculated" when humanitarian law, which is rooted in military necessity, is displaced by human rights law, which is ill-equipped for the harsh realities of war.

[18] Meron, *supra* note 7, at 241.

war that it purports to eradicate.[19] Therefore, the unconstrained expansion of human rights law into matters of war must be stopped, for the sake of soldiers and humanity alike.

Part II of this article provides general information regarding the frameworks of human rights law and humanitarian law. Both are highly developed bodies of public international law, consisting of international agreements and customary international law, the latter of which is born of the consent and consistent practice of states. Traditionally, the two were viewed as distinct legal regimes; human rights law applied during peacetime, and humanitarian law applied during armed conflict.[20] An emerging approach views human rights law as applying at all times, with humanitarian law acting as the *lex specialis*, or specific law, during periods of armed conflict.[21] *Lex specialis* is a principle of interpretation in international law that "suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific."[22] A more radical

---

[19] *Id.* (quoting Francis Lieber from Lieber Code, *supra* note 8, art. 29: "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.").

[20] *See* JEAN PICTET, HUMANITARIAN LAW AND PROTECTIONS OF WAR VICTIMS 15 (1975) (stating that: "humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime").

[21] *See, e.g.*, *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, ¶ 102 (July 9) (stating that: "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. [T]he Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.").

[22] Report of the International Law Commission on the Work of Its Fifty-eighth Session, U.N. GAOR, 61st Sess., Supp. No. 10, at 408, U.N. Doc. A/61/10 (2006), *available at* http://www.un.org/law/ilc/. The principle may apply to conflicting terms in a single treaty or between two or more treaties, between conflicting provisions of customary law, or between conflicting provisions of customary and treaty law. *Id.* The rationale for the principle is that "special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may often create a more equitable result and it may often better reflect the intent of the legal subjects." *Id* at 409.

view urges that human rights law should displace humanitarian law as the preferred method of regulating the battlefield.[23]

It is undeniable that parallels exist between human rights law and humanitarian law. For example, some provisions of the Geneva Conventions of 1949[24] (Geneva Conventions), and their Additional Protocols[25] contain protections that are also contained in human rights instruments or recognized as fundamental human rights.[26] Despite the commonalities, Part III argues that the normative frameworks of human rights law and humanitarian law should remain distinct based upon two foundational arguments. First, state sovereignty and consent are paramount in the formation of international law. With few exceptions, states are bound by international law only to they extent that they agree to be bound. Therefore, if states have not agreed to apply human rights law during armed conflict, either through treaty formation or the development of customary law, there should be no room to debate whether such expansion is appropriate.

---

[23] *See, e.g.*, Bennoune, *supra* note 15, at 180; Koller, *supra* note 15.

[24] 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 GWS]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS (Sea)]; 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 GPW]; 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 GC].

[25] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

[26] *See infra* Part I.C.

The second argument for distinct regimes is the underlying theory of human rights law as a rights-based system and humanitarian law as an obligations-based system.[27] The dissimilar structures of both frameworks make them incompatible for simple merger. To apply human rights law in armed conflict consistent with the structural constraints of humanitarian law, states have two choices. States could agree to incorporate human rights law into existing humanitarian law by converting individual rights afforded by human rights law into direct obligations imposed upon states and those fighting its wars. Alternatively, states could displace humanitarian law with a human rights regime. The first approach is preferable in that it preserves the framework of humanitarian law, along with its ability to consider military necessity as a relevant factor in determining the obligations of states and soldiers to protect individuals during times of war.

Part IV demonstrates that, despite strong reasons against applying human rights law in armed conflict, such expansion has already begun. Opinions of the International Court of Justice (ICJ) and decisions of human rights tribunals have held that human rights law applies during armed conflict, and in some cases, that the obligations of states assumed under human rights instruments apply extraterritorially during armed conflict and occupation.

Part V relates the dangers posed by expanding the application of human rights law in armed conflict. Regulating armed conflict through a human rights regime will tend to grant more protections to the victims of war. Warfighters will bear the costs of these increased

---

[27] *See generally* PROVOST, *supra* note 11 (providing detailed analysis of the concept of rights under human rights and humanitarian law).

protections as additional constraints on how they accomplish the mission and as increased risks to their lives.

Key areas of conflict between human rights law and humanitarian law include the use of force, detention of enemy prisoners of war and internment of civilians, security restrictions imposed on civilian populations, and occupation. If this trend toward expansion continues unchecked, military commanders and soldiers will face an exceedingly complex set of rules for conducting military operations. This overregulation of the battlefield may prolong conflict rather than facilitate a quick end to wars.

Part VI argues that the expansion of human rights law into armed conflict must be halted. The United States should actively recruit its allies to join in preventing such expansion from ever developing into customary law. Simultaneously, it must become a "persistent objector" to preclude becoming bound to apply human rights norms in armed conflict, should those norms eventually develop into customary law. Furthermore, the United States needs to vigorously pursue the issue of expansion with the Human Rights Committee, the monitoring body of the ICCPR, and capitalize on the authority of the U.N. Security Council to direct in its resolutions that humanitarian law alone regulates armed conflicts and occupations.

II. Background

Human rights law and humanitarian law developed distinctly, each having different core goals and philosophies.[28] Human rights law traditionally sought to grant positive rights to individuals and to ensure that a state respected the rights of its own people; whereas, humanitarian law historically endeavored to form compacts between states regarding the permissible justifications for waging war and the delineation of acceptable methods and means for conducting it.[29] While the issue of the overlap or interplay of the two diverging regimes has generated moderate interest in the past, it has been thrust into the spotlight with the advent of the war on terrorism and the armed conflict and occupation in Iraq.[30]

A. International Human Rights Law

Human rights law developed from custom and flourished after World War II, largely in response to the atrocities inflicted upon populations prior to and during the war. The United Nations Charter acknowledged the field of human rights in its preamble stating its determination "to reaffirm faith in fundamental human rights"[31] and in expressing a purpose "[to] achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or

---

[28] Bennoune, *supra* note 15, at 180.

[29] *See generally* PROVOST, *supra* note 11 (providing a history of the development of human rights law and humanitarian law).

[30] *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,* 98 AM. J. INT'L L. 1, 3 (2004) (explaining that "[t]he events of September 11 have focused attention on the potential overlap between international armed conflict, noninternational armed conflict, and law enforcement"). *See generally* Ralph Wilde, *Iraq: Ad Bellum Obligations & Occupation: The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq*, 11 ILSA J. INT'L & COMP. L. 485 (2005).

[31] U.N. Charter pmbl.

religion."[32] Human rights law is comprised of treaty law and customary international law, and fundamental human rights law forms the core of customary human rights law.

1. Customary Human Rights Law

Customary human rights law is formed through the consent and consistent practice of states.[33] It stemmed most notably from the Universal Declaration of Human Rights of 1948.[34] This Declaration, which was adopted by the United Nations General Assembly, espouses human rights of universal application.[35] It was fashioned as a guide to the United Nations Charter, rather than a legally binding treaty to be ratified by individual states.[36] However, it is regarded to some degree as having attained the status of customary international law.[37]

---

[32] *Id.* art. 1, para. 3.

[33] *See* Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law,* 25 GA. J. INT'L & COMP. L. 1, 8 (1996). There is an argument that customary law also could be formed though the wide ratification of human rights treaties by states also. *See* Thomas Buergenthal, *The Evolving International Human Rights System,* 100 AM. J. INT'L L. 783, 790 (2006).

[34] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948). For an overview of the development and importance of customary international human rights law, see Lillich, *supra* note 33, at 1.

[35] *See* Lillich, *supra* note 33, at 1.

[36] *See* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 589 (2006); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) (stating that "the Declaration does not of its own force impose obligations as a matter of international law").

[37] *See* Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors,* 11 BUFF. HUM. RTS. L. REV. 21, 34 (2005) (referencing Hurst Hammum, *The State and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law,* 25 GA. J. INT'L & COMP. L. 287 (1995–96)); Lillich, *supra* note 33, at 1-7. United States federal courts have held that the Universal Declaration of Human Rights, as customary international law, provides actionable rights. For example, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Filartigas,

Fundamental human rights law is a subset of customary human rights laws. It consists of a body of non-derogable human rights that are binding upon all states. Its application is not conditioned upon a state's consent to be bound, and it need not be codified to have universal application.

The international community has not reached a consensus on which human rights are considered to be fundamental or even that fundamental human rights are superior to ordinary human rights.[38] Theodore Meron addressed this issue in *On a Hierarchy of International Human Rights* and concluded that "the international community should direct its efforts to defining the distinction between ordinary and higher rights and the legal significance of this distinction, steps that would contribute significantly to resolving conflicts between rights."[39] Attempts have been made to identify the fundamental rights, and the *Restatement (Third) of the Foreign Relations Law of the United States* is one such work that lists human rights purported to be fundamental and, therefore, universally applicable.[40] It asserts that

---

who were citizens of Paraguay, sued the Inspector General of Police in Asuncion, Paraguay, under the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000), which provides federal courts with jurisdiction over civil actions by aliens for torts committed in violation of U.S. treaties or the law of nations. The Filartigas alleged that the Inspector General caused the wrongful death of their family member through kidnapping and torture, in violation of the Universal Declaration of Human Rights, *supra* note 34, and other declarations, documents, and practices they claimed evidenced customary international human rights law. 630 F.2d at 879. The Second Circuit Court of Appeals held that the right to be free from torture was a violation of customary international law, "as evidenced and defined by the Universal Declaration of Human Rights," *id.* at 882, and that it provided an actionable right under the Alien Tort Claims Act. *Id.* at 887.

[38] *See* Theodore Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 5 (1986).

[39] *Id.* at 22.

[40] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (2003) [hereinafter RESTATEMENT (THIRD)]. The American Law Institute (ALI) publishes this and many other restatements of the law, model codes, and legal studies "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." *See* The American Law Institute,

fundamental human rights are violated when a state practices, encourages, or condones genocide; slavery; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; violence to life or limb; hostage taking; punishment without fair trial; prolonged arbitrary detention; failure to care for and collect the wounded and sick; systematic racial discrimination; and consistent patterns of gross violations of internationally recognized human rights.[41]

Fundamental human rights have been the subject of litigation in the United States. In *Sosa v. Alvarez-Machain,*[42] a Mexican citizen filed suit in the U.S. District Court in California alleging that the U.S. Drug Enforcement Agency prompted his abduction from Mexico for criminal trial in the United States.[43] He claimed that the United States was liable under the Federal Tort Claims Act[44] and the Alien Tort Claims Act[45] (ATCA) for violating

---

http://www.ali.org/index.cfm?fuseaction=home.main (last visited Dec. 18, 2007). Its members are judges, lawyers, and legal scholars from the United States and abroad, and it was founded in 1923. *Id.* The ALI's restatements of the law are created through a deliberative process with the goal of producing clear statements of the current status of the law or how courts may likely state the law. *Id.*

[41] RESTATEMENT (THIRD), *supra* note 40, § 701.

[42] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[43] *Id.* at 718. Mr. Alvarez-Machain was alleged to have tortured and murdered an agent of the U.S. Drug Enforcement Agency. *Id.* at 698.

[44] Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1)–2671 (2000). The Federal Tort Claims Act removes the sovereign immunity of the United States to permit civil actions against the United States for property damage or loss, personal injury, and death caused by the negligent or wrongful acts or omissions of U.S. government employees acting within the scope of their employment. *Id.* § 1346(b)(1).

[45] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

international law by abducting him.[46] The ATCA provides U.S. Courts with jurisdiction over civil actions by aliens for torts committed in violation of the law of nations or U.S. treaty.[47]

The Supreme Court analyzed whether transborder abduction violated a U.S. treaty or the law of nations. Part of Mr. Alvarez-Machain's claim was that his abduction constituted an arbitrary arrest in violation of the ICCPR.[48] The Court found that since the United States had ratified the ICCPR with the understanding that it was not self-executing, its protections were not enforceable in federal courts.[49]

The Court then looked to whether the abduction violated the law of nations, and in doing so, provided an explanation of what constitutes the "law of nations." After a detailed discussion of the type of violations of the law of nations that were actionable under the ATCA, the Court held that "federal courts should not recognize private claims under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted."[50] It then determined that transborder abduction did not violate any

---

[46] *Sosa*, 542 U.S. at 697.

[47] *Id.*

[48] *Id.* at 734 (referencing ICCPR, *supra* note 2, art. 9).

[49] *Id.* at 735.

[50] *Id.* at 732.

international norms that had attained the requisite certainty and acceptance level.[51] Therefore, the claim was not actionable.[52]

2. *Treaty-based Human Rights Law*

Shortly after the United Nations General Assembly adopted the Universal Declaration of Human Rights, a number of human rights treaties emerged. The European Convention for the Protection of Human Rights and Fundamental Freedoms[53] (ECHR) was adopted by the Council of Europe in 1950 to protect basic human rights.[54] The ICCPR[55] and the International Covenant on Economic, Social and Cultural Rights[56] (ICESCR) followed in

---

[51] *Id.* at 738.

[52] *Id. Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), discussed at note 29, provides another example of the use of human rights law in litigation in U.S. courts. For a comprehensive discussion of whether fundamental human rights law operates as U.S. federal common law and, thereby, provides a cause of action under U.S. domestic law when it is violated, see Ryan Goodman & Derek Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law,* 66 FORDHAM L. REV. 463 (1997).

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

[54] *See id.* The European Court of Human Rights is responsible for adjudicating issues arising under the ECHR from member states and individual applicants. *See* European Court of Human Rights, Historical Background, http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/ (last visited Dec. 18, 2007). Since 1998, the Court has been comprised of a number of judges equal to the number of ECHR member states, currently forty-six. *Id.* Judges are elected by the Parliamentary Assembly of the Council of Europe, serve for six years, and may be re-elected. *Id.* They do not represent individual states and must maintain their neutrality. *Id.*

[55] ICCPR, *supra* note 2. The ICCPR currently has 160 parties, including the United States. *See* Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, New York, 16 Dec. 1966, http://www2.ohchr.org/english/bodies/ratification/4.htm (last visited Dec. 18, 2007).

[56] International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The ICESCR has 157 parties. *See* Office of the United Nations High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, New York, 16 Dec. 1966, http://www2.ohchr.org/english/bodies/ratification/3.htm (last visited Dec. 18, 2007). The United States has signed, but not ratified, the ICESCR. *Id.*

1966. Like the ECHR, the ICCPR addresses basic rights, such as the rights to life, freedom from torture, freedom from slavery, due process in criminal proceedings, and privacy.[57] The ICESCR, to which the United States is not a party, sought to provide equality in the enjoyment of economic, social, and cultural rights, and specifically recognized rights to employment, healthcare, and education.[58] Several treaties aim to eradicate violations of certain categories of human rights, such as the Convention on the Elimination of All Forms of Racial Discrimination,[59] the Convention on the Prevention and Punishment of the Crime of Genocide,[60] and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment.[61]

To permit enforcement of the rights contained in human rights treaties, such treaties may create monitoring institutions and judicial or quasi-judicial mechanisms. For example, the ICCPR established a Human Rights Committee of eighteen members to monitor

---

[57] *See* ICCPR, *supra* note 2, arts. 6–27.

[58] *See* ICESCR, *supra* note 56, arts. 3, 6, 12, 13.

[59] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. EXEC. DOC. C, 95-2, 660 U.N.T.S. 195. The International Convention on the Elimination of All Forms of Racial Discrimination has 173 parties, including the United States. *See* Office of the United Nations High Commissioner for Human Rights, International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 Mar. 1966, http://www2.ohchr.org/english/bodies/ratification/2.htm (last visited Dec. 18, 2007).

[60] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The Genocide Convention has 140 parties, including the United States. *See* Office of the United Nations High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, New York, 9 Dec. 1948, http://www2.ohchr.org/english/bodies/ratification/1.htm (last visited Dec. 18, 2007).

[61] Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, Dec. 10, 1984, 1988 U.S.T. 202, 1465 U.N.T.S. 85. The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment has 145 parties, including the United States. *See* Office of the United Nations High Commissioner for Human Rights, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, New York, 10 Dec. 1948, http://www2.ohchr.org/english/bodies/ratification/9.htm (last visited Dec. 18, 2007).

implementation of the ICCPR and resolve complaints from state parties against one another regarding alleged violations of the ICCPR.[62] Additionally, if a state becomes a party to an Optional Protocol to the ICCPR, individuals who are subject to the party's jurisdiction may file complaints with the Human Rights Committee against the party for violating rights protected by the treaty.[63] The Human Rights Committee then considers the allegation, notifies the offending party, and endeavors to bring the party into compliance with the ICCPR through communications.[64] As discussed in the preceding subsection regarding *Sosa v. Alvarez-Machain*, violations of human rights law may also be actionable under domestic legal systems.

B. International Humanitarian Law

Similar to human rights law, humanitarian law consists of treaties, such as the Geneva Conventions,[65] and customary international law. As with other bilateral and multinational treaties, humanitarian law treaties bind states to the extent that they agree to be bound, subject to reservations, understandings, and declarations.[66] Customary law binds all states,

---

[62] *See* ICCPR, *supra* note 2, arts. 28–42.

[63] Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 302. The Optional Protocol has been ratified by 110 parties, but the United States has not done so. *See* Office of the United Nations High Commissioner for Human Rights, Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 Dec. 1966, http://www2.ohchr.org/english/bodies/ratification/5.htm (last visited Dec. 18, 2007).

[64] Optional Protocol to the International Covenant on Civil and Political Rights arts. 2–5.

[65] GWS, *supra* note 24; GWS (Sea), *supra* note 24; GPW, *supra* note 24; GC, *supra* note 24.

[66] *See* North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20) (North Sea Continental Shelf Cases) (holding that the Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S., did not bind the Federal Republic of Germany as it had not ratified the Convention and, even if it had, the Federal Republic of Germany could have entered reservations to certain articles of the Convention); *see*

except those that persistently object to being bound by a given principle as it develops.[67] While customary international law may eventually be codified, much of it is evidenced by state practice.

1. Treaty-based International Humanitarian Law

The term "humanitarian law" originally referred to the Geneva Conventions,[68] which were designed to protect those who found themselves in the hands of their enemy and to minimize human suffering during war. Several treaties preceded the Geneva Conventions, including the Hague Conventions[69] and the 1929 Geneva Convention.[70] The Hague

---

also Vienna Convention on the Law of Treaties art. 26, Mar. 23, 1969, 1155 U.N.T.S. [hereinafter Vienna Convention] (stating "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith," a principle known as *pacta sunt servanda*, Latin for "pacts must be respected"). The United States has not ratified the Vienna Convention, but it views the Convention as an authoritative guide to principles of treaty interpretation. *See, e.g.*, Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 433 (2d Cir. 2001) (stating that the Vienna Convention is "an authoritative guide to the customary international law of treaties").

[67] *See* North Sea Continental Shelf Cases, 1969 I.C.J. at 19 (explaining that state practice that has been "both extensive and virtually uniform in the sense of the provision invoked" and that has occurred "in such a way as to show a general recognition that a rule of law was involved" is required to demonstrate that a provision has formed a new rule of customary international law); *see also* Statute of the International Court of Justice art. 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993 (stating that the Court uses international custom, as evidence of a general practice accepted as law, as one source of international law). *See generally* Arthur M. Weisburd, *The Significance and Determination of Customary International Human Rights Law: The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99 (1996) (explaining the criteria for determining the existence of customary international law and the impact of customary law on human rights treatises).

[68] *See* Meron, *supra* note 7, at 239.

[69] Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 [hereinafter Hague II]; Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. 598 Hague Convention (IV) on Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague IV].

[70] Convention of Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 342.

Conventions were aimed primarily at restricting the methods and means of warfare, by prohibiting certain types of weapons, tactics, and munitions.[71]

Since the signing of the Geneva Conventions in 1949, a number of additional treaties followed to further regulate the battlefield, including the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts[72] (Protocol I); the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts[73] (Protocol II); and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.[74]

While humanitarian law instruments aspire to induce acceptable conduct during warfare, they also provide the justification for holding individuals accountable for violations of treaty obligations. War crimes tribunals of Nuremberg and Tokyo convicted many leaders of the German and Japanese militaries after World War II for war crimes and crimes against

---

[71] *See* Christopher Puckett, *In This Era Of "Smart Weapons," Is A State Under An International Legal Obligation To Use Precision-Guided Technology In Armed Conflict?*, 18 EMORY INT'L L. REV. 645, 672-73 (2004); Manuel E. F. Supervielle, *The Geneva Conventions and the Rules of War in the Post-9/11 and Iraq World: Islam, the Law of War, and the U.S. Soldier*, 21 AM. U. INT'L L. REV. 191, 198 (2005)

[72] Protocol I, *supra* note 25.

[73] Protocol II, *supra* note 25.

[74] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S.

humanity.[75] These tribunals punished violations of international treaties and violations of customary international law, as well.[76]

2. *Customary International Humanitarian Law*

While treaty-based humanitarian law develops from the express, written consent of states, customary humanitarian law develops from the consent and consistent practice of states.[77] On occasion, portions of humanitarian law instruments that are not universally ratified may develop into customary humanitarian law. For instance, although the United States has not ratified Protocol I [78]and Protocol II,[79] it regards many provisions of the Protocols to be customary law.[80]

---

[75] Charter of the International Military Tribunal of Nuremberg, Aug. 8, 1945, 566 Stat. 1544, 82 U.N.T.S. 279.

[76] *Id.* art. 6 (listing as crimes within the Tribunal's jurisdiction: crimes against the peace; war crimes, including violations of the law or customs of war; and crimes against humanity).

[77] *See* North Sea Continental Shelf Cases, 1969 I.C.J. 4, 19 (Feb. 20) (explaining that state practice that has been "both extensive and virtually uniform in the sense of the provision invoked" and has occurred "in such a way as to show a general recognition that a rule of law was involved" is required to demonstrate that a provision has formed a new rule of customary international law).

[78] Protocol I, *supra* note 25.

[79] Protocol II, *supra* note 25.

[80] *See* Memorandum, W. Hays Parks, Chief, International Law Branch, U.S. Army, et al., to John H. McNeill, Assistant General Counsel (International), U.S. Office of the Secretary of Defense, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986); *see also* Michael J. Matheson, *Continuity and Change in the Law of War: 1975 to 2005: Detainees and POWs,* 38 GEO. WASH. INT'L L. REV. 543, 546 (2006) (explaining that the Reagan administration accepted various provisions of Protocol I as part of customary international law and indicated as such in a public statement in 1987 by the State Department on behalf of the U.S. government).

The International Committee of the Red Cross (ICRC) conducted a 10-year study on customary humanitarian law and published its findings in 2005.[81] In determining whether a practice had arisen to the level of customary law, the ICRC looked for the presence of two elements: "namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinion juris sive necessitatis*)."[82] In other words, state practice born of mere convenience or self-interest does not give rise to customary international law; practice out of a sense of legal obligation is required.[83]

Once a principle has developed into customary law, all states are bound by it,[84] except those that persistently objected to its application as it emerged.[85] However, a state cannot object to certain principles of international law that are regarded as *jus cogens*, meaning

---

[81] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts et al. eds., 2005).

[82] Henckaerts, *supra* note 14, 178.

[83] *See* North Sea Continental Shelf Cases, 1969 I.C.J. 4, 19 (Feb. 20) (finding that customary international law had not been formed when fifteen states agreed to draw national boundaries in the North Sea according to the principle of equidistance, as there was "no evidence that they had so acted because they had felt legally compelled to draw them in that way").

[84] *See* Statute of the International Court of Justice art. 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993 (stating that the Court uses international custom, as evidence of a general practice accepted as law, as one consideration in deciding disputes).

[85] *See generally* Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 150 (1996) (providing an overview of the persistent objector doctrine in international law and its origins in the sovereign autonomy of states).

"compelling law," as these principles are deemed to be peremptory norms that can never be derogated.[86]

The persistent objector doctrine applies to the formation of customary human rights law, as well as customary humanitarian law. It parallels the use of reservations, declarations, and understandings in treaty formation in that it, too, acknowledges the importance of state sovereignty and consent in the formation of international law and provides a method by which states may opt out of an emerging norm of international law.[87]

The persistent objector doctrine has two requirements. First, a state must object while the rule is developing and continue to object after it has gained acceptance as customary law.[88] Second, the state must consistently object to the rule.[89] Furthermore, evidence of the objection must be clear,[90] and failure to object may be deemed consent.[91]

---

[86] *See* Vienna Convention, *supra* note 66, art. 53 (stating that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

[87] *See* Loschin, *supra* note 85. The persistent objector doctrine is not universally accepted. For criticisms of the doctrine, see, for example, Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495 (2005).

[88] Loschin, *supra* note 85, at 150 (citing MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 16 (1985)).

[89] *Id.* at 151 (citing VILLIGER, *supra* note 88, at 12).

[90] *Id.* at 150–51 (citing IAN BROWLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 10 (2d ed. 1973)).

[91] *Id.* (citing Jonathan I. Charney, *Universal International Law,* 87 AM. J. INT'L L. 529, 532 (1993)).

Since international treaties do not address every issue that may arise during armed conflict and not all international treaties are universally ratified, customary humanitarian law is useful in closing gaps that may exist. The "de Martens clause" is considered by some to further fill any voids. It first appeared in the Preamble to the Hague Convention on the Laws and Customs of War on Land in 1899,[92] and in its 1907 revised form it stated:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the law of humanity, and the dictates of the public conscience.[93]

This clause was intended to provide "residual humanitarian rules for the protection of the population of occupied territories, especially armed resisters in those territories."[94] A version of the clause appears in the Geneva Conventions,[95] and its goal was to:

> make it clear that if [High Contracting Parties] denounce the Conventions, the parties will remain bound by the principles of the law of nations, as they result from the usages established among civilized peoples, the laws of humanity, and the dictates of public conscience[,] . . . [thereby guaranteeing] that

---

[92] Hague II, *supra* note 59.

[93] Hague IV, *supra* note 59. Frederic de Martens was a renowned Russian Jurist who was the primary drafter of the 1899 Hague Convention. Lieutenant Commander Gregory Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 196 (2000).

[94] Theodore Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience,* 94 AM. J. INT'L L. 78, 79 (2000).

[95] *See* GWS, *supra* note 24, art. 63, ¶ 4; GWS (Sea), *supra* note 24, art. 62, ¶ 4; GPW, *supra* note 24, art. 142, ¶ 4; GC, *supra* note 24, art. 158, ¶ 4. In the Geneva Conventions, the Martens Clause is contained in substantive provisions, *id.,* while in the Hague Conventions, it appears in the preambles. *See* Hague II, *supra* note 59, pmbl.; Hague IV, *supra* note 59, pmbl.

international customary law will still apply for states no longer bound by the Geneva Conventions as treaty law.[96]

There is no consensus on the modern meaning of the de Martens clause, and Theodore Meron demonstrates this through reference to the ICJ's advisory opinion *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case)*,[97] which is discussed in Part III of this article. Most states conceded to the ICJ that, as a baseline interpretation, the clause means that adoption of a conventional norm does not displace customary international law.[98] The United Kingdom argued that the de Martens clause does not, by itself, outlaw the use of nuclear weapons and that the clause requires reference to customary international law to determine the issue, since no treaty exists on point.[99] Additionally, the United Kingdom explained that customary law cannot be discovered through resort to general humanitarian principles alone.[100] The United States concurred and added that the de Martens clause does not transform public opinion into customary law.[101]

Conversely, some states argued that the de Martens clause could indeed transform general principles of international law and humanity into prohibitions on conduct, without those principles having ascended to customary international law through consent of states

---

[96] Meron, *supra* note 94, at 80.

[97] *See id.* at 85–88 (discussing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 35 I.L.M. 809 (July 8, 1996)).

[98] *Id.* at 85.

[99] *Id.*

[100] *Id.* at 86.

[101] *Id.*

and consistent state practice.[102] In other words, "actions that are not explicitly prohibited by treaty or customary rule are not *ipso facto* permitted and . . . the conduct of the parties . . . is judged not only in accordance with treaties and custom, but also in light of the principles of international law referred to in the clause."[103] While the ICJ held that the de Martens clause was relevant to its analysis of the lawfulness of nuclear weapons, it did not resolve the debate over is interpretation.[104]

Given the lack of clarity over the meaning of the de Martens clause, some have found room to argue that human rights law becomes applicable to armed conflict through the clause's invocation of the "law of nations, the laws of humanity, and the dictates of public conscience."[105] To make such arguments ignores the context of the de Martens clause. In the version appearing in the Hague Conventions, the clause begins with the words: "Until a more complete code of the laws of war has been issued . . . ."[106] Given the reference to "laws of war," it appears that when resorting to the "principles of the law of nations," one should be looking for principles relating to war. While principles of the law of nations regarding a host of international legal issues, from environmental protection to global commerce, may exist,

---

[102] *Id.*

[103] *Id.*

[104] *Id.* at 87.

[105] *See id.* at 84 (noting that in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 35 I.L.M. 809 (July 8, 1996), Australia argued that "international standards of human rights must shape conceptions of humanity and have an impact on the dictates of public conscience" and that Judge Weeramantry in a dissenting opinion also emphasized a place for human rights in shaping "the dictates of public conscience.").

[106] Hague IV, *supra* note 59, pmbl.

only the law of nations regarding conduct in war should be relevant to the inquiry under a contextual and logical interpretation of the clause.

If gaps exist in humanitarian law, they should be filled by uncodified humanitarian law, rather than uncodified or codified human rights law. Additionally, gaps are best filled by states manifesting their consent through treaty formation or through consistent state practice that develops into customary international law. Ultimately, states may choose to fill voids by applying norms borrowed from human rights law. However, the process of incrementally filling gaps in this manner is preferable to squeezing an entirely new legal regime into the fissures of humanitarian law, via the amorphous language of the de Martens clause. This is especially true, given that the human rights regime was not originally intended to regulate warfare.

C. Parallels and Differences Between International Human Rights Law and International Humanitarian Law

Early traces of embryonic human rights law can be seen in the Lieber Code, which contained prohibitions on rape, slavery, and disparate treatment of captured combatants based upon race.[107] As human rights law developed as a body of law, it influenced or informed contemporary humanitarian law treaties. Provisions of the Geneva Conventions[108] aimed at providing protections to individuals embody that influence.[109] These include the

---

[107] *See* Lieber Code, *supra* note 8.

[108] GWS, *supra* note 24; GWS (Sea), *supra* note 24; GPW, *supra* note 24; GC, *supra* note 24.

[109] *See* Roberts, *supra* note 36, at 590.

protections of life and due process and prohibitions against torture; cruel, inhuman, or degrading treatment or punishment; arbitrary arrest or detention; and discrimination on grounds of race, sex, language, or religion. While some scholars characterize these protections as creating "rights,"[110] these obligations are not true rights for many reasons.[111] Part III of this article provides analysis of the distinction between rights and obligations and how the "rights" created under humanitarian law are best characterized as standards of treatment or obligations.

Article 72 of Protocol I[112] goes further than the Geneva Conventions' allusion to human rights law. It asserts that fundamental human rights are recognized during an international armed conflict, as it states that it is additional to the Fourth Geneva Convention, "as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict."[113] Furthermore, Article 75 of Protocol I[114] and Article 6 of Protocol II[115] are drawn directly from the ICCPR.[116] These articles demonstrate how human rights law can be incorporated into humanitarian law without displacing the human rights regime.

---

[110] *See, e.g.*, Meron, *supra* note 7, at 251–253.

[111] *See generally* PROVOST, *supra* note 11 (providing detailed analysis of the concept of rights under human rights and humanitarian law).

[112] Protocol I, *supra* note 25, art. 72.

[113] Roberts, *supra* note 36, at 591 (citing Protocol I, *supra* note 25, art. 72).

[114] Protocol I, *supra* note 25, art. 75.

[115] Protocol II, *supra* note 25, art. 6.

[116] *See* Roberts, *supra* note 36, at 591 (referring to the ICCPR, *supra* note 2, arts. 6–27).

Similarly asserting a role for human rights in armed conflict, the United Nations General Assembly has issued resolutions calling for the implementation of fundamental human rights in armed conflict and occupation.[117] In 1968, the General Assembly called for Israel to permit former inhabitants of Arab territories subsequently occupied by Israel to "return home, resume their normal life, recover their property and homes, and rejoin their families according to the provisions of the Universal Declaration of Human Rights."[118] In 1970, the General Assembly affirmed that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict."[119]

Some scholars view the parallels between human rights law and humanitarian law as support for uniting the two regimes.[120] One way to unite the regimes is by contending that human rights law applies at all times and that humanitarian law is a subset of human rights law; during armed conflict, humanitarian law becomes the *lex specialis,* meaning specific law, and the requirements of human rights law are then determined by reference to

---

[117] *See e.g.*, Respect for and Implementation of Human Rights in Occupied Territories, G.A. Res. 2443, U.N. G.A.O.R., 23d Sess., 1748th plen. mtg. (Dec. 19, 1968), Basic Principles for the Protection of Civilian Populations in Armed Conflict , G.A. Res. 2675, U.N. G.A.O.R. 2675, 25th Sess. 1922nd plenary meeting (Dec. 9, 1970).

[118] Respect for and Implementation of Human Rights in Occupied Territories, G.A. Res. 2443, U.N. G.A.O.R., 23d Sess., 1748th plen. mtg. (Dec. 19, 1968).

[119] Basic Principles for the Protection of Civilian Populations in Armed Conflict , G.A. Res. 2675, U.N. G.A.O.R. 2675, 25th Sess. 1922nd plenary meeting (Dec. 9, 1970).

[120] *See, e.g.*, Meron, *supra* note 7, at 240 (remarking that "[n]ot surprisingly, it has become common in some quarters to conflate human rights and the law of war/international humanitarian law").

humanitarian law.[121] A more radical faction advocates displacing humanitarian law and regulating armed conflict purely through a human rights regime.[122]

Despite the commonalities between human rights law and humanitarian law, there are important pragmatic differences between the two. Theodore Meron emphasizes some of these differences:

> Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law. It allows an occupying power to resort to internment and limits the appeal rights of detained persons. It permits far-reaching limitations of freedoms of expression and assembly.[123]

Inherent differences, such as the focus of human rights law on the granting of rights to the individual and the focus of humanitarian law on imposing obligations on the individual, also discourage convergence.[124] The reason is that, "[w]hile contemporary [humanitarian law] is rooted in statist conceptions of rights, human rights law requires any action to be justified in terms of individual rights, thus creating a tension between the two

---

[121] *See Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, ¶ 102 (July 9) (stating that: "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. [T]he Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.").

[122] *See, e.g.*, Bennoune, *supra* note 15; Koller, *supra* note 15.

[123] *Id.*

[124] *See* PROVOST, *supra* note 11, at 13; *see also* Hessbruegge, *supra* note 37, at 25 (noting universal versus conditional application of rights under human rights law and humanitarian law).

legal frameworks."[125] One scholar vividly describes this as the two regimes "rub[bing] up against each other like two tectonic plates."[126] Part III of this article provides a discussion of these differences.

D. When International Human Rights Law and International Humanitarian Law Apply

Another justification for the bifurcation of human rights law and humanitarian law is the context in which they traditionally have applied. Historically, human rights law governed the relationship between a state and its own nationals who were located within its territory and jurisdictional reach.[127] It primarily applied during peacetime, and some human rights treaties, such as the ICCPR[128] and ECHR,[129] made this principle clear by including provisions that permit derogations from the treaties to temporarily suspend the operation of rights in times of public emergency or war.[130] Derogation provisions essentially permit a state engaged in war to take away some of the rights of its own nationals to facilitate winning the war or preserving the state.[131] For example, the ICCPR permits a state to derogate from

---

[125] Koller, *supra* note 15, at 231–32.

[126] CHARLES GARRAWAY, THE "WAR ON TERROR": DO THE RULES NEED CHANGING? 3 (Chatham House 2006), http://www.chathamhouse.org.uk/pdf/research/il/BPwaronterror.pdf.

[127] Major Richard Whitaker, *Civilian Protection Law in Military Operations: An Essay*, 1996 ARMY LAW. 3, 23 (1996).

[128] ICCPR, *supra* note 2.

[129] ECHR, *supra* note 53.

[130] *See* ECHR, *supra* note 53, art. 15; ICCPR, *supra* note 2, art. 4.

[131] Mohamed M. El Zeidy, *The ECHR and States of Emergency: Article 15--A Domestic Power of Derogation from Human Rights Obligations*, 11 MSU-DCL J. INT'L L. 261, 262-63 (2002).

the right to liberty of movement in Article 12.[132] In time of war or emergency, the state could prevent its citizens from entering or leaving certain areas or impose curfews for their safety and security.

Human rights treaties do not permit derogations from rights regarded as fundamental. For example, the ICCPR does not allow derogations from the rights not to be arbitrarily deprived of life; to be free from torture and other cruel, inhuman, or degrading treatment or punishment; to be free from slavery and servitude; not to be imprisoned for failure to fulfill a contractual obligation; not to be punished under ex post facto laws; to recognition as a person before the law; and to freedom of thought, conscience, and religion.[133] These rights would remain protected even in times of war, given their universal nature.

Critics could use the universality of fundamental human rights to argue that such human rights apply during armed conflict, regardless of whether they are incorporated into humanitarian law. This argument is flawed. Given that human rights law was designed to protect individuals from their own state, fundamental human rights law would continue to operate during armed conflict regarding a state and its own citizens. However, states would not be required to provide fundamental human rights to citizens of enemy states unless such requirement exists under humanitarian law.

---

[132] ICCPR, *supra* note 2, arts. 4, 12.

[133] *Id.* arts. 4, 6, 7, 8, 11, 15, 16, 18.

Although fundamental rights are universal, they are not absolute; they may be qualified or interpreted differently in times of peace and war. For example, the right to life is considered a fundamental human right, but it is not unconditional.[134] It protects individuals from "arbitrary," but not all, deprivations of life. During peacetime, this right may be "limited by competing interests such as the right to self-defense, acting to defend others, the prevention of serious crimes involving a grave threat to life or serious injury, and the use of force to arrest or prevent the escape of persons presenting such threats."[135] Deprivations of life under these circumstances are not arbitrary.

During armed conflict, the right to life is similarly and further qualified. For example, the ECHR permits the deprivation of life in self-defense or defense of another, in the course of a lawful arrest or to prevent escape of a lawfully detained person, or in action taken to quell a riot or insurrection.[136] It also provides that deaths resulting from lawful acts of war are not prohibited.[137] One may commend the architects of the ECHR for attempting to draft a comprehensive instrument applicable in both peacetime and armed conflict. However, other articles of the ECHR fail to account for measures that are prohibited during peacetime but permitted during war.[138] For example, in listing instances in which a person

---

[134] *See* RESTATEMENT (THIRD), *supra* note 40, § 701.

[135] Watkin, *supra* note 30, at 10.

[136] *See* ECHR, *supra* note 53, art. 2.

[137] *Id.* art. 15.

[138] *See, e.g., id.* art. 5.

may be deprived of liberty, Article 5 fails to mention the capture of prisoners of war or the internment of civilians during periods of war.[139]

In contrast to the principle that human rights law applies at all times, with certain permitted limitations, humanitarian law applies only when certain thresholds are met. For example, armed conflict between two or more states is necessary to trigger the entirety of the Geneva Conventions.[140] Internal state strife must reach a certain level of intensity before Common Article 3 of the Geneva Conventions[141] will apply, and humanitarian law has no role when internal disturbances do not attain the requisite intensity characteristic of an armed conflict.[142]

---

[139] *See id.* art. 5.

[140] GWS, *supra* note 24, art. 2; GWS (Sea), *supra* note 24, art. 2; GPW, *supra* note 24, art. 2; GC, *supra* note 24, art. 2. I use the phrase "entirety of the Geneva Conventions" loosely, as certain portions of the Geneva Conventions apply only when triggered by certain events, such as occupation or internment. *See, e.g.*, GC, *supra* note 24, arts. 47–141.

[141] GWS, *supra* note 24, art. 3; GWS (Sea), *supra* note 24, art. 3; GPW, *supra* note 24, art. 3; GC, *supra* note 24, art. 3.

[142] Theodore Meron noted that the ICRC study on customary humanitarian law "seeks broader recognition that many rules are applicable to both international and non-international armed conflicts," thereby blurring the threshold methodology of the Geneva Conventions and Additional Protocols. Meron, *supra* note 7, at 261. This view has been gaining support. *Id.* at 262 (noting that "recent regulations promulgated by the Secretary-General of the United Nations on the observance by United Nations forces of international humanitarian law restate a broad set of protective norms distilled from humanitarian treaties without making any distinction between the international and noninternational conflicts in which U.N. forces are involved," referring to U.N. Secretary-General, Bulletin on the Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13, *reprinted in* 38 I.L.M. 1656 (1999)). As evidence of this trend, Meron cites the U.S. Law of War Policy in effect when he wrote the article, which stated that U.S. forces will comply with the law of war in all conflicts, no matter how characterized, and comply with principles and spirit of law of war in all operations. *Id.* (referring to U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998). The DoD Law of War Program was revised in 2006. *See* U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006). The revised program contains the language: "Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations." *Id.* para. 4.1. See Major John T. Rawcliffe, *Changes to the Department of Defense Law of War Program,* ARMY LAW., Aug. 2006, at 23, for an overview of the revised program.

III. International Humanitarian Law and International Human Rights Law Should Remain Distinct Regimes

Humanitarian law and human rights law began as separate, distinct regimes and should maintain their independent natures. Each is partly comprised of peremptory norms, by which all states are bound, regardless of their concurrence. However, a large volume of the legal tenets of both regimes was formed by state consent through a treaty process or through the development of customary international law. The importance of state consent in the development of international law cannot be overstated, and it provides a strong foundational argument against displacing humanitarian law with human rights law or merging the two regimes.

A. The Importance of State Consent in Determining a State's Obligations Under International Law

To understand the role of state consent in humanitarian law and human rights law, it is helpful to examine the underlying theory and history of international law. In the Western World, the early origins of international law can be traced to Greece and the Roman Empire.[143] Prior to the Macedonian conquest, Greece developed rules to regulate the dealings of its numerous city-states.[144] Although these rules did not apply to relationships between Greek city-states and non-Greek states, they closely resemble modern international

---

[143] HENKIN ET AL., *supra* note 10, at xxii; s*ee also* Noone, *supra* note 93, at 183-84.

[144] HENKIN ET AL., *supra* note 10, at xxii*; see also* Noone, *supra* note 93, at 183-84.

law in their regulation of diplomatic practices, formation of alliance treaties, and rudimentary rules of war.[145]

While the Roman Empire did not develop a system of rules to govern relationships within its borders, it is credited with developing *jus gentium*, a system of laws regulating the relationship between Roman citizens and foreigners.[146] "The *jus gentium* contained many principles of general equity and 'natural law,' some of which are similar to certain 'general principles of law recognized by civilized nations'—one of the sources of contemporary international law listed in Article 38 of the Statute of the International Court of Justice."[147]

The emergence of multiple separate states, such as England and France, followed the end of the Roman Empire and necessitated a system of rules to govern relations among the states, kingdoms, and principalities of this new political landscape.[148] In Europe, increases in international trade, improvements in navigation and military techniques, and the discovery of new lands spurred the creation of the law of nations.[149] In the 13th century, German city-states founded the Hanseatic League, which regulated commercial and diplomatic relations among over 150 trading cities and centers.[150] Additionally, Italy's practice of sending ambassadors to other states prompted the development of rules regarding diplomatic

---

[145] HENKIN ET AL., *supra* note 10, at xxii.

[146] *Id.*

[147] *Id. See* Statute of the International Court of Justice art. 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993.

[148] HENKIN ET AL., *supra* note 10, at xxii.

[149] *Id.* at xxiii.

[150] *Id.*

relations, and trade growth in Europe encouraged the formation of commercial treaties.[151] Disputes by European states arose over issues of sovereignty, jurisdiction, trade and navigation rights with the discovery of new lands, and issues surfaced over relations of the indigenous populations of those lands.[152]

By the early 17th century, international treaties and customs had developed a complexity that compelled their collection and codification.[153] One such collection is Hugo Grotius's *De Jure Belli, Ac Pacis Libri Tres* ("On the Laws of War and Peace"), a treatise which is widely regarded as the keystone of contemporary international law.[154]

In addition to this acclaim, Grotius is credited as one of the most renowned natural law theorists.[155] Under his natural law theory, law and legal principles originate from universal reason.[156] The concept that law is derived by, rather than created by, mankind was

---

[151] *Id.*

[152] *Id.*

[153] *Id.* at xxiv.

[154] *Id. See* HUGO GROTIUS, DE JURE BELLI, AC PACIS LIBRI TRES (1623-24); *see also* Noone, *supra* note 93, at 187.

[155] HENKIN ET AL., *supra* note 10, at xxiv. For an overview of natural law principles in international law, see Robert John Araujo, *International Law Clients: The Wisdom Of Natural Law*, 28 FORDHAM URB. L.J. 1751 (2001).

[156] *See* HUGO GROTIUS, DE JURE BELLI, AC PACIS LIBRI TRES (1623-24).

shared by an equally famous natural law philosopher, St. Thomas Aquinas.[157] However, Aquinas believed that law was derived from divine authority rather than reason.[158]

Several principles of early natural law theory exist in modern international law. The principle of *pacta sunt servanda*, which requires that promises given through treaty or otherwise must be kept, was part of Grotius's system of the law of nations.[159] It is articulated in the Vienna Convention on the Law of Treaties.[160] Another example that has survived since Grotius's time is the basic principle of the freedom of the seas.[161]

In compiling his treaty on the law of nations, Grotius also recognized the importance of *jus gentium*,[162] the customary law of nations first developed by the Roman Empire. Although the Roman version contained many principles of natural law, *jus gentium* is regarded as an offspring of positive law theory. Positivism is described as "whatever is enacted by the lawmaking agency is the law in society,"[163] and positivism's "essential meaning in the theory and development of international law is reliance on the practice of states and the conduct of international relations as evidenced by customs or treaties, as

---

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] Vienna Convention, *supra* note 56, art. 26 (stating "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

[161] HENKIN ET AL., *supra* note 10, at xxv.

[162] *Jus gentium* is also called *jus voluntarium,* which means a body of law formed by the conduct and will of nations. *Id.*

[163] MARTIN P. GOLDING, PHILOSOPHY OF LAW 25 (1975).

against the derivation of norms from basic metaphysical principles."[164] Positivism gradually became the dominant theory of international law, "through increasing emphasis on the voluntary law of nations built up by state practice and custom."[165]

Between the 18th and early 20th centuries, the concept of state sovereignty permeated the majority of international legal theory.[166] In 1927, the Permanent Court of International Justice articulated the importance of state sovereignty and consent as follows: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law."[167]

To positivists, such as English jurist John Austin, who viewed law as requiring a command from a superior and a punitive sanction for violations of the command, the concept of state sovereignty was troubling.[168] In international law, no definite superior was dictating commands to states; rather, states with equal authority were voluntarily accepting norms as

---

[164] HENKIN ET AL., *supra* note 10, at xxv.

[165] *Id.*

[166] *Id.*

[167] John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility,* 15 B.U. INT'L L.J. 433, 437 (1997) (quoting S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7)).

[168] HENKIN ET AL., *supra* note 10, at xxv.

binding.[169] Therefore, Austin deemed international law to be "positive morality" rather than true law.[170]

The debate over whether international law is truly law, positive morality, or something else had appeared to have cooled following the end of the Cold War.[171] However, contemporary issues have renewed interest in the question of how international law becomes law and the importance of state sovereignty and consent. Professor Duncan Hollis points to terrorism, hegemony, and globalization as three such issues.[172] Since September 11, 2001, some have argued for "the primacy of national security interests—particularly, efforts to combat terrorism and the proliferation of weapons of mass destruction—even if pursuing those interests requires discarding or dismissing existing regimes of international law."[173] In other words, national interests trump the state's obligations under international treaties and customary international law. Some view the U.S. invasion of Iraq in 2003 and U.S. predominance in global affairs as evidence of international hegemonic law.[174] "Such a system would replace the rule of equally sovereign states creating law through consent and

---

[169] *Id.*

[170] GOLDING, *supra* note 163, at 25.

[171] Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law,* 23 BERKELEY J. INT'L L. 137, 137 (2005) (referencing Jose Alvarez, *Why Nations Behave,* 19 MICH. J. INT'L L. 303, 303 (1998) ("An ever increasing number of scholars are going beyond well-worn debates about whether international law is truly 'law' to undertake 'post-ontological' inquiries appropriate to the new 'maturity' of the international legal system.").

[172] *Id.*

[173] *Id.* at 138.

[174] *See, e.g, id.* at 137; Andreas Paulus, *The War Against Iraq And The Future Of International Law: Hegemony Or Pluralism?*, 25 MICH. J. INT'L L. 691 (2004); Michael T. Wawrzycki, *The Waning Power of Shared Sovereignty in International Law: The Evolving Effect of U.S. Hegemony*, 14 TUL. J. INT'L & COMP. L. 579 (2006).

practice with a system whereby a single actor, the hegemon, dictates new rules of law."[175] Finally, some scholars argue that globalization's tendency to decentralize power has lessened the importance of sovereign states in international law, as corporations, organizations, and individuals exert growing influence in the formation and enforcement of international law.[176]

These arguments are part of a broader debate over "legitimacy" versus "justification" in international law.[177] Legitimacy regards as most important the source of claim of legal obligation rather than the obligation's justification, and the source of claim in international law is state consent.[178] Justification looks to the moral principles or common values that inform the specific provisions of the law.[179]

Professor Paul Kahn illustrated the operation of these competing perspectives and the primacy of state sovereignty in the ICJ's *Nuclear Weapons Case.*[180] In this case, the U.N.

---

[175] Hollis, *supra* note 171, at 138 (referencing, for example, Jose Alvarez, *Hegemonic International Law Revisited,* 97 AM. J. INT'L L. 873 (2003); Detlev F. Vagts, *Hegemonic International Law,* 95 AM. J. INT'L L. 843 (2001)).

[176] *Id.* (citing, for example, Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law,* 52 STAN. L. REV. 959, 959 (2000) (acknowledging that some perceive "national sovereignty . . . to have diminished significantly in the past half century as a result of economic globalization" and other manifestations of globalization); Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for Retention of State Sovereignty,* 25 B.C. INT'L & COMP. L. REV. 235, 235–36 (2002) (discussing the debate over globalization's impact on sovereignty in terms of the decrease in subjects excluded from international regulation and the increase in non-state actors' participation); Phillip Trimble, *Globalization, International Institutions and the Erosion of National Sovereignty,* 95 MICH. L. REV. 1944, 1946 (1997) (citing "globalism" as a "visible challenge[] to national sovereignty")).

[177] *See* Paul W. Kahn, *Nuclear Weapons and the Rule of Law,* 31 N.Y.U. J. INT'L L. & P. 349, 367–68 (1999).

[178] *Id.*

[179] *Id.*

[180] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 35 I.L.M. 809 (July 8, 1996).

General Assembly asked the ICJ for an advisory opinion regarding the legality of the threat or use of nuclear weapons under international law.[181] To decide the issue, the Court analyzed treaties, the U.N. Charter, and customary international law and concluded that, generally, the threat or use of nuclear weapons would be unlawful.[182] However, it could not definitively conclude "whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[183] The ICJ found itself:

> [U]nable to state as a matter of law what may seem an obvious proposition of common sense: If international law protects any common values of humanity, it must prohibit weapons that threaten to destroy civilization itself. The Court cannot reach this conclusion because the arguments from legitimacy, which insist on the primacy of the sovereign state, cannot be subordinated to this argument from justification, even when civilization hangs in the balance.[184]

At a minimum, this opinion illustrates that "as long as states maintain a policy of nuclear self-defense, it is difficult to argue that the age of state sovereignty is over."[185]

Many international lawyers regard Article 38 of the Statute of the International Court of Justice as providing the list of modern sources of international law.[186] Article 38 lists

---

[181] *Id.*

[182] *Id.* ¶ 105.

[183] *Id.*

[184] Kahn, *supra* note 177, at 413.

[185] *Id.* at 380.

[186] *Id.* at 142 (referencing the Statute of the International Court of Justice art. 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993.

treaties, custom, and recognized general principles as the sources.[187] At the core of each of these sources of law is the principle of state sovereignty and consent.[188] Given the importance of state consent, the parameters and conditions of the consent should matter when determining a state's obligations under international law.

This contention is supported by states' use of reservations and objections in multilateral treaty formation.[189] Under current reservations law, a state may enter reservations when signing a treaty so long as the reservations are compatible with the object and purpose of the treaty.[190] Furthermore, if another signatory state enters an official objection to another state's reservation, the objection affects the treaty relationship only between those two states.[191]

---

[187] Statute of the International Court of Justice art. 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993. Some cite "General Assembly resolutions, the work of the International Law Commission, and even aspirational texts such as the American Declaration of the Rights of Man" as sources of international law. *See* Hollis, *supra* note 171, at 143 (referencing, for example, T. Olawale Elias, *Modern Sources of International Law*, *in* TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 34 (1972).)

[188] Lau, *supra* note 87, at 495 (explaining that "[a]ccording to its traditional conceptionalization, international law derives from agreement among sovereign states"); *see also* Kahn, *supra* note 177, at 380 (noting that "[r]egardless of the development of human rights law and multiple international legal regimes, as long as states maintain a policy of nuclear self-defense, it is difficult to argue that the age of state sovereignty is over"). For a discussion of the importance of state consent in treaty-making and the new trend of treaty formation involving sub-state, supranational, and extra-national actors into treaty formation, see Hollis, *supra* note 171.

[189] *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 19 (May 28) (stating "[i]n its treaty relations, a State cannot be bound without its consent").

[190] *Id.* ¶ 66 (noting that reservations are permissible under the Genocide Convention, *supra* note 60, so long as they are not incompatible with the object and purpose of the Convention); *see also* Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent,* 96 AM. J. INT'L L. 531 (2002) (discussing the I.C.J.'s opinion in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28) and the Vienna Convention, *supra* note 66, art. 26).

[191] *Id.*

If it is permissible for a state to exempt itself from certain treaty obligations through reservations, then the plain language and reasonable interpretation of a treaty should constitute the outer boundaries of what a state has agreed to undertake or provide; a state should not have to fear that it may later incur a broader, unforeseeable obligation under the treaty through reinterpretation of the treaty's terms by an international tribunal or otherwise. For example, if states have agreed that a given human rights treaty applies only within a state's own borders, no party should be forced to provide rights enumerated in the treaty outside its borders.[192] Exceptions should occur under very limited circumstances. For example, if the treaty protects some rights considered to be fundamental, these fundamental rights would apply extraterritorially because of their nature as peremptory norms, not due to their delineation in the treaty. Additionally, if extraterritorial application of certain rights found in the treaty develops into customary law, a state could be bound to provide those rights outside its borders as a matter of customary law, if it had not perfected its status as a persistent objector.

State consent is paramount in the formation of customary international law, as well. Customary law develops from the consistent practice of states, acting out of a sense of legal obligation. States engaging in the consistent practice may be deemed to have "consented" to the developing norm. However, a state may become bound by customary law even if it did

[192] This was the issue in the *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136 (July 9), *infra* Part IV.A.

not engage in the consistent practice of the developing norm.[193] In that case, a state would not have, in fact, "consented" to the application of the norm.

However, the persistent objector doctrine permits a state to voice its objections to a developing norm, attempt to influence other states to depart from a developing norm, and remove itself from binding application of the norm. In this manner, the sovereignty and consent of the objector state remain important.

If a state has consented to apply only humanitarian law during armed conflict and human rights law in all other contexts, how does the expansion of human rights law into armed conflict occur? The importance of state sovereignty and consent should prevent courts and tribunals from taking the entirety of human rights law, or pieces of it, and thrusting it upon states as binding obligations in armed conflict. The primacy of state consent, along with the important distinction between the normative frameworks of human rights and humanitarian law, appears to have been forgotten or ignored by those who advocate the expansion of human rights law.

B. The Normative Frameworks of Human Rights and Humanitarian Law

In addition to state consent, the structural dissimilarity of the normative frameworks of humanitarian law and human rights law provides another basis for rejecting a convergence

[193] *See* Loschin, *supra* note 85, at 150 (explaining that "situations may arise when a practice has gained the status of customary law, although some states may disagree" with being bound by the norm); *see also* Kahn, *supra* note 177, at 371 (stating that "[e]ven the state that refuses to join a multilateral convention may find itself in a situation in which others are arguing that it is bound by a customary law rule 'crystallized' in the process of creating the convention").

of the two in the absence of incorporation. In *International Human Rights and Humanitarian Law,* René Provost compares the systems of human rights and humanitarian law and meticulously deconstructs each.[194] His analysis of the primary difference between the normative frameworks, in that human rights law is founded upon the granting of rights to the individual and that humanitarian law is rooted in the imposition of obligations on the individual, demonstrates the incompatibility of the two.[195]

A right is a "claim[] grounded in the interest of a holder."[196] Under human rights law, individuals are the holders of rights, and the potential offender of the rights is usually the individual's state of nationality.[197] The pivotal issue is whether humanitarian law creates rights in this same sense.

Provisions of the Geneva Conventions prohibiting protected persons from renouncing the "rights secured to them under the present Convention"[198] and those prohibiting special agreements adversely affecting the rights of protected persons[199] have been interpreted as providing rights to individuals.[200] To the contrary, these provisions demonstrate that, despite

---

[194] PROVOST, *supra* note 11.

[195] *Id.*

[196] *Id.* at 18.

[197] *Id.*

[198] *See* GWS, *supra* note 24, art. 7; GWS (Sea), *supra* note 24, art. 7; GPW, *supra* note 24, art. 7; GC, *supra* note 24, art. 8.

[199] *See* GWS, *supra* note 24, art. 6; GWS (Sea), *supra* note 24, art. 6; GPW, *supra* note 24, art. 6; GC, *supra* note 24, art. 7.

[200] *See* PROVOST, *supra* note 11, at 28.

the label of "rights," they are not in the nature of rights at all. If the Geneva Convention created "rights," then the holder of those rights, whether the holder is the individual or the state, would be able to waive those rights.[201] The prohibition on waivers suggests that "the Convention actually sought to decree standards of treatment of individuals rather than 'rights' similar in nature to human rights."[202]

Provost provides further evidence of this by referencing initial International Committee of the Red Cross drafts that permitted protected persons to waive their rights.[203] Waiver provisions were rejected, because "claims of waiver from the state under whose power protected persons find themselves would have been easy to make and hard to disprove."[204] Similarly, Article 85 of the Third Geneva Convention[205] supports the notion that rights in the Geneva Conventions are best understood to be standards existing independent of individuals and their actions. Article 85 states the prisoners of war convicted of war crimes retain the benefits of the Convention.[206] This provision was contrary to customary law prevailing at the time the Conventions were drafted, which held that a war criminal renounced the benefit of the protections of humanitarian law.[207]

---

[201] *Id.* at 29

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] GPW, *supra* note 24, art. 85.

[206] *Id.*

[207] PROVOST, *supra* note 11, at 30.

Skeptics could quickly point out that, under the Fourth Geneva Convention, protected persons who commit hostile acts "shall not be entitled to claim such rights and privileges under the present Convention" and are deemed to have "forfeited rights of communication under the present Convention."[208] However, suspension of a protected person's rights "is not justified by their presumed forfeiture, but rather by reference to the security of the state."[209]

The universality of human rights law and the conditionality of humanitarian law is another key difference between the normative frameworks.[210] Under human rights law, rights are given to all, "including nationals of states not bound by the same norm and stateless individuals;" state of nationality is irrelevant.[211] In contrast, many of humanitarian law's protections are linked to nationality[212] or membership in groups, such as combatants.[213]

Another distinction between the regimes is that many human rights norms have been found to be directly applicable, meaning that they are self-executing and create a private

---

[208] *Id.* at 31 (referring to GC, *supra* note 24, art. 5).

[209] *Id.*

[210] *Id.* at 24–42; *see also* Hessbruegge, *supra* note 37, at 25 (noting as a "crucial difference" between human rights law and humanitarian law that "whereas human rights law is universal . . . the protection offered by international humanitarian law is general limited to the opponent's soldiers and civilians.).

[211] PROVOST, *supra* note 11, at 25.

[212] *See* GC, *supra* note 24.

[213] *See* GPW, *supra* note 24.

cause of action before national legal systems without the need for further legislation.[214] In contrast, humanitarian norms are generally not self-executing.[215]

Rather than granting rights, humanitarian law creates direct obligations on individuals and states. An individual who violates humanitarian law may face prosecution for his actions, as the Nuremberg trials illustrate. Human rights law does not impose obligations on individuals. If an agent of the state violates human rights law, the offended individual's recourse is with the state, not the individual agent.

The differences between the normative frameworks of human rights law and humanitarian law show that a simple merger of human rights into humanitarian law is unworkable. While it is possible to incorporate human rights law into humanitarian law, the process of converting rights into direct obligations must be accomplished through state consent and give deference to military necessity.

IV. International Human Rights Law Should Not Apply During Armed Conflict, But Such Expansion Is Already Underway

---

[214] PROVOST, *supra* note 11, at 23; *see, e.g.*, discussion of Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) *supra* Part II.A.1.

[215] *See* Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005) (holding that the Third Geneva Convention does not confer a right to enforce its provisions in U.S. federal court), *rev'd*, 126 S.Ct. 2749 (2006), *remanded to* 2006 U.S. App. LEXIS 20943 (D.C. Cir. Aug. 11, 2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* Boumediene v. Bush, 476 F.3d 981, 2007 U.S. App. LEXIS 3682 (D.C. Cir. 2007); *see also* Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. Ct. App. 1978) (holding that there was no evidence that the Geneva Conventions were intended "to create private rights of action in the domestic courts of the signatory countries").

Given the importance of state consent in forming international law and the essential differences between the regimes of human rights and humanitarian law, human rights law should apply in armed conflict only if states consent to incorporating it into existing humanitarian law or agree to completely replace humanitarian law with a human rights regime. However, a subtle, ominous shift towards displacing humanitarian law with human rights law is underway, absent state consent. Opinions of the ICJ and decisions of human rights tribunals show evidence of this change. This shift has taken two basic forms: the extraterritorial application of human rights treaties and the application of human rights law, aside from that which is incorporated into humanitarian law or recognized as fundamental, during armed conflict and occupation. While the United States, Britain, and other nations object to this move,[216] proponents are advocating the increasing expansion of the human rights regime into armed conflict.

A. International Court of Justice Opinions

In two opinions, the ICJ made clear its position on the role of human rights law during armed conflict: human rights law does not cease to apply during armed conflict and

[216] *See* Wilde, *supra* note 30, at 487. To support his position, Wilde cites the U.S. Dep't of Defense, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Consideration (2003), *available at* http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf (last visited Mar. 25, 2007) (stating "[t]he U.S. has maintained consistently that the [ICCPR] does not apply outside the U.S. or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during international armed conflict") and the Rt. Hon. Adam Ingram MP, Ministry of Defence, Letter to Adam Prince MP (on file with Ralph Wilde) (stating that "[t]he ECHR is intended to apply in a regional context in the legal space of the Contracting States. It was not designed to be applied throughout the world and was not intended to cover the activities of a signatory in a country which is not a signatory to the Convention. The ECHR can have no application to the activities of the U.K. in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition Forces. Further, although the U.K. Armed Forces are an occupying power for the purposes of the Geneva Convention, it does not follow that the U.K. exercises the degree of control that is necessary to bring those parts of Iraq within the United Kingdom's jurisdiction for the purposes of article 1 of the Convention.").

human rights treaties apply extraterritorially in certain contexts during armed conflict. In the *Nuclear Weapons Case,* discussed in Part III of this article, the ICJ stated that "the protection of the International Covenant on 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 time of national emergency."[217] To its credit, the Court qualified this statement by explaining that whether a particular loss of life is considered to be an arbitrary deprivation of life in violation of the ICCPR would have to be determined by reference to humanitarian law, as *lex specialis.*[218]

In another advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case)*,[219] the ICJ affirmed its view that human rights law does not cease to apply during armed conflict. More controversial though, when determining whether Israel's construction of a security barrier violated the human rights of civilians living in the occupied Palestinian Territory, it held that the ICCPR applies extraterritorially.[220]

A brief summary of the facts is necessary to put the issue in context. A 1949 general armistice agreement between Jordan and Israel fixed a demarcation line between Arab and

---

[217] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 35 I.L.M. 809, ¶ 25 (July 8, 1996).

[218] *Id.*

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

[220] *Id.*

Israeli forces in the territory of Palestine.[221] This demarcation line was later called the "Green Line."[222] In 1967, Israel occupied all the territories that had previously constituted Palestine, including the areas that were on the Arab side of the Green Line, known as the West Bank.[223] Israel has continuously occupied the West Bank since 1967.[224]

Israel planned to construct a security barrier in the West Bank to stop infiltration from the central and northern portions of that area, as it maintained that this infiltration was largely responsible for terror attacks.[225] Israel had completed work on sections of the barrier in 2003.[226] The final project was to consist of a fence with electronic sensors, a ditch, a paved patrol road, a sand strip to detect footprints, and coils of barbed wire.[227] Palestinians living between the Green Line and the barrier would have to obtain a permit issued by the Israeli authorities to remain in the area, and access to and from the area would be restricted through gates.[228]

---

[221] *Id.* ¶ 72..

[222] *Id.*

[223] *Id.* ¶ 73.

[224] *Id.* ¶ 78.

[225] *Id.*

[226] *Id.* ¶ 79–84.

[227] *Id.*

[228] *Id.* ¶ 85.

After determining that Israel was bound to apply the Fourth Geneva Convention[229] to the occupied Palestinian Territory, the ICJ turned to the issue of whether Israel was required to apply obligations under international human rights treaties, as well.[230] Israel had previously ratified the ICCPR, the ICESCR, and the United Nations Convention on the Rights of the Child, and it remained a party to those instruments.[231]

Article 2, paragraph 1 of the ICCPR states that "each State Party to the present Convention undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind . . . ."[232] While the plain language of this provision seems to clearly indicate that it protects only individuals who are both located within a state's territory and subject to its jurisdiction, the ICJ determined that it was plausible to construe the "and" between "territory" and "subject" in Article 2, paragraph 1 as an "or," thereby giving the protections of the ICCPR to individuals located within a state's territory and also to those located outside the state's territory, but subject to its jurisdiction.[233]

Michael Dennis, U.S. Department of State legal advisor, delved into the preparatory work of the ICCPR and found that the phrase "within its territory" was deliberately included

---

[229] GC, *supra* note 24.

[230] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ¶ 102.

[231] *Id.* ¶ 103.

[232] ICCPR, *supra* note 2, art. 2 (emphasis added).

[233] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ¶ 108–09.

to clarify that the Convention did not obligate states to provide rights in occupied territory.[234] Eleanor Roosevelt was the U.S. representative and chair of the Commission on Human Rights at the time the phrase was added, and she explained:

> The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without [the proposed] addition the draft Covenant might be construed as obliging the contracting State[] to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying States in certain respects, but were outside the scope of legislation of those States. Another illustration would be leased territories; some countries leased certain territories from others for limited purposes, and there might be a question of conflicting authority between the lessor nation and the lessee nation.[235]

France and other delegations opposed the insertion of the territorial limitation, but it was ultimately adopted in 1950 by a vote of 8–2.[236] Two years later, France proposed to delete the phrase "within its territory," but when put to a vote, the proposal was rejected.[237]

Despite the literal meaning of the phrase "within its territory" and the preparatory work available to aid the ICJ in discerning the phrase's intended meaning, the ICJ concluded

---

[234] Michael Dennis, *Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?*, 12 ILSA J. INT'L & COMP. L. 459, 463 (2006).

[235] *Id.* at 463–64 (citing Summary Record of the Hundred and Thirty-Eighth Meeting, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 138th mtg. at 10, U.N. Doc. E/CN.4/SR.138 (1950)).

[236] *Id.* at 464 (referencing Summary Record of the Hundred and Ninety-Third Meeting, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 193d mtg., at 21, U.N. Doc. E/CN.4/SR.193 (1950)).

[237] *Id.* (referencing U.N. GAOR, 3d Comm., 18th Sess., 1259th mtg., at 30, U.N. Doc. A/C.3/SR.1259 (1963)).

that "the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[238] In reaching its conclusion, it referenced observations of the Human Rights Committee regarding "the long-standing presence of Israel in the [occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli forces therein."[239]

Critics have noted the ICJ's utter lack of detail concerning the interaction of human rights law and humanitarian law under the circumstances of the case and its lack of objectivity concerning the facts, and accordingly, urge that the opinion be given no weight.[240] Michael Dennis analyzed the ICJ's opinion and concluded that the court based its opinion on the extended duration of Israel's occupation of the Palestinian territory.[241] In trying to reconcile the ICJ's holding with the plain language of the ICCPR, he stated: "Thus, arguably the best reading of the Court's opinion is that it was based only on the view that the West Bank and Gaza were part of the 'territory' of Israel for purposes of the application of the Covenant."[242] Whether the ICJ would apply the ICCPR extraterritorially in any other context is unclear, as "the structure of the Opinion, in which humanitarian law and human rights law

---

[238] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ¶ 111.

[239] *Id.* ¶ 110.

[240] *See, e.g.*, Michael J. Kelly, *Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier,* 29 FORDHAM INT'L L.J. 181 (2005).

[241] *See* Michael Dennis, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation,* 99 AM. J. INT'L L 119, 122 (2005).

[242] *Id.* at 123.

are not dealt with separately, makes it . . . extremely difficult to see what exactly has been decided by the Court."[243]

After determining that the ICCPR applied, the ICJ turned to the issue of whether Israel's construction of a security barrier violated the ICCPR's provisions. It noted that Israel had exercised its right of derogation under Article 4 of the ICCPR, but only with respect to Article 9, which deals with rights to liberty and security of persons and sets forth rules applicable to detention and arrest.[244] Other provisions of the ICCPR, such as Article 12, paragraph 1, which provides for liberty of movement and freedom to choose residence, and Article 17, paragraph 1, which provides for freedom from unlawful interference with privacy, family and home, were implicated by the facts of the case. The ICJ held that Israel's security barrier breached these and other provisions of the ICCPR.[245]

Michael Kelly, who served in the Office of the General Counsel in the Coalition Provisional Authority in Iraq has pointed out the ICJ's apparent disregard for its previous adherence to humanitarian law as the *lex specialis* in matters of war.[246] The Hague

---

[243] Kelly, *supra* note 240, at 188 (citing Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) (separate opinion of Judge Higgins)).

[244] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 127. It is unclear from the text of the opinion whether Israel's request to derogate from Article 9 was to apply to Israelis within Israel's border, to Arabs in occupied Palestine, or both. *See id.* However, since Israel argued that the ICCPR did not apply in occupied territories, the derogation apparently related to Israelis within Israel and not individuals in the occupied territories. *See* Kelly, *supra* note 240, at 210.

[245] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 163.

[246] Kelly, *supra* note 240, at 188.

Regulations[247] and the Fourth Geneva Convention[248] contain numerous provisions regarding the power and obligations of occupants. Article 43 of the Hague Regulations gives the occupant the authority to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety,"[249] and Article 52 provides authority for requisitioning private property to satisfy needs of the occupant's army.[250] Article 78 of the Fourth Geneva Convention permits internment or assigned residence for security reasons.[251] These provisions directly contradict Article 12, paragraph 1 of the ICCPR, which provides a right to liberty of movement and freedom to choose one's residence.[252] However, the Court made no attempts to reconcile these and numerous other conflicting provisions in human rights law and humanitarian law treaties.

The United States has rejected the assertion that its obligations under the ICCPR apply extraterritorially. Regarding the applicability of the ICCPR to the U.S. presence in Iraq, "[t]he U.S. has maintained consistently that the Covenant does not apply outside the U.S. or its special maritime and territorial jurisdiction, and that it does not apply to operations

---

[247] *See* Hague IV, *supra* note 59.

[248] GC, *supra* note 24.

[249] *See* Hague IV, *supra* note 59, art. 43.

[250] *Id.* art. 52.

[251] GC, *supra* note 24, art. 78.

[252] ICCPR, *supra* note 2, art 12.

of the military during an international armed conflict."[253] Michael Dennis captured the U.S. position as follows:

> The obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict. Nor were they intended to replace the *lex specialis* of international humanitarian law. Extending the protections provided under international human rights instruments to situations of international armed conflict and military occupation offers a dubious route toward increased state compliance with international norms.[254]

B. Decisions of Human Rights Tribunals

Unlike the ICCPR, the ECHR has no territorial limitation; it obligates states to secure rights "to everyone within their jurisdiction."[255] "Jurisdiction" is not defined, so the ECHR leaves open the possibility that, when a state sends military forces to a foreign country, the inhabitants of the foreign country are within the jurisdiction of the sending state for the purposes of the ECHR. The European Court of Human Rights (European Court) has considered this issue on several occasions.

In cases involving Cyprus and Turkey, the European Court held that a state may be bound to apply its obligations under the ECHR extraterritorially when it exercises "effective

---

[253] Wilde, *supra* note 30, at 487 (quoting U.S. Dep't of Defense, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Consideration (2003), *available at* http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf (last visited Mar. 25, 2007)).

[254] Dennis, *supra* note 234, at 141.

[255] ECHR, *supra* note 53, art. 1.

control" outside its national territory as part of a military operation.[256] However, the Court departed from the "effective control" rationale in later decisions.

The Grand Chamber of the European Court considered the application of the ECHR during armed conflict in *Bankovic v. Belgium.*[257] In *Bankovic,* when determining whether victims of NATO's bombing of the headquarters of Radio Television Serbia were "within the jurisdiction" of the NATO member states, the Court stated that: "Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."[258] Under this reasoning, the Court found that the victims were not within the jurisdiction of member states for the purposes of the ECHR.[259] In rejecting the "effective control" rationale employed in earlier cases, the Court stated that: "The wording of Article 1 does not provide any support for the applicant's suggestion that the positive obligation in Article 1 . . . can be divided in accordance with the particular circumstances of the extraterritorial act in question."[260]

A few years later in *Issa v. Turkey,*[261] a Chamber of the European Court considered the application of the ECHR in Iraq in a case involving a raid by a large contingent of

---

[256] Dennis, *supra* note 234, at 468.

[257] Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333.

[258] Dennis, *supra* note 234 (quoting Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333).

[259] *Id.*

[260] *Id.* at 469.

[261] Issa v. Turkey, 2004 Eur. Ct. H.R. 71.

Turkish forces into northern Iraq.[262] Departing from the *Bankovic* decision and its rejection of the effective control test, the Court held that Turkey was bound to apply the EHCR when conducting military operations outside its national territory.[263] In reaching its decision, the Court relied upon the decisions of the Human Rights Committee regarding the ICCPR in *Lopez Burgos v. Uruguay*[264] and *Celiberti v. Uruguay*,[265] even though these cases predated *Bankovic* by twenty years.

The ICCPR created the Human Rights Committee as a means to implement and enforce the Covenant.[266] In *Lopez Burgos* and *Celiberti*, the Committee found that it had jurisdiction to hear cases involving Uruguay's abduction its own citizens who were living abroad.[267] The ICJ and the European Court have relied on these decisions as authority for applying human rights instruments extraterritorially.[268] However, these cases do not clearly support the proposition that the ICCPR applies extraterritorially in armed conflict and occupation, as the applicants in *Lopez Burgos* and *Celiberti* were citizens of the offending

---

[262] Dennis, *supra* note 234, at 469 (discussing Issa v. Turkey, 2004 Eur. Ct. H.R. 71).

[263] *Id.*

[264] U.N. Human Rights Committee, Lopez Burgos v. Uruguay, Commc'n No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981).

[265] U.N. Human Rights Committee, Celiberti de Casariego v. Uruguay, Commc'n No. 56/1979, U.N. Doc. CCPR/C/13/D/56/199 (1981).

[266] *See* ICCPR, *supra* note 2, arts. 28–39.

[267] U.N. Human Rights Committee, Lopez Burgos v. Uruguay, Commc'n No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981); U.N. Human Rights Committee, Celiberti de Casariego v. Uruguay, Commc'n No. 56/1979, U.N. Doc. CCPR/C/13/D/56/199 (1981).

[268] *See, e.g.*, Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 163; Issa v. Turkey, 2004 Eur. Ct. H.R. 71.

state, and the decisions involved neither armed conflict nor occupation.[269] Furthermore, as Committee member Christian Tomuschat explained: "[Occupation of a foreign territory is an] example of situations which the drafters of the Covenant had in mind when they confined the obligation of State parties to their own territory."[270]

Most recently, the Human Rights Committee stated 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."[271] It further remarked that "this principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peace–keeping or peace–enforcement operation."[272] In response to the United States' adherence to "its position that the [ICCPR] does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war," the Committee remarked that this was contrary to

---

[269] U.N. Human Rights Committee, Lopez Burgos v. Uruguay, Commc'n No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981); U.N. Human Rights Committee, Celiberti de Casariego v. Uruguay, Commc'n No. 56/1979, U.N. Doc. CCPR/C/13/D/56/199 (1981).

[270] Dennis, *supra* note 234, at 465.

[271] Bennoune, *supra* note 15, at 174 (citing Nature of the General Legal Obligation on State Parties to the Covenant, U.N. Hum. Rts. Comm., 80th Sess., General Comment No. 31, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)).

[272] *Id.* The future will show whether peace–keepers are actually required to provide the protections of the ICCPR, and if so, if this will deter states from providing soldiers to U.N. peace–keeping and peace–enforcement missions.

the opinions and established jurisprudence of the Committee and the ICJ.[273] The Committee admonished the United States to:

> (a) acknowledge the applicability of the [ICCPR] with respect to individuals under its jurisdiction but outside its territory as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the [ICCPR]; and (c) consider in good faith the interpretation of the [ICCPR] provided by the Committee pursuant to its mandate.[274]

These cases illustrate that activist international tribunals are eager to expand the application of human rights law into the dominion of armed conflict. This trend is evidence of the tension between legitimacy and justification in international law, discussed in Part III of this article. While legitimacy vests states with the authority to determine whether to apply human rights law in armed conflict, justification permits judicial and quasi-judicial bodies to claim the ability to do so by invoking a sense of justice or morality.

C. Military Cases from Iraq

Courts and tribunals do not bear all the responsibility for commingling human rights law and humanitarian law. Further entanglement occurs when lawyers speak in terms of human rights law in cases where humanitarian law clearly applies. For example, the Attorney General of Britain declined to charge British soldiers with killing an Iraqi in Basra,

---

[273] U.N. Hum. Rts. Comm., 87th Sess., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America*, at 2, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

[274] *Id.* at 2-3 (responding to United States periodic report).

Iraq, on 24 March 2003.[275] The Iraqi had thrown rocks at soldiers guarding a checkpoint and persisted when the commander employed various non-lethal means to persuade him to stop.[276] The soldiers eventually shot and killed the Iraqi.[277] In explaining his decision not to charge the soldiers, the Attorney General told the House of Lords on 27 April 2006 that the soldiers were acting in self-defense.[278] As explained by Charles Garraway, Associate Fellow, International Law and International Security, at Chatham House, in his reference to the incident:

> This is classic human rights law. But the incident was taking place during an international armed conflict. Under the law of armed conflict, the right to use lethal force would depend on whether or not the Iraqi was a legitimate target. If he was a combatant, or a civilian taking an active part in hostilities, he was, as such, a legitimate target and there was no need to justify the soldiers' actions by reliance on self-defence, or the defence of anyone else.[279]

This case illustrates the problems associated with trying to evaluate the use of force during armed conflict under a human rights regime; it subjects soldiers to greater scrutiny than necessary.

The manner in which U.S. soldiers are trained to evaluate threats from those who do not appear to be traditional combatants can add to the confusion over which legal standards

---

[275] *See* GARRAWAY, *supra* note 126, at 8.

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.* Civilians are lawful targets if, and for such time as, they are taking a direct part in hostilities. .*See* Protocol I, *supra* note 25, art. 51.

apply. The *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces* state that when forces are declared hostile, soldiers may target or use force against them based upon their hostile status alone.[280] However, soldiers may use force against other individuals only when they display hostile intent or commit a hostile act.[281] This is a useful methodology for training soldiers. However, as rules of engagement are based upon policy, political objectives, and mission considerations, as well as legal concerns, they are often more constraining than legal principles.[282] When evaluating the lawfulness of the soldier's use of force under international law, resort should be made to humanitarian law alone.

The United Nations appoints rapporteurs, or experts, to report on specific human rights, or to focus on the human rights situations in a particular country. The Special Rapporteur on Iraq, Andreas Mavrommatis, stated that, for those detained by coalition forces for security crimes or terrorist acts, "strict compliance with the [ICCPR], and in particular with Article 14, is mandatory."[283] Article 14 guarantees, among other rights, equality before courts and tribunals, fair and public criminal hearings by an impartial tribunal, prompt notice of the nature of pending criminal charges, trial without undue delay, and appellate review.[284] The Rapportuer's statement is troubling, as Article 14 is one of articles of the ICCPR which

---

[280] *See* CJCS, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES encl. A, para. 2b (13 June 2005).

[281] *See id.* para. 3.

[282] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 85 (2006).

[283] Bennoune, *supra* note 15, 174 (citing Situation of Human Rights in Iraq, Report submitted by the Special Rapporteur, Andreas Mavrommatis, U.N. ESCOR, Hum. Rts. Comm., 60th Sess., para. 13, U.N. Doc. No. E/CN.4/2004/36 (2004)).

[284] ICCPR, *supra* note 2, art. 14.

permits derogation.[285] Furthermore, the Fourth Geneva Convention contains specific provisions regarding detention during occupation that are very similar to, and sometimes more restrictive than, those contained in Article 14 of the ICCPR.[286] To illustrate: Article 68 of the Fourth Geneva Convention provides that when a protected person commits an offense which is intended only to harm the Occupying Power and which does not attempt to kill, seriously wound, or cause serious property damage, the protected person may be punished only by internment or simple imprisonment.[287] Article 14 of the ICCPR does not restrict the punishment for such offenses to internment or imprisonment.[288] Theoretically, the protected person could be subject to harsher punishment, such as hard labor while confined, or additional penalties, such as monetary fines, for such offenses under the ICCPR. Therefore, disregarding humanitarian law as the *lex specialis* also may operate to deprive individuals of protections guaranteed by humanitarian law treaties that exceed the protections of human rights law.

D. Cases Involving Terrorism

Commentators have highlighted the difficulty that has arisen in determining which legal regime applies when responding to non-state actors who commit acts of terrorism in a foreign state. Charles Garraway illustrated this challenge with the example of the 2002

---

[285] *See id.* art. 4.

[286] *See, e.g.,* GC, *supra* note 24, arts. 64–78.

[287] GC, *supra* note 24, art. 68.

[288] ICCPR, *supra* note 2, art. 14.

attack in Yemen on a senior member of Al-Qaeda.[289] The operative was killed with a missile from an unmanned Predator drone.[290]

> If this was governed by the law of armed conflict, then the identification of the operative as a belligerent was sufficient to justify the use of lethal force. On the other hand, if it was governed by law enforcement rules then the killing could only be justified if it could be shown that there was no other option available and the use of lethal force was absolutely necessary.[291]

In *Hamdan v. Rumsfeld,*[292] the U.S. Supreme Court determined that the conflict between the United States and fighters of Al-Qaeda was governed by Common Article 3 of the Geneva Conventions.[293] Ironically, such approach may be viewed as an expansion of humanitarian law by those who view conflicts between state and non-state actors as purely law enforcement matters.

Sorting out the difficulties in determining whether responses to terrorism are properly classified as armed conflicts or law enforcement actions is beyond the scope of this article. However, if the proper role of human rights law in conventional armed conflict is not resolved, regulating lawful responses to terrorism will not be any easier.

---

[289] GARRAWAY, *supra* note 126, at 9.

[290] *Id.*

[291] *Id.*

[292] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

[293] GWS, *supra* note 24, art. 3; GWS (Sea), *supra* note 24, art. 3; GPW, *supra* note 24, art. 3; GC, *supra* note 24, art. 3.

E. Advocacy for Expansion by Writers

Commentators have advocated an increasing role of human rights law in armed conflict. Some urge the application of certain aspects of human rights law, such as its accountability framework,[294] and others see merit in increasing the role of human rights law in particular contexts, such as military occupation.[295] Many of the arguments, such as those from Karima Bennoune, focus on reducing the death and destruction of war through application of a human rights framework. For example, she takes issue with the number of young conscripts killed in combat and the non-"excessive" killings of civilians in attacks on military targets that are discriminate.[296]

Her first assertion is that the number of combatant deaths is too high from a human rights perspective and that a state sending its young people to be killed or wounded by the enemy is the ultimate threat of being arbitrarily deprived of life.[297] State sovereignty inherently requires that a state assume responsibility for the protection of its citizens, and part of a system for ensuring national security is the raising of armies.[298] The number of

---

[294] *See, e.g.,* Watkin, *supra* note 30, at 34 (asserting that "[I]ncorporation of human rights principles of accountability can have a positive impact on the regulation of the use of force during armed conflict. Given the close interface between these two normative frameworks in some types of armed conflict, their mechanisms of accountability will inevitably need to be reconciled . . . .").

[295] *See, e.g.,* Roberts, *supra* note 36.

[296] Bennoune, *supra* note 15, at 186–87.

[297] Bennoune, *supra* note 15, at 186–87.

[298] *See* John R. Cook, *Contemporary Practice Of The United States Relating To International Law: General International And U.S. Foreign Relations Law: Senior Administration Officials Voice Varying Perspectives On International Law*, 101 AM. J. INT'L L. 195, 196 (2007) (stating in regards to Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), "the

volunteer or conscripted soldiers required for national security will vary according to a host of factors, including the state's population and geographic size, the temperament of its neighbors, whether it has entered collective defense agreements, and the type of threats it faces regionally and globally.[299]

What Bennoune proposes is that human rights law should have a voice in determining the number of soldiers that a state may send to war.[300] If human rights law could have such power, it would effectively constrain a state's decision to enter or continue armed conflict and hinder its ability to defend itself from outside threats and aggression. As self-defense is recognized as an "inherent right" in the United Nations Charter,[301] Bennoune's proposed use of human rights law would pierce state sovereignty at its vital core and displace not only the *jus in bello* aspect of humanitarian law, but the *jus ad bellum* aspect, as well. Such threat of encroachment demonstrates why humanitarian law must remain the *lex specialis* during armed conflict; it protects the integrity of states.

Humanitarian law was developed by warfighters who understand the principles and realities of war.[302] War is not a sporting event in which both sides should be constrained to a precise and equal number of players to ensure a fair game. Overwhelming the enemy with

---

court was relatively dismissive of... a very compelling, fundamental attribute of state sovereignty--the right to protect your citizens from being killed by people coming in from outside").

[299] *See, e.g.*, STRUCTURING THE ACTIVE AND RESERVE ARMY FOR THE 21ST CENTURY, Congressional Budget Office, § 4 (Dec. 1997), http://www.cbo.gov/ftpdoc.cfm?index=301&type=0&sequence=3.

[300] *Id.*

[301] U.N. Charter art. 51.

[302] *See* Morris, *supra* note 7.

superior weapons and outmatching him with a disproportionately high number of soldiers on the battlefield are sound military tactics.[303] Furthermore, the principle of overwhelming force, part of the "Powell Doctrine" of the 1990s,[304] may achieve a quick end to hostilities and minimize casualties as a result.

Bennoune also erroneously believes that the principle of collateral damage, meaning the non-"excessive" killing or injuring of innocent civilians, permits too many casualties.[305] Under humanitarian law, whether a certain level of collateral damage is excessive is determined by comparing it to the direct military advantage gained.[306] Commanders do not employ military force for their enjoyment; they do it to obtain a tangible, concrete military goal.[307] The permissible level of incidental civilian death and civilian property damage will vary, depending on the importance of the military goal. For example, an aerial bombardment in a location where civilians are residing may not be permitted if the military objective is to

---

[303] *See* Luis Mesa Delmonte, *Economic Sanctions, Iraq, and U.S. Foreign Policy,* 11 TRANSNAT'L L. & CONTEMP. PROBS. 345, 371 n.136 (stating that the Powell Doctrine proposes that military operations should be "undertaken in the fastest and most efficient way possible with a very clear superiority"); Lieutenant Colonel Jeffrey K. Walker, *The Demise of Nation-State, the Dawn of the New Paradigm Warfare, and a Future for the Profession of Arms,* 51 A.F.L. REV. 323, 334.

[304] *See* Walker, *supra* note 303, at 334 (stating that the Powell Doctrine required "no Commander-in-Chief should send the military anywhere unless he gave them the overwhelming force and *carte blanche* authority to win quick and win big").

[305] Bennoune, *supra* note 15, at 187–90; *see also* Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan,* 33 CAL. W. INT'L L.J. 1 (arguing that the principle of collateral damage permits too many civilian deaths from aerial bombings, as it allows the military to excuse the deaths too easily as unanticipated or unavoidable).

[306] *See* GWS, *supra* note 24, art. 50; GWS (Sea) *supra* note 24, art. 51; GPW, *supra* note 24, art. 130; GC, *supra* note 24, art. 147; Protocol I, *supra* note 25, art. 51(5)(b).

[307] *See* Geoffrey S. Corn, *Filling the Void: Providing a Framework for the Legal Regulation of the Military Component of the War on Terror Through Application of Basic Principles of the Law of Armed Conflict,* 12 ILSA J. INT'L & COMP. L. 481, 484 (2006) (noting the truism in war that "those who engage in mortal combat do not do so for profit or personnel vendetta, but because they have been called upon to do so by the authority they serve").

kill one enemy combatant passing though the area. However, if the bombardment will destroy all of the enemy's air defense capabilities and induce the surrender of the enemy, the incidental deaths may not be excessive.

The principles of proportionality[308] and collateral damage[309] are necessary in war, as even the most advanced weapons and munitions are not infallibly precise,[310] and modern wars are rarely fought in open, uninhabited fields. Additionally, permitting some collateral damage removes the incentive for a ruthless enemy to use human shields and protected civilian property unlawfully to deter an opposing force that complies with the law.

Assuming, *arguendo,* that killing an innocent person is an arbitrary deprivation of life in violation of human rights law, how will a human rights standard prevent such arbitrary deprivations in armed conflict? Requiring that the military advantage outweighs the collateral damage by an outrageously high percentage, such as a thousand-fold, still would not prevent all arbitrary deprivations of innocent life. Arguments for prohibiting all collateral damage are essentially calls for pacifism, as such absolute requirements are unrealistic in war.

---

[308] For an overview and history of the principle of proportionality, see Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

[309] *See generally* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F.L. REV. 1 (2005) (providing an overview of collateral damage and targeting).

[310] *See generally* Danielle L. Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?*, 26 GEO. WASH. J. INT'L L. & ECON. 109, 111 (providing an overview of the relationship of precision-guided munitions and collateral damage and how such munitions may cause more collateral damage than conventional bombs in certain circumstances).

V. Humanitarian Law Is Uniquely Equipped to Regulate Armed Conflict

Humanitarian law was developed specifically to deal with the realities of war. It recognizes that war is sometimes necessary and useful. Regulating armed conflict purely through a human rights perspective will erode the usefulness of war. Rather than abolishing war or achieving global peace, the "humanization" of war may serve to prolong armed conflict, provide more opportunities for a less than honorable enemy to exploit a force's compliance with rules of war,[311] and unnecessarily restrict soldiers to a point where they disregard the rules completely out of frustration with their impossible rigidity.

Human rights law lacks the framework of humanitarian law, especially the Geneva Conventions' design of providing tailored protections and rights to "protected persons."[312] For example, under the Fourth Geneva Convention and Protocol I, a civilian remains protected from intentional attack if, and for such time as, he does not take a direct part in hostilities.[313] Additionally, civilians who find themselves in the hands of their nation's enemy enjoy greater protections under the Fourth Geneva Convention.[314]

---

[311] *See* Reynolds, *supra* note 309, at 79 (stating that "[A]dversaries operating unrestricted by the [law of armed conflict (LAOC)] gain a strategic advantage over states that value compliance with LOAC. Adversaries deriving little or no benefit from LOAC seek to provoke a conflict that challenges its principles, assails moral uncertainty, and exploits public sympathy.").

[312] *See* GC, *supra* note 24; Protocol I, *supra* note 25.

[313] GC, *supra* note 24; Protocol I, *supra* note 25, art. 51(3).

[314] *Id.*

The Fourth Geneva Convention provides selective protection to civilians, based upon their nationality and their geographical location.[315] A civilian located within his own nation's territory is afforded some basic protections.[316] A civilian located within the territory of his nation's enemy is provided additional protections.[317] Civilians location within territory occupied by their nation's enemy and those subjected to internment are afforded the most protections.[318] The escalating degrees of protection are tied to the increasing need for protection—the more control an enemy nation has over an individual, the greater his protections. Under human rights law, no comparable system exists; affording selective protections is directly at odds with the universality of human rights.

Another key concept of humanitarian law is combatant immunity, which shields a soldier from prosecution for acts that would be unlawful outside of war.[319] Displacement of

---

[315] *See* Paul E. Katwill & Sean Watts, *Hostile Protected Persons or "Extra-Conventional Persons:" How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681, 724–731 (providing a detailed analysis of the complex protection arrangement of the Fourth Geneva Convention).

[316] *See* GC, *supra* note 24, arts. 13–26.

[317] *See id.* arts. 35–45.

[318] *See id.* arts. 47–141.

[319] *See* Major Geoffrey S. Corn, *"To Be or Not to Be, That is the Question" Contemporary Military Operations and the Status of Captured Personnel,* ARMY LAW., June 1999, at 1, 14 (explaining that, before capture, "many prisoners of war participate in activities that are, during times of peace, generally considered criminal. For example, it is foreseeable that soldiers will be directed to kill, main, assault, kidnap, sabotage, and steal in furtherance of their nation state's objectives. In international armed conflicts, the law of war provides prisoners of war with a blanket of immunity for their pre-capture warlike acts.").

humanitarian law with human rights law could jeopardize combatant immunity. John Keegan, in *A History of Warfare*[320] captures the essence of combatant immunity:

> The bounds of civilised warfare are defined by two antithetical human types, the pacifist and the "lawful bearer of arms." The lawful bearer of arms has always been respected, if only because he has the means to make himself so; the pacifist has come to be valued in the two thousand years of the Christian era . . . . Pacifism has been elevated as an ideal; the lawful bearing of arms—under a strict code of military justice and within a corpus of humanitarian law—has been accepted as a practical necessity.

A soldier may fight for many reasons.[321] He may fight out of a sense of patriotism or a sense that he is fighting for a just cause.[322] He may fight if ordered to do so out of a sense of duty or fear of the consequences he will endure for disobeying the order.[323] He may fight in self-defense when face-to-face with an enemy soldier. However, a soldier will be less inclined to fight if he is not certain that his conduct will be protected from prosecution by his nation, the enemy nation, or an international tribunal.[324]

---

[320] JOHN KEEGAN, A HISTORY OF WARFARE, 4-5 (1993).

[321] For a perspective on combat motivators in Operation Iraqi Freedom, see Wong, Kolditz, Millen, & Potter , *Why They Fight: Combat Motivation in the Iraq War*, Strategic Studies Institute, *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/pub179.pdf (2003).

[322] *Id.* at 19 (explaining that "many soldiers in this study reported being motivated by notions of freedom, liberation, and democracy.").

[323] *See* Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 168 (stating that "soldiers fight because they are so ordered, not because they so choose"). During Operation Iraqi Freedom, Iraqi Regular Army soldiers were motivated by coercion and fear. Wong, Kolditz, Millen, & Potter , *Why They Fight: Combat Motivation in the Iraq War*, 6 – 7

[324] *See, e.g.,* Sean Rayment, British Troops in Iraq Are Afraid to Open Fire, Secret MoD Report Confirms, Telegraph, *available at* http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/04/30/nirq30.xml, Apr. 29, 2006 (reporting that British soldiers were afraid to fire their weapons in Iraq for fear of prosecution).

The use of force under the human rights regime is highly regulated, and the permissible level of force that may be employed is situation-dependent.[325] One writer believes that the standard for taking a life under a human rights-based system is that "individuals may be killed intentionally if their expected death is compensated by more than an equivalent expected increase in enjoyment of human rights."[326] Lawyers could argue for weeks over the meaning of that standard and how it would apply to specific situations. Expecting soldiers to understand and distill such complex rules is unrealistic. In the heat of battle, rules for using force must be simple; soldiers must make split-second decisions to kill or be killed. The convoluted nature of human rights standards would permit too much second-guessing of a soldier's decision to use force, thereby weakening the protection of combatant immunity.

A. Use of Force

Under humanitarian law, the taking of human life is lawful in several circumstances: enemy combatants may be killed, unless they are *hors de combat*,[327] civilians may be

[325] *See* discussion *supra* P. II.D.

[326] Koller, *supra* note 15, at 251.

[327] GWS, *supra* note 24, art. 3; GWS (Sea), *supra* note 24, art. 3; GPW, *supra* note 24, art. 3; GC, *supra* note 24, art. 3.

intentionally killed if, and for such time as, they are taking a direct part in hostilities,[328] and civilians may be incidentally killed as a result of collateral damage.[329]

When combatants and civilians are targeted, warfighters are permitted to implement a "shoot-to-kill" policy; there is no duty to minimize the amount of force used in an effort to preserve the lives of lawful targets.[330] However, under human rights law, law enforcement personnel are required to minimize the amount of force used and are typically trained to shoot to wound.[331]

If armed conflict is regulated under a human rights regime, a logical evolution of its influence will be the erosion of rules that permit shooting to kill, as killing would be permitted only as a last resort. Soldiers may be permitted to kill only when absolutely necessary, such as when faced with the threat of death or when protecting another from such threat. In other situations, they may be required to provide the enemy with an opportunity to surrender, employ only non-lethal force, or shoot to wound, rather than kill. While these rules may be more easily implemented by ground troops with small arms, they would be impossibly difficult to employ by soldiers in aircrafts, tanks, and artillery batteries.

---

[328] Protocol I, *supra* note 25, art. 51(3).

[329] *Id.* art. 51(5)(b).

[330] The U.S. Army policy is to train soldiers to shoot to kill, rather than shoot to wound. *See Mark S. Martins, Deadly Force is Authorized, but Also Trained*, ARMY LAW., Sep./Oct. 2001, at 1.

[331] *See* Basic Principles of the Use of Force and Firearms by Law Enforcement Officials, UN Doc. A/CONF.144/28/Rev.1 (1990), *available at* http://www.unhchr.ch/html/menu3/b/h_comp43.htm (stating in Article 5, "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life . . . .").

The human rights regime will require revising the principles of proportionality and collateral damage to inflict very low levels of incidental civilian death and civilian property damage. The standard may be articulated as: "An action may be taken if the anticipated enjoyment of human rights by all individuals outweighs the anticipated human rights enjoyment of all alternative courses of action."[332] As fuzzy and impractical as this appears, it is the logical extension of the human rights regime, as "[a]cquiescence to 'collateral damage' [is an] anathema to human rights principles and [a] basic challenge to the right to life."[333]

This illustrates exactly why human rights law is ill-suited to regulate warfare: human rights law lacks the stomach to deal with the harsh realities of modern warfare. "War is an ugly thing . . . ."[334] It accepts that lives, even innocent ones, may be lost in pursuit of a collective goal of the state. Any legal regime attempting to regulate war must have the fortitude to balance the needs of military necessity against the principle of humanity without cringing.

Under human rights law, a use of force that causes a death usually requires an investigation.[335] The objective of the investigation is to produce "eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of

---

[332] Koller, *supra* note 15, at 255.

[333] Bennoune, *supra* note 15, at 174.

[334] John Stuart Mill, *The Contest in America*, *in* DISSERTATIONS AND DISCUSSIONS 26 (1868).

[335] Watkin, *supra* note 30, at 19.

death."[336] While this strict scrutiny of the use of force may be necessary and useful for evaluating actions of law enforcement officers, it is highly unrealistic in the context of armed conflict. Ulysses S. Grant succinctly explained the nature of battle: "The art of war is simple enough. Find out where your enemy is. Get at him as soon as you can. Strike him as hard as you can, and keep moving on."[337] After an engagement with enemy forces, soldiers do not linger. They collect the wounded and dead of their own and enemy forces to the extent that military necessity permits, and then they move out to find or avoid the next battle. There is little time for collecting evidence and witness statements, without potentially sacrificing more lives.

B. Security Restrictions

The ICJ's *Wall* opinion demonstrated the tension between human rights law and humanitarian law in terms of security restrictions.[338] Israel attempted to build a fence to protect itself from terrorists infiltrating its country through the occupied territory of Palestine. Under the Fourth Geneva Convention, a state is permitted to use such measures in armed conflict and occupation to protect its forces and maintain public order and security.[339]

---

[336] *Id.* (citing McKerr v. United Kingdom, 34 Eur. H.R. Rep. 553, 599, para. 113 (2001)).

[337] LOUIS A. COOLIDGE, ULYSSES S. GRANT 54 (1917) (quoting Ulysses S. Grant).

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

[339] *See* GC, *supra* note 24.

In contrast, the ICCPR grants liberty of movement and freedom to choose residence.[340] The ICCPR permits derogation from this right during times of public emergency that threaten the life of the nation. However, there may be situations during occupation where it is necessary for operational reasons to construct security barriers, and yet the imposing force's state may not be facing a threat to the life of its nation. This creates a direct conflict between human rights law and humanitarian law, and this conflict demonstrates why humanitarian law should remain the *lex specialis.*

Humanitarian law sometimes provides greater individual protections than does the ICCPR. Consider again the ICCPR's grant of liberty to choose one's residence in the context of occupation.[341] If the ICCPR applies and the war is severe enough to permit derogations, the occupant could suspend the right to choose one's residence and force an individual to reside in a place designated by the occupant. Under the ICCPR, the individual does not have the right to request reconsideration of the occupant's decision; he would have to pursue relief from the Human Rights Committee, if the occupant was a party to the Optional Protocol to the ICCPR[342] or the occupant's domestic courts, provided they allow for such causes of action.[343]

---

[340] ICCPR, *supra* note 2, art. 12.

[341] *Id.*

[342] *See* Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 53, art. 1.

[343] *See, e.g.*, discussion *supra* P. II.A.1.

However, if humanitarian law applied, an individual placed in an assigned residence is entitled to have that assignment "reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose."[344] Furthermore, if assigned residence is continued, the court or board must periodically, at least twice a year, reconsider the case "with a view to the favorable amendment of the initial decision, if circumstances permit."[345]

This demonstrates that the struggle against expanding human rights law into armed conflict is not simply about state resistance to providing additional rights to individuals. It shows that, while humanitarian law accounts for military necessity and the needs of the state, it also considers the fact that protected persons under the authority of an occupant may need more protection from that occupying, enemy state than from their own state of nationality. To state it bluntly: Human rights law distrusts the state, so it set limits on state power by granting rights to individuals for their protection. Humanitarian law has even less trust for a state when it happens to be wielding power over its enemy's citizens. Therefore, it provides even more protections for individuals under those circumstances.

C. Detention

[344] GC, *supra* note 24, art. 43.

[345] *Id.*

Humanitarian law permits the detention of enemy combatants until the end of hostilities.[346] It also permits the internment of civilians "if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."[347]

The ICCPR protects the right to liberty and security of person.[348] Article 9 states that: "Anyone who is arrested shall be . . . promptly informed of any charges against him."[349] It does not provide any express exceptions from its protections in the case of lawful acts permitted by humanitarian law.[350] While the ICCPR permits derogation from Article 9 during times of public emergency, an armed conflict may not rise to, or remain at, a level of intensity required to permit derogation.[351]

To further complicate the issue, the Human Rights Committee contends that the list of nonderogable provisions in Article 4 of the ICCPR is not exclusive.[352] Regarding detention, the Committee states that "in order to protect nonderogable rights, the rules [under Article 9(4)] to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a state's decision to derogate from the

---

[346] GPW, *supra* note 24. art 118.

[347] GC, *supra* note 24, art. 78.

[348] *See* ICCPR, *supra* note 2, art. 9.

[349] *Id.*

[350] *Id.*

[351] *Id.* art. 4.

[352] *See* Dennis, *supra* note 234, at 477.

Covenant."[353] This would further burden military forces by requiring greater due process in detention and internment, well beyond that which is required by humanitarian law.[354]

Michael Dennis explained the problems that multilateral forces pose regarding derogations.[355] Would every state sending forces to a conflict need to be in a state of public emergency to request derogation? When considering this dilemma, a British High Court concluded that the provision of U.N. Security Council Resolution 1546 applied in lieu of Article 5 of the ECHR.[356] The Court noted that all states sending troops to Iraq may not face a public emergency that would permit derogation from human rights instruments. "Participating states need to know where they stand when faced with making decisions on very short notice."[357]

D. Occupation

The issues of the use of force, security restrictions, and detention are further complicated during occupation. Adam Roberts argues in *Transformative Military Occupation: Applying the Laws of War and Human Rights*[358] that there is a stronger case for applying human rights law in occupation than in armed conflict. He cites problems such as

---

[353] General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, at 13 (Aug. 31, 2001).

[354] *See* GC, *supra* note 24.

[355] Dennis, *supra* note 234, 476–77.

[356] *Id.* at 476.

[357] Al Jedda v. Secretary of State for Defense, [2005] EWHC (Admin) 1809, (Eng), 91.

[358] Roberts, *supra* note 36.

discrimination in employment, discrimination in education, and the importation of educational materials that can arise, which he believes are addressed more thoroughly in human rights instruments than in humanitarian law.[359] He cites two ways in which human rights law could be advocated or applied in occupation:

> (1) Inhabitants, or outside bodies claiming to act on their behalf, may invoke human rights standards so as to bring pressure to bear on the occupant—*e.g.*, to ensure the human rights of inhabitants, internees, and others; and (2) an occupant with a transformative project may view human rights norms as constituting part of the beneficient political order being introduced into the territory, which has been the U.S. position in the U.N. Security Council from 2003 onward as far as Iraq has been concerned, but it is not clear how far it has percolated through the U.S. government.[360]

If humanitarian law does not sufficiently address issues of occupation, the use of human rights law to inform or influence humanitarian law is not objectionable. However, the methodology for developing humanitarian law norms to address new issues needs to respect the sovereignty of states and the importance of state consent; to do so, it should permit states to decide how best to incorporate into humanitarian law new protections drawn from human rights law. Incorporation through treaty formation or the development of customary international law provides legitimacy for the norm, which may encourage wider acceptance of it than would occur if the norm were forced upon a state by a judicial or quasi-judicial body.

VI. Halting the Expansion of International Human Rights Law

[359] *Id.* at 594.

[360] *Id.*

To halt the expansion of human rights law into the realm of armed conflict, the United States must continue to insist that human rights treaties do not apply extraterritorially during armed conflict and occupation and that armed conflict is regulated solely through humanitarian law. Its approach should be two-fold. First, it needs to become a persistent objector to prevent the entire body of human rights norms from becoming binding in armed conflict as a matter of customary international law. It should persuade its allies to join in this endeavor. Second, the United States needs to engage international groups, such as the Human Rights Committee, in discourse regarding the expansion of the human rights regime to make its position known and attempt to persuade others to support its position.

The ICJ, the European Court of Human Rights, and the Human Rights Committee have declared their views on the role of human rights in armed conflict. It is foreseeable that states will begin to apply human rights law consistent with these pronouncements. Over time, the application of human rights law in war could grow into a consistent state practice, born out of a sense of legal obligation. If the United States has not made its objections known while this practice is developing, it could be bound to apply human rights law in armed conflict as a matter of customary international law.

To protect itself from such occurrence, the United States must accept the role of the persistent objector. While the United States appears comfortable with taking minority positions in international law,[361] it is in its interest to persuade it allies to join the fight

[361] For example, while a large majority of states agree that deep seabed mining may occur only in accordance with the 1982 Law of the Sea Convention, the United States disagrees. *See* David Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 967 (1986); United Nations Convention on the Law of the Sea, U.N. Doc. A/Conf. 62/122 (1982), *reprinted in* U.N., The Law of the Sea: Official Text of the United

against the expansion of human rights law. If the United States prevents itself from being bound by human rights norms in armed conflict, but its allies are bound to apply those norms, coalition forces could face interoperability problems. For example, if allied forces capture enemy prisoners of war, they could be precluded from transferring those prisoners to a U.S. detention facility if new human rights norms dictate providing greater rights to prisoners than humanitarian law requires. Also, if U.S. and coalition forces are jointly securing a populated area, problems could arise if U.S. forces want to impose a curfew for security reasons but allied forces are prohibited from doing so under a human rights norm guaranteeing greater freedom of movement.

Since the expansion of human rights law is still in a formative stage, the U.S. position is not necessary unpopular. Therefore, it may be easier at this time to sway states to concur with limiting the role of human rights law in armed conflict.

In addition to recruiting allies to join in objecting to the expansion of human rights as a matter of customary law, the United States should actively challenge the Human Rights Committee's declaration that the ICCPR applies extraterritorially and in armed conflict. Under the ICCPR, the United States and other parties submit reports to the Human Rights

---

Nations Convention on the Law of the Sea with Annexes and Index at 1, U.N. Doc. LOS/Z/1, U.N. Sales No. E.83.V.5 (1983). Additionally, while 155 states have ratified the "Ottawa Treaty," the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and On Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507, (as of Aug. 15, 2007); 167 states have ratified Protol I, *supra* note 25, (as of January 14, 2007); and 163 states have ratified Protocol II, *supra* note 25, (as of January 14, 2007); the United States has not ratified any of these. *See* International Campaign to Ban Landmines, States Parties, http://www.icbl.org/treaty/members (last visited Dec. 20, 2007); 30th Anniversary of Additional Protocols I and II, http://www.icrc.org/web/eng/siteeng0.nsf/html/additional-protocols-30-years (last visited Dec. 20, 2007).

Committee regarding their implementation of the rights contained in the ICCPR.[362] In its most recent reports, the United States clearly articulated its position that the ICCPR does not apply extraterritorially.[363] The United States should continue to object to the expansion of human rights law, through these reports, to assist in asserting its position as a persistent objector and in attempting to persuade other parties to support is position.

The issue of whether to request derogations from the ICCPR during armed conflict and occupation is a tactical one. If the United States does not request derogations, some will view this as a concession that the Convention applies in its entirety.[364] Also, the United States risks having an international tribunal find that it was bound to apply the ICCPR in a given armed conflict and that it violated its provisions, a finding that could be prevented through the use of derogations. The ICJ treated Israel in such a fashion in the *Wall Case*,[365] where it held that Israel was obligated to apply provisions of the ICCPR from which it had not requested derogation. To protect itself in any event, the United States could request derogations from all derogable provisions, while explicitly stating that it does not concede the applicability of the ICCPR in armed conflict or occupation.

---

[362] *See* ICCPR, *supra* note 2, art 40.

[363] U.N. Hum. Rts. Comm., 87th Sess., *Second and Third Periodic Reports of the United States America*, ¶ 469, Annex I, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).

[364] *See, e.g.*, Bennoune, *supra* note 15, at 206 (stating in reference to Operation Iraqi Freedom that: "Significantly, neither the U.S. nor the U.K. registered any derogations related to the Iraq war. This means that the application of the full range of ICCPR provisions was not so precluded.").

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

To further preclude the operation of human rights law in a specific armed conflict or occupation, the United States needs to harness the power of the U.N. Security Council. The Security Council has a crucial role is resolving the conflict over which regime, human rights law or humanitarian law, governs military operations.[366] Article 103 of the U.N. Charter states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[367] As the Security Council is authorized under Chapter VII to authorize measures "necessary to maintain or restore international peace and security,"[368] it resolutions could include language stating that member states participating in the given armed conflict must comply with their obligations under only humanitarian law.[369] While such deference to the U.N. Security Council may appear to diminish the importance of state sovereignty in international law,

> Sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonable good standing in the regimes that make up the substance of international life . . . . In today's setting, the only way most states can realize and express their sovereignty is

---

[366] Dennis, *supra* note 234, at 474.

[367] U.N. Charter art. 103.

[368] *Id.* art 42.

[369] Dennis, *supra* note 234, at 474. Dennis illustrates the authority of the U.N. Security Council to declare the law applicable to forces in U.N. operations: A British citizen was detained by British forces in Iraq for nine months for security reasons. He challenged his detention as inconsistent with Article 5 of the ECHR, as implemented by the United Kingdom's domestic law. The United Kingdom's High Court of Justice held that the relevant U.N. Security Council Resolution, U.N.S.C.R. 1546, authorized the multi-national forces "to continue the powers exercisable in accordance with Article 78 of Geneva IV but inconsistent with Article 5 of the ECHR" and "to intern those suspected of conduct creating a serious threat to security in Iraq." *Id.* at 475 (referencing Al Jedda v. Secretary of State for Defense, [2005] EWHC (Admin) 1809, (Eng), 92–93).

through participation in the various regimes that regulate and order the international system.[370]

Finally, the United States should evaluate the conduct of its own forces through the lens of humanitarian law and domestic law. While rules of engagement are important for regulating the use of force in armed conflict, they are not the legal standard for evaluating a soldier's conduct. Speaking in terms of human rights standards provides support for displacing humanitarian law with a human rights regime.

VII. Conclusion

The issue of when human rights law and humanitarian law apply was once clear; humanitarian law applied in times of peace, and humanitarian law applied in times of war. However, the dividing line between the two regimes has been blurred by decisions of the ICJ and human rights tribunals, advocacy by scholars who favor an expansive role for human rights law, and the complexities of modern warfare and terrorism.

The incompatible frameworks of human rights law and humanitarian law preclude a merger of the two, and the primacy of state sovereignty in international law requires that human rights law be incorporated into humanitarian law only through a process of state consent. Furthermore, regulating armed conflict solely through a human rights regime, without reference to military necessity, is dangerous for warfighters. Therefore, the United

[370] Koh, *supra* note 4, at 1480 n.1 (quoting ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995).

States needs to continue to maintain that humanitarian law alone regulates armed conflict and to act to halt the expansion of human rights law. It owes it to the men and women who fight it wars to ensure that they have clear, workable standards for the use of force and that they remain protected from prosecution for their lawful actions on the battlefield.