

1 of 184 DOCUMENTS

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Cardozo Law Review

May, 2008

29 Cardozo L. Rev. 2461

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SUMMARY:

... I then apply this framework to the issue of whether or not the "war on terror" - in particular, the United States' actions against al Qaeda and related groups outside of the conflicts in Afghanistan and Iraq - constitutes an armed conflict under international law. ... Derogation provisions in human rights treaties are usually read to allow States to derogate only in exceptional circumstances, and States seeking to derogate usually have the burden of establishing that the conditions under which derogation is permitted actually exist. ... Perhaps the most promising methods are the harmonization of norms method and the method under which HRL, and not IHL, would be the *lex specialis* in some situations of armed conflict. ... Therefore, if one takes the perspective that not all rules contain all their qualifications within themselves but are subject sometimes to external exceptions, it is possible to characterize the relationship between at least some rules and at least some of their exceptions as a conflict of rules. ... Under the Geneva Conventions, in addition to the right to detain individuals for the purpose of prosecuting them for a war or other crime, States also have the right to detain combatants to prevent their participation in further hostilities as well as intern civilians who constitute a threat to the State's security or intend to harm it. ... If the conflict with al Qaeda is an armed conflict then these and similar individuals arrested or captured in different parts of the globe can, arguably, under the rules of IHL, be taken into detention without being charged with any crime merely because they are deemed to be taking an active part in the war on terror.

TEXT:

[*2462]

Introduction

The United States Government maintains that the arrest of Jose Padilla, a U.S. citizen and alleged member of al Qaeda, at Chicago's O'Hare Airport was part of an armed conflict against al Qaeda and that Padilla was "an illegal combatant" in that conflict.ⁿ¹ If this is correct, then the United States arguably was entitled, under international humanitarian law (IHL) - the special law that applies in armed conflict - not merely to arrest Padilla but to shoot him on sight at O'Hare,

regardless of whether he posed any immediate danger to the U.S.ⁿ² If no armed conflict exists, however, international human rights law (HRL) - the general law applicable at all times - governs, and such a shooting would be justified only if absolutely necessary to protect life or, in some cases, to effect a lawful arrest or detention. Similarly, the rights of the al Qaeda detainees at Guantanamo Bay and other detention [*2463] centers around the world are contingent on whether actions against al Qaeda are deemed to be part of an armed conflict under international law. If they are, under the rules of IHL, many of these individuals face the possibility of life in detention without trial and without access to legal counsel or the courts. Conversely, if the actions against al Qaeda are not deemed an armed conflict, then HRL applies, and those individuals could only be detained if they were accused of a crime and brought promptly to trial or, at the very least, afforded access to counsel and the courts.

Recent events have led to a debate, both nationally and internationally, about what constitutes armed conflict in international law. The emergence of non-State groups as a major threat to international peace and security and the United States' assertions that the "war on terror" is an armed conflict under international law have been at the center of the controversy. As the above example demonstrates, the stakes in this debate are extraordinarily high. When a situation is characterized as an armed conflict, the rules applicable during peacetime have less impact on State action. Currently, there is no authoritative definition of armed conflict in international law and the debate focuses almost solely on how the term "armed conflict" is used in the Geneva Conventions and the Additional Protocols,ⁿ³ which form the core of IHL. The Geneva Conventions refer to two types of conflicts - "international armed conflict" and "non-international armed conflict" - but do not define the term "armed conflict" and do not provide definitive answers in peripheral situations of conflict, such as those involving a State and a transnational terrorist network.ⁿ⁴ However, the Geneva Conventions do not operate in a vacuum but function in conjunction with other bodies of law, including, in particular, HRL. In [*2464] this Article, I focus on the interaction between HRL and IHL, as mediated by the *lex specialis maxim*, under which the more specific of the two laws takes precedence, to fashion a decisive, yet flexible, approach to the question of what constitutes armed conflict under international law.

As signatories to various treaties, the United States and most other States are bound by both HRL and IHL.ⁿ⁵ HRL is applicable at all times, including during armed conflict, while IHL is applicable only during armed conflict. The two bodies of law, while complementary in some respects, often conflict with each other. Although there are alternative ways in which such conflicts could potentially be resolved, a majority of actors in the international arena apply the *lex specialis maxim* and conclude that IHL takes precedence over HRL in situations of armed conflict.ⁿ⁶ Under the *lex specialis maxim*, when two laws apply to the same situation at the same time, the more specific or more "special" law takes precedence over the other. In this context, therefore, the characterization of a situation as armed conflict or not has pivotal importance. It is this characterization that dictates whether or not the special law - IHL - is activated.

I draw on this dynamic between HRL and IHL and on the canon of construction that calls for exceptions to rules to be interpreted narrowly, to develop a framework that sheds new and decisive light on what counts as an "armed conflict" in international law. The framework comprises two components. Under the first component, in situations in which the application of IHL as *lex specialis* would lead to a derogation from HRL - i.e., IHL acts as an exception to HRL - the term "armed conflict," as the trigger for IHL, must be interpreted narrowly. Under the second component, in cases in which IHL is triggered despite the narrow reading of "armed conflict," the applicable rules must be interpreted so as to deviate as little as possible from HRL. I then apply this framework to the issue of whether or not the "war on terror" - in particular, the United States' actions against al Qaeda and related groups outside of the conflicts in Afghanistan and Iraq - constitutes an armed conflict under international law. I conclude that, in this context, the term "armed conflict" must be interpreted narrowly but that a more expansive interpretation of armed conflict would be permissible if the [*2465] protections available under IHL in such situations were interpreted so as to be consistent with HRL. However, under international law, States acting collectively can change the law to expand the definition of armed conflict in a way that leads to derogations from HRL. Then, even a narrow reading of the term armed conflict would include a wider variety of activities than is currently the case and the exception would be triggered at a lower threshold. In that event, the second component of my framework is activated and dictates that, to the extent possible, the applicable rules of IHL should be read in such a way as to minimize derogations from HRL.

The framework is directed first at international courts and tribunals confronted with the issue of whether or not a particular situation should be deemed an armed conflict for the purposes of international law. These bodies often must invoke general legal principles when making decisions because the law is unclear on a particular matter. My framework provides them with clear direction on how general principles of legal interpretation impact on the definition of armed conflict under international law. The framework is also directed at the International Committee of the Red Cross (ICRC), whose interpretations of the law applicable in armed conflict are especially authoritative. Although the institutional competence of the ICRC is such that it can and should be more flexible in its interpretations than judicial and quasi-judicial institutions, the proposed framework can form the foundation upon which its deliberations are built. Finally, I have formulated my framework to provide sufficient flexibility to the international community of States should those States find it necessary to deliberately expand the definition of armed conflict under international law in order to combat threats to international peace and security in an effective manner.

At present, there is little or no discussion in the scholarly literature about the circumstances in which a special law is triggered. My focus in this Article is on cases in which the special law is an exception to the general law and not an application of that law. A special law is an exception to the general law if applying the special law generates an outcome that is different than the one that would result under the general law.ⁿ⁷ In this Article, I compare the relationship between general laws and such special laws to the relationship between rules and exceptions. Under a widely accepted canon of statutory interpretation and principle of legal interpretation, exceptions should be read narrowly.ⁿ⁸ This means first, that the conditions triggering the applicability of the exception must be interpreted narrowly and second, [*2466] that once an exception is triggered it must be read to deviate as little as possible from the rule. The burden of establishing that the circumstances warrant activation of the exception is on the party asserting that the exception applies. Similarly, a special law must be read to apply in only a narrow set of circumstances. In other words, the trigger that activates the special law must be narrowly interpreted. Further, when the special law is triggered, any ambiguities of interpretation must be resolved by reference to the general law so as to minimize deviation from the general law.

This principle has special force when it comes to the interaction between HRL and IHL. Derogation provisions in human rights treaties are usually read to allow States to derogate only in exceptional circumstances, and States seeking to derogate usually have the burden of establishing that the conditions under which derogation is permitted actually exist.ⁿ⁹ Additionally, there is nothing in the text or goals of IHL that compels a broad reading of the term "armed conflict." Thus, in cases in which the application of IHL would lead to a derogation from HRL, IHL must not be easily triggered, and the term "armed conflict" must be narrowly interpreted. The burden is on the party arguing for an expanded interpretation to establish that the circumstances warrant a broader reading of the term "armed conflict." Even once IHL is triggered, the derogation from HRL must be minimized.

HRL is applicable at all times and is principally directed at safeguarding the fundamental rights of individuals against abuse by States. IHL comes into play only when an armed conflict exists under international law and balances humanitarian concerns with the imperatives of military necessity.ⁿ¹⁰ Some aspects of IHL, such as the fact that it is binding on certain non-State actors and is non-derogable, make it more protective of the individual than HRL.ⁿ¹¹ Notwithstanding this, IHL is a compromise between humanitarian concerns and military necessity, and this is reflected in the fact that many of its provisions are less protective of the rights of individuals than the provisions of HRL. For example, the IHL provisions that parallel the HRL right to life and right to liberty are less stringent because they are based on the assumption that it is appropriate to kill, injure, and capture persons who are combatants or civilians directly participating in active hostilities. In [*2467] some situations, then, the application of IHL as *lex specialis* will, on balance, lead to a derogation from HRL. In such cases, IHL is an exception to HRL and my framework (under which *lex specialis* as exception is only triggered in limited circumstances) requires that the term "armed conflict" be interpreted narrowly.

When this framework is applied to the "war on terror," it becomes clear that if the actors creating and interpreting international law were to characterize all actions against transnational terrorist networks as armed conflict - without making parallel modifications to the protections available under IHL - this would lead to a derogation from HRL. A war

against groups of transnational terrorists, by its very nature, lacks a well-delineated timeline or a traditional battlefield context, and renders it difficult to distinguish between combatants and non-combatants. The application of IHL in this context, results in a derogation from HRL.ⁿ¹² It is therefore necessary to adopt a narrow interpretation of armed conflict in this context. Under such a narrow interpretation, the conflict with al Qaeda would not be an armed conflict as it does not fall within the core definitions of either international or non-international armed conflict in the Geneva Conventions. However, certain situations, like the conflicts in Afghanistan and Iraq, will fall within even a narrow interpretation of armed conflict, regardless of the impact on human rights.

The framework highlights the fact that armed conflict is supposed to be an exceptional situation and that the rules of IHL were formulated with that view of armed conflict in mind. However, it does not insist on a static conception of armed conflict; rather, it accommodates an evolving definition of armed conflict so long as there is a contemporaneous evolution of the rules applicable in armed conflict. The threat posed by global terrorism might well require a rethinking of the paradigm of armed conflict to include a wider variety of State responses to transnational terrorism. My framework suggests that the rules applicable to such armed conflicts will have to be different from those applicable in armed conflict as presently envisaged. An expanded definition of armed conflict would have to be accompanied by a modification of the applicable rules of IHL to make them more appropriate to the type of conflict in question.

In Part I of this Article, I examine the lack of a settled definition of the term "armed conflict" in international law. I discuss how the term "armed conflict" is used in the Geneva Conventions and point out that in many situations the Geneva Conventions do not provide definitive direction as to whether or not an armed conflict exists. Here, I focus in [*2468] particular on the debate over whether or not actions taken by the United States against al Qaeda and connected groups constitute an armed conflict.

In Parts II and III, I propose a framework that would inject a new dimension into the analysis of what constitutes an armed conflict in international law. In Part II, I explain how the relationship between HRL and IHL and the consensus that IHL is the *lex specialis* in armed conflict provides a new lens through which to view the term "armed conflict." I argue that a special law - like an exception - must be triggered only in narrow circumstances. This requires that the conditions activating the special law be narrowly interpreted and that once activated, the special law be interpreted so as to deviate as little as possible from the rule.

In Part III, I use the conclusions of the previous Part to derive the following two pronged framework: (a) in situations in which the application of IHL would result in a derogation from HRL - i.e., IHL acts as an exception to HRL - "armed conflict," as the trigger for IHL, must be interpreted narrowly; and (b) even once IHL is triggered, the derogation from HRL must be minimized.

In Part IV, I apply this framework to the question of whether State actions against transnational terrorists and, in particular, the United States' "war on terror," constitute an armed conflict under international law. I conclude that, due to the nature of the conflict between the parties, the application of the current protections of IHL leads, on balance, to a derogation from HRL. Therefore, under my framework, any doubts as to whether the "war on terror" is an armed conflict should be resolved in favor of interpreting the term narrowly.

In the conclusion, I consider the possibility of adopting a broader interpretation of "armed conflict" to include a variety of State responses to global terrorism. Under my framework, such an interpretation would be permitted only if the applicable protections of IHL were also modified. In the event that States act collectively to broaden the definition of armed conflict in a way that derogates from HRL, the second prong of my framework would require that the applicable rules of IHL be interpreted in a manner that minimizes the deviation from HRL.

I. The Definition of Armed Conflict in International Law

A. The Geneva Conventions

IHL is triggered by the existence of an armed conflict. Yet there is no settled definition of the term "armed conflict" - which is used freely [*2469] in both the Geneva Conventions and the Additional Protocols but is not defined in either. According to the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." ⁿ¹³ Therefore the first step in ascertaining the meaning of the term "armed conflict" in international law is to look at both the text and the object and purpose of the Geneva Conventions.

The Geneva Conventions recognize two distinct categories of armed conflict - international and non-international. The full complement of protections under IHL is applicable only to the first category. Under the Geneva Conventions, an international armed conflict arises between "two or more of the High Contracting Parties." ⁿ¹⁴ The full complement of protections provided by IHL applies in cases of international armed conflict. According to the Commentary to the Geneva Conventions, "it makes no difference how long the conflict lasts, or how much slaughter takes place." ⁿ¹⁵ Since only States can be High Contracting Parties, an international armed conflict has traditionally been viewed as a conflict between two States. However, as discussed below this assumption is being questioned in the context of the "war on terror." ⁿ¹⁶

A much smaller group of protections included under Common Article 3 of the Geneva Conventions applies to a second category of armed conflicts, namely "armed conflicts not of an international character." ⁿ¹⁷ Such conflicts "occur[] in the territory of one of the High Contracting Parties," ⁿ¹⁸ which suggests that non-international armed conflicts typically occur within a single State. ⁿ¹⁹ Non-international [*2470] armed conflicts are distinguished from "internal disturbances and tensions [or] isolated and sporadic acts of violence." ⁿ²⁰ One of the factors relevant to such a factual determination is the nature, intensity, and duration of the violence. ⁿ²¹ Additionally, the protections applicable in non-international armed conflicts bind all parties to the conflict, including non-State actors. ⁿ²² As a result, for a non-State actor to be deemed a party to a non-international armed conflict, it must have attained a certain level of organization and command structure such that it is capable of being identified as a party in the first place. ⁿ²³ However, many conflicts at the periphery of the definition of non-international armed conflict are calling into question the determinacy of these criteria.

The ICRC Commentary to the Geneva Conventions explains that the term "armed conflict," in addition to the term "war," was included in order to circumvent arguments by States committing hostile acts that they are not making war but merely engaging in police enforcement or legitimate acts of self-defense. ⁿ²⁴ The goal here is clearly humanitarian. Yet it does not follow that the term "armed conflict" must be interpreted broadly in all circumstances. When the provisions of the Geneva Conventions were drafted, the protections available under HRL were not taken into account. ⁿ²⁵ Nor had the ICCPR and the ICESR, the first legally binding human rights instruments of universal applicability, been adopted yet. At that time, IHL was probably viewed as the only source of protection for individuals during times of violent conflict. However if HRL is also applicable in armed conflict, as appears to be the case, ⁿ²⁶ then individuals might be protected even in the absence of IHL. Therefore the humanitarian goals of the Geneva Conventions are not always furthered by a broad interpretation of the term "armed conflict." On the other hand, however, there is nothing in the text or object and purpose of the Geneva Conventions to indicate that a narrow reading is warranted either.

[*2471]

B. Situations at the Periphery, Including the "War on Terror"

Drawing a clear distinction between situations that constitute armed conflict and those that do not has never been an easy task at the periphery. Certain conflicts clearly fall within the definition of armed conflict. For example, high intensity conflicts in which State actors are involved on both sides, such as was the case with the conflict in Afghanistan during the period October 2001 to June 2002, fall within the core definition of international armed conflict. But in many cases it is not clear whether a particular situation qualifies as an armed conflict. For example, was the recent conflict in Lebanon between a State party (Israel) and a non-State actor (Hezbollah) an armed conflict? Was the Irish Republican Army a party in an armed conflict and thus subject to IHL or is it a criminal organization governed solely by domestic

criminal law as the British government has always maintained? ⁿ²⁷

The emergence of non-State groups as a major threat to international peace and security and the U.S. decision to characterize the events of September 11th as an act of war and the many strands of the U.S. reaction to those events as an armed conflict have rendered the definition of armed conflict even more controversial. Outside of the United States, Israel is the only other country that has consistently invoked the armed conflict paradigm to characterize its actions against terrorist groups beyond its borders. ⁿ²⁸ Other countries have sought to respond to terrorism primarily under a criminal law enforcement model.

The United States insists that its conflict with al Qaeda is a "war" in the technical sense and that it is entitled to resort to armed force against members of al Qaeda wherever and whenever they are found. ⁿ²⁹ The Government's position is as follows:

The United States is engaged in a continuing armed conflict against Al Qaeda, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations. ⁿ³⁰

[*2472] Many commentators maintain that the conflict with al Qaeda is not an armed conflict, international or non-international. ⁿ³¹ They acknowledge that the hostilities in Afghanistan immediately post-September 11th and the subsequent occupation constituted an armed conflict, but maintain that other anti-terror operations being carried out on a transnational basis cannot be deemed an armed conflict under international law. ⁿ³² The underlying argument here is that, to be considered an armed conflict under international law, the conflict must fall within the parameters of either an international or non-international armed conflict, and that a conflict with al Qaeda doesn't fall into either category. Most commentators point to its non-State nature to insist that al Qaeda cannot be a party to an international armed conflict which traditionally refers to conflicts between two or more States. ⁿ³³ On the other hand, it is argued, the conflict with al Qaeda is not a non-international armed conflict either. First, the conflict is not confined to the territory of the United States but is instead occurring transnationally in different corners of the world. ⁿ³⁴ Second, as the ICRC has observed, "it is difficult to see how a loosely connected network of cells - a **[*2473]** characterization that is undisputed for the moment - could qualify as a 'party' to the conflict." ⁿ³⁵ Many of these commentators argue that an approach based on criminal enforcement rather than one based on armed conflict is the appropriate response to terrorism. ⁿ³⁶

Other commentators have called for a broader reading of the term "armed conflict" and have advanced arguments as to why the conflict with al Qaeda constitutes an armed conflict under international law. ⁿ³⁷ Primarily, they contend that a criminal enforcement model is inadequate to the task of dealing with groups such as al Qaeda that operate across international borders and are capable of massive amounts of violence and destruction. These arguments usually start with the assertion that a terrorist attack of a sufficient scale and effect can be deemed an "armed attack" under international law regardless of the fact that the attack cannot be attributed to another State. ⁿ³⁸ Under Article 51 of the United Nations Charter, a State is entitled to act in self-defense if it is faced with an armed attack. ⁿ³⁹ As applied to the United States' conflict with al Qaeda, this line of reasoning holds that the actions of September 11th initiated or confirmed an armed conflict between the two parties, which is still ongoing. ⁿ⁴⁰ In terms of this argument, the armed conflict between these two parties includes not only the military operations in Afghanistan but also the range of other actions taken by the United States against al Qaeda and connected groups.

Among those who view the conflict with al Qaeda as an armed **[*2474]** conflict there is debate as to whether it is international, non-international, or hybrid in nature. The U.S. Supreme Court has characterized the conflict with al Qaeda as an armed conflict to which the Geneva Conventions are applicable but has refrained from stating what type of armed conflict it is. In *Hamdan v. Rumsfeld*, the Court held that Common Article 3 of the Geneva Conventions was applicable to the detention of a suspected al Qaeda operative at Guantanamo Bay. ⁿ⁴¹ Although the individual in question had been captured during the hostilities in Afghanistan, the Court proceeded on the basis that the United States' conflict with al Qaeda was distinct from its conflict with the Taliban in Afghanistan and specifically directed its

reasoning to the former.ⁿ⁴² The Court spoke in terms of the applicability of Common Article 3 to the conflict against al Qaeda in general rather than the conflict against al Qaeda in Afghanistan.ⁿ⁴³ The fact that the Court applied Common Article 3 only might indicate that it viewed the conflict as non-international in nature. However, the Court did not reject the possibility that the rest of the Geneva Conventions might also be applicable but determined instead that it need not address that matter because Common Article 3 was applicable in any case.ⁿ⁴⁴ Many commentators argue that the scope of Article 3 is broad enough to encompass any armed conflict that is not an international armed conflict and therefore that the conflict with al Qaeda is a non-international armed conflict,ⁿ⁴⁵ but others remain uncommitted.ⁿ⁴⁶ The latter point to the transnational nature of the conflict with al Qaeda as a factor that makes it difficult to decide whether to characterize the conflict as an international armed conflict, a non-international armed conflict, or some hybrid of the two.ⁿ⁴⁷ Although international and non-international armed conflict have traditionally been viewed as comprehensively defining the entire range of armed conflict, some commentators have begun calling [*2475] for the recognition of a separate category of armed conflict to cover conflicts between States and terrorists outside of their territory.ⁿ⁴⁸

C. The Inability of the Geneva Conventions Alone to Provide a Dispositive Answer in All Cases

In cases in which a conflict does not fall within the core definition of international or non-international armed conflict, neither the text nor the object and purpose of the Geneva Conventions provide sufficient guidance as to how to categorize the conflict. For example, under a narrow, strictly textualist reading of the Geneva Conventions, the "war on terror" is not an armed conflict. Under a more flexible interpretation though, the "war on terror" could be deemed an armed conflict. The Geneva Conventions alone do not provide sufficient guidance on which of those two interpretations should be given more weight.

The decisions of international judicial bodies are of little help in clarifying the term "armed conflict" in this context. The pronouncement of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Tadic caseⁿ⁴⁹ is perhaps the most frequently cited decision on what constitutes an armed conflict.ⁿ⁵⁰ According to the Appeals Chamber, "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."ⁿ⁵¹ While this puts a little more flesh on the skeletal definition provided in the Geneva Conventions, it leaves enough ambiguity that questions can still arise as to whether some situations fall within the definition of armed conflict.ⁿ⁵²

In the next four Parts, I present an alternative framework for considering the definition of armed conflict that is based on the interaction between HRL and IHL as mediated by the *lex specialis maxim* rather than the provisions of the Geneva Conventions alone. That framework clearly delineates when a broad reading of the term "armed conflict" is permitted and when it is not.

[*2476]

II. General and Special Laws and the Relationship Between HRL and IHL

As Part I demonstrates, the Geneva Conventions do not always provide a definite answer as to whether or not a particular situation should be characterized as an armed conflict. Therefore, I look outside the provisions of the Geneva Conventions to develop a framework that provides clear and decisive guidance as to when a narrow reading of the term "armed conflict" is required. The framework that I propose draws on the interaction between HRL and IHL and a comparison between the relationship between general and special laws and rules and exceptions. In this Part, I argue that (a) a special law that derogates from a general law is triggered in narrow circumstances only, and (b) to the extent possible, a special law, once triggered, must be read so as to minimize the derogation from the general law. I begin with a brief primer on the definition of conflict and methods for resolving conflicts in international law. Thereafter, I examine the relationship between HRL and IHL and explain how a consensus appears to be building that IHL is the *lex specialis* in armed conflict. I then develop my argument by comparing the relationship between a general and special law to that between a rule and its exceptions - drawing on the canon of construction that exceptions are to be interpreted

narrowly.

A. Conflicts of Norms in International Law: A Primer

There has been a recent resurgence of interest in the conflicts of norms in public international law, and discussions about the methods of resolving such conflicts, after a long period in the wings, have suddenly taken front and center in much scholarly discussion.ⁿ⁵³ The *lex specialis maxim*, in particular, has been the focus of a great deal of interest and was one of the focal points of the International Law Commission's Study on the fragmentation of international law.ⁿ⁵⁴ I will use the [*2477] conclusions of that Study as a springboard for my discussion of how general and special laws interact with each other.

1. Defining Conflict

In this Article, I adopt a broad definition of what constitutes a conflict of norms.ⁿ⁵⁵ For the purposes of this Article, a conflict is deemed to exist not only in those cases in which Norm A and Norm B impose incompatible obligations but also in those cases in which complying with the obligations imposed by Norm A make it impossible to make use of the permissions or less stringent obligations of Norm B and vice versa. Accordingly, in the context of a concrete case, a conflict exists if two norms are applicable to the same case and the outcome differs depending on which norm is applied.ⁿ⁵⁶

2. Resolving Conflicts in International Law

Conflicts of norms can arise in any system of law, domestic or international. But the absence of a centralized legislature with the authority to make binding rules for States complicates matters considerably in the international arena. Norms are created, interpreted, and implemented on a decentralized and fragmented basis and in a variety of independent fora that lack formal hierarchical or institutional structure.

A conflict between two norms in international law is usually resolved by reference to the intentions of the parties to the norms.ⁿ⁵⁷ When a conflict arises, the first step is to examine whether there is an [*2478] explicit treaty clause regulating the relationship between the norms. In the absence of such a clause, the next step is to ascertain the intention of the parties. State intent can be discerned from the preparatory work of a treaty, from statements made at the time of the emergence of a norm, or from statements made after the conclusion or emergence of the norm that indicate which norm should prevail in cases of conflict. If no such expressions of State intent are found, then resort is had to a variety of choice of law principles, including the *lex specialis maxim*.

3. *Lex Specialis*: A Brief Introduction

The *lex specialis derogate lege generali* principle has a long history originating in Roman law and is widely used both domestically and internationally as a technique for resolving conflicts between different legal norms. Grotius states the principle in these terms:

Among agreements which are equal ... that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.ⁿ⁵⁸

The *lex specialis maxim* has recently been used most prominently in conflicts between IHL and HRL and within the international trade context.ⁿ⁵⁹ In the context of conflicts between IHL and HRL, as discussed below,ⁿ⁶⁰ a majority of players in the international community view IHL as the *lex specialis* in situations of armed conflict.

Under the *lex specialis* principle, the specific prevails over the general. The principle "expresses a rational

proposition that weight should be given to that which is regulated more specifically, i.e., to which the law more closely applies to in particular circumstances." ⁿ⁶¹ Like the *lex posterior* principle, under which a law that is later in time prevails over earlier laws, the *lex specialis* principle reflects the contractual freedom enjoyed by States and is based on the fact that States are generally free to derogate from or contract out of international rules. ⁿ⁶² The maxim is based on the rationale that a special law provides [*2479] better access to the intent of the State parties and that it can regulate a matter in a more effective manner than a general law. ⁿ⁶³ It is used not only for resolving conflicts between treaties but for resolving conflicts between any two potentially applicable rules. ⁿ⁶⁴

The generality or specificity of a particular norm is always a relational matter in that a "rule is never 'general' or 'special' in the abstract but in relation to some other rule." ⁿ⁶⁵ A norm is usually considered more specific than another with reference to either its subject matter or its membership. In the former case, both norms would deal with the same subject matter, but one norm is the *lex specialis* because it deals with the subject matter in a more precise or limited way. So, for example, IHL is often treated as the *lex specialis* in armed conflict because it is a set of norms specifically formulated with the contingencies of armed conflict in mind. A norm is more specific than another by reference to its membership when, because of its limited membership, it is able to go further in terms of detail or the objectives pursued by it and the other norm. ⁿ⁶⁶ For example, regional human rights treaties often deal with the protection of rights in more detail than universal human rights treaties.

Lex specialis usually operates in a contextual manner depending on the circumstances of the situation. As such, it works best when applied on a case by case basis to concrete facts rather than in the abstract. ⁿ⁶⁷ The ILC Study discusses two ways in which the *lex specialis* principle operates. ⁿ⁶⁸ First, there are situations in which the specific rule can be viewed as an elaboration or particular application of the general rule. Here, the special law is interpreted in light of the general one and is treated as a special application or instance of the latter or, in the alternative, the general law is viewed as articulating the rationale or purpose of the special law. In the second case, the specific law is viewed as a modification, overruling or setting aside of the general law or as derogation from the general law. ⁿ⁶⁹ Vitally, although *lex specialis* operates to give priority to the special rule over the general rule, the more general law remains in the background providing interpretive direction to the special law. ⁿ⁷⁰ This is so regardless of whether the [*2480] special rule is an application of or exception to the general rule. ⁿ⁷¹

B. The Relationship Between IHL and HRL

1. Background

Despite having a great deal in common, HRL and IHL are separate bodies of law. HRL has its sources in a series of international treaties such as the ICCPR and the International Covenant on Economic, Social, and Cultural Rights, ⁿ⁷² several regional treaties such as the European Convention on Human Rights ⁿ⁷³ and the American Convention on Human Rights, ⁿ⁷⁴ decisions by international bodies interpreting and applying those treaties, and State practice. Although norms relating to humanitarian conduct in armed conflict have a long provenance, ⁿ⁷⁵ much of IHL is contained in the Four Geneva Conventions of 1949 ⁿ⁷⁶ and the two Additional Protocols of 1977 ⁿ⁷⁷ and is complemented by customary international law. IHL focuses on restricting the means and methods of warfare and on protecting individuals who are not, or are no longer, taking active part in the hostilities and is applicable regardless of the justifiability of one or more of the parties beginning the armed conflict.

Active interaction between HRL and IHL and between the United Nations (UN) and the ICRC, the respective guarantors of the two systems, was practically non-existent in the first twenty years after [*2481] World War II. The UN, as the guarantor of peace and human rights, wanted nothing to do with the law of war and the ICRC, the guarantor of the law of war, did not want to be associated with the UN, which it deemed to be a political organization, or with its baby, human rights. ⁿ⁷⁸ In the ICCPR, war or armed conflicts are not explicitly mentioned even in its derogation provisions and this is commonly attributed to reasoning that the ICCPR should avoid envisaging the possibility of war. ⁿ⁷⁹

Starting in the 1960s, however, a substantial relationship began to form between IHL and HRL. The United Nations Human Rights Conference held in Tehran in 1968 witnessed the establishment of an official link between human rights and IHL. Following the Conference in a resolution entitled "Respect for Human Rights in Armed Conflict," the UN General Assembly called for the better application of existing humanitarian international conventions and the conclusion of additional agreements.ⁿ⁸⁰ Since then interactions between the two systems have flourished. As Theodor Meron puts it, "human rights has greatly influenced the formation of customary rules on humanitarian law, which is discernible in the jurisprudence of courts and tribunals and the work of international organizations."ⁿ⁸¹ It is commonly accepted that human rights law in general and the proceedings and impact of the Tehran Conference in particular directly influenced the adoption in 1977 of the two Protocols Additional to the Geneva Conventions.ⁿ⁸² It has become routine for international bodies charged with the implementation and application of IHL, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda to look to HRL and its methodologies for assistance in interpreting the norms of IHL.ⁿ⁸³ Also, as detailed [*2482] below,ⁿ⁸⁴ many human rights bodies have further stimulated this relationship by using IHL to interpret the norms of HRL during times of armed conflict.ⁿ⁸⁵

2. The Evolving Consensus That IHL is Lex Specialis

The consensus among many international tribunals and international organizations appears to be that both HRL and IHL are directly applicable in armed conflict but when the two sets of laws conflict, IHL takes priority as the more specialized law or the *lex specialis*.ⁿ⁸⁶

The International Court of Justice (ICJ), the UN's principal legal body, first considered the question of whether HRL applies directly in armed conflict in its Advisory Opinion in the 1996 Nuclear Weapons Case.ⁿ⁸⁷ The Court found that the right to life under Article 6 of the ICCPR was applicable in armed conflict and explained the relationship [*2483] between IHL and HRL as follows:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.ⁿ⁸⁸

The Court recently affirmed this position in the 2004 Wall Caseⁿ⁸⁹ and added the following:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.ⁿ⁹⁰

Other international bodies charged with the implementation of IHL and HRL have also articulated a similar position vis-a-vis the relationship between IHL and HRL in armed conflict, albeit with different degrees of explicitness.ⁿ⁹¹ The Inter-American Commission of [*2484] Human Rights has on several occasions held that although HRL applies in armed conflict, the *lex specialis* is IHL.ⁿ⁹² The Human Rights Committee (HRC), has explicitly stated that the

applicability of IHL during armed conflict does not preclude the parallel applicability of the provisions of the ICCPR, ⁿ⁹³ but has observed that "in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights." ⁿ⁹⁴ The European Court of Human Rights has never explicitly discussed the relationship between IHL and HRL but has on several occasions used terminology and concepts arguably borrowed from IHL when applying the ECHR to situations of armed conflict. ⁿ⁹⁵ However, there continues to be debate over whether in fact the European Court is applying IHL as *lex specialis* or is applying the ECHR with no reference to the norms of IHL. ⁿ⁹⁶

The position of the ICRC also appears to be that IHL is the *lex specialis* in times of armed conflict. This was the approach of the experts convened by the ICRC at the seventeenth Round Table on Current Problems of International Law. ⁿ⁹⁷ There appeared to be a [*2485] consensus at the meeting that the non-derogable provisions of HRL continued to apply in armed conflict simultaneously with IHL but that IHL represented the *lex specialis*. ⁿ⁹⁸ During the discussion, multiple references were made to the ICJ's opinion in the Nuclear Weapons Case. ⁿ⁹⁹ The ICRC Study on Customary International Humanitarian Law also adopts the view that both HRL and IHL are applicable during armed conflict and that IHL is the *lex specialis* and takes precedence in armed conflict. ⁿ¹⁰⁰

Many human rights proponents, including human rights organizations, while working on the basis that both IHL and HRL are applicable in an armed conflict, rely solely on IHL norms when assessing whether State conduct in armed conflict violates international law. ⁿ¹⁰¹ Even many academic commentators who see a significant role for human rights in armed conflict appear to accept the ICJ's statement that IHL is the *lex specialis*. ⁿ¹⁰²

3. Why a Framework Based on IHL as *Lex Specialis*?

Lex specialis is not necessarily the only method of resolving conflicts in international law, and even if it were the most appropriate method in this case, it is not always obvious that IHL is the more "specialized" of the two laws. Questions can, therefore, arise as to whether it makes sense to use the IHL as *lex specialis* paradigm when [*2486] analyzing the relationship between HRL and IHL.

Other methods of resolving conflict between HRL and IHL certainly exist. Perhaps the most promising methods are the harmonization of norms method and the method under which HRL, and not IHL, would be the *lex specialis* in some situations of armed conflict. The harmonization method is usually advocated in cases in which the two sets of norms are from two different systems of specialized laws and when the conflict is not between bilateral contractual treaties but between law making treaties that "set up material rules for the behavior of their member States aiming at collaboration and community and not at the exchange of performances." ⁿ¹⁰³ Under this approach, the two sets of norms are interpreted in a mutually supportive way that makes them consistent with each other without giving priority to either of them. ⁿ¹⁰⁴ However, the content of at least one of the norms at issue has to be ambiguous or uncertain for harmonization to be possible. In the case of true conflict, it would not be possible to achieve harmonization without giving more weight to one set of norms over the other. Also, especially in cases in which both the norms in question are ambiguous and there are several ways of reconciling them, harmonization would require a high degree of institutional co-ordination in order for there to be consistency of interpretation. With respect to HRL and IHL, States, the ICJ, human rights bodies, and the ICRC among others would have to co-operate on a continuous basis in order to achieve a coherent effort at harmonizing these two constantly evolving bodies of law.

Under the second method, given the right circumstances, HRL rather than IHL would sometimes be the *lex specialis* in armed conflict. For instance, as Heike Krieger notes, many military operations that form part of the international administration of territory are more like regular policing activities than combat operations. He argues that although IHL applies to such operations, HRL might provide the more appropriate yardstick by which to judge those activities. ⁿ¹⁰⁵ In a slightly different vein, David Koller has argued with respect to the principle of proportionality, that the rules of HRL are at least as clear and specific as those of IHL and that HRL could just as well be viewed as the *lex specialis* in this regard. ⁿ¹⁰⁶ A potential problem with this approach is that it could lead to a loss of predictability in the law with States and [*2487] soldiers in the field no longer being able predict with certainty which system of law

governs their behavior in a given situation. This could ultimately result in a less effective system of protection during armed conflict. The issue is further complicated by the fact that human rights courts and tribunals and the ICRC, because of their respective institutional biases, might very well have different interpretations of which norms are more appropriate in any given situation. The resulting fragmentation of the law would further exacerbate the loss of predictability.

None of the problems raised above necessarily constitutes an insurmountable hurdle. Scholars as well as human rights bodies, the ICRC, and other international organizations should certainly give more consideration to these methods and to ways of overcoming some of the problems associated with them. Further thought has to be given to how more flexible interpretations than one under which IHL is always the *lex specialis* in armed conflict might be coordinated among the several bodies interpreting and applying HRL and IHL in a manner that neutralizes or at least reduces institutional bias and maintains the predictability of the applicable law. If different methods of resolving conflicts between HRL and IHL are adopted, then the definition of armed conflict and the triggering of IHL will have consequences that are different from those assumed in this Article. The argument in this Article might then have to be modified to reflect those different methods and consequences. As things stand, however, the majority of relevant actors in the international community appear to be adopting an IHL as *lex specialis* approach. As such, the argument in this Article reflects current practice and moulds a framework that operates within the contours of such practice.

C. The Framework: *Lex Specialis* and Rules and Exceptions

The central argument I make here is that a special rule that derogates from a general one, like an exception to a rule, must be taken to be activated only in very narrow circumstances. This means that the trigger activating the special law must be narrowly interpreted and once the special law is activated it must be interpreted so as to deviate as little as possible from the general law.

1. Rules and Exceptions

Exceptions can be found everywhere in the law. Qualifications on free speech, exemptions in the Tax Code, affirmative defenses to tort [*2488] and criminal liability, and the exceptions to sovereign immunity are a few of the countless examples.

An exception to a rule can be said to arise "when an applicable rule cannot dispose of a case because the outcome of that case must be determined in accordance with some other rule or principle instead."ⁿ¹⁰⁷ The very definition of an exception presupposes that what is excepted is otherwise within the scope of the broader rule. Surprisingly, the topic of exceptions has not been the focus of a great deal of scholarly attention.ⁿ¹⁰⁸ What writing has been done in this area appears to focus in large part on the question of whether exceptions are really external to a rule or whether they always form a part of the rule itself.ⁿ¹⁰⁹ Sophisticated arguments have been made in favor of the proposition that exceptions are never really external to the rule itself but are always included in the rule.ⁿ¹¹⁰ However, as pointed out by Joseph Raz, although it is possible to formulate rules in a way that includes all their qualifications, this is not always desirable.ⁿ¹¹¹ This is not the way lawyers ordinarily think about the law and such a method of formulating rules obfuscates the fact that "certain groups of law are affected by certain other laws stipulating doctrines such as self-defense, necessity, etc., while others are not."ⁿ¹¹²

Therefore, if one takes the perspective that not all rules contain all their qualifications within themselves but are subject sometimes to external exceptions, it is possible to characterize the relationship between at least some rules and at least some of their exceptions as a conflict of rules.ⁿ¹¹³ When an exception is applicable, the rule is no longer dispositive but defers instead to the exception and the outcome is different than if the exception did not apply. Take, for example, the rule [*2489] prohibiting murder. If all the elements of the offense of murder are proved in a murder trial, then a guilty verdict would result. However, if the affirmative defense of self-defense is raised and proved, then the result would be a not guilty verdict.

2. General and Special Laws

It is often difficult to say with certainty whether a special law applies the general law or modifies or derogates from it. ⁿ¹¹⁴ However, the ILC Study does distinguish between *lex specialis* as application and *lex specialis* as exception, ⁿ¹¹⁵ and so does this Article. The criteria I use here are drawn from the definition of conflict set out above. ⁿ¹¹⁶ For the purposes of this Article, a special rule will be viewed as an application of the general one if the outcome is the same regardless of which set of norms is applied. Here, the special rule provides instructions on what a general rule requires in some particular case. One example of *lex specialis* as application used by the ILC Study is the emission reduction schedule of article 2 of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which gives concrete meaning to the general provisions of the 1985 Vienna Convention on the Protection of the Ozone Layer. ⁿ¹¹⁷ For the special rule to be deemed an exception to the general rule, the outcome must be different if the special rule is applied than if the general rule had been applied. The example used in the ILC Study is the IHL as *lex specialis* paradigm which is the subject of this Article. ⁿ¹¹⁸

A general law, under the *lex specialis maxim*, is like a rule because it is dispositive in the absence of a special law. But in certain circumstances, a special law, like an exception, is triggered and the general law ceases to be dispositive. A special law that derogates from the general law is comparable to an exception in that, when it is triggered, the outcome is different than if the general law were dispositive. As the ILC Study puts it "when *lex specialis* is invoked as an exception to the general law then what is being suggested is that the special nature of the facts justifies a deviation from what otherwise would be the 'normal' course of action." ⁿ¹¹⁹ As illustrated in the first paragraph of this Article, when IHL is the *lex specialis*, certain State [*2490] actions that would be prohibited if no armed conflict existed become permissible.

3. Exceptions and Special Laws Must Be Triggered Only in Narrow Circumstances

A widely accepted canon of statutory interpretation asserts that exceptions and provisos are to be interpreted narrowly. ⁿ¹²⁰ The rationale here appears to be that broadly construed exceptions would swallow the relevant rules. ⁿ¹²¹ As a corollary, "one who claims the benefit of an exception from the prohibition of a statute has the burden of proving that his claim comes within the exception." ⁿ¹²² For example, under the Tax Code, income taxed is described in sweeping terms and is broadly construed in accordance with an obvious purpose to tax income comprehensively. The exemptions, on the other hand, are "specifically stated" and are to be "construed with restraint" in the light of the same policy. ⁿ¹²³ It is thus a commonly accepted rule that "tax-exemption and -deferral provisions are to be construed narrowly." ⁿ¹²⁴ And, the person claiming the exemption has the burden of proving that the exemption applies to him or her. ⁿ¹²⁵ Similar reasoning regarding rules and their exceptions is found in abundance in diverse areas of the law. ⁿ¹²⁶

[*2491] It is possible to view the proposition that an exception should be interpreted narrowly as embracing two sub-propositions. The first sub-proposition would state that the conditions triggering the application of the exception should be interpreted restrictively. The second would assert that once the exception is activated, the law applicable to that exception should deviate as little as possible from the principles underlying the rule to which it is an exception. Exceptions to the equal protection clause of the U.S. Constitution, for example, provide a good illustration of this. Discriminatory measures against members of a suspect class have to meet two criteria in order to be excepted from invalidation under the equal protection clause. ⁿ¹²⁷ First, the measure must further a compelling State interest. This first criterion can be viewed as triggering the exception. The second criterion, that the measure must be narrowly tailored to achieve the compelling interest, can be seen as articulating the proposition that the exception must deviate as little from the principle of equality as possible. As such, it is possible, both conceptually and practically, to conceive of the assertion that exceptions should be construed narrowly as divisible into these two parts.

Following from this, because a special law that derogates from a general one operates identically to an exception, in the absence of indications to the contrary, a special law too (a) must be triggered only in a narrow set of circumstances, and (b) once activated, must be interpreted to minimize the deviation from the rule.

III. Armed Conflict: A Two-Pronged Framework

In this Part, I fashion a framework for the interaction of HRL and IHL that posits the following: (a) in cases in which the application of IHL would result in a derogation from HRL, the term "armed conflict" must be construed narrowly, and (b) to the extent possible, even once IHL is triggered, the applicable rules must be interpreted to minimize the deviation from HRL. I begin by confirming that the canon of construction that exceptions must be interpreted narrowly interpreted applies in the case of HRL and IHL and that IHL does act as an exception to HRL in certain circumstances.

[*2492]

A. Does the Canon of Construction That Exceptions Must Be Narrowly Construed Apply to the Relationship Between HRL and IHL?

In some contexts, courts and other actors depart from the general rule of construction that calls for exceptions to be construed narrowly.ⁿ¹²⁸ However, the rule of construction applies with special force in the case of HRL and its exceptions.

Many human rights treaties include provisions that permit derogation from certain rights in times of public emergency. Article 4 of the ICCPR, for instance, provides:

In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation.ⁿ¹²⁹

While States are thus permitted to derogate from certain rights in certain circumstances, they are not entitled to do so completely at their own discretion. The language of the derogation clauses indicate that two conditions must be met. First, there must exist "a public emergency threatening the life of the nation"; second, the measures taken must be "strictly required by the exigencies of the situation."

A State availing itself of the rights of derogation under the ICCPR must immediately inform the Secretary General of the United Nations of the provisions from which it is derogating and the reasons for its derogation.ⁿ¹³⁰ Under the ICCPR, States are also obliged to make periodic reports to the Human Rights Committee (HRC),ⁿ¹³¹ and if a State has declared an emergency, the HRC independently assesses whether an emergency truly exists. In its responses to the reports filed by States, the HRC has adopted the position that the burden is on the State to show the existence of an emergency.ⁿ¹³² It has repeatedly posed probing questions to States about whether the situations being characterized as "emergencies" actually amount to emergencies under [*2493] the provisions of the ICCPR.ⁿ¹³³ Furthermore, the HRC has also been sharply critical of emergencies lasting for several years and has voiced concern that emergencies lasting for an indefinite period amounted to a permanent restriction of human rights.ⁿ¹³⁴ In its General Comment No. 29, the HRC has reinforced these views and has expressly stated that the threshold for derogation is high and that "not every disturbance or catastrophe qualifies as a public emergency" and that "even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."ⁿ¹³⁵

It seems clear that derogations from HRL are triggered only in exceptional circumstances and the onus is on the State seeking to derogate to establish that a particular situation justifies derogation. Additionally, any derogation must be narrowly tailored to the circumstances of the emergency in question. Also, there appears to be nothing about IHL that compels us to conclude that it should be easily triggered. As discussed above,ⁿ¹³⁶ nothing in the text or object and purpose of the Geneva Conventions required a broad reading of the term "armed conflict."

B. Is IHL an Exception to HRL?

1. IHL Derogates from HRL in Some Cases

Deciding whether IHL is an application or elaboration of or a [*2494] derogation from HRL in a particular situation will often require a balancing of factors. It is beyond the scope of this Article to outline every situation in which the application of IHL can be deemed an exception to or derogation from HRL. But, drawing on the principles set out above,ⁿ¹³⁷ it is possible to derive the following general principles. If the outcome is the same regardless of which set of norms is applied, then IHL can be viewed as an application of HRL and it is the *lex specialis* as application rather than *lex specialis* as exception paradigm that is triggered. If the application of IHL results in a different but more favorable outcome vis-a-vis the rights of individuals, IHL can still be viewed as an application of HRL because of the "more favorable provision" principle described below. Therefore, for IHL to be deemed a derogation from HRL, the situation must be such that not only is the outcome different but also less favorable for the rights of individuals if IHL is applied rather than HRL.

IHL is sometimes an application or elaboration of HRL and at other times a derogation from it. Many aspects of IHL are more protective of the individual than HRL. For example, IHL is binding on non-State actors,ⁿ¹³⁸ provides for individual criminal responsibility,ⁿ¹³⁹ and is non-derogable.ⁿ¹⁴⁰ HRL, on the other hand, is binding only on State actors,ⁿ¹⁴¹ is enforceable only against State entities,ⁿ¹⁴² and, as discussed above,ⁿ¹⁴³ can be derogated from in certain circumstances. In addition, IHL contains provisions that provide specific armed conflict related protections for civilians in ways that HRL does not. For example, Additional Protocol I provides for the special protection of non-defended localities and demilitarized zones.ⁿ¹⁴⁴ In situations in which the benefits of IHL outweigh its disadvantages, in terms of the protection of rights, there is no conflict between HRL and IHL. This is so because many HRL treaties contain a "more favorable provision" principle under which HRL is deemed not to derogate from provisions [*2495] that are more protective of the individual than HRL.ⁿ¹⁴⁵ Thus HRL can be viewed as incorporating the more favorable provisions of IHL.

IHL can be also viewed as an application of HRL when the circumstances are such that IHL and HRL can be applied simultaneously and can complement each other without there being a conflict between the two sets of norms. This is what occurs when some norms of IHL are interpreted by reference to the more developed norms of HRL. For example, this appears to have been the approach of the ICRC Study in its chapter on "Fundamental Guarantees" in which the authors use human rights instruments, documents, and case law to define the content of some of the rules of IHL such as those relating to torture, fair trial guarantees, and conditions of detention.ⁿ¹⁴⁶ Many commentators also argued in favor of increased reliance on the norms of HRL in interpreting the rules of IHL.ⁿ¹⁴⁷ This is consonant with the way the *lex specialis maxim* operates. As discussed above, under the *lex specialis maxim*, although the special law takes precedence, the general law, far from disappearing into oblivion, stays in the picture and provides guidance in interpreting the special law.ⁿ¹⁴⁸

However, it is not always possible to conceive of IHL as an application of HRL. Some provisions of the two bodies of law are clearly so much in conflict as to make it difficult, if not impossible, to interpret IHL by reference to HRL in a manner that makes them compatible with each other. The principal reason for this is that whereas the provisions of HRL focus predominantly on the rights of the individual, IHL balances the rights of the individual with the imperatives of military necessity. "Military necessity" is described by the oft-quoted Lieber Code as follows:

[*2496]

Military necessity admits of all direct destruction of life or limb of "armed" enemies, and of other persons whose destruction is incidentally "unavoidable" in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy.ⁿ¹⁴⁹

Therefore, with respect to certain issues IHL is compromised as compared to HRL. As Theodor Meron has put it:

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 an armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law. It 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.ⁿ¹⁵⁰

Many individual provisions of IHL, therefore, because they incorporate the demands of military necessity, are less protective of the individual than HRL. Here I will focus on two sets of provisions which often lead to IHL providing different and less protective standards than HRL: provisions relating to the right to life and the right to liberty.

The right to life under HRL is non-derogable and stipulates that no one may be arbitrarily deprived of their life.ⁿ¹⁵¹ Under this standard, the lethal use of force must be absolutely necessary to achieve a legitimate aim, such as protecting life and, in some cases, effecting a lawful arrest or detention.ⁿ¹⁵² The jurisprudence of the European Court of Human Rights is particularly instructive here because it has applied this standard to deaths arising out of confrontations between military forces and armed groups.ⁿ¹⁵³ These cases demonstrate that the use of force is [*2497] prohibited under the ECHR unless capture would be too risky to bystanders or the forces involved.ⁿ¹⁵⁴ The right to life applies without distinction to all individuals and the European Court has applied the same standard regardless of whether the individuals concerned were "civilians" or engaged in hostilities.ⁿ¹⁵⁵

IHL, on the other hand, operates under the thesis that a stark moral and legal distinction can and should be drawn in armed conflict between the rights and obligations of combatants and civilians.ⁿ¹⁵⁶ Under one of the fundamental principles of IHL, the principle of distinction, civilians and civilian objectives must be distinguished from military targets, and parties to a conflict must "direct their operations only against military objectives."ⁿ¹⁵⁷ This is taken to mean that under IHL there is no prohibition against killing individuals who are part of the armed forces of the State or civilians directly participating in active hostilities, unless they are in custody, incapacitated, or surrendering. There is no requirement to try and arrest or incapacitate combatants before resorting to killing them. The rule is further complicated by the fact that there is no universally accepted definition of "direct participation in hostilities,"ⁿ¹⁵⁸ which means that there is much ambiguity as to who may and may not be classified as a non-civilian for the purposes of the rule. When IHL applies, therefore, it is not clear to what extent States are [*2498] prohibited from targeting combatants and civilians directly participating in active hostilities. Although some commentators maintain that targeted killings presumptively violate the principle of proportionality under IHL because of the potential risk to civilians,ⁿ¹⁵⁹ others argue that targeted killings could satisfy the proportionality requirement in the right circumstances.ⁿ¹⁶⁰ What is clear is that the rules of IHL on this issue are not as clear cut and unambiguous as those of HRL.

Even those taking no part in the hostilities may be at greater risk under the provisions of IHL as opposed to HRL. Under IHL's principle of proportionality, civilians are only protected against military attacks if the foreseeable injury to civilians is disproportionate to the military advantage likely to be gained.ⁿ¹⁶¹ Injury to civilians is disproportionate "if an attack ... may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."ⁿ¹⁶² Therefore, although the intentional targeting of civilians constitutes a grave breach of IHL, death or injury to civilians that is collateral to the legitimate targeting of military personnel or property only violates IHL if such death or injury is judged to be disproportionate. Although a proportionality test is also used under HRL, it establishes a much more stringent standard than the test under IHL. As discussed in the previous paragraph, under HRL, the use of force against an individual is proportionate only if it is absolutely necessary to achieve a legitimate aim such as protecting another individual's life. Not only are the aims for which lethal force may be used more restrictive than under IHL but the "absolute necessity" standard has been interpreted so as to impose an extremely high burden on States that extends

to both the planning and execution of actions that [*2499] might result in lethal force.ⁿ¹⁶³ As such, the proportionality test used in IHL, because it takes considerations of military necessity into account, and does not insist on absolute necessity, can be less protective of civilians than the test used under HRL.

The right to liberty under HRL can also be compromised by the application of IHL as *lex specialis*. Although IHL does provide for the protection of individuals captured during armed conflict, some of those standards are significantly different and less protective than the parallel standards of HRL.

Under HRL, individuals cannot be deprived of their liberty except in accordance with the standards and procedures established by law. The ICCPR, for instance, provides:

No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.ⁿ¹⁶⁴

This means that not only must an arrest and detention be authorized by the domestic laws of the State in question but also that it cannot be "arbitrary." The HRC has declared that the term "arbitrary" encompasses "elements of inappropriateness, injustice, lack of predictability ... [and] remand into custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime."ⁿ¹⁶⁵ Although States can and do circumvent these stringent requirements by derogating from the right to liberty and implementing systems of administrative or preventive detention, many important aspects of the right to liberty remain untouched by this. Importantly, in order to comply with the derogation provisions of the ICCPR, any measures taken in derogation of the right, including their duration, geographical coverage, and material scope, must be limited to the extent strictly required by the exigencies of the situation.ⁿ¹⁶⁶ Additionally, States must submit to the HRC comprehensive and precise information of the measures taken so that the HRC can ensure that such [*2500] measures are proportionate to the nature of the emergency.ⁿ¹⁶⁷ Also, the right to liberty includes the right to be informed of the reasons for arrest,ⁿ¹⁶⁸ the right to be informed about the evidence underlying these reasons,ⁿ¹⁶⁹ the right to challenge the legality of detention before a court in proceedings affording fundamental and due process rights,ⁿ¹⁷⁰ and the right to assistance by counsel.ⁿ¹⁷¹ These guarantees remain applicable even in cases of preventive or administrative detention.ⁿ¹⁷²

Although the principle of legality applies also in armed conflict, the standards can be less stringent. Under the Geneva Conventions, in addition to the right to detain individuals for the purpose of prosecuting them for a war or other crime, States also have the right to detain combatants to prevent their participation in further hostilitiesⁿ¹⁷³ as well as intern civilians who constitute a threat to the State's security or intend to harm it.ⁿ¹⁷⁴ Therefore, certain individuals can be detained for the duration of the hostilities for the sole purpose of preventing them from taking up arms against one of the parties. Each category of prisoner is entitled to a particular status and level of protection under IHL.ⁿ¹⁷⁵ However, those protections can be less stringent than if HRL were applicable. Although detainees must be informed of the reasons for their detention,ⁿ¹⁷⁶ they need not be given access to a court or to counsel unless they are charged with a crime. Detainees have a right to be heard by a competent tribunal to have their status determined if they have not been granted prisoner of war statusⁿ¹⁷⁷ and the right to complain to a Protecting Power about the conditions of their captivity.ⁿ¹⁷⁸ In [*2501] addition, in the case of civilian detainees, the detaining power is obliged to conduct periodic reviews to determine whether continued detention is necessary.ⁿ¹⁷⁹ However, there is no automatic right to be represented by counsel at any of these proceedings or to appeal to an independent tribunal vis-a-vis the legitimacy of the detention.

Therefore while certain aspects of IHL are more protective of the individual than HRL, others can clearly lead to less protection for the individual, and thus a derogation from HRL. Deciding whether IHL is an application or elaboration of or derogation from HRL in a particular situation will often be dependent on the facts at hand and which provisions of HRL and IHL are most implicated by the circumstances.

2. Distinguishing Between International and Non-International Armed Conflict

In analyzing whether or not the application of IHL will lead to derogation from HRL, it will often be important to be specific as to whether IHL rules under consideration are those applicable to international or non-international armed conflict. The extent of derogation may, arguably, be greater in cases of international armed conflict than non-international armed conflict. The latter is more sparsely regulated and contains many more gaps. Many commentators argue that HRL can, and should, be used to fill in the gaps left unregulated by IHL.ⁿ¹⁸⁰ This argument is consonant with the way *lex specialis* operates. The maxim only comes into play if there are two norms that purport to govern the same subject matter. Therefore, in the case of non-international armed conflicts, because many issues are left ungoverned by IHL, the *lex specialis* maxim would not be applicable and HRL would apply in undiluted form with regard to those issues. But both the principles of distinction and proportionality apply to non-international armed conflict.ⁿ¹⁸¹ Therefore, with respect to the right to life, IHL would derogate from HRL as much in the case of non-international as international armed conflict. However, with respect to the right to liberty, the undiluted norms of HRL may have a much greater role to play in bulking up the leaner regulations of IHL, which would then lead to much less derogation from the right to liberty than [*2502] would otherwise be the case.ⁿ¹⁸² However, there is a lack of agreement on whether HRL can be used in this manner to develop the norms applicable in non-international armed conflict. If HRL is not used in this manner, the rules of IHL applicable in non-international armed conflict - which are sparser and arguably less protective than in international armed conflict - might constitute a greater derogation from HRL than the rules of international armed conflict.

C. The Two-Pronged Framework

The canon of construction that calls for exceptions to be narrowly construed clearly applies in the case of HRL and IHL. It is also clear that there will be situations in which the applicability of the IHL as *lex specialis* paradigm will result in derogation from HRL. Two conclusions can be drawn here: (a) in situations in which the application of IHL would result in a derogation from HRL - i.e., when IHL acts as an exception to HRL - the term "armed conflict" must be interpreted narrowly, and (b) to the extent possible, even once IHL is triggered, it must be interpreted so as to minimize the derogation from HRL.

In some situations, applying IHL as *lex specialis* will result in equal or more protections for the individual making IHL an application of HRL rather than an exception to it. Here, a restrictive interpretation of the term "armed conflict" will not be required. In situations in which the application of IHL would result in a derogation from HRL, IHL is an exception from HRL and, *prima facie*, the term "armed conflict" must be narrowly interpreted. Many situations will be classified as armed conflicts regardless. For example, the conflicts in Afghanistan and Iraq, as inter-State conflicts, clearly fall within the definition of "international armed conflict," even if that phrase is interpreted narrowly. When IHL is triggered, the second component of the principle that exceptions are to be interpreted narrowly is activated and any ambiguities in IHL should be resolved by reference to HRL.

However, in cases in which it is ambiguous whether an armed conflict exists, a narrow interpretation of armed conflict might result in the situation being excluded from the definition of armed conflict. The "war on terror" is such a situation because, as discussed above, the "war on terror" does not fall within a narrow interpretation of the term "armed conflict."ⁿ¹⁸³ Further work will need to be done to explicate the [*2503] categories of situations in which the balance is such that the application of IHL results in derogation from HRL. It is unlikely that there will ever be universal agreement as to these categories. However, by using this framework as the basis for deciding whether or not an expanded definition of armed conflict can and should be adopted, the focus of those entering the debate will shift away from looking solely at the ambiguous definitions in the Geneva Conventions to looking at a broader spectrum of considerations that include the relationship between those definitions and the interaction between HRL and IHL. In this Paper, I limit myself to analyzing whether or not the application of IHL to the United States' actions against al Qaeda and connected groups results in a derogation from HRL.ⁿ¹⁸⁴

IV. Is the "War" Against al Qaeda an Armed Conflict?

In this Part, I apply the framework to the "war on terror" and conclude that the application of the IHL as *lex specialis* paradigm in this context does lead, on balance, to a derogation from HRL. Therefore, the term "armed conflict" must be narrowly interpreted and because a conflict with al Qaeda does not fall within a narrow definition of the term, it should not be deemed an armed conflict.

A. HRL and IHL as Applied to the "War on Terror"

In the case of the "war on terror," and in particular the United States' conflict with al Qaeda and connected groups, the potentially less stringent standards of IHL are clearly exposed while its more protective aspects are rendered largely irrelevant because of the nature of the conflict between the parties. Other commentators have analyzed how many of the U.S. actions in the conflict with al Qaeda violate the norms of IHL.ⁿ¹⁸⁵ I will not delve into those issues here but focus instead on how the standards of HRL and IHL lead to divergent outcomes in the context of the war on terror, even assuming that the rules of IHL are correctly interpreted and applied by the U.S. Further, although the United States has not officially derogated from any of its HRL obligations, I will also discuss how the application of the standards of IHL can lead to a different result from the application of HRL even if [*2504] the United States had derogated from certain provisions of the latter. It should be noted also that my focus here is on the consequences of labeling activities undertaken as part of the "war on terror" that fall outside of the conflicts in Afghanistan and Iraq as an armed conflict.

The "war on terror" has illuminated the extent to which IHL and HRL can lead to vastly different results when applied to the same situation. When the definition of armed conflict is stretched to encompass less conventional cases, the divergence between the norms of HRL and IHL becomes more significant. U.S. President George Bush has implied that the war on terror could extend to as many as sixty countries in which individuals perceived to be connected to al Qaeda might be found.ⁿ¹⁸⁶ As other commentators have noted, the expanding boundaries of warfare are leading to a breakdown of the spatial and temporal boundaries in armed conflict and the ability to distinguish between combatants and civilians.ⁿ¹⁸⁷ Transnational terrorist groups are, by definition, spread across the globe and an armed conflict with them could extend to actions taken against them anywhere in the world, far from any conventional battlefield. Unlike with enemy States or armed groups within one territory, it is unlikely that such groups can ever be comprehensively defeated and therefore "active hostilities" are likely to continue indefinitely. Also, the different facets of activity involved in acts of global terrorism make the task of distinguishing between those directly participating in active hostilities and others even more problematic than usual. These are not issues that were in the contemplation of States when drafting the Geneva Conventions.

1. Impact on the Right to Life

The potential discrepancy between the provisions of HRL and IHL with respect to the right to life is rendered especially stark in situations in which the killings take place far from any conventional battlefield. In situations of large scale violence in battlefield contexts, the principle of distinction might, on balance, arguably provide the same or better protection to individuals that the right to life under HRL. However, the same cannot be said with respect to the low intensity violence that characterizes much of the "war on terror." Take for example, the U.S. missile strike against a vehicle full of suspected al Qaeda operatives in Yemen, in which several people were killed.ⁿ¹⁸⁸ If the United States is [*2505] embroiled in an armed conflict with al Qaeda, unrestricted by the conventional geographical and temporal boundaries of warfare, this could be viewed as legitimate action against combatants in the armed conflict. As discussed above,ⁿ¹⁸⁹ it is ambiguous whether IHL prohibits targeted killings of this kind. And although some commentators argue that members of al Qaeda and other terrorist groups are not combatants under IHL and can, therefore, be targeted only when they are actually involved in fighting,ⁿ¹⁹⁰ many others adopt a broader reading of the phrase "directly participating in active hostilities."ⁿ¹⁹¹ The latter argue that when hostilities between a State and a terrorist group are protracted and many terrorists are repeat players, "direct participation" includes not only actual fighting but also planning and dispatching others to commit terrorist acts.ⁿ¹⁹² Under this reasoning, any suspected al Qaeda member, anywhere in the world, would be fair game for as long as the "war on terror" continues. For example, the United States would arguably be entitled to kill suspects operating at London's Finsbury Park Mosque which U.S. officials have

alleged is a recruiting ground for al Qaeda operatives.ⁿ¹⁹³ And any collateral damage to bystanders and property would arguably not violate international law as long as the damage is not disproportionate to the anticipated military advantage. If, on the other hand, HRL were applicable, such killings would be viewed as extrajudicial executions in violation of the right to life.ⁿ¹⁹⁴ The right to life is a non-derogable right. An added complication here is that the principles of distinction and proportionality under IHL become especially difficult to apply in these situations because of the difficulty, if not impossibility, of distinguishing between combatants and non-combatants.ⁿ¹⁹⁵ All of these discrepancies arise regardless of whether the conflict with al Qaeda is classified as an international or non-international armed conflict or some hybrid of the two.

[*2506]

2. Impact on the Right to Liberty

The right to liberty is also compromised if the global conflict with transnational terrorist groups such as al Qaeda is characterized as an armed conflict. The rights of suspected members of al Qaeda detained at Guantanamo Bay, Cuba, and other detention centers around the world provide a good example of this. The U.S. Government has refused to grant Prisoner of War status to any of these individuals and seeks to characterize all such detainees as "enemy combatants" who can be detained until the end of its hostilities against al Qaeda.ⁿ¹⁹⁶ The classification as "enemy combatants" does not denote the legal status of the detainees under IHL as all prisoners are entitled to a particular status under IHLⁿ¹⁹⁷ and "enemy combatants" is not one of them. However, as discussed above,ⁿ¹⁹⁸ anyone classified as a combatant, privileged or unprivileged, or a civilian who poses a threat to the detaining power can be detained without being charged of a crime until the end of hostilities.ⁿ¹⁹⁹ The rationale for permitting such detentions under IHL is that they are necessary to prevent the individuals concerned from taking up arms against the detaining power. However, that rationale becomes more tenuous when the "armed conflict" in question extends to the larger part of the world and for an indefinite period of time.

Many of the detainees at Guantanamo Bay and other detention centers were captured far from any battlefield and in such far-flung corners of the world as Italy, Bosnia, and Cairo.ⁿ²⁰⁰ For example, in October 2001, the U.S. Government sought the surrender of six Algerians suspected of planning attacks on Americans in Bosnia. In January 2002, the Bosnian Supreme Court ordered the release of the men ruling that there was insufficient evidence to warrant their detention. The same day, the Bosnian Human Rights Chamber issued an order that the men had a right to remain in Bosnia and could not be [*2507] deported.ⁿ²⁰¹ The next day, upon their release from detention, they were seized by U.S. military personnel with the help of the Bosnian police and flown to Guantanamo Bay.ⁿ²⁰² In 2004, Bosnian prosecutors and police formally exonerated the men after a lengthy criminal investigation and the Bosnian prime minister has asked the U.S. Government to release them from custody.ⁿ²⁰³ So far that request has been ignored.ⁿ²⁰⁴ If the conflict with al Qaeda is an armed conflict then these and similar individuals arrested or captured in different parts of the globe can, arguably, under the rules of IHL, be taken into detention without being charged with any crime merely because they are deemed to be taking an active part in the war on terror. If it is not an armed conflict and HRL applies, the detentions would only be legal if the detainees have been charged with a crime and brought promptly to trial or if the United States derogates from Article 9 of the ICCPR and introduces a regime of preventative detention strictly required by the exigencies of the situation.ⁿ²⁰⁵

As discussed above,ⁿ²⁰⁶ even in cases of preventive detention, the right to habeas corpus review and access to counsel continues, and this can go a long way towards ameliorating both the likelihood and conditions of long-term detention. Under IHL, as discussed above,ⁿ²⁰⁷ there is no automatic right to counsel nor is there access to an impartial body except for the limited purpose of challenging the conditions of detention. The United States Supreme Court has held that the prisoners at Guantanamo Bay have the right to test the lawfulness of their detentions through the writ of habeas corpus in federal court.ⁿ²⁰⁸ Following this holding, Congress has sought to strip detainees of the right to habeas corpus under a provision in the Military Commissions Act of 2006,ⁿ²⁰⁹ but the Supreme Court has recently granted certiorari on a petition challenging the constitutionality of this provision.ⁿ²¹⁰ However, if an armed conflict exists and IHL applies, then detainees would have no grounds on which to challenge their detention unless they can establish that

they were not combatants in the conflict and are [*2508] not deemed to constitute a threat to U.S. security.ⁿ²¹¹ Uncertainties remain as to the degree to which an individual has to have been connected to prior terrorist acts in order to be deemed a combatant or a security threat.

If the act of capturing and detaining al Qaeda suspects around the world is part of an armed conflict, then, once they are taken into detention, these individuals can be kept in detention without trial as long as they can be classified as combatants in that armed conflict or as civilians who pose a threat to the security of the United States.ⁿ²¹² Under the Geneva Conventions, detainees must be repatriated as soon as active hostilities come to an end.ⁿ²¹³ However, if the armed conflict in question is likely to last indefinitely - as is the case if the United States is involved in an armed conflict against "terror" - then so can the detentions.ⁿ²¹⁴ Even a detainee who is charged and acquitted by a military commission, can be returned to indefinite detention as a combatant or civilian posing a security threat to the United States. In any event, many of those currently being held in detention are unlikely ever to be charged with specific offences because the Government's primary rationale for holding them is not that they are individuals responsible for specific criminal acts but that they are combatants in a "war against terror."

In July 2004, following *Hamdi v. Rumsfeld*, the Bush Administration set up the Combatant Status Review Tribunal (CSRT) to make determinations as to whether detainees are "enemy combatants."ⁿ²¹⁵ The CSRT has attracted a great deal of criticism in regard to several matters, including its broad definition of "enemy combatants" and inadequate procedural safeguards.ⁿ²¹⁶ All of these criticisms are justified; however, even if these problems were to be [*2509] remedied, if an armed conflict exists and IHL applies, the detainees could successfully challenge their detention only if they are able to establish that they are not combatants and that they do not pose a security threat to the United States, both of which criteria are poorly defined. This means that, if the war on terror is an armed conflict, then many of the detainees face the prospect of long-term detention without trial without access to counsel or courts. On the other hand, if it is not an armed conflict then HRL would apply. Under HRL, although there is no explicit outright ban against indefinite detention, it is arguable that detention which may initially be legal can become "arbitrary" and violate the ICCPR if it is unduly prolonged or not subject to periodic review.ⁿ²¹⁷

All of the above assumes that the rules of IHL applicable in an armed conflict against transnational terrorists would be those applicable in an international armed conflict. If the relevant rules are those applicable in non-international armed conflict, however, the picture could look different. Common Article 3 does not refer specifically to the grounds and length of detention or to the conditions of detention. It is therefore at least arguable that because there is no conflict between HRL and IHL in this regard, all of the rights implicated by the right to liberty under HRL remain in place.ⁿ²¹⁸ If, this is indeed the case, then there would be no derogation from HRL with respect to the right to liberty. However, as noted above,ⁿ²¹⁹ it is questionable whether there is currently a consensus in the international community on whether Common Article 3 should be bulked up by reference to HRL as opposed to the rules applicable in international armed conflicts. If the war against terror is deemed an armed conflict which falls into a hybrid class of armed conflict, then the exact content of the applicable rules and the degree to which they would derogate from HRL remains unclear.

3. The More Protective Aspects of IHL

In the context of the "war on terror," not only are the arguably less [*2510] protective aspects of IHL brought to the forefront, but its more protective provisions are rendered less relevant than in conventional warfare. Although HRL is not binding on non-State organizations, that does not mean that IHL is the only way of holding terrorist organizations accountable for their actions. It is almost universally accepted that terrorism itself is antithetical to human rights.ⁿ²²⁰ As such, not only do States have the right to pursue terrorists and bring them to justice but they also have an obligation to do so.ⁿ²²¹ And because there are a plethora of criminal laws aimed at terrorist acts, the criminal law enforcement model provides States with a panoply of tools with which to do just that.ⁿ²²² Similarly, although HRL does not provide for individual criminal responsibility, criminal law certainly does. In fact, despite the U.S. Government's insistence that terrorism is not a matter of crime but armed conflict, the Department of Justice has been actively charging suspected terrorists with a variety of terrorist and non-terrorist related crimes.ⁿ²²³ With respect to derogation, although some provisions of HRL can be derogated from, the right to life is not one of them and, as explained above,ⁿ²²⁴ the right to

liberty, even once derogated from, provides a higher degree of protection than IHL.

As for the conflict-specific protections of IHL, these are usually implicated only when the conflict in question is a large scale, high intensity conflict in which control over territory is at issue. So, for example, although the existence of a demilitarized zone might provide additional protection to civilians in the context of the conflicts in Iraq or Afghanistan, the same would not be true in the context of the missile attack in Yemen or the arrests in Bosnia because these places are far removed from any conventional battlefield in which a demilitarized zone would make sense.

B. The "War on Terror" Is Not an Armed Conflict

Conflicts between States and widely dispersed networks of [*2511] terrorists fall within a broad reading of the term "armed conflict" as used in the Geneva Conventions but not within a narrow reading of that term.ⁿ²²⁵ The Geneva Conventions provide insufficient guidance as to which reading should be adopted. However, when the definition of armed conflict is viewed through the lens of *lex specialis* and the relationship between general laws and special laws, a clearer picture emerges. As discussed above, under the protections currently provided by IHL, when the war against terror is characterized as an armed conflict, the result is a derogation from the provisions of HRL. Therefore, it is necessary to adopt a narrow interpretation of armed conflict in this context. Under such an interpretation, most actions against terrorist groups such as al Qaeda cannot be deemed to be part of an armed conflict.ⁿ²²⁶ Any State claiming that it is an armed conflict bears the burden of persuading the international community that countervailing considerations - possibly based on issues of security and/or military necessity - warrant a departure from the general principle that exceptions to HRL must be triggered only in narrow circumstances.

This does not mean that certain aspects of the "war on terror" cannot be classified as an armed conflict. Some actions may be deemed an armed conflict while others should be viewed through the lens of criminal law enforcement. This means that a State can be embroiled in an armed conflict governed by IHL in one country but be using law enforcement mechanisms governed by HRL in another country, even though the parties involved are the same. Therefore, the interventions in Afghanistan and Iraq fall within even a narrow definition of armed conflict. Further, applying IHL to certain actions against transnational terrorist groups might not result in a derogation from IHL and, therefore, a narrow interpretation of the term "armed conflict" would not be required. For example, if the intensity of hostilities against a group of terrorists in a particular geographical area were to escalate to a certain level of violence, it might be that IHL would provide more protection for individuals than HRL. If that were the case, my framework would not require a narrow reading of the term "armed conflict" as applied to those actions. But that would not necessarily mean that other, lower intensity interventions against the same group, in other parts of the world, would also be part of that armed conflict.

Other commentators may disagree with my conclusion here and argue, for instance, that designating the "war on terror" as a whole as an armed conflict does not lead to a derogation from HRL because it is the most effective way of preventing the human rights abuses that result [*2512] from terrorism. Such arguments would be consonant with the focus of this Article which attempts to shift the focus from an ambiguous definition of armed conflict in the Geneva Conventions to the effects of an expanded definition of armed conflict on the applicability of different bodies of law and the consequences involved.

Conclusion: The Evolving Nature of Armed Conflict in the Present and Future

Under the framework proposed in this Article, in the context of the "war on terror," the term "armed conflict" should be interpreted narrowly. However, the framework does not preclude a broader reading of armed conflict in this context if the protections of IHL are modified to reflect the particular circumstances of a conflict between a State and transnational terrorists.

A large number of commentators maintain that the existing categories of armed conflict do not need to be modified and that terrorism is best dealt with under a law enforcement rather than armed conflict model.ⁿ²²⁷ The fact that Jose

Padilla was recently found guilty by a federal jury on several terror related charges might provide some support for this position.ⁿ²²⁸ In addition to the entire range of domestic criminal law, there is also a web of international conventions aimed at preventing, prosecuting, and punishing acts of terror.ⁿ²²⁹ Many of these commentators advocate against the revision of the laws of armed conflict on the basis that this could be counterproductive in terms of protecting human rights.ⁿ²³⁰ Moreover, States too are likely to resist an expanded definition of armed conflict if doing so entails bestowing [*2513] some degree of legitimacy to terrorist fighters under the rules of IHL.ⁿ²³¹

On the other hand, arguments are often made that alternative regimes are inadequate to the task of tackling transnational terrorism and that the concept of armed conflict must be expanded to include at least some State actions against terrorism.ⁿ²³² For example, several commentators have argued that the "either or" categories of international and non-international armed conflict are too restrictive and fail to capture the nature of conflicts in the contemporary world.ⁿ²³³ They posit that the reality is that States already resort to the use of combat power against extraterritorial terrorist groups and will continue to do so. At least in cases of large scale, high intensity conflict between States and non-State groups acting in other territories, they argue, it is unrealistic and utopian to insist that the rules of peacetime continue to apply.ⁿ²³⁴ In any event, they point out that the laws of peace are not designed to deal with situations like this.ⁿ²³⁵ These commentators call for the creation or recognition of a new category of armed conflict - "extra-State armed conflict" or "transnational armed conflict" - that encompasses hostilities between a State and a non-State actor that take place, at least partially, outside the territory of the State.ⁿ²³⁶ The reaction of the international community to the recent conflict in Lebanon, between Israel and Hezbollah, is taken as evidence that such a hybrid category of conflict is de facto recognized by international law.ⁿ²³⁷ Here, the international community appeared to accept, without question, that the rules of IHL were applicable even though the conflict was between a State and a non-State group and took place both in and outside the State's territory.ⁿ²³⁸

To the extent that an expanded interpretation of armed conflict is necessary, States and bodies like the the ICRC might adopt a broader definition of armed conflict that encompasses extra-State conflicts while simultaneously modifying their interpretations of the existing rules of IHL. For instance, it has been argued that a new category of armed [*2514] conflict can be governed by "specific rules that are derived from an interpretation of the general principles of international humanitarian law in the specific context of extra-state armed conflicts."ⁿ²³⁹ But there is no reason why States and the ICRC have to be restricted to the principles and provisions of IHL in formulating these rules. They could, potentially draw from the principles of HRL as well as from IHL in seeking to interpret the provisions of IHL applicable to this new form of armed conflict. The ICRC has already demonstrated its willingness to draw extensively from HRL in formulating and interpreting the norms applicable in armed conflict.ⁿ²⁴⁰

Under the first prong of my framework, if IHL is interpreted in such a way as to be compatible with HRL, then, a narrow interpretation of the term "armed conflict" is not required. Therefore, the first step would be to consider whether, it might be possible, with respect to certain issues, to derive a specific set of rules that, while taking into account both the reality of armed conflict and the general principles of IHL, maintains at least the degree of protection to individuals that HRL provides.ⁿ²⁴¹ If this is possible, the resulting rules, when applied as the *lex specialis* by courts, tribunals, and States, will then be an instance of *lex specialis* as application rather than *lex specialis* as exception. In such a situation, there would be no need to adopt a narrow interpretation of the term "armed conflict."

Despite the above, States might decide that the threat from transnational terrorism is so great as to warrant departures from HRL that would not be permissible under the first prong of my framework. In other words, they could act to expand the definition of armed conflict in a way that derogates from HRL. Under my framework, a State cannot act unilaterally to adopt such a definition. Other States, the ICRC, and courts should resist any attempts to do so. However, States can act collectively, either through a new Convention or, as is more likely, through the development of new customary international law, to change the law to incorporate a broader definition of armed conflict without modifying the applicable protections to be compatible with HRL. So, for example, State practice might evolve in such a way that certain types of conflicts with terrorist groups outside of a State's territory begin to fall definitively within the definition of armed conflict - whether international, non-international, or a hybrid - and are governed by the rules applicable in such conflicts. If this happens, the analysis under my framework would shift such that it is no longer

[*2515] debatable whether or not the "war on terror" is an armed conflict. It is an armed conflict, even under a narrow interpretation of the term.

In such a situation, the second prong of the principle that exceptions are to be narrowly interpreted would become relevant. Under this prong, an exception once triggered, should be interpreted to deviate as little as possible from the rule.ⁿ²⁴² This means that although IHL is triggered, to the extent that there is any ambiguity in its provisions that cannot be resolved by reference to its own underlying principles, resort should be had to the principles underlying HRL. So, for example, if the definition of armed conflict were expanded to include "extra-state armed conflicts," the principles of distinction and proportionality and the term "direct participation in hostilities," as applied to those conflicts, would perhaps have to be interpreted in a way that reflects the realities of extra-State conflicts. Such interpretations might have to incorporate the fact that terrorists are less distinguishable from civilians than the armed forces of a State and might also be more likely to use civilian shields than State actors who are legally and politically responsible for the well being of their citizens. The protections afforded to battlefield detainees might have to be interpreted to include access to courts and counsel if "extra-State armed conflicts" last for longer periods than "traditional armed conflicts."ⁿ²⁴³ However, such interpretations would differ from current interpretations of IHL and questions might arise as to whether they can be adopted without departing from the underlying principles of IHL.

It is clear that there are many issues that would need to be addressed in the context of an expanded definition of armed conflict. It is beyond the scope of this Article to delve into these. However, my framework can be used by States, the ICRC, courts, and commentators to approach these issues in a principled yet flexible manner. Ultimately, however, an expanded definition of armed conflict in this context might require a rethinking of the IHL as *lex specialis* paradigm. As reflected in the Supreme Court's decision in *Hamdan* - which made only a marginal reference to HRLⁿ²⁴⁴ - the current wisdom appears to be that the IHL as *lex specialis* paradigm would apply even in the context of an armed conflict between a State and non-State armed group that takes place outside of the State's territory.ⁿ²⁴⁵ However, questions should be raised as to whether the rationales for applying the *lex specialis* maxim apply in the context of a type of conflict that was not in the [*2516] contemplation of States when developing the norms of IHL and whether the particular circumstances of such conflicts require a more nuanced approach to the relationship between IHL and HRL.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Criminal Offenses
Crimes Against Persons
Terrorism
Terroristic Acts
General
Overview
International Law
Dispute Resolution
Laws of War
International Law
Sovereign States & Individuals
Human Rights
Terrorism

FOOTNOTES:

n1. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

n2. This example is borrowed from Gabor Rona and Kenneth Roth. See Gabor Rona, "War" Doesn't Justify Guantanamo, *Fin. Times*, Mar. 1, 2004, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/5WVFB4>; Kenneth Roth, *The Law of War in the War on Terror: Washington's Abuse of "Enemy Combatants"*, 83 *Foreign Aff.* 2, 4 (2004). It might be argued, however, that targeted killings of this kind almost always violate IHL's proportionality requirement as the risk to civilians is so great. It is also arguable that suspected terrorists cannot be categorized as combatants under IHL and may only be targeted when they are actually taking part in fighting. However, neither of these

arguments commands universal agreement, and it is fair to say that the law is unsettled in this area. See *infra* Sections III.B.1, IV.A.1.

n3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] [hereinafter, collectively, Geneva Conventions]; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] [hereinafter, collectively, Additional Protocols].

n4. See *infra* Section I.B. Although, for the sake of convenience, I use the terms "terrorism" and "terrorist" in this Article, it must be noted that there is no agreed definition for these terms in international law. For an extensive discussion of the use of the term "terrorism" in international law, see Helen Duffy, *The "War on Terror" and the Framework of International Law* 17-70 (2005).

n5. For example, the United States is a signatory to the International Covenant on Civil and Political Rights, which provides for the protection of the civil and political rights of individuals, and to the Geneva Conventions of 1949, which provide for the protection of individuals in times of armed conflict. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (adopted Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm [hereinafter ICCPR]; Geneva Conventions, *supra* note 3.

n6. See *infra* Section II.B.2.

n7. See *infra* Section II.C.2.

n8. See *infra* Section II.C.3.

n9. See *infra* Section III.A.

n10. For detailed discussions of the similarities and differences between HRL and IHL, see the following: Rene Provost, *International Human Rights and Humanitarian Law* (2002); Hans-Peter Gasser, *International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion?*, 45 *German Y.B. Int'l L.* 149, 149-62 (2002).

n11. In situations when IHL protects the individual more than HRL, IHL can be viewed as an application of HRL and be triggered more easily than when it derogates from HRL because my framework is not activated under such circumstances.

n12. This conclusion is not, however, crucial to the argument I make in this Article. See *infra* Section IV.B.

n13. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/convention_s/1_1_1969.pdf [hereinafter Vienna Convention].

n14. *Id.* In addition, Additional Protocol I, which supplements the protections available in international armed conflict, applies also to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination." See, Additional Protocol I, *supra* note 3, art. 1(4).

n15. 1 Jean S. Pictet, *Commentary on Geneva Convention for the amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 32 (1952) [hereinafter Pictet, *Commentary on Geneva Convention*].

n16. See *infra* Section I.B.

n17. Under Additional Protocol II, further protections apply in cases of conflict between a State and armed forces that are "under responsible command [and] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." See Additional Protocol II, *supra* note 3, art. 1(1).

n18. Geneva Conventions, *supra* note 3, art. 3.

n19. See David Wippman, Introduction: Do New Wars Call For New Laws?, in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* 1, 11-12 (David Wippman & Matthew Evangelista eds., 2005) [hereinafter *New Wars, New Laws?*]; Geoffrey S. Corn, Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict, 40 *Vand. J. Transnat'l L.* 295, 307 (2007).

n20. See Additional Protocols, *supra* note 3, art. 1(2) ("This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.").

n21. See Int'l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2003), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/\\$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf) [hereinafter *ICRC Report*].

n22. See Geneva Conventions, *supra* note 3, art. 3.

n23. *ICRC Report*, *supra* note 21, at 19.

n24. Pictet, *Commentary on Geneva Convention*, *supra* note 15, at 32.

n25. See *infra* Section II.B.1.

n26. See *infra* Section II.B.2.

n27. I have borrowed this example from Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L. Rev. 675, 704 (2004) [hereinafter Brooks, *War Everywhere*].

n28. For example, in December 2006, the Israeli Supreme Court found certain targeted killings by Israeli Defense Forces to be part of an international armed conflict between Israel and Palestine on the basis that Israel was involved in an armed conflict with various terrorist groups active in Judea, Samaria, and the Gaza strip. See H CJ 769/02 Pub. Comm. *Against Torture in Israel v. Gov't of Israel* [2006] IsrSC 53(4) 817, § 21, available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a3_4.pdf.

n29. See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (characterizing the events of September 11th as an attack "on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces") (emphasis added).

n30. See Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 4 (2006), available at <http://www.asil.org/pdfs/ilib0603212.pdf> [hereinafter U.S. Reply to U.N. Report].

n31. See, e.g., Duffy, *supra* note 4, at 250-55 (arguing that the conflict with al Qaeda cannot be characterized as an international or non-international armed conflict); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"*, 857 Int'l Rev. Red Cross 39, 46 (2005) (arguing that outside of Afghanistan and Iraq, the "war on terror" should not be considered an armed conflict but as law enforcement on an international scale); Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 Hum. Rts. Q. 323 (2002) (arguing that the September 11th attack should be treated as a criminal attack and be addressed by international criminal law and process).

n32. See, e.g., Duffy, *supra* note 4; Borelli, *supra* note 31. Human rights organizations, in particular, have been vocal in their insistence that actions against al Qaeda outside of Afghanistan should be viewed through the framework of IHL. For example, following the missile attack allegedly committed by the United States on an al Qaeda commander in Yemen on November 3, 2002, Amnesty International published the following statement: "If this was the deliberate killing of suspects in lieu of arrest, in circumstances in which they did not pose an immediate threat, the killings would be extra-judicial executions in violation of international human rights law." Press Release, Amnesty Int'l, *Yemen/USA: Gov't Must Not Sanction Extra-Judicial Executions* (Nov. 8, 2002), available at <http://www.amnesty.org/en/library/info/AMR51/168/2002>. There is a potential incongruity in human rights advocates arguing, solely based on the Geneva Conventions, for a narrower more traditional reading in this context when they have been at the forefront of arguing that IHL should be flexibly interpreted in contexts in which such an interpretation results in greater human rights protections. See Brooks, *War Everywhere*, *supra* note 27, at 681 (pointing out that "it is difficult to simultaneously argue, for instance, that the law of armed conflict should be construed narrowly when the goal is reining in U.S. Government actions, but flexibly when the goal is holding non-state actors accountable for crimes against humanity or ending impunity for gender-based crimes committed during armed conflicts").

n33. See, e.g., Duffy, *supra* note 4, at 251; Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the Law on Terror*, 27 Fletcher F. World Aff. 55, 58 (2003), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PWELF/\\$ File/R_ona](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PWELF/$ File/R_ona)

terror.pdf.

n34. See, e.g., Borelli, *supra* note 31.

n35. ICRC Report, *supra* note 21, at 19. Cf. Derek Jinks, September 11 and the Laws of War, 28 *Yale J. Int'l L.* 1, 38 (2003) (arguing that "the organizational characteristics of al Qaeda suggest that the attacks amounted to an "armed conflict" because "al Qaeda is a highly organized, well-funded entity with operational units in dozens of countries") (footnotes omitted).

n36. See, e.g., Borelli, *supra* note 31; Drumbl, *supra* note 31; Kenneth Roth, Justice and the "War" Against Terrorism: Beyond the Law, *World Today* (Jan. 6, 2003) [hereinafter Roth, Justice and the "War" Against Terror].

n37. See, e.g., William K. Lietzu, Combating Terrorism: The Consequences of Moving From Law Enforcement to War, in *New Wars, New Laws?*, *supra* note 19, at 31-51; Sean Murphy, Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter, 43 *Harv. Int'l L. J.* 41, 41-51 (2002); Davis Brown, Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses, 11 *Cardozo J. Int'l & Comp. L.* 1 (2003); Jinks, *supra* note 35.

n38. See, e.g., Murphy, *supra* note 37, at 47-50 (arguing that the September 11th attacks could be deemed to constitute an armed attack because "incidents were certainly akin to that of a military attack" and that the "fact that the incidents were not undertaken by a foreign government cannot be viewed as disqualifying them from constituting an "armed attack"); Jinks, *supra* note 35, at 21 (arguing that the attacks "exhibit several characteristics of an armed conflict, including their purpose, coordination, and intensity").

n39. U.N. Charter art. 51.

n40. See, e.g., Jinks, *supra* note 35, at 9 (arguing that "the attacks initiated or confirmed the existence of an "armed conflict' between the United States and an organized armed group, al Qaeda"); Greg Travalio & John Altenburg, Terrorism, State Responsibility, and the Use of Military Force, 4 *Chi. J. Int'l L.* 97, 111 (2003) ("There is no doubt that the United States and others are engaged in a "war' against terrorism no less real than many other wars fought in the past.").

n41. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2757 (2006).

n42. Id. at 2795.

n43. See id.

n44. See id.

n45. See, e.g., Brief for Retired Generals and Admirals and Milt Bearden as Amici Curiae Supporting Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), available at <http://www.hamdanvrumsfeld.com/GeneralsandAdmirals.pdf>; Brief for the Association of the Bar of the City of New York & the Human Rights Institute of the International Bar Association as Amici Curiae in Support of Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), available at <http://www.hamdanvrumsfeld.com/16620pdfLucas.pdf>; Brief for Professors Ryan Goodman, Derek Jinks & Anne-Marie Slaughter as Amicus Curiae Supporting Reversal, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), available at <http://hamdanvrumsfeld.com/GoodmanJinksSlaughter-FINALHamdamAmicusBrief-Jan52006.pdf>.

n46. See, e.g., Kenneth Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, 98 Am. J. Int'l L. 1, 2-8 (2004); Brooks, War Everywhere, supra note 27, at 714.

n47. See, e.g., Watkin, supra note 46, at 2-8; Brooks, War Everywhere, supra note 27, at 714.

n48. See, e.g., Roy S. Schondorf, Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?, 37 N.Y.U. J. Int'l L. & Pol. 1 (2004); Corn, supra note 19.

n49. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, P 70 (Oct. 2, 1995).

n50. See, e.g., Anne-Marie Slaughter & William Burke-White, An International Constitutional Moment, 43 Harv. Int'l L.J. 1, 4-5 (2002); Schondorf, *supra* note 48, at 11 (2004).

n51. Tadic, Case No. IT-94-1-I, P 70.

n52. Cf. Slaughter & Burke-White, *supra* note 50, at 4-5 ("This definition covers all contemporary uses of force ...").

n53. See, e.g., Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law 170-71 (2003); Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties* (2003).

n54. See Int'l Law Comm'n U.N. Gen. Assembly, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, P P 88, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi) [hereinafter ILC Study], available at <http://documents-dds-ny.un.org/doc/UNDOC/LTD/G06/610/77/pdf/G0661077.pdf>; see also Anja Lindroos, Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*, 74 *Nordic J. Int'l L.* 27, (2005); Jorg Kammerhofer, Unearthing Structural Uncertainty Through Neo-Kelsenian Consistency: Conflicts of Norms in International Law, <http://www.esil-sedi.eu/english/pdf/Kammerhofer.pdf>.

n55. Under a narrow definition, conflicts exist only if the norms in question impose mutually exclusive obligations. For example, in his seminal work, C. Wilfred Jenks adopts a narrow definition, as distinguished from divergence. See C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 *Brit. Y.B. Int'l L.* 401, 425-26 (1954) ("A divergence between treaty provisions dealing with the same subject or related subjects does not in itself constitute a conflict... A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties."). Under such a definition, there would be no conflict between a norm that prohibits a particular activity and a norm that permits the same activity or some sub-set of that activity. For the purposes of this Article, a narrow definition of conflict is unhelpful because it conflates how to resolve conflict with the definition of conflict.

n56. The ILC Study uses a definition under which a conflict exists "where two rules or principles suggest different ways of dealing with a problem." See ILC Study, *supra* note 54, P 24. For an overview of some of the broader definitions of conflict used by authors, see Erich Vranes, *The Definition of "Norm Conflict" in International Law and Legal Theory*, 17 *Eur. J. Int'l L.* 395, 404-05.

n57. For an overview of the different stages of conflict resolution, see Sadat-Akhavi, *supra* note 53, at 199-212.

n58. Hugo Grotius, *De Jure Belli ac Pacis: Libri Tres*, in *The Classics of International Law*, bk. II, ch. XVI, sec. XXIX, at 428 (James Brown Scott ed., 1995).

n59. The *lex specialis maxim* has been used in several WTO Panel and Appellate Body cases to resolve conflicts in the international trade context. See, e.g., Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997); Appellate Body Report, *European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Produces*, WT/DS135/AB/R (Mar. 12, 2001).

n60. See *infra* Section II.B.2.

n61. Lindroos, *supra* note 54, at 36.

n62. For detailed account of the basis for and application of the *lex specialis* principle, see ILC Study, *supra* note 54, P P 59-62; Lindroos, *supra* note 54, at 27-62; Pauwelyn, *supra* note 53, at 385-418.

n63. ILC Study, *supra* note 54, P P 59-60.

n64. *Id.* P 66.

n65. *Id.* P 112.

n66. For more details on membership specificity, see Pauwelyn, *supra* note 53, at 390-91; ILC Study, *supra* note 54, P P 113-15.

n67. See Lindroos, *supra* note 54, at 42.

n68. See ILC Study, *supra* note 54, P 88.

n69. *Id.*

n70. See, e.g., Appellate Body Report, Argentina - Safeguard Measures on Imports of Footwear, P 83 WT/DS121/R (June 25, 1999) (explicitly confirming that a special law does not vacate or subsume a general law); U.N. First Arbitral Tribunal Constituted Under Annex VII of the U. N. Convention on the Law of the Sea, Southern Bluefin Tuna Case Between Australia and Japan and Between New Zealand and Japan, Award on Jurisdiction and Admissibility, P 52, (Aug. 4, 2000), available at <http://untreaty.un.org/cod/riaa/cases/volXXIII/1-57.pdf> (rejecting the argument that the *lex specialis* completely eclipses the *lex generalis*); see also ILC Study, *supra* note 54, P 120; Pauwelyn, *supra* note 53, at 412-13.

n71. ILC Study, *supra* note 54, P 103.

n72. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (adopted Dec. 16, 1966), 993 U.N.T.S. 3 (entered into force Jan. 2, 1976), available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm [hereinafter ICESCR].

n73. Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, E.T.S. 5, 23 U.N.T.S. 221 [hereinafter ECHR].

n74. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

n75. For a more in-depth discussion of the development of international humanitarian norms and law, see Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* 8-32 (2d ed. 1998); see also Brooks, *War Everywhere*, supra note 27, at 688-90.

n76. Geneva Conventions, supra note 3.

n77. Additional Protocols, supra note 3. Additionally, the Hague Conventions of 1899 and 1907 and the annexed Regulations lay down important rules for the conduct of hostilities and are now considered to be part of customary international law. Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803; Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

n78. See Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 324 *Int'l Rev. Red Cross* 409, 409-10 (1998); Karima Bennouna, *Towards a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 *U.C. Davis J. Int'l L. & Pol'y* 171, 173 (2003).

n79. See The Secretary-General, *Report of the Secretary-General on Respect for Human Rights in Armed Conflicts*, at 22, U.N. Doc. A/7720 (1969). The ECHR, on the other hand, explicitly allows derogation in "times of war or other public emergency." ECHR, supra note 73 Art. 15(1).

n80. *Declaration on Respect for Human Rights in Armed Conflicts*, G.A. Res. 2444, P 2, U.N. GOAR, 23d Sess., Supp. No. 49, U.N. Doc. A/7433 (1968).

n81. Theodor Meron, *The Humanization of Humanitarian Law*, 94 *Am. J. Int'l L.* 239, 244 (2000).

n82. See, e.g., Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 *Int'l Rev. Red Cross* 94, 113 (1993); Dietrich Schindler, *The International Committee of the Red Cross and Human Rights*, 208 *Int'l Rev. Red Cross* 3, 3-14 (1979).

n83. See, e.g., *Prosecutor v. Delalic*, No. IT-96-21-T, Judgment, P 266 (Nov. 16, 1998) (where the Trial Chamber of the ICTY looks to

HRL for support for its interpretation of the term "protected persons" in Geneva Convention IV); *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, P 97 (Oct. 2, 1995) (where the Appeals Chamber states that one of the reasons for applying the rules of international armed conflicts to non-international armed conflicts also is "the impetuous development and propagation in the international community of human rights doctrines").

n84. See *infra* Section II.B.2.

n85. Contemporaneous with the growing interaction between IHL and HRL, a vigorous debate has raged as to whether in fact such interaction is justified. Some scholars point to factors like the distinct historical roots and conceptual frameworks of the two systems and maintain that the two sets of norms must be kept strictly separate. For a good survey of many of the arguments for keeping IHL and HRL separate, see Barry A. Feinstein, *The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel's Security Barrier*, 4 *Nw. U. J. Int'l Hum. Rts.* 238 (2005). See also Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 *Am. J. Int'l L.* 417, 423 (1997) (arguing that HRL should not be applied in situations of armed conflict). Others hail the cross-fertilization between IHL and HRL as an opportunity that should be embraced wholeheartedly and point to and applaud what they see as the growing influence of each body of law on the other. See, e.g., Meron, *supra* note 81; Doswald-Beck & Vite, *supra* note 82.

n86. It should be noted that some States, notably the United States and Israel, insist that HRL is not applicable to their actions outside their respective territories and that they are only bound by IHL when they engage in armed conflict abroad. See U.S. Reply to U.N. Report, *supra* note 30. See also CCPR Human Rights Comm., *Concluding Observations of the Human Rights Committee: Israel*, P 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument) [hereinafter *Concluding Observations of the Human Rights Committee*]. It is beyond the scope of this Article to delve into the debate as to whether a State's HRL obligations extend to its extraterritorial activity except to say that, regardless of the debate, the majority of actors in the international community appear to accept that HRL is applicable in armed conflict. However, it should be noted that, to the extent that HRL does not extend to particular extraterritorial activities and IHL is the only source of law, then my framework would not be applicable because there would be no conflict of laws. For detailed analyses of the extraterritorial applicability of HRL, see Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 *Am. J. Int'l L.* 119 (2005); Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 *Mich. J. Int'l L.* 739 (2005).

n87. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 66 (July 8), available at <http://prop1.org/2000/icjop1.htm> [hereinafter *Nuclear Weapons Case*].

n88. *Id.* P 25.

n89. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136 (July 9), available at <http://unispal.un.org/unispal.nsf/0/b59ecb7f4c73bdbc85256eeb004f6d20?OpenDocument> [hereinafter *Wall Case*].

n90. *Id.* P 106. In the more recent DRC v. Uganda case, the Court appears to apply the two bodies of law in parallel and finds violations of both IHL and HRL without referring to IHL when finding violations of HRL. However, the Court did not delve into the issue of how any conflicts between HRL and IHL might be resolved. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, P P 217-219 (Dec. 19).

n91. But it must be noted that there are some cases in which some human rights bodies have directly applied HRL to situations of armed conflict, without any reference to IHL. See, e.g., Wilfredo Loyola et al., Case 6724, Inter-Am. C.H.R. 79, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985) (1984-85); African Commission on Human Rights, *Civil Liberties Organization v. Chad* ACHPR, Corn. No. 74/92, Decision of Oct. 11, 1995. There may also be procedural impediments to human rights bodies applying IHL as the *lex specialis*. In the Las Palmeras case, for instance, the Inter-American Court of Human Rights stated that it only had competence to determine whether the acts in question were compatible with the American Convention and refused to examine the legality of the actions under Common Article 3. See *Las Palmeras Case, Judgment on Preliminary Objections* of Feb. 4, 2000, 2000 Inter-Am. C.H.R. (Ser. C) No. 67, P 28 (2000), available at <http://www1.umn.edu/humanrts/iachr/C/67-ing.html>.

n92. See, e.g., *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc 7 rev. P 271 (1997); *Coard et al. v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/ser.L/V/II.106, doc. 3 rev. (1999).

n93. See *Concluding Observations of the Human Rights Committee*, supra note 86, P 11 (stating, with respect to the second periodic Report submitted by Israel, that "the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including Article 4 which covers situations of public emergency which threaten the life of the nation"). See also *CCPR Human Rights Comm., Concluding Observations of the Human Rights Committee: Israel*, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998), available at <http://www.unhcr.ch/tbs/doc.nsf/7cec89369c43a6dfc1256a2a0027ba2a/7ea14efe56ecd5ea8025665600391d1b?OpenDocument>.

n94. See *CCPR Human Rights Comm., General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter *General Comment No. 31*].

n95. See, e.g., *Ergi v Turkey*, App. 1998-IV Eur. Ct. H.R. 1751, P 79, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hb km&action=html&highlight=Ergi&sessionid=6906606& ;skin=hudoc-en> (referring to "civilian life" and "incidental loss" which are arguably terms borrowed directly from IHL).

n96. Some commentators maintain that the European Court is applying the ECHR in an undiluted form without regard to IHL. See generally

William Abresch, *The Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 *Eur. J. Int'l L.* 741 (2005). Others insist that in applying the ECHR, the Court is implicitly treating IHL as the *lex specialis*. See, e.g., Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: A Case of Fragmentation?* 16-22 (Feb. 26 2007) (paper presented at the International Law and Justice Colloquium, New York University School of Law) (on file with author).

n97. Int'l Inst. of Humanitarian L. & Int'l Comm. of the Red Cross, *Summary Report, International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence* (2003) [hereinafter *Summary Report*], [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/\\$ File/I nterplay other regimes Nov 2003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/$ File/I nterplay other regimes Nov 2003.pdf).

n98. *Id.* at 8-9.

n99. *Id.* at 9.

n100. 1 Int'l Comm. of Red Cross, *Customary International Humanitarian Law* 299-306 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter *ICRC Humanitarian Law Study*].

n101. This trend is apparent in the reports on the recent conflict in Lebanon. For example, the analysis of a recent report by Human Rights Watch focuses solely on the IHL framework and its distinction between combatants and civilians. See Human Rights Watch, *The Terrible Toll of the Israel - Lebanon Conflict on Civilians: Ongoing Human Rights Abuses and Violations of International Humanitarian Law* (Aug. 10, 2006), <http://hrw.org/english/docs/2006/08/10/lebano13955.htm>. See also Amnesty Int'l, *Israel/Lebanon: End Immediately Attacks Against Civilians* (July 13, 2006), <http://news.amnesty.org/index/ENGMDE150642006> (solely referencing IHL and Geneva Conventions in demanding that Israel and Hezbollah immediately cease attacks on civilian populations).

n102. For example, Watkin insists that, with respect to deaths that take place in the context of an armed conflict, "rather than attempt to extend human rights norms to an armed conflict scenario, the appropriate approach is to apply the *lex specialis* of humanitarian law." See Watkin, *supra* note 46 at 2, 22. See also Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in Occupied Territories*, 37 *Isr. L. Rev.* 17 (2003) (stating that they "have come to the conclusion that ... the law of war and humanitarian law provide *lex specialis* in situations of armed conflict and occupation").

n103. See Rudiger Wolfrum & Nele Matz, *Conflicts in International Environmental Law* 132 (2003).

n104. *Id.* at 133-47.

n105. See Heike Krieger, *A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 *J. Conflict & Security Law* 265, 273-74 (2006).

n106. David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 *Harv. Int'l L.J.* 23, 263-64 (2005). See also Krieger, *supra* note 105 at 274-75 (arguing that with respect to internal armed conflicts, the rules of HRL are more specific than those of IHL).

n107. See Claire Oakes Finkelstein, *When the Rule Swallows the Exception*, 19 *Quinnipiac L. Rev.* 505, 514 (2000).

n108. See *id.* at 506 (stating that "the topic of exceptions has largely been ignored by legal philosophers"); Frederick Schauer, *Exceptions*, 58 *U. Chi. L. Rev.* 871, 872 (1991) (stating that "the exception is an invisible topic in legal theory").

n109. In addition, there is a substantial amount of writing in criminal law on the relation between an offense and a defense. See, e.g., Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 *Colum. L. Rev.* 199, 199-291 (1982); Glanville Williams, *Offences and Defences*, 2 *Legal Stud.* 233, 233-56 (1982).

n110. See, e.g., Ronald Dworkin, *The Model of Rules*, 35 *U. Chi. L. Rev.* 14, 25 (1967) (arguing that "an accurate statement of the rule would take [the] exception into account, and any that did not would be incomplete"); Glanville Williams, *The Logic of Exceptions*, 47 *Cambridge L.J.* 261, 262 (1988) (arguing that, with respect to the relationship between an offense and a defense, "rationally regarded, an 'exception' merely states the limits of an offence").

n111. See Joseph Raz, *Legal Principles and the Limits of Law*, 81 *Yale L.J.* 823, 831 (1972).

n112. *Id.* at 832.

n113. See *id.* (arguing with respect to the relationship between rules and exceptions: "The result is that laws ... may conflict. It is because they conflict or "interact"... that they can modify and qualify one another."); see also Finkelstein, *supra* note 107, at 513 (stating that "Raz is on the right track in understanding rules as capable of conflicting, and in explaining the relation between at least some rules of prohibition and some defenses in these terms").

n114. See ILC Study, *supra* note 54, P 95 (stating that "fixing a definite relationship between two standards[,] one which should be seen either as an application or an exception to the other[,] may often be quite impossible").

n115. *Id.* P P 88, 98-107.

n116. See *supra* Section II.A.1.

n117. ILC Study, *supra* note 54, P 99.

n118. See *id.* P 105.

n119. *Id.*

n120. See, e.g., William N. Eskeridge, Jr., *Dynamic Statutory Interpretation* 324 (1994) (citing *Comm'r v. Clark*, 489 U.S. 726, 739 (1989)); Norman J. Singer, *Statutes and Statutory Construction* §§47.08-47.11 (6th ed. 2000).

n121. See, e.g., *Bernal v. Fainter*, 467 U.S. 216, 222 n.7 (1984). ("We emphasize, as we have in the past, that the political-function

exception must be narrowly construed; otherwise the exception will swallow the rule ... "); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) ("The 'narrow' exception should stay that way and never be allowed to swallow the general rule ...").

n122. *Singer*, supra note 120, P 47.11 (citing to both Federal and State cases that stand for this proposition).

n123. *Comm'r v. Jacobson*, 336 U.S. 28, 49 (1949).

n124. *United States v. Centennial Savs. Bank FSB*, 499 U.S. 573, 583 (1991); see also *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) ("Exemptions from taxation ... must be unambiguously proved."); *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939) ("Exemptions from taxation do not rest upon implication.").

n125. See, e.g., *Harding Hosp. v. United States*, 505 F.2d 1068 (6th Cir. 1974) (stating that, because an exemption is an exception to the norm in taxation, an organization seeking tax-exempt status must bear the heavy burden of proving that it satisfies all the elements of the exemption statute); see also *Granzow v. Comm'r*, 739 F.2d 265, 268 (7th Cir. 1984) ("The party claiming the exemption bears the burden of proof of entitlement.").

n126. See, e.g., *United States v. J. E. Mamiye & Sons*, 665 F.2d 336, 339-40 (C.C.P.A. 1981) (construing a statutory exception from custom duties narrowly); *McMahon v. United States*, 342 U.S. 25, 27 (1951) (explaining that statutes waiving sovereign immunity are to be strictly construed). Both WTO Panels and the Appellate Body have utilized the canon on several occasions. See, e.g., Appellate Body Report, *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R (adopted Feb. 25, 1997) (citing several additional cases); Panel Report, *Canada - Import Restrictions on Ice Cream and Yoghurt*, P P 59, 68, 84, L/6568-36/S/68 (adopted Dec. 5, 1989).

n127. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

n128. For example, the principle was recently rejected by the Appellate Body of the WTO, which concluded that one portion of the text of an agreement is not superior or inferior to another, unless the text itself so indicates. See Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, P 104, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

n129. ICCPR, *supra* note 5, art. 4. Although the ICCPR doesn't refer to war, the parallel provision of the ECHR reads "in time of war or other public emergency." See ECHR, *supra* note 73, art. 15(1). However, this still leaves open the question of what counts as a "war" for the purposes of this provision.

n130. ICCPR, *supra* note 5, art. 4(3).

n131. *Id.* art. 40.

n132. For a detailed discussion of the HRC's consideration of State derogations, see Jaap A. Walkate, *The Human Right Committee and Public Emergencies*, 9 *Yale J. World Pub. Ord.* 133-46 (1982).

n133. See, e.g., U.N. Human Rights Comm., 33 U.N. GAOR Supp. No. 40, at 31, U.N. Doc. A/33/40 (1978) (where the members of the HRC concentrated on whether the situation in Northern Ireland threatened the life of the British nation, the reasons and extent of the derogations undertaken, and whether there was a justification for each derogation.); U.N. Human Rights Comm., 10th Sess., 221st mtg., P 29-30, U.N. Doc. CCPR/C/1/ST.221 (July 15, 1980) (where the British member of the HRC remarked in respect to the situation in Colombia that "a state of siege was not necessarily synonymous with a "public emergency which threatened the life of the nation").

n134. See, e.g., U.N. Human Rights Comm., 10th Sess., 128th mtg., P 17, U.N. Doc. CCPR/C/SR.128 (Apr. 11, 1979) (where the HRC was not convinced by the Chilean representative's assertion that five-and-a-half years after the chaotic events of September 1973, the government could still continue a state of emergency).

n135. U.N. Human Rights Comm., General Comment 29, *States of Emergency* (article 4), P 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001). The preconditions for invoking the derogation provisions of human rights treaties are not always construed as narrowly as the discussion above implies. The European Court of Human Rights has developed a "margin of appreciation" doctrine founded on the idea that States ought to be allowed a certain measure of discretion in implementing the standards enshrined in the ECHR because they have more intimate knowledge of what is going on in their territory than an international tribunal. The definition of armed conflict, however, is a matter of international concern and is not susceptible to such reasoning. For a more detailed discussion of this issue, see Provost, *supra* note 10, at 277-337.

n136. See *supra* Section I.A.

n137. See supra Section II.C.2.

n138. Organized armed groups that meet the Convention criteria are bound by its provisions. See Geneva Convention III, supra note 3, art. 4(2); Additional Protocol I, supra note 3, art. 43. The ICRC argues that all parties to a conflict are bound by the Geneva Conventions as custom. See ICRC Report, supra note 21, at 495-98.

n139. It is a norm of customary international law that individuals are criminally responsible for war crimes they commit. See ICRC Humanitarian Law Study, supra note 100, at 551-55 (Rule 151); see also Rome Statute of the International Criminal Court art. 25, U.N. Doc. A/CONF.183/9 (July 17, 1998).

n140. The Geneva Conventions make no provision for derogation in situations of armed conflict. See, e.g., Geneva Convention III, supra note 3, art. 10 (prohibiting derogations by special agreement).

n141. See General Comment No. 31, supra note 94, P 8.

n142. Id.

n143. See supra Section IV.A.

n144. Additional Protocol I, supra note 3, arts. 59-60.

n145. For example, the ICCPR provides as follows:

There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Convention pursuant to the present Covenant pursuant to law, conventions, regulations, or customs on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

See ICCPR, *supra* note 5, art. 5(2). For a more detailed discussion of the most favorable provision principle see Sadat-Akhavi, *supra* note 53, at 213-32.

n146. See ICRC Humanitarian Law Study, *supra* note 100, chap. 32. As discussed above, the International Criminal Tribunals for Yugoslavia and Rwanda also often refer to the norms of HRL when interpreting IHL. See *supra* Section II.B.1. For a critique of the ICRC Study's approach in this regard, see Krieger, *supra* note 105.

n147. See, e.g., Kreiger, *supra* note 105 at 277-78 (arguing that in many cases HRL standards can complement and clarify the standards of IHL); Francisco Forrest Martin, Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict, 64 *Sask. L. Rev.* 347, 372-74 (2001) (advancing what the author terms the "Unified Use of Force Rule," which borrows the concepts of "absolute necessity" and "least possible suffering" from human rights jurisprudence to interpret norms of IHL in a manner that provides more protection for the individual than IHL alone).

n148. See *supra* Section II.A.3.

n149. General Orders No. 100, Instructions for the Government of Armies in the Field (Lieber Code), Apr. 24, 1863, available at http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/a2_5aa5871a04919bc12563cd002d65c5?OpenDocument. For a detailed discussion of the Lieber Code and military necessity, see Burnus M. Carnahan, Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity, 92 *Am. J. Intl L.* 213, 213-31 (1998).

n150. Meron, *supra* note 81, at 240.

n151. See, e.g., ICCPR, *supra* note 5, art. 1(1); ECHR, *supra* note 73, art. 2(1).

n152. The ECHR, for example, provides that the deprivation of life shall not be considered a contravention of the Convention "when it results from the use of force which is no more than absolutely necessary" to protect against unlawful violence, to effect a lawful arrest or detention, or to quell a riot or insurrection. ECHR, *supra* note 73, art. 2(2). The ICCPR, on the other hand, contains a blanket prohibition on the arbitrary deprivation of life but has been interpreted to include a necessity and proportionality test. See Manfred Nowak, U.N. Covenant

on Civil and Political Rights: CCPR Commentary 110-13 (1993).

n153. See, e.g., *McCann & Others v. United Kingdom*, App. No. 18984/91, P P 149-150 (1995) available at <http://www.leeds.ac.uk/law/hamlyn/gibraltar.htm> (applying this standard to a confrontation between a number of plainclothes British special forces officers and several IRA members); *Isayeva v. Russia*, App. No. 57950/00, P 79 (2005), available at <http://www.londonmet.ac.uk/research-units/hrs/j/affiliated-centres/ehrac/ehrac-litigation/echr-pleadings/isayeva-and-others-v-russia.cfm> (applying the same standard to artillery and air bombardment by Russian forces in Chechnya); *Ergi v. Turkey*, App. 1998-IV Eur. Ct. H.R. 1751, P 79, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ergi&sessionid=6906606&skin=hudoc-en> (applying the standard to a clash between Turkish forces and member so the Workers Party of Kurdistan). In all of these cases, the State in question denied that an internal armed conflict was ongoing and therefore denied that IHL applied. For a detailed analysis of these cases, see Abresch, *supra* note 96.

n154. See Abresch, *supra* note 96, at 753.

n155. Of course, resort to force is likely to be more acceptable when the individuals in question are participating in hostilities because they are likely to pose an imminent threat to bystanders or the military forces. See *id.* at 759.

n156. A combatant here is taken to mean any person who is not a civilian, i.e., any person directly participating in active hostilities. See ICRC Humanitarian Law Study, *supra* note 100, at 3.

n157. Additional Protocol I, *supra* note 3, art. 48. There are, of course, some limitations on the killing of combatants. For example, they may not be killed by means that cause unnecessary suffering or deliberately killed when wounded, surrendering, or otherwise rendered hors de combat. For a more detailed discussion of the history and operation of the principle of distinction and combatant immunity, see Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern Law*, 39 *Int'l Law* 733 (2005).

n158. ICRC Humanitarian Law Study, *supra* note 100, at 23 (stating that "outside [a] few uncontested examples, ... in particular use of weapons or other means to commit acts of violence against human or material enemy forces, a clear and uniform definition of direct participation in hostilities has not been developed in State practice").

n159. Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killings of Suspected Terrorists*, 56 *Hastings L.J.* 801, 887-89 (2005); Yael Stein, *By Any Name Illegal and Immoral: Response to "Israel's Policy of Targeted Killing,"* 17 *Ethics & Int'l Aff.* 127, 133-35 (2003).

n160. See, e.g., Supplemental Response on Behalf of the State Attorney's Office, Pub. Comm. Against Torture in Israel v. Israel, HCJ 769/02, at 9-10, 55, 61 (Israel 2003), available at <http://www.stoptorture.org.il/eng/images/uploaded/publications/73.pdf> (last visited Dec. 8, 2007) [hereinafter Supplemental Response]; David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?, 16 Eur. J. Int'l L. 171, 200-02 (2005).

n161. The principle of proportionality is rooted in customary international war and is codified in Additional Protocol I of the Geneva Conventions. Additional Protocol I, supra note 3, arts. 51, 57. For more detailed discussions of the principle of proportionality, see Judith Gail Gardam, Proportionality and Force in International Law, 87 Am. J. Int'l L. 391 (1993); Yoram Dinstein, Collateral Damage and the Principle of Proportionality, in *New Wars, New Laws?*, supra note 19, at 211-24.

n162. Additional Protocol I, supra note 3, art. 51(5)(b). States are also obliged to plan and execute attacks so as to minimize civilian casualties. See id. art. 57(2)(a).

n163. See, e.g., *Ergi v. Turkey*, App. 1998-IV Eur. Ct. H.R. 1751, P 79, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696077&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> ("Use of the term 'absolutely necessary' suggests that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is 'necessary in a democratic society' [and] the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination.").

n164. ICCPR, supra note 5, art. 9(1).

n165. CCPR Human Rights Comm., *Van Alphen v. The Netherlands*, P 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990).

n166. See CCPR Human Rights Comm., General Comment No. 29 States of Emergency (article 4), P 4, CCPR/C/21/Rev.1/Add.13 (Aug. 31, 2001).

n167. *Id.* P P 2, 4.

n168. ICCPR, *supra* note 5, art. 9.2. For a detailed discussion of the protections applicable to different categories of persons detained by a party to an armed conflict, see Duffy, *supra* note 4, at 396-428.

n169. ICCPR, *supra* note 5, art. 15.3(a).

n170. *Id.* art. 9(4).

n171. *Id.* art. 14(3)(d).

n172. See CCPR Human Rights Comm., General Comment No. 9, Article 10, (Sixteenth Session 1982) *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, P 4, HRI/GEN/1/Rev.1 at 9 (1994).

n173. Geneva Convention III, *supra* note 3, art. 21.

n174. Geneva Convention IV, *supra* note 3, arts. 41-43, 78-79.

n175. See Geneva Convention III, *supra* note 3; Geneva Convention IV, *supra* note 3; Additional Protocol I, *supra* note 3, arts. 11, 31, 33, 45, 75(3), 75(6), 76(2), 77. The ICRC Commentary to the Geneva Conventions states as follows:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can fall outside the law.

4 Jean S. Pictet, *Commentary on Geneva Convention Relating to the Protection of Civilian Persons in Times of War* 51 (1958).

n176. Additional Protocol I, *supra* note 3, art. 75(3).

n177. Geneva Convention II, *supra* note 3, art. 5.

n178. Geneva Convention III, *supra* note 3, art. 78; Geneva Convention IV, *supra* note 3, art. 101.

n179. Geneva Convention IV, *supra* note 3, art. 43.

n180. See, e.g., Watkin, *supra* note 46, at 2 (arguing that the appropriate principles of IHL and HRL should be applied in tandem to "ensure that there are no gaps in humanitarian protection"); Ben-Naftali & Yuval Shany, *supra* note 102, at 103-04 (arguing that in cases that are unregulated or sparsely regulated by IHL, HRL ought to apply and vice versa).

n181. See ICRC Report, *supra* note 21, vols.1, 3, 46.

n182. For an analysis of how HRL could play a vital role in defining the conditions of detention in non-international armed conflict, see Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 858 *Int'l Rev. Red Cross* 375, 391 (2005).

n183. See *supra* Sections I.B-C.

n184. See *infra* Sections IV.A-B.

n185. See, e.g., James G. Stewart, *The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview*, 5 J. Int'l Crim. Just. 26 (2007); Jonathan Hafetz, *Vindicating the Rule of Law: The Legacy of Hamdan v. Rumsfeld*, 31 Fletcher F. World Aff. 25 (2007).

n186. President George W. Bush, *Address to Joint Session of Congress and American People* (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

n187. See generally Brooks, *War Everywhere*, *supra* note 27.

n188. See *US Kills al Qaeda Suspects in Yemen*, U.S.A. Today, Nov. 5, 2002, available at <http://www.usatoday.com/news/world/2002-11-04-yemen-explosion x.htm>.

n189. See *supra* Section III.B.1.

n190. See, e.g., Proulx, *supra* note 159, at 884-87; Stein, *supra* note 159, at 129.

n191. See, e.g., *Supplemental Response*, *supra* note 160, at 48; Kretzmer, *supra* note 160, at 192-94.

n192. See Kretzmer *supra* note 160, at 192-94.

n193. I am borrowing this example from Kenneth Roth. See Roth, *Justice and the "War" Against Terrorism*, *supra* note 36, at 1.

n194. Id.

n195. See Adam Roberts, Counter-Terrorism, Armed Force and the Laws of War, 44 *Survival* 7, 13 (2002) (arguing that the principle of distinction "can be difficult to apply in anti-terrorist operations, because the terrorist movement may not be composed of defined military forces that are clearly distinguished from civilians").

n196. See U.S. Reply to U.N. Report, *supra* note 30, at 16-17.

n197. See *supra* Section III.B.1.

n198. Id.

n199. It is beyond the scope of this Article to discuss how al Qaeda detainees should be classified under the Geneva Conventions, but for an interesting discussion on this subject, see Françoise J. Hampson, Detention, the "War on Terror" and International Law, in *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* 145-50 (Howard M. Hensel ed., 2005).

n200. For examples of such seizures, see Elisabetta Povoledo, Egyptian Says He Was Tortured After Being Kidnapped, *N.Y. Times*, Nov. 11, 2006, available at <http://www.nytimes.com/2006/11/11/world/europe/11italy.html? r= 1&oref=slogin>; Scott Shane, C.I.A. Expanding Terror Battles under Guise of Charter Flights, *N.Y. Times*, May 31, 2005, available at <http://www.nytimes.com/2005/05/31/national/31planes.html>. Those currently held in Guantanamo include individuals picked up in Gambia, Bosnia, Mauritania, Pakistan, Egypt, Indonesia, Thailand, and United Arab Emirates, as well as Afghanistan. See Amnesty Int'l, Military Commissions Act of 2006: Turning Bad Policy into Bad Law, <http://web.amnesty.org/library/index/ENGAMR511542006>.

n201. Craig Whitlock, At Guantanamo, Caught in a Legal Trap: 6 Algerians Languish Despite Foreign Ruling, Dropped Charges, *Wash. Post*, Aug. 21, 2006, at A1.

n202. Id.

n203. Id.

n204. Id.

n205. See supra Section III.B.1. In this context, many countries, such as the United Kingdom, have formally derogated from Article 9 of the ICCPR, but the United States has not.

n206. Id.

n207. Id.

n208. See *Rasul v. Bush*, 542 U.S. 507 (2004).

n209. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600 (2006).

n210. *Boumediene v. Bush*, 476 F.3d 981 (C.A.D.C. 2007), cert. granted, 75 U.S.L.W. 3705, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

n211. This is not to say that the writ of habeas corpus is redundant in this context. In the case of many of the detainees, the evidence against them is so peripheral or was obtained by clearly illegal means that a court is likely to hold that there is insufficient evidence that they constitute a security threat to the United States. For examples of cases in which individuals have been detained on the basis of peripheral or illegally obtained evidence of connection to terrorist activities, see Hafetz, supra note 185, at 35; Robert Knowles, *Detainee Policy and the Rule of Law: A Response*, 48 Harv. Int'l L.J. Online 69 (2007), www.harvardilj.org/online/111.

n212. See supra Section III.B.1.

n213. Geneva Convention III, supra note 3, art. 118.

n214. Cf. Alfred de Zayas, Human Rights and Indefinite Detention, 857 Int'l Rev. Red Cross 15, 19 (2005) (arguing that "there can be little doubt that indefinite detention entails inhuman treatment and may even constitute a form of torture").

n215. See Dep't of Defense, Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

n216. See, e.g., Hafetz, supra note 185, at 35 (2007); see also, Duffy, supra note 4, at 410-11 (pointing out that the CSRT "procedure provides individuals with a limited opportunity to challenge whether they fall within the 'enemy combatant' category, not to determine their correct status under international law, such as entitlement to POW status" and is therefore "of little significance").

n217. The HRC has stated:

The drafting history of Article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.

CCPR Human Rights Comm., Van Alphen v. The Netherlands, P 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990).

n218. See supra Section III.B.1.

n219. See supra Section II.B.2.

n220. See, e.g., Kenneth Roth, Human Rights, the Bush Administration, and the Fight Against Terrorism: The Need for a Positive Vision, in *Lost Liberties: Ashcroft and the Assault on Personal Freedom* 237, 238 (Cynthia Brown ed., 2003); see Rosa Ehrenreich Brooks, Protecting Rights in the Age of Terrorism: Challenges and Opportunities, 36 *Geo. J. Int'l L.* 669, 673 (2005) [hereinafter Brooks, Protecting Rights].

n221. For discussion of a State's positive obligations to prevent human rights violations, see Duffy, *supra* note 4, at 301-05.

n222. In addition to the entire range of domestic criminal law, there is also a web of international conventions aimed at preventing, prosecuting, and punishing acts of terror. See *infra* Conclusion.

n223. See Ctr. on Law and Sec., N.Y. Univ. Sch. of Law, *Terrorist Trials, 2001-2007: Lessons Learned* (2007), available at <http://www.lawandsecurity.org/publications/TTRC2007Update1.pdf>.

n224. See *supra* Sections III.B.1, IV.A.

n225. See *supra* Section I.B.

n226. See *supra* Sections I.B-C.

n227. See *supra* note 36.

n228. In 2006, after three and a half years in military confinement, Padilla was released to face charges in Federal District Court. See Abby Goodnough & Scott Shane, *Padilla is Guilty on All Charges on Terror Trial*, N.Y. Times, Aug. 16, 2007, available at <http://www.nytimes.com/2007/08/17/us/17padilla.html?n=Top/Reference/Times%20Topics/People/S/Shane,%20Scott>.

n229. See, e.g., Hague Convention for the Suppression of Unlawful Seizure of Aircraft (entered into force Oct. 14, 1971), reprinted in 22 U.S.T. 1641 (1972), 10 I.L.M. 133 (1971); International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. Doc. A/RES/52/164 (Jan. 12, 1998); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (Jan. 10, 2000). For an overview of the international criminal mechanisms available to counter terrorism, including the extradition or prosecution mechanism, see Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* 60-65 (2005).

n230. See, e.g., Anthony Dworkin, *Revising the Laws of War to Account for Terrorism: The Case Against Updating the Geneva Conventions, on the Ground That Changes are Likely Only to Damage Human Rights*, Findlaw Writ: Legal Commentary, Feb. 4, 2003, http://writ.news.findlaw.com/commentary/20030204_dworkin.html; Rona, *supra* note 33.

n231. See Dworkin, *supra* note 230.

n232. For an overview of some of the potential problems in using a criminal enforcement model against transnational terrorists, see Christopher Greenwood, *International Law and the "War Against Terrorism,"* 78 *Int'l Aff.* 301, 303-05 (2002).

n233. See, e.g., Schondorf, *supra* note 48, at 1-2; Corn, *supra* note 19, at 296. Even certain human rights organizations have admitted to the possibility that we may be witnessing the development of a new hybrid category of conflict. Interights, for example, declares: "It may be that the events of September 11 highlight a new hybrid type of armed conflict - between organized groups and foreign States. The law governing such a scenario is unsettled." Helen Duffy, *Responding to September 11: The Framework of International Law* (2001), available at <http://www.spr-consilio.com/sept11.pdf>.

n234. See Schondorf, *supra* note 48, at 28.

n235. *Id.* at 21.

n236. *Id.*

n237. See Corn, *supra* note 19, at 298.

n238. *Id.*

n239. See Schondorf, *supra* note 233, at 8.

n240. See generally ICRC Humanitarian Law Study, *supra* note 100.

n241. For an analysis of whether it might be possible to "apply the broad principles of human rights law to the conduct of hostilities in a manner that is persuasive and realistic," see Abresch, *supra* note 96, at 750-67.

n242. See *supra* Section II.C.3.

n243. For a discussion of some of the questions that could arise with respect to the rules applicable in extra-State conflicts, see Schondorf, *supra* note 48, at 62-75.

n244. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 n.66 (2006).

n245. See, e.g., Schondorf, *supra* note 48 at 41-62; Watkin, *supra* note 46, at 2, 22; Brooks, *Protecting Rights*, *supra* note 220, at 674-75.