

TOWARD A HUMAN RIGHTS APPROACH TO
ARMED CONFLICT: IRAQ 2003

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TABLE OF CONTENTS

| | | |
|------|---|-----|
| I. | INTRODUCTION | 172 |
| II. | THE MOVE TO IHL..... | 175 |
| | A. <i>The Relevant Bodies of Law</i> | 175 |
| | 1. An Overview of IHL..... | 175 |
| | 2. Human Rights Law in Brief | 177 |
| | B. <i>IHL and Human Rights: Fraternity or Bifurcation?</i> | 179 |
| | C. <i>The U.N. Approach to Law in War</i> | 182 |
| III. | THE LIMITATIONS OF THE IHL APPROACH AS SHOWN BY THE IRAQ CONFLICT..... | 184 |
| | A. <i>Iraq 1990</i> | 184 |
| | B. <i>Iraq 2003</i> | 185 |
| | 1. Combatant Deaths | 186 |
| | 2. Civilian Deaths and Injuries | 187 |
| | 3. The Broad Human Impact of the Attacks on Iraq..... | 190 |
| | 4. The Aftereffects on Soldiers | 193 |
| | 5. Militarism and Human Rights | 194 |
| IV. | INTERNATIONAL HUMAN RIGHTS LAW AND THE INVASION OF IRAQ (2003)..... | 196 |
| | A. <i>Introduction</i> | 196 |
| | B. <i>Human Rights and IHL Redux</i> | 196 |
| | C. <i>Relevant Human Rights Standards and Their Realms of</i> | |

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| | | |
|-------|--|-----|
| | <i>Application</i> | 198 |
| | 1. Overview | 198 |
| | 2. The Universal Declaration of Human Rights | 199 |
| | 3. Treaty Law and Armed Conflict | 202 |
| | a. <i>The International Covenant on Civil and Political Rights</i> | 202 |
| | i. Jurisdictional Matters | 202 |
| | ii. The Derogation Problem | 205 |
| | iii. The Right to Life | 207 |
| | b. <i>The International Covenant on Economic, Social and Cultural Rights</i> | 210 |
| V. | <i>JUS IN BELLO/JUS AD BELLUM</i> | 213 |
| | A. <i>War, the War System and Human Rights</i> | 215 |
| VI. | THE NGO APPROACH TO IHL | 216 |
| | A. <i>Human Rights Watch</i> | 216 |
| | B. <i>Amnesty International</i> | 218 |
| VII. | EXAMPLES OF A HUMAN RIGHTS APPROACH IN ACTION | 220 |
| VIII. | CHALLENGES FACED BY A HUMAN RIGHTS APPROACH TO ARMED CONFLICT | 221 |
| | A. <i>Distinguishing Bankovic</i> | 222 |
| | 1. <i>Lex Specialis</i> | 225 |
| IX. | CONCLUSION | 227 |

I. INTRODUCTION

There is no question in this writer's mind that the 2003 United States and United Kingdom invasion of Iraq was illegal according to the international law rules on the use of force, including the United Nations Charter.¹ There have been serious allegations that both the U.S./U.K. forces and the Iraqi defenders committed grave violations of international humanitarian law (IHL) during the conflict.² It is also

¹ See, e.g., Rabinder Singh, Charlotte Kilroy and Alison Macdonald, *In the Matter of the Potential Use of Armed Force by the U.K. against Iraq and the Draft U.S./U.K. Resolution Published on Feb. 24, 2003*, Opinion, Matrix Chambers, London (Mar. 3, 2003), available at <http://www.matrixlaw.co.uk/frames/frame.html> (listed under "latest news"); Mary Ellen O'Connell, *Addendum to Armed Force in Iraq: Issues of Legality*, AM. SOC'Y OF INT'L LAW INSIGHTS (Apr. 2003) (AI Index: MDE 14/071/2003), available at <http://www.asil.org/insights/insigh99a1.htm> (last visited Nov. 22, 2004). This author's views on that topic are further developed in Karima Bennoune, *The War Was Illegal*, 60 NATIONAL LAWYERS GUILD PRACTITIONER NOTES 225-235 (2003).

² See, e.g., Amnesty International, *Iraq: Civilians under Fire* (Apr. 2003), available at <http://web.amnesty.org/library/Index/engmde140712003> (last visited Nov. 11, 2004); INTERNATIONAL HUMANITARIAN LAW RESEARCH INITIATIVE, POSSIBLE VIOLATIONS OF IHL IN IRAQ, BRIEFING ON THE STATUS OF COMBATANTS, CIVILIANS AND

clear, but less publicized, that fundamental principles of human rights law were trampled in the course of this war,³ notwithstanding the deplorable human rights record of the previous Iraqi regime, itself.⁴ And what the conflict – and international assessments of it – reinforced is that human rights norms seem to be increasingly discounted in talking about the conduct of war, perhaps except when employed as liberal justifications for the use of force.⁵ International commentators, including academics and human rights organizations, now use IHL as the primary, sometimes sole, mode of analysis of armed conflicts.⁶ This approach, though understandable, may be harmful in the long run. It fails to convey the scope of what is at stake in human terms in any armed conflict. In the wake of the 2003 invasion of Iraq, it is time to construct a *human rights* approach to armed conflict.

CIVILIANS TAKING UP ARMS (2003), available at <http://www.ihlresearch.org/iraq>.

³ The preferred term in the legal context is *armed conflict*. *War*, as a legal term of art, has largely been jettisoned from the law governing the use of force, including IHL. For stylistic reasons, this article employs the terms interchangeably, echoing the International Committee of the Red Cross, which recently campaigned on “Women and War.” See INTERNATIONAL COMMITTEE OF THE RED CROSS, WOMEN AND WAR (1995) (emphasis added).

⁴ In the past, the author has described this record as follows:

There is little left to be said about the nightmarish violations of the vast majority of the human rights of the Iraqi population by the Ba’ath regime under the leadership of President Saddam Hussein. Insulting the President is a capital offence. Reports of widespread extra-judicial killings, torture whose cruelty defies the imagination, prolonged detention without trial or charge, mass “disappearances,” persecution of the Shi’a of the south, and genocidal acts against the Kurdish minority have been abundantly documented.

Karima Bennoune, *Sovereignty vs. Suffering?: Re-Examining Sovereignty and Human Rights Through the Lens of Iraq*, 13 EUR. J. INT’L L. 243, 249 (2002). However, it also should be recalled that, despite this abysmal record, the Iraqi government had improved the standard of living and thus the enjoyment of economic, social and cultural rights by significant parts of the Iraqi population. Compared with its neighbors, it had also in some ways advanced the status of women. These few gains were decimated by, among other things, sanctions and war. *Id.* at 254.

⁵ See, e.g., Michael Walzer, *What a Little War in Iraq Could Do*, N.Y. TIMES, Mar. 7, 2003, at A27.

⁶ For examples prior to Iraq, see HUMAN RIGHTS WATCH (HRW), WAR WITHOUT QUARTER: COLOMBIA AND INTERNATIONAL HUMANITARIAN LAW (1998). On Iraq, see Mary Papenfuss, *Building a Better War* (Mar. 6, 2003), available at http://www.salon.com/news/feature/2003/03/06/human_rights_watch/index_np.html (discussion of HRW approach to Iraq war); Amnesty International, *Iraq: People come first, Amnesty International’s 10-point appeal to all parties involved in possible military action in Iraq* (Mar. 18, 2003) (AI Index: MDE 14/022/2003).

This article reviews the history of the human rights community's move toward humanitarian law as the key analytical tool in situations of conflict. It then assesses the weaknesses of this framework using the Iraq conflict as a prism. Next, it suggests the possibilities for a human rights approach to conflict and explores the obstacles such an approach must surmount. Its most urgent task, however, is to illustrate the need for the human rights approach, full elaboration of which is a long-term project beyond the scope of this article.

IHL is a pragmatic and useful corpus of international law. It makes real sense for the International Committee of the Red Cross (ICRC) to employ IHL and for national militaries to train their soldiers in its principles. This law can help to mitigate some of the worst abuses associated with the use of force and military occupation. But should international human rights lawyers use it to analyze armed conflicts to the exclusion, or minimization, of human rights law?

IHL is silent about a number of situations that should concern the human rights lawyer. Some examples include the killings of large numbers of young conscripts in combat; the non-“excessive”⁷ killings of civilians in attacks on military targets that are discriminate; the long-term and cumulative impact of an armed conflict, including the terrorization of the population by “lawful attacks;” the aftereffects on soldiers, even from participating in lawful (for the purposes of IHL) acts of war; and the broader human rights consequences – pronounced in the area of economic, social and cultural rights – of the continued militarization of global and domestic economies and agendas. Former General and U.S. President Dwight Eisenhower noted:

Every gun that is made, every warship launched, every rocket fired signifies, in the final sense, a theft from those who are hungry and not fed, those who are cold and not clothed. This world in arms is not spending money alone. It is spending the sweat of its laborers, the genius of its scientists, the hopes of its children. The cost of one modern heavy bomber is this: a modern brick school in more than 30 cities It is two fine, fully equipped hospitals We pay for a single destroyer with new homes that could have housed more than 8,000 people. This is not a way of life at all, in any true sense. Under the cloud of threatening war,

⁷ This term is taken from Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 51(5)(b), 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. See discussion *infra* text accompanying notes 85-86.

2004]

Toward a Human Rights Approach

175

it is humanity hanging from a cross of iron.⁸

More recently, U.N. Secretary-General Kofi Annan, in his 2001 report to the General Assembly on the “Prevention of Armed Conflict,” explained that “[t]he human costs of war include not only the visible and immediate – death, injury, destruction, displacement – but also the distant and indirect repercussion for families, communities, local and national institutions and economies, and neighbouring countries. They are counted not only in damage inflicted but also in opportunities lost.”⁹ Clearly, the human impact of an armed conflict is much larger than a sum of violations of the Geneva Conventions, even as significant as such violations may be.

II. THE MOVE TO IHL

A. *The Relevant Bodies of Law*

1. An Overview of IHL

IHL¹⁰ is also known as the “law of war.”¹¹ The United Nations

⁸ Dwight D. Eisenhower, *The Chance for Peace*, Address Before the American Society of Newspaper Editors 75, 77-78 (Apr. 16, 1953), available at <http://www.Eisenhower.utexas.edu/53text.pdf>.

⁹ *Report of the Secretary-General on the Prevention of Armed Conflict*, U.N. GAOR, 55th Sess., at para. 1, U.N. Doc. A/55/985-S/2001/574 (2001) [hereinafter *Report of the Secretary-General on the Prevention of Armed Conflict*].

¹⁰ Some commentators object to using the term international humanitarian law. Note, for example, the following:

[I]t (the term *international humanitarian law*) has the defect that it seems to suggest that humanitarianism rather than professional standards is the main foundation on which the law is built, and thus invites a degree of criticism from academics, warriors and others who subscribe to a realist view of international relations.

Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT. L. 11, 14 (1995). Arguably, this very criticism foreshadows the need for the rethink suggested in this article.

¹¹ For general introductions to IHL, see FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* (Int’l Comm. of the Red Cross, 2001) (1987); INTERNATIONAL COMMITTEE OF THE RED CROSS, *BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS* (1983); *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (Dieter Fleck ed., 1995); George Aldrich, *The Laws of War on Land*, 94 AM. J. INT’L L. 42-63 (2000). A short overview is also offered in Karima Bennouné, *As-Salamu ‘Alaykum?: Humanitarian Law in*

Centre for Human Rights described IHL in 1991 as “the principles and rules which limit the use of force in times of armed conflict.”¹² It seeks to humanize warfare to the extent possible, while accepting that, for the present, human beings use armed force to resolve their disputes. Its precepts take no position on when or whether states should resort to force, but rather on how they may use it once they have decided to do so. Thus, the cynical view of IHL is that it describes “[h]ow to kill your fellow human beings in a nice way.”¹³ This author does not intend to critique IHL in quite the same way, recognizing a legitimate role for this body of law. However, this article warns against its predominate use by human rights proponents over and instead of human rights concepts.

Humanitarian law’s central texts include the Four Geneva Conventions adopted in 1949¹⁴ and their two Additional Protocols adopted in 1977.¹⁵ Additionally, the 1907 Hague Convention and

Islamic Jurisprudence, 15 MICH. J. INT’L L. 605, 607-12 (1994).

¹² U.N. Centre for Human Rights, *International Humanitarian Law and Human Rights*, FACT SHEET NO. 13 (1991) [hereinafter FACT SHEET NO. 13], available at <http://www.unhcr.ch/html/menu6/2/fs13.htm> (last visited Nov. 22, 2004).

¹³ This is the critique as relayed by a leading classical scholar of IHL. G.I.A.D. Draper, *Human Rights and the Law of War*, 12 VA. J. INT. L. 326, 335 (1972). In this vein, IHL has been subjected to a driving critique suggesting that it actually thereby legitimizes warfare itself. See, e.g., Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L. J. 49 (1994).

¹⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]. All four of the Conventions entered into force on Oct. 21, 1950, and as of 2004, they have 191 State Parties. See International Committee of the Red Cross, *States Party to the Geneva Conventions and Their Additional Protocols, Geneva Conventions of 12 August 1949 and Their Additional Protocols of 8 June 1977* [hereinafter ICRC, *States Party to the Geneva Conventions*], at http://www.icrc.org/eng/party_gc (last visited Nov. 22, 2004). Geneva Conventions I and II deal with wounded and stranded soldiers on land and sea, respectively. Geneva III regulates the treatment of prisoners of war. Geneva IV focuses on the lives of civilians in time of war and occupation.

¹⁵ Protocol I, *supra* note 7; 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 Protocol II] (entered into force Dec. 7, 1978). As of August 2004, Protocol I has 161 State Parties while 156 states adhere to Protocol II. ICRC, *States Party to the Geneva Conventions, supra* note 14.

annexed regulations supply important rules on the conduct of hostilities.¹⁶ These texts are supplemented by important principles of customary international law.¹⁷ IHL has a particular sphere of application, most of its copious principles only activating when there is a situation amounting to an “armed conflict” or a military occupation.¹⁸

Though IHL has evolved into a complicated system defying easy synopsis, its key norms can be summarized. These include the principle of distinction, which requires differentiating between civilian persons and property, and military targets, and only targeting the latter for attack. Furthermore, IHL limits the methods of warfare and any that result in unnecessary losses or excessive suffering are absolutely prohibited. Additionally, certain categories of persons, such as captured combatants and civilians, must be guaranteed specific protections. This sounds similar to human rights ideas, but there is significant divergence in that which IHL permits and omits. Hence, scholars grapple with understanding the correct relationship between the two bodies of law.

2. Human Rights Law in Brief

International human rights law is the body of public international law that, for the most part, springs from the 1948 Universal Declaration of Human Rights (UDHR).¹⁹ It incorporates a variety of stand-

¹⁶ Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2227 (entered into force Jan. 26, 1910).

¹⁷ See, e.g., THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1996).

¹⁸ See Common Article 2 to all four Geneva Conventions of 1949, *supra* note 14. Note also that different principles of IHL apply depending on whether the situation is an international armed conflict (the four Conventions and Protocol I apply) or a much more common non-international (or internal) armed conflict (in which only Common Article 3 of the four Conventions, and possibly Additional Protocol II, apply). Common Article 3 applies in case of any “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” Additional Protocol II is only triggered where the non-international armed conflict is between a State Party and a well-organized armed group which controls part of its territory. See Additional Protocol II, *supra* note 15, at art. 1(1) (In both international and non-international armed conflict, these principles are complemented by relevant norms of customary international law.). Human rights law makes no such particular distinction between rules that would apply in one type of conflict versus another. Even as the standards of IHL are generally lower than those of human rights law, the rules of IHL which apply in internal conflicts are even more modest.

¹⁹ Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/217(III) (1948) [hereinafter UDHR]. IHL is defined above. See *supra* text accompanying notes 10-18. Stephen Ratner and Jason Abrams summarize the

ards, from multilateral treaties, to norms of customary international law, to principles called “soft law.”²⁰ The subject matter of all these rules is, quite simply, regulating the treatment of the human person, and in some aspects the human community (so-called peoples’ rights²¹). They apply at all times to those states upon whom they are binding, except when derogation precepts activate, as per the provisions of particular treaties.²²

IHL explicitly creates obligations for non-governmental groups, such as armed groups which are fighting each other or the state.²³ However, human rights law only directly creates obligation for states, though it speaks about the actions of private individuals and groups in society. There have been some creative efforts to expand human rights obligations to non-state actors.²⁴ In some cases, international bodies have held that non-state actors are directly bound by human rights

meaning of human rights law versus IHL as follows:

International human rights law refers to the body of international law aimed at protecting the dignity of the individual. The law of armed conflict, or international humanitarian law, addresses limits on war making methods (the Law of the Hague) as well as protections of certain individuals during wartime (the Law of Geneva).

STEPHEN RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 9 (1997).

²⁰ This controversial term refers to international standards from non-treaty sources, in a gray zone between law and non-law. See COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000).

²¹ See PEOPLES’ RIGHTS (Philip Alston, ed., 2001).

²² See discussion of derogation *infra* text accompanying notes 171-180. Norms of customary law are binding on all states except those that have been persistent objectors to the emergence of the rule. However, if the customary norm in question rises to the level of a peremptory norm, no such exemption is available and the rule applies to all states. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, REPORTERS’ NOTES: PRACTICE CREATING CUSTOMARY HUMAN RIGHTS LAW, § 102, cmt. k & Reporters’ Note 6; see also *id.* at § 702, cmts. i, n, & Reporters’ Note 11. A treaty obligation applies only to those states that have ratified the treaty, unless the text has crystallized in custom as well. A lower level obligation attaches to states that have signed, but not yet ratified, a treaty. They must not act to defeat its object and purpose. Vienna Convention on the Law of Treaties, art. 18, 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/27 (1969) (entered into force on Jan. 27 1980) [hereinafter VCLT].

²³ See Rachel Brett, *Non-Governmental Human Rights Organizations and International Humanitarian Law*, INT’L REV. OF THE RED CROSS, No. 324, 531-536 (1998).

²⁴ LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 47-51 (2002).

standards.²⁵ However, this is a cutting edge approach, and not one that is fully accepted. In regards to the Iraq war of 2003, the early formal combat phase of which is the main focus here, these non-state actor problems are not an issue. This was a traditional inter-state conflict in which all the major parties, the U.S., the U.K. and Iraq, were indisputably bound by a range of human rights and humanitarian law norms.

B. IHL and Human Rights: Fraternity or Bifurcation?

Some experts suggest there is a close linkage between human rights law and IHL.²⁶ They also posit that the two bodies of law are cross-pollinating in significant ways.²⁷ Leading publicists like Theodor Meron argue that human rights law informs the ongoing development of humanitarian law.²⁸ Louise Doswald-Beck and Sylvain Vité, writing in the *International Review of the Red Cross*, also note this phenomenon. In this vein, they suggest that the Additional Protocols of 1977, which advanced the levels of protection available in both international and non-international armed conflict, represented “the world of humanitarian law pa[y]ing tribute to the world of human rights.”²⁹ The Inter-American Commission on Human Rights took this perspective a step further when it held that “the provisions of Common Article 3 are essentially pure human rights law.”³⁰ Such a perception has been further magnified. For example, Doswald-Beck and Vité have made the striking claim that IHL *in toto* is “increasingly perceived as part of

²⁵ *Id.*

²⁶ Dale Stephens, a commander in the Australian military, argues that the connection between IHL and human rights dates to the Tehran Conference. Dale Stephens, *Human Rights and Armed Conflict—The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 YALE HUM. RTS. & DEV. L. J. 1 (2001). In his view, the main legal instruments in the human rights and humanitarian law area share similar aims: “the respect and protection of humanity.” According to Stephens, this invalidates arguments against inter-linkage. *Id.* at 13. See also Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, INT’L REV. OF THE RED CROSS, No. 293, 94-113 (1993).

²⁷ *Id.* at 112.

²⁸ See, e.g., Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000).

²⁹ Doswald-Beck & Vité, *supra* note 26, at 113.

³⁰ *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., OEA/Ser/L/V/II.97, Doc. 38, at para. 158, n. 19 (1997). In this case, the Commission went farther than any regional human rights body up to that time and deemed itself competent to directly apply the norms of IHL. See discussion in Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: a Comment on the Tablada Case*, INT’L REV. OF THE RED CROSS, No. 324, 505 (1998).

human rights law applicable in armed conflict.”³¹

Conversely, the same authors stress how the U.N. Convention on the Rights of the Child (CRC), a human rights treaty adopted in 1989, incorporates IHL in its notable Article 38.³² They note with approval the growing use of IHL by international human rights bodies and by non-governmental organizations (NGOs).³³ Others have also lauded the recourse of the European Court of Human Rights (ECHR) to applying IHL, as for example in *Ergi v. Turkey*.³⁴ Such writers see IHL as complementary to human rights law and as being used in tandem, rather than in the alternative. They explain that U.N. General Assembly resolutions related to armed conflict increasingly cite *both* IHL and human rights. In this view, connection between IHL and human rights constitutes progress for both bodies of law.

Yet, as other scholars have pointed out, the historical lineage of these two corpora of international law are completely distinct, with divergent underlying philosophies, goals, and concepts. IHL, when applied to international armed conflict, is classically recognized as a set of state-to-state obligations, deeply infused with the principle of reciprocity. Human rights law is also formally built around state-to-state obligations. But, in addition, human rights law clearly represents a compact between governments and individuals, recognizing rights inhering in those persons.

Hence, another school of thought appeals to maintain the stark separation between these bodies of law.³⁵ Draper, while in some writings suggesting that human rights law has lessons to teach IHL, has elsewhere maintained that:

The two regimes are not only distinct but are diametrically opposed . . . at the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things be a different and opposed law to that which seeks to regulate the conduct of

³¹ Doswald-Beck & Vité, *supra* note 26, at 94 (emphasis added).

³² *U.N. Convention on the Rights of the Child*, opened for signature Nov. 11, 1989, art. 38, 1577 U.N.T.S. 3 (adopted under G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (Nov. 20, 1989), and entered into force Sept. 2, 1990) [hereinafter CRC]. *Inter alia*, Article 38 requires that: “States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.” *Id.* at art. 38(1).

³³ Doswald-Beck & Vité, *supra* note 26, at 113-16.

³⁴ Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, INT’L REV. OF THE RED CROSS, No. 324, 513-29 (1998).

³⁵ Dale Stephens has detailed this trend. Stephens, *supra* note 26, at 8.

hostile relationships between states or other organized armed groups, and in internal rebellions.³⁶

Similarly, Michael Matheson, a former principal deputy legal advisor at the U.S. State Department, has underscored the need to maintain the bifurcation of IHL and human rights law. He fears that, otherwise, human rights law and other “peacetime” bodies of law would be undermined. In his view, “the negotiation and ratification of environment, human rights and similar instruments would . . . become hostage to the need to agree on express exemptions and special rules for military activities.”³⁷ He goes much further than Draper and exhorts that ordinary rules of international law not be applied willy-nilly in conflict, but rather that they find expression *through* IHL.³⁸ It appears that Matheson’s motive is to keep standards higher in peacetime and lower in wartime with a clear distinction between the two.

Some human rights experts are also concerned about the over-linkage between human rights practice and IHL, though for different reasons.³⁹ They fear this may lower standards, making less stringent rules of armed conflict the norm. This is a particular worry in the era of the “war on terror,” which is said to be going on everywhere between “civilization” and “terror.”⁴⁰ Relying increasingly on standards that offer less protection in such an era may permanently decrease the level of protection which human rights advocates are able to demand.⁴¹ Thus, such experts are concerned with reprioritizing human rights norms.

³⁶ *Id.* at 9 (quoting G.I.A.D. Draper, *Humanitarian Law and Human Rights*, ACTA JURIDICA 193, 199 (1979)).

³⁷ Michael 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) (writing in his personal capacity).

³⁸ *Id.* at 435.

³⁹ Brett, *supra* note 23, at 531. See also Ruti Teitel, *Humanity’s Law: Rule of Law for the New Global Politics*, 35 CORNELL INT’L L.J. 355, 374-377 (2001-2002).

⁴⁰ President George W. Bush, President Bush Reaffirms Resolve to War on Terror, Iraq and Afghanistan, Remarks by the President on Operation Iraqi Freedom and Operation Enduring Freedom (Mar. 19, 2004), available at <http://www.whitehouse.gov/news/releases/2004/03/20040319-3.html>.

⁴¹ In the context of the war against terrorism, IHL is itself under threat. See, e.g., Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER FORUM OF WORLD AFFAIRS 55-74 (Summer/Fall 2003).

C. The U.N. Approach to Law in War

Initially, the U.N. took a wary approach to IHL. Reportedly, the U.N.'s International Law Commission (ILC)⁴² chose not to discuss the topic in 1949 because it would be seen as conceding that the new U.N. system might not be able to keep the peace, thus necessitating rules to govern the conduct of hostilities.⁴³

In the 1960s, (perhaps having recognized that its conflict prevention work would, alas, not vitiate the need for such rules) the U.N. did begin to engage more fully with IHL and to cooperate with the ICRC. This was first noticeable in Security Council Resolution 237⁴⁴ which was welcomed by the General Assembly in its resolution 2252.⁴⁵ Security Council Resolution 237 specifically called on governments involved in the then-recent Middle East conflict to respect the Third and Fourth Geneva Conventions.⁴⁶ However, it also recognized the continuing validity of other standards in conflict situations, “[c]onsidering that essential and inalienable human rights should be respected even during the vicissitudes of war.”⁴⁷

The 1968 Tehran International Conference on Human Rights marked the first thorough consideration by the U.N. of human rights in wartime.⁴⁸ It affirmed the idea that “humanitarian principles must prevail during periods of armed conflict.”⁴⁹ Coming out of that

⁴² This is the U.N. system’s expert international law body, made up of thirty-four members who are elected through the General Assembly. Its mandate includes advancing international law by adopting draft texts of treaties and reviewing substantive areas in international law about which there are disputes or uncertainties. U.N. International Law Commission, *Introduction*, available at <http://www.un.org/law/ilc/introfra.htm> (last visited Nov. 11, 2004).

⁴³ FACT SHEET NO. 13, *supra* note 12. This early UN concern has also been noted in R. Quentin-Baxter, *Human Rights and Humanitarian Law—Confluence or Conflict*, 9 AUSTL. Y.B. INT’L L. 94, 97, 102 (1985).

⁴⁴ S.C. Res. 237, U.N. SCOR, 28th Sess., U.N. Doc. S/RES/237 (1967).

⁴⁵ *Humanitarian Assistance*, G.A. Res. 2252, U.N. GAOR, 5th Emergency Special Sess., U.N. Doc. A/RES/2252(ES-V) (1967).

⁴⁶ S.C. Res. 237, *supra* note 44, at para. 2. The General Assembly specifically mentioned this prong of the resolution when welcoming the text as a whole. G.A. Res. 2252, *supra* note 45, at para. 1(c).

⁴⁷ S.C. Res. 237, *supra* note 44, at pmb. This pronouncement was also quoted approvingly by the General Assembly. G.A. Res. 2252, *supra* note 45, at para. 1(b).

⁴⁸ Doswald-Beck and Vité, *supra* note 26, at 112.

⁴⁹ FACT SHEET NO. 13, *supra* note 12. This formulation, as summarized by the UN Centre for Human Rights, does not appear to suggest that humanitarian norms prevail over human rights norms. Rather, it indicates that *some* rules must apply to govern conflict situations. Doswald-Beck and Vité discuss the impact of the Tehran conference on the development of IHL. See Doswald-Beck and Vité, *supra* note 26, at 94.

conference, the U.N. General Assembly, in Resolution 2444, affirmed some general principles of IHL that had recently been endorsed by the ICRC. The Assembly also called on the U.N. Secretary-General to work, together with that organization, toward the implementation of humanitarian law.⁵⁰ It called upon all states to ratify the 1899 Hague Conventions along with the Geneva Protocol of 1925 and the four 1949 Geneva Conventions.⁵¹ Paradoxically, though the resolution is entitled “Respect for *Human Rights* in Armed Conflicts,”⁵² it makes no specific mention of human rights law or standards, but focuses exclusively on IHL, presaging an approach that has come to be commonly employed.⁵³

By the time of the 1974 U.N. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, the General Assembly had taken on a true hybrid approach, citing both IHL and human rights law.⁵⁴ Through this Declaration, the Assembly demanded states abide by the Geneva Conventions and “other instruments of international law relative to respect for human rights in armed conflicts.”⁵⁵ It specifically noted the relevance in armed conflict of the UDHR,⁵⁶ the International Covenant on Civil and Political Rights (ICCPR),⁵⁷ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵⁸ and the Declaration of the Rights of the Child.⁵⁹ From that time to the present, U.N. discussions of armed

⁵⁰ G.A. Res. 2444, U.N. GAOR, 23d Sess., at paras. 1-2, U.N. Doc. A/2444(XXIII) (1968).

⁵¹ *Id.* at para. 5.

⁵² *Id.* at title (emphasis added).

⁵³ However, the U.N. Centre for Human Rights interprets this resolution to weave together the strands of IHL rules and those designed to safeguard human rights in war. FACT SHEET NO. 13, *supra* note 12.

⁵⁴ *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, G.A. Res. 3318, U.N. GAOR, 29th Sess., Supp. No. 31, 24th Sess., at 146, U.N. Doc. A/9631(XXIX) (1974).

⁵⁵ *Id.* at para. 3.

⁵⁶ UDHR, *supra* note 19.

⁵⁷ *International Covenant on Civil and Political Rights, opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (adopted under G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316(XXI), Annex (entered into force Mar. 23, 1976)) [hereinafter ICCPR].

⁵⁸ *International Covenant on Economic, Social and Cultural Rights, opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (adopted under G.A. Res. 2200A, *supra* note 57, at 49 (entered into force Jan. 3, 1976)) [hereinafter the ICESCR].

⁵⁹ *Declaration of the Rights of the Child*, G.A. Res. 1386, U.N. GAOR, 14th Sess., U.N. Doc. A/1386(XIV) (1959). This is the precursor to the convention about the same topic. All of the standards listed here are cited in *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, *supra* note 54, at para. 6.

conflict have often referenced both sets of norms. However, increasing tribute has been paid to the IHL framework in practice, with less actual use being made of human rights norms, especially in the context of international conflicts. This article details the analogous NGO shift below⁶⁰ to take into account the following discussion of IHL's application in the context of Iraq.

III. THE LIMITATIONS OF THE IHL APPROACH AS SHOWN BY THE IRAQ CONFLICT

To illustrate the deficiency of the solely IHL approach, this article now considers how that law framed the Iraq conflict. The following discussion briefly considers the consequences of the 1990 Gulf War and the imposition of sanctions from 1990 to 2003, events which helped to create the particularly fragile context in which the 2003 conflict occurred.

A. Iraq 1990

Though some Western international lawyers saw the 1991 Gulf War as a triumph of international law,⁶¹ on the ground it was experienced by ordinary Iraqis as a calamity.⁶² Estimates of civilian deaths directly resulting from the conflict have ranged from 2,500 to nearly 25,000.⁶³ The country's infrastructure was deliberately targeted during the war, such that basics like power and clean water were rarely available.⁶⁴ These shortages, compounded by the sanctions, led to even greater loss of life in the war's aftermath. After the war, Iraq suffered an increase in cancer and leukemia rates, especially among children, and birth defects.⁶⁵ Overall, the U.N. assessed the post-war situation in the country as "apocalyptic."⁶⁶

⁶⁰ See *infra* text accompanying notes 222-241.

⁶¹ Abraham Sofaer, *The War Powers Resolution and Kosovo*, 34 LOY. L.A. L. REV. 71, 78 (2000).

⁶² For a more thorough account of the human rights impact of that war, see Bennoune, *supra* note 4, at 255-256.

⁶³ The lower estimate comes from HUMAN RIGHTS WATCH, NEEDLESS DEATHS IN THE GULF WAR: CIVILIAN CASUALTIES DURING THE AIR CAMPAIGN AND VIOLATIONS OF THE LAWS OF WAR 19 (1991). A U.S. sociologist who visited Iraq shortly after the war offered the higher of the numbers. Louise Cainkar, *Desert Sin*, in BEYOND THE STORM: A GULF CRISIS READER, 338-45 (P. Bennis and M. Moushabeck eds., 1991).

⁶⁴ Bennoune, *supra* note 4, at 256.

⁶⁵ Nicholas Kristof, *The Stones of Baghdad*, N.Y. TIMES, Oct. 4, 2002, at A27.

⁶⁶ *Report on humanitarian needs in Iraq in the immediate post-crisis environment by*

The international community imposed comprehensive sanctions on Iraq, through Security Council Resolution 661, after its illegal invasion of Kuwait.⁶⁷ They remained in force, with some modifications, until after the overthrow of Saddam Hussein's regime, some twelve and a half years later. During the interim, the U.N. Sub-Commission on the Promotion and Protection of Human Rights spoke of 6,000 deaths per month among children under five and "a return to illiteracy" caused by the embargo.⁶⁸ UNICEF detailed more than a doubling of the infant mortality rate in the country.⁶⁹ The Security Council's very own Panel on Humanitarian Issues said that "[e]ven if not all suffering in Iraq can be imputed to external factors, especially sanctions, the Iraqi people would not be undergoing such deprivations in the absence of the prolonged measures imposed by the Security Council and the effects of the war."⁷⁰ Meanwhile, the ICRC warned of "steady deterioration of living conditions" in Iraq.⁷¹ The 2003 war was launched on a country already in such execrable circumstances.

*B. Iraq 2003*⁷²

IHL had much to say about numerous occurrences in the 2003 invasion of Iraq. Examples include the clearly illegal display on television of U.S. POW's by the former Iraqi regime, and the alleged use of perfidious tactics and the placement of military objectives in civilian areas by Iraqi forces.⁷³ On the other side, the U.S. dropped

a mission to the area led by Martti Ahtisaari, Under-Secretary-General for Administration and Management, U.N. SCOR, Annex, U.N. Doc. S/22366 (Mar. 20, 1991).

⁶⁷ S.C. Res. 661, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/661 (1990).

⁶⁸ *Humanitarian Situation in Iraq, Sub-commission Decision 1999/110*, Sub-commission on the Promotion and Protection of Human Rights, 51st Sess., 33d mtg., U.N. Doc. E/CN.4/SUB.2/1999/110 (1999) (reiterated in *The Humanitarian Situation of the Iraqi Population*, Sub-commission on the Promotion and Protection of Human Rights, 53d Sess., U.N. Doc. E/CN.4/SUB.2/2001/L.42 (2001)).

⁶⁹ UNICEF, *Iraq Surveys Show "Humanitarian Emergency,"* Aug. 12, 1999, available at <http://www.unicef.org/newsline/99pr29.htm>.

⁷⁰ *Report of the Second Panel Established Pursuant to the Note by the President of the Security Council of 30 January 1999 (S/1999/100), Concerning the Current Humanitarian Situation in Iraq*, U.N. SCOR, Annex II, at para. 45, U.N. Doc. S/1999/356 (1999).

⁷¹ *Red Cross Warns of Deteriorating Living Conditions in Iraq*, AGENCE FRANCE PRESSE, May 8, 1999, available at <http://www.casi.org.uk/discuss/1999/msg00328.html>.

⁷² This section relies primarily on Australian, British, and U.S.-based sources, i.e., those based in countries that actively participated in the war.

⁷³ See Amnesty International, *Iraq: Civilians under Fire*, *supra* note 2.

cluster bombs in civilian neighborhoods⁷⁴ and reportedly attacked “leadership targets” in indiscriminate fashion, leading to the deaths of civilians.⁷⁵ However, a great bulk of the misery provoked by this conflagration lay beyond the range of IHL’s provisions. The following review demonstrates this point.

1. Combatant Deaths

Under IHL, it is mostly lawful to kill enemy soldiers in conflict. If war is politics by other means, those means are, first and foremost, killing the troops of the other side. IHL accepts the killings of conscripted soldiers in combat with conventional weapons. There are, obviously, some limitations placed by IHL in this area. Even soldiers may not be killed by means that cause unnecessary suffering. They may not be deliberately killed after becoming wounded, surrendering, or otherwise becoming *hors de combat*. They may not be killed while in custody except after a fair trial for an offense that the Detaining Power could sentence one of its own soldiers to death for under law.⁷⁶ But, most routine killings of soldiers in the course of combat are lawful under IHL in an armed conflict.

It is not clear how many Iraqi soldiers were killed in the war. National Public Radio quoted an intelligence source suggesting some 10,000 Iraqi military casualties.⁷⁷ According to a widely cited study by the Project on Defense Alternatives, between 4,895 and 6,370 soldiers were killed up to April 2, 2003, alone.⁷⁸ A study by the NGO Medact, the British affiliate of International Physicians for the Prevention of Nuclear War, suggests the accurate figure may be between 13,500 and 45,000.⁷⁹ The New York Times reported with a certain fatalism that we

⁷⁴ See Press Release, Amnesty International, Iraq: Use of cluster bombs – Civilians pay the price, MDE 14/065/2003, Apr. 2, 2003, available at <http://web.amnesty.org/library/index/engmde140652003> (In Amnesty’s view, the use of cluster munitions in civilian areas represents an indiscriminate attack in violation of IHL).

⁷⁵ Kenneth Roth, *War in Iraq: Not a Humanitarian Intervention*, in HUMAN RIGHTS WATCH, WORLD REPORT 2004: HUMAN RIGHTS IN ARMED CONFLICT 19 (2004); and HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ (2003) [hereinafter HRW, OFF TARGET].

⁷⁶ See Geneva III, *supra* note 14, at arts. 87, 100-102.

⁷⁷ *Iraqi Casualties* (NPR broadcast, Apr. 30, 2003), available at <http://www.npr.org/templates/story/story.php?storyId=1247683>.

⁷⁸ Carl Conetta, *The Wages of War: Iraqi Combatant and Non-Combatant Fatalities in the 2003 Conflict*, Project on Defense Alternatives Research Monograph #8, available at <http://www.comw.org/pda/0310rm8.html> (last visited Nov. 11, 2004).

⁷⁹ See Robert Schlesinger, *British Group Puts Iraq Casualty Toll at 21,700 to 55,000, Hard Data Elusive, Doctors’ Report Finds*, BOSTON GLOBE, Nov. 12, 2003, at A9. The

may never know the accurate figure.⁸⁰

In any case, if IHL is the sole mode of analysis, many of these deaths are likely legally acceptable and human rights lawyers have no complaint left to make. This is a matter of grave concern. So is the number of U.S. (and other “Allied”) soldiers killed and wounded. CNN put the number for U.S./U.K. military deaths at 181 up to May 14, 2003.⁸¹ As of this writing, U.S. military casualties are listed as 1,210.⁸²

Humanitarian law simply accepts the killing and wounding of many of these predominantly young people. A human rights approach should not. Being put in such a situation, by one’s own government or another, arguably represents the ultimate threat of arbitrary deprivation of life.⁸³ In line with the early Human Rights Committee (HRC) approach discussed below, concern about military fatalities should be particularly pronounced in a war, like this one in Iraq, which was illegal for purposes of the U.N. Charter.⁸⁴

2. Civilian Deaths and Injuries

The IHL framework tolerates non-“excessive” (to use the term of Additional Protocol 1, Article 51) killings of civilians in attacks aimed at military targets that are discriminate.⁸⁵ As long as the target is legitimately military, the means used to hit that target are lawful and the resultant deaths not deemed “excessive” relative to military advantage, these killings are not unlawful. Causing further difficulty,

number of casualties was determined by extrapolating from the death rates found in units in the Baghdad area of three to ten percent.

⁸⁰ John Broder, *Number of Iraqis Killed May Never Be Determined*, N.Y. TIMES, Apr. 10, 2003, at B1.

⁸¹ CNN, *Forces: U.S. & Coalition/Casualties* (2004), available at <http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties/index.html> (last visited Nov. 11, 2004).

⁸² Fox News, *U.S. Death Toll Tops 1000 in Iraq* (Sept. 8, 2004), available at <http://www.foxnews.com/story/0,2933,131713,00.html>. See also Department of Defense, Washington Headquarters Services, Statistic Information Analysis Division, *Military Casualty Information, Operation Iraqi Freedom Military Deaths: Since May 1, 2003* (Nov. 17, 2004), at <http://www.dior.whs.mil/mm/casualty/OIF-Deaths-After.pdf>.

⁸³ See discussion *infra* text accompanying notes 181-195 and 215-218.

⁸⁴ This is a very controversial idea given the separation of the *jus in bello* from the *jus ad bellum* accepted in contemporary international law. See *infra* text accompanying notes 211-218. However, as prominent a person as William Schabas, director of the Irish Center for Human Rights, posed this very problem in Human Rights and Humanitarian Law: Are There Some Individuals Bereft of All Legal Protection?, 2004 Annual Meeting, held by the American Society of International Law (Apr. 3, 2004) (recording on file with the author).

⁸⁵ Protocol I, *supra* note 7, at art. 51(5)(b).

the test to assess proportionality is vague and fraught with controversy.⁸⁶

Acquiescence to “collateral damage” is anathema to human rights principles and is a basic challenge to the right to life. If by simply declaring war (de jure or de facto) governments may take civilian life without complaint from human rights advocates, the meaning of human rights law is greatly diminished when most needed. Under IHL, governments may not intentionally target civilians in particular instances. But their choices to resort to force or per se to conduct aerial bombardment of military targets in civilian areas are not questioned in an IHL framework. Given that civilian casualties are highly likely to result in both cases, the meaning of “intentionally” killing such persons should be rethought. Such choices should be the subject of human rights scrutiny.

The 2003 conflict directly claimed the lives of thousands of Iraqi civilians.⁸⁷ U.S. press sources noted that hospital records indicated the deaths of at least 1,101 civilians in Baghdad alone during the active phase of the campaign (some 1,255 additional deaths “probably were civilians”), as well as 286 in the city of Najaf at one hospital alone.⁸⁸ In May 2003, the *Christian Science Monitor* reported that between 5,000 and 10,000 civilians might have been killed in the initial conflict.⁸⁹ As

⁸⁶ Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391 (1993).

⁸⁷ A series of statistics follow but perhaps an anecdote gives a clearer sense of the loss involved. The *Christian Science Monitor* told the story of Mahmoud Ali Hamadi:

Hugging his 18 month-old son, Haidar, to his breast for comfort, he cannot hold back his sobs as he recounts how a U.S. missile that landed by his front gate killed his wife and three elder children on the night of April 5. ‘My children were the brightest in the whole school,’ he recalls, looking fondly at an old family photograph through his tears. ‘Eleven years I spent raising them, and in one instant I lost them.’ Mr. Hamadi’s family died in Rashidiya, a village of palm groves and vegetable plots on the banks of the Tigris, half an hour north of Baghdad.

Surveys Pointing to High Civilian Death Toll in Iraq, CHRISTIAN SCI. MONITOR, May 22, 2003, available at <http://www.csmonitor.com/2003/0522/p01s02-woiq.htm>.

⁸⁸ Matthew Schofield et al., *Civilian Deaths in Baghdad Total At Least 1,101*, THE PHILA. INQUIRER (May 4, 2003), available at <http://www.philly.com/mld/inquirer/news/front/5778486.htm>. Note, however, that the *Christian Science Monitor* warns of potential inaccuracies in hospital records “kept in the heat of war under intense pressure on doctors and staff.” The article suggests that this might mean the hospital records would actually underestimate the number of civilian deaths, but could also lead to the misreporting of some military deaths as civilians. *Surveys Pointing to High Civilian Death Toll in Iraq*, *supra* note 87.

⁸⁹ According to the article, this would make the Iraq war “the deadliest campaign

this article goes to press in November 2004, a new report by U.S. researchers from Johns Hopkins University estimates that 100,000 Iraqis have now died as a result of the conflict.⁹⁰

As with civilian fatalities, IHL provides no legal claim for the wounding of civilians resulting from IHL-lawful attacks. As David Weissbrodt and Beth Andrus have explained, "There is no absolute right of civilians to be free from injury during an armed conflict. If the parties to the hostilities take all possible precautions and use methods of warfare that conform to international standards, they cannot be held responsible for any collateral damage."⁹¹ This is a legally sound interpretation of IHL. Should it be adopted as policy by human rights advocates? Does it not risk being pachydermatous in light of the human reality of conflict?

In this war, many thousands of Iraqis were wounded, in a context in which adequate medical care and rehabilitation were not available. Knight-Ridder News Service on May 4, 2003, indicated that 6,800 civilians had been wounded in Baghdad alone.⁹² The British NGO, Iraq Body Count, enumerated 20,000 civilian injuries as of early July 2003.⁹³ Many of these injuries were ghastly, their impact compounded by lack of adequate medical care. Reports abounded that patients were placed on bloodstained gurneys and that anesthetic and medicines were unavailable. An Australian journalist described the scene in Kindi Hospital trauma ward in Baghdad as follows:

Kindi . . . doesn't have enough medical staff, drugs and equipment; it's running out of body bags and clean water and is dependent on electricity in a city of day-long blackouts. Patients facing emergency surgery can have only 800 milligrams of ibuprofen, the same amount an Australian doctor might prescribe for muscle pain, and there is a critical shortage of anaesthetics. . . . An army of exhausted, weepy support staff help them on to trolleys,

for noncombatants that US forces have fought since Vietnam." *Id.*

⁹⁰ Patricia Reaney, *Civilian Death Toll in Iraq Exceeds 100,000* (Oct. 28, 2004), available at <http://www.reuters.co.uk/newsPackageArticle.jhtml?type=topNews&storyID=611455§ion=news>.

⁹¹ David Weissbrodt & Beth Andrus, *The Right to Life During Armed Conflict: Disabled Peoples' International v. United States*, 29 HARV. INT'L. L.J. 59, 81 (1988).

⁹² This information was gleaned from hospital records. Matthew Schofield et al., *supra* note 88.

⁹³ See Iraq Body Count, *Adding Indifference to Injury* (Aug. 7, 2003), available at http://www.iraqbodycount.net/editorial_aug0703_print.htm. The group's methodology is described on its website. The reports of injuries included cover shootings of civilians, bombings, as well as less direct killings caused by left over weaponry.

scattering the flies that feed on the blood of the last patient.⁹⁴

Some of the killings and injuries described above will have occurred in ways that violated humanitarian law. Opening fire on Iraqi civilian vehicles at checkpoints in certain circumstances or dropping cluster bombs in civilian neighborhoods provide examples. However, many of the killings and injuries likely occurred within the parameters of IHL, a thought which should give the international human rights lawyer pause.

U.S. military spokespersons, like those from other sophisticated military forces in the world, have become adept at using IHL. During the spring 2003 conflict, they referred continuously to attempts to minimize civilian casualties. Press reports claimed that civilian targets had been marked in red as no-fire areas (“NFAs”) on U.S. targeting maps.⁹⁵ There is no question that the situation could have been worse and IHL may deserve credit in part for this accomplishment. Yet, thousands of deaths and injuries, which came to have the imprimatur of IHL legality, still resulted. When one solely employs IHL and poses no questions of the armed conflict on broader human rights terms, what is left to say about the many people who may be harmed, but not be victims for the purposes of IHL? A human rights approach to armed conflict must face up to this reality.

3. The Broad Human Impact of the Attacks on Iraq

As horrible as it may have been, the direct effect of the attacks was but the beginning of the story.⁹⁶ The overall impact included the terror caused to the general population, particularly children, even by IHL lawful attacks. Article 51(2) of *Protocol I* prohibits targeting civilians and also says that “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are

⁹⁴ Paul McGeough, *Descent into a charnel-house hospital hell*, SIDNEY MORNING HERALD, Apr. 10, 2003, available at http://www.ccmep.org/2003_articles/Iraq/041003_descend_into_a_charnel.htm.

⁹⁵ Matthew Schofield et al., *supra* note 88.

⁹⁶ It must be acknowledged that while in the Gulf War of 1991, the U.S. and its allies deliberately targeted the infrastructure of Iraq, with devastating consequences for the population, they did not do so in the 2003 conflict. This was perhaps based on a mix of motives: lessons learned from the suffering after the earlier conflict, and the political reality that the U.S. and allies would be responsible for Iraq after this later “regime-change” oriented war. Compare and contrast the findings of NEEDLESS DEATHS IN THE GULF WAR, *supra* note 63, with the same organization’s later assessment of the 2003 war. HRW, OFF TARGET, *supra* note 75.

prohibited.”⁹⁷ Thus, IHL does prohibit attacks whose *purpose* is to terrorize. However, to the nerves of those on the ground, the intention of the attacker may matter little. Ordnance that falls from the sky is inherently terrifying. The Iraqi populace suffered the trauma of sustained aerial bombardment, an experience the specific rules of humanitarian law do not distill. A fourteen-year-old Iraqi girl kept a diary that gives some sense of this experience. She wrote:

War is torment. Mother is crying because of her fear for us. Mahmood woke up and is so afraid. Duha and Hibba [her sisters] are . . . hoping for the morning to come. . . . Now it is 6 a.m. and [neighbors] Um Saif and Um Noor come over to the house very afraid, and in tears. . . . The electricity was out, so we went to our mother’s friend Um Jala At 9:15 pm the bombing was intense, close to our home

The sound of bombing is getting stronger and stronger Then it turns quiet again . . . and we don’t know when Bush’s storm hits again. Fatima thinks that we are living and dying at the same time. . . .

[A]t 9, the bombing was louder; [we] were crying from the sound and the shaking of buildings, so we went in front of the house. [The Saif family] were crying in the street; we went inside, where [friend] Um Haidar fainted. I am writing and the house next to our building is shaking. It’s now 9:35 pm, and all the families in the house are terrified and crying for God to bring the morning. . . . I’ve never seen anything like this. I’m so afraid tears are running down my eyes, and I’m saying “Oh God, dear God.”⁹⁸

The U.S./U.K. attacks left behind an atmosphere of chaos and looting in which virtually no actor could ensure human rights. In early April, UNICEF Iraq declared, “We have an emergency on our hands now Our actions in the next few weeks will determine the physical and mental well-being of a generation of Iraqi children.”⁹⁹ Reuters recounted on April 23, 2003 that “[t]he Red Cross reports Iraqi hospitals lack supplies and staff. Rotting corpses, summer heat, lack of

⁹⁷ Protocol I, *supra* note 7.

⁹⁸ Scott Peterson, *Iraqi Teen Shares Her Diary of War*, CHRISTIAN SCI. MONITOR, May 2, 2003, available at <http://www.csmonitor.com/2003/0502/p08s01-woiq.html>.

⁹⁹ United Nations Children’s Fund, *UNICEF Warns of Worsening State of Iraqi Children*, Apr. 9, 2003, available at <http://electroniciraq.net/cgi-bin/artman/exec/view.cgi/10/603>.

electricity and water have also sparked fears of epidemic diseases.”¹⁰⁰ In May 2003, the BBC reported outbreaks of disease, primarily of typhoid and cholera, which were predicted by aid agencies. Thanks to the looting of hospitals, which unlike the Oil Ministry did not receive sufficient U.S. military protection,¹⁰¹ there were no resources to isolate infectious patients.

British aid agencies issued a joint statement on May 2, 2003, reporting that: “newly armed militia are forcing some people to flee their homes or offering ‘protection’ to hospitals.” The situation was “critical” in some sections of the country, “very serious and deteriorating” in others.¹⁰² The hospitals were “overwhelmed, diarrhoea is endemic and the death toll is mounting.”¹⁰³ The interruption of basic services like clean running water and electricity compounded all of these problems.¹⁰⁴ The Guardian summarized this statement as follows: “Iraqis were being forced to cope with deteriorating health and hygiene while overwhelmed hospitals were being targeted by armed militiamen exploiting the ‘yawning administrative vacuum’ that had been left since the war.”¹⁰⁵

This has been a survey of only some of the conflict-related issues that have had grave consequences for the human rights of the Iraqi people. Taken together all of this made life in Iraq miserable in new ways. As BBC television reported on May 7, 2003, “Everywhere you look, people are in more squalid conditions than before the war.”¹⁰⁶

¹⁰⁰ Reuters, Andrea Shalal-Esa, *Costs of Rebuilding Iraq Steep Despite Short War* (Apr. 23, 2002). See also Marc Santora & Lawrence Altman, *Experts Fear a Cholera Epidemic in Basra*, N.Y. TIMES, May 13, 2003, at A15.

¹⁰¹ David Rieff, *Blueprint for a Mess*, N.Y. TIMES, Nov. 2, 2003, § 6, at 28. Martin Sullivan, who chaired the President’s Advisory Committee on Cultural Property, resigned in April to protest the “failure of U.S. forces to prevent the wholesale looting of priceless treasures from Baghdad’s antiquities museum.” He stated, in the context of stolen Iraqi antiquities, “It didn’t have to happen . . . In a pre-emptive war that’s the kind of thing you should have planned for.” Niala Boodhoo, *Bush Cultural Advisers Quit Over Iraq Museum Theft* (Apr. 17, 2003), available at <http://www.commondreams.org/headlines03/0417-14.htm>.

¹⁰² *Joint Agency Statement on Iraq*, May 2003 (May 2, 2003), available at http://www.cafod.org.uk/archive/iraq/joint_state20030502.shtml (The aid agencies which signed the statement included Oxfam, Christian Aid, ActionAid, Save the Children UK, Islamic Relief, and Muslim Aid.).

¹⁰³ *Id.*

¹⁰⁴ Todd Richissin, *Iraq Humanitarian Crisis Verging on Catastrophe*, BALT. SUN, Apr. 9, 2003, available at <http://www.baltimoresun.com/news/nationworld/iraq/bal-te.aid09apr09,0,3142551.story?coll=bal-iraq-storyutil>.

¹⁰⁵ *Joint Agency Statement on Iraq*, *supra* note 102.

¹⁰⁶ BBC News Television Broadcast, May 7, 2003. It then should be no surprise that Iraq’s Health Ministry and cooperating UN agencies recently determined that “[a]cute

IHL is only able to capture slivers of this broad affront to a wide range of human rights.

4. The Aftereffects on Soldiers

Yet another problem which IHL does not address is “the effects of war on the people who wage it.”¹⁰⁷ In addition to causing profound harm to the soldiers themselves, the trauma of war has a domino effect on the rights of others with whom they come into contact, particularly women.¹⁰⁸ The results arguably include increased rates of, often severe, domestic violence and other violence against women, including murder, as well as violent crime in the community.¹⁰⁹ As a timely anecdotal example, the U.S. anti-death penalty NGO Equal Justice USA asked the following question after the 2003 war:

Is it just coincidence that two of the three men who have been executed under the current federal death penalty law are veterans of the first Gulf War? Each executed man’s family tells the same story, as does the family of the now infamous “Washington area sniper”: he who returned from the war was not the same man who left.¹¹⁰

In further support of this point, Vietnam veterans are “disproportionately represented in U.S. prisons and on death row in particular.”¹¹¹

What will happen to U.S. soldiers returning from the current

malnutrition among young children in Iraq has nearly doubled since the United States led an invasion of the country” *Child malnutrition soared in Iraq, agencies report*, WASH. POST, Nov. 21, 2004, available at <http://www.indystar.com/articles/6/196420-4126-P.html>.

¹⁰⁷ Jon Elliston and Catherine Lutz, *Hidden Casualties: An Epidemic of Domestic Violence When Troops Return from War*, 31.1 SOUTHERN EXPOSURE 2 (Spring 2003), available at <http://www.southernstudies.org/reports/Hidden%20Casualties-new.htm> (last visited Nov. 22, 2004).

¹⁰⁸ Sarah Edmonds, *Gulf War Studied as Slaying Factor*, NEWSDAY, Nov. 26, 2002, at A54.

¹⁰⁹ See, e.g., Elliston and Lutz, *supra* note 107; Pamela Hess, *Study links combat, domestic violence*, July 29, 2002, available at <http://www.upi.com/view.cfm?StoryID=20020729-063721-8294r>.

¹¹⁰ Jane Henderson and Shari Silberstein, *April 2003 Letter*, EQUAL JUSTICE USA, available at <http://www.quixote.org> (last visited Nov. 11, 2004).

¹¹¹ *Action Alert: George Page* (National Coalition to Abolish the Death Penalty), Feb. 27, 2004. See also RICHARD KULKA ET AL., *TRAUMA AND THE VIETNAM WAR GENERATION: REPORT OF FINDINGS FROM THE NATIONAL VIETNAM VETERANS READJUSTMENT STUDY* (1990).

cauldron of Iraq?¹¹² Soldiers must cope with deep and ever-present psychological and physical scars. An initial study already suggests a higher than usual suicide rate among soldiers serving in Iraq.¹¹³ At least 8,956 soldiers have been wounded in Iraq from the start of the war through November 2004.¹¹⁴ The long-lasting effects of many of these injuries speak for themselves.¹¹⁵ A recovering young soldier quoted in the New York Times Magazine answered a passerby's "Howyadoin?" with, "Buddy . . . I'm going to hurt the rest of my life."¹¹⁶ Will international law and international human rights lawyers have anything to say about this? An IHL framework contains no vocabulary for this set of concerns.

5. Militarism and Human Rights

The broader human rights concerns raised by the continued

¹¹² The analogous impact on Iraqi combatants and those with whom they come into contact is, of course, also a concern. Currently, documentation on this issue is much less readily available.

¹¹³ Dr. William Winkenwerder, Assistant Secretary of Defense for Health Affairs, reported that the military itself had documented some twenty-one suicides among U.S. soldiers in Iraq during 2003 alone. See Matt Kelley, *Army's Suicide Rate in Iraq Said Higher*, ASSOCIATED PRESS, Jan. 14, 2004, available at <http://www.notinourname.net/troops/suicide-14jan04.htm>.

¹¹⁴ CNN, *supra* note 81. Sara Corbett, in February 2004, also relays that the Army Surgeon General's office had listed an additional 5,184 U.S. soldiers evacuated from the Iraq theater "for other medical reasons." As of mid-February 2004, at least 560 were "qualified as psychiatric casualties," and one can assume that many of these are direct results of the stresses of war. Sara Corbett, *The Permanent Scars of Iraq*, N.Y. TIMES (Magazine), Feb. 15, 2004, at 37.

¹¹⁵ Many of the returnees say they cannot sleep, suffer nightmares and are easily prone to anger; some suffer already from post-traumatic stress syndrome, which may plague them for the rest of their lives. Family relationships have been deeply impacted. *Id.* There are also real concerns about their economic, social and cultural rights. See ABC News, Brian Ross, David Scott & Maddy Sauer, *Injured Iraq Vets Come Home to Poverty* (Oct. 14, 2004), available at <http://abcnews.go.com/Primetime/IraqCoverage/story?id=163109&page=1>.

¹¹⁶ Corbett, *supra* note 114, at 37 (The author explains this answer with her account of the twenty-nine year-old soldier's (Shrode's) injuries and those of his twenty-two year-old buddy Bricklin:

Shrode lost most of his right arm, which was amputated just below the elbow in a Baghdad field hospital. Even healed, his face is pitted with purple shrapnel scars the size of raindrops. Bricklin . . . bears larger, raw-looking scars from his thigh to his neck. Both men have significant hearing loss They are plagued by headaches and are convinced they've had some memory loss. Between them, they've had nine operations)

militarization of global and domestic economies, exemplified by the Iraq war, constitute the overriding issue which IHL cannot touch. The Iraq conflict cost \$62 billion during the initial phase.¹¹⁷ A total of \$126.1 billion has been allocated by the U.S. to the Iraq war with an additional cost of \$25 billion predicted by the end of 2004.¹¹⁸

This deployment of resources arguably involved a shift of funds from meeting human needs. Some might rebut that these funds would not have been spent for human needs anyway such that no direct correlation can be shown. However, many aid groups and international organizations have been making this link at the global level, decrying the shifts in resources, priorities and attention.¹¹⁹ Peace groups in Britain and the U.S. have speculated about how much revenue was diverted from which regions of their respective nations to cover the costs of the Iraq war.¹²⁰

In fall 2003, the World Bank estimated that it would cost \$55 billion to rebuild Iraq.¹²¹ McKinsey, the U.S. consulting firm, has suggested closer to \$90 billion would be required.¹²² Taken together, this has led the Institute for International Finance to conclude that “reconstruction is likely to be a slow process, ensuring that Iraq

¹¹⁷ See Institute for Policy Studies, *Paying the Price: The Mounting Costs of the Iraq War*, available at www.ips-dc.org/iraq/costsofwar (last visited Nov. 22, 2004). Lawrence McQuillan, *Short Conflict, Less Ammo Kept War Cost Down*, available at http://www.usatoday.com/news/world/iraq/2003-06-12-war-costs_x.htm (last visited Nov. 11, 2004).

¹¹⁸ Institute for Policy Studies, *supra* note 117.

¹¹⁹ See, e.g., BBC News, *Iraq ‘Overshadowing’ World Poverty* (Apr. 27, 2003), available at http://news.bbc.co.uk/2/hi/uk_news/2979245.stm (detailing report by Save the Children); Press Release, Britons want war on poverty, not on Iraq, Oxfam Great Britain, June 8, 2004, available at http://www.oxfam.org.uk/press/releases/007_080604.htm; Reuters, *Spend Money on Aid, Not Wars, World Bank Head Says* (Apr. 26, 2004), at <http://in.news.yahoo.com/040426/137/2crfv.html> (quoting World Bank President James Wolfensohn: “Around \$900 billion a year is thrown into defense spending compared to only \$60 billion for foreign aid.”).

¹²⁰ See, e.g., <http://www.costofwar.com> (last visited Nov. 11, 2004). In its study, the Institute for Policy Studies noted that the monetary cost of the Iraq war could have paid for the needed housing vouchers in the U.S. (\$23 million), health care for uninsured Americans (\$27 million), needed salaries for U.S. elementary school teachers (\$3 million), necessary new fire engines (\$678,200) and Head Start (\$20 million). Internationally, it also could have paid for food for half the hungry people in the world, comprehensive global AIDS treatment and prevention programs, clean water and sanitation and childhood immunizations for all children in the developing world, all over a period of two years. The cost of the war is \$3,415 per U.S. household so far. *Paying the Price*, *supra* note 117.

¹²¹ BBC News, *Rebuilding Iraq ‘will cost \$55 bn’* (Oct. 3, 2003), available at <http://news.bbc.co.uk/1/hi/business/3160800.stm>.

¹²² *Id.*

remains a poor country for years to come.”¹²³

The long-term impact of the recent conflict on economic, social and cultural rights on both sides of the ocean is unmistakable.¹²⁴ This compounds the harm to civil and political rights caused by the war, as sketched above. The stark dilemma which human rights lawyers face is how much of this human misery they want to be able to address. An IHL-driven framework excludes serious consideration of most of the issues discussed in this section. A new approach must be found which could reflect those concerns.

IV. INTERNATIONAL HUMAN RIGHTS LAW AND THE INVASION OF IRAQ (2003)

A. Introduction

Is this grim picture of human suffering beyond the scope of IHL simply a litany of tragedies or does it indicate that the U.S./U.K. invasion force violated the human rights of the Iraqi people? The answer to that question depends on one's assessment of international human rights law. This article holds that, undoubtedly, human rights law speaks about and to armed conflict.¹²⁵ Its jurisdictional limitations can be met even in international conflicts between non-contiguous states, such as that in Iraq in 2003. Many of its substantive provisions are highly relevant to conflict-related issues and should be used to assess conduct therein. Furthermore, the jurisprudence of the U.N. human rights treaty bodies provides support for all of these propositions. Finally, the implications of the *lex specialis* rule in this context must be rethought, and do not inherently preclude application of human rights law in armed conflict situations. The following section will sketch the contours of a possible human rights approach to conflict. It will primarily demonstrate how the commonly assumed obstacles to applying human rights in conflict are surmountable.

B. Human Rights and IHL Redux

The relationship between IHL and international human rights law

¹²³ *Id.*

¹²⁴ In the case of Iraq, the impact of the 2003 war compounds the earlier effects of dictatorship, sanctions and prior conflicts. See Bennoune, *supra* note 4.

¹²⁵ Admittedly such application does raise some difficulties. See, e.g., discussion in Weissbrodt & Andrus, *supra* note 91, at 59 (1988).

is a complicated one. Their relative propinquity is greatly debated.¹²⁶ The two bodies of law have different goals, different philosophies and different, though overlapping, spheres of application.¹²⁷ While IHL's aim is described as "preserv[ing] humanity in the face of the reality of war," human rights law aims at the higher goal of effecting *systems* of repression and denial.¹²⁸ Unquestionably, human rights law offers a more ambitious set of provisions. These alternate approaches produce different results and fundamentally different views of conflict. An IHL approach to the Iraq conflict would simply catalogue and criticize some choices made about how to conduct the war. A developed human rights approach has the potential to reach more broadly, to evaluate the fuller set of consequences, and possibly even the choice of engaging in the conflict in the first place.

Not enough thinking has been done about how to apply human rights law in conflict. The reversion to IHL has become an automatic reflex in the human rights community. This is partly due to the IHL's operational nature. Extant human rights law cannot answer all these questions. Increasingly, rather than develop the necessary thinking and jurisprudence to develop solutions, scholars and advocates instantly abdicate human rights law in favor of IHL. While IHL offers some practical tools to deal with the "trees" of a particular conflict, the broader forest may be lost with such a narrow approach. Furthermore, human rights law offers the practical advantage of a wide range of existing international supervisory mechanisms.¹²⁹ Here follows a review of human rights standards that could be invoked to address the broader impact of conflict.

¹²⁶ See *supra* text accompanying notes 26-41. See also, e.g., Doswald-Beck & Vité, *supra* note 26.

¹²⁷ Rachel Brett advocates for the use of IHL by NGOs to confront abuses by non-state actors in armed conflict, but recognizes reason for discomfort with such an approach. "Its [IHL's] concepts, language and approach are different from those of human rights." Brett, *supra* note 23, at 536. As she also notes, "For human rights NGOs, there have been questions about how to interpret the law and whether there is a danger of lowering standards by applying international humanitarian law rather than human rights law." *Id.* at 532. Brett is the associate representative for human rights at the Quakers United Nations Office.

¹²⁸ FACT SHEET NO. 13, *supra* note 12, at 17.

¹²⁹ Zegveld, *supra* note 24, at 51-52.

C. *Relevant Human Rights Standards and Their Realms of Application*

1. Overview

The primary instruments making up the International Bill of Human Rights: the UDHR, the ICCPR, and the ICESCR, are potential building blocks for a new human rights approach to armed conflict.¹³⁰ Each instrument offers opportunities and obstacles for a new approach.

Jurisdiction, both in relation to location and substance, represents a particular obstacle that must be explored in relation to each of the documents discussed. The difficulty in international armed conflict like in Iraq 2003 is that human rights obligations are often thought only to bind states to those within the territory formally under their jurisdiction. As discussed below, this has been expanded to a notion of effective jurisdiction.¹³¹ Under this approach, such responsibility atta-

¹³⁰ Many additional sources can be looked to for guidance in the future in constructing a human rights approach, but they cannot all be discussed in full here. These include other human rights treaties such as the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (adopted under G.A. Res. 34/180 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981)). General Recommendation No. 19 of the CEDAW committee makes clear this standard's relevance to violence against women, including in armed conflict. CEDAW Committee, *General Recommendation No. 19, Violence against Women*, U.N. GAOR, 11th Sess., U.N. Doc. A/47/38, at 1 (1993). Other treaties such as the *Convention on the Rights of the Child*, *supra* note 32, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature Feb. 4, 1985, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (adopted under G.A. Res. 39/46 (XXXIX), Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987)), are also important. "Soft law" standards can be used as building blocks of this argument as well, such as the *U.N. Code of Conduct for Law Enforcement Officials* (adopted under G.A. Res. 34/169, Annex, U.N. GAOR, 34th Sess., Supp. No. 46, at 186, U.N. Doc. A/34/46 (Dec. 17, 1979)), the *U.N. Declaration on the Elimination of Violence against Women* (adopted under G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/104 (Dec. 20, 1993)), and the aforementioned 1974 *U.N. Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, *supra* note 54, as well as the *U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (adopted by the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27 to Sept. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1, at 122), and the *U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions*, E.S.C. Res. 1989/65, Annex, 1989 U.N. ESCOR, Supp. No. 1, at 52, U.N. Doc. E/1989/89 (May 24, 1989).

¹³¹ See discussion *infra* text accompanying notes 151-165.

ched to the U.S. and U.K. in Iraq as these forces became the de facto power in Iraqi territory.

There is also an inherently transnational component to human rights law and standards that can ground a human rights argument about the impact of U.S./U.K. action and other, similar uses of force. This approach is rooted in the U.N. Charter itself, the first document in the modern international system that enshrined *international* protection of human rights. One of the stated purposes of the U.N. was “to achieve *international* cooperation in . . . encouraging respect for human rights . . . for all.”¹³² Read together, the charter’s Article 55 and 56, commit U.N. members to take “joint and separate action . . . for the achievement of . . . *universal* respect for human rights”¹³³ The intention of the initial Australian proposal for this text was to require all U.N. members to take action “on both national and international levels, for the purpose of securing for all peoples, including their own, such goals”¹³⁴

Furthermore, while the traditional notion of sovereignty classically came into play when scrutinizing the internal behavior of a state, such a roadblock is not present when looking at what a state does outside its own borders.¹³⁵ Hence, arguably, there should be less, rather than more, resistance to applying internationally agreed norms to judge such behavior.

2. The Universal Declaration of Human Rights

The UDHR serves as the touchstone in the human rights field.¹³⁶ Adopted as a resolution by the General Assembly, it was originally conceived as a non-binding standard. However, it has come to be seen by some as a statement of customary international law.¹³⁷

¹³² U.N. CHARTER, art.1 (emphasis added).

¹³³ U.N. CHARTER, arts. 55-56 (emphasis added). One needs to be careful not to overstate the obligation created by Articles 55 and 56. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, SECOND EDITION, Vol. II, 942-4 (Bruno Simma ed., 2d ed. 2002).

¹³⁴ *Id.* at 942.

¹³⁵ One should not exaggerate this point. Human rights law came to be seen as a kind of exception to aspects of sovereignty, with international concern about how a state treats its population considered legitimate. See Bennoune, *supra* note 4, at 245-250.

¹³⁶ For a thorough review of the drafting history of this document, see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

¹³⁷ Hurst Hannum, *The Status of the Universal Declaration of Human Rights*, 25 GA. J. INT’L & COMP L. 287 (1995).

The confusion as to its exact legal status remains a challenge to using the UDHR as a source. As the U.S. was a key architect of the UDHR this should enhance the document's authority here. Still, the official U.S. position at the time of drafting, was that the declaration was a wish list, rather than a piece of law.¹³⁸ However, to the extent that the Declaration has crystallized into customary international law, it is binding on all nations. This approach has even been taken by some U.S. courts.¹³⁹ At the very least, as a General Assembly resolution it represents an early statement of an international consensus.¹⁴⁰ As such, the UDHR should be the philosophical root of a human rights approach to armed conflict.

The declaration has an expansive, and transnational sense of mission, beyond ordinary jurisdictional limitations. It is

a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive . . . by progressive measures, national *and international*, to secure their *universal* and effective recognition and observance, *both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction*.¹⁴¹

Article 28 of the declaration makes clear that "Everyone is entitled to a social and *international order* in which the rights and freedoms set forth in this Declaration can be fully realized."¹⁴² Although geared toward the national level, human rights are not contained within borders, but reach out across them. Interestingly, in light of the then-ongoing struggle over decolonization, Article 2 insists that, in implementing the UDHR, "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."¹⁴³

¹³⁸ Eleanor Roosevelt, Making Human Rights Come Alive, Speech to the Second National Conference on UNESCO (1949), available at <http://www.udhr.org/history/114.htm> (last visited Nov. 11, 2004) (stating that the Declaration included "aspirations").

¹³⁹ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980). This case notes approvingly that "several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law." *Id.* at 883.

¹⁴⁰ See Glendon, *supra* note 136, at 237.

¹⁴¹ UDHR, *supra* note 19, pmbl. (emphasis added).

¹⁴² *Id.* at art. 28.

¹⁴³ *Id.* at art. 2, para. 2.

It should not be forgotten that the UDHR, just like the 1949 Geneva Conventions, was born out of the ashes of World War II. It was inspired by revulsion to that conflict's horrors, many of which took place across national boundaries and in the context of an international war. For this reason, it would be absurd to apply strict substantive and territorial limitations that would undercut the standard's meaning. In fact, the Declaration conceives of an inherent link between the promotion of peace and human rights.¹⁴⁴ As noted in its preamble: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . ."¹⁴⁵ Because there is nothing in the text which allows for derogation or suspension in emergency, it is a framework that remains relevant in time of war.

Substantive provisions which U.S./U.K. action in Iraq could be argued to contravene include: Articles 2 (implementation, non-discrimination including on basis of status of territory), 3 (life, security of person), 5 (freedom from torture and cruel, inhuman or degrading treatment or punishment), 12 (freedom from interference with, *inter alia*, family and home), 16(3) (special protection of families), 17 (protection from arbitrary deprivation of property), 23 (right to work), 25(2) (special assistance to children), 26 (right to education), and 27 (right to cultural life).

In practical terms this assessment is grounded in the reality of the war. Thousands were killed in conflict and stripped of any meaningful right to life.¹⁴⁶ Thousands of others were gravely wounded, losing any or all security of the person. The occupation that followed was incapable of protecting the population from abuses by other actors, such as kidnapping, violent crime, and trafficking in women.¹⁴⁷ The destruction of civilian homes in the relentless bombardment claimed property in an arbitrary fashion and represented the ultimate interference with family and home.¹⁴⁸ Taken together the war's impact

¹⁴⁴ However, it may be read to implicitly reserve the possibility of resort to armed force. The preamble notes as a basis for the UDHR: "it is essential, if man is not to be compelled to *have recourse, as a last resort, to rebellion against tyranny and oppression*, that human rights should be protected by the rule of law . . ." (Emphasis added). *Id.* at pmb1.

¹⁴⁵ *Id.*

¹⁴⁶ The factual support for these assertions is available *supra* text accompanying notes 77-90.

¹⁴⁷ See, e.g., HUMAN RIGHTS WATCH, CLIMATE OF FEAR: SEXUAL VIOLENCE AND ABDUCTION OF WOMEN AND GIRLS IN BAGHDAD (July 2003), available at <http://hrw.org/reports/2003/iraq0703/> (last visited Nov. 11, 2004).

¹⁴⁸ For examples of families hurt in such a manner, see Michael Howard, *From Out*

affronted many of the UDHR's basic provisions.

3. Treaty Law and Armed Conflict

As the two foundational human rights treaties, the ICCPR and the ICESCR should play a central role in a human rights approach to conflict. The U.S. and the U.K., the major parties involved in the invasion of Iraq, have both ratified the ICCPR. Additionally, the U.K. has ratified the ICESCR. The U.S. has signed the latter treaty so, although it is not bound to fully implement the ICESCR, it must not act to defeat its object and purpose.¹⁴⁹

a. *The International Covenant on Civil and Political Rights*

i. Jurisdictional Matters

To apply the ICCPR to an international armed conflict, one must overcome the jurisdictional hurdle found in its Article 2(1):

Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant*, without distinction of any kind. . . .¹⁵⁰

Manfred Nowak, in his authoritative commentary on the ICCPR, addresses this highlighted language. He notes that “[a]n excessively literal reading would . . . lead to often absurd results.”¹⁵¹ In his view, the purpose for including the clause “within its territory” (based on a U.S. drafting proposal) was to preclude a state’s responsibility for rights violations against its own nationals by foreign sovereigns or other parties. However, according to Nowak, “[w]hen States Parties . . . take actions on foreign territory that violate the right of persons subject to its sovereign authority, it would be contrary to the purpose of the Covenant if they could not be held responsible.”¹⁵² Nowak cites

of the Rubble, THE GUARDIAN, July 31, 2004, available at <http://www.guardian.co.uk/international/story/0,,1273150,00.html>.

¹⁴⁹ VCLT, *supra* note 22 at art. 18. The United States has not ratified the Vienna Convention on the Law of Treaties, but accepts that it is “authoritative.” S. EXEC. DOC. L, at 1, 92d Cong., 1st Sess. (1971).

¹⁵⁰ ICCPR, *supra* note 57, at art. 2(1).

¹⁵¹ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 41 (1993).

¹⁵² *Id.* at 42. According to the VCLT, treaties are to be interpreted in line with the

the jurisprudence of the HRC¹⁵³ to support his view. He notes that in the *Lopez Burgos* case, the HRC agreed to hear communications from individuals who had been kidnapped by Uruguayan agents while in neighboring countries, “reasoning that States Parties are responsible for the actions of their agents on foreign territory.”¹⁵⁴

Furthermore, in the *Celiberti* case, the Committee noted that the language of Article 2(1) “does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.”¹⁵⁵ This case also concerned the abduction of Uruguayan nation-als from abroad by Uruguayan agents. The HRC held the Uruguayan state responsible under the ICCPR. Strikingly, the Committee noted that “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”¹⁵⁶

Although this argument may be tougher to make with regard to non-citizen victims, such as Iraqis killed or injured by the U.S. or U.K., it is not precluded. For example, the HRC regularly criticizes Israel’s violation of the Covenant against non-nationals in the Occupied Territories of the West Bank and Gaza.¹⁵⁷ It has also expressed concern about Syrian abductions of Lebanese nationals in Lebanon¹⁵⁸ and

ordinary meaning of their terms, in context, but also “in light of (their) object and purpose.” VCLT, *supra* note 22, at art. 31(1).

¹⁵³ The Human Rights Committee is the expert body created in the ICCPR to supervise its implementation. ICCPR, *supra* note 57, at art. 28.

¹⁵⁴ *Lopez v. Uruguay*, Uruguay Communication No. 52/1979 (CCPR/C/13/D/52/1979) (July 7, 1981), *cited in* NOWAK, *supra* note 151, at 43.

¹⁵⁵ *Celiberti v. Uruguay*, Uruguay Communication No. 56/1979 (CCPR/C/13/D/52/1979), at para. 10(3) (July 29, 1981). This reasoning was recently adopted by the International Court of Justice. *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, General List No. 131, I.C.J., paras. 108-110 (2004) [hereinafter *Legal Consequences of the Construction of a Wall*], *available at* <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited Nov. 11, 2004).

¹⁵⁶ *Celiberti*, *supra* note 155, at para. 10(3).

¹⁵⁷ *See, e.g., Concluding Observations of the Human Rights Committee: Israel*, U.N. GAOR, Hum. Rts. Comm., 63d Sess., at paras. 10, 13, 17, 18, 21-24, 31, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998) [hereinafter HRC, *Israel August 1998*].

¹⁵⁸ *Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, U.N. GAOR, Hum. Rts. Comm., 71st Sess., at para. 10, U.N. Doc. CCPR/CO/71/SYR/Add.1 (Apr. 24, 2001). It is to be noted however that these persons were allegedly “transferred to the Syrian Arab Republic.” *Id.*

Moroccan practices in the Western Sahara that are in contravention of the ICCPR.¹⁵⁹

With regard to Israel, the HRC has gone so far as to say that it “is deeply concerned that Israel continues to deny its responsibility to fully apply the Covenant in the Occupied Territories.”¹⁶⁰ This may reflect both the length of Israel’s presence in the territory and the effective control it possesses. Still, in the context of the war in the then-breaking-up Federal Republic of Yugoslavia in 1992, “The Committee . . . regretted the refusal of the Federal Government to acknowledge its responsibility for such acts [abuses in Croatia and Bosnia and Herzegovina] on the grounds that they were committed outside its territory.”¹⁶¹

Of course, one must moderate the support gleaned from these views in the instant situation of Iraq 2003. The status of the territory is not in dispute in the same way, nor are the states involved contiguous or arguably part of the same polity, as in the above examples. Still, taken together, its jurisprudence shows that the HRC considers the ICCPR relevant to a government’s human rights responsibilities in situations of de facto military control outside of national borders, during military occupation, and even in international armed conflict.

Most recently, the HRC has developed an “effective control” test, an approach mirrored by the Committee on Economic, Social and Cultural Rights (CESCR), which would encompass the occupation of Iraq.¹⁶² The “effective control” test has been written into the HRC’s official interpretation of Article 2, the Covenant’s most important provision, by the new General Comment on this article.¹⁶³ Here the Committee has opined that a “State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”¹⁶⁴ Most importantly, this text goes on to specify that,

¹⁵⁹ *Concluding Observations of the Human Rights Committee: Morocco*, U.N. GAOR, Hum. Rts. Comm., 67th Sess., at para. 9, U.N. Doc. CCPR/C/79/Add.113 (Nov. 1, 1999).

¹⁶⁰ HRC, *Israel August 1998*, *supra* note 157, at para. 10.

¹⁶¹ *Concluding Observations of the Human Rights Committee: Yugoslavia*, U.N. GAOR, Hum. Rts. Comm., 46th Sess., at para. 7, U.N. Doc., CCPR/C/79/Add. 16 (Dec. 28, 1992).

¹⁶² *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. GAOR, Hum. Rts. Comm., 80th Sess., General Comment No. 31, at para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

this principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peace-keeping or peace-enforcement operation.¹⁶⁵

The most germane substantive provisions of the ICCPR to the 2003 U.S./U.K. military action in Iraq include: Articles 6 (right to be free from arbitrary deprivation of life), 7 (right to be free from torture and other cruel, inhuman or degrading treatment or punishment), 9 (security of person), 10 (right to humane treatment when deprived of liberty), 17 (no unlawful interference with family or home), 21 (peaceful assembly), 23 (protection of family) and 24 (special provisions for children).

The war's sequelae detailed above concretely reveal the relevance of these provisions.¹⁶⁶ More than 1200 U.S. soldiers were arbitrarily deprived of their lives in an illegal conflict into which they had been sent by their own government, with thousands of others wounded.¹⁶⁷ Returning combatants may yet pose a threat to the lives and security of others, implicating the government's Article 2 duty to "ensure" these rights at home.¹⁶⁸ Iraqi families suffered grave losses and saw their social security support collapse.¹⁶⁹ Children were terrorized by the invasion, and were killed and injured, without adequate health services or rehabilitation facilities available to assist them.¹⁷⁰ There can be no interpretation but that, taken together, this gave rise to widespread denials of a myriad of ICCPR provisions.

ii. The Derogation Problem

Once the jurisdictional hurdle is leapt, and relevant substantive articles are invoked, the derogation problem must still be addressed.

¹⁶⁵ *Id.*

¹⁶⁶ *See supra* text accompanying notes 73-124.

¹⁶⁷ *See supra* text accompanying notes 81-84. For further discussion about the difficulties surrounding the meaning of the right to life in this context, see *infra* text accompanying notes 181-195.

¹⁶⁸ *See supra* text accompanying notes 108-111.

¹⁶⁹ *See supra* text accompanying notes 96-106 and 123. For more information on this topic, see also Save the Children-USA, *Iraq: Working to protect women and children in war and conflict in Iraq*, at http://www.savethechildren.org/one_world/iraq.asp (last visited Nov. 11, 2004)

¹⁷⁰ *See supra* notes 87, 106 and text accompanying note 99.

Article 4 of the ICCPR allows for the limited suspension of some rights in certain emergency situations that “threaten the life of the nation.”¹⁷¹ Rights may not be suspended in a discriminatory manner, nor in ways inconsistent with State Parties’ other obligations under international law. Any such suspensions must be formally recorded with the U.N. Secretary-General.

Other rights are listed as non-derogable, not capable of such limitation. These include the right to be free from arbitrary deprivations of life and to freedom from torture and cruel, inhuman or degrading treatment or punishment. Nowak notes of Article 4’s framework that:

the significance of this catalogue of non-derogable rights does not, however, lie in the listing of such rights but rather in the express recognition that certain essential rights of the human being and his or her dignity that are particularly endangered in emergency situations may not be restricted under any circumstances (including war or civil war).¹⁷²

Any rights either non-derogable, or not actually derogated from by states, remain in effect for State Parties regardless of the existence of a conflict. Significantly, neither the U.S. nor the U.K. registered any derogations related to the Iraq war.¹⁷³ This means that the application of the full range of ICCPR provisions was not so precluded.

The HRC has elaborated on the issue of derogation in two General Comments. In the first it specified that the threshold for derogation is high and that such measures may only be undertaken to the “extent strictly required by the situation.”¹⁷⁴ They must be both “exceptional and temporary.”¹⁷⁵ Particularly relevant to this discussion, the Committee opined that “in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made.”¹⁷⁶

¹⁷¹ ICCPR, *supra* note 57, at art. 4(1).

¹⁷² NOWAK, *supra* note 151, at 82.

¹⁷³ A U.K. derogation was filed immediately after September 11, 2001, however none was made related to the Iraq war. No U.S. derogation was filed about the war either. Derogations are listed on <http://www.bayefsky.com/docs.php/area/reservations/state/184/node/3/treaty/ccpr/opt/0> (last visited Nov. 11, 2004).

¹⁷⁴ *Derogation of Rights*, U.N. GAOR, Hum. Rts. Comm., General Comment No. 5, 13th Sess., art. 4, at para. 1, U.N. Doc. HRI/GEN/1/Rev.1/ (July 31, 1981), available at <http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/ecb5519dedd9b550c12563ed0046d1a1?OpenDocument>.

¹⁷⁵ *Id.* at para. 3.

¹⁷⁶ *Id.*

The second General Comment on the topic, issued in 2001, is explicit that “even during 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.”¹⁷⁷ Additionally, it enumerated a series of other Covenant rights, not explicitly listed in Article 4, as being not “subject to lawful derogation.”¹⁷⁸ These include the right to be treated with humanity while deprived of liberty, and the prohibitions against hostage-taking, abduction, unacknowledged detention, and forced displacement. Furthermore, derogation from derogable rights cannot be carried out so as to undermine non-derogable rights.¹⁷⁹

The International Court of Justice has also weighed in on derogation, particularly in the context of armed conflict. In dictum in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court argued that:

the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities.¹⁸⁰

As the right to life is perhaps the central human rights question at stake in any armed conflict, special attention must be given to its meaning in this context.

iii. The Right to Life

The right to life has been described as the central human right without which all the others are meaningless. It is indeed a non-derogable right rising to the level of a *jus cogens* norm, meaning that it will override most inconsistent treaty or customary norms.¹⁸¹ However, its human rights meaning in times of armed conflict is a

¹⁷⁷ *States of Emergency*, U.N. GAOR, Hum. Rts. Comm., 13th Sess., General Comment No. 29, art. 4, at para. 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31 2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/71eba4be3974b4f7c1256ae200517361?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361?Opendocument).

¹⁷⁸ *Id.* at para. 13.

¹⁷⁹ *Id.* at para. 15.

¹⁸⁰ Advisory Opinion, *The Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, at para. 25 (July 8). See also *infra* text accompanying note 187.

¹⁸¹ Jordan Paust, *The Right to Life in Human Rights Law and the Law of War*, 65 SASK. L. REV. 411 (2002).

matter of some controversy.¹⁸² This issue must be sorted out since, as Nowak argues in his commentary, “Armed conflicts continue to represent the greatest threat to human life.”¹⁸³

Scholars have noted that the right to life was not designed to be an absolute right. Very few human rights are. One expert has explained that, “the fact that a person is killed does not necessarily mean that the human right to life has been violated.”¹⁸⁴ Just as domestic criminal law allows killing in self-defense under certain exigent circumstances, some killing is allowed in international law, both under human rights law and IHL. Under the ICCPR, “[n]o one shall be *arbitrarily* deprived of his life.”¹⁸⁵ Much then turns on the international law meaning of the concept of “arbitrary.”

The ICJ, which helpfully noted that the ICCPR and its Article 6 apply even during an armed conflict, used circular logic to argue that:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*,¹⁸⁶ 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.¹⁸⁷

Does the right to life truly have no independent human rights meaning in armed conflict?¹⁸⁸ What are the consequences for human

¹⁸² For example, see the discussion of the *lex specialis* problem, *infra* text accompanying notes 264-275.

¹⁸³ NOWAK, *supra* note 151, at 108.

¹⁸⁴ Paust, *supra* note 181, at 414.

¹⁸⁵ ICCPR, *supra* note 57, at art. 6(1).

¹⁸⁶ The meaning of this term and related international law doctrine are discussed in detail, *infra* text accompanying notes 264-275.

¹⁸⁷ The Legality of the Threat or Use of Nuclear Weapons, *supra* note 180, at para. 25.

¹⁸⁸ David Weissbrodt and Beth Andrus suggest the following of the analogous provision guaranteeing the right to life in the American Declaration of the Rights and Duties of Man, a regional human rights instrument: “A literal reading of Article 1 would create an absolute right to life regardless of the circumstances. It seems difficult to imagine that the American Declaration forbids the taking of soldiers’ lives in combat. It seems equally implausible, however that the American Declaration sets no limits to the killing of innocent people during armed conflict.” Weissbrodt & Andrus, *supra* note 91, at 69. Hence, the current understanding of the meaning of the human

rights of accepting that “[f]orce applied in accordance with humanitarian law could not result in extralegal killing since it would not constitute an arbitrary deprivation of life?”¹⁸⁹ Are the victims of the Iraq conflict whose lives were lost or forever changed outside the parameters of IHL violations truly beyond all international legal concern?

Here follows but the beginning of a response to these questions that the human rights approach must further develop. Such an approach must recognize that determining whether or not a killing is arbitrary requires multiple steps. This comprises an assessment of whether the resort to force was itself legal as well as whether the kind of force used complied with IHL. Otherwise, IHL would serve to transform illegal action into legal action, as expected by its harshest critics. By making reference to states’ obligation to prevent wars in its first General Comment on the Right to Life, the HRC was making this link.¹⁹⁰

Such a calculation also should involve weighing the impact of the force used on the human rights of affected populations. Human rights and IHL are not the same. Human rights must have independent meaning in conflict. For, as Ruti Teitel has argued,

the attempted merger [of IHL and human rights discourses] poses a threat to the continued existence of an independent international human rights discourse. Indeed . . . the displacement of the established human rights vocabulary by that of the law of war goes to the very heart of the meaning of “human rights.”¹⁹¹

Vera Gowlland-Debbas has also explained that the meaning of arbitrary has to be judged in light of the treaty as a whole.¹⁹² This is a teleological approach to treaty interpretation. In this view, the Covenant is a living and evolving instrument. As the International Court of Justice opined in the *Aegean Sea Continental Shelf Case*, the interpretation of general legal terms is not static, but should “follow

right to life in armed conflict lies somewhere in between.

¹⁸⁹ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 22 (2004).

¹⁹⁰ NOWAK, *supra* note 151, at 108. See discussion *supra* text accompanying notes 83-84; see also discussion *infra* text accompanying notes 216, 241 and note 215.

¹⁹¹ Teitel, *supra* note 39, at 375.

¹⁹² Vera Gowlland-Debbas, *The Right to Life and Genocide: The Court and an International Public Policy*, INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 315-337 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

the evolution of the law and . . . correspond with the meaning attached to the expression by the law in force at any given time.”¹⁹³

The term “arbitrary” was originally intended in part to allow for some deprivations of life such as certain non-discriminatory uses of the death penalty after a fair trial and conviction for a heinous crime. However, the use of the death penalty itself has been subject to ever tightening limitations as human rights law evolves. In 2004, the Commission on Human Rights reiterated that, “abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.”¹⁹⁴ This is an example of positive evolution in the understanding of the human rights meaning of the right to life and a willingness to expand the notion of what is “arbitrary.” The Commission, notably, also called directly on all states to “abolish the death penalty completely.”¹⁹⁵ Indeed while certain killings in armed conflict may not be precluded in the current framework, there is no reason why many of them could not also be the object of a similar evolution in interpreting human rights law. A human rights approach to armed conflict can be a crucial part of this process.

b. The International Covenant on Economic, Social and Cultural Rights

The ICESCR constitutes the other primary treaty from the International Bill of Human Rights. This Covenant entirely omits the jurisdictional limitation found in Article 2 of the ICCPR. It is inherently international in conception though, like all human rights law, the obligations it creates focus on the compact between a government and its people. The CESCR, which monitors this Covenant’s implementation, addressed the issue when it explicated its Article 2(1). This section contains the basic responsibility of parties under the treaty to “take steps . . . [to] realiz[e]” the substantive rights guaranteed by this document. The CESCR explained that:

the undertaking given by all States parties is “to take steps, individually and through *international* assistance and cooperation” The Committee notes that the phrase “to the maximum of its available resources” was intended

¹⁹³ Aegean Sea Continental Shelf (Greece v. Turkey), 1978 I.C.J. 3, at 32-4, *cited in* Gowlland-Debbas, *supra* note 192.

¹⁹⁴ *Question of the Death Penalty*, Commission on Human Rights, C.H.R. Res. 2004/67, at pmb1., U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004).

¹⁹⁵ *Id.* at para. 5(a).

by the drafters of the Covenant to refer to both the resources existing within a State and *those available from the international community through international cooperation and assistance*.¹⁹⁶

Such international cooperation is emphasized in a number of the Covenant's articles.¹⁹⁷

In its statements, the CESCR has clarified that national boundaries do not limit state responsibility for implementation of specific rights. For example, State Parties must not simply respect their own citizens' right to food, but must also respect the same right of other countries' citizens.¹⁹⁸ To that end they must "have control over the impact of their policies within and outside their territory . . ."¹⁹⁹ Such an expansive notion is crucial to a human rights approach to armed conflict.

The CESCR has considered the application of the ICESCR, which makes no explicit reference to the possibility of derogation, in situations of armed conflict or military occupation. Hence, in reviewing a report from Israel the CESCR stressed that "even during armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law . . ."²⁰⁰ It also insisted that Israel's obligations under the Covenant extended to the Occupied Territories and deplored that government's refusal to report on the situation in those territories to the Committee.²⁰¹ In its view, echoing that of the HRC with regard to the ICCPR, the Covenant directly and fully applies wherever the State Party exercises "effective control."²⁰²

¹⁹⁶ *The Nature of States Parties Obligations*, U.N. CESCR, 5th Sess., General Comment No. 3, 83-87 (1990) (quoting ICESCR, *supra* note 58, at art. 2, para. 1).

¹⁹⁷ These include Articles 11 ("essential importance of international cooperation" to meet adequate standard of living), 15 (promoting international cooperation and contacts in the scientific and cultural fields), 22 (empowering ECOSOC to recommend "international measures . . . to contribute to the effective . . . implementation of the . . . Covenant") and 23 (examples of international measures). ICESCR, *supra* note 58.

¹⁹⁸ *Report on the Sixteenth and Seventeenth Session*, U.N. CESCR, 16th & 17th Sess., at ch. IV, para. 478, U.N. Doc. E/1998/22 (1997).

¹⁹⁹ *Id.*

²⁰⁰ *Report on the Twenty-fifth, Twenty-sixth and Twenty-seventh Sessions*, U.N. CESCR, 25th, 26th & 27th Sess., at para. 703 U.N. Doc. E/C.12/2001/17 (2001). Of course, it further pointed out that protection of such rights is "prescribed by international humanitarian law." *Id.*

²⁰¹ *Id.* at para. 702.

²⁰² *Concluding Observations of the Committee: Israel*, U.N. CESCR, 30th Sess., at

With regard to 2003 military action in Iraq, the most affected substantive articles of ICESCR include: Articles 2 (implementation), 6 (right to work), 7 (favorable work conditions), 9 (social security), 10 (protection of families, mothers and children), 11 (adequate standard of living including food, clothing and housing), 12 (highest attainable standard of physical and mental health), 13 (education) and 15 (right to take part in culture and science).²⁰³

For example, the current Iraqi Ministry of Labor and Social Affairs claims that the number of Iraqis living below the poverty level jumped from 143,000 in 1993 to some five million in 2004.²⁰⁴ Its study attributes this rise to “wars” and sanctions. This clearly implicates the right to an adequate standard of living.²⁰⁵ Mothers and children have been among those hardest hit, gainsaying their right to special protection.²⁰⁶ The right to work was undercut by the looting of factories and other institutions after the war, as well as their destruction during the hostilities, and the failure to rebuild those facilities.²⁰⁷ And there can be no question about the war’s impact on the right to health of those wounded.²⁰⁸

Finally, Common Article 1 of the ICCPR and the ICESCR bears quoting in full here as it is so pertinent:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-

para. 31, U.N. Doc. E/C.12/1/Add.90 (May 23, 2003).

²⁰³ As noted above, the United States has signed, but not ratified the ICESCR, leaving it with a lower level obligation not to defeat the Covenant’s object and purpose rather than of full implementation. *See supra* text accompanying note 149. Still, many economic, social and cultural rights are also included in the UDHR. *See supra* text accompanying notes 136-148.

²⁰⁴ Iraq Press, *Five Million Iraqis Are Below Poverty Line* (Feb. 28, 2004), available at <http://www.iraqpress.org/english.asp?fname=ipenglish/2004-02-28/00.htm>.

²⁰⁵ *See also supra* text accompanying notes 99-106 and 123.

²⁰⁶ IRAQ PRESS, *supra* note 204.

²⁰⁷ This reality is detailed in U.N. Office for the Coordination of Humanitarian Affairs, *Iraq: Unemployment hits hard in Basra* (Apr. 25, 2003), available at http://www.irinnews.org/report.asp?ReportID=33686&SelectRegion=Iraq_Crisis&SelectCountry=IRAQ.

²⁰⁸ Documentation on this point is available *supra* text accompanying notes 92-105.

operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.²⁰⁹

As a whole, by war's end, the population of Iraq was completely deprived of its right to self-determination by foreign domination, though of course many in Iraq had not enjoyed much in the way of determining their own affairs under the Ba'ath dictatorship. During the 2003 war, many Iraqis, both those who had survived the Saddam Hussein reign of terror intact and those who had already suffered from *its* cruelty, were deprived of the right to life and to bodily integrity. Others lost the right to be free from cruel, inhuman, or degrading treatment. Many more lost their rights to the highest possible standard of health, to work, to housing, and to food as a result of the war. Many families, which human rights law sanctifies as the fundamental unit of society, were devastated or torn asunder. The country was subjected to military occupation, in which its natural resources were placed under the control of foreign powers. Even the atrocious track record of Saddam Hussein's government should not have rendered the human rights of the Iraqi people a free fire zone for any international actor to decimate with impunity.²¹⁰

V. *JUS IN BELLO/JUS AD BELLUM*

As IHL developed, the *jus ad bellum*, the law which regulated when states might have recourse to force, became divorced from the *jus in bello*, the rules about how force, whatever the occasion, could be used. All parties to conflicts were required to respect IHL norms reg-

²⁰⁹ Common Article 1, ICCPR, *supra* note 57; ICESCR, *supra* note 58. Nowak has suggested that this article "is one of the most important improvements in international human rights protection." NOWAK, *supra* note 151, at 6.

²¹⁰ One of the post hoc justifications offered for the 2003 war has been the human rights situation of the Iraqi people under Ba'ath rule. Vernon Loeb, *Senators Grill Administration Over Iraq Costs*, WASH POST, July 30, 2003 at A11. Interestingly, Human Rights Watch has recently proclaimed that, in its view, the war did not constitute an example of "humanitarian intervention." Roth, *War in Iraq*, *supra* note 75, at 19.

ardless of the underlying legality of their resort to violence. In many ways, this was a positive development, particularly since most parties to most conflicts believe that their cause is just, and even legally sound.²¹¹ The committee to investigate NATO bombing of Yugoslavia, established by the prosecutor of the International Criminal Tribunal for the Former Yugoslavia, opined: “An argument that the ‘bad’ side had to comply with the law while the ‘good’ side could violate it at will would be most unlikely to reduce human suffering in conflict.”²¹²

Yet, when a war is patently illegal, neither a legal act of self-defense nor a use of force authorized by the Security Council, if the only mode of analyzing the conflict is humanitarian law, then the central illegality, which is the wellspring of all other violations, will be overlooked. The consequences of overlooking this illegality will be exacerbated where there is an imbalance of force or technological resources that favors the aggressor. This methodology reduces the international law approach to a cataloguing and attacking of symptoms, without any attempt to identify the disease itself, a strategy unlikely to succeed in either the medical or legal fields. Still, in this connection it is to be recognized that post-World War II courts refused to accept the argument that since Nazi Germany was carrying out an illegal aggressive war in the first place, all of the death and destruction purveyed by the German military was thereby rendered illegal as war crimes.²¹³

However, in a war not required by self-defense “leaving no choice of means, and no moment for deliberation,”²¹⁴ the choice to use force is perhaps the most important one of all. It is highly likely to involve concomitant violations of human rights; its consequences are most often infeasible. An IHL-based approach to armed conflict militates away from discussion of the underlying *jus ad bellum*. A human rights law approach need not do so.

In fact, early argumentation posited that the human rights meaning of “arbitrary” with regards to deprivation of life involved a calculus that included both *jus in bello* prohibitions and the rules governing the resort to force found in the U.N. Charter. The IHL/*jus*

²¹¹ For example, Christine Gray has wryly noted that in most inter-state wars, both sides claim to be acting in legitimate self-defense against the other. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 6 (2000).

²¹² *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, International Criminal Tribunal for the Former Yugoslavia (ICTY), 39 I.L.M. 1257, 1266 (2000).

²¹³ This has been mentioned by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia. *Id.*

²¹⁴ The Caroline, 2 Moore, DIGEST OF INT'L LAW 412 (1906).

in bello rules would still apply to all parties regardless of the “justice” of their underlying cause. But, for the purposes of human rights law a killing could only be lawful if the actual resort to force in question was also in accordance with the rules of the U.N. Charter.²¹⁵

As notable a figure as Bertie Ramcharan, former acting U.N. High Commissioner for Human Rights, has written that,

The duty to respect the right to life imposes upon governments a duty to settle their disputes by peaceful means, and only when acting in legitimate self-defense or in pursuance of enforcement measures under the Charter of the United Nations will deprivations of life during armed conflict be excusable under international law.²¹⁶

In this regard, he sees a powerful connection between the right to life and the right to peace.²¹⁷ Such an approach would have a profound effect on the legal analysis of all killings in the Iraq 2003 war.²¹⁸ All of this is lost if human rights advocates resort solely to IHL.

A. *War, the War System and Human Rights*

The Iraq war raises the broader question of how military spending undercuts human rights around the world by diverting economic resources. International NGO Global Action to Prevent War has described military budgets as amounting to all the world’s governments collectively spending over \$1 million per minute on the military, or a total of \$2 billion per day.²¹⁹ This shockingly large amount of money, if redirected appropriately, could make huge strides in human rights implementation possible. An IHL-bound framework focuses on operational matters and leaves human rights advocates with no vocabulary

²¹⁵ According to Nowak, the Human Rights Committee would “deem killings in the course of a war – insofar as the latter is not permissible under the UN Charter – to be a violation of the individual right to life.” NOWAK, *supra* note 151, at 108. However, he also contraindicates that some experts like Yoram Dinstein disagree. *Id.* at 108 n.28. A concern with this approach is that it can remove the motivation for complying with IHL once resort to force has occurred. This must be carefully considered. Still, the legal sanitizing of killings in unlawful wars must also be a grave concern. In any case, this rule is only helpful in regards to international armed conflict, but not in regards to the more commonly occurring internal conflicts.

²¹⁶ B.G. RAMCHARAN, *The Concept and Dimensions of the Right to Life*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 1-32 (1985).

²¹⁷ *Id.* at 10-13.

²¹⁸ *See supra* note 1 and accompanying text.

²¹⁹ Global Action to Prevent War, *Program Statement 10* (2003), available at http://www.globalactionpw.org/GATPW_v3.03.pdf.

to comment on the broader issue of such misguided priorities.

Military spending has a particularly significant impact in the area of economic, social and cultural rights. For example, \$625 billion was the projected cost of implementing Agenda 21, the sustainable development agenda developed at the Earth Summit in Rio de Janeiro in 1992. That same year, developed countries spent \$584 billion on their militaries.²²⁰ Military spending also directly correlates with global inequality. As one author has described it:

power is built on militarism. There is no clearer example of this than that of the five permanent members of the Security Council. The very nations charged with maintaining peace and security and upholding the values of the U.N. Charter maintain the world's biggest armies, account for the lion's share of world military expenditures, hold virtually all nuclear weapons, are the biggest arms merchants and dominate the world economy. They quite literally run the world. And they use the war culture to maintain their power.²²¹

It is unlikely then that human rights proponents can be neutral about the resort to armed conflict and still say they promote all the human rights in the Universal Declaration. War and the war system are human rights issues deserving human rights analysis.

VI. THE NGO APPROACH TO IHL

The major international human rights organizations started to refer to IHL with increasing frequency in the 1980s and 1990s when they began to enlarge their work on human rights in armed conflict.²²² The increased reference to IHL also resulted from the challenge of horrifying abuses by non-state actors, who are not directly bound by human rights law, but are directly implicated by humanitarian law.²²³

A. *Human Rights Watch*

Human Rights Watch's World Report for 2004 is focused entirely

²²⁰ *The Effect of Militarism on a Fragile Planet*, in *THE HUMAN RIGHT TO PEACE* 50 (Douglas Roche ed., 2003).

²²¹ *Id.* at 55-56.

²²² Rachel Brett notes that the first time Amnesty International used IHL in a report to judge a government's military campaign was in its 1996 report, Amnesty International, *Israel/Lebanon, Unlawful Killings During Operation "Grapes of Wrath"* (1996) (AI Index MDE 15/42/96). See Brett, *supra* note 23, at 532.

²²³ See discussion *supra* text accompanying notes 23-25.

on the subject of armed conflict.²²⁴ Given that it is a very recent, thorough discussion of armed conflict by one of the world's leading human rights NGOs, this report bears careful consideration. It is a stark reminder of the misery wrought by war. Yet, its approach to the international legal framework that applies in conflict is somewhat ambiguous. On the one hand, Executive Director Kenneth Roth affirms in his article on the war against terrorism that, in that context, what he terms "law enforcement rules," should be presumed to apply in non-battlefield situations. IHL/conflict rules should only be available as a last resort. In his piece on the war in Iraq, he underscores that any force carrying out a "humanitarian intervention" has to "respect international human rights and humanitarian law."²²⁵

However, in actually applying the law to the facts of the U.S./U.K. military action in Iraq in 2003, Roth and other authors focus largely on a solely IHL framework. This approach is further reflected in the organization's detailed study of the war, "Off Target."²²⁶ Notably, its 147 pages make no reference to human rights standards whatsoever. Roth's article on the 2003 Iraq war featured in *World Report 2004*, contains just one section, entitled "Compliance with Humanitarian Law," which specifically assesses the compliance of the war with human rights or IHL norms. As per its title, the only issues actually discussed are those under the rubric of IHL.²²⁷ Thus, the article necessarily omits all of the issues raised by the conflict enumerated above which are outside that framework. This led Roth to conclude, rather surprisingly, that "[t]he invasion of Iraq largely met this requirement [of compliance with international human rights and humanitarian law], but not entirely."²²⁸

A further piece about Iraq in the tome, by Joe Stork and Fred

²²⁴ HUMAN RIGHTS WATCH, *WORLD REPORT*, *supra* note 75.

²²⁵ Roth, *War in Iraq*, *supra* note 75, at 19.

²²⁶ HRW, *OFF TARGET*, *supra* note 75.

²²⁷ Roth, *War in Iraq*, *supra* note 75, at 30. This singular emphasis is reiterated in the article's conclusion when Roth notes that the war "was not conducted in a way that maximized compliance with international humanitarian law." He makes no explicit mention of its impact on human rights or any human rights law assessment of the conflict. *Id.* at 33.

²²⁸ *Id.* at 30. This was in the equivalent of dictum, the holding of the article being that Roth held that the U.S./U.K. war did not constitute a legitimate humanitarian intervention, as per the criteria used by Human Rights Watch. Its status as dictum may account in part for the incomplete accounting for the war's human rights impact. Roth praised efforts made by the "coalition" to avoid harm to civilians when carrying out attacks on certain targets. The violations he listed included targeting "that bordered on indiscriminate" in regards to the bombing of "leadership targets" and the use of cluster munitions in populated zones, but little else. *Id.*

Abrahams, entitled "Sidelined: Human Rights in Postwar Iraq," resuscitates the relevance of human rights norms.²²⁹ The authors criticize what they see as the ambivalence of United States and other occupying forces in Iraq "toward human rights and humanitarian law concerns."²³⁰ They also make a number of references in the article to post-war practices that have been in contravention of human rights norms, such as the use of combat forces for policing tasks.²³¹ While the calls for "Ensuring Human Rights Accountability"²³² during the occupation, and for the Iraqi transition to have a "human rights grounding,"²³³ are laudable, only IHL standards are cited by name. No mention is made of any specific human rights standards that apply.²³⁴ This is becoming a very common approach among human rights groups.

B. *Amnesty International*

Amnesty International's official position is that it takes no stand on the resort to force, but only on how force is actually used.²³⁵ Since the early 1990s, the organization has made increasing recourse to IHL to judge such conduct. However, Amnesty moved slightly beyond these strictures in 2003 when it warned governments that the use of armed force ought only to be a last resort in accordance with the U.N. Charter, and that human rights abuses were a likely product of any such resort.²³⁶

²²⁹ Joe Stork & Fred Abrahams, *Sidelined: Human Rights in Postwar Iraq*, in HUMAN RIGHTS WATCH, WORLD REPORT, *supra* note 75, at 93.

²³⁰ *Id.*

²³¹ *See id.* at 97, 116, 117 and 119.

²³² *Id.* at 116.

²³³ *Id.* at 119.

²³⁴ The article makes reference to the 1949 Geneva Conventions and the Hague Regulations of 1907 by name, but mentions not a single specific human rights norm. *Id.* at n.3 and text accompanying n.14. In light of the specificity of IHL rules, and the acceptance by the U.S. government that they do apply in this context, this makes some practical sense. However, it further proves the central point about the increasing reliance on IHL in these contexts by human rights organizations.

²³⁵ Amnesty International is in the process of revisiting this very issue which has been a perennial source of debate within the organization's vast membership.

²³⁶ *See, e.g.*, Amnesty International, *Iraq: Secretary-General asks UN Security Council to ensure that force is the last resort* (Sept. 24, 2002) (AI INDEX 14/010/2002); Amnesty International, Irene Khan, Secretary-General of Amnesty International, *Human Rights in the Balance* (AI INDEX: MDE 14/011/2002); Amnesty International, *USA/Iraq: Not in the Name of Human Rights* (AI INDEX: MDE 14/009/2002); and BBC News, *Amnesty Lashes Out at UN* (Feb. 11, 2003), available at <http://news.bbc.co.uk/1/hi/world/europe/>

Still, its actual assessment of the conflict was based, almost entirely, on IHL. Its report, "Iraq: Responsibilities of the Occupying Powers," recognizes that the U.S. and U.K. must "respect their own international human rights obligations" when administering Iraq. But the report almost exclusively makes specific reference to the provisions of IHL.²³⁷ Interestingly, the organization did note a broader human rights threat posed by the war in other countries.²³⁸ The advent of war was used as a pretext, or cover, by other nations for arbitrary detentions, harassment of anti-war protesters and excessive uses of force, and even restriction of asylum rights.

Human rights organizations face an emerging paradox. They repeatedly affirm, that "[a]lmost without exception, the world's worst human rights and humanitarian crises take place in combat zones."²³⁹ Yet, the increasingly exclusive use of IHL, in addition to limiting the scope of concerns which can be raised, also relegates them to adopting a neutral stance vis-à-vis the resort to force itself. NGOs argue that neutrality about the choice to use force enhances the effectiveness of advocacy about abuses with the parties to the conflict, and this may be true.²⁴⁰ Yet, it also forces human rights groups not to confront the root cause – which they themselves have identified – of many of the worst atrocities they oppose. This contradiction must be faced and a human rights approach to conflict may be a useful tool in so doing. While IHL is decidedly neutral about the existence of armed conflict, human rights law, especially in light of the modern understanding of the human meaning of armed conflict, does not have to be. In the past, the HRC faced up to this problem when it indicated in its first General Comment on the Right to Life that,

States have the supreme duty to prevent wars . . . and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding to the right to life.²⁴¹

2750309.stm.

²³⁷ Amnesty International, *Iraq: Responsibilities of the occupying powers*, at 5 (AI INDEX: MDE/14/089/2003).

²³⁸ Amnesty International, *Iraq: In the Shadow of War: Backlash against Human Rights* (AI INDEX: MDE 14/057/2003).

²³⁹ HUMAN RIGHTS WATCH, *WORLD REPORT*, *supra* note 75, at 1.

²⁴⁰ *See, e.g.,* Roth, *War in Iraq*, *supra* note 75, at 15.

²⁴¹ *The Right to Life, Article 6*, U.N. GAOR, Hum. Rts. Comm., 16th Sess., General Comment No. 6, at 6, U.N. Doc. HRI/GEN/1/Rev.1(1982), *available at*

VII. EXAMPLES OF A HUMAN RIGHTS APPROACH IN ACTION

Though the IHL-based analysis of armed conflict has come to dominate, in some recent instances, both international and national bodies have used human rights standards to judge behavior in armed conflicts. Such evidence proves that it is possible, despite the challenges faced.

The African Commission on Human and Peoples' Rights, in a 1995 decision about abuses during "the civil war between the security services and other groups" in Chad, used human rights law to judge the conduct of those hostilities.²⁴² It found violations of the right to life based on killings in that strife, as well as violations of the prohibition on torture, of the right to security of the person, the right to a fair trial, and even the right to freedom of expression.²⁴³ This was made possible in part because, unlike the ICCPR, the African Charter on Human and Peoples' Rights does not permit derogation. Thus, as the African Commission concluded, "even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter."²⁴⁴ While jurisdictional questions based on location are not raised by a civil war, there was no attempt to revert to IHL, whose standards are not mentioned at all in the terse decision. Human rights standards are directly and unapologetically applied to judge the conduct of an armed conflict.

An additional recent example can be found at the national level, in the Israeli Supreme Court decision of *Marab and others v. IDF Commander in the West Bank*.²⁴⁵ In that case, the Supreme Court, sitting as the High Court of Justice, considered the legality of special detention provisions used during a military operation. The provisions, *inter alia*, extended the length of time a person could be held without the right to be brought before a judge. The Court looked to human rights standards, including the ICCPR, side-by-side with humanitarian law, in order to anchor the "normative framework in which the legality of the arrangement should be examined."²⁴⁶ The opinion never questions whether human rights standards were applicable in this context

<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/84ab9690ccd81fc7c12563ed0046fae3?Opendocument> (last visited Nov. 11, 2004).

²⁴² Commission Nationale des Droits de l'Homme et des Libertés v. Chad, African Comm. Hum. & Peoples' Rights, Comm. No. 74/92 (1995).

²⁴³ *Id.* at para. 26.

²⁴⁴ *Id.* at para. 21.

²⁴⁵ *Marab and others v. IDF Commander in the West Bank*, Israeli Supreme Court Sitting as the High Court of Justice, HCJ 3239/02 (2002), 57 (2) P.D. 349 (2003).

²⁴⁶ *Id.* at para 43.

nor suggests the Court should defer to IHL.

In the context of the Iraqi Special Tribunal, created after the 2003 war to try senior members of the Ba'ath regime for war crimes, crimes against humanity, genocide and other grave offenses, U.N. officials have criticized the availability of the death penalty. This is despite the fact that, strictly speaking, as prisoners-of-war, under the Geneva Conventions, they could in fact be executed for such offenses, under certain circumstances. The then-Acting U.N. High Commissioner for Human Rights, Bertie Ramcharan, argued that the tribunal's statute "does not seem to take account of the significant development in international criminal law so as to ensure a legitimate process."²⁴⁷ He also spoke of "certain acts committed by some members of the Coalition forces that are at variance with international human rights norms," and cited the norms, including the ICCPR, alongside humanitarian law. The Special Rapporteur on Iraq, Andreas Mavrommatis, insisted that with regard to people detained by the occupying powers for security crimes or terrorist acts, "strict compliance with the . . . [ICCPR], and in particular with Article 14, is mandatory."²⁴⁸ He made a similar recommendation about those being tried for crimes against humanity and war crimes. He did not refer to the standards of the Geneva Conventions.²⁴⁹

VIII. CHALLENGES FACED BY A HUMAN RIGHTS APPROACH TO ARMED CONFLICT

The substitution of humanitarian law for a human rights law approach to conflict has happened for numerous reasons. The first is that human rights organizations, in the 1990s in particular, expanded their work beyond governmental violations. They began to cover the abuses committed by non-state actors, such as the Shining Path in Peru or Algeria's Armed Islamic Group. As some principles of humanitarian law (Common Article 3, Additional Protocol II) explicitly apply to some armed groups in some situations, IHL seemed to offer an advisable way to tackle abuses from both (or multiple) sides in any conflict. This also allowed human rights advocates to avoid the thorny

²⁴⁷ *The Present Situation of Human Rights in Iraq*, Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, U.N. GAOR, 59th Sess., Supp. No. 36 (A/59/36), at para. 124, U.N. Doc. E/CN.4/2005/4 (2004).

²⁴⁸ *Situation of Human Rights in Iraq*, Report submitted by the Special Rapporteur, Andreas Mavrommatis, U.N. ESCOR, Hum. Rts. Comm., 60th Sess., at para. 13, U.N. Doc. No. E/CN.4/2004/36 (2004).

²⁴⁹ *Id.* at para. 54(c).

issue of whether non-state armed groups could be considered bound by human rights law.²⁵⁰

Furthermore, since the provocative 2001 ruling, many international lawyers read the ECHR opinion in *Bankovic and Others v. Belgium and 16 Other Contracting States*²⁵¹ to make human rights law inapposite in time of war. A human rights approach must respond to such jurisprudence and impact similar cases in the future. Another reason for the burgeoning interest in IHL has been the renaissance which international criminal law has experienced in the last decade and the close relationship which it has to IHL. Except for in regards to torture and genocide, a close correlation between international human rights law and international criminal law has not yet been fully developed.²⁵²

A further explanation for the increased interest in IHL among human rights groups has been the increasingly technocratic and professional nature of some international human rights work. Becoming versed in the intricacies of IHL has allowed human rights advocates to talk like experts and to find a place at the table with military officials and government representatives, debating the choice of targets. This was a pragmatic endeavor which in many ways made sense. Still, too many important concessions can be made for a place at the table when the terms of the discussion held there have already been set.

Each of these issues mentioned above must be addressed satisfactorily by any viable human rights approach to armed conflict. However, in the present article, they can only be commented on briefly, focusing on those issues of particular relevance to the 2003 invasion of Iraq.

A. *Distinguishing Bankovic*

In 1999, the surviving relatives of victims of an April 1999 NATO bombing of the Radio-Television Serbia headquarters in Belgrade (and one survivor himself) sued the State Members of NATO which were also State Parties to the European Convention on Human Rights (European Convention). The complaint alleged violations of the rights

²⁵⁰ See *supra* text accompanying notes 23-25.

²⁵¹ *Bankovic and Others v. Belgium and 16 Other Contracting States*, Eur. Ct. H.R., App. No. 52207/99, 41 I.L.M. 517 (2001).

²⁵² For a thorough discussion of this problem (though one which predates the adoption of the Rome Statute of the International Criminal Court), and proposed solutions to it, see Stephen Ratner, *Why Only War Crimes? De-Linking Human Rights Offenses from Armed Conflict*, 3 HOFSTRA L. & POL'Y SYMP. 75 (1999).

to life, to freedom of expression, and to an effective remedy as set out in the European Convention.²⁵³ The applicants recognized that, in regards to the European Convention, jurisdiction was normally grounded on a territorial basis. However, they argued that this military action – “an attack on a target outside the territory of any member state” – fit within exceptions to this rule, and thus was within the jurisdiction of the Court.²⁵⁴ The exceptions, which applicants felt to be supported by past jurisprudence of the ECHR, included: 1) when otherwise lawful acts in the territory of a member state cause a violation elsewhere; 2) when states are responsible for abuses outside of their formal territory in places that they “effective[ly] control;”²⁵⁵ and 3) focusing on actual causation, as exemplified by *Issa v. Turkey*, when action is carried out by the forces of a state, regardless of jurisdiction. The applicants were careful, as expressed by one of their advocates, to deal with the floodgates issue. They tried to emphasize the particular nature of *Bankovic’s* fact pattern which was not a U.N. sanctioned peacekeeping operation, and involved targeting decisions made at the highest level of governments of member states.²⁵⁶ Ultimately, they requested that the Court “adopt a sliding scale of scrutiny, in which the degree of responsibility of a state for extraterritorial acts would depend on the degree of effective control or jurisdiction in fact exercised.”²⁵⁷ This approach made sense to the applicants from a policy perspective, as “where states have the power to reach beyond their borders and deny the most basic human right – the right to life – to others, they are obligated to act in a manner consistent with the Covenant.”²⁵⁸

Notwithstanding these arguments, the European Court decided it did not have jurisdiction and dismissed the case. The Court emphasized that its jurisdiction was territorial as a rule and rejected the contention that exceptional arguments applied in this instance. It did acknowledge that it had found jurisdiction, exceptionally, in the past where, “the respondent state through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence

²⁵³ *Bankovic v. Belgium*, *supra* note 251, at para. 28. The other defendant nations were the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom. *Id.* at 1.

²⁵⁴ Hurst Hannum, Remarks, *Bombing for Peace: Collateral Damage and Human Rights*, 96 AM. SOC’Y INT’L L. PROC. 95, 97-98 (2002).

²⁵⁵ *Id.* at 98.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

of the Government of that territory, exercised all or some of the public powers normally to be exercised by that Government.”²⁵⁹ It even reaffirmed its authority in such cases which it distinguished from *Bankovic*.

The advocates for the applicants denounced the holding as “disappointingly simplistic, distort[ing] the arguments put forward by the applicants, and fail[ing] to distinguish its own precedents persuasively.”²⁶⁰ They also suggested that the unfortunate timing of *Bankovic*, which was argued on October 24, 2001, just as the war against terrorism was beginning, may have been a factor.

Many cursory presentations of this case imply that it rules out the possibility of human rights norms applying to armed conflict. On the other hand, its holding is very specific. It rules that individuals not living in the territory of State Parties to the European Convention may not have access to the European Court to claim violations by parties under that Convention, by virtue solely of aerial bombardment. This is the case where those states did not have effective control of the territory being bombed. Furthermore, as Diane Amann has explained, the Court in *Bankovic* conceded that, “judicial review would be particularly appropriate when necessary to avoid stranding applicants in a ‘vacuum in human rights protection.’”²⁶¹ This is just the situation that pertains in armed conflict outside the boundaries of IHL concern, in the absence of a human rights approach.

The Court in *Bankovic* also emphasized the nature of the European Convention as a regional convention seeking to promote order in the Europe region alone. Serbia was beyond the frame of reference of the treaty. Thus, factoring in *Bankovic* to the treaty analysis above, one could still invoke those human rights treaties in the case of the 2003 war to which Iraq was also a party.²⁶² This includes the ICCPR and the ICESCR. Note that these are universal and not regional instruments, and that unlike in the Yugoslavia situation, the military action here went far beyond the scope of high range aerial bombardment.

Bankovic notwithstanding, human rights lawyers must construct a

²⁵⁹ Press Release, Eur. Ct. of H.R., *Bankovic v. Belgium* (Dec. 12, 2001), at <http://www.echr.coe.int/Eng/Press/2001/Dec/Bankovicadmissibilitydecisionepress.htm>.

²⁶⁰ Hannum, *supra* note 254, at 98.

²⁶¹ Diane Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 312 (2004) (citing *Bankovic v. Belgium*, *supra* note 251, at para. 80).

²⁶² For consideration of the relevance of *Bankovic* to Iraq, see Kerem Altiparmak, *Bankovic: an obstacle to the application of the European Convention on Human Rights in Iraq?*, 9 J. CONFLICT & SECURITY L. 213-251 (2004), available at <http://jcs.l.oupjournals.org/cgi/content/abstract/9/2/213>.

robust human rights law analysis of armed conflict. However, it will not be an easy task. Government officials seem to assume that “human rights law . . . does not necessarily apply” in wartime.²⁶³ Given the sort of territorial control seemingly required by *Bankovic* and the effective control test, aerial bombardment alone, without ground operations, will continue to pose particular challenges. In addition, humanitarian law has some more obviously operational rules which may be seen as particularly helpful in the armed conflict situation. Human rights law will have to be carefully thought through in such situations. This leads to consideration of the *lex specialis* problem.

1. *Lex Specialis*

The maxim *lex specialis derogat generalis* means broadly that a specific or special rule of international law is to take precedence over a general rule.²⁶⁴ This *lex specialis* rule is meant to help decide what norm ought to be applied in a particular situation. Grotius, a founding international law expert, in a passage quoted in a recent study for the ILC explained this rule by saying that “special provisions are ordinarily more effective than those that are general.”²⁶⁵

However, the *lex specialis* rule is not found in the Vienna Convention on the Law of Treaties. Also, as Vera Gowlland-Debbas points out, *lex specialis* in traditional practice was only used as a “discretionary aid in interpreting conflicting but potentially applicable treaty rules”²⁶⁶ Even the ILC study, which found the *lex specialis* rule to be held a general principle of law in the literature, observes that the role of such a principle in treaty interpretation should still be “limited.” It is “one factor among others in treaty interpretation.”²⁶⁷ Furthermore, the study underscores the challenge of determining when

²⁶³ Jane Dalton, Judge Advocate General, U.S. Navy, Constraints on the Waging of War: Jus in Bello and the Challenge of Modern Conflicts, 2004 Annual Meeting, held by the American Society of International Law (Apr. 4, 2003) (recording on file with the author).

²⁶⁴ For a thorough discussion of the meaning of *lex specialis*, though in the context of trade law rather than human rights, see JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 385-413 (2003).

²⁶⁵ Hugo Grotius, *De Jure Belli Ac Pacis*, LIBRI TRES, BOOK II SECT. XXIX, para 29, cited in MARTTI KOSKENNIEMI, INTERNATIONAL LAW COMMISSION, STUDY GROUP ON FRAGMENTATION (“The function and scope of the *lex specialis* rule and the question of self-contained regimes”), available at <http://www.un.org/law/ilc/sessions/55/55sess.htm> (last visited Nov. 22, 2004).

²⁶⁶ Vera Gowlland-Debbas, *supra* note 192, at 326.

²⁶⁷ KOSKENNIEMI, *supra* note 265, at 5.

a particular rule is general or special in relation to a particular situation and specific parties.²⁶⁸

In the context of armed conflict, the usual presumption is that IHL constitutes the *lex specialis* which should prevail over human rights law. However, in some areas, for example on detention standards, human rights law is more specific. How should this be handled? Human Rights Watch suggests that “during a non-international armed conflict, international humanitarian law as the *lex specialis* (specialized law) takes precedence, but does not replace, human rights law . . . where the law is absent, vague, or inapplicable, human rights law standards still apply.”²⁶⁹

On the other hand, Francisco Forrest Martin argues that derogation rules by their very terms allow the possibility for states to choose not to derogate, including in time of armed conflict. As such, the applicable rules of human rights law would continue to operate, constituting a kind of *lex specialis* which should be looked to when interpreting provisions of the Hague Convention and the Geneva Conventions.²⁷⁰ Gowlland-Debbas suggests another line of reasoning when she argues that “a view of the law of armed conflict as *leges specialis* totally pre-empting the *leges generalis* of the rest of international law, including human rights law, and which originated at a time when strict compartmentalization between conditions of peace and of war were possible, is no longer tenable today.”²⁷¹

The HRC, for its part, takes the view that, “the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant.”²⁷² The International Court of Justice faced the same issue in the recent case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Israel had argued against the HRC’s application of the Covenant to the Occupied Territories that “[T]he Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch

²⁶⁸ *Id.*

²⁶⁹ HUMAN RIGHTS WATCH, ENDURING FREEDOM: ABUSES BY U.S. FORCES IN AFGHANISTAN 48 (2004), available at <http://www.hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf>.

²⁷⁰ Francisco Forrest Martin, *Colloquy on the Law of Armed Conflict: The Unified Use of Force and Exclusionary Rules -Amplifications in Light of the Comments of Professors Green and Paust*, 65 SASK. L. REV. 451, 453 (2002).

²⁷¹ Gowlland-Debbas, *supra* note 192, at 325.

²⁷² *Concluding Observations of the Human Rights Committee: Israel*, U.N. GAOR, Hum. Rts. Comm., 78th Sess., at para. 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003). Specifically, the HRC was clarifying that application of the Fourth Geneva Convention in the West Bank and Gaza did not preclude the ICCPR’s force in these territories.

as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights”²⁷³ The Court responded that it “cannot accept Israel’s view,” and ratified the approach of the HRC.²⁷⁴ Subsequently, the Court used both IHL and human rights treaties, including the ICCPR and ICESCR, to judge Israel’s conduct in occupation and ongoing armed conflict.²⁷⁵

There is no question that much work lies ahead in operationalizing human rights standards in an armed conflict setting. Currently, that work is being neglected in favor of an IHL-dominated approach. Still, the ground has not been completely ceded. As the HRC recently opined in its General Comment on Article 2,

the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, 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, both spheres of law are complementary, not mutually exclusive.²⁷⁶

IX. CONCLUSION

Contrary to popular belief, human rights law does not simply evaporate in time of war. The very fact that some derogations are allowed from some rights in time of public emergencies that threaten the life of the nation serves as a reminder that, by default, human rights law obligations continue. The International Court of Justice said as much. The U.N. Secretary-General’s expert on children in armed conflict, Grac’a Machel, reminded the international community in her ground-breaking 1996 report that “[h]uman rights law establishes rights that every individual should enjoy at all times, during both peace and war.”²⁷⁷

There is no question that a human rights approach may initially be jarring, especially, but not exclusively, to the ears of government officials. It represents a challenge to what is becoming accepted wisdom even in the human rights community. Much work is needed to

²⁷³ Legal Consequences of the Construction of a Wall, *supra* note 155, at para. 112.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at paras. 123-137.

²⁷⁶ General Comment No. 31, *supra* note 162, at para. 11.

²⁷⁷ *Impact of Armed Conflict on Children*, Report of the Expert of the Secretary-General, Ms. Grac’a Machel, submitted pursuant to G.A. Res. 48/157, U.N. GAOR, 51st Sess., at para. 219, U.N. Doc. A/51/306 (1996).

face up to the admitted obstacles, but they are surmountable. Furthermore, such an approach is necessary. As the assessment of an IHL-based analysis of the Iraq war shows, continuing a solely humanitarian law approach to armed conflict may ultimately reduce human rights groups, lawyers and academics to merely commenting on the target lists of warring parties, a useful but not comprehensive task. Should not human rights norms offer more to the victims, including those in Iraq, of what the U.N. Charter labels “the scourge of war?”²⁷⁸

²⁷⁸ U.N. CHARTER, art. 1(1). Saving succeeding generations from this scourge is listed in the article as a central purpose of the United Nations, with the U.N. Secretary-General recently dubbing it “the cardinal mission of the United Nations.” *Report of the Secretary-General on the Prevention of Armed Conflict*, *supra* note 9, at para. 17.