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. The Relevant Bodies of Law.................................................175
      1. An Overview of IHL.......................................................175
      2. Human Rights Law in Brief.................................177
   B. IHL and Human Rights: Fraternity or Bifurcation?..........179
   C. The U.N. Approach to Law in War..............................182

III. THE LIMITATIONS OF THE IHL APPROACH AS SHOWN BY THE IRAQ CONFLICT.....................................................................184
   A. Iraq 1990.................................................................................184
   B. Iraq 2003.................................................................................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. Introduction............................................................................196
   B. Human Rights and IHL Redux............................................196
   C. Relevant Human Rights Standards and Their Realms of

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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

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clear, but less publicized, that fundamental principles of human rights law were trampled in the course of this war, notwithstanding the deplorable human rights record of the previous Iraqi regime, itself. 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. International commentators, including academics and human rights organizations, now use IHL as the primary, sometimes sole, mode of analysis of armed conflicts. 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.


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.


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,

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it is humanity hanging from a cross of iron.  

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.” 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

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

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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.


Centre for Human Rights described IHL in 1991 as “the principles and rules which limit the use of force in times of armed conflict.” 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.” 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 predominant use by human rights proponents over and instead of human rights concepts.

Humanitarian law’s central texts include the Four Geneva Conventions adopted in 1949 and their two Additional Protocols adopted in 1977. Additionally, the 1907 Hague Convention and

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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).


annexed regulations supply important rules on the conduct of hostilities. These texts are supplemented by important principles of customary international law. 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.

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). It incorporates a variety of stand-

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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.

ards, from multilateral treaties, to norms of customary international law, to principles called “soft law.” 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’ rights). 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.

IHL explicitly creates obligations for non-governmental groups, such as armed groups which are fighting each other or the state. 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. 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).


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).


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].


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

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25 Id.
27 Id. at 112.
29 Doswald-Beck & Vité, supra note 26, at 113.
human rights law applicable in armed conflict.\textsuperscript{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.\textsuperscript{32} They note with approval the growing use of IHL by international human rights bodies and by non-governmental organizations (NGOs).\textsuperscript{33} Others have also lauded the recourse of the European Court of Human Rights (ECHR) to applying IHL, as for example in \textit{Ergi v. Turkey}.\textsuperscript{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.\textsuperscript{35} Draper, while in some writings suggesting that human rights law has lessons to teach IHL, has elsewhere maintained that:

\begin{quote}
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
\end{quote}

\textsuperscript{31} Doswald-Beck & Vité, supra note 26, at 94 (emphasis added).


\textsuperscript{33} Doswald-Beck & Vité, supra note 26, at 113-16.


\textsuperscript{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 overlinkage 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.

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36 Id. at 9 (quoting G.I.A.D. Draper, Humanitarian Law and Human Rights, ACTA JURIDICA 193, 199 (1979)).
38 Id. at 435.
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) 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.

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 237 which was welcomed by the General Assembly in its resolution 2252. Security Council Resolution 237 specifically called on governments involved in the then-recent Middle East conflict to respect the Third and Fourth Geneva Conventions. However, it also recognized the continuing validity of other standards in conflict situations, “considering that essential and inalienable human rights should be respected even during the vicissitudes of war.”

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

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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.
55 Id. at para. 3.
56 UDHR, supra note 19.
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 below 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, on the ground it was experienced by ordinary Iraqis as a calamity. Estimates of civilian deaths directly resulting from the conflict have ranged from 2,500 to nearly 25,000. The country’s infrastructure was deliberately targeted during the war, such that basics like power and clean water were rarely available. 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. Overall, the U.N. assessed the post-war situation in the country as “apocalyptic.”

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60 See infra text accompanying notes 222-241.
62 For a more thorough account of the human rights impact of that war, see Bennoune, supra note 4, at 255-256.
64 Bennoune, supra note 4, at 256.
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. 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. UNICEF detailed more than a doubling of the infant mortality rate in the country. 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.” Meanwhile, the ICRC warned of “steady deterioration of living conditions” in Iraq. The 2003 war was launched on a country already in such execrable circumstances.

B. Iraq 2003

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. On the other side, the U.S. dropped

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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 neighborhoods\textsuperscript{74} and reportedly attacked “leadership targets” in indiscriminate fashion, leading to the deaths of civilians.\textsuperscript{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\textit{ 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{79} The New York Times reported with a certain fatalism that we


\textsuperscript{75} Kenneth Roth,\textit{ 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].}

\textsuperscript{76} See Geneva III, supra note 14, at arts. 87, 100-102.


may never know the accurate figure. 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. As of this writing, U.S. military casualties are listed as 1,210.

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. 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.

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. 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,
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. 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. In May 2003, the Christian Science Monitor reported that between 5,000 and 10,000 civilians might have been killed in the initial conflict. As

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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 Mahmud 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.


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. 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.” 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. The British NGO, Iraq Body Count, enumerated 20,000 civilian injuries as of early July 2003. 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.”

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


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.
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.”

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.” Reuters recounted on April 23, 2003 that “[t]he Red Cross reports Iraqi hospitals lack supplies and staff. Rotting corpses, summer heat, lack of

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electricity and water have also sparked fears of epidemic diseases.”

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, 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. The hospitals were “overwhelmed, diarrhoea is endemic and the death toll is mounting.” The interruption of basic services like clean running water and electricity compounded all of these problems.

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.”

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.”

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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.


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 “acute
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

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cauldron of Iraq. 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. At least 8,956 soldiers have been wounded in Iraq from the start of the war through November 2004. The long-lasting effects of many of these injuries speak for themselves. 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.” 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

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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.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{120}

In fall 2003, the World Bank estimated that it would cost $55 billion to rebuild Iraq.\textsuperscript{121} McKinsey, the U.S. consulting firm, has suggested closer to $90 billion would be required.\textsuperscript{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..."
remains a poor country for years to come."\textsuperscript{123}

The long-term impact of the recent conflict on economic, social and cultural rights on both sides of the ocean is unmistakable.\textsuperscript{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.


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.\textsuperscript{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 \textit{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

\textsuperscript{123} \textit{Id.}

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

\textsuperscript{125} Admittedly such application does raise some difficulties. \textit{See}, e.g., discussion in Weissbrodt & Andrus, \textit{supra} note 91, at 59 (1988).
is a complicated one. Their relative propinquity is greatly debated. 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. 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. Here follows a review of human rights standards that could be invoked to address the broader impact of conflict.

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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. 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. Under this approach, such responsibility atta-

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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.” 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 . . . .” 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 . . . .”

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. 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. 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.

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132 U.N. CHARTER, art. 1 (emphasis added).
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).
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. 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. At the very least, as a General Assembly resolution it represents an early statement of an international consensus. 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.

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.” 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.”

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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. 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 . . . .” 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. 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. The destruction of civilian homes in the relentless bombardment claimed property in an arbitrary fashion and represented the ultimate interference with family and home. Taken together the war’s impact

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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 pmbl.
145 Id.
146 The factual support for these assertions is available supra text accompanying notes 77-90.
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
the jurisprudence of the HRC\textsuperscript{153} to support his view. He notes that in the \textit{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."\textsuperscript{154}

Furthermore, in the \textit{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."\textsuperscript{155} This case also concerned the abduction of Uruguayan nationals 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."\textsuperscript{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.\textsuperscript{157} It has also expressed concern about Syrian abductions of Lebanese nationals in Lebanon\textsuperscript{158} and ordinary meaning of their terms, in context, but also "in light of (their) object and purpose."\textsuperscript{159} 

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


\textsuperscript{156} Celiberti, supra note 155, at para. 10(3).


Moroccan practices in the Western Sahara that are in contravention of the ICCPR.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{164} Most importantly, this text goes on to specify that,

\begin{footnotesize}
\begin{enumerate}
\item[160] HRC, Israel August 1998, supra note 157, at para. 10.
\item[163] Id.
\item[164] Id.
\end{enumerate}
\end{footnotesize}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{168} Iraqi families suffered grave losses and saw their
social security support collapse.\textsuperscript{169} Children were terrorized by the
invasion, and were killed and injured, without adequate health services
or rehabilitation facilities available to assist them.\textsuperscript{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.

\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{See supra} text accompanying notes 73-124.
\textsuperscript{167} \textit{See supra} text accompanying notes 81-84. For further discussion about the.diffic-
ties surrounding the meaning of the right to life in this context, see \textit{infra} text
accompanying notes 181-195.
\textsuperscript{168} \textit{See supra} text accompanying notes 108-111.
\textsuperscript{169} \textit{See supra} text accompanying notes 96-106 and 123. For more information on this
topic, see also Save the Children-USA, \textit{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)
\textsuperscript{170} \textit{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.” 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).

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. 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.” They must be both “exceptional and temporary.” 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.”

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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).
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.” Additionally, it enumerated a series of other Covenant rights, not explicitly listed in Article 4, as being not “subject to lawful derogation.” 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.

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.

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. However, its human rights meaning in times of armed conflict is a

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178 Id. at para. 13.

179 Id. at para. 15.


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

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.” 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.” 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, 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.

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

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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
2004] Toward a Human Rights Approach

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?”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{191}

Vera Gowlland-Debbas has also explained that the meaning of arbitrary has to be judged in light of the treaty as a whole.\textsuperscript{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 \textit{Aegean Sea Continental Shelf Case}, the interpretation of general legal terms is not static, but should “follow


\textsuperscript{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.

\textsuperscript{191} Teitel, supra note 39, at 375.

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 inher-
ently 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.
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


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.


199 Id.


201 Id. at para. 702.

202 Concluding Observations of the Committee: Israel, U.N. CESC, 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-

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.


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

206 IRAQ PRESS, supra note 204.


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.  

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.

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-

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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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{213}

However, in a war not required by self-defense “leaving no choice of means, and no moment for deliberation,”\textsuperscript{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 indefeasible. An IHL–based approach to armed conflict militates away from discussion of the underlying \textit{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 \textit{jus in bello} prohibitions and the rules governing the resort to force found in the U.N. Charter. The IHL/jus

\begin{flushleft}
\textsuperscript{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, \textit{International Law and the Use of Force} 6 (2000).
\textsuperscript{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).
\textsuperscript{213} This has been mentioned by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia. Id.
\textsuperscript{214} The Caroline, 2 Moore, \textit{Digest of Int’l Law} 412 (1906).
\end{flushleft}
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.


217 Id. at 10-13.

218 See supra note 1 and accompanying text.

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. 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.

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. 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.

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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{228}

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

\textsuperscript{224} Human Rights Watch, World Report, supra note 75.
\textsuperscript{225} Roth, War in Iraq, supra note 75, at 19.
\textsuperscript{226} HRW, Off Target, supra note 75.
\textsuperscript{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.
\textsuperscript{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. They criticize what they see as the ambivalence of United States and other occupying forces in Iraq “toward human rights and humanitarian law concerns.” 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. While the calls for “Ensuring Human Rights Accountability” during the occupation, and for the Iraqi transition to have a “human rights grounding,” are laudable, only IHL standards are cited by name. No mention is made of any specific human rights standards that apply. 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. 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.

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.
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

239 HUMAN RIGHTS WATCH, WORLD REPORT, supra note 75, at 1.
240 See, e.g., Roth, War in Iraq, supra note 75, at 15.
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. 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. 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.” 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. 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.” The opinion never questions whether human rights standards were applicable in this context.


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

249 Id. at para. 54(c).
issue of whether non-state armed groups could be considered bound by human rights law.\textsuperscript{250} 

Furthermore, since the provocative 2001 ruling, many international lawyers read the ECHR opinion in \textit{Bankovic and Others v. Belgium and 16 Other Contracting States}\textsuperscript{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.\textsuperscript{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.

\textbf{A. Distinguishing \textit{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

\textsuperscript{250} See \textit{supra} text accompanying notes 23-25.


\textsuperscript{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 \textit{Stephen Ratner, Why Only War Crimes? De-Linking Human Rights Offenses from Armed Conflict}, 3 \textit{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. 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. 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;” 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. 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.” 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.”

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.”

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.” 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.’” 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. 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


260 Hannum, supra note 254, at 98.


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

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

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

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.”

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. 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.”

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.” 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

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268 *Id.*


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

Toward a Human Rights Approach

as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights . . . .” The Court responded that it “cannot accept Israel’s view,” and ratified the approach of the HRC. 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.

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.

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.”

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.
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 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.