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# The Laws of War in the Age of Terror

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# THE LAWS OF WAR IN THE AGE OF TERROR

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## I. INTRODUCTION

What is the optimal design for international legal rules that apply to the use of military force against terrorist groups both within and far from any recognizable battlefield? More specifically, what rules should govern the U.S.' ability to target, apprehend, detain, and kill suspected members of organized armed groups not only in places like Afghanistan, Iraq, and Syria, but also in more far-flung places away from hot battlefields like Niger and parts of Libya?

As remnants of al-Qaeda persist and new threats of international terrorism have emerged in the form of well-organized armed groups like the Islamic State, how can the U.S. balance its efforts to protect national security without undermining humanitarian norms? These are the central questions that animate my remarks today. I focus, in particular, on how official

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legal positions promoted by the U.S. government in support of ongoing military responses to terrorism can either help stabilize or destabilize the international legal system. I also focus on how some criticisms of U.S. policies may do the same.

My principal concerns are the international norms involving the laws of war and human rights in regulating military operations.

What I hope to provide is an accurate descriptive account of the normative expectations of the existing international legal system, and an examination of how exactly the U.S. government's efforts to justify its own actions within the existing legal system might change the international legal order for good or ill.

First, I will describe the years of legal contestation over the U.S. fight with al-Qaeda, during which opposition to U.S. policies fluctuated between considering the situation an armed conflict and not an armed conflict. The goal of this exercise is, in part, to show what was legally at stake at each point. For example, at one point recognizing the situation as an armed conflict would trigger fair trial protections, yet at another point recognizing the situation as an armed conflict would allow for indefinite or prolonged preventive detention. At bottom, it appeared that the classification of the situation as an armed conflict would turn on or off different legal protections by turning on or off the baseline legal regime that applies to such situations of extreme violence. An underlying concern that may have motivated the different turns along the way was the outcome of those legal protections.

Second, I aim to set forth different paths that may address the underlying concerns without having to select or deselect whether an armed conflict exists. One path involves working within the law of armed conflict to identify and maintain legal protections that some might mistakenly think are lost when that legal regime applies. Another path involves working across both the law of armed conflict and human rights law to identify legal protections that may exist during armed conflict. The faithful application of human rights law, including the accommodations made to states in times of emergency, may also show that there is far less of a gap in protections than one might assume regardless of which legal regime applies. In essence, these pathways are a form of reconciliation. They address some of the underlying concerns that motivate some to accept or oppose the determination that an armed conflict exists.

## II. UNSETTLING FOUNDATIONS: WHEN IS IT (NOT) AN ARMED CONFLICT?

Following the September 11th attacks in 2001, President George W. Bush justified several military actions on the ground that the U.S. was in an armed conflict with al-Qaeda. For nearly two decades since, many legal experts and opponents of U.S. actions have argued that aspects of the U.S. response have violated international law. But on closer inspection, those arguments have been inconsistent with regard to a fundamental legal question: whether the U.S. is, as a matter of law, in an armed conflict with al-Qaeda and its associated forces. Indeed, many disagreements over whether the U.S. can take a certain action boiled down to whether the U.S. was in an armed conflict with al-Qaeda. Yet, at the same time, some humanitarian protections appear to have been afforded only if the situation was deemed to be an armed conflict.

Accordingly, a pattern has emerged over the years. Opponents to different U.S. actions have alternated between arguing that the U.S. is or is not involved in an armed conflict with al-Qaeda. It sometimes seems as though the preferred argument depends on how that threshold question—whether the U.S. is in an armed conflict—affects the outcome at stake. Let's consider a few turns, in chronological order, that show these different rotations.

### *A. Turn 1. Not an "Armed Conflict": Militarization*

In the weeks following September 11, many experts argued that the U.S. could not be, as a matter of international law, in an armed conflict with al-Qaeda.

What was at stake? One set of implications involved the policy consequences—and effect on public debate—following such a legal classification. Accepting the armed conflict paradigm would lead to a highly militarized response to the events of September 11 and expansive executive and governmental power. Accordingly, arguing that the situation did not constitute an armed conflict could potentially restrain the war machine internationally and limit excessive state power at home.

Examples of experts who have argued that the situation did not count as an armed conflict include Professor Alain Pellet who wrote an essay entitled, "*No, This Is Not War!*"[1] He contended that the idea that the U.S. could be in an armed conflict was "legally false."[2] He also argued, explicitly on policy grounds, that the armed conflict model could lead to a "spiral of hate" and violence, "create more 'martyrs[,]'" and cost "thousands of lives of those who are already victims of the Taliban."[3] As another example, Professor Antonio Cassese wrote: "It is obvious that in this case 'war' is a misnomer. War is an armed conflict between two or more states."[4] And he worried that calling the al-Qaeda attacks a war would lead to the belief that "the necessary response exacts reliance on all resources and energies, as if in a state of war."[5]

### *B. Turn 2.*
### *Is an "Armed Conflict":*
### *Combatant Status-Determinations*

Once U.S. forces began apprehending detainees in Afghanistan and elsewhere, some experts argued that the United States was in a standard armed conflict that included the Taliban and al-Qaeda.

What was at stake? The debate centered on whether the U.S. had an obligation under Article 5 of the Prisoners of War Convention[6] to establish an independent tribunal to determine the status of individuals detained in Afghanistan and elsewhere (e.g., Bosnia). The Geneva Conventions apply only if an armed conflict exists.[7] Writing in the online publication for the American Society of International Law, Professor John Cerone, contended, "It is arguable that the law of international armed conflict should also govern relations between the Unite[d] States and Al-Qaeda," and he suggested that Article 5 applied to members of al-Qaeda.[8] If the threshold were not true—if the situation did not constitute an armed conflict—one could not invoke those provisions of the law of armed conflict to provide procedural protections.

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1. Alain Pellet, Discussion Forum, *No, This Is Not War!*, 12 EUR. J. INT'L L. (2001).
2. *Id.*
3. *Id.*
4. Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 993 (2001).
5. *Id.*
6. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 135.
7. *Id.* art. 2.
8. John Cerone, *Status of Detainees in International Armed Conflict, and Their Protection in the Course of Criminal Proceedings*, 7 GASIL INSIGHTS 1 (2002), https://web.archive.org/web/20110116112625/http://www.asil.org/insigh81.cfm.

### *C. Turn 3.*
### *Not an "Armed Conflict":*
### *Indefinite Military Detention*

Once long-term and indefinite military detention of individuals became a reality, many experts argued that the U.S. could not be in an armed conflict with al-Qaeda.

What was at stake? The Bush administration invoked the war model to argue that the law of armed conflict permits the U.S. to hold combatants in military detention "until the cessation of hostilities."[9] In response, many experts argued that the U.S. was not in an armed conflict. For example, in an amicus brief submitted to the Supreme Court in *Al-Marri v. Spagone*, a group of law of war experts argued that an al-Qaeda member could not be detained in the U.S. under domestic law because the situation did not amount to an armed conflict.[10]

### *D. Turn 4.*
### *Not an "Armed Conflict":*
### *Military Commission Jurisdiction*

Following a Presidential Military Order establishing military commissions to try those responsible for September 11,[11] many experts argued that such commissions were unlawful because the U.S. was not in an armed conflict with al-Qaeda.

What was at stake? Due to the particular construction of U.S. domestic law,[12] individuals could be tried before a military commission only for violations of the law of armed conflict. Arguing that the attacks on September 11 did not take place in an armed conflict could potentially stop military commissions in their tracks. For example, Professor Jordan Paust argued that "al Qaeda attacks on the United States on September 11th (before the international armed conflict in Afghanistan began) . . . cannot be prosecuted as war crimes because the United States and al Qaeda cannot be 'at war' under international law."[13] Similar questions

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9. *See* Jeffrey Toobin, *Camp Justice*, NEW YORKER (Apr. 7, 2008), https://www.newyorker.com/magazine/2008/04/14/camp-justice.

10. Brief for *Amici Curiae* Experts in the Law of War at 4, Al-Marri v. Spagone, 555 U.S. 1220 (2009) (No. 08-368).

11. Exec. Order No. 222, 66 Fed. Reg. 57,831–36 (Nov. 13, 2001).

12. *E.g.* Uniform Code of Military Justice, 10 U.S.C. § 821 (2012).

13. Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DoD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 685 (2002).

had arisen with respect to determining when the armed conflict occurred[14] because only actions taken within that armed conflict could be prosecuted by military commissions.

### *E. Turn 5.*
### *Is an "Armed Conflict": Fair Trial Rights and Torture*

Once military commissions were underway, many experts argued that such trials were unlawful because the law of armed conflict applied. This argument was connected to another one: many of the same experts (myself included) also took the position that torture of detainees was prohibited by the laws of war.

What was at stake? Common Article 3 of the Geneva Conventions applies to armed conflicts between state and nonstate actors.[15] It requires that any trials meet international standards of fairness and that all detainees be treated humanely.[16] If Common Article 3 applies, the commissions could be held unlawful under the Geneva Conventions and CIA interrogation practices would be invalid. As a matter of customary international law, the rule reflected in Article 75 of the 1977 Additional Protocol to the Geneva Conventions ("Additional Protocol I") could also potentially invalidate the trials and inhumane treatment of detainees.[17] However, to apply Common Article 3 and Article 75 of Additional Protocol I requires the existence of an armed conflict.[18]

Examples of experts who took these positions abound. In 2005, in an amicus brief submitted to the Supreme Court in *Hamdan v. Rumsfeld,* a group of experts argued that the trial of an alleged al-Qaeda member before a military commission violated the law of armed conflict.[19] I, along with Professors Anne-Marie Slaughter and Derek Jinks, made a similar argument in an amicus brief

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14. Laurie R. Blank & Benjamin R. Farley, *Identifying the Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World*, 36 MICH. J. INT'L L. 467, 538 (2015).

15. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287 [hereinafter Geneva Convention, Civilian Persons].

16. *See id.*

17. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

18. *Id.*; Geneva Convention, Civilian Persons, *supra* note 15, art. 5.

19. Brief Amicus Curiae of Louise Doswald-Beck, Guy S. Goodwin-Gill, Frits Kalshoven, Vaughan Lowe, Marco Sassòli, and the Center for International Human Rights of Northwestern University School of Law in Support of Petitioner at 5–6, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184).

submitted to the Court. We argued that Common Article 3 applied.[20] When the Supreme Court invalidated the commissions on the basis that Common Article 3 applied to the U.S. armed conflict with al-Qaeda,[21] former Ambassador David Scheffer celebrated it as "a good day for international law, and a good day for American jurisprudence."[22] At the same time, Professor Marty Lederman quickly recognized and celebrated the implications of the ruling for bringing an end to the CIA interrogation regime.[23]

### *F. Turn 6.*
### *Not an "Armed Conflict": Extrajudicial Killings*

Once attention became focused on the use of lethal force (e.g., targeted killings), many experts argued that the United States was not in an armed conflict with al-Qaeda.

What was at stake? The law of armed conflict is significantly more permissive than international human rights law in regulating the conditions under which individuals can be killed. Accordingly, many of the targeted killings and signature strikes carried out by the U.S. arguably would be illegal if they did not take place in an armed conflict. Professor Mary Ellen O'Connell, who has written on this turn, has repeatedly argued that the legality of U.S. lethal force depended on this distinction; she has argued that the United States could not be in an armed conflict with al-Qaeda and therefore the U.S.' use of lethal force is illegal.[24]

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20. Brief of Professors Ryan Goodman, Derek Jinks, and Anne-Marie Slaughter as *Amicus Curiae* Supporting Reversal (Geneva-Applicability) at 18–25, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184).

21. Hamdan v. Rumsfeld, 548 U.S. 557, 562–63 (2006).

22. David Scheffer, *Hamdan v. Rumsfeld: The Supreme Court Affirms International Law*, JURIST, (June 30, 2006, 8:01 AM), https://www.jurist.org/commentary/2006/06/hamdan-v-rumsfeld-supreme-court/.

23. Marty Lederman, *Hamdan Summary – And HUGE News*, SCOTUSBLOG, (June 29, 2006, 10:37 AM), https://www.scotusblog.com/2006/06/hamdan-summary-and-huge-news/.

24. Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 343, 360 (2010); *see also* Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Study on Targeted Killings*, 6, U.N. Doc. A/HRC/14/24/Add.6 (May 26, 2010).

### *G. Final Turns. Is an "Armed Conflict": The Future?*

Other turns in the designation of the law of armed conflict have occurred with respect to the release of detainees from Guantanamo Bay. These turns include acceptance of the law of armed conflict model and calling for the release of wounded and sick detainees consistent with those provisions of the Geneva Conventions. More dramatically, they also include the call for the release of detainees on the ground that the armed conflict, or at least the condition of active hostilities, is now over.[25]

As the degradation of al-Qaeda and other groups may reach a "tipping point,"[26] and as the United States draws down forces in Afghanistan and Syria, it is entirely conceivable that the U.S. government will turn a corner and maintain that there is no longer an armed conflict in different areas or with different groups, but that the law of self-defense fully and independently justifies some lethal force (e.g., targeted killings) in various parts of the world.[27]

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25. Brief of Experts on International Law and Foreign Relations Law as *Amici Curiae* in Support of Initial Hearing en Banc at 14, Al-Alwi v. Trump, 236 F. Supp. 3d 417 (D.C. Cir. 2017) (No. 17-5067).

26. Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., The Conflict Against Al Qaeda and Its Affiliates: How Will It End?, Oxford Union, Oxford University, (Nov. 30, 2012) (transcript available at https://www.lawfareblog.com/jeh-johnson-speech-oxford-union). The General Counsel of the U.S. Department of Defense provided this "tipping point" as the basis for deeming an end to the armed conflict against al-Qaeda. Even after this "tipping point," he explained that the situation would require the U.S. to maintain "military assets available in reserve to address continuing and imminent terrorist threats." Specifically, Johnson stated:

> I do believe that on the present course, there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.
>
> At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counterterrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community – with our military assets available in reserve to address continuing and imminent terrorist threats.

*Id.*

27. Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a 'Legal Geography of War'* 8–9 (Am. Univ. Wash. Coll. of Law, Research Paper No. 2011-16, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783; *cf.* Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Line Between the* Jus ad Bellum *and the* Jus in Bello, 88 INT'L L. STUD. 57, 57–58 (2012).

Of course, new armed groups may arise in the future as well, and the question will be whether the situation crosses the armed conflict threshold.

In these different scenarios, the United States will likely maintain, in step with presidential administrations over the past three decades, that international human rights law either does not apply or does not impose any additional restrictions in important situations. It is a familiar three-step move in which (1) the United States contests whether certain human rights law applies extraterritorially; (2) even if human rights law applies extraterritorially, the United States then contests whether certain human rights rules apply to some matters of armed conflict; and (3) even if human rights law applies extraterritorially and to matters of armed conflict, the United States then contests whether certain human rights rules apply when the United States does not exercise effective control on the ground. In short, the United States may disclaim that either the law of armed conflict or important international human rights obligations apply.

Under these circumstances, there will be strong pressures for experts to argue that the United States remains in an armed conflict as long as the government undertakes lethal military actions against organized armed groups—and that law of armed conflict should thus regulate the exercise of violence as a matter of law. In other words, there will be a reason to flip back again, this time in support of the application of the law of armed conflict.

### *H. Summary*

There are at least three implications to draw from this account of flips and flops in the designation of an armed conflict. First, implicit in my analysis is a call for greater consistency. Such consistency is of great value if we want to maintain and develop respect for the rule of law and the international legal system. Second, this analysis shows several ways in which considering the situation with al-Qaeda an armed conflict has afforded greater humanitarian protections to combatants and *hors de combat* (e.g., in status-based determinations, fair trial rights, and targeting in self-defense). Third, this analysis provides insight into our future legal situation. The next turn may occur when the U.S. government declares it is no longer in an armed conflict with al-Qaeda or other groups, and those stakeholders who seek greater humanitarian protections will have good reasons to argue the

opposite. To put the point more strongly: those who argue against the existence of an armed conflict could, if successful, be left in a worse, not better, position.

What might have been a better path over the past near-two decades? What may be a better pathway moving forward? An advisable answer: hold to a consistent position that one legal situation (armed conflict) or the other (not an armed conflict) exists, with the recognition that such a position will maximize humanitarian interests in some cases and compromise those interests in others. That said, there are other ways to understand how the law of armed conflict works, both as an internal set of rules and in relationship to human rights law, which can address some of the deep underlying normative concerns that give rise to the flip-flops in the first place.

## III. RECONCILIATION WITHIN THE LAW OF ARMED CONFLICT

One way to reconcile some of the competing concerns in the application of the law of armed conflict may be resolved within the law of armed conflict itself. Although I neither fully evaluate nor advocate for any of these approaches, I want to identify what solutions may work.

As conditions on the ground more closely approach a peacetime or law enforcement situation, some of the broader principles of humanitarian law may impose greater restrictions on states in their use of force and detention authority. An illustration of this approach is the International Committee of the Red Cross's ("ICRC") view of the obligation to capture rather than kill enemy fighters under certain conditions.[28] In issuing this guidance, the ICRC predicated its assessment on the principle of humanity.[29] One of the most important factors for determining whether this principle applies in a military action according to the ICRC is whether the state has control over the territory.[30] I have written that the so-called duty to capture was incorporated into Additional Protocol I to the Geneva Conventions by the drafters' prohibition on the infliction of "superfluous injury or unnecessary suffering."[31]

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28. INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 79, 81–82 (2009) [hereinafter ICRC, INTERPRETIVE GUIDANCE].

29. *Id.* at 78–79, 81–82.

30. *Id.* at 80–82.

31. Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819, 819 (2013); Ryan Goodman, *The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt*, 24 EUR. J. INT'L L. 863 (2013). *But see* Michael N. Schmitt,

This conceptualization of unnecessary suffering may overlap with the ICRC's view of the legal norm. That is, when conditions on the ground make it unnecessary to create suffering through killing a combatant who can just as easily be physically apprehended, the rule may direct belligerents toward the capture option. The important point is that this broader understanding of how this set of legal norms operates may reconcile some of the concerns that lead to the flip-flop of conflict classification. One need not consider turning on or off the entire classification of the situation as an armed conflict if, indeed, the rules within armed conflict may be raised or lowered to resolve some of the same concerns.

Another example of obligations within the law of armed conflict that may depend on whether conditions on the ground approach peacetime or a situation of effective territorial control involve the obligation to take feasible precautions to ensure a target is a legitimate military object and to minimize civilian casualties prior to engaging in a lethal operation. Specifically, in important circumstances, the law of armed conflict may require an attacker to obtain a higher level of certainty that a target is a legitimate military object. Law of war treaties define "[f]easible precautions" as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time."[32] The ICRC, for its part, has explained that targeting decisions "must reflect the level of certainty that can reasonably be achieved in the circumstances" and that "[i]n practice, this determination will have to take into account, *inter alia*, the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision."[33]

All targeting decisions are subject to a test of reasonableness, and it would be unreasonable for a decision-maker to forego a higher level of certainty when circumstances allow. A heightened level of certainty should be applied, for example, when conditions approach the end of the spectrum in which decision-makers have the luxury of significant intelligence information and time to determine whether to authorize a strike several days, if not weeks,

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*Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants,'* 24 EUR. J. INT'L L. 855, 856 (2013); Geoffrey S. Corn, Laurie R. Blank, Chris Jenks, and Eric Talbot Jensen, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536, 539 n.8 (2013).

32. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) art. 1(5), Oct. 10, 1980, 1342 U.N.T.S. 171; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) art. 3(10), Oct. 10, 1980, 1342 U.N.T.S. 168.

33. ICRC, INTERPRETIVE GUIDANCE, *supra* note 28, at 76.

in advance; have multiple opportunities to strike the target without any threat to their own personnel and little, if any, known threat to others; and are operating in local conditions far from an active battlefield. Once one acknowledges that such extreme situations on one end of the spectrum require a higher level of certainty, it is easy to understand how this kind of analysis involves a sliding scale. The greater degree to which conditions approach that end of the spectrum, the greater standard of proof required. Leading scholars in the law of armed conflict have now supported this type of heightened standard in evaluating targeting decisions.[34]

The obligation to take feasible precautions applies to both the principle of distinction and the principle of proportionality. After selecting a legitimate military object, commanders must take all reasonable steps to minimize the loss of civilian life and to ensure the loss of civilian life is not excessive in relation to a concrete and direct military advantage. For instance, the greater degree to which conditions approximate peacetime, the more feasible it will be to obtain a higher degree of certainty before authorizing a strike.

It is important to think more innovatively about how the law of armed conflict may work to accommodate the concerns that lead to the flip-flop of conflict classification. A significant concern that motivates some of the flip-flops is that states will unduly exploit the application of the law of armed conflict to accrue greater license to use force (the permissions of the law of armed conflict), even though the law of armed conflict may also impose some appropriate and valuable restrictions. The area in which this concern may most directly and most acutely apply is when a state initially decides to take lethal military action against a non-state

34. *E.g.* Geoffrey S. Corn, *Targeting, Command Judgement, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 BROOK. L. REV. 437, 496 (2012) (defining different conditions that would change the level of certainty, or "quantum of information[,]" required for a lethal operation to be considered reasonable, including a high standard for attacks against unconventional enemies outside of an area of active combat operations); Adil Ahmad Haque, *Targeted Killing Under Trump: Law, Policy, and Legal Risk*, JUST SECURITY (Feb. 10, 2017), https://www.justsecurity.org/37636/targeted-killing-trump-law-policy-legal-risk/ (writing that a heightened level of certainty is grounded in the obligation on attackers to presume that an individual is a civilian in case of doubt and the obligation to take all feasible (or "reasonable") precautions to ensure that the object of attack is a legitimate military target); Michael J. Adams & Ryan Goodman, *De Facto and De Jure Non-International Armed Conflicts: Is It Time to Topple Tadić?*, JUST SECURITY (Oct. 13, 2016), https://www.justsecurity.org/33533/de-facto-de-jure-non-international-armed-conflicts-time-topple-tadic/.

actor. To resolve this concern, one might ask whether there are conditions under which the permissions of the law of armed conflict do not apply, but other restrictions do.

Perhaps surprisingly, the U.S. Department of Defense's Law of War Manual suggests such an approach.[35] It is surprising because the Manual is, in many respects, highly doctrinal and, in several places, controversially expands the aperture for more permissive uses of force.[36] But in a section on the application of the laws of armed conflict, the Manual points directly to the potential bifurcation of restrictions and permissions when a state decides initially to take lethal action against a non-state actor. The Manual states:

> 3.4.1 Intent-Based Test for Applying *Jus in Bello* Rules. *Jus in bello* rules apply when a party intends to conduct hostilities.
>
> If a State chooses to go to war, then it is bound by *jus in bello* rules for the conduct of those hostilities. For example, if a State considers it necessary to respond to attacks with military force, then those military operations must comply with *jus in bello* rules.
>
> The fact that the intention to conduct hostilities gives rise to obligations to comply with the law of war is important because law of war obligations must be taken into account even before the fighting actually begins, such as in the planning of military operations.[37]

Most importantly for our purposes, the Manual then qualifies the above analysis by stating that it applies to law of armed conflict restrictions, and not necessarily law of armed conflict permissions:

> It must be emphasized that the discussion in this section is for the purpose of assessing whether *jus in bello* restrictions apply and not necessarily for other purposes. . . . Similarly, the fact that *jus in bello* restrictions apply is not determinative of whether the permissions that are sometimes viewed as inherent in *jus in bello* rules may be relied upon by a State or non-State actor.[38]

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35. OFFICE OF GEN. COUNSEL, DEP'T. OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 3.4.1 (2016) [hereinafter LAW OF WAR MANUAL].

36. *See, e.g.*, Adil Ahmad Haque, *Off Target: Selection, Precaution, and Proportionality in the DoD Manual*, 92 INT'L L. STUD. 31, 33 (2016).

37. LAW OF WAR MANUAL, *supra* note 35, ¶ 3.4.1.

38. *Id.* ¶ 3.4.

Another pathway forward may be to consider whether the definition of a non-international armed conflict must necessarily be "trans-substantive." In other words, can the definition of armed conflict be different across different substantive areas of international law and practice? Consider two examples. There may be reasons to impose a higher threshold of violence to meet the definition of a non-international armed conflict when a supranational tribunal applies the law of armed conflict in criminal trials. The higher threshold, in that context, safeguards state sovereign interests and affords procedural protections to criminal defendants. In the context of refugee law, however, a lower threshold may be more advisable to meet the object and purpose of that legal domain if doing so would afford more humanitarian protections.[39] Indeed, different tribunals and sources of authority have proffered different standards for defining a non-international armed conflict.[40] Future academic work may provide an account of the different definitional thresholds depending on the substantive area of law or adjudicative body implicated.

Finally, practitioners of the laws of war may be able to address other concerns that motivate the flip-flopping of conflict classification by thinking more broadly about how the principles of necessity and humanity operate, especially when making the difficult interpretive move of applying rules developed in international armed conflict to the terrain of internal and transnational conflicts with non-state actors. In detention operations, for example, the rules of international armed conflict require at most that military commissions (not an independent court) make status-based determinations.[41] An empirical assumption undergirds that rule, namely, that it would be mistaken to ask states to commit to greater guarantees especially when courts, for example, have not been common features in such decisions in interstate warfare and when such guarantees would be wholly impracticable when large armies fight each other on a traditional battleground. But what if a state has every ability to

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39. Case C-285/12, Diakité v. Commissaire Général aux Réfugiés et aux Apatrides, 2014 E.C.J 39; Adams & Goodman, *supra* note 34.

40. Adams & Goodman, *supra* note 34.

41. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 art. 45 (Yves Sandoz et al. eds., 1987), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5EB5CB1D0CA354C3C12563CD00433D24 ("[T]he Rapporteur indicated in his report that 'as in the case of Article 5, such a tribunal may be administrative in nature', which includes, in particular, military commissions.").

open its courts, if the detainees are very few in number, if, in other words, there is no great military necessity or justification for a state to deny access to stronger procedural protections? The answer cannot simply be that creating such a standard would be impractical in other situations. The standard itself could include flexibility to adjust to different circumstances. And, indeed, how we think about the principles of military necessity and humanity should affect the consideration of customary international law obligations that apply to non-international armed conflicts and to situations in which a state exercises considerable control over the area in which it conducts military operations.[42] Perhaps the answer to this doctrinal question cannot ultimately be resolved within the law of armed conflict as a hermetically sealed legal regime, but rather will benefit from what Professor Theodor Meron called "the humanization of humanitarian law,"[43] the formal co-application of human rights law and the law of armed conflict, or the direct application of human rights rules in armed conflict settings.

## IV. RECONCILIATION ACROSS LEGAL REGIMES: THE LAW OF ARMED CONFLICT AND HUMAN RIGHTS

Some of the concerns that motivate the conflict classification flip-flops may be resolved by how human rights law applies to military operations. Indeed, some of the reasons to resist the idea that a non-international armed conflict exists are that doing so may be thought to displace important protections under human rights law. But what if those protections apply in a robust manner in armed conflict as well? The standard view of international law

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42. The International Committee of the Red Cross has articulated similar guidance for the application of the principles of necessity and proportionality:

> In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL ["International Humanitarian Law."] The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.

ICRC, INTERPRETIVE GUIDANCE, *supra* note 28, at 80–81.

43. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 239 (2000).

is that human rights law does apply in armed conflict situations, and there may be areas in which this recognition could develop further as we better understand how the rules apply,[44] how international tribunals and other bodies interpret the rules, and how states work at this intersection of legal regimes in counterterrorism operations during armed conflict.

A remarkable convergence occurred in recent years between United States counterterrorism policies and the International Committee of the Red Cross's account of the legal rules that apply away from hot battlefields. During the Obama administration, the United States employed a formal set of standards for lethal operations against terrorist targets outside of areas of active hostilities in a manner that more closely approximated human rights law.[45] The standards included, for example, a near certainty that no civilians would be harmed in deliberate strikes even though those direct actions were, according to the United States, part of an ongoing non-international armed conflict. The Trump administration has reportedly maintained the basic organizational framework, though it lowered some of the standards of proof within that framework. (One may also add that the United States has also not applied law-of-armed-conflict targeting rules to the use of force against suspected members of terrorist groups within its own borders, and the United States has not claimed it has the prerogative to do so under international law.)

In the meantime, the International Committee of the Red Cross elaborated an understanding of the law of armed conflict that also demarcates the laws applicable to a geographic separation of the battlespace. The ICRC's 2016 Commentaries to the Geneva Conventions strongly suggest that this organizational framework may, indeed, apply as a matter of law, not just policy.[46] The Commentaries state:

> 460 However, the applicability of humanitarian law in the whole of the territory of a State party to the conflict does not mean that all acts within that territory therefore fall necessarily under the humanitarian law regime. . . .

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44. *See, e.g.*, Anthony Dworkin, *Individual, Not Collective: Justifying the Resort to Force Against Members of Non-State Armed Groups*, 93 INT'L L. STUD. 476, 480 (2017).

45. U.S. DEP'T OF JUST., PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE OF THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

46. *See* INT'L COMM. OF THE RED CROSS, UPDATED COMMENTARY ON THE FIRST GENEVA CONVENTION (2016), https://ihl-databases.icrc.org/ihl/full/GCI-commentary.

> 461 Furthermore, if a specific act carried out or taking effect in more peaceful areas of a State could – in line with the considerations addressed above – generally fall under the scope of application of humanitarian law, questions regarding the applicable legal standards in a particular scenario might still arise. It may also need to be determined whether, in a given case, a specific use of force is necessarily governed by conduct of hostilities law or whether it is governed by the law enforcement regime based on human rights law.
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> 462 . . . The situation is less clear, however, with regard to the use of force against isolated individuals who would normally be considered lawful targets, under international humanitarian law but who are located in regions under the State's firm and stable control, where no hostilities are taking place and it is not reasonably foreseeable that the adversary could readily receive reinforcement.[47]

Of course, another way in which the application of human rights law may resolve some of these concerns is if the "conflict of law" between human rights and the law of armed conflict is narrowly understood to arise only when it is impossible to comply with both.[48] A "true conflict," on this view, occurs only when one legal rule says a state must do X, and another legal rule says a state must not do X. In other words, a conflict would not arise when human rights law requires a higher standard in some settings (a strict standard of imminent threat before using lethal force) and the law of armed conflict is much more permissive (not requiring imminence). Parties bound to both legal regimes could simply apply the former and remain in compliance with the latter. But the conflict of laws may arise at a more general level, for example, if the body of detention rules in international armed conflict is robust enough that it occupies the field where human rights rules of detention otherwise normally operate.[49] Or, if one thinks of the two bodies of law on detention, let's say, as two different insurance regimes which price items differently, one then has to pick between the two regimes.

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47. *Id.* ¶¶ 460–62 (internal citations omitted) (click on "Commentary of 2016" next to "Art. 3: Conflicts not of an international character").

48. *See, e.g.*, Sean Richmond, *Transferring Responsibility?: The Influence and Interpretation of International Law in Australia's Approach to Afghan Detainees*, 17 ASIA-PAC. J. HUM. RTS. & L. 240, 242–43 (citing Derek Jinks, *International Human Rights Law in Time of Armed Conflict*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 656–74 (Andrew Clapham & Paola Gaeta eds., 2014)).

49. *E.g.*, Hassan v. United Kingdom, App. No. 29750/09, Eur. Ct. H.R. (2014).

Yet another approach to understand ways in which human rights law may operate in armed conflict settings is where the law of armed conflict tapers off. For example, in the Nuclear Weapons Advisory Opinion, the International Court of Justice accepted that the right to life under the International Covenant on Civil and Political Rights ("ICCPR") applies in armed conflicts.[50] However, the Court appeared to conclude that the determination of whether a state action involves an "arbitrary deprivation of life" should be answered exclusively by turning to the law of armed conflict.[51] In other words, if the deprivation of life is permitted by the law of armed conflict, it is not an arbitrary deprivation under the human rights Covenant. The Court reasoned:

> In principle, the right not arbitrarily to be deprived of one's life also applies in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and *not deduced from the terms of the Covenant itself.*[52]

As of 2018, the United Nations Human Rights Committee appears to disagree. In General Comment 36, concerning the right to life, the Human Rights Committee stated, "[u]se of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary."[53] What uses of force that are consistent with international humanitarian law could still be arbitrary under the ICCPR? Might that residual category include, for instance, an obligation to capture rather than kill when the use of lethal force is clearly unnecessary to stop a threat from a suspected combatant (if there were no such obligation under international humanitarian law)? Might the residual category apply to the long-term public health

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50. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶¶ 24–25 (July 8).

51. *Id.* ¶ 25.

52. *Id.* ¶ 25 (emphasis added).

53. U.N. Human. Rights Comm., General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, ¶ 64, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

consequences of military targeting operations if international humanitarian law considers such effects too remote to include in a proportionality analysis? Might the residual category include protections for religious and medical military personnel if those individuals were not covered by the principle of proportionality under international humanitarian law? I asked two members of the Committee those very questions. They stated:

> The qualifier "in general" in the General Comment allows for the development of interpretations such as the ones listed in the question (but obviously does not require it). It also serves to emphasize that "arbitrary" deprivations of life are not necessarily confined to violations of the substantive norms pertaining to the right to life, such as the rules on the means and methods of warfare. Procedural shortcomings can also render a deprivation of life arbitrary, for example a failure to investigate potentially unlawful deprivation of life during armed conflict. Finally, since the Committee has taken the view that arbitrariness may also be construed in the light of other relevant norms of international law, including jus ad bellum, there may be circumstances where an act would be lawful under IHL and yet internationally unlawful, and thus arbitrary.[54]

At bottom, this line of analysis by the Human Rights Committee is a strong one. It indicates a vast number of issues where there is no conflict between the law of armed conflict and human rights law, and the latter would, consistent with the logic of each regime, regulate the specific actions in question.

Finally, the faithful application of human rights law, including the accommodations made to state authorities in times of genuine emergency, may also show that there is far less of a difference in protections than one might assume regardless of which legal regime applies. As an example, human rights law provides for long-term preventive detention of terrorist suspects under certain conditions. Specifically, a significant body of international human rights law clearly permits—and regulates—preventive detention of security detainees. The very first decision of the European Court of Human Rights—*Lawless v. Ireland*—upheld the United Kingdom's use of preventive detention of IRA members (through a derogation

54. Interview by Ryan Goodman with Christof Heyns and Yuval Shany, Members, UN Human Rights Committee (Feb. 4, 2019), https://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/.

by the UK government).[55] Citing *Lawless*, the Inter-American Commission has also recognized the same principle of allowing preventive detention of security threats under particular conditions.[56] And, it is a settled understanding that the International Covenant on Civil and Political Rights provides for this option as well.[57] While there are important legal preconditions that a state must meet for it to engage in any form of preventive detention for security purposes, this recap of law of preventive detention illustrates that the gap between human rights law and the law of armed conflict may not be as wide as some imagine. The UN Human Rights Committee's General Comment on the right to life indicates other areas in which human rights law may similarly accommodate state interests when dealing with terrorism, and as a result narrow the difference between the two legal regimes.

As a final matter, a question may be asked how relevant the application of human rights is to the United States, which takes the position that the most relevant human rights treaties do not apply extraterritorially at all or only in a most narrow set of cases.[58] The position of the United States, however, should be understood as limited to the jurisdictional requirements of specific treaties, and not customary international human rights law. U.S. military manuals, for example, reject the application of only human rights *treaties* (and the International Covenant on Civil and Political Rights specifically),[59] and otherwise openly embrace

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55. Lawless v. Ireland, 3 Eur. Ct. H.R. (ser. A) at 34 (1961).

56. INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS ¶ 140 OEA/Ser.L/V/II.116 (2002), http://www.cidh.org/terrorism/eng/part.e.htm#_ftnref363.

57. U.N. Human. Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), ¶ 57, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014); U.N. Human Rights Comm., CCPR General Comment No. 29: Article 4: Derogations During a State of Emergency, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

58. *Cf.* Mary E. McLeod, *Acting Legal Adviser McLeod: U.S. Affirms Torture Is Prohibited at All Times in All Places* (Nov. 12, 2014) ("In brief, we understand that where the text of the Convention provides that obligations apply to a State Party in 'any territory under its jurisdiction,' such obligations, including the obligations in Articles 2 and 16 to prevent torture and cruel, inhuman or degrading treatment or punishment, extend to certain areas beyond the sovereign territory of the State Party, and more specifically to 'all places that the State Party controls as a governmental authority.' We have determined that the United States currently exercises such control at the U.S. Naval Station at Guantanamo Bay, Cuba, and with respect to U.S. registered ships and aircraft."), https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/.

59. LAW OF WAR MANUAL, *supra* note 35, ¶ 1.6.3.3 (discussing the International Covenant on Civil and Political Rights); *id.* ¶ 1.6.3.4 ("[W]here the text of the Convention Against Torture provides that obligations apply to a State Party in 'any territory under its jurisdiction,' such obligations, including the obligations in Articles 2 and 16 to prevent torture and cruel, inhuman, or degrading treatment or punishment, extend to certain areas beyond the sovereign territory of the State Party, and more specifically to "all places that

customary international human rights to U.S. military operations abroad. The 2017 Operational Law Handbook, for example, states explicitly: "[i]n contrast to much of human rights treaty law, fundamental customary [international human rights law] binds a State's forces during all operations, both inside and outside the State's territory."[60] U.S. foreign policy has also long involved the application of human rights law in criticism of other countries' military operations in extraterritorial settings—from the Soviet Union's human rights violations in Afghanistan to Russia's in Georgia.[61] In short, there is nothing stopping the reconciliation I have described here at least as a matter of customary international law. Many experts would add the same holds true under a proper understanding of treaty law as well, even though the United States government may not, as a whole,[62] yet embrace that understanding of the International Covenant on Civil and Political Rights.

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the State Party controls as a governmental authority."); BRAD CLARK ET AL., THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 45 (Dustin Kouba ed., 17th ed. 2017) ("Unlike the ICCPR, the [Convention Against Torture] applies to U.S. activities worldwide, including military operations.").

60. CLARK ET AL., *supra* note 59, at 49.

61. Ryan Goodman, *The United States' Long (and Proud) Tradition in Support of the Extraterritorial Application of International Human Rights Law*, JUST SECURITY (Mar. 10, 2014), https://www.justsecurity.org/8035/united-states-long-and-proud-tradition-supporting-extraterritorial-application-international-human-rights-law/.

62. *See* U.S. Dep't of State, Office of the Legal Advisor, Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights (Oct. 19, 2010).