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ARTICLE: Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict *

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SUMMARY:
... The topic of this article is *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*. ... THE MARTENS CLAUSE ACCOMMODATES THE UNIFIED USE OF FORCE RULEAs for the relative authority between this international human rights law and the old law of armed conflict, the non-derogability of the rights to life and humane treatment also confirm that these rights are *jus cogens* norms that, in turn, have at least the same legal authority as the *Hague* and *Geneva Conventions* governing the conduct of armed conflict, which themselves reflect many *jus cogens* norms. ... Furthermore, as for that dimension of the Unified Use of Force Rule that relies on the right to life guaranteed by the ECHR or *CIS Convention* (which arguably reflects only a regional customary international law norm), the global customary international law governing the right to *humane treatment* probably will moot the textual differences between the rights to life guaranteed by the ECHR (and *CIS Convention*) and other international human rights treaties. ...

Based on the 2001 Ariel F. Sallows Lecture, this article describes and argues for a Unified Use of Force Rule that relies on the application of international human rights law to the law of armed conflict. The author argues that such a Rule is legally and operationally required in light of both the changing character of contemporary armed conflicts and the law of armed conflict. The Rule incorporates an absolute necessity threshold from international human rights law for interpreting the Superfluous Injury and Unnecessary Suffering Rule, and the Proportionality Rule, both of whose present implementations pose practical and legal difficulties. The author addresses the applicability of the doctrine of lex specialis and the accommodation of this Rule under Martens Clause. The article concludes with a list of legal and military advantages afforded by the implementation of the Unified Use of Force Rule.

TEXT:

[*347] The topic of this article is *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*. I will argue that international human rights law can be used to interpret some aspects of the law of armed conflict and, thereby, create greater restraints on the use of force. n1 The result of this effort will be a Unified Use of Force Rule that not only makes the conduct of war and "operations other than war" n2 (OOTW) more humane, but also [*348] enables military personnel to adhere more effectively to the law of armed conflict.

I. CHANGING CHARACTER OF ARMED CONFLICT AND THE LAW OF ARMED CONFLICT

For many people--even those who supported NATO's humanitarian intervention in Kosovo--the number of collateral civilian injuries and deaths was too high, especially in light of the precision bombing capabilities of NATO forces. In the Persian Gulf War, the Gulf Coalition was criticized for its apparent unnecessary slaughter of Iraqi forces during their retreat from Kuwait. n3 As Judge Theodor Meron has concluded:

Since in both the second Persian Gulf and the Yugoslavia bombardments, [targets serving both military and civilian uses]...were frequently attacked with major consequences for the civilian population, new reflection should be given to the adequacy of the criteria stated in [*Geneva Convention] Protocol I* for attacks on such objects. n4

How can we place greater legal restraints on the use of force in order to decrease casualty rates of both civilians and combatants while achieving the very important objectives of peace and international security? To do so, we must first examine how the conceptualizations of armed conflict and the law of armed conflict have changed over the last fifty years.

Until the end of World War II, the normative understanding of armed conflict generally had been bifurcated into issues dealing with (i) whether the war itself was just, n5 and (ii) whether the war was being waged in a morally or legally acceptable manner. The examination of whether a war was just took place apart from the examination of the conduct of warfare, hence the distinction between *jus ad bellum* and *jus in bello*. n6 This bifurcation was reflected in textual codifications of legal norms. For example, on one hand the *Hague* n7 and *Geneva [*349] Conventions* n8 only governed the conduct of warfare; n9 and, on the other hand, the *Kellogg-Briand Pact* n10 only addressed the lawfulness of war itself. This normative conception of war has changed as the dichotomy between just war and lawful waging of war has begun to collapse. The beginning of this conceptual change emerged near the end of World War II with the adoption of the *London Agreement* and *The Charter of the United Nations*, n11 which established the Nuremberg War Crimes Tribunal. This Agreement and Charter addressed both crimes against peace and war crimes in the same instrument, thereby encouraging the integration of *jus ad bellum* and *jus in bello*. n12 Most [*350] recently, the *Treaty of Rome* establishing the International Criminal Court has done the same. n13

One cause of the collapsing of this dichotomy was the emergence of the idea that certain wars or other armed conflicts are "police actions." The Korean Conflict was described as a police action because of North Korea's aggression against South Korea. The war conducted against North Korea (and later China) was justified under the *UN Charter*, which allows use of armed force for self-defense or international security. n14 Recently, humanitarian military intervention in Kosovo by NATO was justified as necessary to protect international security in a region that was being threatened by the commission of genocidal acts and crimes against humanity. Accordingly, the humanitarian military intervention in Kosovo also could be considered a police action because it arguably sought to stop and prevent further international criminal acts. While such police actions could be taken unilaterally by a state (although UN Security Council approval probably would be required), most police actions today are international [*351] efforts (called "peace-enforcement" operations) under chapter VII of the *UN Charter*.

The second cause of this change in the normative conception of armed conflict has been growing technological advances in the means of warfare. On the one hand, technological "advances" have resulted in increased casualty rates for both combatants and civilians. For example, the improvement of air defenses during World War II compelled bomber aircrafts to fly at higher altitudes. This resulted in target-area bombardment instead of bombardment aimed at individual and discrete military targets. n15 As a result, unfortunately, more civilians and combatants were killed. n16 This trend of growing casualties continued with the deployment of landmines and nuclear and chemical weapons. The international concern with collateral civilian casualties led to the adoption of several treaties and declarations seeking to curb or eliminate casualties produced by this indiscriminate or unnecessarily injurious weaponry. n17

On the other hand, as evidenced by the Gulf War and Kosovo Conflict, growing technological advances have recently decreased casualty rates among both civilians and combatants. n18 As Capt. [*352] Robert G. Hanseman observed in regard to the U.S.' advanced military capabilities:

The U.S. is enhancing its power to "leapfrog" over traditional combat units, strike at their command and control centers, and then target the enemy combat units at a leisurely pace as they scramble for intelligence. If this is the case, it could well result in decreased casualties, because enemy units would be more likely to surrender after being cut off from their chain of command, and U.S. forces would have time to put on a display of force designed to convince them that surrender is their best option, rather than simply targeting and killing them. n19

Smart weaponry and non-lethal measures have allowed military forces to protect not only their own military personnel but also the military forces and civilian populations of an enemy state. In order to remedy the growing casualty rates of civilians, governments ironically have also effectively decreased the casualty rates of enemy combatants. Combatants have become, in a sense, "civilians" in that the protections afforded to civilians by international treaty and use of smart and non-lethal weapon technologies have impacted combatants, too.

The fact that armed conflicts have increasingly become non-international is contributing to the collapse of the civilian-combatant distinction. Wars of national liberation and ethnic conflicts have blurred the distinction between regular forces and irregular forces, making the civilian-combatant distinction difficult to recognize. n20 As a result, the meaning of threats to "international peace and security" has arguably expanded to include conflicts that appear at first glance to be only internal in order to extend international legal protection to non-combatants. n21 Moreover, with the development of peacekeeping operations over the last fifty years, military peacekeeping forces often take on domestic police roles. Thus, civilians are increasingly becoming targets for use of force.

[*353] These developments reflect a new kind of warfare, and this new warfare represents a revolution in military affairs. There has been a fundamental change in four areas: "information operations, weapons systems, and space", n22 and--particularly relevant to this article--"militarization of civilians and civilian activities". n23 This last area of change is visible in many facilities shared by military and civilian operations (*e.g.*, airports, office buildings), and in the center of technological advances in weaponry, communications, and computers, which lie in the commercial, non-defense sectors.

Together, these opposing results from technological advances in weaponry are collapsing the bifurcation of the normative concept of armed conflict because, in conjunction with the implementation of the idea of "international police actions", combatants have effectively become either "criminal suspects" or "international police", depending on one's opinion as to the underlying legality of the conflict. n24 Persons once characterized as "enemies" should now be characterized in international police actions as "criminal suspects" under international law. As criminal suspects, they have political and civil rights as do civilians who are less blameworthy. It does not matter if these criminal suspects are terrorists or enemy forces possessing substantial weaponry. As the character of armed conflict changes into one characterized best as law enforcement actions, so too should the law governing the conduct of armed conflict.

II. THE TRADITIONAL LAW OF ARMED CONFLICT

Let us now turn to the traditional law of armed conflict. *The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (hereinafter *Geneva Convention-Protocol I*) addresses the use of force against combatants. Article 35 states:

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. n25

[*354] This is called the "Superfluous Injury and Unnecessary Suffering Rule" or the "SIrUS Rule". n26

Most important, the *Geneva Convention-Protocol I* addresses the use of force against civilians and adds two more rules: the Distinction Rule and the Proportionality Rule. n27 Article 48 of the *Geneva Convention-Protocol I* articulates the Distinction Rule:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between

civilian objects and military objects and accordingly shall direct their operations only against military objectives. n28

Article 51 of the *Geneva Convention-Protocol I* states the Proportionality Rule:

4. Indiscriminate attacks are prohibited....

[*355] 5. ...The following types of attacks are to be considered as indiscriminate:

...
(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. n29
Let us examine these rules more closely. The SIrUS Rule has been interpreted to be a balancing test because what is considered neither "unnecessary" nor "superfluous" must be balanced against the foreseeable suffering and injury that the weapon will produce. However, assessments of both unnecessary suffering and superfluous injury require a deeper analysis of necessity. After all, how necessary is "necessary?" There are different levels of necessity and different tests for defining these levels. n30 The lowest level of necessity, which borrowing from U.S. equal protection jurisprudence will be called a "minimum rational basis test", would only require that the means and methods of warfare be *rationally related* to a legitimate governmental purpose. n31 An intermediate level of necessity, which may be assessed with a "heightened scrutiny test", requires that the means and methods of warfare are *substantially related* to achieving an important governmental objective. n32

The highest level of necessity, which we may assess with a "strict scrutiny" or "absolute necessity" test, would require that the means and methods of warfare be absolutely necessary for achieving a compelling governmental objective. There can be no other alternative available for achieving the objective. The means must be neither under-inclusive nor over-inclusive for achieving this end--although an over-inclusive means is more harmful because it can collaterally harm other rights or persons. n33 The strict scrutiny or absolute necessity test is used when fundamental rights n34 are harmed or the [*356] class of persons targeted is suspect. n35 Although Professor Gerald Gunther has described this method of scrutiny in the U.S. equal-protection context as "'strict' in theory" but "fatal in fact", n36 certain means or methods of warfare might satisfy this test. n37 The strict scrutiny or absolute necessity test is especially appropriate to warfare because an over-inclusive means harms persons who have no intrinsic relevance to achieving lawful objectives, and because an under-inclusive means is ineffective for achieving such objectives, thereby negating the necessity of its use.

Many experts--including the International Committee of the Red Cross-have concluded that the SIrUS Rule as now stated is ambiguous and difficult to implement, lacking any practical value because of its failure to articulate the specific threshold of necessity required, which has resulted in disagreement over the proper threshold. n38 Because of this difficulty, states have approached the subject of inhumane treatment by using treaties to outlaw particular means and methods of warfare, such as the use of chemical, biological, and nuclear [*357] weapons, n39 although some of these weapons do not always cause unnecessary suffering or superfluous injury. n40 In this way, the international community can circumvent the issue of whether, in fact, the weapon always causes unnecessary suffering or superfluous injury.

However, there are problems with this approach. First, with the acceleration of technological advances in weaponry, the outlawing of [*358] specific categories of weapons by treaties will always come too late for persons who become casualties from the use of these means and methods of warfare due to the long negotiating process inherent in treaty adoption. n41 Even extant weapons in long use may violate the SIrUS Rule but continue to be used because states have failed to adopt specific treaties outlawing them. n42 For example, the use of shrapnel artillery shells can result in unnecessary suffering or superfluous [*359] injury even though no treaties have been adopted outlawing shrapnel and none are likely forthcoming in the future.

Second, this weapons-design approach to the SIrUS Rule ignores the circumstances surrounding the decision to use force, n43 and whether it is necessary to escalate use of force. Therefore, the SIrUS Rule needs to be tightened up in order to expeditiously challenge new weapons designs that have not yet been fielded and to challenge the use of existing weapons that, in certain circumstances, may

cause unnecessary suffering or superfluous injury.

This does not assert that the SIrUS Rule should no longer be implemented through a weapons-design approach; quite simply, it is not the only valid means of implementation. The SIrUS Rule only "lays down a prohibition relating to the results produced". n44 There is nothing in the *travaux preparatoires* of the *Geneva Convention-Protocol I* that excludes an interpretation of the Rule based on, for example, a necessity analysis--much less requires only a weapons-design interpretation of the Rule. n45 Furthermore, as we shall see, a new interpretation of the SIrUS Rule is required in order to conform the law of armed conflict with the international human rights law governing armed conflict.

Let us now turn to the Proportionality Rule. First and foremost, the Proportionality Rule only applies to potential, collateral injury to civilians--not combatants. n46 Since the Proportionality Rule does not apply to combatants, military forces can lawfully use overwhelming force against their opponents. Indeed, the use of overwhelming force is militarily preferable for winning wars. The means and methods of warfare employed, however, must not cause unnecessary suffering, and such means and methods, this author will argue, need not be lethal. Under the traditional understanding of the law of armed conflict, such overwhelming force can have unfortunate consequences by including lethal and non-lethal force that is not absolutely necessary for achieving lawful military objectives.

The Proportionality Rule also is a balancing test that is difficult to implement. How does one measure "proportionality?" When weighed against military advantage, how much civilian loss of life or injury is proportional? We have already seen disagreement over what [*360] constitutes disproportionate force. For example, during the Gulf War, the British refused to participate in some operations because of the divergent opinion among Coalition forces concerning the threshold of proportionality. n47 Therefore, a more precise rule has to be articulated to ensure better protection to civilians.

The law governing the use of force needs a new approach because both the SIrUS and Proportionality Rules come up short. Such a new approach needs to examine the circumstances requiring or not requiring the use of *any* force--whether lethal or non-lethal. n48 The pivotal determinative issues are the following:

(i) Which circumstances absolutely require a use of force?
(ii) Which particular means or method of conducting war or OOTW causes the least suffering and injury?
(iii) How does one escalate the level of force (and the consequent suffering or injury) to that level when it is absolutely necessary to achieve the lawful objective?
Now, in light of this changing conception of armed conflict, are there any existing or emerging rules that tighten up the law of armed conflict and serve to lessen suffering and injury within the context of armed conflict? The answer is "yes," and we can locate these rules in the application of international human rights law.

III. THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW TO THE LAW OF ARMED CONFLICT

The law of armed conflict has incorporated numerous human rights guarantees. These are located primarily in the common Article 3 provisions of the *Geneva Conventions* that are universally guaranteed regardless of how the armed conflict is characterized. n49 These guarantees include prohibitions of violence to life and person, hostage-taking, outrages upon personal dignity, extrajudicial executions, discriminatory treatment, and a duty to care for the wounded and sick. Reflected in common Article 3 provisions are two human rights [*361] guarantees: the right to life and the right to humane treatment. Let us first address the right to life. Article 6 of the *International Covenant on Civil and Political Rights* n50 states:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. n51

Article 2 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* n52 is even more precise. It states in relevant part:

1. Everyone's right to life shall be protected by law....

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than *absolutely necessary*:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest...;
(c) in action lawfully taken for the purpose of quelling an...insurrection. n53
The right to humane treatment is guaranteed by Article 7 of the ICCPR, which states in relevant part:

No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. n54

Article 3 of the ECHR is nearly identical to the ICCPR. Article 3 states:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment. n55 [*362]
Relevant to the application of these rights to war and OOTW are the non-derogability provisions in the ICCPR and ECHR. Both the ICCPR and ECHR allow no derogation from the right to humane treatment. However, the ECHR differs from the ICCPR in regard to the right to life. Unlike the ICCPR, the ECHR does allow derogation from the right to life during war. Article 4 of the ICCPR states in relevant part:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6 [right to life], 7 [right against inhuman treatment]...may be made under this provision. n56

Article 15 of the ECHR states in relevant part:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Article[] 3 [right to humane treatment]...shall be made under this provision. n57

Other major human rights treaties also allow no derogation from the rights to life and humane treatment during war or other national emergencies. n58 What is important to recognize about the non-derogability [*363] of these rights during war (except the right to life guaranteed by the ECHR) and other national emergencies is that they reflect *jus cogens* norms. *Jus cogens* is non-derogable, peremptory law that binds all nations at all times. n59 Multilateral treaties guaranteeing non-derogable rights are a source for *jus cogens* norms. n60

A. THE RIGHT TO LIFE AND THE *MCCANN* RULE n61
The European Court of Human Rights has repeatedly interpreted the right to life guaranteed by the ECHR in the context of military use of lethal force. n62 In *McCann and Others* v. *United Kingdom*, n63 the Grand [*364] Chamber n64 of the European Court of Human Rights considered a case involving the shootings of three suspected Irish Republican Army terrorists by members of the Special Air Service (SAS) and the police in Gibralter in March 1988. The UK, Spanish, and Gibralter authorities had reason to believe that a terrorist attack was planned in Gibralter, and that the target was probably the Band and Guard of the Royal Anglican Regiment during a ceremony in 1988. The authorities knew that the suspects were active IRA members and were attempting to enter Gibralter. However, the authorities did not prevent the suspects from entering because the authorities had insufficient evidence to successfully prosecute them.

Fearing that the suspects would detonate a remote-controlled bomb, the authorities shot and killed them. Although the suspects, indeed, had planned an attack and planted a bomb, the method of detonation was not a remote device that could be set off instantaneously. Moreover, the evidence claiming that it was such a device was dubious, having been provided by a non-expert.

Family members of the deceased suspects claimed a violation of the suspects' rights to life under the

ECHR. It was alleged that, on the evidence, the level of force used was more than absolutely necessary because shooting the three suspects was not necessary to prevent the bombing. The European Court found a violation of the right to life because the authorities had used lethal force that was not "absolutely necessary in defence of persons from unlawful violence." n65 The Court's decision was based on the facts that the authorities (i) had not prevented the IRA suspects from travelling to Gibraltar; (ii) had "failed to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous"; and (iii) and failed to stop their soldiers from automatically using lethal force. n66 The Court noted that the right to life allows no derogation in times of national emergency, and as such it must be strictly construed. Thus, the deprivation of life must be subjected to the most careful scrutiny, taking into consideration both the actions of the authorities and the surrounding circumstances, including the planning and control of the operation.

The Court accepted that the soldiers honestly believed that it was necessary to shoot the suspects in order to prevent remote detonation of the device. Their beliefs were based on erroneous information with [*365] which they had been supplied. However, the Court found that their commanders had failed to organize the operation as a whole in conformity with the right to life, including the information and instructions given to the soldiers. Consequently, the organization of the operation inevitably required the use of lethal force and failed to adequately respect the suspects' right to life.

For convenience, let's call the Court's application of the right to life to military operations the "*McCann* Rule." It is important to note that the *McCann* Rule allows military authorities to use lethal measures only if there are no other alternatives to taking life. Accordingly, they must consider and use non-lethal measures n67 if they can achieve their lawful objectives by such means.

The use of the *McCann* Rule is not limited to tactical operations. It also extends to strategic operations. The U.S. Department of Defense has noted that non-lethal weapon employment is not limited to operations in the lower spectrum of conflict (*i.e.*, peacekeeping, peace-enforcement, and humanitarian missions that generally are associated with discrete, independent, relatively small operations). Rather, the employment of non-lethal means and methods of warfare can apply across the range of military operations where, to quote the U.S. Department of Defense, they can "enhance the...effectiveness and efficiency [of]...military operations". n68 To comply with the *McCann* Rule, military forces would need to be further trained in tactics and strategy using non-lethal measures, and several senior military authorities already have argued for such training. n69 Of course, military forces must be given access to these non-lethal means and methods. n70

[*366] What is the relevance of the *McCann* Rule to the law of armed conflict, and how does it place greater restraints on the use of force? First, the *McCann* Rule is a clearer and better defined rule to implement than the SIrUS or Proportionality Rules. The *McCann* Rule only allows the taking of life *if there is no other alternative*. Second, the right to life applies to both civilians and combatants, the latter application as illustrated by the *McCann* Rule. The ECHR (as well as most other human rights treaties, including the ICCPR) makes no distinction between civilians and combatants. The Proportionality Rule does not extend such protection to combatants when they are the only targets. Third, although the *McCann* Rule was formulated in the context of a non-international conflict, n71 the Rule also is applicable to international conflicts, because several international tribunals have repeatedly held that international liability for human rights violations--including violations of the right to life--extends outside a nation's territory. n72 Moreover, the enemy forces (whether state or non-state) need not be [*367] a party to the ECHR because the right to life guaranteed by the ECHR reflects not only regional international law norms but also global international law norms. n73 Furthermore, there is no *si omnes* or general participation clause in the ECHR that allows state-parties to exempt themselves from their ECHR obligations when such enemy forces are not parties to the ECHR. Even if the ECHR had such a general participation clause (such as Article 2 of the *Hague Convention (IV)* for states or Article 96(2) of the *Geneva Convention-Protocol I* for non-states), the general participation clause has fallen into disuse. n74

Although the ECHR allows a state-party to take measures derogating from the right to life "in respect of deaths resulting from lawful acts of war" (Art. 15(2)), such measures are allowed only "to the extent *strictly required* by the exigencies of the situation" (Art. 15(1)) [emphasis added]. This strict necessity requirement is identical to the absolute necessity test articulated by the *McCann* Rule because both operate identically. n75 Furthermore, Article 15(1) creates an additional requirement that such measures taken by a state-party in derogation of the right to life during war must "not be inconsistent

with its other obligations under international law." As we shall see below, n76 the right to *humane treatment* under international human rights law requires that states may use force only if there is no other alternative to inflicting suffering and that such use of force--if absolutely necessary--must employ a means or method of warfare of a nature to cause the *least possible* amount of suffering. The right to humane treatment is non-derogable during war. Therefore, a state-party's "other obligations under international law"--*i.e.*, under the right to humane treatment--would require that a state-party may only use force if absolutely necessary. This fortifies the *McCann* Rule because the taking of life by use of force also must meet an identical absolute necessity threshold under the right to humane treatment. Unless the taking of life occurs without any suffering, n77 the taking of life must be absolutely necessary under the right to humane treatment.

[*368] Clearly, the *McCann* Rule is an emerging rule that will increasingly acquire greater recognition. n78 But what about the use of non-lethal force that still causes unnecessary suffering or superfluous injury? To address this issue, let us now turn to the right to humane treatment under international human rights law.

B. THE RIGHT TO HUMANE TREATMENT AND THE *SATIK* RULE

The right to humane treatment under international human rights law can be used to interpret and clarify the SIrUS and Proportionality Rules. Although international human rights law absolutely prohibits inhumane treatment, *exactly what* constitutes such inhumane treatment depends on the context--in terms of both the conditions requiring use of force and the foreseeable level of suffering imposed. In other words, it may be lawful to use force that causes suffering, but the level of suffering caused by that use of force may violate the right to humane treatment.

In *Satik and Others* v. *Turkey*, a case concerning a detainee, the European Court of Human Rights held that "recourse to physical force which had not been made *strictly necessary* by [the victim's] own conduct diminishes human dignity and is in principle an infringement" of the right to humane treatment. n79 In cases involving unlawful behaviour by the victim, the Court recognizes that some acts causing suffering may indeed be lawful if strictly necessary to achieve a lawful objective. In *Satik*, the European Court noted the absence of governmental justification for the commission of certain harmful acts and then held that such acts were unlawfully inhumane. n80 The *Satik* case is important because its strict necessity rule can interpret and supplement the SIrUS Rule, which does not say what level of necessity is required for allowing the use of particular means and [*369] methods of warfare that cause suffering or injury. We can call this strict necessity rule the "*Satik* Rule".

However, in other cases only involving innocent victims, the Court is less clear. For example, in *Selcuk and Asker* v. *Turkey*, n81 the European Court of Human Rights examined the burning of civilian Kurdish homes by Turkish military authorities and noted:

Even if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as a discouragement to others, this would not provide a justification for the ill-treatment. n82

The Court does not explain whether it was the Turkish authorities' decision to use force, or the level of suffering caused by the burning of the applicants' homes, that violated the right to humane treatment.

This brings us to the level of suffering imposed. Under the right to humane treatment guaranteed by the ICCPR, the means or method of warfare must--at least--cause the least suffering. n83 In *Ng* v. *Canada*, the UN Human Rights Committee held that the lawful execution of a convicted prisoner "must be carried out in such a way as to cause the *least possible physical and mental suffering*" in order to comply with the right to humane punishment under the ICCPR. n84 However, it is important to note that *Ng* v. *Canada* did not deal with innocent persons--as is the case with mixed civilian-combatant targets during armed conflict. This suggests that innocent persons may receive greater protection than convicted persons; namely, that innocent persons may not be subjected to *any* physical or mental suffering. This suggestion casts doubt on the legal validity of the Proportionality Rule, which still allows innocent civilians to be targeted. Until a court determines whether the right to humane treatment prohibits the subjection of innocent persons to any suffering during armed conflict, it is at least safe to say that the subjection of innocent civilians to any use of force because they constitute part of a mixed civilian-combatant target must be carried out in a way so as to cause the least possible physical and mental suffering. Nevertheless, for combatants, the least possible suffering requirement [*370] under *Ng* v.

Canada still provides greater protection and serves to interpret and augment the SIrUS Rule.

The *Satik* Rule--like the *McCann* Rule--requires strict or absolute necessity. Although the *Satik* Rule was articulated outside the context of war, the non-derogable provision of the ECHR does not allow derogation of the right to humane treatment guaranteed by Article 3. n85 Therefore, it probably is not relevant that the *Satik Case* did not address warfare.

In the context of armed conflict, the right to life is closely associated with the right to humane treatment. Both address the use of force, and both rights are applicable to the contexts of war and OOTW. n86 Using identical necessity thresholds for uses of force that can entail death and suffering would bring the right to humane treatment in line with the right to life. Consistency and uniformity are not just important for creating elegant legal systems, but also for practical operational reasons. First, not using the absolute or strict necessity threshold for interpreting the SIrUS Rule can foreseeably n87 lead to a violation of both the *McCann* Rule and the *Geneva Convention-Protocol I*. Article 57 of the *Geneva Convention-Protocol I* also suggests a strict necessity requirement for attacking mixed combatant-civilian targets:

When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to [*371] be selected shall be that the attack on which may be expected to cause the *least danger to civilian lives* and to civilian objects. n88

For example, instead of the less potentially lethal water cannon, one chooses to use rubber bullets (given that both means can achieve the objective) and death does in fact result, the *Geneva Convention-Protocol I* would have been violated with respect to civilians, and the *McCann* Rule would have been violated with respect to combatants. If the *Geneva Convention-Protocol I* and the *McCann* Rule are to be effective, the law governing the use of force--lethal and non-lethal--must be consistent. If combatants are going to be held accountable to a law of armed conflict, then that law of armed conflict must be clear, precise, and operationally practical, and violations of the law of armed conflict must be foreseeable.

Second, applying international human rights law to the law of armed conflict today helps render irrelevant the observance of the combatant-civilian Distinction Rule. This collapse of the combatant-civilian distinction reflects a practical reality because the use of force against military targets often entail collateral civilian suffering or injury. n89 A recent twist on this development is the voluntary protection of military targets by civilians. After the Gulf War, Iraqi civilians surrounded potential targets on several occasions to protect the targets from air attacks by Gulf Coalition forces. Although these civilians removed themselves from international legal protection afforded to persons placed *hors de combat* because they took part in the hostilities, n90 they still were unarmed. Furthermore, some civilians may have been children who were forced to participate by relatives. n91 If Coalition forces had used lethal force, the world community probably would have been outraged. Nonetheless, such use of lethal force would have probably been lawful under the old law of armed conflict, because it did not violate the Proportionality or SIrUS Rules.

Third, applying international human rights law to the law of armed conflict furthers the collapse between the law governing international conflicts and the law governing non-international [*372] conflicts, n92 because international human rights law addressing the rights to life and humane treatment recognizes no distinction n93 between international and non-international conflicts. This collapse is imperative today because armed conflicts increasingly have become non-international. n94 Moreover, international human rights law applies even to those grey situations (*e.g.*, "riots, isolated and sporadic acts of violence" n95) in which a party to the conflict claims that neither the law governing international conflicts nor the law governing non-international conflicts applies.

In summary, contemporary armed conflicts have made the combatant-civilian distinction requirement increasingly unworkable, and international human rights law has made the distinction requirement increasingly irrelevant. This is not to say that compliance with the Distinction Rule is no longer legally required. Rather, the greater intermingling of military and civilian objects and personnel that has been brought about by, *inter alia*, the internet, placement of military-related computer and programming development in commercial non-defense sectors, n96 and civilian-military shared telephone networks n97 and electrical power grids makes it increasingly difficult to comply with the Distinction Rule (and by implication the Proportionality Rule).

By applying an absolute necessity threshold borrowed from international human rights law to the law of armed conflict, we can articulate a new use of force rule that unifies not only international human rights law and the law of armed conflict but also the rules governing the uses of lethal and non-lethal force against combatants and civilians. It also makes warfare more humane. Let's call this new rule the "Unified Use of Force Rule".

IV. THE UNIFIED USE OF FORCE RULE

The Unified Use of Force Rule is a three-part rule with the following requirements.

[*373] First, military authorities may use force against combatants or mixed combatant-civilian targets only if there is no other alternative to inflicting injury and suffering for achieving lawful objectives, both tactical *and* strategic. Second, if the means or method *per se* of such use of force is not illegal, the employed means or method must inflict only the *least possible* amount of suffering and injury. Third, suffering and injury may be escalated incrementally through the additional use of force by the original or another means or method of warfare only if at each incremental use, the use of such means or method is absolutely necessary for achieving the lawful objectives.

The consequence of this new Rule is that the use of force has to be re-conceptualized. Military authorities must not approach their use of force decisions by way of "ratcheting down" from use of lethal force. The proper approach is to "ratchet up" when absolutely necessary--recognizing and using a range of means or methods of force with escalating degrees of suffering and injury. No longer can the decision be an "either-or"--between the use of no force and the use of lethal force. No longer can the decision alone be whether to use or not use a means or method of warfare that already has been held legal *per se*.

Let us examine this new Rule more closely.

A. MILITARY AUTHORITIES MAY USE FORCE AGAINST COMBATANTS OR MIXED COMBATANT-CIVILIAN TARGETS ONLY IF THERE IS NO OTHER ALTERNATIVE TO INFLICTING INJURY AND SUFFERING FOR ACHIEVING LAWFUL OBJECTIVES, BOTH TACTICAL *AND* STRATEGIC

The first part of the Unified Use of Force Rule constitutes the primary guiding principle for use of force and concerns the initial decision to use it. Reaching that decision requires that strategic and tactical objectives themselves be lawful and that a legal assessment of both means and ends be carried out, according to the absolute necessity threshold from international human rights law. We already have addressed the absolute necessity threshold in international human rights law. The remaining issue to be examined is the subject of lawful objectives.

Force can lawfully be used against military targets (*i.e.*, combatants) under the rights to life and humane treatment if absolutely necessary. However, as previously discussed, n98 it is less clear whether any force causing suffering can be used against non-combatants under the right [*374] to humane treatment if they constitute part of a mixed combatant-civilian target. n99 Because of this ambiguity and because the Proportionality Rule does allow use of force against civilians, it is at least safe to say that the use of force executed must cause the least possible suffering. This may be a troubling humanitarian conclusion given that innocents still can be targeted, but disallowing such targeting would absolutely immunize military targets from attack. As a result, enemy military authorities would be encouraged to place such targets among civilian populations, and the inability to attack some military targets--such as nuclear missile sites--can have devastating consequences on friendly and other civilian populations. Implementation of the Unified Use of Force Rule at least ensures that such attacks inflict the least possible degree of injury and suffering on the civilians n100 surrounding the target. n101

Strategically speaking, force may be used lawfully against enemy forces only for protecting a state's sovereignty, territorial integrity, or political independence; maintaining peace or international security; n102 and arguably for preventing international crimes (*e.g.*, genocide, war crimes, crimes against humanity, terrorism) and humanitarian catastrophes (*e.g.*, as seen in Somalia), because such crimes and catastrophes are inconsistent with the *UN Charter* and represent a threat to international security. n103 Therefore, only these six strategic [*375] objectives are lawful: (i) defense of sovereignty, (ii) defense of territorial integrity, (iii) defense of political independence, (iv) maintenance of peace, (v) maintenance of international security, and, arguably, (vi) prevention of international crimes and humanitarian catastrophes. n104

However, it is illegal to use *lethal* force to obtain any of these six strategic objectives in cases *not* involving (i) the defense of persons from unlawful violence, (ii) lawful arrest or prevention of escape of persons lawfully detained, or (iii) the quelling of a riot or insurrection. The right to life guaranteed by the ECHR allows the use of lethal force only in these three cases. n105 For example, it is unlawful to use lethal force in response to enemy infection of one's computer with a virus to destroy intelligence information if such infection cannot foreseeably cause unlawful violence to persons. It is less clear whether *non-lethal* force could be used because the right to humane treatment does not address which objectives could be lawfully pursued through the infliction of suffering.

Tactically speaking, the lawfulness of targeting military objects or personnel must be made on the basis of each individual attack, not on a cumulative basis, under the Proportionality Rule. n106 Targeting a [*376] military objective in order to reduce the enemy's general war-making capability is unlawful because this merely addresses means, not ends. International law has rejected the doctrine of *Kriegsraison* because the doctrine provides no standard as to the lawfulness of means. After all, even lawful ends never justify unlawful means. The only lawful tactical objective for using force is the neutralization or deterrence of enemy force, which can take place by surrender, withdrawal, and/or isolation of enemy combatants or military assets. n107 Neutralization or deterrence does not necessarily mean the destruction of military objects or the infliction of injury or suffering upon combatants. Indeed, temporary neutralization or deterrence would be especially preferable because permanent damage can have the collateral effects of discouraging resolution of conflict and creating long-term harmful conditions for civilians. As Colonel Siniscalchi has observed in the case of non-lethal weapons:

Non-lethal weapons enable effective conflict termination. The reversibility of most non-lethal effects limits the duration of the "damage." Assuming that the political objective is to re-establish stability, it becomes necessary to assist the failed state to restore economic and political processes. A non-lethal strategy provides one option. n108 [*377]
Therefore, the first part of the Unified Use of Force Rule, "military authorities may use force against combatants or mixed combatant-civilian targets only if there is no other alternative to inflicting injury and suffering for achieving lawful objectives, both strategic *and* tactical," ensures that both the means and ends are part of the calculus for using force.

B. IF THE MEANS OR METHOD *PER SE* OF SUCH USE OF FORCE IS NOT ILLEGAL, THE EMPLOYED MEANS OR METHOD MUST INFLICT ONLY THE *LEAST POSSIBLE* AMOUNT OF SUFFERING AND INJURY
The second part of the Unified Use of Force Rule addresses the execution of the decision to use force by assessing the means and methods of warfare according to the absolute necessity threshold standard. The second part requires that "if the means or method *per se* of such use of force is not illegal, the employed means or method must inflict only the *least possible* amount of suffering and injury." Suffering or injury that is not absolutely necessary does not constitute the least possible amount of suffering or injury. n109

Certain means and methods of warfare are already *per se* illegal under international law. n110 Under the Unified Use of Force Rule, the use of these means and methods remain prohibited. However, as already discussed, there are other means and methods of warfare that are not illegal *per se*. Therefore, one needs to grade different means and methods of warfare according to their foreseeable consequences in terms of suffering and injury, as well as in terms of their efficacy in achieving a lawful objective. As for grading efficacy, military authorities and arms manufacturers already employ different models for such measurement. For example, each branch of the U.S. military issues publications called "Joint Munitions Effectiveness Manuals" that use a four-tier approach in measuring the effectiveness of different munitions. n111

[*378] However, these manuals do not grade these weapons according to relative injury or suffering, and the *Geneva Convention-Protocol I* requires such grading:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, *in some or all circumstances*, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party. n112

Therefore, in order to comply with the *Geneva Convention-Protocol I*, states must provide such grading. Unfortunately, military authorities have adopted only the weapons design approach that does not limit particular applications of weapons in different contexts if the weapon already has been determined to be lawful *per se*. Therefore, governments must grade those different means and methods of warfare that inflict foreseeable suffering and injury along a continuum.

Furthermore, states must make non-lethal weapons available to their military forces. The European Court of Human Rights has already held that military authorities must have access to non-lethal weapons and use such weapons for achieving lawful objectives. For example, in *Gulec* v. *Turkey*, n113 the European Court of Human Rights examined a case in which the applicant's son, Ahmet Gulec, was shot by the Turkish security forces on his way home from school during an unauthorised demonstration in 1991. The Turkish Government alleged that he was a terrorist belonging to the Kurdish Worker's Party (PKK) and that there were armed terrorists among the demonstrators, requiring police to open fire on the protestors in order to disperse the demonstration. Subsequently, it was shown that the protestors were not armed. The applicant claimed that the police could have used less force, but the government stated that no other weapons were available at the scene of the incident. The Court held that the lack of equipment such as tear gas, rubber bullets, water cannons, and truncheons was "incomprehensible", n114 given that the province of Sirnak where the protest took place was "in a region in which a state of emergency had been declared" n115 and where disorder could therefore be expected. n116 In these circumstances, the Court unanimously declared that the force used was not absolutely necessary and, therefore, constituted a violation of the right to life. This case is important because the Court [*379] addressed particular non-lethal measures that should have been made accessible to and used by the Turkish military forces.

Although commanders probably will be inclined to use force that does not cause the least possible suffering or injury in order to successfully achieve their lawful objective, the use of the Unified Use of Force Rule is operationally better than ratcheting down because it ensures that less suffering or injury would occur, given the availability of a spectrum of means and methods of warfare that produce different levels of suffering or injury. For example, in the case of neutralizing an enemy military radar, the use of force that would produce the least suffering and injury would be viral infection (including the advance deposit of probes or benign viruses for determining the extent of future damage) of the enemy's computer radar system. However, the enemy may be able to immunize against such infections. Therefore, one may be inclined to ratchet up the use of force by precision-guided munitions (PGMs or "smart bombs"). n117 Nevertheless, this use of PGMs still would cause less suffering or injury than carpet bombardment.

This operational advantage afforded by the Unified Use of Force Rule is also applicable to cases of less technologically advanced militaries. For example, in order to compel the surrender or withdrawal of enemy troops from a fixed fortified position, the playing of loud, [*380] obnoxious music over public address systems for a long period of time (as the U.S. did during the Panamanian invasion), is an effective method of warfare that causes the least suffering or injury, but this may not have immediate effects. Therefore, one may be inclined to ratchet up the use of force by storming the enemy fortification and employing stun-grenades and rubber bullets or tasers. Nevertheless, this still would cause less suffering or injury than the use of rifle-propelled grenades or artillery.

This Rule also solves some problematic scenarios in contemporary armed conflicts. For example, where there is a mixed combatant-civilian target whose destruction will probably result in collateral harm to civilians, and where it is anticipated that the destruction of such target is barely proportional for achieving a military advantage, the Unified Use of Force Rule ensures that proportionality is, in fact, maintained. The Rule requires that military authorities start with using a means or method of warfare that causes the least suffering and injury to not only combatants but also civilians. Use of such a means or method--such as the deployment of carbon fiber chaff over an electrical power plant to disrupt electricity production also warns civilians who are not aware of their proximity to a military target, which is in compliance with the *Geneva Convention-Protocol I*. n118 In cases of voluntary protection of military targets by unarmed civilians (as seen in the post-Gulf War example) or involuntary protection by POWs (as seen during the Vietnam War), the application of the Unified Use of Force Rule would have been more acceptable to the international community because the Rule requires the use of a means or method that causes the least suffering or injury, and such would probably also effectively disperse the crowd of civilians surrounding the targets.

C. SUFFERING AND INJURY MAY BE ESCALATED INCREMENTALLY THROUGH THE ADDITIONAL USE OF FORCE BY THE ORIGINAL OR ANOTHER MEANS OR METHOD OF WARFARE ONLY IF AT EACH INCREMENTAL USE, THE USE OF SUCH MEANS OR METHOD IS ABSOLUTELY NECESSARY FOR ACHIEVING THE LAWFUL OBJECTIVES

The third part of the Unified Use of Force Rule also addresses the execution of use of force decisions. Specifically, the third part deals with cases in which the initially chosen means or method of warfare [*381] fails to achieve its lawful objective. The third part of the Rule allows "suffering and injury to be escalated incrementally through the additional use of force by the original or another means or method of warfare only if at each incremental use, the use of such means or method is absolutely necessary for achieving the lawful objectives." Again, the absolute necessity threshold standard is used because another discrete attack, and possibly additional attacks, may be executed. This development now requires not only a re-visitation to the first part of the Rule, but also a modification to allow for incremental escalation of suffering and injury. The assessment of the absolute necessity for each incremental escalation of suffering and injury ensures that once military authorities use force and such use of force does not achieve its objective, they do not overreact and use disproportionate force.

Of course, incremental escalation of force can be advantageous to enemy forces by providing them with an opportunity to, for example, refortify or reinforce their position, or move their military assets. Therefore, it is necessary that one is able to disrupt the enemy's OODA (observe, orient, decide, act) loop n119 in the first attack in order to shape the battlespace n120 to one's advantage before the enemy can, as well as to quickly ratchet-up the use of force if absolutely necessary after the first attack. In this regard, the importance of information warfare (IW) cannot be overstated. The use of IW means and methods that produce no foreseeable suffering or injury could be used in combination with use of force under the Unified Use of Force Rule. Indeed, this would be a preferable method because the disruption of the enemy's OODA loop in a first strike probably would weaken the enemy, thereby allowing a ratcheting-down of force on a subsequent attack(s) or even the surrender, withdrawal, leapfrogging, or isolation of enemy forces.

V. JURISPRUDENTIAL SECOND-GUESSING IN WAR AND OOTW

It is important to note that jurists have been loath to "second-guess" the military who operate often in the heated context and confusion of the battlefield. The reluctance of jurists to do so is certainly understandable. Jurists have not closely scrutinized military operations because such operations historically fell outside both their area of professional competence and their ability to elicit all the facts. n121

[*382] However, there are discoverable and "judicially workable standards" for determining whether the conduct of war or OOTW is justiciable. n122 In this past century alone, there have been numerous courts, both domestic and international, that have scrutinized whether the use of force was lawful in a particular military context. These courts have included the International Military ("Nuremberg") Tribunal, n123 Control Council Law Number Ten Proceedings, n124 domestic courts martial, civil and criminal proceedings, n125 the International Criminal Tribunal for Yugoslavia, n126 the Inter-American Commission on Human Rights, n127 and the European Court of Human Rights. n128

This reluctance to second-guess the military operating in the battlefield is becoming increasingly less justified in light of changes in contemporary armed conflicts. Battlefields, which generally were areas where "linear-fielded forces confronted each other across a geographically distinct line", n129 have been replaced with "battlespaces", in which force is "applied from a wide variety of precision platforms which are maneuvered in synchronization with other platforms to defeat a target pinpointed by superior information capabilities." n130 In contemporary armed conflicts, planning and intelligence gathering are essential aspects, and these aspects are more conducive to jurisprudential analysis and criticism.

Particularly relevant to the issue of jurisprudential second-guessing is *McCann* v. *United Kingdom*. The European Court of Human Rights in *McCann* was able to discover and articulate judicially manageable standards because it focused on command planning of operations and intelligence, thereby avoiding the problems posed by second-guessing military personnel operating in the heat of battle. n131 The [*383] European Court noted that the U.K. authorities could have prevented the need for the use of lethal force by proper planning and use of intelligence. The fault lay not with the soldiers in the field for using lethal force to prevent IRA members from setting off the bomb. The fault n132 lay with their commanders who failed to consider the use of non-lethal means in their operations planning. This focus

on planning and intelligence also comports with the precautionary measures required by the *Geneva Convention-Protocol I*. n133

[*384] **VI. THE DOCTRINE OF *LEX SPECIALIS* DOES NOT EXCLUDE THE USE OF INTERNATIONAL HUMAN RIGHTS LAW FOR ARTICULATING THE UNIFIED USE OF FORCE RULE**

What are the possible objections to these arguments in support of the Unified Use of Force Rule? One possible objection is the doctrine of *lex specialis derogat generali*, which holds that the more specific law (in this case, *jus in bello*) should apply instead of more general law (in this case, human rights law). As the International Court of Justice opined in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*: n134

Whether a particular loss of life [in armed conflict], through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [International Covenant on Civil and Political Rights], can only be decided by reference to the [*385] law applicable in armed conflict and not deduced from the terms of the Covenant itself. n135

From the outset, it should be noted that the International Court of Justice's advisory opinion probably does not carry greater legal authority than international case law. Case law has the advantage of providing *in concreto* application of legal rights and duties. The concretization of international rights and duties in cases involving conflicting interests and issues serves as a crucible for purifying and sharpening international law, as well as for providing resilience to these rights and duties. The European Court of Human Rights in numerous cases has found it appropriate to apply international human rights law governing the rights to life and humane treatment to the context of an armed conflict. n136 Moreover, the International Court of Justice was deeply divided in its advisory opinion and gave only a scant three-paragraph examination of international human rights law. n137

Rejecting the application of international human rights law to the law of armed conflict in this area on the basis of this doctrine would be misplaced or irrelevant. First, the rights to life and humane treatment are expressly non-derogable in states of emergency, such as armed conflicts, because these human rights are, in fact, appropriately applicable to war and OOTW. n138 Second, a strict application of the *Hague* and *Geneva Conventions* is becoming somewhat unworkable, as evidenced by (i) the UN policy of eliminating the distinction between protected and non-protected persons in armed conflict, n139 and (ii) the contemporary character of armed conflicts requiring joint military-civilian operations. n140 The Unified Use of Force Rule approach [*386] comports with the concept of international police actions that requires "civil-military implementation strategies" n141 for subsequent effective peacekeeping operations. n142 Operationally, such strategies would require the use of identical use of force standards by the civil and military authorities because, if the military is taking on domestic law enforcement duties, the military authorities would be required to comply with the international law governing such actions. n143 Third, the Proportionality and SIrUS Rules are themselves general rules, whereas international human rights cases establishing an absolute necessity threshold, which in turn serves to articulate the Unified Use of Force Rule, are more specific. Therefore, the Unified Use of Force Rule is more appropriate under the doctrine of *lex specialis* itself. The doctrine was "traditionally applied only as a discretionary aid in interpreting conflicting but potentially applicable treaty rules and at any rate is not relevant in determining the *incremental* nature of treaty rules." n144 Therefore, it is especially appropriate to apply international human rights law to armed conflicts. As the Inter-American Commission on Human Rights held in a case concerning the arbitrary detention of persons during the Grenada Invasion:

while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity," and there may be a substantial overlap in the application of these bodies of [*387] law. Certain core guarantees apply in all circumstances, including situations of conflict, and this is reflected, *inter alia*, in the designation of certain protections pertaining to the person as peremptory norms (*jus cogens*) and obligations *erga omnes*, in a vast body of treaty law, in principles of customary international law, and in the doctrine and practice of international human rights bodies such as this Commission. n145

How more appropriate could be the application of international human rights law to contemporary

armed conflicts, where the line between war and OOTW is often blurred?

VII. THE MARTENS CLAUSE ACCOMMODATES THE UNIFIED USE OF FORCE RULE

As for the relative authority between this international human rights law and the old law of armed conflict, the non-derogability of the rights to life and humane treatment also confirm that these rights are *jus cogens* norms that, in turn, have at least the same legal authority as the *Hague* and *Geneva Conventions* governing the conduct of armed conflict, which themselves reflect many *jus cogens* norms. But most important, the law of armed conflict itself recognizes that other international law can supplement previously existing laws of armed conflict. Under the Martens clause, as stated in the *Fourth Hague Convention* and its restatements in the later *Geneva Conventions* and various national military manuals, n146 the absolute necessity threshold established by international human rights law and incorporated into the Unified Use of Force Rule would augment the Proportionality and SIrUS Rules. The Martens Clause, as restated in the *Geneva Convention-Protocol I*, guarantees the following:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience. n147

[*388] As Judge Meron has concluded,

It is generally agreed that the [Martens] clause means, at the very least, that the adoption of a treaty regulating particular aspects of the law of war does not deprive the affected persons of the protection of those norms of customary humanitarian law that were not included in the codification. The clause thus safeguards customary law and supports the argument that what is not prohibited by treaty may not necessarily be lawful. n148

Although the Martens Clause states that this additional international law applies to "cases not covered by this Protocol or by other international agreements," other "international agreements" include human rights treaties that address, even if only in part, armed conflicts. Therefore, there are no legal impediments for applying international human rights law to the old law of armed conflict because this international human rights law is accommodated by the Martens Clause.

VIII. THE UNIFIED USE OF FORCE RULE REFLECTS NOT ONLY REGIONAL INTERNATIONAL LAW BUT ALSO GLOBAL INTERNATIONAL LAW

Although we have been looking predominantly at cases interpreting the European Convention on Human Rights to which a majority of countries worldwide are not states-parties, the language addressing the rights to life and humane treatment in the ECHR are respectively similar and identical to the language addressing the same rights in other regional and global human rights treaties. In particular, the language of Article 3 of the ECHR addressing the right to humane treatment is materially identical to the language of Article 7 of the ICCPR. n149 Since the right to humane treatment in Article 7 of the ICCPR reflects a global customary international law norm, n150 Article 3 [*389] of the ECHR also reflects a global customary international law norm. n151 Therefore, the dimension of the Unified Use of Force Rule based on the international human rights law governing the right to humane treatment establishing the absolute necessity threshold still reflects a global customary international law norm. Most importantly, because the right to humane treatment is a *jus cogens* norm (to which no state can object n152) and the Unified Use of Force Rule is based on the right to humane treatment (under both regional and global customary and treaty law), the Rule is universally binding.

[*390] However, that aspect of the Unified Use of Force Rule that relies upon the right to life as articulated by Article 2 of the ECHR is problematic for determining whether the Rule reflects global international law. The language of Article 2 of the ECHR differs from the language addressing the right to life in Article 6 of the ICCPR, which does not mention any absolute or strict necessity rule. The ECHR only has forty-one states-parties n153 --about twenty per cent of countries worldwide. On the other hand, as early as 1980, a U.S. District Court has recognized the ECHR as reflecting global customary international law. n154 One may be inclined to think that a single U.S. court opinion does not provide much legal authority for establishing the ECHR as reflecting customary international law. However, several reasons support the court's holding. First, there is no contrary case law, domestic or international, holding that the ECHR does not reflect or codify global customary international law norms. Second, the rights guaranteed by the ECHR can hardly be disputed as fundamental or novel. Third, Article 2 of the *CIS Convention* has similar language to the ECHR regarding the right to life:

Deprivation of life shall not be regarded as inflicted in contravention of the provisions of this Article when it results from the use of force solely in such cases of *extreme necessity* and necessary defenses are provided for in national legislation. n155
The CIS Convention has about a dozen states-parties--not counting those states that are also states-parties to the ECHR. This brings the total number of states obligated under treaty law to meet a strict, absolute, or extreme necessity threshold up to about 50--about 25 per cent of states worldwide. Among these states-parties are three of the five permanent UN Security Council members (*i.e.*, the U.K., France, the Russian Federation) and other powerful states (*e.g.*, Germany), which probably also provides strong evidence of the global customary international legal status of the right to life as guaranteed by the [*391] ECHR and *CIS Convention*. n156 These factors indicate that the absolute necessity threshold probably reflects global customary international law.

Furthermore, as for that dimension of the Unified Use of Force Rule that relies on the right to life guaranteed by the ECHR or *CIS Convention* (which arguably reflects only a regional customary international law norm), the global customary international law governing the right to *humane treatment* probably will moot the textual differences between the rights to life guaranteed by the ECHR (and *CIS Convention*) and other international human rights treaties. The use of a means or method of warfare allowed by the Unified Use of Force Rule still must be absolutely necessary and must cause the least suffering. The only real-world application of the use of force that would violate *regional* customary international law, as reflected in the Unified Use of Force Rule, but that arguably would not violate *global* customary international law, is when the use of the means or method of warfare is absolutely necessary but results in death without unnecessary suffering. Under international human rights law, a person convicted of a capital crime, for example, may be executed lawfully if the government authorities execute him or her by a method of execution that causes the least possible amount of suffering, such as gas asphyxiation. n157 This conclusion, of course, is rather ironic given the fact that the right to life has--at least morally--greater value than the right to humane treatment, because if a person is "lawfully" killed, she or he cannot exercise any of his or her other rights, including the right to humane treatment that legally has greater value than the right to life because of its non-derogability.

Most importantly, operational and public relations considerations also support the global adoption of the Unified Use of Force Rule. International police actions frequently are undertaken by countries in coalition with European nations bound by the ECHR or Commonwealth states bound by the *CIS Convention*. n158 Assuming *arguendo* that the non-European/non-Commonwealth countries are not governed by the Unified Use of Force Rule because it reflects only regional customary international law or treaty norms, practical operational considerations still would require these countries to conform their practices with the Unified Use of Force Rule. In cases where such non-European/non-Commonwealth forces would be placed under European/Commonwealth command in a coalition [*392] force, European/Commonwealth commanders would be required to ensure that the Unified Use of Force Rule was still observed by non-European/non-Commonwealth forces under their command. n159 In cases where non-European/non-Commonwealth forces were not placed under European/Commonwealth command, the inconsistent observance of these rules by such coalition forces probably would lead to logistical, strategic, and tactical difficulties for joint operations, because there would be uneven availability of weapons (especially non-lethals) and conflict among strategic or tactical objectives. Also, the non-European/non-Commonwealth military forces would receive severe criticism from the world press for valuing civilian lives less than their European/Commonwealth partners.

The number of coalition forces over the last fifty years supports the operational necessity of implementing the Unified Use of Force Rule:

Since 1948, 123 nations have contributed military and civilian police personnel at various times [to UN peacekeeping operations]. As of 31 October 2000, 89 countries are contributors of almost 38,000 military and civilian police personnel [to U.N. peacekeeping operations]. n160

The number of peacekeeping operations has increased exponentially over the last 15 years. During only a 43-month period (1988-1992), the UN authorized as many peacekeeping forces as it had during its first 43 years. As for enforcement operations (such as those taking place in Kuwait and Iraq during the Gulf War, Somalia, Rwanda, Haiti, Bosnia and Herzegovina, Albania, and East Timor), states-parties to the ECHR and *CIS Convention* have participated in most, if not all, of these operations.

Therefore, the Unified Use of Force Rule reflects, or should reflect, global international law.

IX. IMPLEMENTATION OF THE UNIFIED USE OF FORCE RULE GUARANTEES FORCE PROTECTION AND DECREASES LIKELIHOOD OF CONFLICT

Although we have been looking at the Unified Use of Force Rule's favourable impact upon civilians and enemy combatants, the Rule [*393] also impacts favourably on one's own forces. The implementation of the Unified Use of Force Rule guarantees force protection and decreases the likelihood of conflict. Force protection often is an important national policy concern. n161 Moreover, under international human rights law, this protection is an express legal obligation. The Unified Use of Force Rule also guarantees legal protection to one's own military forces because international human rights law (including the rights to life and humane treatment) also protects one's own forces. n162 Governments may not place their own military forces at risk of death, injury, or suffering unless absolutely necessary under the rights to life and humane treatment. Ironically, the SIrUS and Proportionality Rules under the old law of war do not apply to one's own forces. Of course, this issue probably is mooted by the fact that governments generally wish to avoid incurring casualties among their own military forces unless absolutely necessary. n163

[*394] Furthermore, military personnel cannot waive their rights protected by this international law--at least under orders from their superiors. High risk, voluntary missions may be lawful under the *customs* of war, n164 but aside from these cases, commanders would be required by international law to provide the same legal protection to their own forces as to enemy forces. This protection could include ordering their forces to surrender or withdraw when they cannot achieve their lawful objectives without incurring casualties less than absolutely necessary. This dynamic creates an interesting consequence. The implementation of the Unified Use of Force Rule decreases the possibility of battle and thereby can quicken the termination of the conflict as a whole.

X. CONCLUSION

This article has set forth a perhaps rather subtle reconceptualization of the lawful use of force, but it is a dramatically important one because it allows a more precise, stage-by-stage decisional analysis in place of the ambiguous and ineffective approach under the old law of armed conflict. This new approach inverts the old law of armed conflict governing use of force by placing primary value on human beings--and not military necessity, which is an ambiguous doctrine that has led to past horrific atrocities. The myopic emphasis on military necessity (*"Kriegsraison geht vor Kriegsmanier"* n165) has encouraged and justified some of the worse atrocities in the history of warfare, including terrorist bombing of civilian targets and the execution of combatants [*395] placed *hors de combat*. n166 However, putting primary operational value on the protection of human beings through the application of international human rights law supplants military necessity as a primary organizing principle for the law of armed conflict. In conclusion, the implementation of the Unified Use of Force Rule makes warfare more humane.

We can summarize the advantages the Unified Use of Force Rule provides as follows:

. Specifies level of necessity required for use of force, thereby providing a more practical rule.
. Requires least amount of force against both combatants and civilians, thereby making war and OOTW more humane.
. Moots the deficiencies of a weapons-design approach to the SIrUS Rule, but still incorporates this approach.
. Unifies international human rights law and law of armed conflict.
. Unifies use of force standards for enemy combatants and mixed combatant-civilian targets.
. Unifies law of armed conflict for international and non-international conflicts.
. Solves moral dilemma of targeting unarmed civilians or POWS who are protecting military targets.
. Ensures compliance with Proportionality Rule in cases where anticipated military advantage is marginal.
. Encourages conflict resolution by minimizing permanent damage.
. Serves to break cycle of continuing and escalating violence by requiring exploration of peaceful alternatives to reprisals.
. Decreases likelihood of conflict and expedites termination of conflict by extending protection to own forces.
. Serves to provide further protection to one's own forces.
. Effectively holds more powerful, technologically advanced states to a higher standard for use of force,

which undercuts arguments by less powerful states that more powerful states have unfair advantages in creating treaties or recognizing customary international law addressing armed conflict.
As we begin the new millennium--one that foresees no less inclination by humankind to use force in settling interstate and [*396] intrastate conflicts--it behooves us to figure out new legal and practical ways of lessening the horrors consequent to use of force. The recognition and implementation of the Unified Use of Force Rule is one step in that direction. n167

FOOTNOTES:
n1 As will become clear later in this article, my use of the phrase "use of force" is not limited to the context of *jus ad bellum* but also extends to the context of *jus in bello*, hence the name: "Unified Use of Force Rule."

n2 "Operations other than war" refer to operations undertaken during those armed conflicts that do not rise to the level of a declared war against another state. Such operations include peacekeeping, anti-drug trafficking, and anti-terrorist operations.

n3 See S.M. Hersh, "Overwhelming Force, What Happened in the Final Days of the Gulf War" *The New Yorker* 76:12 (22 May 2000) 48.

n4 "The Humanization of Humanitarian Law" (2000) 94 A.J.I.L. 239 at 276.

n5 This inquiry also includes whether *any* war was just.

n6 See R. Lagoni, "Comments: Methods or Means of Warfare, Belligerent Reprisals, and the Principle of Proportionality" in I.F. Dekker & H.H.G. Post, eds., *The Gulf War of 1980-1988* (The Hague: T.M.C. Asser Instituut, 1992) 115 at 118-19 (noting historical bifurcation of *jus in bello* and *jus ad bellum*).

n7 See *e.g., Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations*, 18 October 1907, T.S. No. 539, 1 Bevans 631, 36 Stat. 2277 (entered into force 26 January 1910) [hereinafter *Hague Convention (IV)*]; *Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907, 205 Consol. T.S. 299 (entered into force 26 January 1910); *Hague Convention (VI) relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities*, 18 October 1970, 205 Consol. T.S. 305 (entered into force 26 January 1910); *Hague Convention (VII) relative to the Conversion of Merchant-Ships into War-Ships*, 18 October 1907, 205 Consol. T.S. 319 (entered into force 26 January 1910); *Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines*, 18 October 1907, 205 Consol. T.S. 331 (entered into force 26 January 1910).

n8 See *e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316. T.I.A.S. No. 3364 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365 (entered into force 21 October 1950) [hereinafter *Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 7 December 1978, 16 I.L.M. 1391, (entered into force 7 December 1978) [hereinafter *Geneva Convention-Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 16 I.L.M. 1442, (entered into force 7 December 1978) [hereinafter *Geneva Convention-Protocol II*].

n9 Other instruments included the *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*, 11 December 1868, adopted by International Military Commission at St. Petersburg (outlawing projectiles under 400 grammes that are explosive, or charged with fulminating or inflammable substances) in L. Henkin *et al.*, eds., *Basic Documents Supplement to International Law: Cases and Materials*, 3d ed. (St. Paul, Minn.: West Publishing Co., 1993) at 406.

n10 *Treaty Providing for the Renunciation of War as an Instrument of National Policy*, 27 August 1928,

L.N.T.S. 57, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732 (entered into force for the U.S. 24 July 1929).

n11 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, 8 August 1945, 82 U.N.T.S. 280, 59 Stat. 1544 (entered into force 8 August 1945) [hereinafter *London Charter*].

n12 Although war crimes and crimes against peace remain two different *crimes*, it does not necessarily follow that *jus in bello* and *jus ad bellum* cannot be integrated and unified insofar as the use of force is concerned, as this article will demonstrate. Furthermore, it is important to note that the law of armed conflict (and especially its criminal aspects) has not had the opportunity to develop as much as international human rights law because international human rights law has been interpreted by numerous global and regional tribunals, unlike the law of armed conflict. There is a substantially greater number of international human rights cases that have flushed out the international law governing armed conflict than cases decided by international criminal tribunals, and many of these human rights cases addressed the use of force in armed conflict. See F.F. Martin *et al., International Human Rights Law & Practice: Cases, Treaties and Materials* (The Hague: Kluwer Law International, 1997) for a discussion of cases adjudicated by international human rights and war crimes tribunals.

n13 See *Rome Statute of the International Criminal Court*, 17 July 1998, art. 5, U.N. Doc. A/CONF.183/9 [hereinafter ICC Statute].

n14 Article 2(4) of the *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945) [hereinafter *UN Charter*] states:
All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
Article 51 states:
Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

n15 G.H. Aldrich, "The Laws of War on Land" (2000) 94 A.J.I.L. 42 at 49.

n16 "In 1950, noncombatants accounted for about one half of world-wide casualties during war; in 1980 the rate rose to about 80 percent": *ibid.*; Col. J. Siniscalchi, "Non-Lethal Technologies: Implications for Military Strategy", Occasional Paper No. 3 at 21 (Maxwell Air Force Base, Ala.: Center for Strategy and Technology, Air War College & Air University, 1998), online: Center for Strategy and Technology <http://www.au.af.mil/au/awc/awcgate/cst/occppr03.htm> (last modified: 23 May 2002).

n17 See *e.g. Geneva Convention-Protocols I* and *II, supra* note 8; *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 21 U.S.T. 483, T.I.A.S. No. 6389, 729 U.N.T.S. 161, 7 I.L.M. 811 (1968) (entered into force 5 March 1970); *Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, 10 April 1972, 11 I.L.M. 309; *Declaration on the Prohibition of Chemical Weapons*, 11 January 1989, 28 I.L.M. 1020; *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, 10 October 1980, 19 I.L.M. 1524 (entered into force 2 December 1983); *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II)*, 10 October 1980, 19 I.L.M. 1529 (entered into force 2 December 1983); *Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II)*, 3 May 1996, 35 I.L.M. 1206-1218 (entered into force 3 December 1998); *Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III)*, 10 October 1980, 19 I.L.M. 1534 (entered into force 2 December 1983); *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 18 September 1997, 36 I.L.M. 1507-1519 (entered into force 1 March 1999).

n18 Of course, the superior military capabilities of the Gulf War Coalition forces and NATO, respectively, also contributed to fewer casualties in the Gulf War and Kosovo Conflict by bringing these conflicts to a quick end.

n19 Capt. R.G. Hanseman, "The Realities and Legalities of Information Warfare" (1997) 42 Air Force L.R. 173 at 186.

n20 See W.J. Fenrick, "The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" in M.N. Schmitt & L.C. Green, eds., *The Law of Armed Conflict: Into the Next Millennium* (Newport, RI: Naval War College, 1998) at 77-78 (the nature of future conflicts will create pressures to dissolve distinction between law governing international conflicts and law governing non-international conflicts).

n21 Two examples are the UN's approval of intervention in Somalia and Haiti, with their "international" aspects being cross-border refugee flows.

n22 Lt. Col. M.N. Schmitt, "Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict" (1998) 19 Mich. J. Int'l L. 1051 at 1059-60.

n23 *Ibid.*

n24 Regardless of subjective viewpoint, the *Convention on the Safety of United Nations and Associated Personnel* makes it a crime to harm UN peacekeepers operating under Article VI of the UN Charter, but it applies the law of armed conflict to Article VII peace-enforcement operations: 9 December 1994, UN GA 84th Plen. Mtg., GA/Res/49/59 at art. 2(2), online: United Nations <http://www.un.org/gopherdata/ga/recs/49/59> (last modified: 29 November 1999).

n25 *Geneva Convention-Protocol I, supra* note 8, art. 35(2).

n26 The term "SIrUS" is an acronym for "Superfluous Injury" and "Unnecessary Suffering." It is borrowed from the International Committee of the Red Cross' SIrUS Project, discussed *infra* note 42. The SIrUS Rule is reflected in earlier and later treaties. See *e.g.*, art. 23(e): "It is especially forbidden--...To employ arms, projectiles, or material calculated to cause unnecessary suffering....": *Hague Convention (IV), supra* note 7; see also the Preamble of the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, supra* note 17: "Basing themselves on the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering". See also *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, supra* note 9 (renouncing useless aggravation of suffering of disabled persons caused by use of explosive projectiles).

The phrase *"maux superflus"* from the original authentic text of the *Hague Convention (IV), supra* note 7, was translated inadequately into English by the phrase "unnecessary suffering". Subsequent instruments added a prohibition against "superfluous injury" in order to reflect the French original, authentic text of the *Hague Convention IV*.

n27 Although some states (including the U.S.) are not parties to the *Geneva Convention-Protocol I*, both the Distinction and Proportionality Rules already reflected customary international law by the time the treaty was adopted: International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ed. by Y. Sandoz, C. Swinarski & B. Zimmerman (Norwell, MA: Martinus Nijhoff Publishers, 1987) at 615 [hereinafter *ICRC Commentary*]. Therefore, many of these non-states-parties still were bound by these Rules.

n28 *Supra* note 8.

n29 *Ibid.*

n30 I will borrow three kinds of tests from U.S. constitutional jurisprudence addressing equal protection

of the law to illustrate these levels of necessity. Equal protection jurisprudence is an appropriate area of law from which to borrow these tests because this law addresses the proper selection of means for achieving legitimate governmental objectives in light of the harm inflicted by these means on the rights of others.

n31 See *e.g., Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) at 312-17.

n32 See *e.g., Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982).

n33 See *e.g., Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

n34 In U.S. constitutional jurisprudence, such fundamental rights include the rights to speech and interstate travel. In international human rights law, such rights would include the rights to life and humane treatment.

n35 In U.S. constitutional jurisprudence, such suspect targeted classes include racial minority groups because targeting such groups is usually based on considerations reflecting prejudice or antipathy and is seldom relevant to the achievement of any legitimate governmental objective. In the law of armed conflict, such suspect targeted groups include civilians and other persons placed *hors de combat* because harming such persons rarely is necessary for achieving lawful military objectives.

n36 G. Gunther, "The Supreme Court 1971 Term--Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" (1972) 86 Harv. L. Rev. 1 at 8.

n37 See *e.g., Korematsu* v. *United States*, 323 U.S. 214 (1944), where the U.S. Supreme Court upheld the detention of a U.S. citizen of Japanese descent during World War II for national security purposes. Although the Court's decision was faulty on the facts, having failed to properly scrutinize the U.S. government's findings of fact, the case still demonstrates that states can overcome the strict scrutiny test during war or other national emergencies.

n38 See International Committee of the Red Cross, "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977", online: International Committee of the Red Cross <http://www.icrc.org> Select "International Humanitarian Law"; Select "IHL database"; Select "1949 Conventions & 1977 Protocols: Commentaries" (last modified: 19 June 2001) at art. 35, para. 1439:
The concept of superfluous injury or unnecessary suffering, its objective effect on the victim (severity of the injury, intensity of suffering), and its relation to military necessity (rendering the enemy 'hors de combat') are not interpreted in a consistent and generally accepted manner. This concept continues to be the basis on which judgment is formed, but debates have shown its relative and imprecise character.
See also A. Cassese, "Weapons Causing Unnecessary Suffering: Are They Prohibited?" (1975) 58 Rivista di Diritto Internazionale 12 at 16-20.

n39 See *e.g.*, instruments listed in *supra* note 17. This approach has continued as evidenced by the adoption of the ICC Statute, *supra* note 13, art. 8:
1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
....
(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
...
(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, *provided that such weapons*, projectiles and material and methods of warfare *are the subject of a comprehensive prohibition and are included in an annex* to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123: [emphasis added].
Non-governmental organizations also have used the weapons-design approach. See *e.g.*, Human Rights Watch Arms Project <http://www.hrw.org> (date accessed: 22 January 2001) (campaign against landmines); Lawyers Committee on Nuclear Policy <http://www.lcnp.org> (last modified: 17 April 2001)

(campaign against nuclear weapons); International Committee of the Red Cross' SIrUS Project, *infra* note 42.

Furthermore, the literature on the SIrUS Rule appears to be wholly devoted to the weapons-design approach. See *e.g.*, C.J. Moxley Jr., *Nuclear Weapons and International Law in the Post Cold War World* (Lanham: Austin & Winfield, 2000) at 762-66 (arguing for *per se* rule outlawing nuclear weapons); Lt. Comm. S.W. Belt, "Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas" (2000) 47 Naval L. Rev. 115 (using weapons design approach in examining international law requiring use of PGMs against combatant-civilian mixed targets); M.P. Scharf, "Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization" (1999) 20 Mich. J. Int'l L. 477; J.E. Lord, "Legal Restraints in the Use of Landmines: Humanitarian and Environmental Crisis" (1994) 25 Cal. W. Int'l L.J. 311; B.M. Carnahan & M. Robertson, "The Protocol on 'Blinding Laser Weapons': A New Direction for International Law" (1996) 90 A.J.I.L. 484; W.H. Parks, "Memorandum of Law--Sniper Use of Open-Tip Ammunition" (February 1991) Army Law. 86; W.H. Parks, "Memorandum of Law--Review of Weapons in the Advanced Combat Rifle Program" (July 1990) Army Law. 18.

n40 For example, the use of certain chemical weapons, such as tear gas, can be preferable in terms of causing less suffering and injury than artillery.

n41 J. Paust, "Remarks on Human Rights and Armed Conflicts" in *Proceedings of the 67th Annual Meeting of the American Society of International Law 1973*, cited in A. Cassese, "Means of Warfare: The Traditional and the New Law" in A. Cassesse, ed., *The New Humanitarian Law of Armed Conflict* (Napoli: Editoriale Scienfitica s.r.l., 1979) 161 at 171.

n42 To address this problem, the International Committee of the Red Cross (ICRC) through its SIrUS Project has attempted to establish a baseline for determining which means or methods of warfare cause unnecessary suffering or superfluous injury in violation of international law. The SIrUS Project concluded that states, when reviewing the legality of a weapon, should consider whether the weapon in question would cause any of the following effects as a function of its design:
. disease other than that resulting from physical trauma from explosions or projectiles;
. abnormal physiological state or abnormal psychological state (other than the expected response to trauma from explosions or projectiles);
. permanent disability specific to the kind of weapon (with the exception of the effects of point-detonated anti-personnel mines--now widely prohibited);
. disfigurement specific to the kind of weapon;
. inevitable or virtually inevitable death in the field or a high hospital mortality rate;
. grade [three] wounds [*i.e.*, skin wounds of ten centimetres or more with a cavity] among those who survive to hospital;
. effects for which there is no well-recognized and proven medical treatment which can be applied in a well-equipped field hospital.
If such weapons do cause any of these effects, the state should weigh "the military utility of the weapon against these effects...and determine whether the same purpose could reasonably be achieved by other lawful means that do not have such effects": R.M. Coupland & P. Herby, "Review of the Legality of Weapons: A New Approach The SIrUS Project" (30 September 1999), online: International Committee of the Red Cross <http://www.icrc.org> (last modified: 19 June 2001).

Unfortunately, the SIrUS Project's baseline sometimes is too high given the fact that it uses the method of averaging that does not address whether these averages are themselves inflated by weapons that cause unnecessary suffering or superfluous injury. The SIrUS Project places too much emphasis on state practice, which itself may be unlawful. For example, the ICRC argues that weapons designs that cause skin wounds up to ten centimetres in diameter with penetration is lawful. One can easily think of other weapons that cause less injury and can still be used to achieve lawful objectives. Moreover, the SIrUS Project does not argue for the use of weapons that inflict the least possible suffering or injury.

Nevertheless, the SIrUS Project is helpful for articulating a clearer rule for lessening suffering and injury because the Project at least addresses the issue of weapons designs that potentially can cause unlawful suffering or injury, but that are not now prohibited by a treaty regime.

n43 At this point it may be helpful to recall that with the collapsing of the bifurcation of *jus ad bellum* and

jus in bello, the phrase "use of force" applies not only to the initial use of force in the *jus ad bellum* context but also subsequent uses of force in the *jus in bello* context.

n44 *ICRC Commentary, supra* note 27 at 409.

n45 The *travaux preparatoires* indicate debate only about the use of the English phrase "calculated to cause" *versus* the French phrase "*propre a" (i.e.*, "of a nature to cause"): *ibid.* at 406-407.

n46 Only the SIrUS Rule applies to combatants--although it also effectively applies to civilians in cases where civilians foreseeably can become collateral casualties.

n47 F. Hampson, "States' military operations authorized by the United Nations and international humanitarian law" in L. Condorelli, A.M. La Rosa & S. Scherrer, eds., *Les Nations Unies et le Droit International Humanitaire, Actes du Colloque International a l'Occasion du Cinquantieme Anniversaire de l'ONU* (Geneve, 1996) 372 at 400.

n48 This would fulfill the requirement of Article 36 of the *Geneva Convention-Protocol I* that has been neglected in part:
In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, *in some or all circumstances*, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.
Supra note 8 [emphasis added].

n49 See *e.g., Fourth Geneva Convention, supra* note 8, art. 3.

n50 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. (entered into force 23 March 1976) [hereinafter ICCPR].

n51 *Ibid.*

n52 4 November 1950, 213 U.N.T.S. 221 (entered into force 3 February 1953) [hereinafter ECHR].

n53 *Ibid.* [emphasis added]. Interestingly, the *Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States*, art. 2(4), Council of Europe doc. H(95) 7 rev. and Human Rights Information Sheet No. 36 (1995) H/Inf (95) 3 at 195-206 [hereinafter *CIS Convention*] articulates a similar right to life:
Deprivation of life shall not be regarded as inflicted in contravention of the provisions of this Article when it results from the use of force solely in such cases of *extreme necessity* and necessary defenses are provided for in national legislation [emphasis added].

n54 *Supra* note 50.

n55 *Supra* note 52.

n56 *Supra* note 50.

n57 *Supra* note 52.

n58 For example, Article 27 of the *American Convention on Human Rights*, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978) [hereinafter ACHR] states in relevant part:
1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
2. The foregoing provision does not authorize any suspension of the following articles: ...Article 4 (Right to life), Article 5 (Right against inhuman treatment)....

Article 35(1)-(2) of the *CIS Convention, supra* note 53, states in relevant part:
1. In time of war or other emergency situation threatening the higher interests of any Contracting Party, that Party may take measures derogating from its obligations under this Convention to the extent strictly required by the gravity of the situation, provided that such measures are not inconsistent with other obligations under international law and to not entail discrimination set out in Article 20 of the Convention
2. No derogation from Article 2 [right to life]...or from Article 3 [right against inhuman treatment]...shall be made under paragraph 1 of the present Article.
Perhaps most importantly, the *African Charter on Human and Peoples' Rights*, 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force 21 October 1986) [hereinafter *Banjul Charter*] does not contain *any* provisions for derogation of the rights to life and to humane treatment.

n59 *Jus cogens* "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character": *Vienna Convention on the Law of Treaties*, 23 May 1969, art. 53, U.N. Doc. A/CONF/.39/27 (entry into force 27 January 1980).

n60 C.L. Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties* (Amsterdam: North-Holland, 1976) at 71 (*jus cogens* norms reflected by treaty language governing suspension of rights).

n61 Some of the points argued here are based in part on F.F. Martin, *Challenging Human Rights Violations: Using International Law in U.S. Courts* (Ardsley, NY: Transnational Publishers, 2001) at 115-41.

n62 See *e.g., Gulec* v. *Turkey* (1998), 28 E.H.R.R. 121 (military security forces operation); *Kaya* v. *Turkey* (1998), 28 E.H.R.R. 1; *McCann and Others* v. *United Kingdom* (1995), 21 E.H.R.R. 97 (Special Air Services [SAS] operations).

n63 *Ibid.*

n64 The Grand Chamber, before Protocol No. 11 to the ECHR was put into effect, consisted of seventeen judges, as opposed to panels consisting of three or five judges. The Grand Chamber adjudicated cases of exceptional importance, and its decision is more authoritative than those decisions from the three- or five-member panels.

n65 *McCann* v. *U.K., supra* note 62 at 62.

n66 *Ibid.*

n67 "Non-lethal technologies cover a broad, diverse range of capabilities. The technology ranges from..., chemical, information warfare, crowd control measures, to the latest offerings of exotic weapons": Siniscalchi, *supra* note 16 at 4. These include strobe lights (which cause disequilibrium); tear gas and pepper spray; low frequency sound emissions and other noises (for inducing nausea); carbon-fiber chaff, electromagnetic pulse and high powered microwave weapons (for disrupting electrical systems); internet viruses (for disrupting command and control communications); and soft projectiles (*e.g.*, rubber bullets, stringball grenades, tennis-ball launchers, water cannons): *ibid.* at 6-9. However, it is important to recognize that under some circumstances, some of these non-lethal weapons may violate the SIrUS Rule.

n68 United States Department of Defense, "Policy for Non-Lethal Weapons" (United States: Department of Defense Directive 3000.3, 1996) at para. 4.7 (written by C. Sweet), online: U.S. Department of Defense <http://web7.whs.osd.mil/corres.htm> (date accessed: 13 June 2001).

n69 See Siniscalchi, *supra* note 16 at 14-15; see also Council on Foreign Relations, Report of an Independent Task Force, "Non-lethal Technologies" (January 1995), online: Council on Foreign Relations <http://www.foreignrelations.org/public/pubs/taskfrc.html> (date accessed: 22 January 2001).

n70 See *Gulec* v. *Turkey, supra* note 62 (rejecting Turkish government's defense that non-lethal methods, such as tear gas, rubber bullets, water cannons, and truncheons, could not be used).

n71 It is not relevant that the government recognizes a state of belligerency in order for rebel forces to

acquire protection under the law of armed conflict (which now includes the *McCann* Rule), because *McCann* addressed rebel forces (the I.R.A.) that had not been declared belligerents by the U.K. government for purposes of international law. See Aldrich, *supra* note 15 at 58-60 (discussing recognition of belligerency under international law).

n72 As the European Court of Human Rights in *Loizidou* v. *Turkey* (Preliminary Objections) (1995), 20 E.H.R.R. 99 at 101 held:
The responsibility of a Contracting Party may also arise when as a consequence of military action--whether lawful or unlawful--it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the [ECHR] derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.
See also *Cyprus* v. *Turkey* (1976) 15 E.H.R.R. 509; see *Caliberti De Casariego* v. *Uruguay* (1984), 68 I.L.R. 41 at para. 10.3 (state liable for extraterritorial violations); *Saldias de Lopez* v. *Uruguay* (1985), Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 (views adopted 29 July 1981).

One may argue that an enemy target generally is not located within effective territorial control of the attacking state, and therefore, the attacking state cannot be held liable for violations of the right to life under international human rights law. For example, the Gulf Coalition forces dropped bombs on Baghdad, an area not within effective control of the Coalition forces. However, if military planning took place within the territory effectively controlled by the state, this moots the issue. In the case of bombing Baghdad, such planning obviously did take place in territory effectively controlled by the Gulf Coalition Forces. The attacking state's liability attaches to the place where the planning was executed. "It is the nexus between the person affected, whatever his nationality, and the perpetrator of the alleged violation which engages the possible responsibility of the State and not the place where the action takes place": F. Hampson, "Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts" (1992) 31 Revue de Droit Militaire et de Droit de la Guerre 119 at 122

n73 See discussion at Part VIII below.

n74 T. Meron, "The Humanization of Humanitarian Law" (2000) 94 A.J.I.L. 239 at 247-48. The International Military Tribunal at Nuremberg circumvented the issue of the general participation clause by holding that all of the Hague Conventions reflected customary law. Subsequently, the UN General Assembly unanimously adopted a resolution affirming the principles of law recognized by the London Charter and the judgment of the IMT.

n75 See text above accompanying notes 34-37.

n76 See Part III-B below.

n77 Governments lawfully may execute persons for the commission of capital crimes, but neither the conditions of their confinement nor the method of execution may violate the right to humane treatment. See *e.g., Soering* v. *United Kingdom* (1989), 11 E.H.R.R. 439 (outlawing death-row phenomenon); *Ng* v. *Canada* (1993), Communication No. 469/1991, 98 I.L.R. 479 (outlawing execution by gas asphyxiation).

n78 As evidence of this, the European Court of Human Rights recently, in the *Bankovic and Others* (NATO), has begun to consider complaints alleging violations of the right to life resulting from the NATO bombing of the Serbian television station in Belgrade during the Kosovo Conflict: see "Pending Cases Before a Grand Chamber", online: European Court of Human Rights: <http://www.echr.coe.int/BilingualDocuments/PendCase.htm> (last modified: 12 June 2001).

n79 (2000), Application No. 31866/96 at para. 54 [emphasis added].

n80 The European Court stated:
In particular, it has not been *suggested* by the Government that the intervention of the gendarme officers was considered *necessary* to quell a riot or a planned attack on the internal security of Buca Prison: *ibid.* at para. 57 [emphasis added].
The Court's language indicates that if the Turkish government had provided a justification for the use of force, demonstrating that it was strictly necessary for achieving lawful objectives, then the Court would

not have found a violation of the right to humane treatment.

n81 (1998), 26 E.H.R.R. 477.

n82 *Ibid.* at para. 79.

n83 For determining the level of suffering, the European Court has articulated a "totality of circumstances" test by holding that the assessment of whether an act constitutes unlawful inhuman treatment "depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim": *ibid.* at para. 76.

n84 *Supra* note 77 at para. 16.2 [emphasis added].

n85 *Supra* note 52, art. 15(1)-(2).

n86 Ironically, the right to humane treatment under the ECHR is non-derogable during war, unlike the right to life: *ibid.*, art. 15. This would seemingly suggest that the right to humane treatment has greater value than the right to life--a rather odd conclusion. However, the non-derogability of the right to humane treatment and the derogability of the right to life during war are not material to the relative values of these rights because violations of both turn on whether the acts infringing these rights are absolutely necessary.

n87 In *Osman* v. *United Kingdom* (2000), 29 E.H.R.R. 245, the European Court of Human Rights established a negligence standard in determining liability for violations of the right to life. Therefore, if the taking of life was reasonably foreseeable, the right to life could have been violated, as the Court stated at para. 116:
Where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to [the Court's] satisfaction that the authorities *knew or ought to have known* at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life [emphasis added].

n88 *Supra* note 8, art. 57(3) [emphasis added].

n89 See Schmitt, *supra* note 22 at 1059-60 (militarization of civilians and civilian activities is well underway).

n90 See *Geneva Convention-Protocol I, supra* note 8, art. 51(7):
The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations....

n91 Or in an earlier scenario, North Vietnamese military authorities placed U.S. POW's near military targets during the Vietnam War in order to prevent U.S. forces from attacking these targets.

n92 The law governing international conflicts is found primarily in the *Hague* and *Geneva Conventions*. The law governing non-international conflicts is found primarily in common Article 3 of the *Geneva Conventions* and the *Geneva Convention-Protocol II*.

n93 The only arguable recognition is that the right to life under the ECHR is derogable during war. However, as discussed below, this recognition is effectively mooted for other legal and operational reasons. See text below accompanying notes 153-60.

n94 This assumes that they have not been characterized as international conflicts because they do not constitute a threat to international peace and security.

n95 *Geneva Convention-Protocol II, supra* note 8, art. 1(2).

n96 Schmitt, *supra* note 22 at 1069.

n97 "[Ninety-five per cent] of U.S. military communications is over commercial networks": Hanseman, *supra* note 19 at 194.

n98 See text above accompanying notes 80-82.

n99 Ironically, the right to life allows the use of lethal force that results in death of innocents when such use of force is absolutely necessary because the language of the right makes no mention of whose life is taken: see ECHR, *supra* note 52, arts. 2(2) and 15.

n100 Interestingly enough, in cases concerning civilian objects (not civilians themselves) in the territory of the Occupying Power, the *Fourth Geneva Convention* also only allows destruction of such objects "if absolutely necessary": *supra* note 8, art. 53; destruction of civilian objects only allowed when required by "imperative military necessity": see *Geneva Convention-Protocol I, supra* note 8, art. 54(5). This absolute-necessity threshold resonates compatibility with the Unified Use of Force Rule.

n101 However, where there already is international law absolutely prohibiting certain means or methods of warfare regardless if their use is absolutely necessary, this law remains binding. See text below accompanying note 110.

n102 G.A.Res. 3314 "Definition of Aggression" Resolution, Annex, 14 December 1974, Article 2; see *UN Charter, supra* note 14, arts. 2(4) and 51.

n103 This issue has received great debate. See *e.g.*, W.G. Sharp, Sr., *Jus Paciarii: Emergent Legal Paradigms for U.N. Peace Operations in the 21st Century* (United States: Paciaril International, LLC, 1999); F.R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2d ed., (Ardsley, NY: Transnational, 1997); J.I. Charney, "Editorial Comments: NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo" (1999) 93 A.J.I.L. 834; C.M. Chinkin, "Editorial Comments: NATO's Kosovo Intervention: Kosovo: A 'Good' or 'Bad' War?" (1999) 93 A.J.I.L. 841; R.A. Falk, "Editorial Comments: NATO's Kosovo Intervention: Kosovo, World Order, and the Future of International Law" (1999) 93 A.J.I.L. 847; T.M. Franck, "Editorial Comments: NATO's Kosovo Intervention: Lessons of Kosovo" (1999) 93 A.J.I.L. 857; L. Henkin, "Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of 'Humanitarian Intervention'" (1999) 93 A.J.I.L. 824; J. Lobel & M. Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime" (1999) 93 A.J.I.L. 124; W.M. Reisman, "Editorial Comments: NATO's Kosovo Intervention: Kosovo's Antinomies" (1999) 93 A.J.I.L. 860; R. Wedgwood, "Editorial Comments: NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia" (1999) 93 A.J.I.L. 828.

n104 However, some of these lawful objectives arguably can only be pursued with the approval of the UN Security Council. These include maintenance of peace and international security, and the prevention of international crimes and humanitarian catastrophes. Which of these objectives require UN Security Council approval, if any, is an issue beyond the scope of this article.

n105 *Supra* note 52, art. 2(2).

n106 J.G. Garnam, "Proportionality and Force in International Law" (1993) 87 A.J.I.L. 391 at 406. Furthermore, as L. Doswald-Beck has noted in "The San Remo Manual on International Law Applicable to Armed Conflicts at Sea" (1995) 89 A.J.I.L. 192 at 199:
It is worth noting that the participants intentionally chose the definition of "military objective" found in Article 52 of Protocol I, which refers to the contribution of the target in question to the enemy's "military action," rather than the formula used in the U.S. *Handbook*, which uses the term "war-fighting, war-sustaining capability." The majority felt that the *Handbook* does not take into account developments in the law relating to target discrimination since the Second World War. In particular, they feared that "war-sustaining" could too easily be interpreted to justify unleashing both the type of indiscriminate attacks

that annihilated entire cities during that war, which were claimed to be necessary to eliminate Germany's and Japan's war-making capacity, and attacks on civilians, who were said to be "quasi-combatants" because of the general economic support they gave to the enemy. [footnotes omitted] Some commentators continue to mistakenly define military necessity in terms of general war-making capacity. See *e.g.*, M. Corn, Department of the Army Pamphlet 27-50-308, "Introduction" (July 1998) Army Law. 72. ("The essence of the concept of military necessity is that the only legitimate focus of a combatant's destructive power is the enemy war-making capability.")

n107 Related to this issue are reprisals and the escalation of suffering and injury often consequent of such acts. Lawful reprisals are those in which an otherwise unlawful act is undertaken as an effective (but proportional) measure to force the enemy to discontinue its commission of unlawful acts. Of course, the problem with reprisals has been two-fold: (i) the enemy may not believe that its act was unlawful, and (ii) the enemy may undertake its own reprisal leading to a cycle of continuing and escalating violence between the warring parties. Implementation of the Unified Use of Force Rule can break this cycle because the Rule only allows states to use force if there are no other alternatives, including diplomatic efforts, sanctions, and other non-violent responses. This also comports with Articles 2(4) ("All Members shall refrain in their international relations from the threat or use of force") and 3 ("The parties to any dispute...shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice") of the *UN Charter, supra* note 14.

Unfortunately, many times states do not interpret Article 3 to require such peaceful means be explored first because the *UN Charter* also recognizes the right to self-defense under Article 51. The Unified Use of Force Rule, on the other hand, requires that such peaceful means be explored before the use of force, unless it is absolutely necessary to use force to achieve lawful objectives strategic and tactical.

n108 *Supra* note 16.

n109 *Cf. Ng* v. *Canada, supra* note 77 at para. 16.2. (The execution of a convicted prisoner "must be carried out in such a way as to cause the least possible physical and mental suffering" to comply with the right to humane punishment under the ICCPR.) Although *Ng* v. *Canada* deals with the death penalty, the *Ng* test would probably also apply to armed conflicts because enemy combatants are legally only "criminal suspects", having not been convicted of any capital offense. Therefore, enemy combatants should receive at least the same level of protection as convicted persons.

n110 See *e.g.*, instruments *supra* note 17; *Geneva Convention-Protocol I, supra* note 8, art. 54 (starvation of civilians); *Geneva Convention-Protocol II, supra* note 8, art. 14 (starvation of civilians).

n111 See *e.g. Joint Munitions Effectiveness Manual/Surface-to-Surface: Effectiveness Data for Mortar, 81-mm: M29* Field Manual 101 61.3 referred to in *Tactical Employment of Mortars*, Field Manual 7-90, online: U.S. Department of Defense <http://www.adtdl.army.mil> Select: Documents; Select: Field Manuals; Select FM 7-90.

n112 *Supra* note 8, art. 36 [emphasis added].

n113 *Supra* note 62.

n114 *Ibid.* at para. 71.

n115 *Ibid.*

n116 *Ibid.* at paras. 71-72.

n117 One commentator has noted that the availability of, for example, PGMs to technologically advanced states creates asymmetrical force strengths between such states and less-technologically advanced states that, in turns, effectively creates a double standard in the law of armed conflict: Schmitt, *supra* note 22 at 1088. As Lt. Col. Schmitt states:
As the gap between the military "haves" and "have nots" widens, there will be subtle stressors that encourage an interpretation of the law of armed conflict relative to the state to which it is applied.... In

abstracto, an identical standard is applied to both states--a requirement to minimize collateral damage and incidental injury. In practice, however, the developed state is held to a higher standard: *ibid.* However, this is old wine in new skins. There always have been asymmetrical force strengths in armed conflict. As a matter of law, such differences have not been recognized as a justification for the violation of the law of armed conflict. "The rules of international law must be followed even if this results in the loss of a battle or even a war": see *Re List and Others (Hostages Trial)*, [1948] 15 Ann. Dig. I.L.C. No. 215, 632 at 647.

Furthermore, technologically advanced states generally have arsenals with greater destructive capabilities at their disposal than less technologically advanced states. As a matter of morality, should such advanced states not be held to a higher standard because of the enormous destructive forces that they can and often do unleash? Finally, as a matter of politics, holding such powerful states to a higher standard undercuts the criticism by less powerful states that the law of armed conflict generally has been manipulated in favour of powerful states because powerful states generally have stronger bargaining positions in the negotiation of treaties and other international legal instruments, as well as stronger impact on the development of customary international law: see M. Byers, *Custom, Power and the Power of Rules* (Cambridge: University Press, 1999) at 37.

n118 *Supra* note 8. Article 57(2) of the *Geneva Convention-Protocol I* states:

With respect to attacks, the following precautions shall be taken:

...
(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

n119 Schmitt, *supra* note 22 at 1061-62.

n120 The term "battlespace" has supplanted the term "battlefield" because of the latter's failure to conceptualize fully the changing character of warfare that consists of other dimensions than the linear approach of the battlefield.

n121 See *United States* v. *Sisson*, 294 F. Supp. 515 at 517-18 (D. Mass. 1968).

n122 See *e.g.*, H.H. Koh, "Judicial Constraints: The Courts and War Powers" in G.M. Stern & M.H. Halperin, eds., *The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives* (Westport, Connecticut: Greenwood Press, 1994) 121 at 123. As Koh states, "even cases involving massive amounts of classified information can be fairly adjudicated by a competent and conscientious judge, particularly if the parties provide the crucial information to the court *in camera": ibid.*

n123 See *e.g., Re Goering and Others* (Nuremberg, International Military Tribunal), [1946] 13 Ann. Dig. I.L.C. No. 92, 203.

n124 See *e.g., Re List and Others, supra* note 117.

n125 See *e.g., United States* v. *Calley*, 48 C.M.R. 19 (U.S. Ct. of Military App., 1973); *The Llandovery Castle* (1921), 2 I.L.R. 436 (sinking of unarmed hospital ship by German U-boat).

n126 See *e.g., Prosecutor* v. *Tadic* (1995), 105 I.L.R. 419.

n127 *Coard* v. *United States* (1999), Inter-Am. Comm. H.R., No. 109/99; *Juan Carlos Abella* v. *Argentina* (1997), Inter-Am. Comm. H.R., No. 55/97, OEA/Ser.L/V/II.95/doc.7 (1997) 271.

n128 See *e.g., McCann* v. *U.K., supra* note 62.

n129 Schmitt, *supra* note 22 at 1057.

n130 *Ibid.*

n131 Also, under the "Rendulic Rule," a commander in the field is not judged by knowledge gained in hindsight: see *e.g., Re List and Others, supra* note 117 at 647-49.

n132 It is unclear whether a violation of the Unified Use of Force Rule could establish criminal liability because it is unclear whether there has been sufficient notice under the international law principle of *nullum crimen sine lege*. For example, Article 7 of the ECHR, *supra* note 52, states:
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.
See also *S.W.* v. *United Kingdom* (1995), 21 E.H.R.R. 363. Whether the Unified Use of Force Rule is a "general principle of law" recognized by "civilized nations" is subject to debate and is beyond the scope of this article.

n133 Articles 57 and 58 Chapter IV of the *Geneva Convention-Protocol I, supra* note 8, states:
Article 57--Precautions in attack
1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
(a) those who plan or decide upon an attack shall:
(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Article 58--Precautions against the effects of attacks
The Parties to the conflict shall, to the maximum extent feasible:
(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
(b) avoid locating military objectives within or near densely populated areas;
(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

n134 (1996), I.C.J. Rep. 341.

n135 *Ibid.* at para. 25.

n136 See *supra* notes 62 and 72. And inversely, the Inter-American Commission on Human Rights has used the law of armed conflict for defining international human rights law: see *Coard* v. *United States, supra* note 127.

n137 See Advisory Opinion, *supra* note 134 at paras. 24-26.

n138 See text above accompanying notes 56-60.

n139 The UN now does not distinguish between international and non-international conflicts, which would be relevant to whether and how certain persons are protected under the *Geneva Conventions*. See "UN Secretary-General's Bulletin on the Observance By United Nations Forces of International Humanitarian Law" (1999) 38 I.L.M. 1656 (entered into force 12 August 1999) (application to both peace-enforcement and peacekeeping operations). The U.S. also has adopted a similar policy. "Armed forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized": Corn, "When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War" (June 1998) Army Law. 17.

n140 See Meron, *supra* note 74 at 266-73 (arguing for use of human rights law to complement international humanitarian law).

n141 H. Olsen & J. Davis, "Training U.S. Army Officers for Peace Operations, United States Institute of Peace Special Report" (29 October 1999). UN operations have become "increasingly civilian and multidimensional in nature, involving civilian police, political, humanitarian, human rights, and electoral components": D. Shraga, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage" (2000) 94 A.J.I.L. 406 at 412.

n142 It is important to recall that the Unified Use of Force Rule not only applies to the conduct of war but also applies to the use of force against prisoners of war, terrorists, and pirates because the civilian-combatant distinction is becoming less operationally relevant in OOTW.

n143 Recall that *McCann* v. *U.K., supra* note 62, also involved a domestic police operation employing members of the Gibralter police.

n144 V. Gowlland-Debbas, "The Right to Life and Genocide: the Court and an International Public Policy" in L. Boisson de Chazournes & P. Sands, eds., *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: University Press, 1999) 315 at 326 [emphasis in original].

n145 *Coard* v. *United States, supra* note 127 at para. 39.

n146 See T. Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience" (2000) 94 A.J.I.L. 78 (listing uses of Martens clause in treaties, international tribunal decisions, and governmental and intergovernmental declarations).

n147 *Supra* note 8, art. 1(2).

n148 *Supra* note 146 at 87.

n149 The only difference is that Article 3, ECHR, does not include a prohibition against "cruel" treatment, which the ICCPR does.

n150 See *e.g., Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Paul* v. *Avril*, 812 F. Supp. 207 (S.D. Fla. 1993); *Filartiga* v. *Pena-Irala*, 630 F.2d 876 at 878 (2nd Cir. 1980); see also s. 702 of *Restatement of the Law (Third): The Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn.: American Law Institute, 1987) at 170 sec. 702 [hereinafter *Restatement*].

For a particular norm to have the status of customary international law, two conditions must be met under international law: the norm (i) must have *opinio juris sive necessitatis (i.e.*, "a sense that it is necessary by rule of law") and (ii) must be reflected in general practice of nations. *Statute of the*

International Court of Justice, 26 June 1945, 59 Stat. 1055, art. 38, T.S. 993, 3 Bevans 1179: ("The Court...shall apply...international custom, as evidence of a general practice accepted as law...."). The International Court of Justice has stated that it is appropriate to emphasize *opinion juris* and de-emphasize evidence of actual practice in finding customary international law: *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua* v. *United States)*, [1986] I.C.J. Rep. 14 at paras. 218-20. The ICCPR generally reflects global customary international law norms because over 70% of states worldwide have ratified/acceded to the treaty. See Martin, *supra* note 61 at 44-47 (arguing that ratification/accession of multilateral human rights treaty by 50% of total states worldwide establishes customary international legal status of treaty).

n151 It should be noted that the *Geneva Convention-Protocol I* also reflects global customary international law.

There are 152 parties to the *Geneva Convention-Protocol I*: online: International Committee of the Red Cross <http://www.icrc.org> Select: "International Humanitarian Law"; Select: "Geneva Conventions and their Additional Protocols" (last modified: 19 June 2001). Therefore, under the Customary International Law 50% Threshold Test, it reflects conventional customary international law. See Martin, *supra* note 61 at 44-55 (arguing for 50% Threshold Test); see also Aldrich, *supra* note 15 at 53 (*Geneva Convention-Protocol I*) provisions for protection of civilians reflect customary international law).

n152 For a discussion of the universally binding nature of *jus cogens* rules, see L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Helsinki: Finnish Lawyers' Publishing Company, 1988). "There appears to be much support in the international community of States for the view that, in extremely urgent cases, 'the international community of States as a whole' is entitled to assume the authority to require one or a few dissenting States to observe a customary norm of general international law as a customary peremptory norm": *ibid.* at 242. "Presumably no act done contrary to...a [*jus cogens*] rule can be legitimated by means of consent, acquiescence or recognition; nor is a protest necessary to preserve rights affected by such an act": R. Jennings & A. Watts, eds., *Oppenheim's International Law*, vol. 1, 9th ed., (Essex: Longman Group UK Ltd., 1992) at 8; *Restatement, supra* note 150, vol. 1 at 34 (not all states need to consent to *jus cogens* norm--only "very large majority"); R. St. J. Macdonald, "Fundamental Norms in Contemporary International Law" (1988) 25 Can. Y.B. Int'l L. 115 at 131.

Under the Persistent Objector Rule, a state is not legally bound to a customary international law norm if it should express a clear and consistent dissent during the development of the norm. See *Fisheries Case (United Kingdom* v. *Norway*), Order of 18 December 1951, [1951] I.C.J. Rep. 116 at 131 (dictum recognizing Persistent Objector Rule); see also Martin, *supra* note 61 at 47-55 (discussing Persistent Objector Rule); *Restatement, supra* note 150, vol. 1 at 25 (recognizing Persistent Objector Rule); I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Oxford University Press, 1990) at 10 (recognizing Persistent Objector Rule).

n153 Council of Europe, Directorate General of Human Rights, *Human Rights Information Bulletin: An update on human rights activities within the Council of Europe* (2000) 49 Inf. Bull. 5.

n154 The Court described the ECHR as among the "principal sources of fundamental human rights...and indicative of the customs and usages of civilized nations", thereby reflecting customary international law: *Rodriguez Fernandez* v. *Wilkinson*, 505 F. Supp. 787 at 797 (D.Kan. 1980); see also *Restatement, supra* note 150, vol. 1 at 36-37.

n155 *CIS Convention, supra* note 53, art. 2(4) [emphasis added].

n156 See Byers, *supra* note 117 at 42 (discussing the role of permanent members of the UN Security Council in creating/recognizing customary international law).

n157 See *Ng* v. *Canada, supra* note 77.

n158 "Future peace operations will likely be joint, multinational, and coalition-based": Olsen & Davis, *supra* note 141 at 1.

n159 For a discussion of command responsibility, see F.F. Martin & R.J. Wilson, *The Rights*

International Companion to Criminal Law & Procedure: An International Human Rights and Humanitarian Law Supplement (The Hague: Kluwer Law International, 1999) at 66-79; I. Bantekas, "The Contemporary Law of Superior Responsibility" (1999) 93 A.J.I.L. 573.

n160 "United Nations Peacekeeping: Some Questions and Answers--Who Contributes Personnel and Equipment?", online: United Nations <http://www.un.org/Depts/dpko/dpko/ques.htm#shortages> (last modified: 7 December 2000).

n161 For example, force protection has been a strong focus of U.S. military policy, as evidenced by U.S. practices of high-altitude bombing and avoidance of using ground troops during the Gulf War and Kosovo Conflicts.

n162 See *e.g., Smith and Grady* v. *United Kingdom* (2000), 29 E.H.R.R. 493 at 493: "investigations into [military personnel's] homosexuality and their subsequent discharge from the Royal Navy on sole ground of their homosexuality, in pursuance of the Ministry of Defence policy of excluding homosexuals from the armed forces, constituted degrading treatment and violated their right to a private life." See also *Lustig-Prean and Beckett* v. *United Kingdom* (1999), 29 E.H.R.R. 548; *Vereinigung Demokratischer Soldaten Osterrichs and Gubi* v. *Austria* (1994), 20 E.H.R.R. 56 (Minister of Defence's prohibition of distribution of a journal to military personnel was held to violate freedom of expression under Art. 10, ECHR).

n163 The implementation of the Unified Use of Force Rule also solves some of the difficulties that have been created by the implementation of rules of engagement (ROE) designed only for peacekeeping forces. When initial conditions change from those only requiring peacekeeping to those requiring peace-enforcement, and the ROE cannot be changed and adapted to these new conditions, often both innocent civilians and peacekeeping forces became casualties because use of force was severely limited or prohibited. For example, the peacekeeping UN Protection Force (UNPROFOR) in Bosnia-Herzegovina incurred casualties and failed to prevent the commission of numerous international crimes against the civilian population, because their ROE were unadaptable to conditions requiring peace enforcement. The Unified Use of Force Rule would have supported a solution to this problem because the Rule unifies use-of-force standards for both war and OOTW, as well as *legally requires* that peacekeeping forces use force to protect both themselves and others. International human rights law creates affirmative state duties to prevent the commission of violations of the rights to life and humane treatment by state or private actors against both civilians and one's own military forces. See *e.g., Velasquez Rodriguez Case (Honduras)* (1988), Inter-Am. Ct. H.R., Ser. C., No. 4 at para. 172 (state has an affirmative duty to prevent violations of the right to life committed by a private or state actor); *Osman* v. *United Kingdom, supra* note 87 (state has an affirmative duty to prevent violations of the right to life committed by a private actor); *A.* v. *United Kingdom* (1999), 27 E.H.R.R. 611 (state has an affirmative duty to prevent inhumane treatment committed by a private actor). Therefore, the Unified Use of Force Rule protects not only others but also one's own forces.

Although the U.S. Joint Chiefs of Staff in 1996 adopted new ROE, called the Standing Rules of Engagement (SROE), which addressed the threat of harm to its own forces and other designated persons, the SROE may not require absolute necessity in the use of force. The SROE states in part: When the use of force in self-defense is necessary, the nature, duration, and scope of the engagement *should not exceed* that which is required to decisively counter the hostile act or hostile intent and to ensure the continued safety of US forces or other protected personnel or property.
See "Joint Chiefs of Staff Standing Rules of Engagement Enclosure A To CJCSI 3121.01", (1 October 1994), online: Carlisle Barracks <http://carlisle-www.army.mil/usacs1/divisions/pki/legal/rulengage/frame.htm> at para. 8(a)(2) (last modified: 12 May 1998) [emphasis added]. However, the other enclosures containing more specific information are classified as secret. Therefore, it is unclear whether an absolute necessity threshold is used throughout the SROE.

n164 However, under international human rights law, any such mission may be unlawful because states have an affirmative duty to *prevent* violations of the rights to life and humane treatment. See *e.g., Velasquez Rodriguez Case, supra* note 163; *Godinez Cruz* v. *Honduras* (1989), Inter-Am. Ct. H.R. (Ser. C), No. 5; *Neira Alegria* v. *Peru* (1995), 20 Inter-Am. Ct. H.R. (Ser. C); *Osman* v. *United Kingdom, supra* note 87; *A.* v. *United Kingdom, supra* note 163.

n165 "The necessities of war take precedence over the rules of war."

n166 *E.g.*, Allied bombing of Dresden and German summary execution of Allied soldiers during the Battle of the Bulge in World War II.

n167 A remaining question is whether the Unified Use of Force Rule should be incorporated into a treaty regime. On the one hand, such incorporation would be important for the Rule's dissemination among the international community because the Rule has not been recognized by military authorities. Such recognition would be important for ensuring that the Rule is implemented and that violations of it will be considered criminal violations. Therefore, it may be appropriate to codify the Rule by treaty in order to ensure implementation and greater compliance by threat of criminal sanctions.

On the other hand, the refusal of some states to ratify/accede to this treaty might lead these states to mistakenly believe that they are expressing a legally sufficient objection to the Rule in order to exempt themselves from the customary international law that the Rule already reflects. As argued above, the Rule already has emerged as a customary international legal norm, and it is too late to object to the Rule under the Persistent Objector Rule. See discussion at Part VIII above. However, if a sufficiently large number of states during the negotiation and drafting of this treaty materially changed the language of the Unified Use of Force Rule, the original Rule would lose its global customary international legal status. Therefore, the Rule probably should not be codified into a treaty. But this is an issue for discussion at a later date.