



2-1-2012

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Evan J. Criddle

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## Recommended Citation

Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 Notre Dame L. Rev. 1073 (2013).

Available at: <http://scholarship.law.nd.edu/ndlr/vol87/iss3/4>

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## PROPORTIONALITY IN COUNTERINSURGENCY: A RELATIONAL THEORY

*Evan J. Criddle\**

*At a time when the United States has undertaken high-stakes counterinsurgency campaigns in at least three countries (Afghanistan, Iraq, and Pakistan) while offering support to insurgents in a fourth (Libya), it is striking that the international legal standards governing the use of force in counterinsurgency remain unsettled and deeply controversial. Some authorities have endorsed norms from international humanitarian law as *lex specialis*, while others have emphasized international human rights as minimum standards of care for counterinsurgency operations. This Article addresses the growing friction between international human rights and humanitarian law in counterinsurgency by developing a relational theory of the use of force. The central insight is that a state's authority to use force under international law is derived from, and constrained by, the fiduciary character of its relationship with its people. This relational conception of state sovereignty offers an attractive normative framework for addressing conflicts between human rights and humanitarian law. When states engage in internal armed conflict and belligerent occupation, their assertion of public powers of governance over an affected population entails a concomitant fiduciary obligation to satisfy the strict proportionality standard of international human rights law. Conversely, when states defend their people in traditional international armed conflict and transnational armed conflict against nonstate actors, international humanitarian law ordinarily supplies the applicable proportionality standard. Examples from conflicts in Afghanistan, Argentina, Israel, Libya, and Russia illustrate how the relational approach to choice-of-law analysis could lay a more coherent and principled foundation for counterinsurgency regulation under international law.*

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\* Associate Professor of Law, Syracuse University College of Law, J.D., Yale Law School. This Article has benefited from workshop presentations at Arizona State University, the Inter-disciplinary Center Herzliya, Syracuse University, and the University of Georgia. I am particularly grateful to Diane Marie Amann, William Banks, Daniel Bodansky, Harlan Cohen, Geoffrey Corn, David Crane, Anika Criddle, Laura Dickinson, Evan Fox-Decent, Oren Gross, Eric Talbot Jensen, Brandon Kaufman, Chimène Keitner, Clark Lombardi, Timothy Meyer, Daphné Richemond-Barak, Daniel Rothenberg, Peter Spiro, and Patricia Sullivan for helpful comments and conversations.

## INTRODUCTION

On March 17, 2011, the United Nations Security Council adopted Resolution 1973, authorizing U.N. member states “to take all necessary measures” short of occupation “to protect civilians and civilian populated areas” in Libya from the brutal counterinsurgency campaign waged by Colonel Muammar el-Qaddafi.<sup>1</sup> In explaining the legal basis for its resolution, the Security Council emphasized the Qaddafi government’s sharp “escalation of violence” against insurgents in eastern Libya and the “heavy civilian casualties” attributed to this violence.<sup>2</sup> The Security Council took pains to stress further that the Libyan government had transgressed its basic “responsibility . . . to protect the Libyan population” by failing to take “all feasible steps to ensure the protection of civilians.”<sup>3</sup>

As American and European forces commenced military strikes in Libya, they endeavored to frame their mission objectives in terms consistent with Resolution 1973. The professed rationale for intervention was humanitarian: to prevent the Libyan government from continuing to use unlawfully indiscriminate and disproportionate force in its counterinsurgency operations. In the words of U.S. Admiral Mike Mullen, the chairman of the Joint Chiefs of Staff, the unfolding action in Libya was about “limiting or eliminating” Qaddafi’s “ability to kill his own people.”<sup>4</sup> Military intervention was framed as an appropriate response to the Libyan government’s flagrant violation of international legal standards governing the use of force in counterinsurgency.

Given the strident condemnation of Libya’s counterinsurgency campaign, a casual observer might be forgiven for concluding that the international legal standards governing a state’s use of force in counterinsurgency must be well settled. Sadly, this is not entirely the case. At the close of the twenty-first century’s first decade—a period that will be remembered for costly counterinsurgency operations in Afghanistan, Chechnya, Iraq, Sri Lanka, Sudan, and a host of other locations—international law has yet to develop a coherent framework for counterinsurgency regulation. The problem is not that there are

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1 S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

2 *Id.* at pmbl.

3 *Id.* In a previous resolution, the Security Council condemned Libya’s attacks against unarmed protesters as possible crimes against humanity and had referred the matter to the Prosecutor of the International Criminal Court. *See* S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

4 Helene Cooper & David E. Sanger, *Target in Libya Is Clear; Intent Is Not*, N.Y. TIMES, Mar. 20, 2011, available at <http://www.nytimes.com/2011/03/21/world/africa/21assess.html> (last visited Nov. 23, 2011) (internal quotation marks omitted).

no legal norms that would limit the authority of a Qaddafi to “kill his own people.” Such norms certainly exist; indeed, few norms are more firmly established in international law than the principle that states may use only “proportional” force when responding to national security threats. The real problem is that international law contains multiple, conflicting standards for evaluating a state’s use of force in counterinsurgency, and courts and publicists have yet to reach a consensus about how these standards relate to one another.<sup>5</sup>

Two discrete subfields of international law—international human rights (HRL) and international humanitarian law (IHL)—currently compete for supremacy in the counterinsurgency context. Each of these bodies of law aspires to safeguard human dignity during national security crises, but each honors human dignity in its own way.<sup>6</sup> IHL authorizes states to target enemy fighters freely in support of military objectives, provided that collateral damage to civilians is not manifestly “excessive.”<sup>7</sup> HRL, on the other hand, seeks to safeguard the universal demands of human dignity for all—even, and perhaps especially, during armed conflict—by prohibiting all casualties that are not strictly necessary to preserve human life.<sup>8</sup> Because international law does not contain clear choice-of-law rules to mediate conflicts between HRL and IHL, these two formulations of the “proportionality” principle have continued along parallel tracks without converging toward a unified and theoretically satisfying standard. While regional human rights tribunals have tended to apply HRL’s proportionality standard to counterinsurgency, other international

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5 For a general introduction to these debates, see the recently published collection of essays, *INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW* (Orna Ben-Naftali ed., 2011).

6 This is not to say, of course, that IHL and HRL have not influenced one another over time. See Theodore Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT’L L.* 239, 244–45 (2000) (exploring the influence of human rights norms on IHL).

7 Additional Protocol I to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of International Armed Conflicts art. 51(5)(b), June 8, 1977, 1125 *U.N.T.S.* 3 [hereinafter Additional Protocol I].

8 See U.N. Human Rights Council, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, at 11, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (prepared by Philip Alston) [hereinafter U.N. Report on Targeted Killing] (“Lethal force under human rights law is legal if it is strictly and directly necessary to save life.”); International Human Rights Committee, Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies, General Comment No. 6, HRI/GEN/1/Rev.7 (2004), ¶ 3 (last visited Oct. 28, 2011) (“[T]he law must strictly control and limit the circumstances in which a person may be deprived of his life by [state] authorities.”).

tribunals have applied IHL standards as *lex specialis*.<sup>9</sup> This fragmentation of the legal standards governing counterinsurgency has real-world costs not only because it compromises states' ability to demonstrate their adherence to international standards, but also because the difference between HRL's strict proportionality standard and IHL's more flexible standard is often measured in military and civilian casualties. While these reputational and human costs of counterinsurgency might mean little to an inveterate rights-abuser such as Colonel Qaddafi, they are felt more keenly by coalition forces in Afghanistan and Iraq who recognize that fidelity to international legal standards is a key factor in winning over "hearts and minds."

How, then, should international law reconcile IHL and HRL in counterinsurgency? Some courts and legal scholars have argued that international law should distinguish the respective domains of IHL and HRL based on the *nature of the threat* to national security (i.e., ordinary disturbances vs. armed conflict) and the corresponding *type of operation* conducted (i.e., law enforcement vs. military). According to this logic, HRL's strict proportionality standard would apply whenever a state is able to address internal unrest through traditional law enforcement tools. When internal disturbances spark genuine armed conflict, on the other hand, IHL's proportionality standard would displace HRL. I refer to this approach for reconciling IHL and HRL in the discussion that follows as the "operational theory" of *lex specialis*. Although the operational theory has its detractors, it has emerged as arguably the leading conceptual framework for reconciling IHL and HRL.

In this Article, I argue that the operational theory is normatively unattractive as a choice-of-law rule because it ignores a critical factor in assessing a state's legal authority to use force: the *character of the relationship* between particular states and the persons they target with coercive force. A general theme running throughout contemporary international law is the principle that states bear special duties of care toward their own nationals and foreign nationals over whom they have asserted public powers of governance. Under HRL, states are obligated to guarantee a variety of basic civil, political, social, and economic rights to their citizens and resident foreign nationals. IHL likewise requires states to honor the dignity of prisoners of war and

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9 The canon "*lex specialis derogat legi generali*" stands for the proposition that when conflicts arise between two bodies of international law or ambiguities arise within a single body of law, the legal norm that is tailored most specifically to a particular context should govern. See MARTTI KOSKENNIEMI, INTERNATIONAL LAW COMMISSION STUDY GROUP ON FRAGMENTATION § 2.1, [http://untreaty.un.org/ilc/sessions/55/fragmentation\\_outline.pdf](http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf) (last visited Nov. 23, 2011).

other detained foreign nationals by providing basic medical attention, food, shelter, and other necessities of life. These affirmative duties of care between states and persons over whom they have asserted public powers of governance are different in kind from states' obligations toward extraterritorial foreign nationals over whom they have not asserted such powers. The latter obligations are better described as quasi-tort duties of noninterference rather than affirmative fiduciary duties of care. Individual states do not ordinarily bear duties under international law to *protect* and *fulfill* human rights for foreign nationals,<sup>10</sup> although they do bear duties to *respect* the human rights of other peoples by refraining from military aggression and other harmful acts that would treat foreign nationals as mere means to their own ends. Because the operational theory ignores the relational character of state obligations under international law, it leads to counterintuitive and morally troubling results, including the proposition that states waging counterinsurgency may kill their own people under some circumstances where lethal force is not strictly necessary to preserve equal freedom for all. Given these results, international lawyers would do well to question whether the operational theory in fact offers the best interpretive framework for conceptualizing a state's legal authority to use force in counterinsurgency.<sup>11</sup>

This Article constructs an alternative theory for structuring the relationship between HRL and IHL in counterinsurgency. The starting point is Immanuel Kant's insight that a state's legal authority to use force is best understood in relational, deontological terms. When states conduct counterinsurgency operations against their own people, as in the current Libyan conflict, they bear a fiduciary obligation to ensure that their use of force is strictly necessary to preserve fundamental legal order for all. A state may not treat its people as mere objects that it may oppress or destroy for its own benefit or for the benefit of particular groups or individuals. From these general principles, it follows that states engaged in internal armed conflict and belligerent occupation must comply with HRL's strict proportionality requirements during counterinsurgency, irrespective of the nature of the threat to national security or the operational character of the

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10 This Article will not attempt to develop a comprehensive framework for conceptualizing the conditions under which states would bear affirmative legal duties to protect foreign nationals beyond their borders. Cf. Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341 (2010) (developing a relational account of a state's responsibility to protect that emphasizes inter alia the relationship between the state and the third-party rights-abuser).

11 For an introduction to interpretive approaches to legal reasoning, see generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

state's response. As expressed in Resolution 1973, a state must always "take all feasible steps to ensure the protection" of its people when it undertakes counterinsurgency operations.<sup>12</sup> Conversely, because states do not ordinarily assert public powers over foreign nationals operating beyond their borders, their duties toward foreign nationals in traditional international armed conflicts and transnational armed conflicts with nonstate actors are generally duties of noninterference rather than affirmative responsibilities to protect. As such, states engaged in self-defense are entitled to privilege the lives of their own soldiers over those of a foreign aggressor (as reflected in IHL but not HRL) to the extent consistent with *jus ad bellum* and IHL's general humanitarian principles of distinction, necessity, and proportionality.<sup>13</sup> This relational theory of *lex specialis* offers a principled framework for distinguishing the respective domains of HRL and IHL, while lending support for the human rights-focused proportionality jurisprudence of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (Inter-American Court).

## I. TWO PARADIGMS FOR PROPORTIONALITY

Over the past decade, legal scholars have observed that counterinsurgency operations<sup>14</sup> straddle an active "fault line" where IHL and HRL overlap with potentially destabilizing effects for international law as a unitary normative system.<sup>15</sup> In this Part, I trace the fissures along this fault line and explore efforts by international tribunals and publicists to resolve tensions between IHL proportionality and HRL proportionality in counterinsurgency.

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12 S.C. Res. 1973, *supra* note 1, at pmbl.

13 Whether IHL's current formulation of the principles of distinction, necessity, and proportionality satisfy the relational principles of noninstrumentalization and domination is a question I defer for future consideration.

14 The U.S. Counterinsurgency Manual offers a broad definition of "counterinsurgency" as "those military, paramilitary, economic, psychological, and civic actions taken by a government to defeat insurgency." HEADQUARTERS, DEPARTMENT OF THE ARMY & HEADQUARTERS, MARINE CORPS COMBAT DEVELOPMENT COMMAND, FM3-24/MCWP 3-33.5, THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 383 (Univ. of Chi. Press, 2007) [hereinafter U.S. COUNTERINSURGENCY MANUAL]. This Article focuses on the use of force in counterinsurgency operations while recognizing at the same time that the use of force may be only one aspect of a broader counterinsurgency strategy.

15 See Michael N. Schmitt, *Fault Lines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006). See generally INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 5.

### A. *International Humanitarian Law*

Traditionally, IHL has been concerned primarily with international armed conflict between states rather than noninternational armed conflict (NIAC) between state and nonstate actors, the primary context for counterinsurgency operations. The Geneva Conventions prescribe detailed rules to protect civilians and combatants captured within international armed conflicts.<sup>16</sup> For example, states engaged in international armed conflict are required to distinguish combatants from civilians.<sup>17</sup> When attacks on military targets pose a risk of collateral civilian casualties, states must take “all reasonable precautions to avoid losses of civilian lives”<sup>18</sup> and must ensure that unintended civilian casualties are not “excessive in relation to the concrete and direct military advantage related.”<sup>19</sup> These principles of distinction and proportionality do not generally shield combatants from the use of force within an international armed conflict; rather, states remain free to target enemy combatants without subjecting themselves to legal censure, provided that their chosen means and methods of attack are lawful and the targets are not incapacitated by injury or attempting to surrender.<sup>20</sup> IHL thus safeguards civilians in international armed conflict from excessive state force without according comparable protection to combatants.

Although the Geneva Conventions speak less clearly regarding the use of force in NIAC, they offer some support for extending IHL proportionality to counterinsurgency. Additional Protocol I, which focuses on international armed conflict, extends IHL proportionality to internal struggles against colonialism and apartheid.<sup>21</sup> Additional Protocol II, which addresses NIAC, has a similarly limited field of application, addressing only conflicts with dissident armed groups “under responsible command” that “exercise . . . control over . . . territory” and are capable of conducting “sustained” military operations and complying with IHL.<sup>22</sup> As a result, Additional Protocol II does not apply to most contemporary insurgencies, which are networked

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16 See Additional Protocol I, *supra* note 7.

17 *Id.* art. 51(2).

18 *Id.* art. 57(4).

19 *Id.* art. 51(5)(b).

20 See Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Additional Protocol I, *supra* note 7, arts. 40–41.

21 *Id.* art. 1(4).

22 Additional Protocol II to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of Non-International Armed Conflicts art. 1(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].



rather than hierarchical, opportunistic rather than sustained, and itinerant rather than territorially entrenched.<sup>23</sup> Nonetheless, commentary accompanying Additional Protocol II notes in passing that the proportionality norm is a general principle with broader application.<sup>24</sup> Thus, states must observe “general principles relating to the protection of the civilian population which apply irrespective of whether the conflict is an international or an internal one,” including “the principle of distinction and the principle of proportionality which only intervenes when it is not possible to ensure the total immunity of the population.”<sup>25</sup>

Some authorities have asserted that IHL proportionality applies to all armed conflicts, international and noninternational alike, as a matter of customary international law (CIL).<sup>26</sup> For instance, in *Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia reasoned that principles of discrimination from the law of international armed conflict represented “customary rules” that apply equally “in civil strife.”<sup>27</sup> Similarly, in its landmark 2005 study on customary IHL, the International Committee of the Red Cross (ICRC) asserted that “gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to noninternational armed conflicts.”<sup>28</sup> As evidence of this emerging CIL for NIAC, the ICRC pointed to international agreements, which prohibit the use of mines and other devices that pose a risk of “excessive” civilian casualties.<sup>29</sup>

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23 See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 83 (3d ed. 2008) (“The definition of a non-international armed conflict in Protocol II . . . would exclude most revolutions and rebellions, and would probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government.”). The United States is one of several states that have not ratified Additional Protocol II.

24 Additional Protocol II, *supra* note 22, at 1449–50, ¶ 4772.

25 *Id.* at 1490, ¶ 4772.

26 See, e.g., MICHAEL N. SCHMITT ET AL., *THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY* § 2.1.1.4 (2006), *reprinted in* 36 *ISR. Y.B. HUM. RTS. (Special Supplement)* (2006).

27 See *Prosecutor v. Tadic*, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 119, 127 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

28 Int’l Comm. of the Red Cross, *Customary International Humanitarian Law Rules*, at xxxv (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC Report], available at <http://www.icrc.org/customary-ihl/eng/docs/v1> (last visited Nov. 23, 2011).

29 See *id.* at ch. 4, Rule 14 (citing Amended Protocol II to the Convention on Certain Conventional Weapons, Article 3(8)(c)).

The ICRC also cited state military manuals, declarations, and statutes that incorporate the proportionality principle from Additional Protocol I without restricting its application to international conflicts.<sup>30</sup> Although some legal scholars and military lawyers have embraced the ICRC's vision of IHL proportionality analysis as CIL for noninternational conflicts, this conclusion is by no means universally accepted and remains empirically under-developed.<sup>31</sup>

### B. *International Human Rights Law*

HRL presents a different paradigm for evaluating the proportionality of a state's use of force within internal conflicts.<sup>32</sup> Under HRL, the "right to life" is widely described as a *jus cogens* norm that does not admit derogation even in public emergencies such as a violent riot or insurrection. The human right to life does not prohibit all use of lethal force by states; rather, it imposes a requirement of justification: states may not use lethal force unless they can show that this extraordinary measure is "absolutely necessary" to protect life or legal order.<sup>33</sup> Thus, states may take life only if they first take appropriate precautions to avoid or minimize casualties and only if nonlethal measures such as arrest or incapacitation would be likely to impose disproportionate costs.<sup>34</sup> This strict necessity requirement for the use of lethal

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30 *Id.*

31 Critics protest that the ICRC's conclusions rest upon dubious propositions "that military manuals and declarations by states are (a) intended as statements of international law, rather than domestic law or policy, and (b) apply to internal armed conflicts unless explicitly limited to international armed conflicts." William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 748-49 (2005); see also John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law* (2007), [http://www.icrc.org/eng/assets/files/other/irrc\\_866\\_bellinger.pdf](http://www.icrc.org/eng/assets/files/other/irrc_866_bellinger.pdf) (raising objections to the ICRC's methodology); Douglas J. Sylvester & Aaron X. Fellmeth, *Targeting Decisions and Consequences for Civilians in the Columbian Civil Strife*, in *BEYOND WAR* (Daniel Rothbart et al. eds., forthcoming 2011) (contesting the view that IHL proportionality applies as CIL to internal armed conflict).

32 See Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 178 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008) (recognizing the conflict between IHL proportionality and HRL proportionality).

33 See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]; McKerr v. United Kingdom, Eur. Ct. H.R. (2001), ¶ 110; Human Rights Committee, General Comment No. 6, ¶ 3 HRI/GEN/1/Rev.6 (1982), ¶ 129.

34 See, e.g., Khatsiyeva and Others v. Russia, App. No. 5108/02 Judgment, Jan. 17, 2008.

force places HRL in stark conflict with IHL, which requires only that civilian casualties not be “*excessive* in relation to the concrete and direct military advantage anticipated.”<sup>35</sup>

HRL’s proportionality principle differs from IHL in another respect: it takes into account threats not only to ordinary civilians but also to armed belligerents. While military casualties are irrelevant to IHL’s proportionality inquiry,<sup>36</sup> HRL requires states to consider all potential casualties—lawful combatants, noncombatant fighters, and ordinary citizens alike—when planning and executing counterinsurgency operations.<sup>37</sup> A state violates the right to life if it uses lethal force where nonlethal measures would do, even if those killed were participating directly in armed combat against the state.<sup>38</sup> As the ECtHR has explained, a law enforcement or military operation must be “planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.”<sup>39</sup> When states do employ lethal force, they bear a continuing obligation to “take appropriate care to ensure that any risk to life is minimised.”<sup>40</sup> HRL thus imposes a significantly more protective standard than IHL for determining whether a state’s use of force is adequately proportional.

To be sure, these formal differences between HRL proportionality and IHL proportionality do not always counsel different results on the ground. In the heat of an active firefight, for example, both IHL and HRL would allow counterinsurgents to take the lives of enemy insurgents who are participating actively in the confrontation in order to preserve their own lives and the lives of innocent civilians. Conversely, neither IHL nor HRL would authorize the type of indiscriminate attacks against innocent civilians that prompted the Security Council’s recent condemnation of the Libyan counterinsurgency. Differences between the IHL and HRL proportionality standards become more troubling, on the other hand, in contexts where they could prompt counterinsurgents to develop substantially different rules of engagement depending upon the applicable legal regime. The para-

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35 Additional Protocol I, *supra* note 7, art. 51(5)(b) (emphasis added); see Schmitt, *supra* note 15, at 277, 293.

36 YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 129 (2d ed. 2010) (“Proportionality has nothing to do with injury to combatants or damage to military objectives.”).

37 See David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 HARV. INT’L L.J. 231, 260–61 (2005); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 32 (2004).

38 See Watkin, *supra* note 37, at 17–18.

39 *Isayeva v. Russia*, 41 Eur. Ct. H.R. 847, ¶ 175 (2005).

40 *Id.*

digmatic example involves an unarmed fighter who temporarily takes leave from an organized insurgent group in order to plow his fields away from the battlefield.<sup>41</sup> While most authorities suggest that IHL would permit counterinsurgents to use lethal force freely against such an insurgent,<sup>42</sup> HRL would not authorize lethal force if the insurgent could be apprehended without substantial risk of injury to counterinsurgents.<sup>43</sup> Here the difference between HRL and IHL would constitute a material conflict of laws necessitating recourse to choice-of-law principles.

Unfortunately, such conflicts between IHL proportionality and HRL proportionality arise frequently in counterinsurgency operations. Whenever a civil uprising leads to armed conflict, states must decide whether to adhere to the strict proportionality standards of HRL or employ the more flexible standards of IHL. Uncertainty regarding the international legal standards for counterinsurgency operations has compromised the efforts of compliance-minded states to develop principled rules of engagement. How this conflict between IHL and HRL ultimately gets resolved will have profound implications for the relative safety of countless numbers of counterinsurgent soldiers, insurgent fighters, and innocent civilians in future conflicts.

### C. *Reconciling IHL and HRL: Current Approaches*

The International Court of Justice (ICJ) took a first stab at reconciling IHL and HRL in its 1996 *Advisory Opinion on Nuclear Weapons*.<sup>44</sup> The Court acknowledged the potential for conflict between IHL and HRL, given “that the protection of the International Covenant on Civil and Political Rights” (ICCPR), which enshrines the right to life,

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41 Cf. Marco Sassòli and Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts*, 90 INT’L REV. RED CROSS 599, 613 (2008) (offering the example of an unarmed insurgent commander shopping in a grocery store outside an active zone of combat who could be targeted under IHL proportionality but only apprehended and arrested under HRL).

42 See DINSTEIN, *supra* note 36, at 29 (“A person who engages in military raids by night, while purporting to be an innocent civilian by day . . . can be lawfully targeted by the enemy.”); Int’l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991, 1007 (2008) (reasoning that a civilian performing a “continuous combat function” for an organized armed group may be targeted under IHL even if they are not participating in hostilities at the precise moment an attack occurs).

43 See McCann and Others v. United Kingdom, 21 Eur. Ct. H.R. 97, ¶¶ 149–50 (1995).

44 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

“does not cease in times of war.”<sup>45</sup> The Court suggested, however, that there could be no true conflict between HRL and IHL in practice because “whether a particular loss of life” violated the human right to life could “only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”<sup>46</sup> In short, the ICJ concluded that IHL proportionality would supply the relevant proportionality standard whenever states cross the threshold of armed conflict.

Following the *Nuclear Weapons* decision, the Inter-American Commission on Human Rights adopted a similar approach in *Abella v. Argentina*.<sup>47</sup> Under review was an armed attack by forty-two militants against military barracks in the Argentine province of Buenos Aires.<sup>48</sup> A majority of the militants were killed after encountering overwhelming resistance from a security force numbering approximately 3500 persons supported by tanks and helicopters.<sup>49</sup> Before addressing whether the state’s responsive measures were disproportionate, the Commission reasoned that it must first determine whether the incident involved a mere “internal disturbance or tensions” or, instead, “non-international or internal armed conflict.”<sup>50</sup> If the incident was a mere “disturbance,” the Commission would have to evaluate the proportionality of the state’s response according to ordinary principles of HRL; if the incident constituted “armed conflict,” on the other hand, the Commission could look to IHL for the relevant standard. The basis for this bifurcated approach, according to the Commission, was that the American Convention on Human Rights simply did not address the special context of armed conflict:

[T]he American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations.<sup>51</sup>

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45 *Id.* at 240, ¶ 25.

46 *Id.*

47 *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L./V/II.9, doc. 6 rev. ¶ 271 (1998).

48 *Id.* ¶¶ 1–3.

49 *Id.* ¶¶ 9–11.

50 *Id.* ¶ 148.

51 *Id.* ¶ 161.

Concluding that the *Abella* incident could not “be properly characterized as a situation of internal disturbances,”<sup>52</sup> the Commission held that IHL would supply the relevant proportionality standard for determining whether a state had honored international law.<sup>53</sup>

In the years following *Nuclear Weapons* and *Abella*, critics condemned these decisions for papering over the fundamental normative conflict between HRL and IHL.<sup>54</sup> It is simply not the case as the ICJ suggested in *Nuclear Weapons* that HRL contains “no rules” for assessing the legality of military operations in armed conflict. Although HRL’s proportionality standard is defined in broad terms, it applies equally to law enforcement operations and military operations alike.<sup>55</sup> Whenever states use force, HRL requires them to avoid any deprivations of life that are not strictly necessary to preserve basic security for their people.

Under the normative pull of this human rights logic, international and regional courts have retreated over time from the view expressed in *Nuclear Weapons* and *Abella* that HRL proportionality does not prescribe rules applicable to the use of force in armed conflict. In the 2004 *Palestinian Wall* case, for instance, the ICJ observed that IHL and HRL might apply concurrently in some contexts, forcing courts to “take into consideration both [of] these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”<sup>56</sup> While the ICJ did not clarify what it would mean

52 *Id.* ¶ 154.

53 *Id.* ¶ 179; *see also* *Coard v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, ¶ 42 (1999) (“[I]n a situation of armed conflict, the test for assessing the observance of a particular right . . . may . . . be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis*.”); Third Report on the Human Rights Situation in Columbia, Inter-Am. Comm’n C.R., OEA/ser.L./V/II.102, doc. 9 rev. 1, ch. 4, ¶ 12 (1999) (asserting that the Commission must draw on IHL because the Inter-American Convention on Human Rights lacks standards of distinction and proportionality).

54 *See, e.g.*, Koller, *supra* note 37, at 260.

55 *See* G.A. Res. 2675 (XXV), ¶ 1, U.N. Doc. A/RES/2675 (Dec. 9, 1970) (“Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply in situations of armed conflict.”); Jean-Marie Henckaerts, *Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW 237, 249 (Roberta Arnold & Noelle Quenivet eds., 2008) (noting “extensive state practice to the effect that human rights law continues to apply during armed conflict”).

56 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9); *see also* Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v.

for a court to “take” both IHL and HRL “into consideration,” some experts construed the decision as recognizing that IHL and HRL sometimes operate concurrently, with each body of law acting as an interpretive guide for the other.<sup>57</sup> Thus framed, HRL’s stricter proportionality standard would constitute a legal baseline that states could not disregard in armed conflict.

Not surprisingly, perhaps, both the ECtHR and the Inter-American Court have embraced this approach, applying HRL proportionality to cases arising within their jurisdiction pursuant to their path-dependent, treaty-based mandates.<sup>58</sup> In a series of cases involving internal conflicts in Chechnya, Colombia, Guatemala, and Turkey, these tribunals have applied ordinary HRL proportionality to counter-insurgency operations, notwithstanding the fact that the operations occurred within theaters of active armed conflict.<sup>59</sup> In so doing, they have implicitly rejected the view espoused in *Nuclear Weapons* and *Abella* that the HRL’s strict proportionality principle is inapplicable to armed conflict.

Illustrative of this approach is the ECtHR’s 2005 case, *Isayeva, Yusupova and Bazayeva v. Russia (Isayeva)*.<sup>60</sup> During Russia’s October 2001 military campaign against insurgents in Chechnya, the Russian military established a temporary “humanitarian corridor” to facilitate

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Uganda), 2005 I.C.J. 168, 242 ¶ 216 (Dec. 19, 2005) (considering the dual applicability of IHL and HRL).

57 See William A. Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum*, 40 ISR. L. REV. 592, 596–97, 611 (2007). Others have characterized the Court’s invocation of IHL as a reaffirmation of the operational theory of *lex specialis*, arguing that IHL controls whenever armed conflict comes into play. See Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 INT’L HUMANITARIAN LEGAL STUD. 52 (2010); W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010).

58 See, e.g., *Bámaca-Velásquez v. Guatemala, Merits and Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 209 (Nov. 25, 2000) (suggesting that IHL norms function as subsidiary “elements for the interpretation of the American Convention”).

59 See, e.g., *Isayeva, Yusupova, and Bazayeva v. Russia*, 41 Eur. H.R. Rep. 39 (2005) [hereinafter *Isayeva I*]; *Isayeva v. Russia*, 41 Eur. H.R. Rep. 38 (2005) [hereinafter *Isayeva II*]; *Bámaca-Velásquez v. Guatemala, Merits and Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 209 (Nov. 25, 2000); *Las Palmeras v. Colombia, Merits and Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 67 ¶ 33 (Feb. 4, 2000); *Kaya v. Turkey* (no. 22535/93), 2000-III, Eur. Ct. H.R. (2000). Critics of this approach have argued that human rights tribunals lack competence in the law of armed conflict, as demonstrated by the fact that they apply HRL proportionality without acknowledging the resulting tensions with IHL.

60 *Isayeva I*, 41 Eur. H.R. Rep. 39, ¶ 13.

the departure of civilians from Grozny, Chechnya's besieged capital. As civilian refugees were departing, the Russian military bombed a segment of the humanitarian corridor where militants were believed to be attempting escape. Sixteen civilians were killed, including two Red Cross workers.<sup>61</sup> In reviewing this episode for compliance with the European Convention on Human Rights, the ECtHR declined to apply IHL as the relevant *lex specialis* and instead looked to HRL for the applicable proportionality standard. The Court stressed that Russia's "use of force" against Chechen insurgents "must be no more than 'absolutely necessary'" and that the Russian military "must take appropriate care to ensure that any risk to life is minimised."<sup>62</sup> Although the Court recognized that "the situation that existed in Chechnya at the relevant time called for exceptional measures," it nonetheless condemned the particular bombing under review because Russia was unable to show that this measure was strictly necessary under the circumstances.<sup>63</sup>

In the wake of *Isayeva* and related decisions of the ECtHR and Inter-American Court, the fault line between IHL and HRL in counterinsurgency has become increasingly unstable. Human rights scholars generally have embraced the idea "that international human rights standards are, in some manner, applicable alongside humanitarian law during military" operations, providing more exacting standards for the use of force in NIAC.<sup>64</sup> In contrast, some experts in the law of armed conflict have dismissed HRL as a "law enforcement paradigm" that is ill tailored to armed conflict, where IHL is *lex specialis*.<sup>65</sup>

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61 *Id.* ¶ 29.

62 *Id.* ¶¶ 167, 169, 171 (citing, inter alia, McCann and Others v. United Kingdom (ser. A) No. 324, 21 Eur. H.R. Rep. 39, 45–46, 57 (1995)).

63 *Id.* ¶¶ 178–79.

64 See, e.g., Human Rights Committee, Aug. 4–5, 2003, *Concluding Observations*, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument) (last visited Nov. 23, 2011) ("[T]he applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation."); Christian Tomuschat, *Human Rights and International Humanitarian Law*, 21 EUR. J. INT'L L. 15, 20 (2010) (arguing that HRL standards should "have an impact" on the use of force in noninternational armed conflict, and that some elements of IHL "may . . . requir[e] a profound overhaul" to satisfy HRL).

65 See, e.g., Corn, *supra* note 57. Some experts have argued that HRL should function as a gap filler for IHL in contexts where IHL as *lex specialis* "does not regulate the resort to lethal force with sufficient precision." NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 176 (2008). For a survey of several additional possible paradigms for reconciling IHL and HRL, see Marco Sassòli, *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts*, in *INTERNATIONAL HUMANITA-*



At present, it remains unclear whether one of these approaches will emerge as the definitive legal standard for assessing proportionality in counterinsurgency.

## II. A RELATIONAL THEORY OF THE USE OF FORCE

Given the persistent tensions between IHL and HRL, how *should* international law define the proportionality principle in counterinsurgency?

To answer this question in a principled fashion, we need a legal theory capable of clarifying the basis for a state's authority to use force. In the discussion that follows, I provide a rough outline for such a theory and consider the theory's general implications for international regulation of counterinsurgency operations such as those currently underway in Afghanistan, Iraq, and Libya. The theory I develop takes as its starting point the republican insight that central features of both HRL and IHL reflect a fiduciary relationship between states and the persons who are subject to their public powers. Although this brief Article is not the place for a detailed defense of the relational character of state sovereignty (something I and others have undertaken elsewhere<sup>66</sup>), the discussion that follows suggests a variety of ways in which a relational theory of state legal authority to use force might illuminate the normative basis for key features of both IHL and HRL and mediate conflicts between them. This Article thereby contributes to a growing body of legal scholarship that draws on principles of fiduciary obligation to clarify the purpose and content of public law.<sup>67</sup>

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RIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 34, 69–78 (Orna Ben-Naftali ed., 2011).

66 See, e.g., Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259 (2005); Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301 (2009); Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029 (2003).

67 See, e.g., Lee C. Buchheit & G. Mita Gulati, *Responsible Sovereign Lending and Borrowing*, Conference on Trade and Development, Apr. 2010, U.N. Doc. No. 198 (sovereign debt); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006) (administrative law); Fox-Decent & Criddle, *supra* note 66 (human rights); Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Children's Political Rights*, 12 J. POL. PHIL. (forthcoming 2011) (children's political rights); David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. (forthcoming 2011) (deliberative democracy); Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1078 (2008) (criminal law); Mary Wood, *Atmospheric Trust and Fiduciary Duty*, in FIDUCIARY DUTY AND THE ATMOSPHERIC COMMONS (Ken Coghill ed., 2010) (environmental law).

### A. *The Fiduciary Character of Sovereignty*

The idea that states serve as agents or trustees on behalf of their people has deep roots in many legal and political traditions, but until recently it has not received sustained attention as a normative theory of international law. The fiduciary conception of sovereignty merits further exploration in international legal theory, however, because it offers an attractive foundation for international law's increasing emphasis on human dignity as the central concern of state sovereignty.<sup>68</sup>

As a general matter, fiduciary obligations arise in contexts where one person (the fiduciary) assumes discretionary power of an administrative nature over the legal or practical interests of another (the beneficiary),<sup>69</sup> thereby rendering the beneficiary vulnerable to the fiduciary's potential abuse of power. In relationships that bear these characteristics, private law intervenes to ensure that the fiduciary exercises her discretionary power reasonably. Under the paradigmatic duty of loyalty, fiduciaries are forbidden from engaging in self-interested transactions without their beneficiary's informed consent. Where a fiduciary has multiple beneficiaries, the fiduciary is obligated to exercise her powers reasonably and even-handedly for all.<sup>70</sup> The fiduciary must also take proper care to ensure that she does not squander her beneficiary's interests through arbitrary administration or neglect.

In previous writings, Evan Fox-Decent and I have argued that Kant's theory of fiduciary relations offers a compelling philosophical justification for attributing fiduciary obligations to public institutions and officials.<sup>71</sup> According to Kant, all persons have an innate right to as much freedom as can be reconciled with others' freedom. The law's role is to honor individual dignity by enshrining legal rights within a regime of equal freedom such that no person has the capacity to dominate or instrumentalize another.<sup>72</sup> Fiduciary obligations safeguard legal persons from domination by ensuring that the fiduciary cannot treat her beneficiary as a mere means to her own ends. The

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68 See Anne Peters, *Humanity as the A and O of Sovereignty*, 20 EUR. J. INT'L L. 513 (2009); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990).

69 See Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. (forthcoming 2011).

70 See, e.g., *Equitable Life Assurance Soc'y v. Hyman*, [2000] 2 All E.R. 331 (C.A.), *aff'd*, [2002] 1 A.C. 408 (H.L.) (U.K.).

71 See, e.g., Fox-Decent, *supra* note 66; Fox-Decent & Criddle, *supra* note 66.

72 See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 39–42 (James W. Ellington trans., 1981).

paradigmatic example for Kant is the parent-child relationship. Children have an “innate (not acquired) right to the care of their parents until they are able to look after themselves . . . without any special act being required to establish this right.”<sup>73</sup> As long as children depend upon their parents for care, their innate right to equal freedom dictates that parents cannot arbitrarily “destroy their child”; rather, they bear an obligation to tend to their child’s interests, treating their child as a person endowed with dignity to whom they “cannot now be indifferent.”<sup>74</sup>

Extending this relational account of legal obligation to public law, states are subject to fiduciary obligations under a Kantian theory of right to the extent that they assume control over the legal or practical interests of their people. All public institutions and officials—legislative, executive, and judicial—exercise discretionary powers of an administrative nature over the public’s legal and practical interests. Just as parents bear a duty to tend to the legal and practical interests of children they bring into the world, so too the states must protect their people against domination (the threat of arbitrary interference) and instrumentalization (exploitation as a means to another person’s ends). A state’s beneficiaries for these purposes are persons who stand in a continuing relationship with the state by virtue of the state’s continuing assertion of public powers of governance (e.g., citizenship, residency, detention).<sup>75</sup> For ease of exposition, I will refer to this category of persons as a state’s “people.”<sup>76</sup>

Conceptualizing the relationship between a state and its people in fiduciary terms clarifies the basis for a state’s authority to wield sovereign coercive powers under international law. According to Kantian legal theory, the primary purpose of public law and public institutions is to safeguard human dignity by liberating individuals from a condition where each person would be subject to the threat of arbitrary

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73 IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 64 (Mary Gregor trans., 1997).

74 *Id.*

75 States may have power to act beyond their borders, but they do not ordinarily owe fiduciary obligations to persons beyond their borders over whom they have not asserted public powers. Conversely, although states might not exercise *de facto* control over all parts of their territory, to the extent that they have *asserted* public powers over such persons through claims of territorial sovereignty, they bear a fiduciary obligation to use the resources at their disposal to promote equal freedom for all of their people.

76 I leave for another day consideration of whether, or to what extent, a state may legitimately accord differential treatment to discrete categories of persons within its jurisdiction (e.g., citizens vs. lawful noncitizen residents).

coercion from others (*dominium*).<sup>77</sup> States may use force to resolve disputes between private parties within their jurisdiction as necessary to preserve legal order, which Kant defines as a regime of secure and equal freedom for all. On the other hand, states may not use their coercive powers to instrumentalize individuals as mere means to the ends of public officials, rather than as ends in themselves. The relational theory of state legal authority also harnesses the republican insight that a state's mere capacity to use force arbitrarily (*imperium*) imperils liberty and undermines human dignity. A primary purpose of public law, in Kantian legal theory, is to reconcile states' authority to use coercive force with human dignity by guaranteeing that states employ force only on a nondiscriminatory basis for the benefit of their people and only where such action is strictly necessary to guarantee a regime of secure and equal freedom.

A state's fiduciary relationship with its people has at least two dimensions. A state's primary function is to furnish a regime of secure and equal freedom for its people. Secondarily, a state serves as an agent for its people in international relations. The mere fact that a state has the *power* to affect the interests of foreign nationals beyond its borders does not entail a corresponding *right* to do so, nor does it follow that a state bears fiduciary duties toward all persons everywhere. To the extent that states have the power to extend their influence extraterritorially, international law satisfies the principles of nondomination and noninstrumentalization by imposing tort duties of noninterference and criminal prohibitions such as the crime of aggression to prohibit states from using or threatening to use force unilaterally beyond their borders. Only when a state asserts ongoing public powers over the legal or practical interests of individuals beyond its borders does the fiduciary principle apply, triggering legal duties such as the *jus cogens* prohibitions against slavery and torture. The fiduciary principle thus links a state's legal authority to use coercive force to its correlative obligation to respect human dignity, honoring the principles of nondomination and noninstrumentalization.

The fiduciary principle's relational conception of state sovereignty resonates with the emerging "responsibility to protect" norm in international legal and political discourse.<sup>78</sup> On both accounts, states bear an obligation to secure their people from "avoidable catastro-

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77 See ARTHUR RIPSTEIN, *FORCE AND FREEDOM* (2009) (providing a general introduction to Kant's theory of legal order).

78 See, e.g., G.A. Res. 60/1, ¶ 138–40, U.N. Doc. A/RES/60/1, at 30 (Sept. 16, 2005); INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (Dec. 2001), <http://www.responsibilitytoprotect.org/ICISS%20Report.pdf> [hereinafter *ICISS*].

phe” such as “mass murder” or “starvation.”<sup>79</sup> The fiduciary principle suggests, however, that a state’s responsibility to protect applies more broadly than simply the prevention of mass atrocities. States must take care to safeguard their people from all abuses of public power, including foreign aggression, public corruption, and arbitrary deprivations of life and liberty. To respect the dignity of their people, states must also employ deliberative decision-making processes and offer reasoned justifications for their use of public powers. The fiduciary principle thus provides a general normative account of international law that is congenial to the responsibility to protect, anchoring this emerging norm in the relational fiduciary duties that govern states’ relationships with their people.

The fiduciary principle also has important implications for public governance beyond the state-subject relationship. As recognized in the growing literature on the responsibility to protect, the international community as a whole can be viewed as a secondary guarantor of individuals’ secure and equal freedom when a state is “unable or unwilling” to perform this function.<sup>80</sup> In extraordinary circumstances, a state’s failure to safeguard its own people from oppression may justify collective action by the international community to restore fundamental rights and freedoms.<sup>81</sup> This may be the case, for example, in contexts of widespread and systematic abuses such as Serbian atrocities in Kosovo or the Qaddafi regime’s attacks against civilians in eastern Libya.<sup>82</sup> By the same token, states that engage in belligerent occupation, asserting public powers of governance over individuals in foreign territory, also assume fiduciary obligations commensurate with their power over individuals’ legal and practical interests.

States are not the only actors that may assume fiduciary obligations under a relational theory of international legal authority to use force. Other entities that assert public powers may also incur fiduciary duties, including international organizations, regional military alliances, and transnational regulatory networks. For example, when international organizations undertake temporary territorial administration to assist countries in transition, their exercise of discretionary public powers over individuals subject to their control triggers corresponding fiduciary obligations of loyalty and care. Even private enti-

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79 ICISS, *supra* note 78, at viii.

80 *Id.*

81 *Id.* at xi–xiii.

82 See *Libya Unrest: Scores Killed in Benghazi “Massacre,”* BBC NEWS, Feb. 20, 2011, available at <http://www.bbc.co.uk/news/world-africa-12517327> (last visited Oct. 30, 2011) (describing funeral marches attacked with machine-gun and heavy weapons fire).

ties such as military contractors, multinational corporations, and humanitarian relief organizations may be subject to the fiduciary principle to the extent that they perform public functions. In each of these contexts, adherence to the fiduciary principle's normative constraints is essential to reconcile the exercise of coercive public powers with individual dignity.

### B. *The Fiduciary Character of Human Rights*

When viewed from this perspective, human rights come into focus as relational legal duties emanating from the fiduciary character of state sovereignty. In previous writings, Professor Fox-Decent and I have argued that human rights are essential correlates of a state's fiduciary duty to secure conditions of nondomination and noninstrumentalization for its people.<sup>83</sup> Human rights are constitutive of sovereignty in the sense that a state may not violate the human rights of its people without undercutting its own claim to act as a sovereign entity under international law.

This relational theory of state legal authority stands in stark contrast to many leading theories of human rights because it does not view human rights as static entitlements that all persons may assert equally against the world. Instead, the fiduciary principle frames human rights in dynamic, relational, and institutional terms. Human rights respond to the threats that arise within particular relationships between public institutions and the people they serve. These rights are universal in the sense that they honor the equal dignity of all persons and constitute necessary conditions for the establishment of legal order (a regime of equal freedom) under a Kantian theory of right. But human rights' content and application vary across different societies over time, because the fiduciary principle's application depends upon the relational demands of human dignity within particular political, economic, and cultural contexts. For example, the social and economic entitlements an individual may claim against a state naturally depend upon the resources available to the state and the character of the individual's relationship with the particular state. The relational character of human rights likewise informs states' obligations to protect civil and political rights; while a state must endeavor to secure its own people from violence, it does not ordinarily bear a comparable responsibility to protect persons beyond its borders who are not otherwise subject to its public powers. Unlike some other phil-

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83 See Criddle & Fox-Decent, *supra* note 66; Fox-Decent & Criddle, *supra* note 66; cf. FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION 107 (3d ed. 2005) (arguing that governments that violate human rights "breach a fiduciary duty").

osophical theories that view human rights in static terms, the fiduciary theory of human rights is responsive to the dynamic, relational character of states' human rights obligations under international law.

One implication of the fiduciary principle is that states may derogate from their treaty-based human rights obligations when such action is strictly necessary to preserve legal order for their people.<sup>84</sup> In the past, most legal theorists have viewed derogation clauses in human rights conventions as escape valves that “protect the nation-state more than individual rights, indeed sacrificing these rights at the altar of state sovereignty.”<sup>85</sup> The relational conception of human rights, in contrast, suggests that state derogation from human rights conventions may be consistent with, and perhaps even compelled by, the internal logic of human rights. During genuine public emergencies such as an invasion, riot, or insurgency, a state may find it necessary to restrict some personal liberties such as the freedom to travel in order to safeguard the public's basic right to secure and equal freedom. Such emergency measures limit personal freedoms, but they are consistent with the fiduciary theory of human rights to the extent that they are strictly necessary to preserve a regime of secure and equal freedom for all.

Some human rights norms are never suitable for derogation under the fiduciary theory. International law characterizes these norms as *jus cogens*—peremptory prohibitions that states may not transgress under any circumstances. Examples include the prohibitions against slavery, summary execution, and torture.<sup>86</sup> Violations of these and other peremptory norms are never consistent with a state's fiduciary obligations because such actions exploit the state's subjects as mere instruments of state policy, not as persons entitled to be treated as the state's co-equal beneficiaries. Under the fiduciary principle, public institutions and public officials that engage in slavery, summary execution, or torture cannot claim to have acted under the aegis of sovereign authority.

A significant contribution of the fiduciary theory is that it lends support for international and regional courts' context-sensitive formulation of the “right to life.” Leading human rights conventions such as the International Covenant on Civil and Political Rights, the Ameri-

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84 For a more fulsome discussion of the fiduciary theory's application to public emergencies, see Evan J. Criddle & Evan Fox-Decent, *Human Rights, Emergencies, and the Rule of Law*, 34 HUM. RTS. Q. 39 (2012).

85 RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 284 (2002).

86 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. K, § 702 cmts. d-i (1987).

can Convention on Human Rights, and the European Convention on Human Rights identify the right to life as a preemptory norm from which states may not derogate even during public emergencies.<sup>87</sup> This characterization of the right to life as nonderogable is apt on the fiduciary theory, but only because courts have not defined the right to life as an unqualified entitlement to freedom from lethal force, but rather as a relational right that is correlative to the state's duty to act reasonably and nonarbitrarily to protect its people. The right to life does not prohibit a state from killing an armed insurgent who is participating directly in hostilities, at least where such action is strictly necessary to preserve legal order for others.<sup>88</sup> When a state uses lethal force to prevent an individual from killing others subject to its care, it preserves a regime of equal freedom by ensuring that no private party has the capacity to deprive another of life unilaterally. The fiduciary principle thus provides a theoretical framework congenial to HRL's prevailing definitions of the right to life.

### C. *The Fiduciary Character of International Humanitarian Law*

Central features of IHL, like HRL, can be viewed as reflecting a relational conception of state authority. Perhaps the clearest example is Common Article 3 of the Geneva Conventions, which identifies the minimal standards of care states must observe in NIAC with regard to “[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or other cause.”<sup>89</sup> Once a state gains effective administrative control over incapacitated belligerents in NIAC, it must treat them “humanely, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”<sup>90</sup> Humane treatment includes abstaining from “violence to life and person” such as “cruel treatment and torture,” “outrages upon personal dignity” such as “humiliating and degrading treatment,” and “the passing of sentences and the carrying out of

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87 See American Convention on Human Rights: “Pact of San Jose, Costa Rica”, Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights, arts. 4, 6, Dec. 19, 1966, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221.

88 Conversely, private parties may not take life without legal authorization because they do not occupy the same institutionally rooted sovereign-subject relationship with other private parties. See Thorburn, *supra* note 67, at 1108 (arguing that in the context of justification defenses, the law clothes private parties with public authority to use force).

89 Geneva Convention III, *supra* note 20, art. 3(1).

90 *Id.*



executions without previous judgment pronounced by a regularly constituted court."<sup>91</sup> States also bear an affirmative obligation to collect and care for the wounded and sick with the aid of humanitarian organizations such as the International Committee for the Red Cross.<sup>92</sup> Each of these principles addresses states' duties to treat persons subject to their unilateral administrative authority as human beings endowed with dignity.

Many features of the law of international armed conflict likewise fit congenially within a fiduciary theory of sovereignty. IHL currently safeguards human dignity through prohibitions against aggression<sup>93</sup> and indiscriminate attacks,<sup>94</sup> protections for civilians in conflict zones,<sup>95</sup> and duties of humane treatment for prisoners of war (POWs)<sup>96</sup> and wounded, sick, and shipwrecked combatants.<sup>97</sup> States that detain foreign combatants assume fiduciary obligations to provide for their basic welfare, including the obligation to refrain from engaging in torture, summary execution, and humiliating and degrading treatment.<sup>98</sup> States need not, of course, grant detainees in armed conflict the full spectrum of civil, political, social, and economic rights that their own citizens enjoy. Because their assertion of public powers over foreign detainees is typically for a limited duration and for a limited purpose, the types of human rights detainees may claim against their captors are likewise limited under international law. Nonetheless, even within international armed conflicts, states must honor the fundamental dignity of all foreign nationals who are subject to their public powers. These humanitarian features of IHL comport with the relational character of state legal authority under international law.

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91 *Id.* art. 3(1)(a), (c)-(d).

92 *Id.* art. 3(2).

93 U.N. Charter arts. 1, ¶¶ 1-2, 4; *see also* GA Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631, at 142 (Dec. 14, 1974) (defining "aggression" for purposes of international intervention).

94 Additional Protocol I, *supra* note 7, art. 51(4).

95 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

96 Geneva Convention III, *supra* note 20.

97 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II].

98 Geneva Convention III, *supra* note 20, art. 3.

#### D. *The Relational Theory as an Agenda for Progressive Development*

Although key features of both HRL and IHL dovetail with the relational theory's normative account of state sovereignty, neither HRL nor IHL fully satisfy the fiduciary principle in their current form. In previous writings, Professor Fox-Decent and I have advocated modest reforms to HRL in order to harmonize current legal doctrine with the fiduciary character of state sovereignty.<sup>99</sup> This Article does not afford the space for a comprehensive evaluation of comparable asymmetries between the fiduciary theory's normative account and IHL. In some respects, IHL's protections to individuals in international armed conflict may exceed states' fiduciary obligations.<sup>100</sup> In other respects, IHL likely does not provide sufficient safeguards for human dignity to satisfy the fundamental principles of nondomination and noninstrumentalization. A plausible case might be made, for example, that states cannot satisfy their fiduciary responsibility to protect their own soldiers without developing more robust legal standards in reciprocal agreements to limit combatant casualties in future international armed conflicts.<sup>101</sup> But these questions are beyond the scope of this Article. For present purposes, it will suffice to observe that the relational account of a state's legal authority to use force furnishes a normative agenda for the progressive development of both HRL and IHL.

### III. A RELATIONAL THEORY OF *LEX SPECIALIS*

The relational theory suggests a new approach for resolving tensions between HRL and IHL, including current debates over the appropriate proportionality standard for counterinsurgency opera-

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99 See Criddle & Fox-Decent, *supra* note 66; Fox-Decent & Criddle, *supra* note 66.

100 See, e.g., Geneva Convention IV, *supra* note 95, art. 40 (protecting persons by limiting the extent of work they are compelled to perform).

101 See INT'L COMM. OF THE RED CROSS, WEAPONS THAT MAY CAUSE SUFFERING OR HAVE INDISCRIMINATE EFFECTS 13 (1973), available at [http://www.loc.gov/frd/Military\\_Law/pdf/RC-Weapons.pdf](http://www.loc.gov/frd/Military_Law/pdf/RC-Weapons.pdf) (arguing that "if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided"); Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 115 (2010) (arguing that IHL should adopt "a least-harmful-means test, under which an alternative of capture or disabling of the enemy would be preferred to killing whenever feasible"). Whether the fiduciary theory has implications for what constitutes a legitimate "military advantage" is likewise a question I leave for another day. Cf. MICHAEL WALZER, JUST AND UNJUST WARS 111–17 (1977) (arguing that states ought not to insist upon "unconditional surrender" where this would lead to disproportionate military casualties).

tions. Under the relational theory, a state's legal authority to use force depends upon the character of its relationship with the individuals it targets. Once a state asserts public powers of governance over a class of persons, it assumes a concomitant responsibility to protect them and provide for their basic welfare. The greater the public powers a state asserts over its people, the greater its responsibility to protect. Thus, when uncertainty arises regarding the scope of a state's legal authority to use force under international law, state decision makers, international judges, and other international actors should resolve interpretive ambiguities by following the standard from either HRL or IHL that most closely tracks the relational duties that flow from the character of a state's relationship with particular groups or individuals.

As we have seen, some international and regional courts have avoided direct engagement with the normative underpinnings of IHL and HRL in the past by relying on the *lex specialis* concept. But recent decisions such as *Palestinian Wall* and *Isayeva* suggest that IHL's status as *lex specialis* for all contexts of armed conflict no longer holds. While some experts continue to accept IHL as *lex specialis* relative to the *lex generalis* of HRL (as suggested in *Nuclear Weapons*), this is not the only plausible account of the relationship between IHL and HRL. For example, regional human rights instruments that bind states to stricter standards for the use of force could easily be viewed as a regional *lex specialis* that supersedes the *lex generalis* of general IHL and HRL (as intimated in *Isayeva*).<sup>102</sup> Although the *lex specialis* principle furnishes a conceptual framework for describing such choice-of-law rules, it does not, in and of itself, clarify what those rules are or should be. As the U.N. International Law Commission has observed, "[a] rule is never 'general' or 'special' in the abstract but in relation to some other rule" and "in regard to its subject-matter or in regard to the number of actors whose behavior is regulated by it."<sup>103</sup> To specify the interrelationship between IHL and HRL with greater clarity, international decision makers must of necessity engage in a broader consideration of the normative foundations of international legal order.

#### A. *The Operational Theory of Lex Specialis*

Some scholars and judges have characterized IHL as *lex specialis*, arguing that two factors—the severity of a threat to national security

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102 See Juliet Chevalier-Watts, *Has Human Rights Law Become Lex Specialis for the European Court of Human Rights for Right to Life Cases Arising From Internal Armed Conflicts?*, 14 INT'L J. HUM. RTS. 584 (2010).

103 KOSKENNIEMI, *supra* note 9, § 2.3.

and the type of operation necessary to address the threat—are what distinguish the *lex specialis* of IHL from HRL as *lex generalis*. According to this approach, HRL regulates the use of force under ordinary circumstances but defers to IHL whenever hostilities cross the threshold of “armed conflict.” A state in an internal armed conflict would therefore be free to target the hypothetical insurgent-farmer away from the battlefield with lethal force—even if the insurgent-farmer could be captured without a substantial risk of injury to counterinsurgents. The operational context of armed conflict, combined with the insurgent-farmer’s status as a civilian participating directly in hostilities, would authorize the state’s use of lethal force under IHL. This focus on the nature of the threat and the type of operations conducted by the state to address that threat (whether law enforcement, military, or something in between) has become the preferred choice-of-law model for military lawyers in the United States and abroad.<sup>104</sup>

In a recent article, Professor Geoffrey Corn, a former senior law of war expert in the U.S. Judge Advocate General’s Corps, has offered a sophisticated, pragmatic defense of this operational theory of *lex specialis*.<sup>105</sup> Professor Corn argues that importing HRL’s more restrictive and context-sensitive proportionality standard into NIAC would be “operationally debilitating” for soldiers on the battlefield who must be “ready, willing, and able to kill on demand.”<sup>106</sup> Soldiers cannot be trained to apply HRL proportionality, he suggests, without introducing uncertainty that would jeopardize soldiers’ safety and undermine their ability to achieve military objectives.<sup>107</sup> States must have the latitude to use “overwhelming combat power at designated times and places against an enemy” in order to demonstrate their “full spectrum dominance” effectively to enemy leaders.<sup>108</sup> Furthermore, IHL’s proportionality standard already takes human dignity into account, and it does so in a way that “will not be expected to compromise mission effectiveness or place the forces in significant danger.”<sup>109</sup>

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104 See, e.g., Corn, *supra* note 57, at 59; Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 332 (2007); Dan E. Stigall et al., *Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict*, 30 U. PA. J. INT’L L. 1367 (2009).

105 See Corn, *supra* note 57, at 57–94.

106 *Id.* at 83.

107 See *id.* at 83, 89–90.

108 E-mail from Geoffrey Corn, Professor of Law, South Texas Coll. of Law, to Evan J. Criddle, Assoc. Professor of Law, Syracuse University Coll. of Law (May 26, 2011) (on file with author).

109 Corn, *supra* note 57, at 89.

Professor Corn's arguments for applying IHL proportionality would be more persuasive if we were to assume (as does IHL generally) that a state engaged in armed conflict may always attach greater weight to the lives of its own soldiers than to those of enemy fighters and innocent civilians. Setting aside whether this assumption holds for international armed conflict (the traditional domain of IHL proportionality), it is highly questionable that it applies to internal armed conflict and belligerent occupation (the traditional domains of counterinsurgency) where states bear special duties of equal care toward all of their people, military and civilian alike. While the operational theory focuses on minimizing risks to the state's military, the fiduciary principle suggests that states bear a legal obligation to treat all of their people as equal beneficiaries of state action. Hence, a state may not use force against its people in a manner that would arbitrarily sacrifice the lives of some for the benefit of others. Any collateral damage to civilians must be strictly necessary to preserve legal order for all.<sup>110</sup> Nor may a state treat domestic insurgents in internal armed conflict as mere objects that can be destroyed in the absence of an imminent threat to legal order. Under the relational theory of state legal authority, IHL's proportionality standard is poorly tailored to the fiduciary duties that states bear toward their own people.

### B. *The Relational Theory of Lex Specialis*

Fortunately, the relational theory offers an attractive alternative approach for conceptualizing the "subject matter" of IHL/HRL choice-of-law analysis. Rather than defining the appropriate proportionality standard according to the type of *operation* conducted by a state (i.e., law enforcement or military), the relational theory counsels resolving interpretive ambiguities by applying the legal norm that best tracks the *relationship* between a state and those it would target with force. With regard to proportionality, the relational theory offers a context-sensitive solution. Whenever a state uses force against groups or people over whom it has asserted continuing public powers, HRL's stricter proportionality standard constitutes the applicable *lex specialis*.<sup>111</sup> Conversely, when states use force against those beyond

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110 See BVerfG, Feb. 15, 2006, docket number 1 BvR 357/05 (Ger.), available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215\\_1bvr035705en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705en.html) (holding that the German Defense Minister could not shoot down a hijacked aircraft containing innocent passengers and crew members in order to protect other civilians from a 9/11-style attack).

111 Under the relational theory, a state's obligation to respect human rights extraterritorially would be triggered by its assertion of continuing public powers over *persons* beyond its borders. Compare General Comment No. 31 [80], *Nature of the General*

their domain of asserted public powers of governance, IHL proportionality applies. This relational approach to the *lex specialis* principle arguably casts the recent jurisprudence of the ECtHR and the Inter-American Court in its best light.

Under the relational theory of *lex specialis*, HRL proportionality would govern a state's use of force in internal armed conflict, the paradigmatic context for counterinsurgency operations. One specific implication of this standard, as we have seen, is that counterinsurgents in internal armed conflict would be required to apprehend rather than summarily kill the hypothetical unarmed insurgent-farmer who is found plowing his fields while temporarily away from the battlefield. Even in contexts of armed conflict, states cannot disregard the equal dignity of their people, nor may they treat insurgents as mere objects that they may destroy when less grave measures would be comparably effective for securing legal order. States operating within their own territorial jurisdiction must take care to prevent all civilian casualties that can be avoided through the adoption of reasonable precautionary measures (HRL proportionality); it is not enough for counterinsurgents to ensure merely that civilian casualties are not "excessive" in relation to military objectives (IHL proportionality). Hence, the general principles of HRL proportionality that apply in law enforcement operations against isolated insurgents apply equally to other contexts of internal armed conflict, as the ECtHR and Inter-American Court have recognized. States conducting internal armed conflict must take precautions to avoid unnecessary casualties to domestic insurgents, as well as civilian casualties that are not strictly necessary to restore legal order. To the extent that insurgent groups assert control over a population, they likewise become subject to a fiduciary obligation to avoid unnecessary casualties. The relational theory of *lex specialis* thus supports adherence to HRL proportionality in internal armed conflict. HRL would also supply the applicable proportionality standard for states conducting counterinsurgency operations within contexts of

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*Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (2004), *Pad v. Turkey*, App. No. 60167/00, Eur. Ct. H.R. (2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=821307&portal=hbkmsource=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (extraterritorial military action gave rise to obligations under Geneva Convention), and *Coard v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, ¶ 37 (1999), available at <http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm> (U.S. continued control over person extraterritorially gave rise to obligations under Geneva Conventions), with *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 335, 355–56 (2001) (finding no jurisdictional link between victims of NATO bombing in Yugoslavia and respondent states).

belligerent occupation. The international law of occupation requires occupying powers to stand in as steward for a displaced sovereign to maintain legal order for the duration of their occupation. Because an occupying state asserts public powers over the legal and practical interests of persons within occupied territory, the fiduciary principle requires an occupier to respect the basic human rights of occupied peoples during belligerent occupation regardless of whether the resident population has consented to the occupation.<sup>112</sup> Occupying states must afford “the civilian population” the “maximal safeguards feasible under the circumstances.”<sup>113</sup> Although a state need not give persons within an occupied territory all of the benefits bestowed upon its own nationals, it must refrain from colonialist exploitation and other forms of domination. The relational theory of *lex specialis* supports these features of the law of occupation and suggests that states must honor the heightened protection of HRL’s strict proportionality standard when they use force within an occupied territory.

Of course, in the dynamic transnational battlefields of twenty-first-century counterinsurgency, the planning and execution of insurgent attacks frequently extends beyond the jurisdiction of a single country’s territory. In Afghanistan, for example, counterinsurgency operations are conducted not only by Afghan security forces but also by a coalition of foreign militaries with the consent of the current Afghan government. Counterinsurgency operations in Afghanistan are transnational in the additional sense that they are not confined to the territory of Afghanistan alone; for years, Taliban insurgents have gathered in, and mounted attacks from, the mountainous tribal regions of neighboring Pakistan. Without attempting to address all of the legal problems entailed in this transnational conflict, it is worth noting that the relational theory offers a plausible argument for applying HRL proportionality to some coalition strikes in Pakistan. To the extent that coalition forces in Afghanistan conduct counterinsurgency at the behest of the Afghan government, they arguably succeed to the host state’s fiduciary obligations to respect the human rights of

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112 This criterion resonates with Dinstein’s observation that under international law an occupying power’s “jurisdictional rights . . . stem from effective control alone.” YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 35 (2009); see also Droege, *supra* note 104, at 334 (“International human rights bodies agree that where a state has effective control over a territory or over a person, their respective human rights treaties apply.”).

113 DINSTEIN, *supra* note 112, at 286; see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9); *Loizidou v. Turkey (Palestinian Wall)*, 1996-IV Eur. Ct. H.R. 2216, 2235–36 (discussing human rights obligations of Israel and Turkey as occupiers).

Afghan nationals, whether these nationals are in Afghanistan or across the border in Pakistan. When coalition forces target Taliban fighters in Pakistan's border regions, therefore, the relational theory suggests that they may use lethal force only when such action is strictly necessary to guarantee legal order in Afghanistan and other coalition countries.<sup>114</sup> Similarly, coalition forces might bear fiduciary obligations to respect and protect the human rights of Pakistani civilians endangered by their military operations to the extent that they base their authority to use force on the consent of the central government of Pakistan (which may be unable or unwilling to take action itself). These HRL obligations would not necessarily preclude coalition forces from targeting insurgents with drone strikes or other lethal attacks by coalition special forces; in many instances, such actions might well be strictly necessary to neutralize threats in remote areas where neither the government of Pakistan nor coalition forces exercise effective territorial control. Nonetheless, coalition officials coordinating attacks in Pakistan would bear an obligation under HRL to take all available precautions to minimize civilian casualties.

On the other hand, the fiduciary principle does not require states to apply HRL's stricter proportionality standard to all armed conflicts. A state defending its people from foreign aggression or terrorist attacks launched from abroad does not ordinarily assume a continuing governance relationship with—and accordingly bears no fiduciary obligations toward—foreign belligerents. Instead, a state's primary obligation as fiduciary in such contexts is to protect the secure and equal freedom of its own people. As such, a state defending its people from armed attack originating abroad may target foreign fighters in order to repel ongoing attacks or prevent future attacks, provided that its use of force is consistent with *jus ad bellum* and applicable IHL constraints, including the principles of necessity, distinction, and proportionality. Under the relational theory of *lex specialis*, for example, IHL proportionality would apply to Israel's military response to Hezbollah rocket attacks during the July 2006 Israel-Lebanon conflict, irrespective of whether Hezbollah militants were best characterized at the time as state or nonstate actors.<sup>115</sup> Plausibly, IHL's proportionality

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114 This standard should not be difficult to satisfy when Taliban fighters use bases in Pakistan to launch intense, coordinated attacks against military and civilian targets in Afghanistan.

115 See James G. Stewart, *The UN Commission of Inquiry on Lebanon: A Legal Appraisal*, 5 J. INT'L CRIM. JUST. 1039, 1042–43 (2007) (reviewing and critiquing the Report of the U.N. Human Rights Council's Commission of Inquiry on Lebanon and arguing that IHL would apply to the 2006 Israel-Lebanon conflict despite uncertainty regarding the legal status of Hezbollah militants).



standard would also govern the United States' military strike against Al Qaeda leader Osama bin Laden in Abbottabad, Pakistan—an action conducted by U.S. Navy Seals apparently without Pakistan's foreknowledge or advance consent.<sup>116</sup> In sum, to the extent that conflicts of law arise between IHL and HRL, the relational theory would give primacy to IHL proportionality in traditional international armed conflicts and at least some transnational armed conflicts involving nonstate actors, enabling the state as fiduciary to employ reasonable measures to protect its own people from attack.<sup>117</sup>

Critics of the relational theory might object that its approach to *lex specialis* conflates *lex lata* (law as it exists) with *lex ferenda* (law as it should be). The argument advanced in this Article, however, is not that international law should set aside existing legal standards and manufacture new standards for the use of force from whole cloth. Rather, I have endeavored to show that the current *lex lata* for the use of force in counterinsurgency contains conflicting legal standards, and that this conflict demands principled resolution through interpretive harmonization. In this interpretive process, the deontological character of state sovereignty under international law elucidates *lex lata* by clarifying the relational interplay between extant norms. Nor is it the case, as some critics have intimated, that applying HRL propor-

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116 Under the relational theory of *lex specialis*, IHL's proportionality standard would apply to the killing of Osama bin Laden, irrespective of whether the United States' struggle with Al Qaeda qualifies as (1) an "armed conflict" triggering IHL or (2) a nonarmed conflict governed by the customary international law of self defense. Compare Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS, (May 19, 2011, 6:00 AM) <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden> (suggesting that the United States' conflict with Al Qaeda is an "armed conflict" under IHL), with Marko Milanovic, *When to Kill and When to Capture?*, EJIL: TALK! (May 6, 2011), <http://www.ejiltalk.org/when-to-kill-and-when-to-capture> (asserting that IHL does not impose a necessity requirement but suggesting that the attack against Osama bin Laden's compound did not take place within a context of armed conflict).

117 I will not attempt here to flesh out in full the relational theory's application to military strikes against nonstate actors outside the context of internal armed conflict and belligerent occupation. By all accounts, the respective scope of IHL and HRL in such conflicts is conceptually complex, and determining whether one or both of these bodies of law apply to a particular transnational conflict involving nonstate actors requires a highly fact-specific inquiry even before recourse to choice-of-law analysis. See, e.g., Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3 (2010). For present purposes, it will suffice to observe that under the relational approach adumbrated in this Article, HRL's more stringent proportionality standard would apply only where a state has asserted the type of continuing public powers that trigger the fiduciary principle; elsewhere, IHL norms or customary norms of self-defense would supply the governing standards.

tionality to counterinsurgency operations in internal armed conflict and belligerent occupation would confuse states' legal and moral obligations. As integrated within the relational theory, both IHL and HRL reflect states' legal obligations under a Kantian theory of right, enshrining rights and duties in a manner consistent with principles of noninstrumentalization and nondomination. The argument advanced in this Article is simply that persistent interpretive questions regarding the interrelationship between HRL and IHL—including application of the proportionality principle in counterinsurgency—should be resolved by according primacy to the norms that best fit states' relational duties toward particular individuals within a Kantian account of legal order.<sup>118</sup>

### C. Case Study: *The Targeted Killings Case*

A brief case study from the Israeli-Palestinian conflict illustrates the relational theory's application to contemporary counterinsurgency operations. In 2005, the Supreme Court of Israel took several steps toward the relational theory in its controversial decision, *Public Committee Against Torture in Israel v. Israel (Targeted Killings)*.<sup>119</sup> At issue in *Targeted Killings* was the Israeli military's practice of targeting suspected terrorists in the West Bank and the Gaza Strip with lethal force to prevent terrorist attacks in Israel. Between the start of the second *intifada* in February 2000 and the end of 2005, the Israeli military killed nearly 300 suspected terrorists and approximately 150 innocent civilians and wounded hundreds of others in military strikes designed to prevent future attacks in Israel.<sup>120</sup> At the request of two human rights groups, the Israeli Supreme Court, sitting as a High Court of Justice, agreed to review the military's targeted killing policy

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118 Martti Koskeniemi outlines a general argument for Kantian interpretivism in international law in *Constitutionalism as Mindset: Reflection on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRY L. 9 (2006). Although the relational theory supports applying HRL proportionality to internal armed conflict and belligerent occupation, it does not necessarily follow that *all* HRL norms should apply as *lex specialis* in these contexts. When IHL and HRL come into tension, states should apply the norm that most closely tracks their relational duties toward persons subject to their coercive powers. Some norms of IHL—including, perhaps, customary standards for humane detainee treatment—might offer the best fit for states' relational obligations in internal armed conflict and belligerent occupation. For present purposes, however, I seek only to show that with respect to the current debate over proportionality in counterinsurgency operations, the relational theory supplies a strong normative argument for HRL's stricter standard.

119 HCJ 769/02 *The Pub. Comm. Against Torture in Israel v. Gov't of Israel (Targeted Killings)* [2005] (Isr.).

120 *Id.* ¶ 2.

and issue an advisory opinion clarifying the legal standards applicable to lethal strikes in the West Bank and Gaza.

The Court stressed at the outset of its opinion that Israel's targeted killing operations were conducted within the context of a longstanding belligerent occupation. The "normative system" applicable to this relational context "is complex," the Court observed, because it implicates not only IHL, but also HRL and "fundamental principles of Israeli public law, which every Israeli soldier 'carries in his pack' and which go along with him wherever he may turn."<sup>121</sup> Although the Court characterized IHL as the relevant *lex specialis* for this "international armed conflict,"<sup>122</sup> its proportionality inquiry did not end with IHL's traditional standard. Instead, it played with several different formulations of the proportionality principle. At one point, the Court suggested that targeting civilian terrorists would be permissible only if "innocent civilians nearby are not harmed" (a standard even stricter than HRL proportionality).<sup>123</sup> Almost in the same breath, however, the Court reasoned that collateral damage to innocent civilians would be lawful if the military observed an appropriate "balance" between "military advantage" and "civilian damage" (roughly, IHL proportionality).<sup>124</sup> Ultimately, the Court appeared to settle on a legal standard for targeted killing that closely tracked HRL proportionality: Israel could target terrorists in the West Bank and Gaza only where "there is no other less harmful means" to neutralize the threat.<sup>125</sup> Thus, the Court required the Israeli military to conform their targeted killing operations to the strict proportionality standard commonly associated with HRL.

To be sure, the *Targeted Killings* opinion is hardly a model of clarity, and critics are free to debate whether the Court was aware of the distance between its strict formulation of the proportionality principle and IHL's looser standard. It is entirely possible that the Court unintentionally conflated IHL and HRL, mischaracterizing the former in terms typically associated with the latter. A more charitable reading of the decision is possible, however. The Court clearly recognized that "the question of the legality of [targeted killing] according to customary international law is complex" and multi-layered, implicating over-

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121 *Id.* ¶ 18.

122 *Id.* ¶ 45. The U.S. Supreme Court reached a different conclusion in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), holding that hostilities between state and nonstate actors did not constitute *international* armed conflict. See *id.* at 629–31.

123 *Targeted Killings*, HCJ 769/02, ¶ 60.

124 *Id.*

125 *Id.*

lapping bodies of international and domestic law.<sup>126</sup> The Court also recognized that human dignity constitutes an overarching principle that “feeds the interpretation of international law, just as it feeds the interpretation of internal Israeli public law.”<sup>127</sup> Guided by these concerns, the Court might have fashioned its proportionality standard based on a determination that IHL’s proportionality standard required interpretive adaptation for the special relational context of belligerent occupation. Whether the Court adopted the HRL proportionality standard *qua* HRL or simply viewed the standard as a context-specific formulation of IHL, it appears to have concluded that a strict necessity standard best fit Israel’s limited occupation of the West Bank and Gaza.<sup>128</sup> This charitable reading of *Targeted Killings* reveals the Supreme Court feeling its way toward a context-sensitive approach to the use of force, one that takes both IHL and HRL into consideration while resolving conflicts based on relational context and a fundamental commitment to human dignity.

However one feels about the proportionality standard articulated in *Targeted Killings*, the Court’s opinion remains unsatisfying to the extent that it does not grapple explicitly with the tension between IHL proportionality and HRL proportionality.<sup>129</sup> The relational theory of *lex specialis* developed in this Article offers resources for addressing this lacuna. The starting point for analysis, once again, is the character of the relationship between Israel and suspected terrorists targeted in Judea, Samaria, and Gaza. In *Targeted Killings* and earlier decisions, the Court has held that these territories could be viewed as a single territorial unit under Israeli occupation, notwithstanding Israel’s formal pull-out from Gaza in 2005.<sup>130</sup> As Yoram Dinstein has observed, Israel continues to exercise “diverse core ingredients of effective con-

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126 *Id.*; see also *Palestinian Wall*, 2004 I.C.J. at 180 (holding that the ICCPR “is applicable in respect of acts done by a State in the exercise of jurisdiction outside its own territory”).

127 *Targeted Killings*, HCJ 769/02, ¶ 4 (separate opinion of Vice President Rivlin) (citing Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 *ISR. L. REV.* 81, 88 (2006)).

128 A member of Israel’s legal team for the *Targeted Killings* case tells me that the strict proportionality standard endorsed by the Supreme Court was the standard applied in Israeli targeting decisions even before the Court issued its advisory opinion.

129 See *Targeted Killings*, HCJ 769/02, ¶ 44 (disclaiming any intent to articulate “a comprehensive doctrine of proportionality”).

130 HCJ 7015/02 *Ajuri v. IDF Commander* [2002] (Isr.); cf. *Palestinian Wall*, 2004 I.C.J. at 178 (recognizing Israel as an occupying power in the West Bank). This conclusion is not universally accepted. See Nicholas Rostow, *Gaza, Iraq, Lebanon: Three Occupations under International Law*, 37 *ISR. Y.B. HUM. RTS.* 205, 217–19 (2007).

trol” over the West Bank and Gaza, imposing limitations over aviation, maritime activities, and land borders,<sup>131</sup> as well as claiming authority to intervene militarily on a unilateral basis to remove suspected saboteurs to Israel for detention and trial.<sup>132</sup> Although Israel does not wield all of the public powers traditionally associated with sovereignty, its continued assertion of public powers, including the right to intervene militarily for security purposes, constitutes a form discretionary power that triggers the fiduciary principle.<sup>133</sup>

Had the Court in *Targeted Killings* employed the relational theory of *lex specialis*, its legal analysis would have been more coherent and persuasive. Under the relational theory, HRL proportionality would govern Israel’s use of force in the West Bank and Gaza because Israel continues to assert the type of continuing public powers that trigger the fiduciary principle; namely, the legal prerogative of an occupying power to intervene unilaterally in order to address security threats arising in the territories. As the ICJ observed in *Palestinian Wall*, Israel’s assertion of public powers and its human rights obligations within the West Bank and Gaza are interrelated. Israel must honor the human rights set forth in the ICCPR “in light of the powers available to it” in the occupied territories.<sup>134</sup> Israel cannot, therefore, use lethal force in the West Bank and Gaza unless (1) targeted killing strikes are strictly necessary to guarantee legal order, and (2) appropriate precautions are taken in advance to avoid or minimize injury to innocent civilians. To the extent that HRL and IHL conflict in this context, HRL’s stricter proportionality standard constitutes a minimum baseline of humane treatment that applies for the duration of Israel’s occupation, irrespective of whether terrorist attacks from the West Bank and Gaza would otherwise constitute “armed conflict” for purposes of IHL.

#### CONCLUSION

This Article has outlined a relational theory of state legal authority to use force in an effort to resolve tensions between IHL and HRL

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131 DINSTEN, *supra* note 112, at 278.

132 *Id.* at 279–80.

133 The Court has emphasized on other occasions Israel’s responsibility to consider and protect the human rights of individuals in the West Bank and Gaza alongside its obligations toward its own citizens. See HCJ 7957/04 Mara’abe v. Prime Minister of Israel [2005] IsrSC 38(2) 393, ¶¶ 24, 29; Martti Koskenniemi, *Occupied Zone—A Zone of Reasonableness*, 41 ISR. L. REV. 13, 17–18 (2008) (suggesting that the Court on various occasions has characterized the military as a “trustee of the Arab population”).

134 *Palestinian Wall*, 2004 I.C.J. at 181.

and lay the groundwork for a more coherent approach to counterinsurgency regulation. The relational theory supports the recent jurisprudence of the ECtHR and the Inter-American Court by affirming that a state may use lethal force in internal armed conflict and belligerent occupation only if it “take[s] appropriate care to ensure that any risk to life is minimized.”<sup>135</sup> Even when civil unrest crosses the armed-conflict threshold, a state must refrain from using force against its people except where strictly necessary to secure legal order. Conversely, the relational theory supports applying IHL proportionality primarily within its traditional domain of international armed conflict. States acting as agents for their people in the international realm may legitimately use force to defend their people from foreign aggression, subject to IHL principles of military necessity, distinction, and proportionality. On this relational theory of *lex specialis*, it is the character of a state’s *relationship* with its target, not the severity of the threat to national security or the nature of the state’s response to that threat, which dictates whether IHL or HRL applies.<sup>136</sup>

The relational theory is not likely to pose substantial practical difficulties for states that have already internalized HRL proportionality through regional human rights regimes.<sup>137</sup> Other states that have not fully internalized HRL might need to revise their internal guidelines for the use of force in counterinsurgency. For instance, the United Kingdom Ministry of Defence’s *Manual of the Law of Armed Conflict* endorses IHL’s principles of distinction and proportionality as governing law for all armed conflicts, international and noninternational alike, to the neglect of HRL.<sup>138</sup> Whether the United Kingdom and similarly situated states will accept a broader role for HRL in counter-

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135 *Isayeva v. Russia*, 41 Eur. Ct. H.R. 847, ¶ 175 (2005).

136 Of course, states may choose to commit themselves to higher standards of care, provided that such standards are not otherwise inconsistent with their basic obligations to respect, protect, and fulfill human rights.

137 As legal challenges arose in response to Russia’s counterinsurgency operations in Chechnya, for example, the Russian government did not contest the applicability of HRL proportionality; instead, it argued that it had taken appropriate precautions to comply with HRL. See *Isayeva et al. v. Russia*, App. Nos. 57947/00, 57948/00, 57949/00, 41 Eur. H.R. Rep. 39, ¶ 160 (2005), available at <http://www.humanrights.org/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/2615>.

138 See, e.g., THE U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 387, ¶ 11.8 (2004) (“The law of armed conflict applies . . . until [an] occupation terminates.”); *id.* ¶ 15.6 (concluding that in internal armed conflict, “[a] distinction is to be drawn between those who are taking a direct part in hostilities, who may be attacked, and those who are not taking a direct part in hostilities, who are protected from attack”).

insurgency might depend, in part, on the perceived legitimacy of HRL's proportionality principle. But it will also depend on whether these states perceive that adherence to HRL's proportionality standard will materially enhance or undermine their chances for success on the battlefield.

Recent developments in counterinsurgency theory offer grounds for cautious optimism. Increasingly, military strategists have come to recognize that success in counterinsurgency operations requires support from the embattled population, and that public support, in turn, turns upon counterinsurgents' ability to minimize fatalities.<sup>139</sup> The United States' *Counterinsurgency Manual* reflects this emerging strategic consensus when it observes that an "operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents."<sup>140</sup> Rules of engagement should therefore "address lesser means of force when such use is likely to create the desired effects and joint forces can do so without endangering themselves, others, or mission accomplishment."<sup>141</sup>

To implement this population-centric vision of counterinsurgency, the United States has experimented in Afghanistan with new rules of engagement that are more protective of civilian life than IHL proportionality.<sup>142</sup> While U.S. forces may defend themselves from insurgent attack, tactical directives instruct that lethal force should be employed only "where it is determined no other options are available to effectively counter the threat"—a standard that mirrors HRL.<sup>143</sup> In some respects, these new directives for counterinsurgency are even *more* protective of life than HRL. For instance, counterinsurgents are instructed to refrain from using lethal force against insur-

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139 See David Kilcullen, *Twenty-Eight Articles: Fundamentals of Company-level Counterinsurgency*, 1 SMALL WARS J. 1, 5 (2006) ("Actions—even killing high-profile targets—that undermine trust . . . help the enemy."); Peter R. Mansoor & Mark S. Ulrich, *Linking Doctrine to Action: A New COIN Center-of-Gravity Analysis*, MILITARY REV., Sept.–Oct. 2007, at 46 ("Power emanates from the people; without their support neither the insurgent nor the counterinsurgent can win.").

140 CHAIRMAN OF THE JOINT-CHIEFS OF STAFF, COUNTERINSURGENCY OPERATIONS, JOINT PUBLICATION 3–24, xvi (2009).

141 *Id.* at III-18.

142 See Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 39 ISR. Y.B. HUM. RTS. 307, 315–20 (2009) (discussing the "likely and identifiable threat" standard).

143 Press Release, Int'l Security Assistance Force H.Q. Pub. Affairs, Gen. Petraeus Issues Updated Tactical Directive, Emphasizes "Disciplined Use of Force" (Aug. 1, 2010) *available at* <http://www.dvidshub.net/news/53931/gen-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-force> (providing excerpts from the classified tactical directive).

gent fighters when innocent civilians are present or if it is unclear whether innocent civilians are present in order to avoid the slightest risk of civilian casualties.<sup>144</sup> These unprecedented efforts to avoid fatalities reflect a growing recognition among military strategists that success in counterinsurgency often depends on states counter-intuitively using *less* force against insurgents and willingly accepting *greater* risks to their own soldiers.<sup>145</sup>

The relational theory of *lex specialis* resonates with the new population-centric emphasis in counterinsurgency theory. HRL proportionality arguably tracks public perceptions regarding the legitimate use of force more closely than IHL proportionality. In an age of instant media and precision munitions, states are likely to face increasing public pressure to comply with HRL's strict-necessity standard. When states can minimize civilian casualties by abstaining from the use of lethal force, this option is not merely a moral imperative; it is also a strategic imperative, because it conserves the reservoir of public trust that is essential to sustain counterinsurgency. States that manage their political capital wisely by adhering to HRL proportionality are more likely to achieve their military objectives.<sup>146</sup> Conversely, states such as Libya that flagrantly transgress human rights during counterinsurgency, spreading terror rather than cultivating public trust, undercut their own legal authority to use force and risk alienating both their political base and other states. While it would be premature to draw firm conclusions from recent trends regarding the long-term prospects for HRL proportionality in counterinsurgency, there is mounting evidence that adherence to the HRL standard is not as politically unrealistic or operationally debilitating as critics have insisted in the past. The prospects for state acceptance of the relational theory of counterinsurgency, including broader application of HRL proportionality in internal armed conflict and belligerent occupation, thus appear stronger now than ever before.

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144 See *id.*

145 See U.S. COUNTERINSURGENCY MANUAL, *supra* note 14, at 48–49.

146 See David W. Barno, *Fighting "The Other War": Counterinsurgency Strategy in Afghanistan, 2003-2005*, MILITARY REV., Sept.–Oct. 2007, at 90 (describing the "tolerance of the Afghan people for [counterinsurgency] as a 'bag of capital,' one that was finite and had to be spent slowly and frugally" and suggesting that "Afghan civilian casualties . . . would have the effect of spending . . . this bag of capital . . . more quickly").



