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Of Particles and Proportionality: Negotiating a Truce Between Humanitarian and Human Rights Principles in the Law of Armed Conflict

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OF PARTICLES AND PROPORTIONALITY: NEGOTIATING A TRUCE BETWEEN HUMANITARIAN AND HUMAN RIGHTS PRINCIPLES IN THE LAW OF ARMED CONFLICT

By Matt Meltzer*

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“[T]he reconciliation of human rights law and the law of armed conflict in a manner that provides a comparatively seamless and coherent set of rules across the spectrum of violence may be the challenge of the next generation of international lawyers.”

- Charles Garraway

I. INTRODUCTION: TWO LAWS, ONE NUCLEUS OF FACT

One of the core principles of classical mechanics is that two objects cannot occupy the same place at the same time. Pioneered by Sir Isaac Newton, classical mechanics theorizes that because every object occupies a single coordinate position in the universe, no two objects can occupy the same space at the same time. Elegant as this is, the modern theory of quantum mechanics has proved that there actually are particles that are so small and abstract that more than one of them can occupy a single space at the same time. Stephen Hawking’s work over the past forty years has further shown that both classical mechanics and quantum mechanics describe various facets of the physical universe with near perfect precision. However, that does not quell the driving belief that at some apical level, one theory must prevail over the other. Both cannot simultaneously be right, even though every indication from what we can observe and study seems to say that they are.

The rivalry between international humanitarian law (“IHL”) and human rights law (“HRL”) in the regulation of armed conflict presents much the same quagmire. Both ostensibly regulate how the use of force may be applied in an armed conflict, and commentators are split about whether these bodies of law are separate and distinct or additive and complementary. However, the inexorable conclusion seems to be that both cannot regulate the same facts at the same time: because one (IHL) permits a large amount of what the other (HRL) prohibits, one must apply to the exclusion of the other. Indeed, a survey of judgments from international

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courts, publications of NGOs, and academic literature shows that the battle for supremacy is raging in every sub-field of the law of armed conflict, including direct participation in hostilities and distinction, proportionality and the asymmetric use of force, the duty to warn, detention operations, commander discretion, and the use unmanned combat instruments. Caught in the middle of this tug of war are civilians and soldiers, whose lives depend on which standard governs the conduct of hostilities. This is a very real and very human dilemma.

No legal principle in this debate is better suited for this discussion and more determinative of the conduct of armed conflict than the principle of proportionality. Very roughly stated, proportionality requires combatants to use no more force than necessary to achieve a legitimate combat goal. Proportionality underlies every facet of armed conflict. The results of the clash between IHL and HRL will influence our understanding of proportionality and will have very palpable consequences for everyone caught in the crossfire of war.

This essay attempts to answer Charles Garraway’s call to reconcile international humanitarian law and human rights law across the spectrum of violence, and does so using proportionality as a guiding example. To frame the discussion, I first introduce a short typology of proportionality and briefly review the concepts of IHL proportionality and HRL proportionality. Second, I explore the conundrum of choice that exists between IHL and HRL generally and note that all of the current formulations are lacking in various ways. What the conflict between these two legal principles requires is a process-based method that can neutrally determine which body of law – IHL proportionality or HRL proportionality – should be applied to a particular nucleus of facts. Third, I attempt to divine such a process-based choice of law rule using the late Professor Brainerd Currie’s government interests analysis, an American conflict of laws doctrine developed to determine which body of law (rather than which jurisdiction’s law) is more properly applicable. Fourth and finally, I take on the larger metaphysical question begged by this entire analysis, whether public international law can really tolerate two distinct formulations of proportionality that are inherently in conflict with each other, both as a matter of legal principle and operational pragmatism.

After taking it all in, the surprising conclusion is that the regulation of armed conflict can survive with two competing legal rules of proportionality, although the choice between the two depends primarily on IHL principles. Both rules can actually be right. They are separate and distinct—not complementary—but they can coexist without irreparable harm being done to the clean and efficient conduct of military operations.

II. THE FOUNDATIONS OF PROPORTIONALITY

There is no one single accepted definition of proportionality in the international legal lexicon. As a result, the concept has been loosely applied, and it forms the basis of several competing legal rules of “proportionality” that have governed the disposition of disputes in the field of armed conflict as well as public international law generally.

A. Toward a Typology of Proportionality

1. Non-Legal Sources
The dictionary is an excellent starting point to determine a word’s meaning. As a mathematical concept, a proportion is defined as “a relation of equality between two ratios; e.g., four quantities, \( a, b, c, d \), are said to be in proportion if \( \frac{a}{b} = \frac{c}{d} \).” The field of Euclidian geometry provides a quick and straightforward application of this principle: two triangles of different sizes are said to be proportional to one another when the degree measures of their three angles are the same, because the lengths of their three sides will vary together according to a constant or coefficient of variation. In other instances, triangles may have a combination of sides or angles that are the same, in which case the triangles are said to be similar (rather than strictly proportional) to one another; as one reference states, “Triangles are similar if they have the same shape, but not necessarily the same size. You can think of it as "zooming in" or out making the triangle bigger or smaller, but keeping its basic shape.” At a more basic level, these postulates allow the user to divine a measure of equality between two ostensibly different things.

Outside the realm of mathematics, another dictionary provides three other definitions of the word proportion: (1) a “harmonious relation of parts to each other or to the whole; balance, symmetry;” (2) a “proper or equal share, as in ‘each did her proportion of the work; quota, percentage;’” and (3) “size, dimension.” Note the synergies between these three definitions: both the first and the second refer to the concepts of balance, harmonious relation, and equality, while the second and the third refer to shares, sizes, and dimensions.

Taken together, these sources tell us that proportionality as an abstract concept encompasses a continuum of how two objects may relate to each other. At one end, the measure of two things varies in accordance with a strict rule or coefficient. At the other end, the relation between the two objects is less precise, but there is still some measure of harmony or balance between them that allows us to evaluate one in terms of the other. Either way, the notion of “proportionality” is broad enough to cover both types of relations between different things.

2. Legal Sources

Examples of the use of proportionality as a legal concept from unrelated areas of law provide useful insights into what this principle may mean in the debate over the regulation of armed conflict. The first example comes from the field of domestic environmental law, which has relied on the concept of proportionality to determine the fairness of user fees that cities may charge consumers for their proportionate use of shared environmental resources. In Hotel Employer’s Association of San Francisco v. Gorsuch, the plaintiff sued the city of San Francisco, alleging that its sewer charge system failed to allocate treatment costs of surface runoff according to the acreage occupied by each user, in violation of the proportionality

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6 Surprisingly, Black’s Law Dictionary is not helpful on this score at all, and defines proportionality solely in reference to international law as “The principle that the use of force should be in proportion to the threat or grievance provoking the use of force.” BLACK’S LAW DICTIONARY, 1338 (Brian Garner ed., 9th ed. 2009). This circular definition does not provide any insights into the core abstract elements motivating the use of this term in the law of armed conflict.
7 669 F.2d 1305 (9th Cir. 1982).
requirement of section 204(b) of the Federal Water Pollution Control Act (“FWPCA”). This section requires that the fee charged to the user for their use of the resource must be proportionate to the user’s actual use.\(^8\) As a condition of the federal construction grant that enabled the city to construct the system, the city was required to obtain the Environmental Protection Agency’s approval of its sewer charge scheme. The scheme that the city submitted and that the EPA approved calculated the sewer service charge per user according to assumptions made regarding the use patterns of different categories of users, meaning that each individual consumer’s charge was not calculated by an exact dollar-per-use formula.\(^9\)

In affirming the district court’s ruling that the scheme was proportional under the FWPCA, the Ninth Circuit held that the legislative history of the FWPCA “suggests that Congress did not intend to impose an absolute proportionality requirement,” but instead “meant to require only proportionality which is generally equitable.”\(^10\) Proportionality under this law was “general requirement” designed to “give localities flexibility in designing user fee systems” rather than a formula by which user fees were to be precisely calculated.\(^11\) Congress, therefore, used the concept of proportionality in the FWPCA to require only a rough, loose fit between two objects, not an accurate and tight one. Consequently, the Act did not require the city to use an exact dollar-per-use fee scheme, and the Hotel Employer’s Association did not have a cause of action against the city simply because the city’s assumptions regarding their use of the system resulted in a larger charge than would have been the case under a precise dollar-per-use scheme.

A second example of proportionality as a legal concept comes from international environmental law, specifically its application in the International Court of Justice (“ICJ”). In 1997, the ICJ adjudicated a dispute between Hungary and the Republic of Slovakia over water rights on the river Danube.\(^12\) The facts are relatively straightforward: in 1977, Hungary and then-Czechoslovakia signed a treaty to build a series of dams on the Danube to produce electricity, control flooding, and improve navigation.\(^13\) When Hungary walked away from the project in 1993, Slovakia began an alternative operation that sharply reduced Hungary’s access to the water.\(^14\) Unable to resolve the dispute on their own, the parties went to the ICJ.\(^15\) In ruling for Hungary, the court held that Slovakia’s “unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube” was unlawful because it “failed to respect the proportionality which is required by international law.”\(^16\) Essentially, Slovakia’s response to Hungary’s breach of the 1977 treaty was “not proportionate.”\(^17\)

\(^8\) Id. at 1307.
\(^9\) Id.
\(^10\) Id. at 1308. Internal quotations omitted. Emphasis added.
\(^11\) Id. Emphasis added.
\(^13\) Id.
\(^14\) Id.
\(^16\) Id. at ¶¶ 85, 87.
\(^17\) Id.
Unfortunately, the ICJ majority opinion did not explain in detail why Slovakia’s breach was not proportionate to Hungary’s breach of the treaty, but one of the dissenting opinions does. Dissenting Judge Vladlen S. Vereschetin of Russia described proportionality as a “basic requirement for the lawfulness of a countermeasure” that must be determined “in the circumstances of the case.”18 Quoting the International Law Commission, he conceded that “there is no uniformity . . . in the practice or the doctrine [in international law] as to the formulation of the principle, the strictness or flexibility of the principle and the criteria on the basis of which proportionality should be assessed.”19 As a result, “reference to equivalence or proportionality in the narrow sense . . . is unusual in State practice . . . [which] is why in the literature and arbitral awards it is suggested that the lawfulness of countermeasures must be assessed by the application of such negative criteria as “not [being] manifestly disproportionate,” or “clearly disproportionate” [or] “not out of proportion.”20

In applying this rule to the Hungary/Slovakia dispute, Judge Vereschetin reasoned that the court should have weighed “the importance of the principle…breached by Hungary and the concrete effects of this breach on Czechoslovakia against the importance of the rules not complied with by Czechoslovakia and the concrete effects of this noncompliance on Hungary. The “degree(s) of gravity” in both cases need not necessarily be equivalent but…must have “some degree of equivalence” [or] must “not be out of proportion.”21 He continued:

The task is not an easy one and may be achieved only by way of approximation, which means with a certain degree of subjectivity. Weighing the gravity of the prior breach and its effects on the one hand, and the gravity of the countermeasure and its effects on the other, the Court should, wherever possible, have attempted in the first place to compare like with like and should have done so with due regard to all the attendant circumstances against the back-ground of the relevant causes and consequences. Following this approach, the Court should have assessed by approximation and compared separately:

(1) the economic and financial effects of the breach as against the economic and financial effects of the countermeasure;

(2) the environmental effects of the breach as against the environmental effects of the countermeasure; and

(3) the effects of the breach on the exercise of the right to use commonly shared water resources as against the effects of the countermeasure on the exercise of this right.22

Judge Vereschetin’s discussion of “like to like” comparisons is especially interesting. To undertake the proportionality analysis, he argues that the court must first attempt to compare like

18 Id. at 223 (Vereschetin, J., dissenting).
19 Id.
20 Id. Internal citations and quotations omitted; emphasis added.
21 Id. at 224.
22 Id. Emphasis added.
with like, but he does not say that the analysis breaks down if the two objects being compared are inherently dissimilar. In the dispute between Hungary and Slovakia, the objects being compared were like to like: Slovakia’s enjoyment of an environmental resource may be quantified in dollars, as could Hungary’s injury in being deprived access to the Danube. However, there are certain human elements to being deprived of water access that are not so easily quantifiable. In that sense, money damages are merely an approximation for the human harm caused. Judge Vereschetin acknowledged that the proportionality inquiry involves a degree of subjectivity, and his analysis on that point echoes the Ninth Circuit’s conclusion in Hotel Employer’s Association that it is difficult in practice to derive a legal rule of proportionality that is measured with something akin to dollar-for-dollar precision.

At the risk of previewing coming attractions, the Martens Clause (the famous preamble to the second Hague Convention signed in July of 1899) also embodies notions of proportionality, albeit in a more gestalt and moral sense. Although the clause does not mention proportionality explicitly, it requires that “inhabitants and belligerents remain under the protection . . . of the laws of humanity and dictates of the public conscience.”23 One can glean from this stricture that if a hostile act is unlawful if it is out of proportion to what would ordinarily be justified under the laws of humanity and dictates of public conscience. The clause is not self-executing and does not refer to any specific extrinsic sources that might elaborate on what the “laws of humanity” or “the dictates of public conscience” are in practical application. Antonio Cassese has suggested that the utility of the clause is limited by the fact that it was drafted primarily to avoid a diplomatic impasse, and may not have ever been intended to serve as anything other than an editorial introduction to the Hague Convention.24 However, the words of the clause alone are at least sufficient to help us divine the origins of proportionality as a metaphysical concept, which is probably a combination Judeo-Christian notions of ethics, humanity, and that our ultimate accountability is to a higher power.

B. Lex Lata and IHL Proportionality: Narrow and Deep

In international humanitarian law, proportionality functions as a limiting principle that circumscribes the flexibility of the military commander while still allowing the commander to cause civilian deaths without violating the law. In this usage, proportionality is simultaneously enabling and restrictive. As a body of regulatory law, IHL proportionality is “based on a balance between authority and restraint”25 and is designed to tell the military commander what s/he can do in the conduct of hostilities in a way that minimizes civilian destruction. Although IHL allows commanders to conduct hostilities, its proportionality limitation evidences an “inherent human rights component” that probably owes its origins to the Martens Clause’s general declaration that the laws of humanity and dictates of public conscience underlie this branch of public international law. Finally, as Article 85 of Protocol I to the Geneva Conventions of 1949 tells us, violations of these rules are grave breaches that will land you square in a defendant’s box at The Hague.

24 Id. at 193.
25 Corn, supra note 2, at 94.
Any discussion of this *lex lata* must begin with the Additional Protocol I of the Geneva Conventions of 1949. Many authorities, from NGOs to international tribunals to academicians, support the application of proportionality (be it IHL or HRL, a subject to be taken up later in more depth) to both international and non-international armed conflict.\(^\text{26}\)

Article 51 of Protocol I prohibits indiscriminate attacks by combatants on civilians, and defines such attacks as comprising “those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol.”\(^\text{27}\) This means that combatants cannot pursue all-out warfare against an enemy and must scale back combat operations when civilians are threatened. Article 51 also defines an indiscriminate attack as one “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation to* the concrete and direct military advantage anticipated.”\(^\text{28}\) Regarding appropriate targets, Article 52 permits combatants to attack only those non-military objects that will “make an effective contribution to military action” or which offers “a definite military advantage.”\(^\text{29}\)

Chapter IV of Protocol I imposes similar operational limitations on how combatants may carry out attacks. Article 57 outlines the various *precautions* that combatants must take prior to actually carrying out an attack. Specifically, it requires that “those who plan or decide upon an attack shall do everything feasible to verify that the targets of an attack are neither civilians nor civilian objects” nor any other prohibited target, and that the combatants must “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects,” and thereby “refrain[] from deciding to launch any attack . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”\(^\text{30}\) Article 57 also places direct limitations on a commander’s discretion when s/he has a choice of multiple targets: “When a choice is possible between several military objectives for obtaining a similar military

\(^{26}\) See Protocol II Additional to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of Non-International Armed Conflicts art. 54(4)(c), June 8, 1977, 1125 U.N.T.S. 609 (describing proportionality as a “general principle with broader application” which “applies irrespective of whether the conflict is an international or an internal one”); Int’l Comm. of the Red Cross, Customary International Humanitarian Law Rules, at xxxv (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005), available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14#refFn18 (noting that “the principle has been included in more recent treaty law applicable in non-international armed conflicts”); Prosecutor v. Tadic, Case No. IT-94-1-1, App. Chamber Decision of Oct. 2, 1995 at ¶ 70 (holding that an armed conflict “exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”) and ¶ 119 (“we have pointed to the formation of general rules or principles designed to protect civilians or civilian objects from the hostilities or, more generally, to protect those who do not...take active part in hostilities [and] shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred”); Evan J. Criddle, *Proportionality in Counterinsurgency*: *A Relational Theory*, 87 Notre Dame L. Rev. 1073, 1079 (2012).


\(^{28}\) Id. at art. 51(5)(b). Emphasis added.

\(^{29}\) Id. at art. 52(2). Emphasis added.

\(^{30}\) Id. at art. 57(2).
advantage, the objective [shall be to choose] the attack . . . which may be expected to cause the least danger to civilian lives and to civilian objects.\textsuperscript{31}

In sum, the legal and conceptual architecture of Protocol I proportionality is akin to a mathematical identity with two variables: military advantage on one side, and civilian death and destruction on the other, where the latter limits the former such that the two may exist in a state of equilibrium during an armed conflict, be it international or non-international in character.

As a jurisdictional matter, IHL obligations are triggered when an armed conflict exists between two states or within a single state, and it applies throughout the territory of the state that is waging conflict or in whose territory the conflict is occurring.\textsuperscript{32} Compared to human rights law, which applies to everyone everywhere all the time,\textsuperscript{33} the reach of humanitarian law is narrower in scope and the depth of its restrictions apply only when an armed conflict exists.\textsuperscript{34}

The various legal obligations imposed by the Protocol I articles—to refrain from excessive use of force, to take all feasible precautions to avoid civilian death and destruction, and to take hostilities only if they offer an effective contribution to military advantage—operate only on combatants taking part in the hostilities with the aim of protecting civilians caught in the crossfire. This particular set of obligations in Protocol I is a one-way set of duties that combatants owe to civilians. It does not impose obligations on civilians, nor does it impose

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\item \textsuperscript{31} Id. at art. 57(3). Article 85 provides that violations of these requirements constitute grave breaches of the duties imposed by the conventions on the contracting parties. The Rome Statute, which was drafted in 1998 and created the International Criminal Court in 2002, borrows both literally and figuratively from the proportionality principles established in Protocol I and reifies its legal architecture. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90. Article 8(2)(a) of the Rome Statute explicitly lists as a war crime the “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” Building on customary principles rather than express Geneva language, Article 8(2)(b) also makes it war crime to “Intentionally [launch] an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated,” to “[destroy] or [seize] the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war” and to “[employ] weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering.” Overall, Article 8 of the Rome Statute adds several additional levels of specificity to the proportionality spelled out for us in Protocol I, and reinforces Protocol I’s implied mathematical identity between civilian lives and military advantage.
\item \textsuperscript{32} See Tadic, \textit{supra} note 26, at ¶ 68 (“Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities”); see also Francoise J. Hampson, \textit{Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law}, in \textit{87 International Law Studies: International Law and the Changing Character of War} 187, 190.
\item \textsuperscript{33} See \textit{e.g.}, The Universal Declaration of Human Rights Preamble, Dec. 10, 1948, G.A. res. 217A (III), U.N. Doc A/810, stating that “The General Assembly [of the United Nations] proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”
\item \textsuperscript{34} For a more focused discussion of the jurisdictional contrasts between IHL and HRL, see Hampson, \textit{supra} note 32, at 188-191.
\end{enumerate}
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obligations that combatants owe to each other; that is the province of Article 4 of the Third Geneva Convention.  

C. *Lex Ferenda* and HRL Proportionality: Wide and Shallow

Unlike the *lex lata* of IHL proportionality, there is no similarly voluminous body of treaty law that defines or shapes proportionality as a creature of human rights law. There is, however, a growing body of jurisprudence from the European Court of Human Rights and commentary from NGOs and academics that transmutes proportionality into an HRL concept. Describing HRL proportionality as *lex ferenda*, therefore, is an accurate and honest assessment of where the law is and where it is heading at this moment in time.

In contrast to the IHL rules of Protocol I, the applicability of HRL is not dependent upon the existence of an armed conflict, and its rules place general rather than specific restrictions on conduct. In this sense, where IHL is jurisdictionally narrow and supplies a deep set of legal rules, HRL is widely applicable and shallow in defining the type of conduct it prohibits. Human rights law sets up general duties and obligations that flow not only from combatants to civilians, but also between civilians, between combatants, and even from civilians to combatants.

For example, where IHL prescribes a set of procedures that combatants must follow when planning and conducting hostilities before any resulting civilian death and destruction to be considered lawful, HRL imposes broad obligations such as “[e]veryone has the right to life, liberty and security of person,” and “[d]eprivation of life shall not be regarded as [unlawful] when it results from the use of force...in defense of any person from unlawful violence, in order to effect a lawful arrest or to prevent escape of a person lawfully detained, or in action lawfully taken for the purpose of quelling a riot or insurrection.” Compared to IHL, HRL confers duties that everyone everywhere owes to everyone else all the time, regardless of the existence of an armed conflict, and outlaws a wider expanse of hostile conduct.

As a matter of human rights law, proportionality operates as a presumption against the use of force that commanders must overcome in order for the conduct of hostilities to be lawful. The European Convention on Human Rights articulates this view: given that “[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law,” the “[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is *no more than absolutely necessary*.  Additionally, although not stated in so many words, if only a

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35 Article 4 of the Third Geneva Convention defines the various categories of individuals who are entitled to prisoner of war status, and is implicitly based on provisions appearing in the 1899 and 1907 Hague Conventions which define those who are entitled to combatant status as “members of armies, militias, and volunteer corps” who fulfill a discrete set of requirements.

36 Universal Declaration of Human Rights, supra note 33, at art. 3.


38 Id. at art. 2(1).

39 Id. See also THE INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, 19 (Nils Melzer ed., 2009) (submitting that “the kind and degree of force which is permissible against persons not entitled to
court may deprive someone of his or her life, then it must fall to the user of force who took the life to prove that the force used was no more than absolutely necessary to achieve the legitimate military objective. Compared against IHL proportionality, which requires commanders to choose only that course of conduct which does not produce excessive civilian casualties, this is an exceptionally higher bar that will undoubtedly limit the scope of operations that commanders in the field may undertake.

The European Court of Human Right’s decision in Khatsiyeva and others v. Russia\(^{40}\) shows what this rule looks like in practice. In that case, the surviving relatives of two victims who were killed and a third who sustained shrapnel injuries from Russian aerial fire near the Chechen border sued Russia in the ECHR alleging a violation of Article 2 of the European Convention on Human Rights. The Russian government claimed that it believed the three men were armed and had just participated in an attack that crashed a Russian helicopter, and that it fired warning shots at the men prior to using lethal force.\(^{41}\) In ruling against the Russian government, the court held that “[t]he use of force which may result in the deprivation of life must be no more than “absolutely necessary” … [which] indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is “necessary in a democratic society” …. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims.”\(^{42}\)

The court’s construction of the term “strictly proportionate” is exactly that: strict and unforgiving. The court held that even if the Russian pilots had fired warning shots at the men on the good-faith belief that there armed and were engaged in terrorist activities, such use of lethal force would still violate Article 2 of the Convention.\(^{43}\) In finding that the Russian government did not take appropriate care with respect to determining whether or not the victims were terrorists or just grass cutters,\(^{44}\) the court seemed to be saying that “states may take life only if they first take appropriate precautions to avoid or minimize casualties and only if non-lethal measures such as arrest or incapacitation would be likely to impose disproportionate costs.”\(^{45}\) One wonders what else a soldier could be expected to do after firing warning shots at an armed (or apparently armed) enemy who continues to flee and seek cover, ostensibly to return fire and prolong hostilities. Were this case to have been decided under IHL proportionality, it is unlikely that the Russian government would have been found guilty of using force that was excessive in relation to the nature of the threat its soldiers perceived under the circumstances of the case.

Interestingly, even though IHL is more permissive to soldiers on the battlefield, Evan Criddle notes that it is actually HRL and not IHL that better protects soldiers’ right to life. As we know from Geneva Law, combatants are always lawful targets, as are civilians for such time


\(^{41}\) Id. at ¶¶ 21-26.

\(^{42}\) Id. at ¶ 129. Emphasis added.

\(^{43}\) Id. at ¶¶ 133, 134.

\(^{44}\) Id. at ¶ 137.

\(^{45}\) Criddle, supra note 26, at 1081.
as they take direct part in hostilities. HRL is a bit more forgiving than IHL on this point: “While military casualties are irrelevant to IHL’s proportionality inquiry, HRL requires states to consider all potential casualties – lawful combatants, non-combatant fighters, and ordinary citizens alike – when planning and executing” military operations, and a state “violates the right to life if it uses lethal force where nonlethal measures will do, even if those killed were participating directly in armed combat against the state.”

III. THE CONUNDRUM OF CHOICE: IHL PROPORTIONALITY VS. HRL PROPORTIONALITY

A. The Regulatory Clash of IHL and HRL in the Conduct of Hostilities

Above and beyond proportionality, there is a larger debate about whether international humanitarian law or human rights law supplies the dispositive legal rule in the regulation of armed conflict. As Geoffrey Corn has written (and quite grimly so), “there has been a steady march of human rights application into” the application of IHL, which had formerly exclusively regulated the field. The reason for the clamor is that both bodies of law draw a “bottom line, below which conduct is unlawful.” The problem is that the HRL line is much higher than the IHL line, meaning that HRL’s entrance into the field will render illegal a large swathe of conduct that was previously legal under IHL. This uncertainty will present commanders on the ground with significant operational hurdles, the consequences of which are as yet unknown and could actually lead to greater deprivations of human life and suffering.

Proportionality has not escaped the stomping feet of this debate, there now seems to be two forms of proportionality, “IHL proportionality” and “HRL proportionality.” For example, Article 6 of the International Covenant on Civil and Political Rights provides unqualified

46 Id. at 9.
47 Corn, supra note 2, at 52.
48 Hampson, supra note 32, at 192.
49 See e.g. Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks During Operation Storm at ¶ 5, The Prosecutor v. Ante Gotovina and Mladen Markac, Case No. IT-06-90-A [hereinafter Gotovina Amicus Brief]: “even the most scrupulous compliance with IHL cannot produce and does not require absolute perfection in the execution of an attack. Artillery and other indirect fire assets, by their very nature, involve a range of variables that will inevitably produce effects beyond the intended target. Even when using the most precise attack capability, such as precision-guided munitions, there is no guarantee that each and every effect will be registered against (and only against) the intended object of attack.” Under HRL, if this volume of force is deemed to be more than that which was “absolutely necessary” to achieve a “legitimate military purpose” it is unlawful. Comparing these formulations, one is tempted to wonder whether the amici’s use of the phrase “absolute perfection in the execution of an attack” is the standard that HRL seeks to impose.

50 As Corn states, supra note 2 at 93-94, unlike IHL, HRL “is simply not based on a balance between authority and restraint that is in any way analogous to the law regulating the application of combat power during armed conflict. Instead it is based on an assumption that state employment of force is an exceptional situation, with the accordant presumption that force is only justified when the actual situation confronted by a state actor leaves no viable alternative to maintain order and the safety of others. Because this presumption is inconsistent with the underlying presumptions [underlying IHL], human rights standards for the employment of force cannot be relied upon to define what constitutes an arbitrary deprivation of life…[a]ttempting to apply these human rights norms in this realm is an extension beyond the limits of logic.” Although he does not come out and say it word by word, what he believes HRL advocates are attempting to do, one step at a time, is outlaw the conduct of hostilities – i.e. war – altogether, as a realization of Woodrow Wilson’s dream to forever “end war.”

51 Criddle, supra note 26, at 1082.
protection to all persons from being “arbitrarily deprived of his life,” and Article 9 similarly provides that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Additional Protocol I would permit such deprivations of life as long as they meet the requirements of Articles 51 and 57. Jurisprudence from the ICJ (discussed in more depth below) makes clear that these articles are binding legal rules and not just mere editorial declarations. Therefore, a conflict between the two proportionality regimes is inevitable.

In its 1996 Nuclear Weapons advisory opinion, the ICJ articulated its *lex specialis* formulation, that when IHL and HRL are equally applicable over the same nucleus of operative facts, the proper rule of decision is “the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”

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

However, subsequent jurisprudence—most notably the ICJ’s *Wall* opinion, published in 2004—has refuted the idea that IHL actually displaces HRL when they are both applicable, and argues that IHL is to be applied over HRL only when the two bodies of law are in conflict with each other.

In *Wall*, the court reformulated its Nuclear Weapons approach and described the IHL/HRL *lex specialis* inquiry as one that requires the court “to take into consideration both these branches of international law.”

The most logical readings of these two opinions is that the *Wall* incarnation of *lex specialis* represents the present state of the law within the ICJ. Yet it is hardly a model of clarity.

**B. Beyond the Haze of Lex Specialis**

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

53 *Id.*

54 *Legal Consequences of the Construction of a Wall in the Occupied Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9). See also William A. Schabas, Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Comundrum of Jus ad Bellum, 40 Isr. L. Rev. 592, 595 (2007). As a conflict of laws matter, it feels as if the court is playing fast and loose with the doctrine of *lex specialis*. In its Nuclear Weapons opinion, where the court referred to IHL as *lex specialis*, one would be inclined to think that if there are two bodies of law at issue, and one (IHL) is *lex specialis*, then HRL must be the *lex generalis*. According to Black’s Law Dictionary 9th ed. (which unfortunately does not define *lex specialis*), *lex generalis* is defined as “a law of general application, as opposed to one that affects only a particular person or a small group of people.” If we accept that *lex specialis* is the opposite of *lex generalis*, which seems perfectly reasonable, then we would deduce a definition where *lex specialis* is a law of “specific application,” which affects “a particular person a small group of people.” In this discussion, that particular person or small group of people would be those involved in armed conflict in the case of IHL. (Trans-Lex describes *lex specialis* simply as “specialized laws prevail over general laws ("lex specialis derogat legi generali"), and does not require a conflict; see also Practising Law Institute, *Making the FTC Look Tame: The EU Targets Behavioral Profiling*, 1071 PLI/Pat 511, November, 2011 (“a law governing a specific subject matter (lex specialis) overrides a law which only governs a general matter (lex generalis”).) There is therefore no reason to read in a requirement to a *lex specialis* definition that IHL actually produce different results from HRL, because the entire debate arises from the fact that these are separate and distinct bodies of law that apply to the same facts.

55 *Wall Opinion, supra* note 54, at ¶ 106.
In the wake of the ICJ’s seemingly schizoid pronouncements on the matter, several schools of thought have emerged to reconcile these two regulatory regime: (1) that the two bodies of law are “additive” in nature and are mutually applicable and reinforcing;\(^56\) (2) that the two bodies of law are “interoperable,”\(^57\) and may exist together, although a rule must be establish to toggle between the two, (3) that the fiduciary relationship between the targets of force and the purveyors of force should determine which body of law applies\(^58\), and finally (4) that the two bodies of law are fundamentally “irreconcilable” with each other and cannot simultaneously regulate the conduct of armed conflict.\(^59\)

The first view is what William Schabas terms the “belt and suspenders” approach: the two systems of law function as an “additive” regime where the “norm that better protects the individual, whether it is drawn from international human rights law or international humanitarian law, is to be applied.”\(^60\) This view is supported by the International Committee for the Red Cross and the United Nations Human Rights Committee and was also the approach taken by the European Court of Human Rights in its al-Skeini opinion, which applied the European Convention on Human Rights over IHL to hold British soldiers liable for the detainment deaths of Iraqis in the British-controlled zones.\(^61\) Because IHL standards are generally far more permissive than HRL standards, it is difficult to imagine a scenario in which IHL would be applied over HRL, rendering this theory less of a means of determining which rule to apply and more of a declaration that the HRL rule always wins.

Similar to the belt-and-suspenders approach, the interoperable theory adopts the premise that the two bodies of law are complementary in nature, but stops a few paces short of the view that the most protective regime always applies. The reason for this hesitancy is simple: nine times out of ten (and it’s hard to come up with what the tenth would actually be), human rights law will “better protect the individual” such that IHL would become obsolete and non-existent. Instead, the interoperable theory advances a jurisdictionally-based method: it acknowledges that States are obligated to apply human rights standards in any territory that they occupy and towards persons whom they physically control, and because a State should not be allowed to do extraterritorially what it cannot do within its borders, it would seem that States owe to everyone a general duty to abide by human rights norms.\(^62\) The obligations of HRL therefore follow a state wherever it goes and no matter what it does. But where does this leave IHL? Noting that “forces needing the protection of [the IHL] paradigm should get it,” the interoperable approach would make IHL the applicable rule only “when it is necessary.”\(^63\) This approach is more flexible and not as flatly outcome-determinative as the additive theory, but it does little to provide operational clarity and will be less relevant as the legal rules applying to international armed conflicts and non-international armed conflicts increasingly converge.

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\(^56\) Schabas, supra note 54, at 593.
\(^57\) Hampson, supra note 32, at 187.
\(^58\) Criddle, supra note 26, at 1073.
\(^59\) Corn, supra note 2, at 94.
\(^60\) Schabas, supra note 54, at 593.
\(^62\) Hampson, supra note 32, at 188-189.
\(^63\) Id.
The relational theory of the use of force reconciles the two systems by deriving the state’s authority to use force from the fiduciary character of its relationship to its people.\textsuperscript{64} This theory looks to the fiduciary character of sovereignty, and would apply IHL and HRL according to the following decision rule: “When states engage in internal armed conflict and belligerent occupation, their assertion of control over an affected population entails a concomitant belligerent obligation to satisfy the strict proportionality standard of international human rights law. Conversely, when states defend their people in traditional armed conflict and transnational armed conflict against non-state actors, international humanitarian law ordinarily supplies the applicable proportionality standard.”\textsuperscript{65} The reasoning underlying this distinction derives from a Kantian theory of right to life, which imputes fiduciary duties to States to the extent that they “assume control over the legal or practical interests of their people.”\textsuperscript{66} While this approach is attractive, creative, and not at the same risk of being outcome-determinative as the previous two, its territorial lens and reliance on the element of “control over a population” likely render it too imprecise to be of much practical value.

Finally there is the school of thought that IHL and HRL are irreconcilable, and as a consequence, IHL must always prevail as the applicable body of law in the regulation of armed conflict. This school is predicated on the position that any regime purporting to regulate the conduct of hostilities must be translatable “into an effective operational framework for warfighters,” and any regime that adds to “the complexity and confusion to the rules that warfighters must apply in the execution of their missions” is unsupportable.\textsuperscript{67} HRL fails this test and consequently should never furnish the governing rule. Adherents of this view are not troubled by this result, and instead would emphasize that “the law of armed conflict [that is, IHL] has always included an inherent human rights component,” and that in the context of armed conflict, defining what constitutes an arbitrary deprivation of life, liberty or property “by norms never intended for this purpose” is “legally and logically” incorrect.\textsuperscript{68} Like the additive and interoperable approaches, the irreconcilable approach is also outcome determinative: IHL always wins.

At the end of the day, the lack of consensus in this area leaves us with two bodies of regulatory law and no uniformly accepted way to determine which rule applies to which set of facts. In its present form, \textit{lex specialis} is not really \textit{lex specialis} at all, but rather an ambivalent proposition that gets us nowhere in determining which body of law prevails over the other when the two may be applied cotermiously. The additive and interoperable approaches are inherently outcome-determinative, and will almost always favor the application of HRL over IHL. The relational theory is creative and not outcome-determinative, but it does require the establishment of several preliminary elements that a court seeking to apply one system over the other could easily bypass. The theory that the two fields of law are irreconcilable ignores the fact that the human rights notion of the right to life is a non-derogable principle that cannot be overcome by

\begin{itemize}
\item \textsuperscript{64} Criddle, supra note 26, at 1073.
\item \textsuperscript{65} Id. at 1, 15.
\item \textsuperscript{66} Id. at 16.
\item \textsuperscript{67} Corn, supra note 2, at 54.
\item \textsuperscript{68} Id. at 57, 61, 66.
\end{itemize}
the need for operational clarity and efficiency, even though it may make the conduct of hostilities cleaner and safer, especially when there is doubt that an armed conflict actually exists.

The problem with the ICJ’s *lex specialis* formulation and its subsequent substitutes is essentially this: none of these approaches adequately addresses the distinction between IHL and HRL. In a true *lex specialis* formulation, IHL would always apply in armed conflict because it is law which governs a specific subject matter which would override a law governing only a general matter. As the ICJ said in its *Wall* opinion, this is not the relationship between IHL and HRL, and the former does not categorically replace the latter whenever the two are applicable. Therefore, the true relationship between IHL and HRL is not one of *lex specialis*, so it cannot be that IHL is “specific law” and HRL is “general law.” Nor can it be that the two laws are the same or are merely additive, because they derive from different sources and impose objectively different obligations on the same actors. If one does not displace the other, and they cannot be applied concurrently, then what is needed is a choice of law rule that enables a court to choose between them in a reasoned and intellectually objective way.

**IV. AN ‘INTERESTS ANALYSIS’ SOLUTION TO THE CONUNDRUM OF CHOICE**

**A. Brainerd Currie and Modern Choice of Law**

The field of conflict of laws in American law is concerned with determining the substantive law that governs a particular dispute when more than one body of law may apply. As a legal discipline, conflict of laws is procedural rather than substantive in scope, because it does not supply the rule of decision that ought to dispose of a particular case. There are three primary sub-fields of procedural rules within the discipline: (1) the jurisdiction rules, which are concerned with the question of whether a particular state’s court has the power to dispose of a dispute, (2) the choice of law rules, which determine which state’s law governs the disposition of a dispute, and (3) the enforcement of judgments, which concerns the enforceability of another forum’s judgment. The similar demands of our federal system and the international legal system for a set of procedural rules to settle these types of disputes has led to cross pollination between the fields of domestic conflict of laws and private international law.

One of the most lauded contributors to the field of American conflict of laws was the late Professor Brainerd Currie, a noted scholar of admiralty, civil procedure, and conflict of laws. To Currie, the “central problem of conflict of laws may be defined...as that of determining the appropriate rule of decision when the interests of two or more states are in conflict—in other words, of determining which interest shall yield,” a problem that exists in part because we lack a world “with an all-powerful central government.” This is the essence of the choice of law decision.

Unique among conflict of laws scholars, Professor Currie in the 1950s and 1960s was one of the first in the legal academy to argue forcefully for “a systematic assessment of the interests of the concerned states that might be implicated in a particular dispute,” which marked a

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69 See Practicing Law Institute, *supra* note 54 (defining *lex specialis*).


departure from the traditional jurisdictional *lex loci* focus that had occupied the focus of most conflicts scholars of the time.\(^{72}\) As Clyde Spillenger has observed,

> To Currie, then, the kind of conflict [involved when two statutes are agnostic on the territorial scope of their application is] precisely that – a *conflict* between two rules of decision, neither of them limited by its terms to events occurring within the state, and both presumptively applicable to the case at hand. The existence of a *conflict* of laws, and the consequent need to make a *choice* of law, could not be wished away by categorical *lex loci* rules that suggested that in any case only one of the competing laws could legitimately be said to apply. They *both* “applied.”\(^{73}\)

This is an exact description of the IHL/HRL conundrum of choice currently facing public international law. Assuming an armed conflict exists, both sets of laws—IHL and HRL—can be said to apply to the same nucleus of operative facts, and as jurisprudence from the ECHR shows, the implications of this choice are enormous for governments, warfighters and civilians. Although the ICJ itself first engaged this issue with a conflict of laws doctrine—*lex specialis*—that doctrine is no longer useful, and the doctrines that have stepped in to fill its spot are also lacking in various respects.

Professor Currie’s government interests analysis may help to square this circle. Although Currie framed his discussion of conflicts and choice-of-law problems in jurisdictional terms, as exemplified by the question “[w]hat interest does the state have in making sure the court applies its law,”\(^{74}\) the question in the IHL/HRL conundrum is more aptly phrased as “[w]hat interest does the *body of law* have in making sure that the court applies it.” This may at first seem like an odd question to ask, and potentially too abstract to be of any real use. But consider the context of the debate: although IHL and HRL are predicated on inherent “human rights” principles, the effect of one is to enable hostilities so long as it is conducted in accordance with certain rules, while the effect of the other is to set the bar so high that all hostilities are unlawful. Examining publications like the International Committee for the Red Cross’s *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, which as *lex ferenda* effectively refashions IHL as HRL, this is a fair statement of the differences between these two systems of law. Therefore, saying that each law has an *interest* in its own application may serve as the basis for a legal regime and is more than just rhetorical flourish.

### B. Currie’s Government Interests Analysis

When two sets of laws ostensibly apply to resolve a single dispute, Professor Currie’s government interests analysis provides a two-step solution: first, the court must “determine the *governmental policy* – perhaps it is helpful to say the social, economic, or administrative policy – that is expressed by the law;” second, the court “should then inquire whether the relationship of the forum state to the case at bar – that is, to the parties, to the transaction, to the subject matter, to the litigation – is such as to bring the case within the scope of the state’s governmental

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\(^{72}\) Clyde Spillenger, *Principles of Conflict of Laws*, 66 (West 2010).

\(^{73}\) Id. at 67. Emphasis in original.

\(^{74}\) Currie, *supra* note 71, at 189.
concern.” This inquiry thus enables the court to determine whether the state’s assertion that it possesses an interest in having its policies applied to the dispute is legitimate or merely rhetorical. Currie uses the term “interest” to mean “the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation.”

Currie’s government interests analysis seeks to answer a very basic question: which law’s purpose will be served by applying it to this dispute? Building on this approach, section 6 of the Restatement (Second) of Conflict of Laws incorporates several other factors relevant to a court’s choice of law decision, most notably the protection of justified expectations and the certainty, uniformity, and predictability of the result. Echoing Currie’s analysis, the commentary accompanying section 6 of the Restatement notes that the choice of law decision is “an accommodation of conflicting values.”

To determine the state interests or policies that might be embodied in a particular legal rule, Currie looks to traditional tools and sources of statutory construction. As a matter of democratic theory, this makes perfect sense: because legislatures are popularly elected bodies, their deliberations, legislative notes, and other expressions of intent and purpose comprise the source of the policy and interest underlying a particular law.

75 Id. Because we are not dealing with forum analysis in the IHL/HRL debate, the distinction between “the forum” and the “foreign state” in Currie’s articulation of government interests is irrelevant. To be clear, IHL would certainly not apply in the absence of an armed conflict, but this quagmire arises because both bodies of law are being applied to armed conflicts.

76 Currie, supra note 71, at 621; see also Kay, supra note 70, at 53: in clarifying Currie’s use of the term “interest,” Professor Kay notes that “[t]hree elements are necessary to produce an interest: first, a factual relationship must exist between the state and the transaction, the parties, or the litigation; second, the factual relationship must implicate the governmental policy; and third, the relationship must be an appropriate [i.e., a constitutional] one.”

77 Section 6 of the Restatement (Second) of Conflict of Laws (1971) provides that in the absence of a statutory directive on choice of law, the factors relevant to the court’s choice of the applicable rule of law include:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

78 Comment on Subsection 2 to section 6 of the Restatement (Second) of Conflict of Laws.

79 See Currie, supra note 71, at 182: the “assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy. It is a function that the courts cannot perform effectively, for they lack the necessary resources...This is a job for a legislative committee, and determining the policy to be formulated on the basis of the information assembled is a job for a competent legislative body.”

80 Id. As Professor Kay notes, supra note 70 at 56, “Currie’s model of government...was one in which the state promulgates private laws that embody its domestic governmental policy, and, at least in the context of litigation, leaves the implementation of those policies in the hands of private actors.”
Strike out a few terms in Currie’s and the Restatement (Second)’s analyses and recast them in light of the IHL/HRL conundrum, and you get the following: to determine whether IHL or HRL should apply in a particular instance, the court should look to the interests and policies embodied by these two systems of law, and then, taking in all of the facts and circumstances of the case before it, should choose a law in light of the interests at stake. The court’s choice of law decision should also reflect the justified expectations of the parties involved, as well as the need for certainty, predictability, and uniformity in attaining results under these rules. To determine the interests of the bodies of law, one need only look to the lex lata of Geneva and Hague law for IHL, or to the decisions of the ECHR and lex lata of the various human rights conventions.

C. A Common Law Analogy: the “Gist of the Action” Doctrine

Similar to Professor Currie’s government interests test is the common law “gist of the action” test, which owes its origin to the conceptual similarities between the law of torts and the law of contract. The purpose of the doctrine is to determine whether a cause of action arising out a particular set of facts lies in contract or in tort; hence, it answers the very basic question “What is the gist of this action.” In the words of a recent Pennsylvania trial court opinion:

Generally, the “gist of the action” doctrine precludes a party from raising tort claims where the essence of the claim actually lies in a contract that governs the parties’ relationship. The doctrine is designed to maintain the conceptual distinction between breach of contract claims and tort claims. Whereas actions in tort lie from a breach of duties imposed as a matter of social policy, actions in contract lie for the breach of duties imposed by mutual consensus. In other words, a claim should be limited to a contract claim when the parties’ obligations are defined by the terms of the contracts, and not by the larger social policies embodies by the law of torts.81

To determine whether the plaintiff’s action properly lies in contract or tort, the court must determine whether the defendant’s breach of his/her contractual obligations was one arising from misfeasance or nonfeasance:

If there is misfeasance, there is an improper performance of the contract in the course of which the defendant breaches a duty imposed by law as a matter of social policy. In such instances, the “gist” of the plaintiff’s action sounds in tort and the contract itself is collateral to the cause of action. On the other hand, if there is “nonfeasance,” the wrong attributed to the defendant is solely a breach of the defendant’s duty to perform under the terms of the contract. In such instances, the “gist” of the plaintiff’s action sounds in contract, and the plaintiff would not have a cause of action but for the contract.82

Like Currie’s interests analysis, this doctrine is fundamentally purposive: it asks what goals will be served by applying tort law over contract law to a particular dispute when the facts

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82 Id. Internal citations and quotations omitted.
give rise to both claims simultaneously. In the case of misfeasance, or an actor behaving badly, the action will be construed as lying in tort, because this will allow the plaintiff to seek more generous tort damages rather than the more restrictive expectation damages that are recoverable in contract. On the contrary, if the breach did not arise from bad intentions, then the plaintiff is restricted to contract damages, because contract damages are not influenced by the mens rea of the breaching party.

D. An IHL/HRL Interests Analysis Rule

Inspired by Professor Currie and the gist of the action doctrine, a definitive statement of an interests analysis choice of law rule between IHL and HRL in armed conflict might look something like this: In resolving disputes arising out of the conduct of hostilities in an armed conflict, the court must choose whether to apply international humanitarian law or human rights law. In deciding which rule to apply, the court should take into account the different interests and policies underlying IHL and HRL. As a system of law, IHL is motivated by inherent human rights interests and is designed to restrict the scope of the commander’s discretion while still allowing the commander the flexibility to conduct hostilities in a manner that respects the fundamental concepts of proportionality and distinction. HRL, also motivated by human rights interests as its name suggests, is not designed to supply rules that govern the range of hostilities that commanders may conduct, but rather is concerned with protecting fundamental human rights as a general matter.

Therefore, the court’s decision to apply IHL or HRL should be based on whether the dispute before it directly implicates the scope of discretion of the commander to conduct hostilities in a manner consistent with established Geneva and Hague principles. If it does, then IHL should furnish the rule of decision. If the dispute does not present such an issue, then HRL should govern the dispute. In making this decision, the court should weigh the relative interests and policies of IHL and HRL against the justified expectations of the parties involved, including civilians, governments, and soldiers, as well as the effect that the court’s choice of law will have on the certainty, predictability, and uniformity of the law as a cohesive and continuous body of jurisprudence.

To determine whether the scope of the commander’s discretion is directly implicated, the court must weigh the available evidence. If the evidence indicates that the military commander in an armed conflict ignored, purposefully defied, or otherwise acted in bad faith without regard for the rules of IHL, then HRL rules should apply. If, on the other hand, the evidence indicates that the military commander attempted to comply with the rules of IHL but made a good faith error in judgment regarding the facts and circumstances of the action, then IHL rules should apply.

This rule incorporates the core aspects of Professor Currie’s government interests analysis as well as the logical framework of the common law “gist of the action rule.” The rule’s logical framework is built on weighing the competing and distinct interests that IHL and HRL embody: the former is combat enabling, while the latter is combat restricting. Yet a rule that requires the decisionmaker to merely “weigh the interests” would not contribute anything to the debate and would only make things more aggravating and confusing for courts and
commentators. This is where the gist of the action doctrine becomes important. Like that doctrine, an IHL/HRL interests rule presents a clear legal question that must be answered before the court may proceed to choose a legal rule: the court must determine, based on the facts and circumstances, whether the dispute presents a genuine issue related to commander discretion as it is governed by Geneva and Hague principles of proportionality and distinction. Furthermore, it provides two specific factors (based on the Restatement) that the court must consider when answering that question.

Because this is a procedural rather than a substantive rule, its application depends on the evidence before the court. As it is phrased, the rule requires subjective rather than objective evidence of the military commander’s efforts to comply with IHL in order for its more flexible rule of proportionality to apply. It goes without saying that when a commander consciously ignores or defies IHL, that regime has no interest in protecting the discretion that IHL extends to commanders because, by definition, that discretion was not exercised and therefore not implicated. Applying IHL in such a scenario would sully its purpose and turn it into a blanket license to kill without regard for human life. However, the use of such strong language as “in bad faith” and “without regard for” is meant to indicate that this evidentiary standard may be satisfied by objective evidence that establishes whether the commander acted with gross negligence towards the fulfillment of his or her IHL obligations. In such circumstances, an expectation that IHL rules would govern when the commander took no steps to ensure that his/her conduct complied with those rules would not be justified.

However, when the evidence indicates that the commander’s actions were objectively reasonable and the commander actually believed they were complying with IHL, the scope of the commander’s discretion is the core of the dispute. IHL therefore has an interest in the court’s adjudicating the matter under its rules and strictures, because as a body of law it needs to know where the outer limits of commander discretion are found. The commander also has a justified expectation that the legality of his/her conduct will be judged as a matter of IHL. To be clear, when a commander objectively and subjectively believes s/he has complied with IHL but the court finds otherwise, the law that is violated is IHL even though HRL is also likely to have been violated. The difference is that IHL rather than HRL furnishes the rule of decision based on the evidence before the court.

One of this rule’s key components is that it incorporates the agnosticism of IHL and HRL towards just war theory, or the jus ad bellum. Almost by definition, the Geneva Conventions are a set of jus in bello rules in that they govern conduct during wartime, but that governance is not based on the perceived justice or injustice of the war. HRL, despite its higher legal standard and the greater amount of conduct in war that it would render unlawful in comparison to IHL, is still essentially a set of jus in bello rules. It is just more exacting and less forgiving of commander discretion and decisions during war. Mindful of this shared trait between the two bodies of law, this rule is structured in a way such that the determination of whether IHL or HRL should apply ignores any consideration of jus ad bellum.

This revised proportionality rule also captures the reality that the proportionality typology demonstrated earlier—that outside the abstract fields of mathematics and Euclidian geometry, attaining precision through proportionality in real life is a fool’s errand. It is one thing to say
that two triangles are exactly proportional or are similar because they have two sides and the degree measure of an angle in common, but it is quite another to apply this rule of exactitude to such human affairs as sewage use and user fees, breach of contract and water access, or civilian destruction and military advantage. This drive for exactitude is borne from the noblest of intentions, our innate desire for the law to achieve fundamental fairness, but in the end is just a quixotic charge on a field of windmills. In armed conflict, proportionality must be conceived as requiring a “looser” rather than a “tighter” fit. A procedural rule that adjudicates alleged deviations by choosing the substantive regime that has the greatest interest in the dispute is the best way to achieve the balance and symmetry that the concept of proportionality was meant to achieve when it was first introduced into Hague law over a hundred years ago.

E. Interests-Based Proportionality in Practice

Applying an IHL/HRL interests rule to the Khatsiyeva case demonstrates how this rule would function in practice. The matter presented to the court is as follows: two men were killed and one injured from warning shots fired by Russian military helicopters near the Chechen border after the men allegedly failed to drop their arms and remain in position until the soldiers could ascertained who they were. This occurred in an area that is the locus of an ongoing armed conflict between the Russian government and rebel factions, and the Russian military has promulgated standards that civilians are to follow in order to ensure that they remain safe in the zone of danger. For the sake of the argument, we will assume that additional evidence proves that the Russians took all appropriate care in firing the warning shorts.

On these facts, when the court poses the question, “Does this dispute involve the flexibility of the commander to conduct hostilities in a manner consistent with established Geneva and Hague principles?” the answer should be yes and IHL should apply to furnish the governing rule. The soldiers fired warning shots that accidentally hit the three men, and they did so after the men refused their warnings to cease and desist. Weighing the justified expectations of the soldiers, it would seem patently absurd to require them to wait for the three men—who may very well have been terrorists—to return lethal fire before they took steps to protect themselves, especially when they had a reasonable belief that the men may have been involved in taking down of another helicopter. Considering the justified expectations of the three men, they were aware that they were living in a conflict zone, and were at least constructively aware of the policies the Russian military had put in place to distinguish law abiding civilians from terrorists. Because the men did not heed those warnings, the soldiers were justified in firing warning shots at them, believing they may have been armed and dangerous. Despite its tragic and catastrophic consequences, this use of force would not have been considered excessive in relation to the threat posed or the advantage sought to be gained.

However, the Khatsiyeva decision would go the other way if the evidence before the court showed that the soldiers did not take appropriate care in firing the warning shots. In this case, the answer to the question “Does this dispute involve the flexibility of the commander to conduct hostilities in a manner consistent with established Geneva and Hague principles?” would have to be no, because IHL requires combatants to take reasonable precautions. On such facts, the commanders would have acted without regard for IHL, in which case IHL would have no interest in the dispute because the scope of discretion would not legitimately be implicated or
questioned. Consequently, HRL rather than IHL would furnish the rule of decision, and the outcome would be similar to the ECHR’s actual disposition of the case.

Another example is the Gotovina litigation pending in the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”). This case involves allegations that the artillery-based targeting missions authorized by Croat general Ante Gotovina against Serbian forces during the Yugoslav wars constituted a disproportionate and unlawful use of force due to the high number of civilians killed during the missions.83 One of the amicus briefs filed in the ICTY in the appeal illustrates the impossibility of coming up with a bright-line standard of precision for how wide the radius of an artillery attack may be before it should be presumed to have been made with the unlawful intent of targeting civilians rather than combatants.84 The amici’s discussion of targeting as a military operation shows just how difficult a process it is:

Targeting is the process by which a military commander brings combat power to bear against enemy military objectives in order to set the conditions for achieving tactical, operational, and strategic objectives. Targeting is a complex process, beginning with the commander’s articulation of the mission, which is then translated into tasks for subordinate units. The targeting process begins with assessing potential enemy targets and defining the effects that must be achieved against those targets to contribute to mission accomplishment. Combat assets capable of achieving those effects are then “matched” to those targets, missions are executed in accordance with IHL, and effects are assessed. The targeting process is cyclical, continuing until the desired effect is achieved or the necessity for achieving the effect dissipates.

As the amici note, while an order “may quite properly trigger inquiry into a commander’s compliance with IHL, it seems axiomatic that where such inquiry indicates overall lawful execution, the commander should benefit from the presumption that his orders and actions fully complied with obligations established by international humanitarian law, just as indications of overall unlawful execution would result in the opposite conclusion.”85 In the phraseology of an interests-based rule, an “unlawful execution” would be one where the commanders acted without regard for the rules of IHL and not one where they acted with regard for IHL but made a good-faith error in judgment.86 On the facts provided in the ICTY Trial Chamber’s Gotovina decision—including their finding that General Gotovina “chaired meetings…in which he always raised issues relating to law and order, along with sending out orders reminding all military units to conduct themselves within the rules of international humanitarian law,”87—an interests-based rule would hold the General to account under IHL rules, because it has an interest in determining

83 Gotovina Amicus Brief at ¶ 1.
84 Id. at ¶¶ 18, 19.
85 Id. at ¶ 18.
86 In arguing for the applicability of IHL, the Gotovina amici characterize IHL as imposing a “good faith efforts” standard on commanders “to mitigate risk to civilians and civilian objects resulting from this inevitable risk of error and from the ever present reality that attacks properly directed against lawful military objectives may occasion collateral damage or incidental injury to civilians and/or civilian property.” Id. at ¶ 5.
whether his actions actually conformed with or violated the IHL standards of conduct during armed conflict.

This interests-based rule is not operationally very different from the *lex specialis* formulation that the ICJ issued in its *Nuclear Weapons* advisory opinion in 1996: it is a choice of law rule that recognizes that two different bodies of law may be applicable to the same set of facts. However, unlike *lex specialis*, it recognizes that while these two bodies of law are similar, they are not complementary, and one does not automatically displace the other when both are applicable. As the rule’s application to Khatsiyeva and Gotovina demonstrates, it avoids the outcome determinative pitfall and resolves the choice of law decision without resorting to such metaphysically appealing yet legally untenable notions as a state’s fiduciary duty to its people. Instead, it lays out a framework for the court’s choice of law decision in a way that strengthens IHL and HRL as separate and distinct bodies of law in a way that respects the justified expectations of the parties involved and brings more clarity and certainty to the law of armed conflict.

V. CONCLUSION: IS THERE ROOM FOR TWO?

At the beginning of this essay, I posed the question of whether the effective governance of armed conflict can tolerate two definitions of proportionality, one inspired by IHL, the other by HRL. Now nearing the end of the road, it is apparent that the answer must be and is yes.

The typology of proportionality developed earlier showed that the definition of proportionality varies from application to application. In mathematics, the proportional relationship between two different objects can be reduced to an exact and precise coefficient of variation: two triangles with angles of the same degree measure may have sides of different lengths, which will result in different total areas, but the difference between them will always be exactly the amount of the coefficient of variation between the lengths of their sides. In this sense, the proportion between them is exact and calculable, and can be reduced to a number.

This is not so in domestic and international environmental regulation. The decisions from the U.S. Court of Appeals for the Ninth Circuit and the ICJ reveal that proportionality in that context is one of approximate or loose fit, where the facts and circumstances determine what it is excessive and what is not. In *Hotel Employer’s Association*, it was enough that there was a “general” fit between the user fees and approximate use attributable to the individual consumer. On the other hand, Slovakia’s significant cutting off of Hungary’s access to the Danube was too extreme a move compared to Hungary’s action of walking away from the project. Unlike Euclidian geometry, proportionality in these contexts is a rough approximation. There are no exact calculations to be made.

The takeaway from these examples is that there are times when proportionality may demand exactitude, and there are times when exactitude is unwarranted. The IHL rule of proportionality requires that civilian casualties and suffering not be excessive in relation to the advantage to be achieved, but goes no farther than that to provide an exact calculus for how this must proceed. However, the key is that IHL assumes that commanders always base their conduct on fundamental Geneva and Hague principles, and it is only for that reason that the law
is willing to be less demanding. When commanders do not base their conduct on fundamental Geneva and Hague principles, it seems only fitting that they should be held to answer to a higher standard, namely, the more exacting proportionality rule of human rights law.

Aligning *jus in bello* proportionality with the more flexible approaches seen in other areas of the law will strengthen rather than weaken the protections afforded to both soldiers and civilians in the conduct of hostilities. This ultimately serves the fundamental purposes of both bodies of law. Consider the examples: in Khatsiyeva, if the soldiers were using appropriate care in directing lethal force at suspected terrorists whom they believed posed an immediate threat, then IHL would apply on the theory that the soldiers fulfilled their precautionary duties and the civilian destruction was a tragic accident, even if their use of force was improperly calibrated. If on the other hand the evidence showed that soldiers were careless in their use of lethal force, then IHL would no longer have an interest in the dispute, but human rights law still would.

The analysis is the same for targeting. As the Gotovina amici argued, when “a military commander brings combat power to bear against enemy military objectives in order to set the conditions for achieving tactical, operational, and strategic objectives,”88 such as when combatants are comingled with (or are given safe harbor by) civilians, s/he is justified in believing that IHL regulates his or her conduct when it is performed in good-faith obeisance with the strictures of IHL. Even if the soldier did make an error in judgment, IHL has an interest in determining how such errors in judgment are to be addressed. However, when the soldier disregards IHL targeting rules, HRL rules should be used to determine the legality of their conduct. If we were to throw the IHL baby out with the bathwater and demand a proportionality rule of perfect symmetry, the result could very well be a world where commanders are hamstrung to achieve an enemy’s quick and efficient submission, leaving the enemy forces free to maraud a defenseless civilian population.89

Astrophysics is still struggling with the question of whether the laws of the Milky Way permit two particles to exist in the same place at the same time. The law of armed conflict, while not exactly concerned with unlocking the secrets of the physical universe, has for the time being permitted two laws to apply to the same facts at the same time. Lucky for us, the universe will not come crashing down as a result.

88 Gotovina Amicus Brief at ¶ 3.
89 See Corn, *supra* note 2, at 55.