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On a Differential Law of War

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Should the United States, as the strongest military power in the world, be bound by stricter humanitarian constraints than its weaker adversaries? Would holding the U.S. to higher standards than the Taliban, Iraqi insurgents, or the North Korean army yield an overall greater humanitarian welfare or be otherwise justified on the basis of international justice theories? Or would it instead be an unjustifiable attempt to curb American power, a form of dangerous "lawfare"?

The paper offers an analytical framework through which to examine these questions. It draws on the design of international trade and climate agreements, where obligations have been linked to capabilities through the principle of Common-but-Differentiated Responsibilities (CDRs), and inquires whether the justifications that have been offered for CDRs in these other regimes are transposable to the laws of war. More broadly, the framework tests the extent to which war can and should be equated to other phenomena of international relations or whether it is a unique context that resists foreign analogies.

Rather than offering a definitive answer, the inquiry illuminates the types of judgments and predictions that one must hold in order to have a position on the desirability of CDRs in international humanitarian law, most notably, the degree to which weaker adversaries will be prone to abusing further constraints on stronger enemies, the expected effects of CDRs on the propensity to go to war, who on the enemy's side is the "enemy," and what are the duties that are owed to one's enemies.

Introduction

Should the United States, as the strongest military power in the world, be held to higher standards of compliance with the laws of war than the Taliban? Should its forces, for instance, assume greater risk to themselves in order to minimize civilian casualties in Iraq? Should it, as another example, be obliged to develop and employ more precise and expensive weapons that would minimize civilian casualties? Should it be obliged to transfer these more precise and expensive weapons technologies to Iran, North Korea, or Al Qaeda?

At first glance, these questions may seem absurd. But replace the words "precise weapons" with "green technology," "civilian casualties" with "environmental degradation" or "barriers to development," and "risk to forces" with "additional costs," and the international community's answer to these questions is a resounding "yes." The notion of correlating obligations with

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capabilities, at least as a normative aspiration, is now a hallmark of the international laws of trade and the environment. Why should it not be so in war?

The current system of the laws of war, or as they are otherwise known, international humanitarian law ("IHL"), builds on the principle of the equal application of the law—the uniform and generic treatment of all belligerents on the battlefield according to the same rules and principles. Some exceptions notwithstanding, IHL obligations bind all parties equally, regardless of the type of war they fight, the justness of their respective causes, or the disparities in power and capabilities between them.[1] This principle has endured even as the principle of reciprocity has been eliminated, as a matter of law, from the organizing principles of the system, so that formally equal obligations persist even when an enemy violates them.

While the equal application of the law has formally endured in IHL, as in most spheres of international law, regulation has taken a different path in some areas of international law—most notably, international environmental law ("IEL") and international trade law ("ITL")—by linking obligations with capabilities. This linkage has been accomplished in several ways: by defining obligations with reference to resources (such as ordering compliance by developed parties "to the fullest extent possible"),[2] exempting weaker parties from compliance with certain obligations altogether,[3] and even ordering more powerful parties to extend material assistance to weaker ones.[4] Taken together, these provisions have been termed Common but Differentiated Responsibilities ("CDRs"): a prima facie oxymoron that commentators have described as "a manifestation of general principles of equity in international law."[5] Notwithstanding critiques and skepticism regarding its application in practice, the principle of differential law in the spheres of environment and trade is now the accepted norm.

Over the past decade or so, some scholars have called for a similar departure from the principle of equal application in IHL.[6] These calls have arisen particularly in the contexts of humanitarian interventions and counterinsurgency operations, with some scholars calling for lowering the standard of

1. *See* Adam Roberts, *The Equal Application of the Law of War: A Principle Under Pressure*, 90 Int'l Rev. Red Cross 931, 932 (2008) ("Under this principle, the laws of war . . . apply equally to all those who are entitled to participate directly in hostilities . . . it is not relevant whether a belligerent force represents an autocracy or a democracy, nor is it relevant whether it represents the government of a single country or the will of the international community.").

2. *See*, *e.g.*, General Agreement on Tariffs and Trade art. XXXVII(1), Oct. 30, 1947, 61 Stat. A–11, 55 U.N.T.S. 194 [hereinafter GATT].

3. *See*, *e.g.*, *id.* art. XVIII(2).

4. *See*, *e.g.*, Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 10(c), Dec. 11, 1997, 2303 U.N.T.S. 148 [hereinafter Kyoto Protocol].

5. *See* Ctr. for Int'l Sustainable Dev. L., The Principle of Common But Differentiated Responsibilities: Origins and Scope (2002), *available at* http://www.cisdl.org/pdf/brief_common.pdf [hereinafter CISDL].

6. *See infra* Part I, Section A.

compliance with the law, and others for raising it. These normative claims, which have been driven mainly by considerations of fairness and justice, have not brought about any formal change to the equal application principle. Indeed, there has been no attempt to negotiate different rules for different parties or different types of conflicts.

More recently still, however, several scholars and policymakers have claimed that despite the lack of any formal change in the equal application of IHL to different parties, CDRs are now being introduced de facto through differential interpretation, monitoring, and adjudication of compliance with general standards.[7] In particular, in the context of U.S. military operations in Iraq and Afghanistan, some commentators have suggested that the U.S. military is being held to higher standards of compliance than an objective reading of the law would mandate. Such claims have sometimes been raised in discussions of "lawfare"—the use of law as a tool of war—cautioning that U.S. power is being curbed in the name of humanitarian concern.

Whether or not the United States is in fact held to higher standards of compliance with IHL is an empirical question, which I note but do not test. Whether it *should* be is the normative question I seek to explore here. Unlike others before me who have questioned or challenged the equal application principle, my normative quest takes a comparative route, borrowing the justifications offered for CDRs in the spheres of international environmental and trade law and testing their application to the sphere of war. My inquiry thus centers on the question of whether a departure from the equal application principle is warranted on the basis of disparities in power and capabilities—on whether *can* implies *ought*.

The immediate payoff of this project should be a framework through which both ends of the ideological spectrum—those pushing for CDRs in IHL as a way of promoting justice and those resisting CDRs as a threat to justice—can test their intuitions on the basis of capabilities-based arguments (which operate to justify CDRs in other spheres of international law). More broadly, however, this Article inquires into the possibilities and limits of analogies from other spheres of international law to the context of IHL. In other words, it inquires whether war is, and should be, equated with any other phenomenon for purposes of lawmaking and adjudication. The proposed framework does not offer a definitive answer to these questions. It does, however, illuminate how varying conceptions of international justice and varying understandings and predictions about war affect individual judgments about the desirability of CDRs in IHL.

The Article begins, in Part I, with a brief overview of the principle of the equal application of the law as a fundamental feature of IHL. It notes the debates surrounding a possible departure from this principle and the trend

7. *See infra* notes 35 and 45.

that is allegedly taking place in differentiated third party monitoring or adjudication of wartime conduct.

Part II sketches the effort to introduce CDRs into the spheres of international environmental and trade law and the justifications offered for such introduction. I acknowledge that there is some debate regarding the degree to which the rhetorical commitment to differential obligations in these spheres has been followed in practice, but I am nonetheless interested in the commitment itself. The justifications offered for CDRs have generally taken one (or more) of four forms: welfare maximization (or utilitarianism), distributive justice, corrective justice, and Samaritanism. While acknowledging occasional critiques of these justifications, I nonetheless proceed on the assumption that all four could justify a differential regulatory scheme in these fields on the basis of power disparities.

Part III turns to consider how differentiation might work in IHL. In theory, CDRs can take any of three forms: prescribing different rules for different parties (resulting in differentiated laws); enforcing uniform laws in a differential manner (through, for example, prosecutorial discretion); or applying uniform standards in a way that accounts for differences between parties. I briefly suggest how all three could feature in the regulation of hostilities. Still, when considering differentiation in IHL, it is the third strategy—a differential application of uniform standards—that is easiest to imagine politically. It is also most reflective of some parties' intuitions as to what is already taking place in practice.

To demonstrate the practical implications of such differentiation, I offer as background the existing principle of proportionality and the corollary duty to employ precautions in attacks to minimize civilian casualties. Both principle and duty have been the bases for much criticism of U.S. military operations, and both could in theory become the bases for international criminal adjudication. The indefiniteness of both makes them amenable to ad hoc interpretation and application; under a regime of CDRs in IHL, this flexibility could be expanded to include explicit consideration of differentiated capabilities, resources, technological knowledge, or power asymmetries.

Part IV then proceeds to offer an analytical framework through which one can assess the introduction of CDRs into IHL. The framework draws on the justifications for CDRs in IEL and ITL and uses the proportionality principle as a case in point. The discussion begins with a utilitarian framework that considers a global interest in humanitarian welfare. The transposition from the fields of IEL and ITL illuminates the way in which the mixed-motive nature of all three fields—hostilities, trade, and the environment—intertwines conflict with cooperation. The discussion then proceeds to emphasize those features that are nonetheless unique to war, particularly to war with nonstate actors, and shows how these features might impact the utilitarian effects of CDRs in IHL.

Ultimately, the analysis questions the intuition that CDRs that raise the bar for the more powerful would promote overall humanitarian welfare. In fact, when considering warring parties' motivations in initiating wars and complying with constraints on warfare, it becomes clear that any prediction about the humanitarian consequences of CDRs is indeterminate. At most, such consequences are likely to vary with the content of the particular CDR, the type of war being fought, and the incentives of weaker adversaries—especially nonstate actors—to defect from humanitarian obligations.

The analysis of justifications based on distributive justice, corrective justice, and Samaritanism begins with the observation that proponents of such conceptions of justice have generally stopped short of considering their applicability to situations of enmity. Moreover, conventional accounts of just war theory have not suggested any differential application of jus in bello, that is, the rules governing conduct in conflict. I consider the possible reasons for these omissions and the potentially unique features of the war context. I conclude that it is the acceptance or rejection of some features of war as unique that drives our attitudes towards CDRs in IHL. In particular, it is our view of nationality—the "ours" and "theirs"—that warrants special consideration. The acceptance or rejection of the idea that an enemy civilian is generically innocent and equal to all other civilians—our own or a third party's—is inextricable from any application of distributive justice theories to the context of war.

I. The Equal Application of the Laws of War

A. The principle of equal application

The principle of equal application has been heralded as a foundational principle of IHL.[8] Its earliest general manifestation (outside reciprocal bilateral treaties) appeared in Hugo Grotius' and Alberico Gentili's insistence that the obligation to comply with some rules of warfare must be divorced from the justness of the war's cause, or, in other words, that the justness of the resort to force under jus ad bellum was immaterial to the just prosecution of the war under jus in bello.[9] In Grotius' time, this divorce mainly applied to wars conducted among Christians, but later on, as the concept of jus in bello became more generic, its application became universal to all warring parties, regardless of religion, race, or national identity.

The formal efforts of the international community to systematize and universalize the laws of war began with the 1856 Paris Declaration on Maritime Law in the aftermath of the Crimean War, which was also the first multilat-

8. *See generally* Roberts, *supra* note 1.

9. *See* 3 Hugo Grotius, On the Law of War and Peace 1–2, 171–72 (Gaunt, Inc. 2001) (1625); Alberico Gentili, De Jure Belli Libri Tres 131 (John C. Rolfe trans., William S. Hein & Co. 1995) (1612).

eral treaty open to accession by all states.[10] Subsequent treaties followed a similar trend; they were concluded with the purpose of codifying and developing universal rules of war that were equal for all countries' belligerents, and even for some limited categories of nonstate actors.[11]

As developing nations gained greater political voice in the post-colonial era, the effort to bring all belligerents within the ambit of IHL advanced a step further. Additional Protocol I to the Geneva Conventions of 1977 ("API")[12] greatly expanded the legal recognition of irregular forces fighting colonial domination, alien occupation, or racist regimes.[13] The newly adopted rules dispensed with all but one of the conditions previously recognized with regard to nonstate actors—namely, the duty to carry arms openly. Further, even nonstate belligerents who failed to carry arms openly were to be treated "like" prisoners of war ("POWs").[14] Although the motivation was to benefit nonstate actors, the new rules applied to all belligerents—state and nonstate alike.

API further expanded humanitarian protections by codifying and expanding the prohibition on belligerent reprisals, which essentially eliminated reciprocity as a legitimate consideration of compliance with IHL.[15] One party's violation no longer justified another's response in kind, and instead was to be dealt with through public shaming or individual criminal indictment. Despite the fact that several countries, including the United States, have refrained from ratifying API, and some others have added reservations to their ratifications (creating de facto CDRs), most of API is now considered customary international law that binds all countries regardless of ratification.[16]

The move to systematize and universalize the application of IHL has been noticeable even in the doctrines applicable to non-international armed conflicts ("NIACs"), which were originally designed to place fewer limitations on governments facing rebels from within than on those facing enemies

10. Declaration Respecting Maritime Law, Apr. 16, 1856, *reprinted in* 1 AJIL Supp. 89 (1907) (establishing general principles for the law of war at sea and abolishing privateering); Roberts, *supra* note 1, at 940.

11. *See, e.g.*, Annex to the Hague Convention (IV) respecting the Laws and Customs of War on Land §1, ch. 1, art. 1, Oct. 18, 1907, T.S. No. 539; Geneva Convention Relative to the Treatment of Prisoners of War art. 4(2), Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GCIII].

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

13. *Id.* art. 1(4). The expansion of the regime to these types of armed conflicts further demonstrates, rather than weakens, the pro-state bias of the IHL system, as in all these cases, the nonstate actors are those fighting on behalf of states-in-the-making.

14. *Id.* art. 44(4).

15. *Id.* arts. 20, 51(6), 52(1), 53(c), 54(4), 55(2), 56(4).

16. *See* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 Int'l Rev. Red Cross 175, 187–88 (2005).

from the outside.[17] Thus, for example, while a captured foreign soldier cannot be tried or punished for his lawful wartime activities, under the rules of NIACs, rebels are not entitled to POW status if captured, and instead may be tried and punished for all violent actions against their government. Nonetheless, within any particular NIAC, the international rules apply symmetrically to both governments and rebels, so that neither the government's soldiers nor the rebels are entitled to POW status. Moreover, in recent decades there have been efforts to expand the humanitarian rules that regulate international armed conflicts to cover NIACs as well: examples include the identification of a customary law of NIACs,[18] the elaboration of war crimes committed in NIACs within the Rome Statute of the International Criminal Court ("ICC"),[19] and the expansion of the application of certain arms control agreements to NIACs.[20] In addition, the growing effort to apply human rights norms to governments' conduct in NIACs has further restrained the powers that governments may exercise against domestic rebels, at times even to a greater extent than against foreign enemies.

The only sphere of IHL in which there has been an explicit departure from the equal application principle relates to nuclear weapons. Under the Nuclear Non-Proliferation Treaty, the development and possession of nuclear weapons were reserved for the five permanent members of the United Nations Security Council; in exchange, the nuclear powers undertook to assist the nonnuclear powers in energy matters.[21] Here, the bias is in favor of the more powerful, not the weaker. In fact, the "poor man's nuclear weapon"—biological and chemical munitions—has been banned entirely.[22]

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17. These laxer constraints on governments fighting NIACs are evident even from the comparative breadth of legal regulation of international and non-international conflicts: of the entire body of the four Geneva Conventions of 1949, only Common Article 3 applies to NIACs. *See* GCIII, *supra* note 11, art. 3. Additional Protocol II from 1977, which has been the major modern effort to develop rules for NIACs, contains only 28 articles in comparison to the 102 articles of its sister-convention for IACs, Additional Protocol I. *Compare* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 6, *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II], *with* API, *supra* note 12.

18. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 287, 296 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). Some have argued that the International Criminal Tribunal for the Former Yugoslavia ("ICTY") effectively created a customary international law of NIACs, rather than merely identifying it. *See, e.g.*, LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 136–47 (2002). The identification of such law appears in the International Committee of the Red Cross ("ICRC") study on customary international law as well. Henckaerts, *supra* note 16, at 192–98.

19. Rome Statute of the International Criminal Court art. 8, ¶ 2(c)–(f), *adopted* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

20. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects as Amended on 21 Dec. 2001 art. 1(3), *adopted* Dec. 21, 2001, 2260 U.N.T.S. 82.

21. *See* Treaty on the Non-Proliferation of Nuclear Weapons arts. 1–2, 5, *opened for signature* July 1, 1968, 729 U.N.T.S. 161.

22. *See generally* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 U.N.T.S. 65; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 1015 U.N.T.S. 163; Convention

Most other arms control regimes, while applying in practice only to those countries capable of employing regulated arms (such as blinding laser weapons, cluster munitions, etc.), make no distinctions on the basis of relative capabilities. Even in the rare cases in which some flexibility in the compliance timeline is allowed—such as in the Ottawa Convention on Landmines, which allows up to ten years for the destruction of all antipersonnel landmine stockpiles—the option is available to all members and does not necessarily depend on individual capabilities, resources, or types of threats faced.[23]

The principle of equal application of the law sits well with formalistic—but often unrealistic—understandings of the rule of international law and the principle of sovereign equality (by which all countries are supposed to enjoy an equal voice and equal standing in the formation and application of international law). Indeed, most of international law is articulated in uniform and generic terms, making no distinction in obligations for differently situated parties.[24] The fiction of sovereign equality undoubtedly features in IHL. An alien reading it might be led to believe that the rules were designed to regulate wars between equals, similar to the way that boxing rules regulate matches between opponents of equal weight, and soccer rules govern matches between teams of eleven members on each side. Reality is, of course, very different.

There is wide agreement that although the laws of war apply equally in theory, when applied in practice to substantially different adversaries, they cannot help but result in stark inequality in favor of the more powerful.[25] At the very least, the law echoes the preexisting power structures of the international system, and in all likelihood it further exacerbates them.[26] Of course, absent any legal constraints whatsoever, the more powerful would face even fewer constraints on their warring capabilities. This does not change the fact, however, that existing legal constraints make lawful fighting much easier for the powerful than for the weak. For example, IHL allows aerial bombardment (by states that have air forces) but prohibits potential targets from practicing "shielding" (hiding among the civilian population);[27] in

on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45.

23. *See* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction art. 5, *opened for signature* Dec. 3, 1997, 2056 U.N.T.S. 211.

24. Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 538-39 (2006).

25. Eyal Benvenisti, *Essay in Honor of W. Michael Reisman: Use of Force: Rethinking the Divide Between* Jus ad Bellum *and* Jus in Bello *in Warfare Against Nonstate Actors*, 34 YALE J. INT'L L. 541, 547 (2009).

26. Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 340–42 (2002) (arguing that international law generally is a mechanism used by powerful states to establish facially neutral rules that allow powerful states to impose their wills upon weaker ones).

27. API, *supra* note 12, art. 51(7).

this and similar ways, it generally favors states over nonstate actors.[28] IHL also imposes no real limitations on military expenditures or military force that can be accumulated and ultimately discharged on the battlefield, so long as such force meets the vague and general tests of "necessity" and "proportionality."[29]

The political economy account of why weaker states have agreed to this regime is largely beyond the scope of this Article; possible explanations range from a realist view of the law as "cheap talk" that parties do not take seriously, to reliance on alliances with the more powerful that correct against power imbalances, to true normative commitment to humanitarian welfare that transcends concerns about relative gains. Whichever political account one favors, the realization is equally widespread that once compliance becomes impossible without excessive risk or costs to a party's own war efforts, the rules are bound to be ignored.[30] It is largely for this reason that nonstate actors, facing legal constraints that would render their belligerency impossible (such as the prohibition on shielding in the face of aerial attacks), demonstrate a high incidence of noncompliance.[31]

While the moral philosophy literature has extensively debated the equal application principle, and in particular, the independence of jus in bello from jus ad bellum,[32] over the past decade or so, legal scholars have begun calling for an explicit departure from the principle, particularly in the context of humanitarian interventions and counterinsurgency operations. In the process, both sides of the debate have invoked utilitarian and non-utilitarian justice arguments, although not on the basis of disparities in power per se. In the case of humanitarian interventions, some have argued for a stricter standard of compliance so as to ensure the benevolent motivation of the intervener,[33] while others have advocated a laxer standard to make interven-

28. *See*, *e.g.*, Protocol II, *supra* note 17, art. 6 (regarding the prosecution of persons for participation in an armed conflict; there are no provisions for the prosecution of belligerents in international armed conflicts).

29. *See* JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 19-27 (2004).

30. Michael Schmitt notes, "[s]tates are generally only willing to accept those humanitarian limitations on their conduct of hostilities that neither enfeeble them militarily nor give their opponents a measurable advantage. When that balance is thrown off-kilter, as occurs when forces are asymmetrically equipped and capable, it is only natural that the weaker side seeks to compensate for the imbalance." Michael Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, *in* INTERNATIONAL LAW FACING NEW CHALLENGES 11, 22 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007); s*ee also* Eric Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297, 309–10 (2003).

31. Of course, noncompliance might be motivated by other considerations as well, which I discuss below.

32. A strong proponent of this position has been Jeff McMahan, although even he suggests that his position is one of deep morality rather than a call for amending the laws of war. *See* Jeff McMahan, *On the Moral Equality of Combatants*, 14 J. POL. PHIL. 377, 384–85 (2006).

33. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 69–75 (2001).

tions less costly and more likely.[34] In the case of counterterrorism or counterinsurgency operations, some have suggested that the sheer disparity in power between the government and foreign insurgents calls for a more stringent binding of the powerful (with David Rodin extending the argument to all asymmetric wars),[35] while others have countered that the government must be given greater latitude in the face of persistent noncompliance by its enemies.[36] Still others have argued for the maintenance of the principle of equal application of the law at all times, and as a matter of law, this principle still governs IHL.[37]

B. The unequal monitoring and judging of wartime behavior

Of all possible spheres of international regulation, war seems to be the most challenging in terms of ensuring compliance with restraints. In an international system that lacks mandatory adjudication and enforcement mechanisms, the predominant instrument for ensuring compliance has been self-interest, enforced through reciprocity; accordingly, the early IHL treaties were applicable only between signatories, and later on to non-signatories who expressed their commitment to the treaty obligations in the particular conflict.[38] In the face of a violation by the enemy, a wronged party could resort to reprisal or a reciprocal violation of the laws of war. Reprisals had to be "proportionate," but proportionality was measured only in relation to the nature of the opponent's violation, not in relation to the parties' capabilities or relative power.[39]

In time, most IHL rules have become customary in nature, binding the entire international community without distinction between signatories and non-signatories. In addition, an increased focus on humanitarian welfare, coupled with the human rights revolution, has placed the individual at the

34. *See, e.g.*, Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 Am. J. Int'l. L. 107, 110 (2006). Eyal Benvenisti has advanced the more general claim that the United States should be subjected to fewer restrictions on resorting to force (as a jus ad bellum matter), given its unique role as the world's police officer. *See* Eyal Benvenisti, *The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies*, 15 Eur. J. Int'l L. 677, 683–84 (2004); *see also* Benvenisti, *supra* note 25.

35. *See* David Rodin, *The Ethics of Asymmetric Warfare*, *in* The Ethics of War: Shared Problems in Different Traditions 153, 153–56 (Richard Sorabji & David Rodin eds., 2006); *see also* Paul W. Kahn, *The Paradox of Riskless Warfare*, 22 Phil. & Pub. Pol'y Q., 2, 8 (2002); Paul W. Kahn, *War and Sacrifice in Kosovo*, 19 Phil. & Pub. Pol'y Q., 1, 4–7 (1999).

36. *See* Michael A. Newton, *Reconsidering Reprisals*, 20 Duke J. Comp. & Int'l L. 361, 380–81 (2009–2010).

37. *See generally* Roberts, *supra* note 1.

38. *See*, *e.g.*, Convention with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land arts. 2, 4, July 29, 1899, 32 Stat. 1779, 187 Consol T.S. 429.

39. *See* Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 Mil. L. Rev. 184, 194 (2003) (noting the two different proportionality tests in reprisals: the more generally accepted one is that proportionality is measured in relation to the original violation that prompted the reprisals; the other, still maintained by some, is that it is measured in relation to bringing the violating party into compliance). See *generally* Mark Osiel, The End of Reciprocity: Terror, Torture, and the Law of War (2009).

center of attention, paramount to any incentive structure designed to bring the adversary into compliance. As a result, reprisals, which inevitably entailed a deliberate harm to some individuals, were largely outlawed, especially as applied to noncombatants. Consequently, a belligerent party cannot lawfully respond in kind—even if proportionately—to most humanitarian violations by its opponents.[40]

With belligerent reprisals outlawed, enforcement was channeled to other mechanisms, including U.N. sanctions or collective security efforts, judicial processes, and the court of public opinion.[41] These developments, along with the expansion of real-time media access and exposure, increased the role of domestic constituencies and third parties as monitors and judges of compliance. A growing number of international judicial bodies are now entrusted with judging wartime conduct (for example, the International Criminal Court and the European Court of Human Rights);[42] a greater number of domestic tribunals worldwide are open to hearing challenges related to wartime behavior under a universal jurisdiction paradigm; a growing number of international human rights bodies are monitoring and reporting on wartime conduct; and a proliferation of nongovernmental organizations join these monitoring and reporting efforts and also, at times, initiate legal proceedings in domestic and international fora against alleged perpetrators of war crimes. All of these mechanisms feed on, and into, a growing Western-liberal humanitarian consciousness, which loathes war in principle and holds the humanitarian functions of the laws of war in high regard.

Some anecdotal evidence suggests that despite the formally equal application of the law, third party monitoring is far from uniform. In 2003, international outrage followed the bombings of the United Nations and International Committee of the Red Cross headquarters in Baghdad by Iraqi insurgents, yet much of the anger was directed at the United States for not doing more to protect the facilities (despite U.N. Secretary General Kofi Annan's earlier decision to decline U.S. protection for the U.N. com-

40. Several countries, including the United States, the United Kingdom, and Italy, maintain that they retain the right to engage in humanitarian reprisals under some circumstances. *See* Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law: Volume I: Rules 139–55 (2005) [hereinafter CIHL]; *see also* Julie Gaudreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protections of War Victims*, 849 Int'l Rev. of the Red Cross 143, 146 (2003).

41. *See* Roberts, *supra* note 1, at 945 (discussing the decline of the principle of reciprocity); *see also* Prosecutor v. Martić, Case No. IT-95-11-A, Judgment, ¶ 263 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008) (finding that, while reprisals might be justified under extraordinary circumstances, they were not justified in the case at hand); Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 513 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (referencing the prohibition on reprisals against civilian populations).

42. Even though the ECHR is not officially empowered to review IHL, in practice, several ECHR judgments indirectly address conduct in conflict. *See, e.g.*, Isayeva v. Russia, App. No. 57950/00, 41 Eur. H.R. Rep. ¶ 79 (2005) (addressing the use of force by Russia in Chechnya); Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 1751, ¶ 79 (addressing clashes between Turkish forces and members of the Workers Party of Kurdistan).

pound).[43] Statements by U.N. officials have also hinted at an unofficial higher standard for U.S. conduct in combating terrorism: Martin Scheinin, the Special Rapporteur on the Protection and Promotion of Human Rights While Countering Terrorism, has noted that the United States is a world leader and has a responsibility to ensure respect for human rights and international humanitarian law.[44] Amnesty International titled its report on Operation Allied Force (the 1999 NATO campaign in Kosovo) *Collateral Damage*, while Human Rights Watch titled its report on Operation Iraqi Freedom *Off Target.*[45]

Michael Schmitt has noted the role of the media in creating a higher standard for liberal democracies such as the United States. Journalists tend to embed with coalition forces, not with Iraqi insurgent cells, and thus any damage done by coalition forces is more likely to receive attention and criticism.[46] Rodin notes that Western states are acutely aware that any breach of the rules of war will be reported in the world media, and Western forces "will implicitly be judged by a higher standard to those of other states."[47] There have been more attempts to indict American officials under universal jurisdiction in Belgium, Germany, Spain, and the United Kingdom than there have been to indict officials from any other single country, with China and Israel following closely behind.[48]

At the same time, somewhat paradoxically, other international mechanisms may implicitly serve the interests of more powerful belligerents. For example, numerous commentators have suggested that the ICC serves as a "Court for Africa,"[49] with its handful of indictments extending so far only to African conflicts. While the many attempts to indict American or Israeli officials under universal jurisdiction have all failed, Belgium succeeded in convicting several Rwandan citizens in 2001 for their participation in the 1994 genocide, with some prosecutions against "low cost" Rwandan defendants continuing even after Belgium repealed its universal jurisdiction law in 2003.[50] Within the United States itself, there have been several suc-

43. *See* Kenneth Anderson, *Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003–2004 Afghanistan and Iraq Conflicts*, 17 HARV. HUM. RTS. J. 41, 45–47 (2004).

44. *See generally* Martin Scheinin, United Nations Human Rights Council Special Rapporteur on the Protection and Promotion of Human Rights While Countering Terrorism Presentation at the Sixth Session of the Human Rights Council (Dec. 12, 2007), *available at* http://www2.ohchr.org/english/bodies/chr/special/docs/statements/hrc6thsession/A-HRC-6-17Scheinincounteringterrorism.pdf.

45. Michael N. Schmitt, *21st Century Conflict: Can the Law Survive?*, 8 MELB. J. INT'L L. 443, 470 (2007).

46. *Id.* at 469.

47. Rodin, *supra* note 35, at 165.

48. Israel is second on the list of nationalities of indicted officials. *See generally* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Regulating Role of the Political Branches in the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. (forthcoming Jan. 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661243.

49. *See* HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS, 44–45 (2008).

50. Langer, *supra* note 48, at 34, 38–39.

cessful civil lawsuits in domestic courts against the Palestinian Authority, Iran, and Libya under the Alien Tort Claims Act, but similar lawsuits against American and Israeli officials have been dismissed.[51]

Whatever the correct assessment of international monitoring and adjudication of wartime practices, the overall consensus has been that the United States is observed and judged by higher standards of compliance with IHL than other belligerent forces. This, of course, may have to do with the United States' greater involvement in armed conflicts generally. It may also be a function of the United States' status as the world's superpower and its self-professed commitment to humanitarian norms.[52] There is also a sense in which the United States is expected to do more, simply because it can afford to do so. Within the United States, observations that U.S. forces tend to be held to a higher standard are often linked with concerns over lawfare.[53] Variously defined, lawfare captures everything from manipulating legal rules to one's advantage to using courts as an alternative battleground. The most extreme expression of this concern may be found in the 2005 U.S. National Defense Strategy, which grouped together "international fora, judicial processes, and terrorism" as strategies employed by "the weak" against the United States.[54]

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51. *Compare Collett v. Socialist Peoples' Libyan Arab Jamahiyira*, 362 F. Supp. 2d 230, 233 (D.D.C. 2005) (rejecting the motion of individual members of the Libyan government to dismiss a claim brought against them for a terrorism-related offense), *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 302 (D.D.C. 2003) (granting plaintiffs relief in a wrongful death suit against Iran), *and Sokolow v. Palestine Liberation Org.*, 583 F. Supp. 2d 451, 453-58 (S.D.N.Y. 2008) (denying defendant's motion to dismiss for lack of subject matter jurisdiction on the grounds that the Palestinian Authority was not recognized as a state and thus lacked sovereign immunity), *with Belhas v. Ya'alon*, 466 F. Supp. 2d 127, 130-31 (D.D.C. 2006) (granting a claim of sovereign immunity for an Israeli general acting in his official capacity), *and Sosa v. Alvarez-Machain*, 542 U.S. 692, 737–38 (2004) (holding no federal jurisdiction under the Alien Tort Claims Act unless the cause of action was a crime against the law of nations in the 18th century and recognizing full sovereign immunity for all actions by the government in foreign countries).

52. Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EJIL 331, 335–36 (2009). *See* John R. Bolton, *Should We Take Global Governance Seriously?*, 1 Chi. J. Int'l L. 205, 207–08 (2000) (discussing perceived anti-Americanism in global governance efforts); Jeremy Rabkin, *American Self-Defense Shouldn't Be Too Distracted by International Law*, 30 Harv. J.L. & Pub. Pol'y 31, 50–52 (2006) (arguing that international law advocates call upon the United States to uphold the tenets of international law against its own interests, even when its adversaries do not, because of the unique legitimacy of being the world's most powerful state binding itself to international norms); *cf.* Benvenisti, *supra* note 34, at 684–85, (suggesting lowering the threshold of jus ad bellum for the United States, given its special role as the world's police officer).

53. *See generally* Charles J. Dunlap, Jr., Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts (2001) (unpublished workshop paper), *available at* http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf; Charles J. Dunlap, Jr., *Commentary, Lawfare Today: A Perspective*, 3 Yale J. Int'l Aff. 146, 147 (2008); *Lawfare, the Latest in Asymmetries,* Council on Foreign Relations (Mar. 18, 2003), http://www.cfr.org/publication/5772/lawfare_the_latest_in_asymmetries.html?id=5772.

54. United States Department of Defense, The National Defense Strategy of The United States of America, 5 (Mar. 2005), *available at* http://www.defense.gov/news/mar2005/d20050318nds1.pdf.

II. CDRs in International Law

As discussed above, IHL is no different from most other spheres of international law in its preference for uniform obligations. This generic articulation expresses a formalistic application of the concept of sovereign equality and the international rule of law; it ignores material differences in size, population, political association, capabilities, and preferences among the law's subjects. In other words, the application of the law is generally *equal*, but not necessarily *equitable* insofar as it affects differently situated parties unevenly.

Recently, the idea of translating the principle of sovereign equality into equitable obligations that differ from country to country has been gaining ground in some areas of international law, even if it is still far from being a dominant or even prevalent concept. Through the introduction of various forms of CDRs, international environmental and trade law (and, to some degree, parts of international human rights law[55] and elements of the law of the sea[56]) are increasingly tailored to apply differently to the developed and the developing world.

In IEL, CDRs are so prevalent that they are now the norm rather than the exception, especially when one takes into account plans for future agreements.[57] Numerous binding and nonbinding instruments contain language to the effect that individual countries' resources and capabilities must be taken into account in setting the standard for compliance. The most explicit of these instruments are the Kyoto Protocol of the U.N. Framework Convention on Climate Change ("UNFCCC") and the Montreal Protocol of the Vienna Convention for the Protection of the Ozone Layer, which set different targets and compliance standards for developed and developing countries.[58] Moreover, in what Mark Drumbl has termed "a shared compact,"[59]

55. The relevant subset of IHRL is that which imposes affirmative duties in the sphere of social, economic, and cultural rights. Affirmative duties are considered more programmatic in nature, and they are dependent on each state party's resources and capabilities. *See, e.g.*, International Covenant on Economic, Social, and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . . . " (emphasis added)).

56. *See* United Nations Convention on the Law of the Sea arts. 82, 140, 144, 148, Dec. 10, 1982, 1883 U.N.T.S. 397 (including provisions for the transfer of technology and the "equitable" sharing of deep sea mining revenues, suggesting the transfer of resources from richer to poorer states).

57. In the 2009 Copenhagen summit on climate change, disagreements were over the exact design of a CDR regime on carbon emissions, not over the principle of it. *See* Aoife White, *EU Leaders Fail to Agree on How Much Climate Aid to Give*, Boston Globe, Oct. 31, 2009, at A5.

58. Kyoto Protocol, *supra* note 4, annex B (translating the UNFCCC recommendations into binding commitments and setting firm targets for only thirty-seven industrialized countries and the European Community for reducing greenhouse gasses); Montreal Protocol on Substances that Deplete the Ozone Layer art. 5(1), Sept. 16, 1987, 1522 U.N.T.S. 28, 29 [hereinafter Montreal Protocol] (allowing developing countries, on the basis of their annual consumption of controlled substances, a delay of ten years to comply with the control measures set out in the Protocol).

the developed world was ordered to extend positive assistance in the form of financial resources and technology transfers to the developing world as a condition for the latter's compliance with its environmental obligations.[60]

In ITL, the General Agreement on Tariffs and Trade ("GATT")/World Trade Organization ("WTO") framework offers explicit exemptions for developing countries, and particularly for least developed countries ("LDCs"), from compliance with the provisions of the Agreement.[61] Most notably, the Agreement allows LDCs to discriminate against exported goods to allow for economic progress,[62] gives them additional time to complete reporting requirements, reduces their barriers for entry into "most favored nation" status with trade partners, accords them increased technical assistance, and instructs the WTO to give "sympathetic consideration" to the circumstances of LDCs in resolving issues and claims brought against them.[63] The 2001 Doha Decision on Implementation-Related Issues and Concerns added to the GATT/WTO provision by setting out a detailed program for the incorporation of differentiated obligations and staggered timetables for compliance for the developing world, with special emphasis on those areas of trade that are of particular concern for developing countries. It charged the Committee on Trade and Development with identifying CDRs and investigating potential improvements to the CDR regime.[64] Developed countries must also assist their developing counterparts in participating more effectively in subsequent trade negotiation rounds.[65] Even beyond the formal incorporation of explicitly differentiated obligations for the developed and developing world, the WTO Dispute Settlement Body has at times rejected

59. Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 TUL. L. REV. 843, 853–55 (2002).

60. Montreal Protocol, *supra* note 58, art. 10; United Nations Framework Convention on Climate Change art. 4(7), May 2, 1992, 1771 U.N.T.S. 108 [hereinafter UNFCCC]; United Nations Convention on Biological Diversity art. 20(4), June 5, 1992, 1760 U.N.T.S. 142, 143.

61. GATT, *supra* note 2, art. XVIII (setting out a scheme of exemptions for "those contracting parties the economies of which can only support low standards of living and are in the early stages of development," noting that their ability to participate in a free-trade regime depends on their progressive development and that such development requires laxer compliance with the agreement's obligations, thus permitting LDCs to maintain flexibility in tariff structures for particular industries and to apply quantitative restrictions, despite the prohibitions on such practices stipulated in Articles I and XI).

62. Developed states must, barring "compelling reasons," lower trade barriers inhibiting the importation of products from LDCs. GATT, *supra* note 2, art. XXXVI(1), XXXVII(1).

63. *Id.* art. XVIII(4), XXXVI(8) ("[T]he less-developed contracting parties . . . should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments."). Developing countries, which are defined as being at a more advanced stage than LDCs, enjoy fewer exemptions, and for the most part have only the right to delay compliance for a number of years. *Id.*

64. World Trade Organization, Implementation-related Issues and Concerns—Decision, ¶ 12.1, WT/MIN(01)/17 (Nov. 14, 2001); World Trade Org. Comm. on Trade and Dev., *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77 (Oct. 25, 2000) at 6, 75–76.

65. World Trade Organization, Implementation-related Issues and Concerns—Decision, *supra* note 64, ¶ 14.

formal equality as a baseline for interpreting and applying general obligations, and has instead taken disparities in resources into consideration.[66]

The justifications offered in scholarship and policy papers for the incorporation of CDRs into IEL and ITL suggest that it is intended to allocate equitable—rather than formally equal—shares of both the burden in meeting global threats (such as climate change) and the benefits of international cooperation (such as economic development). Disparity in resources is the distinguishing feature that underlies the various justifications for CDRs. The four types of justifications most commonly offered for this scheme are utilitarianism, distributive justice, corrective justice, and Samaritanism, and I outline each briefly below.[67]

I acknowledge at the outset that the degree to which the developed world has assumed the obligation to aid the developing world through the use of CDRs is highly contested, and that it is possible, at least in some contexts, that differentiated undertakings are more rhetorical than real in practice.[68] Still, even if merely expressive, the principle of differential obligations that are resource-dependent now operates as a norm accepted by developing and developed countries alike, and the legitimacy of future arrangements will be measured in its shadow. If there is indeed an expectation that future trade and environmental regimes will be applied in a differential manner, it begs the question why a similar expectation does not arise in the sphere of war.

A. The utilitarian argument

A utilitarian approach seeks to maximize the stated goal of the regime at hand—often, collective benefit to the participants in a given system. For example, the environment is a common good, the protection of which requires the cooperation of all countries, and harm to which can be inflicted by any country. It is for this reason that, under a utilitarian analysis, it is desirable to secure the participation of the entire international community

66. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 152–54, WT/DS58/AB/R (Oct. 12, 1998) (citing Preamble of the WTO Agreement, ¶ 1) (noting that the objective of the 1994 GATT was to promote sustainable development, taking into consideration the differing levels of economic development); *see also* Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 7.38, WT/DS79/R (Aug. 24, 1998) (explaining the Generalized System of Preferences for developing states in implementing patent protections embodied by Article 65 of the Agreement on Trade-Related Aspects of Intellectual Property Rights).

67. Varying articulations of these and other types of arguments have been advanced by some scholars; for instance, Drumbl discusses charity and altruism, developmental justice and human survival, intergenerational justice, avoiding harm, solidarity and cooperation, selfishness and self-interest. *See* Drumbl, *supra* note 59, at 895–939.

68. *See*, *e.g.*, Paul G. Harris, *The European Union and Environmental Change: Sharing the Burdens of Global Warming*, 17 Colo. J. Int'l Envtl. L & Pol'y 309, 343 (2006) (commenting that European subsidies to the coal industry undercut measures towards reducing emissions) (citing Matthias Duwe, Climate Action Network Eur., Climate Policy in the European Union: A Brief Overview of EU-wide Policies and Measures 26 (2004), *available at* http://www.aef.org.uk/downloads/EU%20and%20Climate%20-%20Duwe.pdf).

in the regime—if necessary, through positive inducements.[69] In an ideal world, all countries would contribute as much as they could to fight climate change. However, since perfect differentiation is unlikely pragmatically and politically, some commentators have advocated a more limited multilateral arrangement among the world's largest economies (the G-8 group plus China and India), or even a bilateral agreement between the United States and China,[70] so as to avoid the lowest-common-denominator problem often associated with universal treaties.[71] Other proposals entail the transfer of cash payments, instead of differential obligations, for carbon emissions as a more effective formula for securing multilateral cooperation.[72] Still, even among those commentators who have advanced alternative schemes to the paths heretofore chosen, there is an understanding that obligations cannot be symmetrical across differently situated countries.[73]

Trade may be more accurately described as a "club good" than as a common good, but trade liberalization is often promoted through multilateral regimes seeking greater openness of international markets.[74] Members of the club of free trade have an interest in additional members joining the club, thereby expanding their own opportunities for trade and investment. In an increasingly globalized economy, barriers to trade threaten to inflict harmful externalities on countries other than just the immediate trading partners. Moreover, CDRs and other economic measures aimed at providing assistance to LDCs are often presented as economically efficient, as the marginal utility of a dollar is greater in the developing world than it is in the United States.[75] In addition, even if international trade may be accurately characterized as a club good, development is constructed in both the environment and trade regimes as a common good for which all nations must share responsibility.[76] The promotion of development has been the token with which the developed world has sought to attract additional members to join the club.

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69. *See generally* CISDL, *supra* note 5.

70. *See* Sheila M. Olmstead & Robert N. Stavins, *An International Policy Architecture for the Post-Kyoto Era*, 96 AM. ECON. R. 35, 37 (2006).

71. On bilateral and multilateral arrangements generally, see Gabriella Blum, *Bilateralism and Multilateralism: The Architecture of International Law*, 49 HARV. INT'L L.J. 323 (2008).

72. *See* Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1567, 1585–88 (2008).

73. *See* Henry D. Jacoby & David M. Reiner, *Getting Climate Policy on Track After The Hague*, 77 INT'L AFF. 297, 299 (2001).

74. *See* World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, ¶ 4 (2002) [hereinafter Doha Declaration].

75. *See* Chantal Thomas, *International Debt Forgiveness and Global Poverty Reduction*, 27 FORDHAM URB. L.J. 1711, 1715 (2000).

76. The GATT stipulates that the regime must strive to broad participation, as such participation, in turn, "promot[es] recovery, growth and development." Doha Declaration, *supra* note 74, ¶ 1. The Doha Declaration adds that "[i]nternational trade can play a major role in the promotion of economic development and the alleviation of poverty." *Id.* ¶ 2.

Somewhat ironically, the industrialization of developing states typically exacerbates environmental degradation, making it even more important that developing states participate in environmental regimes at the same time that their economies grow through international trade. Consequently, to promote broad participation, rich states offer positive assistance in the form of information, funding, technology transfer, and technical support as side payments; in exchange, they receive poor states' participation and assumption of the associated costs of developing in a manner less harmful to the environment.[77]

B. *The distributive justice argument*

Distributive justice seeks to reallocate resources in an equitable way. In the spheres of trade and the environment, the distributive justice argument begins with the assumption that developed and developing countries are differently situated, both in terms of their current starting points and in terms of their ability to bear the burdens of various obligations. Consequently, any agreement that imposes uniform obligations on all participants would necessarily result in an unequal distribution of costs and benefits. To be just, an agreement must distribute the benefits and burdens of environmental protection or trade in equitable shares among the states of the world.[78] In order to do so, it must take into account the unequal capabilities of rich and poor states to comply with obligations,[79] as well as the special

77. *See* Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, 49 Int'l & Comp. L.Q. 35, 57–58 (2000). *See also* GATT, *supra* note 2, art. XXXVI (ordering developed states to make a "conscious and purposeful effort" to provide access to markets under favorable terms and collaborate with international financial institutions to assist in LDC's financial development).

78. *See* Drumbl, *supra* note 59, at 898–904. Although Drumbl initially uses the term "equally shared," he proceeds to explain why justice requires an equitable distribution of costs and benefits rather than a formally equal one. *Id.*; *see also* United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I, prin.6 (Aug. 12, 1992) [hereinafter Rio Declaration] (ordering that "the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority"). Similarly, the 1972 Stockholm Declaration on the Human Environment mandates that "resources should be made available to preserve and improve the environment, *taking into account the circumstances and particular requirements of developing countries*." United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Stockholm Declaration on the Human Environment*. U.N. Doc. A/CONF.48/14/Rev.1, prin.12 (1992) [hereinafter Stockholm Declaration] (emphasis added).

79. *See* UNFCCC, *supra* note 60, art. 3(1), 4(2); *see also* United Nations Conference on Human Settlements (Habitat II), Istanbul, Turk., June 3–4, 1996 *Istanbul Declaration on Human Settlements*, U.N. Doc. A/CONF.165/14, Annex I, ¶ 10 (June 14, 1996) [hereinafter Istanbul Declaration]. Paragraph ten specifically mandates that different parties will be held to varying standards of compliance with the precautionary principle approach to stemming environmental degradation; the principle "shall be widely applied according to the capabilities of countries." *Id.;* John Ashton & Xueman Wang, *Equity and Climate: In Principle and Practice*, Pew Center on Global Climate Change, at 66 (2003) ("In assessing whether an outcome is equitable, parties will invariably compare the effort they are being asked to make and that required of other parties. . . . If some parties seem to be getting a better deal than others—if their commitments are, in some sense, disproportionately easy—the deal may still be denounced as unfair."); Christopher D. Stone, *Common But Differentiated Responsibilities in International Law*, 98 Am. J.

developmental needs of the poorer countries.[80] Redistribution occurs by tailoring obligations to capabilities as well as making side payments or transferring compensation from the rich to the poor.[81]

In the environmental context, scholars have noted that the United States has the largest gross domestic product of any state and may thus have a "special duty" to mitigate the harmful effects of climate change—an obligation that, for example, comparatively poor India should not have to bear.[82] Furthermore, the United States can provide technological assistance that would contribute to a desirable redistribution and help avoid the catastrophic effects of climate change.[83] The best-off should pay the costs, since it would be unjust for a mutually beneficial environmental agreement to make the worst-off even poorer.[84]

In the trade sphere, similar rationales have been offered in managing the tension between free markets and developmental needs, as CDRs can operate as a partial fulfillment of the redistributive obligations of the wealthier states.[85] Justifications begin with the premise that developing countries often lack the natural endowments of rich states,[86] and the current economic system is "deeply shaped by structural inequality."[87] If international economic institutions are to legitimize their governance mechanisms, they must be concerned with "transnational justice" in the distribution of international public goods—meaning that accommodations must be made for poor states.[88] In particular, the CDR provisions in the GATT were justified as a means to "rectify the structural imbalance" between the primary, com-

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INT'L L. 276, 292 (2004) (arguing that countries with greater resources experience less of a burden from emissions restrictions than poor states, based on utility maximization and the declining marginal utility of wealth).

80. UNFCCC, *supra* note 60, art. 3(2) ("The specific needs and special circumstances of developing country Parties . . . that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration."); *see also* Rio Declaration, *supra* note 78, prin. 6; Stockholm Declaration, *supra* note 78, prin. 12; Ashton & Wang, *supra* note 79, at 77–78; French, *supra* note 77, at 48–49.

81. *See* Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations*, 10 EUR. J. INT'L L. 549, 572–73 (1999); ANITA MARGRETHE HALVORSSEN, EQUALITY AMONG UNEQUALS IN INTERNATIONAL ENVIRONMENTAL LAW: DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES 47–48 (1999).

82. *See* Posner & Sunstein, *supra* note 72, at 1567. This argument obviously has a utilitarian aspect as well.

83. *See id.* at 1591.

84. Drumbl, *supra* note 59, at 904.

85. *See generally* Frank J. Garcia, *Trade and Inequality*, 21 MICH. J. INT'L L. 975 (2000).

86. FRANK J. GARCIA, TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE 23–24 (2003).

87. Chantal Thomas, *Democratic Governance, Distributive Justice and Development*, 08-036 CORNELL LEGAL STUD. RES. PAPER SER.14 (2008).

88. Ernst-Ulrich Petersmann, *Why Rational Choice Theory Requires a Multilevel Constitutional Approach to International Economic Law: A Response to The Case Against Reforming the WTO Enforcement Mechanism*, 2008 U. ILL. L. REV. 359, 369 (2008).

modity-focused LDC economies and the industrialized developed economies.[89]

Distributive justice arguments have not escaped criticism, even among those who do not subscribe to a Hobbesian approach that excludes concepts of justness and morality from international politics. Skeptical (or cautious) commentators have noted that CDRs might create incentives for rent-seeking and corruption in poorer countries, and there is no guarantee that the benefits they bring will actually be distributed among the populations that the CDRs are ultimately meant to serve.[90] In the richer countries, CDRs are likely to exacerbate poverty and to be met with domestic criticism of their nonreciprocal nature.[91]

From the point of view of the poorer countries, however, CDRs have not done nearly enough. In the trade area, exemptions are nominal and are granted only to the least developed economies. Moreover, there is no truly free trade in areas where poorer countries are competitive, such as agriculture and textiles.[92] Even more troubling, the beneficiaries of the laxer rules are often Western multinational corporations that operate in the developing world. In the environmental sphere, some have claimed that certain poorer countries could actually benefit from climate change, making their participation in climate change regimes self-defeating.[93]

C. *The corrective justice argument*

Corrective justice arguments rest on the idea that those who have contributed to causing harm must make amends to those who have suffered from it. In environmental regimes, corrective justice arguments rest on past practices from which the richer world has profited, many of which have harmed the planet and produced negative externalities for all.[94] The International Law Association has claimed that "[t]he rationale for [CDRs] lies in 'the different contributions to global environmental degradation' and not in different levels of development."[95] Differential treatment operates to correct, to some

89. Kevin Moss, *The Consequences of the WTO Appellate Body Decision in* EC–Tariff Preferences *for the African Growth Opportunity Act and Sub-Saharan Africa*, 38 N.Y.U. J. Int'l L. & Pol. 665, 669 (2006).

90. Thomas, *supra* note 87, at 16–18; Joost Pauwelyn, *Book Review: Just Trade: Trade, Inequality, and Justice: Towards a Liberal Theory of Just Trade*, 37 Geo. Wash. Int'l L. Rev. 559, 565 (2005).

91. *See* Drumbl, *supra* note 59, at 906; Posner & Sunstein, *supra* note 72, at 1571.

92. Pauwelyn, *supra* note 90, at 568.

93. *See* Todd Sandler, Global Collective Action, 221, 224–25 (2004).

94. In alternate literature, these considerations are described in different ways. *See, e.g.*, Drumbl, *supra* note 59, at 907–10 (enumerating them); *see also* Rio Declaration, *supra* note 78, prin. 7 ("In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."); Istanbul Declaration, *supra* note 79, ¶ 10.

95. International Law Association, Report of the Sixty-Sixth Conference (held at Buenos Aires, Arg.) 116 (1994); *see also* Stone, *supra* note 79, at 292 ("It is not clear why a contemporary U.S. citizen should

degree, this unfair advantage[96] by allowing the developing world to engage in similar practices, which are now forbidden for rich nations. Transfer payments (in information, technology, etc.) are used not only as a redistribution mechanism, but also as compensation.

In the trade area, corrective justice arguments submit that globalization has produced a "race to the bottom" that has led corporations from wealthy nations to exploit the economies of LDCs.[97] As a result, developed nations have expanded their economies in a manner that would have been impossible under the terms of fair competition.[98] Similar arguments have been advanced in calls for debt relief: Chantal Thomas writes that private lending institutions from wealthy nations, as well as the rich nations themselves, irresponsibly lent money to corrupt regimes and then saddled poor countries with massive debt loads once the markets for the poor countries' goods bottomed out.[99] If bad governance by corrupt regimes contributed heavily to the debt of the poor states, the citizens of LDCs should not be held accountable.[100]

Corrective justice arguments for CDRs have been criticized as both unfair and ineffective. In particular, critics have denounced such corrective or intergenerational justifications as espousing collective guilt for the citizens of developed states, holding them jointly liable for the varying practices of their colonial and post-colonial institutions and corporations.[101] In the environmental sphere, critics have stressed that those who are required to pay compensation now are not those who have benefitted from causing the harm earlier,[102] and those receiving the compensation now are not those who will be the real victims of the harm, since they are not yet alive.[103] From the perspective of the developing world, correction has stopped far short of any true compensation for past exploitation, and current schemes exacerbate, rather than correct, much of the structural disparities in power.

D. Samaritanism

Some CDRs may be accounted for under a Samaritanism argument. Samaritanism assumes that aid is due when one party is uniquely positioned to assist another. In the environmental context, richer countries are under-

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make amends for the overuse of the global commons during the stretch before her forebears had immigrated.").

96. *See* Posner & Sunstein, *supra* note 72, at 1592.

97. Douglas L. Murray & Laura T. Raynolds, *Globalization and its Antimonies: Negotiating a Fair Trade Movement*, *in* Fair Trade: The Challenges of Transforming Globalization 3, 6 (Laura T. Raynolds, Douglas L. Murray & John Wilkinson eds., 2007).

98. Frank J. Garcia, *Building a Just Order for the New Millennium*, 33 Geo. Wash. Int'l L. Rev. 1015, 1020 (2001).

99. Thomas, *supra* note 75, at 1714–15.

100. *See id.*

101. *See* Eric A. Posner & David Weisbach, Climate Change Justice 100–02 (2010).

102. *See* Posner & Sunstein, *supra* note 72, at 1572, 1593–95.

103. *See id.* at 1595–97.

stood to be in a special position to aid poorer ones, because they can both contribute a greater share to climate change prevention and aid with developmental needs.

The Samaritanism argument is especially pronounced in the WTO, and particularly in the Trade Related Aspects of Intellectual Property Rights ("TRIPS") regime. Under TRIPS, states are allowed to grant compulsory licenses to reproduce patented pharmaceutical products without consulting the patent holder, but only in response to self-defined public health emergencies.[104] The justification for such a program is not rooted in any sense of structural inequality between rich and poor states, or as a correction for some past wrong, but in the unique ability of the patent holder (developed states or their corporations) to prevent death in the developing world.[105] From an institutional-instrumental perspective, some have argued that when the developed world has the capability to alleviate massive economic hardship and does not act, the credibility of the international system is challenged.[106]

Samaritanism has been challenged on the grounds that it could slow the innovation in well-off states that led to those states' particular advantages.[107] In addition, as the Samaritan's dilemma forewarns,[108] charity from the developed world runs the risk of diminishing the incentives of LDCs for self-help, thereby further locking LDCs into the institutions that have left them comparatively poor.[109]

Although noting them here, in the subsequent sections of this Article I ignore the criticisms voiced against the various rationales for CDRs in the fields of IEL and ITL, and I proceed on the assumption that all of them might justify CDRs in these fields. My main effort is not to test the validity of these rationales per se, but only the degree to which, even if one accepts their justificatory force in other fields of international law, they are transposable to the context of war.

III. Potential Differentiated Application of IHL

As noted earlier, the law of war is certainly not the only sphere that has thus far avoided the introduction of explicit CDRs. The absence of differentiation in IHL is particularly noticeable, however, given that disparities in

104. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 31, Apr. 15, 1994, 1869 U.N.T.S. 299.

105. *See* John Linarelli, *What Do We Owe Each Other in the Global Economic Order?: Constructivist and Contractualist Accounts*, 15 J. Transnat'l L. & Pol'y 181, 214 (2006).

106. Thomas, *supra* note 75, at 1716.

107. Linarelli, *supra* note 105, at 217–18.

108. For a full analysis of the Samaritan's dilemma, see James M. Buchanan, *The Samaritan's Dilemma*, *in* Altruism, Morality and Economic Theory 71–85 (Edmund S. Phelps ed., 1975).

109. Raj Bhala, *Theological Categories for Special and Differential Treatment*, 50 U. Kan. L. Rev. 635, 657 (2002).

power and capabilities are especially endemic and relevant to the law's application. One could imagine, as a thought exercise, a differential model of IHL that would take into account disparities in power or capabilities. As in any other sphere of law, regulation that aims to take into account differences among its various subjects could assume one of several forms: the stipulation of different rules for different parties, enforcement schemes that discriminate according to circumstances, or the interpretation and application of generic standards in a differentiated manner.

Many IHL norms are articulated in absolute terms: the intentional killing of civilians is always a war crime,[110] the use of chemical or biological weapons is absolutely prohibited,[111] the torture of prisoners of war or civilians is never lawful,[112] and the carrying out of attacks while posing as a civilian is illegal perfidy.[113] One could imagine a differential legislative scheme that, following the architecture of CDRs in environmental or trade regimes, applied explicitly different rules to differently situated parties or exempted weaker parties from compliance with certain humanitarian obligations. Examples would include rules that allowed weaker parties to use prohibited weapons when facing a superior adversary, or rules that exempted weaker parties from the prohibition on shielding when they are battling against an air force and do not have air-defense capabilities. CDRs could also impose heightened obligations on richer countries, such as the extension of humanitarian assistance (food, healthcare, or shelter) to civilians belonging to a weaker enemy,[114] or the prohibition of air combat against an enemy who lacks aerial warfare or defense capabilities.[115] All of these are possible as theoretical matters, but they remain politically unlikely, at least in the foreseeable future.

One could further contemplate enforcement schemes that would discriminate against stronger parties when prosecuting or sentencing criminals in

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110. API, *supra* note 12, art. 51.

111. *See* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction art. 1(b), Sept. 3, 1992, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 45; *see also* Convention on the Prohibition of the Development, Production, and Stockpiling of Bacterial (Biological) and Toxin Weapons and on their Destruction art. 1, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

112. GCIII, *supra* note 11, art. 3.

113. API, *supra* note 12, art. 37(1)(c).

114. Currently, the obligation to extend such assistance is limited to specific scenarios, such as cases of occupied territory, siege warfare, and maritime blockade. *See* Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 NAVAL WAR COLL. REV. 77, 77–92 (2000).

115. Fantastic as this proposition may sound today, there is some historical precedent for limits on such attacks. In 1900 the United States, fearing the prospect of aerial warfare, ratified the Hague Declaration to Prohibit the Launching of Projectiles and Explosives from Balloons. It ratified a similar declaration in 1909, together with the United Kingdom and eighteen other countries. Of course, those declarations were meant to apply to all belligerent parties. *See* Declaration (IV, 1) to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other New Methods of a Similar Nature, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 994; *see also* Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, Oct. 18, 1907, 3 Martens Nouveau Recueil (ser. 3) 745.

trials for violations of IHL obligations. This strategy could be pursued either formally, through explicit instructions to prosecutors, or informally, through discretionary decisionmaking as to which prosecutions to pursue. Given the nascent stage of international criminal law, explicit instructions to prosecutors are likely to face political obstacles not dissimilar to those that would inhibit a differential legislative scheme. Informal discretion in prosecutorial decisionmaking is far more politically feasible, making this option similar to the ways in which the third alternate scheme—the differential interpretation and application of generic standards—can be considered.

Notwithstanding the many absolute rules in IHL, several IHL obligations are articulated as standards[116]: The unintended killing of civilians is lawful if it is not "*excessive* in relation to the concrete and direct military advantage anticipated";[117] while launching attacks, it is necessary to "take all *reasonable* precautions" to avoid losses of civilian lives and damage to civilian objects;[118] a capturing party must evacuate POWs to safe zones *as soon as possible*;[119] and destruction of private property is outlawed unless rendered *absolutely necessary* by military operations.[120]

While judging compliance with absolute rules is presumably a straightforward exercise, judging compliance with standards is more susceptible to discretion.[121] Unlike IEL and ITL provisions that commonly tie standards to capabilities (for example, phrases such as "to the best of their ability" or "taking into account technologies and financial resources [that parties] command"), IHL rarely contemplates such conditionality. The Third Geneva Convention, for instance, does require that "[p]risoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area,"[122] thereby implying that POWs held by richer countries will enjoy better conditions than those held by poorer ones. But this is an exception.

One might imagine the translation of generic standards into a sub-codex of rules that would further tailor the obligations to differently situated parties. For instance, it is conceivable that richer countries could be held to higher standards of medical evacuation and treatment of wounded combatants, or that richer countries could face greater restrictions on destruction of

116. On the move from rules to standards in IHL, see generally Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 41 Isr. L. Rev. 41 (2008).

117. API, *supra* note 12, art. 51(5)(b) (emphasis added).

118. API, *supra* note 12, art. 57(4) (emphasis added).

119. GCIII, *supra* note 11, art. 19 (emphasis added).

120. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV] (emphasis added).

121. On the general distinction between the operation of rules and standards, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992). *See also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Cass R. Sunstein, *Problems with Rules*, 83 Calif. L. Rev. 953 (1995).

122. GCIII, *supra* note 11, art. 25.

property for operational purposes. All of these sub-rules could be made through interpretations and elaborations of the primary rule, thereby essentially creating CDRs.

This is by no means an obvious move. The question of whether generic standards should be interpreted differentially, depending on the nature of the actor or relationship, is the subject of much debate in numerous areas of the law. As the following sections demonstrate, the conventional wisdom is that if differences in power and capabilities matter in the interpretation and application of IHL standards, they matter only to a very limited extent.

Nevertheless, unlike the adoption of a legislative scheme that imposes different rules on different parties or enforcement schemes that explicitly target stronger parties, it is politically far more plausible to compensate for the regressive effects of the law by interpreting generic standards in a redistributive way. There is certainly a sense, as described earlier, in which the introduction of differentiated obligations is already occurring or being attempted indirectly. For example, through interpretation, compliance monitoring, and judgment of wartime conduct, stronger parties may be held to higher standards than their weaker adversaries. If so, we could imagine the introduction of de facto CDRs by way of custom. Given the political realities and practical sensibilities about efforts that are already taking place, it is this type of introduction of CDRs that I will address.

Of course, one obvious difference between this manner of introducing CDRs and the explicit legislative insertion of CDRs into IEL and ITL is that the latter enterprise was undertaken with the express consent of the parties. I bracket out, for present purposes, the question of the legitimacy of rulemaking by means of monitoring or adjudication. This is because the phenomenon of non-legislative rulemaking is endemic to all law and prevalent in IHL (e.g., in developing customary international law through interpretation and adjudication). Whether it should also be used to introduce CDRs into IHL is the normative question I am interested in here.

To make this inquiry more concrete, I offer some background on the principle of proportionality and the corollary duty to employ precautions in attack, to which I refer in the subsequent normative analysis. Both obligations are framed as standards, both are frequently cited as being violated in military operations, and the application of both obligations requires complex judgment calls and is significantly affected by capabilities and context. The two principles, therefore, easily lend themselves to differential application based on disparities in power and resources.

A. The principle of proportionality

Civilian casualties are part and parcel of any armed conflict. According to some estimates, over the course of the twentieth century, about 62 million civilians have been killed in conflict, in comparison with 44 million military

personnel.[123] Although improvements in technology and battlefield strategy since World War II have lowered the incidence of collateral damage in U.S. combat operations, the overall rate of civilian deaths in comparison with combatant deaths in conflicts across the world has risen.[124]

The principle of civilian immunity in IHL prohibits the intentional targeting of civilians and civilian objects in all circumstances.[125] It is further prohibited to conduct indiscriminate attacks that do not distinguish between military and non-military targets.[126] IHL nonetheless acknowledges the inevitability of civilian casualties and harm in the course of military operations. Following the Catholic-rooted doctrine of double-effect, the law prescribes that as long as civilian harm is the unintended—even if foreseen—outcome of an attack, such harm is a lawful cost of war.[127] To be lawful, however, this unintended damage must not be excessive in relation to the overall military advantage that is anticipated from the attack.[128] This, in a nutshell, is the principle of proportionality.

Much has been written on the indeterminacy of the principle of proportionality and on the unworkable test of comparing the incommensurable values of military advantage and civilian lives.[129] Beyond the conceptual problem, the nature of the modern battlefield poses significant challenges for commanders who wish to comply with the principle. These include the intermingling of civilians and combatants in theaters of war; the greater destructiveness of firepower; and the various unintended—and sometimes unexpected—intervening factors in the execution of attacks, such as bad weather, bad visibility, inaccurate or incomplete intelligence, technical malfunctions, or communications breakdowns.[130]

Additionally, while some elements of the proportionality test have been elaborated upon in international legal materials, others have remained unaddressed or highly contested. For instance, is the military advantage to be gained from the attack assessed tactically (the immediate military gain) or strategically (the contribution of the attack to the overall campaign)?[131] Do

123. *See* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F.L. Rev. 1, 75–76 n.322 (2005).

124. *Id.* at 75.

125. API, *supra* note 12, art. 51(2).

126. API, *supra* note 12, art. 51(4).

127. *See* Thomas Hurka, *Proportionality in the Morality of War*, 33 Phil. & Pub. Aff. 34, 36 (2005).

128. API, *supra* note 12, art. 51(5)(b). This section incorporated the principle of proportionality and prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.*

129. *See, e.g.*, Jack M. Beard, *Law and War in the Virtual Era*, 103 Am. J. Int'l L. 409, 427–28 (2009).

130. *See* Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 Int'l Rev. Red Cross 445, 449–54 (2005); *see also* International Committee of the Red Cross, Commentary on the Additional Protocols of June 8 1977 to the Geneva Conventions of 12 August 1949 ¶ 2212, at 684 (1987).

131. See the different articulation of the proportionality principle under article 51(5)(6) of API ("excessive in relation to the concrete and direct military advantage anticipated") and under article 8(2)(b)(iv)

all civilians carry equal weight when one assesses collateral damage, irrespective of who they are or what they do? To what degree should soldiers risk their own lives for the sake of minimizing enemy civilian casualties? Is there a difference in the proportionality analysis between attacks that are preplanned, those that are directed at targets of opportunity, and those that are in immediate response to an opponent's attack?

As enumerated by the Rome Statute establishing the ICC, any violation of the prohibitions on targeting civilians, indiscriminate attacks, and disproportionate attacks would constitute a war crime under international criminal law.[132] But while the offense of deliberate targeting of civilians is relatively straightforward from a criminal law standpoint, the crime of inflicting "excessive damage" requires both a determination of intent (to cause the damage) and some objective assessment (of the damage as "excessive").[133] As it is likely that attackers would commonly believe that the damage they are about to inflict is justified by the necessities of the military operation, the crime becomes one of a mixed mens rea requirement of intent and negligence.[134]

So far, prosecutors have generally avoided pursuing cases of disproportionate targeting, preferring to focus instead on the deliberate or indiscriminate targeting of civilians. Existing case law on proportionality is therefore sparse, and only in a handful of incidents has its practical application been put to a judicial test. Moreover, in the very few cases in which proportionality was the central issue at hand, the relevant court or tribunal rejected the allegation that the collateral damage inflicted was disproportionate.[135]

Nonetheless, allegations of disproportionate attacks abound in public commentary, human rights monitoring, and political rhetorical clashes.[136]

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of the Rome Statute ("clearly excessive in relation to the concrete and direct overall military advantage anticipated"). API, *supra* note 12, art. 51(5)(6); Rome Statute, *supra* note 19, art. 8(2)(b)(iv).

132. Rome Statute, *supra* note 19, art. 8.

133. *Id.* art. 30. *See* Addendum Part II, Finalized Draft Text of the Elements of Crimes, Preparatory Comm'n for the Int'l Crim. Court, Mar. 13–31, June 12–30, 2000, art. (8)(2)(b)(iv), PCNICC/2000/1/Add.2 (Nov. 2, 2000).

134. In reviewing NATO's bombing campaign against Serbia, the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia determined that the proportionality test must be measured by reference to the "reasonable military commander." *See* Office of the Prosecutor, Int'l Crim. Trib. for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia*, 39 I.L.M. 1257, 1271 (June 13, 2000) [hereinafter "NATO Kosovo Report"]. It further cited recklessness as the applicable standard when it urged against issuance of indictments. *Id.* at 1265.

135. *Id.*; *see also* Gonzales v. Canada, [1994] 3 F.C. 646 ¶ 19 (Can. Fed. Ct.). Here, the Federal Court of Appeal had to address the legal implications of infliction of civilian casualties in a shoot-out between the Nicaraguan armed forces and rebels in the country, for purposes of an asylum request. The Court found that "[t]ragic and appalling as its inevitable result, what the applicant admitted to was participation in a military action that does not reach the concepts of war crime or crime against humanity. It was war, not war crime." *Id.*

136. *See, e.g.*, U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (the "Goldstone Report"), U.N. Doc. A/HRC/12/48 (Sept. 25, 2009); *see also Iraq—Fallujah: Assurances Needed for the Protection of Civil-*

Rivals on both sides of various conflicts regularly accuse each other of indiscriminate or disproportionate attacks. Humanitarian NGOs rarely concede that civilian casualties were the unfortunate outcome of legitimate military strikes. Some advocates continue to direct the attention of courts to disproportionate targeting allegations, though they have been unsuccessful in gaining substantive review.[137] As Michael Schmitt notes, public opinion seems to be moving in the direction of a rebuttable presumption that attacks are unlawful whenever civilians are hurt.[138] He further observes that "somewhat ironically, this tendency has been fuelled by efforts of the armed forces to convince domestic and international audiences that they fight very 'discriminate wars.'"[139] And, as Kenneth Anderson notes, the hovering threat of criminal indictments pushes countries to employ stricter standards of proportionality analysis that possibly go beyond what the law actually requires.[140]

The recently revised American Counter-Insurgency Manual ("COIN")[141] supports Anderson's claim that states may adopt restrictions on warfare beyond those required by IHL. As the first reassessment of the doctrine of fighting irregular forces in over two decades, COIN offers a strategic analysis of counterinsurgency as "wars amongst the people."[142] It is premised on the assumption that in these types of wars, killing civilians is a strategic mistake, the avoidance of which is worth even the lives of American servicemen. "An operation that kills five insurgents," stipulates COIN, "is counterproductive if collateral damage leads to the recruitment of fifty more insurgents."[143] It thus orders American forces to assume a greater risk to themselves in order to minimize civilian casualties.

COIN's instruction on civilian casualties is a stricter application of the principle of proportionality than is actually mandated by the laws of war. It is a strategic, self-interested doctrine, not a legal or (purely) moral stipulation. Nonetheless, in the monitoring of U.S. conduct in Iraq and Afghanistan, this strategic preference is sometimes echoed in the form of a legal or

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ians, Amnesty Int'l (Nov. 4, 2004), http://www.amnesty.org/en/library/asset/MDE14/054/2004/en/ae0baec3-d564-11dd-bb24-1fb85fe8fa05/mde140542004en.html.

137. In 2009, a Spanish court was ready to proceed upon a private criminal claim against seven Israeli officials for their involvement in a targeted killing operation in Gaza, which killed the head of the Hamas military wing in Gaza, along with his wife, child, and fifteen other civilians. The indictment was subsequently dismissed, but on grounds of comity in applying universal jurisdiction, without engaging the substantive allegation about the legality of the targeting operation. *See* S.T.S., Apr. 3, 2010 (Spain), *available at* http://estaticos.elmundo.es/documentos/2010/04/13/auto_gaza.pdf.

138. Schmitt, *supra* note 130, at 445.

139. *Id.*

140. *See* Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 Eur. J. Int'l L. 331, 340–43 (2009) (noting the effect of potential individual criminal liability on notions of reciprocity).

141. David Petraeus, U.S. Dep't of Def., The U.S. Army and Marine Corps Counterinsurgency Field Manual (U.S. Army Field Manual No. 3-24, 2006) [hereinafter COIN].

142. *Id.* ¶¶ 5-38; *see also* Rupert Smith, The Utility of Force 5 (2007).

143. COIN, *supra* note 141, ¶¶ 1-141.

moral obligation. Specifically, some observers have accused U.S. forces of engaging in prohibited "risk-transfer," the choice of means and methods of warfare that protect the attackers by shifting the risk to the local civilians (for example, the use of air strikes instead of ground operations).[144] This criticism supports the general principle that soldiers must protect civilians even at risk to themselves, and it underlies a more implicit claim that U.S. forces are powerful enough to take on a greater degree of risk for the sake of sparing the local population from harm. However, this growing criticism of military operations has led to pushback among some commentators, one of whom has gone as far as to suggest that the U.S. military should renounce the principle of proportionality altogether as too indeterminate and problematic.[145]

For critics and defenders alike, it is evident that the application of the principle of proportionality is highly contingent on interpretation, context, and ultimately, the development of a sub-codex of rules for particular circumstances. These are susceptible to considerations of relative power, capabilities, and resources, all of which potentially affect the application of the standard to differently situated parties. This final point is demonstrated when one considers the corollary duty to employ precautions in attack.

B. The duty to employ precautions in attack

The double-effect doctrine does not stop at the intended/foreseen distinction, but also requires that the actor make efforts to minimize foreseen harms. As adopted by Article 57 of API, the principle of proportionality is complemented by an affirmative duty to "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 or civilian life, injury to civilians and damage to civilian objects."[146] Specifically, those who are planning attacks, when selecting among several options that could yield comparable military advantage, must choose the one that is expected to cause the least collateral harm. These duties exist with regard to attacks on land, at sea, and in the air.[147]

The application of Article 57 in any particular instance requires a determination of what "all feasible precautions" are. The Commentary on API states that this provision "was a subject that required lengthy discussions and difficult negotiations in the Diplomatic Conference, and the text which was finally agreed upon [was] the fruit of laborious compromise between the various points of view."[148] The Commentary specifically notes the indeter-

144. *See, e.g.*, Martin Shaw, *Risk-transfer Militarism, Small Massacres, and the Historic Legitimacy of War*, 16 Int'l Rel. 343 (2002).

145. *See generally* Jonathan F. Keiler, *The End of Proportionality*, 39 Parameters 53 (2009).

146. API, *supra* note 12, art. 57.

147. *Id.*; CIHL, *supra* note 40, at 51–67.

148. International Committee of the Red Cross, *supra* note 130, ¶ 2184, at 678.

minacy of the obligation as a cause for concern among the negotiating parties, especially in view of the fact that breach of the obligation would constitute a war crime.[149]

The guidance offered by the Commentary remains general and uniform for all belligerents. It notes that "Article 57 applies to all attacks, whether they are acts of aggression or a response to aggression."[150] Naturally, the particular theater of war might affect the application of the obligation; thus, "[i]t is clear that the precautions prescribed [in the Commentary] will be of greatest importance in urban areas because such areas are most densely populated."[151] But this is a situational difference that conditions the obligation on the nature of the target, rather than on the capabilities of either the targeting or defending forces.

In considering the need to employ intelligence and reconnaissance means to ascertain the military nature of targets, the Commentary notes with agreement one delegation's remark that the ability to comply "[depends] to a large extent on the means of detection available to the belligerents."[152] It says nothing further, however, about the duties to develop or acquire such technical means.[153]

As for choice of means and methods of the attack itself, the Commentary states that the need to consider the precision and range of weapons coincides with the military interests of military commanders "wishing to economise on ammunition and to avoid hitting points of no military interest."[154] But this might not always be true. Precision-guided munitions are generally more expensive than comparable gravity or "dumb" munitions (although their costs are constantly decreasing),[155] they are not always available, and they might be less effective in destroying targets that are spread out over a wide territory.[156] As in the case of intelligence, the Commentary is silent on whether there are derivative duties to incur greater costs in using more precise and expensive weapons, to prefer the purchase of precision weapons, or to develop precision or nonlethal weapons as ways of complying with Article

149. *Id.* ¶¶ 2184–87, at 678–79.
150. *Id.* ¶ 2188, at 679.
151. *Id.* ¶ 2190, at 679.
152. *Id.* ¶ 2199, at 682.
153. *Id.*
154. *Id.* ¶ 2200, at 682 (further stipulating that "[w]hen a well-placed 500 kg projectile is sufficient to render a military objective useless, there is no reason to use a 10 ton bomb or a series of projectiles aimed without sufficient precision").
155. As one commentator notes, "contrary to a decade ago, precision-guided weapons are now reasonably affordable and adequately available." Stuart Walters Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL L. REV. 115, 168 (2000). However, Belt later concedes that "[e]ven if, though, the costs of the weaponry eventually were to become comparable to conventional bombs, there is still the issue of available platforms (adequate aircraft) and training of pilots, which militates against utility of PGMs [Precision-Guided Munitions] by LDCs." *Id.* at 170.
156. *See id.* at 130.

57. Several countries have expressed their explicit view that there are, in fact, no such duties.[157]

Formal duties aside, the possession and use of precision-guided munitions invites different types of monitoring by third parties. Capabilities raise expectations: the greater intelligence and precision capabilities a military possesses, the greater the expectation that it will use them to avoid civilian harm.[158] For the attacker, the use of precision weapons provides an evidentiary case that she did not engage in indiscriminate attacks.[159] At the same time, perhaps ironically, if the weapon misses its target for whatever reason, it is harder for the attacker to protect herself from such allegations. Amnesty International reports were far more critical of American targeting operations in Kosovo (1999) and Iraq (2003) than of Iraq's launching of SCUD missiles at Israel (1991).[160] This may be a case of different moral expectations, but it also, at least in part, suggests a mindset of "can implies ought."

To sum up, a common-but-differentiated principle of proportionality and the duty to take precautions in attack might impose substantially higher degrees of responsibility on richer or more technologically advanced countries than on poorer ones. According to official pronouncements, differences in capabilities are taken into consideration only to a very limited extent. But such differences may matter. One could imagine a differential reading of the law that would impose on richer countries the obligation to spend more money on the deployment, procurement, or development of better intelligence and more discriminating munitions. In a less realistic analogy from IEL, differentiation might even suggest a duty for richer countries to share intelligence or more precise targeting technologies with less capable parties.

Furthermore, the test for what constitutes "excessive" collateral damage may be lower (that is, fewer civilian casualties) for richer countries. As a possible derivative, it might be plausible to argue that in considering the "military advantage" emanating from attacks, the preservation of soldiers' lives is more important for the weak than for the strong.[161] For this reason, powerful countries might have to assume a greater risk to their combatants in order to minimize civilian casualties on the enemy's side. To offset or compensate for the harm to civilians, richer countries might also be expected to offer compensation to the enemy even where no violation of the law had occurred,[162] or to offer direct assistance in the form of medical supplies, foodstuffs, and other humanitarian necessities.

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157. *See* CIHL, *supra* note 40, at 51–67.

158. *See* Schmitt, *supra* note 130, at 457.

159. *See id.* at 455.

160. *See id.* at 454–56.

161. As Schmitt notes, "when one chronically suffers defeat, any success looms large." *Id.* at 28.

162. Present-day IHL imposes a duty to make reparation in cases of violation of the law, even though such reparations are difficult to enforce and are rarely made. *See generally* Emanuela-Chiara Gillard, *Reparations for Violations of International Humanitarian Law*, 85 Int'l Rev. Red Cross 529 (2003).

In the following sections, I offer an analytical framework for testing the normative validity of such a differential reading of the standard of proportionality and its corollary duties.

IV. CDRs in War—The Normative Framework

To recall, the justifications offered for weaving CDRs into IEL and ITL regimes follow one of four rationales: a utilitarian calculation of welfare maximization, notions of justice and fairness built on distributive justice, corrective justice, and Samaritanism. Proponents of CDRs suggest that these rationales justify a differential scheme of obligations that is correlated with differences in resources and capabilities.

In this section, I borrow these four rationales and transpose them onto the world of IHL. The purpose of this exercise is twofold: first, to test the degree to which these rationales are convincing when it comes to justifying the introduction of CDRs into IHL, and second, to engage with the broader question of whether war is "like" or "unlike" other spheres of international relations—hence exploring the extent to which the regulation of war can and should be informed by the architecture of other international legal fields.

For simplicity of organization, I divide the study into two parts. The first addresses the utilitarian calculus, and the second engages with the non-utilitarian justifications (although there are some obvious interfaces between the two). Although it does consider the potential implications of particular types of conflicts, this framework is intended to be generic for all armed conflicts.

Throughout the analysis, I use the terms "rich," "powerful," "capable," and similar terms interchangeably. I concede that there may be important differences among these adjectives (e.g., Japan is a rich country with a small army, China is often described as a developing country although the People's Liberation Army is the largest armed force in the world), but assume that for investment purposes, economic resources and military capabilities are exchangeable (that is, a richer country can invest in better technology or in more soldiers). I am far more skeptical about the fungibility of economic resources and human lives, for reasons I explain later. I further assume that these capabilities are relative, not absolute, and that they are dependent on the particular adversary in the particular conflict; a party might be strong vis-à-vis one enemy, but weaker when facing another. Although the assessment of capabilities and resources is often contested (as in the case of environment or trade), at least in some cases, disparities are obvious.

A. *Maximizing humanitarian welfare*

As noted earlier, the utilitarian arguments advanced to support CDRs in IEL and ITL rest on the belief that to be truly effective, both regimes require the broadest possible participation. This is because the environment is a common good and trade liberalization is as effective as the number of countries willing to demolish barriers to trade and participate in the regime. Under both regimes, development is considered a global interest, whether a real or constructed one.

Given inequalities in capabilities and in the effects of compliance on the developmental needs of various countries, there must be some differentiation in obligations. The participation of poorer countries cannot be secured if they are held to the same obligations as the rich, and if the rich are held to the same obligations as the poor, the regime would be ineffective. Hence, in a perfect world, each country (or group of countries) is held to a level of obligations that best reflects its capabilities. To the extent that existing regimes do not achieve such perfect differentiation, but merely a rough approximation of it, the fault lies in unequal bargaining and imperfect politics. Where appropriate, side payments should be used to further narrow gaps in the equitable distribution of costs and benefits under the regime and secure participation by the weak.

1. *The analogy—preliminary assumptions*

In considering the transposition of the utilitarian argument onto the world of IHL, two preliminary sets of assumptions are in order. The first has to do with the definition and composition of "humanitarian welfare." An assessment of humanitarian welfare that was perfectly loyal to IHL would include only the welfare of civilians and incapacitated soldiers (*hors de combat*) and omit the welfare of able soldiers. For reasons on which I have elaborated elsewhere,[163] I believe that the lives of able-bodied soldiers should be accorded greater attention by IHL, and that a humanitarian welfare calculation that essentially ignores the human lives of an entire class of people is an untenable one. In remaining loyal to the logic of IHL and still demanding some value for the lives of combatants, the framework thus assumes that the lives of civilians weigh more than those of able combatants; however, the latter will still carry a positive value in the overall humanitarian calculation (for instance, when we consider a rule that requires stronger parties to endanger more of their own combatants for the sake of sparing enemy civilians).

For simplicity, the framework ignores the effects of war on civilian objects and the environment and focuses on the welfare of human beings alone.[164]

163. *See* Gabriella Blum, *The Dispensable Lives of Soldiers*, J. Legal Analysis (forthcoming 2010).

164. I add this caveat notwithstanding international rules that grant special protection to certain types of objects, such as cultural property. *See, e.g.*, API, *supra* note 12, art. 16.

The discussion of human welfare captures only direct harms from war. Other worthy social goals that affect individuals' welfare—education, general healthcare, law and order, etc.—enter the humanitarian welfare calculation through the consideration of the opportunity costs of increased investment in humanitarian welfare. This is akin to the ways in which they feature in the opportunity costs of investing in better environmental practices or opening up markets for competition.

It is important to note that when weighing the welfare of civilians, a question arises as to whether all civilians—our own and the enemy's—are of equal value. The generic assessment of the lives of all civilians and civilian objects, regardless of national origin, has been advanced by some proponents as required under IHL,[165] while critiques by others support national preference for the welfare of one's own nationals.[166] In the utilitarian framework, I follow the assumption about the generic civilian, as the framework takes a global vantage point and considers humanitarian welfare as a public good. I relax the assumption about the generic civilian when weighing non-utilitarian arguments, which are more distributive in nature.

A second set of assumptions has to do with the framework of IHL more broadly. Here, we must presume that IHL is, in fact, effective in promoting humanitarian welfare, and the humanitarian consequences of compliance with the law are generally superior to those of noncompliance. I concede the impossibility of putting this assumption to an empirical test, which would be rife with counterfactual exercises, but nonetheless proceed upon it. This is similar to the ways in which the use of CDRs in other spheres of international regulations is premised on the assumption that the regimes incorporating them are effective—even if not the *most* effective one could imagine—in promoting their stated goals. Any departure from this assumption collapses the entire enterprise of an international regime and makes the utilitarian analysis of CDRs redundant. Notwithstanding this assumption, the discussion of the possible unintended consequences of ratcheting up humanitarian obligations illuminates the challenges already facing the existing IHL regime.

Furthermore, in remaining loyal to the skepticism of IHL with regard to dependence on jus ad bellum, I ignore the question of whether the parties are conducting a just or unjust war. Indeed, one could suggest tying levels of humanitarian obligations to the justness of the war, and some have al-

165. *See* Avishai Margalit & Michael Walzer, *Israel: Civilians and Combatants*, N.Y. Rev. Books, May 14, 2009, at 21–22, *available at* http://www.nybooks.com.ezp-prod1.hul.harvard.edu/articles/archives/2009/may/14/israel-civilians-combatants/.

166. *See* Hurka, *supra* note 127, at 59–63; Asa Kasher & Amos Yadlin, *'Israel and the Rules of War': An Exchange*, N.Y. Rev. Books, June 11, 2009, at 77, *available at* http://www.nybooks.com/articles/archives/2009/jun/11/israel-the-rules-of-war-an-exchange/; *see also* Iddo Porat, *Preferring One's Own Civilians: Can Soldiers Endanger Enemy Civilians More Than They Would Endanger Their Own Civilians?* 4 (Univ. San Diego Sch. of Law, Pub. Law and Legal Theory Research Paper Series, Aug. 7, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1445509.

ready done so,[167] but I do not address this option here. Instead, my focus is solely on differentiation that is tied to resources and capabilities.

2. *The analogy—a perfect IHL system*

To return to the analogy, the utilitarian argument for CDRs, as transposed from IEL and ITL regimes, would have to begin with a presumption that there is a global interest in promoting humanitarian welfare. Humanitarian welfare is, of course, most immediately relevant to those who belong to societies at war, are within the territory where war takes place, or are otherwise immediately connected to war. In this sense, it is fundamentally different from the environment, which is a global good, and is probably more akin to trade, which is commonly thought of as a club good. The immediate effects of IHL violations are probably even more limited in scope than those of ITL, in the sense that trade relations often affect third parties more directly than war crimes do.

Yet both war and humanitarian welfare are matters of global concern—if not by the virtue of human nature, then by design. Wars do have spillover effects, such as refugees and political instability. Threats to peace and security fall within the purview of the U.N. General Assembly and Security Council as matters of the highest interest to the whole of the international community, wherever they take place. The entire international community is directed under international law to intervene to stop genocide, war crimes, and crimes against humanity.[168] Universal jurisdiction allows all states to try and punish individuals who commit grave breaches of humanitarian rules. All these provisions are often ignored in practice, but in potential they espouse a view that humanitarian concerns are global and universal and that human lives are a global good in themselves.

In this sense, humanitarian welfare may be likened to development: although development is of direct and immediate concern only to the developing world, both IEL and ITL suggest that it is a global aim toward which the richer states must contribute their share. The same is true for the concept of human rights, which the international community has decided to make a global matter. If humanitarian welfare is likewise conceptualized as a global matter, and if the organizing principle with regard to global goods like the environment is that richer countries are expected to contribute in equitable—rather than equal—share, then stronger parties should be expected to contribute more to promote greater humanitarian protection.

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167. *See* McMahan, *supra* note 32, at 378–79. *But see* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 54–55 (2009) (arguing that while the concepts have often merged in practice, jus ad bellum and jus in bello should remain distinct).

168. *See* Rep. of the Int'l Law Comm'n, 53rd sess., Apr. 23–June 1, July 2–Aug. 10, 2001, art. 40, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001).

A maximally humanitarian model of war would require wars to be fought without a drop of blood being shed, perhaps through computer simulations or robots that duel one another.[169] But this model is unlikely to exist in the near future. Given the existence of war as we know it, a perfect IHL regime would have to be based on an optimum investment in humanitarian welfare based on each party's capabilities. Such investment could include expenditure on the development or procurement of precision-guided munitions, provision of humanitarian assistance to the enemy's civilians, or the shifting of risk from the weaker party's onto the stronger party's combatants. In a less-than-perfect world, obligations would not fully correspond to capabilities, but some rough differentiation would still promote humanitarian welfare to a greater extent than occurs under the current system.

Despite these possibilities, two features of war—the relatively strong incentive to defect from limitations on the conduct of hostilities and the absence of a wider web of international relations where nonstate armed groups are concerned—give reason to suspect that differentiation, even if feasible as a political matter, would fail to promote overall humanitarian welfare.

3. *Incentives to defect*

The regulation of trade, the environment, and war is a mixed-motive enterprise. States have an interest in cooperation, but they also have strong incentives to defect. Oftentimes, what induces countries to defect from cooperative endeavors is the desire to free-ride and escape the costs entailed by compliance. In environmental regimes, countries may wish to avoid the costs of developing green industries and technologies, or of shutting down industries and operations that pollute. In maintaining barriers to competitive trade, a country might seek to protect local producers and manufacturers from suffering losses.

The adversarial nature of war suggests intuitively that the incentives to defect from humanitarian constraints would be more powerful than in other cooperative regimes, since the costs of compliance affect countries' abilities to fight effectively. When soldiers are sacrificed in combat to minimize civilian casualties, there is a direct loss of soldiers' lives, as well as a diminished capacity to inflict further harm on the enemy. When money is transferred to aid enemy civilians, it is at the expense of greater expenditure on munitions and supplies that are necessary for the war effort. One way of framing this intuition is that the harm to others from noncompliance with environmental or trade regimes, for the most part, is *incidental* to the interest in avoiding the costs of compliance, whereas the harm to the enemy is *instru-*

169. This, of course, assumes only that the conduct of war is humanitarian, and ignores the consequences of victory or defeat on humanitarian welfare (or in other words, the justness of the cause of either party).

mental in winning a war. The incentive to harm the enemy therefore seems to double the costs of compliance with humanitarian obligations.

This intuition may not be accurate at all times. The incentives to defect from cooperation over public goods may be stronger than the incentives to defect from constraints on warfare—the latter of which are, although universal in nature, ultimately bilateral in application.[170] Legal constraints notwithstanding, this is especially true if the would-be defector fears retaliation by its adversary.

Moreover, defection from environmental or trade regimes may be motivated by more than free-riding or avoidance of compliance costs in a narrow sense. A country that has a comparative advantage in coal-based industries would have an incentive to defect from an environmental regime that caps emissions not only to spare the immediate costs of compliance, but also to capture monopolist surplus from other economies. Similarly, predatory pricing and dumping are violations of free trade rules that are intended to weaken the competitiveness of trading partners. In both of these cases, harm to others is not only incidental, but instrumental to the benefit of the defector.

Two primary considerations, however, mitigate the incentives to violate trade or environment agreements but do not necessarily hold true in the case of war. One such consideration is that noncompliance with economic or climate agreements is often harmful to the defector itself, even if defection goes unpunished: given some critical mass of compliance, adherence to environmental agreements offers tangible benefits to both powerful and weak states, as all are affected (albeit to varying degrees) by climate change.[171] If a developing country continues to pollute, it will benefit from industrial production but will also suffer the effects of climate change (under some accounts, more than the developed world will).[172] Compliance with trade agreements and the promotion of development also offer some tangible benefits to all states; the poorer gain from more prosperous economies, and the richer profit from more lucrative trading and investment markets.[173] If a developing country erects trade barriers, it protects local producers and manufacturers, but it also entrenches structural inefficiencies.

Compliance with constraints on warfare, however, does not necessarily contribute to a party's own welfare. Under COIN-type logic, in some theaters of war, caring for the enemy's civilians might offer real benefits: win-

170. *See* Rene Provost, Asymmetrical Reciprocity and Compliance with the Laws of War 4–5 (Jan. 14, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1427437 (noting that "states have indeed insisted on a direct quid pro quo in agreeing to be bound by humanitarian law" despite the rejection of the *tu quoque* doctrine for violations of IHL).

171. Drumbl, *supra* note 59, at 924–29.

172. *See* Posner & Sunstein, *supra* note 72, at 1569 (addressing the issue that the United States benefits less from climate change agreements than developing countries do).

173. *See* Peter M. Gerhart, *Slow Transformations: The WTO as a Distributive Organization*, 17 Am. U. Int'l L. Rev. 1045, 1086–88 (2002).

ning the support of the local population, avoiding opposition from audiences at home and abroad, and escaping potential third party intervention and adjudication. In other theaters, however, these immediate interests would be far weaker, and the concern for the enemy's humanitarian welfare would remain in the realm of a general normative commitment. In still other theaters, the interest might well be the opposite—weakening the domestic population so as to make victory more likely. The abolition of reciprocity as an enforcement mechanism of the system has further diminished the immediate interest of a powerful country to comply with IHL.

Another consideration that operates in the trade and environmental regimes, but not necessarily in IHL, is the nature of the parties regulated under the regime. International agreements are concluded among states. States undertake to ensure compliance with obligations, either directly (that is, ensuring that all governmental actions are in conformity with the agreement) or indirectly (that is, enforcing compliance on private entities operating within the state). No international agreement exists in a vacuum; all are part of a web of interstate relations. When governments weigh the burdens and benefits of compliance with obligations, they must consider their actions in light of the fact that they are repeat players on the international plane, with considerations of cooperation that go beyond the specific regime or obligations. Even absent the formal enforcement mechanism of any one agreement, the web of interactions suggests that there may be severe costs to noncompliance that will spill over to other spheres, or positive inducements to comply through side-payments or deals struck in other spheres.

IHL agreements are also concluded among states. But even though IHL purports to regulate the activities of nonstate actors as well, the nature of belligerent nonstate actors makes them far less susceptible to enforcement of compliance by states. Nonstate actors are generally not direct parties to IHL conventions[174] and do not submit themselves to the authority of the governments of the parties. They either fight against these governments (for example, in civil wars) or fight outside any governmental structure (for example, international terrorism). Thus, they are far more autonomous than domestic or transnational actors. In addition, under IHL, the right of nonstate actors to participate in lawful hostilities is far more constricted than the right of state actors to fight. The law thus finds itself in a somewhat paradoxical position of purporting to guide the actions of those whose actions are inherently unlawful.

Furthermore, nonstate armed groups do not usually form a web of international relations with other countries and are less susceptible to package deals or side payments. Their preferences with regard to compliance with IHL are set first and foremost by their belligerent interests, and they are

174. There is an exception under API that allows nonstate parties who fight colonial domination, alien occupation, or racist regimes to lodge a declaration accepting the terms of the Protocol. *See* API, *supra* note 12, art. 96(3). To this day, no nonstate actor has exercised this option.

constrained only by the preferences of the domestic constituencies they purport to represent. Given this structure, the incentives for nonstate actors to comply with any humanitarian constraints, which by definition are intended to benefit a stronger adversary's population, are inherently weak. The elimination of reciprocity from the system further diminishes these incentives, as the stronger adversary remains bound by the humanitarian constraints that benefit the weaker actor's constituency.

Both of these considerations—compliance as self-interest and compliance affected by other issue areas—suggest that the incentives to conform to IEL and ITL agreements are stronger than those in IHL, particularly when one or more of the belligerent parties in an IHL agreement is a nonstate actor. They also suggest a possible difference in the actual welfare effects of CDRs in IHL, in comparison with those operating in other fields.

As noted earlier, the current system of IHL allows more powerful states to maintain their advantage while making it virtually impossible for weaker parties to hold ground. Thus, there are strong incentives for the weak to defect. It is possible that narrowing the power gap by imposing greater constraints on the more powerful would decrease such incentives. For example, if powerful countries were barred from using air power against enemies that lacked air defense systems, the weaker enemies might be less inclined to practice shielding.[175]

But this is not the only possibility. One could also imagine that further constraining stronger parties might create a moral hazard for weaker enemies. If a party cannot rely on air power, it must rely instead on ground troops, at a higher risk to itself. Facing this constrained enemy, a weaker party might be even more encouraged to practice shielding, as the risk to the stronger forces increases and the prospects of military gain loom larger. Further complicating predictions about the humanitarian consequences of this hypothetical is the question of the relationship between the weaker party and its own civilian constituency: civilian casualties can help a weaker party bolster its image as the lamb fighting the lion, thereby garnering international support for its own cause and condemnation of its enemy's. At a certain point, however, the local population might revolt against its own leaders for placing civilians at excessive risk.

The degree of risk of moral hazard has to depend, to some extent, on the type of obligation concerned: compare, for instance, a duty to provide food and medical assistance to enemy nationals harmed by the war against a duty to risk more soldiers to protect enemy civilians. The latter would seem more susceptible to exploitation (for instance, through shielding) than the former, as the weaker party's interest in extracting monetary assistance for the local population would generally be weaker than its interest in inflicting more

175. On the other hand, it might also discourage weaker parties from investing in air defense systems; to the extent that this is a realistic possibility, its ultimate effects on humanitarian welfare are unclear.

harm on enemy forces.[176] Furthermore, the moral hazard concern and the incentives to comply or defect from humanitarian constraints will vary with the type of war fought: the more existential the war is perceived to be, the weaker the incentives for compliance with IHL are likely to be.

It is possible that in order to secure greater compliance, one would have to imagine, perhaps counter-intuitively, lowering the bar further for weaker parties instead of raising it for the powerful (of course, under such circumstances, more compliance may be tautological, as less effort would be required in order to comply). A positive net humanitarian benefit could occur if the prospects of conducting "lawful warfare" were sufficiently attractive to induce some degree of compliance; such compliance, even if under more relaxed obligations, would yield a better outcome than under complete defection from existing obligations. For example, assume that weaker parties currently do not make any serious effort to minimize civilian casualties in their attacks, and that consequently, on average, attacks result in a 6:1 civilian to military casualty ratio (that is, six civilians killed for every enemy combatant killed). If a CDR gave weaker parties the ability to engage in attacks that yield a 4:1 ratio, even though this ratio would be illegal for stronger parties, the weak might be inclined to make some effort to comply. This hypothetical scenario would require a prediction—which is uncertain—about the relative attraction of conducting *lawful* warfare in comparison with the costs of the added constraints. The humanitarian consequences of lowering the bar for weaker parties thus remain uncertain and may very well vary among parties, types of obligations, and intensity of conflicts.

This analysis suggests that there may be another mechanism through which raising the bar for stronger powers might lead to better overall compliance with IHL: namely, through the expressive power of the law, or more broadly, the interaction between law and social and political norms. Tying the hands of more powerful states in the name of humanitarian concerns, especially when this hand-tying is at the advertised consent of the more powerful, may serve to spread and reinforce humanitarian ideals. These ideals may then shape the preferences of weaker parties' domestic constituencies and cause leaders to take their own obligations more seriously. This, to some extent, is the logic behind COIN, which addresses the problem of civilian casualties as affecting the "hearts and minds" of the local population.[177] In the face of true humanitarian commitments, it may be more difficult for weaker parties to garner support for fighting outside the rules. This, of course, is only a possibility. It may or may not fit different political con-

176. The weaker party might still have an incentive to endanger local civilians if it believed that the assistance that the enemy was bound to extend to these civilians would deplete valuable resources. I address this possibility below in the context of Samaritanism and the Samaritan's dilemma. *See infra* Part IV, Section B(3).

177. *See* COIN, *supra* note 141, ¶ A-26.

texts, and it may or may not be sufficient to override short-term incentives to defect in preference for military advantage over humanitarian values.

4. *The effects of CDRs on the propensity to go to war*

An altogether different consideration involves the possible effects of CDRs on the propensity to go to war in the first place. In the context of humanitarian interventions, the argument has been made that raising the bar of compliance for the intervening powers is warranted not only on purely humanitarian grounds, but also because it may distinguish sincere interventions from those that mask self-interest.[178] This argument has been met with the counterargument that deepening humanitarian obligations would unduly deter those capable of intervening from doing so and would perhaps embolden rogue leaders to engage in mass atrocities without fearing intervention.[179]

A somewhat similar dilemma arises with regard to CDRs. If CDRs raise the bar for stronger parties, these states may calculate the costs of war differently and exercise further caution against the use of military force to begin with; correspondingly, if soldiers and citizens of the more powerful party were aware of the increased burdens of war, they would be more hesitant to support their government's belligerent policy. At the same time, the greater constraints on stronger parties might encourage weaker parties, believing they stood a greater chance of success, to initiate conflicts, thereby increasing the overall incidence of violence.

This consideration, too, would depend on the type of CDR, the nature of the parties in the war, and the perceived stakes of the war for the parties. Thus, the obligation to provide food or medical assistance to the enemy population would seem to raise fewer concerns about incentivizing the enemy than would an obligation regarding risks to the powerful party's soldiers.

Finally, it might be necessary to consider the possible tradeoff between humanitarian constraints and the duration of wars. It is possible that more "humanitarian" wars may continue for longer periods of time and ultimately inflict greater harm than would unconstrained, decisive wars. If such a tradeoff does exist, this would warrant caution against any attempt to place further constraints on warfare in the guise of CDRs. But the existence of such a tradeoff would also raise questions about all constraints on warfare and, indeed, about the entire enterprise of IHL. Since I began with the preliminary assumption that compliance with IHL does lead to better humani-

178. *See* INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 168–70 (2000), *available at* http://www.reliefweb.int/library/documents/thekosovoreport.htm.

179. *See* David Wippman, *Kosovo and the Limits of International Law*, 25 FORDHAM INT'L L.J. 129, 149 (2001).

tarian outcomes than defection does, I bracket out the question of the longer-term effects of more humanitarian wars under that same logic.

5. *An alternative scheme—CDRs conditional on reciprocity*[180]

One might imagine a scheme of CDRs that raise the bar for the more powerful but only on the condition that the weaker party complies with its own, relatively lower obligations. The stronger side would still be bound by the threshold obligations regardless of its enemy's conduct, under the same rationale that drove the elimination of reciprocity as an organizing principle of the system in the first place. Additional burdens, however, would be conditional on compliance by the weaker side with its original obligations. This scheme could be employed either through voluntary individual undertaking by the stronger party (so as to create incentives for the weaker party to comply) or through a conditional application of a differential scheme by third parties.

The advantage of this scheme is that it tames, to some extent, the impetus for the weak to exploit the additional burdens on the strong. The disadvantages are obvious in the case that the violations occur on the part of the stronger party. The effectiveness of the scheme also depends on the interest of the weaker party in increasing overall humanitarian welfare. If the weaker party has no such interest and views humanitarian suffering as a strategic asset, there would be no incentives for it to comply with obligations so as to invite a higher degree of compliance by the more powerful enemy. Naturally, if the taming exercise proves ineffective, there would be no increase in overall humanitarian welfare. As a brief observation, it also seems that many of the similar considerations outlined earlier with regard to when the moral hazard risk is likely to loom larger (particular types of CDRs, existential versus choice-wars, etc.) are equally relevant to a scheme based on some element of reciprocity and would affect the chances of its success.

In sum, while a perfect correlation of obligations with capabilities is not possible, a regime with some CDRs that take capabilities into account may work. However, the humanitarian effects of such CDRs are uncertain, especially when the war is fought with or between nonstate actors. The instrumental harming of the enemy might generate a moral hazard that would induce the weaker parties to conduct further attacks—either within an ongoing war or in initiating wars—and would make the overall humanitarian outcome of the scheme uncertain. If so, the intuition that raising the bar of obligation yields better humanitarian results may be misguided. Ultimately, the utilitarian calculus of humanitarian welfare would depend on the type of obligation the CDR covers (for example, economic assistance versus risking of soldiers), the type of war fought (for example, state-to-state, state-to-group), the intensity of preferences on both sides (for example,

180. I am indebted to Matthew Stephenson for suggesting this idea to me.

existential versus choice-war), and the effect of the local constituencies on the preferences of the fighting forces.

Notwithstanding the indeterminacy of the utilitarian calculation, given the considerations just suggested, there is reason to believe that CDRs in the form of obligations to procure precision-guided munitions or to offer direct humanitarian assistance might increase overall humanitarian welfare. On the other hand, an obligation to endanger more soldiers so as to minimize harm to civilians on the enemy's territory might entail a greater risk of moral hazard. Such a regime is therefore more debatable in terms of its probable humanitarian impact.

B. Non-utilitarian arguments: distributive, corrective, and deontological (samaritanism) justice

Some justifications for CDRs in IEL and ITL regimes rest on the argument that differential obligations promote substantive equality: CDRs may readjust burdens (through exempting poorer countries from certain obligations), redistribute benefits (through direct payments in information, technology, etc.), and correct against past injustices. For example, when there are special circumstances that make one country particularly dependent on another, such as when a poorer country faces a health epidemic which is treatable by drugs patented in a richer country, Samaritanism may require the rich to withdraw their patent protections.

Certain types of justice arguments are deontological and ignore the potential effects of differential schemes on overall welfare; others are more consequential in nature. In the transposition of non-utilitarian justifications onto the field of IHL, I include both deontological and consequential rationales. Unlike the utilitarian framework, consequential justice arguments are not driven by a pure concern for overall levels of humanitarian welfare, but only for the possible humanitarian effects of their immediate application.

Proponents of distributive, corrective, or Samaritanism theories of international justice have not explicitly addressed the application of those theories to the context of war or humanitarian welfare. In particular, justice theorists who argue for obligations to redistribute wealth and other resources have neither expressly extended nor explicitly excluded those obligations in application toward one's enemies. For those who, like Thomas Nagel[181] or David Miller,[182] have taken a more nationalist view in holding that a country's obligations to its own citizens lie paramount over any obli-

181. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005). For a similar view, albeit under a different rationale, see Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF. 3 (2007).

182. DAVID MILLER, ON NATIONALITY 65–68 (1995).

gations to foreign nationals, this exclusion is not surprising.[183] But the omission of war is noticeable even among those who, like Peter Singer,[184] Thomas Pogge,[185] and Charles Beitz,[186] have argued for transnational obligations that run parallel to national ones. This latter group, which is cosmopolitan in its sensibilities, has tended to focus on redistribution of wealth, access to healthcare, and even equitable division of labor in the treatment of refugees as parts of what the developed world owes the developing states.[187] However, no member of this group has addressed the question of what a country owes its enemies. Even the feminist school of international law, which has advanced the notion of "ethics of care" in the conduct of international relationships, has stopped short of advocating care for one's adversaries.[188] Nor has the question of duties to the enemy been addressed in the proliferate literature on war *as* justice.[189]

Moreover, while just war theory, including the rules of IHL, is supposedly founded on morality and justice, the conception of this justice seems to apply generically to all. Michael Walzer views Just War as the wartime manifestation of certain shared (that is, near-universal) moral principles.[190] John Rawls follows Walzer's ideas and treats Just War as a form of the just Law of Peoples in times of war.[191] Neither Walzer nor Rawls, however, suggests that Just War rules should be applied differently to differently situated parties. In fact, Walzer's view of international justice is generally a communitarian one,[192] while Rawls seems to suggest that the right to engage in war in self-defense is granted only to "well-ordered peoples" or "decent peoples."[193] When discussing the conduct of hostilities, Rawls argues:

183. For an even stricter denial of the concept of global humanitarianism and a clearer division between "friends" and "enemies," see Carl Schmitt, The Concept of the Political 19–79 (George Schwab trans., 1996) (1932).

184. Peter Singer, One World 150–95 (2002); Peter Singer, *Famine, Affluence, and Morality*, 1 Phil. & Pub. Aff. 229, 233–36 (1972).

185. Thomas Pogge, World Poverty and Human Rights 20–26 (2002).

186. Charles Beitz, Political Theory and International Relations 50–66 (1979).

187. *See, e.g.*, *id.* at 150–53.

188. *See generally* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 Am. J. Int'l L. 613 (1991); *see also* Fiona Robinson, *Methods of Feminist Normative Theory: A Political Ethic of Care for International Relations*, *in* Feminist Methodology for International Relations 221 (Brooke A. Ackerly et al. eds., 2006).

189. Over the past two decades, this literature has tended to focus on the justifications for humanitarian interventions. *See* Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, *in* Global Justice: Nomos XLI 12 (Ian Shapiro & Lea Brilmayer eds., 1999); *see also* Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law 450–54 (2004); Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, *in* Humanitarian Intervention: Ethical Legal, and Political Dilemmas 93, 93–96 (J. L. Holzgrefe & Robert O. Keohane eds., 2003).

190. Michael Walzer, Just and Unjust Wars xxiii–xxiv, 12, 15 (4th ed. 2006).

191. John Rawls, The Law of Peoples 89–90, 95 (1999).

192. *See, e.g.*, Michael Walzer, *The Distribution of Membership*, *in* Global Justice: Seminal Essays 145 (Thomas Pogge & Darrel Moellendorf eds., 2008) (expressing Walzer's views on the rights of states to regulate immigration and refugee-flow into their country). In the war context, however, Walzer believes in the division of roles between combatants and civilians, holding that civilians of either side are generically innocent for purposes of the risks soldiers assume. *See generally* Kasher & Yadlin, *supra* note 166.

193. *See* Rawls, *supra* note 191, at 91.

> Well-ordered peoples must respect, so far as possible, the human rights of the members of the other side, both civilians and soldiers, for two reasons. One is simply that the enemy, like all others, has these rights by the Law of Peoples. The other reason is to teach enemy soldiers and civilians the content of those rights by the example set in the treatment they receive. In this way the meaning and significance of human rights are best brought home to them.[194]

Nothing in Rawls's theory suggests that "well-ordered peoples" must protect the human rights of the "other side" more than the other way around. In any case, what distinction he suggests between "well-ordered" and "not well-ordered" peoples rests on political organization, not on power or capabilities.

Should the lack of explicit treatment of the context of war by existing theories of international justice be understood as mere omission or as a deliberate exclusion that implies that war is a distinct and peculiar context? In other words, can the justice arguments that have been advanced in support of CDRs in IEL and ITL be applied to support CDRs in IHL? Or does war construct a unique type of relationship that precludes a neat transposition of distributive, corrective, or Samaritanism notions of international justice?

1. *Distributive justice*

A distributive justice argument in IHL would suggest the following: current IHL rules that are formally equal result in disparate burdens and benefits for states of different strength. The costs of complying with humanitarian obligations (such as employing precise weapons or endangering combatants for the protection of civilians) are higher, in relative terms, for weaker parties. Humanitarian benefits are also, for the most part, unevenly distributed—stronger parties are better able to protect their civilians from the harms of war, since, among other capabilities, they have the ability to provide sustenance and healthcare and employ sophisticated defense systems. Powerful countries also have the ability to shift war onto the enemy's territory so that the enemy's civilians face greater perils than the powerful country's nationals. And while it is true that given power asymmetries, IHL serves to protect the humanitarian welfare of the weaker party more than that of the stronger party (which can better defend itself by mere reliance on its superiority in power and resources), it is this same IHL that entrenches and even exacerbates power asymmetries by not correcting against them.

Under a distributive justice logic, CDRs should promote a more equitable allocation by enhancing the burdens of stronger powers and forcing them to employ more precautions, assume greater risks, or simply transfer

194. *See* Rawls, *supra* note 191, at 96 (citation omitted).

direct aid to the enemy population. This redistribution of burdens would contribute to an equitable reallocation of benefits, in the form of increased humanitarian welfare of the weaker party's citizens.

Underlying distributive justice arguments is a notion of moral obligations owed by one society to another, even at the cost of some self-sacrifice. The leading rationale behind the self-sacrifice notion is that the marginal cost for the richer citizens who are burdened by the redistribution is far outweighed by the marginal benefit enjoyed by the poorer citizens.

In transposing distributive justice arguments onto war, the question arises whether the general moral obligations that are owed by one society to another endure when the two societies are at war. If distributive obligations are affected by enmity, this might be due to one of three interrelated reasons: first, a sense that there is an inherent moral boundary that separates one's enemies from all others, e.g., that the mere interest of State A in harming State B relieves B from any obligations toward A; second, that redistribution in the context of an armed conflict results in a different calculation of marginal costs and benefits to the aiding and aided population, respectively; and third, that the overall consequences of redistribution are different when we consider narrowing the resource gap in times of peace and in times of war.

In considering any potential boundaries to the moral obligations owed to one's enemies, the first question is who the enemy is. From the internal perspective of IHL, all able combatants belonging to an enemy power are enemies. *Hors de combat* are quasi-enemies, in the sense that they are immune from direct attack, but may nonetheless be detained until the end of hostilities. The question is more complicated with regard to civilians who are nationals of an enemy power; these include people holding government or other leadership positions and people who are not directly linked to the armed forces but nonetheless significantly support their operation. The assumption under the IHL regime is that all civilians (defined as all those who are not "combatants"[195] and who do not take direct part in hostilities[196]) are "innocent" and must therefore be protected from deliberate harm at all times.[197] The generic view of the "innocent civilian," a development that began with the divorce of jus in bello from jus ad bellum, has received a further boost with the evolution of international human rights norms in the twentieth century. This generic view has also evolved within U.S. military strategy, at least in some theaters of war: while in its general Law of Land Warfare section, the 1956 U.S. Army Field Manual referred to "enemy civilians," the 2007 COIN manual devised for the new theaters of war aban-

195. API, *supra* note 12, art. 50.

196. API, *supra* note 12, art. 51(3).

197. The GCIV refers only to civilians who are "civilians of enemy nationality." *See, e.g.*, GCIV, *supra* note 120, art. 110.

doned the reference to "enemy," leaving only the general term "civilians."[198]

But innocence as immunity from direct targeting or harm may be different from innocence for the purpose of entitlement to foreign aid from an enemy power. In fact, it is conceivable that IHL's insistence on viewing all civilians as innocent exists *because* what is required from the enemy is only to refrain from direct or disproportionate harm to them.[199] An obligation to refrain from intentionally killing enemy civilians is conceptually different from an obligation to positively assist them. If true, this might be a point at which the normative analysis of CDRs cannot remain completely internal to IHL.

The reluctance to view all enemy civilians as entirely "innocent" for purposes other than refraining from deliberate harm may be especially relevant (if not as a normative matter, than as a positive one) in civil wars or interstate wars that have a strong national or ethnic component. In such contexts, while we would still seek to confine the armed struggle to the armed forces, the national/societal element of the conflict may not be completely eliminated. A specific case in point is one in which the enemy entity is a democracy, with its belligerent strategies supported by a majority of the population. The voting population is certainly innocent for purposes of targeting and other forms of intentional harm, but it may be less innocent for purposes of an affirmative duty to offer aid.[200] Popular support—whether political, financial, or moral—of the government and armed forces may be enough in such cases to exemplify enmity and, by way of analogy from self-defense doctrines, would diminish any moral obligation to positively assist the civilian-attacker.

Viewing the population of an enemy power differently from that of a non-belligerent poorer country may have more than an atavistic symbolic or intuitive appeal. Any assistance during wartime allows the enemy power to free up resources for the war effort (to the degree that the enemy power allocates resources for the welfare of its civilian population), which, in turn, makes the population of the powerful country more vulnerable. Domestic vulnerability may be enhanced when there are fewer resources for domestic healthcare in peacetime, but it is further exacerbated in war when funds are transferred to an enemy which seeks to inflict further costs on the state. Put

198. *Compare* U.S. Dep't of the Army, The Law of Land Warfare ¶¶ 49, 84 (U.S. Army Field Manual No. 27-10, 1956), *with* COIN, *supra* note 141, ¶¶ 1-127, 1-131, 2-1–2-57.

199. On the rationale of IHL's concern with the welfare of the enemy, see Gabriella Blum, *The Laws of War and the "Lesser Evil,"* 35 Yale J. Int'l L. 1, 48–52 (2010).

200. *See* Michael Green, *War, Innocence, and Theories of Sovereignty*, 18 Soc. Theory & Prac. 39, 51 (1992) ("In a perfect democracy each and every person would be . . . fully responsible, because if the method of consent has been in operation, each has agreed to the decision reached by that method, or, if not that, to be bound by whatever decision was reached by that method."). For a similar argument, see Igor Primoratz, *Michael Walzer's Just War Theory: Some Issues of Responsibility*, 5 Ethical Theory & Moral Prac. 221, 232–33 (2002).

differently, the relative gap between the marginal cost to the aiding population and the marginal benefit to the aided population would narrow (even if not completely disappear) when we consider a transfer between two populations in conflict.

The impact of CDRs on the relative gap between the aider and aided would undoubtedly depend on the type of CDR we consider. An obligation to invest in precision-guided technology would seem to have a less detrimental effect on a powerful country's population than would a direct transfer of resources to the enemy nationals, since direct transfers might free up resources for belligerent activities (again, to the extent we believe the enemy government would otherwise itself invest in the population's welfare).

A harder case is one in which we consider an obligation to endanger more combatants so as to minimize the risk for civilians on the enemy's side. As earlier noted, IHL does not offer a clear answer to this scenario. There are extensive debates in the literature over the extent of the right of a warring party to prefer its own combatants over the enemy's civilians and even over its right to prefer its own civilians over those of the enemy.[201] While it may be possible to view the tradeoff as essentially similar to a transfer of healthcare costs that may adversely affect the life expectancy of the richer population, there is a sense in which the direct endangerment of soldiers' lives is conceptually different.

For instance, consider Allen Buchanan's work on humanitarian interventions. Buchanan's conception of justice aims at ensuring universal access to institutions that protect basic human rights. He argues that when such basic human rights are violated, humanitarian intervention is morally compelled.[202] Nonetheless, he stresses that this moral obligation is a limited one: it need not be undertaken when it would entail "excessive costs" to oneself.[203] Admitting that risking the lives of one's soldiers is likely an "excessive cost," he concedes that armed humanitarian intervention may be merely *permissible*—rather than *obligatory*—unless the armed forces undertaking the intervention have accepted the risks voluntarily.[204]

Note that the local civilian population in the context of a humanitarian intervention is most commonly conceived of as the "victim," not as the "enemy." If endangering the armed forces is excessive to save "victims" in another country, it would seem even more excessive—under a distributive justice argument—to save nationals of an enemy state (that is, unless one takes the view of the generic civilian). Buchanan does not seem to view other types of efforts to help the oppressed foreign nationals, which would undoubtedly involve some expenditure of resources, as "excessive" in a similar

201. *See* Margalit & Walzer, *supra* note 165; *see also* Hurka, *supra* note 166, at 59–66; Porat, *supra* note 166; *infra* notes 211–13.

202. Buchanan, *supra* note 189, at 176, 179–80.

203. *See id.* at 468–71.

204. *See id.* at 470–71.

way. This difference may be attributed to the immediacy in time and causation of battlefield death that is different from longer term adverse consequences of fewer available funds for healthcare. Instead, it may derive from an intuition that money and lives are not absolutely fungible. Whichever it is, the sacrifice of soldiers seems to entail a different kind of distribution than the transfer of funds.

A final reason to reconsider distributive justice in the context of enmity is that even if we ignore the national perspective of redistribution and maintain a global outlook, it is unclear what the overall humanitarian effects of redistributive CDRs would be.

A redistribution of burdens would help narrow the power gap between the rich and the poor. Costs invested in precision-guided technologies must be diverted from other military expenditures, and the sacrifice of soldiers for the minimization of civilian casualties reduces the strength of available forces. It may also deter soldiers subject to such obligations from volunteering to serve in combat roles in the first place. Direct transfer of resources from the rich to the poor similarly serves as a way of redistributing the burdens of humanitarian welfare.

Any interest in promoting the equality of warring capabilities must be premised on one of two rationales. One is a deontological commitment to equality in every context, including war, so that war is just only when it is a "fair fight" (much in the same way that a boxing or soccer match is expected to be a fair fight). It may also be that it is only under some form of fair fight that the weak could stand a chance in a just war.[205] Although some have employed the "fair fight" rationale as a justification for particular rules of war (such as the distinction between combatants and civilians or the prohibition on perfidious methods of war),[206] there has been no general suggestion that the entire body of IHL must promote equality among belligerents. Similarly, the political evolution and application of the law does not seem to suggest such a goal.

A different rationale is a consequentialist one, which brings us back to the utilitarian analysis. According to this concept, equality, or a fair fight, would contribute to overall humanitarian welfare. To assess the validity of this rationale, we would have to engage in predictions about the humanitarian implications of symmetrical versus asymmetrical wars, the ability to win such wars more quickly and efficiently (within IHL rules), and the respective incentives to defect from the rules in either case. Moreover, different international relations theories offer different predictions about the stability of the international system and the propensity to go to war in systems that are built on hegemonic rule versus those that are organized as multipolar. Some theorists believe that symmetry leads to a more stable

205. Rodin, *supra* note 35, at 159.

206. *See* Kahn, *The Paradox of Riskless Warfare*, *supra* note 35, at 3, 6–9.

balance of power and reduces the likelihood of war; others believe that it is a unipolar world, led by one obvious superpower, that holds a greater promise for stability.[207] If we believe the latter to be true, the consequences of narrowing power gaps may be more or longer wars and less humanitarian welfare overall. This, perhaps, should be seen as a variation on the adverse effects of greater economic development on the levels of global pollution.

To sum up the distributive justice consideration: even if one holds distributive justice to be morally just and warranted at all other times, the context of enmity may affect the transposition of its rationale to the justification of CDRs in war. The first consideration has to do with the identification of one's enemies—in particular, whether the civilian population of an enemy power should be classified as an "enemy" for purposes other than deliberate or indiscriminate harm—and the implications of such identification on distributive duties. Even accepting that there may still be such duties, their extent may be limited due to the impact of war on the relative calculation of marginal costs to the aiding population and marginal benefits to the aided citizens. This is especially the case when one considers an obligation to endanger soldiers to protect enemy nationals. In other situations, the calculation of marginal costs and benefits would depend on whether we predict that without foreign assistance, the enemy government itself would transfer resources to its own population, thereby making foreign assistance and resources for war interchangeable. Finally, distributive duties would operate to narrow the power gaps between the parties at war. Unless one holds equality as deontologically warranted, the ultimate consequences of narrower power gaps on the propensity and length of war, and therefore on overall humanitarian welfare, remain unclear.

2. *Corrective justice*

To recall, the corrective justice argument in other spheres of international law relies on the past harmful practices of powerful countries that had benefited from them at the expense of the rest of the world. An argument about corrective justice is not easily transposable to the sphere of war, but it might go something like this: powerful countries have enjoyed the benefits of a system of rules that allowed them to inflict much humanitarian harm on weaker adversaries, which is an allowance that they have used. CDRs would correct, to some extent, these past injustices by forcing powerful countries to assume more costs to protect the humanitarian welfare of weaker adversaries at present.

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207. *Compare* Kenneth N. Waltz, *The Origins of War in Neorealist Theory*, 18 J. INTERDISC. HIST. 615, 620–24 (1988) (arguing that bipolar systems are generally more stable than multipolar systems, since in multipolar systems miscalculation more frequently leads to escalation and victory at an acceptable cost is a more likely proposition), *with* DALE COPELAND, THE ORIGINS OF MAJOR WAR 15–17 (2000) (arguing that lone superpowers have the incentive to maintain the status quo and less powerful states are aware that they lack the capabilities to challenge this system).

This analogy is imperfect. While the developed world did benefit from engaging in bad environmental practices, and it is true that, in part, such practices have enabled countries to develop and gain wealth, countries' resources or military power are not necessarily a derivative of having inflicted humanitarian harm (although instances like the atomic bombings of Hiroshima and Nagasaki may have contributed to the ability of the United States to grow after World War II in ways that would have been harder had one million U.S. soldiers perished or suffered injuries in a land invasion of Japan[208]). European countries, ravaged by war until the mid-twentieth century, are among the most developed countries in the world today. What is true, however, is that the system of IHL (to the extent it had any effect on parties' behavior) has allowed stronger parties to maintain and enhance their power advantages.

Even more so than in the case of distributive justice, however, a corrective justice argument brings into greater focus the challenge of the intertwining of humanitarian welfare and warring capabilities; any correction for the sake of the former might also have an effect on the latter (in terms of narrowing the relative power gap). If this is true, any claim that such corrective power distribution is warranted must be based on some broader conception of the benefits of a level playing field of war.

Another way of transposing corrective justice arguments onto war is through what is commonly known as the "Pottery Barn" rule—"you break it, you own it"—which, according to some reports, the Secretary of State at the time, Colin Powell, warned President George W. Bush against on the eve of the U.S. invasion of Iraq.[209] This type of argument is less historical and rests, instead, on correcting against the harm immediately caused by the warring parties. Since a richer country undoubtedly has greater abilities to inflict harm on an enemy's population, and since in all likelihood (and judging from history), the population of weaker states will suffer more from wars than the population of their richer adversaries, corrective justice would instruct the latter to aid the former.

Corrective justice that rests on this rationale, however, requires us to maintain the separation between jus ad bellum and jus in bello. The justification for the rich state in initiating its belligerent activities becomes irrelevant, and all that is left is the objective and concrete harm inflicted by belligerent operations. Such separation between duties of war and the fault of causing the war is, in fact, IHL's starting point; however, as in the case of distributive justice, there may not be valid reasons to maintain that distinc-

208. For a similarly large estimate of U.S. casualties in the planned invasion of Japan, see Memorandum from W. B. Shockley, Expert Consultant, Office of the Sec'y of War, to Edward L. Bowles on the Estimated Casualties in an Invasion of Japan (July 21, 1945), *in* THE COLUMBIA GUIDE TO HIROSHIMA AND THE BOMB 223 (Michael Kort ed., 2007); but for a far smaller estimate, see Rufus E. Miles, Jr., *Hiroshima: The Strange Myth of Half a Million American Lives Saved*, 10 INT'L SECURITY 121, 121 (1985).

209. *See* BOB WOODWARD, PLAN OF ATTACK 150 (2004).

tion for purposes of enhanced obligations. According to David Miller, the duty to assist others should depend on the degree of responsibility of those assisting for the causes of suffering.[210] Indeed, "causes of suffering" in war may be inextricable from the causes of the war and its justifications. Accordingly, if the weaker side is at fault for the war, it should not benefit from enhanced obligations on the rich, and a stronger party should only comply with enhanced humanitarian duties if that party is also responsible for the war.

Moreover, as in the case of distributive justice, the nature of the CDR could affect our intuitions about what corrective justice actually warrants. The comparative advantage of powerful countries, which enables them to shift the war onto the enemy's territory, may warrant correction of the deteriorating living conditions of the civilian population on the other side and therefore justify obligations such as the provision of food or medical supplies. It might also justify a CDR that obligates richer countries to invest more in precision-guided technology. However, risking a greater number of one's soldiers would require either an assumption about the fungibility of financial costs and human lives or an assumption about the exchangeable nature of the lives of soldiers of country A and the civilians of country B. For reasons explained earlier, both assumptions are contestable.

3. *Samaritanism*

It may be that even if there is no general distributive or corrective justice argument that would warrant aiding the enemy (in the broadest sense of the term), the context of war does impose special obligations on the stronger warring party to assist the weaker adversary's civilians. This is not because the stronger party bears a moral responsibility for the plight of the weaker one, nor is it because the former is simply capable of assisting the latter. Instead, it arises because the context of war makes the weaker population uniquely dependent on the more powerful adversary; in other words, the more powerful party is specially positioned to either harm or assist the population of its weaker enemy.[211]

Any Samaritanism argument immediately raises the concerns about the Samaritan's dilemma (a variation of the moral hazard problem discussed in the utilitarian framework): if the weaker party foresees that its stronger adversary will be obliged to offer its population assistance in the form of food or medication, it might be inclined to divert investments away from taking

210. David Miller, *Distributing Responsibilities*, 9 J. of Pol. Phil. 453, 469–72 (2001).

211. Scott M. James, *Good Samaritans, Good Humanitarians*, 24 J. Applied Phil. 238, 240, 248–50 (2007) (arguing that international humanitarianism is mandated where there is unique dependency of the beneficiary on the helper). GCIV seems to suggest such obligations, but to a very limited extent: other than in occupied territories, warring parties are obliged only to allow humanitarian organizations to deliver assistance to the enemy's population, but are not, as a general proposition, required to extend such assistance themselves. *See* Dinstein, *supra* note 114.

care of its own population (for instance, by building shelters) toward procuring weapons.[212] Unlike in other spheres of international relations, the diversion in this context is of greater concern to the adversary: not only is the adversary expected to bear the burdens of a weaker population, but it also exposes itself to enhanced risk as a consequence. This is, once more, only a strong concern when we believe that the weaker party would, in fact, pursue this strategy of diversion. This assumption will vary with the nature of the warring party and its relationship with the civilian constituency.

To sum up this section, the distributive, corrective, and Samaritanism arguments could all be transposed from other fields to the field of war, so to the extent that one accepts them as valid justifications for CDRs in IEL or ITL, they might similarly justify CDRs in IHL. However, this transposition is not free from difficulties. It requires a judgment of civilians belonging to an enemy power as being generically "innocent" and thereby identical to those belonging to a developing country with which there is no state of armed conflict. It also requires ignoring any initial justification for the war in devising obligations for the conduct of the war. While both assumptions correspond well with IHL's own logic, it may be that this logic holds true only so far as existing obligations are concerned—but not when we consider asymmetrical enhanced obligations for the more powerful. Furthermore, any party seeking to introduce CDRs through these justice theories must consider the narrowing effects of such redistributive obligations on power gaps in war capabilities and the potential humanitarian effects of this enterprise.

All of this analysis suggests that non-utilitarian theories might more easily support certain CDRs, such as investment in precision technology, over others, such as those consisting of endangerment of combatants' lives to better guard enemy nationals' safety.

C. Administrability and enforcement

A final word is necessary with regard to administering and enforcing CDRs in IHL. As noted earlier, compliance with IHL has traditionally been secured through reciprocity, linkages with other areas of interest for the state, or shaming and diplomatic pressure of various forms. With the near absolute abolition of reciprocity as a lawful means of securing compliance, "hard" enforcement of IHL has increasingly been channeled to international criminal law, where the focus is on the conduct of individual actors, not states. When conceiving of CDRs in IHL, the prospects of criminal enforce-

212. Eric Posner discusses the concerns with providing economic assistance to corrupt governments, which may siphon off a significant portion of the aid for their own, non-altruistic purposes, while coercing donor states to provide additional assistance to prevent the harm to civilians that the initial gift was aimed at preventing. Posner, *supra* note 24, at 531–32. The Samaritan's dilemma and the fungible nature of assistance also played a role in the Supreme Court's recent decision to uphold the ban on providing training in international humanitarian law encased within the broader ban on providing material support to terrorists. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2728–29 (2010).

ment against individuals must therefore be considered, even if the primary obligation under IHL attaches to the belligerent state.

The most straightforward implication of considering CDRs in this context is that some types of obligations lend themselves more easily to individual responsibility than others. Consider an obligation to assume greater risk to combatants in compliance with the proportionality principle. This heightened obligation could be judged in the same manner as proportionality is judged today, but what about a rule mandating the development or procurement of more precise weapons? It would be far more difficult to imagine the failure to meet this obligation as establishing criminal liability for any individual actor, combatant, or official. A similar problem arises if we imagine positive obligations in the form of offering direct assistance to the affected population. In all such cases, the official, collective nature of the failure to comply would make individual criminal liability extremely complicated.

In the absence of effective or relevant criminal enforcement, the administration of any CDR norm would have to remain within the realm of interstate relationship and responsibility. It would therefore be subject to the same third party monitoring or public scrutiny mechanisms that are at play with regard to most other international obligations.

V. Conclusions

The principle of equal application has been inscribed in IHL since the mid-Nineteenth Century. While the principle has withstood great pressures from within the field of IHL, the rise of CDRs in the regulation of environmental protection and international trade poses an external challenge to its enduring logic. In terms of practice, there are already debates within the international legal community and civil society regarding the proper application of IHL's generic standards to differently situated parties. If humanitarian welfare is akin to the protection of the environment or the liberalization of trade (in that the entire international community is committed to its expansion), it is questionable whether the formal equality of IHL, as it stands, is either effective or just.

However, the unique context of war makes it difficult to wholly transpose the concept of differentiated responsibilities from trade or environmental regulation. From a utilitarian perspective, it is unclear whether CDRs would, in fact, promote compliance or increase humanitarian welfare overall. To predict the humanitarian impact of CDRs, we would have to consider the type of obligation concerned, the type of war fought, and the incentive structure of the parties in complying or defecting from such obligations. Ultimately, the humanitarian impact of introducing any generic form of CDRs into IHL remains indeterminate.

The transposition of international fairness and justice theories onto war also requires a determination of what the consequences of enmity for international obligations are. At the very least, such a determination requires a much deeper inquiry into the source of such international obligations, a reasoned identification of their beneficiaries, and an examination of what the expanded obligations entail and what their ultimate consequences for humanitarian welfare are predicted to be.

In particular, we would have to reconsider the assumption underlying the utilitarian analysis—about the generic innocence of all civilians—and determine what a departure from this assumption would mean for redistributive obligations. As in the utilitarian framework, we would have to predict what the consequences of narrowing power gaps would be for the frequency and duration of wars. Given the substantial variance among types of wars, types of governments, and the various types of wartime CDRs, it would be oversimplistic to suggest that non-utilitarian justice rationales mandate a move in the direction of differential obligations in IHL.

While the analysis offered in this Article does not take a definitive position for or against CDRs in IHL, it does highlight the types of judgments and determinations that one must make before taking such a position. More broadly, the analysis suggests ways of thinking about war as a phenomenon either unique to or commensurate with other types of national and international relations and demonstrates the ways in which war is at once different from and similar to other fields subject to international regulation.