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# STATE INTELLIGENCE GATHERING: CONFLICT OF LAWS

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## I. INTRODUCTION

When Leo Tolstoy wrote *War and Peace* in the late 1860s,<sup>1</sup> the world was a very different place. Just as the world has changed, so too has the international legal regime. This Article will examine the development of different international legal regimes over the last century or so, and will assess their impact on intelligence-gathering operations. In particular, it asks whether the divisions between the different regimes are relevant in today's complex world or whether it is necessary instead to look at a more coherent structure that can reach across the legal divides.

This Article begins with an examination of the development of the law of war (Part II) and human rights law (Part III) before looking at the differing legal categories of armed conflict (Part IV). It then examines the applicability of human rights law in situations of armed conflict (Part V) and the increasing complexity of defining violence, whether as armed conflict or otherwise (Part VI). The Article proceeds with an examination of the overlap between the law of war and human rights law (Part VII) and the risk of divergence that this overlap causes (Part VIII). Finally, it seeks to draw some conclusions and suggestions on the way ahead (Part IX).

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1. A part of *War and Peace* was first published under the title "The Year 1805" in a Moscow magazine, *The Russian Messenger*. DERRICK LEON, *TOLSTOY: HIS LIFE AND WORKS* 136 (1944). The whole work appeared first in Moscow as a six-volume novel under the title of *War and Peace*, the first four volumes in 1868 and the last two in 1869. *Id.*

## II. THE LAW OF WAR

The legal scholars of Tolstoy's day would find it hard to comprehend the developments in international law over the past 150 years and particularly in the latter half of the twentieth century. When Oppenheim wrote his seminal treatise on international law in 1906, the subject was divided into the law of war and the law of peace.<sup>2</sup> At that time, international law was in its infancy. State sovereignty was still the dominant feature of the world order, certainly in the West. As a result, internal affairs were left exclusively to domestic jurisdiction.

It was only in areas where the tectonic plates of individual state sovereignty rubbed together that international law was seen as necessary. War between states was obviously such an area, but while unwritten conventions on the conduct of hostilities had been accepted for centuries, it was only in the mid-nineteenth century that the law of war began to be codified. This codification developed in two separate areas: first, the protection of "victims of war" (primarily meaning, in the beginning, combatants who were rendered *hors de combat* by wounds, sickness, shipwreck, or surrender), and second, the conduct of hostilities. The protection of victims was principally sponsored by the International Committee of the Red Cross (ICRC) through successive Geneva Conventions, while treaties on the conduct of hostilities arose, for the most part, through initiatives of states, which often sought to restrict rivals from taking advantage of technical innovations. War was a distinct state of affairs and indeed, as late as 1907, a convention was adopted laying out the correct procedures for declaring war.<sup>3</sup>

Intelligence gathering is obviously an important part of military operations, but the manner in which it was handled at the time illustrated the tensions between international and national law. Espionage was seen as a domestic matter and thus not prohibited under international law. However, as it usually involved the conflicting interests of different, and indeed warring, states, it was necessary that the law of war at least provide some guidance. The Annex to Hague Convention IV, containing the Regulations Respecting the Laws and Customs of War on Land, contained three articles dealing with espionage.<sup>4</sup> Article 29 provided a

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2. See LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* (1st ed. 1906).

3. Hague Convention Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 1 Bevens 619.

4. Regulations Respecting the Laws and Customs of War on Land, Hague Convention Respecting the Laws and Customs of War on Land, Annex, arts. 29-31, Oct. 18, 1907, 36 Stat. 2277, 1 Bevens 631 [hereinafter Hague Regulations]. Compare similar (though nonbinding) language in the Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874 [the Brussels Declaration]; and *Les Lois de la Guerre sur Terre* [*The Laws*

definition of a “spy” as someone who, “acting clandestinely or on false pretences . . . obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.”<sup>5</sup> Article 30 indicated that “a spy taken in the act shall not be punished without previous trial,”<sup>6</sup> thus outlawing the practice of executing spies without trial when captured *in flagrante*. Of interest is that the mode of trial was not specified, as this remained a matter for domestic law. Furthermore, under Article 31, a spy who managed to escape and rejoin his own forces, if subsequently captured by the enemy, was to be “treated as a prisoner of war, and incur[red] no responsibility for his previous acts of espionage.”<sup>7</sup> (In this respect, Article 31 reads like a code of chivalry.) International law thus was of limited import and made no attempt to intervene in areas, such as administration of justice, that were seen as purely within the purview of domestic jurisdiction.<sup>8</sup>

International law, through the Hague Regulations, also included provisions regulating the treatment of captured personnel, particularly prisoners of war: “every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank.”<sup>9</sup> The Regulations, however, did not restrict the nature of questioning other than to require “humane treatment” in Article 4.<sup>10</sup>

Finally, how a state dealt with its own population and gathered intelligence within its own boundaries in times of peace or war was not something with which international law was concerned at the time. State sovereignty remained supreme and such issues were left entirely to domestic law.

This all changed with the Second World War. The treatment by the Third Reich of elements of its own population, particularly the Jews, and the populations in occupied territories led to a revolution in international law. The law of war expressed increased concern for the protection of civilian populations, particularly in occupied territory; this concern led to the adoption of the Fourth Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War.<sup>11</sup> The references to espionage in this Convention are effectively limited to Article 5, which provides:

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*of War on Land*], ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, Sept. 9, 1880, available at <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument> [the Oxford Manual].

5. Hague Regulations, *supra* note 4, art. 29.

6. *Id.* art. 30.

7. *Id.* art. 31.

8. For an example of how domestic law dealt with such cases, see *Ex parte Quirin*, 317 U.S. 1 (1942).

9. Hague Regulations, *supra* note 4, art. 9.

10. *Id.* art. 4.

11. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.<sup>12</sup>

The drafting of the Geneva Conventions introduced three major innovations. The first was a move away from the former understanding of “war.” All four Geneva Conventions of 1949 were to apply “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>13</sup> This definition effectively rendered moot the Third Hague Convention of 1907 and was more in keeping with the new era of United Nations law, whereby “the threat or use of force against the territorial integrity or political independence of any state”<sup>14</sup> was prohibited. It was no longer open to a state to excuse itself from international liability by insisting that it was not at “war” in the legal sense. The test was now a factual one: whether the level of violence amounted to an “armed conflict.” While this inevitably led to a degree of uncertainty in that there was no specific test to ascertain what level of violence was required, it also increased the operational coverage of the Conventions.

Second, the existing law of war treaties were only applicable to wars in which all belligerent parties were parties to the treaty. For example, Article 2 of the Fourth Hague Convention specifically stated that “[t]he provisions contained in the Regulations referred to in Article 1, as well

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12. *Id.* art. 5.

13. *See id.* art. 2; *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]. For convenience, further references to the “Common Articles” will refer to the “Geneva Conventions.”

14. U.N. Charter, art. 2, para. 4.

as in the present Convention, do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.”<sup>15</sup> Thus, in the case of a world war, if only one belligerent was not a party, the treaty would be inapplicable throughout the conflict. The Geneva Conventions changed this rule so that while belligerents who were not parties to the Conventions were not, of course, bound by them, those who were parties remained bound in their mutual relations even if any or all of the other belligerents were not parties.<sup>16</sup>

The third innovation was in Common Article 3 to the Conventions.<sup>17</sup> The law of war, as has been noted, applied only to international armed conflicts, conflicts between states. Common Article 3 brought internal conflicts and civil wars within the jurisdiction of international law for the first time. Of all the articles in the four Conventions, Common Article 3 alone applied “in the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>18</sup> Although the ICRC had wanted to apply the complete law of war to internal conflicts, this was a step much too far for most states; the concept of state sovereignty still insisted that such events were a matter for domestic law only. Common Article 3 was the best that could be achieved and merely lays down important principles. All parties to the conflict, both state and nonstate actors, are bound to apply the following minimum provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

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15. Hague Convention Respecting the Laws and Customs of War on Land art. 2, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

16. Geneva Conventions, *supra* note 13, Common Article 3 (“Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power [a Power that is not a Party], if the latter accepts and applies the provisions thereof.”).

17. *Id.* Common Article 3.

18. *Id.*

- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.<sup>19</sup>

Whilst Common Article 3 also includes provisions encouraging parties to bring into force other parts of the Conventions,<sup>20</sup> it finishes with a firm acknowledgment of state sovereignty: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."<sup>21</sup>

Thus, for the first time, under the law of war, states were limited in how they could act within their own territory and with their own people. While there is no direct reference to interrogation, the prohibitions on "violence to life and person" and "humiliating and degrading treatment" would clearly be applicable to the treatment of persons captured during such a conflict and indeed to all those who were not, or were no longer, taking an active part in hostilities. This would cover all detainees.

### III. HUMAN RIGHTS LAW

This small advance in the law of war reflected a far larger movement in international law generally. The end of the Second World War also saw the birth (or at least the coming of age) of human rights as a concept in international law. The Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948, a year before the Geneva Conventions, sought to declare and enumerate "fundamental human rights" recognized by international law.<sup>22</sup> Human rights law as it now developed differed from the law of war in a number of key areas. First, human rights law was designed to deal with the relationship between a state and those within its jurisdiction. In essence, it made individuals the subjects of international law, which had previously been the domain of states. The rights granted to an individual could be en-

19. *Id.*

20. *Id.* ("The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.").

21. *Id.*

22. Universal Declaration of Human Rights, pmbl., G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

forced against the state, though the ability to enforce came later and is still developing in many parts of the world.

Human rights law and the law of war are separate legal systems. As the name implies, the law of war is designed to operate in times of war or armed conflict. Indeed, apart from those preparatory measures such as training that must be carried out in time of peace, the law of war has no application outside war and armed conflict, with occupation for these purposes being part of armed conflict. The law of war also approaches matters from a very pragmatic viewpoint. It stems from a recognition that war exists and thus seeks to balance humanity with military necessity. The purpose of the law of war is not to abolish war, but rather to find a way to reduce to the minimum amount necessary the suffering and general mayhem caused by war and conflict. Finally, the law of war is nonderogable because it is specifically designed to operate in the context of war and armed conflict.

Human rights law approaches matters from a different angle. It outlines basic human rights and divides them into two types, those that are “fundamental” and apply in all circumstances, and those that are “derogable,” meaning a state can limit them in certain circumstances. The default position, however, is that the right applies; it is thus for the state to justify any derogation from that right, even in time of war or other public emergency.

Included among the recognized categories of human rights is the right to privacy. In the Universal Declaration of Human Rights, the privacy right is defined as follows: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”<sup>23</sup> A similar provision appears in the International Covenant on Civil and Political Rights (ICCPR), with “or unlawful” added before “interference.”<sup>24</sup>

Domestic laws on intelligence gathering in peacetime must be in accord with these provisions. The key words here are “arbitrary” and “unlawful.” Targeted interference with the right to privacy in accordance with domestic law would not seem to run afoul of the human rights provision of itself, although the targeting will need to be carefully designated so that it does not violate the prohibition against discrimination. Thus, Article 2 of the ICCPR provides that each state party “undertakes to respect and to ensure to all individuals within its territory

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23. *Id.* art. 12.

24. International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, S. Exec. Doc. E.95-2, 999 U.N.T.S. 171 [hereinafter ICCPR] (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”).



and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>25</sup> Other contributors to this issue have commented on the relationship between domestic law and human rights;<sup>26</sup> as my concern is primarily with the interplay between different international law regimes, I do not propose to go into this area further. I will, however, address the issue of derogation at a later stage.

Another critical provision of the Universal Declaration of Human Rights is Article 5, which provides that “[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>27</sup> The key point here is that this right is nonderogable; it forms an absolute prohibition applicable in all circumstances.

Human rights law has expanded vastly since the Universal Declaration was adopted. Along with the ICCPR, a veritable deluge of treaties and “soft law” declarations have expanded upon the basic rights. The prohibition on torture has been supplemented by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>28</sup> In addition, human rights law has been enriched by a series of UN documents dealing with the treatment of prisoners and detainees, including, for instance, the Standard Minimum Rules for the Treatment of Prisoners.<sup>29</sup> Guidance has also been provided for law enforcement officials,<sup>30</sup> lawyers,<sup>31</sup> and prosecutors.<sup>32</sup> Most of these, however, are general rules and do not specifically cover intelligence-gathering operations except where they deal with the treatment of persons in detention.

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25. *Id.* art. 2.

26. See Simon Chesterman, *Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis*, 28 MICH. J. INT'L L. 553 (2007); James E. Baker, *What's International Law Got to Do with It? Transnational Law and the Intelligence Mission*, 28 MICH. J. INT'L L. 639 (2007); Jeffrey H. Smith, *Keynote Address*, 28 MICH. J. INT'L L. 543 (2007); Francesca Bignami, *Towards a Right to Privacy in Transnational Intelligence Networks*, 28 MICH. J. INT'L L. 663 (2007).

27. Universal Declaration of Human Rights, *supra* note 22, art. 5. For an expanded form of this provision, see ICCPR, *supra* note 24, art. 7.

28. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 U.N.T.S. 112, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

29. U.N. Econ. & Soc. Council, Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. No. 1, U.N. Doc. E/3048 (Jul. 31, 1957).

30. Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 17, 1979).

31. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Role of Lawyers*, U.N. Doc. A/CONF/144/28/Rev.1 at 118 (1990).

32. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Guidelines on the Role of Prosecutors*, U.N. Doc. A/CONF/144/28/Rev.1 at 189 (1990).

## IV. THE CATEGORIES OF CONFLICT

It should be noted that the law of war has also developed since 1949. The two Additional Protocols of 1977 to the Geneva Conventions are of particular interest in this connection.<sup>33</sup> As their titles indicate, the Protocols maintain the divide between international and non-international armed conflicts, with one exception. For legal purposes, the Protocols equate with international armed conflict a particular type of non-international conflict, namely,

situations . . . in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”<sup>34</sup>

Protocol I brought together the Geneva rules on the protection of victims while expanding them somewhat, and also introduced new rules on the conduct of hostilities to enhance those laid down in the 1907 Hague Regulations. In particular, it updated the definition of spies in Article 46.<sup>35</sup> In many ways, Article 46 repeats the provisions of the Hague

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33. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II].

34. Geneva Protocol I, *supra* note 33, art. 1(4).

35. *Id.* art. 46. Article 46 states:

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

Regulations while providing some degree of clarification, particularly in relation to the status of a spy after capture. However, the influence of human rights law can be seen more clearly in Article 75 of the Protocol, which lists certain fundamental guarantees that are applicable to all persons “who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol.”<sup>36</sup> This, of course, includes spies. The fundamental guarantees include the prohibitions contained in Common Article 3 to the Geneva Conventions<sup>37</sup> and also a number of fair trial guarantees taken directly from human rights law.

Additional Protocol II, on the other hand, deals with non-international armed conflict. Originally, as in 1949, the ICRC sought to apply the full ambit of the law of war to non-international armed conflict, but this was unacceptable to states. The final text of Additional Protocol II was a vastly watered-down compromise, both in terms of scope and content. It did, however, contain an article on “fundamental guarantees”<sup>38</sup> (with some of the contents of Article 75 of Additional Protocol I), an article covering persons whose liberty had been restricted for reasons related to the armed conflict,<sup>39</sup> and an article on criminal prosecutions.<sup>40</sup>

Thus, the law of war is now divided into a number of different contexts. First are international armed conflicts, including conflicts under Article 1(4) of Additional Protocol I.<sup>41</sup> Such conflicts are governed by the full law of war. Second are non-international armed conflicts of a sufficient intensity to reach the threshold required by Additional Protocol II.<sup>42</sup> For armed conflicts that do not reach this threshold, the applicable

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4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

*Id.*

36. *Id.* art. 75.

37. Geneva Conventions, *supra* note 13, Common Article 3.

38. Geneva Protocol II, *supra* note 33, art. 4.

39. *Id.* art. 5.

40. *Id.* art. 6.

41. Geneva Protocol I, *supra* note 33, art. 1(4).

42. Geneva Protocol II, *supra* note 33. Geneva Protocol II requires that the conflict not be “international,” that it occur on the territory of a High Contracting Party, and that the conflict involve a High Contracting Party’s armed forces against “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” *Id.* art. 1(1). This threshold would rule out many conflicts within “failed states,” where the fighting is exclusively between nonstate armed groups rather than central government forces.

law is Common Article 3 to the four Geneva Conventions.<sup>43</sup> Finally, the law of war is not applicable at all to “situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”<sup>44</sup> This extension of the law of war into non-international armed conflict has inevitably meant that it has overlapped with human rights and domestic law.

## V. THE APPLICATION OF HUMAN RIGHTS LAW

As has been seen, human rights law begins in peace time with full application. Many took the view that human rights law, as it grew alongside the law of war, was concerned only with peacetime and had no place in war or armed conflict, where it was displaced by the law of war. The two systems were effectively treated as mutually exclusive. With the extension of the law of war into non-international armed conflict, however, that position became increasingly difficult to maintain. Some, particularly in the United States, still take that view, at least as far as the role of the military in international armed conflict is concerned. According to the U.S. Department of Defense, for example, the United States “has maintained consistently that the [ICCPR] does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict.”<sup>45</sup>

Yet the relationship between the legal regimes can be far more complex than this would suggest. The International Court of Justice (ICJ) dealt with this issue in the *Nuclear Weapons* case, in which it stated:

[T]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is

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43. Geneva Conventions, *supra* note 13, Common Article 3.

44. Geneva Protocol II, *supra* note 33, art. 1(2).

45. U.S. DEP'T OF DEFENSE, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY AND OPERATIONAL CONSIDERATIONS 6 (2003), available at <http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf>.

designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>46</sup>

In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ quoted from *Nuclear Weapons* and continued:

[T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>47</sup>

The difficulty is in discovering where the overlap is and which situations fall into which category. As has already been pointed out, certain rights are deemed so fundamental that they cannot be the subject of derogation and are thus applicable in all circumstances. Others can be derogated from “[i]n time of public emergency which threatens the life of the nation.”<sup>48</sup> Any question of whether this involves only public emergencies in peacetime was made moot, certainly so far as members of the Council of Europe are concerned, when the European Convention on Human Rights made its own derogation provision apply “[i]n time of war or other public emergency threatening the life of the nation.”<sup>49</sup> Indeed, the European Convention even has a specific provision allowing

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46. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

47. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9).

48. ICCPR, *supra* note 24, art. 4.

49. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter European Convention].

derogation from the right to life, considered as otherwise nonderogable, in relation to “deaths resulting from lawful acts of war.”<sup>50</sup>

Furthermore, just because a right is derogable does not mean it becomes totally unenforceable. States may derogate from their obligations only “to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”<sup>51</sup> A similar provision in the European Convention<sup>52</sup> is carefully policed by the European Court of Human Rights, which has the authority to give binding judgments. It should be noted that such policing covers both the *circumstances* of the derogation—whether or not there is a “public emergency threatening the life of the nation”—and also the *nature* of the derogation—whether the measures taken are “strictly required by the exigencies of the situation.”

Thus, just as the applicable law of war can vary according to the factual circumstances, so too, through derogation, can human rights law vary. States will be given a substantial margin of appreciation on the question of derogation, but they do not have *carte blanche*. Human rights bodies will examine derogations closely; although they (and the European Court, in particular) will be reluctant to challenge a decision by a state on the circumstances of the derogation, they will ensure that a state’s justification for derogation will be subject to detailed scrutiny. Derogation is thus to be viewed as the last, not the first, resort.

## VI. THE SPECTRUM OF VIOLENCE

As the two legal systems have developed, so too has the context in which they have to be applied. It is this changing context that creates most of the difficulties we find today. The simple dichotomy between war and peace from the times of Tolstoy or Oppenheim has disappeared. There is now a spectrum of violence ranging from peace, through internal disturbances and tensions, civil wars (of differing forms of intensity), to full-scale interstate armed conflict. Further complicating matters are the recent rise of nonstate actors responsible for terrorist atrocities, on the one hand, and the response of states in executing the “Global War on Terror,” on the other hand. The spectrum is like a rainbow, with the colors merging into each other so that it has become increasingly difficult to ascertain which legal regime applies, and when. In many circumstances,

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50. *Id.* art. 15(2).

51. ICCPR, *supra* note 24, art. 4(1).

52. European Convention, *supra* note 49, art. 15(1).

the Balkans being perhaps the classic example, it seems possible to have a series of different “conflicts” going on at the same time with consequent overlapping of legal regimes.

Perhaps nowhere is this more apparent than in the field of intelligence gathering. This is an activity that takes place throughout the spectrum. As a result, its activities cross the legal divides as well. In peacetime, matters are comparatively well regulated, as the legal regime that operates is domestic law in conjunction with human rights law. This will apply to detentions and interrogations as well as to other forms of intelligence gathering, in particular electronic eavesdropping and techniques that might put at risk the right to privacy. Similarly, in full interstate armed conflict, matters are comparatively straightforward in that the law of war will be the main driver. These laws merely provide a definition of spies, however (although they do lay down certain minimum standards for detention and trial process as well).

One point that is of interest here is the position of prisoners of war. It is often erroneously believed that specific limitations apply to the questioning of prisoners of war. In his Memorandum for the President of January 25, 2002, arguing for a determination that the Third Geneva Convention did not apply in Afghanistan, Alberto Gonzales claimed that the “new paradigm renders obsolete Geneva’s strict limitations on questioning enemy prisoners.”<sup>53</sup> In fact, the sole limitation is to be found in Article 17, which provides that “no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”<sup>54</sup> In reality, the standard that will be applied here is similar to that of human rights law. Conduct that would breach this provision is also likely to breach the nonderogable prohibition on cruel, inhuman, or degrading treatment contained in Article 7 of the ICCPR.<sup>55</sup> As the official Commentary to the Third Geneva Convention makes clear, “a State which has captured prisoners of war will always try to obtain military information from them. Such attempts are not forbidden; the present paragraph covers only the methods to which it expressly refers.”<sup>56</sup> It should be noted that prisoners of war are

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53. Memorandum from Alberto R. Gonzales, White House Counsel, to the President on the Decision Regarding Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002).

54. Geneva Convention III, *supra* note 13, art. 17.

55. ICCPR, *supra* note 24, art. 7.

56. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION 163–64 (undated) (citations omitted), available at <http://www.icrc.org/ihl.nsf/COM/375-590022?OpenDocument>.

*obliged* to give certain information, specifically, “surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”<sup>57</sup> An experienced interrogator will agree that the hardest thing to do is to get a subject to *start* talking. Once the prisoner opens his mouth, an interrogator has something to work on. A prisoner of war is obliged, unlike any other detainee, to provide certain information, which can provide an excellent lead in for a trained and experienced interrogator.

On the domestic front, in times of full interstate conflict, almost all states will introduce emergency legislation limiting civil rights within their domestic boundaries. Human rights bodies will almost certainly accept the *right* to derogate from human rights law in such circumstances, although there may still be argument over the necessity of some of the measures introduced. The state in such circumstances, however, will be given significant latitude.

The difficulties are to be found in the gray area between peace and war, a space that has expanded vastly in recent decades. Here we begin to see the battleground developing between the various legal systems. In non-international armed conflicts such as civil wars, in which violence takes place within the boundaries of a single state, the domestic law of that state primarily governs. Derogations from human rights obligations may be possible, but questions may arise concerning both the right to derogate and the form of the derogation itself. Does the armed conflict amount to a “public emergency threatening the life of the nation”?<sup>58</sup> In cases that reach the threshold of Additional Protocol II<sup>59</sup> where the dissident forces actually control territory, again, there is likely to be little argument. Where territory is not held but the authorities are facing an insurgency, however, it may not be so clear. The authorities will be reluctant to admit that the insurgency is of sufficient seriousness as to “threaten the life of the nation” and, as such, it may be difficult for them to acknowledge that the primary condition for derogation is satisfied at all. Even if the authorities are prepared to make such an admission, they will still be subject to an examination of the nature of the measures taken in derogation to ensure that such measures are genuinely necessary.

## VII. THE LEGAL OVERLAP

Despite the foregoing discussion, much of the need for intelligence gathering today, certainly in relation to military operations, involves

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57. Geneva Convention III, *supra* note 13, art. 17.

58. ICCPR, *supra* note 24, art. 4.

59. Geneva Protocol II, *supra* note 33.



neither international nor non-international armed conflict. For example, forces from a number of countries are currently involved in operations in Afghanistan and Iraq. But which legal regime applies to them in those situations? Insofar as Afghanistan is concerned, international armed conflict *did* exist. But does that conflict continue today? The view of the ICRC is that, on the establishment of the Karzai government in Kabul, the conflict changed in nature and became a non-international armed conflict.<sup>60</sup> But where does that leave foreign troops? In terms of the law of war, they are assisting the authorities in a non-international armed conflict. In those circumstances, Afghanistan could indeed argue that it has grounds for derogating from its human rights obligations under the ICCPR because it is facing a “public emergency which threatens the life of the nation.” But can members of the coalition say the same? The United Kingdom, for example, could not rely on the hostilities in Afghanistan alone. It would have to show that a wider context, such as global terrorism, threatened the United Kingdom directly.

The United States has in effect taken this course in declaring that it is in a state of war. By doing so, the executive has sought to adopt wartime powers. I do not intend to go into the complexity of U.S. constitutional law and the balance of power between the executive, the legislature, and the judiciary, as this is outside my expertise; however, we have seen this balance tested both in debates in Congress and in the various cases that have come before the Supreme Court relating to the rights of detainees held at Guantánamo Bay and elsewhere.<sup>61</sup> Indeed, this has gone further than purely detainee issues, as the arguments over wire-tapping show.<sup>62</sup> The view of the United States is that the ICCPR does not apply to U.S. personnel outside U.S. territory.<sup>63</sup> While this reading is consistent with the wording of Article 2 of the Covenant, which provides that a state must “undertake to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction” the rights contained

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60. Letter from the Clerk of the House of Commons Select Comm. on Int'l Dev. to Philip Spoerri, Legal Adviser, Int'l Comm. of the Red Cross (Nov. 28, 2002); Reply Letter from Philip Spoerri to the Clerk of the House of Commons Select Comm. on Int'l Dev. (Dec. 20, 2002), *both in* AFGHANISTAN: THE TRANSITION FROM HUMANITARIAN RELIEF TO RECONSTRUCTION AND DEVELOPMENT ASSISTANCE app. 8 (Int'l Dev. Comm., U.K. House of Commons, 2003), available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm>.

61. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

62. See, e.g., James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

63. See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 136 (2005).

within the Covenant,<sup>64</sup> this interpretation is out of line with modern thinking. The European Convention refers to “everyone within [a state’s] jurisdiction,” with no territorial requirement.<sup>65</sup> The European Court of Human Rights has confirmed that, while the application of the Convention is primarily territorial, extraterritorial jurisdiction is not ruled out, *inter alia*, “when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.”<sup>66</sup> In relation to the ICCPR itself, the UN Human Rights Committee stated in General Comment 31 that “[a] State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”<sup>67</sup>

This confusion over the applicability of human rights norms in contexts such as Afghanistan is again illustrated in Iraq. In Iraq, an international armed conflict preceded a period of occupation, with both periods governed by the law of war relating to international armed conflict. However, after the transfer of authority on June 30, 2004, to the Iraqi administration, the situation once again became less clear.

The United States still views the conflict in Iraq as international in nature, whereas much of the rest of the world views it as a non-international armed conflict in which coalition forces are assisting the Iraqi government, in accordance with a UN mandate. Which body of law therefore applies? To the United States, it is the law of war governing international armed conflict. The coalition partners, however, have differing views; most take the line that the international armed conflict ended at the latest with the end of the occupation. As in Afghanistan, it is necessary to examine the UN mandate in order to see whether exceptional powers, over and above those usually applicable under the law relating to non-international armed conflict, have been granted. For example, what is the meaning of “authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq,” as contained in Security Council Resolution 1546?<sup>68</sup> Does this mean all measures necessary *within the law*, and, if so, what is the relevant legal

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64. ICCPR, *supra* note 24, art. 2 (emphasis added).

65. European Convention, *supra* note 49, art. 1.

66. *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333, para. 71 (Grand Chamber, decision on admissibility).

67. U.N. Human Rights Comm’n, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (March 29, 2004).

68. S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004).

regime? For those subject to the European Convention, it is unclear exactly how the Convention affects the actions of military forces in such circumstances. A classic example would have been the obligations of the United Kingdom in relation to the death penalty if it, and not the United States, had had control of Saddam Hussein prior to his execution.

### VIII. THE DANGERS OF DIVERGENCE

The law of war has always been considered to be universal in application; certainly insofar as its principles are concerned, that remains generally true. In some of the details, however, there is increasing divergence. On the one hand, there is a sense that the United States has rejected the ongoing trend of development in the law of war, as illustrated by its increasingly hostile attitude toward Additional Protocol I to the Geneva Conventions and its opting out of later developments, such as the Ottawa Convention banning anti-personnel landmines<sup>69</sup> or the International Criminal Court.<sup>70</sup> Alongside this trend is the increasing rejection of the law of war by nonstate actors involved in non-international armed conflicts and, more worryingly, the increasing tendency to see *Sharia* law as overriding the law of war wherever religious leaders see a conflict. There is a sense or feeling that some Islamic states view the law of war as applicable only insofar as it is deemed consistent with *Sharia* law, and that the obligation to comply with this law outweighs the state's obligations under treaty law.<sup>71</sup> All of this is helping to fragment the universality of the law of war.

Similarly, divergence is growing in the field of human rights law. Europe has the most progressive system of human rights enforcement and the standards imposed by the European Court of Human Rights increasingly affect the conduct of operations by European states. At the same time, different regional bodies in the Americas<sup>72</sup> and in Africa<sup>73</sup> are

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69. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507.

70. Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 3.

71. See, e.g., *Editorial*, 858 INT'L REV. RED CROSS 237 (2005); see also Tom Pfanner, *Interview with Ahmad Ali Noorbala*, 858 INT'L REV. RED CROSS 243 (2005); Sheikh Wahbeh al-Zuhili, *Islam and International Law*, 858 INT'L REV. RED CROSS 269 (2005); Andres Wigger, *Encountering Perceptions in Parts of the Muslim World and Their Impact on the ICRC's Ability to Be Effective*, 858 INT'L REV. RED CROSS 343 (2005).

72. See American Convention on Human Rights, part II, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (distinguishing the roles of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights).

73. See the African Charter of Human and Peoples' Rights, part II, ch. I, Jun. 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (establishing the African Commission on Human and Peoples' Rights); Protocol to the African Charter of Human and Peoples' Rights on

beginning to develop their own jurisprudence. In Asia and Islamic countries there is a growing suspicion of the human rights movement as essentially Western or “un-Islamic.” Human rights are therefore in danger of becoming subject to a cultural bias that will also fragment their universality.

Finally, there is growing confusion over the role of the United Nations. Does the Security Council have the authority to override provisions of international law, whether contained in the law of war or in human rights law?<sup>74</sup> This issue was particularly pertinent in relation to Iraq under occupation, where the conservative nature of occupation law ran against the desperate need of Iraq for economic reconstruction and development as well as political and legal reform.<sup>75</sup>

## IX. CONCLUSIONS

How does this all relate to intelligence gathering? I would suggest that it affects two separate but related areas. First, the threats that states face today are global and require global solutions. This means that states increasingly must cooperate. Such cooperation can only be achieved on the basis of agreed legal standards. The trend today, however, is toward a divergence of those standards in both the law of war and human rights law. Intelligence gathered in State A, and admissible before its courts, may be inadmissible in State B; indeed, the method of its gathering may even prevent the extradition of a suspect from State B to State A. State B itself may then be left with a security problem: it has no ability under its own domestic law to hold the suspect in detention, but it cannot remove him from the country because of human rights concerns. This is the sort of dilemma that the U.K. government faced in the case of *A and Others v. Secretary of State for the Home Department*.<sup>76</sup> The court denied the government the authority to keep detainees in a “three-walled prison” until the authorities could find a country prepared to accept them and to

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the Establishment of an African Court on Human and Peoples’ Rights, Jun. 9, 1998, OAU Doc. OUA/LEG/MIN/AFCHPR/PROT.1.rev. 2.

74. The International Court of Justice has addressed its own power to assess the validity of acts taken by other United Nations organs and has concluded that, at least under a strict understanding of the concept, it has no such power. *See, e.g.*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.), 1992 I.C.J. 3 (Order of Apr. 14). *See also* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. and Mont.)), 1993 I.C.J. 325 (Order of Sept. 13).

75. *See* Michael Schmitt & Charles H.B. Garraway, *Occupation Policy in Iraq and International Law*, 9 INTERNATIONAL PEACEKEEPING: THE YEARBOOK OF INTERNATIONAL PEACE OPERATIONS 27 (Langholtz et al. eds., 2004).

76. [2005] 2 A.C. 68.

which they could be deported.<sup>77</sup> The U.K. government is still wrestling with this problem.

Second, the context in which differing legal regimes operate is becoming increasingly confused. The simple world Tolstoy inhabited, with war and peace, and never the twain shall meet, has been replaced by a spectrum of violence that makes it difficult, if not impossible, to identify the various contexts as defined by law. The end result is differing legal responses. Global terrorism has highlighted this conundrum. In some ways it has been like a game of doubles tennis, in which the other side has sent the ball flying down the center line. The partners are uncertain as to who must return the serve; the result might be that neither player goes for the ball, or both do, with a consequent clash of rackets. In either case, it usually ends up with recriminations between the partners.

Global terrorism hits the boundary between the law of war and the law of peace. The division over how to respond has pitted the United States, which would argue this is an armed conflict governed by the law of war, against Europe, which maintains this is primarily a domestic law matter governed by human rights law. The answer is probably somewhere between the two, and there will be times when both sets of law are operable. The difficulty today is in coming up with a coherent legal response that is universally applicable across the whole spectrum of violence.

A basic military tenet is “divide and rule”; so long as governments argue over the correct legal response to global terrorism, those with an interest in perpetuating that division will seek to exacerbate the argument. Unfortunately, too much of the discussion at present is conducted in public, often by “megaphone diplomacy.” Human rights and the law of war should be complementary, not contradictory. What is required is for experts from all the different regimes to discuss quietly how best to achieve a *modus vivendi*. Conferences such as that organized by the University of Michigan, bringing together experts from different contexts, amount to a very good start.

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77. *Id.* at 69.