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The Theory and Practice at the Intersection Between Human Rights and Humanitarian Law

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RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

REVIEW ESSAY

THE THEORY AND PRACTICE AT THE INTERSECTION BETWEEN HUMAN RIGHTS AND HUMANITARIAN LAW

The Drone Memos: Targeted Killing, Secrecy and the Law. Edited by Jameel Jaffer. New York, New York: The New Press, 2016. Pp. 352. \$27.95.

Theoretical Boundaries of Armed Conflict and Human Rights. Edited by Jens David Ohlin. New York: Cambridge University Press, 2016. Pp. xiii, 402. Index. \$125.

U.S. White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (Dec. 2016), available at <https://drive.google.com/file/d/0BwJjW6kOLfgicmlfX2hYWHNUTIE/view>. doi:10.1017/ajil.2017.78

The United States is more than fifteen years into a fight against terrorism that shows no sign of abating and, with the change in administration, appears to be intensifying. Other Western democracies that have historically been uneasy about U.S. counterterrorism policies have, in recent years, shifted toward those policies.¹ And

¹ See, e.g., Anthony Dworkin, *Europe's New Counter-terror Wars*, at 2 (European Council on Foreign Relations Policy Brief Oct. 2016) (reviewing the counterterrorism policies of several European states and concluding that “there has been a notable and largely unremarked convergence between European

armed nonstate groups continue to commit large-scale acts of violence in multiple distinct theaters. The legal issues that these situations present are not entirely new, but neither are they going away. Recent publications, like the three works under review, thus provide useful opportunities to reflect on and refine our thinking on them.

All three works concern the international legal regulation of contemporary security operations. *The Drone Memos* focuses on the U.S. practice of using lethal force against suspected terrorists in other states. Jameel Jaffer, a former ACLU Deputy Legal Director, introduces the volume with a scathing critique of the practice. He then collects sixteen official speeches or documents, dating from February 2010 to July 2016, that outline the U.S. government's positions on these operations. In December 2016, the government released another document, the White House *Report on Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*. This document was the Obama Administration's final and most comprehensive presentation of its legal and policy positions on the fight against terrorism. The *Report* addresses not only lethal operations but also, for example, the extradition, treatment, and administrative detention of suspected terrorists. *Theoretical Boundaries of Armed Conflict and Human Rights* is more academically oriented and broader in scope. A few of the essays in this compilation also focus on the U.S. practice, but most tackle more general questions about the relationship between international humanitarian law (IHL) and international human rights law (IHRL).

and US approaches to military action against terrorists, after many years when they differed widely”).

All of the works are well done and worth reading. Yet those who have been following the issues for some time are likely to find that the material is, on the whole, stale. This is not to say that the authors do not offer new insights; they do. At this point, however, the field is saturated, and most of the analytic moves are familiar. In this review essay, I use the three works to take stock of the secondary literature on IHL and IHRL, and to propose a shift in its focus.

I. TWO ROUTINE SCRIPTS

International lawyers who address contemporary counterterrorism operations routinely take two approaches. One is to assess specific operations under international law. The second is to propose reforms for clarifying the law. These moves share a jurisprudential vision—a view of how international law in this area does or should function. They assume that IHL and IHRL work by establishing relatively clear codes of conduct to constrain human behavior.

A. *Examining U.S. Practice*

Since the September 2001 terrorist attacks, the United States has stood out both for the expansive scope of its counterterrorism operations and for the novel legal interpretations that it has advanced to justify these operations. As such, the U.S. practice has been central to debates about the relationship between IHL and IHRL. Several of the essays under review criticize that practice; the official documents in *The Drone Memos* and the December 2016 White House *Report* aim to explain and defend it.

Jameel Jaffer's introductory essay in *The Drone Memos* is a powerful indictment of U.S. lethal operations. Jaffer's strongest policy argument is that these operations are ineffective at suppressing the terrorism threat. He contends that, although drone strikes eliminate particular suspects, they breed resentment that militant groups exploit to recruit new members. As Jaffer puts it, "the United States is caught in a seemingly inescapable loop: the threat of terrorism supposedly necessitates drone strikes, but drone strikes inarguably fuel the terrorist threat" (p. 20). This

claim ought to be taken seriously and assessed empirically.

My focus here, however, is on Jaffer's international legal argument. Jaffer takes issue with the U.S. claim that IHL governs all of its extraterritorial security operations. The crux of his argument is as follows:

[T]he claim that the United States was engaged in a borderless war against terrorist groups . . . permitted the Obama administration to contend that drone strikes—even those carried out "away from the zone of actual hostilities"—were governed *not* by human rights law, which bars the use of lethal force except in very limited circumstances, but by the laws of war, which are more permissive of state violence and less protective of individual rights. If the administration had conceded that human rights law governed, the United States would have been legally empowered to use lethal force only as a last resort, and only in response to concrete and specific threats that were truly imminent. Where human rights law controlled, the entire apparatus of the drone campaign . . . would have been obviously and inarguably unlawful. (P. 38)

Jaffer's argument is that, in invoking IHL worldwide, the United States claims expansive authority to kill people, displacing the much more restrictive standards that would otherwise apply as a matter of IHRL.

This argument against the U.S. position is familiar. For example, Jonathan Horowitz's contribution to *Theoretical Boundaries* also contests the U.S. claim of a global armed conflict. Like Jaffer, Horowitz emphasizes that the U.S. claim is potentially very broad. It would enable a state to use IHL "to target an enemy fighter with lethal force anywhere he or she goes in the world" (p. 158).

The argument is rhetorically powerful, and Jaffer's articulation of it is particularly formidable. But as of 2016, it was in at least two respects overdrawn. First, Jaffer's assertion that U.S. lethal operations would be "obviously and inarguably

unlawful” under IHRL is incorrect. The IHRL standard that Jaffer articulates—that states may use “lethal force only as a last resort, and only in response to concrete and specific threats that were truly imminent”—applies in law enforcement contexts in which the threats are relatively modest, and states have considerable situational control. Even in such settings, IHRL does not really establish a rule of last resort. It does not require states to pursue every available alternative for addressing a threat before resorting to force. It requires states to pursue the alternatives that are reasonable in the circumstances. As I have explained elsewhere, the question of whether particular measures are reasonable turns heavily on the context.²

Because the IHRL standard is fact-dependent, human rights institutions tend to apply it loosely when they assess conduct outside law enforcement settings—when situations are more chaotic, and states have less operational control. Consider a series of decisions by the European Court of Human Rights (ECtHR) arising out of Russia’s responses to internal terrorism. In *Isayeva v. Russia*, the court suggested that Russia could lawfully target to kill Chechen fighters, even absent the kind of imminent threat that IHRL usually requires.³ In *Khatsiyeva v. Russia*, it left open the question of whether a state could lawfully use lethal force against someone merely because he was armed or failed to comply with official safety instructions—possibilities that would be unthinkable in a law enforcement setting.⁴ And in *Finogenov v. Russia*, the court expressly recognized that IHRL applies more leniently when the facts so require—there, because Russia was pressed for time and lacked situational control.⁵

² See Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1392–95 (2012); Monica Hakimi, *Taking Stock of the Law on Targeting, Part I*, EJIL TALK! (Dec. 12, 2016), at <http://www.ejiltalk.org/taking-stock-of-the-law-on-targeting-part-i>.

³ *Isayeva v. Russia*, App. No. 57950/00, 41 Eur. H.R. Rep. 791, 833 (2005).

⁴ *Khatsiyeva v. Russia*, App. No. 5108/02, paras. 134–39 (Eur. Ct. H.R. 2008).

The ECtHR has hinted that IHRL might also be less stringent when it regulates a state’s extraterritorial conduct. In *Al-Skeini v. United Kingdom*, the court decided that the IHRL obligation to investigate state killings “continues to apply in difficult security conditions, including in a context of armed conflict.”⁶ Yet the court then noted that the form of any investigation “may vary depending on the circumstances.”⁷ “[C]oncrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed.”⁸ Such constraints can be expected when a state engages in counterterrorism operations outside its own territory. In these circumstances, the state is unlikely to have the full arsenal of tools and institutions that, back home, allow it to achieve its legitimate security interests while satisfying the strictest human rights standards. In short, even if IHRL governs U.S. lethal operations, its substantive requirements would be fact-dependent and are not yet settled. It would not “obviously and inarguably” prohibit the “entire apparatus” of the U.S. drone program, as Jaffer contends.

Second, Jaffer’s argument against the worldwide application of IHL is misdirected because, as of 2016, the United States insisted that it would apply IHL’s targeting standards only in areas of active hostilities or other “extraordinary circumstances” (pp. 256–57). Outside those situations, the 2013 Presidential Policy Guidance (PPG)⁹ provide for the United States to use lethal

⁵ *Finogenov v. Russia*, App. No. 18299, para. 211 (Eur. Ct. H.R. 2011) (“[T]he Court may occasionally depart from that rigorous standard of ‘absolute necessity’ . . . [if] its application may be simply impossible where . . . the authorities had to act under tremendous time pressure and where their control of the situation was minimal.”).

⁶ *Al-Skeini v. United Kingdom*, App. No. 55721/07, para. 164 (Eur. Ct. H.R. 2011).

⁷ *Id.*, para. 165.

⁸ *Id.*, para. 164.

⁹ Presidential Policy Guidance: Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), available at https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

force only: (1) against a target that poses a “continuing, imminent threat to U.S. persons”; (2) “when capture of an individual is not feasible and no other reasonable alternatives,” including action by the territorial state, “exist to effectively address the threat”; and (3) with “[n]ear certainty that a lawful target is present” and “that non-combatants will not be injured or killed” in the operation (pp. 255–56). The outer bounds of the PPG have never been clear, but they are in any event narrower than what the global application of IHL would permit. Moreover, as a practical matter, the vast majority of U.S. lethal operations have occurred in places like Yemen, Somalia, and the tribal areas of Pakistan—where the ordinary tools of law enforcement were compromised due to the recognized government’s diminished authority or control.

Criticizing the U.S. practice on the merits is, of course, fair game. For instance, Jaffer rightly notes that the United States defines “combatant” broadly, to include many people who would not qualify under more mainstream definitions. That definition dilutes the U.S. claim that it rarely kills or injures non-combatants. But to attack the United States for applying IHL’s permissive standards worldwide is to paint with too broad a brush (at least for now). As Jaffer himself concedes, the PPG “gestured toward human rights principles” and was “in part a concession to those who rejected the paradigm of borderless war” (p. 40).

What really seems to drive Jaffer’s legal critique is his concern that the U.S. executive branch is unbounded by law in conducting these operations. Jaffer attacks the PPG because its targeting standards are “cherry picked from different legal regimes” and discretionary, rather than legally required (p. 7). For him, the “mish-mash of ideas borrowed from different legal paradigms” (p. 40) is troubling because it is part of how the U.S. executive branch evades legal controls on its behavior. “If this is law,” Jaffer proclaims, “it is law without limits—law without constraint” (p. 7).

A similar concern animates other essays under review. Naz Modirzadeh’s chapter in *Theoretical Boundaries* nicely tracks how the participants in

debates about U.S. counterterrorism operations invoked, applied, and adapted IHL and IHRL over time. Modirzadeh characterizes the resultant U.S. legal positions as

“folk international law,” a law-like discourse that relies on a confusing and soft admixture of IHL, *jus ad bellum*, and IHRL to frame operations that do not, ultimately, seem to be bound by international law—or at least by any conception of international law recognizable to international lawyers, especially non-Americans. (P. 194)

A big concern for Modirzadeh, as for Jaffer, is that under the U.S. approach “IHL functions not as binding international law regulating the behavior of the armed forces and armed groups . . . but rather as a free-floating and shifting set of principles that provide guidance for how to kill ethically” (p. 224). Thus, she says that the U.S. approach calls into question “[t]he extent to which international law can meaningfully constrain authority during the tumult of armed conflict and other situations of lethal force . . .” (p. 231).

Kevin Jon Heller’s chapter also complains about the U.S. method for identifying the legal standards that govern its counterterrorism operations. According to Heller, the United States consistently invokes permissive standards by drawing dubious analogies between international armed conflicts and the situations in which it conducts these operations. Heller acknowledges that other global actors also apply IHL and IHRL by analogy. One big difference, he says, is that those other actors treat their analogized rules as customary international law. The United States “has never claimed that the rules it applies by analogy have achieved customary [legal] status” (p. 235). Here again, the complaint is that the United States denies being meaningfully constrained by international law.

So, a lot of what animates the pieces that criticize the U.S. practice is not just, as Jens Ohlin puts it in *Theoretical Boundaries*, that there is “a profound ad hocery in U.S. legal positions, which often involve mixing and matching between legal standards and legal frameworks

...” (p. 18). After all, the U.S. executive branch is not alone in crafting hybrid norms for situations in which neither IHL nor IHRL provides all of the answers. Human rights courts,¹⁰ the International Committee of the Red Cross (ICRC),¹¹ and national courts¹² also mix and match IHL, IHRL, and domestic law. The worry seems to be that, in cherry picking from different regimes, the United States is evading legal constraints on its behavior.

B. *Arguing for Legal Clarity*

A similar worry animates the second routine script on the relationship between IHL and IHRL—which is not to insist that the law is clear and being violated but to acknowledge and then try to resolve its evident uncertainties. Ohlin’s contributions to *Theoretical Boundaries* are illustrative. His introductory chapter emphasizes that, for many counterterrorism operations, the governing regime and standards of behavior are unsettled. He claims that “there is not even agreement on whether the regimes, in this case IHL and IHRL, are complementary or competing” (p. 21). He warns that, now that IHRL has become more ambitious, the two regimes are approaching an “inescapable collision” (p. 4). For Ohlin, that conflict must be resolved: “the day will soon come when public international law will be forced to adopt a clear understanding of how IHL and IHRL interact with each other. . .” (*id.*).

Ohlin then proposes a way to address the “seemingly intractable problem” that he

identifies (p. 21). He argues that, when a government acts as a sovereign exercising control over its subjects, the substantive standards ought to come from IHRL. By contrast, when it acts as a belligerent—by which he basically means a party to an armed conflict—the relevant regime is IHL. Ohlin defends that distinction by explaining that IHL standards “are reciprocal in the sense that they apply to both parties to the armed conflict (even non-state actors), whereas [IHRL standards] are asymmetrical because they only apply to governmental entities capable of exercising sovereign power” (p. 129). Again, Ohlin draws the distinction in order to resolve the uncertainties that arise when IHL and IHRL are both potentially in play but appear to conflict.

Other chapters in *Theoretical Boundaries* focus on the same issue. Marko Milanović assesses the *lex specialis* principle, as one tool for resolving regime conflicts. Milanović argues that the principle is misguided to the extent that it reflects the assumption that states “could not possibly have intended to legislate two hierarchically equal norms that are ultimately contradictory” (p. 109). States *do* in fact “conclude (multilateral) treaties that, once interpreted and applied to specific problems, can ultimately conflict” (p. 110). Like Ohlin, Milanović considers such conflicts to be problematic. “This is not an outcome that is normatively desirable, and it preferably should be avoided, but it can and does happen” (*id.*). But Milanović argues that the *lex specialis* principle is not a useful tool for resolving regime conflicts. He says that, “rather than endlessly ruminate on the relationship between IHL and IHRL as a whole,” we ought to “arrive at specific rules applying to specific problems that are clear and predictable” (p. 116).

Adil Haque also recognizes that “IHL and IHRL can conflict, the former permitting what the latter forbids. One task, then, is to interpret specific norms in a way that avoids or reduces potential conflict between them” (p. 26). For Haque, conflicts between IHL and IHRL would ideally “be resolved by reference to a shared moral aim” (pp. 26–27). He offers a thoughtful analysis of how this might be done. John Dehn focuses on the question of how states

¹⁰ *E.g.*, *Hassan v. United Kingdom*, App. 29750/09, paras. 96–111 (Eur. Ct. H.R. 2014); *Case of the “Mapiripán Massacre” v. Colombia*, Merits, Reparations, and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, paras. 114–15 (Sept. 15).

¹¹ *E.g.*, NILS MELZER, ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 77–82 (2009).

¹² *E.g.*, *infra* notes 24–25 and accompanying text (discussing Israeli and U.K. judicial decisions); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (J. O’Connor, plurality) (using a mix of U.S. domestic law and IHL principles to uphold, and then to impose procedural limits on, the government’s authority to detain people administratively).

may respond to armed attacks by nonstate actors who operate in ineffectively governed territories. Dehn “accepts the ambiguity in international law’s current content and scope” and argues for creating new norms that clarify this area of the law (p. 346). In particular, he suggests that states recognize a right to self-defense in this context and apply “somewhat of a hybrid IHL/HRL legal framework” (p. 318).

Multiple authors thus share the view that conflict and uncertainty in the law are undesirable and ought to be corrected. The authors do not all explain *why* they hold that view, but Ohlin does. He contends that an “animating impulse behind this entire academic endeavor is the assumption that lack of clarity regarding fundamental principles is a major obstacle toward effectiveness on the ground” (p. 22). That assumption has a strong pedigree.¹³ Theorists commonly posit that vagueness in the substantive standards of international law undercuts their efficacy.¹⁴ Some theorists go further and suggest that vague standards lack a defining attribute of law—that they are not really good law.¹⁵ The logic goes something like this: if a standard is

too open-ended, it inadequately defines what is permitted and what is proscribed, so absent an authoritative body to determine the law’s content, it cannot effectively guide human conduct or regulate behavior. As applied to IHL and IHRL, this is usually taken to mean that the law cannot meaningfully constrain states or other actors that might trample on individual rights.

II. AMBIGUITY AND CONTESTATION

The two scripts that I have described are not particular to the works under review. Much of the secondary literature on the relationship between IHL and IHRL: (1) insists that the law is fairly straightforward and just needs to be followed, or (2) proposes reforms for making it clearer. These scripts suggest that, if IHL and IHRL are to operate as effective law, they must define with sufficient clarity the prescribed constraints on human behavior. The implication, whether intentional or not, is that IHL and IHRL are not quite working in many contemporary settings in which human security is at risk. The first script places the blame on states, like the United States, that pursue their own policy preferences in apparent disregard of accepted legal standards. That script is suitable for lawyers in advocacy roles, but the second script exposes its limits as an analytic tool. If, as the second script concedes, the law is unsettled, then claims that states are violating it become less persuasive; states might just be acting within its interpretive spaces. According to the second script, the ambiguity is itself the problem. Yet as I discuss below, this ambiguity is unlikely to be resolved anytime soon. So, the two scripts together create the impression that IHL and IHRL cannot

¹³ See, e.g., RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 111–12 (2013) (“A common view is that human rights treaties should aspire to greater levels of precision to foster compliance and enforcement.”); Malcolm MacLaren & Felix Schwendimann, *An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law*, 6 GERMAN L.J. 1217, 1240 (2005) (“[I]t is incontestable on general legal and practical considerations that such attempts to clarify existing rules can facilitate the rules’ effectiveness and improvement.”).

¹⁴ E.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 10 (1995) (“[A]mbiguity and indeterminacy of treaty language lie at the root of much of the behavior that might seem to violate treaty requirements.”); Thomas M. Franck, *Legitimacy in the International System*, 82 AJIL 705, 714 (1988) (“Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance.”); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1863 (2002) (“As the uncertainty of an obligation increases, the reputational cost from the violation decreases.”).

¹⁵ E.g., JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* 351 (2010) (explaining that the criteria of law include clarity in content and consistency in application); Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcskik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT’L ORG. 401, 414 (2000) (“[P]recision and elaboration are especially significant hallmarks of legalization at the international level.”).

meaningfully be harnessed in many modern situations of violence.

Perhaps they cannot, but the fact that the legal practice in this area has been so active for so long suggests that they are still doing *something*. Let me suggest, as a next stage in the research agenda, that we take this practice more seriously on its own terms. In other words, rather than start with a particular jurisprudential vision for IHL and IHRL, and then begrudge the practice for falling short of that vision, we might begin with the practice itself—by examining how, why, and with what effect IHL and IHRL actually operate in the world. To be clear, I am not suggesting that we simply describe or apologize for the practice. I am suggesting that we evaluate it in terms of the institutional and cultural contexts within which it occurs. A critical or normative assessment would seek to understand the practice as it plays out before trying to diagnose its virtues or weaknesses, identify plausible alternatives, or propose reforms that would be not only viable but also desirable, once they are implemented.¹⁶

¹⁶ We can analogize here to the distinction that some philosophers draw between “practice-independent” and “practice-dependent” theories of human rights. (I am indebted to Christopher McCrudden for bringing my attention to this distinction.) In practice-independent theories, the justification for and content of human rights are not constrained by the historically contingent and politically compromised practices that we happen to live with; human rights principles are derived through other means, like morality or intuition, and then used to assess or try to reform that practice. Carrying the analogy forward, much of the work on the relationship between IHL and IHRL is practice-independent in the sense that it begins with a jurisprudential vision—an idea of what law is or how law functions—and then uses that vision to evaluate the practice. By contrast, practice-dependent theories define and justify human rights in terms of the particular institutional or cultural contexts in which they arise. Such theories ask not whether a given practice conforms to an externally derived ideal but what functions it does or might serve in the real world. The practice-dependent approach is like the one that I am advancing. For excellent overviews of this distinction in the philosophical literature, see Christopher McCrudden, *Human Rights: Law, Politics, and Philosophy* (draft manuscript on file with author); and Andrea Sangiovanni, *Justice and the Priority of Politics to Morality*, 16 J. POL. PHIL. 137 (2008).

A. *Discordance in the Legal Practice*

A number of the pieces under review recognize but do not quite grapple with the fact that international law at the intersection between IHL and IHRL is highly contentious and fluid.¹⁷ Contests over the applicable legal standards persistently play out through multiple doctrinal forms and in manifold arenas. Some of these contests, like the debate about the *lex specialis* principle, center on the regime choice. Others assume that one or the other regime applies and then ask what that regime does or should require in discrete settings.

It is worth acknowledging just how discordant this area of international law is. Start with the basic claim that the substantive standards for non-international armed conflicts derive mostly from customary IHL and are modeled after the treaty law for international armed conflicts.¹⁸ This claim is widely accepted at a high level of generality.¹⁹ But its meaning and relevance remain unstable. IHL experts who take the claim for granted still have fundamental differences about how to translate for non-international conflicts the IHL that was developed for international conflicts.²⁰ These differences were apparent, for example, when the ICRC adopted its 2009 *Interpretive Guidance on the Notion of*

¹⁷ *E.g.*, Dehn at 317 (“Disputes regarding the applicable legal framework stem largely from [a set of normative] disagreements. . . .”); Luban at 49 (“[T]he legalisms are pretty clearly a stand-in for a broader debate about the very nature of war and peace and the laws that regulate them, and that debate is not technical at all.”); Milanović at 78, 81 (describing a debate that is “waged between two camps” of international lawyers, who exploit the “unbearable” complexity in the law to advance their preferred policies); Ohlin at 119 (“It is no surprise, then, that the choice of framework question is contentious and bitter.”).

¹⁸ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at xxxv (2005) (“State practice . . . has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary international law to non-international armed conflicts.”).

¹⁹ See SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 56–57, 61 (2012).

²⁰ For a discussion of and critique of this method, see Hakimi, *A Functional Approach to Targeting and Detention*, *supra* note 2.

Direct Participation in Hostilities.²¹ The *Interpretive Guidance* was meant to clarify an issue that lies at the heart of IHL: when may someone be targeted for attack? Instead, it generated a sharp debate on that issue.²²

Meanwhile, many global actors question whether customary IHL, as modeled after the treaty law for international conflicts, is even the right regulatory framework for modern counterterrorism operations. In this day and age, such operations are regularly appraised by actors who are not particularly invested in “pure” IHL—domestic courts, human rights institutions, and civil society groups. These actors commonly either disregard IHL or apply hybrids that mix it with other sources. The ECtHR has repeatedly applied IHRL, instead of IHL, to situations that are also covered by IHL.²³ The Israeli Supreme Court has used domestic law to modify the norms that, in its view, would have applied as a matter of customary IHL.²⁴ U.K. courts have suggested that, unlike the IHL that governs international armed conflicts, the IHL for non-international armed conflicts does not license administrative detention.²⁵ Such decisions limit the practical relevance of any substantive standard of customary IHL that is modeled after the treaty law for international armed conflicts.

²¹ MELZER, *supra* note 11.

²² See, e.g., W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y. U. J. INT’L L. & POL. 769 (2010); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SECURITY J. 5 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010).

²³ E.g., *Isayeva v. Russia*, *supra* note 3; *Al-Skeini v. United Kingdom*, *supra* note 6.

²⁴ HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Israel*, 2006(2) *Isr. Rep.* 459, 490–95 [2005] (*Isr.*).

²⁵ *Al-Waheed v. Ministry of Defense & Serdar Mohammed v. Ministry of Defense*, [2017] UKSC 2, Jan. 17, paras. 12–14; see also *id.*, paras. 235(ii), 256–57, 271–76 (dissenting opinion of Lord Reed); *Serdar Mohammed v. Secretary of State for Defense*, [2014] EWCA Civ. 843, paras. 9(ii)(c), 164–253 (U.K. Court of Appeal).

The IHRL side of the ledger is not much cleaner. For instance, although the ECtHR has issued several decisions at the intersection between IHL and IHRL, its reasoning tends to be incremental, fact-specific, and at times contradictory. Thus, questions about IHRL’s extraterritorial scope, its content outside law enforcement settings, its derogation provisions, and its relationship with IHL remain a constant source of uncertainty and friction—both at the ECtHR and in other parts of the human rights system. This presumably is why Milanović describes the existing doctrinal framework as “simply unbearable” in its complexity (p. 81).

Of course, not all of IHL and IHRL is up for grabs. Some norms, like the prohibition of torture, are quite strong. They are widely accepted and treated as law, even though they are also at times violated. Further, even in areas of contestation, many interpretations remain out of bounds. No one seriously contends that states may target to kill people who just happen to live in the same neighborhood as an insurgent. Yet as applied to contemporary counterterrorism operations, large swaths of IHL and IHRL are characterized not by clarity or settlement but by fluidity and ongoing contest. Norms that are claimed to be authoritative are actually unstable, either generally or as interpreted for concrete settings. They are accepted and treated as law only provisionally, for discrete operations, by some actors, or in particular venues.²⁶

²⁶ See Christopher M. McCrudden, *Is the Principal Function of International Human Rights Law to Address the Pathologies of International Law? A Comment on Patrick Macklem’s The Sovereignty of Human Rights*, 67 TORONTO L.J. 623, 628 (2017) (“Any legal decision about a contested area of human rights is often quite provisional and subject to varying degrees of continuing legal debate and challenge.”); cf. W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15, 28–29 (Rüdiger Wolfrum & Volker Röben eds., 2005) (“Because the question of whether international law will be effective in a particular dispute will increasingly depend upon the arena or forum in which the dispute is heard, scholarly and practitioner statements of what the law is . . . will increasingly

One reason for that dissonance might be ambivalence or bad faith. Some states are not committed to advancing human rights or want to minimize the constraints on their power. But surely, another reason is that the questions that arise at the intersection between IHL and IHRL are difficult. Global actors who are invested in these regimes but come at them from different perspectives or institutional positions naturally disagree about precisely how to balance the competing considerations that are at stake. These actors might at times find ways to compromise with or accommodate one another, but they often do not. There inevitably are situations in which the relevant interests and values cannot all be realized, and any “settlement” would be deeply offensive to at least some of the groups that partake in the IHL and IHRL project. This means that, even if a proposal for reform were to be adopted by certain actors or in specific venues, it almost certainly would be challenged or undercut by or in others.

B. Jurisprudential Assessments

Acknowledging that the legal practice in this area is so discordant taxes the jurisprudential vision that animates the two scripts that I described. Recall that these scripts assume that IHL and IHRL are not quite working as law when their substantive standards are fluid and constantly debated because, in that event, their capacity to constrain human behavior is limited. Indeed, many international lawyers define international law in terms of consensus and reconciliation, and in opposition to conflict.²⁷ For these lawyers, persistent disagreement about an issue evinces an absence of or deficiency in law; it

have to be qualified by reference to where a potential dispute in the future may initially be characterized in terms of law and where those characterizations will thereafter be put to political use.”)

²⁷ The doctrine on sources reinforces this vision because it defines international law in consensual terms. *See, e.g.,* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 ICJ Rep. 14, para. 269 (June 27) (“[I]n international law there are no rules, other than such rules as may be accepted by the State concerned. . . .”).

betrays that the issue falls more in the political than in the legal domain.²⁸

Yet that jurisprudential vision is not the only available one. A prominent school of thought already conceives of international law as an argumentative practice.²⁹ This school concedes that international law does not always establish accepted standards that regulate behavior. Even so, it can structure a social practice—by establishing texts, institutions, processes, and methods that global actors use to interact on the issues that concern them. Their interactions can be congenial or discordant, but the fact that they are discordant does not make them just politics and not law. Law creates a particular kind of practice by prioritizing some modes of interacting over others.

By the same token, we should not assume that decisions on contested issues are incompatible with the rule of law just because they are provisional, incongruous with one another, or motivated by considerations, like raw power, that might ideally be external to law. As Christopher Kutz has explained, legal decisions still must be defended in law, with reasons that support them. “The force of such reasons is not cancelled by the presence of competing considerations.”³⁰ Meanwhile, the law’s

²⁸ *E.g.,* ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 29 (2008) (“[P]olitical considerations are inherently subjective and can be subjectively manipulated, unlike accepted rules of law.”); MALCOLM N. SHAW, INTERNATIONAL LAW 12 (6th ed. 2008) (“Power politics stresses competition, conflict and supremacy . . . [while] law aims for harmony and the regulation of disputes.”).

²⁹ MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 565, 567–68 (2d ed. 2006) (describing international law as a common grammar that does not necessarily reflect the participants’ shared substantive commitments but instead structures an argumentative practice); Ingo Venzke, *Semantic Authority, Legal Change and the Dynamics of International Law*, 12 NO FOUNDATIONS 1, 2, 12 (2015) (arguing that “[t]he law provides the battleground for competing claims,” such that “different actors with varying degrees of semantic authority struggle” over its meaning).

³⁰ Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1028 (1993).

elasticity enables dissenters to resist the policies with which they disagree and advance competing positions. In the face of deep normative divisions, that dynamic might further the rule of law better than any legal settlement does. An ongoing legal contest allows for the constant airing and balancing of the competing considerations that are at stake. By contrast, legal settlement risks boxing some constituents out of the legal project and enabling the rule *by*, instead of the rule *of*, law. The point for now is that we need not accept a conception of law that fails to capture so much of the legal practice, especially if the practitioners themselves insist that they are doing law. Instead, we ought to question that conception and seriously entertain the alternatives.

C. *Practical Assessments*

Readers who accept that this kind of practice is law might still ask whether it is *effective* law. I do not intend to answer that question here, but for those who insist that IHL and IHRL can be effective only to the extent that they establish relatively clear substantive standards that constrain human behavior, let me underscore three points. Each warrants further research and analysis.

First, the persistent uncertainties in the law reflect fundamental disagreements about the substantive standards that ought to govern. These disagreements cannot simply be wished away, and where they persist, defining the law with more precision might mean accepting a fairly low common denominator. This is especially so because the formal mechanisms for “settling” international law—and reducing the wiggle room to advance contentious claims—are state-centric. States, as a group, would have to accept a new authoritative text that either clarifies the law or delegates substantial lawmaking to a single institution. Legal clarity is less likely to come through the process for customary international law because this process is itself decentralized and volatile; it is limited in its capacity to clarify the law when there is an intense and vociferous normative contest.

Second, if the goal is to improve states’ human rights records, then reducing the law’s elasticity will

at times be counterproductive. To be sure, elasticity enables states, like the United States, to evade the best or most rights-protective interpretation of the law. But it also enables other actors to press for *their* preferred legal positions. In other words, keeping the law pliable invites groups with diverse perspectives to continue arguing through it. And having such disputes might be the most plausible path for instigating change.

Gráinne de Búrca has recently made a similar point. She has argued that human rights treaties influence state conduct by structuring an argumentative and broadly participatory process in which discrete policies are continuously developed, evaluated, and adapted in diverse governance arenas.³¹ In de Búrca’s account, “the apparent ambiguity in standards and the weakness of enforcement mechanisms . . . can be seen as important and necessary components of a properly functioning system” because they create space within which a conflictual practice can thrive.³² The practice on IHL and IHRL does not perfectly replicate de Búrca’s model for success, but it does contain some of her model’s key features, at least for states that engage seriously with the law and have active civil societies.

The experience with U.S. lethal operations might even be an example of such success.³³ The official U.S. documents in *The Drone Memos* and the December 2016 White House *Report* paint a picture not of bull-headed indifference or obstinacy but of real legal engagement and modest change.³⁴ For years, the

³¹ Gráinne de Búrca, *Human Rights Experimentalism*, 111 AJIL 277 (2017).

³² *Id.* at 280.

³³ For an argument to this effect, see JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

³⁴ Jaffer tries to paint a different picture. He describes a “policy of obfuscation” and “stonewalling” by an executive branch intent on keeping “[b]asic information . . . secret even from the courts and Congress” (p. 25). However, Jaffer also recognizes that “[c]ontroversy over drone strikes compelled the Obama administration to discuss the campaign publicly in more detail” (p. 20) and that “the gap between what the government said was secret and what was actually secret became increasingly difficult for the government to manage and increasingly difficult for the

United States refined its counterterrorism policies as it tried to justify them under international law. Jaffer himself recognizes that “the drone campaign is saturated with the language of law” and that “[p]erhaps no administration before [the Obama] one has tried so assiduously to justify its resort to the weapons of war” (p. 7). The United States could certainly do more, and critics will charge that any change was marginal and easily reversible. Even if they are correct, it would not mean that international law was ineffective. It might just mean that the contrary positions were insufficiently compelling to prevail, at least for now.

In any event, the intensity of this normative contest suggests that legal clarity is not an unalloyed good. Consider two alternatives that would clarify the law at considerable cost. First, settling the law as the United States would have it would inhibit, rather than enhance, the opportunities for ongoing protest and change. It would mean solidifying standards that are more permissive than many would like. Second, defining the law as Jaffer does might galvanize more states to disengage from and openly violate it. For decades, the central problem in IHL and IHRL has not been a dearth of authoritative pronouncements on the law’s substantive content. States sometimes fail to comply even with norms that are clear and well accepted as law. The central problem has been that states are, on the whole, ambivalent about doing as much as possible to secure human rights. Where the law is ambiguous, it can at least be used to advance claims that go beyond what states would accept of their own volition; it can entangle states in the practice of trying to justify their positions to other stakeholders; and depending on the circumstances, it can foster organic change. This change might be provisional and might not apply equally to all states, but the effect might still be to enhance human rights in discrete settings.

courts to ignore” (p. 31). Indeed, the collection of documents that comprise the bulk of the book show that, largely because of efforts like Jaffer’s, much about U.S. lethal operations is now publicly available.

Third, even when IHL and IHRL do not have that effect, they might do other important work. For example, they clearly enable a diverse and diffuse set of actors to disagree, in relatively productive ways, about some of the most pressing challenges to human and national security. I have argued elsewhere that having those contests can be valuable, even when they do not lead to substantive resolution or change.³⁵ Related, IHL and IHRL might help constitute or galvanize domestic civil society groups,³⁶ or give people who are otherwise marginalized from decision-making opportunities to voice and justify their discontent.³⁷ To assess whether the legal practice at the intersection between IHL and IHRL is effective, we have to examine the many ways in which it might shape human behavior.

III. CONCLUSION

Although the two familiar approaches on the relationship between IHL and IHRL can be productive, even critical, parts of the legal practice, they have real limits. This does not mean that international lawyers should just abandon them. Lawyers should continue to criticize or defend the legality of specific operations, even when the applicable standards are unclear.

³⁵ Monica Hakimi, *The Work of International Law*, 58 HARV. INT’L L.J. 1 (2017); Monica Hakimi, *Constructing an International Community*, 111 AJIL 317 (2017); see also McCrudden, *supra* note 26, at 14 (“[T]he lack of resolution of the contradictions in the international adjudication of human rights law disputes, for example, is not to be regarded as a failure but, rather, as an essential element of the practice of human rights. The practice . . . becomes the site of provisional and (politically) temporary accommodation that helps us to live together, despite the basic conflicts that are brought to court.”).

³⁶ See Kiyoteru Tsutsui, *Human Rights and Minority Activism in Japan: Transformation of Movement Actorhood and Local-Global Feedback Loop*, 122 AM. J. SOCIOLOGY 1050 (2017).

³⁷ See, e.g., Johan Karlsson Schaffer, *The Point of the Practice of Human Rights: International Concern or Domestic Empowerment?*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564514 (manuscript at 14) (arguing that human rights are “power-mediators that provide relatively weak social agents with normative resources for challenging political authority”).

But when they do, the rest of us should appreciate that they are acting as advocates, advancing particular claims on the law. We should not expect their claims to be broadly treated or accepted as law. Likewise, while lawyers might at times realize certain gains by pressing for legal clarity, such clarifying moves are often limited in effect—relevant only for particular states, venues, or moments in time—and might have real downsides. The key analytic point is that, if we want to understand and assess IHL and IHRL as social phenomena, we have to push beyond those approaches. They tell us little about whether or how the law is working, what functions or values it is serving, or how it might realistically be improved. Tackling these questions requires taking seriously the actual practice of law, with all of its messiness and discordance.

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