

**THE HOUSE BUILT ON SAND:
AN ANALYSIS OF BATTLEFIELD MERCY
KILLINGS IN NON-INTERNATIONAL ARMED
CONFLICTS UNDER INTERNATIONAL
HUMANITARIAN LAW AND INTERNATIONAL
HUMAN RIGHTS LAW REGIMES**

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In discussing laws applicable to the conduct of hostilities in non-international armed conflicts, many scholars presume that battlefield mercy killing is per se illegal. However, the history of the drafting of common Article 3 to the Geneva Conventions, as well as the text itself, reveals much more ambiguity. Additionally, although the applicability of human rights law in armed conflicts is still an issue of debate among States, the principles supporting battlefield mercy killing are the same as those which underpin medical euthanasia, an act recognized by several human rights bodies. This Article analyzes arguments under both treaty and customary international law under which battlefield mercy killing could be deemed legally permissible, and it proposes policy considerations that support either foreclosing these legal gaps or strictly regulating the act under international law.

I. INTRODUCTION

A. *United States v. Chief Special Warfare Operator Edward Gallagher, U.S. Navy*

In October 2016, Iraqi and Kurdish forces—assisted by coalition airstrikes and military advisors—began the push to retake Mosul from the Islamic State of Iraq and Syria (ISIS), an operation that would ultimately last nearly eight months.¹ On a day of particularly heated fighting in May 2017, members of SEAL² Team 7's Alpha Platoon found themselves in the heart of Mosul alongside Iraqi security forces. Word came over the radio that a teenage male ISIS fighter was being brought to the SEAL medics at the rear of the battlefield for care. Caught in a coalition airstrike, the semi-conscious ISIS fighter was suffering from external wounds and a collapsed lung, a common injury from being in the concussive blast radius of a large explosion. Some SEALs would later report that their platoon leader, Chief Special Warfare Operator (SOC) Edward Gallagher,

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I owe a debt of gratitude to Professor Gabriella Blum and the incredible staff of Harvard Law School for guidance and support, especially through the uncertainty caused by the COVID-19 pandemic. All mistakes are attributable to the author alone.

¹ Tim Arango & Michael R. Gordon, *Iraqi Prime Minister Arrives in Mosul to Declare Victory Over ISIS*, N.Y. TIMES (July 9, 2017), <https://nyti.ms/3imZ6dt>.

² The United States Navy's Sea, Air, and Land forces, commonly known as SEALs, perform maritime and land-based special operations in urban, desert, jungle, arctic, undersea, and mountain environments. 1 U.S. NAVY, MANUAL OF NAVY ENLISTED MANPOWER AND PERSONNEL CLASSIFICATIONS AND OCCUPATIONAL STANDARDS SO-3 (2016).

was heard over the radio saying, “Lay off him, he’s mine.”³ Upon arriving at the scene, SOC Gallagher, a trained SEAL medic and sniper, joined other medics in placing a breathing tube inside the ISIS fighter’s chest and cutting open an emergency airway in his throat to alleviate his collapsed lung.⁴ Witnesses would later report that while rendering aid, SOC Gallagher pulled out a hunting knife and stabbed the ISIS fighter in the neck twice.⁵ The incident would remain unreported outside of SEAL channels for nearly a year.

In a court-martial process plagued with allegations of prosecutorial spying,⁶ leaking of documents,⁷ and even Presidential interference that would ultimately cost then-Secretary of the Navy Richard Spencer his job,⁸ SOC Gallagher finally saw the inside of a courtroom in the summer of 2019. During the presentation of its case, SOC Gallagher’s team of uniformed and civilian attorneys put forward its star witness—Special Warfare Operator First Class (SO1) Corey Scott. SO1 Scott, also a trained SEAL medic, had been on the scene treating the ISIS fighter. In a twist of courtroom drama, SO1 Scott stated that although SOC Gallagher might have stabbed the ISIS fighter in the neck, he did not ultimately kill the ISIS fighter—SO1 Scott did. In describing the battlefield scene, SO1 Scott testified, “I held my thumb over his trach[eotomy] tube until he asphyxiated.”⁹ Allegedly harboring no malice towards the ISIS fighter, SO1 Scott testified that this was an act of mercy to prevent the ISIS fighter from being tortured by Iraqi security forces. SO1 Scott testified, “I knew he was going to die anyway, and I wanted to save him from waking up to whatever would happen to him.”¹⁰

This case garnered significant media attention and controversy, in part because of President Trump’s unprecedented involvement in the military justice process.¹¹ One uncontroversial aspect of the case related to the illegality of SOC Gallagher’s alleged actions. If SOC Gallagher had committed the act of which he stood accused, stabbing and killing a fighter who had been rendered *hors de combat* out of mere aggression or misguided pursuit of reprisal, his actions would have been unquestionably illegal under international law. SO1 Scott’s actions open up a wholly separate area of discussion—the role of mercy in killing on the battlefield. Assuming the facts were as SO1 Scott relayed, which this Article will not dispute, he killed the ISIS fighter to save him from a significantly worse fate—torture at the hands of Iraqi security forces.

This Article will consider the legality of battlefield mercy killing under both the international humanitarian law (IHL) and international human rights law

³ Dave Philipps, *Navy SEAL War Crimes Witness Says He Was the Killer*, N.Y. TIMES (June 20, 2019), <https://nyti.ms/3aagU8M>.

⁴ Dave Philipps, *Decorated Navy SEAL Is Accused of War Crimes in Iraq*, N.Y. TIMES (Nov. 15, 2018), <https://nyti.ms/31A4P91>.

⁵ *Id.*

⁶ Sasha Ingber, *Judge Removes Lead Prosecutor in Navy SEAL War-Crime Case*, NAT’L PUB. RADIO (June 4, 2019), <https://n.pr/30H1whe>.

⁷ Julie Watson, *Military Judge Airs Concerns About Media Leaks in Navy SEAL’s War Crimes Case*, NAVY TIMES (Feb. 12, 2019), <https://bit.ly/3fIUooA>.

⁸ Dave Philipps et al., *Trump’s Intervention in SEALs Case Tests Pentagon’s Tolerance*, N.Y. TIMES (Nov. 30, 2019), <https://nyti.ms/3abbH0y>.

⁹ Dakin Andone & Jack Hannah, *Prosecutors Say Navy SEAL Eddie Gallagher Killed a Prisoner and Took Pictures with the Corpse. The Defense Says It Was a ‘High Combat Environment,’* CABLE NEWS NETWORK (July 1, 2019), <https://cnn.it/3fLpsEi>.

¹⁰ Carl Prine, *Thanks to SEAL’s Immunity Deals, Confessed Killer Unlikely to Be Charged*, NAVY TIMES (June 24, 2019), <https://bit.ly/31yonL9>.

¹¹ See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 31, 2019, 3:58 PM), <https://bit.ly/3fBaPDy>; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2019, 8:30 AM), <https://bit.ly/3aaqgRX>; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 24, 2019, 6:32 PM), <https://bit.ly/33NrD8d>.

(IHRL) regimes as applied in non-international armed conflicts (NIACs).¹² Specifically, this Article will examine whether and how the concept of battlefield mercy killing is contemplated by significant international humanitarian and human rights instruments, as well as areas of developing and established customary international law. Under the IHL framework, this Article will consider obligations imposed on States engaged in NIACs vis-à-vis persons *hors de combat* and whether the act of battlefield mercy killing may be consistent with such obligations. Under the IHRL framework, it will consider whether battlefield mercy killing is *per se* an arbitrary deprivation of life or whether any other human rights considerations could render the act permissible, even desirable. In concluding that battlefield mercy killing is not clearly prohibited by either treaty or customary international law, this Article will set forth several policy reasons supporting either prohibition or strict regulation of the act.

B. History of Battlefield Mercy Killing¹³

The concept of mercy killing evokes polarizing legal and moral reactions from academics and warfighters alike. Anecdotally, there is perhaps no more iconic tale than Ambrose Bierce's story of the *coup de grâce*, or blow of mercy. Bierce served in the Union army during the American Civil War, and in one particularly distressing tale, he described the discovery of a gravely wounded comrade, Sergeant Caffal Halcrow, by his young company commander, Captain Downing Madwell.

The man who had suffered these monstrous mutilations was alive. At intervals he moved his limbs; he moaned at every breath. He stared blankly into the face of his friend and if touched screamed. . . . Articulate speech was beyond his power; it was impossible to know if he were sensible to anything but pain. The expression of his face was an appeal; his eyes were full of prayer. For what? There was no misreading that look; the captain had too frequently seen it in eyes of those whose lips had still the power to formulate it by an entreaty for death. . . . For that which we accord to even the meanest creature without sense to demand it, denying it only to the wretched of our own race: for the blessed release, the rite of uttermost compassion, the *coup de grâce*.¹⁴

In Bierce's account, Captain Madwell, believing that there was no other humane alternative in the circumstances, made the agonizing decision to end Sergeant Halcrow's life. Immediately after running his sword through Sergeant Halcrow's heart, Captain Madwell saw three men approach from the horizon. Two of the men were hospital attendants, and the third was Major Creede Halcrow, Captain Madwell's superior at the regiment and Sergeant Halcrow's older brother. Bierce's tale perfectly illustrates the difficulty faced by soldiers

¹² From a policy standpoint, it would be desirable for battlefield mercy killing to be uniformly legal or illegal in the conduct of all armed conflicts, whether they are international or non-international in nature. However, there is a significantly smaller body of law which governs non-international armed conflicts (NIACs), making this a much less settled area in non-international conflicts. Though this Article will focus on battlefield mercy killing in NIACs specifically, it will discuss, where appropriate, bodies of law which apply to international armed conflicts (IACs) and address the differences.

¹³ Stephen Deakin uses the term "battlefield mercy killing" in his article. Stephen Deakin, *Mercy Killing in Battle*, 12 J. MIL. ETHICS 162, 162 (2013). Other scholars have used terms such as "battlefield euthanasia." E.g., David L. Perry, *Battlefield Euthanasia: Should Mercy-Killings Be Allowed?*, 44 PARAMETERS 119, 119 (2014). This Article adopts the phrase "battlefield mercy killing," as it captures the two most fundamental characteristics of the act.

¹⁴ Ambrose Bierce, *The Coup de Grace*, LIFE AND LIMB 169, 172 (David Seed et al. eds., 2015).

placed in this situation. Emotional life-and-death decisions are made under intense conditions, often without time for significant reflection and without knowledge of all the circumstances.

Battlefield mercy killings are characterized by three fundamental criteria. First, the act must take place on the battlefield, however broadly defined. Death and destruction may be the byproducts of warfare, but fighters are the ones who execute them. And on the battlefield, fighters are permitted to take, and are protected from criminal liability for, such acts which are taken in compliance with international law. Second, the act must be undertaken out of mercy or compassion for the person killed.¹⁵ This creates a novel area of consideration whereby the motivation for taking the life of another becomes of utmost importance. IHL focuses on when the taking of a life is legally permissible, but generally does not consider the motivation of the person taking the life.¹⁶ This concept of considering motivation underlying battlefield actions will be explored in further detail. Third, the act must be accompanied by some objective indication that death as a result of the wounds is imminent. A soldier's subjective, but unreasonable, determination that killing is merciful cannot be justified if the victim's life could be saved with medical intervention.

Reports of battlefield mercy killing are sparse, and it is difficult to say whether prevalence has increased with the advent of "modern" warfare. Improvements in medical capabilities have rendered previously mortal injuries, such as abdominal wounds, amputations, and embedded shrapnel, nonfatal. But advances in medical care must also be viewed in light of advances in military technology. Vietnam saw the widespread use of napalm, a substance capable of adhering to man and machine alike, burning at over 1000° C. Air-to-surface missiles, such as the AGM-114 Hellfire, can be launched from miles away, killing everything within a 50-foot radius of the blast site. And while precision-guided munitions today can greatly limit damage to persons and objects beyond the intended target, there is no question that ordnance today has potential destructive capability beyond that which can be treated through modern medical care.

When discussing the propriety of battlefield mercy killing, many scholars presuppose that the act is *per se* prohibited by international law and *prima facie* immoral.¹⁷ However, given the fact that there is not even a clear consensus on the type of law that applies on the battlefield, this presupposition of illegality merits further examination. Specifically, there are two areas of international law that arguably apply in armed conflict: IHL and IHRL. Whether these areas of law apply complementarily or to the mutual exclusion of each other in armed conflict is an area of debate. IHL governs the conduct of warfare with an eye towards minimizing human suffering in relation to military necessity.¹⁸ Among other things, IHL governs aspects of warfare including which individuals may be the targets of attack, what types of weapons may be used in an attack, and what type of treatment must be afforded to individuals. IHL applies to the conduct of hostilities and, with very little exception, has no applicability in peacetime.¹⁹

¹⁵ Deakin, *supra* note 13, at 162.

¹⁶ This is not to suggest that the law regulating warfare should not concern itself with motivation. Under the just war theory, for example, the criterion of right intention requires that States fight for the sake of a just cause, which prohibits reprisals, retribution, and revenge. *See, e.g.*, Annalisa Koeman, *A Realistic and Effective Constraint on the Resort to Force? Pre-commitment to Jus in Bello and Jus Post Bellum as Part of the Criterion of Right Intention*, 6 J. MIL. ETHICS 198, 201-02 (2007).

¹⁷ *See, e.g.*, Deakin, *supra* note 13, at 171; Perry, *supra* note 13, at 120.

¹⁸ GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY 45 (2015).

¹⁹ *E.g.*, 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 [hereinafter Geneva Convention I].

IHL similarly promotes minimization of human suffering, but more broadly seeks to define, secure, protect, and enforce inherent rights held by individuals. IHL applies in times of peace and, some would argue, even in times of war.

II. BATTLEFIELD MERCY KILLING UNDER THE FRAMEWORK OF IHL

The Geneva Academy of International Humanitarian Law and Human Rights has classified the armed conflict in Iraq against ISIS as a NIAC dating back to 2014.²⁰ At the request of the Iraqi government, the United States-led coalition of international forces began an airstrike campaign targeting ISIS in August 2014.²¹ As the campaign evolved, support by the United States extended to military advisors and enablers on the ground. The onset of a NIAC implicates common Article 3 of the Geneva Conventions,²² binding on both States and organized armed groups as both treaty law and customary international law.²³ In relevant part, common Article 3 states:

- (1) Persons taking no active part in the hostilities, including . . . those placed *hors de combat* by . . . wounds . . . shall in all circumstances be treated humanely . . . 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; . . .
- (2) The wounded and sick shall be collected and cared for.²⁴

Much of the scholarship which presupposes the illegality of battlefield mercy killing points to other articles of the Geneva Conventions, perhaps because other articles are more specific in their discussions of safeguards for protected persons, without considering the classification of the armed conflict.²⁵ For example, Article 12 of the First Geneva Convention states:

Members of the armed forces and other persons mentioned . . . who are wounded or sick, shall be respected and protected in all circumstances. They shall be treated humanely and cared for by the Party to the conflict in whose power they may be . . . Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully^[26] be left without medical

²⁰ GENEVA ACAD. OF INT'L HUMANITARIAN L. & HUM. RTS., THE WAR REPORT 184 (Annyssa Bellal ed., 2015).

²¹ *Id.*

²² Common Article 3 refers to language in a particular provision which is common to all four Geneva Conventions. See Geneva Convention I, *supra* note 19, art. 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

²³ Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, INT'L REV. RED CROSS 189, 191 (2011).

²⁴ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

²⁵ See, e.g., Perry, *supra* note 13, at 120; Deakin, *supra* note 13, at 171.

²⁶ “Wilful” and “wilfully” are used throughout the Geneva Conventions, as this is the common British English spelling. This Article will use the phrases “willful” and “willfully” when not quoting sources.

assistance and care, nor shall conditions exposing them to contagion or infection be created.²⁷

However, other articles of the Geneva Conventions, even if they have achieved the status of customary international law, apply only in international armed conflicts (IACs). And while the language of common Article 3 does recommend that parties to the conflict endeavor to bring into force other provisions of the various Geneva Conventions, this precatory language does not bind State parties to any specific action.

A. *Drafting History of the Geneva Conventions*

The Geneva Conventions were negotiated against the recent memories of World War II and significant violations of traditional notions of the law of war.²⁸ While there was broad consensus regarding the comprehensive applicability of the Conventions to armed conflicts of an international character, there was disagreement about the extent of applicability to internal conflicts of domestic strife.²⁹ To the extent that the Geneva Conventions can be viewed as States placing self-limitations on the conduct of international warfare, common Article 3 can be viewed as States placing even further self-limitations in addressing purely domestic issues. Some States posited that common Article 3 was entirely unnecessary, suggesting that no State would inhumanely treat its own nationals in internal conflict, though this minority view was quickly tabled.³⁰ Taking the opposite approach, the International Committee of the Red Cross (ICRC) proposed that parties to an internal conflict be given the option to fully apply all provisions of the Conventions, believing that parties would be unwilling to refuse in the face of public opinion.³¹ Still, other States suggested that the entirety of the Conventions, which memorialized basic humanitarian provisions, apply to all armed conflicts regardless of characterization.³² At the end of the Diplomatic Conference, the States' representatives had reached a consensus that States engaged in NIACs would be bound by "fundamental humanitarian norms," which essentially provides no practical guidance to States on the interpretation of common Article 3.³³ Considerable authority is bestowed upon the text of common Article 3, but the words themselves leave much to be desired.

B. *Common Article 3*

Common Article 3 provides persons placed *hors de combat* with the guarantee of humane treatment in all circumstances.³⁴ But despite the attempt to craft a universally applicable provision for all armed conflicts not of an international character, the *travaux préparatoires* illustrate a surprising lack of discussion regarding the concept of humane treatment. David Elder adopts a definition of "that which is minimally necessary for the normal maintenance of mental and physical health and well-being of a human being," a meaning not

²⁷ Geneva Convention I, *supra* note 19, art. 12.

²⁸ David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE WEST. RES. J. INT'L L. 37, 37 (1979).

²⁹ *See id.* at 38 (noting that some scholars argue that as a result of the tilted power dynamics in favor of a few major stakeholders, common Article 3 results in few practical limitations on the internal policies of States).

³⁰ 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, SEC. B, at 329 (1951) [hereinafter FINAL RECORD B].

³¹ Elder, *supra* note 28, at 42.

³² *Id.* at 50.

³³ *Id.* at 53.

³⁴ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

found anywhere in the text of the Geneva Conventions, but even he recognizes that such a standard is not fixed.³⁵ The minimum standards to uphold the well-being of a human being vary with time, geography, culture, and socio-economic factors.³⁶ Some scholars argue that the ambiguity in common Article 3 was meant to allow the concept of humane treatment to remain relevant against societal changes.³⁷ This flexibility may have been desirable, assuming the drafters foresaw a future in which the conduct of international warfare would become more, not less, humane. Against the dark backdrop of World War II, this may have seemed inevitable. It is unlikely that the drafters of the Geneva Conventions could have anticipated that less than a century later, NIACs would become the prevalent type of armed conflict, overshadowing IACs in both scale and potential for human suffering.³⁸

Rather than seek to define humane treatment, common Article 3 instead enumerates prohibited acts, the first of which is “violence to life and person.”³⁹ Review of the *travaux préparatoires* indicates that some initial drafts of the Conventions qualified this language with the word “serious,” anticipating that some necessary medical treatments would inherently be violent.⁴⁰ Given the requirement to collect and care for the wounded and the sick in common Article 3, this would have been a significant concern. The qualifier was ultimately removed in the final draft, as the ICRC raised concerns that inclusion of such language could be interpreted as authorizing violence, which fell below the ambiguous standard of “serious,” negating the intent of the Conventions. Many States presupposed that legitimate violence, such as medical treatment, would always be permissible, provided it was for the welfare of the wounded and sick.⁴¹ Accordingly, while violence is not qualified in common Article 3, the States believed that the provision would be interpreted to prohibit illegitimate violence, understood as violence that was not for the welfare of the wounded and sick. Again, the phrase “violence to life and person” was not defined in common Article 3, but inclusion of “person” was meant to suggest that both an individual’s physical and moral integrity were to be protected.⁴² This certainly stretches the boundaries of traditional notions of violence, leaving open the question of how the drafters envisioned something like violence against the moral integrity of an individual.

Common Article 3 does not define “violence to life and person,” but lists examples of impermissible violence. This alone was enough to cause consternation by some States, which noted that the enumerated list was less expansive than Article 32 of the Fourth Geneva Convention. It specifically stated that High Contracting Parties were prohibited from taking any measures “causing physical suffering, the extermination of protected persons, murder, torture, corporal punishment, mutilation, medical and scientific experiments, and in general any measures of torture or cruelty whether applied by civilian or military agents.”⁴³ Recognizing that any enumerated list can never be sufficiently expansive, these States feared that common Article 3 could be interpreted as

³⁵ Elder, *supra* note 28, at 60.

³⁶ *Id.*

³⁷ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 98 (2010).

³⁸ Pejic, *supra* note 23, at 189.

³⁹ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

⁴⁰ 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, SEC. A, at 158 (1951) [hereinafter FINAL RECORD A].

⁴¹ *Id.*

⁴² *Id.* at 191.

⁴³ FINAL RECORD B, *supra* note 30, at 409.

providing fewer safeguards for protected persons in NIACs than in IACs,⁴⁴ an interpretation which is facially supported by the text of the Geneva Convention.

Common Article 3 enumerates types of violence to life and person, including “murder of all kinds” and torture.⁴⁵ In the Joint Committee of the 1949 Diplomatic Conference of Geneva, this draft language was met with the tongue in cheek question about how many types of murder there were.⁴⁶ While murder had been previously understood to be a criminal matter dealt with under domestic law, the Nuremberg Statutes included murder as a violation of the laws or customs of war, thus thrusting the concept into the purview of international law.⁴⁷ And while the States’ representatives recognized that concepts like murder and torture were described in the criminal law of all countries, there was no effort to reconcile potential differences in understanding of these fundamental concepts.⁴⁸ The 2016 commentary to the Geneva Conventions suggests that the broad language of “murder of all kinds” was meant to account for potential differences in national conceptions of murder and to ensure a broad interpretation,⁴⁹ and yet it goes on to provide its own definition of murder: the “intentional killing or causing of death of [protected] persons, as well as the reckless killing or causing of their death.”⁵⁰ The term “wilful killing” appears throughout the four Geneva Conventions as a grave breach of State obligations.⁵¹ And yet, the drafters of common Article 3 chose not to use that term, adopting instead the phrase “murder of all kinds.” And while murder is also prohibited in IACs by other provisions of the Geneva Conventions,⁵² the phrase is similarly not defined. If the 2016 commentary to the Geneva Convention is correct and the ambiguity in common Article 3 was intended to allow for different domestic conceptions of murder, this raises concerns about how the same undefined act can be prohibited as a matter of international law. The definition of murder proposed in the 2016 commentary does not appear in the 1952 commentary to the Geneva Convention, which simply states that the prohibited actions contained in subsection (1)(a) of common Article 3—including murder of all kinds—are those “which world public opinion finds particularly revolting—acts which were committed frequently during the Second World War.”⁵³

In the ultimate expression of irony, the 1949 Committee Report stated that terms like “murder” and “torture” were self-explanatory when used in the Geneva Conventions.⁵⁴ Still, if the drafters and States’ representatives believed that such concepts were self-explanatory, whether rightfully or wrongfully, it suggests that they shared some common understanding of acts which ultimately had no place on the civilized battlefield. Several States referred to the Nuremberg trials regarding crimes against humanity in discussing the types of acts which the Geneva Conventions purported to prohibit,

⁴⁴ *Id.* at 334.

⁴⁵ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

⁴⁶ FINAL RECORD B, *supra* note 30, at 329.

⁴⁷ *Id.* at 310.

⁴⁸ *Id.* at 355.

⁴⁹ INT’L COMM. RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION ¶ 597 (2d ed. 2016) [hereinafter 2016 COMMENTARY I].

⁵⁰ *Id.* at ¶ 599.

⁵¹ See Geneva Convention I, *supra* note 19, art. 50; Geneva Convention II, *supra* note 22, art. 51; Geneva Convention III, *supra* note 22, art. 130; Geneva Convention IV, *supra* note 22, art. 147.

⁵² See Geneva Convention I, *supra* note 19, art. 12; Geneva Convention II, *supra* note 22, art. 12; Geneva Convention IV, *supra* note 22, art. 32.

⁵³ JEAN S. PICTET, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD: COMMENTARY 54 (1952) [hereinafter 1952 COMMENTARY I].

⁵⁴ FINAL RECORD A, *supra* note 40, at 191.

immediately call[ing] up the vision of a person who has lost all sense of humanity, whose remaining instincts are those of a brute, who would not hesitate to smash a child's body against a wall, who would shoot anybody and who would order summary executions without trial or sentence, who would torture his victims or, in violation of the prohibition which we have adopted, would take hostages and perhaps, worse still, would execute them.⁵⁵

Although these examples would clearly meet any reasonable definition of impermissible acts under common Article 3, the perspective of the drafters remains unclear. Are these the most egregious acts conceivable when discussing violence to life and person, establishing a metaphorical ceiling in determining the scope of inhumane treatment? If so, what other types of less egregious acts would still be considered inhumane? If these were the types of notions that “self-explanatory” concepts of murder and torture were meant to convey, a textual argument consistent with the *travaux préparatoires* can be made that the arguably altruistic act of battlefield mercy killing would not have been *per se* prohibited by the drafters of common Article 3.

Common Article 3 also imposes an obligation to collect and care for the wounded and sick.⁵⁶ This is further codified in Article 7 of Additional Protocol II to require medical care and attention “to the fullest extent practicable and with the least possible delay.”⁵⁷ Although the existence of this obligation is clear, the extent of the obligation is more ambiguous. States do not have a limitless obligation to care for persons *hors de combat*, but rather have a duty to use best efforts, which may include relying on humanitarian organizations.⁵⁸ But it is also apparent that given the nature of warfare and limitations of modern medicine, best efforts will not always be sufficient to save a life. Common Article 3 and Article 7 of Additional Protocol II are silent as to what should happen once this determination has been made. That is to say, common Article 3(2) clearly imposes an obligation to care for the wounded and sick. Once it is apparent that best efforts will still result in the death of the person, States must look elsewhere to determine their obligations with regards to persons *hors de combat* who will inevitably die from their wounds.

The Geneva Conventions, like other multilateral documents of international law, obligate State parties to fulfill certain duties upon their consent to be bound by the provisions, or the extent that the provisions reflect customary international law or *jus cogens* norms. Similarly, States agree to be held responsible for violations of international law which can be attributed to the States themselves. Common Article 3 binds “each Party to the conflict,” suggesting that each State is responsible for its own actions.⁵⁹ However, the 2016 commentary to the Geneva Conventions interprets an additional obligation by States not to transfer “persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights [contained in

⁵⁵ FINAL RECORD B, *supra* note 30, at 307.

⁵⁶ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

⁵⁷ Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 7, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

⁵⁸ *Id.* arts. 7, 18.

⁵⁹ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

common Article 3] upon transfer.”⁶⁰ This is a concept known as *non-refoulement*, which is a significant doctrine of IHRL. The ICRC’s reasoning for interpreting an inherent obligation of *non-refoulement* under common Article 3 was that any other interpretation would allow States to side-step their obligations under common Article 3 by simply transferring persons within their control to a non-compliant State.⁶¹ The doctrine of *non-refoulement* will be addressed in a separate section on human rights law in the conduct of hostilities. At this point, it should just be noted that the text of common Article 3 does not expressly create the obligation of *non-refoulement*.

C. *United States Policy on Persons Hors de Combat in the Conduct of Hostilities*

The United State Department of Defense (DoD) promulgated the most recent version of its Law of War Manual in 2016. At the time, then-General Counsel of the DoD Stephen W. Preston recognized the same principal that the drafters of common Article 3 envisioned—the law of war plays a significant role in civilized military heritage and adherence to its principles stems from both a legal and ethical obligation.⁶² The DoD Law of War Manual offers significant insight into how the United States interprets many of its obligations under the Geneva Conventions. Of note, the Law of War Manual states that common Article 3 is the “minimum yardstick of humane treatment protections” for persons *hors de combat*, suggesting that the United States would recognize even greater protections than those provided for in common Article 3 in a NIAC.⁶³ And indeed, although the United States has not ratified Additional Protocol II, the DoD nonetheless invokes its requirement that persons *hors de combat* shall be “respected and protected,”⁶⁴ meaning that they shall not be “knowingly attacked, fired upon, or unnecessarily interfered with.”⁶⁵ However, it is doubtful that this acknowledgement carries any substantive weight. Citing to the general provision in Article 4 of Additional Protocol II, which requires that persons *hors de combat* are entitled to “respect for their person, honor and convictions, and religious practices,” the Law of War Manual makes no mention of the specifically enumerated acts which are prohibited under the requirement of humane treatment.⁶⁶ Even so, as previously mentioned, it is unclear whether the act of battlefield mercy killing expressly would be prohibited under Article 4 of Additional Protocol II, assuming that its provisions were binding as customary international law, an assumption that the United States would contest.

D. *Proposal to Revise Common Article 3*

Common Article 3 does not foreclose the act of battlefield mercy killing because of the ambiguity of its language. The word “kill” does not appear anywhere in the text of common Article 3. Instead, the text uses undefined phrases such as “violence to life and person” or proscribes certain acts, such as “murder” and “cruel treatment.”⁶⁷ Interpretations of the obligations under common Article 3 similarly adopt other IHL terms, such as prohibiting “attacks”

⁶⁰ 2016 COMMENTARY I, *supra* note 49, ¶ 708.

⁶¹ *Id.* ¶ 710.

⁶² *Foreword* to DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, at ii (2016) [hereinafter LAW OF WAR MANUAL].

⁶³ *Id.* § 8.1.4.1.

⁶⁴ *Id.* § 17.14.1.

⁶⁵ *Id.* § 17.14.1.2.

⁶⁶ *Id.* § 17.6.

⁶⁷ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

on protected persons.⁶⁸ But while common Article 3 is arguably the only substantive article regarding persons *hors de combat* found in the four main Geneva Conventions which applies in NIACs, it is not the only provision of law which references such protected persons.

Article 23(c) of the Hague (IV) Convention (Hague IV), which only applies in IACs as a matter of treaty law, is more absolute, prohibiting the “kill[ing] or wound[ing of] an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.”⁶⁹ However, the text of Hague IV is not without its own faults. By reference, Hague IV imposes the same duties of medical care to the sick and wounded as the Geneva Conventions.⁷⁰ Article 23(c) of Hague IV arguably provides no latitude for battlefield medical procedures, which could lead to the death of an enemy *hors de combat*, a concept which was heavily debated at the Diplomatic Conference of Geneva. Specifically, some States at Geneva argued whether doctors would have the latitude to perform inherently violent medical procedures without running afoul of the provisions of common Article 3.⁷¹ Ultimately, the drafters suggested that common Article 3 implies a difference between “legitimate” violence for the welfare of the wounded and sick and “punishable” violence.⁷² Medical treatment would fall under the former, while prohibited acts—such as those enumerated in Article 13 of the Third Geneva Convention⁷³—would fall under the latter. Article 23(c) of the Hague Regulations, in its absolutism, would textually treat both situations similarly.

Each of the four main Geneva Conventions also contains a provision regarding grave breaches of the Conventions, which as a strict matter of treaty law, applies only in IACs.⁷⁴ And while they differ slightly in substance, each provision prohibits “wilful killing [of]” and “wilfully causing great suffering or serious injury to body or health [to]” persons protected by the respective Convention.⁷⁵ The addition of this qualifier to the act of prohibited killing is significant because it removes potential liability for inadvertent killing of protected persons in the performance of life-saving medical procedures; in fact, it removes potential liability for inadvertent, or even reckless, killing entirely. At the Diplomatic Convention of Geneva, the drafters understood a willful act to be both intentional and with full knowledge of its wrongfulness. The guilty person “has considered the import and consequences of that act, and has not been deterred by such reflection from committing it.”⁷⁶ Applying this language to the act of battlefield mercy killing, there is no question that the intent of the actor is to end the life of the person *hors de combat*. The act is willful, and regardless of the motivation of the actor, the act would be prohibited under the unambiguous language of the provision. In 1996, the United States passed the War Crimes Act, which, in part, criminalized certain acts as grave breaches of common Article 3. In it, Congress defined murder as “[t]he act of a person who intentionally kills . . . one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.”⁷⁷ By

⁶⁸ INT’L COMM. RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 164 (Jean Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC IHL RULES].

⁶⁹ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex art. 23, Oct. 18, 1907, 36 Stat. 2277.

⁷⁰ *Id.* art. 21.

⁷¹ FINAL RECORD A, *supra* note 40, at 157.

⁷² *Id.*

⁷³ Geneva Convention III, *supra* note 22, art. 13.

⁷⁴ Geneva Convention I, *supra* note 19, art. 50; Geneva Convention II, *supra* note 22, art. 51; Geneva Convention III, *supra* note 22, art. 130; Geneva Convention IV, *supra* note 22, art. 147.

⁷⁵ *Id.*

⁷⁶ FINAL RECORD A, *supra* note 40, at 191.

⁷⁷ War Crimes Act of 1996, 18 U.S.C. § 2441 (2018).

defining the prohibited act as an “intentional killing,” much like the grave breach provisions of the Geneva Conventions, the War Crimes Act removes any ambiguity about battlefield mercy killing by focusing on the intentionality of the act rather than the motivation of the actor.

The fact that the United States has passed legislation prohibiting intentional killing of persons *hors de combat* in NIACs begs the question of whether this arguable ambiguity in common Article 3 makes any difference as pertains to the United States—it absolutely does. First, the United States passed the War Crimes Act of 1996, nearly 50 years after the Geneva Conventions were promulgated. As clarified in 2006, the passage of the law was to “fully satisfy the obligations under Article 129 of the Third Geneva Convention . . . to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character.”⁷⁸ So for nearly 50 years following the Geneva Conventions, during which time the United States was involved in at least two separate NIACs,⁷⁹ the act of battlefield mercy killing was arguably not prohibited as a breach of treaty or domestic law. Second, the adoption of a standard prohibiting intentional killing of persons *hors de combat* is binding on the United States as a matter of domestic legislation, not as a matter of international law. This means that its interpretation and implementation are subject to changes in administration, political climate, and a host of other purely internal variables. In fact, Congress expressly stated that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated [as grave breaches of common Article 3].”⁸⁰ Should any current or future American administration choose to exempt battlefield mercy killing from the definition of intentional killing under the War Crimes Act of 1996, there is arguably no prohibition under international law to supplant that interpretation.⁸¹

Truthfully, it will be difficult to craft treaty language which can enumerate every forbidden act on the battlefield—the State representatives at the Diplomatic Conference of Geneva struggled with that exact issue. Furthermore, to craft such language which could be ratified by States adds another layer of political difficulty. However, common Article 3, as currently drafted, does not textually foreclose the permissibility of battlefield mercy killing in NIACs. If the intent of the global community is to prohibit battlefield mercy killing, it must be expressly indicated in the text of common Article 3 and further expressly acknowledged and applied by States. By amending the current language of common Article 3 to mirror the grave breach provisions of the Geneva Conventions to prohibit willful killing, the international community would do much to narrow this interpretive gap.

III. BATTLEFIELD MERCY KILLING UNDER THE FRAMEWORK OF IHRL

A. *Relationship Between IHL and IHRL in the Conduct of Hostilities*

Less than a year before the Geneva Conventions were adopted, the United Nations General Assembly promulgated the Universal Declaration of

⁷⁸ Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632 (2006).

⁷⁹ BARBARA SALAZAR TORREON, U.S. CONG. RESEARCH SERV., U.S. PERIODS OF WAR AND DATES OF RECENT CONFLICTS 5 (2020).

⁸⁰ Military Commissions Act of 2006, § 6.

⁸¹ Although there is little ambiguity that Congressional intent expressed in the text of the statute would prohibit battlefield mercy killing, the matter of enforcement would still fall under the purview of the Executive.

Human Rights (UDHR).⁸² Chaired by Eleanor Roosevelt, the UDHR drafting committee sought to memorialize the fundamental rights of all individuals. And though the UDHR was developed with the recent memory of human rights atrocities in World War II, the document itself makes no mention of war. Rather, the UDHR was meant to address those human rights which are so fundamental that they apply equally in times of war and peace. In addressing the various States' representatives present at the signing ceremony for the Geneva Conventions in 1949, the President of the Diplomatic Conference, Max Petitpierre of Switzerland, channeled those same sentiments. In referencing fundamental rights, such as protections against torture and cruel or inhuman treatment, President Petitpierre noted that both the UDHR and the Geneva Conventions pursued the same ideal—"that of freeing human beings and nations from the suffering of which they are often at once the authors and the victims."⁸³ That poignant statement recognized that the purposes for which the humanitarian and human rights law regimes exist are not so disparate—"human rights want[s] to change society while humanitarian law want[s] to change war."⁸⁴

B. United States Policy on IHRL in the Conduct of Hostilities

Despite President Petitpierre's assertion over 70 years ago at the signing of the Geneva Conventions, the United States has maintained the position that IHL constitutes the controlling *lex specialis* in the conduct of hostilities.⁸⁵ But unlike more moderate views which consider IHRL relevant to the interpretation of IHL, the United States' more extreme view is that IHRL is completely displaced by IHL in armed conflict.⁸⁶ But the operational effect of the government's expansive interpretation of the primacy of IHL in armed conflict is magnified by its refusal to recognize that some significant human rights obligations contained in multilateral treaties apply extraterritorially. This policy will be addressed below in sections regarding the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).

From a policy standpoint, this interpretation affords the United States great latitude in military operations. This is not to suggest that the United States maintains this viewpoint in order to actively engage in IHRL violations in armed conflicts; after all, IHL still seeks to limit unnecessary suffering and provide fundamental safeguards for protected persons.⁸⁷ Rather, in the conduct of military operations, commanders only need refer to one regime of international law, namely IHL.⁸⁸ Still, it would be irresponsible to leave the argument without exploring exactly what human rights obligations are required under various multilateral treaties and customary international law. The U.S. Government's policy of IHL as *lex specialis*, coupled with its argument of inapplicability of the human rights regime extraterritorially, is a significant minority in the international community.⁸⁹ While it is important to understand the United States policy in this area, it is equally important to understand the position of other international parties, both adversaries and allies alike.

⁸² G.A. Res. 217 (III) A (Dec. 10, 1948).

⁸³ FINAL RECORD B, *supra* note 30, at 536.

⁸⁴ OBERLEITNER, *supra* note 18, at 78.

⁸⁵ LAW OF WAR MANUAL, *supra* note 62, § 17.2.1.3.

⁸⁶ *Id.* § 1.3.2.2. *See also* OBERLEITNER, *supra* note 18, at 93.

⁸⁷ LAW OF WAR MANUAL, *supra* note 62, § 1.3.4.

⁸⁸ *Jus ad bellum*, or the law of war, principles still apply in warfare more broadly. But in the conduct of particular military operations, U.S. commanders look to IHL, and not IHRL. *See id.* § 1.6.3.1 & n.94 (distinguishing between the rules of human rights treaties and the law of war).

⁸⁹ OBERLEITNER, *supra* note 18, at 148.

C. *International Agreements*

1. **International Covenant on Civil and Political Rights (ICCPR)**

The ICCPR was the third human rights instrument adopted after the promulgation of the UDHR. Adopted by the United Nations General Assembly in December 1966, the ICCPR entered into force in March 1976,⁹⁰ currently with 113 State parties including the United States.⁹¹ Informed by the principles declared in the United Nations Charter and the UDHR, the ICCPR seeks to affirm fundamental civil and political freedoms, along with the societal conditions that must be created to ensure the exercise of those freedoms.⁹² Article 28 of the ICCPR also establishes a Human Rights Committee with the authority to issue non-binding general comments regarding interpretation and application of the Covenant.⁹³

Article 6 of the Covenant declares that “[e]very human being has the inherent right to life” and that “[n]o one shall be arbitrarily deprived of his life.”⁹⁴ While the ICCPR authorizes derogation of certain obligations in times of “public emergency which threaten[] the life of the nation,” the protection for the right to life is non-derogable, even in situations of armed conflict.⁹⁵ The ICCPR itself does not define what constitutes an arbitrary deprivation of life or what States must do to protect this inviolable right in the conduct of hostilities. However, the Human Rights Committee creates a comprehensive framework in General Comment 36.

The Human Rights Committee defines deprivation of life as “an intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission.”⁹⁶ Under the human rights framework, battlefield mercy killing constitutes a deprivation of life which clearly falls under the purview of the ICCPR. However, the Human Rights Committee recognizes that the right to life is not absolute. By the black letter text of the ICCPR, arbitrary deprivations of life are prohibited, suggesting that there must be non-arbitrary deprivations of life.⁹⁷ And while deprivations of life which violate international or domestic law are necessarily arbitrary, the Committee looks beyond mere illegality to consider factors such as “inappropriateness, injustice, lack of predictability and due process of law” as well as “reasonableness, necessity, and proportionality.”⁹⁸ This list of factors sheds some light on the Human Rights Committee’s interpretation of arbitrariness. By referencing the IHL doctrines of necessity and proportionality, the Human Rights Committee is again reinforcing its position that the human rights regime remains applicable even in armed conflicts. Additionally, the Committee recognizes that whether an act is deemed arbitrary must be determined in light of the circumstances. For example, the use

⁹⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁹¹ U.N. Treaty Collection, <https://bit.ly/2YEhsQ4> [<https://perma.cc/7ZVZ-DC9Q>] (last visited Apr. 24, 2020).

⁹² ICCPR, *supra* note 90, at pmbl.

⁹³ *Id.* art. 28.

⁹⁴ *Id.* art. 6.

⁹⁵ *Id.* art. 4. *See also* Human Rights Comm., General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 2, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter HRC GC 36].

⁹⁶ HRC GC 36, *supra* note 95, ¶ 6.

⁹⁷ *Id.* ¶ 10.

⁹⁸ *Id.* ¶ 12.

of lethal force in exercising the inherent right of self-defense is generally not arbitrary.⁹⁹ However, the act may be rendered arbitrary if the use of force is not necessary given the threat posed by the attacker, or if the amount of force exceeds that which is necessary to respond to the threat.¹⁰⁰ This is in line with the International Court of Justice's (ICJ) advisory opinion regarding the threat or use of nuclear weapons, where it stated that arbitrariness must be determined by the applicable *lex specialis* (i.e., IHL).¹⁰¹ However, the applicable *lex specialis* in the conduct of hostilities is silent regarding the motivation of the person who commits a deprivation of life.

a. United States Policy Regarding Obligations Under the ICCPR

When the United States submitted its reservations, declarations, and understandings to the ICCPR in 1992, there were no significant substantive submissions regarding Articles 4, 6, or 7.¹⁰² Today, the conflicting interpretations between the United States and the Human Rights Committee about the ICCPR's applicability to the conduct of extraterritorial hostilities remain an unsettled area of international law.¹⁰³

Article 2 of the ICCPR states that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant.”¹⁰⁴ In the context of extraterritorial hostilities, General Comment 31 states that State parties must respect the Covenant rights “to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party,”¹⁰⁵ including in all situations of armed conflict.¹⁰⁶ Recognizing that the specific rules of IHL may be of greater relevance in the conduct of hostilities, the Human Rights Committee requires States to apply human rights law complementarily with, not to the exclusion of, IHL. In arriving at this interpretation, the Human Rights Committee takes a very pragmatic approach—any other interpretation which could “permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory” would be unconscionable.¹⁰⁷

The United States takes severe umbrage with this interpretation on several bases. First, as previously discussed, the United States interprets IHL as *lex specialis*, and therefore the only body of international law which applies in the conduct of hostilities. Second, the United States policy is that the provisions of the ICCPR have no application extraterritorially. The United States relies heavily on the literal text of the ICCPR, which states that State responsibility applies “within its territory and subject to its jurisdiction,”¹⁰⁸ arguing that both criteria are

⁹⁹ *Id.* ¶ 10.

¹⁰⁰ *Id.* ¶ 12.

¹⁰¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 240 (July 8).

¹⁰² See 138 CONG. REC. 8068-71 (1992).

¹⁰³ See Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 INT'L L. STUD. 349, 350 (2010).

¹⁰⁴ ICCPR, *supra* note 90, art. 2 (emphasis added).

¹⁰⁵ Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (May 26, 2004) [hereinafter HRC GC 31].

¹⁰⁶ *Id.* ¶ 11.

¹⁰⁷ Human Rights Comm., Selected Decisions under the Optional Protocol (Second to sixteenth session), at 91, ¶ 12.3, U.N. Doc. CCPR/C/OP/1 (Feb. 1985) (discussing Communication No. 52/1979).

¹⁰⁸ ICCPR, *supra* note 90, art. 2.

necessary for the duties to apply.¹⁰⁹ By stating that the provisions of the ICCPR apply extraterritorially, the United States argues that the Human Rights Committee incorrectly interprets the text as within its territory *or* subject to its jurisdiction.¹¹⁰ However, some human rights scholars have suggested that the ICCPR does not lend itself to such a narrowly textual reading and that States should consider the object and purpose of the comprehensive human rights treaty in determining their obligations.¹¹¹ Nonetheless, the United States relies on the literal text of the treaty for its conclusion of non-applicability in extraterritorial theaters, and to the extent that the Human Rights Committee's interpretation of extraterritoriality in General Comment 31 could be deemed customary law, claims persistent objector status.¹¹²

This is a key point of contention, as it pertains specifically to the right to life contained in Article 6(1) of the ICCPR. The prohibitions on torture and cruel, inhuman, and degrading treatment contained in Article 7 of the ICCPR are already found in common Article 3, which has clear extraterritorial applicability in the conduct of hostilities.¹¹³ But regarding the expansive right to life in the ICCPR, of which there is arguably no direct corollary in common Article 3, the issue of jurisdiction is of fundamental importance. Adopting *arguendo* the Human Rights Committee's argument that human rights law applies in the conduct of hostilities and extraterritorially, the ICCPR would still not apply in a foreign theater unless individuals were subject to the jurisdiction of the United States. Though the concept of jurisdiction is not defined in the ICCPR, the Human Rights Committee obligates States to ensure rights to "all persons over whose enjoyment of the right to life it exercises power or effective control."¹¹⁴ The ICJ has affirmed that occupation of territory amounts to effective control.¹¹⁵ The European Court of Human Rights (ECtHR) has held that domination over a territory by a State's armed forces amounts to effective control.¹¹⁶ The ECtHR has also held that persons who fall under the physical control of a State through the conduct of hostilities are subject to the State's jurisdiction and entitled to human rights protections.¹¹⁷ But in such cases, physical power and control by a State over an individual has applied to situations of detention or custody.¹¹⁸ An expansive interpretation of rulings by the ECtHR could suggest that battlefield medical care of persons *hors de combat*, which does result in *de facto* physical control over an individual, would be a sufficient exercise of jurisdiction to require application of IHRL, though this is not a universally accepted norm.

2. Convention Against Torture

The Convention Against Torture is one of only two human rights instruments which the United States has ratified. Adopted by the UN General Assembly in 1984, the convention entered into force on June 26, 1987. Referring to the non-derogable prohibition against torture contained in other significant

¹⁰⁹ OBERLEITNER, *supra* note 18, at 150.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See also 42 U.S.C. § 2000dd (2018).

¹¹⁴ HRC GC 36, *supra* note 95, ¶ 63.

¹¹⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 179 (July 9).

¹¹⁶ Hassan v. United Kingdom, App. No. 29750/09, 2014-VI Eur. Ct. H.R. 1, 124 (2014) (citing Al-Skeini and Others v. United Kingdom, App. No. 55721/07, 2011-IV Eur. Ct. H.R. 99, 169 (2011)).

¹¹⁷ *Id.* at 124–28.

¹¹⁸ *Id.*

human rights treaties,¹¹⁹ but providing more specificity, the Convention Against Torture defines the term as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person[.]”¹²⁰ But apart from merely prohibiting the act of torture, the Convention Against Torture places additional obligations on States.

First, each State Party undertakes to take “legislative, administrative, judicial or other measures to prevent acts of torture in *any territory under its jurisdiction*.”¹²¹ Unlike the ICCPR, which textually only applies to areas within the territory *and* under the jurisdiction of the State, the Convention Against Torture seems to require broader applicability by removing the territoriality prong. Second, no State Party shall *refouler* (return) a person to another State “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹²² Unlike the ICCPR, where the concept of *non-refoulement* is interpreted into the text by the Human Rights Committee, the obligation is expressly included in the Convention Against Torture. Third, each State Party undertakes to prevent acts of “cruel, inhuman or degrading treatment or punishment which do not amount to torture” under the Convention Against Torture.¹²³ Like the prohibition against acts of torture, this obligation extends to any territory under the jurisdiction of a State Party.

With regards to specific applicability in armed conflict, the Convention Against Torture is clear that a state of war does not provide justification to derogate from the fundamental prohibition against torture.¹²⁴ However, the issue of extraterritorial application adds a layer of analysis that merits examination. In any armed conflict which occurs in a territory under the jurisdiction of a State Party, regardless of whether that conflict is classified as an international or non-international armed conflict, the Convention Against Torture applies, including the obligation of *non-refoulement*. But what of armed conflicts which occur on a territory abroad subject to the jurisdiction of another State Party? The Committee Against Torture seeks to foreclose this argument by emphasizing that the prohibition against torture contained in Article 2 is a *jus cogens* norm of universal applicability, which is undisputed under international law.¹²⁵ In 2007, the Office of the United Nations High Commissioner for Refugees issued an advisory opinion that *non-refoulement*, as contemplated in both the Convention Relating to the Status of Refugees and the Convention Against Torture had similarly achieved the status of *jus cogens*, or at a minimum, the extraterritorial application of *non-refoulement* was an undisputed doctrine of customary international law.¹²⁶ The Committee Against Torture later issued its own general comment concluding that the Convention Against Torture not only applied to territories under the jurisdiction of a State Party, but also “any area under its control or authority.”¹²⁷

¹¹⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmbl., Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].

¹²⁰ *Id.* art. 1.

¹²¹ *Id.* art. 2 (emphasis added).

¹²² *Id.* art. 3.

¹²³ *Id.* art. 16.

¹²⁴ *Id.* art. 2.

¹²⁵ Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 1, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

¹²⁶ U.N. High Comm’r for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol (Jan. 26, 2007), <https://bit.ly/3dKYqvM>.

¹²⁷ Comm. Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶ 10, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018).

a. United States Policy Regarding Non-refoulement

The United States had very little to say regarding *non-refoulement* in its submission of reservations, declarations, and understandings of the Convention Against Torture in 1990. Specifically, the Convention Against Torture prohibits *refouler* “where there are ‘substantial grounds’ for believing that the person concerned would be in danger of being subjected to torture.”¹²⁸ By ratifying the Convention Against Torture without substantive reservation on this issue, the United States recognized its obligation to consider the human rights record of another State before formally returning or extraditing a person to that State.

The application of *non-refoulement* in the context of battlefield mercy killing raises two questions regarding a State’s responsibility. First, does medical treatment of a person *hors de combat* on the territory of another State constitute an exercise of jurisdiction such that the obligation of *non-refoulement* would apply? Second, would allowing the territorial State to take custody of a person *hors de combat* following medical treatment constitute *refouler*? The Committee Against Torture interprets the jurisdictional clause of the Convention to apply to all persons “subject to the de jure or de facto control of a State party.”¹²⁹ And while medical treatment of a person *hors de combat* results in *de facto* physical control, it arguably falls outside the purview of *non-refoulement*. By its very nature, *non-refoulement* requires that a State have control over the physical fate of an individual—the State can either maintain its control or *refouler* the individual to another State. In the case of rendering medical treatment of a person *hors de combat*, there may be a dispute about whether a treating State ever establishes control over the individual. In exercising *de facto* control over a person *hors de combat*, at least for the duration of medical treatment, the ECtHR would likely hold that such treatment does constitute control sufficient to warrant IHRL obligations.¹³⁰ Others could posit an argument that absent an intent to detain by the treating State, the person *hors de combat* is free to deny treatment, leave the scene, and rejoin the fight, such that jurisdictional control is never really exerted over the individual.

b. Balancing Non-refoulement Against Arbitrary Deprivation of Life

The broader question beyond the extraterritorial applicability of *non-refoulement* is its relation to the prohibition against arbitrary deprivation of life vis-à-vis battlefield mercy killing. In the example of SO1 Scott, his concerns about torture by Iraqi security forces, whether pretextual or not, were supported by facts. During the United Nations Human Rights Council’s Universal Periodic Review of Iraq in 2019, several States and non-governmental organizations called upon Iraq to cease the use of torture as a means to extract confessions and to strengthen control over its security forces and related armed groups.¹³¹ If the principle of *non-refoulement* would have prevented transfer of the ISIS fighter to Iraqi forces, could battlefield mercy killing have been justified as the lesser evil? Under ideal circumstances, departing U.S. forces would have taken the ISIS fighter with them and either retained custody or transferred to compliant Iraqi forces outside of the battlefield. However, exfiltration with enemy casualties is not always possible, and IHRL, if applicable, cannot account only for best case

¹²⁸ *Id.* ¶ 11.

¹²⁹ *Id.* ¶ 10.

¹³⁰ See *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, 2011-IV Eur. Ct. H.R. 99, 168 (2011) (reviewing situations of custody abroad, kidnapping of relatives, detention in military prisons, and presence onboard a ship).

¹³¹ Rep. of the Human Rights Comm., at 105-07, U.N. Doc. A/HRC/28/2 (2019).

scenarios. In this context, soldiers may seek to apply a balancing test, weighing the certainty of torture at the hands of allied forces against moral or legal barriers to killing persons *hors de combat*—the higher the certainty of torture, assuming such a variable can be known, the lower the moral or legal barriers to mercy killing. However, applying such a framework raises significant practical concerns, such as how certain the likelihood of torture must be before mercy killing can be justified. The Convention Against Torture prohibits *refouler* where there are “substantial grounds” to believe that a person is in danger of being tortured,¹³² but surely a higher level of certainty would be required to effectuate that person’s immediate death, no matter how humane or swift. Given the impossible decision between leaving a person to die from wounds or potential torture, and taking the person’s life in an act of mercy, the purely doctrinal answer might be that killing a person *hors de combat* is never permissible. However, one could argue that this position, while easy to implement, is less humane.

D. *Medical Euthanasia as a Framework to Consider Battlefield Mercy Killing*

The Human Rights Committee reads into Article 6 of the ICCPR the guarantee of the inherent right to life; in its interpretations, the Committee recognizes the right “to enjoy a life with dignity,”¹³³ which also includes the right to die with dignity.¹³⁴ Acknowledging that the right to assisted death is recognized by several States, the Human Rights Committee articulates that such acts in those States will not be deemed arbitrary as long as a system of safeguards exists to protect patients from undue pressure.¹³⁵ In recognizing the right of individuals to consent to assisted death so long as such consent is truly informed, unambiguous, and expressed without coercion, the Committee legitimizes medical patients who “experience severe physical or mental pain and suffering and wish to die with dignity,”¹³⁶ raising the question of whether fighters on the battlefield should be afforded the same right.

Many of the legal and institutional safeguards which exist in medical facilities cannot feasibly be replicated on the battlefield. For example, in the Netherlands where physician-assisted dying (PAD) has been legal for nearly 20 years, physicians must consult with at least one other independent physician who has met with and examined the patient. Both physicians must conclude in writing that there are no reasonable alternatives for the patient. Additionally, there is a comprehensive review following the PAD by an independent body comprised of a lawyer, physician, and ethicist which determines whether the procedure was conducted with due care.¹³⁷ A second medical consultation can take days, which is not a luxury that can be duplicated on the battlefield, where soldiers may have to make such decisions in minutes to avoid remaining in a precarious tactical position for too long.

In medical practice, euthanasia is voluntary when a person requests or gives consent, involuntary when a person is able to but does not request or give consent, and nonvoluntary when a person is unable to request or give consent.¹³⁸

¹³² CAT, *supra* note 119, art. 3.

¹³³ HRC GC 36, *supra* note 95, ¶ 3.

¹³⁴ *Id.* ¶ 9.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ G. K. Kimsma, *Death by Request in the Netherlands: Facts, the Legal Context and Effects on Physicians, Patients and Families*, 13 MED. HEALTH CARE AND PHIL. 355, 356–57 (2010).

¹³⁸ Byron J. Stoyles & Sorin Costreie, *Rethinking Voluntary Euthanasia*, 38 J. MED. PHIL. 674, 674 (2013).

Given the Human Rights Committee's focus on the importance of consent, involuntary battlefield euthanasia is problematic from both a legal and policy perspective; there is no legitimate argument that involuntary euthanasia can be considered anything but an arbitrary deprivation of life and impermissible under human rights law. Similarly, voluntary battlefield euthanasia would arguably present the least controversial scenario given the Human Rights Committee's emphasis on consent, assuming that safeguards could be implemented to preserve the sanctity of that consent. However, blending concepts of battlefield conduct and medical practice illustrates the potential for conflicts of international and domestic laws and the inherent difficulty of implementing such a regime in the conduct of hostilities. One can envision a situation where the person *hors de combat*, the soldier committing the battlefield mercy killing, and the battlefield itself all hail from jurisdictions with different stances on voluntary euthanasia. While international law governs conduct on the battlefield, its ambiguity in the area of battlefield mercy killing raises the legitimate question of whether domestic law has any role and, more importantly, whose domestic law would apply. However, introduction of domestic law onto the battlefield to address the conduct of hostilities is completely impractical; the same set of rules should apply regardless of where the battle is fought or the jurisdiction of the fighters.

On its face, the ICCPR as interpreted by the Human Rights Committee does not completely foreclose the permissibility of voluntary euthanasia on the battlefield. But nonvoluntary euthanasia presents the most legal uncertainty and, at least anecdotally, may account for the most instances of mercy killing on the battlefield. The Committee's emphasis on consent would seem to render nonvoluntary euthanasia *per se* impermissible, but focusing solely on safeguarding consent is unfounded. First, consent alone does not determine action; a medical provider is not obligated to conduct euthanasia merely upon a patient's request or consent. In the same way, a soldier would not be obligated to conduct a battlefield mercy killing simply because a requesting person *hors de combat* did not want to live with a particular impairment. Second, lack of consent does not necessarily mean lack of desire. By definition, nonvoluntary euthanasia suggests that a person is simply unable to express his or her desire, but not that the underlying desire cannot be ascertained. In medical practice, external actors often seek to ascertain the patient's desires—what the patient would express if able or what is best for the patient.¹³⁹ Medical providers or family members, having both a personal and professional history with the patient, may be in a good position to opine on the patient's desires. On the battlefield, however, the information asymmetry is much more pronounced. Presumably, professional soldiers engage in battlefield mercy killings in order to limit or end physical suffering. This raises the concern of whether a soldier, having no personal history with the person *hors de combat*, is qualified to make such a determination.

Doctrinally speaking, battlefield mercy killing—both voluntary and nonvoluntary—arguably facilitates the right to live and die with dignity. But voluntary battlefield mercy killing, though clearly in accordance with the victim's desire and pursuant to the victim's consent, illustrates a tangled web created by the intersection of international and domestic laws. And nonvoluntary battlefield mercy killing creates a framework where consent essentially becomes irrelevant, and the decision regarding the best interest of the victim is made by a stranger, who moments before was an adversary on the battlefield, creating a line that neither States nor non-state armed groups will want to cross.

¹³⁹ *Id.* at 678.

IV. STATUS AS CUSTOMARY INTERNATIONAL LAW?

There is a plausible argument that treaty law does not *per se* prohibit battlefield mercy killing of persons *hors de combat*. But treaty law is not the only source of international law which regulates State action. To the extent that common Article 3 reflected customary international law in the conduct of NIACs when it was drafted immediately following World War II, it must be considered whether customary international law has developed in the interim seven decades.

A. *State Practice*

In April 2004, U.S. Army Captain Roger Maynulet was prosecuted at general court-martial for shooting a wounded fighter. Following a targeted attack on a vehicle in which the driver was severely wounded, Captain Maynulet was advised by his company medic that the driver would not survive. Claiming to afford the wounded individual the dignity of a swift death, Captain Maynulet shot and killed the Iraqi. Captain Maynulet was convicted of assault with intent to commit voluntary manslaughter and sentenced to dismissal from the U.S. Army with no confinement.¹⁴⁰

In December 2004, U.S. Army Staff Sergeant Johnny Horne pleaded guilty to murder for killing a wounded Iraqi teenager near Baghdad. Staff Sergeant Horne claimed that the killing was an attempt to put the individual out of his misery, despite testimony of witnesses that the wounds were not life-threatening and that the teenager could have been saved with medical attention.¹⁴¹ Staff Sergeant Horne was sentenced to three years confinement and a dishonorable discharge.¹⁴² A co-conspirator in the same battlefield mercy killing, U.S. Army Staff Sergeant Cardenas Alban also was convicted and sentenced to one year confinement and a bad conduct discharge.¹⁴³

In 2010, Canadian Army Captain Robert Semrau was tried by military tribunal for his role in killing an insurgent *hors de combat* in Helmand Province, Afghanistan. Captain Semrau's patrol came upon an insurgent who had been shot out of a tree by a U.S. Apache helicopter and was, by one eyewitness account, 98 percent dead. Captain Semrau shot the wounded insurgent in the chest in an act of mercy. A military jury found Captain Semrau guilty of disgraceful conduct. In sentencing him to dismissal from the Canadian armed forces, the military judge stated that Captain Semrau's actions were "so fundamentally contrary to our values, doctrine and training that it is shockingly unacceptable behaviour."¹⁴⁴

In 2013, British Royal Marine Sergeant Alexander Blackman was convicted of murder for his killing of a wounded insurgent in Helmand Province, Afghanistan. The insurgent was seriously wounded by an Apache helicopter following an attack on a British patrol base, and video evidence showed Sergeant Blackman shooting the insurgent *hors de combat* in the chest at close range. Sergeant Blackman's original conviction for murder was subsequently reduced to

¹⁴⁰ Carlos Sadovi, *GI Avoids Prison, Kicked Out of Army*, CHI. TRIB. (Apr. 2, 2005), <https://bit.ly/2YHCwFG>.

¹⁴¹ Under the framework established in this Article, it is arguable that Staff Sergeant Horne's actions would not constitute battlefield mercy killing, as there were evidentiary contradictions about the inevitability of near-future death absent medical intervention.

¹⁴² Edmund Sanders, *U.S. Soldier Pleads Guilty in 'Mercy' Killings of Iraqi*, L.A. TIMES (Dec. 11, 2004), <https://lat.ms/2PE2F2I>.

¹⁴³ Associated Press, *Second GI Convicted in Shooting of Iraqi Teen*, L.A. TIMES (Jan. 15, 2005), <https://lat.ms/2YGyT2A>.

¹⁴⁴ Michael Friscolanti, *Capt. Robert Semrau Dismissed from the Forces*, MACLEAN'S (Oct. 5, 2010), <https://bit.ly/3i6c5jP>.

manslaughter, and after serving three years of a seven-year sentence, he was released following new evidence of mental illness at the time of the battlefield mercy killing.¹⁴⁵

In 2016, former Special Air Service (SAS) Sergeant Colin Maclachlan was investigated by the British Ministry of Defence for comments he made in a book about killing mortally wounded enemy soldiers in Iraq in 2003. With great detail, Sergeant Maclachlan wrote about Iraqi soldiers who had been disemboweled and had lost limbs following rocket attacks by Sergeant Maclachlan's team. According to Sergeant Maclachlan, the Iraqi soldiers pleaded for death, which the SAS team swiftly granted with "entirely humane" motives.¹⁴⁶ To date, it does not appear that former Sergeant Maclachlan faced prosecution by any tribunal for his actions.

In 2019, SOC Gallagher was prosecuted for his role in killing a wounded ISIS fighter in the campaign to retake Mosul. There was no assertion that SOC Gallagher's actions stemmed from anything other than malice for the wounded fighter. But dramatic courtroom testimony by SO1 Scott all but secured SOC Gallagher's acquittal. Two weeks after the start of the contested general court-martial, the panel of military members acquitted SOC Gallagher of the most serious charges, ultimately finding him guilty of posing for a photo with the dead ISIS fighter's body and sentencing him to time served and reduction in rank.¹⁴⁷ Furthermore, due to a grant of testimonial immunity from the court-martial convening authority and the Department of Justice to secure his testimony, SO1 Scott could not be prosecuted for his role in killing the ISIS fighter.¹⁴⁸ Having exhausted all criminal avenues to hold SOC Gallagher accountable for his actions on the battlefield, the U.S. Navy turned to administrative processes and sought to convene a formal review board to remove SOC Gallagher's special warfare insignia, referred to as a SEAL trident.¹⁴⁹ In an unprecedented exercise of authority over military administrative processes, President Trump directed the U.S. Navy to stop all processing of SOC Gallagher and restore SOC Gallagher's rank.¹⁵⁰

Although these examples include several nations from North America and western Europe, it is still a small minority of States. Accounts from many States (e.g., Russia, China, Israel, and France) which have participated in recent conflicts in the Middle East, southwest Asia, and Africa are missing. This handful of examples from a few Western nations may not be sufficient practice to create or change customary international law. This Article merely posits that these high-visibility examples may illustrate that State practice regarding battlefield mercy killing is not so wholly uniform.

¹⁴⁵ Steven Morris, *Marine A, Who Killed Wounded Taliban Fighter, Released from Prison*, GUARDIAN (Apr. 28, 2017), <https://bit.ly/3idUcQC>.

¹⁴⁶ *SAS Soldier 'Investigated for Iraq War Mercy Killing'*, BRITISH BROADCASTING CORP. NEWS (Oct. 16, 2016), <https://bbc.in/3icT4wU>.

¹⁴⁷ Dave Philipps, *Navy SEAL Chief Accused of War Crimes Is Found Not Guilty of Murder*, N.Y. TIMES (July 2, 2019), <https://nyti.ms/3dJzODH>.

¹⁴⁸ Carl Prine, *Thanks to SEAL's Immunity Deals, Confessed Killer Unlikely to Be Charged*, NAVY TIMES (June 24, 2019), <https://bit.ly/2CJGncw>.

¹⁴⁹ Dave Philipps, *Trump Reverses Navy Decision to Oust Edward Gallagher From SEALs*, N.Y. TIMES (Nov. 21, 2019), <https://nyti.ms/31mzVCJ>.

¹⁵⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2019, 8:30 AM), <https://bit.ly/2XkJJdn>.

B. *Opinio Juris*

“[E]xpressions of *opinio juris* operate as the fulcrum around which new customary humanitarian law norms crystallize, as well as the basis for the contextual interpretation and development of existing treaty and customary [international humanitarian law] principles and rules.”¹⁵¹ States, however, have become more reticent to offer concrete expressions of *opinio juris*, especially in developing areas of international humanitarian law.¹⁵² With the sheer number of conflicts of both an international and non-international nature in the past two decades, there is no dearth of opportunity to generate or reinforce *opinio juris* in the conduct of hostilities. And yet, the dialogue is far less than robust. While some argue that States preserve freedom by operating within the ambiguities without accompanying expressions of *opinio juris* to generate or reinforce customary international law, other scholars argue that States cede their authority to interpretation by non-state actors, such as the ICRC, to shape the development of customary international law.¹⁵³ As a necessary criterion for the development of customary international law, it is precisely when States fail to voice unequivocal rationales for actions taken, or provide views on actions taken by other State actors, that customary international humanitarian law becomes even less clear.¹⁵⁴

C. *Uncertain Status*

Of the cases highlighted above, only those of Canadian Captain Semrau, British Sergeant Blackman, and U.S. special operator Scott involved actions in a NIAC. However, the consistency of the actions also taken in IACs suggest that this area of practice transcends the NIAC–IAC classification. The comments by Lieutenant Colonel Jean-Guy Perron, the military judge in the case of Canadian Captain Semrau, suggest a strong presumption that the Canadian armed forces believe themselves to be bound by a prohibition on the killing of wounded fighters. Even the United States’ DoD Law of War Manual, in referencing the duty to respect and protect persons *hors de combat* contained in Additional Protocol II, could be read in such a manner.¹⁵⁵ Paired with the high visibility prosecution of military members who engage in battlefield mercy killings, this would appear to be a clear example of established customary international humanitarian law.

And yet, the strong and unequivocal sentiment voiced by Lieutenant Colonel Perron is the exception, not the rule. Furthermore, State practice in this area is far from a uniform illustration of State opinion. The few examples highlighted above fail to reflect cases in which mercy killings are committed on the battlefield but never reported. And even when such cases are reported, and military commanders feel bound—either by domestic law or their own personal senses of justice—to investigate the allegations, State practice remains far from consistent.

First, not all investigated cases result in prosecution. In November of 2019, the spokesperson for the UN Office of the High Commissioner for Human Rights (UNOCHR) issued a statement reminding States that international

¹⁵¹ Michael N. Schmitt & Sean Watts, *The Decline of International Humanitarian Law Opinio Juris and the Law of Cyber Warfare*, 50 TEX. INT’L L.J. 189, 193 (2015).

¹⁵² *Id.*

¹⁵³ *Id.* at 195.

¹⁵⁴ *Id.*

¹⁵⁵ LAW OF WAR MANUAL, *supra* note 62, § 17.14.1 (“The wounded, sick, and shipwrecked . . . should not be knowingly attacked, fired upon, or unnecessarily interfered with.”).

humanitarian law establishes an obligation to “investigate violations and prosecute war crimes.”¹⁵⁶ But, even assuming *arguendo* that battlefield mercy killings are clear violations of international law and prosecutable as war crimes, there is no obligation imposed upon States to prosecute all cases in which such actions are alleged. For example, States must initiate investigations to determine whether allegations are credible or there exists a reasonable basis to proceed. Furthermore, States may also consider the likelihood of success at trial in the calculus of whether to bring a case before a military tribunal. However, these decisions are rarely, if ever, made public. Recommendations made by legal advisors to commanders on prosecution of military criminal cases may be protected by privilege or classification and therefore exempt from broader disclosure requirements. In an area of practice where unequivocal expressions of *opinio juris* are rare and the rationale behind non-prosecution of individuals need not be disclosed, high-visibility unexplained non-prosecutions of individuals like British Sergeant Maclachlan may serve to blur the lines between “mere” violations of international law and “novel” state practice.

Second, military tribunals are but one aspect of State practice. In the same 2019 statement, the UNOCHR spokesperson emphasized that State military justice systems must clearly comply with international law obligations by investigating allegations of wrongdoing, and initiating and completing criminal proceedings.¹⁵⁷ But in the United States, for example, the President as the chief executive and Commander in Chief of the armed forces, retains the authority to grant pardons for offenses against the United States.¹⁵⁸ In 2019, President Trump pardoned former U.S. Army First Lieutenant Clint Lorance and U.S. Army Major Matthew Golsteyn. First Lieutenant Lorance was convicted in 2013 of two counts of murder for ordering his platoon soldiers to fire on unarmed Afghans in Kandahar Province. He was serving his sixth of a 19-year sentence when he received the pardon.¹⁵⁹ Major Golsteyn received his pardon while awaiting trial for allegedly killing an Afghan man he suspected of being a Taliban bomb maker in 2010 in Helmand Province.¹⁶⁰ To the extent that battlefield mercy killing of persons *hors de combat* may be an ambiguous area of international law, the killing of individuals not directly engaged in hostilities against State forces is clearly anathema to established IHL doctrine. And yet, President Trump’s comments, and more importantly his actions, suggested a willingness to undermine those established tenets of IHL by “[sticking] up for [these] great warriors.”¹⁶¹

It should not be lightly argued, nor does this Article do so, that President Trump’s actions undermine established international law prohibiting the killing of individuals not directly engaged in hostilities. However, his involvement does raise the question of the type of presidential action that is sufficient to establish or undermine customary international law versus the type of action that is simply politically-motivated and actually contrary to customary international law, and more importantly, how to distinguish between the two. One could argue that the former might require some semblance of formality, such as an exercise of pardon authority coupled with direction that the Department of Defense change its policy

¹⁵⁶ *US Pardons for Accused War Criminals, Contrary to International Law*, U.N. NEWS (Nov. 19, 2019), <https://bit.ly/3gq0mMn>.

¹⁵⁷ *Id.*

¹⁵⁸ U.S. CONST. art. 2, § 2, cl. 1.

¹⁵⁹ Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 15, 2019), <https://bit.ly/31eJYrN>.

¹⁶⁰ Dave Philipps, *Army Denies Request by Soldier Pardoned by Trump, Setting Up Showdown*, N.Y. TIMES (Jan. 9, 2020), <https://bit.ly/39Pgp3L>.

¹⁶¹ Maggie Haberman, *Trump Brings 2 Officers He Cleared of War Crimes Onstage at Fund-Raiser*, N.Y. TIMES (Dec. 8, 2019), <https://bit.ly/3k8y2k6>; see also, Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 12, 2019, 9:49 AM), <https://bit.ly/3fniFkb>.

documents to reflect the President's views. Politically-motivated actions taken by the President, which violate tenets of customary international law, may not demonstrate sufficient state practice and *opinio juris* to actually establish customary international law. But as governmental policy continues to be promulgated through less formal means, such as social media, the line between State practice and partisan politics will continue to blur.

The 2019 statement by the UNOCHR was written in direct response to President Trump's controversial pardons of suspected and convicted war criminals. However, apart from the domestic, and arguably politicized, media which excoriated the President's actions,¹⁶² the silence from other sovereign States was deafening. While state silence in these isolated instances may not necessarily reflect tacit approval or acquiescence, failure to respond to such practices over time could serve as evidence of *opinio juris*.¹⁶³

Though only States have the legal competence to create customary international law, many non-state actors, such as the ICRC, have sought to fill in the gaps left by State silence.¹⁶⁴ While the ICRC's interpretations of State obligations under customary international humanitarian law may not be strictly binding, they serve as a persuasive body of interpretive soft law. In considering the prohibition of killing persons *hors de combat*, which the ICRC concludes is a long-standing norm of customary international law in both IACs and NIACs, even the ICRC frames the doctrine as a prohibition against "attacking" such protected persons.¹⁶⁵ "Attack" is a specific term of art, defined in Article 49 of Additional Protocol I as an "act[] of violence against the adversary, whether in offence or in defence."¹⁶⁶ By utilizing this specific language, the ICRC reinforces the view of the 1949 Diplomatic Conference of Geneva that acts of unnecessary or unwarranted violence are forbidden. Its interpretation of customary international law in this regard still leaves open the possibility that battlefield mercy killings, which arguably are not attacks nor acts of violence, are permissible.

V. POLICY CONSIDERATIONS

Significant policy considerations exist independent of assessments on the legality of battlefield mercy killing. If the international community seeks to prohibit the act, relying on States' self-restraint—either in policy or self-restricting interpretations of ambiguous international law—is naïve. The line between legality and legitimacy is often blurred, such that States perceive those actions which are legally permitted to thus be operationally desirable.¹⁶⁷ Legality becomes a "go/no go" check without the further examination of whether a particular action should be pursued. In this type of environment, it becomes even more important to clearly delineate those acts which are illegal, allowing States to decide for themselves which remaining acts may be legal but undesirable.

¹⁶² See, e.g., Philipps, *supra* note 159.

¹⁶³ DUSTIN A. LEWIS, NAZ K. MODIRZADEH & GABRIELLA BLUM, HARVARD LAW SCHOOL PROGRAM ON INTERNATIONAL LAW AND ARMED CONFLICT, QUANTUM OF SILENCE: INACTION AND JUS AD BELLUM 32 (2019).

¹⁶⁴ Schmitt & Watts, *supra* note 151, at 193.

¹⁶⁵ ICRC IHL RULES, *supra* note 68, at 164.

¹⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 49, June 8, 1977, 1125 U.N.T.S. 3.

¹⁶⁷ Gabriella Blum, *The Role of the Client: The President's Role in Government Lawyering*, 32 B.C. INT'L & COMP. L. REV. 275, 278 (2009).

A. *Difficulty of Discerning Motivation on the Battlefield*

The motivation of the actor is of utmost importance in characterization of the act as battlefield mercy killing, requiring subjective compassion or mercy for the person *hors de combat*. Determining the subjective motivation of a soldier killing on the battlefield is outside the scope of IHL considerations. For example, under IHL targeting rules, if a strike complies with the doctrines of necessity, proportionality, and precaution, the killing is legal regardless of the subjective motivation of the soldier. Assuming that consideration of motivation underlying battlefield actions is currently irrelevant under IHL, battlefield mercy killing raises the question of whether it should stay that way—absolutely. The conduct of hostilities is far from black and white. The legality of a strike may come down to an *ex post* review of a commander’s proportionality analysis or whether feasible precautionary measures were ignored, but the commander’s motivation has no role in the calculation. In the same way, if a soldier executes that strike on a target, the soldier’s motivation is irrelevant to the question of legality. Battlefield mercy killing would introduce a scenario where an otherwise illegal act (e.g., killing a protected person) could be rendered lawful if the soldier’s intent is pure—a slippery slope not worth pursuing.

But even if a legal framework could be developed to discern the subjective motivation of a soldier purporting to kill as an act of mercy, what would be required? In many anecdotal cases, soldiers voice an *ex ante* desire to end the misery of a person *hors de combat*. Assuming that such desire was observed by witnesses, perhaps that would be sufficient to render the killing justified. But, if there is no articulated *ex ante* justification, can a soldier’s action be justified based on an objective standard of reasonableness? For example, a battlefield mercy killing is arguably reasonable only if there is a medical certainty that the person *hors de combat* will die as a result of the wounds. But whose determination of medical certainty matters? The non-medically trained soldier who has seen hundreds of battlefield casualties? The medical officer back at headquarters? Soldiers from allied forces who have a lower standard of domestic healthcare?

Furthermore, discerning the intent of individual soldiers of one’s own military forces would already be burdensome, as discussed above. But, discerning the intent of members of non-state armed groups who are party to the NIAC would be nearly impossible. One can envision a battlefield where mercy killing is used by the adversary, not as a tool of compassion, but as a weapon of choice where malicious intent cannot be proven.

B. *Reconciling the Soldier and the Commander*

Examples of battlefield mercy killing highlight an important disconnect between actions by soldiers and reactions by commanders.¹⁶⁸ On the one hand, soldiers may believe that killing a person not actively engaged in the fight is morally or legally wrong. But on the other hand, something also feels instinctively wrong about allowing a person to suffer towards a slow but inevitable death, when one has the power to put a swift end to it. In making the decision to end a person’s life under such circumstances, soldiers may believe they are choosing the honorable path, regardless of the consequences. And yet, commanders regard such actions as not only dishonorable but criminal.

¹⁶⁸ The author understands that the titles of soldier and commander are not mutually exclusive. In this context, the intent is to differentiate between actions by participants on the battlefield and review of those actions by senior leaders, whether uniformed or civilian, with some degree of separation from the battlefield.

There are many reasons for this disconnect. Soldiers may have to live with the consequences, whether legal or moral, of their individual actions, but commanders are charged with developing and implementing policies for hundreds and thousands of soldiers. Similarly, commanders are directed to uphold good order and discipline among their ranks, and allowing “rogue” individuals to act with impunity only undermines control.¹⁶⁹ That is to say, whether a commander personally agrees with a soldier’s motivation behind battlefield mercy killing may matter little, if overlooking it could result in hundreds of other soldiers taking matters into their own hands.

One policy proposal for narrowing this chasm could be to regulate, rather than prohibit, the act of battlefield mercy killing. There is a basis under international criminal law to decline to investigate or prosecute if such actions would not serve the interests of justice.¹⁷⁰ This could include declining prosecution in the most justifiable circumstances, such as when exfiltration with the injured person is not operationally feasible, when the certainty of death from injury is confirmed by a medical provider, when the act is overseen by a medical provider, and only upon the request or with consent of the victim. Or similarly, these factors could be implemented into statute as an affirmative defense to the crime of murder. Although these factors would likely be met in only the rarest of occasions, this would help ensure that true mercy killing remained a rare instance on the battlefield. These proposed factors do not consider the subjective motivation of the actor, which as discussed earlier, can be difficult to ascertain and even more difficult to prove. Rather, these factors emphasize the objectively verifiable circumstances. Furthermore, these proposed factors still require request by or consent of the victim, thus rendering nonvoluntary mercy killing still impermissible. Although this Article raises several arguments suggesting that consent is too highly weighted in euthanasia generally, it also recognizes that battlefield conditions make nonvoluntary mercy killing too uncertain to implement.

VI. CONCLUSION

Article 31 of the Vienna Convention on the Law of Treaties states that all treaties shall be interpreted in good faith and that treaty terms shall be considered in light of the object and purpose of the treaty.¹⁷¹ The Geneva Conventions memorialize fundamental humanitarian principles protecting, in part, persons who are *hors de combat* in the conduct of hostilities.¹⁷² There is little question that at least one significant purpose of the Geneva Conventions is to preserve the sanctity of protected persons in times of war. Read in light of that purpose, perhaps the prohibition of “violence to life” and “murder of all kinds” contained in common Article 3 clearly precludes battlefield mercy killing. If so, perhaps States prosecute soldiers for engaging in the act because they believe this to be an indisputable doctrine of customary international law. Strong arguments exist against the very foundations of this Article.

However, what if those arguments are not as solid as previously assumed? If arguments could be made to undermine interpretations of common Article 3 or question the customary international law status of the act, this potentially opens an entire class of protected persons to legal death on the

¹⁶⁹ See, e.g., 10 U.S.C. § 5947 (2018).

¹⁷⁰ See, e.g., Rome Statute of the International Criminal Court art. 53, Jul. 17, 1998, 2187 U.N.T.S. 38544.

¹⁷¹ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 340.

¹⁷² 2016 COMMENTARY I, *supra* note 49, at ¶ 1.

battlefield. From a policy standpoint, perhaps we can rely on States to self-restrain in the conduct of hostilities. But States will also act with restraint until it is in their interest not to do so. Until this legal gap is foreclosed, States can await the perfect storm to shake the unsteady foundations of common Article 3, hoping that it never comes.