

Article

Human Rights and Armed Conflict—The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case

Dale Stephen†

I. INTRODUCTION

The Advisory Opinion of the International Court of Justice (ICJ) in the 1996 *Nuclear Weapons Case*¹ (“the Advisory Opinion”) assessed the legitimacy of the threat or use of nuclear weapons in an armed conflict. The Court determined that while the use of such weapons seemed “scarcely reconcilable” with the tenets of the law of armed conflict,² such use was not necessarily prohibited in limited contexts, namely when a State’s survival is at stake.³ While the decision did not produce a clear and unambiguous ruling on the threat or use of nuclear weapons, the case has nonetheless been heralded as the first occasion that the Court extensively reviewed the interpretation of the law of armed conflict.⁴ Accordingly, the

† Commander, Royal Australian Navy, B.A., LL.B. (Hons), GDLP; presently occupies the position of Deputy Director of Operations Law at Strategic Command, Canberra, Australia. Previous postings have included Chief Legal Officer, UNTAET Peacekeeping Force HQ, Dili, East Timor; Assistant Director, Operational and International Law, Australian Defence Force HQ and Legal Officer, Naval Command Component, INTEFET HQ, Dili, East Timor. The author wishes to thank Pene Mathew and Robin Warner who reviewed early drafts of this Article. The views expressed in this Article are the author’s alone and do not necessarily reflect those of the Australian Defence Force, the Australian Department of Defence, or the Australian Government.

1. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 [hereinafter “Nuclear Weapons”].

2. *Id.* at para. 95.

3. *Id.* at para. 105 E.

4. Louise Doswald-Beck, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 1997 INT’L

Advisory Opinion necessarily provides an authoritative benchmark and provides rich insight into the underlying principles of the contemporary law of armed conflict. The Court emphasized the formal inter-relationship between the law of armed conflict and international human rights law when identifying and analyzing the cardinal principles of this body of law.⁵ By expressly declaring that the protections contained within the International Covenant on Civil and Political Rights (ICCPR)⁶ did not cease in a time of armed conflict,⁷ the Court effectively settled a 50 year-old theoretical debate concerning the application of the law of armed conflict and international human rights law to the battlefield⁸ and underscored the humanitarian principles that they both share.

While determining that both areas of international law applied during armed conflict, the Advisory Opinion gave formal primacy to the law of armed conflict when interpreting the applicability of specific provisions of the ICCPR (in this instance the right to life) as contained within Article 6 of the Covenant).⁹ Prima facie, this is a significant interpretation given that the law of armed conflict permits the taking of life, both of combatants and, indirectly, of civilians. The Opinion thus would seem broadly to override the right to life. On closer reading of the Advisory Opinion,¹⁰ however, one notices that the Court did highlight the common humanitarian underpinnings of both areas of international law. In emphasizing the common humanitarian impulse that drives both streams, the Court identified a natural convergence of humanitarian principle underlying these two bodies of law. In this Article, I contend that the Court has augmented certain principles of the law of armed conflict, particularly that of proportionality. I conclude that this augmentation has tempered the circumstances when life may be legitimately taken in the course of an armed conflict.

In this Article, I review the Advisory Opinion analysis of the inter-relationship between the law of armed conflict and international human rights law. I contend that the Court's reasoning has the potential to

REV. RED CROSS 35.

5. The Court was consistent throughout the Advisory Opinion with its use of terminology to describe the rules applicable to regulate conduct in a time of armed conflict, namely "international humanitarian law." While it was entirely appropriate for the Court to have selected this term, I contend that the use of this particular term was calculated and intentional on the part of the Court. It would have been equally possible for the Court to have used the terms "law of war" or "law of armed conflict," or indeed the Latin term "*jus in bello*" and still have faithfully referred to the same body of law. This article will principally refer to the body of law referred to by the Court as the "law of armed conflict" noting however that all the nominated terms are basically interchangeable.

6. 999 U.N.T.S. 171, 6 I.L.M. 368.

7. Nuclear Weapons, *supra* note 1, at para. 25.

8. Note that the interrelationship between human rights and humanitarian law was first formally recognised at the 1968 Teheran International Conference on Human Rights. See Proclamation of Teheran, May 13, 1958, International Conference on Human Rights.

9. Nuclear Weapons, *supra* note 1, at para. 25.

10. This is evident both in the majority opinion and in the dissenting opinion of Judge Shahabuddeen. See *id.* at 375-428.

profoundly affect the interpretation of the law of armed conflict by invoking considerations of humanitarianism and prioritizing such considerations when planning and executing military operations. In Part I, I briefly summarize the position of the Court on the legality of the threat or use of nuclear weapons and on the interpretation of the right to life during a time of war. In Part II, I analyze the historical debate over the differing character of the law of armed conflict and international human rights law, and will outline the theoretical schisms characterizing that debate. The Court broke several of the supposed theoretical barriers used by some scholars to support the separation and distinction of the two areas of law.

Finally, in Part III, I assess the Advisory Opinion's contribution to a contemporary understanding of the law of armed conflict. In its determination, the Court has provided an added weighting for humanitarian standards when assessing the legitimacy of military actions. This "weighting" significantly modifies the legitimate application of military force, particularly under the principle of proportionality. Far from constituting a "loss" as a definitive statement on the illegality of nuclear weapons, as many commentators contend, the Advisory Opinion is a significant statement on the convergence of humanitarian principles between the law of armed conflict and international human rights law. In short, I contend that while the Advisory Opinion ostensibly gave formal primacy to the law of armed conflict when assessing the legitimacy of military actions, the reasoning adopted by the Court will enable the opposite to occur; namely, it will promote human rights in the interpretation of the law of armed conflict. Additionally, I contend that the Court's formal recognition of human rights standards in armed conflict has a significant impact on rights enjoyed by a Government's own military members. These rights, manifested most clearly in the right of unit self defense, permit military members a greater opportunity to protect their own lives in circumstances where their Government has authorized the use of force.

II. THE DETERMINATION OF THE COURT

The question posed to the ICJ in the Advisory Opinion was whether "the threat or use of nuclear weapons in any circumstance permitted under international law?" The abstract nature of the question¹¹ probably ensured that the Court would be circumspect in its decision. Indeed, after a general survey of the potentially applicable international laws to the question of unlawfulness, the Court found that it did not have "sufficient elements" to "conclude with certainty that nuclear weapons would necessarily be at variance with the principles and rules of law applicable in any

11. Christopher Greenwood, *The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law*, 1997 INT'L REV. RED CROSS 65.

circumstance.”¹² Importantly, while making a “non-finding”¹³ regarding the use of nuclear weapons in a general sense, the Court did recognize that their use remained under legal analysis and control. Indeed, the Court extensively elucidated the legal considerations that apply generally when determining the legitimacy of the use of force in situations short of nuclear armageddon. This elucidation in general, and the analysis of the law of armed conflict in particular, will have an enduring effect on the planning and execution of conventional military operations.

A. Survey of Applicable Legal Principles

In assessing the central question of the legality of nuclear weapons, the Court examined many discrete areas of international law. First, the Court surveyed international human rights law and canvassed the application of the ICCPR¹⁴ and the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁵ The Court did not find any provision in these instruments that was dispositive to the issue at hand. Following its consideration of the human rights conventions, the Court examined various environmental safeguards contained within environmental protection treaties and the supporting customary law. As with human rights law, the Court concluded that the protections in environmental instruments did not undermine a State’s right to national self defense as outlined in the United Nations Charter and therefore did not necessarily prohibit the use of nuclear weapons for such purposes.¹⁶ Accordingly, environmental obligations, in and of themselves, were not enough to override the use or threat of use of nuclear weapons.

In accordance with its position on the significance of national self-defense, the Court indicated that, as outlined in Article 51, the right of national self-defense did not specifically prohibit the use or threat of use of such weapons. The reasoning was premised upon an exclusionary construct, as Article 51 addresses the issue of force generally, rather than the use of force through specific types of weapons.¹⁷

The Court then extensively reviewed applicable conventions and relevant customary law relating to the prohibition of specific weaponry. At the outset, the Court stated no express treaty or customary law principle

12. Nuclear Weapons, *supra* note 1, at para. 95.

13. Timothy L.H. McCormack, *A non liquet on nuclear weapons – The ICJ avoids the application of general principles of international humanitarian law*, 1997 INT’L REV. RED CROSS 76, 78.

14. Nuclear Weapons, *supra* note 1, at paras. 24 & 25.

15. *Id.* at para. 26; 78 U.N.T.S. 277.

16. *Id.* at paras. 27-30 (examining the following International Instruments: 1977 Additional Protocol 1 to the 1949 Geneva Conventions, the 1977 Convention on Environmental Modification Techniques and applicable customary law contained within the Declaration of the UN Conference on the Human Environment, adopted at Stockholm on 16 June 1972 and the 1992 Rio Declaration on Environment and Development).

17. Nuclear Weapons, *supra* note 1, at para. 39.

specifically *authorized* the use or threat of use of nuclear weapons.¹⁸ As a corollary, however, the Court also examined relevant conventional and customary principles that might prohibit the use of nuclear weapons. While the Court ultimately concluded that contemporary rules prohibited bacteriological, chemical and poisonous weapons, such rules did not similarly prohibit nuclear weapons.¹⁹ Furthermore, the Court concluded that, while a number of conventions limit the deployment and testing of nuclear weapons, they contain no specific prohibition on the actual use or threat of use of nuclear weapons.²⁰

B. Law of Armed Conflict/Right to Life

Finding no general prohibition concerning the use of nuclear weapons, the Court finally examined the central question under the rubric of the law of armed conflict. The Court declared that this body of law possesses the greatest capacity for moderating the application of force and confronting the indiscriminate effects of nuclear warfare. Within the framework of the law of armed conflict, the Court painstakingly catalogued the evolution of the law through the late nineteenth and twentieth centuries, highlighting humanitarian developments over the past 50 years.

The Court identified the principles of distinction and unnecessary suffering as cardinal principles of the law of armed conflict. The former protects civilians from direct attack, while the latter prohibits weapons that cause unnecessary suffering to combatants.²¹ This framework, the Court opined, was “scarcely reconcilable”²² with the use or threat of use of nuclear weapons in most circumstances. However, the Court could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of national self-defense, in which the very survival of a State would be at stake.²³

While reviewing the law of armed conflict with respect to nuclear weapons, the Court, in a truly remarkable development, declared that nonderogable human rights obligations continued to apply in a time of armed conflict. Such obligations, however, applied in accordance with the rules of armed conflict. In this instance, the Court specifically identified the right to life within Article 6 of the ICCPR²⁴ as *having continuing legal effect* in an armed conflict. In holding that the Covenant extends to times of war,²⁵ the Court stated:

18. *Id.* at para. 52.

19. *Id.* at paras. 54-58.

20. *Id.* at paras. 62 & 63.

21. *Id.* at para. 78.

22. *Id.* at para 95.

23. *Id.* at paras. 95 & 96.

24. See *supra* note 6, at art. 6(1) (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

25. The Court did not dwell on the vexed issue concerning the extra territorial application of the ICCPR, but rather concentrated on an exploration of the principles

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.²⁶

In acknowledging non derogable provisions of the ICCPR that applied in a time of armed conflict, the Advisory Opinion specifically highlighted the right to life, described as "the most basic or fundamental of all the rights of man."²⁷

Partly as a result of the nature of Article 6, defining the right to life has created considerable debate before the ICJ's ruling.²⁸ Some interpret Article 6 broadly and argue that it includes subsidiary rights that support the "quality" of life. Such rights include a right to development, due process, and peace.²⁹ Others interpret the Article more narrowly, claiming that jurists universally accept the maintenance of individual physical integrity as its core objective.

The drafters of the Article intentionally left the definition of arbitrary vague so as to ensure wide latitude for the protection against deprivation.³⁰ They anticipated a "broadening respect for the dignity of human beings" that would provide a greater legal compass to the respect for life over time.³¹ Indeed, the Human Rights Committee established pursuant to the ICCPR, has faithfully and consistently interpreted the right to life broadly, particularly in circumstances concerning the deprivation of life by a State's

underpinning the Convention in order to develop an encompassing theoretical framework. The Court's disinclination to invoke a restrictive interpretation of an extra territorial application of the Convention suggests an acknowledgement of the continuing application of the Convention to those military members/nationals serving outside their national territories but subject to the continuing jurisdiction of the State party

26. Nuclear Weapons, *supra* note 1, at para. 25.

27. D. Nsereko, *Arbitrary Deprivation of Life: Controls on Permissible Deprivations*, in THE RIGHT TO LIFE IN INTERNATIONAL LAW (B.G. Ramcharan ed., 1985) [hereinafter THE RIGHT TO LIFE].

28. See generally THE RIGHT TO LIFE, *supra* note 27; Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 114 (Louis Henkin ed., 1981).

29. Hugo Adam Bedau, *Book Review*, 7 LAW & PHIL. 237, 238-40 (1988) (reviewing THE RIGHT TO LIFE, *supra* note 27).

30. D. Weissbrodt, *Protecting the Right to Life: International Measures Against Arbitrary or Summary Killings by Governments*, in THE RIGHT TO LIFE, *supra* note 27, at 297, 298.

31. *Id.*

security forces.³²

The Court's identification of the right to life within Article 6 of the ICCPR and the invocation of the right in a time of armed conflict was a rather conventional choice. The right is universally acknowledged and repeatedly expressed in both regional and international law. In addition to the ICCPR, the 1948 Universal Declaration of Human Rights,³³ the European Convention on Human Rights,³⁴ the American Convention on Human Rights³⁵ and the African Charter on Human and People's Rights all proclaim the right to life.³⁶

The right to life, as expressed by the ICJ in the *Nuclear Weapons Case*, avoids the more contentious issues of abortion and the death penalty.³⁷ Rather, the Court interpreted the right to life in the context of preserving physical integrity and avoiding arbitrary deprivation under the law of armed conflict. As I will outline, the prohibition against the arbitrary deprivation of life (human rights concept) finds a ready application within the general principle of proportionality (law of armed conflict concept) that constrains military action. Proportionality requires a balancing between the loss of civilian life and the attainment of military objectives. In the determination of whether a particular loss is proportionate or acceptable, the right to life may tip the balance toward concerns for civilians. While the principle of proportionality prohibits "excessive" incidental civilian casualties, the right to life as espoused in Article 6 of the ICCPR prohibits an arbitrary loss of life. By emphasizing the overriding consideration of humanity, the Advisory Opinion created the expectation that military planners approach the question of acceptable civilian loss of life in accordance with the proportionality test through both an assessment of what is not excessive and what is not arbitrary.

III. THE FUSION OF PRINCIPLE: CRITIQUING HISTORICAL/THEORETICAL DIFFERENCES

The Court's decision concerning the amalgamation of the principles of the law of armed conflict and international human rights law is significant; yet in many respects this conclusion confirmed a historical trend. The preponderance of academic literature in recent decades has referred to the

32. In this regard, the Human Rights Committee has stated "The deprivation of life by the authorised forces of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities." *Id.* at 299.

33. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 3, U.N. Doc. A/810 (1948).

34. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2, 213 U.N.T.S. 221.

35. American Convention on Human Rights, Nov. 22, 1969, art. 4, 1144 U.N.T.S. 123.

36. African Charter on Human and People's Rights, June 27, 1981, art. 4, 1520 U.N.T.S. 217.

37. See generally THE RIGHT TO LIFE, *supra* note 27.

apparent “fusing,”³⁸ “meshing”³⁹ or “confluence”⁴⁰ of these two areas of law. The Advisory Opinion thus vindicated these views. Notwithstanding the vindication of the theoretical amalgamation of certain principles, the Opinion clearly distinguishes between the character and quality of these streams of law

A number of scholars stridently resist the notion that the law of armed conflict and international human rights law interrelate. These arguments are based not only upon an appraisal of the historical differences between the two areas of international law, but also on the practical advantages of maintaining the two as distinct bodies of law. Hence, in the name of ensuring more effective protection for human rights during armed conflict, these scholars contend that the law of armed conflict provides the complete code for maintaining basic standards of dignity in the specific circumstances of armed conflict.⁴¹ The argument emphasizes that the law of armed conflict has been devised in specific contemplation of the exigencies of battle conditions and thus provides a very detailed and practical standard for military compliance that States have already expressly acknowledged.⁴²

Arguments in support of separation are also touted as realistic by recognizing the ease from which States may derogate obligations contained within human rights treaties.⁴³ These arguments also seem to assume that soldiers are less likely to derogate from tactically oriented rules, which specifically state their application in times of armed conflict, than more nebulous rules of human rights instruments. It is unclear what real-life evidence supports this conclusion. While the law of armed conflict is the principal body of law governing the legitimacy of military actions, a number of human rights obligations (such as Article 6 of the ICCPR) also expressly operate in a time of armed conflict or public emergency and are, in fact, accorded nonderogable status in such circumstances. Indeed, even those cases that have examined the “war” or “public emergency” caveats on the application of human rights obligations (other than the right to life), have set an extremely high standard for the threshold for derogation⁴⁴

38. Felicity Rogers, *Australia's Human Rights Obligations and Australian Defence Force Operations*, 18 U. TASMANIA L. REV. 1, 2 (1999).

39. Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589 (1983).

40. R. Quentin-Baxter, *Human Rights and Humanitarian Law – Confluence or Conflict?*, 9 AUSTL. Y.B. INT'L L. 94 (1985).

41. See MICHAEL J. KELLY, PEACE OPERATIONS, 6.1 – 6.10 (1997) (analysing the prevailing views).

42. *Id.* at 6.9.

43. B.G. Ramcharin, *The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts*, 33 AM. U. L. REV. 99, 105 (1983).

44. *Lawless v. Ireland*, 1 Eur. Ct. H.R. 1, 56 (1960), where the European Commission of Human Rights determined that the words ‘public emergency’ which enabled derogation of certain provisions of the European Convention on Human Rights “refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.” In the subsequent *Greek*

before such rights might be dismissed. Therefore, States did intend that the right to life continued to have legal effect in a time of armed conflict.

Other arguments arrayed against the mutual application of both streams of law rely upon theoretical rather than practical objections.⁴⁵ G.I.A.D. Draper, a leading scholar on the subject,⁴⁶ strenuously opposed the fusion of these two streams of law, arguing that the law of armed conflict and international human rights law have fundamental distinctions based upon their origin, theory, nature and purpose.⁴⁷ Indeed, in his influential 1979 article on the subject, Draper contended:

The attempt to confuse the two regimes of law is insupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed . . . at the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized armed groups, and in internal rebellions.⁴⁸

Draper posits that while there are occasions of “overlap” and “contact,”⁴⁹ the two bodies of law should not and could not be fused in any meaningful manner. He argues that the law of armed conflict governs the hostile relations between States, whereas international human rights law governs relations between a State and its own citizens. Thus, the law of armed conflict can be enforced against individual soldiers and States, whereas the laws of international human rights only are enforceable against a citizen’s State of origin.⁵⁰ Additionally, Draper contends that international human rights law is predicated upon ensuring individual freedoms within a society whose freedoms are neither “intended nor adequate to govern an armed conflict between two states in a condition of enmity.”⁵¹ He rejects the notion that there is any human rights nexus between armed combatants “engaged in military operations against each

case, the Commission further clarified the constituent elements of ‘public emergency’ as comprising the whole nation and that normal measures or restrictions permitted for the maintenance of public health and safety are inadequate, Rogers *supra* note 38, at 7.

45. Cf. Kelly, *supra* note 42, at 6.6, “Pictet rejected the application of human rights law categorically on the grounds that humanitarian law was designed for the specific circumstances of occupation and conflict, while human rights law was applicable in peacetime only.”

46. G. BEST, *WAR AND LAW SINCE 1945*, at 72 (1994).

47. G.I.A.D. Draper, *Humanitarian Law and Human Rights*, ACTA JURIDICA 193, 199 (1979) [hereinafter Draper, *Humanitarian Law*].

48. *Id.* at 205.

49. *Id.* at 199.

50. *Id.* at 204.

51. *Id.*

other"⁵² and notes that protections of enemy soldiers who are *hors de combat* are provided on the basis that such persons are enemy individuals rather than governed citizens.⁵³

In essence, Draper presents a theoretical construct whereby the law of armed conflict is a "derogation from the normal regime of human rights."⁵⁴ Such law applies, in his view, to the necessary detriment of generally stated human rights standards as a pragmatic and temporary concession to the unfortunate predilection of humanity to wage armed conflict.⁵⁵ There is no hope of common ground in his view, since the two bodies of law can only apply in a mutually exclusive fashion.

To support his views, Draper relies significantly on the different historical development of the two bodies of law, which he maintains has heavily influenced the current state of each. He contends that the law of armed conflict, as it developed through the centuries, was primarily influenced and informed by concepts of chivalry and personal honor.⁵⁶ Beyond these noble concepts, he also argues that the *jus in bello* was significantly concerned with regulating the financial gains made in the course of battle.⁵⁷ While Draper concedes that conceptions of humanity have left their mark on the modern state of the law, he nonetheless maintains that the residual character of the modern law of armed conflict is directed towards different aims than international human rights law.

Draper's logic is partially supported given the historical development of the law of armed conflict as practical and personally oriented. Thus, in his analysis of ancient Greek conventions of war, Ober notes the practicality of many of the conventions observed in such classical times and recognizes the underlying conceptions of personal honor, which also sustained many of the conventions of conflict.⁵⁸ The Greeks acknowledged, for example, that "war is an affair of warriors," "to request the return of one's dead" symbolically manifested defeat, and prisoners of war should be ransomed rather than executed.⁵⁹

Similarly, authors who have traced the development of *jus in bello* through subsequent centuries portray an elaborate and complex array of rules that were largely premised upon conceptions of honor (principally observed only among members of the privileged classes) and very practical (and enforceable) rules pertaining to the commercial significance of exchanging prisoners of war and of dividing the spoils of war.⁶⁰ Even in the

52. *Id.*

53. *Id.* at 204 – 205.

54. G.I.A.D. Draper, *The Relationship Between The Human Rights Regime and the Law of Armed Conflicts*, 1 ISR. Y.B. ON HUM. RTS. 191, 206 (1971) [hereinafter Draper, *The Law of Armed Conflict*].

55. *Id.* at 196.

56. Draper, *Humanitarian Law*, *supra* note 47, at 199.

57. *Id.*

58. Josiah Ober, *Classical Greek Times*, in *THE LAWS OF WAR* 12, 13 (Michael Howard et. al. eds., 1994).

59. *Id.*

60. See generally Robert C. Stacey, *The Age of Chivalry*, in *THE LAWS OF WAR*, *supra* note

early part of the twentieth century, the law of armed conflict was characterized by its emphasis upon the methods and means of warfare, rather than upon extraneous notions of humanity. Several instruments drafted during the second Hague Peace Conference of 1907 reflect this practicality.

The 1907 Convention on Naval Mine Warfare is one apposite example of such practical influences, and its negotiating history corroborates Draper's argument about the traditional character of the *jus in bello*. The 1907 Naval Mine Warfare Convention was drafted against the backdrop of the 1904 Russo-Japanese War where the use of naval mines was extensive and completely unrestricted.⁶¹ While the mines accounted for significant naval losses during the conflict, their post-conflict effect caused considerable civilian casualties and represented an ongoing danger to commercial maritime activity, thus prompting the inclusion of the mine issue at the second Hague Peace Conference. Notwithstanding the humanitarian impulse for ensuring the safety and protection of non-belligerent vessels and of lives from third party States after the War, the two dominant powers at the Conference, Great Britain and Germany, were not especially influenced by humanitarian arguments. Germany did not wish to squander, through legal regulation, the tactical and strategic usefulness of the naval mine.⁶² Equally, Britain recognized that naval mines more than adequately redressed superior naval dominance and balanced power disparities. Britain's zeal to "outlaw" naval mines was undoubtedly motivated by a desire to retain its naval dominance rather than by any sentiment of altruism.⁶³

The compromised language that the Convention ultimately adopted reflects the various motivations for its prohibition. Article 2 of the Convention, for example, forbade States "to lay automatic contact mines off the coast and ports of the enemy, with the sole object of interrupting commercial shipping." The inclusion of the sole object test has been described as the "yawning loophole",⁶⁴ which could easily be circumvented and severely undermines the prohibition's effectiveness. Similarly, Article 3 of the Convention provided, *inter alia*, that where naval mines broke loose from their lines, or where belligerents no longer could monitor the mines, States were publicly obliged to acknowledge the dangers only if "military exigencies" permitted. Moreover, even with these significant compromises to humanitarian considerations, the Convention was based upon the principle of reciprocity. Obligations were owed under the Convention only

58, at 27; Geoffrey Parker, *Early Modern Europe*, in THE LAWS OF WAR, *supra* note 58, at 40.

61. Thomas A. Clingan, Jr., *Submarine Mines in International Law*, in THE LAW OF NAVAL OPERATIONS 351 (Horace B. Robertson, Jr. ed.) (U.S. Naval War College Int'l Law Studies Vol. 64, 1991).

62. See generally Dale Stephens & Mark Fitzpatrick, *Legal Aspects of Contemporary Naval Mine Warfare*, 21 LOY. L.A. INT'L & COMP. L.J. 553 (1999).

63. 2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 1138 (I.A. Shearer ed., 1984).

64. Clingan, *supra* note 61, at 353.

to the other “contracting Powers, and then only if all the belligerents [were] parties to the Convention.”⁶⁵

As the negotiating background to the 1907 Naval Mine Convention demonstrates, considerations of humanity did not especially drive the initial development of the law of armed conflict. The concern in drafting rules to regulate warfare at the turn of the twentieth century remained essentially mired in balance of power paradigms and restrictions upon weapons systems. Yet, beginning at around the turn of the twentieth century, a trend nonetheless emerged that highlighted considerations of humanity in the law of armed conflict. The tentative introduction of humanitarian considerations at that time became a dominant characteristic of the law of armed conflict and has led to greater commonality than difference between the law of armed conflict and international human rights law.

Even before the turn of the twentieth century, humanitarian concerns began to influence the law of armed conflict. The preamble of the 1899 Hague Convention on the Laws and Customs of War on Land first expressed the celebrated “Martens Clause.”⁶⁶ The Martens Clause did not directly regulate conflict but rather acknowledged the challenge of including humanitarian considerations into the law of war. It held that, until a more complete code of laws could be issued, the activities contracting parties always should be governed, *inter alia*, by the “requirements of the public conscience.”⁶⁷

The Martens Clause became the legal touchstone for the steady development of humanitarian protections within the law of armed conflict throughout the twentieth century.⁶⁸ More than just a pious sentiment, the Clause has, at least, been a moral guide for determining the nature of humanitarian obligations under customary international law. A flood of treaty law throughout the twentieth century has sought to regulate armed conflict, including the 1925 Geneva Gas Convention, the 1936 London Submarine Warfare Convention, the 1949 Geneva Conventions, the 1977 Additional Protocols to the Geneva Conventions and the 1981 Conventional Weapons Convention. All these Instruments, to some extent, make the protection of humanity from the ravages of war a central feature of their intended compass. These developments in the law of armed conflict parallel the chronological development of the modern international

65. Convention Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, art.7, 36 Stat. 2332, 2344, 204 Consol. T.S. 331, 338.

66. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, preamble, 32 Stat. 1803, 1805, 187 Consol. T.S. 429, 431 (“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.”).

67. *Id.*

68. See, e.g., Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 1997 INT’L REV. RED CROSS 125, 125-34.

human rights law developed following World War II. The principal Instruments/Resolutions comprising human rights law include the 1948 UN Universal Declaration of Human Rights, the 1951 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, the 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 ICCPR, the 1966 International Covenant on Economic, Social and Cultural Rights and the 1969 American Convention on Human Rights.

Given the relatively similar goals of these instruments, namely the protection and respect of humanity, it is difficult to accept Draper's contention that the two streams of the law are "diametrically opposed." Admittedly, there are features of the two streams that are plainly different, such as the concept of reciprocity⁶⁹ and the fact that human rights instruments invariably impose obligations only upon States, rather than upon both States and individuals.⁷⁰ The Advisory Opinion does not recognize a human rights nexus between individual soldiers engaged in armed conflict, which Draper had so strenuously opposed.⁷¹ Rather, it simultaneously recognized the primacy of the law of armed conflict and the humanitarian considerations that inform that law. It is the law of armed conflict viewed on a humanitarian basis that defines an arbitrary loss of life under Article 6 of the ICCPR. Such an approach effectively counters Draper's contention that the shared base of humanity between the two areas is too "vague"⁷² to provide any meaningful standard in a time of armed conflict.

Draper's criticism of the fusion of principle underpinning the law of armed conflict and international human rights law as conceptually incompatible is not well founded. While the history of the development of the *jus in bello* was admittedly characterized by its emphasis upon conceptions of personal honor and the regulation of financial gain, the principle of humanity has slowly inculcated itself into the development of this law and has become a driving feature of law of armed conflict today. Even Draper acknowledges that the steady appearance of humanitarian principles within the law of armed conflict has resulted from the special status of the "nightmare experience" of the brutality of national wars fought in the twentieth century.⁷³ It is this profound influence that the Advisory Opinion's reasoning so effectively highlights.

In this Article, I suggest that by emphasizing the "overriding" significance of humanitarian principle when interpreting the rules

69. The principle of reciprocity contemplates an interdependence of obligations assumed by participants. See René Provost, *Reciprocity in Human Rights and Humanitarian Law*, 65 BRIT. Y.B. INT'L L. 383 (1994).

70. Louis Henkin, *Introduction*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 1, 15 (Louis Henkin ed., 1981).

71. Draper, *Humanitarian Law*, *supra* note 47, at 204.

72. *Id.* at 205.

73. Draper, *The Law of Armed Conflict*, *supra* note 54, at 192-193.

comprising the law of armed conflict,⁷⁴ the Court has highlighted a critical point for interpretation and has contributed greatly to the integrity of the humanitarian basis of the rules and principles comprising the law of armed conflict. Indeed, as manifested in the many Geneva Instruments, the law of armed conflict focuses on the restoration of “the cohesion and harmony in human society,”⁷⁵ the purpose that Draper had singularly accorded to international human rights law.

IV. THE SIGNIFICANCE OF THE COURT’S INTERPRETATION

A. The Law of Armed Conflict

While human rights proponents welcomed ICJ’s application of Article 6 of the ICCPR during times of armed conflict, the interpretation of its Opinion remains ambiguous. The Court did not determine that the law of armed conflict had been modified in any structural manner by the parallel application of non-derogable provisions of the ICCPR. Rather, the Opinion suggests that “humanitarian law is to be used to actually interpret a human rights rule.”⁷⁶ Such an interpretation suggests that the possible legal content of Article 6 completely assimilates into the applicable rules of the law of armed conflict. Indeed, according to one authoritative view, it suggests that “in the context of the conduct of hostilities, human rights law cannot be interpreted differently from humanitarian law.”⁷⁷

While this interpretation may be formalistically correct,⁷⁸ it nonetheless is quite narrow. It is based upon an orthodox interpretation by acknowledging that the language of Article 6 is very general.⁷⁹ In contrast, the plethora of rules governing the protection (and destruction) of life as contained within the law of armed conflict are quite detailed and therefore should, under common canons of interpretation, continue to be the exclusive governing regime. Those seeking to ensure specific separation of the two streams of international law have applauded this manner of interpretation. These commentators contend that the rules of the law of armed conflict were largely the product of strenuous and specific negotiation. Accordingly, the import of applying operative peacetime human rights concepts, such as the right to life, would undermine the integrity of the existing rules⁸⁰ and only promote numerous reservations

74. Nuclear Weapons, *supra* note 1, at para. 95.

75. Draper, *Humanitarian Law*, *supra* note 47, at 205

76. Doswald-Beck, *supra* note 4, at 51.

77. *Id.*

78. The Court itself acknowledged that it was applying the law of armed conflict as the applicable *lex specialis*. See Nuclear Weapons, *supra* note 1, at para. 25.

79. Greenwood, *supra* note 11, at 66.

80. Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT’L L. 417, 423 (1997).

and declarations to current and future law of armed conflict regimes. While possibly representative of *realpolitik*, such views represent a narrow assessment of the import of the Court's approach to the issue.

Though the Court formally maintained the priority of the law of armed conflict, it interpreted that law in terms of the underlying principles of humanity.⁸¹ This emphasis elevated the humanitarian aspects and priorities of the law of armed conflict and ensured that these "weighted" humanitarian aspects must be considered when determining the legitimacy of military actions. In this way, the Court understands that the right to life envisaged by Article 6 applies as a nonderogable right and is to be interpreted only in accordance with the status quo of the prevailing law of armed conflict. Hence, the Court develops its reasoning by re-interpreting the law of armed conflict with a new-found emphasis on promoting humanitarian considerations.

Three fundamental principles of the law of armed conflict determine whether and to what extent military force may legitimately be applied in any given circumstance: military necessity, unnecessary suffering, and proportionality. The Advisory Opinion has profoundly influenced the way in which the interdependent relationship between these principles is to be interpreted by providing a new benchmark for balancing the license to employ destructive force against a renewed priority for ensuring the protection of human life. More particularly, the Advisory Opinion provides a new basis for a Government, field commander and/or individual soldier to exercise his or her discretion when determining whether the application of destructive military force is legitimate; this basis significantly considers the interest in minimizing the loss of life.

1. The Humanitarian Underpinning of the Law of Armed Conflict

In providing the first comprehensive analysis of the law of armed conflict, the Advisory Opinion recognized the historic development of this law as comprising both the "Hague" and "Geneva" strands. The Court noted that these two strands had become, over the course of the twentieth century "closely interrelated" and had somewhat fused in the form of the Additional Protocols of 1977.⁸² The Court specifically acknowledged that the Additional Protocols were a testament to the "unity" and "complexity" of this law⁸³ and that the collective term for this unified law was "international humanitarian law,"⁸⁴ otherwise known as the law of armed conflict.

The Court was at pains to highlight the fundamental principles of humanity⁸⁵ that regulate the conduct of warfare. It opined that the law of

81. Nuclear Weapons, *supra* note 1, at para. 95.

82. *Id.* at para. 75.

83. *Id.*

84. *Id.*

85. *Id.* at para. 79.

armed conflict had so matured this century, and had become “so fundamental to the respect of the human person,”⁸⁶ that the rules enjoyed universal endorsement and were, in fact, “intransgressible” principles under customary international law.⁸⁷ Indeed, the Court repeatedly emphasized that the law of armed conflict was “permeated” with an “intrinsic humanitarian character”⁸⁸ and ultimately concluded by stating that at the heart of all the rules and principles applicable in armed conflict “is the *overriding* consideration of humanity.”⁸⁹ It even seemed to elevate the Martens Clause to a cardinal principle of the law of armed conflict as a representative expression of the humanitarian limitations on warfare.⁹⁰

By identifying humanity as the overriding consideration in the law of armed conflict, the Court acted consistently with two of its previous cases. In the 1949 *Corfu Channel Case*, the Court examined the 1907 Hague Convention on Naval Mine Warfare and found an obligation incumbent upon Albania to warn Great Britain of naval mines within its territorial sea. Critically, the Court came to this conclusion, not on the basis of a *de jure* application of the Convention, but rather on the basis of “certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war.”⁹¹ In this seminal aspect of the judgement, the Court celebrated the universal nature of humanitarian principles and readily accepted the application of such principles in any circumstance that involves the application of force, whether in armed conflict or otherwise. Similarly, in the 1986 *Nicaragua Case*, the Court determined that the laying of mines within Nicaraguan harbors violated principles of humanity, which underpinned the 1907 Hague Convention on Naval Mine Warfare. The Court again came to this conclusion not on a literal application of the terms of the Convention, which could only apply in a time of armed conflict, but rather by applying the Court’s appreciation of “underlying principles” of humanitarian law, which supported the Convention.⁹² Such overt references to the “underlying principles” and “elementary considerations” that support the 1907 Hague Convention demonstrate the Court’s preparedness to embrace interpretations which ensured the maintenance of human dignity in situations where contrary literal interpretations would not achieve this result. Indeed, this is particularly ironic given that the principal negotiators to the Conference were largely indifferent to the humanitarian

86. *Id.*

87. *Id.*

88. *Id.* at para. 86.

89. *Id.* at para. 95 (emphasis added).

90. *Id.* at paras. 78 & 84. The Court referred to the Martens Clause in the same context as the identified “cardinal principles” of the Law of Armed Conflict, although it failed to provide an outline of the significance of the Clause beyond noting that it constituted applicable customary law.

91. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (April 9).

92. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 112 (June 27).

aspects of the Convention.⁹³

2. The Principles of Humanity/Unnecessary Suffering and Distinction

The law of armed conflict comprises an amalgam of many historic influences deriving from treaty law, customary law, and other subsidiary sources of international law. The principle of distinction constitutes the most basic and lingering principle of this law. The principle provides that combatants must distinguish between military objectives and the civilian population and that parties to a conflict must direct their operations only against military objectives. Similarly, the principle of unnecessary suffering enjoys an equally impressive status and is designed to ensure that weapons that are designed to cause unnecessary suffering or superfluous injury are prohibited. Poisoned projectiles and soft nosed bullets fall within the category of weapons.

The Advisory Opinion identified the principles of distinction and unnecessary suffering as cardinal principles of the law of armed conflict. While the identification of these principles is undoubtedly correct, the Court excluded the principle of proportionality, which provides critical safeguards during armed conflict. The literature of academics and non-governmental organizations recognizes a broader framework of cardinal principles than those identified in the Advisory Opinion for regulating armed conflict. Reference literature published by the International Committee of the Red Cross (ICRC), for example, recognizes that the prohibition against unnecessary suffering/humanity is undoubtedly a principle underpinning the law of armed conflict; yet such literature also identifies the principles of military necessity and proportionality as essential to the law of armed conflict.⁹⁴ The ICRC thus understands the law of armed conflict to consist of a triumvirate equation that balances military necessity against unnecessary suffering/humanity so as to arrive at a proportionate application of military force that provides the general test for legitimacy of military action.

3. The Principle of Military Necessity

The principle of military necessity has developed in diametric strands. The first strand developed in the nineteenth century, when the law did not place undue restrictions on a state's engagement in armed conflict/war. Specifically, the principles governing military engagement suggested that a State could do all that was necessary to ensure its survival and achieve

93. See *supra* note 61 and accompanying text.

94. MARCO SASSOLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS, AND TEACHING MATERIALS IN INTERNATIONAL HUMANITARIAN LAW 112 (ICRC ed., 1999).

military victory.⁹⁵ The theory, particularly embraced by German statesmen in the late nineteenth century and developed into the doctrine of *Kriegsraison*, permitted a belligerent State the right to violate virtually any law of war or, indeed, virtually any tenet of international law to avoid defeat.⁹⁶

Even as Germany and others embraced this broad interpretation of military necessity, at the instigation of President Lincoln, the United States Army developed a code of conduct that squarely limited the right of military necessity in the conduct of hostilities in the field. This second strand, the "Lieber code" of 1862,⁹⁷ restricted the level of military force that could be applied on the battlefield only to "those measures that are indispensable for securing the ends of war and that are lawful according to the modern law and usages of war."⁹⁸

By the early twentieth century, a growing body of law limited the means of warfare and prescribed, albeit somewhat tentatively, humanitarian limits upon international conflict. Notwithstanding these developments, a number of German defendants in Nuremberg adhered to the broader interpretation of their predecessors by pleading the so-called "military necessity" defense. Though the Tribunal rejected such defenses in those particular cases, it did acknowledge that the scope of the concept was wide. In a particular judgement, and in terms reminiscent of the Lieber Code, the Tribunal defined its interpretation of the term "military necessity" as follows:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money . . . It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war. . . .⁹⁹

95. This is a position that is sometimes repeated in modern times using the doctrine of "absolute necessity," as demonstrated by the statements of Dean Acheson during the 1962 Cuban missile crisis when he stated that the law "simply does not deal with some questions of ultimate power The survival of States is not a matter of law." OSCAR SCHACTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 136 (1991) (quoted from 57 AM. SOC'Y INT'L L. 13-14 (1991)).

96. Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 63 (1994).

97. So called because of the author of the code, Dr. Francis Lieber, who was professor of Columbia College at the time of drafting. See generally Jochnick & Normand, *supra* note 96, at 65 (describing the content and significance of the Lieber Code).

98. U.S. War Dept. Instructions for the Government of the Armies of the United States in the Field, General Orders No. 100 (April 24, 1863), Art. 14, *microformed on 19th Century Legal Treatises*, Fiche 31,460 (Research Publications).

99. Jochnick & Normand, *supra* note 96, at 93 (citing in re List, 11 WAR CRIMES AND COMM'N, MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. (0-759, 1253-54 (1950)).

Accordingly, the principle anticipates the legitimate application of force to obtain a military objective. In short, it allows for the killing of the enemy and destroying the ability of the enemy to wage war. While the conception of military necessity is reasonably wide there still do exist limiting factors embedded within the principle itself. Hence wanton destruction can never be justified under the concept of military necessity. Similarly there is a requirement that the force applied under the authorization of military necessity must always be the minimum necessary to achieve the objective.

4. The Principle of Proportionality

The principle of proportionality provides a formal link that balances the competing priorities of unnecessary suffering/humanity and military necessity. Article 57 of Additional Protocol 1 of the 1949 Geneva Conventions details the rule of proportionality,¹⁰⁰ though Articles 51(5)(b) and 52 also reiterate the content of the rule.

Together these Articles prohibit both indiscriminate attacks and attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be *excessive* in relation to the concrete and direct military advantage anticipated” (my emphasis). This test requires a military commander to weigh the interests arising from the success or military advantage of the attack against the possible harms to protected persons and objects. There must be an acceptable ratio between the legitimate destructive effect to be applied and the undesirable collateral or incidental effect¹⁰¹ of an attack.

In essence, the principle of proportionality balances the “necessities of war and humanitarian requirements.”¹⁰² While violation of Article 57(2)(a)(iii) of Additional Protocol 1, which specifically applies the principle of proportionality, is defined as a “grave breach” and hence punishable as a particularly serious war crime,¹⁰³ its interpretation is notoriously ambiguous. The difficulty lies in quantifying what may be considered an acceptable loss of life vis-à-vis the value placed upon achieving the military objective. Additionally, there remains the unresolved question of the level of risk to which a military Commander must expose his or her troops in order to protect civilian lives in accordance with proportionality requirements.¹⁰⁴ Pictet notes that there is a

100. JEAN PICTET, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 683 (Yves Sandoz et al. eds., 1987).

101. *Id.* at 684 (referring to a lone soldier on leave in a village as an example where the destruction of a village to attack this military objective would be totally disproportionate).

102. *Id.* at 683.

103. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, art. 85(3), 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978), reprinted in 16 I.L.M. 1391 (1977).

104. Judith Gardem, *Proportionality as a Restraint on the Use of Force*, 20 AUSTL. Y.B. INT'L L. 161, 171 (1999).

“very heavy burden of responsibility imposed by this article on military commanders, particularly as the various provisions are relatively imprecise and open to a fairly broad margin of judgment.”¹⁰⁵

Commentators such as Gardam have strenuously argued that the humanitarian underpinning of Article 57 is seriously vitiated by the subjectivity of the test. She maintains that the rule allows significant latitude in determining “military advantage” such that individual attacks may be combined to balance the composite military advantage of an operation against the growing civilian losses in any particular engagement. In this way, she argues that commanders may take a strategic, long term view of military advantage, notwithstanding that civilian losses may be disproportionate to the immediate military goal to be achieved in any particular tactical attack. She submits that this outcome was not what the framers envisioned when drafting the provision,¹⁰⁶ a point that Pictet also supports.¹⁰⁷

Gardam explains that, in addition to allowing latitude through the term military advantage, the Article 57 test may be influenced by the perceived legitimacy of the overall military action. In the 1990-91 Gulf War, for example, she maintains that since the Security Council endorsed it as a “just war,” military commanders were only concerned with two formalistic aspects of the rule of proportionality—namely that civilians not be made direct objects of attack and that targeted attacks not be conducted negligently.¹⁰⁸ Otherwise, she maintains that “military advantage always outweighed the civilian casualties”¹⁰⁹ and consequently, coalition combatant lives were not to be unduly risked to preserve Iraqi civilian lives.¹¹⁰

The indirect application of Article 6 of the ICCPR to the military decision making process as envisaged by the Advisory Opinion further defines the considerations for determining whether a particular action is proportionate. The Advisory Opinion refers to Article 6 as a framework through which to constrain the wide discretion employed in the military decision making process criticized by Gardem. It explains that the right to life of Article 6 operates (via its assimilation within the law of armed conflict) to further limit military assessments of acceptable non-combatant civilian deaths within the contours of a particular attack. In this manner, military commanders must not only determine the “concrete and direct” military advantage to be achieved from a particular attack, but also must understand that the right to life cannot be arbitrarily denied by a perfunctory assessment of what is an excessive loss of life. This manner of interpretation ensures that the humanitarian underpinnings of both the law

105. PICTET, *supra* note 100, at 679.

106. Gardem, *supra* note 104, at 409.

107. PICTET, *supra* note 100, at 685.

108. Gardem *supra* note 104, at 410; *see also* Jochnick & Normand, *supra* note 99, at 50.

109. *Id.*

110. *Id.* at 409.

of armed conflict and international human rights law are given a specific expression and necessarily prompt military planners to apply a meaningful humanitarian test before undertaking the application of force.

Equally significant in this determination, however, is the relative value of military lives. When ratifying the Additional Protocol, the Australian Government representative made the following declaration concerning the Convention:

In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that The term 'military advantage' involves a variety of considerations including the security of attacking forces

Therefore, contrary to Gardam's criticism concerning the "trading" of civilian lives for military ones, an Australian military commander must determine the respective cost in both military *and* civilian lives when determining the respective military advantage stemming from an attack. The commander must base the assessment upon a combination of factors, namely the overriding humanitarian basis (as emphasised by the Advisory Opinion) in the proportionality equation under the law of armed conflict, the intent of the specific Australian declaration to the Additional Protocols and, finally, the influence of Article 6 of the ICCPR and the prohibition against an arbitrary deprivation of life; all of which direct that humanitarian considerations be given an especially high priority. In such circumstances, the framers' intention to ensure that military planners consider only the "concrete and direct military advantage anticipated" in an attack may be faithfully realised.

5. Unit Self Defense: The Right of Members of the Armed Forces and Their Governments

In addition to fundamentally influencing the proportionality equation, the Advisory Opinion may have significantly impacted the relationship between members of a nation's armed forces and their own Government. In particular, by endorsing the application of Article 6 of the ICCPR in a time of armed conflict the Opinion may have formally protected the right of such members to defend their own lives in circumstances where their Government places them in harms way. This right is a personal and a specific one, quite separate from the content of the law of armed conflict, which is generally silent upon the obligations owed by a Government towards its own troops. Moreover, as a human right, it individually protects every member of a Government's armed forces and does not depend upon the prevailing legitimacy of the *jus in bello*. While the law of armed conflict protects of rights of foreign nationals, whether they are combatants or non-combatants, a State owes few obligations towards its

own nationals.¹¹¹ One of the few express protections afforded to members of the military is contained within Article 12 of Geneva Conventions I and II, which makes it clear that these Conventions apply to certain wounded, sick or shipwrecked persons without distinction of nationality.

As part of customary international law, individual/unit self defense for members of the military applies in a time of armed conflict, but is not strictly part of the *jus in bello*.¹¹² In essence, the right of unit self defense allows commanders or, indeed, individual soldiers, sailors, or airmen the automatic authority to defend their units or themselves, within certain well-defined circumstances. The lethal discretion afforded to the contemporary commander under the banner of unit self-defense is absolute in status. In terminology akin to that employed in international human rights instruments, Australian statements have characterized the concept of unit self-defense as a “non derogable right.” The United States designation goes further and maintains that unit self defense imposes an incumbent “obligation” on the commander to act in defense of the unit.¹¹³ Nonetheless, the mandatory language used in both propositions demonstrates the fundamental humanitarian basis of the right.

The positioning of this right in the context of Article 6 of the ICCPR means that the term “obligation” as used in the US definition of unit self defense and the phrase “non derogable” right used in the Australian formulation are consistent with the international human rights quality of the concept. Consistent with the application of Article 6 of the ICCPR, a military member cannot lawfully be ordered to resist acting in individual or unit self-defense and a Government cannot lawfully prevent a military member or unit from exercising such a right. This is critical when determining how military members should be deployed and armed in missions such as peacekeeping operations.

Clearly, during a time of armed conflict a State loses military lives as a matter of military necessity. However, the obligations owed by National Governments to their citizens pursuant to Article 6 of the ICCPR continue to extend to military members, who do not cease to be citizens at such times. Indeed, given that the law of armed conflict is largely silent on the right of a country’s own military members, Article 6 would have a complete and independent effect beyond the strictures of the law of armed conflict. Specific circumstances determine what an arbitrary loss of life means, however it is evident that military lives are not simply expendable. The late Professor Daniel O’Connell opined that warships had to take the

111. Meron, *supra* note 39, at 596.

112. See generally Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126 (1998) (exploring the right of individual/unit self-defense and concluding that the right derives from customary international law; the right does not depend on Article 51 of the UN Charter and is nonderogable allowing military members the right to defend themselves wherever and whenever they are faced with a hostile act or demonstration of hostile intent.)

113. *The Commander’s Handbook on the Law of Naval Operations*, 9 NAVAL WARFARE PUB. § 4.3.2.2 (1989).

“first hit” with resulting loss of life before responding in self-defense (i.e. may not act in accordance with the principle of reacting to a demonstration of hostile intent).¹¹⁴ Such statements run counter to the concept of unit self defense (which permits the use of armed force in situations where a soldier/sailor/airman reasonably believes that he/she is threatened by the imminent application of armed force by an opposer) and must now surely be re-examined given the substance and application of Article 6 of the ICCPR. In essence, the Advisory Opinion declared that Article 6 of the ICCPR applies during armed conflict. While the Court accorded the law of armed conflict priority (while giving an extra emphasis to the humanitarian obligations), it nonetheless follows that Article 6 of the ICCPR may be applied when the law of armed conflict is silent. In this instance, the Advisory Opinion makes it very plain that from now on Article 6 applies in a time of armed conflict and, *a fortiori*, in circumstances short of armed conflict, so as to permit military members to exercise their right of individual/unit self-defense so as to avoid an arbitrarily deprivation of the right to life.

V. CONCLUSION

While the legitimacy of the threat or use of nuclear weapons comprised only a subsidiary aspect of the matter with which it was seized, the Advisory Opinion’s formal acknowledgment of the mutual application of the law of armed conflict and international human rights law in armed conflict represents a milestone in international jurisprudence. It would be a mistake, however, to consider the Advisory Opinion “revolutionary.” Instead, the Opinion formally confirmed an “evolutionary” development of the twentieth century. In the few cases brought before it dealing with the use of force, the ICJ had consistently emphasized the application of humanitarian principles even when strict legalism may have suggested otherwise. The Court repeated and refined in the Advisory Opinion its assessment of the character of the law of armed conflict and the weighted significance it gave to humanitarian considerations within that body of law.

If “all law is created for the benefit of human beings,”¹¹⁵ then the Advisory Opinion will serve as a useful basis from which to explore the application of relevant human rights principles in times of armed conflict (even if subsumed within law of armed conflict). The right to life, as expounded in Article 6 of the ICCPR, can be readily applied to ameliorate many of the brutal consequences of armed conflict because it provides a substantive basis for bolstering the law of armed conflict provisions that seek to preserve human life and promote human dignity. As I have

114. D. P. O’CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 83 (1975).

115. *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 Oct. 1995), 35 I.L.M. 32, 63 (1996).

outlined in this Article, this is manifested *inter alia*, in determining a more precise content of the principle of proportionality and in asserting the integrity of the right of individual/unit self defense, thus providing a safeguard against arbitrary sacrifice of military lives. When it comes to defining the rights of military members vis-à-vis their own Government, the Advisory Opinion provides a useful legal authority to assert the independent application of Article 6 of the ICCPR to bolster the right of individual/unit self-defense. Such a right ensures that a Government may not place their military members in harms way and withhold from them the lawful right to properly defend themselves.

The Advisory Opinion should not be regarded as the end point of the struggle to humanize the rules of war, but should rather be seen as the starting point. It will be the challenge for lawyers and international tribunals in the near future to better realize the humanitarian underpinnings of both the law of armed conflict and international human rights law so as to ensure that such "fused" principles developed for the benefit of human beings, are given the priority they deserve.