THE EXTRATERRITORIAL CONSTITUTION AND THE INTERPRETIVE RELEVANCE OF INTERNATIONAL LAW

For over a century, courts have wrestled with the question of whether, and to what extent, the Constitution applies outside of the United States. While this question first surged to prominence when the enterprise of American expansionism went to the Supreme Court in the *Insular Cases*,[1] it has begun to receive renewed attention in recent years as the post-9/11 war on terrorism has brought extraterritoriality issues to the fore. Though the precise legal framework that will govern this question is unclear at the moment, there are indications the Constitution may apply when the result would not be "impracticable and anomalous."[2] Given the significance of this matter, it is striking that the "impracticable and anomalous" standard "has not yet acquired an academic theorist who would elaborate and defend it as the best interpretation of U.S. constitutionalism."[3] Indeed, the standard has been criticized for giving courts too much discretion on sensitive matters.[4]

This Note argues that the "impracticable and anomalous" standard need not be considered quite so problematic if it is interpreted, in light of the precedents on which it relies, as implicitly referencing generally applicable international law. Important issues in the war on terrorism that the conventional approach would relegate to a case-by-case, discretionary judicial determination of whether an application of the Constitution is impracticable in policy terms can instead be decided more systematically by applying the standard in light of international humanitarian law (IHL). To clarify at the outset, this approach is different from previous suggestions that the *substantive content* of international law should determine the scope of constitutional rights applicable extraterritorially, which risks of giving judges too much discretion and infringing on American constitutional dualism. Instead, the approach is to ask not *what* rights apply under international law, but rather *in what sorts of circumstances* international law contemplates the protection of individual rights. Asking when international law provides strong individual rights protections — in other words, when international law deems such protections practicable — should guide the constitutional inquiry. With this question in mind, two key distinctions in IHL — between law regulating the battlefield and law

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[1] *See, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901).

[2] United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result)) (internal quotation mark omitted).

[3] Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2076 (2005).

[4] *See, e.g.*, Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 987–90 (1991).

regulating detention, and between occupied territory and active zones of operations — are highly salient for determining when it would be "impracticable and anomalous" to apply individual rights extraterritorially during war.

What this Note does not seek to do is justify the "impracticable and anomalous" approach as normatively superior to positions that either reject extraterritorial application completely or demand that constitutional protections accompany all government actions. The intent, rather, is to show that interpreting the standard by reference to international law has a longstanding constitutional pedigree, and that this approach to the standard is superior to, and more justifiable than, the standard's conventional understanding.

Part I discusses the state of the law following *United States v. Verdugo-Urquidez*[5] and the contemporary significance of the question of extraterritorial application of the Constitution. Part II situates the "impracticable and anomalous" standard in historical context, drawing on the nineteenth-century use of international law to identify "powers inherent in sovereignty," and lays out a justification for the contemporary use of international law in fleshing out the Constitution's extraterritorial applicability. Part III argues that in the context of the war on terrorism, it is sensible to look to IHL to guide the inquiry into when certain rights apply extraterritorially. By reference to the differences between battlefield targeting law and detention law — vestiges of the traditional "Hague Law"-"Geneva Law" distinction in IHL — this Note demonstrates how, under the "impracticable and anomalous" standard, Fourth Amendment protections do not apply to house-to-house counterterrorist sweeps abroad, but Fifth Amendment procedural due process protections apply to war on terrorism detainees held extraterritorially. These examples prove nothing conclusively, but they do illustrate the promise the international law–based approach offers in clarifying this murky area of the law. Finally, Part IV concludes with some discussion — and some potential caveats — regarding the broader usefulness of this framework beyond IHL and the war on terrorism.

I. *VERDUGO-URQUIDEZ*, EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION, AND THE WAR ON TERRORISM

The Supreme Court's most recent extended discussion of the extraterritorial applicability of the Constitution occurred in *Verdugo-Urquidez*, in which the Supreme Court held that a search by agents of the Drug Enforcement Agency (DEA) of a Mexican citizen's home in

[5] 494 U.S. 259.

Mexico was not subject to the Fourth Amendment.[6] Writing for a nominal majority,[7] Chief Justice Rehnquist articulated a theory of the Fourth Amendment based on the idea of a social compact under which only those aliens with a sufficient connection to the United States are entitled to constitutional protections.[8] Justice Kennedy, however, who provided the fifth vote for the majority, expressly disavowed the Chief Justice's social compact theory; instead, quoting extensively from Justice Harlan's concurrence in *Reid v. Covert*,[9] Justice Kennedy asserted that constitutional rights apply extraterritorially unless such an application would be "impracticable and anomalous."[10]

Precisely what Justice Kennedy's approach in *Verdugo-Urquidez* requires of courts is presently a highly relevant issue. In *Rasul v. Bush*,[11] the Supreme Court, though ruling only that the Guantánamo detainees were statutorily entitled to habeas review, suggested — citing Justice Kennedy's *Verdugo-Urquidez* concurrence — that the Constitution may have been violated.[12] The import of the *Rasul* Court's decision to cite Justice Kennedy's and not Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* is not entirely clear, but it may well signal that the "impracticable and anomalous" standard governs the rights of detainees held extraterritorially.[13]

Agreeing with this assessment, Judge Green, in *In re Guantanamo Detainee Cases*,[14] read *Rasul*'s citation to Justice Kennedy's concurrence as requiring consideration of the rights the Guantánamo detainees possessed using the "impracticable and anomalous" inquiry.[15] Conducting this analysis, Judge Green determined that the Due Proc-

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[6] *Id.* at 274–75.

[7] As discussed below, Justice Kennedy's theory of extraterritorial applicability is so different from Chief Justice Rehnquist's that the Chief Justice's opinion may be best read as speaking only for a plurality of justices. *See* United States v. Guitterez, 983 F. Supp. 905, 915 (N.D. Cal. 1998) (noting that "a majority of the justices did *not* subscribe to Chief Justice Rehnquist's opinion" and that "[a]lthough Justice Kennedy joined in the Chief Justice's opinion and agreed that no violation of the Fourth Amendment had occurred, he filed a separate concurrence which diverged, in large part, from the 'majority' opinion"); *see also* Neuman, *supra* note 4, at 972. Note, however, that Justice Kennedy did not view his opinion as inconsistent with Chief Justice Rehnquist's. *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring).

[8] *See Verdugo-Urquidez*, 494 U.S. at 270–71 (majority opinion).

[9] 354 U.S. 1 (1957).

[10] *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring in the result)) (internal quotation mark omitted). Professor Neuman terms this approach "global due process." Neuman, *supra* note 4, at 920.

[11] 542 U.S. 466 (2004).

[12] *Id.* at 483 n.15.

[13] *See* Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 150–51 (interpreting *Rasul* as rejecting the approach to extraterritorial constitutional rights staked out by Chief Justice Rehnquist in *Verdugo-Urquidez*).

[14] 355 F. Supp. 2d 443 (D.D.C. 2005), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007).

[15] *Id.* at 463.

ess Clause applied to the detainees in Guantánamo and that the Combatant Status Review Tribunal process lacked constitutionally sufficient safeguards.[16] Judge Leon, by contrast, in *Khalid v. Bush*,[17] held that aliens detained extraterritorially lack due process protections.[18] This issue is currently before the Supreme Court in *Boumediene v. Bush*,[19] which might, but will not necessarily, resolve the question of the Constitution's applicability to detention operations in Guantánamo Bay. Yet even if the Supreme Court resolves that issue, it remains to be seen whether the analysis will be limited to Guantánamo, or whether the case will have broader significance for the extraterritorial applicability of the Constitution.[20] And if it is in fact Justice Kennedy's approach that will provide some answers, it will be important to know what precisely the "impracticable and anomalous" standard means and what it has to say about contemporary debates.

II. THE RELEVANCE OF INTERNATIONAL LAW TO THE "IMPRACTICABLE AND ANOMALOUS" STANDARD

The "impracticable and anomalous" standard can best be understood, in light of the historical context in which it developed, as implicitly incorporating international law principles. Bracketing the question of precisely how international law should come into play in the modern-day extraterritoriality discussion, some form of incorporation can be justified in two ways: first, as a historically valid interpretive tool; and second, as functionally preferable — even according to the metrics of critics who denounce citation to international law in constitutional interpretation more generally — to the conventional amorphous balancing approach to the "impracticable and anomalous" standard.

A. The Standard in Historical Context: International Law's Constitutional Pedigree

Justice Kennedy's concurrence in *Verdugo-Urquidez* grounded its analysis in a century-old approach to the question of the Constitution's vitality abroad. The "impracticable and anomalous" standard he applied was drawn from language in Justice Harlan's concurring opinion

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[16] *Id.* at 464, 468–74.

[17] 355 F. Supp. 2d 311 (D.D.C. 2005), *vacated sub nom. Boumediene*, 476 F.3d 981, *cert. granted*, 127 S. Ct. 3078 (2007).

[18] *Khalid*, 355 F. Supp. 2d at 320–23.

[19] 127 S. Ct. 3078 (2007) (mem.), *granting cert. to Boumediene*, 476 F.3d 981.

[20] *See* David Golove, Developments, *United States: The Bush Administration's "War on Terrorism" in the Supreme Court*, 3 INT'L J. CONST. L. 128, 136 (2005) (noting the uncertainty over whether *Rasul* will apply beyond Guantánamo).

in *Reid v. Covert*,[21] and Justice Kennedy's application of this standard was explicitly guided by the *Insular Cases*.[22] In this series of cases at the turn of the twentieth century, the Supreme Court had held that none of the guarantees of the Constitution are automatically applicable to "unincorporated" territories where only certain rights apply.[23] Justice Kennedy analogized to these cases in ruling that it would be "impracticable and anomalous" to apply the Fourth Amendment to the search at issue in *Verdugo-Urquidez*: "Just as the Constitution in the *Insular Cases* did not require Congress to implement all constitutional guarantees in its territories because of their 'wholly dissimilar traditions and institutions,' the Constitution does not require U.S. agents to obtain a warrant when searching the foreign home of a nonresident alien."[24]

These cases were not directly on point, and required extension by analogy to apply their methodology to the facts of *Verdugo-Urquidez*. The *Insular Cases* dealt with U.S. territories, and *Reid* concerned the rights of U.S. citizens abroad; neither squarely addressed the applicability of the Constitution to aliens in foreign countries. Nonetheless, Justice Kennedy's concurrence in *Verdugo-Urquidez* tapped into a century-long effort to clarify the role the Constitution plays overseas by reference to international law.

Note first the role that international law played in the reasoning of the *Insular Cases*. As Professor Sarah Cleveland demonstrates, the Court's determination that Congress had substantial power to act as a colonial power was "powerfully informed by international law principles of the day."[25] According to Professor Cleveland, Justice White believed that the United States possessed inherent powers equivalent to "all the powers of sovereign nations recognized under international law."[26] Thus, Justice White began his discussion of what the Constitu-

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[21] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy J., concurring) ("[T]here is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous." (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result)) (internal quotation mark omitted)).

[22] *See id.*

[23] *See* Downes v. Bidwell, 182 U.S. 244, 293 (1901) (White, J., concurring) ("[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States."). Justice White's position eventually came to be adopted by a majority of the Supreme Court. Neuman, *supra* note 4, at 964.

[24] *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 14).

[25] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 165 (2002).

[26] *Id.* at 224.

tion permitted by noting that, as a "general principle[] of the law of nations," sovereign nations have the power to acquire new territory.[27] After establishing the government's authority to gain territory, it remained to Justice White to justify the lawfulness of governing such territory without significant constitutional restrictions. Here, too, international law proved helpful: "The general principle of the law of nations . . . is that acquired territory, in the absence of agreement to the contrary, will bear such relation to the acquiring government as may be by it determined."[28] Freedom to govern the territories as it saw fit was thus a sovereign power of the United States, without which the country would be "helpless in the family of nations."[29] Elucidating the scope of the government's power by reference to international law not only drove the *Insular Cases*, but was also an important theme of the Supreme Court's nineteenth-century jurisprudence.[30]

More recently, courts and commentators have picked up on the relevance of international law in the extraterritoriality arena, this time elaborating on a parallel theme in the *Insular Cases* — Justice White's suggestion in *Downes* that certain "fundamental" rights, (that is, those rights "which are the basis of all free government"), always apply.[31] Relying on this formulation, the Ninth Circuit, in determining the applicability of the Equal Protection Clause in the Northern Mariana Islands, interpreted fundamentality as used in the *Insular Cases* as meaning "fundamental in the *international* sense."[32] One lower court judge, applying this standard, looked to international human rights treaties in holding that "equality in voting rights is a fundamental right in the international sense under *Insular Cases* analysis."[33] Dean Alexander Aleinikoff sees this development as evidence of an approach that takes "the baseline of international human rights law" into ac-

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[27] *Downes*, 182 U.S. at 300 (White, J., concurring). Justice White went on to cite numerous international law treatises for this point. *Id.* at 301.

[28] *Id.* at 306.

[29] *Id.*

[30] *See* Cleveland, *supra* note 25, at 10–11. Most famously, *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), 130 U.S. 581 (1889), held that the United States had the power to exclude aliens on the ground that the country, as a sovereign, was "invested with powers which belong to independent nations," *id.* at 604, and the ability to exclude aliens was one such power, *see id.* at 603–04. *See also* Ekiu v. United States, 142 U.S. 651, 659 (1892) (relying on international law to hold that national power exists to forbid entrance to foreigners); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 567 (1823) (holding that the United States can gain title to discovered land based on principles adhered to by "all civilized nations").

[31] *Downes*, 182 U.S. at 291 (White, J., concurring).

[32] Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1992) (emphasis added).

[33] Sablan v. Tenorio, 4 N. Mar. I. 351, 371 (1996) (Mack, Spec. J., concurring in part and dissenting in part); *see also* Rayphand v. Sablan, 95 F. Supp. 2d 1133, 1140 (D. N. Mar. I. 1999) (holding that the "one man, one vote" principle is not part of the "basis of all free government" because "[s]everal countries that are considered to have 'free government' have a bicameral legislative in which one house is malapportioned" (internal quotation marks omitted)).

count in determining which provisions of the Constitution apply in the territories.[34]

As these more recent developments illustrate, an approach to the "impracticable and anomalous" standard that relies on international law has considerable constitutional pedigree dating back to the nineteenth century. Two objections to the current relevance of this history, however, may be leveled. The first objection is that the nature of international law has changed; international law at the time of the *Insular Cases*, unlike international law today, offered an enhancement of — rather than a restraint on — the enumerated powers of the government, and it would be an unfaithful application of these cases to invoke in their name this "new" international law. But while this account may be descriptively accurate, the doctrinal tool the Court used contained a very real limiting principle. Had the government asserted a power to act in the territories in a way not countenanced as acceptable conduct of sovereigns, such a power would not be included among the "powers inherent in sovereignty."[35] Modern international law changes the underlying calculus of what conduct is and is not acceptable for sovereigns, but this does not fundamentally change the analysis. Analogous objections are common to the debate between originalism and living constitutionalism, and in at least some contexts the Supreme Court has accepted that the background principles to which constitutional norms refer may evolve.[36]

The second objection is that the *Insular Cases*' approach to international law rests on a discredited natural law approach that has no place in contemporary, post-*Erie*[37] jurisprudence.[38] Descriptively, this is likely accurate. However, unlike the more general idea of incorporating international law directly as "part of our law,"[39] under the *Insular Cases*' approach international law matters because the Framers drafted the Constitution conscious of background understandings of sovereignty derived from international law.[40] In light of this intent,

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[34] T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 86 (2002). Notably, however, Dean Aleinikoff views international law as one component of a "multi-factor" test. *See id.*

[35] *See generally* Cleveland, *supra* note 25.

[36] *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[37] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[38] *Cf.* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 820–21 (1997) (arguing that customary international law was, in the nineteenth century, considered to be the sort of "general common law" that was later rejected).

[39] The Paquete Habana, 175 U.S. 677, 700 (1900).

[40] The future Justice Sutherland, foreshadowing his famous opinion in *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936), wrote: "The government [the Framers] instituted and

even if the international law relied on by *Chae Chan Ping v. United States*[41] and the *Insular Cases* is unrecognizable to us today, it is not an unprecedented move to remain faithful to this intent by "translating" its principles based on contemporary understandings of that law.[42] These two objections, therefore, while serious, do not undermine either the constitutional pedigree of referencing international law in this context or the viability of a contemporary approach derived from this history.

B. The Standard in Functional Context: International Law's Institutional Competence Justification

In addition to the historical support the recourse to international law has in this context, this approach also outperforms the conventional approach based on functional and structural considerations. As conventionally understood, the "impracticable and anomalous" standard is opaque, leaving considerable discretion to the courts.[43] Should the high economic cost of applying a certain right extraterritorially preclude its application? Should foreign policy consequences? At a certain level of abstraction, the question becomes whether it is sound policy to apply constitutional rights extraterritorially, but at this point the exercise would become largely unnecessary — if applying certain rights abroad is good policy, Congress (presumably an institutionally more competent policymaker) would be free to extend such rights by statute.[44] Interpreting the "impracticable and anomalous" standard by reference to international law, by contrast, presents courts with a source clearer than pure policy judgments with which to answer extraterritoriality questions.

The functional case for adopting an international law–driven approach to the standard can be illustrated by comparing it with the conventional policy-based method of applying the standard, according to the rubric of those who criticize the use of international and foreign

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contemplated was that of a fully sovereign nation, possessing and capable of exercising in the *family* of nations every sovereign power which any sovereign government possessed or was capable of exercising under the *law* of nations." Cleveland, *supra* note 25, at 276 (quoting George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373, 381–82 (1910)). Professor Cleveland notes that this language "could have been drawn directly from *Chae Chan Ping* or the *Insular Cases*." *Id.*

41 130 U.S. 581 (1889).

42 *Cf.* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 895 (2007) (describing *Sosa* as "translat[ing]" the intent of the Framers of the Alien Tort Statute by creating new causes of action for a set of customary international law violations).

43 *See* Neuman, *supra* note 4, at 987 (discussing the "laxity" of this standard and the extent to which it invites judicial discretion).

44 *See* Torres v. Puerto Rico, 442 U.S. 465, 470 (1979) ("Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling.").

law in constitutional interpretation.[45] Such criticism has come on numerous grounds, but two overarching and related critiques are notable: that judicial use of international law for interpretation upsets the delicate structural balance among the branches of government, and that the availability of a manipulable array of international authorities allows judges to act with too much discretion. Regardless of whether these critiques are correct in general, in the extraterritoriality context the international law approach actually fares better than the conventional approach when measured against the critiques.

According to the first criticism of the general practice of using international law in constitutional interpretation, judicial reliance on international law allows judges to encroach on the constitutional prerogative of the political branches to determine America's relationship with and adherence to international law.[46] If this critique is valid, it only follows that it is improper for courts to use this means of constitutional interpretation to answer first-order questions about whether the content of domestic rights should be based on international law. In using international law to interpret the "impracticable and anomalous" standard, however, courts would be asking institutionally appropriate second-order questions that have relevant international-level answers: Is the nation's power to engage in a particular behavior inherent in the nature of sovereignty? Is a particular right fundamental in the *international* sense? These questions less closely resemble the political branches' decisions about whether to comply with international law as a substantive policy matter, and instead fall within the judicial function as traditionally conceived. Rather, it is the inherently policy-driven analysis called for by the conventional approach to the "impracticable and anomalous" standard that presents a much greater concern of judges encroaching on the traditional roles of the political branches.

The second key objection is that recourse to international law widens judicial discretion and enhances judges' ability to reach outcomes they favor on policy grounds.[47] However, in the context of determining the extraterritorial applicability of provisions of the Constitution, reference to international law actually *constrains* judges more than the current approach of taking the word "impracticable" at face value.[48] Because of the amorphous nature of the current approach to the "im-

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[45] On the broader debate over citation to international law in constitutional interpretation, see generally *Agora: The United States Constitution and International Law*, 98 AM. J. INT'L L. 42 (2004).

[46] *See* Ernest A. Young, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 163–65 (2005).

[47] *See* Roper v. Simmons, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting).

[48] *Cf.* Eric A. Posner & Cass R. Sunstein, Response, *On Learning From Others*, 59 STAN. L. REV. 1309, 1312 (2007) (arguing that judicial borrowing from the law of other countries is justifiable because it constrains judges by limiting the range of acceptable outcomes).

practicable and anomalous" standard, courts are relatively free to make policy judgments regarding whether they think it is wise to extend a constitutional provision abroad.[49] By contrast, the question of whether international law provides strong protection to individual rights in a particular context is less open to the discretion of judges. This is not to say that all hard cases disappear. But comparing the two approaches to the "impracticable and anomalous" standard, the discretion worry actually cuts in favor of anchoring the analysis in international law in this context, at least as compared to the conventional approach to "impracticable and anomalous."

III. THE FRAMEWORK DEVELOPED AND APPLIED: INTERNATIONAL HUMANITARIAN LAW AND EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION IN THE WAR ON TERRORISM

Once it is established that international law may be a helpful and appropriate interpretive guide in applying the "impracticable and anomalous" standard, the next issue becomes identifying precisely what questions international law provides answers to. As discussed above, Dean Aleinikoff has suggested that international human rights law provides a baseline minimum of rights which everyone should be accorded; in other words, international human rights law informs the content of constitutional fundamental rights that should apply extraterritorially.[50] To the extent that human rights law can be considered the modern analog to the "principles of natural justice" Justice White referred to in the *Insular Cases*,[51] there is something to be said for this approach.

There is, however, a superior alternative. Dean Aleinikoff envisions international human rights law helping us answer a substantive question: What sorts of *rights* are fundamental? Instead, international law should help us answer a subtly distinct question: Under what sorts of *circumstances* does international law protect individual rights? The key difference is that the former question would directly link the content of a constitutional right to international human rights norms,

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[49] *See, e.g.*, Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990) (discussing the desirability of not applying the Equal Protection clause to the Northern Mariana Islands with respect to racial restrictions on land alienation because applying equal protection would be detrimental to the islanders' culture and way of life); *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 463 (D.D.C. 2005) ("Recognizing the existence of [the Fifth Amendment due process] right at the [Guantánamo] Naval Base would not cause the United States government any more hardship than would recognizing the existence of constitutional rights of the detainees had they been held within the continental United States."), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted* 127 S. Ct. 3078 (2007).

[50] *See* ALEINIKOFF, *supra* note 34, at 86–87.

[51] Downes v. Bidwell, 182 U.S. 244, 280 (1901) (White, J., concurring).

while the latter question goes not to the content of the right, but rather to the *practicability* of according rights protection in a certain situation. Explained as such, the connection to the "impracticable and anomalous" standard is obvious — the first clear strength of the international law–based approach.

This method also avoids a number of serious difficulties that plague the substantive rights approach. First, the extraterritoriality problem may not be solved at all; even if a right is fundamental in the sense of being protected under international law, it may not follow that international law guarantees protection of that right against extraterritorial government actions. Although the United Nations Human Rights Committee takes the position that the word "jurisdiction" in Article 2(1) of the International Covenant on Civil and Political Rights[52] (ICCPR) should be interpreted to cover states' conduct vis-à-vis individuals outside of their territory,[53] the United States has long dissented from this view.[54] The United States' interpretation of the ICCPR may not be correct — indeed, it has come under sustained criticism[55] — but the point remains that simply relying on international human rights law generally does not end the legal debate regarding extraterritoriality. Under the international law–based approach advocated here, however, this problem falls away. By asking whether international law protects rights in a certain situation, the extraterritoriality question is necessarily addressed and resolved.

Second, relying on international human rights law to define the substantive content of constitutional rights is a controversial proposition that, as Professor Neuman points out, may amount to direct incorporation of international law in contravention of the United States's "dualist tradition."[56] But by looking to international law to ask the antecedent practicability question, the content of applicable constitu-

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[52] Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

[53] U.N. Human Rights Comm., *General Comment 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument.

[54] Matthew Waxman, Principal Deputy Dir. of Policy Planning, U.S. Dep't of State, Opening Statement on the Report Concerning the International Covenant on Civil and Political Rights to U.N. Human Rights Committee (July 17, 2006) (transcript available at http://www.state.gov/g/drl/rls/70392.htm).

[55] *See, e.g.*, Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78, 81 (1995)

[56] Neuman, *supra* note 4, at 989. *See generally* Curtis A. Bradley, Breard*, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999). Traditionally, a state is considered "monist" if international law is directly incorporated into its legal system, and "dualist" if it maintains a rigid separation between domestic and international law. Although lively debates continue over when, how, and to what extent international law is "part of our law," the United States is typically considered to fall closer to the "dualist" side of the spectrum. *See id.* at 531.

tional rights is not itself changed.[57] Thus, for example, if the Geneva Conventions establish that in certain situations detainees have individual rights to due process that are carried extraterritorially, this would inform the threshold issue of whether the Constitution's due process guarantees apply to extraterritorially held detainees, but the substantive scope of these guarantees would be determined not by the Conventions but by the Constitution's standards of due process.

What recommends this approach most, however, is its ability to provide guidance on live questions of constitutional law. Consider the current war on terrorism — an area in which extraterritoriality issues have arisen and will likely continue to do so. Given the nature of this war, the most clearly relevant body of international law rules is IHL.[58] In particular, the differences between battlefield targeting law and detention law help resolve the practicability determination the extraterritoriality question calls for. IHL has particular analytical usefulness because it uncontroversially applies extraterritorially.[59] Indeed, in the course of arguing that the ICCPR does not apply to the United States's extraterritorial conduct in the war on terrorism, the United States has asserted that IHL provides the applicable legal framework.[60] The remainder of this Part explores this body of international law, applying the relevant areas of IHL to the constitutional extraterritoriality question, and showing how it would answer concrete questions likely to arise in the war on terrorism.

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[57] These problems associated with Dean Aleinikoff's approach may not, of course, be insurmountable. However, the intent here is simply to bracket these problems and note the contrast with a much clearer case: the case for using international law to delineate the circumstances under which constitutional rights, whatever their substance, have extraterritorial application.

[58] *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795–96 (2006) (holding that "at least one provision" of the Geneva Conventions applies to the United States's conflict with al Qaeda).

[59] *See* Meron, *supra* note 55, at 78 (considering it "axiomatic" that IHL imposes obligations on governments acting both within and outside of their borders).

[60] *See* U.S. DEP'T OF STATE, REPLY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE REPORT OF THE FIVE UNCHR SPECIAL RAPPORTEURS ON DETAINEES IN GUANTANAMO BAY, CUBA 21 (2006), *available at* http://www.asil.org/pdfs/ilibo603212.pdf. Although the government's argument that IHL, as lex specialis, displaces human rights during the current conflict is a disputed one, the point here is only that the United States accepts that IHL provides rules that are applicable extraterritorially. The Bush Administration's position that the Geneva Conventions are inapplicable to the conflicts with al Qaeda and the Taliban, *see* Draft Memorandum from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. (Jan. 9, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 38, 38–39 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (regarding the "Application of Treaties and Laws to al Qaeda and Taliban Detainees"), is a separate question.

A. Targeting Law and Detention Law: Vestiges of the Hague-Geneva Distinction

In the context of the war on terrorism, the "impracticable and anomalous" standard invites reference to IHL for the purpose of distinguishing among wartime situations in which nations regard individual rights as capable of protection and those in which they do not. IHL makes just such a distinction, one that loosely tracks the traditional distinction within the law of armed conflict between so-called "Hague Law" and "Geneva Law." Historically, IHL has distinguished between situations in which individuals are "subject to the enemy's lethality (Hague Law)" and those in which they are "subject to the enemy's authority (Geneva Law)."[61] Although the formal Hague-Geneva distinction has become significantly blurred,[62] the areas of IHL they traditionally referred to — battlefield targeting and detention, respectively — remain importantly different from one another in key practical respects. Since their inception, these two sets of rules have had differing motivations, with "Geneva Law" often thought to be "closer in nature to human rights" guarantees than "Hague Law."[63] Even as these streams of IHL have converged, targeting law and detention law continue to differ dramatically in terms of how IHL asserts and protects the rights of individuals — significant differences for purposes of discerning, in applying the "impracticable and anomalous" standard, under what circumstances international law strictly enforces rights.

1. Targeting Law. — The three central principles of targeting law are those of distinction, proportionality, and the proscription of unnecessary suffering. The principle of distinction requires that armed forces "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives."[64]

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[61] Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 370 n.10 (2004).

[62] These streams of IHL were typically addressed in separate treaty regimes, but in 1977 the Additional Protocols to the Geneva Conventions incorporated both sets of rules in the same treaties, resulting in this blurring of the boundaries. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 256; *see also* M. Cherif Bassiouni, *Observations Concerning the 1997–98 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397, 414 (1997); *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 1950 n.18 (2001).

[63] *See* RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 193 (2002); *see also* HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 2 (2d ed. 1998) (indicating that the Geneva Conventions' purposes were more closely focused on the protection of the victims of armed conflict than were those of the Hague Conventions).

[64] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, *adopted* June 8, 1977, 1125 U.N.T.S. 3, 25 [hereinafter Protocol I]. For the ease of exposition, this section will discuss the principles of targeting law with reference to Protocol I, the most recent collection and expression of these principles. Although the United States has not ratified Protocol I, it recognizes the

Only military objectives may be targeted, and civilians may never be the object of an attack.[65] Civilians are not, however, wholly immune from injury and loss of life during hostilities: according to the principle of proportionality, an attack with the collateral effect of causing harm to civilians is lawful unless such harm "would be excessive in relation to the concrete and direct military advantage anticipated."[66] To this end, the armed forces are required to take a number of precautions to ensure against inflicting excessive collateral damage on civilians and civilian objects.[67] Targeting combatants and civilians who take direct part in hostilities, however, is permitted, though there is a prohibition on causing "superfluous injury or unnecessary suffering."[68] Certain weapons are therefore expressly outlawed,[69] and states are required to take the unnecessary suffering ban into account in the development of new weapons.[70]

In some respects, these defining features of targeting resemble individual rights protections. The three core principles all attempt to protect individuals — both civilians and combatants — from certain horrors of war. Further, rules such as civilians' immunity from targeting grant clear legal protection to individuals provided they abstain from combat. It is apparent, however, that the judgment of the international community, as expressed through targeting law, is that strict, individualized rights coupled with individualized remedies (protections of the sort guaranteed by the U.S. Constitution[71]) are not appropriate to the battlefield, even though there exists a legal regime designed to minimize the harmful effects of war. The interplay between the distinction rule and the proportionality rule is illustrative. Although civilians as a group are entitled not to be targeted, an individual civilian has no right to life in the face of a lawful and proportionate attack; so

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general validity of the rules discussed here. *See* JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., INT'L & OPERATIONAL LAW DEP'T, LAW OF WAR HANDBOOK 166–68 (Keith E. Puls ed., 2005); *see also* Martin D. Dupuis et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 424, 426 (1987) (reporting the remarks of Michael J. Matheson, Deputy Legal Advisor, U.S. Department of State).

65 Protocol I, *supra* note 64, art. 51(2).

66 *Id.* art. 51(5)(b). Such attacks are termed "indiscriminate." *Id.* art. 51(5).

67 *See id.* art. 57.

68 *Id.* art. 35(2).

69 *See* Convention Respecting the Laws and Customs of War on Land art. 23(a), Oct. 18, 1907, 36 Stat. 2277, 2301, 1 Bevans 631, 648 (Fourth Hague Convention) (prohibiting the use of "poison or poisoned weapons").

70 *See* Protocol I, *supra* note 64, art. 36.

71 *Cf.* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991) (discussing the principle that the Constitution calls for "individually effective remediation").

long as the attacking military takes into account civilians in the aggregate, IHL is satisfied.

Moreover, the principle of proportionality and the proscription of unnecessary suffering are expressed in vague terms, placing most of the law's focus not on rights individuals have on the battlefield itself, but on decisions and precautions taken prior to battle. Consider the proportionality principle in operation. If any aspect of targeting law resembles an individualized protection, it is the right of a civilian not to be harmed by the enemy unless such harm is proportionate. Of course, framed as a right in this way, the right is a very contingent one, but a rigorous proportionality rule could still be regarded as a significant individualized battlefield protection. The real problem, however, is that Article 51(5)(b) of the First Protocol Additional to the Geneva Conventions[72] (Protocol I) is not quite so rigorous. As the official Commentaries to Protocol I acknowledge, there is no precise calculus based on which civilians are to be protected; in application, the proportionality principle is a matter of "good faith" on the part of the military.[73] Furthermore, the principle has been applied to accord a great deal of discretion to militaries.[74] The clearest requirements in the area of proportionality are thus the precautions against the infliction of excessive injury to civilians required by Article 57 of Protocol I. Although these precautions are intended to protect individuals — and are admittedly precise enough to give rise to criminal liability in egregious cases[75] — they leave considerable leeway for states to inflict civilian casualties and fail to require that the rights of individuals be absolutely protected.

2. Detention Law. — Outside the battlefield context, when individuals become subject not to the enemy's lethality but to its authority, the approach taken by IHL is markedly different. Combatants and

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[72] Protocol I, *supra* note 64.

[73] INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 625 (Yves Sandoz et al. eds., 1987); *see also* Michael N. Schmitt, *Fault Lines in the Law of Attack*, *in* TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 293 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006) (emphasizing that proportionality is not truly a "balancing" requirement, but simply a "reasonableness" requirement that civilian casualties not be "excessive").

[74] *See, e.g.*, OFFICE OF THE PROSECUTOR, INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, para. 77 (2000), *available at* http://www.un.org/icty/pressreal/nato061300.htm (declining to pursue an investigation of NATO bombing campaigns against the former Yugoslavia and concluding that "civilian casualties were unfortunately high but do not appear to be *clearly* disproportionate" (emphasis added)).

[75] *See* Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90, 95 (defining knowingly causing "clearly excessive" damage in attacks by belligerents as a war crime).

civilians covered by the Geneva Conventions are accorded protections that are more rigorous, more individualized, and more enforceable than those available to individuals protected by targeting rules. For example, any individual who falls under enemy authority and whose status is in doubt is entitled either to treatment as a POW or to a status determination by a "competent tribunal."[76] POWs are accorded numerous protections, many of which are absolute: they may not be tortured or coercively interrogated;[77] they have freedom to engage in religious activities;[78] they have the right to make requests of and complaints to the detaining power;[79] they may only be subject to the same laws and procedures as are members of the detaining power's armed forces;[80] and they may only be tried by a court that is independent and impartial.[81] Civilian detainees are also entitled to protections: they cannot be coerced into providing information;[82] decisions regarding internment for security reasons must be made "according to a regular procedure" including a right of appeal;[83] and detainees have a right to the reconsideration of their internment, at least twice a year, by "an appropriate court or administrative board."[84]

These rights are admittedly limited, and some are subject to curtailment for reasons of military necessity.[85] However, unlike at the targeting stage, protections at the detention stage contain clear prohibitions, and focus not on overall welfare through ex ante precautions but rather on the treatment of distinct individuals. The Geneva Conventions also clearly contemplate penalties for breaches.[86] Because detained individuals have been rendered *hors de combat* and thus battlefield exigencies have waned, the international community has deemed individualized protections much more practicable in the detention context than in the targeting context.

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[76] Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

[77] *Id.* art. 17.

[78] *Id.* art. 34.

[79] *Id.* art. 78.

[80] *Id.* art. 82.

[81] *See id.* art. 84.

[82] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 31, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

[83] *Id.* art. 78.

[84] *Id.* art. 43; *see also id.* art. 78.

[85] *See, e.g.*, *id.* art. 5 (permitting curtailment of some protections with respect to civilians suspected of activities hostile to national security).

[86] *See* Third Geneva Convention, *supra* note 76, art. 129; Fourth Geneva Convention, *supra* note 82, art. 146.

B. The Targeting-Detention Distinction at Work: Some Initial Answers

If the international law–based approach to the "impracticable and anomalous" standard is superior to the conventional approach, one reason must be its simplification of the legal questions at issue. This benefit only exists, however, if answers really do emerge from the proposed analysis. This section considers three constitutional issues likely to arise in the war on terrorism and demonstrates that IHL effectively guides their resolution. This is not to say that this approach answers all hard questions. Even where the approach does not provide definitive answers, however, it at least identifies the right questions to ask in the hard cases.

1. The General Inapplicability of the Fourth Amendment by Analogy to Battlefield Targeting Law. — Consider a variant of *Verdugo-Urquidez* occurring as part of the present war on terrorism. Instead of Mexico, the house might be in Afghanistan, and the relevant government actors might be not DEA agents but Special Forces engaged in a house-to-house counterterrorist sweep. Would the Fourth Amendment apply to such a search and any resulting seizures?

Applying the "impracticable and anomalous" standard with reference to IHL and the targeting-detention distinction, the answer is no. In the current conflicts in Iraq and Afghanistan, house-to-house combat has become a common battlefield tactic.[87] Though perhaps different from a traditional "battlefield," house-to-house combat involves active hostilities with the potential for engagement with enemy forces. Under the IHL analysis, therefore, battlefield targeting law provides the most analogous legal framework. Reference to international law thus establishes that this is a setting in which individualized rights protection is not expected; accordingly, applying the Fourth Amendment in this scenario would be "impracticable and anomalous."

This example demonstrates that fears of constitutionally hamstringing soldiers on a live battlefield do not mandate a bright-line rule against extraterritorial application of the Constitution. Chief Justice Rehnquist expressed this categorical view in *Verdugo-Urquidez*, arguing that the Constitution could not be applied abroad lest it "disrupt the ability of the political branches to respond to foreign situations involving our national interest."[88] What an analysis of targeting law shows, however, is that the international community is cognizant of concerns based on the national interests of belligerents. The "impracticable and anomalous" standard interpreted through the lens of inter-

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[87] *See* Eric Westervelt, *U.S. Troops Train for Urban Warfare*, NPR, Feb. 3, 2003, http://www.npr.org/templates/story/story.php?storyId=967541.

[88] United States v. Verdugo-Urquidez, 494 U.S. 259, 273–74 (1990).

national law responds to Chief Justice Rehnquist's functional worry, and does so without an overbroad rule covering situations in which the international community regards the recognition of individual rights as appropriate.

2. The General Applicability of Fifth Amendment Procedural Due Process Rights by Analogy to Detention Law. — Another relevant issue in the war on terrorism is extraterritorial detention. On remand from *Rasul*, Judge Green, applying the "impracticable and anomalous" standard, concluded that detainees at Guantánamo were constitutionally entitled to procedural due process rights.[89] In doing so, Judge Green found such rights not to be "impracticable and anomalous" on the narrow ground of the feasibility of applying American principles of justice at the military base at Guantánamo specifically,[90] making it unclear what results the "impracticable and anomalous" inquiry would produce on bases where American control is less firmly entrenched.

By contrast, the IHL approach would look not to a judge's appraisal of feasibility regarding particular bases but to one overarching question regarding extraterritorial detention: is this the sort of wartime situation that IHL regards as amenable to strong individual rights protections? The answer is clear: detention law is the relevant framework, and because international law deems it practicable to accord individual rights protection to detainees who have been rendered *hors de combat*, those constitutional rights applicable to detention apply to extraterritorial detention in the context of the war on terrorism. As a matter of constitutional law, the extent of procedural protections actually available may be malleable in light of the necessities of ongoing international conflicts,[91] but the "impracticable and anomalous" standard does establish that the Constitution's procedural due process guarantee applies.

3. A Hard Case: Substantive Due Process and the Problem of Battlefield Interrogation. — Although the Supreme Court has not explicitly ruled on this point, it is likely that at least some egregious forms of nonpunitive torture violate substantive due process.[92] If such a constitutional protection against torture exists, is it applicable extraterritorially to coercive interrogations conducted in the war on terrorism? The

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[89] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 463–64 (D.D.C. 2005), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted* 127 S. Ct. 3078 (2007).

[90] *See id.* at 463 ("In light of . . . *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of U.S. territory in which fundamental constitutional rights apply.").

[91] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533–35 (2004) (plurality opinion).

[92] *See* Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 290–94 (2003) (interpreting *Chavez v. Martinez*, 538 U.S. 760 (2003), as confirming a substantive due process constraint on torture in the course of questioning that shocks the conscience). Punitive torture violates the Eighth Amendment. *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1879).

easy version of this question would be if the interrogation took place in a prison well removed from battlefield hostilities. Interrogation in this context would plainly be covered by the Geneva Conventions,[93] so under the IHL analysis constitutional protections apply.

Consider, however, the more difficult situation of so-called "battlefield interrogation." Some commentators have suggested a distinction between coercive interrogation away from the battlefield and coercive interrogation "on the battlefield."[94] These conceptual boundaries are blurry, perhaps because it is so difficult to precisely define the "battlefield." One might posit a situation, however, in which, in the course of conducting a house-to-house sweep, members of the armed forces interrogate an individual even before transporting her to a detention facility. One possible answer is that targeting law would be the relevant paradigm, since the "battle" is ongoing and the individual in question has not been rendered *hors de combat*. However, if a soldier has gained sufficient control over the individual such that the individual cannot be said to be engaged in combat, there is an argument that this situation would fall under detention law — indeed, the Geneva Conventions expressly contemplate the problem of coercive interrogation. Yet even this point may not be dispositive — the framers of the Geneva Conventions may have only contemplated interrogations incident to detention, and modern conflict suggests the possibility of interrogation locations that more closely resemble the battlefield than do traditional detention facilities.[95]

This hard case may also implicate another, more contested, distinction in IHL, between occupied territory and nonoccupied enemy territory. The Geneva Conventions apply relatively uncontroversially to a treaty party's home territory and to territory the party occupies, but there potentially exists a third category of territory — enemy territory that is not yet occupied and in which a struggle for control continues — in which application of the Conventions is contested.[96] This debate, important for numerous reasons, has implications for the battlefield interrogation case. If the view that there is territory where the Conventions do not apply is correct, this would support the inference that the international community regards non-occupied, active zones of

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[93] *See* Third Geneva Convention, *supra* note 76, art. 17; Fourth Geneva Convention, *supra* note 82, art. 31.

[94] *See, e.g.*, Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319, 1323 (2006).

[95] *See generally* Campbell Brown, *New Front in Iraq Detainee Abuse Scandal?*, NBC NEWS, May 20, 2004, http://www.msnbc.msn.com/id/5024068/ (describing Delta Force's "battlefield interrogation facility" in Iraq).

[96] *Compare* Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 328 (1951) (arguing that Convention protections do not apply in such territory), *with* Jinks, *supra* note 61, at 393–97 (arguing against this view).

combat as unfit for Geneva Convention protections, and that extending the Constitution to cover interrogation in such zones would be "impracticable and anomalous." If, however, the alternative view is correct, it would suggest that the Geneva Conventions' strong rights protections apply in active battlefield situations when people are under sufficient control, and therefore that any substantive due process limitations on government conduct should apply. Note, of course, that this question of the territorial applicability of the Geneva Conventions also implicates the "easier" detention question discussed above, and, if there exists territory where the Conventions are inapplicable, the answer to that question could also vary depending on where the detention occurs.

The point of this example is not to resolve these hard questions but to acknowledge the limitations of the framework that has been developed. This approach to the "impracticable and anomalous" standard is not a constitutional panacea, but it does channel the analysis. The answer may not always be apparent — as in the case of "battlefield interrogation" — but at the very least the *questions* will be. The same cannot be said for the "impracticable and anomalous" standard as conventionally understood.

IV. BEYOND IHL AND THE WAR ON TERRORISM?

As helpful as the use of international law is for analyzing the extraterritorial applicability of the Constitution in armed conflicts, it does not necessarily follow that it will be helpful in other contexts. And war-related cases to which IHL rules might conceivably apply certainly do not exhaust the universe of cases in which extraterritoriality is at issue. For instance, recent cases in the D.C. Circuit have raised the question of constitutional due process protections for alleged foreign terrorist organizations subject to asset freezes.[97] More conventionally, cases like *Verdugo-Urquidez* present paradigmatic extraterritoriality questions outside of war scenarios. This Part provides some thoughts, and caveats, regarding the application of the international law–based approach beyond the war context.

A. Extraterritoriality in Human Rights Law

Human rights law is less temporally limited than is IHL, and is thus a more generalized indicator of when extraterritorial rights protection is practicable. As discussed above, however, claims regarding human rights law's extraterritorial applicability are contested. Given the flux in this area of international law, there is a specter of too much

[97] *See, e.g.*, People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17 (D.C. Cir. 1999).

judicial discretion in answering the controversial question of when human rights law applies extraterritorially.

Nonetheless, there are indications in the jurisprudence of the European Court of Human Rights (ECHR) that human rights law is developing in a manner that reflects distinctions similar to those that exist in IHL. In *Banković v. Belgium*,[98] although the ECHR rejected wholesale extraterritorial applicability of the European Convention on Human Rights, it recognized the Convention to apply extraterritorially when a state has "effective control" over a territory, "exercis[ing] all or some of the public powers normally to be exercised by that [territory's] Government."[99] British courts recently applied this standard, with an interesting result. *Al-Skeini v. Secretary of State for Defence*[100] involved six Iraqi civilians killed in Basra, five of whom were killed by British troops on patrol and one of whom was killed while in British military custody.[101] The High Court held that the Convention did not apply to the actions of the British troops on patrol, but that it did apply to the individual detained in a British military prison.[102] The House of Lords agreed.[103] Although these decisions were wartime decisions and not the authoritative word of the ECHR, they appear to be consistent with the ECHR's recent conclusion in *Öcalan v. Turkey*[104] that Turkey had sufficient "jurisdiction" over Abdullah Öcalan after abducting him in Kenya:

> Directly after [Öcalan] had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.[105]

Considered together, the *Banković*, *Öcalan*, and *Al-Skeini* cases indicate some convergence, at least within European human rights jurisprudence, with the targeting-detention distinction in IHL. Whether such a trend truly exists is beyond the scope of this Note, and it bears repeating that questions of extraterritorial applicability of human rights law are not settled — it may be too early to tell whether human rights law provides clear instructions relevant to the determination of the Constitution's extraterritoriality outside of the war context.

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98 Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333 (admissibility decision).

99 *Id.* para. 71.

100 [2008] 1 A.C. 153 (H.L.) (appeal taken from Eng.).

101 *Id.* para. 6 (opinion of Lord Bingham of Cornhill).

102 Al-Skeini v. Sec'y of State for Def., [2004] EWHC (Admin) 2911, paras. 287–88.

103 *See Al-Skeini*, [2008] 1 A.C. 153, paras. 83–84 (opinion of Lord Rodger of Earlsferry).

104 37 Eur. H.R. Rep. 238, 274–75 (2003) (Eur. Ct. of H.R., First Section).

105 *Id.* para. 93. The Grand Chamber agreed with this jurisdictional assessment. *See* Öcalan v. Turkey, 2005-IV Eur. Ct. H.R. 131, 164, para. 91.

B. The Framework's Limits

Ultimately, one might conclude that questions of extraterritorial protection of individual rights under international law are simply too unclear at this juncture to say that the framework offered in this Note can extend outside of the war context. One of the key attractions of this approach is its claim to replace a practicability inquiry that permits unlimited judicial discretion with a more focused inquiry that utilizes a fairly definite legal standard. To the extent that the approach becomes as loose and flexible as the theory it is attempting to replace, it loses its luster.

Nonetheless, although broad legal theories are sometimes desirable, it remains important to locate the best answers to concrete constitutional questions. Thus, whatever else is to be said about the approach to the "impracticable and anomalous" standard offered here, it has at least three virtues: 1) it applies a historically well-grounded methodology, that 2) is normatively preferable to the dominant approach to the standard, and that 3) arrives at some clear legal answers regarding situations of great contemporary salience. As the ongoing litigation involving detainees held in Guantánamo and elsewhere illustrates, these questions have, for the first time since the *Insular Cases*, returned to the forefront of constitutional law. IHL — and international law more broadly — may not prove to be a panacea for this area of constitutional law, but its lessons are salient for an important subset of pressing constitutional matters.

CONCLUSION

The debate over the appropriate framework for deciding questions of extraterritorial constitutional protection is not yet over, and the "impracticable and anomalous" standard may once again be pitted against wholesale rejection of, or wholesale acceptance of, an extraterritorial Constitution. However, for those who favor Justice Kennedy's "intermediate" path, it is encouraging to know that such an approach need not constitute an invitation to judges to make hard decisions on policy grounds. Even opponents of the "impracticable and anomalous" approach can take solace in the fact that this standard, interpreted in light of international law, is superior to the conventional understanding of "impracticable and anomalous" in terms of historical pedigree and constraining judicial discretion — two issues opponents of referencing international law often raise. Regardless of which side of the broader debate over citation to international law is correct, it is notable that in at least this one context the debate is more complicated than is usually recognized. Given the spirited controversy the issue of referencing international law in constitutional adjudication has triggered, this more nuanced approach to the confluence of international law and constitutional law is welcome.