The Rogue Civil Airliner and International Human Rights Law: An Argument for a Proportionality of Effects Analysis within the Right to Life

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Introduction

By now, it has become trite to state that the terrorist attacks of 11 September 2001 (9/11) had a paradigm-shifting effect on the approaches taken by states to aviation security, to national defence, and to law enforcement. In their efforts to prevent similar attacks by rogue civil aircraft — that is, civil aircraft under the effective control of one or more individuals who apparently intend to use the aircraft as a weapon against persons and/or property on the surface — the responses of states have been as varied as their respective national legal traditions and political histories. State members of the International Civil Aviation Organization (ICAO) have collectively implemented stricter security standards for international flights and agreed to extend measures relating to the unlawful interference with international civil aviation to domestic civil aviation operations "to the extent practicable."[1] Aviation security

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[1] See *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, Can TS 1944 No 36 (entered into force 4 April 1947) [*Chicago Convention*]; International Civil Aviation Organization (ICAO), *Security: Safeguarding International Civil Aviation against Acts of Unlawful Interference, Annex 17 to the Convention on International Civil Aviation*, 8th edition (entered into force 1 July 2006), in particular, para 2.2.2 [*Annex 17 to the Chicago Convention*].

worldwide has taken on a multi-faceted, layered, "defence-in-depth" approach by incorporating such elements as "no fly" lists, more stringent physical security screening, the installation of armoured cockpit doors, and the placement of armed, undercover "air marshals" on some commercial flights.[2] States have also agreed upon amendments to existing international instruments that seek to deter (through state assertion of criminal jurisdiction) unlawful interference with civil aviation. Such amendments will require ratifying states parties to criminalize the use of "an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment."[3]

Still, while the likelihood of, and risks posed by, a rogue civil aircraft incident can be mitigated through active security measures and, perhaps, through the deterrent effect of after-the-fact criminal measures, these responses, which are consistent with a paradigmatic "law enforcement" approach, are not capable of eliminating the risks entirely. Thus, as a last resort, to prevent attacks by rogue civil aircraft against targets on the surface, a number of states have implemented, either through legislation or under the authority of executive prerogative, procedures under which officials may, under particular circumstances (not all of which have been made public), authorize military personnel to shoot down rogue civil aircraft.[4]

[2] See, eg, US Department of Homeland Security, *National Strategy for Aviation Security* (Washington, DC: Department of Homeland Security, 2007) at 16, 18-20, online: Department of Homeland Security <http://www.dhs.gov/xlibrary/assets/laws_hspd_aviation_security.pdf>. More generally, see *Annex 17 to the Chicago Convention*, *supra* note 1.

[3] *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, 10 September 2010, art 1(f) [not yet in force] [*Beijing Convention*]. As noted at art 24, this convention is intended to supersede, as between states parties, the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 178, Can TS 1973 No 3 (entered into force 26 January 1973), as amended by the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention of 23 September 1971*, 24 February 1988, 1589 UNTS 474, 27 ILM 627.

[4] In North America, Canadian and American fighter aircraft controlled by NORAD are permanently on alert to intercept and, under particular (and classified) circumstances, shoot down rogue civil aircraft. See Ian MacLeod, "Canada's 'Unthinkable Protocol' for Shooting Down a Hostile Airliner, *Ottawa Citizen* (10 July 2011), online: Ottawa Citizen <http://www.ottawacitizen.com/news/Canada+unthinkable+protocol+shooting+down+hostile+airliner/5079275/story.html>; Craig Mellow, "Don't Cross That Line," *Air and Space Magazine* (1 March 2010), online: Air and Space Magazine <http://www.airspacemag.com/flight-today/dont-cross-that-line.html>; Rebecca Grant, *The War of 9/11: How the*

The possibility that some of these circumstances might properly be characterized as armed attacks or as associated with armed conflict — such that the *lex specialis* of international humanitarian law (IHL) would regulate the state's use of force in response — is beyond question. Less clear, but legally more interesting, is the international law framework governing state responses to circumstances that do not fall within the armed attack/armed conflict paradigm but constitute a mere criminal act.

This article examines the obligations of states under international human rights law (IHRL) to respect and ensure the rights of persons subject to their jurisdiction not to be arbitrarily deprived of life. It does so in the specific context of possible state responses to a particular combination of circumstances, a subset of the problem posed by rogue civil aircraft, which I will call the "rogue civil airliner problem." These circumstances are:

- the rogue civil aircraft is airborne;
- in addition to the person or persons who are effectively in control of it, the rogue civil aircraft also carries innocent persons[5] — that is, passengers and crew who are not involved in any plan to use the aircraft as a weapon and who are presumed to be unable to influence the conduct of the persons effectively in control;[6]

World Conflict Transformed America's Air and Space Weapon (Arlington, VA: Air Force Association, 2005) at 19-20. For a fairly forthcoming description of the process followed in the United Kingdom in respect of rogue civil aircraft, see Richard Norton-Taylor, "RAF Jets Scrambled after Two Passenger Plane Terrorist Alerts," *The Guardian* (29 March 2010), online: Guardian Unlimited <http://www.guardian.co.uk/uk/2010/mar/29/raf-jets-scrambled-terrorist-alerts>.

[5] I use the term innocent to denote persons who "have done nothing, and are doing nothing that entails the loss of their rights." See Michael Walzer, *Just and Unjust Wars*, 4th edition (New York: Basic Books, 1977) at 146.

[6] It is this circumstance — the presence of innocent persons on board — that, for the purposes of my analysis, most defines the a rogue civil airliner subset. This distinction between rogue civil aircraft and rogue civil airliner is based upon a similar one drawn in the recently published Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the Humanitarian Policy and Conflict Research Manual on International Law Applicable to Air and Missile Warfare,* version 2.1 (March 2010), online: Program on Humanitarian Policy and Conflict Research <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf> [*Harvard Manual*]. The intention of the distinction is to emphasize that aircraft carrying innocent ("civilian") passengers are to be treated with "particular care in terms of precautions" (see rules 1(h) and 1(i)).

- the incident is a crime, albeit one of potentially significant proportion, and occurs in a pure "law enforcement" context such that the only relevant international law framework engaged is IHRL; and
- the state possesses the capability to destroy the rogue civil airliner either immediately or, at least, in a timely manner — before the persons effectively in control are able to successfully perfect their attack.

Taken to the most extreme case, where attempts to use less forceful measures to deter the attack have been exhausted or are no longer practicable, the rogue civil airliner problem presents the state (and the officials authorized to make and carry out decisions on the state's behalf) with a dilemma: either use deadly force to shoot down the aircraft or refrain from such use of force. A decision to shoot down the aircraft will protect persons and property on the surface from both the direct and indirect effects of the use of the aircraft as a weapon. The costs of these positive effects, however, are the negative effects caused or contributed to by the state's actions — the destruction of the airliner and its cargo and, most significantly, the likely deaths of everyone aboard it, including its innocent passengers and crew. Conversely, a decision to refrain from the use of force will have the positive effect of preserving (for at least some period of time) the airliner, its cargo, and the lives of all persons on board. Yet this effect will come at the cost of allowing the persons effectively in control of the airliner to carry out their intended acts, possibly (and in the most extreme case, certainly) resulting in the deaths not only of all those on board the aircraft but also in deaths and injuries among innocent persons on the surface along with direct or indirect destruction and damage to property.

I argue that IHRL's existing approach to the right to life fails to provide a satisfactory analytical framework for considering the legal aspects of the rogue civil airliner problem — one that is principled, effective, and in line with the rule of law and human rights.[7] A more

[7] This definition of what constitutes a satisfactory framework for legal analysis is based upon a formulation employed by Kai Möller in discussing legal challenges posed by the threat of terrorism. See Kai Möller, "On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the German Federal Constitutional Court" (2006) 51 PL 457 at 465. Nils Melzer uses a similar definition of satisfactory — namely that the normative standards under discussion "meet the demands of both operational reality and humanity in that they entail

satisfactory framework — one that more completely accounts for the moral, political, and legal complexities of the problem — is provided by adding a norm requiring proportionality of positive to negative effects. Such a norm would be analogous to those that have been developed within the frameworks of IHL and modern constitutional rights law as well as by some schools of moral philosophy, to address what would otherwise be irreconcilable state duties arising from irreconcilable rights claims. This proposed norm of proportionality of effects would supplement — not replace — the existing IHRL normative framework only in specific circumstances: where all of the options available to the state may be expected inevitably to cause or to contribute to innocent persons being deprived of life — circumstances such as those of the rogue civil airliner problem. I argue that, under such circumstances, incidental deaths of innocent persons that are consistent with existing IHRL norms and that also display a proportionality of effects should not be considered to be arbitrary deprivations of life. Given the social reality following the 9/11 attacks — that (at least some) states appear willing, under particular circumstances and as a final resort, to consider shooting down a rogue civil aircraft, even a rogue civil airliner carrying innocent persons — a proportionality of effects norm would provide states with an additional tool of legal analysis in addressing a morally, politically, and legally complex dilemma.

Analysis

Before launching into my analysis, I will provide a brief exposition of some additional assumptions I have made in order to isolate the essential elements of the rogue civil airliner problem. First, I recognize that Article 3*bis* of the *Convention on International Civil Aviation* (*Chicago Convention*)[8] provides that (subject to the rights and obligations set forth in the *Charter of the United Nations*)[9] "every State must refrain from resorting to the use of weapons against civil aircraft in

neither unreasonable restraints for the operating States nor unacceptable risks for the individuals exposed to their authority or power." Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008) at 82; see also at 431.

8 *Chicago Convention, supra* note 1; *Protocol Relating to an Amendment to the Convention on International Civil Aviation*, 10 May 1984, 2122 UNTS 337, 23 ILM 7045 (entered into force 1 October 1998) [Article 3*bis*].

9 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [*UN Charter*].

flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered." However, for present purposes, I also accept the view that Article 3*bis* does not preclude a state's use of weapons for law enforcement purposes, at least within its own sovereign airspace, against a civil aircraft on its own registry.[10] Second, while recognizing that any practical analysis of a particular rogue civil airliner incident must account for uncertainties regarding, *inter alia*, the intent of those effectively in control of the aircraft and its possible targets, I assume for the purposes of this article the most extreme case — that a failure of the state to shoot down the rogue civil airliner will result in its striking its target on the surface, causing significant death and destruction.

THE RIGHT TO LIFE IN IHRL

Notwithstanding the modern prominence of human rights discourses, international law dealing with human rights is a product of relatively recent times, first finding common expression in the years immediately following the adoption of the *Charter of the United Nations*[11] and the end of the Second World War.[12] The extensive and ever-expanding collection of international instruments — binding treaties and non-binding declarations, codes of conduct, guidelines, and the like (some of which have become a settled basis for the practice of states) — represents an attempt to create a normative structure that captures values shared across societies and cultures.

The nature of state duties under IHRL instruments differs from the nature of the duties under most international treaties, which are generally limited to the direct performance of reciprocal obligations between two or more states. While the obligations set out in

[10] Michael Milde, who was the director of the ICAO Legal Bureau at the time of its adoption, argues that Article 3*bis*, *supra* note 8, was intended to limit states' use of weapons only in respect of aircraft registered in other states. See Michael Milde, "Interception of Civil Aircraft versus Misuse of Civil Aviation" (1986) 11 Ann Air & Sp L 105 at 126. See also Robin Geiß, "Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3*bis* of the Chicago Convention, and the Newly Adopted German 'Luftsicherheitsgesetz'" (2005) 27:1 Mich J Int'l L 227 at 250-51.

[11] *UN Charter*, *supra* note 9.

[12] René Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002) at 201; David Kretzmer, "Rethinking the Application of IHL in Non-International Armed Conflicts" (2009) 42:1 Israel LR 8 at 9-10.

IHRL instruments are also undertaken in agreements among states, the performance of these obligations is internal to each state, taking place in the context of the relationship between the state and the persons who are subject to its jurisdiction. The state's obligation to its fellow states parties is to "respect and ensure," *vis-à-vis* those persons subject to its jurisdiction, the rights set out in the instruments.[13] The obligation may be broader still. Obligations derived from the "principles and rules concerning the basic rights of the human person" have been cited by the International Court of Justice as examples of obligations *erga omnes* — that is, obligations that a state owes to the international community as a whole and not simply reciprocally to other state parties.[14]

The right to life is seen by many (but not all) scholars as being pre-eminent among human rights. As Yoram Dinstein notes, "[w]hen life is deprived, it is impossible to enjoy any fundamental freedom."[15] The right to life, however — even in the eyes of those who rank it above all other rights — is not an absolute right, and its existence does not impose unlimited duties upon the state. Again in the words of Dinstein, it is "in effect, the right to be safeguarded against (arbitrary) killing."[16]

[13] See, eg, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 2(1), Can TS 1976 No 47 (entered into force 23 March 1976) [*ICCPR*]; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, art 1, Eur TS 5 (entered into force 3 September 1953) [*ECHR*].

[14] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, [1970] ICJ Rep 3 at paras 33-34.

[15] See, eg, Yoram Dinstein, "Terrorism as an International Crime" (1987) 19 Israel YB on Human Rights 55 at 63, quoted in Kenneth Watkin, "Assessing Proportionality: Moral Complexity and Legal Rules" (2005) 8 YB Int'l Human L 3 at 14. This view of the pre-eminence of the right is also shared by the United Nations Human Rights Committee, which calls the right to life "the supreme right." See *General Comment No 6: Article 6 (The Right to Life)*, UN Human Rights Committee, 16th Sess, (1982) in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1, (1994) at 128. See, cf, Saskia Hufnagel, "German Perspectives on the Right to Life and Human Dignity in the 'War on Terror'" (2008) 32 Criminal LJ 100 at 101: "Human rights lawyers typically disclaim any hierarchy of rights."

[16] Yoram Dinstein, "The Right to Life, Physical Integrity and Liberty" in Louis Henkin, ed, *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 114 at 115, quoted in BG Ramcharan, "The Concept and Dimensions of the Right to Life," in BG Ramcharan, ed, *The Right to Life in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1985) 1 at 4.

Different international human rights instruments define individual rights and state duties in respect of human life in different ways. For the purposes of the present analysis, I will focus upon the formulation of the right to life as it appears in the most widely accepted IHRL instrument, the *International Covenant on Civil and Political Rights* (*ICCPR*).[17] It provides that every person has the right not to be *arbitrarily* deprived of life[18] and imposes a correlative obligation upon state parties to respect that right and to ensure that persons subject to their jurisdiction are not arbitrarily deprived of their lives.[19] Similar protections against arbitrary deprivation of life appear in the *American Convention on Human Rights*,[20] the *African Charter on Human and Peoples' Rights*,[21] and the League of Arab States' *Revised Arab Charter on Human Rights*.[22] While the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (*ECHR*), which predates the *ICCPR*, contains a different formulation that sets out an exhaustive list of permitted limitations to the right to life,[23] the Grand Chamber of the European Court of Human Rights (ECtHR) has, on at least one occasion, implied that these limitations would constitute at least a subset of non-arbitrary deprivations of life, speaking of the *ECHR* as providing "a general legal prohibition of arbitrary killing by agents of the State."[24]

[17] *ICCPR*, *supra* note 13. As of 27 September 2011, the Covenant has 167 states parties. See United Nations Treaty Collection, online: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

[18] *ICCPR*, *supra* note 13, art 6(1) [emphasis added]: "Every human being has the right to life … No one shall be arbitrarily deprived of his life."

[19] *Ibid*, art 2(1): "Each State Party … undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."

[20] *American Convention on Human Rights,* 22 November 1969, 1144 UNTS 123, art 4(1), OAS TS No 36, 9 ILM 99 (1969) (entered into force 18 July 1978).

[21] *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217, art 4, 21 ILM 58 (1981) (entered into force 21 October 1986).

[22] See *Arab Charter on Human Rights*, 22 May 2004, art 5(2), reprinted in (2005) 12 Int'l Human Rights Rep 893 (entered into force 15 March 2008).

[23] *ECHR*, *supra* note 13, art 2(2): "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;
b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c. in action lawfully taken for the purpose of quelling a riot or insurrection."

[24] See *McCann and Others v United Kingdom* (1995), 324 ECHR (Ser A) 4 at para 161, 21 EHRR 97 [*McCann and Others,* cited to ECHR], where the court, in

The use of the term "arbitrary" in defining the scope of individual protection and state duty has been criticized for lacking precise legal meaning. It seems clear from the *travaux préparatoires* to the *ICCPR*, however, that the drafters' much-debated choice to adopt the term was intended, first, to reflect a realistic approach to the right to life by recognizing that there do exist circumstances under which the taking of life by the state may be justified and, second, to ensure sufficient flexibility so that the content of the right to life (and exceptions and limitations to it) could be developed over time without the constraint of a fixed enumeration of specific exceptions that would necessarily be incomplete.[25] The obligation to respect and ensure the right not to be arbitrarily deprived of life imposes two different types of duties upon the state, both of which are relevant to the rogue civil airliner problem. These are generally called negative duties and positive duties, and, respectively, they enjoin the state from acting or from omitting to act in certain ways.

Negative duties "require states not to interfere in the exercise of rights"— that is, to refrain from particular acts.[26] Violation of these duties comes about as a result of state action. Thus, the state's negative duty in respect of the right to life is to refrain from acts that would arbitrarily deprive a human being subject to its jurisdiction of life.

Positive duties, on the other hand, require states to take positive actions ("reasonable and suitable measures") to protect the rights of the individual.[27] Positive duties are not unlimited. States must

finding that the right to life imposes a positive obligation upon states to conduct an effective official investigation into deaths caused by the State's use of lethal force, noted that in the absence of such a requirement, "a general legal prohibition of arbitrary killing by the agents of the State would be ineffective."

[25] BG Ramcharan, "The Drafting History of Article 6 of the International Covenant on Civil and Political Rights," in Ramcharan, *supra* note 16, 42 at 43, 51-52. As CK Boyle points out, the negotiators of the *ICCPR* appear to have arrived at the concept of an arbitrary deprivation of life as a compromise, with the expectation that its substantive content would emerge from future jurisprudence, soft law developments and state practice: "No reading of the *travaux* [*préparatoires*] of Article 6 of the Covenant could possibly conclude that there was any consensus as to the meaning of arbitrary or as to its appropriateness in that Article." CK Boyle, "The Concept of Arbitrary Deprivation of Life," in Ramcharan, *supra* note 16, 221 at 225.

[26] Jean-Francois Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Strasbourg: Council of Europe, 2007) at 5; Daniel D Nsereko "Arbitrary Deprivation of Life: Controls on Permissible Deprivations" in Ramcharan, *supra* note 16, 245 at 246.

[27] Akandji-Kombe, *supra* note 26 at 7, 11.

"exercise due diligence to prevent, punish, investigate or redress the harm caused by … acts by private persons or entities" that would impair individual rights.[28] Violation of positive duties is brought about by state inaction (or an omission to act). Thus, the state's positive duties in respect of the right to life include an obligation to take practical "preventative operational measures" to prevent persons subject to its jurisdiction from attacking the physical integrity or taking the life of another individual where there is a real and immediate threat to that individual of which the state is aware or ought to be aware.[29] Positive human rights duties underlie many of the specific duties of state officials in the law enforcement context — a fact recognized in the considerable body of IHRL surrounding state uses of force (including deadly force) in the context of law enforcement operations.

NORMS PROVIDING FOR NON-ARBITRARY DEPRIVATION OF LIFE

Scholarly and judicial analysis of IHRL in relation to state uses of deadly force in a law enforcement (that is, non-armed conflict) context has tended to assume a narrow paradigm case — that of individual state law enforcement personnel defending themselves or others by using deadly force against one or more individuals who pose a grave and imminent threat of death or serious bodily injury through violence. Analysis has been, for the most part, silent on the human rights implications of using force that causes foreseeable and incidental (as opposed to accidental) injury or death to innocent persons who do not pose a threat.

This assumption of the paradigm case is reflected in the IHRL framework that governs state uses of deadly force in a purely law enforcement context, which includes a series of commonly held requirements for a state deprivation of life to be considered not arbitrary. This framework applies to all state law enforcement authorities, including military personnel employed in a law enforcement,

[28] *General Comment no 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Human Rights Committee, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) at para 8 [*General Comment no 31*].

[29] Gloria Gaggioli and Robert Kolb, "A Right to Life in Armed Conflicts?: The Contribution of the European Court of Human Rights" (2007) 37 Israel YB on Human Rights 115 at 129; *Osman v United Kingdom* (1998), 95 ECHR (Ser A) 3124 at para 115ff, 29 EHRR 245. See also Philip Alston, *Interim Report on the Worldwide Situation in Regard to Extrajudicial, Summary or Arbitrary Executions*, UNGAOR, 61st Sess, UN Doc A/61/311 (2006) at para 37.

or assistance to a law enforcement, role.[30] In its broad strokes, this framework has received near universal acceptance among states, judicial authorities, and scholars.

To be non-arbitrary, any limitation of the right to life must "be regarded as an extraordinary exception that requires special justification."[31] However, the very acceptance in IHRL of a formulation of the right to life that allows for state deprivations that are not "arbitrary" reflects a recognition that extraordinary exceptions can and do exist — that "[t]he individual's right to life cannot … be considered in isolation. It must be considered together with the rights of the rest of the members of the community."[32] The substantive content of what comprises an IHRL-permitted, non-arbitrary deprivation of life is found in a variety of sources. Much follows from the practice of states in accepting and adhering to various "codes of conduct" or "statements of basic principles" developed by groups of experts, either with or without official state involvement. These instruments seek to expand upon and provide substantive content to the deliberately broad formulations incorporated in legally binding instruments such as the *ICCPR*.[33] Other "softer"

[30] *Code of Conduct for Law Enforcement Officials*, GA Res 34/169, UNGAOR, 34th Sess, UN Doc A/34/169 (1979), commentary to art 1, paras (a) and (b).

[31] Kretzmer, *supra* note 12 at 24.

[32] Nsereko, *supra* note 26 at 246.

[33] The norms are drawn, to a considerable degree, from the *Code of Conduct for Law Enforcement Officials*, *supra* note 30, and from the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 8th UN Congress on the Prevention of Crime and Treatment of Offenders, UN Doc A/CONF.144/28/Rev.1 (1990). Alston points out that their value lies in the fact that these documents were "developed through intensive dialogue between law enforcement experts and human rights experts" and that the "process of their development and adoption involved a very large number of States and provides an indication of the near universal consensus on their content." See Alston, *supra* note 29 at para 35. More broadly, the norms are also consistent with the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, ECOSOC, 41st Sess, UN Doc E/CN.4/1984/4 (1984) [*Siracusa Principles*], see particularly arts 5, 10, and 11, and with the approach to limitations captured within the term "arbitrary" in the context of other protected rights that are similarly not subject to an internal limitation clause. See, for instance, *Toonen v Australia*, UN Human Rights Committee, 50th Sess, UN Doc CCPR/C/50/D/488/1992 (1994). The committee opined that in order to not be arbitrary, "any interference with privacy [as protected by art 17 of the Covenant] must be proportional to the end sought and be necessary in the circumstances of any given case" (at paras 8.3-8.6).

sources of relevant IHRL comprise such diverse elements as reports and comments of supervisory bodies and special rapporteurs, those portions of internationally developed codes of conduct and guidelines that have not crystallized into customary IHRL, scholarly analyses, and judicial decisions that have persuasive value outside of the *espace juridique* of the issuing tribunal.

A review of existing IHRL reveals the following generally accepted norms with respect to state uses of deadly force in a law enforcement context. They provide indicia of circumstances where the state is relieved at international law of the negative duty not to deprive a human being of life — situations where, in the eyes of IHRL, the positive duty to protect the lives of other persons outweighs the duty not to take life. Deaths resulting from state uses of deadly force in a law enforcement context that do not comply with these norms will generally be considered to be arbitrary deprivations of life. As will become clear, different international law sources organize and express the norms in different terms. Thus, the norms summarized in the following sections are all interrelated and overlapping.

Authorized by Law

Consistent with the rule of law, there exists a general requirement that the use of deadly force by the state be authorized according to the law of that state.[34] It cannot be, to use a commonly held lay definition of arbitrariness, "based on … random choice; capricious."[35] A discussion of the various forms that such authorization can take[36] or the procedural and substantive requirements it must meet[37] is beyond the scope of the present analysis.

[34] Gaggioli and Kolb, *supra* note 29 at 134; Melzer, *supra* note 7 at 100; Boyle, *supra* note 25 at 239.

[35] *Concise Oxford Dictionary of Current English*, 9th edition (Oxford: Oxford University Press, 1995), *sub verbo* "arbitrary."

[36] Depending upon the constitutional framework of the state concerned, the form of such authorization can include: primary legislation enacted by a legislative body; secondary legislation enacted by the executive pursuant to authority granted in primary legislation or a constitutional document; exercises of discretionary authority granted in legislation; or authority derived from constitutionally permitted exercises of residual executive (or "Crown") prerogative powers.

[37] See, for instance, Nsereko, *supra* note 26 at 248, positing that a law authorizing a deprivation of life must not, *inter alia*, be "despotic, tyrannical and in conflict with international human rights standards or international humanitarian law."

Triggered by Positive Duties to Protect

As discussed earlier, IHRL imposes upon the state positive duties to protect the lives of persons subject to its jurisdiction against the threat of grave and imminent violence.[38] Building upon the idea that providing for common security is one of the bases for the state's very existence,[39] the obligation to protect individual human beings can be extended and generalized to a broader obligation (or, indeed, a right against other states) to protect persons subject to the state's jurisdiction from threats to "law and order"[40] or to "the security of all."[41] Some care is required, however. While IHRL recognizes that the duty to protect security constitutes a component of the positive duty to protect life,[42] the term "security," like the term "terrorism," is one that brings with it both theoretical uncertainties and considerable emotional baggage. One must avoid allowing the use of broad terms such as "security" to cloud our understanding of the substance of state duties in respect of the individual's right to life in a purely law enforcement context. These duties are not significantly different in the context of a "terrorist" threat to "security"

[38] *Code of Conduct for Law Enforcement Officials*, *supra* note 30, arts 1, 3 (see also commentary to art 3, para a).

[39] See, eg, Kimmo Nuotio, "Security and Criminal Law: The Difficult Relationship," in Martin Scheinin et al, eds, *Law and Security: Facing the Dilemmas,* Working Paper (Florence: European University Institute Department of Law, 2009-11) 23 at 23, online: Social Sciences Research Network <http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1555686_code97794.pdf?abstractid=1555686&mirid=1>; Lucas Lixinski, "The Rights/Security Debate in the Inter-American System," in Scheinin et al., 97 at 97.

[40] Melzer, *supra* note 7 at 101.

[41] Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Doc OEA/Ser.L/V/II.116/Doc.5 (2002), rev 1, corr, at para 88 [*Report on Terrorism and Human Rights*]. See also *American Convention on Human Rights*, *supra* note 20, art 32(2), which provides that "[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."

[42] *Permissibility of Shooting Down a Passenger Aircraft in the Event of a Danger That It Has Been Used for Unlawful Acts, and Where State Security Is Threatened*, Case K44/07 (2008) (Constitutional Tribunal of the Republic of Poland) [*Permissibility of Shooting Down a Passenger Aircraft* (English summary)]. Although a complete translation does not exist, an English summary contains excerpts. See Polish Constitutional Tribunal, online: <http://www.trybunal.gov.pl/eng/summaries/documents/K_44_07_GB.pdf> at para 15.

from what they are in "normal" times.[43] Their content must always be considered in the context not of labels but, rather, of particular fact situations. The point to be made here is that it is only in the context of protecting select rights (most particularly the right to life) that state deprivations of life may even be contemplated.[44] The standard of care in fulfilling positive duties is one of "due diligence,"[45] which means that where the state is in an immediate position to fulfil its protective duties it may (provided that all other conditions are met) be permitted (perhaps even obligated) to deprive one or more human beings of life without such deprivation being "arbitrary."[46]

Distinction

One of the foundational concepts in modern IHL, "distinction" is a term that is not commonly associated with IHRL. Nevertheless, state uses of deadly force in a law enforcement context are, in effect, constrained by a similar concept — the requirement to distinguish between persons "who, by their actions, constitute an imminent threat of death or serious injury, or a threat of committing a particularly serious crime involving a grave threat to life and persons who do not present such a threat"[47] as well as the related requirement to "use force only against the former."[48] Unlike IHL, distinction in IHRL is made on the basis not of status (that is, "combatant"

43 Lixinski, *supra* note 39 at 97.

44 See, eg, *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948), art 29(2): "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

45 Phillip Alston, *Report on Extrajudicial, Summary or Arbitrary Executions: Addendum: Study on Targeted Killings*, UNHRC, 14th Sess, UN Doc A/HRC/14/24/Add. 6 (2010) at para 33.

46 Liora Lazarus, "Mapping the Right to Security," in Benjamin J Goold and Liora Lazarus, eds, *Security and Human Rights* (Oxford: Hart, 2007) 325 at 342. See Alston, *supra* note 29 at para 37.

47 *Report on Terrorism and Human Rights*, *supra* note 41 at para 111.

48 *Ibid.* See also *Declaration of Minimum Humanitarian Standards*, art 5(1), reprinted in *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, UNESCOR, 51st Sess, UN Doc E/CN.4/1995/116 (1995) [*Declaration of Minimum Humanitarian Standards*]; *ECHR*, *supra* note 13, art 2; Kretzmer, *supra* note 12 at 24.

versus "civilian") but, rather, on the basis of particular conduct or the imminent threat thereof.[49] The standard of care in distinction is one of reasonableness — a use of deadly force cannot be based upon a mere suspicion that an individual or object poses a threat.[50]

Necessity

The use of deadly force by state law enforcement officials must be necessary on three separate axes: qualitative, quantitative, and temporal.[51] It must be a last resort — that is, "strictly unavoidable"[52] or "strictly necessary"[53] for the state to achieve the purpose of fulfilling its positive duties to protect life (qualitative necessity).[54] That is to say, the use of deadly force is only permitted "if other means remain ineffective or without any promise of achieving the intended [and otherwise permitted] result" (for example, self-defence or the defence of others).[55] The amount of force used must not be more than is "absolutely necessary" to achieve that result (quantitative necessity).[56] Finally, the threat against which deadly force is used must be immediate or imminent (temporal necessity).[57]

49 Kretzmer, *supra* note 12 at 24, argues against introducing an IHL-like principle of distinction into the law enforcement paradigm, arguing that doing so would defeat the humanitarian purpose that the principle plays in IHL: "[F]orbidding the use of force against some persons … would by implication be legitimizing use of force against others." This is a valid concern, but it is not one that arises from the conduct-based distinction discussed earlier. It does, however, point to the importance of clarity in the language used to express related but different (indeed, distinct) concepts.

50 Melzer, *supra* note 7 at 102.

51 This characterization of necessity is Melzer's, *supra* note 7 at 101.

52 *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, *supra* note 33, art 9. Alston asserts that the substance of art 9 reflects customary international law. Alston, *supra* note 29 at para 35.

53 *Code of Conduct for Law Enforcement Officials, supra* note 20, art 3. Alston asserts that the substance of art 3 reflects customary international law. Alston, *supra* note 29 at para 35.

54 *Report on Terrorism and Human Rights, supra* note 40 at para 88; Gaggioli and Kolb, *supra* note 29 at 136.

55 *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, *supra* note 33, art 4. See also Gaggioli and Kolb, *supra* note 29 at 137.

56 *Code of Conduct for Law Enforcement Officials, supra* note 30, commentary to art 3; *ECHR*, *supra* note 13, art 2(2). See also *Isayeva, Yusupova and Bazayeva v Russia*, Case nos 57947/00, 57948/00, and57949/00 (24 February 2005) (ECtHR) at para 169 [*Isayeva I*]; *Isayeva v Russia*, Case no 57950/00 (24 February 2005) (ECtHR) at para 173 [*Isayeva II*].

57 Melzer, *supra* note 7 at 101.

Precaution

The state must take all feasible precautions to avoid resorting to deadly force and must, in any event, minimize the amount of force used.[58] Such feasible precautions may include warnings, attempts to arrest, and the use of non-lethal measures.[59] The state must also avoid, and in any event minimize, the amount of damage and injury caused by its use of force.[60] The norm of precaution provides that *all* damage and injury is to be avoided or at least minimized. It is, therefore, neutral on the question to which I will soon turn: whether any non-accidental injury or death may be permitted to persons other than those who constitute the imminent threat. If such "collateral damage" is permitted by existing IHRL, it too must be avoided and in any event minimized.[61]

Proportionality (of Force)

The amount of force used by the state must be proportionate (or, indeed, "strictly proportionate"[62]) to the seriousness of the threat and to the legitimate objective to be achieved.[63] In general, IHRL's approach to limitations of human rights is to balance the negative effects of the limiting measure with the importance of the aim that

58 Note that these first two elements of the principle of precaution simply reflect the principles of qualitative and quantitative necessity.

59 Melzer, *supra* note 7 at 102. See also Alston, *supra* note 29 at para 41.

60 *Code of Conduct for Law Enforcement Officials, supra* note 30, art 3; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, supra* note 33, arts 4, 5.

61 *Isayeva II, supra* note 56 at para 176; Gaggioli and Kolb, *supra* note 29 at 134.

62 *Isayeva I, supra* note 56 at para 169; *Isayeva II, supra* note 56 at 173. Interestingly, the European Court of Human Rights's (ECtHR) approach shows a strong relationship between the concept of force that is "no more than absolutely necessary" to achieve a legitimate aim and force that is "strictly proportional" to the achievement of the same. The first term appears in art 2(2) of the *ECHR*; the second does not. The court treats "the concept of proportionality as being inherent in the idea of necessity" and, in fact, uses "absolute necessity" and "strict proportionality" interchangeably. See Boyle, *supra* note 25 at 239 and discussion in note 95 and associated text. For an approach that does assert a distinction between necessity and proportionality of force, see Alston, *supra* note 29 at paras 40-44.

63 *Declaration of Minimum Humanitarian Standards, supra* note 48, art 5(2); *Code of Conduct for Law Enforcement Officials, supra* note 30, commentary to art 3 at para b; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, supra* note 33, art 5(a); Melzer, *supra* note 7 at 101.

the limitation seeks to achieve. This is the case also with its approach to limitations to the right to life. The norm of proportionality of force deals with the importance of the aim to be achieved by the use of force and "the question of how much force might be permissible" to achieve it.[64] The state may only use deadly force to respond to a threat of the same magnitude — that is, force that may cause death or serious bodily injury.[65]

Effective Investigation

Any use of force by the state that results in any deprivation of life must be thoroughly and effectively investigated.[66] The purpose of such an investigation is to determine whether a deprivation of life complies with the norms set out earlier — that is, to determine whether it was arbitrary or not. It serves the additional purpose of deterring those officials who might otherwise be tempted to subscribe to a less restrictive standard of care in considering the use of deadly force.[67] As the ECtHR has noted, "a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities."[68] The hallmarks of an adequate investigation include: the investigator's formal and practical independence from the persons or organizations being investigated; the possibility that the investigation will lead to effective remedies, including criminal proceedings; the timeliness of the investigation; and the availability of public scrutiny.[69]

64 Alston, *supra* note 29 at para 42.

65 Leaving aside other potentially legitimate aims for the use of deadly force in a law enforcement context, some scholars argue that the only permissible reason for the state to deprive a person of life is to prevent that person from taking other lives. See Boyle, *supra* note 25 at 241-42 (who, in 1985, saw this standard as *lex ferenda* — a "goal" towards which IHRL should strive to evolve). See also Alston, *supra* note 29 at para 44 (where Alston asserts the standard as *lex lata*).

66 *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, *supra* note 33, art 22; *General Comment no 31*, *supra* note 28 at para 6. See also Kretzmer, *supra* note 12 at 26, 36.

67 See Boyle, *supra* note 25 at 241.

68 *McCann and Others v United Kingdom*, *supra* note 24 at para 161.

69 *Isayeva I*, *supra* note 56 at paras 208-13; *Isayeva II*, *supra* note 56 at paras 209-14. See also Amichai Cohen, *Proportionality in Modern Asymmetrical Wars* (Jerusalem: Jerusalem Center for Public Affairs, 2010) at 33, online: Jerusalem Center for Public Affairs <http://www.jcpa.org/text/proportionality.pdf>.

Of the seven norms that I have described, those that will be of most interest going forward are the four whose substantive legal content has an impact upon operational decisions as to whether, and how, the state resorts to the use of deadly force in the law enforcement context: distinction, necessity, precaution, and proportionality of force. It is these IHRL norms that will form the basis for my comparisons with other normative frameworks. Nevertheless, it is important to remain cognizant of the existence and content of the more procedurally oriented norms, since they will continue to be a part of any IHRL legal framework governing the use of deadly force. It is only through the collective operation of all of these norms that IHRL addresses arbitrary deprivations of life.

IHRL's approach to the use of deadly force in law enforcement is notable for its asymmetry. While it fully accounts for negative state duties by strictly constraining the uses of force intended to deprive individuals of life, its approach to positive state duties to protect the right to life actively, particularly when the state is in a position to do so, is incomplete. The IHRL framework governing state uses of deadly force in a law enforcement context clearly defaults to the avoidance or at least the minimization of the use of force. However, while it focuses on circumscribing state uses of deadly force, it pays considerably less attention to the impact of state non-uses of force — that is, situations where violence to innocent persons results from a state decision, despite having an immediate capability to do so, to refrain from the use of force. This approach leaves a normative gap in respect of situations where deaths of innocent persons are inevitable.

COLLATERAL DAMAGE AND IHRL

One cannot help but notice that the commonly accepted set of IHRL norms applicable to state uses of deadly force in the law enforcement context, not to mention the sources from which they are drawn, are silent regarding the possibility of collateral damage, particularly in the form of the deaths of innocent persons that are foreseeable, but incidental, to state uses of deadly force.[70] The

[70] For the purposes of the present analysis, the definition of collateral damage is that used by the group of experts who drafted the *Harvard Manual, supra* note 6, rule 1 (l): "'Collateral damage' means incidental loss of civilian life, injury to civilians and damage to civilian objects or other protected objects or a combination thereof, caused by an attack on a lawful target." This definition is derived from language set out in *Protocol Additional to the Geneva Conventions of 12 August*

framework does not indicate or imply that foreseeable incidental innocent deaths may be acceptable. Nor does it indicate or imply that foreseeable incidental civilian deaths would be treated as arbitrary. The best that can be said of the existing framework is that it simply does not account for incidental deaths but leaves a gap that, to the extent that it is filled at all, is filled only with non-binding commentary. Such commentary as exists, however, assumes the paradigm case of law enforcement and is unpersuasive in that it fails to provide a coherent analytical accounting of situations such as the rogue civil airliner problem — situations in which innocent persons will inevitably be deprived of life, regardless of how the state responds.

The Prevailing View: A Categorical "No"

In 2006, the German Federal Constitutional Court struck down as "completely unconstitutional and consequently … void" provisions of the German *Aviation Security Act* (*Luftsicherheitsgesetz*) that authorized, as a last resort, the shooting down of "renegade" civil aircraft in a "non-warlike" context.[71] One of its bases for doing so was a finding that, to the extent that it authorized the shooting down of an aircraft carrying innocent passengers and crew (whom the court recognized to be "victims of an attack on the security of air traffic"),[72] the impugned provisions were inconsistent with the German Constitution's (the *Basic Law for the Federal Republic of Germany*) protection

1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, arts 51(5)(b), 57(2), Can TS 1991 No 2 (entered into force 7 December 1979) [*Additional Protocol I*].

71 *Dr H v s 14.3 of the Aviation Security Act of 11 January 2005*, [2006] 1 BvR 357/05 at para 153 (German Federal Constitutional Court) [*Dr H*]. An English translation of the complete judgment may be found online: Das **Bundesverfassungsgericht** <http://www.bundesverfassungsgericht.de/en/decisions/rs20060215_1bvr035705en.html>. Under the impugned legislation, the resort to shooting down the aircraft was subject to several conditions: the measures had to be necessary; cause the least impairment to individuals and the general public; and not result in a "detriment that is recognisably out of proportion to the aspired success." *Aviation Security Act (Luftsicherheitsgesetz – LuftSiG) of 11 January 2005*, Federal Law Gazette (Bundesgesetzblatt) I at 78, para 14(2). A similar decision by the Polish Supreme Court striking down a similar law has attracted virtually no international attention. See *Permissibility of Shooting Down a Passenger Aircraft* (English summary), *supra* note 42.

72 *Dr H*, *supra* note 71 at para 116.

of the right to life of the innocent persons on board the aircraft,[73] read in conjunction with its guarantee of human dignity.[74]

The decision, which adopts an absolutist approach to human dignity and the right to life but considers only the rights of those persons aboard the aircraft, without carrying out a similar analysis of the rights of those on the surface, has been the subject of considerable academic discussion. Commentators are divided between praising and criticizing the result and the reasoning underlying it.[75] Nils Melzer, in a brief analysis, attempts to extend the German court's constitutional rights conclusions to IHRL, characterizing the case as confirming a "[f]ailed legalization of 'collateral damage.'"[76] This apparent view of the *lex lata* — that foreseeable and incidental deaths of innocent persons are not permitted by IHRL — is supported by a number of eminent scholars of international

[73] See *Basic Law for the Federal Republic of Germany,* 23 May 1949, art 2 (Official English translation), online: Deutscher Bundestag <https://www.btg-bestellservice.de/pdf/80201000.pdf>, which provides:

> Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
>
> Every person shall have the right to life and physical integrity … These rights may be interfered with only pursuant to a law.

[74] *Ibid*, art 1(1): "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." Möller, *supra* note 7 at 458, notes that the official translation of the *Basic Law* may lack nuance. The German word used in this provision, "unantasbar," is more appropriately translated as "untouchable," a term that Möller suggests implies an even stronger degree of protection — that is, one where "any interference will automatically amount to a violation of the right" — than "inviolable."

[75] See, eg, Oliver Lepsius, "Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act" (2006) 7:9 German LJ 761 (praising the decision as "remarkable" and criticizing the act as "pretend[ing] to prevent something which will hardly happen again in this way" (at 775); and Tatjana Hörnle, "Shooting Down a Hijacked Plane: The German Discussion and Beyond" (2009) 3:2 Crim L & Phil 111 (particularly critical of the court's absolutist approach to human dignity). In an earlier article, Hörnle provides a lengthy list of articles approving of the decision. See Tatjana Hörnle, "Hijacked Airplanes: May They Be Shot Down?" (2007) 10:4 New Criminal L Rev 582 at 584, n 7. In contrast, the bulk of the English-language literature (much of it written from the perspective of Anglo-American legal culture) seems to be more critical of the decision. See, eg, Michael Bohlander, "In Extremis: Hijacked Airplanes, 'Collateral Damage' and the Limits of Criminal Law" (2006) Crim L Rev 579 at 589-90.

[76] Melzer, *supra* note 7 at 15.

law. The predominant view appears to be that any death of an innocent person that is foreseeable and yet incidental to an otherwise lawful state use of deadly force in a non-armed conflict/law enforcement context would constitute an arbitrary deprivation of life. Some of the more prominent expressions of this view are described briefly in the text that follows. It is notable that each of these expressions occurs almost as an afterthought, as if the author views the proposition as trite law that does not require further explanation.[77]

Theodor Meron, in a seminal and much cited article, implies that a norm against incidental innocent death exists, pointing out that "despite the growing convergence of various protective trends" one of the significant differences remaining between IHRL and IHL is that, "[u]nlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of human beings not directly participating in armed conflict, such as civilian victims of lawful collateral damage."[78] Similarly, Philip Alston, writing as United Nations special rapporteur on extrajudicial, summary, or arbitrary executions, summarily rejects the possibility that IHRL might accept as lawful any deaths of innocent persons that are incidental to a targeted killing in a law enforcement context: "[K]illing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability."[79] Thomas Smith extends the comparison between

[77] Eg, Melzer uses the *Aviation Security Act* case as an example in the introductory portion of his book on targeted killings but does not revisit it (*ibid* at 15-18). Kretzmer, *supra* note 12 at 28, also makes brief use of the outcome of the case to buttress an argument but does not analyze it. Similarly, Lazarus, *supra* note 46 at 343, uses the case to illustrate the limits to positive duties of the state to protect security, but she does not critique it. One might speculate as to whether this scholarship suffers from an availability heuristic — that is,"a mental shortcut by which individuals correlate the probability of an event to their ability to call to mind an example of that event" (see "Responding to Terrorism: Crime, Punishment and War" (2002) 115:4 Harv L Rev 1217 at 1230) — in that the "paradigm" law enforcement case involves small-scale, low-level, tactical policing and extreme cases such as the rogue civil airliner are less available (or at least were in the pre-9/11 era when the existing framework of IHRL was developed). It would, however, require significantly more research (into *travaux préparatoires*, conference proceedings, and so on) to determine whether the heuristic exists and to exclude other possible explanations for IHRL's relative silence on the issue.

[78] Theodor Meron, "The Humanization of Humanitarian Law" (2000) 94:2 AJIL 239 at 240.

[79] Alston, *supra* note 46 at para 86. Note that in the preceding paragraph, Alston also expresses the view that a targeted killing within a state's own territory in a

IHL and IHRL. In pointing out that the relationship between IHL and IHRL is an uneasy one in the best of circumstances, he points specifically to the contrast in their treatment of collateral deaths:

> Where is the common ground between the dignity represented by human rights and the tragedy represented by the "necessary" violence, including collateral violence against civilians, that is sanctioned by the law of war? The utilitarianism of humanitarian law sets it apart from the "absoluteness" of human rights. For military lawyers the central question about the use of force is "Is it worth it?" Can civilian casualties be justified by the military advantage anticipated? Human rights law drives a harder bargain. Certain acts — killing innocent civilians … — are never worth it; at least that norm is inescapable.[80]

David Kretzmer, in the context of a discussion of the IHL norm of proportionality of effects, argues that IHRL has no parallel doctrine that would allow state authorities to decide to attack "a legitimate target in full knowledge that innocent persons will also be hit."[81] He does suggest one possible exceptional situation where IHRL might permit incidental innocent deaths: "[I]f the innocent persons are those whom the authorities are aiming to protect by attacking the target."[82] He uses as an example incidental deaths of hostages that occur in an attempt to free them.[83] He limits even this exception, however, by distinguishing it from cases where force is used to protect persons other than those innocent persons who may foreseeably be harmed.[84]

The opinion of the International Court of Justice (ICJ) in *Legality of the Threat or Use of Nuclear Weapons* might also be understood as

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law enforcement context "would be very unlikely to meet human rights law limitations on the use of lethal force."

80 Thomas W Smith, "Can Human Rights Build a Better War?" (2010) 9:1 J Human Rights 24 at 25. See also Cohen, *supra* note 69 at 14-19, pointing out that some human rights advocates seek to extend this approach even into the armed conflict context.

81 Kretzmer, *supra* note 12 at 27. This view forms the foundation of a broader argument that international human rights law (IHRL) alone should govern the conduct of non-international armed conflicts since its rejection of collateral damage and of a norm of proportionality of effects would provide greater protection to innocent persons.

82 *Ibid* at 27, n 52.

83 *Ibid.*

84 *Ibid* at 29, n 58.

further authority for the proposition that IHRL does not allow for incidental deaths of innocent persons in a law enforcement context.[85] The ICJ's observation that what constitutes an arbitrary deprivation of life during armed conflict not only cannot be decided by IHRL alone as *lex generalis* but also requires reference to IHL as *lex specialis* implies that IHRL does not generally incorporate such IHL norms as acceptance of incidental deaths of innocent persons, provided there is proportionality of effects. If such a norm existed within IHRL as *lex generalis*, there would be no requirement to refer to IHL in such a situation. The IHRL framework is structured to address the classical law enforcement paradigm, constraining the state from using deadly force in a manner inconsistent with its negative duty not to take life. It is less effective in accounting for the state's positive duty to protect life against deprivations by third parties — a duty that is particularly strong when the state has the immediate capability to intervene and prevent the deprivation.

The effect of the existing IHRL's apparent rejection, as arbitrary, of any foreseeable and incidental deaths of innocent persons in the law enforcement context is to categorically prohibit, regardless of the consequences, the state use of deadly force if it is foreseeable that such use will incidentally deprive any innocent person (or, in Kretzmer's approach, any innocent person other than those whom the use of deadly force is intended to protect) of life. This approach seems radically, even absurdly, absolutist. In its extreme form, it would prohibit the state from using deadly force where even one incidental innocent death is foreseeable, even if that use of force could save thousands of other innocent lives.[86] There may be some moral attraction to such a norm as part of the pacifist, idealistic strain that animates at least some aspects of both human rights law

[85] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, [1996] ICJ Rep 226 at para 25. William Schabas hints at such an argument. See William Schabas, "*Lex Specialis*? Belt and Suspenders?: The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*" (2007) 40:2 Israel LR 592 at 604. Marko Milanović discusses appeals to the *lex specialis* as a means of avoiding conflicts between norms of IHRL and international humanitarian law (IHL), similarly implying that in the absence of a conflict, no appeal to the *lex specialis* would be required. See Marko Milanović, "A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law" (2009) 14:3 J Conflict & Security 459.

[86] Möller makes a similar argument in respect of the extreme consequences of the German Federal Constitutional Court's absolutist approach to human dignity. See Möller, *supra* note 7 at 458-59.

and the deontological school of moral philosophy, but it is an approach that seems inconsistent with social and political reality — at least beyond the point where the possible effects of adhering to it cross some qualitative or quantitative threshold.

More important than its lack of consistency with social and political reality, an approach to IHRL that categorically rejects the possibility of incidental death or injury to innocent persons leads to a result that is logically and legally unsatisfactory when applied to circumstances such as those of the rogue civil airliner problem. Applying an absolutist approach to the right to life of the individuals on both sides of that problem leads to an irreconcilable conflict in state duties to respect and ensure life — no matter what course of action the state selects, innocent persons will be deprived of life through the state's failure to fulfil one or more of its duties.

ECtHR: A Conditional "Yes"?

There exists some limited authority, however, for a different approach, at least in respect of the right to life as it is protected by the *ECHR*. This is the view that "strict HRL proportionality [that is, proportionality of force used] does not imply that 'collateral damages' are not acceptable"[87] and that, at the extreme boundaries of the law enforcement paradigm, IHRL must account in some way for state decisions regarding the use or non-use of deadly force when the deaths of innocent persons are unavoidable. This view finds some support in two recent ECtHR decisions that address the issue of incidental deaths of innocent persons in the context of the right to life as formulated in the *ECHR*.[88] The four cases decided in those decisions arose in Chechnya during events that the court characterized not as an armed conflict but, rather, as operations by Russian law enforcement authorities[89] in response to a situation that, as the court accepted, "called for exceptional measures by the State in order to regain control over the Republic and to suppress

[87] Gaggioli and Kolb, *supra* note 29 at 137. Boyle, *supra* note 25 at 240, in discussing IHRL's approach to proportionality also appears to advocate a comparison of end-states that looks very much like a proportionality of effects analysis, requiring that "it be evident that greater damage or harm will result unless the purpose is achieved" when using force for a legitimate purpose. He does this, however, at the conclusion of a discussion in which he makes clear his rejection of incidental deaths of innocent persons.

[88] See *ECHR*, *supra* note 13, art 2.

[89] *Isayeva II*, *supra* note 56 at para 191.

the illegal armed insurgency."[90] While holding that these exceptional measures "could presumably include" the deployment and employment of military units, including aviation units equipped with heavy combat weapons,[91] the court also held that given the circumstances, the employment of these measures had to be judged against a "normal legal background" — that is to say, against the standards of IHRL, specifically the *ECHR*, and not against the standards of IHL.[92]

All four cases arose out of aerial attacks made by Russian Air Force aircraft that resulted in the deaths of a significant number of innocent persons who took no part in any use or threat of violence. In the first three cases, decided in *Isayeva, Yusupova and Bazayeva v Russia* (*Isayeva I*), the Russian pilots claimed to have acted in self-defence after having been fired upon by two trucks that they said were travelling within a convoy of civilian vehicles.[93] In the final case, *Isayeva v Russia* (*Isayeva II*), the deaths occurred during the Russian bombardment of a village in which a large number of insurgents had taken refuge.[94]

The *Isayeva* cases were decided in the context of Article 2 of the *ECHR*, which, in contrast to the *ICCPR* and other major IHRL instruments, does not protect a right not to be arbitrarily deprived of life but, rather, sets out an explicit (and exhaustive) list of allowable limitations to the right to life:

> Deprivation of the right to life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in the defence of any person from unlawful violence ...[95]

What is particularly significant about the court's analysis of the *Isayeva* cases is that it does not categorically reject any possibility of

[90] *Ibid* at para 180; *Isayeva I, supra* note 56 at para 178.

[91] *Isayeva I, supra* note 56 at para 178; *Isayeva II, supra* note 56 at para 180.

[92] *Isayeva II, supra* note 56 at para 191. The court declined to consider or apply IHL despite evidence that could have supported a characterization of the situation as a non-international armed conflict and the submissions of the applicants and third party interveners urging it to do so.

[93] *Isayeva I, supra* note 56.

[94] *Isayeva II, supra* note 56.

[95] *ECHR, supra* note 13, art 2(2).

incidental deaths of innocent persons as being absolutely inconsistent with state duties to protect life, even in a pure law enforcement context (which was the context within which it purported to decide the cases). Instead, the court recognizes and accepts the possibility that there may exist circumstances under which incidental deaths of innocent persons would not violate a state's *ECHR* obligations.

The court held that "article 2 covers not only intentional killing but also situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life."[96] In other words, provided that it complies with the generally accepted IHRL restrictions on the use of force, a state may use deadly force for a "permitted aim" such as "the defence of any person from unlawful violence," even if that use of force results in unintended, but presumably foreseeable, deaths of innocent persons.[97] The only limitation that the court placed on such deaths in addition to commonly held IHRL standards was a logically related expansion in the scope of the norm of precaution — that is, states must avoid and, in any event, minimize incidental deaths of innocent persons.[98]

The only proportionality requirement discussed and applied by the court in the *Isayeva* cases was the commonly held IHRL requirement of proportionality of force — that is, that the force used be "strictly proportionate" to (or, to use the convention's language, "no more than absolutely necessary" for) the achievement of the permitted aim of defending persons from unlawful violence.[99] While assuming in one decision[100] and accepting in the other[101] that the use of force may have been justified in order to protect persons from unlawful violence, the court noted that "a balance must be achieved between the aim pursued and the means employed to achieve it."[102]

The court made no reference to, and did not incorporate into its analysis of human rights law, a proportionality of effects analysis such as that developed within the framework of IHL or in constitutional human rights law. This approach might be seen as an indication that

96 *Isayeva I*, *supra* note 56 at para 169; *Isayeva II*, *supra* note 56 at para 173.

97 *Ibid.*

98 *Isayeva II*, *supra* note 56 at para 176. See also *Isayeva I*, *supra* note 56 at para 171.

99 *Isayeva I*, *supra* note 56 at para 169; *Isayeva II*, *supra* note 56 at para 173.

100 *Isayeva I*, *supra* note 56 at paras 181, 199.

101 *Isayeva II*, *supra* note 56 at paras 180, 200.

102 *Ibid* at paras 181, 191.

it did not view such a test as being appropriate in the law enforcement context of the cases. It might equally be because the *ECHR*, lacking a broad, flexible standard that allows for "non-arbitrary" deprivations of life, deprived the court of jurisdiction to consider a balancing approach. Just as likely, however, is the possibility that given the facts of the cases, where the amounts of force used were not just excessive but also so excessive as to be indiscriminate, there was, in effect, no need for the court to extend its analysis to the point that such an approach might have become relevant. In both cases, the court found that the Russian military's uses of force had not been "planned and executed with the requisite care for the lives of the civilian population."[103] The force used was more than absolutely necessary and therefore failed the standard of strict proportionality of force.[104] Moreover, the authorities had not taken the precautions required to avoid, and in any event to minimize, incidental casualties to innocent persons.[105]

Some scholars have been critical of the ECtHR's "Ivory Tower" approach to the *Isayeva* cases and to other similar cases that arose out of circumstances that might well have been characterized as non-international armed conflicts[106] — an approach that has resisted any explicit reference to IHL.[107] Others have chosen to ignore the court's characterization of the cases as not arising in the context of an armed conflict (a characterization that was made in the face of contrary submissions by the claimants and third parties[108]) and to treat the cases as illustrative of their argument that IHRL can provide protection to victims of non-international armed conflicts that is superior to that provided by IHL.[109] Yet another has gone so far as to suggest that the *Isayeva* decisions must be distinguished

[103] *Isayeva I, supra* note 56 at para 199; *Isayeva II, supra* note 56 at para 200.

[104] *Isayeva I, supra* note 56 at paras 194-98; *Isayeva II, supra* note 56 at paras 189-90, 198-99.

[105] *Isayeva I, supra* note 56 at paras 186, 189, 195-96; *Isayeva II, supra* note 56 at paras 184-96.

[106] Eg, *Ergi v Turkey* (1998), 81 ECHR (Ser A) 1751, 32 EHRR 18; *Ahmet Özkan and Others v Turkey*, No 21689/93 (6 April 2004).

[107] See, eg, Gaggioli and Kolb, *supra* note 29 at 124ff.

[108] See, eg, *Isayeva I, supra* note 56 at paras 157, 162-67; *Isayeva II, supra* note 56 at para 167.

[109] See William Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya" (2005) 16:4 EJIL 74; Kretzmer, *supra* note 12 at 30-31.

from other ECtHR decisions since they took place in the context of hostilities and presumably, therefore, reflect the influence of IHL as *lex specialis* on IHRL in the specific context of an armed conflict.[110] However, the court itself was clear: it dealt with the cases strictly under IHRL, judging them against a "normal legal background."[111] Thus, its acceptance of the possibility of incidental deaths of innocent persons in the pursuit of a legitimate goal must be taken as an acceptance of such within IHRL.

Implications of the ECtHR's Approach

The ECtHR's approach, in recognizing the possibility of lawful incidental deaths of innocent persons, shows some promise of alleviating the irreconcilable conflicts in state duties that can arise at the extreme boundaries of the right to life. This promise extends to situations such as the rogue civil airliner problem where any course of action elected by the state will result in innocent persons being deprived of life. Even if the possibility of incidental deaths is accepted, however, the existing IHRL framework governing state uses of force in the law enforcement context may not be entirely satisfactory because its limited approach to proportionality may not account for the complexities of situations such as the rogue civil airliner problem. As a result, it may not provide a sufficiently nuanced or "surgical" approach to resolving irreconcilable conflicts in state duties to respect and ensure the right to life. Indeed, limiting the proportionality analysis to proportionality of force may, in some circumstances, prove to be less protective of individual claims to the right to life and overly deferential to the state's choices.

One cannot ignore the possibility that there may exist circumstances where the threat posed or the importance of the state's objective is sufficient to warrant the use of deadly force on the existing proportionality of force analysis, where deadly force is necessary because no equally effective alternatives are available and where all feasible precautions have been taken to avoid and in any event minimize collateral damage, and, yet, despite being consistent with the full spectrum of existing IHRL norms governing state uses of deadly force, the expected collateral damage (including incidental deaths of innocent persons that would be permitted but not accounted for in the proportionality of force analysis) would exceed

[110] Melzer, *supra* note 7 at 386-92.

[111] *Isayeva II*, *supra* note 56 at para 191.

the advantages anticipated from the use of force.[112] Under such circumstances, the ECtHR's approach would not only allow for the possibility of incidental deaths but would also allow for the use of deadly force even though the negative effects of that use of force would be expected to exceed the anticipated positive effects. In failing to account for this possibility, the approach taken by the ECtHR in the *Isayeva* cases, while showing the promise of an improved analytical framework for state uses of deadly force that accounts for what would otherwise be irreconcilable conflicts in state duties arising from irreconcilable claims to the right to life, remains incomplete and, therefore, unsatisfactory.

I conclude that, because of its inability to address the irreconcilable conflicts in state duties and individual rights, IHRL's absolutist approach to the right to life is unsatisfactory as a framework within which to consider the rogue civil airliner problem. Rather than providing a principled approach to the problem, the existing IHRL framework leads to arbitrary, capricious results — results that vary depending upon which side of the equation one begins one's analysis and that are reached without reference to any coherent legal standard. Such results are inconsistent with the rule of law and fail to fully account for all of the relevant human rights interests.

Indeed, it would appear from this analysis that if IHRL is to accept the possibility of incidental deaths of innocent persons, its concern for the protection of human life also requires, as a matter of logic, that it incorporate a requirement of proportionality of positive and negative effects. Only this sort of additional norm will fill the protective gap that could be left if legal analysis were to be limited to the existing substantive IHRL factors of distinction, necessity, precaution, and proportionality of force and will thereby ensure that competing claims to the right to life are properly accounted for. If IHRL is to account for the reality that, in some circumstances, any course of action involving the use (or non-use) of deadly force by a state will result in incidental deaths of innocent persons, then it appears that it must incorporate a legal analysis comparing the effects of different courses of action.[113]

[112] For a judicial elaboration of this concern in a constitutional rights context, see *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at paras 92-95, 120 DLR (4th) 12 [*Dagenais*].

[113] See Kretzmer, *supra* note 12 at 28-29, for a critique of this approach from an absolutist IHRL perspective.

PROPORTIONALITY OF EFFECTS: A COMPARATIVE ANALYSIS

Having concluded that a satisfactory legal framework for the analysis of the rogue civil airliner problem requires the addition of a norm of proportionality of effects, I turn to a comparative analysis of the role of proportionality of effects norms in balancing competing interests in three non-IHRL normative frameworks: IHL, moral philosophy, and constitutional human rights law. I conclude that the premises underlying each framework's approach to proportionality of effects are sufficiently similar to the factual circumstances inherent in the rogue civil airliner problem in a law enforcement context to indicate that a similar approach, carefully tailored so as to be minimally intrusive to the existing framework, will provide IHRL with a satisfactory analytical approach to the problem.

IHL

Although at least from a Western perspective, IHL and IHRL share similar roots in theology and moral philosophy[114] and although, in many ways, they respond to similar humanitarian concerns, each has, for the most part — and at least until recently — developed and evolved independently of the other: "[T]hey advanced on parallel tracks; different personalities were involved in the projects of IHL and IHRL and represented different state interests."[115] IHL and IHRL approach their shared humanitarian concerns from different perspectives: IHL from the pragmatic, accepting "that … it is too late to prevent the use of armed violence between the various parties to [a] conflict"[116] and seeking instead "the maximization of humanitarian protections from harms of inevitable wars,"[117] and IHRL from the idealistic.

IHL's norm of proportionality weighs the anticipated positive effects of a state use of military force against at least some of the expected negative effects. The state must refrain from launching

[114] Watkin, *supra* note 15 at 34.

[115] Kretzmer, *supra* note 12 at 10 [footnotes omitted].

[116] International Committee of the Red Cross (ICRC), *International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence*, Summary Report of the XXVIIth Round Table on Current Problems of International Humanitarian Law (November 2003), online: ICRC <http://www.icrc.org/Web/eng/siteengo.nsf/htmlall/5UBCVX/$File/Interplay_other_regimes_Nov_2003.pdf> at 13.

[117] Gabriella Blum, "The Laws of War and the 'Lesser Evil'" (2010) 35:1 Yale J Int'l L 1 at 44.

(or continuing) an attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof (collateral damage), which would be excessive in relation to the concrete and direct military advantage anticipated.[118] It is important to note that this norm of proportionality of effects imposes a legal obligation that is distinct from, and complementary to, IHL's other fundamental norms of distinction, military objectives, and precaution. Once military objectives have been identified and all feasible precautions have been taken to avoid or at least minimize collateral damage, a separate assessment of proportionality of effects must be carried out.[119] As Amichai Cohen notes,

> instead of military necessity justifying any damage to civilians, [the norm of proportionality] … orders the attacking power to audit his proposed operation, comparing the foreseeable damage to the civilian population with the expected military advantage … [and] to relinquish the effort to gain a military advantage if its attainment threatens to cause disproportionate harm to the civilian population.[120]

The IHL norm of proportionality of effects responds to a set of circumstances that shares similarities with those that exist in the rogue civil airliner problem. In both sets of circumstances, the violent deaths of innocent persons are inevitable, and attacks that harm innocent persons are allowed only because no possible alternative exists.[121] In the armed conflict context, the IHL norm of proportionality of effects seeks to minimize those deaths to the extent practicable by balancing those deaths (and other elements of collateral damage) against the constellation of conflicting interests that is captured by the phrase "military advantage." In the law enforcement context, a norm of proportionality of effects would also seek to minimize innocent deaths. The degree of pragmatism

[118] Jean-Marie Henckaerts and Louise Doswald-Beck, eds, *Customary International Humanitarian Law* (Cambridge: International Committee of the Red Cross, 2005) vol 1 (*Rules*), rule 14 at 46; *Additional Protocol I*, *supra* note 70, arts 51(5)(b), 57(2)(a)(iii).

[119] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004) at 102 and 112; Kretzmer, *supra* note 12 at 27.

[120] Cohen, *supra* note 69 at 9.

[121] *Ibid* at 14. See also Watkin, *supra* note 15 at 47.

implicit in an IHRL balancing would, however, have to be considerably more limited, with the conflicting interests being limited in a manner consistent with IHRL's focus upon protecting human rights rather than the gaining of military advantages.

The recently published *Program on Humanitarian Policy and Conflict Research at Harvard University Manual on International Law Applicable to Air and Missile Warfare* (*Harvard Manual)* provides a convenient mechanism to consider how an IHL-like norm of proportionality of effects could be applied to the rogue civil airliner problem.[122] The manual addresses itself directly to the situation of the rogue civil airliner, albeit in the context of armed conflict. In its approach to collateral damage and proportionality, however, it provides an illustration of how an analysis of proportionality of effects can be integrated into a legal analysis that is, in all other relevant operational respects, effectively identical to the analysis that is required by IHRL in the law enforcement context.

The *Harvard Manual* holds that there are circumstances during armed conflict under which a civil airliner, ordinarily protected from attack as a civilian object, may, by virtue of its use, location, or purpose, lose its protection and become a military objective despite the fact that innocent persons — that is, civilians — are on board.[123] These circumstances include the use of the aircraft as a means of attack[124] and its refusal to comply with orders from state authorities or otherwise resisting interception.[125] The manual recognizes, however, that the presence of innocent crew members and passengers on board the aircraft makes the rogue civil airliner a special case in targeting, which requires particular care in decision making and that must be analyzed using a more nuanced approach than IHL ordinarily requires. As a result, the circumstances under which the rogue civil airliner may lawfully be shot down in an armed attack/armed conflict context are very strictly prescribed through the addition of norms that are ordinarily applicable only in the

[122] The *Harvard Manual* is not a binding legal instrument. Its authority is persuasive. It was prepared by a group of experts in the IHRL and IHL fields and is intended to be an elaboration of international law as applicable specifically to air and missile warfare. See *Harvard Manual, supra* note 6, rule 2.

[123] *Ibid*, rule 10(b)(ii). See also *Additional Protocol I, supra* note 70, art 52.

[124] *Harvard Manual, supra* note 6, rule 1(t), commentary to rule 27(a) at para 2, commentary to rule 58 at paras 7, 10.

[125] *Ibid,* rule 63, commentary to rule 27(a).

non-armed conflict/law enforcement context.[126] These additional norms are:

- necessity — the use of deadly force against a rogue civil airliner must be necessary in the sense that "no other method is available for exercising military control" of the aircraft (that is, for preventing the rogue civil aircraft from accomplishing its aim);[127]
- precaution — all feasible precautions (including verifying that the aircraft is a military objective,[128] the issuing of warnings (when circumstances permit),[129] and making all feasible attempts to divert the aircraft for landing, inspection, and possible capture[130]) must be taken prior to a use of force in order to avoid and in any event minimize both the use of force itself and incidental effects of any use of force;[131] and
- proportionality of force — the circumstances under which its use, location, or purpose make the rogue civil airliner a military objective must be "sufficiently grave to justify an attack"[132] (in other words, any use of deadly force must only be in response to a sufficiently grave threat).

These norms represent an innovation in the approach of international law to armed conflict, at least in respect of the rogue civil airliner, in that they incorporate legal restrictions on the use of deadly force that traditional IHL would not require, strictly speaking, as a matter of law. The addition of these norms contributes to a more nuanced framework for legal analysis and also reflects the influence upon international law norms of the moral and political dilemmas associated with the rogue civil airliner problem.

The *Harvard Manual*'s approach to a rogue civil airliner in the context of an armed conflict is to employ an analytical framework that consists of the core, substantive norms of the IHRL use of deadly force framework (distinction, necessity, precaution, and

126 *Ibid,* rule 58; see also section J(III).

127 *Ibid*, rule 68(b).

128 *Ibid*, rule 40.

129 *Ibid*, rules 38, 70.

130 *Ibid*, rule 68(a). See also generally Section G, rule 58, commentary to rule 10.

131 *Ibid*, rules 68(a), 68(d).

132 *Ibid*, rule 68(c).

proportionality of force) along with the added IHL norm requiring proportionality of effects — that "the expected collateral damage will not be excessive in relation to the military advantage anticipated."[133] This approach confirms that there are circumstances where a pragmatic proportionality of effects analysis can be integrated with IHRL's more idealistic approach to strictly limiting state uses of deadly force.

When it comes to the pure law enforcement context, however, some of the substantive content of the IHL proportionality analysis remains inappropriate in analyzing the rogue civil airliner problem. While the two contexts share the significant similarity that the loss of innocent lives is inevitable, there remains a significant difference in how the dilemma of choosing which lives to end must be addressed. The IHL norm of proportionality allows a state to accept foreseeable and innocent deaths of innocent persons in the achievement of an anticipated "military advantage" that is not limited to the protection of other lives. Thus, human lives may be "balanced" against a broad range of interests other than other human lives — anything that might provide a military advantage, including the destruction of equipment, weapons, and other items of military value or the advantage of gaining or denying to the enemy the use of a particular piece of geography. IHRL, on the other hand, to the extent that it accepts any state use of deadly force, accepts it only for the limited purpose of protecting human life.

This distinction between the IHL and IHRL frameworks, while significant, is not irreconcilable, particularly in the circumstances of the rogue civil airliner. Part of the difference is narrowed by the factual circumstances. Any use of deadly force against a rogue civil airliner, regardless of context, will have a defensive purpose. The advantage to be gained from it will be primarily preventative. In an armed conflict context, it lies in preventing the enemy from achieving its own military advantage, while, in a law enforcement context, it lies, similarly, in preventing the person(s) in effective control of the aircraft from achieving their suicidal/homicidal and destructive objective. While the set of possible military advantages in an armed conflict context is thus more limited than it would be in the case of an offensive attack, it still includes matters that go beyond protecting the lives of those on the surface and may, in fact, have no rational connection at all to any goal of saving innocent lives. Thus, the "balancing" that takes place in the context of the rogue civil

[133] *Ibid*, rule 68(d).

airliner problem in armed conflict still incorporates other factors not related to the right to life and can involve balancing lives against those factors. Such balancing is anathema to the idealistic foundation of IHRL.

IHRL's restrictive approach to the use of force in a law enforcement context is one that must not be interfered with lightly. Its legal framework has proven to be satisfactory in respect of the vast majority of circumstances that might arise in the law enforcement context. As a result, there is no requirement, nor any justification, for a radical amendment to the framework. Indeed, any general incorporation of a proportionality of effects analysis might have the effect of seriously weakening IHRL's protective framework by increasing the scope within which state deprivations of life might be considered acceptable.[134] Thus, any use of a proportionality of effects norm in a law enforcement context to resolve the irreconcilable conflicts of state duties and individual claims to the right to life must differ from the IHL approach to the norm by ensuring that the right to life remains at the centre of its analysis.

This effect can be achieved through a combination of three constraints. First, the circumstances under which a law enforcement proportionality of effects analysis is permitted must be carefully constrained. The addition of a proportionality of effects analysis to the existing IHRL framework must only occur under circumstances that cannot be coherently and satisfactorily addressed by that framework. Second, while recognizing that other interests will factor into state decision making, even in a law enforcement context, the proportionality of effects analysis must respect the significant value that IHRL places on the right to life and assign the lives of persons (particularly innocent persons) a more significant "weight" in the balancing exercise than might be the case in the armed conflict context. Third, and in a similar vein, the analysis must also ensure that valid state interests that do not have a rational connection to the state's duties to respect and ensure the right to life are assigned a minimal value — one that ensures that decision makers do not lose focus on the lives involved.

Moral Philosophy

The moral dimension of the rogue civil airliner problem was of particular importance to the German Federal Constitutional Court

[134] See Kretzmer, *supra* note 12 at 29.

in its striking down of portions of the *Aviation Security Act* in 2006.[135] Indeed, its approach to the problem was strongly rooted in the Kantian, categorical view that human lives are of incommensurable worth and in an absolutist, deontological approach that holds that nothing, even the saving of innumerable other lives, can justify the taking of even one innocent life. The practical implications of such an approach are clear in the result — namely an irreconcilable conflict in state duties, the practical resolution of which is arbitrary and capricious.

While many moral theorists continue, like the Constitutional Court did, to hew to an absolutist approach whatever the consequences, others argue that in circumstances such as the rogue civil airliner problem, where deprivations of innocent life are inevitable, the conflict can be resolved by reference to the most fundamental premise upon which Kantian deontology is built: individual free will and self-determination. In other words, "[t]he overriding value Kantian moral philosophy places on the rational autonomy of individuals does not support indifference to how many individuals survive. That would not be in harmony with the value of individual human beings whose personhood rational autonomy defines."[136]

Thus, in such a truly exceptional situation, where innocent persons will inevitably be deprived of life, there is a claim to be made in moral philosophy that a course of action that preserves the rational autonomy, dignity, and lives of more, rather than fewer, persons would be in keeping with Kant's fundamental premise.[137] If one is committed to the goal of protecting life, one must also be committed to the goal of protecting the most lives. One cannot hide behind "question-begging claims about the distinction between state actions and state omissions or between killing and letting die."[138]

Another strong moral claim, and one that is more broadly accepted than the consequentialist reading of Kant set out above, is

[135] *Dr H, supra* note 71. See Möller, *supra* note 7 at 464: "The problem of whether it is permissible to kill some in order to save others from being killed is at the centre of much contemporary debate in moral theory."

[136] Tom Stacy, "Acts, Omissions and the Necessity Killing of Innocents" (2002) 29:3 Am J Crim L 481 at 508.

[137] *Ibid* at 507-12. See David Cummiskey, "Kant's Consequentialism" 100:3 Ethics 586, which makes a similar argument. See also Blum, *supra* note 117 at 40-44.

[138] Cass R Sunstein and Adrian Vermeule, "Is Capital Punishment Morally Required?: Acts, Omissions and Life-Life Tradeoffs" (2005) 58:3 Stan L Rev 703 at 708.

made by the school of "threshold deontology," which recognizes "that at some extreme points, one cannot avoid some consequentialist analysis that would require departure from the absolute proscription" and "responds to the accusation that pure deontology would allow catastrophic outcomes for the sake of moral narcissism."[139] The approach of threshold deontology is to seek a theory that is strongly protective of life (and, for some theorists, of dignity) but that nevertheless justifies and authorizes limited departures from deontological absolutes once a particular threshold is reached. One such theory is the doctrine of double effect (DDE). This doctrine is of long-standing, deriving from St. Thomas Aquinas's writings on self-defence and just-war theory[140] and is generalized and elaborated not only by Catholic theologians but also by secular moral philosophers. It has been applied to the context of armed conflict as an analytical framework capable of resolving a number of key moral dilemmas, justifying not only killing in self-defence or the defence of others but also killings of innocent persons that are incidental to the achievement of a sufficiently important military objective.[141] DDE provides that an act that is likely to have "evil" consequences is morally permissible provided that each of the following conditions hold:

- the act is good in itself or at least indifferent;
- the direct effect of the act is morally acceptable;
- the intentions of the actors are good — that is, they aim only at the acceptable effect and the evil effect is not one of their ends, nor is it a "mere means" to their ends; and
- there is a proportionality of effects — that is, the good effect is sufficiently good to compensate for allowing the evil effect.[142]

Some describe the IHL norm of proportionality as being rooted in DDE.[143] The analytical similarities are certainly not difficult to

[139] Blum, *supra* note 117 at 43ff.

[140] See Sophie Botros, "An Error about the Doctrine of Double Effect" (1999) 74:1 Philosophy 71 at 72-73.

[141] See, eg, Joseph M Boyle, Jr, "Toward Understanding the Principle of Double Effect" (1980) 90:4 Ethics 527 at 528-29.

[142] These elements paraphrase those set out by Walzer, *supra* note 5 at 153 and 129. For an alternative formulation, see Botros, *supra* note 140 at 72-73.

[143] See, eg, Watkin, *supra* note 15 at 26. Blum, *supra*, note 117 at 40, equates IHL's norm of proportionality of effects with the doctrine of double of effect (DDE);

perceive. However, even a cursory review of current scholarly debates in moral philosophy demonstrates that DDE has proven to be a useful theoretical tool far beyond the confines of armed conflict. It plays a prominent role in many theoretical analyses of moral dilemmas, such as the well-known "trolley" and "transplant" problems that mirror many of the features of the rogue civil airliner problem,[144] including the inevitable deaths of innocent persons, *prima facie* irreconcilable conflicts between duties and claims to rights, and the requirement for an analytical framework that will assist in resolving those conflicts in a principled, rather than an arbitrary or capricious, manner.

Far from being the consequentialist "sham" that some suspect it of being,[145] DDE provides a theoretical device that, in contrast to broader "maximization of good" consequentialism, recognizes the particular weight of some moral duties and claims and provides an analytical framework to address conflicts that would, in a pure, absolutist deontology, be irresolvable.[146] As Joseph Boyle, Jr., points out in discussing the role of the doctrine in moral philosophy, a commitment to "a normative theory demanding respect for a set of basic goods" (that is, human rights) also requires a commitment

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Kretzmer, *supra* note 12 at 26, also notes the conceptual similarity. On the other hand, note that Gardam, *supra* note 119, who describes the history of the norm of proportionality in considerable detail, makes little mention of any influence of DDE in the emergence of IHL's rule.

144 In the trolley problem, a runaway trolley travels towards five people on the track in front of it, all of whom will be killed if it strikes them. However, a bystander is able to use a switch that will divert the trolley onto another track where it will only kill one person. A variation on the problem posits that there is no switch, but that the bystander can stop the trolley before it kills the five people on the track by pushing another person (sometimes a "fat person") into the trolley's path. See the description (albeit without a discussion of DDE) in Mattias Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement," in George Pavlakos, ed, *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart, 2007) 131 at 153. The transplant problem is the "fat person/trolley" problem in a different context: A doctor has five ill patients who will all die unless they receive transplanted organs. The doctor also has a healthier patient whose organs, if harvested, will save the ill patients. See Botros, *supra* note 140 at 75.

145 See Hörnle, "Hijacked Airplanes" *supra* note 75 at 592: "I doubt that this doctrine is much more than a sham to hide pockets of consequentialist reasoning in states of emergency or other situations when the consequences of deontological thinking might seem too harsh."

146 Botros, *supra* note 140 at 73, 82-83.

to a proportionality of effects approach such as that in DDE: "Otherwise respecting the goods becomes an impossibility, since any performance can — and many performances do — bring about what is contrary to one or more basic goods."[147] To put it in the terms of our rogue civil airliner problem, a commitment to the protection of the lives of innocent persons means that where a deprivation of innocent life is unavoidable, a morally principled response requires that some sort of proportionality-based, balancing approach be adopted.

Constitutional Human Rights

Building upon the work of Ronald Dworkin and based upon a study of the German constitutional order, Robert Alexy has posited an influential theory of constitutional protection of human rights that has relevance across a broad range of state constitutional orders, particularly those that have emerged in the post-Second World War era of human rights and that feature extensive guarantees of those rights.[148] The theory will appear familiar to scholars of Canadian law, who will recognize, albeit in different terms, the elements of the analysis undertaken by Canadian courts to determine whether a limit to a right protected by the *Canadian Charter of Rights and Freedoms* is reasonable and can be demonstrably justified in a free and democratic society.[149]

Alexy conceives of rights as "principles" that, according to his theory, are "optimization requirements," expressions of "ideal oughts" that are valid across the legal order as a whole but apply in a "more-or-less" fashion.[150] Within such a conception of rights, where broadly defined principles are certain to come into conflict,

147 Boyle, *supra* note 141 at 538.

148 See Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002). See also Kai Möller, "The Right to Life between Absolute and Proportional Protection" (2010) LSE Law Society and Economy Working Papers 13/2010 at 2, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620377>.

149 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1. For an elaboration of the analytical framework, see *R v Oakes*, [1986] 1 SCR 103 at paras 69-70, 26 DLR (4th) 200; *Dagenais*, *supra* note 112 at paras 92-96.

150 Alexy, *supra* note 148 at 57-66. For useful paraphrasing and summaries of the basic building blocks of the theory, see Martin Scheinin, "Terrorism and the Pull of 'Balancing' in the Name of Security," in Scheinin et al, *supra* note 39, 55 at 58; Kumm, *supra* note 144 at 136-37.

a "balancing" test based on proportionality is required as an "analytical structure for assessing whether limits imposed on the realization of a principle in the particular [factual] context are justified."[151] The balancing process weighs the importance of the competing principles to the situation at hand, favouring the "weightier" principle while also seeking to apply the other principle to the extent legally and factually possible.[152] Alexy describes a "proportionality test" that uses the following elements to analyze whether a particular limit should be permitted:

- legitimate ends — the limitation of rights must serve a legitimate objective;
- suitability — the limitation must be suitable to achieve the legitimate objective (in other words, it must be capable of achieving it);
- necessity — the limitation must be necessary to achieve the legitimate objective in that there are no other, less limiting means of achieving it; and
- balancing — there must be proportionality *stricto sensu* between the limitation's positive effects and its negative effects (that is, the costs must not clearly outweigh the benefits).[153]

The heart of the constitutional proportionality framework is the proportionality of effects analysis that Alexy calls "balancing." As Alexy conceives of it, the balancing test is flexible, allowing for different principles to be assigned different "weights" depending upon the particular circumstances in which they conflict. This is a very flexible theory, one that is capable of accounting for the different approaches to various rights and interests that are taken by the constitutional orders of different states, including even categorical approaches to particular rights that can be accounted for by assigning absolute rights an infinite weight in the balancing exercise so as to preclude any countervailing interest.[154]

[151] Kumm, *supra* note 144 at 137.

[152] This description is drawn from the work of Scheinin in summarizing and paraphrasing Alexy. See Scheinin, *supra* note 150.

[153] See generally Alexy, *supra* note 148 at 57-66. See also Möller, *supra* note 148 at 3; Möller, *supra* note 7 at 458; Kumm, *supra* note 144 at 137. McCrudden provides another useful description of the common elements among similar proportionality analyses. Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19:4 EJIL 655 at 715.

[154] See Alexy, *supra* note 148 at 102; Robert Alexy, "Thirteen Replies," in Pavlakos, *supra* note 144, 333 at 344.

Alexy's constitutional rights theory also provides a useful analogy to IHRL in that both constitutional human rights law and IHRL are concerned with the protection of similar rights and both are capable of doing so in a non-armed conflict context. Moreover, the proportionality-based constitutional and legislative approaches to the protection of human rights taken by states whose constitutional orders are reflected in Alexy's theory might be seen as providing some indication (in the form of both state practice and *opinio juris* in respect of the implementation by those states of their obligations under IHRL) of the possibility of an emerging customary IHRL acceptance of a proportionality of effects analysis where irreconcilable conflicts of state duties and individual rights claims exist.[155]

DEFINING AN IHRL NORM OF PROPORTIONALITY OF EFFECTS

The fact that constitutional rights theory, widely held theories of moral philosophy, and IHL all converge upon a similar analytical framework — proportionality of effects — as a means of resolving conflicting claims to protection of strongly held, "weighty" rights such as the right not to be arbitrarily deprived of life, along with the fact that such an approach is not limited to an armed conflict context, supports the use of such an approach to provide a satisfactory theoretical approach to the rogue civil airliner problem in a pure law enforcement context. The strongly IHRL-influenced approach to the rogue civil airliner problem that is taken by the *Harvard Manual* is perhaps the closest analogy that is available, but, as suggested earlier, some adjustments are required. A theoretical basis for these adjustments is suggested in the theories of moral philosophy and constitutional human rights discussed earlier. With these thoughts in mind, I turn to defining an IHRL norm of proportionality of effects.

[155] Both Möller and Kumm imply that Alexy's theory might be applicable in the IHRL context (at least within the *ECHR*, which, in the case of many rights, provides a clearer textual basis for "balancing" than does the *ICCPR*'s language of "arbitrary"). Such an approach also seems to be common in balancing competing rights (at least those that are susceptible to limitations or derogations) within the *ICCPR*. See *Siracusa Principles*, *supra* note 33. Scheinin, *supra* note 150 at 63, argues that because it lacks a strong central structure for review of state decisions and actions in balancing human rights principles, "international human rights law [in contrast to 'stable' constitutional systems] still needs to emphasize the existence of absolute rules that are not subject to 'balancing' against competing interests" in order to maximize the protection of individual rights on a practical level. Scheinin's approach, however, does not provide any

The "Threshold" — Triggering the Application of the Norm

Drawing on the idea of a "threshold" beyond which categorical approaches to moral or legal questions are no longer appropriate, under what circumstances should a proportionality of effects test be added to the existing IHRL framework governing the use of deadly force in a purely law enforcement context? This is a question that is closely related to the issue of whether an increase in the permissiveness of the IHRL framework might constitute the top of a "slippery slope" of other modifications to the framework that could weaken its overall ability to protect the right to life.

The existing IHRL framework that governs state uses of deadly force in a law enforcement context has proven itself to be both coherent and effective in most situations. Thus, any modification to it should be limited to what is required to achieve coherence and effectiveness in the circumstances at hand while preserving, to the greatest extent possible, IHRL's absolutist, idealistic core. This aim is achieved, *prima facie*, by limiting the application of an IHRL proportionality of effects norm to situations where the existing IHRL framework is not satisfactory — that is, where there exists a conflict between state duties to ensure and respect the right to life that arises from irreconcilable claims to that right — situations where, in other words, innocent persons will be deprived of life no matter the state's chosen course of action.

It is only when the deaths of innocent persons are inevitable, regardless of the state's course of action, that a proportionality of effects analysis should be added to the existing IHRL framework. It is only under these circumstances that the existing approaches to IHRL become incoherent, and some additional analytical framework is required.

A Proposed Formulation of the Norm

I have already suggested that, in contrast to the IHL norm of proportionality, any IHRL proportionality of effects analysis must, as IHRL itself does, place particular weight upon the right to life. However, once it has been triggered, any proportionality analysis will be ineffective if it perpetuates the theoretical shortcomings that

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alternative mechanisms to account for the irreconcilable conflicts of duties and rights claims that are inherent in situations such as the rogue civil airliner problem.

have led to its being required in the first place. Therefore, the "weight" placed on the right to life of innocent persons cannot be infinite. Any legal analysis of the rogue civil airliner problem must both accept the reality that innocent deaths are inevitable and then provide a mechanism that will assist state decision makers in choosing an appropriate course of action. To categorically assign infinite weight to human lives would, in the circumstances of the rogue civil airliner problem, simply "break the scale," so to speak, with infinite weights on both sides rendering any attempt to "balance" through a proportionality analysis nugatory and leaving the irreconcilable conflicts in place.

While the balancing analysis can (and indeed must) account for interests other than lives, the additional interests accounted for should be limited to those that are significant to the overall public interest, bearing in mind the pre-eminent weight given to the right to life by IHRL. In other words, the interests that can be given positive weight in the analysis are those that are rationally connected to the state's duty to ensure and respect the right to life. These additional interests might include environmental effects and damage to infrastructure of a sort that would have an effect upon public and individual health (as opposed to mere convenience or comfort) along with more policy-oriented concerns (also related to the protection of health and life) such as the sustaining of public confidence in the state's ability to provide security and protection of individual rights and the deterence of future incidents of similar scale and seriousness. These are all matters habitually balanced by governments in making policy decisions with legal implications and by courts in reviewing such decisions. As such, they should not pose insurmountable challenges to the effectiveness of the modified IHRL framework.

With these caveats in mind, how should the proportionality of effects norm in the particular circumstance of the rogue civil airliner in the law enforcement context be formulated? I propose the following norm:

Select a course of action that is not expected to result in incidental loss of life to innocent persons, injury to innocent persons, damage to other interests rationally connected to the protection of human life, or any combination thereof, that is excessive in relation to the anticipated concrete and direct advantages that are rationally connected to the protection of human life.

This formulation takes a neutral approach to the available courses of action both in refraining from any reference to a direct use of force and in not modifying the term "excessive" with adjectives such as "clearly" that would suggest a default position with respect to the use of force. Its focus upon "innocent" persons is a reflection of the fact that the right to life of "non-innocent" persons is already accounted for in the existing IHRL framework. The requirement that any advantages to be balanced against human life be rationally connected to the protection of human life reflects and retains the pre-eminent value placed upon human life by IHRL.

The Proposed Norm in Context

For ease of comparison, a table summarizing and comparing the existing, IHRL-based law enforcement approach to the rogue civil airliner with both the *Harvard Manual*'s armed conflict approach and the proposed law enforcement approach, which includes my proposed addition of the proportionality of effects analysis, is set out in Table 1. While Table 1 compares the three legal frameworks in respect to what I have called the operationally relevant norms of IHL and IHRL, it must also be understood that my proposal does not modify any of the other norms of the existing IHRL framework. Thus, any use of deadly force against a rogue civil airliner in a law enforcement context must also be authorized by law and subjected to an effective investigation.

Practical Challenges in Application of the Norm

The mere acceptance of a modified legal framework leaves unaddressed a number of issues that will arise in most, if not all, real world manifestations of the rogue civil airliner problem. While I will introduce some of these issues in the following discussion, their potential variations are infinite and will depend upon the particular factual circumstances of each case. My point in introducing them is not to resolve them — this challenge will have to wait until actual situations with actual facts arise. The modified framework that I advocate provides a framework within which these issues can be raised and analyzed — a framework that would not otherwise exist.

The first set of issues that will arise in any "real world" rogue civil airliner incident is that of dealing with "prognostic difficulty" — that is, how the state authorities "will be able to know with sufficient certainty the factual foundation" for any decision-making

Table 1
Comparison of Legal Frameworks

Existing IHRL	*Proposed IHRL*	*Existing IHL (Harvard Manual)*
Distinction: Distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury, or a threat of committing a particularly serious crime involving a grave threat to life and persons who do not present such a threat and use force only against the former.	*Distinction:* Distinguish between ordinary civil aircraft and rogue civil aircraft. Direct attacks only against rogue civil aircraft that constitute a grave and imminent threat of death or serious injury.	*Distinction:* Distinguish between ordinary civil aircraft and those that have become military objectives (rogue civil aircraft). Direct attacks only against the latter.
Necessity: Employ deadly force only when absolutely necessary to protect life.	*Necessity:* Employ deadly force against a rogue civil airliner only if no other method is available to protect the life of persons on the surface.	*Necessity:* Attack a rogue civil airliner only if "no other method is available for exercising military control."
Precaution in Using Force: Take all feasible precautions to avoid and in any event minimize the use of force.	*Precaution in Using Force:* Take all feasible precautions to avoid the use of force.	*Precaution in Using Force:* Take all feasible precautions to avoid the use of force.
Precaution in Amount of Force: Take all feasible precautions to avoid and in any event minimize death or injury to innocent persons (ECtHR only)	*Precaution in Amount of Force:* Take all feasible precautions to avoid and in any event minimize collateral damage.	*Precaution in Amount of Force:* Take all feasible precautions to avoid and in any event minimize collateral damage.

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◀ Table 1
COMPARISON OF LEGAL FRAMEWORKS

Existing IHRL	*Proposed IHRL*	*Existing IHL (Harvard Manual)*
Proportionality of Force: Use only force that is strictly proportionate to the threat and the legitimate objective to be attained.	*Proportionality of Force:* Use force against a rogue civil airliner if the circumstances are "sufficiently grave to justify an attack."	*Proportionality of Force:* Use force against a rogue civil airliner only if the circumstances are "sufficiently grave to justify an attack."
Proportionality of Effects: not applicable	*Proportionality of Effects:* Where, regardless of the state's course of action, both using and refraining from using deadly force will foreseeably result in casualties to innocent persons, select a course of action that is not expected to result in incidental loss of life to innocent persons, injury to innocent persons, damage to other interests rationally connected to the protection of human life, or any combination thereof that is excessive in relation to the anticipated concrete and direct advantages that are rationally connected to the protection of human life.	*Proportionality of Effects:* In any event, refrain from carrying out an attack where the expected collateral damage would be excessive in relation to the military advantage anticipated.

exercise.[156] As indicated earlier, for the purposes of developing my analysis, I have assumed the extreme case — that without state intervention, the person in effective control will, in fact, crash the aircraft into his or her target. Such a degree of certainty will be impossible to replicate in any "real world" case. The existence of an additional analytical tool such as the proportionality of effects test will not change this issue. Nor will it provide certainty as to the effects of a successful rogue civil airliner attack. Thus, while the likely success and incidental effects of a state use of deadly force against the rogue civil airliner can be divined with some degree of confidence (although not in respect of damage likely to be caused by the aircraft's wreckage on the surface),[157] decision makers will always be faced with considerable uncertainty as to the intention of the persons in effective control of the aircraft and of the effects if they are successful in perpetuating their attack.

An additional set of issues will also be inherent in any rogue civil airliner situation — that is, how to value the lives of the persons affected by it. For instance, are the lives of the innocent passengers and crew to be given a lower weight in the balancing exercise because they are expected to die in any event? Such an approach would be problematic from both a fundamental philosophical perspective (in that human lives are of inestimable value regardless of their quality or anticipated duration) and from a practical one (in the sense that if the persons in effective control intend only to perform a "low pass" over the apparent target area, shooting the aircraft down will result in death and destruction that would have been unnecessary, while refraining from stopping an eventually successful attack could have the effect of undervaluing the lives of persons on the surface). Further, what number of immediate deaths and what degree of other effects on the surface that are related to the right to life will justify shooting down the aircraft?[158] In the

[156] Bohlander, *supra* note 75 at 583.

[157] The group of experts that drafted the *Harvard Manual*, *supra* note 6, could not agree on whether to account for such damage in applying the IHL rule of proportionality to the shooting down of an aircraft. The majority rejected such an accounting as impractical, but they conceded that some exceptional circumstances might warrant considering the potential for collateral damage on the surface, such as where the state has air supremacy and can choose the time and place of an attack on an airborne aircraft. See Section G(III), commentary to chapeau at para 4, commentary to rule 68(d) at para 3.

[158] For another description of the situation, see Kumm, *supra* note 144 at 156, n 58. See also Hörnle, "Shooting Down a Hijacked Plane," *supra* note 75 at 121-22,

extreme case, does preventing a single death on the surface justify shooting down the aircraft (since those on board will die in either event)? What if that person is a particularly important individual, a political leader or a scientist possessing irreplaceable knowledge?[159]

The weighing of various interests, particularly the lives of the persons on each side of the rogue civil airliner problem, is not simple: it is complex and requires that a large number of factors be assimilated and analyzed. In any rogue civil airliner situation, the factors of time and space will play a significant role. A decision will have to be made quickly and likely without all of the information that might be desirable. And a decision cannot be avoided. Given the consequences, a non-decision (or a non-timely decision) is, in effect, a decision. The elements and interests implicated in the rogue civil airliner problem, therefore, must be analyzed in as much detail as possible before an actual incident occurs. Decision makers must understand the policy, legal, and operational landscapes. Exercising the various operational response and communications mechanisms that are available in order to identify and rectify shortcomings is also necessary to ensure that decision makers, those who advise them and those who execute their decisions can focus their attention and efforts on the specific circumstances of each incident.[160]

The manner in which decision makers address these issues is of some importance since, in the law enforcement context, any deaths caused by a state use of deadly force must be the subject of an effective investigation within the state. It seems reasonable to conclude that the requirement of an investigation will have a positive influence upon state decision makers from the perspective of protecting human rights. A decision maker "who is aware that his actions will be monitored after the fact is likely to take care that he gives due

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for a brief discussion of different approaches to valuing the lives of those aboard the aircraft and their apparent relationship to different legal traditions.

159 An example from an entirely different context may clarify this point. In an article that analyzes empirical evidence suggesting that eighteen lives were saved for every state execution of a convicted murderer, Sunstein and Vermeule suggested that this ratio (where eighteen lives could be saved by ending one) might represent a threshold at which execution might be not merely morally justified but morally required. Sunstein and Vermeule, *supra* note 138 at 719, 727. See also Blum, *supra* note 117 at 60-62.

160 These sort of exercises do, in fact, appear to take place on a regular basis. See, eg, Mellow, *supra* note 4, and Dan Elliott, "Russia, U.S. Chase Jet in Hijack Drill," *Associated Press* (9 August 2010), online: MSNBC<http://www.msnbc.msn.com/id/38628835/ns/world_news-europe/t/russia-us-chase-jet-hijack-drill/>.

consideration to all possibilities when reaching a decision."[161] Since there are no objectively correct ways in which to respond to a particular rogue civil airliner situation, it is impossible for any investigation, tribunal, or other state to judge the lawfulness of the ultimate result. The best that can be done is to investigate and judge the decision-making process.[162]

POSSIBLE ALTERNATIVE APPROACHES

Before concluding, I will consider briefly whether alternative approaches might provide a satisfactory framework for considering the rogue civil airliner problem. The two clearest possibilities both involve retaining, without changes, the existing IHRL framework and using different mechanisms to resolve the conflict of irreconcilable duties and claims to the right to life.

Political Question

One alternative is to accept that the legal conflict between state IHRL duties in respect of the lives of the innocent persons on board the rogue civil airliner and the lives of the innocent persons on the surface is one that cannot be resolved by the law and to choose a course of action on the basis of political and moral factors alone. Assuming that there is no factual basis to claim that another framework of international law applies (that is, there is no armed attack and no armed conflict), the state employing this first alternative might support its choice before the international community on a number of bases, each employing some element of legal reasoning. The state might simply argue that the conflict in duties indicates that the appropriate approach to resolving the problem is a political one — one with which the law should not concern itself.[163] As a matter of law, the point seems to be easier to make in the context of a domestic legal system. Indeed, some legal systems do admit doctrines of "political questions" or "non-justiciability" in certain

[161] Cohen, *supra* note 69 at 32.

[162] *Ibid* at 30-31.

[163] See Milanović, *supra* note 85, particularly at 477-81; Miguel Beltran de Felipe and Jose Maria Rodriguez de Santiago, "Shooting Down Hijacked Airplanes? Sorry We're Humanists: A Comment on the German Constitutional Court Decision of 2.15.2006, Regarding the Luftsicherheitsgesetz (2005 Air Security Act)" (2007) Berkeley Electronic Press 1983 at 21-25, online: Berkeley Electronic Press <http://law.bepress.com/expresso/eps/1983>. See also McCrudden, *supra* note 153 at 715.

circumstances.[164] As a matter of practicality, it seems less likely to be persuasive in the context of international law regulating the relations between sovereign states or in the context of obligations *erga omnes*.

Internationally, the state might assert that law enforcement is a matter that is essentially within its domestic jurisdiction — a purely internal matter. This argument operates on a political level seeking to convince other states to forego claims of a legal nature. It may, indeed, prove to be effective, depending upon a number of factors, including, for example, the number of foreign citizens affected by a particular rogue civil aircraft situation and its outcome. Outcomes that might be expected to be of greater concern to foreign states include those where the rogue civil airliner is shot down and contains a large number of foreign citizens (states may be more willing to accept deaths of their citizens that can be attributed to criminal acts of the persons effectively in control of the aircraft than those that are attributable to the state shooting the aircraft down) or where the attack is successful but causes widespread environmental damage affecting other states.[165] Both general international law and the *ICCPR* impose particular obligations upon the state, and acts or omissions of the state that breach those obligations entail state responsibility at international law.[166] If foreign states pursue claims of international responsibility, a more nuanced response is required.

Circumstances Precluding International Responsibility

A second alternative would involve an assertion by the state of a circumstance such as distress or necessity, which would preclude

[164] Eg, *Baker v Carr*, 369 US 186 at 210-11 (1962). Where a determination of constitutionally protected human rights is at stake, see, cf, *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at paras 51-68 (Wilson J.) and para 38 (Dickson J.), 18 DLR (4th) 481.

[165] See, eg, *Trail Smelter Case (United States v Canada)* (1938 and 1941), III UNRIAA 1905.

[166] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, contained in *Report of the International Law Commission, Fifty-Third Session*, UN ILC, 56th Sess, Supp No 10, UN Doc A/56/10 (2001), ch IV.E.1, arts 1-3 [*Draft Articles on Responsibility*]. The issue that seems more likely to arise as a result of a rogue civil airliner problem is not whether there is state responsibility for a breach of an international obligation undertaken pursuant to the *ICCPR* but, rather, whether another state would raise the issue in an international dispute resolution forum.

its being held internationally responsible.[167] The pleas of distress and necessity both present specific difficulties, however. While the claim of distress, on its face, seems to require only that there be "no other reasonable way … of saving … the lives of … persons entrusted to the … care" of the author of the otherwise internationally wrongful act,[168] most cases where distress has been claimed have involved breaches of sovereignty by aircraft or ships due to threats to life caused by bad weather or mechanical failure.[169] Moreover, the claim requires a "special relationship" of responsibility between the author of the act and the persons in danger that appears to go beyond the general duty of state agents to protect all persons subject to the state's jurisdiction and, thus, does not extend to "more general cases of emergencies, which are more a matter of necessity than distress."[170]

The possibility of a claim of necessity as a circumstance precluding wrongfulness is somewhat more intriguing. The claim of necessity acts as a justification or excuse for acts or omissions "where there is an irreconcilable conflict between an essential interest [of the state] on the one hand and an [international] obligation … on the other,"[171] and the act or omission "is the only way for the State to safeguard an essential interest against grave and imminent peril."[172] The difficulty in asserting such a claim with respect to the rogue civil airliner problem is that it involves not simply a conflict between an essential interest and an international obligation but, rather, conflicts between two interests that might be seen to be essential to the state (the right to life of those persons on board the aircraft and the right to life of those on the surface) and between two international obligations (to ensure and respect the right to life of each group of individuals). Necessity provides the state with a justification for an act or omission that breaches an obligation in international law under circumstances where the requirements of international law are inconsistent with the social and political reality of a particular

[167] See, eg, the discussion of such possibilities in Darren C Huskisson, "The *Air Bridge Denial Program* and the Shootdown of Civil Aircraft under International Law" (2005) 56 AFL Rev 109 at 152-54 (dealing with distress), 154-63 (dealing with necessity).

[168] *Draft Articles on Responsibility, supra* note 166, art 24.

[169] *Ibid*, commentary to art 24 at paras 2, 5.

[170] *Ibid* at para 7.

[171] *Ibid*, commentary to art 25 at para 2.

situation. It is not clear that it provides a justification for a choice between competing obligations.

In any event, two other arguments militate against reliance on either distress or necessity in preference to adopting a proportionality of effects approach within the existing IHRL framework that governs the use of deadly force in the law enforcement context. The first is that the nature of the international obligation that is primarily at stake in the rogue civil airliner problem may either preclude a claim of necessity or render it superfluous. The wrongfulness of an act or omission that violates a peremptory norm of general international law — part of *jus cogens* — cannot be excused or justified under any circumstances.[173] There are some who assert that the right to life (and the state's obligation to ensure and respect that right) form part of *jus cogens*, although the particular substantive content of the *jus cogens* right and duty is not clear.[174] This would appear to leave open three possibilities in the context of the rogue civil airliner problem. The first is that the act or omission breaches *jus cogens*, in which case neither distress nor necessity is available as a justification or excuse. The second is that the act or omission breaches neither *jus cogens* nor any of the substantive content of the obligation to ensure and respect the right to life that is legally binding but resides outside of *jus cogens*, in which case there is no need to resort to a justification or excuse. The third is the only possibility in which a plea of necessity as a circumstance precluding responsibility is available, and it arises where there is no breach of *jus cogens* but a breach of an international obligation nonetheless. Thus, while distress and necessity may remain relevant to an analysis of the situation, they may play less of a role than might have been expected.

[172] *Ibid*, art 25(1)(a).

[173] *Ibid*, art 26.

[174] See Ramcharan, *supra* note 25 at 14-15, making the argument that the right to life, "subject to certain controlled exceptions" (which presumably fall within the scope of "non-arbitrary"), is part of *jus cogens*. See also *General Comment no. 29: States of Emergency (Article 4)*, UN Human Rights Committee, 72nd Sess, UN Doc CCPR/C/21/Rev.1/Add.11(2001) at para 11. While the negative duty might be sufficiently well defined to allow for legal debate as to whether it has been breached and whether it is of peremptory character, the extent of the state's positive duties is considerably less certain. Thus, it seems premature at least to claim that there is any clearly defined right to life in *jus cogens*. It seems that the most that might be said is that some of the specific use of force obligations that define the negative aspect of the right form part of customary international law.

The second and more important argument is that invoking circumstances precluding wrongfulness still requires a legal analysis of the situation. Indeed, both distress and necessity can both only be invoked where there exists a proportionality of effects. A claim of distress cannot be made where the otherwise wrongful act or omission is "likely to create a comparable or greater peril" than the situation of distress to which it responds.[175] Indeed, the ILC's commentary to its *Draft Articles on Responsibility of States for Internationally Wrongful Acts* argues that "[d]istress can only preclude wrongfulness where the interests sought to be protected … clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress."[176] Similarly, the requirement that an act or omission in respect of which necessity is invoked "not seriously impair an essential interest of the State or States towards which the obligation exists, or the international community as a whole"[177] is said to require that "the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective."[178]

The point to be made here is that the sort of legal analysis that must be carried out in contemplation of any claim of distress or necessity in regard to a rogue civil airliner in the law enforcement context will strongly resemble the sort of analysis that will be required under the IHRL-centred approach that I have proposed. Even if distress or necessity is claimed, international obligations can only be breached to the extent required by the circumstances, which implies conditions additional to those that the act or omission be necessary and proportionate, such as the taking of all feasible precautions to avoid, and in any event minimize, wrongful acts and omissions and their effects. Applied to its fullest extent, pleading a circumstance precluding wrongfulness would seem to require that the state carry out, in full, the legal analysis that would be required under my proposed norm of proportionality of effects.

[175] *Draft Articles on Responsibility*, *supra* note 166, art 24(2)(b).

[176] *Ibid*, commentary to art 24 at para 10.

[177] *Ibid*, art 25(1)(b).

[178] *Ibid*, commentary to art 25 at para 17.

The foregoing discussion is not an outright rejection of pleas of distress or necessity as an alternative approach to addressing the legal dimension of the rogue civil airliner problem in a law enforcement context. It is, rather, a recognition that adopting this approach may have only minimal impact (if any) on the sort of legal analysis that will be required in assessing a state's operational response to a rogue civil airliner situation. There is one important legal distinction between the approaches, however. Under a distress/necessity approach, there is no substantive change to the existing IHRL framework governing the use of deadly force by the state in a law enforcement context. By its acts or omissions, the state breaches an international law obligation to ensure and respect the right of innocent persons not to be arbitrarily deprived of life, but, at the same time, it excuses or justifies its acts or omissions through a claim of distress or necessity. Thus, the idealism of IHRL is (apparently) preserved, although with a recognition that states may attempt to escape responsibility for their breaches of its idealistic, absolutist values.

Under my proposed approach, there is a substantive change to IHRL, in that there is an expansion of what constitutes a non-arbitrary deprivation of life — although under very limited, prescribed circumstances. This approach to the rogue civil airliner problem is more realistic and respectful of the rule of law. The rogue civil airliner problem is one of a small set of realistically foreseeable circumstances under which the state cannot abdicate its responsibilities and accept an irreconcilable conflict in its international law duties. Given that the possibility of a rogue civil airliner is one that has now been recognized (and, indeed, there is sufficient information available to support a presumption that, at the very least, some states will not, in practice, reject out of hand the possibility of shooting down a rogue civil airliner), respect for the rule of law favours the development of a principled yet effective legal analytical framework within substantive IHRL rather than a premeditated and standing intention to breach an international obligation while invoking a circumstance precluding responsibility.[179]

Some would surely argue that IHRL must retain an idealistic, pacifist approach to individual rights and resist any acceptance of

[179] See Victor V Ramraj, "Between Idealism and Pragmatism: Legal and Political Constraints on State Power in Times of Crisis," in Goold and Lazarus, *supra* note 46, 185 at 189. The idea is one introduced by David Dyzenhaus.

deaths of innocent persons that are incidental to state uses of force.[180] However, if IHRL norms are to be universally respected and effectively implemented, there must be some degree of practicality to them — they must respond to and reflect social reality.[181] Otherwise, they risk irrelevance. Thus, "it might be better to have *some* rules which are effective than rules which satisfy our moral intuitions but are honoured only by their breach."[182]

Conclusion

The addition of a proportionality of effects analysis to the existing IHRL framework governing state uses of deadly force in a law enforcement context provides a modified framework within which to consider the rogue civil airliner problem that is principled, effective, and in line with the rule of law and with human rights — a framework, in other words, that is satisfactory. The modified framework is principled in that it accounts, under the circumstances where the proportionality of effects norm is intended to apply, for the reality that any state course of action will result in the deaths of innocent persons and provides a legal mechanism that can contribute effectively to the state's decision-making process. It is impossible under such circumstances to maintain an idealistic "purity" in IHRL and ignore the conflicting rights claims and duties that arise from categorical approaches. Such an approach is naive, irrational, and ultimately unprincipled since it deprives the decision maker of any legal analytical framework and results in the choice of a course of action that is based purely on extra-legal factors.

The modified use of force approach is effective because it accounts for the reality that some states are prepared, in appropriate circumstances, to consider shooting down a rogue civilian airliner, yet

[180] See Schabas, *supra* note 85.

[181] See Lon L Fuller, "Human Interaction and the Law" (1969) 14 Am J Juris 1 at 27.

[182] Milanović, *supra* note 85 at 479. See also Heiner Bielefeldt, "Philosophical and Historical Foundations of Human Rights," in Caterina Krause and Martin Scheinin, eds, *International Protection of Human Rights: A Textbook* (Turku/Abo: Abo Akademe University Institute for Human Rights, 2009) 3 at 8-9. Kretzmer, *supra* note 12 at 27, also rejects, in very strong terms, an IHL-like proportionality of effects rule in IHRL: "[A] *rule*, which makes it lawful in advance to use force with the full knowledge that innocent persons will be killed or injured if their death or injury is not excessive in relation to the anticipated advantage of using that force" [emphasis in original].

provides them with a rational, legal framework within which to make decisions. The "balancing" approach that I propose is one that is accepted by IHL, constitutional human rights theory, and moral theory. It has proven to provide an effective analytical framework within each of these fields and brings with it a rich body of theoretical scholarship and practical application that can assist state decision makers.

The proposed framework is also consistent with the rule of law. By providing a legal framework for decision making, it ensures that state decision making is based upon something more than extra-legal factors and provides protection against decisions that are arbitrary and capricious. The proportionality of effects test itself is flexible, allowing for adjustment of the weight assigned to particular interests under particular circumstances. As such, it is able to account for different state approaches to such individual interests as human dignity and the right to life. The addition of a proportionality of effects analysis under the limited circumstances proposed in no way modifies the procedural protections that already exist under the IHRL framework. Any course of action in response to the rogue civil airliner problem must be authorized by law, and any use of force that results in a deprivation of life must be the subject of an effective investigation.

Finally, the addition of a proportionality of effects analysis to the existing framework is consistent with human rights. This conclusion is, to some extent, a matter of definition. It is inherent in the rogue civil airliner problem that lives will be lost. An individual is only deprived of a protected right, however, if he or she is deprived of life arbitrarily. The modification of the existing IHRL framework governing the use of deadly force also modifies the conditions under which a deprivation of life is permitted by IHRL as not being arbitrary. This acknowledgement would seem to be entirely consistent with the apparent intention of the drafters of the *ICCPR* when they decided to adopt the more flexible language of "arbitrary" in describing the limits of the right to life. While it is important not to weaken IHRL's strong rights protections in a manner that would lead to them becoming less relevant and/or less protective under other circumstances, such a concern can be addressed by strictly limiting the circumstances in which the proportionality of effects analysis is admissible.

The proposed framework is consistent with human rights on a broader level as well. By considering the rights of all individuals

implicated in the problem, a balancing approach respects and values their lives in a manner that a less principled, more arbitrary decision-making process would not. It at least does them the dignity of considering whether there exists any benefit that can justify their foreseeable deaths. Moreover, where it is accepted as inevitable that some persons will be deprived of life, the addition of a proportionality of effects analysis provides more "granularity" to the decision-making process. It allows a more nuanced assessment and fills the analytical gap created by the possibility that even though all of the other use of force norms are complied with, the deleterious effects of a course of action will still be excessive in comparison with the salutary effects.

The proposed test should not be seen as being simple window dressing to justify a decision to shoot down a rogue civil airliner. That is not its intent. The intent behind the proposal is to provide a tool for the legal analysis of the problem — one that neither provides conflicting results depending upon the group of individuals to which it is applied nor predetermines the outcome of the political, moral, and legal dilemma facing the state. Nor should the proposal be seen as an attempt to weaken human rights protections in a law enforcement context. Rather, it should be seen as advocating limited modification to a generally satisfactory legal framework that will bring increased coherence to that framework's approach to a particular set of factual circumstances.

The proportionality of effects norm that I propose is not perfect, but there is no perfect solution (legal or otherwise) to the rogue civil airliner problem. The addition of the norm to the existing IHRL framework governing state uses of deadly force in a law enforcement context does, however, provide decision makers (and their legal advisors) with a more flexible, nuanced analytical framework than would otherwise be available — one that allows a possible basis for resolution of what would otherwise be irreconcilable conflicts in the state's duties to respect and ensure the right to life arising from irreconcilable claims to that right. To refuse to consider such a balancing approach — one that incorporates an analysis of the proportionality of effects — is to deprive IHRL of a useful tool — one that is ultimately protective of the sanctity of human life.

Sommaire

L'avion de ligne civil dévoyé et le droit international de la personne: un argument pour une analyse de la proportionnalité des effets dans le cadre du droit à la vie

Les approches théoriques actuelles du droit international de la personne en ce qui a trait à l'obligation de l'État de respecter et garantir le droit de ne pas être arbitrairement privé de la vie ne fournissent pas un cadre analytique adéquat pour traiter du problème d'un avion de ligne civil dévoyé — un avion avec des passagers civils mais sous le contrôle effectif d'un ou plusieurs individus qui ont l'intention d'utiliser l'avion lui-même comme une arme contre des personnes ou des immeubles à la surface. Une approche plus utile est fournie par l'ajout d'une norme de proportionnalité des effets, par analogie à celles qui ont été développées dans le cadre du droit international humanitaire, la philosophie morale moderne et le droit constitutionnel des droits de la personne. Cette norme supplémentaire s'appliquerait seulement où il y a un conflit irréconciliable entre les devoirs de l'État à l'endroit du droit à la vie qui découle du fait que tous les cours d'action disponibles à l'État se traduiront en la mort de personnes innocentes.

Summary

The Rogue Civil Airliner and International Human Rights Law: An Argument for a Proportionality of Effects Analysis within the Right to Life

Existing theoretical approaches to international human rights law governing the state's duty to respect and ensure the right not to be arbitrarily deprived of life fail to provide a satisfactory analytical framework within which to consider the problem of a rogue civil airliner — a passenger-carrying civil aircraft under the effective control of one or more individuals who intend to use the aircraft itself as a weapon against persons or property on the surface. A more satisfactory approach is provided by the addition of a norm of proportionality of effects that is analogous to those that have been developed within the frameworks of international humanitarian law, moral philosophy, and modern constitutional rights law. This additional norm would apply only where there is an irreconcilable conflict between the state's duties in respect of the right to life such that all of the courses of action available will result in innocent persons being deprived of life.