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What Happens When the Prosecutor Is the War Criminal?

By Rachel E. VanLandingham & Geoffrey S. CornFebruary 14, 2020

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The ICC prosecutor's recommendation to prosecute Israeli and Palestinians for war crimes allegedly committed in Gaza and the West Bank distorts international law and undermines the purpose of the ICC.

The prosecutor for the International Criminal Court (ICC) is exploiting the largely unlimited power of her office. Her recent decision to recommend that Israelis face international prosecution for alleged war crimes, besides constituting an abuse of her discretion, will reverberate far beyond the Middle East, and should be highly unsettling to all nations with professional militaries who strive to follow the law.

Both Israel and the United States refused to join this international court because of the concern (now validated) of prosecutorial abuse of discretion. Ironically the United States was an early and strong proponent of a permanent international tribunal. The need to provide an international backstop against blatant impunity for the worst of the worst war criminals – most notably when their governments were unable or unwilling to impose such accountability – motivated this support.

This conception of limited ICC jurisdiction is baked into the Rome Statute, which provides that states, *not* the ICC, shoulder the primary responsibility for ensuring accountability. Accordingly, the ICC jurisdiction should be invoked *only* when there is a credible basis to conclude that the relevant member state is unable or unwilling to pursue meaningful accountability efforts. Nonetheless, the U.S. ultimately concluded the court's foundational treaty, the Rome Statute, vested too much power to the prosecutor to decide when domestic accountability efforts are insufficient. This created a risk the ICC Prosecutor would pursue ICC prosecution even after the state's investigatory and disciplinary response satisfied high standards of credibility, thereby transforming the ICC from a backstop tribunal to the primary war crimes prosecution venue.

This concern is now playing out. Because the ICC charter's prosecutorial obligation to defer to credible domestic criminal systems lacks any real enforcement mechanism, the current prosecutor can easily claim she legitimately invoked the Court's jurisdiction. But the objective facts indicate otherwise. The U.S., and especially ICC member states, should, therefore, be deeply disturbed by this assertion of jurisdiction – because if the Israeli military and civilian criminal justice system is assessed as sufficiently defective to justify ICC jurisdiction, it is difficult to imagine what system would be deemed "good enough."

There is really no credible basis for concluding that Israel's internal accountability systems are so defective that international intervention is necessary. Indeed, in some ways, these systems may be more effective than the U.S. counterpart, given that Israeli military commanders do not have the final say on who gets prosecuted (not to mention that its head of state isn't in the practice of pardoning convicted war criminals).

Dismissing the credibility of Israel's internal accountability systems – systems the ICC's own charter ostensibly prizes – not only indicates prosecutorial abuse. The assertion that there is credible evidence that Israeli military personnel committed serious war crimes during conflict in Gaza also reflects either a troubling misunderstanding or deliberate distortion of the law of armed conflict, one that reinforces a flawed methodology in assessing international law compliance during combat operations.

The Prosecutor's conclusion seems to be primarily "effects-based", one based on the assumption that the deadly and destructive consequences of combat operations *ipso facto* indicate the commission of war crimes. This is inconsistent with the type of careful and deliberate evidence assessment expected of any prosecutor entrusted with the discretion to allege war crimes. This is why all professional armed forces should be troubled that the Prosecutor appears to assume that the destructive effects of combat provide *prima facie* indications of war crimes. Combat effects alone rarely provide sufficient evidentiary significance to justify aggressive assertions of international war crimes jurisdiction. Instead, the critical inquiry is *why,* under the circumstances prevailing at the time, those effects were produced. That is an extremely complex question to answer and one that depends on information within the hands of those conducting the attack. While attack effects are certainly probative of legal compliance, they are rarely dispositive.

Nonetheless, after receiving extensive access to IDF information during her preliminary investigation – information that almost certainly revealed the intensely complex nature of the battlefield judgments and the extensive efforts implemented by the IDF to ensure LOAC compliance – the Prosecutor still decided that there was enough evidence to justify alleging war crimes. While the Prosecutor may not like the legal framework she is obligated to apply to determine criminality, she is not free to simply ignore it. Bluntly put, the law tolerates incidental injury and destruction during hostilities, and demands of decision-makers not that their attack judgments are always perfect, but that they are reasonable. By that touchstone, it is difficult to understand the conclusion that evidence justifies invoking the extraordinary jurisdiction of the ICC.

This jurisdictional precedent for invoking supra-national criminal court is disturbing. The armed forces of both ICC states and others, like the U.S., may find themselves facing ICC indictment even when the evidence of a violation is dubious and when their internal military disciplinary and criminal accountability process is credible. Invoking jurisdiction in such situations reflects a usurpation of what the Rome Statute indicates is a primary *state* responsibility, even more troubling, when that invocation of jurisdiction involves complex battlefield decisions with all their inherent uncertainty based on the invalid assumption that attack effects provide sufficient evidence of criminality.

Finally, this was all made possible only because the Prosecutor not only decided Palestine was a State, but its precise borders. Her summary resolution of this intractable issue – one that has defied diplomatic resolution for decades – reflects the extent of her willingness to stretch the discretion of her office to unjustifiable lengths. This is why other nations, to include ICC member States, should be deeply concerned about this development.

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UNTYING THE GORDIAN KNOT: A PROPOSAL FOR DETERMINING APPLICABILITY OF THE LAWS OF WAR TO THE WAR ON TERROR

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One of the most difficult legal questions generated by the United States' proclaimed Global War on Terror is how to determine when, if at all, the laws of war apply to military operations directed against nonstate actors. This question has produced a multitude of answers from scholars, government officials, military legal experts, and even the Supreme Court of the United States.[1] The

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1. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 558, 625–31 (2006) (determining when law of war applies to military operations directed against nonstate actors), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w), *as recognized in* Boumediene v. Bush, 476 F.3d 981, 985 (D.C. Cir. 2007); JENNIFER ELSEA, CONG. RESEARCH SERV., ORDER CODE RL31191, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS, at CRS-10 to CRS-16 (2001), *available at* http://fpc.state.gov/documents/organization/7951.pdf (analyzing whether September 11th attacks triggered law of war); Sean D. Murphy, *International Law, the United States, and the Non-Military 'War' Against Terrorism*, 14 EUR. J. INT'L L. 347, 359–61 (2003) (discussing U.S. government's attempts to "avoid the application of standard US and international due process norms" when dealing with suspected terrorists); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and*

varied responses to this question are almost certainly attributable to the reality that the criterion for determining when the law of war applies to any given military operation is based on an assumption that armed conflicts will occur either between the armed forces of states or between state armed forces and internal dissident groups.[2] Prior to the terror attacks of September 11, 2001 and the military response they triggered, the application of this body of law to military operations directed against nonstate entities outside the territory of the responding state had not been seriously contemplated. Both proponents and opponents of application of the laws for war to this struggle relied on this law-triggering paradigm, derived from articles 2 and 3 of the four Geneva Conventions of 1949.[3] This merely revealed that characterizing the "war on terror" according to this state-centric paradigm was like putting a proverbial square peg into a round hole.[4] While from a lay perspective it may seem that resolving such a question is like dancing on the head of a pin, the resolution has profound consequences for virtually every person involved in or impacted by this "war."

Ironically, this state-centric law-triggering paradigm emerged as one of the most significant post-World War II ("WWII") advances in the laws of war. From 1949 through 2001, this paradigm evolved into almost an article of faith among the international legal and military community. Accordingly, military operations were subject to this body of international legal regulation only when the situation satisfied certain law-triggering "criteria."[5] This paradigm became so pervasive that at least one major military power felt compelled to establish military policy requiring compliance with the "principles" of this law during military operations that did not satisfy this triggering paradigm, a situation that became increasingly common following the end of the Cold War.[6]

Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions, 79 NOTRE DAME L. REV. 1335, 1340–43 (2004) (same). *See generally* Derek Jinks, *The Applicability of the Geneva Conventions to the "Global War on Terrorism,"* 46 VA. J. INT'L L. 165 (2005); Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443 (2007) (discussing how war against terrorist networks such as al Qaeda could impact nature of existing war conventions).

2. *See* Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U. L. REV. 53, 57–61, 63–65 (1983) (explaining norms determining armed conflict and status of combatants).

3. *See* Geoffrey S. Corn, Hamdan, *Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 323–25, 329 (2007) (noting how both President Bush and Supreme Court relied on Common Articles 2 and 3 to reach opposite conclusions about applicability of Geneva Conventions to post-9/11 conflict).

4. *Id.* at 329.

5. *See id.* at 300–10 (discussing use of Geneva Convention triggers for determining whether laws of war apply).

6. *See, e.g.*, U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE DIRECTIVE NO. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf (mandating that "[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations"); *see also* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJSCI 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR

The utility of this paradigm was, however, truly thrown into disarray as the result of the events of September 11, 2001. President Bush characterized the terror strike against the United States as an "armed conflict,"[7] and he and the Congress of the United States almost immediately invoked the war powers of the nation to respond to the threat presented by al Qaeda, a nonstate entity operating throughout the world.[8] This characterization was embraced not only by the United Nations Security Council,[9] but also by the North Atlantic Treaty Organization[10] and others.[11] Since that time, the executive branch has struggled to articulate, and in many judicial challenges defend, how it could invoke the authorities of war without accepting the obligations of the law regulating war.[12] Unfortunately, responding to such questions by application of the traditional law-triggering paradigm was like fitting a square peg into a round hole.[13]

PROGRAM para. 4(a) (2007), *available at* http://www.dtic.mil/cjcs_directives/cdata/unlimit/5810_01.pdf (using same words as Directive to describe when armed forces are to "comply with the law of war").

7. Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

8. *See* Jayshree Bajoria, *al-Qaeda (a.k.a al-Qaida, al-Qa'ida)*, CFR.ORG, Apr. 18, 2008, http://www.cfr.org/publication/9126/ (discussing origins, structure, and goals of al Qaeda).

9. *See* S.C. Res. 1373, pmbl., U.N. Doc. S/RES/1373 (Sept. 28, 2001) (calling for international response to "terrorist attacks"); S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (condemning September 11th attacks as "threat to international peace and security").

10. *See* Press Release, N. Atl. Treaty Org., Statement by the North Atlantic Council (Sept. 12, 2001), *available at* http://www.nato.int/docu/pr/2001/p01-124e.htm (stating that if 9/11 attacks were "directed from abroad against the United States," such terrorist attacks would constitute "armed attack" requiring international response).

11. *See* Steven R. Ratner, Jus ad Bellum *and* Jus in Bello *After September 11*, 96 AM. J. INT'L L. 905, 909–10 (2002) (collecting responses from other organizations).

12. *See generally* Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, U.S. Dep't of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), *available at* http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf (containing executive branch's analysis and conclusion that al Qaeda and Taliban operatives are not subject to Geneva Convention); Memorandum from Alberto R. Gonzales, Counsel to the President, to George W. Bush, President of the United States, on Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), *available at* http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html (same); Memorandum from Donald Rumsfeld, Secretary of Def., U.S. Dep't of Def., to Chairman of the Joint Chiefs of Staff, U.S. Dep't of Def., Status of Taliban and Al Qaeda (Jan. 19, 2002), *available at* http://news.findlaw.com/hdocs/docs/dod/11902mem.pdf (summarizing past analysis). In a message dated January 19, 2002, the Chairman notified combatant commanders of the Secretary of Defense's determination. Message from the Chairman of the Joint Chiefs of Staff, Status of Taliban and Al Qaida 1 (Jan. 19, 2002), *available at* http://news.findlaw.com/hdocs/docs/dod/12202mem.pdf (announcing Secretary Rumsfeld's determination that captured Taliban forces were not entitled to prisoner of war status under Geneva Conventions). This determination endorsed the analysis provided by the Office of Legal Counsel of the Department of Justice to the General Counsel of the Department of Defense that reflected a restrictive interpretation of legal applicability of the laws of war. Memorandum from George W. Bush, President of the United States, Humane Treatment of Taliban and al Qaeda Detainees ¶ 2 (Feb. 7, 2002), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

13. *See* Hamdan v. Rumsfeld, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring) (articulating difficulties in applying Geneva Convention's language to war on terror), *rev'd*, 548 U.S.

Because of this disarray, the time has come to develop a new approach to determining application of the laws of war that reconciles this disparity between authority and obligation related to the conduct of combat military operations. This will require adopting a new triggering "criteria." This trigger must reflect not only the underlying purpose of the laws of war, but also the pragmatic realities of contemporary military operations.

As nations prepare to use military force, national leaders dictate rules on how the military may apply force in any impending operation. These rules, broadly categorized as rules of engagement ("ROE"),[14] fall into two general categories: conduct-based ROE that allow military personnel to respond with force based on an individual's actions,[15] and status-based ROE that allow military personnel to use deadly force based only on an individual's membership in a designated organization, regardless of the individuals actions.[16] It is the thesis of this Article that a nation's adoption of status-based ROE for its military in a particular military operation should constitute the trigger requiring that nation and its military to apply the laws of war to that operation.

This Article will initially discuss the historical underlying purpose of regulating conflict, and why that purpose supports an expansive application of the laws of war. It will then explain why the current law-triggering test is insufficient to respond to the realities of contemporary transnational conflict between states and nonstate organizations. The Article will then provide a comprehensive discussion of the concept of rules of engagement, including how they evolved to complement application of the laws of war. More importantly,

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557 (2006). Judge Williams' explanation exemplifies the challenge associated with applying the laws of war to the war on terror:

> Non-state actors cannot sign an international treaty. Nor is such an actor even a "Power" that would be eligible under Article 2 (¶ 3) to secure protection by complying with the Convention's requirements. Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The gap being filled is the non-eligible party's failure to be a nation. Thus the words "not of an international character" are sensibly understood to refer to a conflict between a signatory nation and a non-state actor. The most obvious form of such a conflict is a civil war. But given the Convention's structure, the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict "not of an international character." In such a conflict, the signatory is bound to Common Article 3's modest requirements of "humane[]" treatment and "the judicial guarantees which are recognized as indispensable by civilized peoples."

Id. (alteration in original).

14. *See* JOINT CHIEFS OF STAFF ET AL., DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JOINT PUBLICATION 1-02, at 476 (rev. ed. 2008), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf (providing DoD standardized definition of "rules of engagement") [hereinafter DoD DICTIONARY].

15. See *infra* notes 133–40 and accompanying text for an explanation of when conduct-based ROE are applicable in determining whether to use force.

16. See *infra* notes 130–32 and accompanying text for a discussing of when it is appropriate to invoke status-based ROE in using force.

the Article will explain how, in practice, rules of engagement fall into two broad categories: status or conduct rules. The distinction between these two categories of ROE will, as this Article demonstrates, offer a new analytical criterion for triggering the law, relying on a nation's invocation of status-based ROE. The Article will accordingly analyze how focusing on the rules of engagement related to military operations offers perhaps the best de facto indicator of the line between conflict and nonconflict operations, and therefore is the best triggering criterion for legally mandated application of the fundamental principles of the laws of war. The Article will conclude with a proposal for adoption of this new law-triggering paradigm, and a discussion of some pragmatic policy concerns that will need to be carefully considered in any such adoption.

I. HISTORICAL UNDERLYING PURPOSE OF REGULATING CONFLICT, AND WHY THAT PURPOSE SUPPORTS AN EXPANSIVE APPLICATION OF THE LAWS OF WAR[17]

As long as there has been conflict, there have also been attempts to limit or control that conflict.[18] The focus of these attempts has ranged from a desire to increase military effectiveness to concerns for the victims of conflict. Over time, this body of conflict regulation has come to be known as the laws of war, the law of armed conflict, or, more recently, international humanitarian law. This Part will briefly chart the historical underpinnings of these laws[19] and demonstrate that they serve three broad purposes: (1) "protecting both combatants and noncombatants from unnecessary suffering," (2) "safeguarding all persons who fall into the hands of an enemy," and (3) helping with the reestablishment of peace.[20]

Many ancient civilizations developed detailed rules to regulate armed conflict,[21] including the Chinese,[22] Romans,[23] Babylonians, Hittites, Persians,

17. For further background on the historical bases for regulating conflict, see generally Eric Talbot Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENV. J. INT'L L. & POL'Y 241, 244–51 (2007).

18. Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 182–85 (2000) (asserting that laws regulating conflict have developed in almost every culture).

19. *See generally* Howard S. Levie, *History of the Law of War on Land*, 838 INT'L REV. RED CROSS 339 (2000), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQHG (discussing modern attempts to codify conduct and limitations in law of war).

20. INT'L & OPERATIONAL LAW DEP'T, U.S. ARMY, OPERATIONAL LAW HANDBOOK 12 (John Rawcliffe ed., 2007) [hereinafter OPERATIONAL LAW HANDBOOK].

21. William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 641 n.12 (2004); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 60 n.37 (1994); Noone, *supra* note 18, at 182–85.

22. For an example of an early Chinese work about military strategy, see generally SUN TZU, THE ART OF WAR 76 (Samuel B. Griffith trans., Oxford Univ. Press 1963) (n.d.).

23. *See* Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. TOL. L. REV. 111, 113–14 (2001) (explaining role of Roman law in shaping law of war during Age of Chivalry).

and Greeks.[24] This effort continued in the Age of Chivalry, when fighters formed complex rules concerning plunder[25] and siege,[26] assassination,[27] the distinction between ruses and perfidy,[28] and ransom[29] and parole.[30] As states began to employ professional armies and hostilities grew in scale and breadth, the need for laws governing what happened on the battlefield also grew with a more focused intensity.[31]

This need started an age of law of war codification that generated numerous conventions and agreements that still regulate armed conflict today. The 1863 Lieber Code,[32] the 1868 Declaration of St. Petersburg,[33] the unratified Brussels Conference of 1874,[34] the Hague Conventions of 1899 and 1907,[35] and the 1909 Naval Conference of London[36] are a few prominent examples of this codification trend. Because most of these burgeoning principles related to the regulation of

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24. *See* Noone, *supra* note 18, at 182–85 (describing conflict-regulating laws in different ancient civilizations).

25. *See* Wingfield, *supra* note 23, at 115–16 (describing mechanics and rules of plundering).

26. *See id.* at 117–19 (describing rules of siege).

27. *See* Kristen Eichensehr, *On the Offensive: Assassination Policy Under International Law*, HARV. INT'L REV., Fall 2003, at 36, 36 (describing ancient roots of international agreements prohibiting assassination).

28. *See* Wingfield, *supra* note 23, at 131 (presenting rationales used in attempts to distinguish ruses from acts of perfidy).

29. *See* Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, ARMY LAW., Dec. 1997, at 4, 4 (explaining that practice of keeping battlefield captives alive for ransom was traditionally based on "fiscal" rather than "humanitarian" reasons); Wingfield, *supra* note 23, at 116–17 (describing how "law of ransom" operated during Middle Ages).

30. *See* Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 201–08 (1998) (discussing development of parole from days of ancient Carthaginian civilization through World War II).

31. *See* Nathan A. Canestaro, *"Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq*, 43 COLUM. J. TRANSNAT'L L. 73, 81–87 (2004) (detailing evolution of law of war).

32. Dietrich Schindler & Jiří Toman, *Introductory Note* to *Instructions for the Government of Armies of the United States in the Field*, *in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3, 3 (Dietrich Schindler & Jiří Toman eds., 3d rev. and completed ed. 1988). An analysis of the provisions of the document, commonly called the Lieber Instructions or the Lieber Code, shows that it clearly "acknowledge[s] the supremacy of the warrior's utilitarian requirements even though explicitly referring to the need to balance military necessity with humanitarian concerns." Eric S. Krauss & Mike O. Lacey, *Utilitarian vs. Humanitarian: The Battle over the Law of War*, PARAMETERS, Summer 2002, at 73, 76.

33. Dietrich Schindler & Jiří Toman, *Introductory Note* to *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, *in* THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 101, 101. This document is commonly referred to as the Declaration of St. Petersburg.

34. Dietrich Schindler & Jiří Toman, *Introductory Note* to *Brussels Conference of 1874*, *in* THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 25, 25.

35. Dietrich Schindler & Jiří Toman, *Introductory Note* to *Convention (II) with Respect to the Laws and Customs of War on Land* and *Convention (IV) Respecting the Laws and Customs of War on Land*, *in* THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 63, 63. These documents are typically referred to as the Hague Conventions.

36. Dietrich Schindler & Jiří Toman, *Introductory Note* to *Naval Conference of London*, *in* THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 843, 843.

warfare were ultimately codified in the Hague Convention of 1907, the type of battlefield regulation embodied in this treaty came to be known as the "Hague tradition."[37] The principles of the Hague Tradition were focused on the fighters and tied to the practicalities of war.[38] Accordingly, George Aldrich has written, "The 1907 Hague Regulations contain very few provisions designed to protect civilians from the effects of hostilities. Aside from the prohibition on the employment of poison or poisoned weapons, which was primarily intended to protect combatants, the only such rules are Articles 25–28."[39]

Concurrent with the development of the Hague rules was the beginning of a growing concern for the victims of war, comprising both combatants who were out of the fight and civilians who were never part of the fight. Beginning with Henri Dunant's experience at the 1859 Battle of Solferino,[40] and the subsequent

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37. Derek Jinks and David Sloss discuss the differences between the Geneva and Hague traditions:

> The *jus in bello* is . . . subdivided into Geneva law and Hague law. Comprised principally of the four 1949 Geneva Conventions and the two 1977 Additional Protocols, Geneva law is a detailed body of rules concerning the treatment of victims of armed conflict. Embodied principally in the 1899 and 1907 Hague Conventions, Hague law prescribes the acceptable means and methods of warfare, particularly with regard to tactics and general conduct of hostilities. Though Geneva law and Hague law overlap, the terminology distinguishes two distinct regimes: one governing the treatment of persons subject to the enemy's authority (Geneva law), and the other governing the treatment of persons subject to the enemy's lethality (Hague law). International humanitarian law embraces the whole *jus in bello*, in both its Geneva and Hague dimensions.

Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 108–09 (2004) (footnotes omitted).

38. *See* Louise Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, *in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 39, 42 (Michael N. Schmitt & Leslie C. Green eds., 1998) (arguing that advance in weapons technology also drove States to try and enact laws to limit warfare).

39. George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 50 (2000) (footnote omitted). Aldrich continues:

> Article 25 forbids the bombardment "of towns, villages, dwellings, or buildings which are undefended." By undefended, it was clear that the article meant that there were no defending armed forces in the town or other area in question or between it and the attacking force and consequently that it was open for capture by the attacker. It clearly did not apply to towns, villages, and so forth, that were in the hinterland and consequently were not open to immediate capture—or, in 1907, even to bombardment. Essentially, the article was a commonsense prohibition against bombarding something that could be taken without cost to the attacker.
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> Articles 26 and 27 were precautionary measures, and neither suggests that its primary object was to minimize civilian casualties, although they might have provided some beneficial incidental effects for civilians in places under siege or bombardment. Article 28, which prohibits pillage, protects civilians only after the fall of the town or place and was necessary to make clear that the ancient custom permitting pillage of places that had resisted sieges was no longer acceptable.

Id. (footnotes omitted).

40. International Committee of the Red Cross, From the Battle of Solferino to the Eve of the First World War, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNVP (last visited Apr. 30, 2009) (providing concise history of Dunant, including Battle of Solferino).

formation of the International Committee of the Red Cross ("ICRC"), the world began to consider the plight of war victims, particularly the wounded and sick on the battlefield. By 1864, the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field[41] was signed, followed by its accompanying Additional Articles of 1868.[42] This convention was followed by the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[43] Much like the Hague tradition, with the ICRC headquartered in Geneva, Switzerland, this new humanitarian-centered focus became known as the "Geneva tradition."[44]

When WWII ravaged much of the world, it demonstrated the need to update the laws of war to increase protections not only for combatants, but civilians, as well.[45] "At the end of the nineteenth century, the overwhelming percentage of those killed or wounded in war were military personnel. Toward the end of the twentieth century, the great majority of persons killed or injured in most international armed conflicts have been civilian noncombatants."[46] The nations of the world responded to this great destruction with the 1949 Geneva Conventions.[47] While the first three Geneva Conventions[48] built upon preexisting established principles that survived WWII and were aimed at the protection of sick or wounded warriors, a new treaty, Convention (IV) relative to the Protection of Civilian Persons in Time of War,[49] granted extensive

41. Dietrich Schindler & Jiří Toman, *Introductory Note* to *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, *in* THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 279, 279.

42. Dietrich Schindler & Jiří Toman, *Introductory Note* to *Additional Articles Relating to the Condition of the Wounded in War*, *in* THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 285, 285.

43. Dietrich Schindler & Jiří Toman, *Introductory Note* to *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, *in* THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 301, 301.

44. Jinks & Sloss, *supra* note 37, at 108–09.

45. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, at 344 tbl.504 (2006), *available at* http://www.census.gov/prod/2005pubs/06statab/defense.pdf (showing U.S. death toll disparity between World Wars I and II).

46. Aldrich, *supra* note 39, at 48.

47. *See* Bradford, *supra* note 21, at 765–71 (discussing enactment of four treaties following WWII).

48. *See* Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I] (updating earlier conventions on treatment of wounded and sick soldiers); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S 85 [hereinafter Geneva Convention II] (applying standards of convention on wounded and sick soldiers to fighting at sea); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] (instituting minimum standards for treatment of captured enemy troops).

49. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Eric Krauss and Mike Lacey describe the importance of this treaty:

> Previous conventions had forced the utilitarians to deal with issues such as the treatment of the sick and wounded and prisoners of war—duties which most utilitarians saw as part of

protections to civilians considered to be victims of war, including those in the hands of an enemy.[50] The overall goal of the four conventions was the advancement of humanitarian law by enlarging the reach of the law of war.[51]

The trend to enlarge the coverage of the laws of armed conflict continued as a result of the deadly armed conflicts that occurred after WWII. In 1977, the ICRC sponsored the completion of two Additional Protocols[52] that expanded on the prior Geneva Conventions. They not only brought the Geneva Conventions up to modern expectations, but for the first time showed a merging of the Geneva and Hague traditions.[53] For example, Part IV of Additional Protocol I is titled "Civilian Population" but contains some of the most important contemporary regulation of target selection and engagement, subjects theretofore reserved almost exclusively to the Hague tradition.[54]

The laws of armed conflict have also been modified considerably to affect specific weapons, for example, by the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and its additional protocols,[55] and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.[56] Some of these regulations have been passed without much deference to the

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their "warrior code" anyway. The Civilian Convention for the first time placed affirmative obligations upon the utilitarian warrior class to address the food, shelter, and health-care needs of civilians in an occupied area.

Krauss & Lacey, *supra* note 32, at 77.

50. Jensen, *supra* note 17, at 244–51.

51. Krauss & Lacey, *supra* note 32, at 77.

52. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, *available at* http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, S. TREATY DOC. NO. 100-2, 1125 U.N.T.S. 609, *available at* http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument [hereinafter Additional Protocol II].

53. James D. Fry, *Contextualized Legal Reviews for the Methods and Means of Warfare: Cave Combat and International Humanitarian Law*, 44 COLUM. J. TRANSNAT'L L. 453, 466 (2006).

54. *See generally* Orna Ben-Naftali & Keren R. Michaeli, *"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, (2003) (examining targeted killings of suspected terrorists in context of Additional Protocol I); Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 82; Mark David Maxwell & Richard V. Meyer, *The Principle of Distinction: Probing the Limits of Its Customariness*, ARMY LAW., Mar. 2007, at 1 (using Additional Protocol I to analyze how soldiers should distinguish between civilians and combatants).

55. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (with Protocols), Oct. 10, 1980, 1342 U.N.T.S. 137.

56. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211.

military's desire to maintain the weapon's wartime capability.[57] Nevertheless, the governments of many nations have embraced continued development of the law of armed conflict in order to increase its applicability and coverage because it supports the purposes of the law of war.

The merging and expansion of the Hague and Geneva traditions not only adds to the protections for combatants, noncombatants, and civilians on the battlefield, but also those who are in the hands of an enemy. In doing so, it also supports the quicker restoration of peace. The expansive application of the laws of war is a trend based in history and supportive of the modern political climate.

II. CONFLICT CLASSIFICATION: THE INHERENT INSUFFICIENCY OF THE TRADITIONAL APPROACH TO DETERMINING APPLICABILITY OF THE LAWS OF WAR[58]

A thorough appreciation of the historical underpinnings of the laws of war demonstrates the critical importance of providing a regulatory framework for the execution of combat operations. Accordingly, asserting that armed conflict must be subject to such a framework becomes almost axiomatic. However, as noted above, the rapid evolution of the nature of warfare exemplified by the post-9/11 Global War on Terror has outpaced the evolution of the legal triggers for application of this regulatory framework. As a result, nations and the armed forces called upon to execute combat operations in their name confront increasing uncertainty as to the applicability of the laws of war to their operations, an uncertainty frequently resulting in policy-based application of law of war principles.[59]

That such uncertainty exists seems inconsistent with the intent of the drafters of the Geneva Conventions of 1949. One of the most important aspects of these four treaties was the rejection of a legally formalistic approach to determining application of the laws of war in favor of a pragmatic trigger, an effort inspired by the perceived "law avoidance" that occurred during WWII by characterizing armed conflicts as falling outside the legal definition of "war."[60]

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57. *See id.* pmbl. (focusing on harmful impact on civilians and not mentioning weapon's military utility); *cf.* INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 2008: TOWARD A MINE-FREE WORLD (2008) (describing, in purely humanitarian terms, global effort to ban landmines).

58. For further analysis of the insufficiency of the current law-triggering paradigm to address issues related to transnational armed conflicts, see Corn, *supra* note 3, at 300–11.

59. *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, *supra* note 6, at para. 4(a) (providing that U.S. armed forces will comply with law of war at all times, regardless of how conflicts are characterized, unless directed otherwise); U.S. DEP'T OF DEF., *supra* note 6, at para. 4.1 (requiring all members of Department of Defense to comply with law of war at all times, regardless of how conflict is characterized).

60. 3 INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 22–23 (Jean S. Pictet ed., 1960) [hereinafter ICRC COMMENTARY]. The ICRC Commentary offers additional background for this emphasis on de facto hostilities as a trigger for the protections of the Conventions:

> The Hague Convention of 1899, in Article 2, stated that the annexed Regulations concerning the Laws and Customs of War on Land were applicable "in case of war". This

The method adopted by the international community in 1949 to accomplish this objective of preventing "law avoidance" was to develop a law-triggering mechanism based on the de facto existence of hostilities. Accordingly, the Geneva Conventions provide that the full corpus of the treaties come into effect during any "armed conflict" of an international character (interstate armed conflicts);[61] and that the more limited regulation provided by Common Article 3 to the treaties comes into effect during any armed conflict not of an international character[62] (understood at that time to mean intrastate armed conflicts).[63] While

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definition was not repeated either in 1907 at The Hague or in 1929 at Geneva; the very title and purpose of the Conventions made it clear that they were intended for use in war-time, and the meaning of war seemed to require no defining. . . . Since 1907 experience has shown that many armed conflicts, displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the Hague Convention. Furthermore, there have been many cases where Parties to a conflict have contested the legitimacy of the enemy Government and therefore refused to recognize the existence of a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation or capitulation has been put forward as a pretext for not observing one or other of the humanitarian Conventions. It was necessary to find a remedy to this state of affairs and the change which had taken place in the whole conception of such Conventions pointed the same way. The Geneva Conventions are coming to be regarded less and less as contracts concluded on a basis of reciprocity in the national interests of the parties, and more and more as a solemn affirmation of principles respected for their own sake, a series of unconditional engagements on the part of each of the Contracting Parties vis-à-vis the others.

Id. at 19–20.

61. Geneva Convention I, *supra* note 48, art. 2; Geneva Convention II, *supra* note 48, art. 2; Geneva Convention III, *supra* note 48, art. 2; Geneva Convention IV, *supra* note 49, art. 2. Each of these Conventions includes the following identical article:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Geneva Convention I, *supra* note 48, art. 2; Geneva Convention II, *supra* note 48, art. 2; Geneva Convention III, *supra* note 48, art. 2; Geneva Convention IV, *supra* note 49, art. 2.

62. Geneva Convention I, *supra* note 48, art. 3; Geneva Convention II, *supra* note 48, art. 3; Geneva Convention III, *supra* note 48, art. 3; Geneva Convention IV, *supra* note 49, art. 3. Each of these Conventions includes the following identical article:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

Geneva Convention I, *supra* note 48, art. 3; Geneva Convention II, *supra* note 48, art. 3; Geneva Convention III, *supra* note 48, art. 3; Geneva Convention IV, *supra* note 49, art. 3.

63. See *supra* note 73 and accompanying text for a discussion of the evolving definition of intrastate conflicts. The following explains this paradigm:

these law triggers technically relate only to the treaty provisions to which they are connected, over time they evolved into the customary international law triggers for the law of armed conflict writ large.[64]

The significance of these law triggers for purposes of this Article is not that transnational counterterrorism operations fall into either the interstate or intrastate armed conflict categories. Indeed, it was the fact that these operations fell into a proverbial twilight zone between these two types of armed conflicts that formed the basis for the Bush administration's denial of Geneva protections for captured al Qaeda operatives.[65] The significance lies in the determined efforts of the international community to ensure that, in future conflicts, the regulatory framework of the law of armed conflict could not be disavowed once a de facto situation of armed conflict existed. Accordingly, relying on these law-triggering provisions as a basis to *deny* applicability of this regulatory framework to a situation claimed to fall into the category of armed conflict represented a perversion of the spirit and intent of this fundamental advancement of the law.[66]

The reality that evolved after 1949 did not, however, necessarily implement this spirit and purpose. Instead, the geographic context of armed conflicts became as decisive to law applicability as did the existence of armed conflict itself. Accordingly, unless a conflict could be pigeonholed into what one of the Authors has characterized elsewhere as the interstate/intrastate "either/or" law-triggering paradigm,[67] applicability of the law was rejected. This paradigm is reflected in the following excerpt from a presentation by an ICRC Legal Adviser:

> Humanitarian law recognizes two categories of armed conflict - international and non-international. Generally, when a State resorts to

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> To understand why endorsing a new category of armed conflict—transnational armed conflict—is the necessary answer to respond to the realities of contemporary military operations, it is first necessary to understand the limitations inherent in the traditional Geneva Convention-based law-triggering paradigm. This paradigm is based on Common Articles 2 and 3 of these four treaties. Common Article 2 defines the triggering event for application of the full corpus of the laws of war: international armed conflict. Common Article 3, in contrast, provides that the basic principle of humane treatment is applicable in non-international armed conflicts occurring in the territory of a signatory state. Although neither of these treaty provisions explicitly indicate that they serve as the exclusive triggers for application of the laws of war, they rapidly evolved to create such an effect. As a result, these two treaty provisions have been long understood as establishing the definitive law-triggering paradigm. In accordance with this paradigm, application of the laws of war has always been contingent on two essential factors: first, the existence of armed conflict and second, the nature of the armed conflict.

Corn, *supra* note 3, at 300–02 (footnotes omitted).

64. *See* INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GEN.'S SCH., THE LAW OF WAR WORKSHOP DESKBOOK 13–24 (Brian J. Bill ed., 2000) (discussing legal justifications for armed conflict).

65. See *supra* notes 7–9 and accompanying text for a discussion of the characterization of al Qaeda as an armed attacker and the stance of the U.N. Security Council.

66. *See generally* Corn, *supra* note 3 (discussing need to update law-triggering paradigm to reflect modern realities of war).

67. *Id.* at 308.

> force against another State (for example, when the "war on terror" involves such use of force, as in the recent U.S. and allied invasion of Afghanistan) the international law of international armed conflict applies. When the "war on terror" amounts to the use of armed force within a State, between that State and a rebel group, or between rebel groups within the State, the situation *may* amount to non-international armed conflict . . . .[68]

This interpretation of the law not only formed the foundation of Bush administration interpretations in relation to the U.S. military response to the terror attacks of September 11,[69] but did then and continues to play a central role in the assertion by some experts and governments that the law of armed conflict cannot apply to transnational counterterror military operations (unless those operations are part of a broader interstate armed conflict, such as U.S. operations in Afghanistan).[70]

If, as suggested herein, the ultimate purpose of the drafters of the Geneva Conventions was to prevent "law avoidance" by developing de facto law triggers—a purpose consistent with the humanitarian foundation of the treaties—then the myopic focus on the geographic nature of an armed conflict in the context of transnational counterterror combat operations serves to frustrate that purpose. These combat operations fall in a gap between the understood meaning of international and noninternational armed conflicts, because they are not conflicts resulting from disputes between states,[71] nor are they confined to the territory of the responding state. Thus, when one state uses combat power against an organized terrorist group in another state, and one or both states denies that it is involved in the armed conflict with the other (such as the 2006 Israeli intervention in Lebanon to destroy Hezbollah forces), uncertainty exists as to whether the armed conflict is "international" within the meaning of the law.[72] And, because such operations occur outside the responding state's territory, they certainly are not intrastate.[73]

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68. Gabor Rona, Legal Adviser, ICRC, Presentation at the Workshop on the Protection of Human Rights While Countering Terrorism: When Is a War Not a War? - The Proper Role of the Law of Armed Conflict in the "Global War on Terror" (Mar. 16, 2004) (transcript available at http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList575/3C2914F52152E565C1256E60005C84C0).

69. See *supra* notes 7–9 and accompanying text for a discussion of the Bush administration and U.N. Security Council's characterization of al Qaeda.

70. *See, e.g.*, UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 3.1 (2004) (limiting application of law of armed conflict to situations in which "the armed forces of a state are in conflict with those of another state"). *But see* Rona, *supra* note 68 (rejecting idea that international humanitarian law does not apply to war on terror).

71. *See* ICRC COMMENTARY, *supra* note 60, at 32 (discussing difficulties in coming to consensus about applicability of Geneva Conventions to conflicts that are not traditional civil wars or interstate conflicts).

72. "This 'hostilities without dispute' theory was clearly manifest in the recent conflict in Lebanon, where neither Israel nor Lebanon took the position that the hostilities fell into the category of international armed conflict." Corn, *supra* note 3, at 305; *see also* Statement by Group of Eight Leaders - G-8 Summit 2006 (July 16, 2006), *available at* http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2006/Statement%20by%20Group%20of%20Eight%20Leaders%20-%20G-8%20Summit%202006%2016-Jul-2006 (describing conflict between Israel and terrorist organization

It therefore becomes apparent why this "either/or" law-triggering paradigm fails to address the reality of extraterritorial counterterror combat operations conducted outside the territory of the responding state. These operations cannot be characterized as international armed conflicts within the meaning of Common Article 2 because they fail to satisfy the interstate predicate. As for Common Article 3, although they are certainly "non-international" as the result of the fact that they are not "interstate," because they occur outside the territory of the responding state they fail to satisfy the "within the territory of the High Contracting Party" qualifier of Common Article 3, a qualifier that based on the drafting history of the article is properly understood as limiting Common Article 3 conflicts to those that are truly intrastate. This interstate/intrastate understanding of the Geneva Convention law-triggering paradigm was pervasive prior to the initiation of the U.S. military response to the terror attacks of September 11. As a result, the characterization of this military response as an "armed conflict" between the United States and a transnational terrorist group exposed a regulatory lacuna created by the Common Article 2/3 law-triggering paradigm. It was clear that the law had failed to account for determining what regulatory framework should or does in fact apply to such operations, typified by not only the U.S. military response to these attacks but also the subsequent Israeli assault on Hezbollah. These operations reveal the existence of this regulatory gap[74] and the legal uncertainty it produces.[75] Ironically, however, the

based in Lebanon). However, "this was not the first example of the use of such a theory to avoid the acknowledgement of an international armed conflict. In fact, the U.S. intervention in Panama in 1989 represents perhaps the quintessential example of [this] theory of 'applicability avoidance' due to the absence of the requisite dispute between nations." Corn, *supra* note 3, at 305. The United States executed the intervention to remove General Manuel Noriega from power in Panama and destroy the Panamanian Defense Force—the regular armed forces of Panama. RONALD H. COLE, OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, OPERATION JUST CAUSE: THE PLANNING AND EXECUTION OF JOINT OPERATIONS IN PANAMA, FEBRUARY 1988–JANUARY 1990 1–3 (1995), *available at* http://www.dtic.mil/doctrine/jel/history/justcaus.pdf. "Operation Just Cause involved the use of more than 20,000 U.S. forces who engaged in intense combat with the Panamanian Defense Forces." Corn, *supra* note 3, at 305. However, "the United States asserted that the conflict did not qualify as an international armed conflict within the meaning of Common Article 2. The basis for this assertion was the fact that General Noriega was not the legitimate leader of Panama," therefore the United States dispute with him did not qualify as a dispute with Panama. *Id.* (footnote omitted). "Although this rationale was ultimately rejected by the U.S. district court that adjudicated Noriega's claim to prisoner of war status, it is" not the only example of the emphasis "of a lack of a dispute between states as a basis for denying the existence of a Common Article 2 inter-state conflict." *Id.* (footnote omitted); *see also* United States v. Noriega, 808 F. Supp. 791, 794 (S.D. Fla. 1992) (discussing argument for denying role to Common Article 2 in Noriega's case).

73. See Corn, *supra* note 3, at 307 & n.38 (examining evolution of interpretation of Common Article 3 from origins to post-September 11 applications).

74. *See* ELSEA, *supra* note 1, at CRS-10 to CRS-16 (analyzing whether attacks of September 11, 2001 triggered law of war); Kirby Abbott, *Terrorists: Combattants* [sic], *Criminals, or . . .?–The Current State of International Law*, *in* THE MEASURE OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS AND VALIDITY 366, 366–70 (2004) (discussing difficulty of determining what law applies in War on Terror context); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 2–9 (2004) (discussing complex challenge of

existence of this gap does not prove that regulation in this context is not required. In fact, the policy response to the reality of this gap in legal coverage reveals that professional armed forces consider an unregulated operational environment fundamentally inconsistent with disciplined military operations.[76] Furthermore, the pragmatic recognition that all armed conflicts must be subject to the regulatory principles of the law of armed conflict has been central to the Supreme Court's rejection of the "regulatory gap" interpretation of the law central to the government position in war on terror cases. The most profound example of this is certainly the Court's decision in *Hamdan v. Rumsfeld*.[77] But even before that case reached the Court, this logic was embraced by the concurring judge in the lower court endorsement of the Bush position that brought the case to the Supreme Court. In the D.C. Circuit Court of Appeals decision,[78] Judge Williams responded to the majority's reasoning that, because the President determined that the conflict is of international scope but is not interstate, Common Article 3 is therefore inapplicable to armed conflict with al Qaeda:

> Non-State actors cannot sign an international treaty. Nor is such an actor even a "Power" that would be eligible under Article 2 (¶ 3) to secure protection by complying with the Convention's requirements. Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The gap being filled is the non-eligible party's failure to be a nation. Thus the words "not of an international character" are sensibly understood to refer to a conflict between a signatory nation and a non-state actor. The most obvious form of such a conflict is a civil war. But given the Convention's structure, the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict "not of an international character." In such a conflict, the signatory is bound to Common Article 3's modest requirements of "humane[]" treatment and "the judicial guarantees which are recognized as indispensable by civilized peoples."[79]

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conflict categorization related to military operations conducted against highly organized nonstate groups with transnational reach).

75. *See Lebanon/Israel: U.N Rights Body Squanders Chance to Help Civilians*, HUMAN RIGHTS WATCH, Aug. 11, 2006, http://hrw.org/english/docs/2006/08/11/lebano13969_txt.htm (denouncing Human Rights Council's decision to investigate abuses committed by Israel but not those perpetrated by Hezbollah); *U.N.: Open Independent Inquiry into Civilian Deaths*, HUMAN RIGHTS WATCH, Aug. 7, 2006, http://hrw.org/english/docs/2006/08/08/lebano13939.htm (noting that Kofi Annan, Secretary-General of the United Nations, called for investigation into effects of conflict on civilians in Israel and Lebanon).

76. *See* Corn, *supra* note 3, at 311–15 (discussing policy-mandated application of fundamental law of armed conflict principles to situations that do not trigger legal application of these principles).

77. 548 U.S. 557 (2006).

78. Hamdan v. Rumsfeld, 415 F.3d 33, 44 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006).

79. *Id.* (Williams, J., concurring).

Although this argument seems to provide a compelling recognition that the critical trigger for application of the law was a government assertion of authority based on a theory of armed conflict and that no armed conflict should be unregulated, Judge Williams was unable to convince his peers to adopt this interpretation. This reflects the pervasive impact of the Common Article 2 and 3 "either/or" law-triggering paradigm on conflict regulation analysis. It is simply inescapable that such a pragmatic interpretation of these law triggers is fundamentally inconsistent with the evolved interpretation of these articles, a reality borne out by the subsequent Supreme Court decision in *Hamdan v. Rumsfeld,* where the Court was essentially evenly divided on the proper interpretation of Common Articles 2 and 3.[80] But as Judge Williams and the *Hamdan* Supreme Court decision recognized, "it is fundamentally inconsistent with the logic of the law of war to detach the applicability of regulation from the necessity for regulation."[81] A pragmatic reconciliation of these two considerations, one that ensured that conflict dictates application of law, not that law dictates what is a conflict, was needed.

But pragmatism only reaches so far. The law of armed conflict is indisputably a *lex specialis,* and as such does not and cannot apply at all times to all situations. Nor can it simply apply to all military operations, for many such operations cannot under any legitimate definition be characterized as armed conflicts. Accordingly, to achieve this reconciliation it is necessary to identify triggering conditions beyond those focused on the interstate and intrastate conflict paradigm. Identification of such criteria is particularly essential for determining the existence of an extraterritorial noninternational armed conflict. As one of the Authors has proposed elsewhere, such conflicts involve the transnational characteristics of international armed conflict, but the military operational characteristics of noninternational armed conflicts (because of the state versus nonstate nature of the operations).[82] As a result, attempting to rely on the accepted triggering criteria for either of these categories of armed conflict is like trying to put the proverbial square peg into the round hole. It is therefore unsurprising that designating the struggle against international terrorism a "global war" and announcing that the United States was engaged in an "armed conflict" with al Qaeda was both controversial and ultimately confusing for the armed forces required to execute operations associated with this struggle.

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80. In an opinion written by Justice Stevens, a plurality of the Court embraced the conclusion reached by Judge Williams in the D.C. Circuit, arguing that Common Article 3 operated in "contradistinction" to Common Article 2, and applied to any armed conflict not satisfying Common Article 2. *Hamdan*, 548 U.S. at 629–31. The dissenters rejected this interpretation, asserting that the plain language of Common Article 3 did not extend to transnational conflicts against nonstate entities. *Id.* at 718–20 (Scalia, J., dissenting) ("The President's interpretation of Common Article 3 is reasonable and should be sustained. The conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also 'occurring in the territory of' more than 'one of the High Contracting Parties.'").

81. Corn, *supra* note 3, at 310.

82. *Id.* at 300–10.

Identification of law-triggering criteria that address such transnational combat operations is not inconsistent with the underlying purpose of the "either/or" paradigm. It is the underlying purpose reflected by the articles that spawned this paradigm that should be the focus of law development. That purpose was to provide a law-triggering mechanism that is based not on a legally formalistic interpretation of treaty provisions but instead on the historically validated necessity of providing regulation of warfare and limiting the suffering associated with military conflict. Analyzing the law from this perspective leads to the conclusion that it may have been simply an accident of history that resulted in the failure to provide for regulation of transnational nonstate conflicts, caused by the simple reality that the drafters of the Conventions did not have contemporary experience with such conflicts. Accepting such a proposition—a proposition bolstered by the policies adopted by professional armed forces mandating application of the law during all military operations even when they failed to fall under the Article 2 and 3 paradigm—leads to the necessity of identifying an effective triggering criteria that can reconcile the reality of contemporary combat operations with the internationally ordained application trigger for the laws of war. As will be discussed below, analysis of rules of engagement may provide the key for achieving such a reconciliation.

III. THE DEVELOPMENT OF RULES OF ENGAGEMENT AND HOW THEY COMPLEMENT THE LAWS OF WAR

As demonstrated above, the development of warfare has been paralleled by the formation of rules of warfare. Because those rules have responded to the changes in the nature of warfare, over time they have not only been codified in numerous treaties, but also generally accepted as authoritative by armed forces, even when they are not meticulously applied in practice.[83] Regardless of the increasing influence on humanitarian organizations in the development and interpretation of this law, the underlying tactical rationale for most of these rules continues to be the military commander's desire to regulate the use of force by warriors in order to facilitate accomplishment of political, tactical, or strategic goals.

This idea of a commander controlling the use of force has resulted not only in laws of war, but also in tactical control measures commonly referred to as rules of engagement ("ROE"). As defined in U.S. military doctrine, ROE are "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."[84] In other words, ROE are intended to give operational and tactical military leaders greater control over the execution of combat operations by subordinate forces. Though not historically designated in contemporary terms, the history of warfare

83. See *infra* notes 84–97 and accompanying text for a discussion of the development of the rules of engagement.

84. DOD DICTIONARY, *supra* note 14, at 476.

is replete with examples of what have essentially been ROE. From the leader of the hunt by prehistoric man, who organized his forces to surround the great mammoth, to the children of Israel marching around Jericho and blowing their horns,[85] as long as man has engaged in organized combat, military leaders have used ROE as a mechanism to maximize success. The Battle of Bunker Hill provides a more modern and perhaps quintessential example of such use. Captain William Prescott imposed a limitation on the use of combat power by his forces in the form of the directive "[d]on't one of you fire until you see the whites of their eyes"[86] in order to accomplish a tactical objective. Given his limited resources against a much larger and better-equipped foe, he used this tactical control measure to maximize the effect of his firepower. This example of what was in effect ROE is remembered to this day for one primary reason—it enabled the American rebels to maximize enemy casualties.

Another modern example of tactical controls on the use of force is the Battle of Naco in 1914. The actual battle was between two Mexican factions, but it occurred on the border with the United States.[87] In response to the threat of cross-border incursions, the 9th and 10th Cavalry Regiments, stationed at Fort Huachuca, Arizona, were deployed to the U.S. side of the border to ensure that U.S. neutrality was strictly maintained.[88] As part of the Cavalry mission, "[t]he men were under orders not to return fire,"[89] despite the fact that the U.S. forces were routinely fired upon and "[t]he provocation to return the fire was very great."[90] Because of the soldiers' tactical restraint and correct application of their orders—what today would be characterized as rules of engagement—the strategic objective of maintaining U.S. neutrality was accomplished without provoking a conflict between the Mexican factions and the United States.[91] The level of discipline reflected by the actions of these U.S. forces elicited a special letter of commendation from the President and the Chief of Staff of the Army.[92]

Despite these and numerous other historical examples of soldiers applying ROE, the actual term "rules of engagement" was not used in the United States until 1958, when the military's Joint Chiefs of Staff ("JCS") first referred to it.[93]

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85. *Joshua* 6:1–20.

86. Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 34 (1994) (quoting JOHN BARTLETT, FAMILIAR QUOTATIONS 446 & n.1 (Emily Morison Beck ed., 14th ed., Little, Brown and Co. 1968) (1855)).

87. *See* James P. Finley, *Buffalo Soldiers at Huachuca: The Battle of Naco*, HUACHUCA ILLUSTRATED, 1993, *available at* http://net.lib.byu.edu/estu/wwi/comment/huachuca/HI1-10.htm (providing information on Fall of Naco).

88. *Id.*

89. *Id.*

90. *Id.* (quoting Colonel William C. Brown).

91. *Id.*

92. The commendation letter stated, "These troops were constantly under fire and one was killed and 18 were wounded without a single case of return fire of retaliation. This is the hardest kind of service and only troops in the highest state of discipline would stand such a test." Finley, *supra* note 87.

93. *See generally* Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. REV. 245, 245–47 (1997) (indicating Joint Chiefs of Staff are responsible for Rules of Engagement enactment).

As the Cold War began to heat up and the United States had military forces spread across the globe, military leaders were anxious to control the application of force and ensure it complied with national strategic policies.[94] With U.S. and Soviet bloc forces looking at each other across fences and walls in Europe and over small areas of air and water in the skies and oceans, it was important to prevent a local commander's overreaction to a situation that began as a minor insult or a probe to result in the outbreak of a conflict that could quickly escalate into World War III. Accordingly, in 1981 the JCS produced a document titled the JCS Peacetime ROE for Seaborne Forces, which subsequently expanded in 1988 into the JCS Peacetime ROE for all U.S. Forces.[95] Then, at the end of the Cold War, the JCS reconsidered their peacetime ROE and determined that the document should be amended to apply to all situations, including war and military operations other than war.[96] In 1994, they promulgated the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement, which was subsequently updated in 2000 and again in 2005.[97] As will be discussed below in detail, it is this 2005 edition that governs the actions of U.S. military members today.

ROE have become a key issue in modern warfare[98] and a key component of mission planning for U.S. and many other armed forces.[99] In preparation for military operations, the President or Secretary of Defense personally reviews and approves the ROE, ensuring they meet the military and political objectives.[100] Ideally, ROE represent the confluence of three important factors:

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94. *See generally* Robert K. Fricke, *Dereliction of Duty: Lyndon Johnson, Robert McNamara, the Joint Chiefs of Staff, and the Lies That Led to Vietnam*, 160 MIL. L. REV. 248, 252–53 (1999) (book review) (identifying Cuban missile crisis as event encouraging planning for "graduated use of force").

95. *See* Martins, *supra* note 86, at 22–26 (explaining rules with which military units must comply under JCS Peacetime ROE, including United Nations Charter and international law regulations regarding force).

96. Faculty, Judge Advocate General's School, *International Law Notes: "Land Forces" Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement*, ARMY LAW., Dec. 1993, at 48, 49.

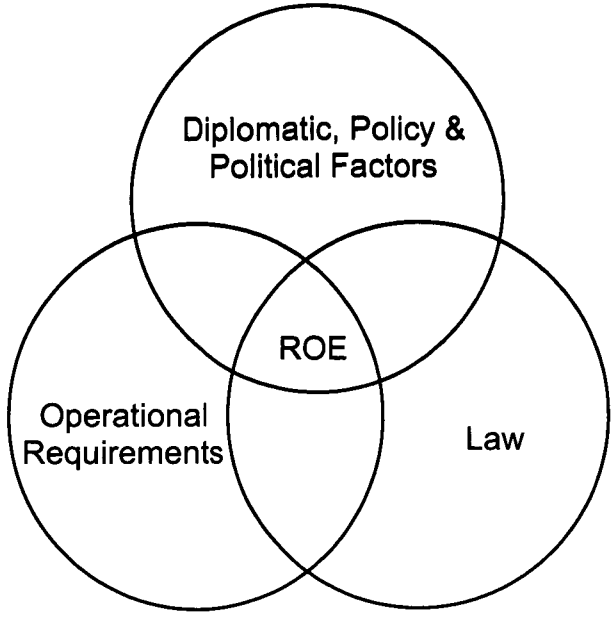
97. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES (2005) [hereinafter CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B]; OPERATIONAL LAW HANDBOOK, *supra* note 20, at 84.

98. *See* Sean McCormack, Spokesman, U.S. Dep't of State, United States Department of State Daily Press Briefing (Oct. 3, 2007), *available at* http://2001-2009.state.gov/r/pa/prs/dpb/2007/oct/93190.htm (explaining that civilians and contractors must abide by rules of engagement in war zones).

99. *See* CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT HANDBOOK FOR JUDGE ADVOCATES 1-1 to 1-32 (2000) [hereinafter RULES OF ENGAGEMENT HANDBOOK] (providing in-depth analysis on role rules of engagement play in planning process); OPERATIONAL LAW HANDBOOK, *supra* note 20, at 84 (detailing potential parameters that rules of engagement impose on mission planning).

100. *See* Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126 (1998) (explaining that "national command authority" ensures rules of engagement are in line with nation's military and political goals).

operational requirements, national policy, and the law of war.[101] This is illustrated by the diagram below.



It is particularly important to note while ROE are not coterminus with the laws of war, they must be completely consistent with the laws of war. In other words, while there are laws of war that do not affect a mission's ROE, all ROE must comply with the laws of war. This is illustrated by the diagram above, which reflects the common situation where the authority provided by the ROE is more limited than would be consistent with the laws of war. For example, in order to provide greater protection against collateral injury to civilians, the ROE may require that the engagement of a clearly defined military objective in a populated area is authorized only when the target is under direct observation. This is a fundamental principle and key to the proper formation and application of ROE. In fact, the preeminent U.S. ROE order (discussed in Part V below) explicitly directs U.S. forces that they "will comply with the Law of Armed Conflict during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with the principles and spirit of the Law of Armed Conflict during all other operations."[102] Note that this directive applies to "armed conflict," not international armed conflict. The significance of this language will be discussed below.

101. Grunawalt, *supra* note 93, at 247.

102. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-1 para. 1(d).

To illustrate this interaction between ROE and the laws of War, consider an ROE provision that allows a soldier to kill an enemy. While this provision is completely appropriate, it does not give the soldier the authority to kill an enemy who is surrendering because such conduct would violate the law of war.[103] Similarly, if the ROE allow a pilot to destroy a bridge with a bomb, that does not relieve the pilot of the responsibility to do a proportionality analysis and be certain that any incidental civilians deaths or damage to civilian property is not "excessive in relation to the concrete and direct military advantage"[104] to be gained by the destruction of the bridge. ROE will also often contain provisions that remind soldiers that they can only engage the enemy or other individuals that engage in defined conduct endangering soldiers or others. In this way, ROE ensures compliance with the laws of war by reinforcing the requirement to abide by the laws of war.

To ensure that approved ROE are properly understood and applied during armed conflict, they become an integral part of the training in preparation for military operations.[105] Military trainers are tasked with incorporating vignettes into training that reinforce the ROE and law of war. The training also highlights specific issues important to the upcoming military operation. For example, as a result of the ratification of the Chemical Weapons Convention,[106] the United States has agreed not to use riot control agents such as tear gas as a method of warfare.[107] Therefore, using riot control agents against an enemy in international armed conflict would be a violation of the law of war for U.S. soldiers. However, using riot control agents is not proscribed in other military operations such as peace support operations conducted in Haiti.[108] As the unit prepares for their mission, an analysis is done of what law of war constraints will apply, based on the type of conflict, and then the training centers can adapt their training to appropriately incorporate the use or nonuse of riot control agents. In this way, the ROE not only act as a guide to the use of force but also are a flexible and responsive method of ensuring compliance with international legal obligations in armed conflict, including differing obligations between international armed conflict, transnational armed conflict, and internal armed conflict.

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103. *See* Susan L. Turley, Note, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139, 142 (1994) (categorizing reciprocity in dealing with enemy as central to laws of war).

104. Additional Protocol I, *supra* note 52, art. 57.2(b).

105. *See* OPERATIONAL LAW HANDBOOK, *supra* note 20, at 90–91 (explaining how rules of engagement may affect soldiers); RULES OF ENGAGEMENT HANDBOOK, *supra* note 99, at 2-1 to 2-12 (detailing rules of engagement training principles and tactics). *See generally* Martins, *supra* note 86, at 24 (discussing peacetime training in rules of engagement).

106. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 45, *available at* http://www.cwc.gov/cwc_treaty.html.

107. *See id.* art. 1 (setting forth obligations of parties, including agreement to refrain from use of riot control agents in warfare).

108. RULES OF ENGAGEMENT HANDBOOK, *supra* note 99, at C-29.

IV. TWO BROAD CATEGORIES OF RULES OF ENGAGEMENT: STATUS RULES AND CONDUCT RULES

As discussed above, for the United States, the seminal ROE directive is the Chairman of the Joint Chiefs of Staff Instruction 3121.01B Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces ("CJCSI"),[109] as amended in 2005. The CJCSI is divided into two parts, the Standing Rules of Engagement for U.S. Forces ("SROE") and Standing Rules for the Use of Force ("SRUF"). The CJCSI explains the purpose of the SRUF as follows:

> The SRUF . . . establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all DOD civil support . . . and routine Military Department functions (including [antiterrorism/force protection] duties) occurring within US territory or US territorial seas. SRUF also apply to land homeland defense missions occurring within US territory and to DOD forces, civilians and contractors performing law enforcement and security duties at all DOD installations . . . within or outside US territory, unless otherwise directed by the [Secretary of Defense]."[110]

SRUF therefore are not particularly relevant to the thesis of this Article because they are intended to apply in what are relatively clear peacetime/nonconflict situations.

In contrast, and directly relevant to our thesis, the SROE "establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all military operations and contingencies and routine Military Department functions."[111] This includes "Antiterrorism/Force Protection . . . duties, but excludes law enforcement and security duties on DoD installations, and off-installation while conducting official DoD security functions, outside US territory and territorial seas."[112] The SROE also apply to "air and maritime homeland defense missions conducted within US territory or territorial seas, unless otherwise directed by the [Secretary of Defense]"[113] and are standing instructions that are "in effect until rescinded."[114] Thus, the SROE are standing instructions regulating the use of destructive military power that apply to almost everything the military does outside the continental United States.[115] Unless otherwise directed, it applies to soldiers stationed in Germany, air crews providing disaster assistance in Pakistan

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109. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97. The CJCSI is classified SECRET but the basic instruction and Enclosure A titled "Standing Rules of Engagement for US Forces" are unclassified. *Id.* All references in this Article will come from the basic instruction or the unclassified enclosure and will be from the 2005 edition unless otherwise noted.

110. *Id.* at 1.

111. *Id.*

112. *Id.* at A-1 para. 1(a).

113. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-1 para. 1(a).

114. *Id.* at A-1 para. 1(d).

115. *See* Grunawalt, *supra* note 93, at 247–48 (describing scope of SROE's application).

after an earthquake, Marines on shore leave in Australia, and sailors cruising through the Mediterranean. And they certainly apply to members of the military patrolling neighborhoods on a United Nations peace enforcement mission or fighting in the streets against a counterinsurgency.

A. *Organization*

Understanding the organization of the U.S. ROE Instruction provides insight into the principles it espouses. The basic instruction is only six pages long, unclassified, and provides only general guidelines concerning the use of force.[116] Most importantly, it discusses the general applicability of the document as discussed above, and then highlights the difference between the rules for self-defense and mission accomplishment which will be discussed in detail below.

Appended to the basic instruction are seventeen Enclosures, the majority of which are protected by national security classification.[117] The first enclosure, however, is unclassified and deals with the self-defense policies under the SROE.[118] Enclosures B, C, and D contain general rules tailored for maritime, air, and land operations, respectively.[119] Enclosures E through H contain more specific rules targeted at types of military operations, rather than instructions based on the geographic aspects of the operations.[120] These later enclosures include directions for space operations, information operations, noncombatant operations, and counterdrug operations.[121] Enclosure I contains a menu of potential supplemental measures which will be discussed below in Part IV.F.[122] This is followed by Enclosure J, discussing the ROE request and authorization process, and Enclosure K, containing a list of references.[123] Enclosures L through Q deal with the SRUF and will therefore not be discussed.[124]

B. *Bifurcation*

The genius of the SROE is in its bifurcation between the rules governing self-defense and mission accomplishment. This foundational principle is the key to proper understanding and application of force by U.S. forces. As the

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116. *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-1 para. 1(a) (describing purpose and scope of SROE).

117. *See, e.g.*, INSPECTOR GEN., U.S. DEP'T OF DEF., REVIEW OF MATTERS RELATED TO THE AUGUST 28, 2005 SHOOTING OF REUTERS JOURNALISTS 43 n.22 (2008), *available at* http://www.dodig.osd.mil/Inspections/ipo/reports/Reuters%20Final%20Print%20Version.pdf (discussing scope of unclassified materials).

118. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at 3, A-1.

119. *Id.* at 5.

120. *Id.*

121. *Id.*

122. *Id.*

123. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at 5.

124. *Id.*

document states, "The purpose of the SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of self-defense."[125] Throughout the document these two situations are treated as almost mutually exclusive.[126] By treating these two applications of force separately, the instruction provides a paradigm where each set of rules can be the subject of appropriate training to ensure they are clearly understood and readily applicable. Accordingly, they facilitate the execution of missions regardless of whether military members are employing force in self-defense or employing force without the necessity of immediate imminent threat in order to accomplish a designated operational mission.

This bifurcation of force employment authority between mission accomplishment and traditional self-defense principles is indicative of both the nature of the mission as well as the nature of anticipated threats posed by different groups that might be encountered during such missions. For example, when U.S. forces entered Iraq in March 2003, the Iraqi forces were presumably the "enemy" and could be attacked on sight irrespective of whether they were presenting U.S. forces with an imminent threat. Individuals in this category were easy to identify because they were normally wearing Iraqi uniforms. The Iraqi forces were also, of course, correspondingly able to engage U.S. forces on sight without waiting for any specific action or additional direction. These engagements were governed by the mission accomplishment ROE, which provided robust authority to engage any Iraqi soldier upon contact.[127]

In contrast, once U.S. forces defeated the Iraqi military and established general control in areas throughout Iraq and began moving among the populace, there was the additional risk that they would come under attack from time to time by members of this population. Such risk did not come from Iraqi forces or other lawful combatants under the definitions in the Geneva Conventions.[128]

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125. *Id.* at A-1 para. 1(a).

126. *See id.* at A-2 to A-3 (defining force and self-defense).

127. *See* Grunawalt, *supra* note 93, at 255 (explaining mission accomplishment ROE).

128. *See* Geneva Convention I, *supra* note 48, art. 4 (outlining requirements to be considered prisoner of war). Prisoner of War status is reserved for lawful combatants:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

Instead, it came from Iraqi civilians who opposed the U.S. presence in Iraq. In these situations, U.S. forces responded not against declared or known hostile forces, but against an otherwise protected civilian who had decided to take up arms and act hostile to US forces. In this situation, it is self-defense principles that are implemented by the ROE, authorizing U.S. forces to employ necessary force in response to an imminent threat directed to them or other innocent individuals. Thus, when employing force against the Iraqi armed forces, it is their status as members of that group that subjects them to attack, whereas when employing force against hostile civilians, it is their conduct that subjects them to attack.

Though the SROE treat mission accomplishment and self-defense as almost mutually exclusive, there are situations where such bifurcation could be misleading. For example, if U.S. forces engage an opponent who launches an attack against them during combat or high intensity conflict situations, they are ostensibly defending themselves. In such situations, should the response be governed by the self-defense rules? The answer is no. Because they are in a combat environment and declared hostile forces are engaging them, their use of force is governed by mission accomplishment rules, even though the nature of the response also implicates self-defense. This provides an operational advantage for U.S. forces because, as explained below, mission accomplishment rules are generally more permissive than self-defense rules. There are similar examples on the fringes of the differentiation between self-defense and mission accomplishment,[129] but for the majority of situations, this bifurcation is a great aid not only in applying force but also in the conduct of preparatory training for an assigned mission.

C. *Status Versus Conduct*

Within the SROE, there are several definitions that are key to the proper application of force and that must be clear to guide an appropriate response in situations similar to the Iraq hypothetical above. As described in that hypothetical, in March 2003 the Iraqi army was the enemy, or "declared hostile forces." Declared hostile forces are defined in the SROE as "[a]ny civilian, paramilitary or military force or terrorist(s) that has been declared hostile by appropriate US authority."[130] Under the SROE, U.S. forces may always engage a declared hostile force, irrespective of their manifested conduct (with the

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. . . .

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Id.

129. Grunawalt, *supra* note 93, at 255.

130. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-3 para. 3(d).

exception of conduct that clearly indicates such personnel are *hors de combat*).[131] It is their status as members of a declared hostile force that makes them subject to attack. It does not matter whether the declared hostile force is sleeping, taking a shower, eating a meal, or attacking U.S. forces. In all cases, they may be attacked.[132] This is not to say that once identified as a member of a hostile group, U.S. forces *must* attack. Ultimately, other tactical considerations will dictate the nature of the U.S. reaction. For example, if a U.S. soldier happens upon a sleeping Iraqi soldier, it may very well be tactically preferable to capture this enemy rather than kill him. But this merely illustrates that the authority granted by the ROE, which is in turn derived from the law of war principle of military objective, is just that—an authority, and not an obligation. Understanding the distinction between authority and obligation is therefore essential to appreciate the significance of the tactical choice to forego an otherwise lawful attack. It is, however, the authority provided by the ROE as the result of the designation of "hostile force" that permits the U.S. soldier kill the "sleeping enemy" if such action is deemed tactically appropriate.

This is in contrast to the civilian in the Iraq hypothetical who takes up arms against U.S. forces. His status is that of a civilian, a protected status[133] that prohibits U.S. forces making him the object of attack. However, when he attacks,[134] he is divested of that protected status and military forces have the right to respond in self-defense.[135] In other words, the protection he enjoys from being made the object of attack is not absolute, but instead may be forfeited for as long as the civilian engages in conduct that threatens U.S. forces. This is only logical, for no state would consent to a law of war principle that would deprive their personnel of the ability to act in self-defense and defense of others.

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131. *Id.* at A-2 para. 2(b).

132. *Id.*

133. *See* Additional Protocol I, *supra* note 52, art. 51.1 (providing that civilians are protected from military attacks).

134. *See id.* art. 51.3 (stating that civilians are protected until they "take a direct part in hostilities"). The definition of "direct participation in hostilities" is a matter of some controversy. Academics and military leaders have searched for a workable definition since its inception. *See, e.g.*, J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 176–80 (2005) (attempting to define scope of direct participation required). The Commentary is not much help as almost all agree that it is broader than this definition. The ICRC has an on-going "group of experts" meeting to discuss this topic. With such a lack of clarity, it is beyond the scope of this Article to resolve that issue. However, it is important here to draw the distinction between "direct participation in hostilities" as a law of war principle and self-defense ROE principles. ROE and the law of war are not coterminus, but ROE must comply with the law of war. See *supra* notes 100–01 and accompanying text for a discussion of the requirements of ROE. Therefore, when a civilian takes a direct part in hostilities by attacking a member of the military, he surrenders his law of war protective status and becomes targetable. Additional Protocol I, *supra* note 52, art. 51.3. The ROE then govern the tactical application of force against that targetable civilian. See *supra* notes Part IV.D for a discussion of when the ROE permit use of force in self-defense.

135. See *supra* note 134 for a discussion of targetable civilians.

D. *Self-Defense*

When responding in self-defense, two SROE definitions are determinative: hostile act, and hostile intent.[136] The SROE define a hostile act as "[a]n attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property."[137] This is the easier of the two principles to understand and apply. In the Iraq hypothetical, it is when the civilian shoots at U.S. forces. By attacking U.S. forces, he has committed a hostile act to which U.S. forces may respond with proportionate force,[138] including deadly force if necessary.

Hostile intent is "[t]he threat of imminent use of force against the United States, US forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property."[139] Determining a "threat" or "imminent use of force" necessarily injects increased subjectivity into the analysis. Application of this principle is dictated by the actions prior to firing at U.S. forces, such as when the prospective attacker establishes a firing position, raises his rifle or puts the U.S. forces in his weapon sight. Once the prospective attacker's intent is discernible and his capability evident, U.S. forces may respond with proportionate force, including deadly force.[140]

The need for military members to be able to respond to hostile act and hostile intent is amply illustrated from unfortunate past experience. In 1982, the U.S. military units deployed to Beirut as part of a multinational force comprised of British, French, and Italian forces.[141] Their mission was to facilitate the withdrawal of non-Lebanese forces from the country.[142] There was no "enemy"

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136. *But see* Stephens, *supra* note 99, at 142 (arguing that definitions of hostile act and hostile intent are overly broad to comply with international law).

137. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-3 para. 3(e).

138. The SROE uses the term "proportionality" instead of proportionate force. *Id.* at A-3 para. 4(a)(3). However, to avoid confusion with the law of war term "proportionality," this Article uses the term "proportionate force." In describing a proportionate response, the SROE state

> [t]he use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required.

Id.

139. *Id.* at A-3 para. 3(f). "The determination of whether the use of force against US forces is imminent will be based on an assessment of all facts and circumstances known to US forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous." *Id.* at A-3 para. 3(g).

140. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-3 para. 4(a)(3).

141. For an excellent analysis of the events in Beirut, see Martins, *supra* note 86, at 10–12.

142. U.S. DEP'T OF DEF., REPORT OF THE DOD COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCTOBER 23, 1983, at 1–3 (1983) [hereinafter DEPARTMENT OF DEFENSE COMMISSION, BEIRUT REPORT].

or declared hostile force.[143] As the mission continued into 1983, relations between the local population and the multinational forces deteriorated.[144] On October 23, 1983, a suicide bomber drove a truck loaded with explosives that were the equivalent of over 12,000 tons of TNT past several guard stations and crashed into the Marine barracks, detonating the explosives and killing 241 Marines.[145]

As a result of the attack, the Secretary of Defense convened a commission to "examine the rules of engagement in force and the security measures in place at the time of the attack."[146] While the commission concluded that the "ROE used by the Embassy security detail were designed to counter the terrorist threat posed by both vehicles and personnel," it also concluded that "Marines on similar duty at [Beirut International Airport], however, did not have the same ROE to provide them specific guidance and authority to respond to a vehicle or person moving through a perimeter."[147] One of the contributing factors on which the commission based its conclusion was that the ROE "underscored the need to fire only if fired upon, to avoid harming innocent civilians, to respect civilian property, and to share security and self-defense efforts with the [Lebanese Armed Forces]."[148] Had the Marines been functioning under the hostile intent and hostile act rules that U.S. service members currently function under, their permissible actions in self-defense would have been clear and a tragedy potentially averted.

It is therefore apparent that the engagement authorization provided by the self-defense prong of the ROE essentially extends traditional criminal self-defense and defense of others principles to the operational environment.[149] Hostile intent and hostile act serve as triggers for proportionate actions in self-defense or defense of others. This is a true necessity-based authority, permitting only that amount of responsive force necessary to terminate the threat, and extant for only so long as the threat exists.[150] Because of the necessity basis for this authority, the SROE permit the use of force pursuant to this prong of authority at all times and during all missions.[151] This authority never changes in

143. *Id.*

144. *Id.* at 39–40.

145. *Id.* at 1–2; Stephens, *supra* note 99, at 128.

146. DEPARTMENT OF DEFENSE COMMISSION, BEIRUT REPORT, *supra* note 142, at 19.

147. *Id.* at 50.

148. *Id.* at 51.

149. *See* David Bolgiano et al., *Defining the Right of Self-Defense: Working Toward the Use of a Deadly Force Appendix to the Standing Rules of Engagement for the Department of Defense*, 31 U. BALT. L. REV. 157, 166 (2002) (describing "inherent right" to self-defense as essential element of American common law).

150. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-3.

151. There has been some discussion amongst military personnel about the "inherent right of self-defense" and allegations that the principles of self-defense are insufficient to protect individual soldiers. *See, e.g.*, Bolgiano, *supra* note 149, at 160 (arguing that self-defense principles in SROE are "confusing, confounding, and dangerous"). This right of self-defense is vested in the commander of the unit rather than individual members of the unit. As the SROE states,

relation to the nature of the operational mission and even applies when functioning under operational ROE different than those in the SROE, such as when U.S. forces operate under the command and control of a multinational force such as NATO.[152]

The indelible nature of this self-defense prong of the ROE add immensely to their military value by making them a prime training tool. As U.S. forces train day-to-day for undetermined future missions with undetermined mission accomplishment ROE, they can always base such training on the default expectation that these self-defense principles will apply in whatever mission they are assigned.[153] In current operations in Iraq, some have raised allegations that the military is not permitted adequate ROE to defend themselves.[154] This is not true. While many of the same considerations apply in Iraq as applied in Beirut, there should be no doubt in the minds of military members as to their ability to respond in self-defense with proportionate force. These principles are not only taught and trained constantly through standard military training requirement, but are also reinforced on a continuing basis while in Iraq. Having these self-defense principles remain constant and unchanging allows them to become as natural and immediate to a member of the armed forces as clearing a jammed weapon or reloading ammunition in the middle of a firefight.[155]

E. Mission Accomplishment

While the ROE principles for self-defense are constant, each mission will likely have its own specific ROE that provide authorizations to use force to accomplish the designated operational mission. If the military mission is to

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> Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. *As such, unit commanders may limit individual self-defense by members of their unit.* Both unit and individual self-defense includes defense of other US military forces in the vicinity.

CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-2 para. 3(a) (emphasis added).

152. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-1 para. 1(f).

153. Because self-defense ROE focus on the conduct of civilians and other noncombatants, the validity of this assumption is based on the reality that there will always be civilians of some kind in the area. Even in the hottest of combat battles, it is seldom that all civilians have been completely swept from the battle area. And if recent conflicts are a pattern of things to come, it is likely that hostilities will continue to be conducted among the civilian population, making a clear understanding of these rules and a pattern of consistent practice and training on conduct-based actions a vital part of military preparation. These conduct-based rules will allow soldiers to respond appropriately on the modern battlefield and still preserve the principle of distinction between civilians and combatants.

154. Kyndra Rotunda, *Denying Self-Defense to GIs in Iraq*, CHRISTIAN SCI. MONITOR, Mar. 2, 2007, at 9.

155. *See* Martins, *supra* note 86, at 6 (noting that once shots are fired, soldiers will follow rules that through repetition and experience have become second nature).

destroy, defeat, or neutralize a designated enemy force or organization, such as the Iraqi Army in 2003, personnel associated with that force will be declared hostile pursuant to the ROE. The consequence of this designation is that once individuals are identified as a member of such a group or organization—a designation based on relevant criteria established through the intelligence preparation process—U.S. forces have the authority (but as noted above not necessarily the obligation) to immediately attack these "targets."[156] Thus, it is the "status" of being associated with the declared hostile organization that triggers the use-of-force authority: threat identification results in a group of individuals that as a result of their status, i.e., membership of a specific organization such as an army, may be attacked.[157] As the SROE state, "[o]nce a force is declared hostile by appropriate authority, US forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force."[158]

Although specifics of potential mission accomplishment rules are protected from public disclosure as classified information, as a general rule they fall into two categories: (1) Measures that "specify certain actions that require [Secretary of Defense] approval," and (2) Measures that "allow commanders to place limits on the use of force during the conduct of certain actions."[159] One of the most important aspects of these two prongs of authority is that unless a specific action falls within those measures requiring approval by the Secretary of Defense, the operational commander may assume he has the authority to use all lawful means and measures without having to seek additional authorization. This means that as military commanders face difficult situations in Iraq and other areas, they should plan to employ their entire arsenal of capabilities, limited only by the law of war and their judgment as to what is operationally and tactically appropriate.

Underlying all of these measures for mission accomplishment is the assumption that mission accomplishment may require more specific use-of-force authorization than that provided by the self-defense prong of the SROE. When authorizing such additional measures, the authorizing commander is able to provide additional guidance on the application of force against individuals or groups based on their status. Because these measures are not constant and change for each mission (and often change during missions) they are precisely tailored for each mission, providing clear directives for the use of force related to specific operations.[160] This in turn assists the forces tasked to execute such

156. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-2 to A-3.

157. *Id.*

158. *Id.* at A-2 para. 2(b). The necessity of this rule is obvious. Determining hostile act or hostile intent is a difficult task and requires constant watchfulness. Such action is not required when facing a declared enemy who is equally free to attack U.S. forces and is willing to demonstrate that by wearing a uniform and carrying their arms openly.

159. *Id.* at 2 para. 6(b)(2)(a)(1), (2).

160. *See* OPERATIONAL LAW HANDBOOK, *supra* note 20, at 84–85 (detailing purpose of mission-specific directives). *See generally* RULES OF ENGAGEMENT HANDBOOK, *supra* note 99, at 1-1 to 1-32

missions by providing direction on whether they may employ unrestricted use of force or must instead comply with limits on that use of force designed to enhance the probability of mission accomplishment.

In an effort to highlight the utility of the ROE regime, consider the following scenario, adapted from the 1991 Gulf War. In 1990, Iraq invaded Kuwait.[161] As a result of the invasion, the United States engaged in a political process with the United Nations, the result of which was a political decision to expel Iraqi forces from Kuwait and reestablish the international border. As a result of this political decision, the U.S. military became involved in a military operation to invade Kuwait, expel Iraqi forces, and restore the international border. Assume for analytical purposes that a group of indigenous Kuwaitis, known as the KLI, supported Iraq during the invasion and continue to be active in Kuwait but have not taken up arms. As U.S. forces prepare to deploy, the President and Secretary of Defense issue ROE that declare Iraqi forces as hostile forces. Based on this ROE, when U.S. forces arrive in Kuwait, they can immediately attack all Iraqi forces as a "status-based" declared hostile force. They can also respond with proportionate force in self-defense to other individuals or groups that commit hostile acts or demonstrate hostile intent.

Assume further that the conflict continues, and the U.S. forces successfully begin expelling Iraqi forces across the border. In order to support Iraqi forces, the KLI organizes into a militia that begins attacking U.S. forces. While U.S. forces can respond with proportionate force to all hostile attacks and hostile intent, they can only respond based on the KLI's conduct. The commander of U.S. forces determines that the KLI are now organized and represent a threat to U.S. forces so he requests that the KLI militia be declared as a hostile force so they can be attacked without having to wait for some hostile conduct by KLI militia members. The response approves the ROE change and the commander disseminates that change, ensuring that every sailor, soldier, airman, and Marine understands the new ROE measure.

As the operation continues, at some point the U.S. destroys the effectiveness of the KLI militia and repels the Iraqi forces back into Iraq. The U.S. and U.N. broker an armistice and both Kuwait and Iraq agree to its terms. As part of the agreement, the United States is asked to act as an implementation force and monitor the agreement and patrol the border between the two nations. In response to the new operation, the President and Secretary of Defense modify the existing ROE. While the self-defense rules remain unchanged, both the KLI and Iraqi forces would no longer be declared hostile forces and the ROE would be changed to remove U.S. forces' authority to attack them based on their status. However, if they commit hostile acts or demonstrate hostile intent, U.S. forces

(describing process of ROE development and noting need for adequate planning and integration of development through all phases of mission).

161. *See generally* Majid Khadduri, *Perspectives on the Gulf War*, 15 MICH. J. INT'L L. 847, 848 (1994) (reviewing JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW (1992) and LAWRENCE FREEDMAN & EFRAIM KARSH, THE GULF CONFLICT, 1990–1991: DIPLOMACY AND WAR IN THE NEW WORLD ORDER (1993)).

could still respond in self-defense with proportionate force, including deadly force if necessary.

This example highlights the flexibility of the ROE to respond to mission requirements. It also demonstrates the value of the unchanging "conduct-based" ROE that allow the military to respond to hostile acts and hostile intent regardless of the current mission. At no point in the mission did the self-defense ROE change. Military members who had been trained to respond appropriately to hostile acts and hostile intent continued to apply that training as the fluid nature of the mission changed. In contrast, the fluid nature of the mission changed the political and strategic goals of the United States. The "status-based" ROE were able to change accordingly, ensuring that the appropriate amount of force was applied against the appropriate targets. The ROE were also responsive to military changes on the ground, such as the militarization of the KLI, changing the response to their actions from a "conduct-based" ROE to a "status-based" ROE and then back again when "status-based" ROE were no longer needed or appropriate.

This distinction between conduct- and status-based justifications for the use of force is fundamental to the U.S. theory on the conduct of military operations. It is key to a proper understanding and application of the SROE. It is not only a commander's tool to control his forces, but also a tool to limit and authorize specific methods of warfare necessary to meet the political and strategic ends of a particular operation, while always providing for the self-defense of military personnel, regardless of the nature of the mission.

V. OPERATIONAL RULES OF ENGAGEMENT: THE ULTIMATE DE FACTO INDICATOR OF ARMED CONFLICT

As explained above, ROE fall into two broad categories of use-of-force authorization: conduct-based and status-based. It is this dichotomy that provides a truly de facto indication of the existence of armed conflict for purposes of triggering fundamental principles of the laws of war.[162] Because conduct-based ROE are inherently self-defensive and responsive in nature, they indicate that the state views the nature of the military mission as insufficient to trigger the targeting authority of the laws of war. However, because status-based ROE require no justification for the use of force beyond threat recognition and identification, they indicate that the state views the nature of the military mission as sufficient to trigger the targeting authority of the laws of war. In such situations, it is the principle of military objective that dictates the application of combat power once the threat identification process results in the conclusion that the object of anticipated attack is a member of a designated hostile group.[163]

Because the approval of status-based ROE implicitly invokes the target engagement authority of the laws of war, it seems logical that such issuance

162. See *supra* notes 14–16 and accompanying text for a discussion of ROE categorization.

163. See *supra* Part IV.C for an analysis of the distinction between conduct- and status-based categories.

should trigger an analogous requirement to comply with fundamental regulatory obligations derived from the laws of war. And because such ROE have and will likely continue to be issued for military operations that fall into the twilight zone between Common Articles 2 and 3, this indication that the state is invoking the laws of war in support of mission accomplishment provides the missing ingredient in determining when these principles apply outside this established law-triggering paradigm. Clinging to the restrictions of this paradigm in such situations produces a dangerous de facto anomaly: military forces will execute operations with the force and effect of expansive authority without being constrained, as a matter of law, by any balancing principles. Such an anomaly may be explicable in purely treaty interpretation terms, but it is inconsistent with the historical underpinnings of the laws of war noted above. To this end, it is important to understand why the focus on a consideration not already identified by the Geneva Conventions or their associated commentaries is necessary.

As noted above, the most significant concern related to the decision to interject international legal regulation into the realm of noninternational armed conflicts was the intrusion of state sovereignty represented by Common Article 3.[164] Although today such intrusions are relatively unremarkable as the result of the rapid evolution of human rights law in the latter half of the twentieth century,[165] in 1949 subjecting a purely internal conflict to international regulation was indeed remarkable.[166] Considering that such conflicts often challenged the existence of the state itself, what is regarded today as a relatively modest level of regulation was profound, for it vested internal enemies of the state with a shield of international protection.

Because of sovereignty concerns, the drafters of Common Article 3 walked a proverbial tightrope between mandating humanitarian protections for victims of internal armed conflicts and protecting states from unwarranted application of international law to internal affairs.[167] Although the language of Common

164. *See generally* Corn, *supra* note 3, at 300–10 (noting changes in nature of warfare and observing that limitations of Common Articles 2 and 3 result in uncertainty with regard to whether conflict is international or noninternational).

165. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (2008) (discussing universally accepted intrusion of international human rights norms in realm of state sovereignty). *See generally* Kenneth Watkin, *supra* note 75 (discussing potential role of human rights norms in regulation of armed conflict).

166. *See* LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 21–23 (2002) (noting stiff state resistance to "international regulation of internal armed conflict").

167. ICRC COMMENTARY, *supra* note 60, at 32–35. The Commentary emphasizes that the limited scope of applicability of Common Article 3 was responsive to historical concerns related to the protection of state sovereignty:

> It at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for interventions by the International Committee of the Red Cross or any other impartial humanitarian organization—interventions which in the past were all too often refused on the ground that they represented intolerable interference in the internal affairs of a State.

Id. at 35.

Article 3 refers only to "conflict[s] not of an international character,"[168] the ICRC Commentary emphasized the necessity of distinguishing internal disturbances not rising to the level of armed conflict from those situations triggering application of the substantive protections of the article.[169] This seems somewhat axiomatic, for all it really emphasized was that the law of war should apply only to armed conflicts.[170] However, it was the analytical method proposed by the Commentary that provided insight into how focusing on de facto criteria should dictate interpretation of the armed conflict trigger.

In order to protect the sovereignty of party states, the Commentary indicates that the key focus of the treaty drafters was determining the existence of an actual armed conflict.[171] To this end, the Commentary offered a number of objective criteria that either individually or in combination would indicate an internal situation had crossed the threshold from nonconflict to armed conflict.[172] These included, among others, the scope, intensity, and duration of military operations; whether the dissident group controlled territory to the exclusion of government forces; and whether the dissident group enjoyed demonstrable popular support.[173] However, because none of these considerations would be dispositive of the existence of armed conflict, the Commentary proposed an additional consideration: the nature of the government response to the threat.[174] According to the Commentary, one important indication of the existence of armed conflict is when a government is forced to resort to regular armed forces to respond to a dissident threat.[175] Use of such forces is normally reserved for combat-type operations. Accordingly, employment of such forces would indicate that the state authorities no longer considered normal law enforcement assets capable of responding to the dissident threat, which in turn would indicate that the threat had progressed beyond widespread criminal activity or civil disobedience.

In the realm of internal armed conflicts, this "nature of government response" consideration is indeed extremely indicative of the existence of armed conflict.[176] Of course, this one factor has not been a talisman. In some situations, the commingling of military and law enforcement organizations make it difficult to apply this factor; in others, precipitous resort to military forces to respond to civil disturbances undermines the efficacy of this factor.[177] However, once a state

168. Geneva Convention I, *supra* note 48, art. 3.

169. ICRC COMMENTARY, *supra* note 60, at 35–37.

170. *Id.* at 22–23.

171. *Id.* at 35–36.

172. *Id.* at 35–37.

173. *Id.*

174. ICRC COMMENTARY, *supra* note 60, at 36.

175. *Id.*

176. *Id.* at 35–37.

177. For example, the federal police forces of some states are technically a component of the armed forces. This was the case in Panama when the United States executed Operation Just Cause to oust General Noriega. *See* History Office, XVIII Airborne Corps and Joint Task Force South, Panamanian Defense Force Order of Battle: Operation Just Cause, http://www.history.army.mil/

employs its armed forces to conduct combat operations against an internal dissident threat, it becomes almost impossible to disavow the existence of armed conflict.

Unfortunately, in the emerging realm of transnational military operations between state and nonstate forces, this factor is far less instructive in determining the existence of armed conflict. There are two reasons for this. First, in the context of responding to an internal dissident threat—the context for which this factor was originally proposed—use of the regular armed forces is generally regarded as a somewhat extraordinary escalation from the norm of police response.[178] However, such contextual significance is less profound in relation to transnational operations, for the simple reason that it would be equally extraordinary for a state to use its own nonmilitary (law enforcement) security forces outside its borders.

The second reason, one that exacerbates the significance of the contextual difference between internal armed conflict and transnational armed conflict, is that states routinely use military forces to conduct nonconflict "peace operations."[179] Military forces conducting such operations almost always operate under a legal mandate limiting their authority to use combat power to situations of self-defense or defense of others; rarely does such authority allow the application of combat power as a measure of first resort. Because of this, such operations almost never rise to a level of hostility considered sufficient to trigger application of the law of war. This was emphasized in the recently revised U.K. Manual of the Law of Armed Conflict:

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documents/panama/pdfob.htm (last visited Apr. 30, 2009) (listing "Fuerza de Policia" as component of armed forces). Even in states where the police are not a component of the armed forces, the armed forces may be called upon to provide assistance to police forces for the purposes of law enforcement, as occurred when the U.S. Army provided assistance to federal law enforcement efforts to arrest David Koresh in Waco. *See* Philip Shenon, *Documents on Waco Point to a Close Commando Role*, N.Y. TIMES, Sept. 5, 1999, at A14 (indicating involvement of armed forces in assisting law enforcement agencies may have been longer and closer than previously thought).

178. *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 216 (2d ed. 2004) (arguing that continued state control and application of domestic law can be indicative of internal security problem while lack of state control or normal application of domestic law can be indicative of armed conflict).

179. *See generally* OPERATIONAL LAW HANDBOOK, *supra* note 20, at 52–57 (discussing definition, key concepts, legal authority, and U.S. role in peace operations). The Handbook summarizes Peace Operations as follows (drawing from other Department of Defense doctrinal sources):

> 1. Peace Operations is a new and comprehensive term that covers a wide range of activities. FM 3-07 defines peace operations as: "military operations to support diplomatic efforts to reach a long-term political settlement and categorized as peacekeeping operations (PKO) and peace enforcement operations (PEO)."
>
> 2. Whereas peace operations are authorized under both Chapters VI and VII of the United Nations Charter, the doctrinal definition excludes high end enforcement actions where the UN or UN sanctioned forces have become engaged as combatants and a military solution has now become the measure of success. An example of such is Operation Desert Storm. While authorized under Chapter VII, this was international armed conflict and the traditional laws of war applied.

Id. at 53 (footnotes omitted).

> The extent to which [Peace Support Operations, or PSO] forces are subject to the law of armed conflict depends upon whether they are party to an armed conflict with the armed forces of a state or an entity which, for these purposes, is treated as a state . . . .
>
> Where PSO forces *become party to an armed conflict* with such forces, then both sides are required to observe the law of armed conflict in its entirety . . . .
>
> . . . .
>
> . . . [A] PSO force which does not itself take an active part in hostilities does not become subject to the law of armed conflict simply because it is operating in territory in which an armed conflict is taking place between other parties. That will be the case, for example, where a force with a mandate to observe a cease-fire finds that the cease-fire breaks down and there is a recurrence of fighting between the parties in which the PSO force takes no direct part.
>
> It is not always easy to determine whether a PSO force has become a party to an armed conflict or to fix the precise moment at which that event has occurred. Legal advice and guidance from higher military and political levels should be sought if it appears possible that the threshold of armed conflict has been, or is about to be, crossed.[180]

Because the use-of-force authority normally associated with these transnational "peace operations" is inherently defensive in nature,[181] it is essential to focus on some alternate analytical factor to distinguish between nonconflict transnational military operations and those that trigger the laws of war. And, because this type of armed conflict was either unanticipated or overlooked by the drafters of the 1949 Geneva Conventions, neither the text of these treaties nor the ICRC Commentary provide such a factor. But this does not mean that none could be identified. Combining consideration of the underlying purpose of the Convention triggers with the realities of contemporary military operations leads almost inexorably to one conclusion: status-based ROE provide this elusive factor.

In order to emphasize the validity of this proposition, it is useful to consider the nature of the contemporary debate on the applicability of the laws of war to the war on terror. It is not uncommon for the question of law of war applicability to be hotly debated during contemporary symposia addressing issues related to the Global War on Terror.[182] Participants in such debates often argue that the war on terror is not really a "war," and as a result the laws of war do not regulate

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180. UK MINISTRY OF DEFENCE, *supra* note 70, at ¶¶ 14.3–14.4, 14.6–14.7 (footnotes omitted) (emphasis added).

181. *See* DEP'T OF THE ARMY, FIELD MANUAL NO. 100-23, PEACE OPERATIONS 34–35 (1994) (indicating that during peacekeeping operations, use of force should be last resort but rules of engagement should not hinder commander's duty to protect his troops).

182. *See generally* Daphné Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001, 1001 (2007) (analyzing rules governing warfare in light of war on terror and transnational terrorist organizations). This article appeared as part of Catholic University Law Review's Symposium on Reexamining the Law of War.

it. The paradigm of Common Articles 2 and 3 is then cited in support of such arguments.[183]

What is striking about such debates is how they seem to ignore the pragmatic realities of military operations. Such realities are the day-to-day business of the armed forces tasked to execute operations under the Global War on Terror rubric. These forces have been and will continue to be called upon to execute military operations to destroy or disable terrorist personnel and assets. Unlike politicians, policymakers, scholars, and pundits, they do not have the luxury of debating the legal niceties of whether the law of war should or should not apply to their operations. For them, the line between armed conflict and nonconflict operations is easily defined: when they are authorized to engage opponents based solely on status identification—opponents who ostensibly seek to kill them—they know they are engaged in armed conflict.

It is this simple reality that illustrates the value of ROE as a factor to determine when the laws of war are triggered by transnational military operations, for it is the ROE that informs the soldier of the nature of the operation. As noted elsewhere in this Article, ROE provide a clear indication of how the state ordering the military operation perceives both the threat and the authority to address the threat.[184] When ROE authorize engagement based solely on status determinations, it represents an inherent invocation of the laws of war as a source of operational authority, for it is the rules of necessity and military objective that will provide the parameters for implementing such ROE. Accordingly, analysis of the nature of the ROE both illuminates the state's perception of the nature of the operation, and indicates when the forces of the state will inherently invoke authorities derived from the laws of war. It is therefore appropriate to focus on the nature of ROE to determine when the balance of competing interests reflected in the laws of war must apply to a military operation.

Adding consideration of the nature of ROE to the decision by the state to employ combat forces in response to a threat provides an effective means of determining the existence of *any* armed conflict. Any military operation in which such authority is granted and exercised must rely, de facto, on the principle of military objective to determine permissible target engagement. It is therefore both logical and essential to treat such operations as bringing into force all foundational principles of the laws of war. Doing so will ensure the armed forces operate within the framework of essential regulation derived from the history of warfare; prevent a nonstate enemy from claiming a status or legitimacy

183. *See* Watkin, *supra* note 74, at 2–9 (discussing complex challenge of conflict-categorization-related military operations conducted against highly organized nonstate groups with transnational reach); Rona, *supra* note 68 (asserting that "humanitarian law" applies to armed conflict whereas "human rights law" applies to nonarmed conflict and distinguishing between international and noninternational armed conflict). *See generally* ELSEA, *supra* note 1, at CRS-10 to CRS-16 (analyzing whether attacks of September 11 triggered law of war); Abbott, *supra* note 74 (analyzing whether members of al Qaeda and Taliban can be considered "combatants" per international law).

184. See *supra* notes 162–63 and accompanying test for a discussion of ROE as an indicator of state perception.

unjustified by the conflict; and prevent national policymakers from avoiding the most basic obligations of the laws of war through the assertion of technical legal arguments devoid of pragmatic military considerations.

VI. PROPOSAL FOR ADOPTION OF THIS NEW LAW-TRIGGERING PARADIGM

Congress unquestionably supported the decision of the President to characterize the military response to the terror attacks of September 11 as an armed conflict.[185] While this characterization is the source of continued scholarly criticism,[186] the United States is unlikely to alter its perspective any time soon, and the forces called upon to engage terrorist entities will continue to employ combat power in a manner consistent with this position.

In contrast to the relative clarity of the U.S. characterization of the struggle against global terror, there continues to be tremendous uncertainty as to the applicability of the laws of war to this fight.[187] This uncertainty is detrimental to the execution of these operations because it creates a regulatory void and imposes upon the armed forces the responsibility to fill this void. In the past, reliance on military policy to deal with such uncertainty has been generally effective.[188] However, in the post-9/11 era, it has not been uncommon for civilian

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185. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (authorizing president to use necessary military force to destroy terrorist threat posed by al Qaeda and states that sponsor it); Military Order of November 13, 2001, 66 Fed. Reg. 57,833, 57,833 (Nov. 16, 2001) (noting that scale of September 11, 2001 attacks resulted in "state of armed conflict" requiring use of military forces); *cf.* Hamdan v. Rumsfeld, 548 U.S. 557, 566, 635 (2006) (reflecting almost unanimous conclusion among Justices that struggle between United States and al Qaeda is armed conflict for purposes of international law), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w), *as recognized in* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

> International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

Military Order of Nov. 13, 2001, 66 Fed. Reg. at 57,833.

186. *See* Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATH. U. L. REV. 759, 760 (2007) (stating that, "[u]nder international law, the United States cannot be at 'war' with al Qaeda as such, much less with a tactic or strategy of 'terrorism,' and the laws of war are not applicable with respect to acts of violence between members of al Qaeda and armed forces of the United States outside the context of an actual war, such as the wars in Afghanistan or Iraq").

187. *See, e.g.*, Corn, *supra* note 3, at 300–10 (noting absence of definitive test to determine when armed conflict exists, and that such absence can result in uncertainty as to when laws of war are triggered); Paust, *supra* note 186, at 760–67 (suggesting that laws of war do not apply to al Qaeda or 9/11 attacks because al Qaeda does not hold status necessary for warfare or armed conflict, although attacks triggered United States' right to exercise self-defense); Rona, *supra* note 68 (arguing that laws of armed conflict, including humanitarian law, are not applicable to "war on terror" except in limited situations).

188. *See* Geoffrey S. Corn, *"Snipers in the Minaret—What is the Rule?" The Law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAW., July 2005, at 28, 34–40 (discussing policy-based application of law of armed conflict principles in accordance with Department of Defense directives).

leaders of the military to make policy decisions that are not consistent with compliance with the principles of the laws of war.[189]

It is therefore imperative that the United States clearly articulate when the fundamental principles of the laws of war will apply to military operations that fail to satisfy the Common Articles 2 and 3 triggering criteria.[190] As explained above, the evolving nature of warfare has created a necessity for such an articulation, and the historical purposes of the laws of war support the application of the law to such situations.[191] Asserting application of this law based on the pragmatic realities of contemporary military operations will ensure that the armed forces executing such operations clearly understand their fundamental obligations and that these operations are guided by an indelible regulatory framework that balances the authority to employ combat power with the obligations historically associated with such action.

Assuming the necessity and utility of such a position does not, however, resolve what the criteria for application should be. It does seem relatively indisputable that to date there has been an almost myopic effort to fit the Global War on Terror into the Common Article 2/3 paradigm. As noted above, this has resulted in uncertainty for military forces and controversy among policymakers and their critics.[192] Perhaps even more troubling is that it has shifted the focus from what rules should apply to such combat operations to whether a particular legal trigger is satisfied. Because of this, and the simple reality that relying on the Common Article 2/3 paradigm to characterize transnational military operations directed against nonstate actors is like trying to put the proverbial square peg into the round hole,[193] the time has come to adopt a different approach to determining when the fundamental regulatory framework of the law of war applies to such operations.

Based on the foregoing analysis, the nature of mission-specific ROE provides an effective analytical criterion for making such a determination. Quite simply, the authorization of status-based ROE for a military mission provides a critical de facto indication that the state is inherently invoking the authority of the laws of war to guide target selection and destruction decisions. As a result, linking application of fundamental law of war principles to the authorization of such ROE ensures that the essential balance between authority and obligation

189. The rebuke to executive wartime authority represented by the decision in *Hamdan v. Rumsfeld* is perhaps the quintessential example of this reality. 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w), *as recognized in* Boumediene v. Bush, 476 F.3d 981, 985 (D.C. Cir. 2007).

190. See *supra* notes 76–81 and accompanying text for a discussion of the necessity of clear delineation regarding when the fundamental principles of the laws of war will apply to military operations not falling within the Common Article 2/3 paradigm.

191. See *supra* notes 59–73 and accompanying text for a discussion of the evolving nature of warfare. See *supra* Part I for a discussion of the historical purposes of the laws of war and why they support an expansive application.

192. See *supra* notes 187–89 and accompanying text for a discussion of the confusion resulting from the attempt to fit the global war on terror into the Common Article 2/3 paradigm.

193. Corn, *supra* note 3, at 329.

central to the laws of war is preserved. More importantly, this will ensure the force and effect of this essential regulatory framework regardless of the geographic nature of the operations, the nonstate character of the enemy, the duration of the hostilities, the intensity of the hostilities, or, most significantly, whether the hostilities satisfy the Common Article 2/3 law-triggering paradigm.

Ironically, the entire emphasis of this law-triggering paradigm supports the adoption of the ROE-based trigger. As noted above, the objective of the drafters of the 1949 Conventions was to prevent "law avoidance" as the result of technical legal definitions and associated arguments.[194] For this reason, the focus of Common Articles 2 and 3 was the creation of a truly de facto law-triggering standard, immune from the type of technical manipulations so common during the Second World War. Although the drafters did not anticipate extraterritorial armed conflict between states and nonstate entities, this does not justify ignoring the effort to ensure that the laws of war would come into force based primarily on the existence of armed conflict.

There is perhaps no better de facto indication of the existence of armed conflict than the authorization of status-based ROE. These ROE permit the application of destructive combat power based solely on the determination that the anticipated object of attack is associated with a group or entity that has been "declared hostile" by national authority. As a result, status-based ROE provide the most permissive and proactive source of target engagement authority available for military forces, limited only by the law of war itself. Thus, once such ROE are authorized, it is the law of war that ipso facto applies to regulate the use of combat power.

More importantly, consistent with the underlying objective of the Geneva Conventions, the probability that an ROE-based trigger for law of war application will be manipulated to avoid application of the law is de minimis. This is because of one simple reality: the state is unlikely to deprive its forces of the authority to effectively accomplish a military mission in order to avoid obligations imposed by the laws of war. Considering the hypothetical use of combat power to target an al Qaeda base camp in a remote area of another country illustrates this point. To effectively accomplish this mission, the military commander will need to engage the "enemy" immediately upon positive threat identification. While that process may indeed be complex because of the unconventional nature of the enemy, once identification is made, success will depend on the unhesitating application of combat power. This can only occur if the command is operating pursuant to status-based ROE. If the national authority attempted to avoid law of war application by issuing conduct-based ROE, it would debilitate operational effectiveness. Accordingly, the cost for law avoidance would be so profound that it should rarely if ever be a significant influence on ROE authorization.

It is therefore time for the President to issue an executive or military order adopting an ROE trigger for application of fundamental law of war principles.

194. See *supra* notes 61–63 and accompanying text for a discussion of the "law avoidance" purpose of the 1949 Conventions.

This order should emphasize a number of critical points. First, the United States has been and will continue to be a leader in the development and application of the laws of war.[195] Second, there is unanimous agreement among the branches of our government that the struggle against transnational terrorist groups is an armed conflict, and that this characterization has been endorsed by a number of allies and international organizations. Third, the United States will continue to aggressively pursue and target individuals and groups it determines to be operatives of hostile groups. Fourth, when determined necessary the United States will employ the full spectrum of combat capabilities to destroy such targets. Fifth, whenever the military is tasked to conduct such operations pursuant to status-based mission ROE, the fundamental principles of the laws of war will apply as a matter of legal obligation irrespective of whether the operation brings into force other law of war treaty obligations. Sixth, these principles include military necessity, proportionality, the prohibition against unnecessary suffering, and the obligation to treat any individual who is *hors de combat* humanely. The order should conclude by calling upon all other states to adopt an analogous position on law of war application.

Perhaps the most controversial military order ever issued by a president in his capacity as Commander-in-Chief was the order establishing the military commissions.[196] Much of the controversy that order sparked resulted from the perception that it reflected a lack of respect for the most fundamental obligations imposed by the laws of war.[197] Now is the time to issue an order that will have a radically different effect; an order that will confirm and advance those fundamental obligations, and send a powerful message to the international community that never again will the United States assert authority derived from the laws of war without acknowledging fundamental obligations. The order proposed herein will have such an effect.

VII. DISCUSSION OF SOME PRAGMATIC POLICY CONCERNS THAT WILL NEED TO BE CAREFULLY CONSIDERED IN ANY SUCH ADOPTION

This new triggering paradigm is not without its risks. As described earlier in the diagram, one of the inputs into ROE is national policy. Policy is by definition

195. Prior presidents have emphasized the important role played by the United States in the positive development of the laws of war. *See, e.g.*, Letter of Transmittal of Protocol II Additional to the Geneva Conventions of 12 August 1949 from Ronald Reagan, President of the United States, to the United States Senate (Jan. 29, 1987), *reprinted in* 26 I.L.M. 561, 562 (noting that United States is generally at forefront of efforts to modify rules of armed conflict); Letter of Transmittal of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Hague Protocol from William J. Clinton, President of the United States, to the United States Senate (Jan. 6, 1999) (urging ratification of Hague Convention and noting United States will play role in amendments as party to Convention).

196. Military Order of November 13, 2001, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

197. *See, e.g.*, Amicus Curiae Brief of Retired Generals and Admirals and Milt Bearden in Support of Petitioner at 9–11, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184) (asserting that respondent's position, in support of President Bush's military order, undermines long-standing tradition of fidelity to law of war, which is central to U.S. profession of arms).

a political input. That means that, by definition, ROE are already subject to political inputs. Naturally, in a nation such as the United States, which strongly believes that its military must be subject to civilian control, the inputs are not only important, but necessary. However, it is equally important that ROE remain a functional tool that the military can apply to achieve the end state desired by the political leadership.

History has already provided at least one occasion where military leaders felt the ROE were too constrained to allow military victory. In the midst of the Vietnam War, President Johnson proudly proclaimed that the military could not "bomb an outhouse without my approval."[198] Many military leaders chafed under such controls and argued that this level of review and approval prevented the military from successfully carrying out its mission.[199] Some of this may be the military leaders not recognizing that the political end state may not always include a complete military victory and the total destruction of the enemy. However, there is certainly a valid concern that the ROE can be overpoliticized at the expense of blood and treasure.

Given that ROE are already a policy issue, this new paradigm could result in the overpoliticization of the ROE, placing military forces in grave danger. It is easy to envision a situation where the executive branch might not want to be seen as going to "war" or taking actions that might trigger the War Powers Act, regardless of the realities on the ground. In an effort to avoid such a trigger, the military could be given only self-defense ROE, making the claim that, based on the ROE, this was less than war and therefore there was no requirement to report to Congress. The military would then be sent to a hostile environment with ROE that would not provide sufficient authority to adequately accomplish the mission, nor possibly provide adequate protections in the face of an armed enemy. As mentioned above, while this situation is unlikely under current circumstances due to the short-lived patience of the American people to the inevitably mounting U.S. casualties that would result, it is still a risk that must be recognized with the adoption of the new paradigm.

Additionally, there is disagreement currently between the United States and much of the rest of the world, including the United States' allies, as to the characterization of the current conflict in Iraq[200] and, to some degree, the conflict in Afghanistan.[201] If manipulating the ROE became an option by either

198. Richard Lowry, *Bush's Vietnam Syndrome: The President Draws a Wrong Lesson*, NAT'L REV., Nov. 20, 2006, at 18, 20 (internal quotation marks omitted).

199. *Id.* at 20, 22.

200. *Compare* Corn, *supra* note 188, at 28–34 (noting that United States characterization of conflict in Iraq was first as belligerent occupation, followed by "'armed conflict' of some character" still requiring application of laws of war), *with* Knut Dörmann & Laurent Colassis, *International Humanitarian Law in the Iraq Conflict*, 47 GERMAN Y.B. INT'L L. 293, 295–301 (2004) (noting ICRC position that conflict in Iraq was first an international armed conflict followed by a military occupation).

201. This has been resolved to some extent by the Supreme Court's ruling in *Hamdan v. Rumsfeld*. 548 U.S. 557, 628–30 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub.

side to bolster its argument, it may have deleterious effects on the military members from those countries and would almost certainly hamper interoperability between the nations' militaries.

Overall, however, this risk is insufficient to preclude the application of the new paradigm of looking to ROE as a trigger for the type of conflict. Such a trigger presents an excellent measure of the nature of the conflict and would present a somewhat objective test that should clarify the nature of the conflict in the future.

VIII. CONCLUSION

This Article began with a discussion of the historical underpinnings of the contemporary law of war. This history provides a proverbial looking glass through which the logic of this law can be best understood. That logic finds at its core a simple but critical proposition: warfare and anarchy are not synonymous. Accordingly, the waging of war has been, and must always be, subject to a regulatory framework. The laws of war provide that framework.

In an ironic twist of history, the post-World War II efforts to ensure that war and law operated concurrently in all circumstances has become the basis for disavowing law-of-war-based obligations in relation to the type of contemporary transnational conflicts exemplified by the global war on terror. However, as discussed above, disconnecting armed conflict from a legally based regulatory framework is both detrimental to warriors and victims of war and inconsistent with the spirit of the 1949 Geneva Conventions and the history they build upon.[202] Accordingly, the time is ripe to reconsider the law-triggering paradigm that evolved after 1949 in order to ensure that a de facto standard for application is once again the norm and not considered an aberration.

Asserting the logic of applying law of war principles to all combat operations does not, however, resolve perhaps the most complicated questions related to the regulation of conflict to emerge in decades: How does a state determine what triggers this law outside the Common Article 2/3 paradigm? As illustrated above, relying on the existing law-triggering criteria is insufficient to provide an effective answer to this question, even when supplemented by consideration of analytical factors suggested in the ICRC Commentary. This insufficiency has led to confusion as to when this law applies to contemporary operations, criticism of decisions related to its application, and uncertainty for the armed forces called upon to execute missions against nonstate entities.

The answer to this question, therefore, must be derived from a new perspective, and it is the perspective of the warrior where it is found. Warriors understand the difference between conflict and nonconflict operations. This understanding is not based on the nature of the opponent, the geographic

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L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w), *as recognized in* Boumediene v. Bush, 476 F.3d 981, 985 (D.C. Cir. 2007).

202. See *supra* notes 59–81 and accompanying text for a discussion of the growing disconnect between armed conflict and the regulatory framework formed by the Common Article 2/3 paradigm.

location of the operation, or the scope, duration, or intensity of the operation. Instead, it is based on the pragmatic and simple reality that authorization to engage an opponent based solely on a status determination means the line has been crossed. Thus, for the warrior, the most fundamental indication of armed conflict is the nature of the ROE issued for the mission.

As explained above, focus on the nature and purpose of ROE supports this conclusion. Conduct-based ROE, because they are inherently responsive in nature, indicate an extremely limited use-of-force authority based on self-defense principles and not on the laws of war. In contrast, status-based ROE indicate an authority to employ force that is presumptively coextensive with the laws of war. Accordingly, such ROE implicitly invoke the principle of military objective to dictate target engagement decisions. Thus, they provide the ultimate de facto indication of the existence of armed conflict. Accordingly, application of complementary principles of the laws of war, specifically the prohibition against the infliction of unnecessary suffering, the doctrine of military necessity, and the obligation to treat any person who is *hors de combat* humanely, must apply to any mission conducted pursuant to status-based ROE.

Focusing on the nature of ROE to determine law-of-war applicability offers an additional important benefit: it will create a powerful disincentive for the state to avoid law-of-war obligations by manipulating the characterization of a given military operation. In order to achieve such avoidance, the state would have to be willing to deprive its forces of the use-of-force authority necessary to attack and destroy a target without any actual threat or provocation. Such decisions are obviously unlikely because of the debilitating effect they would have on mission accomplishment.

It is therefore time for the United States to reassert its historical role as a leader in the positive development of the laws of war by adopting this law-triggering test. This would ideally come in the form of a military order issued by the president—the same type of order used to create the military commissions. Unlike that order, however, an order mandating application of fundamental law of war principles to all operations conducted pursuant to status-based mission ROE will ensure the humane treatment of victims of armed conflict as a matter of law. Once such an order is issued, the United States should then press for adoption of this standard by other states.

Entre armes, sine leges is a flawed concept. History demonstrates that the effective and disciplined execution of combat operations necessitates a regulatory framework. The fundamental principles of the laws of war provide this framework. Depriving warriors of the value of such an important set of principles—a value validated by hundreds of years of history—on the basis of technical legal analysis of two treaty provisions is no longer acceptable. Instead, all warriors must understand that when they "ruck up" and "lock and load" to conduct operations during which an opponent will be destroyed on sight, the laws of war go with them. The ROE-based trigger proposed herein will accomplish such an outcome.

TARGETING, DISTINCTION, AND THE LONG WAR: GUARDING AGAINST CONFLATION OF CAUSE AND RESPONSIBILITY

Professor Geoffrey Corn[*]

I. INTRODUCTION.

Imagine you are a soldier deployed to participate in a combat operation against what is increasingly labeled a "hybrid" enemy, *i.e.*, a non-state organized belligerent group utilizing both conventional and unconventional military tactics. Unlike the type of enemy you trained to fight at one of the premier U.S. combat training centers, this enemy wears no distinctive uniform or recognizable emblem. Instead, prior to deployment your unit received numerous briefings indicating you should expect this enemy to appear indistinguishable from the local civilian population. To complicate matters, your unit anticipates that much of its operations will be conducted in densely populated civilian areas, and that the enemy will seek to protect its vital military assets by embedding them in and near the most protected civilian structures, like schools, hospitals, and mosques.

Your commander and subordinate leaders continually emphasize that you are about to find yourselves in a tough fight against a determined enemy that is anything but a pushover. They tell you not to underestimate the enemy's resolve and tactical effectiveness. But, they also constantly emphasize the importance of protecting the civilian population and limiting risk to civilians and their property. They want you to be aggressive and decisive in bringing maximum combat power to bear against the enemy, but avoid to the greatest extent possible harm to civilians and their property.

You, along with the rest of your unit, are fully committed to this objective. Your goal is to attack the *enemy,* and not the civilians caught up in the conflict. But you are not naïve; you know that the enemy's tactics are going to make drawing this line difficult. Indeed, you know the enemy is not going to hesitate to *increase* the risk to civilians in the hope of neutering your tactical and technical superiority. Nonetheless, you are a professional warrior

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serving a great nation committed to the rule of law even in the most complicated battle-space; no matter how illicit your enemy may be, you will refuse to sink to a similar level, but will instead strive to comply with the rules of war.

At higher headquarters, operational planners are plotting out every phase of the mission. The targeting cell is synthesizing mission objectives, intelligence, and combat capabilities to develop a prioritized target list. A military lawyer, or JAG, is fully integrated into this process, and is relying heavily on the Department of Defense Law of War Manual[1] as the authoritative statement of law applicable to guide the development of the target list. Like the supported commanders, the JAG understands that the complexity of both planned and time-sensitive targeting decisions will be significantly influenced by the anticipated tactics of the hybrid enemy. While compliance with the fundamental distinction obligation is a constant influence on the planning process, she knows, as does her commander and every subordinate leader in her unit, that the most complex aspect of implementing the distinction obligation will be how to factor the enemy's refusal to distinguish itself from civilians and the deliberate use of civilians and civilian property to cloak its vital assets.

The JAG knows something her commander and staff probably do not, *i.e.*, that the Law of War Manual has sparked substantial controversy. She knows from surfing the many blog posts and commentaries inspired by the publication of the Manual that unlike its predecessor, Army Field Manual 27-10, the DoD Manual reads much more like a treatise and far less like a restatement of widely recognized *lex lata*. She also knows that much of the criticism directed at the Manual reflects the perception that through its provisions, the United States is seeking to expand its authority to employ lethal combat power in the future. This is not a hypothetical issue for the JAG and her commanders; her advice and the command judgments it informs will produce lethal effects directed against enemies, and potentially lethal collateral consequences for civilians and their property. Those effects will be perceived as the ultimate manifestation of U.S. interpretations of the law. Ultimately, the Manual's emphasis on fundamental LOAC obligations — most notably the *distinction* obligation[2] — provide a vital start-point for guiding commanders through these difficult decisions.

1 The U.S. Department of Defense Law of War Manual, published in 2015, will be subsequently referred to throughout the text as the "DoD Law of War Manual" or simply, "the Manual." For more on the origins of the Manual, *see* U.S. DoD, Law of War Manual, iii–vi (June 2015).

2 The distinction principle is one of what the International Court of Justice labeled the "cardinal" principles of the law of armed conflict (LOAC). *See* DoD Law of War Manual,

The Manual also addresses the precise dilemma the commander and his troops expect to face: the impact of enemy non-compliance with "passive" distinction obligations.[3] Specifically, the Manual indicates that implementation of LOAC principles and the more specific rules derived therefrom (such as the rule of military objective and the proportionality obligation, which is an aspect of the prohibition against indiscriminate attack) will in many cases be influenced by an enemy's failure to comply with its own distinction obligations.[4] For example, paragraph 17.5.1, titled, ". . . the Enemy in NIAC", provides that,

> [p]arties to a conflict must conduct attacks in accordance with the principle of distinction. As during international armed conflict, an adversary's failure to distinguish its forces from the civilian population does not relieve the attacking party of its obligations to discriminate in conducting attacks. On the other hand — also as during international armed conflict — such conduct by the adversary does not increase the legal obligations on the attacking party to discriminate in conducting attacks against the enemy. For example, even though tactics used by non-State armed groups may make discriminating more difficult, State armed forces — though obligated to be discriminate — are not required to take additional protective measures to compensate for such tactics.[5]

What should our JAG and the commander make of these apparent qualifiers to the distinction obligation? One interpretation is that the Manual signals a minimalist approach to interpreting targeting-related legal obligations whenever fighting "hybrid" or "unconventional" enemies; that the enemy's illicit tactics justify a significant dilution of the distinction and

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supra note 1, pt. II; *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at para. 78–97 (July 8, 1996); Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 12 (3d ed., 2016) (hereinafter, "Dinstein").

3 *See* DoD Law of War Manual, *supra* note 1, at 2.5.5, 5.5.4; *see also* C. Pilloud & J. Pictet, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 691–92 (1987) (hereinafter, "AP I Commentary") ("the ICRC has felt the need to lay down provisions for "passive" precautions, apart from active precautions, if the civilian population is to be adequately protected. . . .").

4 DoD Law of War Manual, *supra* note 1, pt. II (*see* 5.7.8 for "military objective" and 6.7 for the prohibition on inherently indiscriminate weapons, resultant to the principles of distinction (2.5) and proportionality (2.4)).

5 DoD Law of War Manual, *supra* note 1, at 17.5.1.

proportionality obligations. However, this is not the only plausible interpretation, and in fact is probably the least plausible. An alternate interpretation is that the Manual's drafters sought to emphasize that while the LOAC cardinal targeting principles are always obligatory, the context is relevant to how they are implemented. This alternate interpretation would, in effect, account for the reality that an important factor in the "contextual implementation" equation is the relative compliance or non-compliance by an enemy with its own LOAC obligations. An enemy's pattern of ignoring or deliberately violating these obligations — most notably the "passive distinction" obligation — would, according to this interpretation, be a legitimate consideration in assessing the reasonableness of an attack judgment and the accordant compliance with the "active distinction" obligation. In essence, this interpretation posits that it is operationally naïve and misleading to fail to acknowledge the impact of illicit enemy tactics on the capacity of U.S. forces to produce outcomes consistent with the LOAC's overall civilian risk mitigation imperative.

This article examines the broader question of how illicit enemy tactics impact implementation of fundamental LOAC targeting obligations, placing the Manual's treatment of this issue into proper context in the process. In the search for an answer to these challenging questions, this article will focus on both the law of distinction and lawful target engagement, and the practical realities of conflict against hybrid enemies. Part II summarizes the distinction obligation, emphasizing both the "positive" and "passive" aspects of the obligation. This passive component of distinction is often overlooked, yet tightly woven into the fabric of IHL targeting law. Emphasis on the positive obligation without consideration of the passive obligation distorts the logic of the law. Part III considers the threat identification challenge of hybrid warfare and how urban warfare exacerbates this challenge, as well as the enemy tactics designed to exploit the distinction obligation to gain a tactical and strategic advantage. Part IV suggests the permissible and impermissible consequences of such enemy tactics. It explains why it is impermissible and counter-productive to treat such tactics as a justification for ignoring the distinction obligation. However, it also proposes that these tactics form part of the totality of the circumstances related to lawful attack judgments, and therefore must logically dilute the weight of the civilian presumption. Part V then explains how failing to acknowledge this dilution imposes an unfair burden on lawful belligerents, grants the hybrid enemy an unjustified windfall, and distorts the assessment of overall operational legality.

II. THE DISTINCTION FOUNDATION OF COMBAT TARGETING.

Mitigating risk to civilians and civilian property during armed conflict is a primary objective of the LOAC.[6] The central component of the law's risk mitigation equation is the principle of distinction, what The 1977 Additional Protocol I (AP I) to the Geneva Conventions of 1949 designated the "Basic [R]ule."[7] Distinction requires parties to the conflict[8] — which logically includes all meaning members of organized belligerent groups involved in the armed conflict — to constantly "distinguish" between lawful objects of attack and civilians and civilian property, confining their deliberate[9] attacks only to the former category of potential targets.[10] This distinction obligation is implemented through LOAC rules that define combatant, civilians, and military objectives. Codified in AP I and widely considered customary international law, these rules provide the framework for determining who

6 *See, e.g.*, Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, art. 48, 1125 *U.N.T.S.* 3, (hereinafter, "AP I") ("In order to ensure *respect for* and *protection of the civilian population and civilian objects* . . . ." (emphasis added)); Y. Beer, "Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity", 26 *Eur. J. Int'l L.* 801, 802 (2015) (hereinafter, "Beer").

7 AP 1*, supra* note 6, art. 48.

8 As used here, the term combatant refers to any individual who is a member of an organized belligerent group in any armed conflict, international or non-international. This pragmatic use of the term combatant is quite common. However, it can also be confusing. This is because "combatant" also has specific legal significance, as it is used in AP I to denote only those belligerent operatives who satisfy the requirements to be considered privileged by international law to engage in hostilities. *Compare* AP I, *supra* note 6, art. 43 (referencing "combatants" as those that ". . . have the right to participate directly in hostilities.") *with* G. Corn & C. Jenks, "Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts", 33 *U. Pa. J. Int'l L.* 313, 333–40 (2011) (hereinafter, "Corn & Jenks") (discussing combatants as members of an organized belligerent group).

9 The term "deliberate" is defined: "to think about or discuss something very carefully in order to make a decision." *See* Merriam-Webster Dictionary, available at http://www.merriam-webster.com/dictionary/deliberate. The use of the term, "intentional" is often associated with the distinction obligation: a prohibition against intentionally attacking civilians and civilian property. Because intent can be defined not only in terms of purpose (a conscious objective to produce a result), but also knowledge (substantial certainty conduct will produce a result), the term "intentional" or "intent" can be misleading. Neither distinction nor proportionality prohibit the, "knowing" infliction of harm on civilians and/or civilian property. Indeed, proper implementation of the proportionality principle involves a calculated decision to inflict such harm, based on the determination that this harm is not excessive compared to the anticipated military advantage of the attack. It is, however, clear that the distinction obligation prohibits deliberate attack on civilians and/or civilian property, as the term deliberate connotes a purpose to produce harm.

10 *See* DoD Law of War Manual, *supra* note 1, at 2.5 (outlining the principle of distinction). Distinction is commonly referred to as discrimination, and is an obligation to parties of a conflict to distinguish between armed forces, civilians, and associated objects.

and what may be considered a lawful target subject to deliberate attack.[11] These rules also address situations that result in civilians losing protection from attack when they take a direct part in hostilities (DPH).[12] As for objects or places, the LOAC provides a framework for assessing when the "nature, location, purpose, or use" of the "thing" justifies treating it as a lawful object of attack.[13]

For individuals, this, "targeting framework" focuses on the status or conduct of the potential target, either of which may justify deliberate attack on the individual (which must be distinguished from incidental injury to others resulting from an attack on an individual who is a "lawful subject of attack").[14] During armed conflict, members of enemy armed forces and other organized enemy belligerent groups are subject to attack as the result of their "status" as belligerents.[15] In contrast, all other individuals are considered civilians, and as a result they are presumptively immune from deliberate

11 *See* AP I, *supra* note 6, art. 48; *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. 226, at para. 78–79 (1996) ("these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.").

12 *See* AP I, *supra* note 6, art. 65; DoD Law of War Manual, *supra* note 1, at 4.8.2 ("Civilians who engage in hostilities forfeit the corresponding protections of civilian status and may be liable of treatment in one or more respects as unprivileged belligerents.").

13 AP I, *supra* note 6, art. 52(2); *see also* Dinstein, *supra* note 2, at 103, 110–17 (defining lawful objects of attack, or "military objectives", through a discussion of the nature, location, purpose, and use of the objective.); Beer, *supra* note 6, 808–09.

14 *See* AP I, *supra* note 6, art. 43; Joint Chiefs of Staff, Joint Pub. 3-60, Joint Targeting, at I-3–4 (2013).

15 AP I, *supra* note 6, art. 43(2) ("combatants . . . have the right to participate directly in hostilities."); *see also* AP I Commentary, *supra* note 3, 516: "The general distinction made in Article 3 of the Hague Regulations, when it provides that armed forces consist of combatants and non-combatants, is therefore no longer used. In fact, in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel, despite their status as members of the armed forces, or to civilians, as they are not members of the armed forces. All members of the armed forces are combatants, and only members of the armed forces are combatants."); Dinstein, *supra* note 2, at 42; Beer, *supra* note 6, 813 ("The underlying rationale behind this classification is the notion that soldiers as a class (unless *hors de combat*) threaten their opponent's army, either actually or potentially.").

attack.[16] This presumptive immunity is, however, forfeited if and for such time as they take a direct part in hostilities.[17]

The DPH qualifier to the presumptive civilian immunity from attack is an important and pragmatic compromise between humanitarian restraint and military necessity: no armed force should be required to expose its personnel to mortal danger from individuals protected as the result of their civilian status. Accordingly, the LOAC provides authority to respond decisively with lethal combat power to civilians whose actual conduct poses an immediate and substantial threat to the force. While there is virtually no dispute about the logic of this DPH rule, it has proved impossible to develop international consensus on where to draw the line of demarcation between conduct that does or does not result in loss of immunity from deliberate attack. The challenge associated with identifying this demarcation point has been the subject of extensive expert analysis, government assessments, and scholarly treatment.[18]

Unfortunately, this "DPH debate" has confused the basic binary equation central to the distinction obligation. Many commentators conflate the *test* for what the ICRC's Interpretive Guidance on the Meaning of Direct Participation in Hostilities labeled, "continuous combatant function" with the

16 AP I, *supra* note 6, art. 50 (Where there is doubt in the status of an individual, "that person shall be considered to be a civilian.").

17 *Id*., art. 65; DoD Law of War Manual, *supra* note 1, at 4.8.2 ("Civilians who engage in hostilities forfeit the corresponding protections of civilian status and may be liable of treatment in one or more respects as unprivileged belligerents."). Dinstein, *supra* note 2, at 41-2. Prof. Y. Dinstein notes that: "The trouble is that, as a matter of increasing frequency in contemporary IACs, civilians - instead of keeping out of the circle of fire - take a direct part in the hostilities. When they do so, civilians are assimilated to combatants for such time as they engage in the hostilities .... Empirically, what counts therefore is not formal status alone (namely, membership in armed forces) but also conduct (namely, engagement in hostilities). Civilians directly participating in hostilities differ from combatants in that they are not entitled to act the way they do. But they do not differ from combatants in that they become lawful targets for attack. Direct part in hostilities is commonly referenced as DPH. As referenced in the subsequent paragraph, determination of what qualifies as DPH is elusive to all.

18 *See*, *e.g.*, N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 11–12 (2009) (hereinafter, "Melzer"); *see also* AP I Commentary, *supra* note 3, at 619 (determining what constitutes DHP is of supreme significance. This is noted in the language of the commentary to Article 51 of AP I. "There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.").

status of belligerent operative.[19] As explained in a previous article,[20] while the factors for assessing when a civilian loses protection from attack as the result of engaging in a continuous combatant function may be analogous to the factors for assessing who is a member of an enemy belligerent group, the ultimate consequence of the analysis is different. A civilian may lose protection from attack, but continues to be a civilian; a member of a belligerent group — even a non-state group — is not a civilian because of his association with and subordination to the belligerent group. Such an individual is better understood as a belligerent enemy, and is therefore subject to belligerent attack authority by virtue of his or her membership status. Even if the attack authority is analogous for each of these individuals (which may not always be the case)[21], other issues derived from the individual's status, such as detention authority, will not be the same. Treating members of belligerent enemy groups as civilians, therefore, distorts this binary distinction inherent in the LOAC framework and confuses implementation of the distinction obligation.

So why does this matter if civilians who "DPH" lose their protection from deliberate attack? The answer lies in the presumptions associated with distinction's binary "civilian/belligerent" foundation. The most important targeting consequence of a determination that an individual is a member of an enemy belligerent group is that the individual qualifies as a presumptive threat, subject to attack at any time, even when the individual does not present an immediate actual threat to friendly forces.[22] In other words, once belligerent membership is identified, attack authority is purely status based, and is not contingent on a determination of threatening or offensive conduct. Acknowledging that non-state actors, who are members of enemy belligerent groups are subject to deliberate attack by virtue of their status, does not, however, make the *assessment* of that status any easier. Indeed, *implementation* of the distinction obligation at the tactical level of conflict is one of the most complex challenges confronting armed forces today.

19 *See* Melzer, *supra* note 18, at 33; Y. Dinstein, *Non-International Armed Conflicts in International Law,* 61–62 (2014) (hereinafter, "Dinstein II").

20 Corn & Jenks, *supra* note 8, at 333–40.

21 *Id.* at 347–53.

22 Dinstein II, *supra* note 19, at 61 (Dinstein indicates that once an affirmative determination on organized belligerent group membership is made, that person is directly participating in hostilities and subject to attack at any time. This belligerent status is retained, irrespective of actual combat activity, threatening conduct, or even possession of a weapon.); *see also* G. S. Corn, *Belligerent Targeting and the Invalidity of the Least Harmful Means Rule*, 89 *Int'l L. Stud.* 536 (2013) (providing a comprehensive explanation of the nature and justification for status based belligerent targeting authority).

Distinction, however, is a non-derogable obligation: no matter how difficult it may be to distinguish between belligerent operatives and civilians who are presumptively protected from deliberate attack, the obligation may not be suspended or ignored.[23] This may seem completely logical in the context of an armed conflict between two armed forces committed to passive distinction obligations; forces that distinguish their appearance from civilians and who endeavor in good faith to avoid exposing civilians to unnecessary risk by refraining from embedding vital military assets among the civilian population.

However, when fighting hybrid or unconventional enemy armed groups, implementing the distinction obligation is not only far more complex, but may also seem tactically illogical, as it seems to provide a windfall to the non-compliant enemy. In reality, compliance with and implementation of this obligation is arguably most important during operations against these non-LOAC-compliant enemies. Indeed, at least in practical terms, an inverse relationship exists between commitment to the distinction obligation as a civilian risk mitigation tool and the complexity of implementing the obligation when fighting "hybrid" enemies, who ignore *their* "passive" distinction obligation. These enemies exacerbate the risk to innocent civilians by their tactics of co-mingling and appearing indistinguishable from civilians. But no matter how illicit the enemy's tactics may be, the obligation to comply with distinction remains constant. As a result, when confronting this type of enemy, armed forces committed to compliance will inevitably — and appropriately — be expected to offset the increased risk to civilians caused by the enemy's illicit tactics by increasing their efforts to distinguish lawful targets from protected individuals and objects.

An expectation that additional efforts will be required to implement the precautions obligation — most notably greater effort to gather timely intelligence to inform targeting judgments — in order to offset enemy non-compliance may be perceived as unfair or illogical. However, such is the plight of the modern professional warrior. It is, however, naïve to ignore the reality that the protective effect of even the most diligent efforts to implement the precautionary obligation will often be undermined by the illicit enemy tactics that complicate distinction — tactics that substantially increase the risk of distinction errors and unintended harm to actual civilians. How should the law respond to this intersection of tactical reality, legal obligation, and humanitarian interests? In other words, what should the law actually demand of the law abiding combatant struggling to draw the

[23] DoD Law of War Manual, *supra* note 1, 2.5.5 (notably, "A party is not relieved of its obligations to discriminate in conducting attacks by the failures of its adversary to distinguish its military objectives from protected persons and objects.").

distinction between civilian and enemy belligerents in the context of combat operations against hybrid enemies who deliberately seek to complicate this distinction?

Contemporary armed conflicts expose the profound significance of this question, *i.e.*, the question our hypothetical soldier is contemplating as she prepares for deployment. Unfortunately, the law provides only an outline for an answer. The outline begins with AP I's "presumption" of civilian status for any individual who is does not qualify as a combatant within the definition adopted in Article 50 of the Protocol.[24] This definition defines combatant by cross-reference to certain categories of individuals qualified for prisoner of war status if captured. Of course, a combatant contemplating attacking an enemy will not be able to evaluate that enemy's combatant status by checking an identification card. Instead, the attack judgment — and the accordant distinction decision — will almost certainly be based on objective indicia that the individual is a member of an enemy group qualified for prisoner of war status if captured: indicia of inherently military in appearance.

As explained below, there is some uncertainty as to whether this presumption is reflective of binding customary international law applicable to both international and non-international armed conflicts. However, it is probably not an exaggeration to assert that even for states that question the legally binding nature of this presumption, it in fact forms the foundation of human targeting analysis in practice. Thus, when a soldier observes a silhouette through the rear sight aperture of his rifle, and aligns his front sight post on center mass of that silhouette, unless he observes some distinctive uniform or marking that clearly indicates enemy belligerent status by appearance, the practical presumption should be that he has a civilian in his sights.

But whether legally mandated or practical in nature, it remains unclear precisely what justifies rebutting the presumption of civilian status? In other words, what level of certainty is necessary for a soldier to lawfully attack what may *appear* on the surface to be a civilian? Or perhaps, what degree of doubt requires a soldier to refrain from attacking a person whose status is unclear? Closely connected to this question is the question this article addresses, *i.e.*, how, if at all, should the enemy's deliberate tactic of consistently avoiding "passive" distinction obligations impact the weight of this civilian presumption and the accordant reasonableness of attack decisions?

24 AP I, *supra* note 6, art. 50(1).

III. THE TWO SIDES OF THE DISTINCTION COIN

As noted above, it is a LOAC axiom that distinction provides the foundation for lawful and legitimate attacks during all armed conflicts. Implemented through the rule of military objective, distinction allows deliberate attacks against lawful targets, and prohibits deliberate attacks against all other people, places, and things.[25] By "distinguishing" between these two categories of potential targets, armed forces and other organized belligerent groups advance the dual interests of bringing opponents into submission while mitigating the risk to civilians and their property.

While distinction may have been an inherent aspect of the historic customary laws and customs of war, it was not until 1977 that the "principle" was codified in a treaty.[26] Article 48 of AP I, titled, the "Basic [R]ule", requires parties to an international armed conflict "at all times [to] distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly … direct their operations only against military objectives."[27] While AP I's non-international armed conflict counterpart, Additional Protocol II (AP II), did not include an identical article, Article 13 of that treaty provides that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."[28] Thus, at least for decisions related to what *people* may be lawfully attacked, the rules seem to impose the same obligation: restrict the *deliberate* attack to only individuals who are not civilians.

Distinction is based on a binary set of presumptions: belligerents are presumptively subject to deliberate attack and all other individuals are presumptively immune from such attack. Because AP I includes a definition of combatant, and because that term is routinely used as the generic characterization for any member of an organized belligerent group, it is common to refer to the obligation to distinguish between combatants and civilians. But the scope of the distinction principle is broader. First, the presumptive immunity from deliberate attack extends beyond just civilians, and includes within its scope non-combatant members of the armed forces (for example, members of the armed forces exclusively engaged in medical

25 *See Id.* at 52(2); For a more in depth discussion on the "military objective," *see* Dinstein, *supra* note 2, at ch. 4.

26 *See* AP I, *supra* note 6, art. 48.

27 *Ibid.*

28 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), 1977, art. 13, 1125 *U.N.T.S.* 609 (hereinafter, "AP II").

and religious activities), and any belligerent who is incapacitated as the result of wounds or sickness.[29] Second, the binary distinction equation is indisputably applicable to non-international armed conflicts (NIACs).[30]

Application of distinction to NIACs is not the result of treaty law, because AP II does not include an express provision analogous to Article 48 of AP I.[31] However, as recognized in both the International Committee of the Red Cross Customary Law Study (ICRC CIL Study) and numerous military LOAC manuals, distinction extends to all armed conflicts as a matter of customary international law.[32] Still, because only AP I defines "combatant" in a definition that is tethered to "lawful belligerent" qualification and the accordant entitlement to prisoner of war status upon capture,[33] complexity arises over "who" must be distinguished in NIAC. The ICRC CIL Study uses the term "combatant" in its statement of the basic distinction rule, ostensibly in the practical and not legal sense.[34] In contrast, the 2015 U.S. Department of Defense Law of War Manual explains both the similarity and difference between the term, "combatant" and "belligerent": both combatants and belligerents are subject to lawful attack by virtue of their status as members of enemy armed groups, whereas the term combatant also indicates the individual is "privileged," pursuant to international law, to participate in hostilities.[35]

Ultimately, application of distinction to both international armed conflicts (IACs) and NIACs necessitates a definition of "parties" to a conflict that

29 *See* AP I, *supra* note 6, art. 10, 12; Dinstein, *supra* note 2, at 187–203, 218–26 (discussing general protection from attack for the wounded and sick, those shipwrecked, parachutists, those surrendering, parlementaires, medical and religious personnel, relief personnel, journalists, etc.).

30 Dinstein II, *supra* note 19, at 213–15 (In NIACs, it is essential to distinguish fighters from civilians. Protecting civilians during internal armed conflict is a general principle inherent in AP II.).

31 *Compare* AP II, *supra* note 28 *with* AP I, *supra* note 6, art. 48 (for the lack of analogous provisions); Dinstein II, *supra* note 19, at 214.

32 J. M. Henckaerts & L. Doswald-Beck, Customary International Humanitarian Law, Vol. 1: Rules 3–8 (3d ed. 2009) (hereinafter, "Henckaerts & Doswald-Beck") (Rule 1, states that "[t]he parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."); *see, e.g.*, DoD Law of War Manual, *supra* note 1, 62–66; United Kingdom Ministry of Defence, Joint Service Publication 383, *The Joint Service Manual of the Law of Armed Conflict* 24 (2004); Canada, Department of National Defence, Joint Doctrine Manual B-GJ-005-101/FP-021, *Law of Armed Conflict at the Operational and Tactical Levels* 4–1, 403 (Aug. 13, 2001).

33 AP I, *supra* note 6, art. 43, 44.

34 Henckaerts & Doswald-Beck, *supra* note 32, at 3.

35 *See* DoD Law of War Manual, *supra* note 1, 4.3.2 (distinguishing each of these terms).

facilitates implementation of the binary set of presumptions at the core of the principle. The term "belligerent" is therefore a logical characterization for members of organized enemy groups, because it indicates a member of an enemy belligerent group who should, pursuant to the general concept of military necessity, be subject to deliberate attack as a consequence of that membership and the implicit threat associated with that membership. For distinction purposes, it is irrelevant whether the attack decision is being made in an IAC or NIAC, or whether the individual is qualified for prisoner of war status upon capture and is therefore a "combatant" or "privileged" belligerent. What matters is that there is an armed conflict between two or more "parties" and that the parties to the conflict are composed of organized belligerent groups. In such situations, belligerent forces of all parties to the conflict must constantly endeavor to distinguish between enemy belligerent operatives and all other individuals, and restrict deliberate status-based attacks only to the former.

Imposing a prohibition against deliberately attacking civilians, either in the express terms of AP II, or in the "distinction" terms of AP I, also necessitated a workable definition of 'civilian'. In the context of IACs, AP I defined civilians as any individual who was not a "combatant."[36] This negative definition is ostensibly effective in the context of conventional armed conflicts between regular armed forces. However, its efficacy is diluted in the context of NIACs, and in hostilities during an IAC between regular armed forces and irregular or hybrid forces. In these contexts, many belligerents will fail to qualify as combatants, so the binary division between combatants and all other individuals who (by negative definition) who are not combatants within the definition of AP I Article 50 and must therefore be presumed civilians protected from deliberate attack, leads to inevitable confusion. Nonetheless, the logic of distinction as a foundation for the legitimate use of violence is no less relevant in these contexts than it is in the context of traditional or conventional conflicts.

The importance of facilitating distinction by imposing a "passive" distinction obligation on belligerents was not lost on the drafters of AP I. Like their LOAC treaty drafting predecessors, the drafters of AP I developed a dualistic concept of the distinction obligation: (1) the obligation of the attacker to distinguish between belligerent and all other individuals, complemented by (2) the obligation of belligerents to distinguish themselves from the civilian population.[37] The "passive" component of the overall

[36] AP I, *supra* note 6, art. 50 (referencing Article 43 and the Third Geneva Convention, Article 4(A)(1), (2), (3), (6)); Dinstein, *supra* note 2, at 139.

[37] *See* Regulations Respecting the Laws and Customs of War on Land, Annex to Convention (IV) Respecting the Laws and Customs of War on Land, reg. art. 1, Oct. 18, 1907, 36

distinction obligation — the requirement that belligerents distinguish themselves from the civilian population — was really not new. Indeed, it was actually central to the qualification for lawful belligerent status adopted in 1899 and again in 1907 in The Regulations Annexed to The Hague Convention IV.[38] Article 1 of the Annexed Regulations limited entitlement to the international law derived "rights, and duties of war", to:

> . . . armies, but also to militia and volunteer corps fulfilling the following conditions:
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."[39]

As these "lawful belligerent" qualifications reveal, the passive distinction obligation was central to the privilege to engage in hostilities, because that privilege was linked to wearing a fixed distinctive emblem recognizable from a distance and carrying arms openly.

AP I reinforced this passive element of the distinction equation two ways. First, it defined (for the first time in treaty form) the term "combatant"; and second, like Hague IV, AP I vested combatants with the privilege to engage in hostilities.[40] Combatants, in turn, were defined as members of the armed forces, which was further defined as follows:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a

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Stat. 2295, (hereinafter, "Hague IV Reg") (In addition to clear 'active' distinction principles, the drafters of Hague IV included 'passive' distinction principles such as fixed uniform emblems and the open carry of weapons, which is further discussed in this article).

38 *Id.* (Specifically, The Regulations Annexed to The Hague Convention IV denotes two passive conditions: the requirement to wear a fixed emblem recognizable at a distance, and the right to openly carry arms.).

39 *Ibid.*

40 *Compare* AP I, *supra* note 6, art. 43(2) *with* Hague IV Reg., *supra* note 37, reg. art. 1.

> government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.[41]

The passive distinction obligation is a rule of international law applicable to armed conflicts — a rule reflected in Hague IV. Accordingly, AP I's combatant definition linked, by implication, combatant qualification with the requirement to implement passive distinction by wearing an identifiable emblem and carrying arms openly.

This linkage between combatant status and a passive distinction obligation was confirmed — at least in relation to complementing the positive distinction obligation — by Article 44 of AP I. Specifically, the definition of combatant included the following provision:

> 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
> (a) during each military engagement, and
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. . . .[42]

This sub-paragraph generated substantial controversy, and was a significant influence on the U.S. decision to reject AP I.[43] For example, the United States considered this provision of Article 44 an unjustified dilution

41 AP I, *supra* note 6, art 43(1).

42 *Id.* at art. 44(3).

43 Dinstein, *supra* note 2, at 64; J. Gurule & G. Corn, *Principles of Counter-Terrorism Law* 105 (2010) (hereinafter, "Gurule & Corn") ("Article 44 of Additional Protocol I diluted the requirements by extending the protections afforded to prisoners of war, to enemy belligerents who only meet the requirement of carrying arms openly and complying with the laws and customs of war. This provision effectively degraded the requirement that the enemy distinguish itself from the civilian population.").

of the customary passive distinction obligation imposed on belligerents.[44] Specifically, the United States objected to a rule that allowed belligerents to claim lawful combatant status without always distinguishing themselves from the civilian population.[45] But the source of the controversy surrounding this provision and the U.S. objection actually reinforces the critical importance of the passive component of the distinction equation. It was not the imposition of a passive distinction obligation that was controversial; instead, it was the apparent dilution of this obligation resulting from the requirement that combatants "distinguish themselves" only during engagements or while preparing for an engagement and visible to the enemy.[46]

It is undisputed that both Hague IV and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) linked the "privileged" belligerent qualification to the passive distinction obligation. In Hague IV, the linkage between lawful belligerent status and compliance with passive distinction was explicit.[47] Although the GPW did not include an analogous explicit linkage for members of the regular armed forces (but instead included them within the POW category simply by virtue of being members of the armed forces), the very notion of a regular armed force implied a uniform and openly bearing arms requirement.[48] Furthermore, while POW qualification was obviously tethered back to Hague IV's belligerent definition, the GPW was not purporting to define lawful or privileged belligerents, but instead who was entitled to POW status upon capture.[49] Thus, even if a member of the regular national armed forces is entitled to this status, even if *captured* out of uniform, this does not suggest that such individuals are permitted to engage in hostilities without distinguishing themselves from civilians.

For other armed groups associated with the armed forces, such as militia groups and volunteer corps, both of these treaties imposed an explicit requirement to wear an observable emblem and carry arms openly.[50] Perhaps

44 Gurule & Corn, *supra* note 43, at 105.

45 *Id.*

46 *Id.; see also,* U.S. Dep't of the Air Force, Pamphlet No. 110-31, International Law – The Conduct of Armed Conflict and Air Operations 5-8 (1976) ("The requirement to distinguish between combatants and civilians, and between military objectives and civilian objects, imposes obligations on all the parties to the conflict to establish and maintain the distinctions.").

47 Hague IV Reg., *supra* note 37, reg. art. 1.

48 *See* Convention (III) relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 75 *U.N.T.S.* 287 (hereinafter, "GPW").

49 *Id.* at art. 4–5.

50 Hague IV Reg., *supra* note 37, reg. art. 1; GPW, *supra* note 48, art. 4(2).

more importantly, neither treaty qualified the obligation to apply only during an attack or during a deployment immediately preceding an attack, as did AP I.[51] Whether this was a positive advancement of the law or a negative dilution is not, however, the relevant issue here. Instead, the basis for objecting to AP I indicates how significant states like the United States (and other States that shared the same objection) considered this passive component of the distinction equation, and the risk to civilians inherent in dilution of the obligation.

It is also notable that even AP I's more liberal passive distinction obligation reinforces the basic premise that the overall concept of distinction can function effectively only through both active and passive implementation. Unless members of opposing belligerent groups effectively distinguish themselves from the civilian population — at a bare minimum during engagements and during deployments preceding and after engagements — the best efforts of the opponent to distinguish enemy from civilian in the attack will be compromised and civilians will be exposed to unjustified risk.

The absence of treaty based NIAC definition of combatant or belligerent makes the issue of passive distinction more complicated in that context. However, both Article 13 of AP II and customary international law require "active" distinction in the attack during NIACs.[52] While passive distinction is not explicitly required by either Common Article 3 of the 1949 Geneva Conventions or AP II, this is almost certainly the consequence of an absence in these treaty provisions of a "combatant" or "belligerent" definition. Without first defining "civilian" and "combatant", it would have been illogical for the AP II drafters to include a rule requiring "combatants" to distinguish themselves from civilians. It is, however, extremely significant that even without including such definitions, the drafters of AP II still implicitly incorporated an active distinction obligation into the treaty. As noted above, during any NIAC falling within the scope of AP II, Article 13 prohibits parties from making the civilian population or individual civilians the deliberate object of attack.[53]

51 *Compare* Hague IV Reg., *supra* note 37, reg. art. 1 *and* GPW, *supra* note 48, art. 4(2) *with* AP I, *supra* note 6, art. 44(3).

52 *See* AP II, *supra* note 28, art. 13; *see also* Dinstein II, *supra* note 19, at 214 (discussing support for broadening protections for civilians from military operations, with an example being the banning of the use of civilians as human shields) 'Active' distinction is a "general principle . . . 'inherent' in AP/II, 'which provides for the protection of civilians': after all, '[f]or them to be protected, they must be distinguished.'" *Id.*

53 AP II, *supra* note 28, art. 13.

This provision of the most significant effort to provide more comprehensive and effective LOAC regulation to NIACs indicates three important expectations related to these conflicts. First, all NIACs are defined as a contest between "parties to the armed conflict", a term that indicates, at least by implication, a contest between organized belligerent groups distinct from the general civilian population.[54] Second, these groups bear an international legal obligation to limit deliberate attacks to only individuals who qualify as belligerent members of the opposing group.[55] And third, by implication, members of these groups bear an obligation to take measures to distinguish themselves from the civilian population in order to facilitate implementation of Article 13.[56] Accordingly, while "fighters" in NIACs may not qualify for any type of internationally derived legal "status" that carries with it a privilege to engage in hostilities, they nonetheless bear an obligation to facilitate active distinction by their opponent by distinguishing themselves from the civilian population. In other words, while it is legally imprecise and overbroad to refer to "combatants" in a NIAC, because the legal significance of that term is that the individual is qualified pursuant to international law to directly participate in hostilities (or, as Hague IV indicates, vested with the "rights and duties" of war), the passive distinction obligation extends to belligerent members of a "party" to *any* armed conflict.

The alternate interpretation — that the principle of distinction is limited to the "active" component in the context of NIACs — would be fundamentally inconsistent with the central humanitarian interest advanced by the principle itself. It would also contradict the indisputable conclusion that the efficacy of distinction requires both an active and passive component. As noted above, NIACs are contests between "parties to an armed conflict", a concept that requires organized belligerents — a concept that implies they will be distinct from the general civilian population and even civilians who directly participate in hostilities.[57] Indeed, the fact that Article 13 of AP II extends the distinction rule to NIACs, but also indicates that *civilians* who directly participate in hostilities lose protection from deliberate attack, reinforces the conclusion that members of belligerent parties to such armed conflicts are distinct from the civilian population, as the latter is presumptively immune from deliberate attack. Ultimately, it is illogical for Common Article 3 and AP II to refer to "parties" to an armed

54 *Id.* at art. 1; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 *U.N.T.S.* 287; *see also* Melzer, *supra* note 18, 27–28; Dinstein II, *supra* note 19, at 133; *How is the Term "Armed Conflict" Defined in International Humanitarian* Law, ICRC Opinion Paper, at 3–5, (2008), available at https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf.

55 AP II, *supra* note 28, art. 1.

56 *See id*., art. 13.

57 *See* Melzer, *supra* note 18, at 6, 27–28, 33—34; Corn & Jenks, *supra* note 8, at pt. 2.2.

conflict without the implicit requirement that these groups utilize some objective method of "distinguishing" their belligerent members from civilians. Thus, interpreting the passive component of the distinction obligation to apply to all armed conflicts not only enhances civilian protection by facilitating distinction in the attack, but is central to the very conception of armed conflict itself.

It is also important to recognize the unqualified nature of this obligation: the law recognizes no necessity exception. Distinction may be intended to mitigate risk to civilians and civilian property, but it would be naïve to fail to recognize that it also increases risk to belligerents. By complying with the passive distinction obligation, belligerent operatives facilitate the enemy's ability to identify and engage them. But this consequence never justifies derogation from the obligation. Thus, the very nature of the obligation renders any suggestion of a necessity-based qualification counter-intuitive: passive distinction may be intended as a civilian risk mitigation measure, but it inevitably increases exposure to deliberate attack, and avoiding such exposure can never justify derogation. Indeed, this was the primary rationale invoked by the United States in its objection to AP I's apparent dilution of the passive distinction rule.[58]

Failing to require passive distinction by all belligerent operatives in armed conflict, even those who do not or cannot qualify for "privileged" belligerent status, also produces a range of perverse outcomes. First, and most obviously, the tactical advantage derived by the belligerent who fails to distinguish himself from the civilian population is gained at the expense of increased civilian risk — an increase that is legally unjustified. There is simply no plausible argument to counter this conclusion. The increased risk imposed on belligerents as the result of passive distinction is the price international law imposes in order to advance the interest of civilian protection. Thus, the very notion of distinction reveals a central LOAC premise: belligerents will often be required to accept increased mortal risk in order to mitigate risk to civilians. Allowing belligerent operatives to employ tactics that inverse this equation is a perversion of the underlying logic of both distinction and the LOAC more generally.

Second (and closely related to the first), failing to require passive distinction by all belligerents incentivizes tactics that exacerbate — rather than mitigate — civilian risk. This contradicts the object and purpose of the LOAC's imperative that belligerents take "constant care" to *mitigate* risk to civilians. Absent such an obligation, victimization of civilians is inevitable, and as Professor Laurie Blank notes, "(1) they [civilians] are trapped —

58 Gurule & Corn, *supra* note 43, at 105.

literally and figuratively — in the conflict zone by fighters using them as cover for their perfidious tactics; and (2) they become the unintentional and tragic targets of soldiers who mistake them for legitimate targets when unable to distinguish between fighters and civilians."[59] All incentives of the law should contribute to this overriding humanitarian objective imperative, which, in the context of conduct of hostilities, focuses on tactics that *mitigate* instead of *exacerbate* civilian risk. The passive distinction obligation is a central, if not a decisive, component of this equation.

Finally, imposing a passive distinction obligation on regular armed forces without analogous imposition on irregular belligerent groups functionally penalizes one party to the conflict for its commitment to LOAC compliance. Military forces should employ tactics to shield their activities and their personnel from the enemy. These tactics range from the use of camouflage to active deception activities. Such measures are logical, because they are intended to mitigate enemy efforts to identify and attack friendly forces. However, the passive distinction obligation imposes an essential limitation on such tactics: a tactical advantage may not be gained at the expense of civilian protection from deliberate attack. Thus, at its most basic level, a military uniform is a proverbial "dual edged" sword. One edge of the sword provides an advantage by rendering the enemy's attack identification efforts more complicated. However, the other edge of the sword increases the risk to the belligerent by facilitating the enemy's distinction between lawful objects of deliberate attack and civilians, thereby protecting civilians.

The relationship between civilian objects and a passive distinction is more nuanced. Unlike the absolute obligation imposed on belligerents, use of civilian objects for military purpose and/or locating military assets among the civilian population is not absolutely prohibited.[60] Of course, imposition of an absolute prohibition against the use of such tactics is appealing from a humanitarian perspective; after all, placing all civilian property and areas "off limits" to belligerent forces during armed conflict would substantially enhance the distinction process. However, the law recognizes that an absolute prohibition of such tactics would be unworkable. Military forces will always seek tactical and operational advantages in the conduct of hostilities, and such advantage will often be derived from tactics that rely on the use of civilian property or exploit proximity to civilian population

59 *See* Laurie R. Blank, "Taking Distinction to the Next Level: Accountability for Fighters' failure to Distinguish Themselves from Civilians", 46 *Val. U. L. Rev*. 765, 790 (2012) (hereinafter, "Blank").

60 AP I Commentary, *supra* note 3, at 694–95; DoD Law of War Manual, *supra* note 1, 2.5.4, 5.16.1 (the use of civilian objects is not expressly prohibited, and in fact may be used for a military purpose where the object is no longer 'protected').

centers. It is simply unrealistic to expect complete isolation of armed hostilities to only belligerents and inherently military property.

AP I addressed this aspect of tactical necessity and its intersection with the complex challenge of mitigating risk to civilian property and population concentrations.[61] The competing operational and humanitarian interests led to a rule that seeks to accommodate both, a rule that accounts for the reality that complete immunization of such places and things is impossible. Accordingly, the treaty imposes what is probably best understood as a, "refrain" obligation on parties to a conflict. Specifically, Article 58 provides, *inter alia*:

> The Parties to the conflict shall, to the maximum extent feasible: . . .
> (b) avoid locating military objectives within or near densely populated areas;
> (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.[62]

It is apparent that the "feasibility" qualifier indicates that Article 58 reflects a qualified passive distinction rule. However, the rule also imposes an important unqualified obligation: to act in good faith to refrain from tactical and operational decisions that needlessly exacerbate civilian risk. Indeed, the Commentary notes that "during the final debate[,] several delegations indicated that[,] in the view of their governments, this article should in no way affect the freedom of a State Party to the Protocol to organize its national defence to the best of its ability and in the most effective way."[63] Thus, unlike the passive distinction obligation applicable to belligerents, this obligation presents a more complex implementation equation.

This complexity results not only from the qualified nature of the obligation, but also from the express limit to "densely populated" areas as it relates to the co-mingling aspect of the rule.[64] Unfortunately, the ICRC Commentary provides virtually no insight into how to assess what qualifies as a "densely populated" area. This sub-paragraph should not be assessed in isolation. Instead, it should be interpreted within the broader context of the constant care obligation, reinforced by the next sub-paragraph, which requires parties

61 AP I, *supra* note 6, art. 58.
62 *Id.*
63 AP I Commentary, *supra* note 3, at 692.
64 *Id.* at 694.

to "take other necessary precautions."[65] In this context, it would be improper to interpret the "densely populated" qualifier as a license to co-mingle military assets with civilian populations when the civilian population is not "dense." Instead, parties to a conflict should refrain from co-mingling military assets amongst the civilian population, and should do so only when justified by genuine military necessity.

Even if understood as applicable to any area with a presence of civilians, implementing this obligation, and assessing compliance with it, involves complex questions of objective feasibility. Because parties to a conflict will frequently adopt tactics that complicate their enemy's distinction efforts — locating military assets amongst the civilian population and converting civilian property into military objectives — it will often be difficult to assess when doing so contravenes this passive distinction obligation. However, the focal point of such assessment must be derived from Article 58's structure. Like Article 57 precautions, Article 58 is phrased as a presumptive obligation with limited qualification: parties, "shall" implement the obligation to the maximum extent feasible.[66] Accordingly, parties should constantly endeavor to avoid co-mingling. The feasibility qualifier would logically turn on considerations of military necessity — the consideration that rebuts the presumptive prohibition.

Focusing on the objective validity of the alleged military necessity to deviate from the presumptive prohibition may provide outer parameters for assessing proper implementation of this obligation. However, it must be acknowledged that this also produces a wide margin of discretion. Like any other exercise of military necessity, the legitimacy of each tactical assessment will be intensely fact-dependent. In this regard, it is worth considering whether the term "maximum extent" suggests some type of heightened necessity requirement, akin to the increased necessity required to justify destruction of civilian property during occupation. This might support the conclusion that co-mingling and/or the use of civilian property is justified only as a measure of last resort. This may be a logical inference. However, neither Article 58 nor the associated Commentary references military necessity. Perhaps more importantly, practice suggests that this is not the case. In many situations there are a range of tactical options available to a commander, some of which do not involve co-mingling, but the co-mingling option is nonetheless selected.

What does seem clear, however, is that at a minimum, some credible claim of military necessity is required to justify co-mingling. What then would

65 *Ibid.*
66 *Compare* AP I, *supra* note 6, art. 57 *with* AP I, *supra* note 6, art. 58.

clearly indicate a violation of this obligation? One answer may lie in the nature of the civilian property utilized for military purposes and the options available at that time. When presented with a range of tactical options, selecting the option that exposes the most highly protected civilian property to attack is highly indicative of a deliberate violation of the passive distinction obligation. Such tactics would not only be inconsistent with the passive precaution obligation generally, but also with AP I's express prohibition against using the presence of civilians to immunize or shield military objectives from attack.

To illustrate, consider military use of a church steeple, a civilian object that may, like most other civilian objects, may, based on legitimate military necessity, be used for a military purpose. Imagine that in anticipation of a ground attack, a defending force utilizes a church steeple as an observation post and for adjusting indirect fires against the enemy. This use of the civilian building certainly permits the enemy to treat the steeple as a military objective. The observation provided by such a high point certainly offers the defending forces a significant military benefit, and would therefore be justified by military necessity. Even considering the heightened protection normally afforded to religious buildings,[67] the vantage point provided by a steeple will almost always be viewed as offering a significant tactical advantage. Under these circumstances, military necessity provides an objectively credible justification for use of the steeple, thereby rendering the use consistent with the passive precautions obligation.

Now consider additional information. Imagine that the church steeple is not the only high point available offering the same observation advantage. There is an abandoned high rise office building nearby, as well as a radio/television tower. Nonetheless, the enemy chooses the church steeple as the observation post. These circumstances — the ready availability of an alternate option that, while civilian in nature, is not normally treated with the same heightened level of protection as a religious building — result in a genuine question as to the motivation for use of the steeple. When alternate options are available to satisfy the ostensible military necessity for co-mingling with civilians or using civilian property for military purposes, and the use of these alternates would mitigate risk to civilians, it seems logical to infer that the tactic actually utilized was motivated, at least in part, by the hopes of impeding enemy attack.

67 *See* AP I, *supra* note 6, art. 53.

Hamas tactics in the 2014 Gaza conflict[68] illustrate the logic of drawing an inference of violation from decisions that unnecessarily exacerbate civilian risk. During the course of this conflict, it became obvious that Hamas was co-mingling military assets and personnel with civilians and locating important military assets in or around civilian property.[69] As noted above, such tactics may have been justified by considerations of military necessity, and thereby consistent with the feasibility qualifier to passive distinction obligation related to places and things. However, publicly available information indicates that Hamas consistently sought to exploit areas and property it must have known were considered highly protected by the Israeli Defense Forces (IDF), such as hospitals, schools, and United Nations compounds.[70] Embedding firing positions, command posts, and logistics in and around such sites when other buildings and areas in close proximity could have been used suggests illicit tactical decision-making in violation of the passive precaution obligation. In these circumstances, it is completely logical to infer that these tactics were motivated by the hope that the IDF would refrain from or hesitate to attack such targets, and the understanding that if attacks were launched, the inevitable damage and destruction to these sites could be leveraged for strategic information value.

Even in the face of this type of tactic, however, identifying the line between justifiable military use of civilian property — use based on military necessity that transforms the property into a lawful military objective as the result of that use — and violations of the passive precaution obligation remains complex. The mere absence of rapid and universal condemnation of Hamas tactics in the 2014 Gaza conflict indicate that even in the extreme there remains uncertainty.[71] There are, however, some aspects of the analysis

68 The 2014 Gaza conflict, Operation Protective Edge, was an Israeli military operation aimed at ceasing Hamas launched rockets into Israeli population centers. The operation has garnered extensive discussion and criticism because of the high number of Gazan civilian casualties resulting from the conflict.

69 *See* JINSA-commissioned *Gaza Conflict Task Force, 2014 Gaza War Assessment: The New Face of Conflict*, 10 (2015) (hereinafter, "JINSA Report") ("Hamas's focus in the conflict was on the exploitation of the presence of civilians in the combat zone, not just as a passive defense tactic, but through actions intended to place its own civilians in jeopardy.").

70 *Id.* at 20 (". . . Hamas deliberately and unlawfully placed command and control, firing positions and logistical hubs underneath, inside or in immediate proximity to structures it knew the IDF considered specially protected, to include hospitals, schools, mosques, churches and housing complexes, as well as administrative buildings formerly belonging to the Palestinian Authority, in full knowledge that this would substantially complicate IDF targeting decisions and attack options.").

71 Professor Blank emphasizes the same point, when she notes, that "[t]he absence of — or at best minimal — condemnation of the practice of placing military equipment and objectives in civilian areas thus encourages those who wish to take advantage of the

that should produce no uncertainty. First, belligerents have always and will almost certainly continue to engage in such tactics. Second, as explicitly indicated by Article 51 of AP I, such tactics never relieve an attacking force of its active distinction obligation: no matter how deliberate or illicit the enemy co-mingling tactic may be, active distinction obligations are not suspended or nullified.[72] Third, illicit enemy tactics in violation of passive distinction inevitably complicate compliance with active distinction. Fourth, knowledge of enemy co-mingling will inevitably increase the attacker's obligation to take measures to mitigate civilian risk, to include implementing the proportionality obligation.

IV. ILLICIT TACTICS, STATUS PRESUMPTIONS, AND REASONABLE MISTAKES

The inevitable reality of combat operations must influence the weight of the presumptive nature of civilians and civilian objects, and in turn the reasonableness of attack judgments that endanger these individuals and their property. Whether as a result of resource limitations or deliberate efforts to complicate an enemy's distinction decisions, the era of combat between uniformed opponents seems increasingly outpaced by the new reality of hybrid warfare. Such tactics obviously complicate effective implementation of the distinction and proportionality obligations. In many cases, attacks directed against these enemies produce the intended outcomes — degrading enemy capabilities by killing or injuring enemy belligerent operatives or producing intended effects on lawful objects of attack. Such outcomes reflect positively on the attacking forces, whose LOAC commitment and implementation efforts offset the dilution to civilian protection produced by illicit enemy tactics inconsistent with their own LOAC obligations.

However, it is inevitable that in some cases attack outcomes will deviate from what was intended. Unfortunately, this will often result in unintended deaths of or injuries to civilians and/or destruction of civilian property. In this context, unintentional refers to outcomes that were not consistent with the purpose of the attack, or outcomes that the attacking commander could

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civilian population's presence. Without robust enforcement of this key obligation for the protection of civilians, parties will continue to locate rocket launchers, military equipment, and other military objectives in civilian areas with impunity. The effect, unfortunately, is to endanger civilians rather than protect them. For civilians caught in the zone of combat, and for military planners and commanders making targeting determinations, the continued force of this obligation is critical. Unfortunately, the absence of any mention of this obligation simply gives parties free rein to exploit the civilian population and to undermine, at the most fundamental level, one of the central principles of LOAC." *See* Blank, *supra* note 59, at 797.

72 DoD Law of War Manual, *supra* note 1, 2.5.5.

not reasonably anticipate with substantial certainty at the time of the attack decision. Thus, for purposes of this discussion, "unintended" means an outcome that was inconsistent with the purpose or knowledge of the attacking force at the time the attack was executed.

There are, of course, situations where the commander will "know" with substantial certainty that an attack will produce incidental injury to civilians or collateral damage to civilian property, and will nonetheless authorize the attack. So long as those attack judgments comply with the precautions and proportionality obligations, they are legally permissible.[73] These judgments, and the human and property consequences they produce, are in no way unique to operations against hybrid or irregular enemies. In such situations, it is the ultimate balance between military necessity and civilian risk mitigation that must continue to dictate the reasonableness of attack judgments.[74]

Of course, any death or injury to civilians, or destruction of civilian property, is tragic. But it is important to constantly differentiate between an injury that was knowingly but nonetheless lawfully inflicted from an injury that was unintentionally inflicted. The harsh reality of the intersection of law and war is that the LOAC does not (and, practically, probably cannot) completely prohibit such outcomes. Instead, LOAC targeting rules are intended to mitigate the risk of such outcomes. The LOAC permits the "knowing" infliction of such injury and destruction, but only based on a determination that the need outweighs the consequence. This balance between necessity and civilian risk does not account for situations where the individuals or objects originally assessed as lawful targets turn out to have been civilians or civilian property. It is this type of unintended civilian harm that is the focus of this discussion: injury to individuals identified as civilians only after the attack, or destruction of property determined after the fact not to have been a lawful military objective.

Certainly, if such harm is deliberately inflicted, the condemnation of LOAC violation would be straightforward. But in many situations — perhaps even most involving combat operations executed by armed forces committed to LOAC compliance — the relevant harm will not be the result of a deliberate effort to target civilians or destroy civilian property. Instead, it will be an outcome that comes to light after conducting an attack against

73 *See Id.* at 2.4, 2.4.1.2 ("applying the proportionality rule in conducting attacks does not require that no incidental damage result from attacks. Rather, this rule obliges persons to refrain from attacking where the expected harm incidental to such attacks would be excessive in relation to the military advantage anticipated to be gained").

74 *Ibid.*

what was, at the time of the attack decision, assessed as a lawful target. These incidents present much more complex questions of LOAC compliance.

Answering these questions begins with the LOAC's targeting presumptions. These presumptions facilitate implementation of the distinction obligation, and therefore are intended to enhance protection for persons or objects that are not inherently military by nature. When such individuals or objects are observed by an attacking force through the literal or proverbial "front sight post", they must initially be presumed protected from deliberate attack. This presumption implements the protective corollary to the authority of an attacking force to presume individuals and objects that are inherently military by nature may be attacked based on the presumed threat they pose at all times and places.

This concept of presumptive protection, or immunity, from deliberate attack is codified, at least for objects, in Article 52 of AP I.[75] The essence of Article 52 is that whenever there is "doubt" as to the nature of a proposed object of attack, it must be presumed civilian in nature and therefore immune from deliberate attack:

> 1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph …
> 3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.[76]

Consider the essence of sub-paragraph 3: combatants are instructed that objects that are normally dedicated to civilian purposes must be presumed *not* to qualify as lawful military objectives.[77] Note that the examples included in the article are not exhaustive, but merely illustrative. So, what then falls outside this presumption? Only objects that are not normally dedicated to civilian purposes. The implication is that only inherently military objects may, by their nature, be considered to fall outside this presumptive immunity from attack. This is consistent with the ICRC Commentary to Article 52, which provides that,

75 AP I, *supra* note 6, art. 52.
76 *Ibid.*
77 *Ibid.*

> A closer look at the various criteria used reveals that the first refers to objects which, by their 'nature,' make an effective contribution to military action. This category comprises all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres etc.[78]

All other objects must, therefore, be presumed civilian. But what about individuals? Does an analogous presumption extend to potential human targets? The answer must be affirmative.

Article 52 addresses only non-human targets, but it would be counter-intuitive to suggest that IHL is less protective of civilians than of civilian property. Applying a less protective rule for humans would also be fundamentally inconsistent with the basic rule of distinction. Indeed, Article 48 requires that armed forces, "direct their operations only against military objectives."[79] The use of the term "military objectives" could suggest the rule is limited to objects, as only objects are addressed in Article 52 defining military objectives. This is not the case. Instead, it is clear that military objectives as used in the context of Article 48's codification of the basic rule of distinction refers to human and non-human targets.[80] This is supported by the core logic of the distinction rule, and is specifically addressed in the ICRC Commentary to Article 48, which provides that, "as regards military objectives, these include the armed forces and their installations and transports."[81]

Extending an analogous presumption of civilian status and immunity to potential human targets enhances the humanitarian effect of distinction. The contribution to civilian risk mitigation made by this binary presumption is twofold. First, as with objects, it allows combatants to act with maximum aggression against inherently military personnel or objects, but balances this authority with an obligation to take greater care before launching an attack against any person or object that is not "by its nature" military in character. As noted in the Commentary to Article 52, "even in contact areas there is a presumption that civilian buildings located there are not used by the armed forces, and consequently it is prohibited to attack them unless it is certain that they accommodate enemy combatants or military objects."[82] Second,

78 AP I Commentary, *supra* note 3, at 636.
79 AP I, *supra* note 6, art 48.
80 *Ibid.*
81 AP I Commentary, *supra* note 3, art. 48.
82 *Id.* at art. 52.

because this presumption is the start point of target analysis, the burden is on the attacking force to identify information that rebuts the presumption, which in turn incentivizes information collection and situational awareness.

This latter contribution cannot be overstated. Collection and assessment of information in order to maximize targeting situational awareness is a critical precautionary measure. And, the importance of this measure increases in direct relation to the lack of enemy commitment to passive distinction. Indeed, the Commentary to Article 50 actually emphasizes the vital importance of such information when it states, "Article 50 of the Protocol concerns persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked."[83]

As noted in a prior article,[84] this and other precautionary measures will often provide a greater probability of advancing the LOAC's civilian risk mitigation goal than will proportionality assessments. The mentality adopted by combatants in the complex and co-mingled battle space on how to treat potential targets will inevitably influence the extent to which these precautionary measures are considered and implemented. When combatants instinctively treat any individual or object not inherently military "by nature" as civilian, it will trigger an analogous instinct to maximize information and situational awareness as a predicate to launching the attack. In short, burdens flow from presumptions, and when a potential target is presumed immune from attack, the accordant burden of rebuttal will produce an inevitable demand for greater targeting clarity.

It is, of course, undeniable that efforts to gather more accurate information will be contingent on the tactical situation, and that the more deliberate a targeting decision is, the more space there will be for such efforts. Other factors such as intelligence, surveillance, and reconnaissance capability and tactical priorities of effort will also influence the reasonableness of implementing this precautionary measure. These legitimate implementation considerations ameliorate the potential tactical risk produced by the civilian status presumption. In other words, while the presumption places a burden on the attacking combatant to gather information to rebut the presumption, the extent of those efforts will be dictated by the tactical situation. In some situations, the presumption will have a substantial impact on efforts to

83 AP I Commentary, *supra* note 3, art. 50.

84 *See generally* G. S. Corn "War, Law, and Precautionary Measures: Broadening the Perspective of this Vital Risk Mitigation Principle", 42 *Pepp. L. Rev*. 419 (2014).

clarify the nature of a proposed target; in others, the impact will be minimal. But in all situations, the combatant will be obligated to do his or her best to validate the nature of the potential target as lawful, either because the individual is not in fact entitled to civilian immunity from attack, or the object is in fact a military objective.

Ultimately, there can be little doubt that presumption of civilian status contributes to distinction implementation and civilian risk mitigation. However, acknowledging the applicability and importance of this presumption does not fully account for the impact it has on the legality of attack decisions. To appreciate this impact, it is necessary to consider how the weight of the presumption is influenced by enemy tactics, and how this weight influences the nature and density of information that reasonably rebuts the presumption.

In practical terms, this may in fact be the most important aspect of the targeting consequence of presumptive immunity from attack. For forces contemplating an attack, the decisive aspect of implementing the distinction obligation will often be the assessment of the status of a given target. Directing those forces to presume anyone or anything not inherently military is civilian provides only an initial start-point for the attack assessment. At that point, any indication that the individual is either a belligerent operative or a civilian directly participating in hostilities, or that the object qualifies as a military objective as the result of location, purpose, or use, will lead to the decisive step in the distinction analysis: is the information assessed sufficient to rebut the civilian presumption?

Some presumptions, because they are conclusive, cannot be rebutted by any amount of information. Clearly, the civilian status presumption does not fall within this category. Instead, like most presumptions, it is rebuttable. These type of presumptions are normally defined by the weight or *quanta* of information required for rebuttal. What then rebuts the civilian immunity presumption? Because the presumption triggers a protection against deliberate attack, the answer is clear: a determination that the individual or the object qualifies as a lawful target. But the degree of certainty as to this determination required by the LOAC is simply undefined. Indeed, there is absolutely no guidance on this critical question provided by either the text of AP I or the associated Commentary.

Whether it is beneficial or even possible to define a *quanta* of information justifying an attack decision is debatable. In a prior article,[85] I proposed a *quanta* framework linked to tactical situations. However, Lieutenant Colonel J.J. Merriam's article, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, strongly opposes such a concept.[86] Merriam asserts instead that the requirement that targeting judgments be objectively reasonable is a deliberately flexible standard that adequately accounts for the multitude of variables associated with all attack judgments.[87] Our views, however, intersect on one essential point: the reasonableness of any attack judgment — judgment that require compliance with and implementation of the distinction obligation — is always contingent on the unique facts and circumstances prevailing at the time.

This same standard of reasonableness logically applies to attack decisions that require rebuttal of the presumption of civilian status. In other words, the information available must "reasonably" rebut the presumptive protection accorded to civilians and civilian property. On this point, there can be little debate. The question of how much information renders the rebuttal reasonable finds little or no consensus. Between these two ends of the analytical spectrum, however, lies a consideration that must be accounted for: that enemy tactics impact the reasonableness of a determination that it has been rebutted.

Enemy tactics inconsistent with the passive distinction obligation do not release the attacking force from its active distinction obligation. But does this mean that these tactics are irrelevant when assessing if and when the civilian presumption has been rebutted? An affirmative answer to this question seems not only illogical, but almost unworkable. Treating the weight or strength of the presumption as unitary — identical when confronting such tactics as it is when confronting a uniformed enemy committed to compliance with the passive distinction obligation — would divorce implementation of the rule from the situational context that is central to assessing the reasonableness of all attack judgments. In contrast,

85 *See* G. S. Corn, "Targeting, Command Judgment, and a Proposed Quantum of Proof Component: A Fourth Amendment Lesson in Contextual Reasonableness"*,* 77 *Brook. L. Rev.* 2 (2012).

86 *See* J. Merriam, "Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters", 56 *Va. J. Int'l L.* 1, pt. III (forthcoming 2015)), *available at* http://poseidon01.ssrn.com/delivery.php?ID =039009127112022121072114120085122006004043010035052042110121113108112109002005023026011054008027021002125019019091015009095094001043025043093123115095119083094087122036023003120074087094124116009114092021015114125106088002066015071028094120020104085027&EXT=pdf (hereinafter, "Merriam").

87 *Id*.

acknowledging that enemy non-compliance with the passive distinction obligation reduces the weight or strength of the civilian status presumption, thereby impacting the level of certitude required to reasonably rebut the presumption, would align this status presumption with the contextual reasonableness touchstone of targeting legality.

Moving from the abstract to the concrete illustrates why enemy non-compliance with passive distinction must impact the weight of presumptive civilian status. Consider two different threat situations, each involving the identical tactical maneuver — a movement to contact in an urban environment. In the first scenario, friendly forces confront a uniformed enemy of a regular armed force. To date, there has been no indication that enemy personnel are seeking to exploit the presence of civilians by removing their uniforms to appear as civilians, or by embedding military assets among the most vulnerable civilian areas. In this context, the presumption of civilian status for any person not wearing an enemy uniform is powerful, and friendly forces would be required to observe equally powerful indications of direct participation in hostilities in order to rebut the presumption and subject an apparent civilian to deliberate attack. This same strong presumption would extend to buildings and other objects, although because the enemy would not be prohibited from using such buildings, friendly forces would likely anticipate and be more focused on indicia of such use. However, this focus would likely trend towards presumptive civilian objects that offer the enemy tactical value, for example, civilian buildings that offer observation vantage points or ideal choke points or blocking positions. However, objects that offer no ostensible military advantage to the enemy will benefit from the strongest presumption of civilian status.

Contrast this threat situation with the same movement to contact in an urban area against an enemy that ignores the passive distinction obligation and routinely embeds important military assets in highly protected civilian areas and structures. While this non-compliance cannot be asserted as a justification for releasing friendly forces from the active distinction obligation, it would be illogical to expect them to accord the same weight of presumptive civilian immunity to every person who appears to be a civilian. Doing so would subject them to immense risk, as there will often be a possibility, if not probability, that the individual is in fact an enemy belligerent operative. Requiring that such individual be presumed to be civilian need not, therefore, dictate the weight of that presumption. Instead, that weight must be informed by the pattern of enemy non-compliance with passive distinction.

Of course, AP I exacerbates the uncertainty as to the significance of enemy non-compliance. This is because Article 52 indicates that an object must be

considered civilian whenever any doubt exists as to its status, a presumption that, according to the Commentary to Article 50, and consistent with sheer humanitarian logic must also apply to humans.[88] This "any doubt" language can support an alternate interpretation: the requirement that the heavily weighted presumption of civilian status apply in all tactical and operational situations equally. This interpretation would impose a significant limitation on targeting any person, place, or thing that did not manifest inherently military characteristics, even when an enemy fails to comply with, or even seeks to exploit, the passive distinction obligation. Such an interpretation would provide a windfall of tactical advantage to the non-compliant party to the conflict at the expense of the legally compliant party.

Mitigating civilian risk is the central objective of both the active and passive distinction obligation. It is therefore self-evident that enemy non-compliance with the obligation to distinguish himself from the civilian population and refrain from converting civilian objects into military objectives increases civilian risk. It should be equally self-evident that were such conduct allowed to release friendly forces from their active distinction obligation, the civilian population would be victimized by both parties to the conflict. Thus, Article 51's rejection of such an outcome is inherently logical: civilians should not be deprived of the LOAC's protection based on enemy non-compliance, even if that enemy is deliberately using civilians as human shields. However, this need not mean that this non-compliance be treated as irrelevant to the LOAC-compliant forces' implementation of active distinction. Disallowing that force the ability to factor enemy tactics into the distinction compliance process would create substantial incentives for such non-compliance: the enemy could reap a windfall from exposing civilians to increased risk because it would compromise the full effect of the opponent's combat power.

This unjustified windfall will flow from the functional imposition of disparate targeting paradigms. When the battlefield consists of a contest between distinction compliant and non-compliant opponents, a non-contextual presumption of civilian immunity will also produce a disparate targeting paradigm. Friendly forces committed to distinction compliance will, at least functionally, be required to employ conduct-based targeting. Because all potential targets will be considered presumptively immune from attack, only hostile or belligerent use or conduct will be sufficient to rebut this presumption. In contrast, the distinction non-compliant enemy will be free to employ force based solely on status determinations, for the simple reason that *their* enemy facilitates distinctions based on status indicators.

88 AP I, *supra* note 6, art 52; *see also supra* note 81 and accompanying text.

It may be inevitable that LOAC-compliant armed forces will be compelled to contend with this disparity, as the tendency of the international community to engage in "effects based" judgments of combat operations often nullifies the relevance of credible legal explanations for civilian casualties. However, even if this is the case, it cannot justify ignoring the consequence of a rule of civilian immunity that not only fails to account for enemy non-compliance with passive distinction, but actually incentivizes such non-compliance.

V. THE VIEW THROUGH THE FRONT SIGHT POST: CONTEXT IS EVERYTHING

What then is the solution to this challenge? As noted throughout this article, releasing an attacking force from the basic distinction obligation would go too far, subjecting civilians and their property to excessive risk. Ultimately, the imperative of civilian risk mitigation must apply to all situations of combat, even when confronting a non LOAC-compliant enemy. What is necessary, however, is a constant emphasis on the relationship between distinction, context and the ultimate touchstone of targeting: reasonableness.

Commanders and the subordinates they lead are held to a unitary standard of legal compliance in relation to targeting judgments. That standard is reasonableness. Reasonableness by its very nature requires an objective assessment: did the judgment fall within an objective margin of permissible judgment for a hypothetical reasonable person.[89] But this assessment cannot be completely divorced from the context that framed the individual's subjective attack judgment. Indeed, it is an axiom of LOAC compliance that decisions are critiqued based on the circumstances that prevailed at the time. Thus, context frames the reasonableness of attack judgments.

A key component of this "contextual reasonableness" assessment must be enemy threat indicators. These indicators provide the template for enemy threat identification judgments, whether fighting a conventional, unconventional, or hybrid enemy. When an enemy is committed to passive distinction, civilian appearance, or objects that are not assessed as offering the enemy potential military advantage, can justifiably trigger a heavy presumption of civilian immunity. Threat identification against these enemies will gravitate towards traditional indicia of enemy status and

89 *See, e.g.*, Canada, Department of National Defence, Joint Doctrine Manual B-GJ-005-101/FP-021, *Law of Armed Conflict at the Operational and Tactical Levels* 4–1, ¶ 418.3 (2001); Merriam, *supra* note 86, at 36.

military objective. Attacking forces will seek to determine if the individual wearing the uniform or distinctive emblem of the enemy, or if the location, use, or purpose of the object fits within anticipated enemy courses of action and/or enemy doctrine. But when the enemy eschews commitment to passive distinction, the value of these traditional focal points for threat identification will be diluted.

These situations necessitate a much more complicated threat identification methodology. This methodology will gravitate towards aspects of conduct that indicate belligerent status, and use of civilian property that maximizes the neutralizing impact of proximity to civilians. When this is the context that frames targeting judgments, the key to reasonableness of those judgments will be some credible, objective indicator that distinguishes the lawful from the immune target. But ultimately, the *quanta* of information sufficient to rebut the presumption of civilian immunity must be reduced in direct relation to illicit enemy tactics that violate the passive distinction obligation. Civilians will, undoubtedly, be placed in greater jeopardy as a result, but attribution for that jeopardy must not be directed only or even primarily at the party struggling to implement the active distinction obligation.

Understanding the inherent relationship between the two components of the distinction obligation and how that relationship must provide the touchstone for assessing the reasonableness of attack judgments is essential to implement an informational distinction imperative: the distinction between cause and responsibility for LOAC violations. When an enemy such as Hamas, or ISIS, or al Qaeda, or Boko Haram, confront conventional forces struggling to implement active distinction, civilians will unfortunately suffer the consequences. When a civilian is killed or injured, or civilian property is destroyed, it is all too easy to focus on the *direct* cause of that consequence, which will often be the LOAC-compliant party to the conflict. But *responsibility* for such consequences is a much more important focal point of legal assessment and critique. Separating the assessment of targeting reasonableness from passive distinction non-compliance distorts this far more important inquiry, which is related to but distinct from questions about criminal responsibility:

> Without a doubt, preventing and criminalizing deliberate and indiscriminate attacks on civilians is essential to protecting civilians during armed conflict. But maximizing the role of distinction in times of war demands more. It demands that the obligation to distinguish civilians from fighters and civilian objects

> from military objects occur not only at the level of targeting but at the level of conduct as well.[90]

Armed forces struggling to navigate these complex battle-spaces understand this relationship, and are almost certainly perplexed when their efforts are dismissed as insufficient based on the failure to credibly assess responsibility. Thus, refusing to acknowledge that enemy LOAC non-compliance is an essential situational factor informing the reasonableness of targeting judgments risks undermining the perceived credibility of the law among those who must embrace it.

The DoD Law of War Manual's treatment of this relationship is far from ideal, and suffers from a lack of clarity. But any suggestion that the Manual indicates U.S. forces are somehow released from their active distinction obligation when confronting a LOAC non-compliant enemy is overbroad. Instead, the Manual is seeking to align interpretation and implementation of this obligation with the reality of hybrid warfare against unconventional non-state enemies. This is a complex challenge for those who study, interpret, advise, and assess LOAC compliance. But anyone engaged in this process should remember that this complexity pales in comparison to the complexity of planning and executing these combat operations, and that it is the view through the literal and proverbial front sight post that must continue to inform their efforts.

[90] *See* Blank, *supra* note 59, at 801.

XII

Lawfare Today . . . and Tomorrow

Charles J. Dunlap, Jr.*

A principal strategic tactic of the Taliban . . . is either provoking or exploiting civilian casualties.

Secretary of Defense Robert Gates[1]

I. Introduction

Although he does not use the term "lawfare," Secretary Gates' observation reflects what is in reality one of the most common iterations of lawfare in today's conflicts. Specifically, the Taliban are aiming to achieve a particular military *effect*, that is, the neutralization of US and allied technical superiority, especially with respect to airpower. To do so they are, as Secretary Gates indicates, creating the perception of violations of one of the fundamental norms of the law of armed conflict (LOAC), that is, the distinction between combatants and civilians.

While "provoking or exploiting civilian casualties" is clearly a type of lawfare, it is by no means its only form. Although the definition has evolved somewhat since its modern interpretation was introduced in 2001,[2] today I define it as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective."[3]

As such, it is ideologically neutral, that is, it is best conceptualized much as a weapon that can be wielded by either side in a belligerency. In fact, many uses of legal "weapons" and methodologies avoid the need to resort to physical violence

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and other more deadly means. This is one reason, for example, that the United States and other nations seek to use sanctions before resorting to the use of force whenever possible.

Another illustration would be the use of a contract "weapon" during the early part of Operation Enduring Freedom to purchase commercially available satellite imagery of Afghanistan.[4] This approach was equally or, perhaps, *more* effective than other more traditional military means might have been in ensuring the imagery did not fall into hostile hands. Additionally, most experts consider the re-establishment of the rule of law as an indispensable element of counterinsurgency (COIN) strategy. Finally, few debate that the use of legal processes to deconstruct terrorist financing is an extraordinarily important part of countering violent extremists.

In short, there are many uses of what might be called "lawfare" that serve to reduce the destructiveness of conflicts, and therefore further one of the fundamental purposes of the law of war. All of that said, others have given the concept a rather different meaning. Some couch it in terms of what is alleged to be the "growing use of international law claims, *usually factually or legally meritless*, as a tool of war."[5] Similarly, the privately run Lawfare Project openly acknowledges it concentrates "on the *negative* manipulation of international and national human rights laws" for purposes, it asserts, that are "other than, or contrary to, that for which those laws were originally enacted."[6]

Some go even further. In 2007 respected lawyer-writer Scott Horton expressed concern that unnamed "lawfare theorists" purportedly consider that attorneys who aggressively use the courts in the representation of Guantanamo detainees and other terrorism-related matters "might as well be terrorists themselves."[7] More recently, much discussion of lawfare has centered on legal maneuvering associated with the Israeli-Palestinian confrontation. For example, some individuals and organizations see lawfare as "the latest manifestation in the sixty-year campaign to isolate the State of Israel."[8]

In any event, these sometimes hyperbolic permutations on lawfare theories are not that espoused by this article. Among other things, it is certainly not the view of this writer that any party *legitimately* using the courts is doing anything improper. Instead, this brief article will focus more narrowly on the role of law in contemporary conflicts, principally that in Afghanistan.

It is true, as Secretary Gates' comment suggests, that lawfare in the Afghan context has typically taken the form of the manipulation of civilian casualties to make it appear that US and allied forces have somehow violated legal or ethical norms. Thus, it could be said that lawfare itself is an asymmetrical form of warfare, one that is value-based and that seeks to outflank, so to speak, conventional military means.

Regardless, from this writer's perspective, the use of the term "lawfare" was always intended as a means of encapsulating for non-lawyer, military audiences the meaning of law in today's war. It was *not* intended to fit neatly into some political science construct. Rather, the sobriquet of "lawfare" was meant to impress upon *military* audiences and other non-lawyers that law is more than just a legal and moral imperative; it is a *practical* and *pragmatic* imperative intimately associated with mission success. In that respect, the growth of the term seems to have had some positive results.

II. Lawfare Today: Airpower and Civilian Casualties

Perhaps no aspect of what this writer would characterize as lawfare is more prominent than the restrictive rules of engagement imposed upon allied forces in Afghanistan in an effort to win "hearts and minds" by limiting civilian casualties. These restrictions go far beyond what LOAC requires, and are a classic example of efforts to "improve upon" LOAC via policymaking that insufficiently appreciates unintended consequences that can have, at the end of the day, decidedly counterproductive results. As a noncommissioned officer explained to columnist George Will in June of 2010, the rules of engagement in Afghanistan are "too prohibitive for coalition forces to achieve sustained tactical success."[9] And other troops fighting there have raised similar concerns.

Airpower in particular has been cast—wrongly in my view—as a villain with respect to the civilian casualty issue. The Army and Marine Corps' COIN Field Manual (FM) 3-24,[10] for example, discourages the use of the air weapon by claiming that "[b]ombing, even with the most precise weapons, can cause unintended civilian casualties."[11] Of course, *any* weapon "can" cause civilian casualties,[12] so it is not clear why air-delivered munitions should be singled out for "exceptional care," as FM 3-24 demands.

More important, the data show that *ground* operations can be vastly more dangerous to civilians than airstrikes. A study by the *New England Journal of Medicine* found that fewer than 5 percent of civilian casualties in Iraq during the 2003–8 time frame were the result of airstrikes.[13] Regarding Afghanistan, a 2008 Human Rights Watch study of airstrikes found that it was the presence of troops on the ground that created the most risk to civilians, as the "vast majority of known civilian deaths" came from airstrikes called in by ground forces under insurgent attack.[14]

Even more recently, a National Bureau of Economic Research study found that only 6 percent of the civilian deaths attributed to International Security Assistance Force (ISAF) were the result of airstrikes. In fact, traffic accidents with ISAF vehicles

were two and a half times more likely to be the cause of the deaths of Afghan women and children than were airstrikes.

Nevertheless, ground commanders have insisted that civilian deaths could be curtailed with more troops. Army Brigadier General Michael Tucker suggested as much when he told *USA Today* in late 2008 that "[i]f we got more boots on the ground, we would not have to rely as much on [airstrikes]."[15] Unsurprisingly, therefore, when General Stanley McChrystal assumed command in Afghanistan in June of 2009, he immediately issued orders that significantly restricted the use of the air weapon,[16] and shortly thereafter called for a "surge" of mainly ground forces.[17]

It should be said that even before General McChrystal's orders the coalition's ability to use the air weapon was complicated by NATO's own public pronouncements that distorted the understanding of the law of war, with tragic consequences.[18] Specifically, in June of 2007 NATO declared that its forces "would not fire on positions if it knew there were civilians nearby."[19] A year later its statement was even more egregious, when a NATO spokesman preened that "[i]f there is the likelihood of even one civilian casualty, we will not strike, not even if we think Osama bin Laden is down there."[20]

This statement was not only insensitive to Americans cognizant of the horror of the bin Laden–inspired 9/11 attacks; it also works counter to the basic purposes of LOAC. Of course, zero casualties are *not* what LOAC requires; rather, it only demands that they not be excessive in relation to the military advantage anticipated. The law is this way for good reason: if "zero casualties" were the standard, it would invite adversaries to keep themselves in the company of civilians to create a sanctuary from attack. The Taliban heard NATO's invitation and did exactly that.[21]

In any event, if the intent of the June 2009 airpower restrictions was to save civilian lives, it did not succeed. Although civilian deaths from the actions of NATO forces did decline,[22] *overall* civilian deaths in Afghanistan nevertheless reached an all-time high in 2009.[23] And civilian deaths soared 31 percent in 2010 over 2009's record-breaking figures. I would suggest that an obvious (albeit unintended) result of forgoing opportunities to kill extremists via airstrikes is that they live another day to kill more innocents.[24]

This may be why the UN reported on June 19, 2010—about a year after General McChrystal's order—that security in Afghanistan has "deteriorated markedly" in recent months.[25] Moreover, in terms of "winning hearts and minds," analyst Lara M. Dadkhah raises the interesting point worth pondering in a February 2010 *New York Times* op-ed that the "premise that dead civilians are harmful to the conduct of the war [is mistaken, as] no past war has ever supplied compelling proof of that claim."[26] That is proving to be the case in Afghanistan.

To his credit, General McChrystal did admit in December 2009 that there was "much about Afghanistan that [he] did not fully understand."[27] In that respect, his assumption that seems to underlie his order—that civilian deaths inevitably work against the perpetrators' cause—may be one of the things he did not correctly understand. For example, Ben Arnoldy of the *Christian Science Monitor* reports that the Taliban—not NATO forces—were responsible for the majority of civilian deaths in 2009.[28] Even though those deaths reflect a 41 percent increase over 2008, Arnoldy says that "there is little indication these Taliban indiscretions have backfired on the movement so far."[29]

Consider as well the Afghan reaction in September of 2009 when General McChrystal sought to apologize for the bombing of a hijacked oil tanker near Kunduz that allegedly killed seventy-two Afghans. The *Washington Post* reports that when General McChrystal began to apologize, a local "council chairman, Ahmadullah Wardak, cut him off" with demands for a tougher approach.[30] "McChrystal," the *Post* recounts, "seemed to be caught off guard [by Wardak's reproof]" as Wardak asserted that the allies have been "too nice to the thugs."[31]

Jeremy Shapiro, a Brookings Institution scholar who served on a civilian assessment team for General McChrystal, analyzes Wardak's remarks as saying that if the coalition is going to be a genuine provider of security for the people, that means: "[Y]ou'll do what is necessary to establish control, and the very attention that the coalition pays to civilian casualties actually creates the impression among many Afghans that [coalition forces] in fact are not interested in establishing control and not interested in being the provider of security."[32] Shapiro concedes that the Afghan government has "highlighted" the civilian casualty issue but argues that it is doing so "because it serves to demonstrate [its] independence from the coalition and gives [it] leverage with the coalition."[33] To his surprise, Shapiro says, local officials in his experience "tend actually not to be too concerned" with the civilian casualties.[34] In short, he concludes that while the civilian casualty issue "clearly resonates very strongly [in the United States] and in Europe . . . [it is] not clear that Afghans actually see this as a key issue."[35]

A Gallup poll released in February 2010 provides further data as to Afghan perceptions. Although the question of airstrikes was not directly addressed, it did show that beginning in June of 2009 (coinciding with the new restrictions on airpower) through the end of the survey period in late 2009, Afghans' approval of US leadership in Afghanistan declined, as did their support for additional troops.[36]

Obviously, the restrictions on airpower did not have the hoped-for "hearts and minds" effect. Further complicating the issue is the fact that, like those of Afghan civilians, *coalition* casualties also reached an all-time high in 2009.[37] And these disturbing casualty trends are continuing into 2010; by the end of September the

number of coalition casualties exceeded the record-breaking high of 2009.[38] Thus, however well-intentioned the airpower restrictions may have been, evidence of their efficacy is not apparent.

The deleterious effect on operations is unmistakable, as the deteriorating security situation noted in the UN report above attests.[39] At one time Taliban fighters cowered at American airpower.[40] Today, however, the *Air Force Times* reports that because of the new directive, the Taliban "no longer run and hide when they see a fighter jet overhead."[41] The *Times* quotes an Air Force pilot as expressing frustration "when you can see them shooting at our guys" and are obliged not to attack.[42] The pilot laments that the enemy knows that "we are not allowed to engage in certain situations."[43]

At the same time airpower technology continues to develop even more discrete and effective ways to hunt the terrorists without the need to put thousands of young Americans in harm's way. According to the *Washington Post*, "a new generation of small but highly accurate missiles" designed to limit collateral damage is being fielded for employment on remotely manned vehicles.[44] Such technology, the *Post* reports, along with better intelligence, has caused the "clamor over [drone] strikes [to have] died down considerably over the last year."[45]

While airpower alone is not—*and can never be*—the whole solution to today's wars, rethinking it in the context of what today's technology can provide might produce opportunities to fulfill the President's intent of protecting Americans against terrorist attack in a less resource-demanding way,[46] and at the same time serve the interests of international humanitarian law's effort to ameliorate the horror of war, and especially its impact on innocent civilians.

III. Lawfare Tomorrow: The Emerging Issues

The increasing controversy concerning "drones," or, more accurately, remotely piloted vehicles (RPVs), is raising some interesting legal and policy issues with lawfare implications. By all reports, these weapon systems are extremely effective, particularly in eroding enemy leadership cadres. Yet a variety of objections have been offered as to their use.

Some of the attacks border on the absurd, and are reminiscent of medieval legal debates. For example, in A.D. 1139 Pope Innocent II and the Second Lateran Council condemned the missile warfare that was devastating Europe's knighted aristocracy by calling slingers and archers "dastards" that are practicing a "deadly and God-detested art" with their stones and arrows.[47] Fast-forward to 2009, and we find former Australian Army officer David Kilcullen condemning the missile warfare that is devastating the terrorist aristocracy of the Taliban and Al Qaeda by

telling Congress to "call off the drones" in part because the militants view aerial attacks as "cowardly and weak."[48]

It is not clear why anyone should be concerned about the sensibilities of Taliban and Al Qaeda militants. Although Kilcullen and others seem to view the militants as courageous fighters seeking man-to-man fights, their use of indiscriminate improvised explosive devices—which grew 94 percent over the past year[49]—plainly shows that *they* embrace remotely operated systems (albeit on the ground and not in the air). In addition, reports indicate that the Taliban are not only intermingling with civilians in the hopes of being shielded; media reports also say they are engaging in the vile practice of buying children to use as suicide bombers.[50]

Almost as problematic as the "cowardly" objections to advanced warfighting systems is the emergence of the "targeted killings" debate. This has become something of a cottage industry within the human rights establishment. Many commentators seem to be frantically searching for ways to find the use of the highly effective RPVs somehow improper. A good example is the recent report of the UN's Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.[51]

One of the most disappointing aspects of the report was the allegation that RPV operators might adopt a "Playstation mentality." This wholly speculative and unproven allegation questioning the professionalism of RPV operators is but one illustration of the report's deficiencies. Moreover, the illogical suggestion that military or intelligence professionals would prefer to kill a terrorist as opposed to capturing and interrogating him is yet another indication of the report's flaws.

Yet there *are* issues associated with RPVs. For example, in a recent issue of *Armed Forces Journal*, Peter Singer of the Brookings Institution raises issues about the status of RPV operators by questioning the propriety of the operation of the aircraft by other than military personnel.[52] Perhaps as interesting—or more so—is the question of fully autonomous RPVs or other weapon systems.

As a practical matter, the current generation of RPVs generally requires a very permissive air environment to survive. To use the systems in contested airspace presents a variety of daunting technical challenges that must be overcome, not the least of which is the maintenance of continuous contact between the vehicle and its distant operator. Many experts believe that in the future the vehicle would have to operate autonomously, at least part of the time.

The world has not, however, been receptive to autonomous weapons systems. Exhibit "A" would be the near-universal ban on landmines we have today. When one examines the history of the ban, it becomes clear that emotional arguments predominated as opposed to tempered, rational discussions of how the weapons might be used in ways that actually reduce the destructiveness of war. Regardless, the experience of the landmine campaign may be something of a portent for

policymakers to consider, as science will inevitably provide the opportunity for the development of a whole family of partly or even fully autonomous weapons systems for use in air, land, sea and cyber domains.

IV. Concluding Observations

Any discussion of lawfare seems to invite conclusions that "the law" is somehow an impediment to successfully warfighting, especially in an era of irregular warfare waged by non-State actors.[53] It is true, as mentioned earlier in this article, that there certainly will always be those who will abuse the law for perverse purposes. That should not, however, suggest abandoning the law. Consider the thoughtful observations of Lawrence Siskind in response to the "lawfare" strategies of Hamas leveled at Israel:

> When al-Qaeda terrorists used jet planes as weapons to crash into skyscrapers in 2001, the West did not abandon its airports and office buildings. Instead, it found ways to cope with danger without making fundamental changes to its business life. The fact that Hamas terrorists are cynically using another Western institution, the rule of law, as a weapon today does not mean that Western nations should abandon it. Instead, they must learn to adjust and cope.[54]

In the twenty-first century we should expect to see further developments of lawfare. We may not like all of its iterations, but we should never forget that legal battles are always preferable to real battles, and modern democracies are well-suited to wage—and win—legal "wars."

Notes

1. Press Conference, Secretary of Defense Robert Gates & Chairman, Joint Chiefs of Staff Michael Mullen, Leadership Changes in Afghanistan (transcript), DEFENSELINK (May 11, 2009), http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4424.

2. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), *available at* http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf (last visited Jan. 21, 2011).

3. The author originally cast the definition to say "achieve an operational objective" but changed the wording so as to preclude an interpretation that was linked to a particular level of war. Charles J. Dunlap, Jr., *Lawfare Today*, YALE JOURNAL OF INTERNATIONAL AFFAIRS, Winter 2008, at 146, *available at* http://www.nimj.org/documents/Lawfare%20Today.pdf.

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6. *What is Lawfare?*, THE LAWFARE PROJECT, *available at* http://www.thelawfareproject.org (last visited Jan. 21, 2011).

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10. Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, Counterinsurgency (2006), *available at* http://www.scribd.com/doc/9137276/US-Army-Field-Manual-FM-324-Counterinsurgency.

11. *Id.*, app. E, para. E-5.

12. *See, e.g., Afghan Official: Troops Killed Civilians*, CNN.COM (May 14, 2010), http://afghanistan.blogs.cnn.com/2010/05/14/afghan-official-troops-killed-civilians/.

13. Madelyn Hsiao-Rei Hicks et al., *The Weapons That Kill Civilians – Deaths of Children and Noncombatants in Iraq, 2003–2008*, NEW ENGLAND JOURNAL OF MEDICINE, Apr. 16, 2009, at 1585, 1586, *available at* http://content.nejm.org/cgi/reprint/360/16/1585.pdf (emphasis added).

14. HUMAN RIGHTS WATCH, "TROOPS IN CONTACT": AIRSTRIKES AND CIVILIAN DEATHS IN AFGHANISTAN 29 (2008), *available at* http://hrw.org/reports/2008/afghanistan0908/afghanistan0908web.pdf.

15. Jim Michaels, *Airstrikes in Afghanistan increase 31%*, USA TODAY, Nov. 5, 2008, at 1, *available at* http://www.usatoday.com/news/world/2008-11-05-afghanstrikes_N.htm.

16. Dexter Filkins, *U.S. Toughens Airstrike Policy in Afghanistan*, NEW YORK TIMES, June 22, 2009, at A1.

17. The author discussed this issue in *Could Airstrikes Save Lives?*, WASHINGTON POST, Oct. 22, 2010, at A25.

18. The North Atlantic Treaty Organization nations are the principal but not exclusive contributors of foreign forces for the International Security Assistance Force in Afghanistan.

19. Noor Khan, *US Coalition Airstrikes Kill, Wound Civilians in Southern Afghanistan, Official Says*, ASSOCIATED PRESS, INTERNATIONAL HERALD TRIBUNE, June 30, 2007 (quoting Major John Thomas, spokesman for NATO's International Security Assistance Force), *available at* http://www.iht.com/articles/ap/2007/06/30/asia/AS-GEN-Afghan-Violence.php.

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23. *See* Dexter Filkins, *'09 Deadliest Year for Afghans, U.N. Says*, NEW YORK TIMES, Jan. 14, 2010, at A6, *available at* http://www.nytimes.com/2010/01/14/world/asia/14kabul.html.

24. *See supra* note 17.

25. Ernesto Londono, *U.N. Report on Afghanistan Notes Surge in Attacks and Killings*, WASHINGTON POST, June 20, 2010, at A9, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/19/AR2010061902715.html.

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29. *Id.*

30. Rajiv Chandrasekaran, *Sole Informant Guided Decision On Afghan Strike*, WASHINGTON POST, Sept. 6, 2009, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/09/05/AR2009090502832.html.

31. *Id.*

32. Jeremy Shapiro, Remarks at the Proceedings of the Afghanistan and Pakistan Index and Assessments Project at the Brookings Institution 33 (Oct. 5, 2009) (transcript available at http://www.brookings.edu/~/media/Files/events/2009/1005_afghanistan_pakistan/20091005_afghanistan_pakistan.pdf).

33. *Id.* at 32.

34. *Id.*

35. *Id.*

36. Julie Ray & Rajesh Srinivasan, *Afghans More Skeptical of U.S. Leadership, Troops*, GALLUP (Feb. 3, 2010), *available at* http://www.gallup.com/poll/125537/afghans-skeptical-leadership-troops-2009.aspx.

37. *See Operation Enduring Freedom: Coalition Military Casualties by Year and Month*, ICASUALTIES.ORG, *available at* http://www.icasualties.org/OEF/ByMonth.aspx (last visited Dec. 2, 2010).

38. *Id.*

39. *See* Londono, *supra* note 25.

40. *See, e.g.*, Rowan Scarborough, *Pentagon Notebook: McPeak calls McCain too fat*, WASHINGTON TIMES, June 26, 2008, at B01 (quoting a Taliban commander as saying, "Tanks and armor are not a big deal—the planes are the killers. I can handle everything but the jet fighters."), *available at* http://www.washtimes.com/news/2008/jun/26/pentagon-notebook-mcpeak-calls-mccain-too-fat/?page=2.

41. Michael Hoffman, *Looking Down in Frustration: McChrystal Order Limiting Afghan Airstrikes Takes Punch Out of Pilots*, AIR FORCE TIMES, May 3, 2010, at 16.

42. *Id.*

43. *Id.*

44. Joby Warrick & Peter Finn, *In Pakistan, CIA Refines Methods to Reduce Civilian Deaths*, WASHINGTON POST, Apr. 26, 2010, at A8.

45. *Id.*

46. Even critics concede that attacks on high-value targets—mainly by remotely piloted vehicles but also by other means—can be extremely effective when properly calibrated and conducted. *See* Mathew Frankel, Remarks at the Defense Challenges and Future Opportunities Symposium, at the Brookings Institution 4–13 (Mar. 26, 2010) (transcript available at http://www.brookings.edu/~/media/Files/events/2010/0326_defense_challenges/20100326_defense_challenges_panel1.pdf).

47. Jonah Goldberg, *Crossbows & Suicide Bombers*, NATIONAL REVIEW ONLINE (Aug. 10, 2001), http://www.nationalreview.com/articles/204995/crossbows-suicide-bombers/jonah-goldberg.

48. Doyle McManus, *U.S. Drone Attacks in Pakistan 'Backfiring,' Congress Told*, LATIMES.COM (May 3, 2009), http://www.latimes.com/news/opinion/commentary/la-oe-mcmanus3-2009may03,0,7133284.column.

49. *See* Londono, *supra* note 25 (citing UN report).

50. Sara A. Carter, *Taliban Buying Children to Serve as Suicide Bombers*, WASHINGTON TIMES, July 2, 2009, at 1.

51. *See* U.N. Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (Philip Alston), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf.

52. P.W. Singer, *Double-Hatting Around the Law*, ARMED FORCES JOURNAL, June 2010, at 44, *available at* http://www.armedforcesjournal.com/2010/06/4605658. *See also* Gary Solis, *America's unlawful combatants*, WASHINGTON POST, March 12, 2010, at A17, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html.

53. The Department of Defense defines "irregular warfare" as a "violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s). Irregular warfare favors indirect and asymmetric approaches, though it may employ the full range of military and other capacities, in order to erode an adversary's power, influence, and will." *See* Chairman of the Joint Chiefs of Staff, Joint Publication 1-02, Dictionary of Military and Associated Terms (Nov. 12, 2010, as amended through Dec. 31, 2010), *available at* http://www.dtic.mil/doctrine/dod_dictionary/.

54. Siskind, *supra* note 8.

Sgt. Kyle Hale of 1st Battalion, 6th Infantry Regiment, 2nd Brigade Combat Team, 1st Armored Division, contains an unruly crowd 10 June 2008 to protect a man who was nearly trampled outside the Al Rasheed Bank in the Jamila market in the Shiite enclave of Sadr City, Baghdad, Iraq. (Photo by Petros Giannakouris, Associated Press)

Lawfare 101
A Primer

Maj. Gen. Charles Dunlap Jr., U.S. Air Force, Retired

For many commanders and other military leaders, the role of law in twenty-first century conflicts is a source of frustration. Some think it is "handcuffing" them in a way that is inhibiting combat success.[1] For others, law is another "tool that is used by the enemies of the West."[2] For at least one key ally, Great Britain, law seems to be injecting counterproductive hesitancy into operational environments.[3] All of these interpretations have elements of truth, but at the same time they are not quite accurate in providing

an understanding of what might be called the role of *lawfare* in today's military conflicts.

Law has become central to twenty-first century conflicts. Today's wars are waged in what Joel Trachtman calls a "law-rich environment, with an abundance of legal rules and legal fora."[4] This is the result of many factors outside of the military context, including the impact of internationalized economics. Still, as the Global Policy Forum points out, globalization "is changing the contours of law and creating new global legal institutions and norms."[5]

As with many other aspects of modern life, trends in the economic sphere impact warfighting, and this includes how law interacts with armed conflict. Many senior leaders have come to recognize this reality. Retired Marine Corps Gen. James L. Jones, a former NATO commander and U.S. national security advisor, observed several years ago that the nature of war had changed. "It's become very legalistic and very complex," he said, adding that now "you have to have a lawyer or a dozen."[6]

Technology has also revolutionized the impact of law on war, as its many manifestations add to war's complexity. Sorting out the implications of technology for warfighting requires an advanced appreciation for the norms that do—or should—govern it. Retired Army Gen. Stanley McChrystal recently observed that "technology has only made law more relevant to the battlefield."[7] He believes that "no true understanding of the exercise of U.S. military power can be attained without a solid appreciation of how the law shapes military missions and their outcomes."[8]

The purpose of this article is to provide an overview of the concept of what has come to be known as lawfare. This essay also aims to provide some practical context for nonlawyer leaders to think about lawfare, as well as some considerations for how to prepare to operate against an enemy seeking to capitalize on this phenomenon of contemporary conflicts.[9]

What is Lawfare?

The term lawfare has existed for some time, but its modern usage first appeared in a paper this author wrote for Harvard's Kennedy School in 2001.[10] Lawfare represents an effort to provide military and other nonlawyer audiences an easily understood "bumper sticker" phrasing for how belligerents, and particularly those unable to challenge America's high-tech military capabilities, are attempting to use law as a form of "asymmetric" warfare.[11]

Over time, the definition has evolved, but today it is best understood as the use of law as a means of accomplishing what might otherwise require the application of traditional military force. It is something of an example of what Chinese strategist Sun Tzu might say is the "supreme excellence" of war, which aims to subdue "the enemy's resistance without fighting."[12] Most often, however, it will only be one part of a larger strategy that could likely involve kinetic (lethal) and other traditional military capabilities.

More importantly, lawfare is ideologically neutral. Indeed, it is helpful to think of it as a weapon that can be used for good or evil, depending upon who is wielding it and for what reasons. As Trachtman says, "Lawfare can substitute for warfare where it provides a means to compel specified behavior with fewer costs than kinetic warfare, or even in cases where kinetic warfare would be ineffective."[13] That is a truth that is equally applicable to America's enemies as it is to the United States itself.

How Has the United States Used Lawfare?

There are many examples of how law can be used to peacefully substitute for other military methodologies. For example, during the early part of Operation Enduring Freedom, commercial satellite imagery of areas in Afghanistan became available on the open market. Although there may have been a number of ways to stop such extremely valuable data from falling into hostile hands, a legal "weapon"—a contract—was used to buy up the imagery. Doing so prevented

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> They are using the law in order to turn respect for the law in the United States and other democratic countries into a vulnerability.

"the pictures from falling into the hands of terrorist organizations like al-Qaeda."[14]

Law plays a very significant role in counterinsurgency operations. Although the term lawfare is not used, Field Manual 3-24, *Insurgencies and Countering Insurgencies*, is replete with how law is a key element of the comprehensive approach that success in such conflicts requires.[15] In particular, it makes the point that "establishing the rule of law is a key goal and end state in counterinsurgency."[16] As Gen. David H. Petraeus has pointed out, it is unlikely that a counterinsurgency effort will succeed absent a form of lawfare that brings about the rule of law in the target state instead of relying solely on killing or capturing the insurgent force.[17]

There are further legal means that can impact military capabilities rather directly. For example, sanctions crippled the Iraqi air force to the point where fewer than one-third of its aircraft were flyable when the coalition invaded in 2003.[18] The operational impact is obvious: Iraqi jets were grounded just as effectively as if they were shot down. Sanctions are also seen as having slowed Russia's military buildup. Kyle Mizokami reported in 2016 that international sanctions (along with falling oil prices) were adversely affecting the economy, which, in turn, frustrated Russia's efforts to rebuild its military.[19]

There has been an array of approaches for using law to undermine adversaries, approaches that can be put under the aegis of lawfare. For example, Juan Zarate, a former Treasury Department official, describes a range of legal initiatives his agency used to disrupt and deny terrorists, in particular the financial resources they needed.[20] In addition, even private litigation is working to deny access to the banking and social media platforms terrorists increasingly rely upon.[21]

How Does the Adversary Use Lawfare?

Many hostile nonstate actors use lawfare as a mainstay of their strategy for confronting high-tech militaries. To be clear, they are using the law in order to turn respect for the law in the United States and other democratic countries into a vulnerability. For example, they might seek to exploit real or imagined reports of civilian casualties in the hopes that fear of causing more of the same will result in a constrained use of certain military technologies (e.g., airpower) by rule-of-law countries like the United States.

The after effects of the bombing of the Al Firdos bunker during the 1991 Gulf War presaged much of what we see today. Although believed to be a military command-and-control center, it was actually being used as a shelter for the families of high-level Iraqi officials. When pictures of dead and injured civilians were broadcast worldwide, they "accomplished what the Iraqi air defenses could not: downtown Baghdad was to be attacked sparingly, if at all."[22]

Ironically, nothing violative of the law of war had occurred, but perceptions of the same had the operational effect of a sophisticated air defense system.[23] Many adversaries have "gone to school" on this event as an example of a low-tech means to counter high-tech systems. Obviously, perceptions do matter. Michael Riesman and Chris T. Antoniou insist,

> In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people *believe* that the war is being conducted in an unfair, inhumane, or iniquitous way. [italics added][24]

Accordingly, after witnessing what the Al Firdos bombing raid accomplished, some adversaries seek to exploit such incidents when they occur, but others seek to orchestrate them in order to get the benefit of the restraint that might follow. For example, the Islamic State "uses civilians as human shields to claim that the U.S.-led coalition is targeting innocent people during the strikes."[25]

Syrian Army officers and their families who support President Bashar al-Assad are locked in "human shield" cages by a rebel group called "Army of Islam" 31 October 2015 in the Damascus suburb of Douma, Syria. The group claimed the human shields would protect Douma's civilians from airstrikes led by Russian and Syrian air forces. (Photo by Balkis Press/Sipa USA via Associated Press)

In fact, most U.S. adversaries actually see our political culture's respect for the law as a "center of gravity" to be exploited. William Eckhardt observes,

> Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our "center of gravity."[26]

Incidents of illegality markedly advance an enemy's lawfare strategy. The Abu Ghraib prisoner abuse scandal that occurred during the Iraq War is a classic illustration.[27] It is significant that Lt. Gen. Ricardo Sanchez, then commander of Combined Joint Task Force 7 (commander of coalition ground forces in Iraq), used traditional military language in assessing the impact of the explosion of criminality at Abu Ghraib by terming it "clearly a defeat" because its *effect* was indistinguishable from that imposed by traditional military setbacks.[28] Elsewhere, as reported by Joseph Berger in the *New York Times*, Petraeus, then head of U.S. Central Command, had explained during an interview how violations of the law impact what happens on the battlefield:

> "Whenever we have, perhaps, taken expedient measures, they have turned around and bitten us in the backside," [Petraeus] said. Whenever Americans have used methods that violated the Geneva Conventions or the standards of the International Committee of the Red Cross, he said: "We end up paying the price for it ultimately. Abu Ghraib and other situations like that are nonbiodegradable. They don't go away. The enemy continues to beat you with them like a stick."[29]

The situation is even more aggravated in an era of proliferated sports cameras, cell phones, and similar

devices able to record and transmit images worldwide in real or near-real time. A forty-second video of marines urinating on the bodies of dead Taliban that went "viral" was, according Afghan leaders, a "recruitment tool for the Taliban."[30] This is exactly the kind of avoidable illegality that lawfare-oriented adversaries readily exploit.

The point is that today each troop in the field is, indeed, a "strategic corporal." Gen. Charles C. Krulak, former commandant of the Marine Corps, said in 1999 that "the individual marine will be the most conspicuous symbol of American foreign policy and will potentially influence not only the immediate tactical situation, but the operational and strategic levels as well."[31] Today, the exposure of lawfulness or unlawfulness of individuals, superempowered by technology, is able to have an operational or strategic impact.

Chinese and Russian Lawfare

It is a mistake to think that lawfare is something only utilized by technology-vulnerable nonstate actors. Countries with formidable military capabilities do employ lawfare, but differently. China, for example, has an extremely sophisticated "legal warfare" doctrine, which designates such strategies as one of their "three warfares."[32] According to Dean Cheng, the "People's Liberation Army are approaching lawfare from a different perspective: as an offensive weapon capable of hamstringing opponents and seizing the political initiative."[33]

Quoting Chinese sources, Cheng says, "Legal warfare, at its most basic, involves 'arguing that one's own side is obeying the law, criticizing the other side for violating the law, and making arguments for one's own side in cases where there are also violations of the law.'"[34] Current events suggest that China seems to be executing its lawfare strategy. Indeed, some observers see this strategy as the main thrust of their expansion into the South China Sea.[35]

Additionally, today, Russia is often viewed as a preeminent practitioner of what has been called "hybrid war," of which lawfare is an element. In Army parlance, the term "hybrid threat" captures "the seemingly increased complexity of operations, the multiplicity of actors involved, and the blurring between traditional elements of conflict."[36] It combines "traditional forces governed by law, military tradition, and custom with unregulated forces that act with no restrictions on violence or target selection."[37]

Chairman of the Joint Chiefs of Staff Gen. Joseph F. Dunford Jr. says he tries to stay away from "hybrid" terminology. Rather, he considers it "a competition with an adversary that has a military dimension, but the adversary knows exactly what the threshold is for us to take decisive military action." Consequently, he says "they operate below that level," and are able to "continue to advance their interests and we lose competitive advantage."[38]

Legal experts say that Russia's form of hybrid warfare explicitly seeks to blur legal lines in order to exploit the uncertainty that results.[39] They posit that the "inherent complexity, ambiguity, and the attributable character of hybrid warfare create not only new security but also legal challenges," especially for these "who adhere to international law within good faith and the commonly agreed frameworks established under and governed by the principles of the rule of law."[40] Plainly, this is a form of lawfare and something long a part of Russia's arsenal.[41]

Responding at the Tactical Level: The Commander's Responsibilities

Quite obviously, many of the challenges and opportunities presented by lawfare in its many manifestations arise mostly at the strategic and operational levels of conflict. This does not, however, mean that other aspects of lawfare are of no importance to those at the tactical level. This is relevant with respect to denying the enemy the opportunity to employ lawfare techniques to exploit or orchestrate acts that create the fact or perception of lawlessness that will undermine or even prevent mission success.

Most commanders and tactical-level leaders understand that they have a wide variety of responsibilities in the legal arena, particularly with respect to discipline. The Army's *2015 Commander's Legal Handbook* counsels that in many instances,

> The purpose of your actions should be to preserve the legal situation until you can consult with your servicing Judge Advocate. However, like most aspects of your command responsibilities, you can fail if you just wait for things to come to you. You need to be proactive in preventing problems before they occur.[42]

In terms of operations, being proactive with respect to the challenge of lawfare includes what I call "legal preparation of the battlespace."

Legal Preparation of the Battlespace

Commanders are familiar with the concept of intelligence preparation of the battlefield but need to add *legal* preparation of the battlespace to their "to-do" list.[43] This means systematically analyzing the legal dimensions of a particular mission and its context, and determining their potential effect on operations. It then becomes incumbent on commanders—at every level—to take whatever actions they can to enhance positive effects of the law on the operation, and to eliminate or mitigate potential adverse impacts.

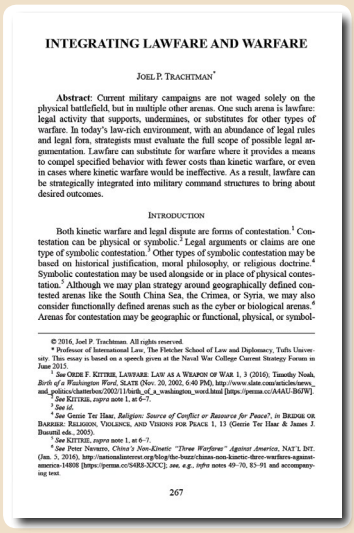
Key to this effort would be utilization of the supporting judge advocate generals (JAGs). Like other services, the Army JAG Corps has established an explicit practice area to "provide legal advice to commanders and their staffers on domestic, foreign, and international laws that influence military operations."[44]

Recently, Maj. Dan Maurer, an Army JAG, advised his fellow uniformed lawyers about the need to understand their advisory role vis-à-vis the commander and other decision makers. Although not addressing lawfare specifically, his advice nevertheless has application: "Decision-makers need to be fully confident and fully aware of not only *what* you think, but *why* you think it, and *how* their particular decisions will affect *others* beyond the slim consequences of the immediate battle drill."[45]

Most commanders would likely agree with Maurer, but how can they ensure that their legal advisor is capable of giving them that sort of insight? Part of the answer is easy, in that commanders will likely be supported by a JAG with strong legal skills. Getting an appointment as a JAG officer is extremely competitive these days, and law students and lawyers who aspire for a commission must be among the very best.[46] However, legal acumen is only part of the process.

The finest lawyer cannot be effective if he or she does not fully understand the client's business and needs. In the military setting, this means a deep understanding of the mission, capabilities, and mindset of the supported unit. Much of this falls upon the JAG to develop, but commanders can facilitate the process by reaching out to their supporting legal officer. This means ensuring that the JAG visits the unit frequently and acquires a familiarity with its soldiers,

INTEGRATING LAWFARE AND WARFARE



INTEGRATING LAWFARE AND WARFARE

JOEL P. TRACHTMAN*

Abstract: Current military campaigns are not waged solely on the physical battlefield, but in multiple other arenas. One such arena is lawfare: legal activity that supports, undermines, or substitutes for other types of warfare. In today's law-rich environment, with an abundance of legal rules and legal fora, strategists must evaluate the full scope of possible legal argumentation. Lawfare can substitute for warfare where it provides a means to compel specified behavior with fewer costs than kinetic warfare, or even in cases where kinetic warfare would be ineffective. As a result, lawfare can be strategically integrated into military command structures to bring about desired outcomes.

INTRODUCTION

Both kinetic warfare and legal dispute are forms of contestation.[1] Contestation can be physical or symbolic.[2] Legal arguments or claims are one type of symbolic contestation.[3] Other types of symbolic contestation may be based on historical justification, moral philosophy, or religious doctrine.[4] Symbolic contestation may be used alongside or in place of physical contestation.[5] Although we may plan strategy around geographically defined contested arenas like the South China Sea, the Crimea, or Syria, we may also consider functionally defined arenas such as the cyber or biological arenas.[6] Arenas for contestation may be geographic or functional, physical, or symbol-

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[1] *See* ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 1, 3 (2016); Timothy Noah, *Birth of a Washington Word*, SLATE (Nov. 20, 2002, 6:40 PM), http://www.slate.com/articles/news_and_politics/chatterbox/2002/11/birth_of_a_washington_word.html [https://perma.cc/A4AU-B6JW].

[2] *See* KITTRIE, *supra* note 1, at 6–7.

[3] *See id.*

[4] *See* Gerrie Ter Haar, *Religion: Source of Conflict or Resource for Peace?*, *in* BELIEF OR BARRIER: RELIGION, VIOLENCE, AND VISIONS FOR PEACE 1, 13 (Gerrie Ter Haar & James J. Busuttil eds., 2005).

[5] *See* KITTRIE, *supra* note 1, at 6–7.

[6] *See* Peter Navarro, *China's Non-Kinetic "Three Warfares" Against America*, NAT'L INT. (Jan. 5, 2016), http://nationalinterest.org/blog/the-buzz/chinas-non-kinetic-three-warfares-against-america-14808 [https://perma.cc/54RS-XJCC]; *see, e.g.*, *infra* notes 49–70, 83–91 and accompanying text.

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Joel P. Trachtman, in his article "Integrating Lawfare and Warfare," writes that lawfare can be integrated into a military command structure strategically if one wants to bring about desired outcomes. He recommends areas in which an integrated legal component may improve strategic and tactical outcomes:

a. Identify disputes in which legal resolution is unlikely in order to predict more accurately the context for kinetic disputes.

b. Join in the planning of new weapons systems and adaptation of existing weapons systems in order to maximize effectiveness given legal restraints.

c. Anticipate challenges to rules of engagement and target policies and identify methods to maximize effectiveness despite potential challenges.

d. Identify circumstances where opponents are creating legal facts on the ground that may give them an advantage in future conflicts, such as the Chinese South China Sea operations.

e. Identify circumstances in which it may be attractive to create legal facts on the ground for advantage.

f. Identify circumstances in which opponents are seeking to create international legal rules or modify or apply existing international legal rules that will restrict use of weapons in which your forces have an advantage.

g. Propose international legal rules or modify or apply existing international legal rules that will restrict use of weapons in which your forces are at a disadvantage.

h. Identify competitors' efforts to block your access to materiel and formulate legal responses.

i. Identify competitors' needs for materiel and seek to block access within applicable law.

Source: Joel P. Trachtman, "Integrating Lawfare and Warfare," *Boston College International and Comparative Law Review* 39, no. 2 (2016): 267 and 281, accessed 20 March 2017, http://lawdigitalcommons.bc.edu/iclr/vol39/iss2/3.

equipment, and methods of operation. This must be accomplished in garrison because it is extremely difficult to do on the fly or once deployed.

Success, Maurer tells us, is "measured by *the relationship itself* between the advisor and principal decision maker."[47] He offers these questions for introspection by both the legal advisor and the decision maker:

> Is [the relationship] characterized by trust? Is it deep? Is it candid? Does it forgive errors and accept nuance and a bit of chaos? Is it built to allow for the *time* to be *all* of these things, or is it nothing more than a twice-monthly status report?[48]

None of this, of course, obviates the responsibility of the supporting legal advisor and others in his or her functional chain of supervision to engage in a wide-ranging professional, and often highly technical, legal analysis, and to prepare a supporting legal plan that spans all levels of war as is necessary to effectively wage lawfare and, conversely, defend against it.[49]

Educate the Troops about Lawfare

Beyond securing the right legal advisor, it is important to have the troops understand the "why" about lawfare. The most obvious part of this process for tactical-level units is ensuring the troops understand that battlespace discipline is more than a matter of personal character and accountability; it directly relates, as discussed earlier, to operational success.

Consequently, commanders and other leaders need to explain the importance of denying adversaries incidents of real or perceived misconduct that can be exploited. This part of the legal preparation of the battlefield must begin long before the unit arrives in the battlespace. As the U.S. Supreme Court explained in *Chappell v. Wallace,*

> The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex, with no time for debate or reflection.[50]

Yet at the same time, twenty-first century commanders need to appreciate that today's troops are not automatons (and we should not want them to be). According to the 2016 Deloitte Millennial Survey, personal values have the greatest influence on millennials' decision making.[51] This means they need to have a keen understanding of how a task fits with their personal values or ethics.[52] Richard Schragger points out that "law allows our troops to engage in forceful, violent acts with relatively little hesitation or moral qualms."[53] Law can, he says, create a "well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes."[54]

Absent a firm grounding in the importance of law and its moral underpinnings, personal moral codes can take a dark turn under the enormous stress of combat. The late historian Stephen Ambrose observed that it is a "universal aspect of war" that when you put young troops "in a foreign country with weapons in their hands, sometimes terrible things happen that you wish had never happened."[55] More recently, William Langewiesche has reported on just how combat can catastrophically distort the judgment of otherwise good soldiers.[56] This and other case studies need to be carefully examined by leaders, JAGs, and troops alike.

Clearly, to deny adversaries an effective lawfare strategy, troops must be trained on the law of war and its incorporation into the rules of engagement. Leaders, however, need to be wary of self-imposed restraints, because they can work to benefit adversaries. For example, the announcement by NATO first and later by the United States of the rules of engagement that require a "near certainty" of zero civilian casualties creates the perception of illegality when such casualties inevitably occur, even though international law does not require zero civilian casualties but merely that they need not be excessive in relation to the concrete and directed military advantage anticipated.[57]

Such publicly announced restraints invite adversaries to do exactly what the law does not want them to do: embed themselves among civilians in order to protect themselves from an air attack more effectively than any air defense might be able to do. Indeed, there is a real risk that overly restrictive rules of engagement may, paradoxically, endanger civilians because the failure to conduct a strike may save some civilians in the near term, but over time, the enemy who escapes an attack may go on to wreak more havoc on innocents, which would not have been the case if the attack had gone forward and the enemy had been neutralized.[58]

All of this suggests that the complexities of modern battlefields, and in particular the implications of

lawfare and counter-lawfare techniques, make solutions very fact-dependent. A sophisticated understanding of the legal "terrain" is essential and will require a real intellectual investment by military leaders and their forces if they are to be prepared to succeed.

The legal machinations of Russians waging hybrid war are not necessarily the same as China's legal warfare in the South China Sea or the Islamic State's ruthless exploitation of human shields to ward off high-tech weaponry. Each approach is a related but differing application of lawfare. Only by a discriminate and detailed analysis of these various lawfare strategies will U.S. forces be able to anticipate and blunt an adversary's use of lawfare.

Concluding Observations

There is yet much work to do. In his book on lawfare, Orde Kittrie makes the astute observation that "despite the term having been coined by a U.S. government official, the U.S. government has only sporadically engaged with the concept of lawfare."[59] He goes on to lament that the United States has "no lawfare strategy or doctrine, and no office or interagency mechanism that systematically develops or coordinates U.S. offensive lawfare or U.S. defenses against lawfare."[60]

Although enumerating all of the techniques to counter adversary lawfare strategies is beyond the scope of this article, I hope that, together with other experts, a start is underway. Fortunately, some useful work has been done with respect to specific challenges. For example, Stefan Halper's 2013 paper—prepared for the Department of Defense's Office of Net Assessments—provides useful ideas not only for the specific situation it addresses (China's actions in the South China Sea) but also with real application to other lawfare situations.[61] Trachtman has also done some valuable work that will help develop thinking about lawfare.[62]

Furthermore, in a recent article in NATO's *Three Swords Magazine*, U.S. Army Lt. Col. John Moore notes that while the alliance has no formal definition or doctrine, the concept has been discussed in papers and at conferences.[63] Given the rise especially of Russia's employment of hybrid war with its lawfare element, he believes it is urgent that NATO coalesce its already extant thinking about lawfareand express it in a formal doctrine in order to facilitate the alliance's ability to defend itself against lawfare techniques, as well as to use the concept proactively.[64]

In the meantime, commanders and leaders at all levels need to include law and lawfare into their planning process and operational conduct, even in the absence of formal doctrine. The fact is that lawfare is not a passing phenomenon; it is intrinsic to current conflicts and will continue to be so for the foreseeable future. The best leaders will ensure that they and their troops will be prepared to meet this challenge. ■

Notes

1. Shawn Snow, "It's Time to Remove Lawyers from the War Room," *Military Times* website, 14 May 2016, accessed 7 March 2017, http://www.militarytimes.com/story/opinion/2016/05/14/time-remove-lawyers-war-room/84233792/.

2. Brooke Goldstein, as quoted by Steve Herman, "'Lawfare' Could Become Trump Tool against Adversaries," Voice of America website, 24 January 2017, accessed 7 March 2017, http://www.voanews.com/a/lawfare-possible-trump-tool-against-adversaries/3690167.html.

3. Con Coughlin, "Legal Action against Soldiers 'Could Undermine Britain on the Battlefield' Warns Chief of General Staff," *The Telegraph* website, 29 January 2016, accessed 7 March 2017, http://www.telegraph.co.uk/news/uknews/defence/12130929/Legal-action-against-soldiers-could-undermine-Britain-on-the-battlefield-warns-chief-of-general-staff.html. The chief of the British General Staff said last year in reaction to more than 1,500 lawsuits filed against British forces, "If our soldiers are forever worrying that they might be sued because the piece of equipment that they're using is not the best piece of equipment in the world, then that is clearly a potential risk to the freedom of action which we need to encourage in order to be able to beat our opponent."

4. Joel P. Trachtman, "Integrating Lawfare and Warfare," *Boston College International and Comparative Law Review* 39, no. 2 (2016): 267, accessed 7 March 2017, http://lawdigitalcommons.bc.edu/iclr/vol39/iss2/3.

5. "Globalization of Law," Global Policy Forum website, accessed 7 March 2017, https://www.globalpolicy.org/globalization/globalization-of-law.html.

6. Lyric Wallwork Winik, "A Marine's Toughest Mission (Gen. James L. Jones)," *Parade Magazine*, 19 January 2003.

7. Stanley A. McChrystal, foreword to *U.S. Military Operations: Law, Policy, and Practice*, by eds. Geoffrey S. Corn, Rachel E. VanLandingham, and Shane R. Reeves (New York: Oxford University Press, 2015), xi.

8. Ibid., xii.

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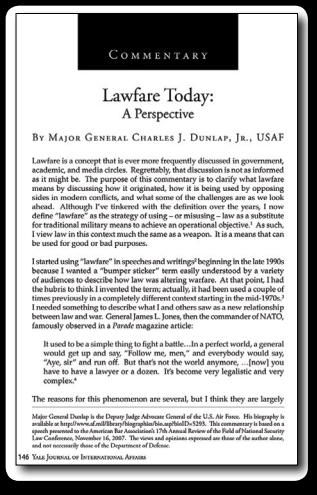
MilitaryReview

WE RECOMMEND

For those who would like to know more about lawfare, *Military Review* recommends two articles by retired U.S. Air Force Maj. Gen. Charles Dunlap Jr.



COMMENTARY

Lawfare Today:
A Perspective

BY MAJOR GENERAL CHARLES J. DUNLAP, JR., USAF

Lawfare is a concept that is ever more frequently discussed in government, academic, and media circles. Regrettably, that discussion is not as informed as it might be. The purpose of this commentary is to clarify what lawfare means by discussing how it originated, how it is being used by opposing sides in modern conflicts, and what some of the challenges are as we look ahead. Although I've tinkered with the definition over the years, I now define "lawfare" as the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.[1] As such, I view law in this context much the same as a weapon. It is a means that can be used for good or bad purposes.

I started using "lawfare" in speeches and writings[2] beginning in the late 1990s because I wanted a "bumper sticker" term easily understood by a variety of audiences to describe how law was altering warfare. At that point, I had the hubris to think I invented the term; actually, it had been used a couple of times previously in a completely different context starting in the mid-1970s.[3] I needed something to describe what I and others saw as a new relationship between law and war. General James L. Jones, then the commander of NATO, famously observed in a *Parade* magazine article:

> It used to be a simple thing to fight a battle…In a perfect world, a general would get up and say, "Follow me, men," and everybody would say, "Aye, sir" and run off. But that's not the world anymore, …[now] you have to have a lawyer or a dozen. It's become very legalistic and very complex.[4]

The reasons for this phenomenon are several, but I think they are largely

Major General Dunlap is the Deputy Judge Advocate General of the U.S. Air Force. His biography is available at http://www.af.mil/library/biographies/bio.asp?bioID=5289. This commentary is based on a speech presented to the American Bar Association's 17th Annual Review of the Field of National Security Law Conference, November 16, 2007. The views and opinions expressed are those of the author alone, and not necessarily those of the Department of Defense.

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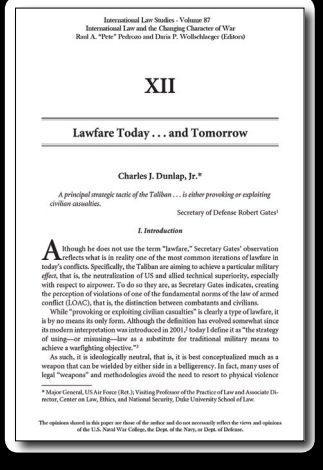

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Raul A. "Pete" Pedrozo and Daria P. Wollschlaeger (Editors)

XII

Lawfare Today . . . and Tomorrow

Charles J. Dunlap, Jr.*

A principal strategic tactic of the Taliban . . . is either provoking or exploiting civilian casualties.

Secretary of Defense Robert Gates[1]

I. Introduction

Although he does not use the term "lawfare," Secretary Gates' observation reflects what is in reality one of the most common iterations of lawfare in today's conflicts. Specifically, the Taliban are aiming to achieve a particular military *effect*, that is, the neutralization of US and allied technical superiority, especially with respect to airpower. To do so they are, as Secretary Gates indicates, creating the perception of violations of one of the fundamental norms of the law of armed conflict (LOAC), that is, the distinction between combatants and civilians.

While "provoking or exploiting civilian casualties" is clearly a type of lawfare, it is by no means its only form. Although the definition has evolved somewhat since its modern interpretation was introduced in 2001,[2] today I define it as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective."[3]

As such, it is ideologically neutral, that is, it is best conceptualized much as a weapon that can be wielded by either side in a belligerency. In fact, many uses of legal "weapons" and methodologies avoid the need to resort to physical violence

* Major General, US Air Force (Ret.); Visiting Professor of the Practice of Law and Associate Director, Center on Law, Ethics, and National Security, Duke University School of Law.

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

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To view this article, visit: http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1084&context=ils.

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Applying a Sovereign Agency Theory of the Law of Armed Conflict

Eric Talbot Jensen*

Abstract

The current bifurcated conflict classification paradigm for applying the Law of Armed Conflict (LOAC) has lost its usefulness. Regulation of state militaries was originally based on the principle that the armed forces of a state were acting as the sovereign agents of the state and were granted privileges and given duties based on that grant of agency. These privileges and duties became the bases for the formulation of the modern LOAC. During the twentieth century, the LOAC became bifurcated, with the complete LOAC applying only to armed conflicts between sovereigns and only few provisions of the law applying to armed conflicts that were not between sovereigns. This bifurcation has led to a lack of clarity for the sovereign's agents in LOAC application and given states the ability to manipulate which law applies to application of force through their agents. The applicability of the LOAC should no longer be based on the manipulable and unclear conflict classification paradigm, but should instead return to its foundations in the sovereign's grant of agency. Thus, anytime a sovereign applies violent force through its armed forces, those armed forces should apply the full LOAC to their actions, regardless of the type or classification of the conflict.

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I. INTRODUCTION

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.[1]

In the aftermath of the terror attacks on September 11, 2001, then-Assistant Attorney General Jay Bybee argued in a memo to Department of Defense General Counsel William Haynes that the Geneva Conventions did not apply to either al-Qaeda or the Taliban, essentially leaving these battlefield

1 *Al-Bihani v Obama*, 590 F3d 866, 882 (DC Cir 2010) (Brown concurring).

fighters in a "no-law" zone.[2] Additionally, White House Counsel, Alberto Gonzales, notoriously described provisions of the Geneva Conventions as "quaint" and "obsolete."[3] Many who have since reviewed Bybee's memo have declared that this was a disingenuous reading of the law and that the Bush Administration was manipulating its interpretation of the law and US Treaty obligations to accomplish specific policy objectives.[4] In the end, the US Supreme Court forced the Bush Administration to change its interpretation of the application of the law,[5] but debate continues on the issue of what law applies.[6]

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2 Memorandum from Jay Bybee, Office of Legal Counsel, US Dept of Justice, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, *5 (Jan 22, 2002).

3 Memorandum from Alberto R. Gonzales, White House Counsel, *Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* *2 (Jan 25, 2002).

4 Jason Ryan, *Torture Investigation: Bush-DOJ Attorneys 'Exercised Poor Judgment'* (ABC News Feb 19, 2010), online at http://abcnews.go.com/Politics/torture-investigation-president-george-bush-era-doj-attorneys/story?id=9892348 (visited Oct 12, 2011).

5 In *Hamdan v Rumsfeld*, the Supreme Court stated:

> The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "international in scope," does not qualify as a "conflict not of an international character." That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." Common Article 2 provides that 'the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.' High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-a-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-a-vis the nonsignatory if "the latter accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning.

548 US 557, 630 (2006) (citations omitted). See also Memorandum from Gordon England, Deputy Secretary of Defense, Office of the Secretary of Defense, *Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees*, *1 (July 7, 2006).

6 Professor Yoram Dinstein writes:

> Sometimes, while the scale and effects of an armed clash between States are substantial, both sides stick to a fiction (which does not mirror the true state of affairs and need not be accepted by third States) that a mere incident "short of war" has occurred. Conversely, the issuance of a declaration war does not mean that hostilities will necessarily ensue, so that a technical state of war may remain technical. Nonetheless, it is clear that since war must be waged between two or more States, figures of speech like "war on terrorism" must be taken as metaphorical. A "war on terrorism" may segue into a real war when—like in Afghanistan in 2001—one State (the United States) went to war against another (Afghanistan) owing to the support given by the latter to terrorists.

As the above quote from the 2010 DC Circuit case of *Al-Bihani v Obama* reflects, the terror attacks and the US government's response sparked a decade of consternation that has pervaded governments, practitioners, and academics concerning the applicability of the law to the actions of transnational terrorists.

At the root of the arguments by Gonzales, Bybee, and others is the law of armed conflict's (LOAC) applicability paradigm established by the 1949 Geneva Conventions[7] and broadened by their subsequent 1977 Additional Protocols.[8] These Conventions and Protocols were promulgated against the backdrop of the proliferation of intra-state conflicts involving organized armed groups that were not state forces, but were using state-level violence to carry out armed conflicts.[9] The LOAC provided no protection for either non-State participants in such conflicts or victims. Organizations such as the International Committee of the Red Cross (ICRC) argued to extend the existing laws of armed conflict to these internal conflicts.[10] States resisted the ICRC's suggestion because they viewed these conflicts as areas where international law had no purview.[11]

Recognizing state resistance but still committed to extending the coverage of the LOAC to victims in these internal armed conflicts, the ICRC proposed in 1949 to bifurcate the LOAC into provisions pertaining to armed conflicts between states, termed international armed conflicts (IAC), and armed conflicts between state forces and other organized armed groups within that state, termed non-international armed conflicts (NIAC). The intent was not only to provide

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> But usually the "war on terrorism" is prosecuted through ordinary law enforcement measures or even incidents "short of war," without waging an all-out war.

Yoram Dinstein, *Comments on War*, 27 Harv J L & Pub Poly 877, 886–87 (2004).

7 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 UN Treaty Ser 31 (1950) (First Geneva Convention); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (1949), 75 UN Treaty Ser 85 (1950) (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War (1949), 75 UN Treaty Ser 135 (1950) (Third Geneva Convention); Convention Relative to the Protection of Civilian Persons in Time of War (1949), 75 UN Treaty Ser 287 (1950) (Fourth Geneva Convention) (collectively, Geneva Conventions).

8 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UN Treaty Ser 3 (1979) (API); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (1977), 1125 UN Treaty Ser 609 (1979) (APII) (collectively, Protocols).

9 In the decades following the adoption of the Geneva Conventions, the world saw an increase in non-international armed conflicts, including wars of national liberation, terrorist organizations and irregular forces working within a failing State. Recent examples include activities of the Taliban, Hizbollah, Hamas, al-Qaeda, the Islamic Courts Union, and Al-Shabbab.

10 See Section II.

11 See id.

greater protections to victims of armed conflict, but also to encourage the armed groups to comply with the LOAC.

States finally agreed to this methodology, which was included in the 1949 Geneva Conventions as Article 3.[12] At the urging of the ICRC, many states extended this bifurcation in 1977 through the promulgation of two Protocols to the 1949 Geneva Conventions. These Additional Protocols solidified the bifurcation and, for those states who became parties,[13] added great detail to the provisions applying in both IAC and NIAC.

From the beginning, the intent of the ICRC (and presumably of the states who acceded to the 1949 Geneva Conventions and 1977 Protocols) was to add protections to the victims of armed conflict and encourage greater compliance with LOAC across a wider range of conflicts. However, history shows that this bifurcation has had little effect, if any, on non-state compliance with the LOAC[14] and has mainly acted to limit states who seek to be compliant. Further, as illustrated by the case of the US' response to the war on terror, it has focused the application of law almost exclusively on conflict classification. If a State calls an armed conflict an IAC, it is bound by one set of duties and authorities, and if it calls it a NIAC, it is bound by another. Further, if it avoids calling a conflict an armed conflict at all, it can use its armed forces to do things that are not covered by the LOAC, thus potentially creating the "no law" zone the US sought with regard to terrorists.

In addition to the US' dilemma, recent events in Colombia,[15] Russia,[16] and Mexico[17] demonstrate this problem. By focusing on the conflict classification, whether an IAC, NIAC, or even as something other than armed conflict at all, states are able to determine the law that applies as a matter of policy, rather than as a matter of fact.

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12 Geneva Conventions (cited in note 7).

13 For a list of states party to API, see API at 396–434 (cited in note 8). For a list of states party to APII, see APII at 667–98 (cited in note 8).

14 See M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J Crim L & Criminol 711, 807–08 (2008) (arguing that states' ability to manipulate conflict classification encourages noncompliance by non-state actors).

15 See Human Rights Watch, *Colombia: Investigate Spate of Killings by Armed Groups* (July 8, 2011), online at http://www.hrw.org/news/2011/07/08/colombia-investigate-spate-killings-armed-groups (visited Oct 28, 2011) (cataloguing recent attacks on civilians by armed groups and calling on the Colombian government to investigate and intervene).

16 See Paola Gaeta, *The Armed Conflict in Chechnya Before the Russian Constitutional Court*, 7 Eur J Intl L 563 (1996) (discussing the decision by the Russian Constitutional Court to declare Russia's conflict with Chechnya as subject to APII).

17 See Carina Bergal, *The Mexican Drug War: The Case for Non-International Armed Conflict Classification*, 34 Fordham Intl L J 1042, 1088 (2011) (arguing that Mexico has not officially declared its situation against the drug cartels as a NIAC, but that it should do so).

The inherent problems with the IAC/NIAC bifurcation are not recent discoveries. Almost immediately after the promulgation of the 1977 Protocols, Professor Michael Reisman argued that the bifurcation would be inaccurate and unnecessarily limiting.[18] The ranks of detractors have grown since the US' war on terror has so ably illustrated the shortcomings of the paradigm. Governments,[19] academics,[20] and even ICRC officials[21] now recognize that the conflict classification paradigm for LOAC applicability is not sufficiently meeting its originally intended goals. While there are many detractors of the current system, there is no general agreement on how to move forward in fixing the gaps in the existing law.[22] No one has suggested an alternative to the current focus on conflict classification as the method of determining which law applies.

This Article argues that the international community's focus on conflict classification to determine which law applies is misplaced and does not facilitate application of fundamental LOAC protections. Rather than using the type or existence of armed conflict as the gauge for LOAC applicability, this Article argues that states should apply the full LOAC every time they utilize their armed forces as state agents to apply sovereign force. This turns the focus from what a state chooses to call a conflict to the forces a state chooses to use to deal with a conflict. Application of the LOAC to all forceful activities by state sovereign forces is drawn from the historical development of the LOAC and will provide a more solid foundation upon which to place the LOAC, diminishing the potential for political manipulation of the law.

Applying the sovereign agency theory of the LOAC, rather than the conflict classification paradigm, will avoid the current pervasive debate between

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18 See Theodor Meron, et al, *Application of Humanitarian Law in Noninternational Armed Conflicts*, 85 Am Socy Intl L Proc 83, 85 (1991).

19 See John Reid, *20th-Century Rules, 21st-Century Conflict, Remarks at the Royal United Services Inst for Defense and Security Studies* (Apr 3, 2006), online at http://www.acronym.org.uk/docs/0604/doc05.htm (visited Oct 14, 2011).

20 See Avril McDonald, *The Year in Review*, 1 YB Intl Humanitarian L 113, 121 (1998); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U Pa L Rev 675, 755–56 (2004).

21 See Jakob Kellenberger, ICRC President, *Sixty Years of the Geneva Conventions: Learning from the Past to Better Face the Future, Address at the Sixtieth Anniversary of the Geneva Conventions* (Aug 12, 2009), online at http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-president-120809.htm (visited Oct 14, 2011); Jakob Kellenberger, ICRC President, *Strengthening Legal Protection for Victims of Armed Conflicts, Address at the Follow-Up Meeting to the Sixtieth Anniversary of the Geneva Conventions* (Sep 21, 2010), online at http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm (visited Oct 14, 2011).

22 John B. Bellinger and Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for The Geneva Conventions and Other Existing Law*, 105 Am J Intl L 201, 204 (2011).

IAC and NIAC that has caused so much consternation. In addition, applying the full LOAC every time a state uses its armed forces will mean that the starting point for humanitarian protections is always the most robust of possible alternatives. It will provide clarity for armed forces, making them more efficient and effective. History has shown that applying the full LOAC to all forceful activities of a state's armed forces is a manageable approach, though it has only been done as a matter of policy to this point. For the sovereign agency theory of LOAC applicability truly to overcome the problems inherent in the conflict classification paradigm, however, it must be accepted as a matter of law.

In arguing that the "full LOAC" should apply when a state employs its military to exercise sovereign force, this would include those customary provisions that normally apply during IAC as well as any conventional obligations imposed by a state's specific treaty obligations. As will be further explained in Section V, despite the positive law that makes clear distinctions between the law applicable in NIAC and the law applicable in an IAC, the practice of states,[23] judicial decisions of international tribunals,[24] and the writings of scholars[25] all demonstrate that the gap between the customary law applicable in NIAC and IAC is decreasing. Some key areas of difference still remain, such as combatant immunity[26] and occupation. While these are definitely critical areas of the LOAC, they represent only a small portion of the LOAC as a whole.

Therefore, for the purpose of this paper, with respect to the sovereign agency theory presented herein, the LOAC refers to the LOAC as it currently applies in IAC to any individual state. This includes the application of human rights law as appropriate.[27] Arguing to apply the full body of the LOAC will trigger concerns by states such as those raised in prior negotiations as catalogued below.[28] Despite these valid arguments by states, the benefits of the sovereign agency theory to a state's armed forces outweigh the traditional concerns about applying the full LOAC to situations other than IAC.

Section II of this paper describes the current paradigm of LOAC applicability based on conflict characterization and includes a brief historical review of the bifurcation of the LOAC into provisions regulating NIAC and

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23 See Section V.E.1.

24 See Section V.E.2.

25 See Section V.E.3.

26 Derek Jinks, *The Declining Significance of POW Status*, 45 Harv Intl L J 367, 376 (2004).

27 Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am J Intl L 1, 34 (2004); Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J Intl Humanitarian Legal Studies 52 (2010).

28 See Section II.

IAC separately. Section III then reviews the effect of the bifurcation of the LOAC to show that it has not been effective either in curbing the violence against victims of armed conflict or in promoting LOAC compliance by participants in armed conflict, but instead has become a political tool to manipulate the applicable law, leading to a lack of clarity on the battlefield. The section will also highlight the increasing call to dissolve the bifurcation. Section IV argues that looking to the type of armed conflict for LOAC applicability is no longer sufficient to preserve the fundamental principles of the LOAC. Rather, states should apply the LOAC to any use of armed forces to apply sovereign force. This proposal reemphasizes the underlying principle of agency and is expressed most significantly in the sovereign state's granting that agency to members of its armed forces. Section V outlines the benefits of the sovereign agency theory and argues that history supports its application. Finally, Section VI analyzes some recent developments that have positioned states to make just such a transition in the law and offers a way forward to complete the transition.

II. THE CURRENT BIFURCATED PARADIGM

> *"[T]he terms 'international' and 'non-international' conflict import a bipartite universe that authorizes only two reference points on the spectrum of factual possibilities. The terms are based on a policy decision that some conflicts . . . will be insulated from the plenary application of the law of armed conflict—even though such conflicts may be more violent, extensive and consumptive of life and value than other 'international' ones. The terms are, in effect, a sweeping exclusion device that permits the bulk of armed conflict to evade full international regulation. This exclusion is not one that comports easily with the manifest policy of the contemporary law of armed conflict, which seeks to introduce as many humanitarian restraints as possible into conflict, without judgments about its provenance, its locus, or about the justice of either side's cause."*[29]

By the early nineteenth century, states recognized two principal forms of armed conflict: armed conflict between two or more states and civil wars.[30] Interstate conflict, or what has become known as IAC, invoked all the principles of the laws of war as they were then understood. During civil wars, on the other hand, states often did not apply such international rules and the treatment of opposing fighters was considered a matter of domestic concern. This difference of application "was based on the premise that internal armed violence raise[d] questions of sovereign governance and not international regulation."[31]

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29 Meron, et al, 85 Am Socy Intl L Proc at 85 (cited in note 18).

30 Emily Crawford, *Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts*, 20 Leiden J Intl L 441, 442 (2007).

31 James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 Intl Rev Red Cross 313, 316–17 (2003).

The middle of the nineteenth century began a time of progressive codification of the LOAC. Starting with the Lieber Code of 1863,[32] states wrote and applied rules to their armed conflicts.[33] Such treaties and conventions moved the development of the LOAC forward, expanding its coverage and raising the level of detail in its provisions.[34] In addition to States, one of the organizations that played a significant role in LOAC development was the ICRC. The concept of the ICRC originated in Henri Dunant's experience after the Battle of Solferino[35] and his determination to provide assistance to victims of armed conflict. Initially, the ICRC's work focused on conflicts between sovereign states. However, the ICRC soon recognized the plight of victims of civil wars, or non-international armed conflicts, to which the LOAC did not extend. As early as the 1912 IXth International Conference of the Red Cross, meeting in Washington, DC, the ICRC presented a report entitled "The Role of the Red Cross in case of Civil War or Insurrection," which contained a draft convention extending some rights under the LOAC to victims of civil wars. This initiative was not well received by the majority of the participants, who felt that "the Red Cross Societies have no duty whatever to fulfil [sic] toward rebel or revolutionary troops, which the laws of [a] country can only consider as criminals."[36]

Despite this setback, the ICRC continued to advance the idea of codifying protections for victims of non-international armed conflicts. At the Xth International Committee of the Red Cross, the Conference adopted a resolution that "recognized that victims of civil wars and disturbances, without any

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32 US War Dept, *Instructions for the Government of Armies of the United States in the Field* (1863), online at http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument (visited Oct 14, 2011) (Lieber Code).

33 Interestingly, the US Civil War was a NIAC, yet the rules Lieber promulgated to govern Union forces in the conduct of that armed conflict came to be the basis for the formulation of modern IAC law.

34 See, for example, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (Declaration of Saint Petersburg), 138 Consol TS 297 (1868); Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague Convention of 1899), 32 Stat 1803 (1899); Final Act of the Second Peace Conference (The Hague Convention of 1907), 36 Stat 2277 (1907); Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy (The Kellogg-Briand Pact), 46 Stat 2343, 94 League of Nations Treaty Ser 57 (1928).

35 See generally Henry Dunant, *A Memory of Solferino* (Intl Comm Red Cross 1986).

36 *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 5 Protection of Victims of Non-Intl Armed Conflicts 1 (Intl Comm Red Cross 1971), online at http://www.loc.gov/rr/frd/Military_Law/pdf/RC-conference_Vol-5.pdf (visited Oct 14, 2011). See also Antonio Cassese, *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 Intl & Comp L Q 415, 418 (1981) (describing general hostility by states toward conferring protection on insurgents).

exception, are entitled to relief, in conformity with the general principles of the Red Cross."[37] Though the resolution had no binding effect on states, it reflected a thaw in the opposition to applying basic international law protections to armed conflicts more broadly.

In 1938, in the wake of the Spanish Civil War, the ICRC convened the XVIth International Conference of the Red Cross in London. At the Conference, the "question of non-international armed conflicts was given attentive study by the legal commission of the Conference, which recognized all the difficulties inherent in it."[38] In the end, the members of the Conference were still unwilling to apply the LOAC directly to non-international armed conflicts that, in their view, invaded the prerogative of the sovereign. The result was that the members of the Conference only agreed to increased study by the ICRC on the application of humanitarian principles during civil wars.[39]

World War II exhibited an exponential rise in wartime costs to civilians, both in terms of lives lost and property damage.[40] Increasingly lethal weapons led to increased effects on civilians.[41] In the aftermath of the war, the ICRC embarked on another review of the LOAC. This effort resulted in the ICRC's submitting proposals for rules applicable in cases of non-international armed conflict to the XVIIth International Committee of the Red Cross in Sweden in 1948. After reviewing the ICRC's submissions, the members of the Conference "recognized the innumerable difficulties which were going to be raised by the problem of non-international armed conflict, and [they] suggested that this question be referred to the [upcoming] Diplomatic Conference."[42]

At the 1949 Diplomatic Conference, which would ultimately produce the Geneva Conventions, the ICRC reiterated its previous call to apply the full LOAC to non-international armed conflicts. While some delegates were in favor of the changes and viewed acceptance of the ICRC's proposals as an "act of

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37 *Conference of Government Experts* at 2 (cited in note 36).

38 Id at 2–3.

39 See id at 3.

40 See Ronald R. Lett, Olive Chifefe Kobusingye, and Paul Ekwaru, *Burden of Injury During the Complex Political Emergency in Northern Uganda*, 49 Canadian J Surgery 51, 53 (Feb 2006) ("The proportion of civilian war-related deaths has increased from 19% in World War I, 48% in World War II, to more than 80% in the 1990s."). See also Lisa Avery, *The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of Intentional Victimization of Women and Children in War*, 51 Loyola L Rev 103, 103 (2005) ("During the last decade alone, two million children were killed, another six million were seriously injured or left permanently disabled, and twice that number of children were rendered homeless by the ravages of war.").

41 See Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 Brit YB Intl L 323, 326 (1951).

42 *Conference of Government Experts* at 2 (cited in note 36).

courage,"[43] the majority remained opposed to such a sweeping measure. Those opposed argued that:

> To compel the Government of a state in the throes of internal convulsions to apply to these internal disturbances the whole body of provisions of a Convention expressly concluded to cover the case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition.[44]

The issue was sent to a Mixed Commission that was tasked with examining articles that were common to all four proposed Conventions. Within these "common" articles were those that determined the applicability of the LOAC. In accordance with the traditional approach, Article 2 of the Conventions described the conflicts to which the full LOAC would apply. Article 2 states:

> In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[45]

This paragraph poses two significant limitations to the application of the Conventions. The first is that there must be an armed conflict, and the second is that it must be between two High Contracting Parties. With the Geneva Conventions universally adopted,[46] the effect of this limitation is to restrict the applicability of the Conventions to armed conflicts between states. This, of course, was not what the ICRC and others were seeking. They wanted a broader application of the LOAC.

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43 Jean Pictet, ed, *Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 44 (Intl Comm Red Cross 1952).

44 Id at 43–44.

45 Geneva Conventions (cited in note 7).

46 For a list of states party to the Geneva Conventions and other international humanitarian law treaties, see International Committee of the Red Cross, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 13-Oct-2011* (Intl Comm Red Cross 2011), online at http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf (visited Oct 14, 2011).

In response to the ICRC's desire for a broader application of the LOAC, a small working party was formed to "draw up a text containing definitions of the humanitarian principles applicable to all cases of non-international conflicts, together with a minimum of imperative rules."[47] Drawing from general preambular language and rules originally intended for the preamble to the convention concerning civilians,[48] the working group produced the provision that would eventually become Common Article 3,[49] which provides limited protections for those who are involved in non-international armed conflicts, including for fighters not acting under the direction of a sovereign. Article 3 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[50]

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47 Pictet, *Commentary: I Geneva Convention* at 47 (cited in note 43).

48 Id.

49 Geneva Conventions, Art 3 (cited in note 7).

50 Id.

Like Article 2, Article 3 only applied to armed conflicts, but in contrast to Article 2, Article 3 was specifically applicable only to those armed conflicts not of an international character occurring in the territory of one of the states party.

A sensible reading of this language might lead the reader to think that the drafters meant Article 3 to cover the complete field of conflicts taking place in the territory of a signatory not covered by Article 2—and eventually the US Supreme Court decided just that[51]—but it is clear that this was not the intention of the parties at the time the Conventions were drafted.[52] Although not explicit in either the text or commentary, the records of the Conventions clearly show that most states believed that Common Article 3 would only apply when the fighting reached "the threshold of intensity associated with contemporaneous international warfare" and opposing armed groups forced the state to respond with its armed forces.[53] The states party also believed that this provision was actually meant to govern civil wars or insurrections,[54] and that they were not considering conflicts with transnational non-state actors.[55] The ICRC viewed this restricted scope as only a limited success; they recognized that these provisions represented only the "most rudimentary principles of humanitarian protection."[56]

Despite the minimal effect of Common Article 3 in extending protections to victims of NIAC, its creation signified the beginning of the application of the LOAC to NIACs, an area that previously had been governed almost solely by domestic law. Though application of the complete LOAC was rejected, there was now, at least, some recognition among states that NIACs were no longer exempt from the direct application of international law.

Since the adoption of the 1949 Geneva Conventions, the majority of conflicts that have occurred throughout the world have been non-international

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51 *Hamdan*, 548 US at 630–31.

52 Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* 37 (Cambridge 2010). See Baxter, 28 Brit YB Intl L at 323 (cited in note 41) (arguing that the treatment of certain guerrillas and saboteurs is outside the coverage of the Geneva Conventions).

53 Cullen, *The Concept of Non-International Armed Conflict* at 37 (cited in note 52).

54 For statements by the US delegation to this effect, see *Diplomatic Conference for the Establishment of the International Conventions for the Protections of War Victims, Final Record of the Diplomatic Conference of Geneva of 1949*, Vol 2B at 12 (1949), online at http://www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html (visited Oct 14, 2011).

55 See Lt Col Robert F. Grubb, Army Intl Affairs Division, Dept of Def Geneva Conventions Working Group, *Memorandum for Record*, Analysis of the Geneva Conventions 3-2 (1955) (memorandum prepared by the Dept of Def Geneva Conventions Working Group in anticipation of Senate hearings) (on file with author); Cullen, *The Concept of Non-International Armed Conflict* at 37 (cited in note 52).

56 Stewart, 85 Intl Rev Red Cross at 317 (cited in note 31).

in character.[57] In its assessment of these armed conflicts, the ICRC determined that Article 3's numerous loopholes "made it no longer possible to ensure sufficient guarantees to the victims in question."[58] The ICRC responded by continuing its efforts to expand protections for victims of all armed conflicts.

At the XXth International Conference of the Red Cross held in Vienna in 1965, the members adopted Resolution XXVIII, which included principles for the protection of civilians in armed conflict, without regard to how that conflict was characterized. These principles were subsequently adopted in UN General Assembly (UNGA) Resolution 2444 on Respect for Human Rights in Armed Conflict. Article 1 of the Resolution states:

> 1. 'Affirms' resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down, inter alia, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts:
>
> (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
>
> (b) That it is prohibited to launch attacks against the civilian populations as such;
>
> (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.[59]

The ICRC/UNGA Resolution is significant for two relevant reasons. First, the Resolution makes no distinction between various types of armed conflict. On its face, the Resolution applies equally to all forms of armed conflict. Second, the Resolution calls on all governments to apply to all forms of armed conflict principles previously understood to apply only to IACs, again without concern for the characterization of the conflict. While the principle of distinction described in paragraphs (b) and (c) is one of the most fundamental principles of the LOAC and is designed to protect victims of war, it is important to note here the ICRC's urging for a new application of the LOAC to armed conflict generally. In keeping with this new approach, "the legal studies of the ICRC were broadened to cover all the laws and customs applicable in armed conflicts, because the insufficient character of the rules relative to the conduct of hostilities often affected the application of the Geneva Conventions in conflicts of all sorts."[60]

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57 See Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* *5 (Intl Comm Red Cross 2008), online at http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf (visited Oct 19, 2011).

58 *Conference of Government Experts* at 7 (cited in note 36).

59 General Assembly Res No 2444, UN Doc A/RES/2444 at ¶ 1 (1968).

60 *Conference of Government Experts* at 7 (cited in note 36).

The ICRC's next move, in furtherance of its twin objectives of broadening the protections of victims of armed conflict and encouraging compliance with the LOAC, was to submit a draft to a Conference of Government Experts in 1971, recommending the application of the full LOAC to civil wars if a foreign military became involved.[61] The ICRC's efforts were successful on this point, and the resulting Report of the Government Experts on the issue of applicability of LOAC to non-international armed conflicts proposed:

> When, in case of non-international armed conflict, the Party opposing the authorities in power presents the component elements of a State—in particular if it exercises public power over a part of the territory, disposes of a provisional government and an organized civil administration, as well as of regular armed forces—the Parties to the conflict shall apply the whole of the international humanitarian law applicable in international armed conflicts.[62]

Eventually, the ICRC put forward its proposals to the Conference of State Parties. Finding that the majority of states in the Conference preferred to maintain the distinction between IACs and NIACs, the ICRC abandoned the "single protocol" approach.[63] In preparation for the 1977 Diplomatic Conference, the ICRC proposed two separate protocols, one dealing with IAC and one with NIAC. These two proposals provided the basis for the Additional Protocols, the adoption of which ultimately solidified the bifurcation of the LOAC.

The bifurcation of the LOAC is clearly expressed in the applicability paragraphs of each Protocol. API, Article 1, paragraphs 3 and 4 state:

> 3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
>
> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[64]

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61 See Stewart, 85 Intl Rev Red Cross at 313 (cited in note 31).

62 *Conference of Government Experts* at 15 (cited in note 36). The same report also concluded that when a third State becomes involved in the conflict, the entire LOAC should apply. Id at 21.

63 Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman, eds, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 1330, ¶ 4387 (Martinus Nijhoff 1987).

64 API, Art 1 ¶¶ 3–4 (cited in note 8).

By referring to Common Article 2 in paragraph 3, API is designed to apply to the standard IAC. However, paragraph 4 carves out a significant change in that understanding by including three types of conflict that had traditionally been considered NIACs. Despite the argument made in the Commentary that conflicts waged against colonial domination, alien occupation, and racist regimes should be considered to be inter-state,[65] their inclusion in API shows that the differentiation between IACs and NIACs was one of political expediency, rather than a principled division of LOAC application.[66] In other words, the transformation of conflicts waged against colonial domination, alien occupation, and racist regimes from being governed by the law relating to NIACs to that regulating IACs had little to do with the factual nature of the conflicts and much to do with the political mood at the time.

In contrast to the expansionist scope of API, the applicability provision of APII draws a more limiting line. Article 1 states:

> 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
>
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[67]

Using Common Article 3 as a basic point of reference, paragraph 1 artfully limits the coverage of APII by requiring the armed groups be under responsible command, exercise control of territory, and have the capacity to carry out sustained and concerted military operations. The Commentary confirms the limiting purpose of the Protocol, stating "the Protocol only applies to conflicts

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65 See Sandoz, Swinarski, and Zimmerman, eds, *Commentary* at 41–56, ¶¶ 66–118 (cited in note 63).

66 See Stewart, 85 Intl Rev Red Cross at 318–19 (cited in note 31) ("[T]he inclusion of such conflicts within the scope of Article 1(4) confirms that the dichotomy between international and non-international conflict is far from strict or principled: international armed conflict is not a synonym for inter-State warfare, nor does the full extent of international humanitarian law presuppose that the collective belligerents must be States."). See also Crawford, 20 Leiden J Intl L at 449 (cited in note 30); Cullen, *The Concept of Non-International Armed Conflict* at 83 (cited in note 52) ("The motivation behind [codifying wars of national liberation as international armed conflicts] was intrinsically political.").

67 APII, Art 5 (cited in note 8).

of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict."[68] Thus, it appears that the same group of states who were sympathetic to those trying to rid themselves of external pressures, such as those mentioned in API, were not as sympathetic to the idea of opposing domestic groups wanting to have the same rights within their own territory under APII.

Nevertheless, APII did successfully extend many humanitarian provisions to those who qualified under the Protocol. Michael Schmitt observed that:

> Additional Protocol II contained articles addressing the protection of children, detainees, internees, the wounded, sick, and shipwrecked, and set forth restrictions on prosecution and punishment. Perhaps most importantly, it established a protective regime for the civilian population, including prohibitions related to targeting, terrorizing, or starving civilians; dams, dykes, and nuclear electrical generating stations; cultural and religious objects and places of worship; the forced movement of civilians; and relief agencies and humanitarian assistance.[69]

All of these had been previously unrecognized within the context of NIACs. Therefore, the extension of such protections to civilians was a significant development in the LOAC, appearing, at least, to increase substantially the protections for the victims of armed conflict.

The legal effect of the promulgation of the API and APII was the cementing of conflict classification as the standard for LOAC application. The Protocols divided the application of the law into two categories and assigned rights and responsibilities within them, effectively requiring a threshold question regarding conflict characterization in every discussion of applicable law. As Emily Crawford has observed, "characterization of the conflict is crucial to determining what level of protection is provided for combatants and civilians."[70]

Unfortunately, the conflict classification paradigm for determining the applicability of the LOAC and the corresponding legal protections provided during armed conflict has proven ineffective. As will be demonstrated by the next section, rather than encouraging states and non-state actors to provide greater protections for victims of armed conflict, it has instead incentivized states to manipulate the conflict classification to limit the protections they must provide on the battlefield.

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68 Sandoz, Swinarski, and Zimmerman, eds, *Commentary* at 1348, ¶ 4447 (cited in note 63).

69 Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 Va J Intl L 795, 810 (2010) (citations omitted).

70 Crawford, 20 Leiden J Intl L at 449 (cited in note 30).

III. INEFFECTIVENESS OF THE BIFURCATION

"Under these circumstances, and in the absence of an impartial body charged with authoritatively determining the status of armed conflicts, it is fair to assume that parties will characterize conflicts in terms that best suit their own interests."[71]

As mentioned earlier, the bifurcation of the LOAC applicability paradigm was solidified with the promulgation of the two Additional Protocols. The international community's response to the promulgation of API and APII was mixed: many hailed them as a great humanitarian breakthrough, while others faced the promulgation of API and APII with determined skepticism.[72] The US' view at the time of promulgation is particularly insightful with respect to the perceived problems with the provisions of the Additional Protocols. While the US believed that many of the provisions of the Protocols were already customarily binding and that others were significant advancements in the LOAC,[73] certain specific provisions caused serious concern.

Although some viewed API as fundamentally flawed,[74] it is really APII that should be the test of the bifurcation's effectiveness in dealing with NIACs. APII

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71 Stewart, 85 Intl Rev Red Cross at 344 (cited in note 31).

72 Even though the UK eventually ratified API, it took more than twenty years, and they issued sixteen statements at the time of signing to clarify their interpretation of the treaty. See Letter from Christopher Hulse, Ambassador of the United Kingdom, to the Swiss Govt (Jan 28, 1998), online at http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument (visited Oct 14, 2011); Schmitt, 50 Va J Intl Lat 813 (cited in note 69).

73 See Martin D. Dupuis, John Q. Heywood, and Michèle Y.F. Sarko, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am U J Intl L & Poly 415, 419 (1987), citing Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Address to the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law* (1987); id at 460, citing Abraham D. Sofaer, Legal Adviser, US Dept of State, *The Position of the United States on Current Law of War Agreements: Remarks* (Jan 22, 1987).

74 When President Reagan sent the Protocols to the Senate, his letter of transmittal made exactly this point. He characterized API as "fundamentally and irreconcilably flawed" and stated that "we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war." Ronald Reagan, *Letter of Transmittal to the US Senate* (Jan 29, 1987), reprinted in 81 Am J Intl L 910, 911 (1987).

At the heart of the US' objection was the potential degradation of the principle of distinction. Article 44.3 of API, while couched in terms of protecting the civilian population, may in fact provide a license for fighters not to distinguish themselves as battlefield participants and still receive the benefits of civilian protections. According to Abraham Sofaer, the US Department of State Legal Advisor at the time, this rule would allow fighters to "hide among civilians until just before an attack." Dupuis, Heywood, and Sarko, 2 Am U J Intl L & Poly at 460 (cited in note 73).

has many important provisions, including the incorporation of a number of IAC provisions into the NIAC legal paradigm.[75] The US had fewer objections to APII than to API,[76] but the limiting criteria for the application of provisions in APII offered states few opportunities for application of the Protocol's

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It now appears that Sofaer's prediction has become reality. See Ben Farmer, *Taliban Plans to Melt into Civilian Population*, (Telegraph Feb 10, 2010), online at http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/7205751/Taliban-plans-to-melt-away-into-civilian-population.html (visited Oct 14, 2011); Statement of Jakob Kellenberger, *Sixty Years of the Geneva Conventions*, ¶ 9 (cited in note 21) ("[C]ombatants do not always clearly distinguish themselves from civilians, neither wearing uniforms nor openly carrying arms."). But see generally Anthea Roberts and Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 Yale J Intl L 102 (2011) (cataloguing armed conflicts where the armed groups have voluntarily accepted the obligations to conform with international law as contemplated in API, Art 96). If every person on the battlefield who decides to take up a weapon will accrue the same privileges as a uniformed combatant, even if he chooses to not wear a uniform and mark himself as a target, he has no incentive to differentiate himself. It seems obvious that encouraging battlefield fighters to fight as civilians will inevitably lead to more civilian casualties as combatants struggle to distinguish the fighters amongst the civilians.

As Schmitt observes, another primary concern with API was that it would "place rebel groups on an equal footing with the armed forces by affording them the more comprehensive protections of the law of international armed conflict, even though their actions demonstrated a disdain for law generally." Schmitt, 50 Va J Intl Lat 812 (cited in note 69).

The author has argued elsewhere that, despite the ICRC's intent with API to encourage LOAC compliance and extend coverage of full LOAC protections to situations previously not known as IAC (such as fights against racist regimes, alien occupation, and colonial domination), the Protocol has had the opposite effect. Instead of encouraging armed groups to comply with the LOAC, it has incentivized them to fight from within civilian populations, effectively bringing the hostilities even closer to the civilians. Eric Talbot Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 Denver J Intl L & Poly 241, 251–57 (2007); Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 Va J Intl L 209, 226–31 (2005).

75 See, for example, APII, Arts 7 (protection and care of the wounded), 8 (obligation to search for the wounded), 9–11 (protection of medical personnel and equipment), 12 (the ICRC emblem), 13 (protection of the civilian population), 14 (protection of objects indispensable to the population), 15 (works containing dangerous forces) (cited in note 8).

76 See id. President Reagan also transmitted APII to the Senate. Schmitt describes the view of the President and State Department:

> Despite the altered balance symbolized by Additional Protocol II, President Reagan submitted the instrument to the Senate in 1987 for advice and consent. In his letter of transmittal, the President opined that the agreement was, with certain exceptions, a positive step toward the goal of "giving the greatest possible protection to the victims of [noninternational] conflicts, consistent with legitimate military requirements." The Legal Adviser to the State Department characterized the instrument's terms as "no more than a restatement of the rules of conduct with which United States military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency."

Schmitt, 50 Va J Intl Lat 811 (cited in note 69) (citations omitted).

protections. In fact, in the years since ratification, the vast majority of claims under APII to an armed conflict have come from international bodies or third party states and not from the state within whose borders the conflict is occurring.[77]

Instead, states have tended to avoid the applicability of these Protocols to their conflicts.[78] State arguments supporting this resistance take various forms. Some states, such as Israel, claim to be involved in a conflict that does not fit into either category but is in a different category altogether.[79] Or, as discussed in relation to the US in the introduction to this paper, states argue that for various reasons, the categories do not apply, or, at least, the law does not apply. As will be discussed below, Mexico is also hesitant to apply officially Common Article 3 or APII to its current fight against narcotics trafficking.[80] These are but a few examples that highlight the manipulability of the conflict classification methodology.

By dramatically restricting the number of conflicts to which its provisions would apply (protections under APII can only be triggered by sufficiently broad violence), the bifurcation model has effectively withheld international protections for the victims of armed conflicts unless the host state is willing to admit that the internal struggle has reached the stage where their opposing armed groups control territory and can conduct sustained and concerted military operations. Such a government statement would have the natural effect of legitimizing those armed groups with whom the state is involved in the domestic conflict.[81] This powerfully disincentivizes states to take such action, with the practical effect of denying critical protections to victims in these types of armed conflicts.

Furthermore, often no clear distinction exists between different types of armed conflict or between armed conflicts and lesser uses of force. For example, there is now almost always some form of third state involvement in internal armed conflicts, prompting the designation of a whole new category of armed conflict, that is, "internationalized armed conflict."[82] In Colombia, "[t]he armed dissident movements have developed a confusing combination of alliances and

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77 See Cullen, *The Concept of Non-International Armed Conflict* at 110 (cited in note 52).

78 See Gaeta, 7 Eur J Intl L at 568 (cited in note 16).

79 See HCJ 769/02 *Pub Comm Against Torture in Isr v Govt of Isr* [2005] Isr SC 57(6), online at http://www.icj.org/IMG/Israel-TargetedKilling.pdf (visited Oct 14, 2011). See also Curtis A. Bradley, *The United States, Israel & Unlawful Combatants*, 12 Green Bag 2d 397, 401 (2009).

80 See Section IV.

81 See Roberts and Sivakumaran, Yale J Intl L at *27 (forthcoming) (cited in note 74) (discussing State hesitancy towards any acts that might lead to legitimization of armed groups).

82 Stewart, 85 Intl Rev Red Cross at 315 (cited in note 31).

simultaneous clashes with other actors in organized crime. The armed dissident groups have also developed ties with the drug trade, where they frequently levy taxes against drug producers and transporters in exchange for protection."[83] Blurring lines between categories only adds further complication to the existing classification scheme that determines the applicable law in a given situation.

In the end, the bifurcated system has developed such that there is a danger that states will manipulate the law for political purposes, choosing how they intervene in the affairs of another state as a means of ensuring that particular provisions of law will apply to the conflict. As Stewart put it:

> States and non-state actors have proved equally willing to favour or fabricate accounts of foreign participation in internal conflicts for their own wider political gain. As a result, the characterization of armed conflicts involving international and internal elements, and the applicable law that flows from that characterization, are frequently "the subject of fierce controversy of a political nature."[84]

While this type of manipulation of the law for political purposes is certainly not a new phenomenon, with regard to the LOAC, it demonstrates that the bifurcation of applicable law has not worked. Instead of accomplishing the desired goals of protecting victims and encouraging state compliance, the bifurcation of the LOAC has had the opposite effect.

The problem has been well noted in the past decade, with increasing calls for dissolution of this bifurcated system between IAC and NIAC. James Stewart, writing for the ICRC on this point, argues, "Commentators agree that the distinction is 'arbitrary,' 'undesirable,' 'difficult to justify,' and that it 'frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.'"[85] Schindler agrees:

> Why should the victims of a war of secession, such as in Biafra and Bangladesh, be less protected than those in a war against colonialism or a racist regime? Of course, one can answer that it is just as wrong to treat victims of international and non-international armed conflicts differently. As long as humanitarian international law distinguishes between international and non-international conflicts, such injustice will be inevitable.[86]

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83 Jan Römer, *Killing in a Gray Area Between Humanitarian Law and Human Rights: How Can the National Police of Colombia Overcome the Uncertainty of Which Branch of International Law to Apply?* 11 (Springer 2010), quoting Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102. Doc. 9 rev. 1 (1999).

84 Stewart, 85 Intl Rev Red Cross at 342 (cited in note 31) (citations omitted).

85 Id at 313 (citations omitted).

86 Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 Recueil des Cours 121, 138–39 (1979).

This sentiment was also echoed in the International Criminal Tribunal for the former Yugoslavia (ICTY) *Tadić* case.[87]

These and a host of other similar statements[88] highlight the illogic of the existing bifurcation, particularly from the standpoint of desiring to protect victims. How can it possibly be argued that victims in NIAC are less deserving of international protections from the ravages of armed conflict than those in IAC?[89] Equally troubling is the proposition that, unless a state voluntarily admits that it is in an NIAC, the state has no obligation to apply the basic protections of Common Article 3 to the victims of that armed conflict.[90] Certainly these civilians—most often citizens of the host country—deserve equal protection as those in an IAC from the ravages of the state's armed forces. Clearly, in light of all of these concerns, it is time to reexamine the paradigm of LOAC application.

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87 In addition to the quote beginning Section V, the *Tadić* Appellate Court also argued that "[i]f international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the [bifurcation between IAC and NIAC] should gradually lose its weight." *Prosecutor v Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-I, ¶ 97 (Oct 2, 1995).

88 See McDonald, 1 YB Intl Humanitarian L at 121 (cited in note 20) ("With the increase in the number of internal and internationalized armed conflicts is coming greater recognition that a strict division of conflicts into internal and international is scarcely possible, if it ever was."). See also Meron, et al, 85 Am Socy Intl L Proc at 85 (cited in note 18) (citing Michael Reisman's remark that the bifurcated system serves as "a sweeping exclusion device that permits the bulk of armed conflict to evade full international regulation").

89 See Crawford, 20 Leiden J Intl L at 483–84 (cited in note 30), arguing:

> [I]mplementation is intimately linked to applicability, and applicability goes directly to the issue of distinction between types of armed conflict. Moreover, where there are tiers of applicability, where the practical situations are equivalent but those affected are treated differently, then compliance and enforcement will always be a problem. The promotion of gradations of humanitarian concern will always leave open the possibility of favoring the lowest permissible level of treatment. Therefore, the reasons for creating a unified approach, with no possibility of "lower" levels of treatment, become more compelling.

90 One might argue that civilians are not left unprotected in these situations, but are covered by domestic law and international human rights law. This might be true to the degree that states apply these laws any better than they apply Common Article 3. However, the argument of this paper is that international law has proscribed a *lex specialis* during armed conflict and that the *lex specialis* should be sufficient to provide meaningful protections in the situations in which it applies as a matter of fact. It is unsatisfactory to say that it is not necessary for the applicable law to provide adequate and meaningful coverage because another set of laws will fill the gap. If the law of armed conflict should apply based on the facts of the situation, it is that law that must be sufficient for the situation.

IV. THE SOVEREIGN AGENCY THEORY OF LOAC APPLICABILITY

> *"War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. . . . The object of war being the destruction of the hostile State, the other side has a right to kill its defenders while they are bearing arms; but as soon as they lay them down and surrender they become once more merely men, whose life no one has any right to take."*[91]

As outlined above, governments, scholars, and practitioners hotly debate the applicability of the LOAC to various conflicts around the world.[92] These arguments almost exclusively revolve around the determination of the existence of an armed conflict and the subsequent characterization of that conflict as either an IAC or a NIAC. The continuing debates demonstrate not only the impotence of the current LOAC applicability paradigm, but also illustrate the validity of the sovereign agency theory.

Rather than continue to rely on the current paradigm where characterization of the conflict determines the applicable law, states should return to the roots of the application of sovereign force and combatancy—the principle of agency. Any time a state deploys its military to an armed conflict, it imbues those forces with agency and exempts them from the individual consequences of traditional criminal activities, such as murder and destruction. As long as a member of the military is acting as the state's agent and taking advantage of this immunity, the full provisions of the LOAC should apply, including the protections for victims of armed conflict.[93]

A. Sovereignty and the Development of the LOAC

While rules regulating warfare have existed since the beginning of recorded history of war,[94] they have not always been regularized in their application.[95] The

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91 Dieter Fleck, ed, *Handbook of International Humanitarian Law* 19–20 (Oxford 2d ed 2008), quoting Jean-Jacques Rousseau, *The Social Contract and Discourses* 11 (J.M. Dent 1920), online at http://forms.lib.uchicago.edu/lib/hathi/info.php?q=oclc:23420750 (visited Dec 8, 2011).

92 See notes 21–23.

93 See Section IV.D.1.

94 See, for example, William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 Miss L J 639, 697–710 and n 12 (2004); Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U Toledo L Rev 111, 114 (2001); Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 Naval L Rev 176, 182–85 (2000).

95 See Fleck, ed, *Handbook of International Humanitarian Law* at 8–10 (cited in note 91) (describing the development of several areas of international law).

seventeenth century opened on a scene of savage warfare that caused Hugo Grotius to write:

> I saw prevailing throughout the Christian world a license in making war of which even barbarous nations should be ashamed; men resorting to arms for trivial or for no reasons at all, and when arms were once taken up no reverence left for divine or human law, exactly as if a single edict had released a madness driving men to all kinds of crime.[96]

Grotius authored one of the seminal works in international law in an attempt to right this uncontrolled culture of violence.

Later that same century, the Treaty of Westphalia solidified states as sovereigns and the primary actors in the international community.[97] It also empowered states with the monopolization of violence through standing armies and navies.[98] As sovereigns acted to bring state-level violence under their control and organize standing armies, a system of agency developed between sovereign and soldier. As the quote from Rousseau at the beginning of this section indicates, the soldier was not viewed as an individual but as an agent of his sovereign until such time as he could no longer fight or laid down his arms. Then, he reverted to his status as an individual and was treated as such.

The monopolization of legitimate violence through the use of sovereign forces was never absolute, but was nonetheless given recognition. In response to this recognition, the laws and customs regulating warfare grew to focus on how the sovereign's armies and navies used force.[99] Because members of the standing army and navy were acting in the sovereign's name and at his will—as his agents—they were granted certain privileges and correspondingly were required to comply with certain duties. One of the most important privileges of being the state's agent was the principle of combatant immunity. Under the developing law, personal acts of violence in the course of armed conflict did not carry individual criminal responsibility.[100] As long as the soldier or sailor was acting on

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96 Id at 19.

97 But see Jordan Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 Va J Intl L 977, 1003–04 (2011) (arguing that though states play a primary role, there is clearly a strong role for non-state actors).

98 See Philip Bobbitt, *The Shield of Achilles* 81–90, 96–118 (Knopf 2002); Frederic Gilles Sourgens, *Positivism, Humanism, and Hegemony: Sovereignty and Security for Our Time*, 25 Pa State Intl L Rev 433, 443 (2006) (citing sixteenth-century writer Bodin as defining sovereignty as the "absolute and perpetual power of commonwealth resting in the hands of the state").

99 See Bobbitt, *The Shield of Achilles* at 509–19 (cited in note 98); Ambassador Richard S. Williamson, *The Responsibility to Protect and the Darfur Crisis, Remarks at Policy Salon* (May 18, 2009), online at http://www.sea-dc.org/news/221.html (visited Oct 15, 2011).

100 See The Judge Advocate General's School, US Army, *A Treatise on the Juridical Basis of the Distinction Between Lawful Combatant and Unprivileged Belligerent* 14 (1959) (on file with author); Allison Marston

the bidding of his sovereign and in compliance with the rules that were developing to govern that use of force, he was granted immunity for his warlike acts.

This combatant privilege and its ties to sovereignty are reflected in the US' "Instruction for the Government of Armies of the United States in the Field,"[101] issued under the direction of President Lincoln during the American Civil War. Article 57 of the Lieber Code, as it has come to be known, clearly ties the idea of combatancy and combatant immunity to the grant of the sovereign. "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."[102] The prerequisite to the privilege was being armed by the sovereign and taking the oath of fidelity to the sovereign's wishes.

Correspondingly, in IAC, those who are the agents of the state traditionally have had the responsibility to distinguish in their warfare between those who are likewise agents of the opposing sovereign and those who are not and direct their hostilities only against those who are.[103] This duty for state agents to limit their violence to those engaged in combat is known as the principle of distinction and is one of the foundational principles of LOAC.[104] Because traditional inter-state war is fought between sovereigns represented by their armed forces, the citizens of the state are neither considered participants nor targets in that armed conflict and therefore benefit from the duty for state forces to distinguish.

In application of this principle of distinction, states reciprocally recognized that the agents of the state are granted individual immunity for what would otherwise be criminal acts, because they are not performing those violent acts on a personal level, but as the agent for the sovereign. As long as the soldier acts within his agency, he is immune from personal responsibility for his warlike

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Danner, *Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism*, 46 Va J Intl L 83, 101 (2005).

101 *Lieber Code* (cited in note 32).

102 Id.

103 API Article 48 states, "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." API, Art 48 (cited in note 8). See also *Lieber Code* (cited in note 32).

104 See W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 Am J Intl L 852, 856 (2006) ("At the very heart of the law of armed conflict is the effort to protect noncombatants by insisting on maintaining the distinction between them and combatants."). See also Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 Yale Hum Rts & Dev L J 143, 144 (1999); Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 AF L Rev 143, 146 (2001). The modern formulation of the principle of distinction is found in API Article 48. See note 103.

acts.[105] However, the moment a combatant steps outside of his role as agent and directs his attacks against a civilian who is not acting as an agent for the opposing sovereign, he opens himself up to personal responsibility for his actions.[106]

Because the tradition, practice, and reciprocity that had evolved from the granting of agency to a sovereign's military revolved around interstate conflicts, states had not allowed those rules to diffuse into other types of armed conflict prior to the bifurcation of the LOAC system. This division unhinged the foundation of LOAC formulation from the granting of agency to a sovereign's actors to conflict classification. Current conflicts demonstrate that a return to sovereign agency as the primary determiner of LOAC applicability, including an expansion into all armed conflicts, will resolve some difficulties that have developed from the LOAC bifurcation paradigm.

B. Sovereign Agency Applicability

Rather than the current LOAC bifurcation paradigm, states should accept a theory of expanded sovereign agency and apply the full LOAC every time they utilize their armed forces to apply sovereign force. Acceptance of this paradigm turns the focus from how states choose to label a conflict to the types of forces a state employs in a conflict.

Three illustrations of conflicts in which the current paradigm falls short of creating a clear answer for LOAC applicability are presented below. In each, the applicability of the LOAC under an agency theory would be completely clear.

C. The No-Law Zone

As the introduction section of this Article highlights, the Bush administration argued that the attack by transnational terrorist organizations against the United States on September 11, 2001 did not fit neatly within the current bifurcated paradigm of LOAC applicability. Based on a simple textual reading, as understood by the states at the time of promulgation, the Bush administration asserted that the conflict with al-Qaeda was neither an IAC, because there were not two states at war with each other, nor a NIAC, because it

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105 Article 57 of the *Lieber Code* states, "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies." *Lieber Code*, Art 57 (cited in note 32).

106 Id at Art 44.

was not a traditional civil war and because of the transnational nature of al-Qaeda.[107]

The arguments on each side of this issue have been openly debated and are not important to the purposes of this Article.[108] It is sufficient here to simply draw attention to the fact that the debate exists. For the law to remain so unclear regarding its applicability to situations as critical to the international community as the attacks of September 11 and subsequent terrorist attacks reflects poorly on the value of the legal paradigm. The Bush administration applied the law in a way that best suited its purposes. In doing so, it manipulated the law to accomplish the US' policy aims. The LOAC ought not to lend itself to such manipulation.

Under an agency paradigm, once the US determined it was deploying its armed forces to use violence against al-Qaeda and the Taliban, the applicable law would be a non-issue. The deployment of the state's armed forces would require the full application of the LOAC. And for those members of the military who were called on to apply that law, the clarity would likely be a welcome relief.[109]

D. The "Not Armed Conflict" Claim

Under the current LOAC applicability paradigm, to reach the level of "armed conflict" requires a certain quality of hostilities. As the Commentary states:

> The expression "armed conflict" gives an important indication in this respect since it introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflict in a legal sense, even if the government is forced to resort to police forces or even to armed units for the purpose of restoring law and order.[110]

An obvious difficulty with this paradigm is the fact that a state must determine if the violence occurring within its borders has risen to the level of a NIAC. A state has a significant disincentive to do this, because once the conflict is termed a NIAC the state must accept certain international law obligations and apply specific portions of the LOAC. Such a decision places significant burdens on the state. Further, the last sentence of the above quote from the Commentary is

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107 See Gonzales, *Application of the Geneva Convention* at *2 (cited in note 3).

108 See, for example, Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (Penguin 2008); Intl Comm of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism, and Human Rights* 50 (2009), online at http://ejp.icj.org/IMG/EJP-Report.pdf (visited Oct 15, 2011).

109 See Section V.C.

110 Sandoz, Swinarski, and Zimmerman, eds, *Commentary* at 1319–20, ¶ 4341 (cited in note 63).

troubling. It allows the use of armed forces for the purpose of restoring law and order, but places this situation outside even the application of Common Article 3. Such a result would potentially leave military forces applying sovereign violence in a domestic situation with no applicable international legal paradigm upon which to base their use of force decisions.

The current situation in Mexico illustrates this dilemma.[111] For the past several years, Mexico has been involved in a battle against illegal drug cartels to "ensure [Mexico's] future as a nation."[112] The violence has been well documented and far exceeds the death totals in Afghanistan for the same period.[113] The situation is such that many are concerned that Mexico will become a failed state.[114] In response to the escalating violence, Mexico has deployed almost 50,000 military and police forces, working side by side to face the well-armed and well-trained "forces" of the cartels, which some estimates place at around one hundred thousand.[115] The military forces have been given "policing powers" and are already coming under fire for civilian abuses and arbitrary arrests.[116] As a result of these alleged abuses, the Inter-American Court of Human Rights urged Mexico's government to try soldiers in civilian courts, rather than military tribunals[117]—a recommendation that it appears the Mexican Supreme Court has adopted.[118]

It is unclear what rules the Mexican military and police are applying to their engagements with the cartel forces. When cartel members are captured, it appears they are being tried as criminals under domestic law, without reference

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111 For an excellent analysis of this issue, see Bergal, 34 Fordham Intl L J at 1042 (2011) (cited in note 17).

112 *Attorney General Leading War on Mexico Drug Cartels Resigns* (Fox News Sept 8, 2009), online at http://www.foxnews.com/printer_friendly_story/0,3566,547568,00.html (visited Oct 15, 2011) (citing remarks by Mexico Attorney General Eduardo Medina-Mora).

113 See Sara A. Carter, *EXCLUSIVE: 100,000 Foot Soldiers in Mexican Cartels* (Wash Times Mar 3, 2009), online at http://www.washingtontimes.com/news/2009/mar/03/100000-foot-soldiers-in-cartels/ (visited Oct 15, 2011); *US to Boost Mexico Border Defence* (BBC News Mar 25, 2009), online at http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7961670.stm (visited Oct 15, 2011).

114 See Carter, *Foot Soldiers* (cited in note 113); *US to Boost Mexico Border Defence* (cited in note 113).

115 See *Attorney General Leading War* (cited in note 112).

116 See *Mexican Court Orders Civilian Trials for Troops Accused of Rights Abuse* (RTT News July 13, 2011), online at http://www.rttnews.com/Content/MarketSensitiveNews.aspx?Id=1664267&SM=1 (visited Oct 15, 2011).

117 See *Mexico Abuse Cases Should be in Civilian Court* (Fox News May 20, 2011), online at http://www.foxnews.com/world/2011/05/20/mexico-abuse-cases-civilian-court/ (visited Oct 15, 2011).

118 See *Mexican Court Orders Civilian Trials* (cited in note 116).

to international law.[119] The scope and intensity of this conflict appear clearly to meet the level of "armed conflict" envisioned in the Protocols. Nevertheless, Mexico has not conceded that this conflict is an "armed conflict" and has not agreed to apply the provisions of APII to the situation.[120]

This situation in Mexico is another example of how the current LOAC applicability paradigm is failing to provide clarity in armed conflict or work toward greater compliance. In contrast, under the agency theory, once Mexico decided to deploy the military to combat the violence from the cartels, the military would have no question about what law to apply. In applying the full LOAC, the principles of distinction, targeting, and civilian immunity would bind the Mexican forces as a matter of law. The power of this change, with its obvious benefits to the victims of armed conflict, seems clear.

E. Special Armed Conflicts

Under the current bifurcated LOAC paradigm there is no category for "special" armed conflicts. However, the State of Israel, in its dealings with the occupied territories, has resisted the claim that the conflict is either an IAC or a NIAC. Instead, governmental statements and Supreme Court decisions have described the conflict in various ways,[121] making arguments which are rooted in conflict classification for LOAC applicability. For example, Israel's ministry of defense is hesitant to call the conflict an NIAC for fear of providing some form of international legitimacy to its enemies.[122]

Under the sovereign agency theory, Israel's deployment of its forces to use and combat violence would clarify the requirement for Israeli Defense Forces (IDF) to apply the LOAC in every military operation within the occupied territories. This would include both targeting principles and the principle of distinction.[123] The LOAC trigger would be the deployment of the IDF, not the

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119 See Ray Walser, *US Strategy Against Mexican Drug Cartels: Flawed and Uncertain*, 2407 Backgrounder *1 (Heritage Foundation Apr 26, 2010), online at http://thf_media.s3.amazonaws.com/2010/pdf/bg_2407.pdf (visited Oct 15, 2011) (suggesting the institution of Mexican drug courts).

120 Mexico has not signed APII. See APII at 667–99 (cited in note 8) (listing signatories).

121 For various decisions and statements concerning the characterization of the conflict in Israel, see Geneva Academy of International Humanitarian Law and Human Rights, *Rule of Law in Armed Conflicts Project – Israel*, online at http://www.adh-geneva.ch/RULAC/applicable_international_law.php?id_state=113 (visited Oct 15, 2011).

122 See *Public Committee against Torture in Israel*, ¶ 22 (cited in note 79) (discussing the delicate balance in international human rights law between humanitarian considerations and military need and success).

123 I do not mean to imply that I think the IDF is not applying these principles now. However, I believe that the application of the LOAC lacks clarity to the international community.

government's decision on conflict classification. Because the trigger would be automatic upon deployment of the IDF, it would not serve to legitimize those with whom the IDF was fighting.

F. Disaster Relief: Non-Application

It is important to point out that under an agency theory, not all uses of the military would be governed by the LOAC—only those where the state intends to use sovereign violence in fulfilling its mission. There have been many recent deployments of military forces to provide assistance after a natural disaster.[124] In such cases, it is not the intention of the state to use violence as a means of accomplishing its objectives. Where disaster relief deployments are domestic, and armed forces stay within the borders of their own state, the sovereign is not anticipating the use of sovereign force and may deal with any resulting criminal violations under its domestic laws.

Additionally, where deployment is to another host state that has suffered the disaster, the LOAC would not apply. As in the domestic setting, in cases involving a host state, the sovereign is not sending its forces in its name with the intention of doing violence. Hence, the state does not expect its forces to be governed by the LOAC with its accompanying privileges and immunities. In most of these cases, the status of the deploying forces is governed by a "status of forces agreement" or an exchange of letters between the host state and the sending state.[125] Depending on the substance of the agreement, a member of the military who commits criminal activity in the host nation is subject to that host nation's domestic laws and does not benefit from the sovereign's grant of immunity.[126]

The above examples illustrate situations in which the current LOAC applicability paradigm does not provide the protections it is intended to provide. Transition to an agency theory where the military is governed by the LOAC any time it is used as the sovereign's agent to do violence would provide clarity to an area of international law and benefit states in many practical ways.

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124 See Matthew Lee and Julie Pace, *Obama Haiti Earthquake Response: 'We Have To Be There For Them In Their Hour Of Need'* (Huff Post Jan 13, 2010), online at http://www.huffingtonpost.com/2010/01/13/obama-haiti-response-we-h_n_421770.html (visited Oct 15, 2011).

125 See Chris Jenks, *A Sense of Duty: The Illusory Criminal Jurisdiction of the US/Iraq Status of Forces Agreement*, 11 San Diego Intl L J 411, 418–22 (2010).

126 See Dieter Fleck, ed, *The Handbook of the Law of Visiting Forces* 5 (Oxford 2001); Paul J. Conderman, *Jurisdiction*, in id at 103; Chris Jenks and Eric Talbot Jensen, *All Human Rights Are Equal, But Some Are More Equal Than Others: The Extraordinary Rendition of A Terror Suspect in Italy, the NATO SOFA, and Human Rights*, 1 Harv Natl Sec J 171, 180–82 (2010).

V. BENEFITS OF THE SOVEREIGN AGENCY THEORY

"What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."[127]

Applying the sovereign agency theory of LOAC rather than the conflict classification paradigm will avoid the current pervasive debate between IAC and NIAC which has caused so much consternation. In addition, applying the full LOAC every time a state uses its armed forces will mean that the starting point for humanitarian protections is always the most robust possible. It will also provide clarity for armed forces, making them more efficient and effective.

A. Avoiding the IAC/NIAC Debate

Applying the sovereign agency theory will reduce the misapplication and manipulation of the current LOAC paradigm by states. Connecting application of the LOAC with its responsibilities and privileges to a state's decision to deploy its armed forces reinforces the LOAC at its foundation. If a state believes a situation to be of such "intensity and scope"[128] as to warrant the engagement of the armed forces,[129] then it is likely facing an external threat to its survival or an internal threat to its monopolization of state-level violence. In its response to such threat, the state will certainly claim the sovereign privileges from prosecution for its armed forces. Additionally, the state will likely authorize the use of force as a first response to the opposing forces. As Geoff Corn persuasively argues, applying force as a first resort is one of the major differences between the state's application of police force and armed military force.[130] In claiming these and other LOAC privileges, the state must also accept the reciprocal responsibilities inherent in the LOAC, such as the aforementioned

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127 *Tadić* at ¶ 119 (cited in note 87).

128 The ICRC Commentary to APII states, "[T]he Conference chose in favour of the solution which makes the scope of protection dependent on intensity of the conflict. Thus, in circumstances where the conditions of application of the Protocol are met, the Protocol and Common Article 3 will apply simultaneously, as the Protocol's field of application is included in the broader one of Common Article 3. On the other hand, in a conflict where the level of strife is low, and which does not contain the characteristic features required by the Protocol, only common Article 3 will apply." Sandoz, Swinarski, and Zimmerman, eds, *Commentary* at 1350, ¶ 4457 (cited in note 63).

129 The ICRC Commentary to APII states, "The term 'armed forces' of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, 'regular armed forces,' in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force)." Id at 1352, ¶ 4462.

130 See Corn, 1 J Intl Humanitarian Legal Studies at 74–75 (cited in note 27).

principle of distinction and proper targeting methodologies, in order to protect civilians from becoming victims of the armed conflict.

An agency approach to LOAC application diminishes the potential for state manipulation because it is unlikely that a state would avoid deploying its armed forces against a force that threatened its survival or monopolization of force, just to avoid application of the LOAC. The risks are too high. Though now many states have robust police forces,[131] where there is a threat to the state, the state will likely employ its armed forces.

B. More Robust Baseline of Protections

From the perspective of victims of armed conflict, adopting the sovereign agency theory of LOAC applicability will provide the most robust baseline of protections. As explained in the introduction, applying the full LOAC under the sovereign agency theory means that any time a state employs its military to apply sovereign force, the members of the military will apply the LOAC applicable in IAC. This body of laws is the most extensive and provides the most detailed and robust protections for both victims of and participants in armed conflict.

Thus, under the sovereign agency theory, the military would always apply the IAC rules when forces are used in a NIAC, regardless of whether the conflict is a traditional counterinsurgency or one against transnational terrorist organizations—such as the current conflict in Afghanistan. That means that all the customary rules on weapons, attacks, targeting, and even detention[132] would apply. In addition, all conventional law obligations such as arms control, weapons prohibitions, and other pertinent treaty obligations would also apply. The application of this extensive body of law would likely increase the protections for both victims of armed conflicts and those who participate in them. Even if compliance with the LOAC is imperfect, as it certainly is, setting the standard to meet the highest and most robust application of protections will be a better starting point than allowing states to determine for policy purposes which set of laws they desire to apply.

C. Clarity through Application to Armed Forces

From the perspective of participants in armed conflict, application of the sovereign agency theory would also provide much needed clarity. Under the current paradigm, states must determine what type of conflict they believe they

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131 See Section V.E.3.

132 The application of IAC detention principles to a counterinsurgency will raise grave concerns by states, particularly those who have not become parties to API. See Section V.E.1.

are participating in before knowing what law will apply.[133] Or, more insidiously, states may determine what law they want to apply and then characterize the conflict appropriately. Even for those states who are not attempting to manipulate the law, the increasing diversity in the types of missions for which states are currently using their armed forces is sufficient to cause confusion and political consternation with regards to providing their armed forces with appropriate legal guidance as to the law to apply.[134]

These increasingly diverse types of missions include fighting non-state organized armed groups,[135] conducting counterdrug operations against narcotics traffickers,[136] dismembering transnational criminal business networks,[137] and forcefully separating belligerents or implementing peace agreements.[138] In each of these cases, there is much debate as to what type of conflict categorization applies—if the LOAC applies at all. These real situations present concerns that

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133 Crawford, 20 Leiden J Intl L at 443 (cited in note 30).

134 Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Operation Iraqi Freedom (OIF) *After Action Report*, *64 (2004) (on file with author) (reflecting lack of information from national level authorities on Rules of Engagement); Office of the Staff Judge Advocate, 1st Cavalry Division, Operation Iraqi Freedom (OIF) *After Action Report*, **19–20 (2005) (on file with author) (reflecting lack of information from national level authorities on Detention Operations).

135 See, for example, Römer, *Killing in a Gray Area* at 2 (cited in note 83) (noting that in 2007, Colombian military and police "officially killed 2,703 members of different 'guerrilla groups,' 'self-defense groups,' and 'criminal bands'"). In 2008, the military and police killed 1,564. Id.

136 See, for example, Erica Werner and Jacques Billeaud, *Obama Set to Send 1,200 Troops to Border* (Huff Post May 25, 2010), online at http://www.huffingtonpost.com/2010/05/25/obama-set-to-send-1200-tr_n_589208.html (visited Sept 23, 2011); William Booth, *Mexico's Crime Syndicates Increasingly Target Authorities in Drug War's New Phase*, (Wash Post May 2, 2010), online at http://www.washingtonpost.com/wp-dyn/content/article/2010/05/01/AR2010050102869.html (visited Oct 15, 2011).

137 See, for example, Cornelius Friesendorf, *The Military and the Fight against Serious Crime: Lessons from the Balkans*, 9 Connections 45, 52–53 (2010) (showing that, while ineffective, the military still was asked to take on this mission in Bosnia); United States Pacific Command, *Our Mission*, online at http://www.pacom.mil/web/site_pages/staff%20directory/jiatfwest/jiatfwest.shtml (visited Nov 2, 2011) ("Joint Interagency Task Force West combats drug-related transnational organized crime to reduce threats in the Asia-Pacific region in order to protect national security interests and promote regional stability."). See generally National Security Council, *Strategy to Combat Transnational Organized Crime*, online at http://www.whitehouse.gov/administration/eop/nsc/transnational-crime (visited Nov 2, 2011) (talking about using all the elements of national power, including the military, to combat transnational crime).

138 See Security Council Res No 1291, ¶¶ 1, 4, 7–8, UN Doc S/RES/1291 (2000) (establishing the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) in order to facilitate the parties' fulfillment of their Ceasefire Agreement obligations as well as authorizing MONUC to take "the necessary action, in the areas of deployment of its infantry battalions and as it deems it within its capabilities, to protect United Nations and co-located [Joint Military Commission] personnel, facilities, installations and equipment, . . . and protect civilians under imminent threat of physical violence").

the current LOAC paradigm struggles to address. Such confusion is not helpful to those participating in armed conflicts.

The UK Law of Armed Conflict Manual highlights the issue. Regarding what law applies to armed conflicts, the manual states:

> There is thus a spectrum of violence ranging from internal disturbances through to full international armed conflict with different legal regimes applicable at the various levels of that spectrum. It is often necessary for an impartial organization, such as the International Committee of the Red Cross, to seek agreement between the factions as to the rules to be applied.[139]

If a third party is required to seek agreement on the applicable law, it seems obvious that there exists a lack of clarity, which inevitably puts the armed forces in an untenable situation of not knowing what legal standards to apply during hostilities. Furthermore, if this decision of what law to apply is to be the matter of negotiation between the parties, it will inevitably be politicized and prone to manipulation based on policy considerations, rather than made as a legal determination. While these policy battles are fought, military forces on the ground are left with few legal answers.[140]

By way of example, in the *Tadić* jurisdictional appeal decision, the ICTY characterized the conflict in the Former Yugoslavia "at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict."[141] Of course, this type of a post-hoc determination about conflict classification is completely unhelpful to the military facing a deployment to the conflict zone. If trained jurists, such as those sitting on the ICTY, have to struggle with these questions years after the conflict and with a clear view of the facts and still respond that the conflict in question was of different types at different times, how can one expect even the most well-meaning government to be able to discern a clearer answer in advance and adequately prepare its armed forces to apply the correct LOAC provisions at the applicable times and in the appropriate ways?

From the perspective of the member of the military called on to apply the LOAC, the sovereign agency theory provides much needed clarity and simplicity. Militaries almost universally train to the IAC standards and then adjust from those standards to meet other mission requirements.[142] Having a

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139 UK Ministry of Defense, *The Joint Service Manual of the Law of Armed Conflict* 17–18, ¶ 1.33.6 (2004).

140 See Marc L. Warren, *The First Annual Solf-Warren Lecture in International and Operational Law*, 196 Mil L Rev 129, 138 (Summer 2008) (describing the challenges faced by troops in Iraq when important decisions were delayed by policy concerns).

141 *Tadić*, ¶ 73 (cited in note 87).

142 See generally US Navy, US Marine Corps & US Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, MCWP 5-12.1, COMDTPUB P5600.7A (2007); The

commitment in advance that, regardless of the mission, militaries need only train on and then apply the IAC standards would greatly increase the efficiency of that training and the effectiveness of its application in the operational environment.

In contrast to the lack of clarity under the current bifurcated LOAC paradigm, under an agency theory of LOAC applicability, every time a state deploys its military to use violence, it is clear that the full LOAC applies. The standard is clear and straightforward in its application both by the state and by the state's forces.

D. A Manageable Approach

Some may argue in response that applying the full LOAC is an unmanageable approach—that states will not want to accept such a legal obligation. However, recognizing the need for clarity across the many contemporary missions that states assign to their armed forces, states are already moving toward a default agency theory of LOAC applicability. This is best illustrated in the practice of the US.

Since the end of the Cold War and the diminishing likelihood of great power military confrontation, the US military has been used in a number of other roles, including peace operations, disaster relief, humanitarian aid and support for counterdrug operations.[143] These missions have often been termed some version of "Operations Other than War,"[144] highlighting their non-traditional nature and distinguishing them from interstate armed conflict.

In response to these non-traditional missions, the US promulgated a policy that "[m]embers of the [Department of Defense (DoD)] Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[145] In other words, the US military, as a matter of policy, has already implemented the agency theory of LOAC applicability. The military recognized the benefit of clarity and the

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Federal Ministry of Defense of the Federal Republic of Germany, *Humanitarian Law in Armed Conflict- Manual,VR II 3* (1992); Canadian Ministry of National Defense, *Law of Armed Conflict at the Operational and Tactical Levels, Joint Doctrine Manual,* B-GJ-005-104/FP-021 (Aug 13, 2001); UK Ministry of Defense, *The Joint Service Manual* (cited in note 139).

143 See generally Chairman of the Joint Chiefs of Staff, *Joint Operations* § 5.A.2.b., Joint Publication 3-0 (Aug 11, 2011); Anne E. Story and Aryea Gottlieb, *Beyond the Range of Military Options*, Joint Force Quarterly (1995), online at http://www.dtic.mil/doctrine/jel/jfq_pubs/2309.pdf (visited Oct 16, 2011). Both discuss the current range of military operations.

144 See generally Chairman of the Joint Chiefs of Staff, *Joint Doctrine for Military Operations Other Than War*, Joint Publication J-7 (June 16 1995), online at http://ids.nic.in/Jt%20Doctrine/Joint%20Pub%203-0MOOTW.pdf (visited Oct 16, 2011).

145 Dept of Def Directive 2311.01E, *DoD Law of War Program*, ¶ 4.1(May 9, 2006).

benefits of a single legal paradigm. Though not done as a matter of law, and not recognizably steeped in the theory of agency, the practical effect of the DoD policy is that the US is already complying with the agency theory and would require little adaptation to apply it as a matter of law.

The US' experience is not unique. In a recent study concerning the customary nature of the LOAC, the ICRC analyzed state practice and then articulated its analysis of what principles of the LOAC could be considered customary.[146] While not all states agreed with the ICRC's conclusions,[147] the study found that most of the customary provisions of IAC concerning targeting and the treatment of the victims of armed conflict were being applied equally in NIAC by states.[148]

In combination with the ICRC's conclusions, the fact that one of the most active and most capable militaries in the world has decided to implement policies that have the effect of applying the agency theory to military operations should not be discounted as insignificant. Rather, it should be persuasive that a transition to agency theory would not only be legally more justified but also that such a transition would not be difficult.

E. Issues

Though applying the agency theory to LOAC applicability would certainly increase protections for victims of armed conflict and decrease the manipulability of law application, several issues would still need to be addressed. As will be described below, these issues are also not adequately addressed by the current paradigm.

1. Areas of special concern.

There are some areas of special concern that states might consider too binding. One example might be the limitation on certain weapons systems, such as riot control agents, which are common in the arsenal of domestic police forces but which many countries have agreed to not use against opposing forces

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146 See Jean-Marie Henckaerts and Louise Doswald-Beck, eds, 1 & 2 *Customary International Humanitarian Law*, Vols I and II (Cambridge 2005) (describing rules governing the law of armed conflict in Vol 1, which are supported by annotated State practice in Vol 2).

147 See John B. Bellinger III and William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 Intl Rev Red Cross 443, 457 (2007) (cataloguing the US' concerns with the study).

148 For a list of the Rules that includes a designation as to which rules apply to IAC, NIAC, or both, see generally Henchaerts and Doswald-Beck, eds, 1 *Customary International Humanitarian Law* (cited in note 146).

in armed conflict.[149] In this case, the Chemical Weapons Convention would not prevent a military from using riot control agents in situations other than as a method of warfare.[150] As an example, the military of Mexico would be precluded from using riot control agents against the cartel forces while conducting hostilities, but could still use them in other situations.

As mentioned above, another example of the application of LOAC that might cause some concern to states is detention and treatment of detainees. Under an agency theory, the armed forces would treat all detainees in compliance with the appropriate Geneva Convention.[151] However, this would not preclude appropriate criminal proceedings for those who violate applicable law, whether international or domestic in character. Detention of a criminal by armed forces in a domestic environment does not prevent the transfer of that criminal to a domestic criminal system where he may be tried for his criminal activities.[152] Further, even those held as prisoners of war can be tried for certain criminal acts and crimes in violation of the laws of war.[153]

2. Reciprocity with non-state actors.

An agency theory of LOAC applicability will also not solve the problem of non-state organized armed groups who refuse to comply with the LOAC. The agency theory's roots in the concept of sovereignty place ultimate importance on the grant of sovereign authority to the armed forces as the basis for the privileges and responsibilities contained in the LOAC. Since non-state organized armed groups by definition do not represent a state, agency theory would have no claim on getting the armed groups to comply. Unfortunately, the current LOAC regime also does not encourage non-state reciprocity. Rather, there is a compelling argument made by numerous scholars and members of the military that the current LOAC regime in fact encourages non-compliance and

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149 See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, General Assembly Res No 47/39, UN Doc A/RES/47/39 (1992).

150 Id at Art 1.5.

151 See Geneva Conventions (cited in note 7).

152 See Stewart, 85 Intl Rev Red Cross at 320 (cited in note 31) ("Most significant from a political perspective is the fact that there is no requirement in either common article 3 or Additional Protocol II that affords combatants *prisoner-of-war* status in non-international armed conflicts, nor is there anything preventing parties from prosecuting enemy combatants in those circumstances for having taken up arms."). But see Bellinger and Padmanabhan, 105 Am J Intl L at 208–09 (cited in note 22) (arguing that even applying the Geneva Conventions will not provide solutions to some of the most vexing current issues in detention operations).

153 See Third Geneva Convention (cited in note 7); Stewart, 85 Intl Rev Red Cross at 347 (cited in note 31).

incentivizes fighters to use the LOAC as a shield to give them an advantage when fighting compliant forces.[154]

However, as recently noted by Anthea Roberts and Sandesh Sivakumaran, there are many examples of non-state armed groups voluntarily taking on LOAC responsibilities.[155] This is an important development in the LOAC and would be welcomed under the sovereign agency theory also. Unilateral but binding statements by organized armed groups that they will apply the full LOAC should be welcomed by all participants in armed conflicts.

3. Working with law enforcement.

A final problem arises where armed forces and other state forces, such as police or border control personnel, would be required to work together against a particular armed group, such as is currently occurring in Mexico.[156] Applying an agency theory of LOAC could result in different groups of state forces who are fighting side by side being governed by different sets of rules. This type of situation may make a state vulnerable to the potential for political manipulation. For example, if military forces are functioning where use of force as a first resort is authorized, a savvy government might ensure there are military intermixed with the local police so that the military can begin engagements, triggering the ability for the police to respond in self defense or defense of others.

The potential for such problems is undeniable and cannot be ignored. However, the intensity and scope of the conflict will have had to reach a certain level for the government to deploy its military. Given the level historically required to do that, it is likely that the opposing groups have sufficient firepower to warrant such a response. In the instances that this is not true, the government is certainly capable of controlling this situation by enacting its own situational restraints through rules of engagement.[157]

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154 See, for example, Col Charles J. Dunlap, Jr, *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* *2 (Kennedy School of Government, Harvard University, Humanitarian Challenges in Military Intervention Conference 2001), online at http://www.duke.edu/~pfeaver/dunlap.pdf (visited Oct 24, 2011) ("[T]here is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.").

155 Roberts and Sivakumaran, Yale J Intl L at **35–36 (cited in note 74).

156 See Bergal, 34 Fordham Intl L J 1042 (cited in note 17).

157 Rules of Engagement (ROE) are orders by which commanders at all levels control the use of force by their subordinates. For the US, the primary ROE document is the Chairman of the Joint Chiefs of Staff's Standing Rules of Engagement, commonly referred to as the SROE. The SROE is classified "secret," but the basic instruction and Enclosure A titled "Standing Rules of Engagement for US Forces" are unclassified. Chairman, Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, Encl A (Jun 13, 2005). The SROE details basic concepts of ROE that apply generally and then

Though these issues do deserve consideration when contemplating the adoption of the sovereign theory of LOAC applicability, they do not present insurmountable obstacles. The fact that the current LOAC paradigm is also incapable of dealing with these problems is some indication of the difficult nature of the issues.

VI. THE WAY AHEAD

"It is all war, whatever its cause or object, and should be conducted in a civilized way . . . There is no distinction from a military view between a civil war and a foreign war until after the final decisive battle."[158]

While this agency theory may seem revolutionary, and it is certainly a revolutionary change in the current view of LOAC applicability, it is simply a return to the roots of the LOAC. As such, there are already many practices in place, and some developing, that presage a transition from the current bifurcated LOAC applicability paradigm to one of agency theory. State practice, international jurisprudence, and the work of scholars are already subtly moving the law in that direction.

A. State Practice

As mentioned above,[159] the diversity of missions conducted by modern militaries has already driven state practice, as a matter of policy, to embrace the principles of the sovereign agency theory. The US has made it an official policy[160] and customary practice seems to be collapsing the difference between IAC and NIAC. As state practice continues in this direction, it will make the transition to application of the full LOAC to all forceful operations of state armed forces much less difficult.

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sets out a methodology for establishing mission-specific ROE. The document is designed to "establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all military operations and contingencies and routine Military Department functions occurring outside US territory." Compendium of Current Chairman Joint Chiefs of Staff Directives *17 (Jan 15, 2009), online at http://www.dtic.mil/cjcs_directives/support/cjcs/cjcsi_comp.pdf (visited Oct 18, 2011). There are additional rules for the application of force within the US, which are contained in later enclosures.

158 Lindsay Moir, *The Law of Internal Armed Conflict* 12 (Cambridge 2002), quoting Hannis Taylor, *A Treatise on International Public Law* 454 (Callaghan 1901).

159 See Section V.D.

160 See Dept of Def Directive 2311.01E, ¶ 4.1 (cited in note 145).

B. International Jurisprudence

International courts have also expressed dissatisfaction with the bifurcation of the LOAC and have been slowly eroding the differences between IAC and NIAC. The ICTY has been especially proactive in this area. In several cases, it has been called on to determine which law applied to a particular aspect of an armed conflict and has struggled with doing so. Perhaps in response to this recognized difficulty, the ICTY has consistently narrowed the gap between the law applicable in IACs and NIACs.

For example, in *Tadić*, the Appeals Chamber held that customary rules governing internal conflicts include:

> [P]rotection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.[161]

Antonio Cassese, who was then president of the ICTY, concluded that "there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts."[162]

International jurisprudence, while not yet conclusive, is clearly trending toward a union of the IAC and NIAC rules. This demonstrates the lack of utility in continuing the differentiation between IAC and NIAC as the source for determining LOAC applicability. If the substantive differences have mostly lost their meaning, then the effort spent determining which law to apply is unnecessary.

C. Scholars

Many scholars agree with the international courts in this area. Perhaps the most profound statement on the growing convergence between the IAC and NIAC is International Institute of Humanitarian Law's Manual on the Law of

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161 *Tadić* at ¶ 127 (cited in note 87). However, the same court also held "this extension [of IAC rules] has not taken place in the form of full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts." Id at ¶ 126.

162 Stewart, 85 Intl Rev Red Cross at 322 (cited in note 31). But see id at 323 (quoting *Tadić* to say, "this extension has not taken place in the form of a full and mechanical transplant of those rules into internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts").

Non-International Armed Conflict.[163] Written by Yoram Dinstein, Charles H.B. Garraway, and Michael N. Schmitt, the manual "is a guide for behaviour in action during non-international armed conflict. While not a comprehensive restatement of law applicable in such conflicts, it nevertheless reflects the key principles contained in that law."[164] An analysis of these "key principles" shows a distinct similarity to the IAC principles of LOAC, purposefully demonstrating the general application of these rules to armed conflict. For example, though the manual specifically deals with NIAC, the authors often quote API as the source for the rules in the manual.[165]

Similarly, in its Customary Law Study, the ICRC found that numerous provisions of Protocol II are customary international law and apply in all armed conflicts.[166] Each of these provisions has a corollary in IAC, further strengthening the claim of a narrowing gap.

D. Further Actions

With states' armies applying the agency theory as a matter of policy, and with that policy supported by the jurisprudence of international tribunals and the writings of eminent scholars, the way ahead is easily envisioned. States need to embrace the agency theory of LOAC applicability and apply the full LOAC, as a matter of law, to every employment of their armed forces to a mission where those armed forces are expected to use violence. Such a transformation would increase the clarity for militaries during armed conflict and eliminate the likelihood of conflict classification manipulation.

Practically, how should this transformation to a sovereign agency theory occur? States who are already applying the theory as a matter of policy, such as

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163 Michael N. Schmitt, Yoram Dinstein and Charles H.B. Garraway, *The Manual on the Law of Non-International Armed Conflict: With Commentary* (International Institute of Humanitarian Law 2006), online at http://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf (visited Nov 19, 2011).

164 Id at *1.

165 Id at 5, ¶ 1.1.4 (defining military objective).

166 Henckaerts and Doswald-Beck, eds, 1 *Customary International Humanitarian Law* (cited in note 146). The provisions include the prohibition of attacks on civilians (Rule 1); the obligation to respect and protect medical personnel, units, and transports, and religious personnel (Rules 25–26, 28–30); the obligation to protect medical personnel (Rules 26, 30); the prohibition of starvation as a method of warfare (Rule 53); the prohibition of attacks on objects indispensable to the survival of the civilian population (Rule 54); the obligation to respect the fundamental guarantees of civilians and persons *hors de combat* (Rules 87–105); the obligation to search for and respect and protect the wounded, sick, and shipwrecked (Rules 109–11); the obligation to search for and protect the dead (Rules 112–13); the obligation to protect persons deprived of their liberty (Rules 118–19, 121, 125); the prohibition of forced movement of civilians (Rule 129); and protections afforded to women and children (Rules 134–37). Id.

the US, could call for a Convention and propose a revision of the Geneva Conventions to accomplish this purpose. While this course of action could be very effective, it is highly unlikely. Perhaps more likely, states could make unilateral decisions to apply the full LOAC as a matter of law each time they employ their armed forces and either make those decisions public[167] or incorporate this decision in their own domestic laws. As states embrace the sovereign agency theory, they could apply pressure on allies and others to do so also. In the end, individual state practice will be the most effective mechanism to accomplish this task over time. Eventually, API and APII would have to be significantly revised or abrogated in order to remove the codification of the LOAC bifurcation.

VII. CONCLUSION

The current LOAC applicability paradigm requires a state to classify the conflict and then determine what law applies based on that determination. Though this may appear to be a legal determination, history has demonstrated that the state's decision has been open to manipulation in order to accomplish policy objectives. The political manipulation of LOAC applicability, such as the 2002 decision by the Bush administration concerning the application of the law to the treatment of al-Qaeda and Taliban detainees, has contributed to the degradation in protection of the victims of armed conflict. It is time for the international community to rethink the current paradigm and select a more effective and principled basis for LOAC applicability.

The application of the LOAC to all activities by state sovereign forces during armed conflict is a much more effective means of protecting the victims of armed conflict and will provide a much more solid foundation upon which to place the LOAC. The fundamental principles of the LOAC, such as distinction and combatant immunity, are based on the monopolization of violence through the grant of agency from the sovereign to its armed forces. It seems appropriate, then, that anytime the state employs its armed forces to accomplish its violent ends, the rights and responsibilities of the sovereign's war-making powers should attend the use of force by the state's agents. Therefore, each time the armed forces of a state are used to conduct forceful operations, the full LOAC should be applied to their activities.

Perhaps most importantly (given recent history), tying the LOAC applicability to agency theory and the use of a sovereign's armed forces will diminish the potential for political manipulation of the law. Currently a state can

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167 See *Nuclear Tests Case (Australia v Fr)* 1974 ICJ 253, ¶ 44 (Dec 20, 1974) (holding that unilateral acts can have full legal effect between states).

deploy its armed forces and determine which law accompanies the military in its use of force. The law should not be so manipulable.

Given current state practice, the jurisprudence of international tribunals, and the work of international law scholars, the transition to an agency paradigm from a conflict typology paradigm would not require significant effort. For States such as the US, it would merely require the commitment to do, as a matter of law, what they are now doing as a matter of policy. Regardless of the effort, an agency theory of LOAC applicability would return the LOAC to its historical roots of sovereignty and advance the protections for victims of armed conflict that history has so carefully fostered.

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Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats

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Exeter Centre for International Law

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Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats

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Abstract The international system has entered a period of increased competition, accompanied by a steady retreat from multilateralism and international institutions. The purpose of this article is to assess the legal implications of these developments from the perspective of three concepts that have risen to prominence in recent years: lawfare, hybrid warfare and grey zone conflict. In doing so, the article makes three arguments. The instrumental use of international law for strategic purposes forms an integral feature of international relations and should not be mistaken, as realists are prone to do, for the irrelevance of law in international affairs. Although the notions of lawfare, hybrid warfare and grey zone conflict all contribute towards a better understanding of the ways in which international law is employed for strategic ends in the current security environment, neither offers a sufficient framework for analysis and policy action. Instead, the challenges posed to *status quo* powers by the revisionist instrumentalization of international law are best countered by adopting a legal resilience perspective and an operational mindset.

Introduction

Throughout most of the world, Canada is renowned for its contribution to the cause of multilateralism, international institutions and the progressive development of international law. Canadians often pride themselves on their country's long-standing commitment to the international rule of law (Fitzgerald et al 2018). It therefore seems out of character for Canada to

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stand accused of a blatant violation of its international obligations. Yet this is the charge levelled against it by the Russian Federation.

On 17 October 2018, the Cannabis Act entered into force in Canada.[1] The Act created a regulatory framework that permits the controlled production, distribution, sale and possession of cannabis. By legalizing the recreational use of the drug, the Act put Canada on a collision course with three international drug control treaties (Habibi and Hoffman 2018).[2] As the International Narcotics Control Board, the body charged with overseeing the implementation of the agreements, has pointed out, the Cannabis Act is incompatible with Canada's international commitments.[3] Russia's accusations against Ottawa are therefore not unfounded, it seems. Nevertheless, their tone is curious. In its statements on the matter, Russia has complained of Canadian 'high-handedness' and repeatedly emphasized the deliberate and fundamental nature of its violation of the applicable rules.[4] Never shy of hyperbole, Russian officials have also accused the Canadian Government of consciously destroying the international drug control regime, promoting selective compliance with international agreements, failing to perform its obligations in good faith and belying its self-professed support for a rules-based world order. Notwithstanding Canada's failure to comply with its obligations, these accusations ring hollow. Their mocking tenor does little to conceal their primary objective, which is to paint a picture of Canadian duplicity and disdain for international rules that stands in stark contrast with the Russian Federation's record of strict compliance and heartfelt concern for the fate of the international legal order.

The passing of the Cannabis Act and Russia's attempts to turn it into a propaganda coup present a sorry spectacle. They are just one sign among many which suggest that the rules-based international order is in trouble. The last decade has seen the return of a multipolar international

1. Cannabis Act (SC 2018, c 16).
2. Single Convention on Narcotic Drugs, 30 March 1961, 18 UST 1407, 520 UNTS 151; Convention on Psychotropic Substances, 21 February 1971, 32 UST 543, 1019 UNTS 175; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, KAV 2361, 1582 UNTS 95.
3. Statement by the International Narcotics Control Board on the entry into force of Bill C-45 legalising cannabis for non-medical purposes in Canada, 17 October 2018, UNIS/NAR/1362.
4. Ministry of Foreign Affairs, Comment by the Information and Press Department on Canada's steps to legalise cannabis for recreational use, 22 June 2018, 1199-22-06-2018; Statement of the Permanent Representative of the Russian Federation to the International Organizations in Vienna Ambassador Mikhail Ulyanov at the 2nd intersessional CND meeting, Vienna, 25 June 2018, 28 June 2018, 1240-28-06-2018; Statement of the Permanent Representative of the Russian Federation to the International Organizations in Vienna Mr Mikhail Ulyanov at the 5th intersessional meeting of the Commission on Narcotic Drugs, Vienna, November 7, 2018, 8 November 2018, 2127-08-11-2018.

system marked by the resurgence of realpolitik and increased competition between the great powers (see Mazarr et al 2018; Porter 2019). By annexing Crimea, Russia has violated one of the core principles of international law (Grant 2015; Geiß 2015; Bering 2017), the rule against the acquisition of another State's territory through force (Korman 1996).[5] China is asserting its interests more vigorously in the international arena, claiming parts of the South China Seas (Dupuy and Dupuy 2013; Gao and Jia 2013)[6] and rejecting the award rendered against it in this matter by the Permanent Court of Arbitration.[7] Western powers too are prepared to disregard international rules at times, as they did by striking Syrian regime targets in response to chemical attacks on civilians in April 2018 (Goldsmith and Hathaway 2018; but see Dunlap 2018).

These incidents feed into broader concerns about the future direction of the international system. Recent withdrawals from international institutions and agreements, such as Burundi's departure from the International Criminal Court (Ssenyonjo 2018; Alter, Gathii and Helfer 2016)[8] and the US renunciation of the Iran nuclear agreement and other international instruments (Talmon 2019),[9] suggest that support for multilateralism is waning (see Cohen 2018). International law and institutions are being side-lined and appear increasingly impotent. Judge James Crawford (2018, 1) of the International Court of Justice has captured the prevailing mood by observing that nowadays international law is invoked in 'an increasingly antagonistic way', whilst at other times it is 'apparently or even transparently ignored.'

The present article places these developments within the context of the current debates over lawfare and the legal dimension of hybrid warfare and grey zone conflicts, with the aim of moving these debates onto new, more fruitful ground. The paper advances three core arguments. First, it suggests that the instrumentalization of law and legal processes is an integral feature of the international system, one from which a certain creed of realism draws the mistaken conclusion that a rules-based international order cannot possibly exist. Second, it argues that the notions of

5. GA Res 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 122–123 (24 October 1970).
6. See, for example, Note Verbale CML/8/2011 from the Permanent Mission of the People's Republic of China to the UN Secretary-General, 14 April 2011; Note Verbale CML/17/2009 from the Permanent Mission of the People's Republic of China to the UN Secretary-General, 7 May 2009.
7. *The South China Sea Arbitration (Phil v China)* (Perm Ct Arb 2016). For the Chinese position, see Ministry of Foreign Affairs of China (2016).
8. UN Secretary-General, Depositary Notification, C.N.805.2016.TREATIES-XVIII.10, 28 October 2016.
9. Remarks by President Trump on the Joint Comprehensive Plan of Action, 8 May 2018, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/>, accessed 20 December 2019.

lawfare, hybrid warfare and grey zone conflict all contribute towards a better understanding of the role that international law plays in the contemporary strategic environment, but that neither of these three concepts offers an adequate framework for analysis and policy action. Finally, it suggests that the challenges posed by the instrumentalization of international law are best countered by adopting a legal resilience perspective and fostering an operational mindset.

The tragedy of international law

To some, the dire state of international law and multilateralism merely confirms that the notion of a rules-based international order is a delusion. In the aftermath of the Cold War, John Mearsheimer (1994) warned against the 'false promise' of international institutions as a means for promoting peace and stability, a view echoed in the latest US National Security Strategy.[10] More recently, Patrick Porter (2016; see also Porter 2018) has argued that a rules-based international order is unattainable. The world is a 'tragic place' where great powers break the rules at their discretion if it serves their interests. To believe that order in international relations can be based on strict rules is to engage in wishful thinking.

Realist scholars are right to pour scorn on the legalist belief that formal rules and institutions can supplant power politics. But legalism so defined offers a thoroughly romanticized account of the role of law in international affairs, one that is little more than a caricature. Law is a function of political society, as EH Carr (1939, 227–231) argued years ago. This means that law's authority derives, ultimately, from politics and is sustained by a concrete social order. But it also means that law serves a distinct social need. Law provides society with predictability. It affords a sense of 'regularity and continuity' without which political life would not be possible (ibid, 232; see also Luhmann 2004, 142–172). Porter (2016) suggests that a workable international order must be forged not by lawyers, but by canny diplomats relying on 'compromise, adjustment, mutual concessions and a continually negotiated universe, backed by deterrence and material strength.' Yet it is difficult to see how such compromise, adjustment, concessions, negotiations and even deterrence (see Schelling 2008, 49–55) could be sustained without formal rules and institutions—or lawyers, for that matter.

Classic realists were more perceptive in this regard. Discussing the decentralized nature of international law in his *Politics among Nations*, Hans Morgenthau (1948, 214) made the following

10. The White House, *The National Security Strategy of the United States of America* (December 2017). The Strategy paints a picture of continuous competition between States and a failure of international institutions to restrain and integrate revisionist powers, such as China.

observation:

> Governments… are always anxious to shake off the restraining influence which international law might have upon their international policies, to use international law instead for the promotion of their national interests, and to evade legal obligations which might be harmful to them. They have used the imprecision of international law as a ready-made tool for furthering their ends. They have done so by advancing unsupported claims to legal rights and by distorting the meaning of generally recognized rules of international law.

This passage does not paint a flattering picture of international law, but it depicts its operation in more accurate terms than the cliché of legalism. In 2014, Russia did not simply invade and annex Crimea with a passing reference to the Melian Dialogue,[11] but offered an elaborate legal argument to justify its actions (Borgen 2015; Ambrosio 2016). According to President Putin, in the absence of a legitimate executive authority in Ukraine, Russia was compelled to intervene to protect the people of Crimea and to create the conditions in which they could exercise their right of self-determination, ostensibly in line with the bilateral agreements governing the presence of Russian forces on the Crimean Peninsula.[12] The use of such legal rhetoric for strategic ends has a long tradition. On 17 September 1939, the Soviet Union justified its invasion of Poland by arguing that the Polish State and Government had ceased to exist, that Soviet-Polish treaties therefore had lost their validity and that Russian military action was necessary to protect the life and property of the population of Western Ukraine and Western White Russia.[13]

Sceptics will object that the use of international legal arguments for the purposes of territorial aggrandizement hardly amounts to a ringing endorsement of a rules-based international order. But this misses the point. As Josef Kunz (1945, 549) once quipped, most international lawyers are comfortable working with two international laws: one for their own nation and one for their enemies. The rules, processes and institutions of international law facilitate cooperation between international actors in pursuit of their goals and values, but at the same time they also enable conflict by sustaining disagreement and competition. International law constrains as well as enables

11. Thucydides (2009), 5.84–5.111. The Melian Dialogue is regarded as a classic illustration of the necessities of power, famous for making the point that 'The strong do what they can: the weak suffer what they must' (ibid, 5.89). See Wassermann (1947).

12. Address by the President of the Russian Federation, 18 March 2014, <http://en.kremlin.ru/events/president/news/20603>, accessed on 20 December 2019. For an assessment of these claims, see Olson (2014).

13. The Ambassador in the Soviet Union (Steinhardt) to the Secretary of State, Moscow, 17 September 1939, in United States Department of State (1956), 428–429, 428–429. On Soviet efforts to justify the invasion of Poland, see Plokhy (2011).

both friends and foes. Taking this insight to its logical conclusion, Monika Hakimi (2017) has recently argued that fostering cooperation and conflict are in fact symbiotic functions of international law (see also Hurd 2017). To annex Crimea, Moscow relied on well-established international instruments. It first recognized the 'Republic of Crimea' as a sovereign and independent State[14] and then entered into an international agreement with that 'Republic' to incorporate its territory into the Russian Federation.[15] In response, the member States of the European Union utilized Article 215 of the Treaty on the Functioning of the European Union[16] to adopt restrictive measures against Russia with the declared aim of increasing the costs of its infringement of the territorial integrity, sovereignty and independence of Ukraine.[17] Realists who see in the annexation of Crimea merely a violation of the prohibition to use force, and thus the irrelevance of law in the face of realpolitik, overlook the fact that international law and power interact in more subtle ways.[18] Law is an instrument of power politics, a framework for countermeasures and a vocabulary for contesting legitimacy all at once.

Yet herein lies the tragedy of international law. Seen from a classic positivist perspective, international law, like any legal system, is instrumental in nature. Its purpose is to serve other ends: predictability, justice, security, the good life. However, since those ends are contested, international law itself is contestable and open to instrumentalization in the service of conflicting objectives and interests.[19] There is a constant tension between those seeking to preserve the *status quo* embodied in the international system and those hoping to overthrow it (Morgenthau 1929, 75–78; Carr 1939, 230). The politicization of international law therefore is inevitable. All questions of international law are political to a greater or lesser extent (Morgenthau 1929, 69–70; Lauterpacht 1933, 155).

14. Decree of the President of the Russian Federation No 147, 'On the recognition of the Republic of Crimea', 17 March 2014, <http://publication.pravo.gov.ru/Document/View/0001201403180002> (in Russian), accessed on 20 December 2019.
15. Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and the Formation of New Federal Constituent Entities, 18 March 2014, <http://publication.pravo.gov.ru/Document/View/0001201403180024> (in Russian), accessed on 20 December 2019.
16. Consolidated Version of the Treaty on the Functioning of the European Union, 13 December 2007, 2012 OJ (C 326) 1 (EU).
17. Council Regulation 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, 2014 OJ (L 229) 1 (EU).
18. Ironically, in so doing they display a remarkable lack of realism about the operation of international law. See Brownlie (1982).
19. It is a mistake, therefore, to assume that a rules-based international order must necessarily be a pluralist and liberal one. See Simpson (2001).

Nonetheless, international law must constantly reassert its distinct logic and formalist *modus operandi* to avoid collapsing into politics (see Luhmann 2004, 76–141), otherwise it would no longer be capable of performing a distinctly legal function in the society it is meant to serve.[20] If international law became mere policy, it would lose the predictability and normativity that sets it apart from other functional systems. "We cannot reduce it to politics without eliminating it as law", as Oscar Schachter (1982, 25) warned.

International law is thus caught in a dynamic where the instrumental use of rules forms a core feature of the system, yet where certain forms and manifestations of instrumentalization are deeply corrosive to the idea of a rules-based international order (generally, see Tamanaha 2006). For example, State recognition constitutes a legitimate means to give effect to the right of self-determination of peoples, as happened in the case of Ukraine following its declaration of independence on 24 August 1991 (Rich 1993, 40–42). By contrast, using State recognition as a means to carry out the forcible annexation of another State's territory, as Russia has done in relation to Crimea, undermines the rule of law (Shany 2014). In cases such as these, a judicial body or other expert audience may find it relatively straightforward to distinguish between valid and invalid legal claims, and thus between the use and abuse of the law, as measured against established methods of interpretation and the substantive values and standards of behaviour enshrined in the international legal order as it presently stands. In other situations the dividing line between the acceptable and abusive instrumentalization of international law may not be so clear even to an expert audience (see, for example, Morton 2002, 99–101) and it will be even less evident to the general public. Indeed, more often than not, States and other actors employ international legal arguments not in order to convince a body of experts, but as a vocabulary of political persuasion, as a language of political judgment and legitimacy (Kennedy 2006), aimed to win over a wider audience at home or abroad. In an age of fake news and information warfare, we should therefore not be surprised to find that the boundaries between formal legal argumentation and blatant propaganda, between at least tenable legal arguments and legal disinformation, have become more fluid. International law thus oscillates between political tribalism and principled arguments over the validity of legal claims.

20. In the *South West Africa Cases, Second Phase (Liber v S Afr; Eth v S Afr)*, Judgment, 1966 ICJ Rep 6, ¶ 49 (July 18), the International Court of Justice put this point as follows: 'Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.'

Making sense of the strategic environment

None of these dilemmas are new, of course (for example, see Henkin 1979, 88–98, and Koskenniemi 1990, 2005 and 2009). However, they have gained renewed vigour as a result of the more competitive international environment, the progressive legalization of foreign affairs and the growing appetite for legal accountability in our societies (see Rowe 2016). They thus lie at the heart of what Judge Crawford has called the turn to a more antagonistic international law.

In recent years, three concepts have entered the scholarly and policy discourse in an attempt to explain and frame these developments: lawfare, hybrid warfare and grey zone conflict. All three concepts make a useful contribution to a better understanding of the role of international law as a medium of strategic competition, but they also suffer from certain shortcomings and analytical blind spots.

Lawfare

The notion of lawfare was introduced into mainstream legal discourse by Major General Charlie Dunlap (2001). In his initial writings, Dunlap described lawfare as a 'method of warfare where law is used as a means of realizing a military objective' (ibid, 4). The example that most readily comes to mind is the deliberate violation by an adversary of its legal obligations in the hope of obtaining an illicit advantage on the battlefield. The law of armed conflict prohibits using the presence or movement of civilians to render certain points or areas immune from military operations, in particular in an attempt to shield military objectives from attack or to shield, favour or impede military operations.[21] However, the fact that an adversary employs human shields in violation of this prohibition does not relieve another belligerent from its duty to protect civilians.[22] By prioritizing the protection of civilians, the law thus affords unscrupulous adversaries with an asymmetric advantage: placing civilians near military objectives may shield the latter from attack, provided that the attacking party continues to abide by its own obligations.

In the eyes of most commentators, lawfare is firmly associated with acting in bad faith (see Horton 2010, 170; Luban 2010, 458–459). However, in later writings, Dunlap emphasized its essentially neutral character (2008, 146–148; 2010, 122; 2011, 315). If law is a means of warfare, then the question whether its use is beneficial or harmful depends entirely on who is employing it

21. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art 51(7), 8 June 1977, 1125 UNTS 3 (Additional Protocol I). See Henckaerts & Doswald-Beck (2005), 337–340.

22. Additional Protocol I art 51(8).

for what purpose and against whom. Law, therefore, does not differ much from a rifle: whether or not a rifle is a good thing depends in large measure on which end of the barrel one happens to stand. Understood in these terms, lawfare is an agnostic concept that simply describes the use or abuse of law as a means to achieving a military goal (Dunlap 2010, 122). It follows that lawfare can be a force for good. For instance, it is not far-fetched to describe the establishment of the International Criminal Tribunal for the former Yugoslavia as an example of lawfare, bearing in mind that one of the aims pursued by the Security Council was to influence the behaviour of the warring parties in the absence of effective military means to do so (Reisman 1998, 46–49; see also Kerr 2004, 12–40).[23]

Others have built on Dunlap's work to refine the concept further. Orde Kittrie (2016, 8) defines lawfare as the use of law to create the same or similar effects as those traditionally sought from conventional military action, *provided* the party using law in this manner is motivated by a desire to weaken or destroy an adversary. The addition of an intent requirement is designed to exclude from the definition actions that are not hostile in character and thereby distinguish it from ordinary, adversarial lawyering.

Despite such refinements, the concept suffers from several limitations (see also Voetelink 2017). The instrumental use of international law is not confined to war. States regularly employ law and legal arguments to pursue their interests outside the context of armed hostilities, for example as China does in the South China Seas. As traditionally understood, lawfare fails to capture the instrumentalization of law beyond armed conflict and for purposes other than strictly military gains. In fact, even during armed conflict, non-State actors such as Hamas and Hezbollah do not resort to lawfare and place civilians at risk solely or even primarily in order to achieve a direct operational advantage. Rather, the benefit they seek often lies in the information domain, where they can exploit the increased rates of civilian suffering caused by their own failure to comply with the law to delegitimize their opponent (see Gemunder Center for Defense and Strategy 2018, especially 28–35; see also Blank 2017). The traditional concept also says little about the standards against which lawfare should be assessed. For example, what criteria should be applied to prioritize different instances of lawfare and to distinguish them from ordinary legal business? If lawfare truly is a neutral concept, how should law-abiding nations know where the dividing line between the legitimate use of law and its impermissible abuse lies (see Noone 2010, 83–85)? In the absence of general agreement on this question, lawfare is open to the charge that it is simply a label used to

23. SC Res 827, preamble (25 May 1993). See also UN SCOR, 48th Sess, 3217th mtg, 12 (France), 19 (UK), 21 (Hungary), 22–23 (New Zealand), 24–25 (Japan), 27 (Morocco) and 32 (Pakistan), UN Doc S/PV.3217 (25 May 1993).

discredit perfectly routine legal claims by tarnishing them with the brush of illegitimacy (Hughes 2016; Irani 2017). The concept is also clouded by national experiences. In the UK, for example, lawfare seems indelibly, but unhelpfully, associated with narrow concerns over human rights litigation and its impact on military effectiveness (see Tugendhat and Croft 2013, 35).

Hybrid warfare

The notion of hybrid warfare originally emerged in the context of debates over the changing character of war and the associated question of future force structures and force modernization (Mattis and Hoffman 2005; see Tenenbaum 2015). One of the earliest proponents of the term is Frank Hoffman (2007; 2009). With adversaries increasingly deploying an integrated mix of conventional capabilities and irregular tactics in the same battlespace, Hoffman argued that distinct modes of warfighting, acts of terrorism and criminality were converging to produce a hybrid form of war. Following Russia's annexation of Crimea, the concept gained wider popularity and entered the Western strategic lexicon. In the process, it acquired a looser meaning to refer to the combined use of military and non-military, conventional and unconventional, overt and covert means of exercising influence (Fridman 2018). This conceptual drift has not escaped criticism. In the eyes of many commentators, a lose understanding of hybrid warfare is little more than a shorthand for geostrategic competition across multiple domains or a euphemism for Russian aggression that offers few, if any, useful insights (see Charap 2015; Monaghan 2015; Renz 2016). Responding to these criticism, other approaches define hybrid warfare as being aimed at exploiting the societal vulnerabilities of a targeted nation, including its political institutions, decision-making processes and critical infrastructure (see Multinational Capability Development Campaign 2019, 13). Understood in this way, hybrid warfare is more readily characterised as a method employed by revisionist actors.

Hybrid warfare is not a legal term of art and its conceptual fluidity has made it difficult to assess its legal implications (see O'Connell 2015; Wittes 2015). However, both NATO and the EU have associated certain legal challenges with the notion.[24] Hybrid adversaries are said to deploy law

24. In particular, see Supreme Allied Commander, Europe and Supreme Allied Commander, Transformation, Bi-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats, 25 August 2010; Headquarters, Supreme Allied Commander Transformation, Assessing Emerging Security Challenges in the Globalised Environment: The Countering Hybrid Threats (CHT) Experiment, Final Experiment Report (FER), 29 September 2011; European External Action Service, Food-for-Thought Paper 'Countering Hybrid Threats', Council Doc 8887/15, 13 May 2015; European Commission, Joint Framework on Countering Hybrid Threats: A European Union Response, JOIN(2016) 18 final, 6 April 2016.

and legal arguments in an effort to gain an operational or strategic advantage. They do so in several ways. They exploit the lack of legal interoperability and consensus among Western nations. They generate and exploit legal ambiguity. They also circumvent legal boundaries and thresholds to avoid triggering the applicability of mutual assistance commitments, such as Article 5 of the North Atlantic Treaty.[25] In addition, it has become practically an article of faith that the classic distinction between war and peace is fading away as a consequence of the hybridization of warfare. For example, at their Brussels summit held in July 2018, NATO leaders took note of the increasing challenges posed by States and non-State actors 'who use hybrid activities that aim to create ambiguity and blur the lines between peace, crisis, and conflict.'[26]

The narrow understanding of hybrid warfare, as initially proposed by Hoffman, describes a form of operational art and is therefore closely linked to the conduct of open hostilities. It shares this feature with Dunlap's definition of lawfare. In fact, lawfare has been identified as a specific hybrid warfare technique (Muñoz Mosquera and Bachmann 2016). The narrow understanding of hybrid warfare draws attention to the multimodal character of contemporary conflicts. This in turn highlights certain legal difficulties, such as the scope of application of the law of armed conflict and its interaction with other legal regimes. However, such a narrow perspective runs into the same objection as the classic definition of lawfare. Adversaries utilize hybrid tactics, including lawfare, not just in the shadow of impending armed conflict or during actual hostilities, but also in situations where there is no immediate prospect of war. The attempted murder of Sergei Skripal with a chemical nerve agent in the city of Salisbury on 4 March 2018 offers an example.[27] This is why many commentators and organizations such as the European Union prefer to use the term hybrid *threats* instead. But that notion suffers from its own shortcomings: its inherent vagueness and sheer breadth undermines its utility as a framework for analysis.

One way out of this conceptual morass is to contextualize. According to the European Centre of Excellence for Countering Hybrid Threats, hybrid threats involve the systematic targeting of the political, social, economic, military and other vulnerabilities of *Western* nations by their strategic competitors and adversaries.[28] Whether or not this definition should be read as a symptom of

25. 4 April 1949, 63 Stat 2241, 34 UNTS 244.

26. Brussels Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels, 11–12 July 2018, <https://www.nato.int/cps/ic/natohq/official_texts_156624.htm>, accessed on 20 December 2019.

27. Letter dated 13 March 2018 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc S/2018/218, 13 March 2018.

28. See <https://www.hybridcoe.fi/hybrid-threats/>, accessed on 20 December 2019.

Western existential angst, as some have suggested (Mälksoo 2018), it does have the advantage of narrowing down the discussion to a set of empirically observable hostile tactics. These include plausible deniability, interference not reaching the level of prohibited intervention, acting through proxies, information operations and the use of force below the threshold of an armed attack. Rather helpfully, this also focuses attention on certain legal difficulties and areas of law, including the attribution of wrongful acts, the law of cyber operations, countermeasures, the rules governing the use of force and the law of armed conflict (see Cantwell 2017). This 'contextualized' hybrid threat construct thus offers a more concrete typology of lawfare and a catalogue of more specific legal challenges to be addressed. Overall, however, the notion of hybrid warfare continues to fluctuate between too narrow and too broad a frame of mind.

Grey zone conflict

When a river enters the sea, the freshwater does not turn into seawater instantly. It tends to produce brackish water at first. War and peace may be polar opposites, but they too may converge in a mixed state. This realization that war and peace are continuous, rather than discrete, fields of human endeavour has given rise to the idea that they may blend into each other, producing a grey zone that is neither truly war nor truly peace (see Ruggie 1993, 28; Curtis 1994; Eide, Rosas and Meron 1995, 217). In recent years, strategic discourse has seized upon this image, above all in the United States, to spawn a range of related concepts, including the notion of grey zone threat and grey zone conflict.

A white paper published by the United States Special Forces Command (2015, 1) describes grey zone conflicts as 'competitive interactions among and within State and non-State actors that fall between the traditional war and peace duality'. This is a broad concept, but as the white paper emphasizes, some level of aggression is required to shift peacetime competition into the grey zone (ibid, 3). A report prepared by the International Security Advisory Board of the United States State Department (2017, 2) adopts a similar approach, arguing that the central characteristic of grey zone operations is 'that they involve the use of instruments beyond normal international interactions, yet short of overt military force'. Grey zone conflict may not be new or exceptional, but it is pathological, rather than normal. This represents one of the weak spots of the concept: wherein lies this pathological element that distinguishes grey zone operations from routine international rivalry? The International Security Advisory Board suggests that grey zone actors employ means that 'go beyond the forms of political and social action and military operations with which liberal democracies are familiar, to make deliberate use of instruments of violence, terrorism, and dissembling' (ibid). This approach is not unreasonable, but it relies heavily on perceptions of

normality (see United States Special Forces Command 2015, 3).

Whereas the notion of hybrid warfare is preoccupied with the multimodal way in which adversaries operate, the grey zone concept focuses on the competitive space within which they conduct their activities. By definition, this space is marked by ambiguity about the nature of the conflict and the status of the parties, which in turn generates uncertainty about the applicable law (Mazarr 2015, 66; United States Special Forces Command 2015, 4). The Kerch Strait incident between Russia and Ukraine illustrates the point. On 25 November 2018, Russian coast guard patrol boats intercepted, fired upon and seized three Ukrainian navy vessels near the entrance of the Kerch Strait. Since Russia and Ukraine are engaged in an ongoing international armed conflict, the incident is governed not only by the general rules of international law, including the law of the sea, but also by the law of naval warfare, a point that is often overlooked (for example, see Gorenburg 2019). Even though Russia could have justified both the attack and the internment of the Ukrainian crew members with reference to the law of war (Kraska 2018), consistent with its efforts to deny its involvement in an armed conflict with Ukraine, it did not invoke its belligerent rights. In addition to generating legal uncertainty, grey zone conflicts also give rise to more specific legal challenges. Since operations in the grey zone for the most part involve the same tactics and techniques as those associated with hybrid warfare (International Security Advisory Board 2017, 2–4; Jackson 2017; Wirtz 2017, 107–110), they mostly raise identical legal questions (see Schmitt and Wall 2014; Nasu 2016, 260–269; Brooks 2018).

Implicit in much of the grey zone debate is a concern that a gap has opened up between the rules of international law, which are based on the traditional duality of war and peace, and the more amorphous character of contemporary warfare (see Leed 2015, 134–135). The law is often accused of lagging behind reality. The same concern animates much of the hybrid warfare debate, as reflected in its fixation on the dividing line between war and peace.

It is true that classic legal authorities have often denied that a middle ground exists between the state of war and the state of peace (Grotius 1625, Bk III, ch XXI, I.1). For most nineteenth century international lawyers, there existed but two categories of international intercourse: 'war and not war', as Lord Robertson put it in the case of *Janson v Driefontein Consolidated Mines Ltd* (see Neff 2005, 178–186).[29] However, the reality of warfare never quite reflected this formalistic position. Even Clausewitz (1834, Bk VIII, ch 2) was forced to admit that the extreme and unrelenting application of violence, which he identified as the internal dynamic of war in an ideal sense, finds itself tempered in the real world by competing considerations. Limited objectives, lack

29. *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, 504 (House of Lords).

of incentives and the fear of escalation breed military stagnation, 'half-wars' and a descent into the use of force as a mere threat (ibid, Bk VIII, ch 6). Legal practice has never quite lived up to the strict doctrinal distinction between war and peace either (Schwarzenberger 1943). Formal declarations of war were always the exception, rather than the rule (Maurice 1883; see also Greenwood 1987). Neither doctrine nor practice ever gave birth to a single definition of the state of war. In a valiant but ultimate unsuccessful attempt to define the concept, Clyde Eagleton (1932, 282) was forced to conclude that there was 'a great deal of uncertainty as to the meaning of war'. The situation has not improved markedly in more recent times. Since 1945, States have found ways of employing force in circumstances not foreseen by the United Nations Charter. In doing so, they have adapted and recalibrated the Charter regime in several respects (see Franck 1970; Franck 2002).

Much of the grey zone debate fails to appreciate that in legal practice, the threshold between war and peace, and between their attendant regulatory frameworks, is therefore not as firm as the black letter of the law may suggest (see Hakimi 2018; see also Reisman 2013, 95–104). In important respects, the legal concept of war and peace are relative notions and the normative line that separates them is neither bright nor in fact is there a single line (see Grob 1949). All of this has important implications for the grey zone concept, since it is difficult to determine whether or not a particular competitive tactic or incident is pathological, and thus falls within the grey zone, based on normative considerations. It also means that grey zone conflicts not only generate legal ambiguity, but that legal grey zones generate conflict too.

The benefit of the grey zone construct thus lies mostly in the notion of greyness. Like the idea of a 'cold war' or 'hot peace', greyness denotes that the intensity of geopolitical confrontation lies somewhere between ordinary diplomacy and all-out war. Greyness also captures the murkiness associated with deniability, disinformation and other measures designed to deceive, confuse and subvert. By comparison, the image of a 'zone' is less helpful. Despite protests that the notion is not meant to replace the duality between war and peace with a tripartite model that distinguishes between war, the grey zone and peace (Joint Chief of Staff 2019, 3), in the eyes of most commentators, it seems to do exactly that. But this is misleading: the idea of a zone that is demarcated by peace at the lower end and by war at the top, and thus sandwiched between two boundaries, diverts attention away from the fact that hostile campaigns may exploit those very boundaries across different domains to achieve asymmetric coercive effects across the full spectrum of competition (see Adamsky 2018), rather than in any particular 'zone'.

Facing up to the challenges

From a legal perspective, the three concepts explored in the preceding section—lawfare, hybrid warfare and grey zone conflict—have proved themselves to be under-inclusive in some respects and over-inclusive in others. The legal community is thus confronted with a situation where policy and strategic discourse has adopted a language that does not translate well into legal doctrine and *vice versa*. By not engaging with the prevailing discourse on its own terms, lawyers open themselves up to censure for ignoring current strategic priorities, including concerns over the erosion of the rules-based international order (for example, Cabinet Office 2018, 6). Yet by adopting those terms uncritically, they run the risk of entangling themselves in concepts that may prove to be of limited benefit for legal analysis.

Nevertheless, certain insights may be identified. At the most general level, all three concepts underscore the instrumentalization of international law for strategic ends. Had Clausewitz been a lawyer, he might have observed that law is but a continuation of politics by other means. This is not to side with those realists who deny that international law is governed by its own, distinct logic. If they were right, the validity of international rules would depend on their political utility and not on legal criteria (see Peters 2018, 486). But then they would cease to be rules of law: law would be mere policy. Rather, it is to accept that international law is, by its very nature, politically contestable and open to instrumentalization for non-universal ends. As I have argued in greater detail elsewhere (Sari 2019, 186–187), in the present context this instrumentalization takes on a particular form. In hybrid warfare and grey zone conflicts, adversaries rely on law and legal arguments predominantly in order to legitimize their own behaviour and maintain their own freedom of action and to delegitimize their opponents' behaviour and restrict their respective freedom of action. In addition, all three concepts draw attention to a set of tactics and techniques that adversaries tend to employ for these purposes. This combined catalogue of lawfare, hybrid and grey zone measures gives more concrete meaning to the instrumentalization of international law by enabling lawyers to identify specific legal questions, difficulties and vulnerabilities that demand their talents.

These are useful insights, as they increase situational awareness and contribute to a better understanding of the dynamics between international law and the pursuit of geopolitical objectives by revisionist actors. In addition, they also harbour important lessons about the nature of the legal challenges that *status quo* powers face.

The national interest and the international rule of law

The turn to a more antagonistic international legal system poses two types of challenges. By definition, the use of international law for geopolitical ends as part of a lawfare, hybrid or grey zone campaign affects the strategic position of the targeted State. The instrumental use of international law by adversaries thus presents a challenge, first of all, to the national interest of the on the receiving end of such a campaign. For methodological reasons, this is an important point to make. Understanding how adversaries utilize the law requires technical legal expertise. However, the strategic significance and impact of their actions is not something that can be assessed by legal criteria alone. These are questions of political judgment—informed by legal expertise, but not decided by it. A legal claim may be perfectly tenable under the law, but that does not prevent it from being pursued with malign or hostile intent. Moreover, whether a particular claim is legally tenable or abusive may be difficult to determine conclusively with reference to legal standards such as the principle of good faith (see Dill 2017, 125–128; see also Stephens 2011). Part of the answer depends on political criteria and thus, inevitably, on non-universal and non-formalistic considerations. If the exercise of political judgment in these matters cannot be avoided, it is more conducive to sound analysis, and intellectually more honest, to acknowledge this.

The hostile instrumentalization of international law also poses a challenge to the international rule of law. Many of the tactics employed—such as taking advantage of legal gaps and thresholds in bad faith, evading legal accountability, advancing untenable legal arguments, circumventing legal commitments or engaging in manifest breaches of the applicable rules—are incompatible with respect for the rule of law. The cynical evasion and manipulation of the law not only deepens the structural weaknesses of the international legal order, especially if the culprits are great powers, but it also leads other actors to question the wisdom of their own continued compliance. At a certain point, the accumulation of persistent and serious transgressions may threaten to undermine the integrity of the international legal system as such. Specifically, the instrumental use of the law risks politicizing international legal processes and discourse to the point where their ability to serve as an effective medium for resolving political disputes is compromised. The near complete schism between Western and Russian international lawyers in their assessment of Russia's annexation of Crimea—the former widely denouncing it as a grave violation of international law, the latter predominantly treating it as a lawful exercise of the right of self-determination—illustrates the danger (Roberts 2017, 231–240).

These two challenges are connected. When actors with a vested interest in the *status quo* are confronted with revisionist tactics, they face a choice. They may continue to comply with the rules that underpin the *status quo* and seek to reinforce them, but at the cost of abstaining from using

the same illicit, though potentially effective, measures employed by their adversaries. Alternatively, they may attempt to beat revisionist powers at their own game and adopt their tactics, but at the expense of joining them in undermining respect for the rule of law. Law-abiding States must therefore navigate a precarious course: they cannot afford to counter lawfare, hybrid and grey zone challenges harmful to their national interests with identical means without chipping away at the international rule of law.

This dilemma between normative/compliant and non-normative/non-compliant counteraction manifests itself in many guises. For example, in the cyber domain, it is the United Kingdom's position that the principle of sovereignty does not prohibit one State from interfering with the computer networks of another State where such interference falls below the level prohibited by the principle of non-intervention (Wright 2018). On this view, cyber interference to manipulate the electoral system of another State is prohibited, but cyber operations to steal private data are not. There is no reason to doubt that this position reflects the genuinely held view of Her Majesty's Government about the current state of international law. However, it is also safe to assume that this view is informed by a pragmatic calculation of risk and reward: the threat that low-level cyber interference poses to the United Kingdom and the benefit the country may derive from conducting or threatening to conduct such cyber operations against its competitors. Although in taking this position the United Kingdom decided against relying on international rules to protect its cyber interests, and instead opted for a non-normative approach, its National Cyber Security Centre subsequently accused Russia of acting 'in flagrant violation of international law' for engaging in cyber interference precisely of the kind that the Government determined was not prohibited by international law.[30] In the light of the Government's earlier position, this accusation lacks bite and smacks of double standards (see Biller and Schmitt 2018). The affair demonstrates that choosing brinkmanship over normative solutions, and *vice versa*, is not cost free.

The challenges posed by the instrumentalization of international law are complex and significant. They go to the heart of the relationship between law and power in international relations. It would be naïve, therefore, to believe that they can be resolved conclusively. Managing them and lessening their adverse impacts is a more realistic objective. Accordingly, *status quo* powers should aim to compete more effectively in the legal domain by defending the rule of law, deterring violations and rolling back revisionism. However, even this more modest goal requires a systematic and sustained effort. Such an effort, I suggest, should be based on two foundations.

30. National Cyber Security Centre, Reckless campaign of cyber attacks by Russian military intelligence service exposed, 4 October 2018, <https://www.ncsc.gov.uk/news/reckless-campaign-cyber-attacks-russian-military-intelligence-service-exposed>, accessed 7 January 2019.

The first step is to adopt a legal resilience perspective to guide policy at the strategic level. Resilience theory derives from multiple sources. One influential strand emerged in the field of ecology in the 1970s (Holling 1973). Over the years, resilience thinking has spread to other disciplines, including the social sciences and, to a lesser extent, law (see Humby 2014). Most of the resilience scholarship undertaken in the field of law is concerned with environmental law and related matters (see, for example, Demange 2012; Garmestani and Allen 2014; Benson 2015). By contrast, so far few attempts have been made to utilize the concept in the field of international conflict and security law. This is a missed opportunity, as adopting a legal resilience perspective promises several benefits.

Legal resilience is concerned with the resistance of legal systems to change and their capacity to adapt in response to disturbances. In essence, the aim of legal resilience theory is to understand how legal systems cope with internal and external shocks. Legal scholarship has followed other disciplines in distinguishing between two forms of resilience (see Ruhl 2010, 1375–1378). Engineering resilience refers to the capacity of a system to suffer disturbances whilst retaining its ability to return to an earlier stable state. Picture a branch twisted by the wind: can it spring back into shape or will it break? Ecological resilience, by contrast, refers to the capacity of a system to absorb the effects of disturbances through adaptation, whilst still retaining its original function and other core characteristics. If the branch breaks, will the tree grow a new one? Both forms of resilience describe the ability of a system to retain its original functionality and identity in response to disturbance, but one focuses on static coping mechanisms (resistance and recovery) and the other on dynamic strategies (adaptation). This distinction translates well into the present context, given that the capacity of international law to endure in the face of persistent breaches and its ability to adapt to the changing international environment are key areas of concern. The literature also distinguishes between two different dimensions of legal resilience (ibid, 1382). The first dimension pertains to the role that law plays in rendering other social or functional systems, for instance the economy or critical infrastructure, more resilient. The second is concerned with the resilience of the law itself. This distinction resonates well with the twin challenges posed by the instrumentalization of international law. From a resilience perspective, we may ask, first, what contribution international (or domestic) law can make towards rendering societies more resilient against the threats posed by hybrid warfare and grey zone conflicts and, second, what measures are required to make the international legal order more resilient against violations and subversion of its norms, institutions and processes.

The first benefit of adopting a legal resilience perspective, therefore, is analytical. It shines a

spotlight on the capacity of international law to cope with disturbances. This focuses attention on law's vulnerabilities and coping mechanisms. It also highlights that there is a difference between using international law in pursuit of societal resilience and increasing the resilience of the international legal order as such. The second benefit is for the formulation of policy. Resilience is not an absolute virtue. Few would wish to see the undesirable features of a social system become resilient to change. Sometimes law is an impediment to social progress, justice or peace and ought to change. However, for States that seek to safeguard their strategic position and the international rule of law against the hostile instrumentalization of international law, legal resilience is a value worth pursuing. A legal resilience perspective encourages States to make better use of international law to strengthen their national resilience and to bolster the capacity of international rules, institutions and processes to withstand their hostile instrumentalization by adversaries. Legal resilience is, essentially, a *status quo* strategy. Finally, adopting a legal resilience perspective should bring different expert communities and their notions of resilience (see Shea 2016; Brinkel 2017) closer together by underscoring that resilience has a legal dimension and international law a resilience aspect (see also Beichler et al 2014).

An operational mindset

If the use of international law for strategic ends teaches one lesson, it is that international law is a dynamic system composed not only of rules, but also of legal actors, decisions, institutions, claims and counter-claims (cf. Higgins 1994, 2). This dynamic nature of international law is often overlooked. Yet there can be little hope of successfully countering the hostile instrumentalization of international law unless the international legal order is treated as a sphere wherein actors engage in legal manoeuvres and counter-manoeuvres. This calls for the adoption of an operational mindset by legal practitioners and their clients. The point may be illustrated with reference to the role of legal advice in the armed forces.

First, in view of its nature as a web of rules, institutions and processes that shapes the conduct of military operations, law should be formally recognized in military doctrine and strategic thinking as a distinct environment within the overall operating environment. NATO defines the operating environment as 'a composite of the conditions, circumstances and influences that affect the employment of capabilities and bear on the decisions of the commander'.[31] Although the operating environment is understood to encompass all relevant physical and non-physical areas and factors, doctrine tends to focus on its political, military, economic, social, information and infrastructure

31. NATO, *Allied Joint Doctrine*, AJP-01, February 2017 (edn 5, ver 1).

(PMESII) dimensions, without specifically including law on this list.[32] Instead, international law is treated outside this conceptual framework in its own right.[33] Although this is to be welcomed to the extent that it acknowledges the distinct characteristics and special significance of the law, it nevertheless compartmentalizes legal affairs by isolating them, both conceptually and in practice, from other environments. Formally recognizing law as a dimension of the overall operating environment would remedy this.

Second, international law should be treated as a specific instrument and medium through which strategic and operational objectives may be pursued. Western military doctrine adopts a holistic and effects-based approach to targeting which is meant to consider 'all available actions and potential effects set against the operations objective'.[34] Despite this supposedly full-spectrum approach, law is not recognized in express terms as a source of available actions and potential effects. Instead, legal considerations usually enter the targeting process in the guise of external constraints on targeting decisions and action.[35] This perspective is too narrow. It fails to appreciate law's potential to achieve operational effects and the fact that operations sometimes pursue legal effects, as do freedom of navigation operations, for instance. Recognizing international law as an operating environment implies that it is a space in and through which effects may be achieved. Conceiving of law in these terms permits incorporating legal effects into the joint targeting process, which in turn provides a framework for undertaking information activities, fires and manoeuvres through legal means and to coordinate, synchronize and integrate these with other targeting activities—*and* to do so more consistently, effectively and subject to appropriate oversight and limitations.

Third, putting an operational mindset into practice requires sound doctrine, effective processes and adequate resources. At the heart of these requirements lies a recalibration of the way in which legal expertise is employed. Legal experts and advisors carry out a wide range of functions that include advising, litigating, negotiating and counselling. Their mandate may even involve contributing to policy planning and development (Hill 2016, 224). Whilst achieving legal effects may be implicit in most of these roles, it is seldom confirmed as an explicit responsibility. In the military context, for example, the legal advisor's principal duty is defined as assisting the commander in exploiting operational options (Ministry of Defence 2019, § 5.1). Whereas legal advisors are expected to carry out their duties proactively, their job description fails to specifically

32. For example, NATO, *Allied Joint Doctrine for the Conduct of Operations*, §§ 0410–0414, AJP-3 (B), March 2011.

33. NATO, *Allied Joint Doctrine*, §§ 1.13–1.19, AJP-01, February 2017 (edn 5, ver 1).

34. NATO, *Allied Joint Doctrine for Joint Targeting*, § 0117, AJP-3.9, April 2016 (edn A, ver 1).

35. Ibid, § 0119.

charge them with the task of manoeuvring in the legal environment to achieve legal and operational effects. Both the law and legal expertise thus remain underutilized (see also Trachtman 2016, 281). To rectify this, it should be recognized that the role of legal experts is not simply to provide *legal support to operations*, but also to undertake *legal operations* (cf. Department of the Army 1991). This shift in perspective must be embedded in doctrine. It also requires robust procedures, guidelines and oversight. Inevitably, engaging in legal operations in a more deliberate fashion raises questions about the dividing line between the legitimate and illegitimate use of law. Enabling legal operations also requires closer collaboration with and support from other expert communities. In an environment increasingly saturated with legal misinformation and fake legal news, particularly close attention must be paid to the interplay between legal expertise and strategic communications (generally, see Patrikarakos 2017; Singer and Brooking 2018).

Conclusion

Following the end of the Second World War, Great Britain peacefully relinquished control over vast stretches of its colonial territories and their 800 million inhabitants. Yet, as Thomas Franck (1983) noted, it was prepared to fight a war with Argentina over the Falkland Islands, an area of approximately 4,700 square miles and a population of less than 2,000. The difference, Franck suggests, lies in the legal principle at play: Britain deemed the Argentine invasion a violation of its territorial sovereignty. The Falklands War illustrates both the weakness of international law and its power to motivate and justify strategic action.

International law is torn between its function as an instrument for ordering international society in a principled manner and its inherent vulnerability to be diverted for partisan ends. In this paper, I have argued that it is this dynamic which sustains lawfare and the various other legal tactics and techniques that characterize hybrid warfare and grey zone conflicts. From a legal perspective, the key insight to be drawn from these concepts is the rampant instrumentalization of international law for strategic ends. That the international legal system is an arena of strategic competition is hardly news, but this point has far-reaching implications for theory and practice. A naïve legalism that puts its faith in rules divorced from considerations of power is headed towards disappointment or worse. However, a narrow realism that fails to appreciate the unique function of law both as an instrument of social order and as a platform for a principled critique of power, and thus as an object of strategic contestation, is headed towards the same fate. Turning to practice, if the world has taken a turn towards a more antagonistic international law, as seems to be the case, then law-abiding societies must come to realize that the hostile instrumentalization of international law may substantially undermine their interests and severely corrode the international legal order.

Not only that, but they must also take concrete steps to counter these challenges. I have argued that such efforts should be based on two foundations: a legal resilience perspective and an operational mindset. Legal resilience highlights the contribution that international law can make to render societies more resilient against hybrid and grey zone threats *and* that the international rule of law itself must be strengthened to withstand the kind of subversion associated with these tactics. A legal resilience perspective thus offers diverse stakeholders a common framework for analysis and a shared set of objectives at the strategic level to guide them in countering the legal challenges arising in the current security environment. In addition, adopting an operational mindset provides legal practitioners and the clients they serve with an opportunity to recalibrate the way they use legal expertise. By treating law as an operating environment, they may develop more adequate capabilities to engage in legal operations and manoeuvre more deliberately through the legal space.

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Hybrid Warfare, Law and the Fulda Gap

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I. INTRODUCTION

In a novel published last year, General Sir Richard Shirreff tells the story of Russia's war with NATO.[1] Entitled *2017 War with Russia*, the book chronicles the invasion of the three Baltic nations

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1. RICHARD SHIRREFF, 2017 WAR WITH RUSSIA: AN URGENT WARNING FROM SENIOR MILITARY COMMAND

by their Eastern neighbor. The story begins with the abduction of a group of American soldiers in Ukraine. Events unfold quickly from there. A precarious ceasefire in Ukraine collapses as the Kremlin's propaganda machine steps into full gear. Two United States F-16s are shot down and Russian forces pour into Ukraine. Fearing an invasion, the three Baltic states invoke the collective defense clause of the North Atlantic Treaty,[2] but bitter disagreements among the nations condemn the North Atlantic Council to inaction. Soon enough, Latvia falls victim to a sophisticated cyber-attack, followed by the bombardment of Lielvārde air base and the destruction of Allied vessels moored in Riga harbor. The war reaches a turning point when a Russian submarine sinks the British aircraft carrier *Queen Elizabeth*. Shaken by the incident, NATO rediscovers its unity and resolve. With Russia distracted by a mounting insurgency in the Baltics, Allied forces led by the United States launch a daring counter-attack on Kaliningrad and Russia is defeated.

Coming from a former Deputy Supreme Commander Allied Forces Europe (DSACEUR), *2017 War with Russia* is more than just a retired general's first attempt as a novelist. The book is meant to alert us to the real possibility of war with Russia.[3] As such, it is not entirely a work of fiction, as Sir Richard explains, but an exercise in "fact-based prediction".[4] This literary genre—half Tom Clancy, half autobiography—serves its purpose well. It enables Sir Richard to sketch a fictional scenario that provides a narrative backdrop for a scathing critique of the lack of strategic forethought that he feels has befallen the West.[5]

For better or for worse, law does not feature prominently in Sir Richard's story.[6] Deterring a land power requires more armor,[7] not more lawyers. A legal advisor armed with a treaty is not

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(2016). For two insightful reviews, see Martin Zapfe, *2017: War with Russia: An Urgent Warning from Senior Military Command*, 161 RUSI J. 86 (2016) and Andrew Monaghan, *2017: War With Russia. An Urgent Warning from Senior Military Command*, The Oxford Changing Character of War Programme (June 10, 2016), http://www.ccw.ox.ac.uk/news/2016/6/10/book-review-2017-war-with-russia-an-urgent-warning-from-senior-military-command-by-andrew-monaghan.

2. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 244.

3. SHIREFF, *supra* note 1, at 2.

4. *Id.* at 14.

5. Sir Richard is not alone in voicing such concerns. A series of wargames conducted by the RAND Corporation suggest that "NATO's current posture is inadequate to defend the Baltic States from a plausible Russian conventional attack". See DAVID A SHLAPAK & MICHAEL JOHNSON, REINFORCING DETERRENCE ON NATO'S EASTERN FLANK: WARGAMING THE DEFENSE OF THE BALTICS 4 (2016).

6. The brother of one of the protagonists is a first year law student, but he is killed in an air strike. One hopes it was coincidence. See SHIREFF, *supra* note 1, at 188.

7. R. REED ANDERSON ET AL., STRATEGIC LANDPOWER AND A RESURGENT RUSSIA: AN OPERATIONAL APPROACH TO DETERRENCE 96–101 (2016). However, land capabilities alone do not suffice. See Stephan

going to stop a tank, even if some commanders might be inclined to give it a shot. One of the few passages in the storyline where law does make an appearance is the Latvian ambassador's speech in the North Atlantic Council. Having noted that Russia is applying new techniques of warfare "designed to undermine the integrity of Latvia before there is any need to cross our boundaries with an invasion force",[8] the ambassador makes the following observations:

> The very rules of war have changed and what we are witnessing in Latvia is the role of non-military means of achieving political and strategic goals; war, as it were, by other means. The advantages we in Latvia enjoy as a result of NATO's unconditional guarantee of collective defence are being nullified by the sophisticated application of hybrid or asymmetric techniques by Russia, techniques that we saw most recently in the invasion of eastern Ukraine and Crimea three years ago.[9]

This passage is instructive. Although the term "hybrid" appears only twice in the book, once in the paragraph quoted above and once with reference to a car, Sir Richard's scenario is squarely based on the hybrid warfare paradigm that has become fashionable in military parlance and strategic discourse of late.[10] The Latvian ambassador puts his finger on the pulse when he admits to his worst fear: that Russia's hybrid warfare techniques might nullify the benefits that the North Atlantic Treaty promises to his country. Russian tanks heading for Riga would not only cross the Latvian border, but also Article 5 of the North Atlantic Treaty, the legal threshold that triggers the duty of all members of the Alliance to come to each other's assistance.[11] Any Russian leader shrewd

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Frühling & Guillaume Lasconjarias, *NATO, A2/AD and the Kaliningrad Challenge*, 58 SURVIVAL 95 (2016).

8. SHIREFF, *supra* note 1, 120.

9. *Id.* at 120–21.

10. For book-length treatments of hybrid warfare, see e.g. NATO'S RESPONSE TO HYBIRD THREATS (Guillaume Lasconjarias & Jeffrey A. Larsen eds., 2015); COUNTERING HYBRID THREATS: LESSONS LEARNED FROM UKRAINE (Niculae Iancu ET AL. eds., 2016); HYBRID WARFARE: FIGHTING COMPLEX OPPONENTS FROM THE ANCIENT WORLD TO THE PRESENT (Williamson Murray & Peter R. Mansoor eds., 2012). See also *infra* notes 25–46 and the accompanying text.

11. North Atlantic Treaty, *supra* note 2, art. 5 provides as follows:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
>
> Any such armed attack and all measures taken as a result thereof shall immediately be reported to the

enough to seek the counsel of his legal advisors would recognize that this threshold constitutes a legal Rubicon. Just as the sinking of the *Queen Elizabeth* hardened resistance against Russia in Sir Richard's story, so would triggering Article 5 furnish the Allies with a legal mandate, in fact a mutual duty, to stand up to Russian aggression. If you can seize the military initiative through other means, why incur this cost by sending in the tanks first or by sending them in at all? In the legal domain, hybrid warfare represents the Fulda Gap that leads around the inaccessible hills of the North Atlantic Treaty.[12]

The lesson implicit in Sir Richard's parable is that it is time to start paying attention to the law when your adversary is using it as a force multiplier. The purpose of this chapter is to reinforce this message by identifying the legal dynamics of hybrid warfare. My central argument is that law constitutes an integral and critical element of hybrid warfare. Law conditions how we conceive of and conduct war.[13] By drawing a line between war and peace and between permissible and impermissible uses of force, the international legal framework governing warfare stabilizes mutual expectations among the warring parties as to their future behavior on the battlefield.[14] Hybrid adversaries exploit this stabilizing function of the law in order to gain a military advantage over their opponents. They do so by failing to meet the relevant normative expectations, using a range of means including non-compliance with the applicable rules, instrumentalizing legal thresholds and by taking advantage of the structural weaknesses of the international legal order, whilst counting upon the continued adherence of their opponents to these expectations. The overall aim of hybrid adversaries is to create and maintain an asymmetrical legal environment that favors their own operations and disadvantages those of their opponents. This poses two principal challenges, one specific and one systemic in nature. Law is a domain of warfare. Nations facing hybrid threats should therefore prepare to contest this domain and strengthen their national and collective means to do so. At the same time, the instrumentalization of law poses profound challenges to the post-Second World War international legal order. Nations committed to that order cannot afford to

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Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

12. Cf. HUGH FARINGDON, CONFRONTATION: THE STRATEGIC GEOGRAPHY OF NATO AND THE WARSAW PACT 306–07 (1986).

13. Nathaniel Berman, *Privileging Combat: Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 4–5 (2004–2005). See also DAVID KENNEDY, OF WAR AND LAW (2006); MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR 65 (1991) ("war without law is not merely a monstrosity but an impossibility"); Ian Hurd, *The Permissive Power of the Ban on War*, 2 EUR. J. INT'L SECURITY 1 (2017).

14. Cf. NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 142–62 (2004) (the function of law as a distinct social system is to stabilize normative expectations as to what future behavior will and will not meet with social approval).

respond to hybrid threats by adopting the same means and methods as their hybrid adversaries without contributing to its decay.[15]

II. War By Other Means

Over the last ten years, military and political leaders have widely adopted the language of hybrid warfare. In 2009, former Secretary of Defense Robert Gates warned that the United States should prepare for hybrid and other complex forms of warfare.[16] General H. R. McMaster used the term to describe the threats facing the United States whilst overseeing the publication of the Army Capstone Concept of 2009.[17] A few years later, General Raymond T. Odierno praised the advances made in "incorporating the complexity of hybrid warfare into our training for deploying forces".[18]

The concept gained renewed currency following Russia's annexation of Crimea. Speaking in July 2014, former NATO Secretary General Anders Fogh Rasmussen branded Russia's intervention as an example of hybrid warfare, defining the latter as "a combination of traditional military means and more sophisticated covert operations".[19] While several commentators have pointed out that the hybrid warfare terminology is alien to Russian military doctrine,[20] the phrase has been used, some might think paradoxically, by Russian military leaders to describe Western approaches to war.[21] As these mutual accusations demonstrate, the meaning of the term remains

15. Cf. Frank G. Hoffman, *Further Thoughts on Hybrid Threats*, Small Wars Journal (Mar. 3, 2009, 5:37 AM), http://smallwarsjournal.com/mag/docs-temp/189-hoffman.pdf ("Hybrid threats … are the problem, not an operating concept that presents a solution.").
16. Robert M. Gates, *A Balanced Strategy: Reprogramming the Pentagon for a New Age Essay*, 88 For. Aff. 28, 33 (2009).
17. John Harlow, *Army Capstone Concept Balances Winning Today's Wars with Preparing for Future Conflict*, TRADOC News Service (Aug. 24, 2009), https://www.army.mil/article/26508/army-capstone-concept-balances-winning-todays-wars-with-preparing-for-future-conflict/. See Department of the Army, The Army Capstone Concept 15 and 47, TRADOC Pam 525-3-0 (2009). For the most recent edition, see Department of the Army, The U.S. Army Capstone Concept 8 and 24, TRADOC Pam 525-3-0 (2012).
18. Raymond T. Odierno, *The U.S. Army in a Time of Transition: Building a Flexible Force Comment*, 91 For. Aff. 7, 10–11 (2012).
19. Anders Fogh Rasmussen, NATO Secretary General, America, Europe and the Pacific, Speech at the Marines' Memorial Club Hotel, San Francisco (July 9, 2014), http://www.nato.int/cps/en/natohq/opinions_111659.htm.
20. E.g. Kier Giles, Russia's 'New' Tools for Confronting the West: Continuity and Innovation in Moscow's Exercise of Power 8–11 (2016).
21. E.g. Valery Gerasimov, *The Syrian Experience*, Military Industrial Courier (Mar. 9, 2016), http://vpk-news.ru/articles/29579 [in Russian]. For an unofficial translation, see Jānis Bērziņš, *Gerasimov, the Experience in Syria, and "Hybrid" Warfare*, Strategy and Economics Blog (Mar. 14, 2016), http://blog.berzins.eu/gerasimov-

elusive and contested. To assess its analytical value, we must turn to its evolution in strategic thinking and doctrine.

A. The concept of hybrid warfare

Modern armed conflicts pitch nation states against other states and against non-state actors. The contemporary battlespace thus harbors the potential for both symmetrical and asymmetrical engagements.[22] However, technological progress and socio-economic developments have gradually blurred the line between the means and methods of warfare adopted by symmetrical and asymmetrical adversaries. Technology has increased the lethality, visibility and geographical reach of non-state actors, who have shown themselves capable of effectively engaging states with irregular and, in some cases, more conventional capabilities.[23] Meanwhile, Russia has demonstrated how states may exploit the vulnerabilities of their peer competitors by employing irregular tactics and information warfare.[24] Just as non-state actors are becoming increasingly capable at the top end of armed conflict, states seem to be (re)discovering the utility of the lower end of the spectrum.

The concept of hybrid warfare, as developed by its early proponents, was meant to express

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syria/. For analysis, see Charles K. Bartles, *Getting Gerasimov Right*, 96 MIL. REV. 30 (2016); Roger N. McDermott, *Does Russia Have a Gerasimov Doctrine?*, 46 PARAMETERS 97 (2016); Timothy Thomas, *The Evolution of Russian Military Thought: Integrating Hybrid, New-Generation, and New-Type Thinking*, 29 J. SLAVIC MIL. STUD. 554 (2016).

22. Generally, see HERFRIED MÜNKLER, THE NEW WARS (2005). It is of course true that all conflicts are asymmetrical in the sense that the capabilities of no two belligerents are perfectly matched (to this effect, see e.g. HEW STRACHAN, THE DIRECTION OF WAR: CONTEMPORARY STRATEGY IN HISTORICAL PERSPECTIVE 82 (2013)). However, the fact remains that actors with radically different capabilities, political organization, strategic objectives and legal standing may adopt radically different means and methods of warfare. Cf. DAVID KILCULLEN, THE ACCIDENTAL GUERRILLA: FIGHTING SMALL WARS IN THE MIDST OF A BIG ONE 22–27 (2009). Symmetry and asymmetry are matters of degree.

23. The Second Lebanon War offers a leading example. See STEPHEN D. BIDDLE & JEFFREY ALLAN FRIEDMAN, THE 2006 LEBANON CAMPAIGN AND THE FUTURE OF WARFARE: IMPLICATIONS FOR ARMY AND DEFENSE POLICY (2008); SCOTT C. FARQUHAR, BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD (2009). But compare Jan Angstrom, *Escalation, Emulation, and the Failure of Hybrid Warfare in Afghanistan*, STUD. CONFLICT & TERRORISM 1, 8–15 (2016).

24. See e.g. ULRIK FRANKE, WAR BY NON-MILITARY MEANS: UNDERSTANDING RUSSIAN INFORMATION WARFARE (2015); KIER GILES, HANDBOOK OF RUSSIAN INFORMATION WARFARE (2016); Rod Thornton & Manos Karagiannis, *The Russian Threat to the Baltic States: The Problems of Shaping Local Defense Mechanisms*, 29 J. SLAVIC MIL. STUD. 331 (2016); Timothy Thomas, *Russia's Information Warfare Strategy: Can the Nation Cope in Future Conflicts?*, 27 J. SLAVIC MIL. STUD. 101 (2014). For further studies on the subject, visit the home page of the NATO Strategic Communications Centre of Excellence at http://www.stratcomcoe.org/.

the idea that symmetrical and asymmetrical forms of warfare are likely to converge, rather than just co-exist in parallel. Writing in 2005, General James N. Mattis and Lieutenant Colonel (retired) Frank Hofmann argued that we should expect future adversaries to combine conventional and irregular techniques in an "unprecedented synthesis" best described as a hybrid way of war.[25] In later publications, Hoffman identified the convergence between different domains and modes of warfare, including the physical and psychological, the kinetic and non-kinetic, the military and non-military, as the essence of this hybrid approach.[26] According to Hoffman, future adversaries will blend conventional warfare, irregular tactics, terrorism and criminality in their operations and thereby fuse the "lethality of state conflict with the fanatical and protracted fervor of irregular warfare".[27] The hallmark of hybridity, therefore, is the combined use to different modes of warfare to achieve synergistic effects in a single battlespace.[28] The majority of commentators embracing the term followed Hoffman's lead and adopted similar definitions of hybrid war.[29] The concept gained further traction following Russia's intervention in Ukraine.[30] Russia's integrated use of a

25. James N. Mattis & Frank G. Hoffman, *Future Warfare: The Rise of Hybrid Wars*, Issue 131 PROCEEDINGS MAG. 18, 19 (2005). See also NATHAN FREIER, STRATEGIC COMPETITION AND RESISTANCE IN THE 21ST CENTURY: IRREGULAR, CATASTROPHIC, TRADITIONAL, AND HYBRID CHALLENGES IN CONTEXT (2007) (hybrid challenges, which combine traditional, irregular, catastrophic or disruptive challenges, are the norm). For earlier uses of the term, see e.g. Robert G. Walker, SPEC FI: The United States Marine Corps and Special Operations (Dec. 1, 1998) (unpublised MA dissertation, Monterey, California, Naval Postgraduate School) (http://hdl.handle.net/10945/8989).

26. Frank G. Hoffman, *Hybrid Warfare and Challenges*, 52 JOINT FORCE Q. 34, 34 (2009).

27. *Id.* at 34–36. See also FRANK G. HOFFMAN, CONFLICT IN THE 21ST CENTURY: THE RISE OF HYBRID WARFARE 28–30 (2007); Frank G. Hoffman, *Hybrid Threats: Reconceptualizing the Evolving Character of Modern Conflict*, STRATEGIC FOR. 1, 5–6 (2009).

28. HOFFMAN, CONFLICT IN THE 21ST CENTURY, *supra* note 27, at 29.

29. E.g. TIMOTHY MCCULLOH & RICHARD JOHNSON, HYBRID WARFARE 17 (2013) (defining hybrid war theory as form of warfare where one of the parties combines all available resources to produce synergistic effects against a conventionally-based opponent); John J. McCuen, *Hybrid Wars*, 88 MIL. REV. 107, 108 (2008) (defining hybrid wars as a particular combination of symmetric and asymmetric war); Josef Schroefl & Stuart J. Kaufman, *Hybrid Actors, Tactical Variety: Rethinking Asymmetric and Hybrid War*, 37 STUD. CONFLICT & TERRORISM 862 (2014) (accepting Hoffman's definition, but proposing to deepen it by drawing attention to the diverse range of actors involved in hybrid warfare); Rod Thornton, *The Changing Nature of Modern Warfare*, 160 RUSI J. 40, 42 (2015) ("integration is at the heart of hybrid warfare").

30. E.g. John R. Davis Jr., *Continued Evolution of Hybrid Threats: The Russian Hybrid Threat Construct and the Need for Innovation*, 28 THREE SWORDS MAG. 19 (2015); Hugo Miguel Moutinho Fernandes, *The New Wars: The Challenge of Hybrid Warfare*, 4 REVISTA DE CIÊNCIAS MILITARES 41 (2016); Jurij Hajduk & Tomasz Stępniewski, *Russia's Hybrid War with Ukraine: Determinants, Instruments, Accomplishments and Challenges*, 2 STUDIA EUROPEJSKIE 37

broad range of means and methods, including political subversion, the positioning of conventional forces, support for separatist groups, economic pressure and information operations, struck many as a masterclass in hybrid warfare.

Notwithstanding its popularity in some quarters, the hybrid warfare concept has received a mixed reception in the literature. Commentators remain divided about its value as a conceptual lens for assessing current and future security threats. Those critical of the concept point out that the fusion of different modes of conflict is not a novelty, but is "as old as warfare itself".[31] The hybrid warfare concept is said to add little to the existing lexicon of strategic thought.[32] Sceptics further lament that the concept has an "elastic quality"[33] which has allowed it to become something of a "catch-all phrase".[34] At best, this has compromised its analytical utility.[35] At worst, it has turned it into an "orthodox label" that inhibits creative thought.[36] Many commentators also express doubts about its utility to explain and assist in countering the Russian approach to warfighting. Hybrid warfare theory is said to overestimate Russian capabilities and intentions,[37] mistakenly elevate its operations in Ukraine "to the level of a coherent or preconceived doctrine"[38] and anchor

(2016); Alexander Lanoszka, *Russian Hybrid Warfare and Extended Deterrence in Eastern Europe*, 92 INT'L. AFF. 175 (2016); ANDRÁS RÁCZ, RUSSIA'S HYBRID WAR IN UKRAINE: BREAKING THE ENEMY'S ABILITY TO RESIST (2015); Philip C. Ulrich, *NATO And The Challenge Of "Hybrid Warfare"*, 5 ATLANTIC VOICES 2 (2015).

31. MICHAEL KOFMAN & MATTHEW ROJANSKY, A CLOSER LOOK AT RUSSIA'S 'HYBRID WAR' 2 (2015). See also ANTULIO J. ECHEVARRIA II, OPERATING IN THE GRAY ZONE: AN ALTERNATIVE PARADIGM FOR U.S. MILITARY STRATEGY 5–12 (2016); GILES, *supra* note 20, at 8–9; Russell W. Glenn, *Thoughts on "Hybrid" Conflict*, Small Wars Journal (Mar. 2, 2009, 6:40 PM), http://smallwarsjournal.com/blog/journal/docs-temp/188-glenn.pdf?q=mag/docs-temp/188-glenn.pdf.
32. Jyri Raitasalo, *Hybrid Warfare: Where's the Beef?*, War on the Rocks Blog (Apr. 23, 2015), https://warontherocks.com/2015/04/hybrid-warfare-wheres-the-beef/.
33. Jan Angstrom, *Escalation, Emulation, and the Failure of Hybrid Warfare in Afghanistan*, STUD. CONFLICT & TERRORISM 1, 5 (2016).
34. HEW STRACHAN, THE DIRECTION OF WAR: CONTEMPORARY STRATEGY IN HISTORICAL PERSPECTIVE 82 (2013); Samuel Charap, *The Ghost of Hybrid War*, 57 SURVIVAL 51, 51 (2015); Bettina Renz, *Russia and 'Hybrid Warfare'*, 22 CONTEMP. POL. 283, 296 (2016).
35. KOFMAN & ROJANSKY, *supra* note 31, at 2.
36. Andrew Monaghan, *The 'War' in Russia's 'Hybrid Warfare'*, 45 PARAMETERS 65, 72 (2015). See also Renz, *supra* note 34, at 297.
37. Lawrence Freedman, *Ukraine and the Art of Limited War*, 56 SURVIVAL 7 (2014) ("the advantages of hybrid warfare have been less evident than often claimed"). Commentators also dispute the novelty of Russia's methods: e.g. Mark Galeotti, *Hybrid, Ambiguous, and Non-linear? How New is Russia's 'New Way of War'?*, 27 SMALL WARS & INSURGENCIES 282, 293–96 (2016).
38. KOFMAN & ROJANSKY, *supra* note 31, at 3. See also Charap, *supra* note 34, 53–56 ("there is no evidence to

"analysis to what took place in February 2014 in Crimea",[39] whilst ignoring the unique features that contributed to the success of that intervention.

The hybrid warfare concept offers neither a grand theory of 21st century warfare nor does it lay open Russia's strategic playbook. Expecting it to deliver either of these two prizes is asking for trouble.[40] Not every conflict hereafter will involve hybrid threats and adversaries, nor should one expect Russia to simply replay the Crimean act in other theatres of war. The utility of the concept is more limited. The distinction between regular and irregular forms of warfare has never been watertight. Understood as the intermingling of two ideal types of war,[41] hybridity has a long tradition and is not a novel phenomenon *per se*.[42] But what is new, by definition, is its manifestation on the contemporary battlefield.[43] Whilst even the Peloponnesian War had its share of hybrid activity,[44] this did not involve troll farms, 24-hour news channels and anti-aircraft weapon systems. There is, therefore, an element of novelty in our present situation. In any event, "a threat need not be new to be dangerous", as Dan Altman noted.[45] Under these circumstances, the value of the hybrid warfare concept is twofold. It serves as a reminder that threats and adversaries which combine symmetrical and asymmetrical modes of warfare are a prominent feature of our operating environment. It can also serve as a starting point for identifying and addressing the specific

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suggest the emergence of a hybrid-war doctrine"); Roger N. McDermott, *Does Russia Have a Gerasimov Doctrine?*, 46 PARAMETERS 97, 103–05 (2016) (questioning whether Russia implemented a preconceived operational model in Donbas); Renz, *supra* note 34, at 294 (hybrid warfare theory "imbues the Russian political leadership with an unrealistic degree of strategic prowess"). See also Kęstutis Kilinskas, *Hybrid Warfare: An Orientating or Misleading Concept in Analysing Russia's Military Actions in Ukraine?*, 14 LITHUANIAN ANN. STRATEGIC REV. 139 (2016) (Russia's action in Crimea only partly matches the criteria of Hoffman's hybrid warfare concept).

39. Monaghan, *supra* note 36, at 68.

40. Cf. Michael Kofman, *Russian Hybrid Warfare and Other Dark Arts*, War on the Rocks Blog (Mar. 11, 2016), https://warontherocks.com/2016/03/russian-hybrid-warfare-and-other-dark-arts/; Michael Kofman, *The Moscow School of Hard Knocks: Key Pillars of Russian Strategy*, War on the Rocks Blog (Jan. 17, 2017), https://warontherocks.com/2017/01/the-moscow-school-of-hard-knocks-key-pillars-of-russian-strategy/.

41. Élie Tenenbaum, *Hybrid Warfare in the Strategic Spectrum: An Historical Assessment*, *in* NATO'S RESPONSE TO HYBIRD THREATS 95 (Guillaume Lasconjarias & Jeffrey A. Larsen eds., 2015).

42. The point is recalled repeatedly by the contributors in Iancu ET AL., *supra* note 10. For historical examples, see Murray & Mansoor, *supra* note 10.

43. Cf. Galeotti, *supra* note 37, at 297.

44. See Peter R. Mansoor, *Hybrid Warfare in History*, *in* HYBRID WARFARE: FIGHTING COMPLEX OPPONENTS FROM THE ANCIENT WORLD TO THE PRESENT, 3–4 (Williamson Murray & Peter R. Mansoor eds., 2012).

45. Dan Altman, *The Long History of "Green Men" Tactics — And How They Were Defeated*, War on the Rocks Blog (Mar. 17, 2016), https://warontherocks.com/2016/03/the-long-history-of-green-men-tactics-and-how-they-were-defeated/.

challenges that such threats and adversaries present.[46]

From a legal perspective, the hybrid warfare concept draws attention to the implications that the fusion of different modes of warfare entails for international law. This is mostly uncharted territory for lawyers and for this reason alone merits study. The hybrid warfare concept thus provides a relevant, and potentially useful, analytical framework for assessing, first, the relationship between the international legal regime governing war and contemporary forms of conflict and, second, the legal challenges posed by specific threats and adversaries which combine symmetrical and asymmetrical modes of warfare.

B. Hybrid warfare in doctrine

The hybrid warfare concept has quickly found its way, be it somewhat erratically, into national security publications and military doctrine. In the United States, successive iterations of the Quadrennial Defense Review[47] and the Army Capstone Concept[48] refer to hybrid threats, enemies and contingencies. The National Intelligence Council's assessment of global trends published in 2012 suggest that the evolution of "hybrid adversaries" adds a new dimension to the competition between state-based military operations and irregular warfighting.[49] None of these texts offer detailed definitions of hybridity. Plugging this gap, Army Doctrine Reference Publication 3-0 describes a "hybrid threat" as "the diverse and dynamic combination of regular forces, irregular forces, terrorist forces, or criminal elements unified to achieve mutually benefitting threat effects."[50] In the United Kingdom, the now superseded Future Character of Conflict paper published by the Ministry of Defence notes that "future conflict will be increasingly hybrid in

46. *Countering Hybrid Threats: Challenges for the West*, 20 STRATEGIC COMMENTS x, x (2014) ("The introduction of hybrid warfare as a concept, albeit a vague one, was therefore useful in nudging military strategists – as well as officials and academics – to consider more flexible and effective responses"); Bastian Giegerich, *Hybrid Warfare and the Changing Character of Conflict*, 15 CONNECTIONS 65, 68 (2016) (hybrid warfare "can serve as a useful construct to think through the capabilities to prevent and counter certain contemporary challenges"). See also Monaghan, *supra* note 36, at 68; Renz, *supra* note 34, at 297. For examples of such work, see Christopher O. Bowers, *Identifying Emerging Hybrid Adversaries*, 42 PARAMETERS 39 (2012); Elizabeth Oren, *A Dilemma of Principles: The Challenges of Hybrid Warfare From a NATO Perspective*, 2 SPECIAL OPERATIONS J. 58 (2016).

47. DEPARTMENT OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 7 and 15 (2010); DEPARTMENT OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT VII (2014).

48. DEPARTMENT OF THE ARMY, THE ARMY CAPSTONE CONCEPT 15 and 47, TRADOC Pam 525-3-0 (2009); DEPARTMENT OF THE ARMY, THE U.S. ARMY CAPSTONE CONCEPT 8 and 24, TRADOC Pam 525-3-0 (2012).

49. NATIONAL INTELLIGENCE COUNCIL, GLOBAL TRENDS 2030: ALTERNATIVE WORLDS 69 (2012).

50. DEPARTMENT OF THE ARMY, ARMY DOCTRINE REFERENCE PUBLICATION 3-0, OPERATIONS ¶ 1-15 (2016).

character".[51] The paper proceeds to define "hybrid threats" as the combination of conventional, irregular and high-end asymmetric threats in the same time and space.[52]

While the hybrid warfare concept evidently had some impact on military doctrine at the national level, it proved itself more influential on the international stage. In May 2008, NATO's Allied Command Transformation, at the time under the command of General Mattis, launched a "Potential Futures" project to identify plausible future scenarios that could inform debates about the role and missions of the military.[53] Hybrid threats feature prominently in the project's Final Report,[54] which warns that the "risks and threats to the Alliance's territories, populations and forces will be hybrid in nature: an interconnected, unpredictable mix of traditional warfare, irregular warfare, terrorism and organised crime."[55] Building on the Report's findings, the following year NATO's two strategic commands prepared a joined input to a NATO capstone concept for the Military Contribution to Countering Hybrid Threats (MCCHT).[56] The purpose of the MCCHT concept was to outline the challenges posed by hybrid threats and to provide an initial framework for countering them. The concept defines hybrid threats as "those posed by adversaries, with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objectives."[57] The document notes that although such threats are not new, technological and social enablers may render them more challenging than at any previous juncture.[58] In parallel to this development, a reference to hybrid threats was incorporated into AJP-01(D), Allied Joint Doctrine, which sets out the keystone doctrine for the planning, execution and support of Allied joint operations.[59] The document lists hybrid threats among the factors that will affect the future military balance in an increasingly dynamic and complex strategic environment:

> Evidence suggests that there is likely to be a further blurring of the boundaries between state and non-state actors (such as insurgents, terrorists and criminals) and NATO may

51. UK MINISTRY OF DEFENCE, FUTURE CHARACTER OF CONFLICT 1 (2009).
52. *Id.* at 13.
53. See Allied Command Transformation, *Multiple Futures Homepage* (2008), http://www.act.nato.int/multiplefutures.
54. ALLIED COMMAND TRANSFORMATION, MULTIPLE FUTURES PROJECT: NAVIGATING TOWARDS 2030 (2009).
55. *Id.* at 33.
56. Supreme Allied Commander, Europe & Supreme Allied Commander, Transformation, Bi-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats, 1500/CPPCAM/FCR/10-270038 & 5000 FXX 0100/TT-6051/Ser: NU0040 (Aug. 25, 2010).
57. *Id.* at 2.
58. *Id.* at 3.
59. North Atlantic Treaty Organization, AJP-01(D), Allied Joint Doctrine (Dec. 2010).

> subsequently confront an adversary using both conventional and non-conventional means. This could be a compound threat of coincidental or uncoordinated actors, or hybrid when used by a determined adversary in a simultaneous and coordinated manner.[60]

During 2011, NATO tested the utility of the MCCHT concept by conducting a "Countering Hybrid Threats" experiment.[61] In addition to developing the themes addressed in the MCCHT at greater depth, the experiment confirmed that the notion of hybrid threats can serve as a useful intellectual model to draw attention to the security threats facing NATO and to guide the Alliance's response to them.[62]

The annexation of Crimea revived interest in the hybrid warfare concept within NATO, as it did elsewhere. At their summit in Wales in 2014, the Heads of State and Government of NATO's member states confirmed their intention to

> ensure that NATO is able to effectively address the specific challenges posed by hybrid warfare threats, where a wide range of overt and covert military, paramilitary, and civilian measures are employed in a highly integrated design. It is essential that the Alliance possesses the necessary tools and procedures required to deter and respond effectively to hybrid warfare threats, and the capabilities to reinforce national forces.[63]

In line with the Wales summit agenda, the North Atlantic Council adopted a Hybrid Warfare Strategy in December 2015,[64] based on the three pillars of preparedness, deterrence and defense.[65] Recognizing that the Alliance does not have the capability to respond to hybrid threats across all relevant domains,[66] NATO has also progressively strengthened its cooperation with the EU.[67] At

60. *Id.* at ¶ 2-6.
61. Headquarters, Supreme Allied Commander Transformation, Assessing Emerging Security Challenges in the Globalised Environment: The Countering Hybrid Threats (CHT) Experiment, Final Experiment Report (FER) (Sept. 29, 2011).
62. *Id.* at 26.
63. Press Release (2014) 120, Wales Summit Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council ¶ 13 (Sept. 5, 2014).
64. Press Statements by NATO Secretary General Jens Stoltenberg and the EU High Representative for Foreign Affairs and Security Policy, Federica Mogherini (Dec. 1, 2015), http://www.nato.int/cps/en/natohq/opinions_125361.htm.
65. Press Conference by NATO Secretary General Jens Stoltenberg following the meeting of the North Atlantic Council in Foreign Ministers session (Dec. 1, 2015), http://www.nato.int/cps/en/natohq/opinions_125362.htm.
66. MCCHT, *supra* note 56, at 5–6.
67. Press Release (2016) 119, Joint Declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization (July 8, 2016).

their most recent summit held in Warsaw in June 2016, the Heads of State and Government of the NATO nations reiterated their commitment to counter hybrid threats in the following terms:

> We have taken steps to ensure our ability to effectively address the challenges posed by hybrid warfare, where a broad, complex, and adaptive combination of conventional and non-conventional means, and overt and covert military, paramilitary, and civilian measures, are employed in a highly integrated design by state and non-state actors to achieve their objectives.[68]

The hybrid warfare concept has also attracted the attention of the EU. At an informal meeting convened by the Latvian presidency of the Council in February 2015, the defense ministers of the Union's Member States agreed on the need to develop a common reference framework for addressing the hybrid threats confronting the EU.[69] In a document prepared earlier, the European External Action Service (EEAS) had already observed that the EU faces a more complex and challenging strategic environment, including hybrid threats "in which adversaries employ an interconnected, unpredictable mix of traditional warfare, irregular warfare, terrorism and organized crime for political, military or other purposes".[70] In May 2015, the EEAS followed up with a more detailed food-for-thought paper on countering hybrid threats.[71] The paper recalls the dramatic changes to Europe's security environment brought about by Russia's hybrid warfare tactics to the East and the expansion of the Islamic State of Iraq and the Levant to the South.[72] According to the EEAS

> [h]ybrid warfare can be more easily characterised than defined as a centrally designed and controlled use of various covert and overt tactics, enacted by military and/or non-military

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Since the Warsaw Summit, the two organizations have developed a set of proposals to strengthen their cooperation in countering hybrid threats. See Press Release (2016) 178, Statement on the implementation of the Joint Declaration signed by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization (Dec. 6, 2016).

68. Press Release (2016) 100, Warsaw Summit Communiqué Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Warsaw 8–9 July 2016 ¶ 72 (July 9, 2016).

69. European External Action Service, Security and Defence on the Agenda at Riga Informal Meeting (Feb. 19, 2015) https://eeas.europa.eu/headquarters/headquarters-homepage/1806/security-and-defence-agenda-riga-informal-meeting_en.

70. European External Action Service, European Union Concept for EU-led Military Operations and Missions, 11, 17107/14 (Dec. 19, 2014).

71. European External Action Service, Food-for-Thought Paper "Countering Hybrid Threats", 8887/15 (May 13, 2015).

72. *Id.* at 2.

> means, ranging from intelligence and cyber operations through economic pressure to the use of conventional forces. By employing hybrid tactics, the attacker seeks to undermine and destabilise an opponent by applying both coercive and subversive methods.[73]

Among its recommendations, the food-for-thought paper suggests that the EU should develop a Union-wide strategy to counter hybrid threats that is complementary to NATO's efforts. The Council subsequently tasked the High Representative of the Union for Foreign Affairs and Security Policy to prepare a joint framework with actionable proposals to this end.[74] The High Representative and the European Commission presented the Joint Framework on Countering Hybrid Threats in April 2016.[75] The Joint Framework adopts a practical approach and develops a set of proposals for preventing, responding to and recovering from hybrid threats.[76] In contrast to the earlier EEAS food-for-thought paper, it defines hybrid threats as follows:

> While definitions of hybrid threats vary and need to remain flexible to respond to their evolving nature, the concept aims to capture the mixture of coercive and subversive activity, conventional and unconventional methods (i.e. diplomatic, military, economic, technological), which can be used in a coordinated manner by state or non-state actors to achieve specific objectives while remaining below the threshold of formally declared warfare.[77]

Together with the EEAS's food-for-thought paper, the Joint Framework constitutes the EU's most detailed policy document on hybrid threats to date.

C. Hybrid threats v. hybrid warfare

Although no consensus definition of hybrid warfare has emerged either at the national or at the international level, we can identify certain salient features. It is widely understood that what sets hybrid warfare apart from other forms of conflict is the combination, blending or mixture of different modes of warfare. In this respect, doctrine remains true to Frank Hoffman's original

73. *Id.*
74. Council of the European Union, Council Conclusions on CSDP, 3, 8971/15 (May 18, 2015).
75. European Commission, Joint Framework on Countering Hybrid Threats: A European Union Response, JOIN(2016) 18 final (Apr. 6, 2016).
76. *Id.* at 3–18. Among the steps taken to implement the Joint Framework, in July 2016 the European Commission and the High Representative adopted an "EU Playbook" which outlines the procedures followed by the Union's institutions in case of a hybrid threat. Secretary-General of the European Commission, Joint Staff Working Document: EU Operational Protocol for Countering Hybrid Threats 'EU Playbook' 11034/16 (July 7, 2016).
77. *Id.* at 2.

understanding of hybridity.[78] The various definitions coined by NATO and the EU also underline that hybrid adversaries use these different means and methods of warfare adaptively pursuant to an integrated design or in a centrally controlled or coordinated manner. This highlights that the simultaneous but coincidental conduct of activities across separate domains does not deserve the label of hybrid warfare. The hallmark of hybridity is the integrated use of distinct means and methods by an adversary with the aim of achieving synergistic effects.[79] The point is made well by NATO's "Countering Hybrid Threats" experiment report:

> [h]ybrid threats can also be understood as the employment of a comprehensive approach by an adversary. In this interpretation, hybrid threats are not solely military threats, but they combine effectively political, economic, social, informational and military means and methods. Adversaries who pose a hybrid threat employ a comprehensive approach with the speed and agility normally associated with unity of command.[80]

There is also broad agreement that hybrid threats may emanate both from states and from non-state actors. However, significant differences prevail over the material scope of hybrid warfare.

The term "warfare" focuses attention on violent activities.[81] This is less of a problem for a military alliance such as NATO, since war is its core business.[82] However, warfare lies on the outer periphery of the EU's institutional mandate.[83] Unlike the EEAS's food-for-thought paper, more recent EU documents have therefore steered clear of the language of "hybrid warfare" in preference of the phrase "hybrid threats". In contrast to "warfare", the word "threat" covers both violent and non-violent forms of confrontation. This is helpful in as much as it reinforces the point that hybrid adversaries may leverage a broad range of instruments across the entire spectrum of conflict. However, the Joint Framework on Countering Hybrid Threats undermines this point when it defines hybrid threats as activities which remain "below the threshold of formally declared warfare".[84] These days, formally declared wars are something of a rarity in international relations.[85]

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78. See *supra* note 27.
79. See *supra* note 28.
80. Countering Hybrid Threats Experiment Report, *supra* note 61, at 27.
81. Cf. Frank G. Hoffman, *On Not-So-New Warfare: Political Warfare vs Hybrid Threats*, War on the Rocks (July 28, 2014), https://warontherocks.com/2014/07/on-not-so-new-warfare-political-warfare-vs-hybrid-threats/ ("The problem with the hybrid threats definition is that it focuses on combinations of tactics associated with violence and warfare (except for criminal acts) but completely fails to capture other non-violent actions").
82. See North Atlantic Treaty, *supra* note 2, art. 5.
83. See *infra* notes 176–183 and the accompanying text.
84. Joint Framework on Countering Hybrid Threats, *supra* note 75, at 2.
85. Cf. Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L.Q. 283, 284–94

Indeed, it may be taken for granted that hybrid adversaries will not issue a formal declaration of war before using force against a member state of the EU. Perhaps what the drafters of the Joint Framework had in mind therefore is that hybrid adversaries may be expected to wage "undeclared" war by denying that their forces are engaged in hostilities against a member state. However, neither a declaration of war nor the formal recognition of a state of war by a hybrid adversary is a necessary precondition for the existence of warfare in the eyes of the law of armed conflict.[86] The reference to formally declared warfare therefore has little, if any, practical relevance.[87] This leaves the possibility that the drafters of the Joint Framework intended to exclude some or all forms of armed hostilities from the concept of "hybrid threats" in order to align its scope with the EU's institutional competences and strategic culture.[88] If so, this would be counterproductive.

Excluding the use of armed force, whether formally declared or not, from the definition of "hybrid threats" denies the very essence of hybridity as an integrated use of different modes of warfare spanning the entire spectrum of conflict. Most importantly, it deprives the concept of its core insight that non-state actors are levelling up the spectrum while states are reaching down. To safeguard its doctrinal utility, the concept of hybrid threats should be reserved for situations where states or non-state actors employ non-violent means and methods as instruments of warfare by closely integrating them with the use of armed force or by backing up such non-violent means and methods with the threat of force.[89] Excluding armed force from the definition reduces hybridity to a loose synonym of complexity. While complex threats below the threshold of actual or potential violence are worthy of attention too, the concept of hybridity serves a more useful purpose if it

(1987). See also Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19 (1938). The last declaration of war by the United States was issued on June 5, 1942, against Romania: Declaration of State of War with Rumania, ch. 325, 56 Stat. 307 (1942).

86. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts 2–3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. See also UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004) ¶¶ 3.2.3, 15.3 and 15.34; UNITED STATES DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL (updated ed. 2016) ¶¶ 3.4.2 and 3.4.2.2.

87. This is not to say that a declaration of war would be irrelevant, but that such declarations by states are unlikely. See Charles J. Dunlap, Jr., *Why Declarations of War Matter*, Harvard National Security Journal Online (Aug. 30, 2016, 8:19 PM), http://harvardnsj.org/2016/08/why-declarations-of-war-matter/.

88. Cf. Benjamin Zyla, *Overlap or Opposition? EU and NATO's Strategic (Sub-)Culture*, 32 CONTEMP. SECURITY POL'Y 667, 673–75 (2011).

89. Cf. JULIO MIRANDA CALHA, NATO PARLIAMENTARY ASSEMBLY, DEFENCE AND SECURITY COMMITEE, HYBRID WARFARE: NATO'S NEW STRATEGIC CHALLENGE? ¶ 12, 166 DSC 15 E bis (2015).

shines a spotlight on a different matter: the blurring between different modes of warfare.

III. LEGAL DYNAMICS OF HYBRID WARFARE

Scholarly interest in the legal aspects of hybrid warfare has been modest so far. While the legality of Russia's annexation of Crimea has been discussed at length in the literature,[90] merely a handful of conferences,[91] blog posts[92] and papers[93] have explored the legal dimension of hybrid warfare in

90. Regarding the legality of Russia's use of force against Ukraine, see e.g. THOMAS D. GRANT, AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW (2015); Veronika Bílková, *The Use of Force by the Russian Federation in Crimea*, 75 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 27 (2015); Peter M. Olson, *The Lawfulness of Russian Use of Force in Crimea*, 53 MIL. L. & L. WAR R. 17 (2014). On the deployment of Russian forces without national insignia (the "little green men"), see e.g. Ines Gillich, *Illegally Evading Attribution: Russia's Use of Unmarked Troops in Crimea and International Humanitarian Law*, 48 VAND. J. TRANSNAT'L L. 1191 (2015); Shane R. Reeves & David Wallace, *The Combatant Status of the Little Green Men and Other Participants in the Ukraine Conflict*, 91 INT'L. L. STUD. 361 (2015). On the legal status of Crimea following its annexation by Russia, see e.g. Michael Bothe, *The Current Status of Crimea: Russian Territory, Occupied Territory or What*, 53 MIL. L. & L. WAR R. 99 (2014); Robin Geiß, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly But They Do Grind*, 91 INT'L. L. STUD. 425 (2015). Regarding the right of Crimea's population to secede from Ukraine, see e.g. Christopher J. Borgen, *Law, Rhetoric, Strategy: Russia and Self-Determination before and after Crimea*, 91 INT'L. L. STUD. 216 (2015); Alisa Gdalina, *Crimea and the Right to Self-Determination: Questioning the Legality of Crimea's Secession from Ukraine Note*, 24 CARDOZO J. INT'L & COMP. L. 531 (2015). But see John J. A. Burke & Svetlana Panina-Burke, *Eastern and Southern Ukraine's Right to Secede and Join the Russian Federation*, 3 RUSSIAN L.J. 33 (2015); Vladislav Tolstykh, *Reunification of Crimea with Russia: A Russian Perspective*, 13 CHINESE J. INT'L. L. 879 (2014).

91. E.g. "The Legal Framework of Hybrid Warfare and Influence Operations", Strategy and Security Institute, University of Exeter (Sept. 16–17, 2015), https://socialsciences.exeter.ac.uk/news/college/title_475346_en.html; "Hybrid Threats = Hybrid Law?", Center on Law, Ethics and National Security, Duke Law School (Feb. 26–27, 2016), https://law.duke.edu/lens/conference/2016/.

92. E.g. Shane Reeves, *The Viability of the Law of Armed Conflict in the Age of Hybrid Warfare*, Lawfare Blog (Dec. 5, 2016, 11:21 AM), https://www.lawfareblog.com/viability-law-armed-conflict-age-hybrid-warfare; Aurel Sari, *Legal Aspects of Hybrid Warfare*, Lawfare Blog (Oct. 2, 2015, 7:38 AM), https://www.lawfareblog.com/legal-aspects-hybrid-warfare; Benjamin Wittes, *What Is Hybrid Conflict?*, Lawfare Blog (Sept. 11, 2015, 5:11 PM), https://lawfareblog.com/what-hybrid-conflict.. See also David Sadowski & Jeff Becker, *Beyond the "Hybrid" Threat: Asserting the Essential Unity of Warfare*, Small Wars Journal (Jan. 7, 2010, 12:18 PM), ("the future threat will also examine the web of legal and ethical constructs that surround governance and warfare, and attempt to manipulate and re-define these constructs in order to maximize their strategic, operational, and tactical advantages vis-à-vis their opponents").

93. E.g. Sascha Dov Bachmann & Andres B Munoz Mosquera, *Lawfare and Hybrid Warfare-How Russia is Using the*

general terms. A number of reasons may explain this lack of enthusiasm for the subject. Most of the specific legal problems associated with hybrid warfare, such as the violation of another nation's territorial integrity, support for separatist movements or the failure to honor international agreements, are hardly novel. Nor are they unique to hybrid wars. The main challenge in this respect is to secure compliance with the applicable rules of international law and this task does not require theorizing about the legal dimension of hybrid warfare. In any event, the breadth and fluidity of the concept makes it difficult to provide a meaningful legal assessment that does not read like an inventory of the predicaments that beset the field of international law and security.

These points, although not without merit, neglect the wider context. They overlook the fact that hybrid warfare is a symptom of our operating environment in which law has become a strategic enabler. States have lost their grip on the monopoly of violence as non-state actors have grown into potent challengers to a state-based international order. The number of inter-state conflicts has decreased, while the number of internationalized armed conflicts has risen sharply. In 2014, a single inter-state armed conflict with fewer than fifty fatalities stood against thirty-nine non-international armed conflicts, thirteen of which were internationalized by the intervention of other states in support of one or more of the warring parties.[94] This represent the highest proportion of internationalized conflicts since the Second World War and has made 2014 the most violent year of the post-Cold War era.[95] Meanwhile, technological progress has rendered contemporary conflicts more asymmetrical. This has not only increased the lethality of non-state actors, but has also left developed nations exposed to influence operations at a time when their post-heroic societies are becoming increasingly averse to the deployment of military power. For states, armed confrontation has become more protracted, enemies more fluid and victory more

Law as a Weapon, 102 AMICUS CURIAE 1 (2015) (the use of law as means of war is a key feature of hybrid warfare); Mary Ellen O'Connell, *Myths of Hybrid Warfare*, 2 ETHICS & ARMED FORCES 27 (2015) (hybrid warfare theories are an "attempt to open up space outside the restrictions of law"); Outi Korhonen, *Deconstructing the Conflict in Ukraine: The Relevance of International Law to Hybrid States and Wars The Crisis in Ukraine*, 16 GERMAN L.J. 452 (2015) (the hybridization of war and the hybridization of States requires international lawyers to abandon doctrinal binaries in favor of a "situational critique"); Vitalii Vlasiuk, *Hybrid War, International Law and Eastern Ukraine*, 2 EUR. POL. & L. DISCOURSE 14 (2015) (situating the concept of hybrid warfare in international law by identifying the relevant legal regimes). See also Shane R. Reeves & Robert E. Barnsby, *The New Griffin of War: Hybrid International Armed Conflicts*, 34 HARV. INT'L. REV. 16 (2013) (the hybridization of warfare exacerbates the existing difficulties of the law of armed conflict).

94. Therése Pettersson & Peter Wallensteen, *Armed conflicts, 1946–2014*, 52 J. PEACE RESEARCH 536, 537 (2015).

95. *Id.* at 537 and 539.

elusive.[96] Overall, these trends have contributed to the evolution of an operating environment in which the traditional distinctions between regular and irregular, forward and rear, war and peace, man and machine, real and virtual are coming under increasing strain. Law is not a neutral bystander amidst these developments. The legal framework of warfare lags behind the pace of military innovation.[97] This has created opportunities that hybrid adversaries can exploit to their advantage.

A. The dividing line between war and peace

The traditional binary distinctions that have characterized inter-state industrial war, above all the distinction between war and peace and between regular and irregular, are deeply embedded in the international legal framework of warfare. As Georg Schwarzenberger has shown, the approach to war adopted by modern international law was based on three principles.[98] First, the doctrine of the normality of peace, which posits peace as the natural condition of international relations and war as its exception. War, as Fauchille wrote, is a state of fact contrary to the normal state of affairs in the international community, which is peace.[99] Second, the doctrine of the alternative character of peace and war, which stipulates that war and peace are mutually exclusive. As Lord Macnaghten held in *Janson v. Driefontein Consolidated Mines Ltd*, "[t]he law recognizes a state of peace and a state of war, but … it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war."[100] Third, the doctrine of war as a status *and* objective phenomenon, which asserts that war is the contention between two or more states through their armed forces, recognized as such.[101]

With the help of these doctrines, modern international law drew a set of dividing lines and attached different normative expectations to actors standing on different sides of the divide. States

96. See RUPERT SMITH, THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD (2005).

97. Cf. ANTONIA HANDLER CHAYES, BORDERLESS WARS: CIVIL MILITARY DISORDER AND LEGAL UNCERTAINTY 4 (2015) ("legal change lags behind a rapidly evolving operational environment"). See also NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE (William C. Banks ed., 2011).

98. Georg Schwarzenberger, *Jus Pacis Ac Belli?: Prolegomena to a Sociology of International Law*, 37 AM. J. INT'L L. 460, 465–77 (1943).

99. PAUL FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC, VOL. II (GUERRE ET NEUTRALITÉ) 5 (1921) ("La guerre est un état de fait contraire à l'état normal de la communauté internationale qui est la paix").

100. Janson v. Driefontein Consolidated Mines Ltd. [1902] A.C. 484 (HL) 497. See also STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 177–86 (2005).

101. LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. II (WAR AND NEUTRALITY) §§ 54–58 and 93 (1st ed. 1906).

at peace were bound by the rules of international law applicable to them in times of peace. In times of war, these rules gave way between the belligerents to the laws of war and the law of neutrality came into operation in their relations with third parties.[102] Absent recognition as a belligerent, non-state actors had no specific standing in war.[103] As Quincy Wright explained, war in its proper, legal sense excluded irregulars from its scope:

> Insurgents, not being a recognized state, can not by their own acts initiate war, and third states are not entitled to consider war in the legal sense as existing unless the parent state by some overt act, such as a declaration of war, enforcement of belligerent rights against neutrals, or conduct of military operations on such a scale that neutral interests are necessarily affected, manifests an intention to make war. Prior to such overt act the conflict is domestic violence or insurgency, but not war.[104]

Despite their proponents' best efforts to draw these dividing lines as sharply as they could,[105] their validity has repeatedly been called into question. Schwarzenberger himself thought that they could not be upheld in the face of the wide-spread practice of measures short of war—which created a *status mixtus*, an intermediate state between war and peace—and international law's inability to supply objective criteria for distinguishing between war, measures short of war and peace.[106] Others have pointed to the existence of multiple legal definitions of war and the resulting relativity of war and peace.[107]

In the meantime, international law has evolved in new directions. Following the end of the Second World War, the concept of war has given way to the notion of "force"[108] and "armed conflict".[109] This opened the door for war in a material sense, understood as actual violence, to gain the upper hand over the concept of war in a legal sense, understood as a normative

102. OPPENHEIM, *supra* note 101, §§ 97–102.

103. *Id.* at § 59.

104. Quincy Wright, *Changes in the Conception of War*, 18 AM. J. INT'L L. 755, 759 (1924).

105. *Id.* at § 27.

106. Schwarzenberger, *supra* note 98, 474. See also L. C. Green, *Armed Conflict, War, and Self-Defence*, 6 ARCHIV DES VÖLKERRECHTS 387, 388–91 (1957); Philip C. Jessup, *Should International Law Recognize an Intermediate Status between Peace and War?*, 48 AM. J. INT'L L. 98 (1954); Myres S. McDougal, *Peace and War: Factual Continuum with Multiple Legal Consequences*, 49 AM. J. INT'L L. 63 (1955).

107. See FRITZ GROB, THE RELATIVITY OF WAR AND PEACE: A STUDY IN LAW, HISTORY AND POLITICS (1949); Clyde Eagleton, *The Attempt to Define War*, 15 INT'L CONCILIATION 237 (1932).

108. Charter of the United Nations art. 2, ¶ 4, June 26, 1945, 59 Stat. 1031.

109. Geneva Convention IV, *supra* note 86, art. 2.

condition.[110] War as a legal term of art thus lost much of its relevance since 1945.[111] The idea that war as a condition can exist only between states, or alternatively can be created only by states, has also lost its potency. This paved the way for extending, through the operation of Common Article 3 of the Geneva Conventions of 1949 rather than through the recognition of belligerency,[112] certain fundamental norms of the laws of war to conflicts involving non-state actors and for the subsequent evolution of the law of non-international armed conflict.[113]

Despite these developments, the traditional conceptual dividing lines have lingered on or have transmuted into new dichotomies.[114] The notion of peace remains a key organizing principle of the post-war international order. The Charter of the United Nations, described by the General Assembly as "the most solemn pact of peace in history",[115] relies extensively on the concept.[116] The very purpose of the United Nations is, amongst other things, "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace".[117] The old distinctions between war and peace and between regular and irregular continue to be reflected in the legal thresholds, core concepts and diverse fields of application of the various branches of law that make up the legal framework of warfare. Examples include the threshold of "armed attack",[118] which acts as the trigger for the legitimate use of force in individual or collective self-defense, the notion of "combatant",[119] which serves to distinguish lawful participants in hostilities from innocent bystanders and unlawful participants, and the derogation

110. Cf. Wright, *supra* note 104, 762. See also IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 393–401 (1963).
111. Greenwood, *supra* note 85, at 303–06.
112. See GEOFFREY BEST, WAR AND LAW SINCE 1945 168–79 (1994).
113. E.g. Additional Protocol II, *supra* note 86.
114. Cf. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 178 (3rd ed. 2002) (distinguishing between war in a strict sense, meaning war waged by states, and war in a loose sense, meaning violence employed by other entities).
115. Charter of the United Nations, *supra* note 108, art. 1, ¶ 1.
116. G. A. Res. 290 (IV) Essentials of Peace ¶ 2 (Dec. 1, 1949).
117. See Rüdiger Wolfrum, *Article 1*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, VOL. I 107, 109 n.6 (Bruno Simma et al. eds., 2012).
118. Charter of the United Nations, *supra* note 108, art. 51.
119. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 42, ¶ 3, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

clauses found in international human rights agreements,[120] which provide states with a mechanism to lighten the burden of the law of normality in times of public emergency and war. While the legal framework of warfare has evolved significantly since the end of the Second World War, the dividing lines between war and peace and between regular and irregular remain firmly etched into the body of the law.

However, today the legal landscape is no longer dominated by just a few binaries. The regulatory framework of warfare is replete with thresholds and dichotomies that render it complex and fragmented. The conceptual opposite to peace is not merely war and measures short of war,[121] but force, armed attack, threat to the peace, breach of the peace, aggression[122] as well as international and non-international armed conflict, attack and hostilities.[123] The old debate about the dividing line between war, measures short of war and peace has shifted onto new ground.[124] In the process, the law has gained in flexibility.[125] In some respects, it has also adapted, with greater or lesser success, to the changing character of war.[126] However, at the same time it has also become more complex, without its internal dividing lines necessarily becoming clearer.[127] Adding to law's complexity are growing coordination problems between its different branches applicable in war, above all between the law of armed conflict and international human rights law.[128] On top of this, states seem to be losing their appetite, at least in some areas, to actively shape the development of

120. E.g. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221.

121. References to war do survive: see *id.*, art. 15.

122. Charter of the United Nations, *supra* note 108, arts. 2, ¶ 4, 39 and 51.

123. Geneva Convention IV, *supra* note 86, arts. 2–3 and Additional Protocol I, *supra* note 119, arts. 48, ¶ 1 and 51, ¶ 3.

124. Cf. Robert W. Tucker, *The Interpretation of War under Present International Law*, 4 INT'L L. Q. 11, 32 (1951).

125. E.g. the notion of "threat to the peace" enables the Security Council to adopt or authorize forcible measure in response to a broad range of threats. See Prosecutor v. Duško Tadić (1995) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-T, Oct. 2, 1995 (ICTY Trial Chamber) ¶¶ 28–30. See also Nico Krisch, *Article 39*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, VOL. II 1272, ¶¶ 12–39 (Bruno Simma et al. eds., 2012).

126. One example of such adaptation is the development of the law of non-international armed conflict. Another is the evolution of the law of self-defense in relation to terrorist threats. See Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT'L L. 359 (2009).

127. See e.g. Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 812–20 (1970). But see Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971).

128. See Charles Garraway, *War and Peace: Where Is the Divide?*, 88 INT'L. L. STUD. 93 (2012). More generally, see GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY (2015).

the law,[129] whilst judicial and supervisory bodies are becoming more willing to take on that role.[130] This increased density and complexity of the legal terrain provides hybrid adversaries with ample opportunities to use its features in order to advance their own operations and to impede the operations of their target. Two areas of law directly relevant to warfare, the rules governing the use of force and the law of armed conflict, illustrate the point.

B. Law as friction

The threat or use of force in international relations is prohibited.[131] States may employ military force only when relying on a valid exception to this prohibition. Absent a Security Council authorization under Chapter VII of the United Nations Charter, the right of individual or collective self-defense constitutes the most established exception in international law.[132] As already noted, the right of self-defense is triggered by an armed attack. Avoiding this trigger promises a significant advantage to a hybrid adversary. By conducting its operations at a lower level of intensity or by limiting itself to the threat of force, a hybrid adversary is in a position, at the cost of violating the prohibition of the threat or use of force, to employ a degree or form of coercion that does not invest its target with the right to respond by using force in self-defense. This tactic is possible because the threshold for an armed attack is higher than the threshold for the use of force.[133] This leaves a legal gap—and thus an operational sweet spot—between the use of force and an armed attack. As is well known, the United States denies the existence of such a gap and takes the position that any use of force gives rise to, in principle, the right to respond in self-defense.[134] Leaving aside

129. Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INT'L. L. STUD. 171 (2015).

130. See e.g. APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS (Derek Jinks ET AL. eds., 2014).

131. Charter of the United Nations, *supra* note 108, art. 2, ¶ 4.

132. *Id.* art. 51.

133. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) Judgment, 1986 I.C.J. 14 ¶¶ 191–95 (June 27).

134. Harold Hongju Koh, *International Law in Cyberspace: Remarks as Prepared for Delivery by Harold Hongju Koh to the USCYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012*, Harvard International Law Journal Online (Dec. 13, 2012), http://www.harvardilj.org/wp-content/uploads/2012/12/Koh-Speech-to-Publish1.pdf ("the United States has for a long time taken the position that the inherent right of self-defense potentially applies against *any* illegal use of force. In our view, there is no threshold for a use of deadly force to qualify as an 'armed attack' that may warrant a forcible response.") See also Abraham D. Sofaer, *International Law and the Use of Force*, 82 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 420, 422 (1988) ("Our position has been that

whether or not this position reflects the law,[135] the fact that few, if any, other states share it means that in an alliance context the gap between force and armed attack represents a problem for legal inter-operability. By contrast, where a hybrid adversary does use force that crosses the threshold of an armed attack, it pays for it to obfuscate or to deny its actions. Doing so will delay or prevent the target state from responding forcibly in self-defense.

The use of force by non-state actors brings further complications. Since the terrorist attacks of September 11, 2001, international practice has come to accept that the right of self-defense extends to armed attacks emanating from non-state actors.[136] However, self-defense is not available where the attack originates from within, rather than from outside, the target state's own territory.[137] Where the attack does originate from abroad, the use of force against the non-state actor responsible will almost certainly bring into play the territorial integrity of the state on whose territory the non-state actor is present. In recent years, a number of states have asserted the right to use force in circumstances where the territorial state is unable or unwilling to effectively address the threat presented by the non-state actor.[138] However, the legality of this position remains subject to debate.[139] While hybrid non-state adversaries benefit from these limitations and legal

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the inherent right of self-defense potentially applies against any illegal use of force".)

135. It is worth noting that the Nicaragua judgment suggests that the use of force may be permissible by way of counter-measure in response to a prior unlawful use of force, though not as an act of self-defense, as the U.S. asserts. See Nicar. v. U.S., 1986 ICJ, *supra* note 133, ¶¶ 210–11 and 249. However, since the use of force would be subject to the principle of proportionality in both cases, the difference between these two positions may be slight. But see Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries in Report of the International Law Commission, 53rd sess., Apr. 23–June 1 and July 2–Aug. 10, 2001, 56 U.N. GAOR Supp. No. 10, 30, at 132, A/56/10 (2001). See also TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER: CUSTOMARY LAW AND PRACTICE 139–57 (2010).

136. See the nuanced assessment *id.*, at 419–510.

137. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. 136, ¶ 139 (July 9).

138. E.g. Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, S/2015/946 (Dec. 10 2015); Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, S/2015/693 (Sept. 9, 2015); Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, S/2015/563 (July 24, 2015).

139. E.g. Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483 (2011) (traces the test to existing principles of international law); Monica Hakim, *Defensive Force against Non-State Actors: The State of Play*, 91 INT'L. L. STUD. 1 (2015) (multiple positions are at play and the law is unsettled); Michael P. Scharf, *How the War against ISIS Changed International Law*, 48 CASE W. RES. J. INT'L L. 15

uncertainties by default, a hybrid state adversary may derive similar benefits by recruiting proxies to fight its cause. The looser the bonds between such proxies and the hybrid state sponsor are, the more difficult it will become for the target state to conclusively attribute any active violence to the sponsoring state.[140] Once again, this will enable the hybrid state adversary to employ coercive measures whilst impeding the target state's response.

Similar opportunities present themselves under the law of armed conflict. It is unlikely that a hybrid state adversary which uses force unlawfully and intends to conceal this fact will readily admit to being a party to an international armed conflict with the target state. Since the threshold for the applicability of the law of international armed conflict is low,[141] a hybrid adversary is likely to deny its involvement in such an armed conflict all together. This tactic would permit the hybrid adversary to conduct military operations to achieve coercive effects, whilst keeping the target state confined to operate in a law enforcement paradigm. To succeed, the hybrid adversary would have to avoid direct involvement in combat operations, and instead limit itself to measures such as the geographical positioning of its forces, harassment of opposing forces or seizure of ground and installations, as open hostilities would render the existence of an international armed conflict obvious. As long as the conventional and non-conventional military threat presented by the hybrid adversary is overwhelming, the target state may prefer not to call its bluff by directly engaging its forces in combat.

By contrast, where hostilities are unavoidable, it is in the interest of the hybrid adversary to employ proxy forces in order to conceal its own involvement. This fosters uncertainty about the classification of the conflict and enables the hybrid adversary to frame the hostilities as a non-international armed conflict. The traditional reluctance of states to admit to the existence of a non-international armed conflict on their territory would now play into its hands.[142] Moreover, even if the existence of a non-international armed conflict was recognized, the target state would be hampered, legally and politically, by the uncertainty that surrounds the legal authority to conduct status-based operations in a non-international armed conflict,[143] all the more so given that from

(2016) (the test has become law); Gareth D. Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the Unwilling or Unable Test*, 36 U.N.S.W.L.J. 619 (2013) (the test is "an emerging norm").

140. Cf. Nicar. v. U.S., 1986 ICJ, *supra* note 133, ¶¶ 115–16.

141. Prosecutor v. Duško Tadić, *supra* note 125, ¶ 70 ("an armed conflict exists whenever there is a resort to armed force between States"). See also UK MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 86, ¶¶ 3.3 and 3.3.1; LAW OF WAR MANUAl, *supra* note 86, ¶ 3.4.2.

142. Sean Watts, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict* 88 INT'L. L. STUD. 145, 150–51 (2012).

143. E.g. Serdar Mohammed v. Ministry of Defence [2014] EWHC 1369 (QB), ¶¶ 228–294. More recently, see Abd

the perspective of the target state, the conflict would be a domestic, rather than an expeditionary, one. In such circumstances, Western nations may find themselves significantly constrained by the exacting legal guarantees applicable within their societies. This, in turn, would exacerbate problems of inter-operability. For example, absent a major calamity, it is unlikely that the target state would grant Allied forces present in its territory unrestricted freedom of movement or permission to offensively prosecute targets through non-lethal, let alone lethal, means.

Operations against hybrid non-state actors present similar difficulties, except that non-state actors will have fewer opportunities and reasons to leverage the divide between international and non-international armed conflicts. Instead, they are likely to exploit the legal terrain for tactical and operational advantage, rather than strategic effect, through calculated breaches of the law, such as acts of perfidy, the taking of hostages or the use of human shields.[144]

C. Law as a domain of hybrid warfare

Seen from the perspective of a hybrid state adversary, the lesson to be drawn from the legal framework governing warfare is that concealing its direct involvement in conflict, irregularizing its use of force through proxies and conducting its operations in a form and at a level of intensity that circumvents the relevant legal thresholds enables it, at the cost of adjusting its tactics and violating some rules of international law, to employ armed force against another state whilst impeding that state's ability to use force effectively in its own defense. In other words, the legal framework of warfare enables and favors—in an operational, not a normative, sense—the use of such a degree and form of force that is militarily sufficient to permit the adversary to achieve its strategic objectives, but legally insufficient to permit the target state to respond effectively. Deploying the optimum mix of force creates legal asymmetry. In turn, legal asymmetry contributes to mission success.

The use of law in support of warfare is not a novelty. The Japanese invasion of Manchuria in 1931 offers some striking parallels with the Russian invasion of Crimea in 2014. During the

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Ali Hameed Al-Waheed v. Ministry of Defence; Serdar Mohammed v. Ministry of Defence [2017] Judgment, UKSC 2, Jan. 17, 2017 (HL), ¶¶ 14–17 (Lord Sumption) and ¶¶ 245–76 (Lord Reed). But see Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, INT'L. L. STUD. 60, 87–115 (2015).

144. For a typology of such acts, see Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, *in* INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES: SYMPOSIUM IN HONOUR OF KNUT IPSEN 11, 23–36 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007). The challenges that such tactics present are highlighted by SAMY COHEN, ISRAEL'S ASYMMETRIC WARS 11–26 (2010).

Manchurian crisis, Japan combined large-scale military operations with non-military means, including instigating civil unrest, organizing armed gangs and supporting armed separatists,[145] just as Russia combined large-scale military maneuvers with the use of unmarked special forces and a broad range of non-military means.[146] In 1931, Japan denied the existence of a state of war[147] in order to avoid the application of the League of Nations Covenant[148] and the Pact of Paris.[149] In 2014, Russia persistently denied that its forces were taking control of Crimea in an attempt to fend off charges that its actions violated the United Nations Charter and other applicable agreements,[150] including the agreement regulating the status and presence of the Russian Black Sea fleet.[151] Japan attempted to justify its invasion of Manchuria as an act of legitimate self-defense and to depict the installation of a puppet regime as the outcome of a genuine independence movement.[152] For its part, Russia justified its intervention in Crimea as an act designed to protect the rights, security

145. *Report of the Commission of Inquiry*, League of Nations Doc. C.663.M.320, 66–83 (Oct. 1, 1932) [hereinafter Lytton Report]. On the military component, see also T. J. Betts, *Military Notes on China and Japan Manchuria*, 10 FOR. AFF. 231 (1931).

146. On the military component and its function in the operation, see Anton Lavrov, *Russia Again: The Military Operation for Crimea*, *in* BROTHERS ARMED: MILITARY ASPECTS OF THE CRISIS IN UKRAINE 157 (Colby Howard & Ruslan Puhov eds., 2015); Fredrik Westerlund & Johan Norberg, *Military Means for Non-Military Measures: The Russian Approach to the Use of Armed Force as Seen in Ukraine*, 29 J. SLAVIC MIL. STUD. 576 (2016).

147. Eagleton, *supra* note 85, at 26–28.

148. Covenant of the League of Nations art. 16.

149. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

150. E.g. Russian Troops Not involved in Belbek Airfield Block - Black Sea Fleet Spokesperson (Feb. 28, 2014), https://sputniknews.com/voiceofrussia/news/2014_02_28/Russian-troops-not-involved-in-Belbek-airfield-block-Black-Sea-Fleet-spokesperson-5968/; Security Council, 7124th Meeting, S/PV.7124, 5 (Mar. 1, 2014); Vladimir Putin answered Journalists' Questions on the Situation in Ukraine (March 4, 2014), http://en.kremlin.ru/events/president/news/20366.

151. Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory, Russ.-Ukr., May 28, 1997, Bulletin of International Treaties, 1999, No. 10, 74 [in Russian].

152. Lytton Report, *supra* note 145, at 127. See John T. Sherwood, Jr., *An Examination of the Legal Justifications Presented by Japan before the League of Nations in Defense of Her Actions concerning the Mukden Incident, the Occupation of Manchuria and the Creation of Manchukuo Studies*, 16 MIL. L. & L. WAR R. 203 (1977). It is instructive to note the role of law in the U.S. policy of non-recognition adopted in response to the invasion. Compare Errol MacGregor Clauss, *The Roosevelt Administration and Manchukuo, 1933–1941*, 32 HISTORIAN 595 (1970) and Arnold D. McNair, *Stimson Doctrine of Non-Recognition*, 14 BRIT. Y.B. INT'L L. 65 (1933) with the more positive assessment by David Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law*, 2 CHINESE J. INT'L. L. 105 (2003).

and lives of Russian compatriots, to safeguard the security of the Russian Black Sea fleet and to respond to the pleas for military assistance issued by the Crimean authorities and Ukraine's disposed President.[153]

In both Manchuria and Crimea, the intervening states relied on law as a strategic enabler. By advancing a legal narrative, their aim was not simply to coat their actions with a veneer of legality in order to portray themselves as law-abiding members of the international community,[154] but to harness the law in order to advance their own operations and to impede the operations of their adversaries.[155] In both cases, the rules governing the use of force were at the heart of their legal narratives, supplemented with legal arguments and norms drawn from other areas of international law, such as the law of treaties and the principle of self-determination. The legal dynamics involved were therefore similar. In this respect, the Manchurian incident strikes one as thoroughly modern, while the Crimean intervention looks decidedly familiar. This should not mask, however, some fundamental differences between the two cases, in particular the radically changed technological and information domain that defines the contemporary operating environment. It is these changes, outlined earlier, which enable hybrid adversaries to employ an effective package of military and non-military measures, rather than just superior firepower, to achieve their desired effects.

IV. Countering the Legal Challenge of Hybrid Warfare

Developing an appropriate response to the legal challenges posed by hybrid threats requires a better understanding of the subject. The policy papers on hybrid warfare prepared by NATO and the EU acknowledge the significance of the legal domain, but they do not explore this theme in detail. Their insights are underdeveloped and a clear understanding that law is an integral, rather than just an incidental, aspect of hybrid warfare is lacking. Countering the legal challenges presented by hybrid warfare therefore involves three tasks: developing a definition of the legal dynamics of hybrid threats, understanding legal vulnerabilities and strengthening preparedness,

153. Vladimir Putin, *supra* note 149; Security Council, 7125th Meeting, S/PV.7125, 3–4 and 15–18 (Mar. 3, 2014). For more detail about Russia's legal arguments, see Grant, *supra* note 90, at 43–61; Roy Allison, *Russian 'Deniable' Intervention in Ukraine: How and Why Russia Broke the Rules*, 90 Int'l. Aff. 1255, 1255–68 (2014); Thomas Ambrosio, *The rhetoric of irredentism: The Russian Federation's perception management campaign and the annexation of Crimea*, 27 Small Wars & Insurgencies 467 (2016).

154. Cf. Allison, *supra* note 153, at 1258; Ambrosio, *supra* note 153, at 469–70.

155. Cf. Walter H. Mallory, *The Permanent Conflict in Manchuria*, 10 For. Aff. 220, 226 (1931) ("each side has a tenable legal case, which is precisely why outside nations have found it so difficult to effect any compromise").

deterrence and defense in the legal domain.

A. Understanding and awareness

NATO and the EU have identified a range of legal challenges presented by hybrid threats. Hybrid adversaries operate in unregulated spaces and across legal boundaries and systems.[156] In doing so, they benefit from the fact that the law has not yet adapted "to the rapid growth rate of technology and social media tools which hybrid threat actors have capitalized upon."[157] Hybrid adversaries apply pressure "across the entire spectrum of conflict, with action that may originate between the boundaries artificially separating its constituents."[158] Responding to such threats may require a combination of law enforcement and military action, "raising legal and jurisdictional questions that might prevent [a] legitimate response."[159] Hybrid adversaries also exploit different interpretations of international law and different national restrictions governing lethal engagement.[160] They aim to create ambiguity "to mask what is actually happening on the ground in order to obscure the differentiation between war and peace."[161] Accordingly, in hybrid warfare, "full attribution and undeniable proofs that can stand before the court is not always possible".[162] Hybrid adversaries "may not be bound by Western legal or ethical frameworks allowing them to challenge NATO in ways that can be difficult to anticipate."[163] By acting in contravention of international law, they "will seek ways to negate military advantage by undermining the Alliance's cohesion, will, credibility, and influence".[164] In some cases, grave violations of international norms by hybrid actors may threaten "the rules-based international order" as a whole.[165]

These are valuable observations. They highlight several important features of the legal dimension of hybrid warfare. However, they do not capture the essence of the matter. In particular, they fail to identify the core legal dynamics of hybrid warfare in a way that provides clear doctrinal

156. MCCHT, *supra* note 56, at 3.

157. Countering Hybrid Threats Experiment Report, *supra* note 61, at 70.

158. MCCHT, *supra* note 56, at 2.

159. Countering Hybrid Threats Experiment Report, *supra* note 61, at 36.

160. MCCHT, *supra* note 56, at 3.

161. Food-for-Thought Paper "Countering Hybrid Threats", *supra* note 71, at 3.

162. *Id.* at 6.

163. AJP-01(D), *supra* note 59, at ¶ 213(c). See also ARMY DOCTRINE REFERENCE PUBLICATION No. 3-0, *supra* note 50, at ¶ 1-15 ("Hybrid threats combine traditional forces governed by law, military tradition, and custom with unregulated forces that act with no restrictions on violence or target selection.")

164. AJP-01(D), *supra* note 59, at ¶ 215.

165. Press Release (2014) 120, Wales Summit Declaration, *supra* note 63, at ¶ 18.

guidance. Based on the preceding analysis, I propose the following definition to close this gap:

> Hybrid adversaries aim to create and maintain relationships of legal asymmetry by
>
> - exploiting legal thresholds, complexity and uncertainty,
> - generating legal ambiguity,
> - violating their legal obligations and
> - utilizing law and legal process to create narratives and counter-narratives
>
> in order to, first, support their own operations and maximize the utility of force and, second, impede the operations of their targets and deny those targets the utility of force.

The definition has three elements. First, it identifies that the aim of hybrid adversaries is to create relationships of legal asymmetry between themselves and other actors within the legal domain. Second, it lists four examples of the means and methods that hybrid adversaries typically employ in order to achieve this aim. Third, it recognizes that the twin operational objectives that hybrid adversaries pursue by fostering legal asymmetry is to maximize the utility of force for themselves and to deny its utility to their opponents.[166] The definition puts the emphasis on hybrid adversaries, rather than on hybrid warfare or hybrid threats, to underline the element of agency involved in creating and maintaining relationships of legal asymmetry. By drawing a direct link between the legal and the operational domain, the definition highlights that hybrid adversaries employ law as an instrument of warfare in order to achieve military effects at all levels. Finally, the definition implies that the use of law has both defensive and offensive aspects.[167]

B. Legal vulnerabilities and challenges

In NATO, the discussion of the legal challenges associated with hybrid warfare has focused

166. The term "utility of force" is borrowed from SMITH, *supra* note 96, but its use has a longer pedigree. See e.g. Laurence Martin, *The Utility of Military Force*, 13 ADELPHI PAPERS 14 (1973).

167. A good illustration of the defensive and offensive use of law are cases where one actor responds to claims that is acting unlawfully by making a counter-claim of illegality to defend itself against the accusation and to preserve its freedom of action. See e.g. Italy's reliance on the law of belligerent reprisals in the Italian-Ethiopian conflict in 1935–1936: Letter, Paris, Jan. 3, from M. Mariam, Minister of Ethiopia, Discussing the Numerous Violations of the Laws of War committed by the Italian Military, League of Nations Doc. C.12.M.11.1936.VII (Jan. 4, 1936); Communication from the Swedish Government, League of Nations Doc. C.207.M.129.1936.VII (May 7, 1936).

prominently on Article 5 of the North Atlantic Treaty. An attack carried out by conventional forces against the territory of an Allied nation clearly engages Article 5. In its response to the terrorist attack of September 11, 2001, NATO has demonstrated that the scope of Article 5 also extends to terrorist attacks directed against an Allied nation from abroad.[168] However, as the Multiple Futures Project notes, "[t]he Alliance may face attacks that do not fit the traditional interpretation of Article 5".[169] Internally, Article 5 it commits the Allies to assist each other in the event that one of them is the victim of an armed attack.[170] Externally, Article 5 conveys this commitment to any would-be aggressors to deter them from attacking NATO nations. However, at the same time, Article 5 also signals that action below the threshold of an armed attack will not necessarily meet with a collective response.

To deter hybrid adversaries from operating against NATO below the threshold of an armed attack, it has been suggested that the Allies should remove the word *armed* from Article 5 of the North Atlantic Treaty.[171] This is not a viable proposal. Pursuant to the United Nations Charter and customary international law,[172] the use of force in self-defense is permissible only in response to an *armed* attack. The member states of NATO are not at liberty to use force pursuant to attacks that are not armed. Amending Article 5 in the way suggested would be imprudent. The solution lies elsewhere. The North Atlantic Council has confirmed that a hybrid attack may trigger Article 5.[173] This is politically helpful and legally correct, assuming that any hybrid attack meets the requirements of an armed attack before Article 5 is invoked. By contrast, hybrid threats which do not reach the threshold of an armed attack may be addressed on the basis of Article 4 of the North Atlantic Treaty[174] using other available instruments of international law, such as counter-

168. Press Release (2001)124, Statement by the North Atlantic Council (Sept. 12, 2001), http://www.nato.int/docu/pr/2001/p01-124e.htm.

169. MULTIPLE FUTURES PROJECT, *supra* note 54, at 33. See also Countering Hybrid Threats Experiment Report, *supra* note 61, at 33.

170. On the scope of this duty, see Sylvain Fournier & Sherrod Lewis Bumgardner, *Article 5 of The North Atlantic Treaty: The Cornerstone of the Alliance*, Issue 34 NATO LEGAL GAZETTE 17 (2014).

171. House of Commons Defence Committee, *Towards the Next Defence and Security Review: Part Two—NATO*, Third Report of Session 2014–15, HC 358, ¶¶ 77 and 88 (July 22, 2014).

172. Cf. Nicar. v. U.S., 1986 ICJ, *supra* note 133, ¶¶ 176 and 195. See also Broderick C. Grady, *Article of the North Atlantic Treaty: Past, Present, and Uncertain Future*, 31 GA. J. INT'L & COMP. L. 167, 171–85 (2002).

173. NATO Secretary General Jens Stoltenberg, *supra* note 65; Warsaw Summit Communiqué, *supra* note 68, ¶ 72.

174. North Atlantic Treaty, *supra* note 2, art. 4 provides:

> The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.

measures.[175]

The EU suffers from its own legal blind spots. The Treaty on European Union (TEU) empowers the EU to promote the "progressive framing of a common Union defence policy", but not to engage in a "common defence".[176] The establishment of the latter requires a separate decision by the European Council.[177] Although the member states have now agreed to a mutual assistance clause between themselves in Article 47(2) TEU,[178] the scope of their commitments remains unsettled.[179] For its part, the EU is competent to use the civilian and military capabilities placed at its disposal by its member states for the purposes of combat operations,[180] but it may do

175. See OMER YOUSIF ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW (1988); ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES (1984).

176. Consolidated version of the Treaty on European Union, art. 42, ¶ 2, Feb. 7, 1992, 2008 O.J. (C 115) 13 [hereinafter: TEU]. On the difference between a "common defence policy" and "common defence", see Heike Krieger, *Common European Defence: Competition or Compatibility with NATO?*, *in* EUROPEAN SECURITY LAW 174, 179–82 (Martin Trybus & Nigel D. White eds., 2007); FREDERIK NAERT, INTERNATIONAL LAW ASPECTS OF THE EU'S SECURITY AND DEFENCE POLICY, WITH A PARTICULAR FOCUS ON THE LAW OF ARMED CONFLICT AND HUMAN RIGHTS 213–33 (2010); Sebastian Graf von Kielmansegg, *The European Union's Competence in Defence Policy: Scope and Limits*, 32 EUR. L.REV. 213 (2007).

177. TEU, *supra* note 176, art. 42, ¶ 2.

178. TEU, *supra* note 176, art. 42, ¶ 7 provides:

> If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.
>
> Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

179. See PANOS KOUTRAKOS, THE EU COMMON SECURITY AND DEFENCE POLICY 57–58 and 69 (2013); NAERT, *supra* note 176, at 225–33.

180. Under TEU, *supra* note 176, art. 42, ¶ 1, the tasks for which the EU may employ civilian and military means include "include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilization". This list, known as the Petersberg Tasks, is widely understood to include, at the top end, the use of armed force. See KOUTRAKOS, *supra* note 179, at 57–58 and 69; NAERT, *supra* note 176, at 198–209; Sebastian Graf von Kielmansegg, *The Meaning of Petersberg: Some Considerations on the Legal Scope of ESDP Operations*, 44 COMMON MARKET L.REV. 629, 634–43 (2007). But see Fabrizio Pagani, *A New Gear in the CFSP Machinery: Integration of the Petersberg Tasks in the Treaty on European Union*, 9 EUR. J. INT'L L. 737, 741

so only outside its territory.[181] Inside EU territory, it may employ military resources only in order to prevent a terrorist threat, protect against terrorist attack or to assist a member state, at its request, in the event of a terrorist attack or in the event of a natural or man-made disaster.[182]

This convoluted institutional arrangement translates into a reluctance to engage with hybrid threats at the upper end of the scale. The EU's Joint Framework on Countering Hybrid Threats thus deals only in passing with what it calls "serious hybrid attacks".[183] The emphasis throughout is on security threats that do not entail armed violence. The different priorities mandated by the respective legal frameworks of NATO and the EU underline the need for cooperation between the two institutions so that they may complement each other's core capabilities. However, as the example of the Joint Framework demonstrates, these different priorities may also give rise to diverging institutional visions and understandings of hybrid threats.

Based on a common definition of the legal dynamics of hybrid threats, NATO and the EU should develop, working with partner nations and organizations, a common understanding of the legal vulnerabilities and challenges that affect them. These may be grouped into three categories. First, legal challenges posed by hybrid adversaries, with particular attention given to the means and methods that such adversaries may employ to create relationships of legal asymmetry. Second, challenges inherent in the international legal order, for example the growing legalization of warfare and the suitability of the relevant legal regimes to offer guidance in key areas of interest, such as the field of information operations. Third, legal challenges faced by NATO, the EU and their member states, for example the institutional division of labor for countering hybrid security threats and problems of legal inter-operability.

(1998).

181. TEU, *supra* note 176, art. 42, ¶ 1 ("The Union may use [civilian and military assets] on missions outside the Union"). This condition is understood to prevent the EU from conducting military operations inside the territory of the EU: see e.g. Fabien Terpan, *Article 43*, *in* COMMENTARY ON THE TREATY ON EUROPEAN UNION 1237, 1238 (Herman-Josef Blanke & Stelio Mangiameli eds., 2011).

182. Consolidated version of the Treaty on the Functioning of the European Union, art. 222, Mar. 25, 1957, 2012 O.J. (C 326) 47. Cf. 2014/415/EU: Council Decision of 24 June 2014 on the Arrangements for the Implementation by the Union of the Solidarity Clause, art. 5, ¶¶ 2(b) and 3(b), 2014/415/EU, 2004 O.J. (L 192) 53. See Steven Blockmans, *L'Union fait la Force: Making the Most of the Solidarity Clause Article 222 TFEU*, *in* EU MANAGEMENT OF GLOBAL EMERGENCIES 111-35 (Inge Govaere & Sara Poli eds., 2014).

183. Joint Framework on Countering Hybrid Threats, *supra* note 75, 16–17.

C. Strengthening legal preparedness, deterrence and defense

Based on a common understanding of the legal dynamics of hybrid warfare and the legal challenges posed by hybrid threats, NATO and the EU should strengthen their legal preparedness, deterrence and defense.[184] Legal preparedness to counter hybrid threats requires maintaining situational awareness in the legal environment, building resilience into legal structures and processes, preserving freedom of manoeuvre in the legal domain, strengthening legal inter-operability, enabling legal advice to play a more proactive role in planning, connecting the political, strategic and operational levels of lawyering and making appropriate adjustments to training and exercises. Legal deterrence means demonstrating the intent and ability to contest the legal domain, demonstrating legal interoperability and resilience and deploying compelling legal narratives. Legal defense means denying the benefits of legal asymmetry to hybrid adversaries, preserving and defending the rule of law at the domestic and the international level and employing law and legal arguments effectively to maintain campaign authority. To provide the necessary guidance and unity of action across the different levels of command, NATO and the EU should develop a doctrine for legal operations as a matter of priority.

V. CONCLUSION

The hallmark of hybrid warfare is the blurring of the traditional dividing line between war and peace. As I have shown in this chapter, international law plays a critical, albeit imperfect, role in preserving this divide. Aided by technological progress and military innovation, hybrid adversaries are exploiting this feature of the law for their military advantage. Legal thresholds, normative boundaries and conceptual dichotomies provide abundant opportunities for hybrid adversaries to employ force in pursuit of their strategic objectives, whilst seemingly leaving their opponents bereft of opportunities to respond in kind. In operational terms, the dividing line between war and peace appears to favor hybrid adversaries not shy to break the law and to penalize their law-abiding victims. Law, it seems, is part of the problem.

It is, indeed. I have argued in this chapter that law is an integral and critical element of hybrid warfare. Hybrid adversaries rely on law as an enabler and force-multiplier at all levels of warfare. Without accepting that law constitutes a contested operating environment, the prospects of overcoming the legal challenges posed by hybrid warfare are slim. However, admitting that law

184. Cf. Sorin Dumitru Ducaru, *Framing NATO's Approach to Hybrid Warfare*, *in* COUNTERING HYBRID THREATS: LESSONS LEARNED FROM UKRAINE 3, 8–10 (Niculae Iancu et al. eds., 2016).

constitutes an operating environment also implies that law is part of the solution. Nations facing hybrid threats must contest the legal domain against hybrid adversaries. This requires a clear understanding of the legal dynamics of hybrid threats, awareness of legal vulnerabilities and strengthening legal preparedness, deterrence and defense. The chapter has offered guidance in all three respects.

The use of law as an instrument of war is not a novel phenomenon.[185] Belligerents have engaged in this practice for some time. In this respect, it is vital to remember that law is not merely an instrument or a means to an end. Law is also a normative system. "The war with Russia began in Ukraine in March 2014", writes General Sir Richard Shirreff in his preface to *2017 War with Russia*.[186] He is right: Russia launched a war against Ukraine in 2014. Despite its legal excuses and persistent denials, the Russian Federation did use force in contravention of international law. Law offers a powerful device to hold hybrid adversaries like Russia to account for their non-compliance with community values. Of course, making a compelling case that Russia acted illegally does not in itself reverse its annexation of Crimea. Laws are rules and rules are immaterial, literally, in the physical domain. However, rules of law are exceptionally powerful constructs for managing expectations and influencing behavior. The hybrid warfare concept offers a useful perspective for understanding conflicts that blend military force with other levers of power, yet it also carries the risk of turning everything into an act of warfare.[187] The war with Russia did not begin in 2014 if Sir Richard meant to suggest that NATO is at war with the Russian Federation. NATO and Russia are engaged in a confrontation, but they are not at war with each other.

The distinction between war and peace, based on the notion that peace is the normal state of affairs and war the exception, is one that is worth preserving. International law has a key role to play in this regard. Nations committed to a rule-based international order must contest the legal domain against hybrid adversaries in a way that safeguards the normative values embedded in the law, including the dividing line between war and peace. The task, therefore, is to find ways of using the law as an instrument of war without abusing it.

185. On this subject, see Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146 (2008) and Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT'L L. 121 (2010–2011).

186. SHIREFF, *supra* note 1, at 1.

187. Cf. the excellent analysis by Christopher Paul, *Confessions of a Hybrid Warfare Skeptic*, Small Wars Journal (Mar. 3, 2016, 4:40 PM), http://smallwarsjournal.com/printpdf/40741.

PANEL 2
Thresholds & Technologies: Internet & Information

Punching on the Edges of the Grey Zone: Iranian Cyber Threats and State Cyber Responses

by Colonel (Retired) Gary Corn

February 11, 2020

The recent escalation in hostilities between the United States and Iran has raised intense debates about the propriety and legality of both parties' uses of lethal force. These debates highlight the murky and dangerous terrain of grey-zone conflict, the attendant legal ambiguities, both domestic and international, and the risks inherent in aggressively pressing grey-zone strategies up to and across recognized lines set by the U.N. Charter.

Be those debates as they may, one thing seems clear. Despite the temporary pullback from open hostilities, Iran will continue to press its grey-zone strategy through asymmetric means, of which malicious cyber operations are likely to constitute a core component. The need to not just prepare for, but actively counter Iran's ability to execute cyber operations is, as a result, squarely on the table. So too are the difficult questions of how international law applies in the current context and should inform U.S. options.

This reality provides an important backdrop to assessing Chatham House's recent foray into the debate arena over how international law should govern cyber operations below the use-of-force threshold. In this article, I scrutinize Chatham House's report on the international law rule of non-intervention and the principle of sovereignty.

Iran's Strategic and Tactical Posture

The Iranian cyber threat is nothing new. Since at least 2012, Iran has employed near-continuous malicious cyber operations as a core component to its grey-zone strategy of confronting the United States. It has conducted operations ranging from multiple distributed denial of service (DDOS) salvos against US banks to destroying company data in an operation against the Sands Casino, not to mention a number of substantial operations directed against targets throughout the Middle East. Well before the current crisis, the US Intelligence Community identified Iran as a significant cyber threat actor with the capability and intention to at least cause localized, temporary disruptive effects,

and assess that it is actively "preparing for cyber attacks against the United States and our allies." And as these assessments make clear, the Iranian threat is not limited to cyber effects operations against data and infrastructure. In true copycat fashion, Iran is also positioned to engage in online influence and election interference operations a la Russia.

Given this background, it is no surprise that many, like my colleague Paul Rosenzweig, have warned that hostile Iranian cyber operations are likely in the offing. The recent step back from the dangerous escalation of open hostilities that culminated in the strike on Soleimani and Iran's retaliatory missile strike is at best a strategic pause, and more likely a return to the pre-existing, if not an escalated, grey zone conflict in which asymmetric cyber operations form a key component of Iran's modus operandi. Indications are that Iran has stepped up its cyber reconnaissance activities since the strikes and some predict it may conduct a substantial cyber operation to exact revenge or send a message.

United States Strategy and Tactical Posture

And so although the threat is not new, it is now more acute and brings into sharp focus key aspects of the shift in U.S. cyber strategy over the last several years, with its emphasis on persistence and proaction—in particular the concepts of defending forward and persistent engagement. As these strategies and the Command Vision for U.S. Cyber Command make clear, addressing cyber threats such as the one emanating from Iran may require "defend[ing] forward to disrupt or halt malicious cyber activity at its source, including activity that falls below the level of armed conflict."

As anyone with even a passing understanding of the strategic and operational environment of cyberspace knows, the effectiveness of counter-cyber operations will often depend on speed and surprise. Further, the ability to "[i]dentify, counter, disrupt, degrade, and deter" adversary cyber capabilities and operations will often require interaction with globally distributed, adversary owned or illicitly controlled infrastructure. From the perspective of international law, this implicates not only the rights and obligations of the two states involved, but potentially those of third-party states, for example, those in whose territory adversary-controlled infrastructure resides.

Orientation to International Law

Accounting for the nature of the threat and the particulars of the domain is essential to assessing how international law applies in the cyber context, especially to cyber operations conducted below the use-of-force threshold and how states are likely to approach these issues. In the final analysis, states and states alone are the authors of international law, and they will form views about how the law applies mindful of these realities; realities that will grow increasingly more challenging with the inevitable introduction to cyber arsenals of artificial intelligence, automation, and machine learning. Determining the legal basis for any specific operation aimed at countering or disrupting cyber threats is complex and highly fact specific, and in the absence of clear state practice and *opinio juris,* general claims to customary rules broadly proscribing states' response options should be viewed with caution.

Chatham House's Report and Recent State Pronouncements on International Law

With its recently released report titled, "The Application of International Law to Cyberspace: Sovereignty and Non-Intervention," Chatham house has weighed in on important debates about how international law applies to states' conduct of cyber operations below the threshold of a use of force and outside the context of armed conflict. Focusing on the principle of sovereignty and the rule of prohibited intervention, the report concludes with an overarching recommendation that, given conflicting state views over the normative status of the principle of sovereignty and uncertainties about how it applies in the cyber context, states are better off approaching the regulation of malicious cyber activities through the prism of the customary international law (CIL) prohibition on intervening in the internal affairs of another state.

To a certain extent, this is sound advice. The CIL foundations of the non-intervention rule are much firmer and the rule has the potential to address aspects of foreign influence efforts in ways that the purported sovereignty rule would not. Considering the unprecedented scope, scale, and depth of malicious foreign interference campaigns that cyber capabilities now enable, advocating against overly narrow articulations of the non-intervention rule has resonance. But ultimately the recommendation rests on the report's argument that the rule of prohibited intervention is broader in scope than generally understood, and so it would do much of the same work as the sovereignty rule. However, it is unclear whether the report is arguing a good faith interpretation of existing law or urging states to evolve the rule of prohibited intervention to broaden its ambit in

the cyber context. Ultimately, states will have to determine the best role the non-intervention rule can play in addressing foreign interference, and hence the rules acceptable parameters. At present, it is simply unclear.

The report's preference for approaching the regulation of malicious cyber operations through the lens of prohibited intervention is also premised on the recognition that there is disagreement among states, at least those that have opined publicly, over the normative status of the sovereignty principle, and virtually no agreement as to a definable set of criteria for determining what cyber operations would run afoul of a professed sovereignty rule. As the report correctly notes, overstatements about the principle of sovereignty not only crash head on with the reality of ubiquitous state practice, but "as such could increase the risk of confrontation and escalation" since violations of international law give the affected state the right to take countermeasures—actions that are otherwise unlawful—in response.

Unfortunately, and in spite of acknowledging the divergence of states' views on the sovereignty question, the Report throws its weight on the debate scale in favor of the sovereignty-as-a-rule camp. In this regard, its arguments are neither novel nor availing, and its effort to better define the internal content of a sovereignty rule adds little clarity. More on that below, but first, a little more on the rule of prohibited intervention.

Prohibited Intervention

Russia's ongoing and concerted campaign to interfere in the elections of numerous democratic states, sow dissension, and undermine democratic institutions more broadly is by now evident and has provided a blueprint for other states like Iran seeking to challenge the existing order and weaken Western democracies. The targets of these efforts have struggled to come up with effective responses, due in no small measure to the legal and policy ambiguities surrounding these sub-use-of-force, grey zone operations. States like Russia and Iran are not so much engaging in novel behavior as much as engaging in traditional, albeit adversarial statecraft through technologically new means and methods. It is the qualitative and quantitative difference in impact that calls into question traditional understandings of the existing legal architecture.

That customary international law contains a prohibition against states intervening in the internal and external affairs of other states is not controversial. As evidenced by the 2015 UN GGE report and subsequent official statements from a growing number of states, it is

generally accepted that this prohibition applies to states' activities conducted in and through cyberspace. Like the U.N. Charter prohibition on the use of force, the non-intervention rule derives from the general principle of sovereignty and is intended to protect the same basic sovereign interests in states' territorial integrity and political independence.

The rule is also of finite scope, prohibiting states from employing an ill-defined notion of "coercion" against an equally ill-defined set of core "sovereign prerogatives" of the targeted state to force a particular outcome. According to the International Court of Justice (ICJ), employing forcible measures such as direct military action or indirect support to an insurgency, actions that would also likely run afoul of Article 2(4) of the U.N. Charter, would violate the non-intervention rule. In contrast, states can and routinely do seek to influence the sovereign decisions of other states through a variety of means, even if heavy handed like sanctions, that do not run afoul of international law. Between these extremes, the standard lacks clarity, making it difficult to easily map to the cyber domain or any other domain for that matter. Unfortunately, only a handful of states have offered official views on the application of the non-intervention rule in the cyber context, providing little insight into their views of the rule's internal content.

Like others, the Chatham House report would fill the void of official state views on the subject by pointing to non-binding sources as "useful guidance," such as the ICJ's articulation of the rule in its 1986 Nicaragua decision. These sources generally focus on the element of coercion as the rule's touchstone, the ICJ describing it as "defin[ing], and indeed form[ing] the very essence of, prohibited intervention." Others, drawing on sources such as Oppenheim, who the Chatham House report cites liberally, yet selectively, articulate the rule in slightly broader terms. They assert that to be internationally wrongful, an intervention "must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question." But as Oppenheim also notes, although intervention and interference are frequently used interchangeably, international law only proscribes the former as wrongful. In his view "[i]nterference pure and simple is not intervention," an important limitation on the intent and purpose of the rule's coverage, and directly relevant to the sovereignty debate discussed below.

A number of commentators take a very narrow view of the non-intervention rule's scope, a point with which the Chatham House report takes issue. According to the report's author, writing in Just Security, it rejects "overly rigid interpretation and application" of the ICJ's description of the coercion element as leaving "unacceptable leeway to aggressor states," and setting a threshold of action and harm that will rarely be crossed. In her view, "the non-intervention principle is in practice capable of broader application." Thus, according to the report, the rule should be understood in light of its central focus on protecting the free will of states regarding core sovereign prerogatives and should operate to prevent states from employing pressure, whether successful or not, aimed at overcoming the free will of the target state in an attempt to compel conduct or an outcome involving a matter reserved as a sovereign right to that state.

The report's focus on efforts to overcome the free will of targeted states is understandable and has merit. Actions aimed at subverting a state's free will undermine the sovereign equality of states and the international order, and present a direct threat to international stability, peace and security. Covert disinformation and influence campaigns may not be new, but the internet and cyber capabilities have exacerbated their impact and elevated the risk they pose. The threat has started to galvanize attention and action, but primarily through domestic-law approaches such as Australia's recent national security and foreign interference laws. In those instances where states have reportedly taken more proactive measures to counter foreign influence campaigns, they have not offered a legal rationale.

There is no doubt work to be done on the international law front if states are going to set boundaries around destabilizing influence campaigns. As Eric Jensen and I stated, the non-intervention rule is indeed in need of clarification and perhaps evolution. As we said, the rule should be understood "to encompass actions involving some level of subversion or usurpation of a victim state's protected prerogatives, such as the delivery of covert effects and deception actions that, like criminal fraud provisions in domestic legal regimes, are designed to achieve unlawful gain or to deprive a victim state of a legal right."

Unfortunately, where the report falls short is in proffering greater evidence of state practice and *opinio juris* in support of its broader interpretation of the rule. Given the dearth of official statements on the subject, this is understandable. Nevertheless, the report would have been better to offer its views not in the form of legal conclusions, but

as recommendations for good faith extension or modification of existing law, which is ultimately a policy question reserved for states that must be carefully considered and weighed against the potential impact on external sovereign prerogatives.

Before turning to the sovereignty question, one aspect of the report's analysis is worth particular mention. In challenging an overly narrow construction of the non-intervention rule, the report was quick to downplay the importance of the ICJ's pronouncements on the subject in the *Nicaragua* decision, dismissing them as dicta. On this point, the report is correct. The matters before the ICJ involved forcible measures addressed separately under the court's use-of-force analysis. Further, the court's entire discussion of the non-intervention principle was only for the purpose of dispelling an argument that the forcible measures were justified as countermeasures. As such, its broader pronouncements on the elements of the rule were unnecessary and deserving of limited weight. Unfortunately, when it comes to the issue of the normative status of sovereignty, the report is less circumspect of ICJ pronouncements.

The Sovereignty Debate

On the question of sovereignty, the report unfortunately tacks in a different direction. It relies on the same sort of ICJ dicta it correctly downplayed with respect to prohibited intervention and fails to adequately reflect the marked divergence in states' views on the sovereignty question and its applicability to the cyber context. In so doing, the report elevates in importance factually inapposite ICJ opinions over actual state practice and *opinio juris*. It also adopts the same flawed syllogism used in the Tallinn Manual 2.0 that rests on the erroneous premise that international law contains a blanket trespass rule against states sending their agents into the territory of another state without consent. Overwhelming state practice, most notably in the context of espionage, says otherwise; a point that neither the report nor the Tallinn Manual 2.0 account for adequately.

Where the report diverges with the Tallinn Manual 2.0 is on its views of what actions might constitute violations of the asserted rule of sovereignty, adopting what the author describes as a more holistic approach and concluding that there may be "some form of *de minimis* rule in action." On this point the report, like the Tallinn Manual 2.0, wades deep into uncharted waters without the benefit of even rudimentary navigational tools. Fortunately, here the report does recognize the limits the distinct absence of state practice or *opinio juris* place on any effort to identify the contours of a claimed

sovereignty rule or to assert controlling thresholds, concluding that "[t]he assessment of whether sovereignty has been violated therefore has to be made on a case by case basis, if no other more specific rules of international law apply."

Notwithstanding claims to the contrary, to date only two states, the United Kingdom and the Netherlands, have put on record their positions as to whether sovereignty is simply descriptive of legal personality or a prescriptive primary rule of international law. Their polar opposite views, coupled with the distinct absence of comment on this core question from the handful of states such as Estonia, Australia, and the U.S. that have offered official statements on international law's applicability to cyber operations is *prima facie* evidence of the unsettled nature of the question.

The United Kingdom's position is clear: that as a matter of current international law, there is no "cyber specific rule of a 'violation of territorial sovereignty' in relation to interference in the computer networks of another state without its consent." The U.K. assesses legality against the accepted prohibitions on the use of force and intervention. Based on my professional dealings, there are a number of key states that find sympathy with this view.

The Netherlands takes the opposite view, stating its belief that "respect for the sovereignty of other countries is an obligation in its own right, the violation of which may in turn constitute an internationally wrongful act." As to what that obligation entails, in what can only be understood as a strong dose of pragmatism the Netherlands is far more vague. Beyond "generally" endorsing the Tallinn Manual 2.0 Rule 4 approach, it notes that in light of the unique nature of cyberspace, the precise boundaries of what may or may not be permissible have yet to crystallize. And in an interesting twist, the Netherlands goes on to intimate that cross-border cyber law enforcement activities may not be captured by the rule, as "[o]pinion is divided as to what qualifies as exercising investigative powers in a cross-border context …." Such an acknowledgment is anathema to strict sovereigntists, and although the Netherlands letter to Parliament is conspicuously silent on the issue, perhaps this was a nod to the difficult question of espionage.

Recently France also lent its voice to the cyber international law discussion. But despite claims to the contrary, including in the Chatham House report itself, France did not assert that sovereignty constitutes a standalone primary norm of international law.

First, it should be noted that despite numerous assertions to the contrary, the French document does not claim to be the official position of the French government. It was written and published by the French Ministère des Armées (MdA), in the same vain as the DoD Law of War Manual which does not necessarily reflect the views of the U.S. Government as a whole. Further, although the MdA does state that cyberattacks, as it defines that term, against French digital systems or any effects produced on French territory by digital means *may* constitute a breach of sovereignty in the general sense, at no point does it assert unequivocally that a violation of the principle of sovereignty constitutes a breach of an international obligation. To the contrary, obviously aware of the debate, the document is deliberately vague on this point and simply asserts France's right to respond to cyberattacks with the full range of options available under international law consonant with its assessment of the gravity of the attack.

Tellingly, while noting that cyber operations are not unlawful per se, the MdA states that it is actively taking "a number of measures to prevent, anticipate, protect against, detect and respond to [cyberattacks], including by neutralizing their effects." Yet when discussing France's right to take countermeasures the document is again vague, and perhaps more so, stating in measured fashion that they are available only when cyberattacks *in fact* infringe international law (with a distinct focus on uses of force)—not simply when they "breach" sovereignty. These are not simply my observations. They were confirmed in discussions with a senior French official involved in the drafting and publication of the document.

The French paper offers a number of important and helpful views on the role international law should play with respect to cyber operations, and the authors should be commended. But it is first and foremost a pragmatic statement of the MdA's views on its authority to proactively respond to malicious cyber operations and is conspicuously silent on whether and how France, or the MdA, feel international law constrains its own freedom of action. Reports that France conducted a mass crypto-currency mining Botnet takedown across multiple states only weeks after publishing the paper is notable in this regard. Simply put, the Chatham House report, like several commentators, places undue weight on the paper and overstates its conclusions on the sovereignty question.

Notwithstanding the documented divergence of states' views, the report relies on ICJ pronouncements in a handful of factually inapposite cases to support its conclusion that sovereignty constitutes a primary rule of international law. This itself raises an import

question about the weight to be given ICJ opinions in general as "sources" of international law; a discussion beyond the scope of this post. Suffice it to say that, although the court's views should not be dismissed lightly, they are often not in conformity with those of the majority of states, and as is evidenced in Article 38(d) of the ICJ statute, states never intended to imbue the court with the power of *stare decisis*.

So while it is true that the ICJ has referred in general terms to violations of sovereignty in certain cases such as Corfu Channel, Certain Activities carried out by Nicaragua, and the 1986 Nicaragua decision, the court's pronouncements were binding only on the parties before it and in each instance the facts ruled on involved substantial military presence, de facto control of territory, and in some instances, violent operations, all of which implicate higher thresholds than the sovereignty-as-a-rule proponents assert.

Further, the pronouncements are often in the form of dicta, which the report relies on selectively. For example, the report ignores the foundational holding in the SS Lotus case that restrictions on states' sovereignty cannot be presumed, citing instead to dicta that, absent a permissive rule to the contrary, states may not "exercise their power in any form" inside the territory of another state. Again, this is an overbroad proposition at odds with extensive state practice in the area of, among other exercises of state power, espionage.

As the report acknowledges, states routinely send agents into the territory of other states without consent, and those agents often alter physical and virtual conditions inside the territory to permit access to and exploitation of information. These activities are broadly recognized as unregulated in international law. Notwithstanding those facts, in an effort to bolster its sovereignty-as-a-rule position, the report follows the Tallinn Manual 2.0's lead and attempts to establish a loose syllogism based on the flawed premise that all physical trespasses violate international law. According to this faulty logic, the entry of a state agent into the territory of another state without consent is a breach of sovereignty; therefore the execution of a close-access cyber operation against a state from within its territory is a breach of sovereignty; and *a fortiori*, remote cyber operations conducted against a state from outside its territory constitute a breach of sovereignty.

The principle of sovereign equality is at the heart of the *Lotus* principle. Turkey's exercise of criminal jurisdiction over a French national in that case involved obvious interference in France's sovereign prerogatives with respect to its national, yet the court found no

impediment in law to Turkey's action. The report disregards the central tenet of the *SS Lotus* case, which is that states are free to act on the international plane except to the extent that their actions are proscribed by clearly identifiable treaty or customary international law. There is simply no evidence that the Lotus principle does not apply with equal force in the cyber context.

In describing the report, the author states that there is no reason the principle of sovereignty "should not apply in the cyber context as it applies in every other domain of State activity." This statement is at odds with the report's own closing observation that in "due course, further state practice and *opinio iuris* may give rise to an emerging cyber-specific understanding of sovereignty, just as specific rules deriving from the sovereignty principle have crystallized in other areas of international law." More important, the statement assumes, counter factually and historically, that sovereignty and the rules that flow from it operate consistently across every other domain of state activity. It does not, and precisely for reasons grounded in the very bundle of sovereign rights and obligations that the paper references.

States' rights flowing from internal and external sovereignty are frequently in tension, and it is only through a process of accommodation that states consent to restrictions on their external sovereign prerogatives—accommodations that start from the Lotus principle and are almost always context specific. Even Judge Alvarez, one of the original judges to sit on the ICJ and a staunch advocate of the court having expansive power to "remodel international law" recognized in his *Corfu* dissent that the rights and obligations that sovereignty confers on states:

> are not the same and are not exercised the same way in every sphere of international law. I have in mind the four traditional spheres—terrestrial, maritime, fluvial and lacustrine—to which must be added three new ones—aerial, polar and floating (floating islands). The violation of these rights is not of equal gravity in all these different spheres.

Had it existed at the time, he would have certainly added to his list the cyber sphere, and like the accommodation of competing sovereign interests reflected in the rule of transit passage *sub judice* in Corfu Channel, it remains for states to settle on any prescriptive regime that would limit their external prerogatives in cyberspace beyond the domain agnostic prohibitions against the use of force and prohibited intervention.

Having adopted the sovereignty-as-a-rule approach, the report turns to an unavailing effort at identifying the rule's content. It points to a number of flaws in the Tallinn Manual 2.0 Rule 4 approach, correctly highlighting the dissension among the Tallinn contributors on how the purported rule operates in practice. I have commented on these weaknesses (here, here, and here). The report correctly rejects an absolutist view of the purported sovereignty rule as unsupported by state practice and dangerously escalatory. To this critique the report should have added that such an overbroad rule would be too constraining to states' ability to conduct effective counter-cyber operations by limiting them to the cumbersome and problematic remedy of countermeasures, which Eric Jensen and I have pointed out.

In rejecting this absolutist view, the report claims to take a more holistic approach to the issue and states that some threshold must be at play. In so doing the report repeats a number of the same unsubstantiated claims as the Tallinn Manual 2.0 and ignores Oppenheim's admonition that mere interference in the internal affairs of another state is to be distinguished from prohibited intervention. Further, the report provides no evidence of state practice or *opinio juris* to demonstrate that states agree or that they would declare such a threshold to be anything other than the non-intervention rule. In fact, a number of the examples offered in the report in support of its sovereignty argument directly implicate prohibited interventions. To the author's credit, on these points the report is more prudent in its approach, concluding that there is currently insufficient evidence to establish governing thresholds as a matter of customary international law.

The paper closes with a number of recommendations to states that, although likely unintentional, lose some persuasion by straying at times from recommendatory to prescriptive, such as telling state intelligence agencies and foreign services how to coordinate their strategic communications. As I noted at the beginning, of greater value is the report's overarching recommendation that states focus on evolving the rule of non-intervention as the most effective tool for establishing greater normative boundaries around state actions in the cyber domain while preserving space for states to execute effective counter-cyber strategies. The real-world scenario I described involving the threat from Iran is a good case study. It is difficult to imagine states like the United States and others that are increasingly on the receiving end of these malicious activities will rally around the sovereignty rule that Chatham House articulates. In the face of concrete and persistent cyber threats from states like Iran, Russia, China, and North Korea, states

will of necessity need to ensure that international law evolves not only to deter irresponsible behavior but to do so in a way that preserves victim states' ability to detect, disrupt, and counter cyber threats.

About the Author(s)

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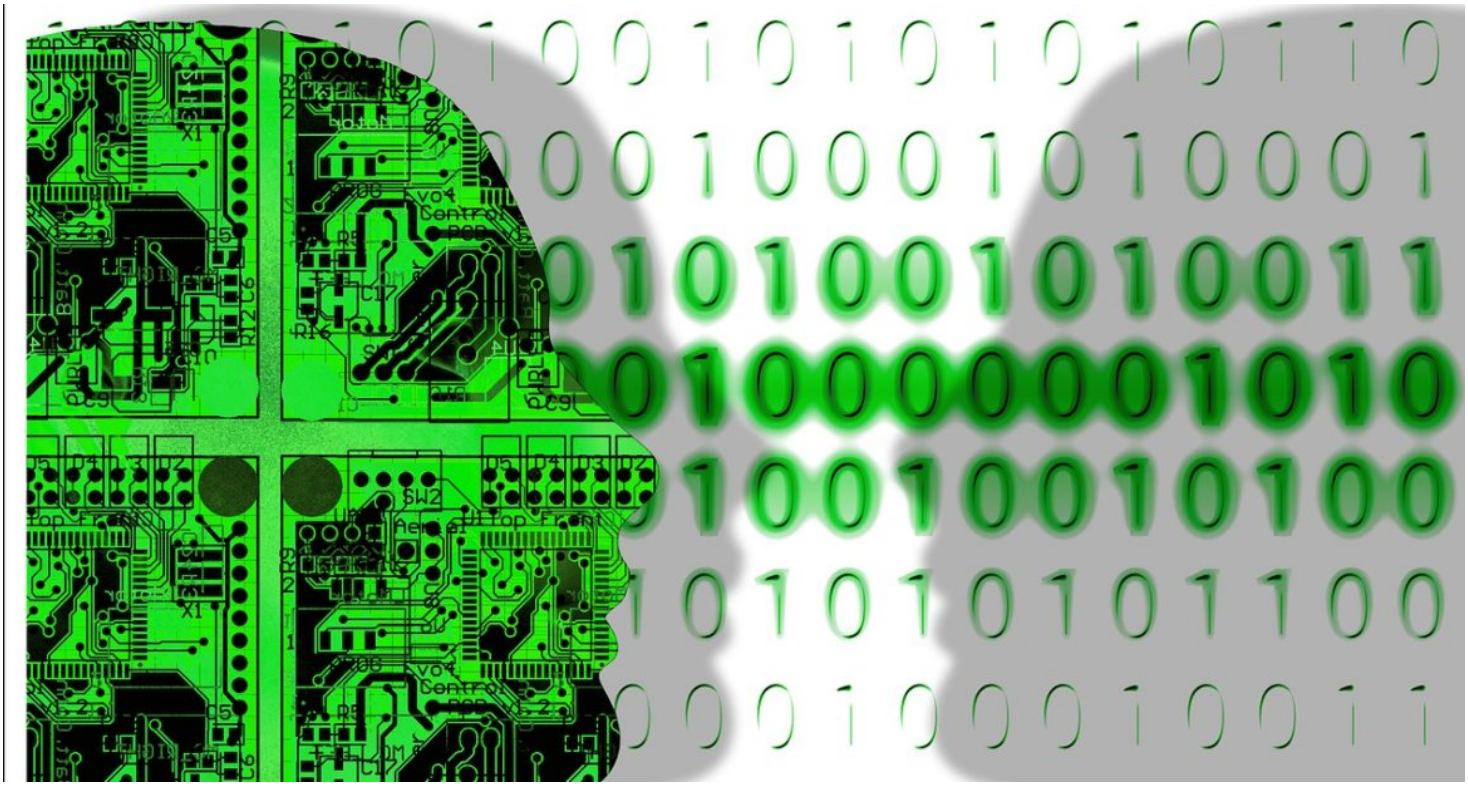
The human nature of international humanitarian law

August 23, 2018, Analysis / Autonomous Weapons / Conduct of Hostilities / Law and Conflict

Eric Talbot Jensen



International humanitarian law (IHL) regulates the use of force in armed conflict. It inherently provides protections to victims of armed conflict while humanizing, at least to some degree, some of man's most inhumane acts. Thus, IHL principles of distinction, humanity, unnecessary suffering and proportionality serve to temper the application of military necessity. In an age of emerging technologies, the international community is deep in discussion about how these principles will be applied, particularly in weapon systems that will make autonomous decisions involving life and death through the application of machine learning and the development of artificial intelligence.

Such discussions should cause us to reflect on a foundational question with respect to the application of IHL—**Is the law regulating armed conflict designed to provide the 'best protections possible' for victims of armed conflict or the 'best protections humanly possible?'** In other words, the current standards for general IHL compliance are often described in terms of human decision-making, i.e., a human commander must make a specific lega determination such as with proportionality as discussed below.

Does this mean that the actual legal standard is tied to human decision-making? If the standard is 'bes humanly possible', then any emerging technology would have to remain subject to human determinations of IHL application, including the recognition that these decisions will continue to be subject to human oversight and potential human error. Note that the ICRC has made two relevant statements applicable to this question *[1]*.

If, however, the requirement is the 'best possible' application of IHL, and we have any belief that autonomous weapons—or artificial intelligence or weapons using machine learning—can factually apply force in a way that in at least some circumstances results in better protection for humans, then w reach a different result. In this case, the international community should be encouraging the development of autonomous weapons that apply machine learning or artificial intelligence on the battlefield because they might (are likely to) be able to apply the legal requirements of IHL in a way tha results in greater protections for victims of armed conflict.

It should be noted at this point that every weapon system, including any autonomous weapons that apply machine learning or artificial intelligence, must undergo and meet the requirements of a *weapon review*. There is no legal possibility of fielding weapons that do not comply with all the requirements of a legal review. The significance of determining the role of a human in a lethal targeting decision is to provide the foundational rationale for that review. For an autonomous weapon to be fielded, it absolutely must be thoroughly tested and prove that it can apply IHL correctly on the battlefield.

The important question raised here is the standard for that review. If that standard is that the weapon system is to be able to apply the law in a way to provide the best protections humanly possible, then certain types of autonomous capabilities need not be researched and developed. However, if the standard is to apply IHL in a way that results in the best protections possible to potential victims of armed conflict, a vast array of possible autonomous weapons that utilize machine learning and artificia intelligence without real-time human involvement may now be capable of development and deployment.

Principle of distinction

Best protection humanly possible

To illustrate the difference between 'best protections possible' and 'best protections humanly possible consider the principle of distinction (e.g., *here* and *here*). Under IHL, every individual who engages in ar attack has an obligation to apply the principle of distinction. In particular, it is unlawful to ever target civilians. It is also unlawful to not take feasible precautions to protect civilians that might be incidentally injured or killed from an otherwise lawful attack. Failure to comply with these legal requirements is a violation of the law of war. Members of armed forces can be held individually criminally liable for failures to properly apply distinction, and assertions are routinely made alleging such violations.*[2]*

At the same time, few who have been in armed conflict will argue that mistakes never happen and that civilians are never wrongly, though unintentionally, targeted. Often these cases of unintentional death occur through a misapplication of the principle of distinction, based on a failure of intelligence, or sometimes just human error. In such decisions, the ability to quickly gather and analyze all available data on a target will often make the difference to a military commander who is making the targeting decision.

Best protection possible

Now, consider an autonomous weapon system that is tied to a vast array of sensors and designed to incorporate machine learning which can gather and analyze huge amounts of data much more quickly than the human brain. It might be able to do this, for example, by possessing greater capability to discern the difference between a hostile fighter and a non-hostile civilian in a crowd of people, based o sensors spread across the area that are providing otherwise unobservable data on the individuals in the crowd. Note that autonomous systems, driven by machine learning, have already demonstrated the ability to outperform humans when conducting very intricate and complex analyses, such as *correctly diagnosing medical conditions* and *playing complex games*.

If such a system could be fielded with a statistically better chance of reaching a correct distinction conclusion based on the ability to more quickly gather and analyze a much larger set of data, it would likely result in a decreased chance of innocent deaths. From a view of IHL where human decision-making is not an integral part of legal compliance, it doesn't matter that a human was not applying the principle of distinction. Rather, what matters is that the principle was applied correctly more often or that the death and injury to civilians was less than when compared to the result of human decision-making.

Principle of proportionality

Best protection humanly possible

Similarly, consider the application of *proportionality*. Commanders are obliged to refrain from attacks ir which death or injury to civilians and/or damage to civilian objects would be excessive to the concrete and direct military advantage anticipated from the attack (*API Article 51*). Perhaps the most 'human' aspect of that decision is the balancing of the anticipated military advantage and the potential collatera

damage. For those who believe IHL requires the best decision 'humanly' possible, the human aspect of that decision is likely very important, even if the outcome of some proportionality decisions are strongly criticized.

Under this view, where no lethal targeting decision without human input can comply with IHL, talk of technological innovation must be tied to creating better ways to support humans in their inherently human decisions. This view does not make AI and machine learning research and development useless, but it should scope such research and development in a way that is designed to support the human decision-maker, not to create an independent decision-maker.

Best protection possible

For those who believe that the 'best' application of IHL, such as the principle of proportionality, is the one that results in the least collateral damage while still accomplishing the military mission, an autonomous decision or one based on machine learning or artificial intelligence may result in a 'better' application of the principle because it has the potential to result in fewer civilian casualties.

Technology optimists

A technology optimist will believe that the ability for autonomous weapons to come to 'better' conclusions than humans is absolutely possible, and in fact, probable in certain situations given enough research and development. An autonomous weapon system that is not affected by emotions (such as anger, fear and aggression) or subject to physical limitations (such as limited senses, fatigue or an inability to quickly process all the factual data available at the point of decision) is likely going to be able to apply these principles in a more legally compliant way. To the extent that the optimistic view of technology is accurate, it seems clear that the international community should be strongly encouraging the research and development of autonomous weapons with these capabilities in order to enable humans to more accurately apply IHL principles. If autonomous weapons that apply machine learning or artificial intelligence could be developed, and more civilian lives could be spared, some will even argue that States will have an obligation to develop such weapons.

Technology skeptics

In contrast, technology skeptics will argue that such technology does not currently exist and is unlikely to ever be developed. Therefore, we should not research and develop these technologies for application in weapons or at least we should move forward with great caution. Skeptics argue that there is significant uncertainty that such research and development will ever result in machine learning or artificial intelligence that will demonstrate an ability to apply IHL principles in a way that produces 'better' results than humans.

Role of human decision-making in IHL

Despite the fact that there may be reason for serious caution as to the path technology will take with respect to decision-making capability, technology skeptics often do not really address the fundamental

issue of the role of human decision-making in IHL. Whether or not research and development is likely to reach a successful conclusion is not determinative as to whether States who take a more optimistic view can/should engage in research and development to that end. **Rather, the fundamental question is if IHL precludes non-human decision-making with respect to the application of lethal force such that States are precluded from pursuing these technological developments.**

And so, as technology continues to develop, the issues concerning the development of AI and machine learning as part of autonomous weapon systems come back to the fundamental question of whether IH requires the best 'human' application of the law or simply the best 'possible' application of the law. Th fact that it may be possible, sometime in the future, to have IHL applied in a way that reduces the death and injury to civilians because of the application of non-human decision-making should encourage us to consider and answer this question now.

Footnotes

[1] ICRC Statement, 18 April 2018 at the Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts on Lethal Autonomous Weapons Systems: *Towards limits on autonomy in weapon systems*; ICRC Statement 15 November 2017 at the Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts on Lethal Autonomous Weapons Systems: *Expert Meeting on Lethal Autonomous Weapons Systems.*

*[2]*ICTY, Prosecutor v Ante Gotovina, Ivan Čermak and Mladen Markač, Judgment, IT-06-90-T, Trial Chamber I, 15 April 2011 (*Gotovina Trial Judgment*); ICTY, Prosecutor v Ante Gotovina and Mladen Markač, Judgment, IT-06-90-A, Appeals Chamber, 16 November 2012 (*Gotovina Appeals Judgment*).

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Comments

STEPHANE OJEDA, 24 August 2018

Thank you so much for this very interesting and thought-provoking article. One issue I am struggling with is how can machines better apply IHL rules or concepts that humans do not even agree upon or interpret differently? Will each government program machines according to its own interpretations of IHL? Even the core principles are not agreed upon. Fo instance, you write "it is unlawful to ever target civilians", well actually you can target civilians as long as they take a direct pa in hostilities, but there is no universal agreement on the constitutive elements of such "direct participation". I fully agree with you that we should ask ourselves such hard questions now. Thanks again.

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The Technicolor Zone of Cyberspace – Part I

by Colonel (Retired) Gary Corn and Eric Jensen

May 30, 2018

The Right Honourable Jeremy Wright's recent remarks at Chatham House on Cyber and International Law in the 21st Century added a welcome dash of color to the otherwise gray zone of cyberspace. While full-HD resolution may still be in the offing, this all-too-rare official pronouncement of opinio juris reinforces the baseline maxim that existing international law applies to states' activities in cyberspace and provides some needed clarity on how certain key provisions of international law govern interstate relations at and below the threshold of armed conflict. As the Attorney General notes, the efficacy and resilience of the international rules-based order depend on states' being open and clear about their understandings of, and commitment to international law. Just as important is his reminder that international law is not static and if it is to remain relevant must "adapt to meet the particular demands" of the modern world and the unique security threats that cyberspace presents. In this regard, his pronouncements on the applicability of the jus ad bellum and the principle of non-intervention to cyber operations, the normative role sovereignty plays in cyberspace, and the substantive requirements of countermeasures are important contributions to advancing understandings of international law's role in regulating states' use of this emerging technology. In this post we offer comment on the first two points. We will address the Attorney General's important statements on sovereignty and countermeasures in a follow-on post.

For a growing number of states, cyber operations are now firmly ensconced as a means of conducting traditional and not-so-traditional statecraft, to include conflict. Cyberspace has delivered tremendous benefits, but its unique construct and ubiquity have also created significant national security vulnerabilities, generating unprecedented challenges to the existing framework of international peace and security. One need look no further than North Korea's destructive and subversive actions against Sony Pictures,

its launch of the Wannacry ransomware, Russia's launch of the indiscriminate NotPetya malware against the Ukraine, or its cyber-enabled covert influence campaigns against the U.S. and other western democracies to realize that cyber capabilities are increasingly part of a powerful arsenal states are using to pursue their interests, oftentimes through aggressive actions aimed at disrupting the status quo. As the recently released Command Vision for US Cyber Command recognizes, the emerging cyber-threat landscape is marked by adversary states engaging in sustained, well-constructed campaigns to challenge and weaken western democracies through actions designed to hover below the threshold of armed conflict while still achieving strategic effect. And as the Cyber Command Vision also makes clear, passive, internal cyber security responses have proved inadequate, ceding strategic initiative and rewarding bad behavior.

The UK's position on this is point is now clear: Both in peacetime and in conflict, states cannot engage in hostile cyber campaigns free of consequence. "States that are targeted by hostile cyber operations have the right to respond to those operations in accordance with the options lawfully available to them and that in this as in all things, all states are equal before the law." Actively contesting adversaries in and through cyberspace must form a key component to any strategy aimed at defeating these threats and reinforcing norms of acceptable and unacceptable state behavior. The Attorney General's remarks implicitly, if not explicitly, recognize that international law must take account of this increasingly evident reality.

At the same time, not all unfriendly or even prejudicial actions by one state against another constitute breaches of international law, whether effected through cyberspace or otherwise. Understanding the line between internationally wrongful and permissible cyber operations is therefore critical to framing legitimate cyber strategies and response actions. The customary laws of state responsibility provide the start point for properly analyzing and characterizing these malicious cyber activities and the response options available to victim states.

The customary law of state responsibility, reflected in much of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, holds that states are legally responsible for acts or omissions that are both attributable to them and that constitute a breach of an international obligation of the responsible state. Where these constituent elements are met, victim states have recourse to a range of

remedies, to include certain self-help measures that themselves would otherwise be considered breaches of international law. A victim state's use of force in response to an imminent or actual armed attack by another state being a case in point.

The Attorney General's remarks are a welcome contribution to advancing the understanding of the state-responsibility framework and its application to state-mounted cyber operations. Four points are of particular importance. First is the Attorney General's affirmation of the generally accepted view that the jus ad bellum governs states' activities in cyberspace. Second is his recognition that considering the novel vulnerabilities attendant to new technologies, the rule of non-intervention has taken on new importance. Third is the U.K.'s emphatic rejection of the assertion that, beyond the jus ad bellum and the rule of prohibited intervention, international law includes a primary rule of territorial sovereignty that would bar cyber activity. Last is the Attorney General's recognition that the extant law of countermeasures must adapt to the realities of cyberspace and the unique nature of the threat. For now, we limit comment to the first two of these important points.

The Jus ad Bellum

While important, the AG's reaffirmation of the applicability of Articles 2(4) and 51 of the UN Charter to state actions in cyberspace is perhaps the least remarkable aspect of his speech. Notwithstanding some retrogression in the last round of the UNGGE, by and large states have accepted this view. Other than intimating that attacks such as Wannacry that target essential medical services might trip the armed attack threshold, his remarks avoid edge cases. The high level of destruction attendant to the Attorney General's hypothetical examples that would qualify them as armed attacks are clear cases and consistent with views presented in the DoD Law of War Manual as well as Tallinn 2.0. While this will leave some critics unsatisfied, perhaps their expectations are unreasonably high.

Given the spate of malicious cyber operations mounted over the last few years, especially Russia's aggressive activities, calls for action are reaching a crescendo. Recent reports of Russia's hacking of U.S. energy and other critical infrastructure and the poisoning of Sergei Skripal and his daughter in the UK will only add to the pressure to respond. Whether and how to hold states like Russia accountable for such actions is ultimately a

political question. And while it is certainly a fair and relevant question whether Russia's actions, individually or taken together, rise to the level of a use of force or armed attack in violation of the U.N. Charter, it is not one likely to yield a satisfying answer.

Greater understanding of the use-of-force and armed attack legal triggers and how they apply to cyberspace is, of course, vital to evolving and strengthening the international rules-based order, and perhaps to deterring malicious cyber operations. However, in the absence of physical harm to individuals or tangible things, there is little consensus on whether or how cyber operations might constitute breaches of these rules. Further, the prevailing view is that most, if not all, documented cyber actions taken by states to date have fallen below the "use of force" threshold. More important, in the absence of political will to use armed force in response to Russian election interference or other malicious cyber actions, the question of whether a cyber operation might constitute an unlawful use of force or armed attack is at best one of limited utility.

In light of the lack of certainty as to how international law applies to cyber and information operations below the threshold of armed conflict, and the obvious brazenness with which Russia has operated to date, the visceral "casus belli" reactions are understandable. Unfortunately, from the perspective of sound policy and strategy development, framing the question in the dichotomy of war and peace is not particularly helpful and perhaps even counterproductive for at least two reasons. First, such reactions are based on a dangerously flawed premise—that armed conflict can be legally or factually confined to the single operational domain from within which it is initiated. That's not so as militarized conflict in the cyber realm can easily trigger actions and reactions in the kinetic realm. The so-called and oft invoked "cyber war" is simply a misnomer. Second, the gap between such rhetoric and inaction only serves to amplify the costs some, like Jack Goldsmith, have identified and risks distorting policy discussions.

That, of course, does not mean that a victim state is left without options. For example, the U.S. has made use of a mix of sanctions and other diplomatic responses, all in the category of retorsions. However, as both the former and current Commanders of Cyber Command have testified before Congress, none of these prior responses seems to have been effective in stopping or deterring Russia or other adversaries like China, the DPRK, or Iran, from continuing to push boundaries and engage in malicious cyber operations. Retired General Michael Hayden echoes this assessment and calls for "a legal and policy

zone that authorizes robust, sometimes destructive responses, well above normal peacetime competition but below what we would define as the threshold of conventional conflict and open interstate war." Absent Security Counsel authorization, the legal zone he seeks per force rests on a predicate finding that Russia has violated international law which would preclude the wrongfulness of the countermeasures he alludes to. Greater clarity on the international rules governing these more pervasive sub-use-of-force cyber operations is therefore of much greater value to reinforcing the international rules based order than continued focus on jus ad bellum thresholds. It is here that the U.K. Attorney General's remarks offer the greatest elucidation.

Prohibited Intervention

The customary international law rule that some sub-use-of-force interventions into the sovereign affairs of another State are considered internationally wrongful is also well established. The Attorney General's affirmation of the non-intervention rule's applicability to cyberspace and the concomitant implication that violations trigger a state's right to employ countermeasures in response is an important contribution to buttressing the normative framework governing state behavior below the level of a use of force. The prohibition on intervention protects against certain impairments of a state's sovereignty below the threshold of a use of force, and the Attorney General is correct to note the rule's "particular importance in modern times when technology has an increasing role to play in every facet of our lives, including political campaigns and the conduct of elections." At the same time, not all infringements on the sovereign interests of another state fall within the scope of the rule, and the Attorney General is also correct to note that the precise boundaries of the interests protected by the rule as well as the nature and scope of conduct it proscribes remain the subject of debate. However, beyond offering some examples as self-evident violations, including an interesting assertion that cyber operations aimed at destabilizing the UK's financial sector would qualify, the speech unfortunately misses an opportunity to better illuminate the UK's views on the vague language of the International Court of Justice's *Nicaragua* decision so often cited as defining the rule's elements, or how those elements might be adapted to account for the modern exigencies of cyberspace. In the meantime, greater insight into the non-intervention framework will have to be found elsewhere.

Citing the *Nicaragua* decision, the rule is generally described as prohibiting forcible, dictatorial, or otherwise coercive measures against a relatively limited but important zone of sovereign interests falling within what is commonly referred to as the state's *domaine réservé*. The *domaine réservé* is generally understood to refer to those matters reserved in international law to the sole prerogative of states, matters such as the right to choose a political, economic, social, and cultural system, and to formulate and execute foreign policy. As noted in Tallinn Manual 2.0, a state's choice of both its political system and its organization is a "matter most clearly within a State's *domaine réservé,*" and coercive actions that deprive or substantially impair a State's freedom of choice—for example over the democratic selection of its political leaders—by forcing it to take or refrain from taking an action against its will, are prohibited. In this, the Attorney General's remarks are entirely consistent with prevailing views.

Unfortunately, as David Jens Ohlin notes, "despite the patina of precision in its French rendering, the concept [of *domaine réservé*] has little internally generated content." Nor is the concept without limits. Those "domains or activities" not strictly reserved to states fall outside of the rule's zone of protected interests—for example purely commercial activities and matters otherwise subject to international legal regulation. Like international law itself, the concept of *domaine réservé* is of necessity malleable and subject to evolution over time. Notwithstanding, a more precise articulation of the boundaries between protected and unprotected interests would better serve international peace and security by placing states on greater notice of the areas of interference most likely to generate legal consequence and potentially escalatory responses.

In even greater need of clarification, and perhaps evolution, is the element of coercion. As others have pointed out, overly rigid interpretation and application of the ICJ's description of this element leaves unacceptable leeway to aggressor states. We submit that the ICJ's framing of prohibited intervention solely in terms of coercion was imprecise and, when applied dogmatically, fails to capture significant modes of state action that could be considered internationally wrongful.

By definition, coercion involves an element of force or the threat thereof to achieve an intended result. As set out in the *Nicaragua* decision, there is no question that use of a level of force violative of Article 2(4) would constitute the "lesser-included offense" of prohibited intervention. However, leaving aside debates about the existence of a force gap between uses of force and armed attacks, in this sense the prohibition adds little if

anything to the jus ad bellum framework set out above. For the prohibition to have any true normative effect *below* the use-of-force threshold, the ICJ's recitation of the actus reus element of the prohibition must be understood as encompassing more than forceful deprivations. Its scope must be understood to encompass actions involving some level of subversion or usurpation of a victim state's protected prerogatives, such as the delivery of covert effects and deception actions that, like criminal fraud provisions in domestic legal regimes, are designed to achieve unlawful gain or to deprive a victim state of a legal right. For example, covertly disseminating on the eve of an election false information that a candidate for office had dropped from the race would likely deprive the victim state of a free and fair electoral process without using coercion in the most common senses of the term.

As Steven Barela argues, perhaps better understanding of the rule's force and effect as applied to cyber operations can be found in an unlikely source—the Special Counsel's indictment of the thirteen Russians and three Russian organizations. In essence, the Mueller indictment reveals a compelling exposition, albeit in the vernacular of U.S. domestic law, of a prohibited intervention into the U.S. electoral process, the overall gravamen of the indictment being that the Russians' "knowingly and intentionally conspired . . . to *defraud* the United States by impairing, obstructing, and defeating the lawful functions of the government through fraud and deceit for the purpose of interfering with the U.S. political and electoral processes . . ." The rich set of facts of intervention set out in the indictment are only buttressed by the Intelligence Community's report on Russia's influence campaign targeting the 2016 election and its attribution to Russia of the DNC hack.

Professor Michael Schmitt, who led both Tallinn Manual processes, points to the link between a domestic crime and an internationally wrongful act of intervention, arguing that "when you engage in what is a domestic crime to distort the electoral process, then in that case you are intervening in the internal affairs of another state." The connection Schmitt draws between the domestic crime committed and the principle of unlawful intervention reinforces the instructive value of the Mueller indictment for international law. According to Paragraph 28 of the indictment, the "conspiracy had as its object impairing, obstructing, and defeating the lawful government functions of the United States by dishonest means in order to enable the Defendants to interfere with the U.S. political and electoral processes, including the 2016 U.S. presidential campaign." Against the backdrop of the U.S. Government separately attributing the election meddling to

Russia and the IC's assessment that Russia's harmful activities are ongoing and aimed at impacting the 2018 mid-term elections, the charge of conspiracy to impair lawful government functions by means of fraud and deceit seems a clear case of prohibited intervention in violation of international law.

The Attorney General calls for states to accept the responsibility to be clear about how international law obligations bind them. In this regard, perhaps his speech could have done more to clarify the scope of the jus ad bellum and the non-intervention rule as applied to state activities in cyberspace. Nevertheless, his declaration of the UK's view on the applicability of these baseline obligations is an important contribution to greater transparency and understanding of the normative structure surrounding this new technology. With respect to other aspects of international law as applied to cyberspace, namely sovereignty and countermeasures, Mr. Wright's statement adds considerably more. But that is for our next post.

The views expressed are those of the authors and do not necessarily reflect the views of the United States Cyber Command, the Department of Defense, or the U.S. Government.

Image: Getty

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The Technicolor Zone of Cyberspace, Part 2

by Colonel (Retired) Gary Corn and Eric Jensen

June 8, 2018

In Part I of this two-part post, we outlined the importance of United Kingdom Attorney General Jeremy Wright's recent speech setting out the UK's views on cyber operations and international law. In that post, we focused on two of the four most salient points of his speech: the applicability of the jus ad bellum and the rule of prohibited intervention to cyber operations. As we noted, Wright's comments on these two central primary norms were an important contribution to reinforcing international law's role in regulating states' activities in cyberspace. We also identified some aspects of these primary norms in need of clarification, or perhaps of adaptation to the particularities of cyberspace as the attorney general correctly counseled, but did not necessarily provide. We now return to his speech to discuss the two remaining and much more groundbreaking points that he made: the normative status and applicability of the principle of sovereignty to cyberspace, and the content of the rule of countermeasures as a self-help remedy to cyber-enabled breaches of international law.

Sovereignty

We pointed out in our last post that when appropriately applied, and perhaps adjusted to account for the novel threats presented by emerging technologies, the rule of prohibited intervention can serve as a powerful tool for enforcing acceptable state behavior in cyberspace. However, the prohibition does not bring within its scope all sub-use-of-force cyber activities and must be distinguished from mere interferences in the internal affairs or against the sovereign interests of another state. This raises the important question of whether, and if so, how, international law regulates cyber activities that fall below the threshold or outside the scope of a prohibited intervention. It is on this point that the attorney general's speech does its most important work in offering the UK's resounding

rejection of the existence of a primary norm of territorial sovereignty, which would make internationally wrongful a nonconsensual interference in the computer networks of another state.

Although the shortest part of his speech, Wright's statement on sovereignty is perhaps the most impactful. In less than 100 words he summed up the current debate on the issue of the normative force of sovereignty in cyberspace and made crystal clear the UK's position:

> "Some have sought to argue for the existence of a cyber specific rule of a 'violation of territorial sovereignty' in relation to interference in the computer networks of another state without its consent. Sovereignty is of course fundamental to the international rules-based system. But I am not persuaded that we can currently extrapolate from that general principle a specific rule or additional prohibition for cyber activity beyond that of a prohibited intervention. The UK Government's position is therefore that there is no such rule as a matter of current international law."

Since at least the launch of Tallinn 2.0., a lively debate has been had among academics, practitioners and commentators over whether sovereignty exists as a primary rule of international law applicable to cyber operations, the violation of which would be an internationally wrongful act in and of itself, or as a foundational principle, which could only be violated by infringing on some other sovereignty-based primary rule.

As one of the authors of this post, along with his co-author Robert Taylor, argued here, contrary to the views expressed in Tallinn 2.0, and separately by some of its authors, there is insufficient evidence of either state practice or opinio juris to support claims that the principle of sovereignty operates as an independent primary rule of international law that regulates states' actions in cyberspace. The UK clearly comes down on the sovereignty-as-principle-vice-rule side of the ledger.

The significance of Wright's statement on sovereignty cannot be overstated. Until now, no states have offered an official view on this fundamental issue. Hence, his speech is an extremely important statement by one of the major cyber powers in the international community. That alone is worthy of note. In addition, how states ultimately resolve the

sovereignty question will have a profound impact on the options available to them to confront the growing threats emanating from, or enabled by, cyberspace. In this regard, the substance of the UK's position is even more significant.

Since its inception, the concept of sovereignty has been tightly tied to geography. The same cannot be said of cyberspace. There is at most a tenuous connection between geography and the logical and social layers of cyberspace, i.e., the software, protocols, and data that combine to generate outputs, and the various digital identities and aliases of the human users of the internet. Further, the undeniable reality is that owing to the nature and construct of cyberspace, malicious cyber operations are nearly always mounted from globally dispersed and often coopted infrastructure. Countering these threats without implicating at least some of these nodes in third-party states is nearly impossible. One of the authors previously pointed this out in the context of a non-state terrorist organization's use of the internet to conduct or facilitate its operations, and the impact the sovereignty issue has on a state's ability to confront this threat. The same holds true equally, if not more, in the context of state-sponsored or conducted malicious cyber operations where their offensive capabilities are likely far more substantial.

As the problem highlights, a robust view of sovereignty as a rule would preclude any action against the aggressor's cyber infrastructure without the consent of the third-party state. Wright made clear in his speech that such a sweeping rule is too strong and not supported by current international law. Rather, a state wishing to take action to disrupt malicious cyber operations, terrorist or otherwise, must certainly consider sovereign interests before taking non-consensual activity on the IT infrastructure located within the territory of a third-party state, but seeking advance permission of that state in all cases is not required as a matter of international law. Activities that themselves do not breach the rule of prohibited intervention are legally available options of response.

Academics and commentators who oppose Wright's view point to due diligence and the plea of necessity as affording viable response options to victim states. The myriad reasons these assertions prove unavailing are too numerous to address here. Suffice it to say that even assuming these rules apply, under the most generous reading of them, victim states would still be unreasonably constrained from adequately responding to malicious cyber actors leveraging globally dispersed infrastructure. As Wright intimates, ceding that type of operational maneuver space to aggressors is unsustainable.

This is not to say the attorney general's declaration is conclusive on the issue. It is the considered view of but one state, and more will have to weigh in on the matter before firm conclusions can be drawn about the status of the debate. Hopefully, more states will heed Wright's call to do so. In the meantime, as a clear expression of opinio juris, his declaration on the normative status of sovereignty not only moves the debate where it needs to be—in the hands of states—but does so by setting the tone and bringing a sorely needed degree of clarity to this critical question.

Countermeasures

As is the case with the issue of sovereignty, much has been written on the potential use of countermeasures in cyber operations, including a full analysis in the Tallinn Manual, a discussion of the inequities between countermeasures and self-defense, and a caution on the potentially escalatory nature of cyber countermeasures. Wright's statement adds critical understanding to how at least one cyberpower views the role of countermeasures with respect to cyber operations.

Countermeasures are traditionally viewed as otherwise unlawful actions that do not amount to a use of force, but are considered lawful when taken for the sole purpose of causing another state to stop its unlawful conduct. According to Article 53 of the Draft Articles on Responsibility of States, because of the connection to an original unlawful action, countermeasures must be reversible and must be terminated as soon as the violating state returns to lawful compliance. Further, the use of countermeasures must be necessary and proportionate. Wright confirmed these traditional requirements on the use of countermeasures:

> "Consistent with the de-escalatory nature of international law, there are clear restrictions on the actions that a victim state can take under the doctrine of countermeasures. A countermeasure can only be taken in response to a prior internationally wrongful act committed by a state, and must only be directed towards that state. This means that the victim state must be confident in its attribution of that act to a hostile state before it takes action in response. In cyberspace of course, attribution presents particular challenges, to which I will come in a few moments. Countermeasures cannot involve the use of force, and they must be both necessary and proportionate to the purpose of inducing the hostile state to comply with its obligations under international law."

Another traditional limitation on a state's use of countermeasures is that the state contemplating the use of countermeasures must put the violating state on notice of the illegality of their actions and of the impending use of countermeasures in order to allow them a chance to stop the illegal activity. With respect to this aspect of countermeasures in cyber operations, Wright's statement signaled a significant departure.

> These restrictions under the doctrine of countermeasures are generally accepted across the international law community. The one area where the UK departs from the excellent work of the International Law Commission on this issue is where the UK is responding to covert cyber intrusion with countermeasures.
>
> In such circumstances, we would not agree that we are always legally obliged to give prior notification to the hostile state before taking countermeasures against it. The covertness and secrecy of the countermeasures must of course be considered necessary and proportionate to the original illegality, but we say it could not be right for international law to require a countermeasure to expose highly sensitive capabilities in defending the country in the cyber arena, as in any other arena.

The Tallinn Manual came to a similar conclusion, noting "the Experts agreed that if notification of intent to take a countermeasure would likely render that measure meaningless, notice need not be provided."

Wright's statement of opinio juris is important not only in clarifying that the traditional requirements generally apply, but perhaps more importantly in denouncing the notice requirement. In addition to the simple statement of law, it reflects that state's will understand the application of cyber norms in a very practical way. Wright's justification for the UK's departure from the accepted norm was not a legal one, but rather a practical concern about the sensitive nature of cyber operations. The signal that cyber norms will be governed by the unique nature of cyber operations, even when it might require the evolution of accepted legal requirements is an important clarification for international law.

Finally, Wright confirmed that countermeasures are not bound by the nature of the original violation.

> "In addition, it is also worth stating that, as a matter of law, there is no requirement in the doctrine of countermeasures for a response to be symmetrical to the underlying unlawful act. What matters is necessity and proportionality, which means that the UK could respond to a cyber intrusion through non-cyber means, and vice versa."

Again, the Tallinn Manual agrees with this approach, noting that

> "Proportionality does not imply reciprocity; there is no requirement that an injured State's countermeasure breach the same obligation violated by the responsible State. Nor is there any requirement that countermeasures be of the same nature as the underlying internationally wrongful act that justifies them. Non-cyber countermeasures may be used in response to an internationally wrongful act involving cyber operations, and vice-versa."

While this particular part of the attorney general's speech is not necessarily an innovation on the use of countermeasures, it solidifies the generally accepted view among commentators that has been assumed to be the approach of states, but not necessarily openly confirmed.

This departure from at least one traditional limitation on the use of countermeasures in the cyber context may signal that states are willing to revisit other aspects of cyber countermeasures. For example, countermeasures do not allow collective action on behalf of a victim state, even if that victim state is technologically incapable of responding on its own. Further, in an age where much of the malicious cyber activity originates from non-state actors, countermeasures may only be used against states. Additionally, there is no ability to use countermeasures in anticipation of an illegal act, only in response to one. These three examples are meaningful when reflecting on countermeasures because states have made exceptions to the traditional rule of self-defense to allow its exercise in precisely these three instances. And cyber countermeasures seem ideally suited for these three exceptions as they could most likely be effected without the cautioning concern of inevitable escalation.

The fact that the UK is looking at the law applicable to countermeasures in a way that allows for potential evolution from traditional norms, or at least a clarified understanding, is a valuable and informative statement. Further clarification by the UK, and by other states, is still necessary and will hopefully be forthcoming.

Conclusion

There is no doubt that this statement by the UK attorney general is one of the most important and clear official statements on the application of international law to cyber operations by a state. The particular points dealing with the use of force, prohibited intervention, sovereignty, and countermeasures are all vitally important because by letting the international community clearly know where the UK stands, it encourages other to likewise step forward. Wright said as much in his remarks.

> [A]s authors and subjects of international law, states have a responsibility here. A responsibility to be clear about how our international law obligations bind us. A responsibility we fulfil through our treaty obligations, our actions and our practice, as well as through our public statements. And a responsibility I believe extends to cyberspace.
>
> The very pervasiveness of cyber makes silence from states on the boundaries of acceptable behaviour in cyberspace unsustainable. If we stay silent, if we accept that the challenges posed by cyber technology are too great for the existing framework of international law to bear, that cyberspace will always be a grey area, a place of blurred boundaries, then we should expect cyberspace to continue to become a more dangerous place.

While a current reading of the statement may be profitable to outline specific views on well-recognized and accepted doctrines of international law and state interaction, the more important achievement of this statement will certainly be if it spurs other states to take up Wright's call to speak up and not "stay silent." If states want to ensure that the international law governing cyber space develops in an acceptable and sustainable way, they should follow Wright's lead and be clear about their "international law obligations" in cyberspace.

The views expressed are those of the authors and do not necessarily reflect the views of the United States Cyber Command, the Department of Defense, or the U.S. Government.

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LAWFARE

INTERNATIONAL LAW

Syria Strikes: Legitimacy and Lawfulness

By **Laurie Blank** Monday, April 16, 2018, 3:06 PM

"Justified, legitimate and proportionate." These are the words that U.N. Ambassador Nikki Haley at an emergency United Nations Security Council session and the director of the Joint Staff, Lt. Gen. Kenneth McKenzie, in a Pentagon briefing used to describe the U.S. and allied strikes on Syrian chemical weapons facilities last Friday evening. Note, however, the absence of the word "lawful" or "legal." Indeed, the word "legitimate" is used in the context of one common definition: "able to be defended with logic or justification."

In contrast, law figured prominently in a separate briefing on the conduct of the strikes, the specific targets, the precautions taken to avoid civilian casualties—indeed, Chairman of the Joint Chiefs of Staff Gen. Joseph Dunford's detailed recitation offered a veritable catalogue of law of war obligations with which the United States has complied.

Both the resort to force—the "why"—and the conduct of hostilities—the "how"—must be lawful under international law. Nonetheless, here it appears that *why* the United States used force is a question of legitimacy, while *how* the United States uses force is a question of lawfulness. The difference between the two is important—not only for what it reveals about the authority to launch the strikes, but as a new step in the long-standing and often inseparable dance between legitimacy and lawfulness in the context of military operations.

To anyone who saw the photos of the aftermath of the attacks, with at least 70 killed and countless children gasping for air, destroying Syria's chemical weapons capability and punishing the regime for its continued use of chemical weapons against its own population in flagrant violation of international law surely seems like a textbook example of "justified" or "legitimate." After all, as both Defense Secretary James Mattis and Pentagon spokesperson Dana White reiterated countless times, no civilized nation can or should tolerate the use of chemical weapons.

This legitimacy, however, does not derive from international law. Although international law flatly prohibits the use of chemical weapons—in wartime or peacetime—international law also prohibits the use of force by one state against another. This ban is the central foundation of our international system. The only exceptions are self-defense, a U.N. Security Council authorization, or the consent of the territorial state concerned. (Although a few states, including the United Kingdom, recognize a narrow exception for humanitarian intervention, the United States does not, and there is no international consensus that such an exception is accepted international law.) Notwithstanding the moral imperative that chemical attacks might generate, retaliation or punishment for the use of chemical weapons, or deterrence against the future use of such weapons, are not lawful reasons to use force.

In fact, there is no international legal authority for the strikes, as the deafening silence from the Trump administration regarding an international law justification for its actions attests. The administration has rightly condemned Syria's violations of international law, but it has instead turned to the language of justness and moral outrage to justify its use of force, pitting the allied forces' "righteous power" and "noble warriors" against Syria's "barbarism and brutality."

The United States is thus using legitimacy in a four-step effort to create lawfulness. Step one: Catalogue and denounce Syria's extensive violations of international law, which by now are too numerous to count. Step two: Affirm the need for accountability for violations of international law, surely critical for any effective enforcement of international law and deterrence for future violations. Step three: Harness the universal moral outrage at the horror of last week's chemical weapons attacks and seven years of unending brutality against civilians and the desire to "make Assad pay" for what he has done. Step four: Add moral legitimacy to international law violations and the need for accountability, and the result is an appearance of lawfulness.

This rhetorical tactic has proved quite effective, as evidenced by the glaring absence of questions or reporting on whether the U.S. and its allies complied with international law in the resort to force against Syria. However, beyond this messaging success, there is now a new step in the *pas de deux* between legitimacy and lawfulness that is as old as war itself.

Legitimacy has always been an essential component of military operations, particularly with regard to public support for both the launch and continuation of such operations. Although the lawful *resort* to force was once the primary key to legitimacy, in recent years, compliance with the law of armed conflict—namely the principles of distinction, proportionality and precautions—in the *conduct* of military operations has become the central pillar of legitimacy.

Even a cursory glance at the discourse on military operations demonstrates this link between compliance with the law of armed conflict and legitimacy. In today's world of nearly instantaneous media and social-media coverage of military operations even in the farthest reaches of the globe, civilian casualties and the mere perception of war crimes can drastically undermine legitimacy both at home and abroad. In many

military operations, such as counterinsurgencies, protection of the civilian population is central to mission success, and therefore compliance with legal rules designed to protect civilians is essential for legitimacy. Similarly, a military that is or appears to be committing war crimes may lose legitimacy at home, eroding valuable public support necessary to sustain military operations. Finally, compliance with the law of armed conflict is the centerpiece of legitimacy in the international community, such that violations can undermine cohesion and diplomatic efforts among the coalition. For these reasons and many more, the United States and its allies go to great lengths to demonstrate their adherence to the fundamental principles and rules of the law of armed conflict.

Lawfulness has thus been the touchstone for legitimacy, whether in the form of compliance with the international law governing the resort to force, historically, or compliance with the law of armed conflict, in today's operations. But legitimacy is now being used as the measure of lawfulness in the absence of actual compliance with the law. Obfuscating the lack of international legal authority for Friday's strikes is, of course, the immediate consequence. After all, the combination of Syria's atrocities and U.S. moral justifications seems to have done the trick—moral legitimacy may not merely be substituting for lawfulness here (such as the "illegal but legitimate" description of the 1999 NATO bombing of the former Yugoslavia), but actually appears to be creating lawfulness.

But a far more damaging consequence may well be a steady erosion of law and legality in favor of legitimacy alone. Legitimacy is essential, but it must rest on law—not righteousness, political imperatives, religion, shared cultural ties, or the exigencies of a given moment. No less than the stability and predictability of our international system—and the ultimate legitimacy of U.S. actions—is at stake.

Topics: International Law, Jus ad Bellum/UN Charter/Sovereignty

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SYMPOSIUM ON THE NEW SPACE RACE

INTERNATIONAL LAW AND SECURITY IN OUTER SPACE: NOW AND TOMORROW

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Once the domain of a few spacefaring nations, outer space has exploded with new actors, state and private, in recent years. New actors and activities bring new potential threats and concerns for new and existing actors alike. In this complex environment, where mistrust and misunderstanding often prevail, international law can play an important role in bridging gaps and creating predictability, clarity, and consistency. Although new treaty law is unlikely, the ordinary incremental international law processes of state practice, *opinio juris*, and international jurisprudence will help to resolve critical questions about the content and application of international law in outer space over time.

The Military Space Environment: Main Players

Space has become bustling, with over seventy states, commercial entities, and international organizations operating in some fashion.[1] The U.S. Department of Defense (DoD) previously described the space environment as "congested, contested, and competitive," highlighting the challenges of expanding players and increasing numbers of objects vying for finite locations and operationally advantageous orbits and capabilities in outer space.[2] Although DoD excised this articulation from its 2016 *Space Policy*,[3] the actors continue to grow and a recent assessment continued the "Competing in Space" theme.[4] This congestion and competition is especially heightened in national security space operations, which include military, intelligence, national technical means, and command and control assets.

Although the overall number of military space players remains small, both the number and capabilities (particularly in command and control, computers, communications, intelligence, surveillance, and reconnaissance (C4ISR) platforms) have expanded in the new space race. The United States, Russia, and China—two Cold

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[1] Secure World Foundation, Handbook for New Actors in Space (Sept. 25, 2017); Saadia M. Pekkanen, *Introduction to the Symposium on the New Space Race*, 113 AJIL Unbound 92 (2019).

[2] Robert Gates & James Clapper, National Security Space Strategy (Unclassified Summary) 1 (Jan. 2011); U.S. Dep't of Defense, Dir. 3100.10, Space Policy para. 1 (Oct. 18, 2012 incorporating Change 1, effective Nov. 4, 2016) [hereinafter DoD Dir. 3100.10].

[3] DoD Dir. 3100.10, *supra* note 2.

[4] U.S. Dept. of Defense, Providing for the Common Defense 13 (Sept. 2018).

War powers from the dawn of the space age and a recently recognized peer player—remain the primary actors. Emerging participants include NATO members, Japan, New Zealand, and Australia working independently and with the United States,[5] and others less openly aligned with major space players, such as India, Iran, and Israel. At present, counterspace capabilities—such as antisatellite missiles (ASATs), rendezvous and proximity operation platforms (RPOs), space or terrestrially-based lasers, and other technology[6]—offer a key distinction between the primary actors and these emerging military space powers, which have only limited capability.

U.S. space doctrine calls for both offensive and defensive, kinetic and nonkinetic[7] space capabilities with the understanding that "peaceful purposes" in the Outer Space Treaty (OST) means nonaggressive uses of space—not nonmilitary uses.[8] This long-held position allows for intelligence, communications, and all other activities that do not breach Article 2(4) of the United Nations Charter prohibiting "the threat or use of force" in international affairs.[9] Although U.S. doctrine ensures maintenance of viable self-defense options in space[10] and the U.S. considers space a military domain,[11] DoD guidance emphasizes protection, deterrence, resiliency, redundancy, and international partnership as avenues for continued freedom of operations in space.[12]

Detailed Chinese and Russian doctrine, policy, and regulation are less accessible. However, both recognize space as a domain of potential conflict and an environment for the assertion of self-defense. China's space policy omits discussion of military uses, highlighting "peaceful purposes," noting its opposition to weaponization of space, and endorsing international cooperation and engagement.[13] However, Chinese military doctrine[14] and external assessments thereof recognize preparations for military competition in space, namely the 2015 reorganization of the People's Liberation Army to enhance space-based C4ISR, without limiting any counterspace options[15]—a capacity China maintains and has already displayed.[16] Russia's doctrine similarly notes space militarization as an "external hazard" and recognizes potential conflict in space, while stressing the importance and legitimacy

[5] Clayton Wear, *Liaison Officers at Vandenberg*, Vandenberg air force base (Nov. 8, 2018) (explaining that the Combined Space Operations Center (CSpOC) hosts officers from Australia, Canada, France, Germany, and the United Kingdom); Steven Hirsch, *Making the Most of Military Space*, Air Force Mag. (Aug. 2018) (reporting that the United States added Japan and New Zealand to the Schriever Wargames).

[6] *See* Secure World Foundation, Global Counterspace Capabilities: An Open Source Assessment (Brian Weeden & Victoria Sampson eds., 2018); Center for Strategic & International Studies, Space Threat Assessment 2018 (Todd Harrison et al. eds., 2018) [hereinafter Space Threat Assessment 2018].

[7] Space Threat Assessment 2018, *supra note* 6, at 3.

[8] *See* U.S. Dep't. of Defense, Law of War Manual para. 14.10.4 (updated Dec. 2016) [hereinafter DoD LoW Manual]; s*ee also* Central Intelligence Agency, Position Paper: Definition of Peaceful Uses of Outer Space (Contingency) [declassified] (Nov. 7, 2000); Central Intelligence Agency, Attachment 2: Definition of Peaceful Uses of Outer Space [declassified] (Mar. 13, 1962).

[9] UN Charter art. 2(4).

[10] DoD Dir. 3100.10, *supra* note 2, at para. 4.b; Pres. Donald Trump, National Security Strategy of the United States of America 31 (Dec. 2017) [hereinafter NSS].

[11] Joint Chiefs of Staff, Joint Publication 3–14, Space Operations para. I.2.a (vice II.16.d) (Apr. 10, 2018) [hereinafter JP 3–14].

[12] *See, e.g.*, *id.* at para II.16.d (vice 2.a); DoD Dir. 3100.10, *supra* note 2, at para. 4.c.

[13] Information Office of the State Council, Full Text of White Paper on China's Space Activities in 2016, at I.3, IV.5, V.1 (Dec. 28, 2016).

[14] Information Office of the State Council, China's Military Strategy (May 27, 2015).

[15] Kevin Pollpeter et al., The Creation of the PLA Strategic Support Force and Its Implications for Chinese Military Space Operations (RAND, 2017).

[16] *See, e.g.*, Brian Weeden, *Through a Glass, Darkly: Chinese, American, and Russian Anti-Satellite Testing in Space*, Space Rev. (Mar. 17, 2014); Steven Lee Myers & Zoe Mou, *'New Chapter' in Space Exploration as China Reaches Far Side of the Moon*, N.Y. Times (Jan. 2, 2019).

of self-defense assertions.[17] Russia has an active Space Force[18] and is developing counterspace capabilities, including RPOs and antisatellite lasers.[19]

All three major players thus recognize space as a military domain of operations, and appear to act accordingly. They generally focus on developing new terrestrially-focused space applications and security of extant space assets (through deterrence or active defense) rather than offensive space operations. This focus is reasonable given the likelihood of kinetic activities only serving to diminish each state's own use of space for terrestrially useful applications through the creation of orbital debris or adverse political or military reactions.

Space may be an infinite expanse, but its useful zones or orbits for space and terrestrial applications are limited. As the number of sovereign and "newspace" actors seeking finite advantageous orbital locations, the range of military capabilities, and the number of states developing counterspace capacities all grow, so will tensions related to space activities. With new technologies now bringing old security concerns to the fore, the space race is at a new inflection point: geostationary orbit-reaching ASATs, RPOs, lasers, and hypersonic weapons may now be an imminent and distributed reality. Although kinetic-only options have an implicit practical limitation if the launching state also intends to use space (due to debris), emerging nonkinetic and nonattributable technology may allow for hostile activities without collateral harm to one's own assets, and without a guarantee of any response or reprisal. As the military space environment leans towards one of realistic threat of action—not just major-state planning for a distant, potential technological future—the national security space community is coming to a crossroads. One way to address competition in this congested, contested environment may be through shared understandings of the law governing state behavior in space.

Room for International Law in Military Space Operations?

Any discussion of international law and military space operations starts with two fundamental questions: does international law apply and, if so, how? It is well settled that international law applies in outer space, both as the law governing the interaction of states, and under the specialized regime of outer space law set forth in Article III of the OST. Whether and how the law of armed conflict (LOAC) applies to military space activities appears less established, however. U.S. views appear clear, but the views of other military space actors are less so given the paucity of open source materials or statements on topic.

The U.S. applies LOAC to all military operations in outer space—space is a warfighting domain, where military members conduct military operations. In accordance with DoD Directive 2311.01E, "[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[20] The DoD Law of War Manual explains:

> [LOAC] regulate[s] the conduct of hostilities, regardless of where they are conducted, … includ[ing] the conduct of hostilities in outer space. In this way, the application of [LOAC] to activities in outer space is the same as its application to activities in other environments, such as the land, sea, air, or cyber domains.[21]

[17] Military Doctrine of the Russian Federation I.8.d & I.6.g (Feb. 5, 2010).

[18] Russian Ministry of Defence, Aerospace Defence Forces.

[19] Maddy Longwell, *State Department Concerned over Russian Satellite's Behavior*, C4ISRNet (Aug. 14, 2018); Patrick Tucker, *Russia Claims It Now Has Lasers To Shoot Satellites*, DefenseOne (Feb. 26, 2018).

[20] U.S. Dep't of Defense, Dir. 2311.01E, DoD Law of War Program para. 4.1 (Feb. 22, 2011).

[21] DoD LoW Manual, *supra* note 8, at para. 14.10.2.2.

U.S. partners—NATO states, Australia, and Japan—do not necessarily have similarly clear articulations, but share this general disposition towards the application of international law (and particularly LOAC) and can be expected to extend it to military activities in outer space.[22]

For the United States, adherence to the law is strategically advantageous and contributes positively to legitimacy and operational success.[23] DoD's National Defense Strategy focuses on near-peer competition, enhancing lethality for credible deterrence of (or reactions to) threats, and competition along the full spectrum of military operations (above and below the threshold of armed attack).[24] One of three pillars is to strengthen alliances and international cooperation, including by "maintaining the rules which underwrite a free and open international order" and deepening interoperability with allies.[25]

Less information regarding China and Russia's views on international law and military space operations is openly available. Their doctrine documents and seeks efforts to advance the draft Treaty on the Prevention of Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects (PPWT); a No First Placement of Weapons resolution; and a Code of Conduct in Space suggest at least some reliance on international law. Questions remain, however, concerning whether these states will actually adhere to the law even if a treaty comes into force, a concern animating U.S. views on space cooperation.[26] Thus, U.S. diplomats openly lament the lack of verification and trust and confidence building measures in the PPWT draft and other arms and Code discussions.[27]

The next question is *how* international law applies. U.S. policy is to compete in the full spectrum of military operations, including when adversaries use "areas of competition short of open warfare to achieve their ends."[28] The *jus ad bellum*, LOAC, law of state responsibility, and law of friendly relations are therefore all implicated. However, the technology, geophysics, and geopolitics of outer space make tackling the contours and the sometimes domain-specific intricacies of general principles and customary international law a challenge. State practice will therefore be a, if not the, significant determining factor.

Applying International Law in Space: Key Issues and Challenges

As in other arenas of international engagement, international law is the primary mechanism for creating, implementing, and enforcing shared understandings of the rights, privileges, and duties of states, nonstate entities, and individuals in space. State actors seek to maintain freedom of action and protect their sovereign national interests.

[22] *See* German Ministry of Defence, Law of Armed Conflict Manual (Joint Service Regulation (ZDv)) 15/2 paras. 201 & 212 (May 2013); United Kingdom Ministry of Defence, The UK Military Space Primer ch. 2 (2010).

[23] NSS, *supra* note 10, at 4, 41.

[24] U.S. Dep't of Defense, National Defense Strategy (Unclassified Summary) (Jan. 2018) [hereinafter NDS].

[25] *Id.* at 8–9; *see also* JP 3–14, *supra* note 11, at para. IV.3.d; DoD Dir. 3100.10, *supra* note 2, at para. 4.f.

[26] U.S.-China Econ. & Sec. Rev. Comm'n, China's Position on a Code of Conduct in Space 5 (Sept. 8, 2017) ("China has frequently broken its agreements, [including its] … promise not to further militarize land features in the … South China Sea, … agreements with India, and its bilateral cyber security agreement with the United States."); Yleem Poblete, Assistant Secretary, Bureau of Arms Control, Verification and Compliance, United Nations, Remarks at the 73rd UNGA First Committee Thematic Discussion on Outer Space (Oct. 23, 2018) ("They are fundamentally flawed proposals advanced by a country [Russia] that has routinely violated its international obligations.").

[27] *See* Poblete, *supra note* 26 (calling NFP a "Potemkin resolution"); Ambassador Robert Wood, U.S. Permanent Representative to the Conference on Disarmament, Explanation of Vote in the First Committee on Resolution L.54: Further Practical Measures for the Prevention of an Arms Race in Outer Space (Oct. 20, 2017).

[28] NDS, *supra* note 24, at 3, 5 (adversaries use "corruption, predatory economic practices, propaganda, political subversion, proxies, and the threat or use of military force to change the facts on the ground").

Doing so often requires cooperative efforts and states are therefore willing to create mechanisms for greater understanding and foreseeable and predictable responses to challenges. The existing foundations of outer space law—the five primary international law treaties on outer space—are the fruits of earlier efforts to provide a critical foundation for this complex environment. Treaty law is the strongest, most enforceable, and most likely to define and regulate state behavior, and therefore to provide concrete guidance and parameters for states to assess threats, including the use of force in, through, or from outer space, and appropriate forcible and nonforcible responses. The likelihood of new treaties being developed and coming into force is slim, however, given the steadily growing cast of characters with an equally expansive set of competing interests in outer space. As a result, customary international law is the most likely tool for development of rules, as states develop patterns of practice and a willingness to accept such practice as binding legal obligation.

Among the most likely legal issues to arise and engender dispute in military space operations are the principle of nonintervention, the threshold for use of force and armed attack, the meaning and application of proportionality, and the status of military-oriented "newspace" objects. Although each has been examined, applied, and interpreted extensively in terrestrial domains, their application in outer space adds an additional layer of complexity.

With respect to the threshold for the use of force, interesting questions arise as to whether nonkinetic acts can meet the threshold for the use of force and whether the temporary or permanent loss of functionality of a space object can suffice to meet that threshold. In the context of armed attack, additional questions include whether, and which, space objects and activities constitute critical national infrastructure such that any attack on such objects or activities will be an armed attack. State practice, and the response of states to hostile or potentially hostile acts in, through, or from outer space, will begin to highlight the contours of these fundamental principles and thresholds, and will be essential in elucidating the content of international law in this domain.

Proportionality introduces further complexities, given the difficulty of understanding and predicting the consequences of attacks on space objects and the potential for objects that are destroyed to contribute to space debris in a consequential manner or to fall to Earth and cause harm on land. The LOAC principle of proportionality prohibits an attack if the expected harm to civilians will be excessive in relation to the anticipated military advantage gained. Although the military advantage of attacks in, through, or from outer space likely rests on the same or analogous information and assessments as in other domains, understanding the nature and foreseeability of civilian harm, including harm to the environment, is extraordinarily difficult.

As military and political practitioners in spacefaring states assess and develop legal positions on these matters, academics and other nongovernmental entities are seeking to help shape the understanding of the legal landscape. In particular, two projects—the Woomera Manual on the International Law of Military Space Operations[29] and the Manual on International Law Applicable to Military Uses of Outer Space[30]—seek to inform the analysis of existing international law related to military operations in outer space. Both projects have a stated goal to objectively articulate the law, including discussion of the contours and application of the relevant treaties and customary international law. Law provides a key framework from which state actors evaluate concerns, threats, or provocations in space operations—military practitioners must know the behavioral baseline, established in law or practice, before they can judge any deviations therefrom. Although the manuals will not be binding law, they can help state practitioners work through new challenges of the extant law, namely LOAC in the space domain. In particular, these manuals evince the recognition that prospective consideration of the law and legal challenges in outer space, as in any domain, is essential for efficient and effective application of the law when incidents arise.

[29] The Woomera Manual (last updated Jan. 11, 2019). Both authors are core experts.

[30] McGill Centre for Research in Air & Space Law, Manual on International Law Applicable to Military Uses of Outer Space.

NEW TECHNOLOGIES AND THE INTERPLAY BETWEEN CERTAINTY AND REASONABLENESS

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1. INTRODUCTION

Cyber. Unmanned aerial vehicles. Autonomous weapons systems. Nanotechnologies. New technologies have sparked extensive discourse on the application of the law of armed conflict (LOAC) to such technologies. Governments, advocacy organizations, and scholars strive to keep pace with technological developments amid debates regarding the applicable law, the need for new international legal regimes, and campaigns to ban certain technologies.

Underlying these intensive efforts to understand how LOAC does, could and should apply to the use of new technologies is an equally comprehensive effort to understand precisely what these new weapons are and how they work. Each of the new technologies above introduces unique questions for human understanding, often driven and exacerbated by the fact that the technology is out of sight or out of reach of human senses, making actual concrete understanding of how it works challenging and elusive. Effective legal analysis and guidance for the use of any weapon rests on an accurate understanding of how that weapon works. For example, the debates regarding autonomous weapons systems often appear to stagnate in a morass of questions about the meaning of autonomy, autonomous and other essential descriptive and defining characteristics of these systems.[1] Without agreement on the meaning of basic terms and descriptions, it is difficult, if not impossible, to proceed to the thorny legal questions at the heart of these debates.

This uncertainty and quest for more determinative information about the nature of certain new technologies has consequences beyond the overt ones of complicating discussions or stalling debates, however. The desire for certainty has the potential for unintended and possibly untoward effects on the very implementation and application of the law itself—in effect, it has the potential to change the law. As in many other legal regimes, critical components of legal analysis and interpretation in LOAC involve reasonableness: that is, whether the actions of a commander were reasonable in the circumstances prevailing at the time. In contrast, the need to understand how a

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[1] *See e.g.* Chris Jenks, *False Rubicons, Moral Panic, & Conceptual Cul-De-Sacs: Critiquing and Reframing the Call to Ban Lethal Autonomous Weapons*, 44 PEPPERDINE L. REV. 1, 9 (2016).

new technology works and what it might do in a given situation, particularly with regard to autonomy, is not an inquiry resting on reasonableness, but rather on the desire for as much certainty as possible.

This chapter examines how the development and use of new technologies in weapons may impact the balance between reasonableness and certainty in LOAC. Difficult questions about quantifying reasonableness and certainty for purposes of assigning criminal responsibility for actions taken during military operations have already emerged as international criminal justice has brought military operations into the courtroom. At the same time, the development of hi-tech weapons introduces enormous challenges for understanding how such weapons work and how to assign responsibility when things go wrong. Demands for greater certainty are likely to increase, in turn, to help humans understand how to judge these weapons and the decisions involved in their programming and deployment. As certainty becomes an overarching need and consideration, an important question is whether that quest for certainty will bleed over into the application and interpretation of the law and, over time, affect the development and understanding of the law itself.

The first section provides the foundation for this analysis, introducing the already evolving tensions between reasonableness and certainty in the application of LOAC. It first briefly sets forth the role of reasonableness in determining the lawfulness of targeting and related decisions during armed conflict, and then considers efforts to understand what reasonableness means and how to measure or assess it in some productive manner. Finally, this section highlights how questions regarding certainty have already begun to emerge in the context of international criminal accountability, regarding both certainty in decision-making and certainty in the analysis of information or intent.

The second section explores how new technologies are driving more frequent and overt demands for certainty. Using lethal autonomous weapons systems as a primary example, this section analyzes three primary certainty issues: the certainty of technology, of knowing how it works and what it does; the certainty of legal norms at issue in debates about if and how the law applies; and the certainty of analysis and decision-making by the autonomous weapons. These efforts to know with certainty what a machine does and will do collide directly with the notion of reasonableness in legal analysis and application. In particular, such efforts raise questions about whether effective analysis of an autonomous weapon's targeting decisions should and will rest on whether the weapon system acted reasonably—a methodology resting on qualitative measures—or whether such system computed the facts and information correctly in acting upon that information—a methodology resting on certainty and quantitative measures.

The final section tackles the consequences of greater reliance on and search for certainty for the long-term development of LOAC. The role of certainty in the discourse on autonomous weapons, and potentially other new technologies, raises significant questions about whether a growing comfort level with measures of certainty will impact the traditional reliance on reasonableness in driving the implementation of and assessments of compliance with LOAC. In effect, if a gap between the operational standard of good faith determinations and a quantitative, certainty-based standard driven by technologies appears and continues to grow, such a mismatch

may undermine the law's effectiveness and the development of expertise and experience in implementing the law in military operations and in post-hoc analysis of such operations.

2. Reasonableness and Certainty in the Implementation of the Law of Armed Conflict

LOAC governs the conduct of both States and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.[2] LOAC applies during all situations of armed conflict, whether between two or more States, between a State and a non-State group, or between two or more non-State groups.[3] Although LOAC governs all aspects of armed conflict, the issues raised by reasonableness and certainty arise predominantly in the context of the use of force, the focus therefore of the discussion in this chapter.

In particular, this chapter primarily addresses lethal autonomous weapon systems (LAWS). A weapons system that is or could be designed to reach its own judgments regarding the lawfulness of a particular target and of attacks on that target at a particular time goes to the essence of the complicated relationship between reasonableness and certainty and the likely consequences of this interplay over time. Like any weapon, LAWS must be used in accordance with the fundamental principles of targeting: distinction, proportionality and precautions. Debates over the legality of LAWS generally center on the anticipated or perceived ability or inability to comply, or obstacles to compliance, with these fundamental obligations and protections. More important, the actual use of such weapons and any post-hoc assessment of an attack using LAWS will be based on the rules and obligations these principles mandate.

As the following discussion highlights, reasonableness is the touchstone for the implementation of these central targeting obligations. At the same time, several factors, including the needs of international criminal accountability and the role of the advocacy community, have begun to inject certainty questions into this traditional reasonableness realm. This trend, already apparent over the past decade, offers a window into the potential consequences and important considerations as LAWS and other new technologies bring quantitative questions and a question for certainty into a more central role in the analysis and application of LOAC.

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[2] LOAC is codified primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 21, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 34, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 19, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

[3] With regards to international armed conflicts, see e.g., Geneva Convention I, *supra* note 2, art. 2. With regards to non-international armed conflicts, see e.g., Common Article 3, Geneva Convention I, *supra* note 2, art. 3.

A. The Law of Targeting and the Touchstone of Reasonableness

The lawfulness of targeting individuals and objects during armed conflict is determined by the principles of distinction,[4] proportionality,[5] and precautions in attack.[6] The principle of distinction, one of the "cardinal principles" of LOAC,[7] requires that any party to a conflict distinguish between military and civilian personnel and objects and direct attacks solely at persons who are fighting and military objectives. Proportionality requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained.[8] Finally, LOAC mandates that parties to a conflict take all feasible precautions in launching attacks that may affect the civilian population. All three principles are widely recognized as customary international law.[9]

Across these three essential principles of targeting, reasonableness remains the touchstone for determining the appropriate application of specific targeting rules and for assessing the lawfulness of action after the fact. Each principle requires commanders and individual soldiers to make decisions in good faith based on the information available to them at the time of the attack. Underlying the treaty law, commentary and jurisprudence is the idea that "decisions are based on reasonable expectations rather than results. In other words, honest mistakes often occur on the battlefield due to the 'fog of war' or when it turns out that reality does not match expectations."[10] This approach dates back to the post-World War II trials, when the Nuremberg Tribunal acquitted General Lothar Rendulic of the crime of wanton destruction of property. Notwithstanding the extraordinary destruction Norway suffered at General Rendulic's hands as he embarked on his "scorched-earth" retreat in the face of the approaching Russian army, the tribunal found that his actions were not criminal because they were based on his judgment in the circumstances. In a clear statement of this fundamental rule of reasonableness for both decision-making and post-hoc assessment of such decisions, the tribunal declared:

> [w]e are not called upon to determine whether urgent military necessity for the devastation and destruction . . . actually existed. We are concerned with the question

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[4] Additional Protocol I, *supra* note 2, art. 48.
[5] *Id*., art. 51(5)(b), 57(2)(a)(iii) and 57(2)(b).
[6] *Id*., art. 57(1).
[7] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of LOAC).
[8] Additional Protocol I, *supra* note 2, art. 51(5)(b).
[9] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3-8 (2005); Legality of the Threat or Use of Nuclear Weapons, *supra* note 4, at 587 (dissenting opinion of Judge Higgins) (distinction as customary law); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 120 (2004); 1 HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 46; Michael N. Schmitt, *Fault Lines in the Law of Attack*, *in* TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 292 (Susan Breau & Agnieszka Jachec-Neale eds., 2006) (proportionality as customary law); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW Rule 15 (2005) (precautions as customary law).
[10] MICHAEL N. SCHMITT, CHARLES B. GARRAWAY, AND YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT, International Institute of Humanitarian Law (2006), p. 23.

> whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. . . . It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.[11]

Although this basic framework of reasonableness in the circumstances prevailing at the time is most often emphasized in the context of proportionality decisions, it applies across the full spectrum of targeting decisions and acts.

With regard to distinction, an attacker must determine whether the potential object of attack is a legitimate target: a combatant, a member of an organized group, a civilian directly participating in hostilities, or a military objective. For each of these possible lawful targets, the law rests on the attacker's honest efforts to distinguish them from persons or objects protected from attack. The very structure of the law and the criminal accountability paradigm reinforce this approach. For example, combatants are subject to attack except when *hors de combat*, and the determination of whether a person is *hors de combat* is based on the attacker's reasonable belief at the time regarding either a clear affirmative act of surrender or incapacitation due to wounds or sickness.[12] The *travaux préparatoires* demonstrate that the decision whether someone is in the power of an attacker and thus protected from attack as *hors de combat* is based on an objectively reasonable determination by the attacker.[13]

Similarly, distinction with regard to civilians is not a strict liability standard for which any mistake is a violation, but rests on the same reasonableness paradigm that permeates LOAC. International criminal accountability offers the most direct manifestation of this framework: the war crime of unlawful attacks on civilians is a crime of intent. Article 85 of Additional Protocol I declares that it is a grave breach to "wilfully . . . mak[e] the civilian population or individual civilians the object of attack," and includes both deliberate and reckless attacks within its scope.[14] As a result, a "willfully unlawful attack on civilians would thus be one that either deliberately

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[11] USA v. Wilhelm List and Others (The Hostages Trial), Case No. 47, Judgment (U.S. Mil. Trib., Nuremberg, Feb. 19, 1948), *in* VIII LAW REPORTS ON THE TRIALS OF WAR CRIMINALS XX (1950).

[12] *See* Geoffrey S. Corn et al, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536, 587 (2013).

[13] Federal Political Department, XV Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva (1974-1977), CDDH1236/Rev.1, at 383 ¶ 21 (1978). The Commentary to Additional Protocol I reaffirms the reasonableness framework, noting that "it would be useless to deny that in the heat of action and under the pressure of events, this rule is not always easy to follow." COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 480 (Claude Pilloud et al. eds., 1987) [hereinafter AP I COMMENTARY]. *See also* Corn et al., *supra* note 12, for a comprehensive discussion of the *hors de combat* determination, the presumptions underlying that determination, and the burden of rebutting those presumptions.

[14] Additional Protocol I, *supra* note 2, art. 85. The Commentary explains that willfulness includes recklessness, which is "the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening." AP I COMMENTARY, *supra* note 28, ¶ 3474.

sought to target civilians, or deliberately ignored the affirmative duty to take care by making no effort to distinguish."[15] However, in the absence of direct evidence that the attacker believed the victims to be civilians, international tribunals rely on a reasonableness framework to assess the attacker's intent. The International Criminal Tribunal for the former Yugoslavia (ICTY), for example, held in *Prosecutor v. Galić* that a prosecutor must prove that "in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant."[16] This reliance on reasonableness to assess intent affirms that, at the time of an attack, a commander or soldier must make a reasonable determination regarding whether an individual is a civilian. The law mandates that in case of doubt, an individual is presumed to be a civilian but the determination remains one of reasonableness based on the information available, not one of perfect decision-making.[17]

Proportionality is the targeting principle most commonly associated with reasonableness. A proportionality determination requires that a commander assess, at the time of the attack, the expected likely civilian casualties and the anticipated military advantage gained from the attack and then determine, based on good faith judgment, whether the expected civilian casualties will be excessive so as to preclude the attack.[18] Proportionality thus operates as an "international version of the common law's reasonable man, who has carefully considered all the evidence available at the critical time and shaped a rational choice between available means."[19] International jurisprudence,[20] military manuals,[21] statements upon ratification of Additional Protocol I[22] and national courts[23] all confirm the role of the "reasonable commander" in the implementation of proportionality and any post-hoc determinations regarding the validity of such decisions taken at the time. As the ICTY held in *Galić*, one of few international tribunal judgments to address proportionality, "[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."[24]

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[15] John J. Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 V.J.I.L. 84, 112 (2016).
[16] Prosecutor v. Galić, Case No. IT-98-29-T, Judgment ¶ 55 (Int'l Crim. Trib. for the former Yugoslavia Dec. 5, 2003). The tribunal took the same approach with regard to attacks on objects. *Id*. at ¶ 51.
[17] Additional Protocol I, *supra* note 2, art. 50(1). *See also* infra Part II(B).
[18] *See* Additional Protocol I, *supra* note 2, art. 51(5)(b), 57(2)(a)(iii) and 57(2)(b).
[19] Thomas Franck, *On Proportionality of Countermeasures in International Law*, 102 A.J.I.L. 715, 737 (2010).
[20] Prosecutor v. Galić, *supra* note 31, at ¶ 58.
[21] See e.g., OFFICE OF THE JUDGE ADVOCATE GENERAL, NATIONAL DEFENCE OF CANADA, THE LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS §5, ¶ 27 (1992) ("consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time.")
[22] HENKAERTS & DOSWALD-BECK, *supra* note 5 at 332 (citing Declaration and Reservations Made Upon Ratification of Additional Protocol I, Ireland § 9 (May 19, 1999)) ("military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonable available to them.").
[23] See e.g., Federal Court of Justice, Federal Prosecutor General, Decision at 47-49 (Apr. 10, 2010), http://www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule8_sectionf, ¶ 3(cc)(4) (an infringement of proportionality occurs when the commander "refrained from acting 'honestly', 'reasonably' and 'competently'.").
[24] Prosecutor v. Galić, *supra* note 31, at ¶ 58. *See also* REVIEW COMMITTEE, OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE

Finally, the implementation of precautions rests on reasonableness and feasibility. As the treaty law, commentary and state practice[25] affirm, the obligation to take precautions, including which precautions and to what extent, is based on the commander's honest and reasonable judgment in the circumstances at the time of the attack. Article 57 of Additional Protocol I uses the language of feasibility in setting forth the obligations to take precautions, including to "do everything feasible" and to "take all feasible precautions".[26] Although neither the treaty nor the International Committee of the Red Cross (ICRC) Commentary specifically define "feasible," the Commentary explains that any assessment of the steps taken "will be a matter of common sense and good faith,"[27] a description akin to reasonableness. Across the spectrum of the law of targeting, therefore, reasonableness is the overarching framework, the fundamental measure for guiding commanders and soldiers in the implementation of and compliance with the law and for judging responsibility for potential violations of the law after the fact.

B. Attempts to Quantify Reasonableness and the Trend Towards Certainty

Increasing analysis of military operations after the fact by non-governmental organizations, national investigations, international commissions of inquiry, or national and international courts and tribunals, has begun to put significant stress on the reasonableness construct. Although the law is clear that "commanders are held to an objective standard of reasonable conduct assessed by considering the context in which the judgment was made,"[28] analyses of military operations and potential LOAC violations in varied contexts often veer away from this well-established framework.

The very dissonance between the courtroom and the battlefield underscores how the imperative of reasonableness in assessing targeting decisions has slowly morphed towards a reliance on effects and other post-hoc information in a quest for more certainty in the analysis of

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COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶ 50 (2000) (explaining that "[i]t is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the 'reasonable military commander.'").

[25] DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE FM 27-10, ¶ 41 (1956) (mandating that an attacker "must take all reasonable steps to ensure . . . that the objectives are identified as military"); DEP'T OF THE NAVY & DEP'T OF HOMELAND SECURITY, NWP 1-14 M/MCWP 5-12/CMODTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (2007), ¶ 8.1 ("all reasonable precautions must be taken"); OFFICE OF THE JUDGE ADVOCATE GENERAL, NATIONAL DEFENCE OF CANADA, THE LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS §4, ¶ 418(3) (2001) (requiring commanders to take all feasible steps to verify that targets are legitimate military objectives and explaining that the test for assessing whether that "standard of care has been met is an objective one: Did the commander, planner or staff officer do what a reasonable person would have done in the circumstances?").

[26] The Commentary to Additional Protocol I notes that the ICRC's original draft text of Article 57 used the expression to "take all reasonable steps," which was later changed to "everything feasible." AP I COMMENTARY, *supra* note 28 at 681.

[27] *Id*., at 682.

[28] Geoffrey S. Corn, *Regulating Hostilities in Non-International Armed Conflicts: Thoughts on Bridging the Divide Between the* Tadić *Aspiration and Conflict Realities*, 91 INT'L L. STUD. 281, 313 (2015).

potential violations during military operations. Although existing treaty law and the associated ICRC Commentaries emphasize reasonableness as the standard, neither "indicates the quantum of information necessary to render 'reasonable' a judgment of target legality."[29] In a criminal prosecution for unlawful attacks on civilians or civilian objects, a tribunal needs tools or methodology for assessing the reasonableness—or unreasonableness—of the attack decision. An objectively reasonable decision that the object of attack is a lawful target will foreclose a finding that the attacker deliberately or indiscriminately attacked civilian objects, making the determination of objective reasonableness a key part of the analysis. In seeking to identify some quantifiable measures for determining reasonableness, however, it has become common for tribunals, commissions of inquiry or other mechanisms to substitute a subjective measure of reasonableness, thus subjecting "the commander under scrutiny to a post hoc judgment based not on the standard of reasonableness analogous to that used at the time of the decision, but on the subjective instincts of the reviewing official or entity."[30]

The so-called effects-based analysis of targeting decisions is the most obvious and problematic example. Given the challenges of measuring whether a commander's judgment was objectively reasonable, a reliance on the effects of the attack to tell the story has become common. Made infamous in the ICTY's trial judgment convicting General Ante Gotovina, an effects-based analysis uses the actual consequences of the attack to draw inferences and conclusions regarding the intent of the commander and the reasonableness of his decision. To assess the reasonableness—and thus lawfulness—of Gotovina's attack decisions, the ICTY concluded that evidence demonstrating that artillery shells landed more than 200 meters from identified military objectives proved that he acted unreasonably in launching such attacks—the foundation of its finding of unlawful attacks on civilians, a crime based on intent.[31]

In so doing, the judgment failed to consider or attribute relevant weight to the myriad of operational variables that impact the execution of combat operations and the use of force against both planned and fleeting targets. Variables such as the quality and quantity of intelligence about enemy and civilian locations, the quality of munitions, training, terrain, weather, quality of equipment, fatigue and many others are "integral to any targeting process at the time of the planning and the attack; they are all also relevant for a tribunal or court in assessing the reasonableness of the commander's decision-making process."[32] The failure to incorporate these operational considerations into an analysis of operational decision-making was glaring and undermined the effective implementation and application of LOAC.[33]

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[29] Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 BROOKLYN L. REV. 1, 15 (2012).
[30] *Id*. at 19.
[31] Prosecutor v. Gotovina, Case No. IT-06-90, Judgement, Vol. II of II, ¶ 2620 (Int'l Crim. Trib. for the former Yugoslavia April 15, 2011).
[32] OPERATIONAL LAW EXPERTS ROUNDTABLE ON THE *GOTOVINA* JUDGMENT: MILITARY OPERATIONS, BATTLEFIELD REALITY AND THE JUDGMENT'S IMPACT ON EFFECTIVE IMPLEMENTATION AND ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW 13 (2011), https://inavukic.files.wordpress.com/2012/01/gotovina_meeting_report.pdf.
[33] *See e.g. id*.; Geoffrey S. Corn & Lt. Col. Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT'L L. J. 337 (2012).

Although the judgment was ultimately overturned on appeal, this type of effects-based analysis has begun to permeate the discourse on LOAC over the past several years. The most common manifestation appears in the consideration of attacks leading to civilian casualties, in which the frequent reaction in the media, commission of inquiry reports and other discourse is that the existence of civilian casualties must mean that the attack was an unlawful attack on civilians. As noted above, however, LOAC in general, and proportionality specifically, simply does not operate on the basis of after-the-fact determinations.

Rather than engage in the complex and multi-faceted analysis required to assess whether the commander's decision was reasonable at the time of the attack, such reports and analyses simply count up the casualties and damage and pronounce that the attack was disproportionate or perhaps even intentional. While this approach represents a fundamental misunderstanding of LOAC, it also likely stems from a desire to find tools to bring greater certainty to the analysis — although it may be difficult or complicated to assess whether a commander's decision was objectively reasonable given the circumstances and information available at the time of the attack, it is quite simple to reach a conclusion on the basis of casualties and destroyed or damaged buildings alone.

As discussed in greater detail in Part III, an effects-based analysis poses substantial risks for the effective implementation and long-term development of, and respect for, LOAC. First, an effects-based approach disregards the notion of targeting as a methodology that guides law-compliant militaries in implementing LOAC in military operations. Second, because an effects-based approach is divorced from the operational realities of combat operations, it may well lead to a situation in which commanders faced with such a rule begin to disregard the law as irrelevant, a development that has extraordinary consequences for the protection of all persons and the dedication to the rule of law. Finally, the most direct and evident consequence of the effects-based approach is that it opens the door to a grave danger: the exploitation of the law by the defending party for its own defensive and propaganda purposes.

3. Lethal Autonomous Weapons Systems and the Quest for Certainty

As if on a parallel track, the discourse about LAWS and their development, use, and compliance with LOAC is dominated by questions of certainty. Underlying the debate is a desire to understand how these systems work and how humans would interact with them. At a fundamental level, this search for greater clarity, certainty, and predictability is obviously sensible. Knowing and understanding how a weapon works is central to assessing how it can be used effectively and lawfully.

For most weapons, one can see how they work and what they do, in order to use that information to assess the weapon's legality and effectiveness. In contrast, a LAWS that is programmed and then deployed to make targeting decisions without human involvement is quite different and it is difficult to grasp precisely what such a system is doing and how it is making those decisions. And yet, to perform a weapons review for compliance with LOAC, or to determine when and in what circumstances deployment of LAWS is appropriate, predicting what

an autonomous weapon will do and how it will take that action is essential. Similarly, in order to assess the legality of an attack by LAWS for the purposes of accountability, we need to be able to understand what information the system gathered, how it processed that information and assessed the possible options for action, how it determined the identity and legality of the target, how it assessed any harm to civilians and the requisite proportionality determinations, and how it assessed the precautions that were needed and feasible and how to take them. Each of these analyses rests on information and understanding — which rest, in turn, on a level of certainty or predictability. Three issues stand out in particular with respect to the effect on LOAC going forward: certainty of technology, certainty of legal norms, and certainty of analyses and decisions.

A. Certainty of Technology

At the most basic level, significant uncertainty and disagreement persist regarding exactly which types of weapons and weapons systems fall within a category of autonomous weapons. In the face of "confused and circular discussion about terminology"[34] and attempts to define autonomy, the discourse remains mired in this initial search for common ground, hampering attempts to examine the ethical and legal ramifications or boundaries of using LAWS. Any attempt to apply the law to a weapons system, whether autonomous or not, requires definition in order to determine how the law applies, how specific treaty provisions apply, when they apply and so forth. The very workings of LAWS are not entirely understood — certainly by lawyers tasked with assessing the application of the law in using such weapons — resulting in a steady discourse to try to reach a greater level of understanding and certitude. Cyber, nanotechnologies and other new capabilities pose similar challenges for understanding how something one cannot see or perhaps even touch functions. At the operational level, "[t]he logic and behavior of such systems can be quite opaque to the airman, and often the system developers do not fully understand how the autonomy will behave.[35] When these opacities and complexities need to be translated to the lawyers and other advisors, the nature and degree of uncertainty increase significantly, driving still greater demands for certainty and predictability for purposes of assessing the appropriate parameters for use.

A second area concerns the survivability and reliability of LAWS. Survivability can likely be measured with a high degree of confidence during testing and development and is understood as a function of detectability, susceptibility, vulnerability, stability and crashworthiness.[36] Reliability, in contrast, poses enduring certainty issues. As the Office of the Chief Scientist of the

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[34] Jenks, *supra* note 1, at 9. *See also* ARMIN KRISHNAN, KILLER ROBOTS: LEGALITY AND ETHICALITY OF AUTONOMOUS WEAPONS 43 (2009) ("[a]s the discourse on autonomous robots gets seized more and more by philosophers . . . the confusion about 'autonomous weapons' in the public debate increases").

[35] U.S. Air Force, Office of the Chief Scientist, *Autonomous Horizons: System Autonomy in the Air Force — A Path to the Future* 22-23 (June 2015), http://www.af.mil/Portals/1/documents/SECAF/AutonomousHorizons.pdf?timestamp=1435068339702.

[36] DEP'T OF DEFENSE, UNMANNED SYSTEMS INTEGRATED ROADMAP 4.5.3 (2013). Detectability is the probability of being discovered by an enemy force; susceptibility is the probability of being hit or jammed; vulnerability is the probability of surviving if hit or jammed; stability is the probability the vehicle will reliably operate in the manner that was intended after it has been hit or jammed; and crashworthiness is the probability the vehicle and its load will survive an impact without serious damage. *Id*.

U.S. Air Force explained in a recent report, new tools for verification and validation must be developed, because "[t]raditional methods . . . fail to address the complexities associated with autonomy software [and t]here are simply too many possible states and combination of states to be able to exhaustively test each one."[37] If LAWS will always function the same way in the same situation, then we have a basis to analyze the lawfulness or morality of that action; if not, we are handicapped in making an effective assessment of how well LAWS can or will comply with the law.

Finally, in the absence of extensive operation of LAWS or other new technologies in competitive environments, there is significant uncertainty regarding how such systems will respond in the face of malfunction, jamming, spoofing, errors or infiltration. The increased complexity of LAWS, for example, undermine our ability to predict or even expect how it might act and react. Like any hi-tech item, the more complex the system, the more lines of code and number of interlocking parts and systems it has, thus increasing possibilities for breakdown or malfunction.

Once in an operational environment, additional challenges for predicting behavior arise. First, the increased "number of potential interactions . . . can make testing the autonomous system's operation under every possible environmental condition effectively impossible."[38] Second, adversaries will seek to disable or exploit a LAWS, like any other vulnerability. Such exploitation is most likely achieved "through hacking, spoofing (sending false data), or behavioral hacking (taking advantage of predictable behaviors to 'trick' the system into performing a certain way)."[39] One unfortunate effect of the system's enhanced complexity, however, is that it is "fundamentally more difficult to detect inadvertent bugs or deliberately embedded malware."[40]

The purpose of highlighting these uncertainties is not to argue regarding the propriety or legality of developing and using LAWS. Rather, these uncertainties and complexities are driving ever greater efforts to secure a more precise understanding of what LAWS do and their levels of resilience and reliability. The ICRC notes that, at present, "it is uncertain whether commanders or operators would have the necessary knowledge or understanding to grasp how an autonomous weapon system functions."[41] This understanding—or minimization of uncertainty, to put it another way—is essential to the lawful use of LAWS or any other advanced technology. The commander or operator tasked or intending to deploy LAWS "must personally decide whether the autonomous weapon can perform lawfully given the specific battlefield situation."[42] To do so, she must "be thoroughly familiar with the system's particular capabilities and must know what embedded values have been pre-programmed into it"[43] and how it is likely to act and react as a result. A firmer

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[37] U.S. Air Force, *supra* note 42, at 23.
[38] Paul Scharre, *Autonomous Weapons and Operational Risk* 14, Center for New American Security Ethical Autonomy Project (February 2016).
[39] *Id*.
[40] U.S. Air Force, *supra* note 42, at 23.
[41] INT'L COMM. RED CROSS, AUTONOMOUS WEAPON SYSTEMS: TECHNICAL, MILITARY, LEGAL AND HUMANITARIAN ASPECTS 87 (2014).
[42] Jeffrey S. Thurnher, *Examining Autonomous Weapon Systems from a Law of Armed Conflict Perspective*, *in* NEW TECHNOLOGIES AND THE LAW OF ARMED CONFLICT 213, 224 (Hitoshi Nasu & Robert McLaughlin eds. 2014).
[43] *Id.*

grasp on the likelihood of error or divergence from the intended action is equally important. For example, just as extensive testing and development in the software industry have reduced the error rate substantially,[44] similar efforts are and will be underway to continually reduce the uncertainties of function and result with LAWS. The question for the interplay with LOAC, as examined in Part III, is whether this trend toward certainty of result will bleed over into legal analysis as well.

B. Certainty of Legal Norms in the LAWS Context

Building on extensive discussions regarding the application of LOAC in the development and programming of LAWS and, equally important, in the implementation of combat operations using such weapons systems, this section highlights how select LOAC principles and rules drive efforts at greater certainty regarding the content and the application of the law. This search for greater certainty with regard to how LOAC principles operate in the LAWS context can then trigger a shift towards greater demands for certainty in the application of LOAC and a fundamental change in the reasonableness construct underlying much of LOAC.

The implementation of the principle of proportionality by humans already engenders significant debate. Rather than a quantifiable concept, proportionality is "above all a question of common sense and good faith for military commanders."[45] It requires that commanders weigh vastly different concepts — civilian casualties and military advantage — in the midst of dynamic and uncertain circumstances, without any specific quantitative measure for doing so. As the ICRC Commentary explains, the rule of proportionality "is by no means as clear as it might have been, but in the circumstances it seems a reasonable compromise between conflicting interests and a praiseworthy attempt to impose some restrictions in the domain where arbitrary behaviour has existed too often."[46] Over decades of training and operations, militaries have honed the methodology of proportionality and the ability to gather the intelligence essential to an informed and reasonable judgment. Nonetheless, assessments of military advantage and how many civilian casualties would be excessive in comparison in various situations continue to pose intellectual and operational challenges for both commanders and outside commentators. The notion of the "reasonable commander" accounts for these challenges and difficult qualitative assessments, recognizing in effect a zone of reasonableness rather than one true answer.

However, once we introduce machines into this framework, there is an inherent slide from the qualitative idea of reasonableness and judgment to a more quantitative notion of measuring and programming. For an autonomous system to apply proportionality, it needs to be programmed to "attribute[e] values to objects and persons and mak[e] calculations based on probabilities and context."[47] Some argue that "no known software [is] capable of mechanizing qualitative decision-making [because the] process of evaluation that is implicit in the application of the proportionality

[44] Scharre, *supra* note 46, at 14.
[45] AP I COMMENTARY, *supra* note 28 at 683-4.
[46] *Id*. at 685.
[47] INT'L COMM. RED CROSS, *supra* note 59, at 82.

test is one that only a human brain can properly undertake."[48] Others, however, explore what would be required for LAWS to implement proportionality: the likelihood and extent of civilian casualties, the military advantage, and a comparison of the two.

Using algorithms similar to the U.S. military's collateral damage estimate methodology (CDEM),[49] an autonomous system could assess "factors such as a weapon's precision, its blast effect, attack tactics, the likelihood of civilian presence, and the composition of buildings"[50] and reach results of comparable reliability to the CDEM system currently used. Military advantage, in contrast, poses more significant challenges: "Given the complexity and fluidity of the modern battle space, it is unlikely in the near future that, despite impressive advances in artificial intelligence, 'machines' will be programmable to perform robust assessments of a strike's likely military advantage."[51] Over time, however, quantitative measures assigning value to specific military equipment might serve as a simplistic substitute for the more qualitative judgment inherent in assessing military advantage.

To make proportionality work for an autonomous system, we need to quantify both the component parts of the proportionality methodology and the balancing or comparative aspect that produces the decision to attack or refrain from attack. Quantifying relies on specific measures or metrics, leading to efforts to impose greater certainty on the entire proportionality construct to develop a measurable paradigm rather than one based primarily on good faith and objective reasonableness. In effect, the challenges of translating proportionality into the world of autonomy may well lead to the world of autonomy imposing certainty and quantitative analysis on the methodology of proportionality.

A second LOAC rule that introduces concerns about certainty is the rule mandating that in case of doubt, a person is presumed to be a civilian.[52] Like many other such judgments in LOAC, any rebuttal of the presumption of civilian status must be based on the attacker's reasonable assessment based on the information available at the time. Although LAWS may be well-suited to make distinction determinations regarding some military objectives, given "established technology which enables sensors to detect and recognize pre-determined categories of military equipment,"[53] doing so with respect to persons raises significantly more difficult questions. A machine needs to determine not only whether an individual is a combatant or member of an

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[48] William Boothby, *How Far Will the Law Allow Unmanned Targeting to Go?*, *in* INTERNATIONAL HUMANITARIAN LAW AND THE CHANGING TECHNOLOGY OF WAR 46, 57 (Dan Saxon ed. 2013).

[49] Chairman of the Joint Chiefs of Staff Instruction 3160.09, No-Strike and the Collateral Damage Estimation Methodology (Feb. 13, 2009).

[50] INT'L COMM. RED CROSS, *supra* note 59, at 83.

[51] Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, HARV. NAT'L. SEC. J.: FEATURES ONLINE 20 (2013).

[52] Additional Protocol I, *supra* note 2, art. 50(1). The customary law status of this rule or the precise contours of the rule remain in dispute. *See* Int'l Comm. Red Cross, Customary International Humanitarian Law Rule 6 and associated commentary; DOD LAW OF WAR MANUAL, *supra* note 5, at 5.4.3.2.

[53] Boothby, *supra* note 66 at 55 (The technology uses algorithms, such that the sensors on the attacking aircraft detect features in the target object which accord with data pre-programmed into the fire control system. When sufficient points of recognition have been achieved to a given level of probability, the unmanned aircraft will, depending on the instructions programmed into the system in advance of the mission, characterize the observed object as a target and may then commence attack procedures").

organized armed group — in which case the individual is not a civilian at all — but also whether an individual who appears to be a civilian is directly participating in hostilities so as to lose the protection from attack otherwise inherent in civilian status. Both this latter step and the assessment of doubt with regard to civilian status pose challenges for LAWS that are likely to introduce a trend towards certainty, much like proportionality.

First, the definition of civilian in LOAC is a negative definition, based on what a civilian is not—a combatant or a member of an organized group. As a result, we may lack identifiable definitional characteristics for a civilian that could be fed into a machine's processes.[54] Second, as the ICRC explains, "programming [direct participation in hostilities] criteria into a machine would appear a formidable task because of the qualitative analyses required . . ., such as the assessment of the likely adverse effects of an act, . . . whether the individual is acting in support of a party to the conflict"[55] and the individual's intentions. Third, it is unclear that a machine can measure doubt in a manner similar to humans or to how we currently understand the LOAC rule. Doing so would require the development of an "algorithm that can both precisely meter doubt and reliably factor in the unique situation in which the autonomous weapon system is being operated," which is "hugely challenging."[56]

The very notion of presuming civilian status in case of doubt means that any change in how an individual is perceived depends on additional information, but how much and what type of information is not specified. Efforts to program a machine to assess when a civilian is no longer a civilian, or when a civilian is no longer protected from attack because of direct participation in hostilities, will therefore seek to introduce quantifiable measures for the types and amount of information required. Attaining greater understanding of how to apply these essential rules of LOAC is, of course, highly desirable. But on a broader level, the continued injection of certainty or quantitative measures into areas traditionally understood as qualitative, based on reasonableness, may well prove destabilizing for LOAC.

C. Certainty of Analyses and Decisions

Understanding how an autonomous system undertakes analysis and reaches decisions is a final area driving demands for greater certainty. In an environment in which the commander's decision and judgment are critical facets of any determination of legality, we have an innate comfort level in both relying on and judging the propriety of another human's decision-making and judgment. Human beings take certain steps in a decision-making process: using senses to collect data; thinking about the data in order to reason; making plans; and making decisions and acting on those decisions.[57] Since we all do this in some form or another, we have the capacity to

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[54] *See e.g.*, Noel Sharkey, *Grounds for Discrimination: Autonomous Robot Weapons*, 11 RUSI DEFENCE SYSTEMS 86, 87 (2008) ("A computer can compute any given procedure that can be written down in a programming language. We could, for example, give the robot computer an instruction such as, 'if civilian, do not shoot'. This would be fine if and only if, there was some way of giving the computer a clear definition of what a civilian is").

[55] INT'L COMM. RED CROSS, *supra* note 59, at 80.

[56] Schmitt, *supra* note 68, at 16-17.

[57] Darren Ansell, *Research and Development of Autonomous 'Decision Making' Systems*, *in* INT'L COMM. RED CROSS, *supra* note 59, at 39.

judge when these steps are taken or not taken, when the process is carried out well or is carried out in an unreasonable manner.

However, reaching a comfort level with autonomous decision-making requires more clarity about how an autonomous system makes decisions and analyzes information. With machines, certainty is often quantified by a confidence rating or error rating, which measures how certain the machine is that what it senses is in fact what it actually is. Quantifying decisions in this manner is useful for assessing how well a machine does the individual parts of its job, but does not offer much guidance for determining how well it makes complex decisions in a dynamic environment and whether it does so better or worse than a human operator. As a result, much of the debate about many new technologies rests on how much certainty we can have — about the decisions LAWS would make, for example, or how other hi-tech weapons would operate.

For decades, machines have replaced humans for many tasks, and in nearly all cases, we expect that the machine will be more precise—machines do not get distracted or make silly errors. Clearly we would not tolerate a calculator that made periodic errors like a human being. Translating this perception of perfection in machines raises interesting challenges for both the application of the law and any long-term ramifications for the law in the world of high technology weapons. Although there is "an implicit assumption that a system will continue to behave in a predictable manner after commands are issued[,] clearly this become problematical as systems become more complex and operate for extended periods."[58]

This unpredictability is a function of the dynamic environment in which LAWS and other high technology systems operate and is also a source of consternation in attempting to understand sufficiently how a system works and what it would do in a given circumstance. An underlying question therefore will ultimately be how comfortable we are with uncertainty in a machine, rather than in a human. Here lies the key issue for the relevant discussion: whether the method and process of machine decision-making will lead to a quantitative approach to judging what LAWS do. In effect, because analyzing whether a machine's decision is reasonable is difficult, if not impossible, given the wholly different decision making process machines currently do or would use, any judgment regarding a machine's decision is effectively based on a series of certainty measures—for example, a 99% confidence rating regarding the identification of an object and similar measures—and the programmable response to different levels of certainty.

4. WHAT EFFECT ON LOAC: SEPARATING CERTAINTY FROM REASONABLENESS

For any weapon or piece of equipment, there is a level of information or knowledge we expect to have before approving or deploying it. That differs, however, from how we view or judge the attacker's decision to launch an attack using that weapon, which is assessed on the basis of objective reasonableness. LAWs and other new technologies challenge the distinction between these two considerations, because an autonomous system is not simply being used, but is or would

[58] UK Ministry of Defence, Development, Concepts and Doctrine Centre, *The UK Approach to Unmanned Systems, Joint Doctrine Note 2/11* ¶ 510 (March 30, 2011). *See also* INT'L COMM. RED CROSS, *supra* note 59, at 71 ("Since autonomous systems are adaptable (within programmed boundaries) they are necessarily unpredictable").

be making its own decisions as an autonomous actor. Nonetheless, it is important to separate the quest for certainty about how new technologies work from the distinct question of whether the attack or other combat operation an autonomous system executes is in accordance with LOAC.

A. Responsible Command and Command Responsibility

The doctrine of command responsibility is a form of liability that holds an individual in a leadership position accountable for the actions of her subordinates. Command responsibility rests on two fundamental elements: the commander knew or had reason to know that the subordinates committed or were about to commit violations of LOAC and the commander failed to take necessary and reasonable measures to prevent such acts or punish the violations.[59] Although command responsibility overall raises many challenging issues in the context of new weapons technologies, the second element of necessary and reasonable measures highlights key issues in the interplay between reasonableness and certainty.

The obligation to take necessary and reasonable measures—such as training, orders prohibiting unlawful acts, or disciplinary and criminal action—is a fundamental incident of responsible command.[60] The type of measures considered necessary and reasonable is limited by what is possible in the circumstances at the time. As the ICTY held, it is important to recognize "that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures within his powers . . . [or] within his material possibility."[61]

Applying these notions of reasonable measures to the use of new weapons technologies immediately introduces the question of certainty and how it relates to or even supersedes reasonableness. Regarding LAWs, for example, some argue that in order to impose criminal responsibility, whether direct or superior responsibility, "it must be always possible to predict what [LAWS] do; otherwise humans cannot remain responsible for their conduct and only human beings

[59] Trial of General Tomoyaki Yamashita, Case No. 21, Judgment (U.S. Mil. Comm'n, Manila Oct. 8, 1945-Dec. 7, 1945), *reprinted in* 4 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1945); Additional Protocol I, *supra* note 2, arts. 86, 87; Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90; Statute for the International Criminal Tribunal for the Former Yugoslavia art. 7(3) (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda art. 6(3) (Nov. 8, 1994); Statute of the Special Court for Sierra Leone art. 6(3), Jan. 16, 2002, 2178 U.N.T.S. 137; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement (Int'l Crim. Trib. for the former Yugoslavia, June 25, 1999); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement (Int'l Crim. Trib. for the former Yugoslavia March 3, 2000); Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Judgement (Int'l Trib. for the former Yugoslavia Feb 26, 2001); Prosecutor v. Askayesu, Case No. ICTR-96-4-T, Judgment, Int'l Crim. Trib. for Rwanda, Sept. 2, 1998); Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment (Int'l Crim. Trib. for Rwanda, May 21, 1999); *In re* Yamashita, 327 U.S. 1 (1946).

[60] *See* AP I COMMENTARY, *supra* note 28, ¶¶ 3548-49 ("The first duty of a military commander . . . is to exercise command"; if commanders "refrain from taking the requisite measures [to prevent abuses], or if, having taken them, they do not ensure their constant and effective application, they fail in their duties and incur responsibility").

[61] Prosecutor v. Delalić, Case No. IT_96-21-T, Judgement ¶ 395 (Int'l Crim. Trib. for the former Yugoslavia, Nov. 16, 1998).

are addressees of international humanitarian law."[62] This approach demands a level of certainty regarding how LAWS work, how they make decisions, how they respond to the operational environment, how often and why they malfunction, and how they respond to hacking or other adversarial exploitation, a level of certainty that simply may not be attainable. In the absence of a firm understanding of how LAWS work and clear rules to govern their deployment, and thus to assess the commander's decision to use them, "it will be difficult if not impossible to establish that a commander had sufficient knowledge of the misuse of complex autonomous weapon systems to justify the imposition of criminal liability for his or her failure to prevent or suppress violations."[63] In effect, command responsibility appears to rest on whether a commander took reasonable measures to prevent violations by an autonomous weapon system, an inquiry that depends on the commander's ability to control or predict the system's decisions so as to know when and whether to take such preventive measures.

This inquiry sparks several questions highlighting how the interplay between certainty and reasonableness can create confusion and even detrimental developments in the interpretation and application of LOAC. A primary question is whether the commander, before deploying an autonomous system, must determine if the system will make the *right* decision or if the system will make a *reasonable* decision. The latter approach to assessing decision-making accords most closely with LOAC's basic reliance on objective reasonableness in the application and post-hoc analysis of distinction, proportionality and precautions. However, it depends almost completely on a comfort level and understanding of how LAWS make decisions, a challenge that raises certainty questions of its own, as discussed above. Alternatively, if the obligation is for the commander to determine that the autonomous system will make the right decision, our current understanding of LAWS suggests that it is highly improbable. And yet the nature of our interaction with machines generally is that we expect and want machines to "get it right" every time, so coming to terms with what appears to be a lesser threshold for a commander to be willing to use an autonomous system may be difficult.

Related questions raise similar issues. For example, imagine that an autonomous weapon system makes a faulty decision and targets a civilian or civilian object. If that faulty decision is considered sufficient to demonstrate that the commander was unreasonable in deploying the weapon, then the commander is effectively being held to a strict liability standard, one more stringent than that applied with regard to acts of subordinates. In contrast, if the relevant judgment is whether the commander's decision to deploy the weapon in the circumstances was reasonable, then the actual targeting decision — made by the autonomous system — is not truly assessed and potentially no responsibility is assigned for what may be a violation of the law. One might also ask how much a commander should be required to foresee the unforeseeable if the autonomous system is deployed as provided. This question includes how much a commander should be able to anticipate breakdowns, jamming, spoofing, infiltration or exploitation, and even errors, all of which introduces the question of what level of technological understanding is required, for both the commander and her subordinates deploying LAWS. More important, after an attack leading to

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[62] Marco Sassòli, *Can Autonomous Weapon Systems Respect the Principles of Distinction, Proportionality and Precaution?*, *in* INT'L COMM. RED CROSS, *supra* note 59, at 41.
[63] Jack M. Beard, *Autonomous Weapons and Human Responsibilities*, 45 GEO. J. INT'L L. 617, 659 (2014).

civilian harm or other indicators of a possible LOAC violation, the difficulty in understanding precisely how LAWS or other new technologies work may interfere with or even eliminate any ability to assign responsibility because of an inability to determine what actually went wrong. At present, it is unclear how the interplay between certainty and reasonableness, and the likely trend towards greater demands for certainty, will affect the application and future development of the doctrine of command responsibility, but the potential for disruption clearly exists.

B. Shifting LOAC to a Certainty Approach

A leading proponent of LAWS argues that one powerful reason to employ autonomous systems is their ability to act conservatively, to risk their own safety so as to ensure a high level of certainty in target identification before engaging the target.[64] The idea is that LAWS could, ideally, perform better than humans in the implementation of distinction, proportionality and precautions. Whether this is attainable remains subject to extensive debate, but nonetheless the discourse already demonstrates that "while autonomous weapons systems cannot be required to be perfect, they will in practice be held to standards that are significantly higher than those posed for humans."[65] These two developments—certainty in targeting decisions and a more stringent standard for decision-making—raise significant concerns about the impact on LOAC going forward.

As Part II explores, discomfort with the uncertainty seemingly inherent in LAWS is a strong impetus either for a total ban on the development and use of LAWS or for measures to impose greater certainty on the circumstances and terms of their use. These efforts at greater certainty appear with respect both to how LAWS function and to how key LOAC norms apply when implemented by an autonomous system. Indeed, finding the threshold of certainty needed is central to the entire enterprise: "[t]he tricky part is developing machines whose behavior is predictable enough that they can be safely deployed, yet flexible enough that they can handle fluid situations."[66] For human actors on the battlefield, training is the primary tool to enhance consistency and capability. For a machine, it is programming that seeks to accomplish a comparable goal, but a goal that most frequently is thought of in terms of result, that is, in quantitative terms, through the idea of an error rating or certainty of result. This partly because

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[64] Ronald Arkin, *Lethal Autonomous Systems and the Plight of the Non-combatant*, AISB QUARTERLY 1, 3 (2013), http://www.cc.gatech.edu/ai/robot-lab/online-publications/aisbq-137.pdf.

[65] Christof Heyns, *Increasingly Autonomous Weapon Systems: Accountability and Responsibility*, *in* INT'L COMM. RED CROSS, *supra* note 59, at 45, 47. *See also* Robin Geiß, *The International-Law Dimension of Autonomous Weapons Systems* 17, Friedrich-Ebert-Siftung International Policy Analysis (June 2015) ("one can conclude that such systems . . . should have to satisfy a much higher standard. [Regarding distinction, for example], a legal duty could be established for the developers of autonomous weapons systems to program them in such a way that they use force only in the case of unequivocally aggressive and offensive behavior on the part of enemy combatants/fighters. In situations, by contrast, that are not clear-cut in this respect, such systems would have to refrain from the use of lethal force even if human soldiers in an identical situation would be permitted to reach for their weapons.").

[66] Matthew Rosenberg and John Markoff, *The Pentagon's 'Terminator Conundrum': Robots That Could Kill on Their Own*, N.Y. TIMES, Oct. 25, 2016.

"the ability to handle uncertainty and unpredictability remain uniquely human virtues, for now,"[67] although clearing this hurdle lies at the heart of the LAWS enterprise.

A critical consequence of this inherent difference between human and machine is that certainty and quantifiable measures begin to substitute for reasonableness as a measure of success or, in the context of LOAC and armed conflict, as a measure of lawfulness. As an initial concern, judging an autonomous weapon system's targeting decision based on a quantifiable measure of certainty will mean that targeting decisions by machines and targeting decisions by humans are judged on different standards. While this differentiation in standard might make sense at first or be the only way that we can reach a comfort level with the use of LAWS, it raises the specter of the same attack being lawful if undertaken by one type of actor but not if launched by the other.

This result is fundamentally at odds with the underlying notion of equality of arms and the consistent understanding that greater technological capability does not impose higher standards of legal obligation. More problematic, however, is the more likely result: the higher certainty-based standard applied to autonomous systems will steadily bleed over into the analysis of decisions and attacks by human actors, changing the foundational standard of objectively reasonable into one based on certainty at the time of decision or, more likely, on actually being correct.

Substituting certainty, being correct, or some other quantifiable measure for reasonableness is plainly at odds with LOAC. It removes the foundation for operational judgment in combat operations, "wish[ing] away the exercise of judgment and discretion by military decision-makers."[68] It effectively imposes an effects-based or strict liability standard — if the threshold of certainty is not met, or if the decision turns out to be wrong after the fact, the attack is unlawful. Once certainty begins to replace reasonableness in the application of the law, an effects-based analysis is the only way to achieve such certainty.

This approach would require commanders to operate with a standard that allows for no errors. Doing so would run counter to the established legal standard in Additional Protocol I, the ICTY Statute, the Rome Statute and customary international law: that commanders are obligated to make reasonable decisions based on the information available at the time of the attack. This standard applies across the legal principles of distinction, proportionality and precautions, as explained in Part I above. Thus, for example, an attacker "must take all reasonable steps to ensure . . . that the objectives [to be attacked] are identified as military,"[69] and must assess whether the expected civilian casualties, civilian injury or damage to civilian objects are excessive in light of the anticipated military advantage gained. These determinations are based on the circumstances and information available at the time of the attack, not the results and facts that come to light afterwards: the "law does not judge commanders based on the outcome alone, nor does it require commanders to be right in all circumstances."[70]

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[67] *Id*.
[68] Merriam, *supra* note 30, at 142 ("it is the effort to somehow quantify reasonableness that ought to be controversial. Seeking to set a 'level' or threshold of certainty is a fool's errand, predicated on the false notion that all possible combat scenarios can be foreseen and accounted for.").
[69] FM 27-10, *supra* note 40, at ¶ 41.
[70] OPERATIONAL LAW EXPERTS ROUNDTABLE, *supra* note 47, at 6.

Since the Nuremberg Tribunals, the law has required that "an individual should not be charged or convicted on the basis of hindsight but on the basis of information available to him or information he recklessly failed to obtain at the time in question."[71] The ICTY has consistently taken the same approach, holding that in order "to establish the *mens rea* of a disproportionate attack, the Prosecution must prove . . . that the attack was launched willfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties."[72] Certainty or perfection is not the LOAC standard. Rather,

> [t]he reasonableness of [one's] actions is the touchstone for determining compliance with [LOAC]. The law allows for mistakes in the Clausewitzian "fog of war." Intelligence may be incomplete or faulty, technology may fail to function properly, and tactical conditions may change after a targeting decision has been made and beyond the point at which an attack may be abandoned. [LOAC] does not require perfection.[73]

If human actors start to be judged on the basis of a higher or certainty-based standard used for machines, this fundamental framework begins to unravel. Relying on quantifiable measures or a strict liability standard effectively reduces any assessment of a commander's decision to one based on the effects of the attack in question, because that is the easiest information to gather, quantify and measure. In addition to being wrong as a matter of law,[74] it also raises significant concerns about the misapplication and future development of LOAC, ultimately leading to greater danger for the civilians and civilian areas the law seeks to protect.

First, the effects-based approach disregards the notion of targeting as methodology and ignores operational realities that inform both the targeting process and any careful analysis thereof. Although difficult in many circumstances, commanders engage in this methodology and process every time they apply combat power with consequences for civilians, sometimes in a longer, deliberative process and sometimes in the split second available for troops in contact and fleeting targets. The core targeting principles highlight the goal of a balance between military needs and humanitarian concerns that minimizes civilian harm as much as possible, and the methodology provides guidance on how to achieve that goal—by gathering and analyzing information about the identity of the target, its military value, and the consequences to the civilian population and civilian objects in the area, and making choices among various operational alternatives to achieve the mission while minimizing harm to civilians. This methodology functions in tandem with the operational realities of combat operations. Although careful planning for military operations attempts to incorporate as many operational variables as possible, it is an axiom of military operations that "no plan survives first contact with the enemy." All of these variables are integral

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[71] USA v. List, *supra* note 26, at 57. This principle is known as the Rendulic Rule; *see* note 24, *supra*, and accompanying text.
[72] Prosecutor v. Galić, *supra* note 31, ¶ 59.
[73] Michael N. Schmitt and Eric W. Widmar, *"On Target": Precision and Balancing in the Contemporary Law of Targeting*, 7 J. NAT'L SEC. L. & POL'Y 379, 401 (2014).
[74] *See* Corn, *supra* note 43 at 318 ("This effects-based focus, however, is inconsistent with fundamental tenets of the law, which demand reasonable combat judgments, which must be assessed contextually, and not based on retrospective analysis.").

to any targeting process at the time of the planning and the attack and to assessing the reasonableness of the commander's decision-making process.

In contrast to this sophisticated and reality-based methodology, an effects-based rule is likely to impose liability regardless of process or effort expended to protect civilians and civilian objects, thus undermining the essential value of this methodology by leaving commanders with only the after-the-fact effects to determine right from wrong. It is thus not simply a higher standard, but a qualitatively different standard altogether. However, "[r]easonableness is not a threshold; rather, it is an attribute of decision-making that can be judged only in context."[75] Even if an autonomous system is programmed to make decisions based on all of the operational considerations and the context, it remains likely that such programming will rely more on a quantifiable measure of certainty or error as a tool to reach what would be considered a reasonable judgment. Over time, this may well replace the quality of reasonableness with a more quantitative measure which, when it spreads back to the arena of human decision-making, will strip commanders and soldiers of the tools and methodology that guide lawful and effective decision-making and execution of combat operations.

Second, divorcing the application of the law from operational realities introduces the very real danger that commanders faced with such a rule will disregard the law as irrelevant. Interestingly, the very effort to maximize the collection and analysis of information and to create a higher level of certainty with regard to identification of targets, harm to civilians, and necessary precautions is likely to have a counter effect when these new standards and expectations filter back down to the application of LOAC to human decisions. Thresholds of certainty and a reliance on results after the fact will create a culture of unpredictability and uncertainty regarding the law and the application of legal standards to operational conduct and decisions. The complexity of the operational environment and the effect of both the enemy's tactics and unexpected changes from the myriad of operational variables mean that an attacker cannot know with certainty what the result of an attack will be. If that certainty is the legal standard, however, the law becomes operationally illogical. Commanders will either refrain from engaging in military operations altogether out of an overabundance of caution in the face of an impossible standard, or will simply disregard the law entirely as no longer relevant to their purposes and mission. Under either scenario, innocent civilians are the ultimate victims—a result directly at cross-purposes with a central goal of LOAC.

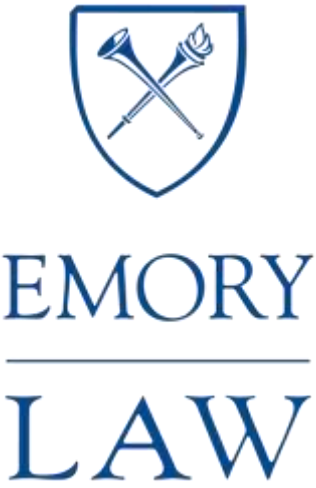
Finally, the most direct and evident consequence of the effects-based approach is that it opens the door to a grave danger: the exploitation of the law by the defending party for its own defensive and propaganda purposes. If the results of an attack determine the lawfulness of that attack, the defending party's precautionary obligations are emasculated because they no longer factor into the legal assessment of who bears responsibility for the harm to civilians. "When parties face no legal consequences, and a potential operational advantage, for co-mingling civilian and military objects, every apartment will be a command center as militaries and armed groups embed

[75] Merriam, *supra* note 30, at 129 (noting that a "targeting decision based on a particular degree of certainty about a target may be entirely reasonable in one context but unreasonable in another" and arguing that "assigning a percentage to certainty is inherently dangerous").

themselves in cities to use the civilian population as a shield."[76] But these tactical advantages are merely the beginning. These tactics often have a more problematic, strategic purpose: to use the resulting civilian deaths as a broader strategic tool to level accusations of war crimes, diminishing support for the war effort and the overall legitimacy of the military operation. Legal assessments based on effects merely ratify the use of civilians and the civilian population as a shield for military operations and — albeit unintentionally, of course — directly undermine the very purpose of LOAC's core principles of distinction, proportionality and precautions.

LAWS appear to offer significant potential for a variety of uses in combat operations, including perhaps autonomous identification and attack of targets without human involvement at some point in the future. If, as some argue, autonomous systems can achieve more accuracy and a higher level of protection for civilians and civilian objects, that accomplishment will be a positive development. The process of achieving that goal, however, presents unintended challenges and consequences for the application and implementation of LOAC in all other combat scenarios in which humans remain the actors and decision-makers. Understanding how the sensible desire for greater certainty with regard to new technologies can, and in fact is likely to, alter the existing and foundational understanding of the roles of certainty and reasonableness in LOAC, to detrimental effect, is therefore an essential aspect of the discourse going forward.

[76] OPERATIONAL LAW EXPERTS ROUNDTABLE, *supra* note 47, at 11.



The Extent of Self-Defense Against Terrorist Groups: For How Long and How Far?

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THE EXTENT OF SELF-DEFENCE AGAINST TERRORIST GROUPS: FOR HOW LONG AND HOW FAR

By Laurie R. Blank[*]

47 ISRAEL YEARBOOK ON HUMAN RIGHTS (forthcoming 2017)

I. INTRODUCTION

State use of military force against terrorist groups has been a defining feature of the post-9/11 world since the United States began bombing al Qaeda and Taliban forces in Afghanistan in the fall of 2001. At a fundamental level, States using military force to protect their territory, their inhabitants and their interests is, of course, nothing new. The right to use force in self-defence is a long-established principle of international law and States have resorted to force in self-defence throughout history, against both State and non-State attacks and threats. Modern international law, including the United Nations Charter and customary international law, provides a comprehensive and well-accepted framework for assessing the legality of a resort to force in self-defence. No less, although States and other actors in the international system may disagree vehemently about the lawfulness of any particular self-defence enterprise, the fact that nearly all States embarking on self-defence actions participate in both the procedural framework for such action through communication with the United Nations Security Council and the international legal discourse demonstrates that the overarching legal infrastructure regarding the use of force in self-defence remains the enduring and appropriate legal framework, regardless of State aggression, transnational terrorism, or other challenges to the international order.

Notwithstanding extensive legal debates over whether a State has a right to use force in self-defence against a non-State group outside its borders, State practice in the aftermath of 9/11 provides firm and increasing support for the existence of a right of self-defence against non-State actors, even if unrelated to any State.[1] Repeated incidents of States responding to attacks by non-

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[1] The international response to the September 11th attacks on the United States are particularly instructive. Both the United Nations Security Council and the North Atlantic Treaty Organization issued resolutions characterizing the attacks as an armed attack triggering the inherent right of self-defense. S.C. Res. 1368, 1, U.N. Doc. S/RES/1368

State groups with forceful measures, both before and after 9/11, have triggered a rich international legal discourse on the nature of an armed attack,[2] whether attribution to a State is required,[3] the meaning of imminence,[4] and the substantive content of the classic requirements of necessity, proportionality and immediacy.[5] But the post-9/11 environment in which states — the United States in particular — may use self-defence as an ongoing and overarching justification and construct for military operations, whether episodic or sustained in nature, against one or more non-state groups for more than fifteen years and counting poses challenges to the very concept of self-defence anew. In particular, this ongoing reliance on self-defence appears to include locations and groups not contemplated at the time of the initial incident or incidents triggering the right to self-defence. This scenario raises essential questions about the extent of self-defence: how far can a State go when acting in self-defence — both in the geographical sense and in the sense of the legitimate aims of using force — and for how long does this right of self-defence last? In this era of extended campaigns

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(Sept. 12, 2001); North Atlantic Treaty, art. 5, Apr. 4, 1959, 34 *U.N.T.S.* 243, 246; Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001). The September 11th attack was the only instance in which NATO invoked collective self-defense under Article 5 of the North Atlantic Charter. Australia activated the collective self-defense provisions of the ANZUS Pact; Security Treaty, U.S.-Aust.-N.Z., art. IV, Sept. 1, 1951, 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86; B. Pearson, "PM Commits to Mutual Defence", *Austl. Fin. Rev.*, 15 Sept. 2001; and the Organization of American States responded similarly as well; Inter-American Treaty of Reciprocal Assistance, art. 3.1, Sept. 2, 1947, 21 *U.N.T.S.* 77, 93; Terrorist Threat to the Americas, Res. 1, Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, OAS Doc. RC.24/RES.1/01 (Sept. 21, 2001).

2 *See* Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, I.C.J. Reports 2005 at 168, ¶¶ 146–47; N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* 30–36 (2010); D. Bethlehem, "Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors", 106 *Am. J. Int'l L.* 1 (2012).

3 S. D. Murphy, "Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter", 43 *Harv. J. Int'l L.* 41 (2002); K. N. Trapp, "Can Non-State Actors Mount an Armed Attack?", *in The Oxford Handbook on the Use of Force in International Law* (2015) ("The ICJ's decisions in *Nicaragua*, *Palestinian Wall*, and *DRC v. Uganda* might be interpreted as limiting 'armed attacks' to uses of force by or attributable to a State.").

4 *See* W. C. Bradford, "The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventative War", 79 *Notre Dame L. Rev.* 1365 (2004); N. S. Erakat, "New Imminence in the Time of Obama: The Impact of Targeted Killings on the Law of Self-Defense", 56 *Ariz. L. Rev.* 195 (2014); J. Yoo, "Using Force", 71 *U. Chi. L. Rev.* 729 (2004); "Imminence" in the Legal Adviser's Speech", *Lawfare* (6 Apr. 2016), available at https://www.lawfareblog.com/imminence-legal-advisers-speech.

5 C. J. Tams & J. G. Devaney, "Applying Necessity and Proportionality to Anti-Terrorist Self-Defense", 45 *Isr. L. Rev.* 91 (2012); K. N. Trapp, "Back to Basics: Necessity, Proportionality, and the Right of Self-Defense Against Non-State Terrorist Actors", 56 Int'l & Comp. L. Q. 141 (2007).

against transnational terrorist groups, examination of such questions is essential to an understanding of self-defence and, therefore, an effective assessment of the legality of State action against such groups.

This article explores the extent of self-defence, particularly in the context of a State using force in self-defence against one or more terrorist groups located in one or multiple locations outside the boundaries of the State. Although identifying the ends of self-defence is relevant to situations of self-defence against attacks by another State or by a more conventional insurgent non-State group, perhaps in a spillover of an existing non-international armed conflict, it is in the realm of transnational terrorism and State responses thereto that the questions of duration, extent and degree of force become most challenging. Matching the international law framework to the operational realities becomes more and more difficult, such that "[w]here hostilities with groups such as Al Qaeda, Hezbollah, or the Taliban extend in time and/or scope, it becomes increasingly challenging to apply self-defence principles to regulate a State response in the same way as is suggested for more isolated uses of force."[6]

Part I provides foundation for the analysis, providing background on both the nature of the extended campaign of self-defence against transnational terrorist groups and the international legal framework for the use of force in self-defence. Part II then examines how the differing conceptions of the legitimate aims of self-defence affect the extent of self-defence. First, this section analyzes the operational goals different States have put forth when acting in self-defence against terrorist groups. Examining how these objectives match with the international legal framework provides a useful tool for considering how the self-defence principles of necessity and proportionality play out in this extended self-defence paradigm. Second, this section addresses the notion of counterterrorism operations against transnational terrorist groups as armed conflict and the consequences of a "war" framework for the parameters of self-defence. Finally, Part III raises questions that naturally follow from a State's initial success in countering a terrorist group with armed force and pose new challenges for the self-defence analysis. For example, as a State's military operations damage a group's ability to operate, it will seek new bases from which to operate in different States or regions and it may splinter into multiple groups or reconstitute itself as one or more new groups. These developments, along with the appearance of new groups inspired by or declaring allegiance to the original terrorist group, require further analysis of whether the nature and

6 K. Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict,* 67 (2016).

extent of self-defence changes — and how — in light of the dynamic operational environment for counterterrorism.

I. FRAMING THE ISSUE

It is axiomatic today that a terrorist group based thousands of miles away in the remote reaches of a developing nation can pose a significant threat to a powerful industrialized nation such as the United States, France or the United Kingdom. Encrypted communication, internet propaganda, the flow of people, weapons and money across borders — many of the freedoms and advances of the modern world offer countless opportunities for groups intent on launching spectacular attacks on civilians. Indeed, the United Nations Security Council has repeatedly characterized international terrorist attacks as a threat to international peace and security, both after 9/11 and after many other attacks.[7] The international community has seen a rapid evolution in the application of international law to the need to respond to terrorist acts and terrorist groups in self-defence, with "the acceptability of resorting to military force in response to transnational terrorism crystalliz[ing] in the aftermath of 9/11."[8] In examining how far this right to respond extends, in time, space and degree, an initial discussion of both the range of self-defence actions launched and the basic international legal framework is useful.

A. The Use of Self-Defence Against Terrorist Groups

On October 7, 2001, the United States declared, in a letter to the President of the United Nations Security Council, that it had "initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States

7 S.C. Res. 1368, ¶ 1, UN Doc. S/RES/1368 (Sept. 12, 2001) ("Unequivocally condemning in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security"). *See also* S.C. Res. 1373, UN Doc. S/RES/1373 (28 Sept. 2001); S.C. Res 1438, UN Doc. S/RES1438 (14 Oct. 2002); S.C. Res. 1440 (UN Doc. S/RES/1440 (24 Oct. 2002); S.C. Res. 1450, UN Doc. S/RES/1450 (13 Dec. 2002); S.C. Res. 1530, UN Doc. S/RES/1530 (11 Mar. 2004); S.C. Res. 1611, UN Doc. S/RES/1611 (7 Jul. 2005).

8 M. N. Schmitt, "Responding to Transnational Terrorism Under the *Jus ad Bellum*: A Normative Framework," *in Essays on Law and War at the Fault Lines* 49, 57 (M. N. Schmitt ed., 2012).

on 11 September 2001."[9] These military operations were launched against "Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan."[10] Since that time, the United States has announced countless actions in self-defence, against numerous groups in equally numerous countries around the world. Strikes and other actions against al Qaeda personnel and facilities have been launched in Afghanistan,[11] Pakistan,[12] Yemen,[13] Somalia[14] and other countries. The United States has also used force in self-defence against al Qaeda in the Arabian Peninsula (AQAP), an offshoot of al Qaeda, striking AQAP operatives in Yemen,[15] and

9 Letter dated 7 Oct. 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946, 7 October 2001.

10 *Id*.

11 Operation Enduring Freedom was the primary United States operation against al Qaeda from 2001-2014 and was succeeded by Operation Freedom's Sentinel, which includes a "counterterrorism mission against the remnants of Al-Qaeda to ensure that Afghanistan is never again used to stage attacks against our homeland." U.S. Dep't of Defense, *Obama, Hagel Mark End of Operation Enduring Freedom* (Dec. 28, 2014), available at http://www.defense.gov/News/Article/Article/603860. Actions against al Qaeda militants in Afghanistan continue today. *See* "Al-Qaeda Leader Killed in Drone Strike in Afghanistan", *BBC News* (5 Nov. 2016).

12 "Al-Qaeda Number Three "Killed by CIA Spy Plane" in Pakistan", *The Telegraph*, 4 Dec. 2005, available at http://www.telegraph.co.uk/news/worldnews/asia/pakistan/1504718/Al-Qaeda-number-three-killed-by-CIA-spy-plane-in-Pakistan.html; "Top al-Qaeda Commander Killed", *BBC.Com* (1 Feb. 2008), available at http://news.bbc.co.uk/2/hi/south_asia/7220823.stm; E. Schmitt, "2 Qaeda Leaders Killed in Drone Strike in Pakistan", *N. Y. Times*, (8 Jan. 2009), available at http://www.nytimes.com/2009/01/09/world/asia/09pstan.html.

13 "Sources: U.S. Kills Cole Suspect", *CNN.com/WORLD* (5 Nov. 2002), available at http://archives.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html.

14 *See, e.g.*, "US 'Targets al-Qaeda' in Somalia", *BBC News* (9 Jan. 2007), available at http://news.bbc.co.uk/2/hi/africa/6245943.stm ("White House spokesman Tony Snow said the U.S. action was a reminder that there was no safe haven for Islamic militants. 'This administration continues to go after al-Qaeda.'"); J. Gettleman & E. Schmitt, "U.S. Kills Top Qaeda Militant in Southern Somalia", *N. Y. Times* (14 Sept. 2009), available at http://www.nytimes.com/2009/09/15 /world/africa/15raid.html; *see also* J. Gettleman & E. Schmitt, "U.S. Forces Fire Missiles Into Somalia at a Kenyan", *N.Y.Times* (4 Mar. 2008), available at http://www.nytimes.com/2008/03/04/world/africa/04somalia.html (detailing an unsuccessful missile strike aimed at Nabhan launched from Kenya into Somalia).

15 B. Roggio, "AQAP Confirms Death of 2 Commanders in US Airstrike", *Long War Jour*. (21 July 2011), available at http://www.longwarjournal.org/archives/2011/07/aqap_confirms_2_comm.php; B. Roggio, "US Airstrikes in Southern Yemen Kill 30 AQAP Fighters: Report", *Long War Jour*. (1 Sept. 2011), available at http://www.longwarjournal.org/archives/2011/09/us_airstrikes_in_sou.php; E. Schmitt, "U.S. Drones and Yemeni Forces Kill Qaeda-Linked Fighters, Officials Say", *N. Y. Times* (21 Apr. 2014), available at https://www.nytimes.com/2014/04/22/world/middleeast/us-

has used lethal force against al-Shabaab in Somalia[16] and other militant groups inspired by or affiliated with al Qaeda.[17] More recently, the United States has used force in self-defence against al Qaeda operatives in Syria,[18] including the splinter Khorasan group,[19] and began military operations against the Islamic State of Iraq and Syria (ISIS) in Iraq in June 2014 and in Syria in September 2014.[20]

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drones-and-yemeni-forces-kill-qaeda-linked-fighters-officials-say.html?_r=0; K. Samolsky, "U.S. Drone Strike May Suggest New Strategy to Combat Terrorism", *Center for Secur. Pol'y* (23 Mar. 2016), available at http://www.centerforsecuritypolicy.org/2016/03/23/u-s-drone-strike-may-suggest-new-strategy-to-combat-terrorism/.

16 P. Stewart, "U.S. Strikes al-Shabaab Training Camp in Somalia, More Than 150 Killed", *Reuters* (8 Mar. 2016), available at http://www.reuters.com/article/us-usa-somalia-dronestrike-idUSKCN0W91XW; L. C. Baldor, "U.S. Drone Strike Targets Al-Shabab Commander in Somalia", *Military.com* (1 June 2016), available at http://www.military.com/daily-news/2016/06/01/us-drone-strike-targets-al-shabab-commander-somalia.html; Reuters, "Leader of Al-Shabab is Killed in U.S. Drone Strike in Somalia . . . As Experts Warn the Group May Now Join Forces with ISIS", *Daily Mail* (5 Sept. 2014), available at http://www.dailymail.co.uk/news/article-2745255/U-S-confirms-death-al-Shabaab-leader-Godane-Somalia-air-strike.html.

17 For example, on 15 June 2015, a U.S. air strike killed Mokhtar Belmokhtar, formerly a senior figure in al Qaeda in the Islamic Maghreb (AQIM) and by then the leader of al-Murabitoun, an al-Qaeda-associated organization in north-west Africa and "a threat to Western interests." "Mokhtar Belmokhtar: Top Islamist "Killed" in US Strike", *BBC News* (June 15, 2015), available at http://www.bbc.com/news/world-us-canada-33129838.

18 "The White House, Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations" 17 (Dec. 2016) (hereinafter "Legal and Policy Frameworks"), available at https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf (providing the Obama Administration's view that the United States' collective right to self-defence justifies Syrian airstrikes under international law).

19 J. E. Barnes & S. Dagher, "Syria Strikes: U.S. Reports Significant Damage in Attacks on Islamic States, Khorasan", *Wall St. J.* (Sept. 24, 2014), available at http://www.wsj.com/articles/syria-strikes-u-s-reports-significant-damage-in-attacks-on-islamic-state-khorasan-1411486035; "U.S. Bombs ISIS Sites in Syria and Targets Khorasan Group", *NBC News* (Sept. 23, 2014), available at http://www.nbcnews.com/storyline/isis-terror/u-s-bombs-isis-sites-syria-targets-khorasan-group-n209421 (reporting that the U.S. "mounted eight separate strikes overnight 'to disrupt the imminent attack plotting against the United States and Western interests conducted by a network of seasoned al Qaeda veterans,' also known as 'the Khorasan group.'); Letter, dated 23 Sept. 2014, from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695, 23 Sept. 2014 ("In addition, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies").

20 *See* Letter from Hoshyar Zebari, Minister for Foreign Affairs of the Republic of Iraq, to the Secretary General of the United Nations, S/2014/440, June 25, 2014; Letter from Ibrahim al-Ushayqir al-Ja'fari, Minister for Foreign Affairs of Iraq, to the Secretary General of the United Nations, S/2014/691, Sept. 22, 2014; Letter dated 23 Sept. 2014

Throughout the past fifteen-plus years since the 9/11 attacks, the United States has relied on self-defence as the overarching justification for military action against these various terrorist groups, alongside the broad assertion of an armed conflict against al Qaeda and associated forces. Notably, even when reporting on strikes against al Qaeda operatives, which would ostensibly fall squarely within this armed conflict paradigm, the United States has typically asserted both an armed conflict and a self-defence justification for such strikes and for operations against al Qaeda generally. For example, the U.S. State Department Legal Advisor explained in a well-known speech in 2010 that the United States uses force against al Qaeda either because it "is engaged in an armed conflict or in legitimate self-defence."[21] Similarly, in a brief submitted to the U.S. District Court for the District of Columbia, the Government asserted that it had legal authority to target Anwar al-Awlaki either in the context of the armed conflict with al Qaeda and associated forces as authorized in the 2001 Authorization to Use Military Force (AUMF) or under "the inherent right to national self-defence recognized in international law."[22] And, as noted above, the *raison d'être* for the armed conflict with al Qaeda is, of course, self-defence. As the United States has extended its self-defence campaign for over fifteen years, across at least seven countries, and against multiple terrorist groups — most of which did not exist at the time of the initial response to the 9/11 attacks, the question of how far self-defence extends becomes increasingly relevant and challenging.

B. The International Law of Self-Defence: Jus ad Bellum Basics

Jus ad bellum is the Latin term for the law governing the resort to force, that is when a State may use force within the constraints of the United Nations Charter framework and traditional legal principles. Modern *jus ad bellum* has its origins in the 1919 Covenant of the League of Nations, the

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from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695, 23 Sept. 2014.

21 Harold Koh, Legal Adviser, U.S. Dep't of State, Address at Annual Meeting of American Society of International Law (Mar. 25, 2010), available at https://www.state.gov/s/l/releases/remarks/139119.htm. *See also* Attorney General Holder's Speech on Targeted Killing, Mar. 2012, Northwestern Law School, 5 Mar. 2012, available at http://www.cfr.org/terrorism-and-the-law/attorney-general-holders-speech-targeted-killing-march-2012/p27562 ("Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. . . And international law recognizes the inherent right of national self-defense.").

22 *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (Opposition to Plaintiff's Motion for Preliminary Injunction & Memorandum in Support of Defendants' Motion to Dismiss at 4–5, (No.10-cv-1469(JDB), 2010 WL 3863135).

1928 Kellogg-Briand Pact, and the United Nations Charter.[23] In particular, the United Nations Charter prohibits the use of force by one State against another in Article 2(4): "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[24] This article, in many ways, is the foundation of the U.N.'s goal of "sav[ing] succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,"[25] through severe restrictions and prohibitions on the use of force.

International law provides only three justifications that rebut this presumption against the use of force; therefore, any use of force not falling within one of these three justifications violates Article 2(4) and the fundamental prohibition of the use of force across State boundaries. These exceptions to the prohibition on the use of force balance two key international law principles: respect for state sovereignty and the collective interests of the international community, including the right to use force in self-defence. Thus, a State's sovereignty and territorial integrity is foundational to international law and the international system. At the same time, however, States have an inherent right to protect their territory, nationals and interests from attack.

The first exception is customary in nature: a State may use force in the territory of another state with the consent of that State. For example, a State engaged in an internal conflict with a rebel group may seek assistance from other States in defeating the rebels and restoring order and security. For example, NATO operations in Afghanistan through the International Security Assistance Force (ISAF) fall within this category of consent,[26] as do individual interventions like the U.S. role in support of the Republic of Vietnam.[27] In a different variation, a State may also consent to another State using force in counterterrorism operations, such as Yemen's consent to United States drone strikes against al Qaeda and AQAP operatives in that country.[28] In such cases, however, the territorial State can only consent to

23 M. N. Shaw, *International Law*, 780–81 (4th ed. 1997).
24 U.N. Charter, art. 2, para. 4.
25 *Id*. (preamble)
26 Koh Address, *supra* note 21 ("[I]n Afghanistan, we work as partners with a consenting host government.").
27 B. K. Landsberg, "The United States in Vietnam: A Case Study in the Law of Intervention", 50 *Cal. L. Rev*. 515, 523 (1962).
28 G. Miller, "Yemeni President Acknowledges Approving U.S. Drone Strikes", *Wash. Post* (Sept. 29, 2012), available at https://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-dronestrikes/2012/09/29/09bec2ae-0a56-11e2-afffd6c7f20a83bf_story.html?utm_term=. f024b7926a13.

such assistance and uses of force in which it could legally engage — no State can consent to actions by another State that would violate international law if undertaken on its own. This means that the intervening State may not use the request as the means for engaging in an act of aggression against a neighboring State.

The United Nations Charter provides the second and third exceptions to the prohibition on the use of force: the multinational use of force authorized by the Security Council under Chapter VII in Article 42, and the inherent right of self-defence in response to an armed attack under Article 51. Article 42 authorizes the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security . . . [including] operations by air, sea, or land forces of Members of the United Nations."[29] The multinational military operation to protect civilians in Libya in the spring and summer of 2011 is an example of the Security Council authorizing the use of force in accordance with Article 42.

Self-defence, the most commonly relied upon justification for the use of force, builds on and establishes the basic framework of *jus ad bellum*. States may use force as an act of individual or collective self-defence in response to an armed attack in accordance with Article 51 of the United Nations Charter. Article 51 states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.[30]

This provision recognizes the pre-existing right of States to use force — and to use force in response to another State's request for assistance — in self-defence against an attack.

The prerequisite for any use of force in self-defence is the existence of an armed attack. Note that an armed attack is more severe and significant than a use of force, meaning that a State can be the victim of a use of force without being the victim of an armed attack that triggers the right of self-defence. Although the United Nations Charter does not define "armed attack," customary international law and, in particular, the jurisprudence of the

29 U.N. Charter, art. 42.
30 *Id*., art 51.

International Court of Justice (ICJ) focuses on the "scale and effects"[31] of any particular hostile action directed at a State to determine whether it rises to the level of an armed attack. For example, the deployment of a State's regular armed forces across a border will generally constitute an armed attack, as will a State's sending irregular militias or other armed groups to accomplish the same purposes. In contrast, providing assistance, such as weapons or other support, to rebels or other armed groups across State borders will not reach the threshold of an armed attack.[32]

Directly related to the analysis of self-defence against attacks by terrorist groups or other non-State actors, is a key *jus ad bellum* question whether only States can launch an armed attack. Nothing in Article 51 specifies that the right of self-defence is only available in response to a threat or use of force by another State. Nonetheless, the precise contours of what type of actor can trigger the right of self-defence remains controversial. Some argue that only States can be the source of an armed attack — or imminent threat of an armed attack — that can justify the use of force in self-defence.[33] The ICJ has continued to limit the right in this manner in a series of cases.[34] However, State practice in the aftermath of the 9/11 attacks provides firm support for the existence of a right of self-defence against non-State actors, even if unrelated to any State.[35] Indeed, the *Caroline* incident, which forms

31 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. US*), I.C.J. Reports 1986, 14, ¶ 195.

32 *Id.*, ¶ 191.

33 *See, e.g.*, A. Cassese, "The International Community's "Legal" Response to Terrorism", 38 *Int'l & Comp. L. Q.* 589, 597 (1989); E. Myjer & N. White, "The Twin Towers Attack: An Unlimited Right to Self-Defense", 7 *J. Conflict & Sec. L.* 5, 7 (2002) ("Self-defense, traditionally speaking, applies to an armed response to an attack by a state.").

34 *See, e.g.,* Military and Paramilitary Activities, *supra* note 31; Oil Platforms (*Iran v. U.S.*), I.C.J. Reports 2003, 161; Armed Activities on the Territory of the Congo (*Dem. Rep. Congo v. Uganda*), I.C.J. Reports 2005, 168; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, 136, 215.

35 *See, e.g.,* Y. Dinstein, *War, Aggression and Self-Defence,* 224-30 (5th ed. 2011); C. Greenwood, "International Law and the Preemptive Use of Force: Afghanistan, al Qaeda, and Iraq", 4 *S. D. Int'l L. J.* 7, 17 (2003) (discussing the effects of attacks made by non-State actors); S. D. Murphy, "The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan", *in The War in Afghanistan: A Legal Analysis* 109, 126 (M. N. Schmitt ed., 2009) (Vol. 85, U.S. Naval War College Int'l Law Studies) ("While this area of the law remains somewhat uncertain, the dominant trend in contemporary interstate relations seems to favor the view that States accept or at least tolerate acts of self-defense against a non-State actor."); R. van Steenberghe, "Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?", 23 *Leiden J. Int'l L.* 183, 184 (2010) (concluding

the historical foundation of the right to self- defence, involved an armed attack by non-State actors. United Nations Security Council Resolution 1368, for example, recognized the inherent right of individual and collective self-defence against the September 11th attacks[36] and the North Atlantic Council activated the collective self-defence provision in Article 5 of the North Atlantic Treaty for the first time in its history.[37] Several other States have asserted the same right, including Turkey, Israel, Colombia, and Russia, for example.[38] Over the past decade, the challenge of responding to transnational terrorism has helped drive State practice and debate regarding the lawfulness of self-defence in response to armed attacks by non-State actors. Although the question of when and whether terrorist acts constitute armed attacks is essential to the analysis of self-defence against such groups, the instant discussion focuses on the extent of self-defence once the right to use force in self-defence has been triggered, and therefore further examination of the initial question of what constitutes an armed attack is outside the scope of this article.

Once an armed attack triggers a State's right to use force in self-defence, that use of force must comply with three requirements derived from the *Caroline* incident in the nineteenth century: necessity, proportionality and immediacy. In the *Caroline* incident, British troops crossed the Niagara River to the United States side and attacked the steamer *Caroline*, which had been running arms and materiel to insurgents on the Canadian side.[39] The attack set fire to the *Caroline* and killed one American. The British claimed that they were acting in self-defence in response to the insurgents' provocations.[40] In a letter to Lord Ashburton, his British counterpart, U.S. Secretary of State Daniel Webster declared that the use of force in self-defence should be limited to "cases in which the necessity of that self-defence is instant, over-whelming, and leaving no choice of means, and no

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that recent State practice suggests that attacks committed by non-State actors alone constitute armed attacks under Article 51).

36 S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (emphasis added).

37 North Atlantic Treaty, art. 5, Apr. 4, 1949, 34 *U.N.T.S.* 243, 246; Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001).

38 For an extensive treatment and discussion of the use of force in self-defense and the unwilling or unable test with regard to state consent to the use of force, *see* A. S. Deeks, ""Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense", 52 *Va. J. Int'l L.* 483 (2012).

39 H. Miller, "British-American Diplomacy: The Caroline Case", *The Avalon Project*, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp.

40 *Id.* ("[T]he destruction of the Caroline was an act of necessary self-defense." (quoting a letter from Mr. Fox, the British minister at Washington, to Mr. Forsyth, U.S. Secretary of State)).

moment for deliberation."[41] Furthermore, the force used must not be "unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[42] As a result, the central features of the right to self-defence, reaffirmed repeatedly by the ICJ and other courts, are that the force used is necessary and proportionate to the goal of repelling the attack or ending the grievance.[43]

The requirements of necessity and proportionality are the essential ingredients for the analysis here of how long, how far, and for what purposes self-defence can be used. Parts II and III examine how necessity and proportionality match with the operational goals that States seek to achieve in combatting terrorist groups and explore how our understanding of necessity and proportionality does or should change over time and in response to changing facts and circumstances. A preliminary discussion here of both requirements and the particularities of their application in the counterterrorism context provides useful foundation and context for the more in-depth analysis below. The third criterion of immediacy, which imposes a temporal limitation on the resort to self-defence, does not affect the extent of self-defence but rather highlights on the question of when the right to self-defence matures — in the case of an imminent attack — and how soon after an attack the victim State must act.[44]

1) Necessity

Overall, the requirements of necessity and proportionality focus on whether the defensive act is appropriate in relation to the ends sought. Necessity addresses whether there are adequate non-forceful options to deter or defeat the attack, such as diplomatic avenues, defensive measures to halt any further attacks or reparations for injuries caused. To this end, "acts done in self-defence must not exceed in manner or aim the necessity provoking them."[45] The *Caroline* formula of "no choice of means" guides the application of necessity with an underlying goal of minimizing or prohibiting the resort to force except in situations where it is unavoidable to

41 Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, Special British Minister (Aug. 6, 1842), *reprinted in* 2 *J. Moore, Dig. of Int'l Law* sec. 217 at 409 (1906).

42 *Id*.

43 Legality of the Threat and Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996, 226, 245 (hereinafter Nuclear Weapons); Military and Paramilitary Activities, *supra* note 31, para. 237; Oil Platforms *supra* note 34, paras. 43, 73-74, 76; Jus ad Bellum (*Ethiopia v. Eritrea*), Ethiopia's Claims 1–8, Partial Award (Dec. 19, 2005), available at http://www.pca-cpa.org.

44 *See* Schmitt, *supra* note 8 at 63-66.

45 O. Schachter, "In Defense of International Rules on the Use of Force", 53 *U. Chi. L. Rev.* 113, 132 (1986).

protect the State's essential interests, such as sovereignty, territorial integrity, and nationals. If a State has an alternative to force available to it, *i.e.*, if it had been able "to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force."[46] Necessity thus operates to enforce the ban on using force.

Crucially, however, necessity centers on the absence of reasonable alternatives, and thus "does not require victim States to exhaust *all* non-forcible responses before resorting to self-defence, but only those that are likely to be effective."[47] Thus, for example, as the then-United States State Department Legal Advisor explained with respect to the United States' exercise of self-defence in 2001,

> if [the United States] did not have the right to use force against al Qaida and the Taliban, then we would have had no acceptable way to defend our citizens after the most devastating attack against the United States in history. Given the Taliban's unwillingness to cooperate with the international community to bring the perpetrators of the September 11th attack to justice, it cannot reasonably be argued that the only recourse the United States had was to file diplomatic protests or extradition requests with Mullah Omar.[48]

Similarly, the fact that an extensive law enforcement operation was underway against al Qaeda after 9/11 did not affirmatively rule out the use of force in self-defence. Notwithstanding "the most intensive international law enforcement operations in history, . . . al Qaeda remained active, launching numerous spectacular attacks in the wake of 9/11."[49] The United States' use of force thus clearly met the necessity criterion.

In the case of attacks by non-State actors, States seeking to act in self-defence must first explore whether the territorial State can take action to stop the non-State actors from launching further attacks, including, potentially, detention of those responsible, as part of determining whether there are any

46 R. Ago, "Addendum to Eighth Report on State Responsibility", 2 *Y.B. Int'l L. Comm'n,* 13 para. 120 (1980), U.N. Doc. A/CN.4/318/ADD.5-7.

47 Tams & Devaney, *supra* note 5 at 96.

48 J. B. Bellinger III, *Legal Issues in the War on Terrorism* (2006). The justification for the use of force against the Taliban rests on shakier footing given the lack of evidence that al Qaeda's attack could be attributed to the Taliban. Lubell, *supra* note 2, at 47-48.

49 Schmitt, *supra* note 8 at 63.

non-forceful alternatives available. Unlike the State-on-State context, when self-defence is contemplated against a non-State group, there are two States with potential capability to respond to the terrorist attack or threat: the victim State and the host State. To the extent they are effective, non-forceful repressive measures by the host State are the preferred response in comparison to the victim State's extraterritorial use of force, simply due to the international system's fundamental distaste for the use of force. Therefore, "for self-defence to be considered necessary [against a non-State group], the victim State has to make an attempt to have the host State suppress the terrorist threat[,] attempt to cooperate with the host state against terrorists . . ., or seek the host State's consent to extraterritorial anti-terrorist measures."[50] To target a terrorist operative in self-defence, the State must have "credible evidence that the targeted persons are actively involved in planning or preparing further terrorist attacks against the victim State and no other operational means of stopping those attacks are available."[51] Particularly with regard to terrorist groups, the intransigence of the group and the practice of seeking operational space and safe haven in remote areas with little, if any, effective government authority will often mean that the necessity criterion will be satisfied for a state seeking to respond in self-defence to an armed attack or imminent armed attack.

2) Proportionality

The requirement of proportionality measures the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy. Rather than addressing whether force may be used at all — which is the main focus of the necessity requirement — proportionality looks at how much force may be used. The underlying goal is "the minimization of the disruption of international peace and security."[52] Historically, scholars have presented numerous formulas or descriptions of

50 Tams & Devaney, *supra* note 5 at 98; *see also* Dinstein, *supra* note 35 at 275 ("It must be clearly demonstrated by Utopia that the attacks by the organized armed group or terrorists cannot be defeated through recourse to alternative measures that are less intrusive in their effects on the territorial sovereignty of Arcadia.").

51 D. Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", 16 *Eur. J. Int'l L.* 171, 203 (2005). *See also* M. N. Schmitt, "Counter-Terrorism and the Use of Force in International Law" 5 Marshall Center Papers 20 (2002), available at http://www.marshallcenter.org/mcpublicweb/mcdocs/files/College/F_Publications/mcPapers/mc-paper_5-en.pdf. ("Similarly, if a State in which the terrorists are located conducts military operations with a high probability of success, there would be no necessity basis for self-defense by the victim State.").

52 C. Greenwood, "Self-Defence and the Conduct of International Armed Conflict", in *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne*, 273, 278 (Y. Dinstein ed., 1989).

proportionality in *jus ad bellum*, including the idea that the response must be proportionate to the danger posed,[53] that the force used must be "what is required for achieving the object,"[54] or that the self-defence action "is proportionate, in nature and degree, to the prior illegality or the imminent attack."[55] Ultimately, proportionality focuses not on some measure of symmetry between the original attack and the use of force in response, but on whether the measure of counterforce used is proportionate to the needs and goals of *repelling* or *deterring* the original attack.[56]

Israel's response to Hezbollah's cross border raid in July 2006 highlights this focus on the objective of stopping the attack and further attacks rather than the nature of the original attack. Once Hezbollah had captured the Israeli soldiers, Israel needed to take action to recover the hostages, including by preventing their movement deeper into Lebanon, and to stop Hezbollah's rocket attacks on northern Israel. In the end, "[a]lthough the IDF response exceeded the scope and scale of the Hezbollah kidnappings and rocket attacks manyfold, the only way effectively to have prevented movement of the hostages was to either destroy or control lines of communication [and] the best tactic for preventing Hezbollah rocket attacks, especially from mobile launchers, was through control of the territory from which they were being launched."[57] In assessing proportionality, therefore, the force used may indeed be significantly greater than that used in the attack that triggered the right to self-defence — what matters is the result sought, not the equivalence between attack and response. As a report to the International Law Commission explains,

> it would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to

53 D. Bowett, *Self-Defence in International Law,* 269 (1958).

54 H. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 *Receuil des Cours* 455, 463-64 (1952).

55 R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* 201 (1963).

56 Dinstein, *supra* note 35, at 275.

57 M. N. Schmitt, "Change Direction‖ 2006: Israeli Operations in Lebanon and the International Law of Self-Defense", 29 *Mich. J. Int'l L.* 127, 153 (2007–2008). Although Israel's operations against Hezbollah in 2006 engendered significant international criticism, including on the question of proportionality, the predominant issue was extension of military operations to infrastructure beyond southern Lebanon, including the roads and airfields in and around Beirut, and the air and sea blockade of southern Lebanon, which were seen as extending beyond that which was needed to respond effectively to the attack. *Id*. at 154–55.

> assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the "defensive action" and not the forms, substance and strength of the action itself.[58]

One question that arises in the context of self-defence against terrorist groups is whether the geographical location of attacks and the force used in response has any bearing on the proportionality analysis. Historically, some have argued that any force in self-defence must be limited to the area of the attack they seek to repel, and that, as a result, any coercive action that occurs far from the initial attack is likely to constitute a disproportionate use of force.[59] The notion of geography ultimately serves merely as a proxy for examining the objective of the victim State in using force. The issue is whether self-defence actions at the location of the attack can accomplish the goal of repelling or deterring the attack, or whether action against the attacker beyond that immediate locale is necessary. For example, in the 1990-1991 Persian Gulf conflict, the United States and its coalition partners "took the view that tactically, in light of Iraq's military capability, the response could not be restricted to Kuwaiti territory"[60] and therefore attacking targets in Iraq was not disproportionate. In contrast, the ICJ in *Armed Activities on the Territory of the Congo* held that Uganda's extensive and extended forays into Congolese territory exceeded the limits of the proportionality requirement, because Ugandan operations capturing "airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence."[61] However, it was not the fact of

58 Ago, *supra* note 46 at 69. *See also* J. G. Gardam, *Necessity, Proportionality and the Use of Force by States*, 160-161 (2004) ("an assessment of what will achieve the end result of self-defence, 'that of halting and repelling the attack', consists neither merely of a comparison of weapons or the scale of force used nor, as Ago puts it, 'the forms, substance and strength of the action itself'. Indeed, the action needed to halt and repulse an attack may well have to assume dimensions that would be disproportionate using such a comparison").

59 Greenwood, *supra* note 52 at 277. *See also* S. Etezazian, "Air Strikes in Syria—Questions Surrounding the Necessity and Proportionality Requirements in the Exercise of Self-Defense", *OpinioJuris*, (14 October 2015), available at http://opiniojuris.org/2015/10/14/guest-post-air-strikes-in-syria-questions-surrounding-the-necessity-and-proportionality-requirements-in-the-exercise-of-self-defense/.

60 Gardam, *supra* note 58 at 164.

61 Armed Activities on the Territory of the Congo *supra* note 34, para. 147. *See also* Military and Paramilitary Activities, *supra* note 31, para. 237; Gardam, *supra* note 58 at 158 (explaining that in the Nicaragua case, the Court held that "the approach is not to focus on the nature of the attack itself and ask what is a proportionate response but rather to determine what is proportionate to achieving the legitimate goal under the Charter, the repulsion of the attack").

geographical distance but rather the relationship between those extended operations and the legitimate self-defence objective of repelling the attack that drove the Court's analysis.

Terrorist attacks, of course, usually occur on the territory of the victim state while the action in response takes place where the terrorists or terrorist group has found safe haven, often halfway around the world. Al Qaeda's attacks or attempted attacks against the United States have predominantly been on United States territory or aircraft, such as the 9/11 attacks, the shoe-bomber, the underwear bomber, or the attempted bombing in Times Square in May 2010. The United States has launched military force in response where it finds al Qaeda operatives and facilities: Afghanistan, Pakistan, and Yemen, for example. The geography of self-defence does pose challenging questions for the extent of self-defence, as discussed in Part III.A, below. However, as an initial question of proportionality,

> recent practice suggests that geographical factors that may be considered relevant to the proportionality of inter-state self-defence are of limited relevance [in the terrorism context]: hence states hit by terrorist attacks on their home soil have asserted a right to respond against terrorists at their base — and even where their conduct was not generally accepted, this fact that the self-defence operation had carried the fight against terrorism into far-away, remote countries seemed to be a factor of limited relevance.[62]

Finally, and particularly relevant to counterterrorism operations, the necessity and proportionality criteria can account not only for action taken to halt and defeat an initial attack, but also for broader action to eliminate a continuing threat. In the State-on-State context, a victim State is not constrained to respond separately to each intrusion from the attacking State, but can respond appropriately where the only means available to end the attacks is a more comprehensive and large-scale response. With regard to the acceptable degree or amount of force, if "a [S]tate suffers a series of successful and different acts of armed attack from another [S]tate, the requirement of proportionality will certainly not mean that the victim [S]tate is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks."[63] Terrorist groups rarely capture and hold territory — ISIS being the current exception of a terrorist group operating more akin to conventional forces in Iraq and

62 Tams & Devaney, *supra* note 5 at 104.
63 Ago, *supra* note 46, ¶ 121.

Syria.[64] Rather, they launch attacks, often dispersed by time and geographical distance, and a victim state's small-scale response to one such attack may not have any utility in stopping the attacks. As with any other armed attack and considered response in self-defence, the nature of the attacker, the attacks themselves, the effects on the victim State, and the anticipated effects, or lack thereof, of potential actions in response will all drive the necessity and proportionality analysis.

II. LEGITIMATE AIMS AND THE EXTENT OF SELF-DEFENCE

As the discussion of necessity and proportionality shows, any assessment of self-defence must start with the victim State's aim or objective in using force in response to the armed attack or imminent armed attack. Necessity focuses on whether force is the only means available to achieve that objective; proportionality looks to the relationship between the force used and the objective sought. Decision-makers in the victim State therefore "should ideally define the aims of [self-defence] force and assess the scope of the force and the means necessary to achieve those aims."[65] The terminology of *jus ad bellum* and self-defence comport with the basic concepts of a State's aggression and the victim State's response, including notions of "deterring" or "repelling" an attack. One can certainly envision one state's army massing at the border, invading the other State's territory, and then the victim State marshalling its forces to push the invading forces back across the border and to accomplish any further objectives necessary to ensure that the aggressor state does not continue the attack or try again. How we analogize this conventional image to the current environment of terrorist attacks, terrorist groups and State action in response and to preempt is much more complicated.

After a brief explication of the legitimate aims of self-defence, this Part explores two questions in depth with an eye to furthering our understanding of the extent of self-defence. The first sub-section seeks to match the operational goals of contemporary counterterrorism operations with the international law framework and terminology, to examine whether the framework of necessity and proportionality can help determine how far and

64 A. Kurth Cronin, "ISIS is Not A Terrorist Group: Why Counterterrorism Won't Stop the Latest Jihadist Threat", *For. Aff.* (Mar./Apr. 2015), available at https://www.foreignaffairs.com/articles/middle-east/isis-not-terrorist-group ("ISIS, on the other hand, boasts some 30,000 fighters holds territory in both Iraq and Syria, maintains extensive military capabilities, controls lines of communications, commands infrastructure, funds itself, and engages in sophisticated military operations.").

65 D. Kretzmer, "The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*", 24 *Eur. J. Int'l L.* 235, 267 (2013).

how long self-defence extends in such contexts. Second, the characterization of counterterrorism operations as armed conflict — such as the United States' campaign against al Qaeda — raises separate questions regarding the impact on self-defence, namely whether armed conflict paradigm expands the reach of self-defence to include complete defeat of the terrorist group or groups.

The fundamental premise of self-defence is that a State is not rendered helpless when faced with an attack, but rather can respond to protect its territory, sovereignty, nationals and interests. The most basic and widely-supported aim of self-defence, therefore, is to halt or repel an attack. "In the case of self-defence against an armed attack that has already occurred, it is the repulsing of the attack giving rise to the right that is the criterion against which the response is measured."[66] If, for example, one State attacks another, repelling the attack would naturally include military operations not only to halt the aggressor, but also to push it back across the border. The challenge in the terrorism context is that attacks tend to be singular events causing mass civilian casualties rather than military operations to gain territory or achieve other conventional strategic objectives, such that the very idea of halting or repelling an attack does not translate well into the counterterrorism scenario.

Where the armed attack is imminent but has not yet occurred, there is general acceptance — with significant disagreement about what specifically constitutes an imminent attack and when the right of self-defence is triggered in such situations — that a State may act in anticipatory self-defence to prevent an attack from occurring. Prevention of imminent attacks is a common theme of strikes against terrorists and terrorist groups, such as the United States strikes against the Khorasan Group in Syria in 2014, a group that had not launched any attacks against the United States at the time but was believed to be actively planning attacks.[67] One useful description of when the use of force in self-defence is acceptable against terrorist groups to prevent anticipated attacks is the idea of the "last window of opportunity." Given that a terrorist group may put an attack in operation well in advance and then "go underground" to avoid detection before the attack, a State may have its only opportunity to prevent the attack and defend itself when it can find the terrorist operatives, even if that opportunity is long before the attack ultimately takes place. Accordingly, "self-defence against terrorists is appropriate and lawful when a terrorist group harbors both the intent and

66 Gardam, *supra* note 58 at 156.

67 R. Kaplan, "Khorasan Was 'Nearing the Execution Phase of an Attack': Pentagon", *CBS News* (23 Sept. 2014), available at http://www.cbsnews.com/news/khorasan-was-nearing-the-execution-phase-of-an-attack-pentagon/.

means to carry out attacks, there is no effective alternative for preventing them, and the State must act now or risk missing the opportunity to thwart the attacks."[68] The United States government takes this approach, arguing that a rule forcing a State to wait until specific preparations are concluded and the attack is temporally imminent is impractical and operationally not feasible in the counterterrorism context. The very nature of al Qaeda and other terrorist groups is such that "defensive options available to the United States may be reduced or eliminated if al-Qa'ida operatives disappear and cannot be found when the time of their attack approaches."[69]

Even in the State-on-State context, however, it is unclear to what extent self-defence allows a State to use force to go beyond merely repelling the attack and to also prevent further attacks in the future. More conservative theorists resist this more comprehensive view of self-defence, positing that any use of force "must necessarily be commensurate with the concrete need to repel the current attack, and not with the need to produce the level of security sought by the attacked State."[70] However, this limited concept of the legitimate aims of self-defence does not comport with the realities of the international system, where the United Nations Security Council is often not effective at maintaining international peace and security, or provide sufficient protection for victim states if an aggressor state faces no consequences beyond a repulsed attack. These disconnects are only magnified in the case of terrorist attacks, where the terrorist attackers either escape before the attack or die in the course of the attack and the leaders are far from the point of attack at all times, so there is no one for the state to repel at the moment of attack. For these reasons, States responding to attacks that have been completed will commonly point to the need to defend against future attacks and future threats, even if undefined, in justifying action in self-defence. President Clinton presented this argument in announcing U.S. strikes in response to the 1998 Embassy bombings. After explaining that law enforcement and diplomatic tools were not sufficient to protect U.S. national security, he stated that "[w]ith compelling evidence that

68 Schmitt, *supra* note 8 at 66. *See also* M. N. Schmitt, "Preemptive Strategies in International Law", 24 *Mich. J. Int'l L.* 513, 535 (2003).

69 "Dep't of Justice, White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force 7" (8 Nov. 2011), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

70 E. Cannizzaro, "Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War", 88 *Int'l Rev. Red Cross* 779, 785 (2006) (arguing that "the forcible removal of threatening situations and the creation of permanent conditions of security seem to have been reserved by the international community as tasks to be performed collectively"). *See also* A. Cassese, *International Law* 355 (2d ed. 2005) ("self-defence must limit itself to rejecting the armed attack; it must not go beyond this purpose").

the bin Ladin network of terrorist groups was planning to mount further attacks against Americans and other freedom-loving people, I decided America must act."[71]

The precise parameters of such action remain uncertain, however, leaving open key questions about whether and to what extent a State can take action to destroy the attacking entity as a way to prevent future attacks or whether proportionality precludes action to remove a continuing threat, beyond that needed to prevent an immediate future attack. In effect, the issue is twofold. First, if halting or repelling the attack is a legitimate objective, "is it proportionate to take action that is designed to prevent such an attack occurring again and restore the security of the State,"[72] including the total defeat of the attacking entity's forces if necessary? This approach looks at the broader range of action to defeat the enemy not as a more robust objective of self-defence, but as a question of proportionality and how elastic the degree of force allowed can be for achieving the more conservative objective of halting or repelling. Alternatively, the second possibility is to ask whether the destruction of the attacking force's capability is a legitimate objective of force in self-defence. An evolution in thinking about how terrorist groups operate offers support for this approach. There is a growing recognition that rather than looking at each terrorist attack or potential attack as an armed attack in isolation, and examining the necessity, proportionality and immediacy criteria for each such attack separately, terrorist groups now should be "viewed as conducting campaigns."[73] Thus, "once it is established that an ongoing campaign is underway, acts of self-defence are acceptable throughout its course, so long as the purpose is actually to defeat the campaign."[74] If so, the proportionality inquiry and analysis would be based on that objective in assessing the amount of force appropriate to achieving the goal of self-defence.

Assessing the extent of self-defence is difficult in the face of vague or shifting objectives for the use of force in self-defence. Both necessity and proportionality depend, fundamentally, on the objective of the self-defence, and both effectively determine how extensive or constrained the use of force

71 W. J. Clinton, Address to the Nation on Military Action against Terrorist Sites in Afghanistan and Sudan, (20 Aug. 1998), available at https://www.gpo.gov/fdsys/pkg/WCPD-1998-08-24/pdf/WCPD-1998-08-24-Pg1642.pdf. Indeed, the requirement of necessity suggests that "there must be a sound basis for believing that further attacks will be mounted and that the use of armed forces is needed to counter them." Schmitt, *supra* note 51 at 64.

72 Gardam, *supra* note 58 at 165.

73 Schmitt, *supra* note 51 at 66.

74 *Id*.

can or must be in any given situation. One international scholar summarized the difficulties of analysis and interpretation thus:

> For example, where a [S]tate is faced with an ongoing pattern of attacks by a non[-S]tate group acting from a territory across its border, the [S]tate is entitled to take defensive action, but with what objective? Is the [S]tate only entitled to act to stop the threat of immediate future attacks, or may it take action to prevent these attacks over the long run? The answer to that question will determine whether, for example, the [S]tate is only entitled to go across the border to destroy rocket launchers used to initiate the attacks, to destroy the base where the non[-S]tate groups are camped, or, instead, to seek to change the government of the host state to prevent the territory from being used for future attacks.[75]

These questions and other related questions present even more complex challenges when the non-State group is a transnational terrorist group without a fixed territorial home base, or any other group operating in a manner that similarly negates the effectiveness of the victim state using force to clear and hold territory and to disabuse the group from further attacks through the direct application of force. The following two sub-sections examine these questions thoroughly by looking at whether and how the stated operational goals of current and recent counterterrorism operations comport with or perhaps even illuminate the necessity and proportionality analysis.

A. Matching Operational Goals and the International Legal Framework

Preventing future attacks is the common underlying theme or goal when States use force against terrorist groups. Indeed, the very nature of terrorist attacks as singular attacks on civilian sites or events, where the attackers are far away or die as planned in the attack, renders it improbable, if not impossible, for a State to repel an attack while it is underway. But preventing future attacks is a remarkably elastic concept, particularly in the contemporary world where the ease of movement across borders and communication makes it possible for terrorist groups to strike at targets notwithstanding extraordinary distance from their seeming base of operations. As a result, the *justification* of preventing future attacks does not

[75] D. Akande, "Note and Comment: Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense", 107 *Am. J. Int'l L.* 563, 569 (2013).

necessarily provide any useful guidance on understanding the extent to which a State may act in self-defence, because the justification stems from the existence of the armed attack or imminent armed attack as the trigger for the right to act in self-defence. Rather, necessity and proportionality, which determine how much force a state can use, depend on the *goal* of acting in self-defence, the objective the state seeks to achieve. In the absence of clear parameters for the appropriate objectives for self-defence action, a look at the stated operational and strategic goals States have declared in using force in self-defence against terrorist groups can help advance our analysis of the extent of self-defence.

1) What States Seek to Achieve

These stated operational goals fall along a spectrum from ending ongoing attacks and preventing future attacks to what appear to be a more wide-ranging objective of defeating or destroying the terrorist group. The former goals match the language of the international legal frameworks discussed above more closely. With regard to military operations in Gaza in 2008-2009, for example, Israel explained that it had "both a right and an obligation to take military action against Hamas in Gaza to stop Hamas' almost incessant rocket and mortar attacks upon thousands of Israeli civilians and its other acts of terrorism."[76] The rocket attacks were ongoing and military operations in response were the only method of stopping them. The stated goal of ending ongoing attacks falls squarely within the classic objectives of self-defence to halt or repel attacks. Similarly, the United States response to the 1998 Embassy attacks focused on preventing future attacks[77] and did not present any broader or more comprehensive goals. On that particular occasion, the United States launched a single series of strikes against two targets and that was the full extent of the action in self-defence, eliminating any real question regarding how far the right of self-defence would extend for the operational goal of preventing future attacks.

That question, of course, drives further analysis into how much force a State can use to protect itself from terrorist attacks. In particular, since the very nature of terrorism means that preventing future attacks must be a legitimate aim in self-defence — a State cannot exercise its inherent right of self-defence if it must always absorb a terrorist attack rather than seek to prevent it — then the essential question is what is allowed to achieve this goal of preventing future attacks. Indeed, the United States declared in

[76] State of Isr., The Operation in Gaza 27 December 2008 - 18 January 2009: Factual and Legal Aspects 1 (2009).

[77] Clinton, Address to the Nation, *supra* note 71.

October 2001 that it was using force against al Qaeda to "prevent and deter further attacks on the United States."[78] In the AUMF, Congress authorized the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[79]

Over fifteen years later, the United States continues to rely on that original claim of self-defence. However, without greater granularity on the meaning of preventing future attacks as a general self-defence objective and what it could or should encompass, the concept remains elusive, highly elastic and perpetually subject to manipulation.

As a preliminary point, preventing future attacks can include both action to eliminate or degrade the terrorist group's capability to attack and action to deter future attacks, that is, to weaken the group's will to launch attacks. Self-defence can, therefore, include a degree of force "sufficient to cause the terrorist to change his expectations about the costs and benefits so that he would cease terrorist activity."[80] This framing tracks how we conceive of self-defence against another State as well and underlies the basic understanding that force used in self-defence may well be significantly greater than the force used in the initial attack. With regard to preventing attacks, "it is clear that the more damage done to [the enemy's] military capacity the less chance there will be of a further attack by the same enemy."[81] Where terrorist groups have significant military capacity and infrastructure, States have declared operational goals that focus on destroying or substantially weakening the terrorist group's capabilities. For example, Turkey launched Operation Sun against the Kurdistan Worker's Party (PKK) in 2008 to "destroy PKK camps and hunt rebels of the PKK,"[82] an objective that was generally justified and accepted by the international

78 Letter, dated 7 Oct. 2001, from the Permanent Representative of the United States of America to the United Nations Security Council, *supra* note 9.

79 Pub. L. No. 107-40, 115 Stat. 224 (2001).

80 O. Schachter, "The Extraterritorial Use of Force against Terrorist Bases", 11 *Hous. Int'l L. J.* 309, 315 (1988-89).

81 Kretzmer, *supra* note 65, at 268.

82 P. de Bendern, "Turkey Launches Major Land Offensive into Northern Iraq", *Reuters* (22 Feb. 2008), available at http://www.reuters.com/article/us-turkey-iraq-idUSANK00037420080222.

community "as a broad response that would finally weaken [the] PKK for good."[83] After immediate actions in response to Hezbollah's attack and kidnapping of two Israeli soldiers in 2006, as Hezbollah rocket attacks accelerated in frequency and range, Israel ultimately sought to end the threat Hezbollah posed to Israel by weakening Hezbollah decisively. Prime Minister Ehud Olmert declared that they would "not stop until we can tell the Israeli people that the threat hanging over it has been removed,"[84] effectively aiming for "Hezbollah neutralization."[85]

Over time, the United States has begun to add further texture to its objective of preventing future attacks by al Qaeda. To achieve this broad self-defence objective, the United States seeks to "disrupt, dismantle, and ensure a lasting defeat of al Qaeda and violent extremist affiliates."[86] Although this formulation provides greater detail about what the United States believes is necessary to prevent future attacks, it could easily be interpreted as a broadening of the authority to use force overall, both to what end and against whom or what groups. Finally, most recently, the United States has stated that the goal of its military operations against ISIS are to "degrade and ultimately destroy"[87] the terrorist group. Its allies have presented a range of objectives in joining forces against ISIS as well. Belgium, Germany and Norway simply refer to "necessary measures of self-defence" in their respective letters to the United Nations Security Council regarding their actions in collective self-defence.[88] The United Kingdom has progressed through multiple objectives, beginning with the collective self-defence of Iraq to "end the continuing attack on Iraq, to protect Iraqi citizens and to enable Iraqi forces to regain control of Iraq's borders by striking ISIL sites and military strongholds in Syria, as necessary and proportionate

83 Tams & Devaney, *supra* note 5, at 103.

84 Israel Ministry of Foreign Affairs, Cabinet Communique, 16 July 2006, available at http://www.mfa.gov.il/mfa/pressroom/2006/pages/cabinet%20communique%2016-jul-2006.aspx.

85 R. Wright, "Strikes Are Called Part of Broad Strategy: U.S., Israel Aim to Weaken Hezbollah, Region's Militants", *Wash. Post* (16 July 2006).

86 J. C. Johnson, "The Conflict Against Al Qaeda and its Affiliates: How Will it End?", Speech at the Oxford Union, Oxford University (30 Nov. 2012), available at www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/#_ftn11.

87 The White House, *Statement by the President on ISIL* (10 Sept. 2014), available at https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1.

88 Letter, dated 7 Jun. 2016, from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/523, June 9, 2016; Letter, dated 10 Dec. 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946, Dec. 10, 2015; Letter dated 3 Jun. 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/513, 3 Jun. 2016.

measures."[89] Several months later, the United Kingdom notified the Security Council that it had launched a precision air strike against an ISIS vehicle in individual self-defence against a "target known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom"[90] — focusing here on the classic objective of preventing immediate attacks. Finally, as discussed further below, by the end of 2015, the United Kingdom had broadened its stated objective to degrading and defeating ISIS.[91]

2) Military Doctrine

Military doctrine is instructive here in understanding what these stated goals mean and could mean, particularly with respect to how necessity and proportionality apply. The terms defeat, disrupt, and destroy have specific meanings in military doctrine that offer guidance for further analysis and examination of the operational goals states pronounce for these self-defence actions against terrorist groups. According to Army Field Manual 3-90-1, defeat

> is a tactical mission task that occurs when an enemy force has temporarily or permanently lost the physical means or the will to fight. The defeated force's commander is unwilling or unable to pursue that individual's adopted course of action, thereby yielding to the friendly commander's will and can no longer interfere to a significant degree with the actions of friendly forces. Defeat can result from the use of force or the threat of its use.[92]

The two primary components of defeat are physical defeat, when the enemy no longer has the military capability, including equipment and personnel, to continue fighting; and psychological defeat, when the enemy

89 Identical Letters, dated 25 Nov. 2014, from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851, 26 Nov. 2014.

90 Letter, dated 7 Sept. 2015, from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/688, Sept. 8, 2015.

91 Remarks by Prime Minister David Cameron, House of Commons, November 26, 2015, available at http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151126/debtext/151126-0001.htm.

92 Headquarters, Department of the Army, Field Manual 3-90-1, Appendix B, Tactical Mission Tasks B-11 (4 July 2001).

loses the will to fight because of low morale or mental exhaustion that renders them no longer able to accomplish their mission.[93] In theory, the notion of defeat can extend to a State's struggle with a terrorist group. A State acting in self-defence is permitted to take action necessary to repel or end ongoing attacks and, just as with a State enemy, it is possible that defeating the terrorist group is the only way — that is, necessary — to accomplish that goal. For example, although the United States originally formulated its self-defence actions against al Qaeda as "preventing future attacks," that objective quickly morphed into defeat of al Qaeda as the means to accomplish that original goal. U.S. strategy and planning in the immediate aftermath of 9/11 and the launch of Operation Enduring Freedom in Afghanistan, therefore, "was that the elimination of al Qaida would bring the war on terrorism . . . to an end."[94]

The doctrinal meaning of defeat, however, is one based on collective action, resting on the understanding that the opposing forces have a commander who makes decisions for the entire entity and personnel who abide by the decision of the commander. This corporate notion of defeat begins to fray in the context of highly decentralized terrorist groups driven by ideology rather than allegiance to a sovereign entity. Structurally, the decentralization and non-hierarchical nature of decision-making and execution impedes the State's ability to conceptualize defeat and actually accomplish the objective. Al Qaeda and other current groups demonstrate that "cells that operate independently are much more difficult to eliminate."[95] More important, terrorists "may be fanatical devotees willing to die for their cause; this makes it extremely difficult to meaningfully affect their cost-benefit calculations."[96] These characteristics pose two primary challenges to any necessity and proportionality analysis.

First, it is unclear what defeat of a terrorist group looks like. Army doctrine explains that defeat "manifests itself in some sort of physical action, such as mass surrenders, abandonment of significant quantities of equipment and supplies, or retrograde operations."[97] In a geographically confined conflict with a terrorist group, such as the Tamil Tigers in Sri Lanka, the organization may well be "sufficiently coherent and could eventually be defeated in some meaningful sense (or its military capacity sufficiently

93 *Id*. at B-11-12.
94 A. Kurth Cronin, "How al Qaida Ends: The Decline and Demise of Terrorist Groups", 31 *Int'l Sec*. 7, 7 (Summer 2006).
95 *Id*. at 13.
96 Schmitt, *supra* note 51, at 22.
97 Field Manual 3-90-1, *supra* note 92, at B-12.

degraded to declare its defeat)."[98] However, even a cursory familiarity with al Qaeda and its derivative or affiliated groups demonstrates that these conventional physical manifestations of defeat simply do not exist or make sense in the transnational terrorism environment. Indeed, when a terrorist group withdraws in some way that is more likely to mean that they are regrouping for another day than that they are giving up the fight.

One Obama administration counterterrorism official explained that he would "define the strategic defeat of Al Qaeda as 'ending the threat that Al Qaeda and all of its affiliates pose to the United States and its interests around the world.'"[99] This definition comports with the international legal framework as a legitimate aim of self-defence but does not provide any detail to help understand what "ending the threat" al Qaeda and affiliates pose actually looks like. Different conceptions of "defeat" or "ending the threat" lead to vastly different conclusions about the success of the self-defence endeavor in this case. For example, the defeat of al Qaeda could be "defined as no terrorist attacks or attempted attacks on the US and its interests at all,"[100] or it could be understood as "no major terrorist attacks on US soil of the kind orchestrated by al-Qaeda on 9/11."[101] As one top terrorism analyst explains, "if closer to the former, it is a standard that has not existed for the United States since 1970, when it began to keep decent records. If closer to the latter, the US may already be there."[102]

The way one defines defeat, or winning, against a terrorist group then controls the way in which one analyzes the permissible extent of force in self-defence against that group. If defeat of al Qaeda means that "the US and its allies have eliminated the al-Qaida that attacked the United States, and prevented it from resurging,"[103] then self-defence would end once the achievement of that objective can be identified. Although identifying when that objective has been attained is difficult, because terrorist groups operate in the shadows, the issue is one of intelligence gathering and analysis rather than a more basic conceptual challenge. In contrast, if the defeat of al Qaeda

98 M. C. Waxman, "The Structure of Terrorism Threats and the Laws of War", 20 *Duke J. Comp. & Int'l L.* 429, 452-453 (2010).

99 E. Schmitt, "Ex-counterterrorism Aide Warns Against Complacency on Al Qaeda", *N. Y. Times*, 28 July 2011, available at http://www.nytimes.com/2011/07/29/world/29leiter.html (quoting statement by Matthew Olson made during confirmation hearings for the post of Director of the National Counterterrorism Center).

100 A. Kurth Cronin, "The 'War on Terrorism': What Does it Mean to Win?", 37 *J. Strat. Stud.* 174, 191 (2014).

101 *Id.*

102 *Id.*

103 *Id.* (noting that such a scenario "may shortly be achieved").

means that "no al-Qaida 'associate' is attacking anyone, anywhere,"[104] then the United States and its allies would be entitled to continue acting in self-defence until that objective could be achieved. The nature of terrorism, of course, means that such an objective is unlikely, if not impossible, to ever be achieved, let alone verified.[105] As a result, this broader conception of defeat renders the necessity and proportionality criteria for lawful self-defence effectively toothless without some more specific metrics to guide the analysis.

Second, there is an equal lack of clarity as to what actions are necessary or effective in defeating a terrorist group, a challenge that significantly handicaps any attempt to analyze when a state's choice of particular actions against a terrorist group go beyond what is necessary and proportionate in self-defence. There are few, if any, examples of international commentary, whether approval or condemnation, regarding the type of acts taken to defeat a terrorist entity, simply because few State actions against terrorist groups have been characterized as designed to defeat the terrorist group rather than prevent further attacks. The international community and individual States did remark on the nature and extent of specific acts taken by Turkey in Operation Sun in 2008 and by Israel in 2006 against Hezbollah, but neither of those self-defence operations aimed to defeat the terrorist entity. Rather, they focused on the objective of weakening the enemy decisively such that the enemy could not continue its attacks against the state, an objective short of defeating the group. Comments regarding the proportionate or disproportionate nature of the actions taken by Turkey or Israel,[106] therefore, do not provide any useful guidance regarding the extent of force that is or

[104] *Id*. (noting that if defeat is so characterized, "the US will be forced into a perpetually tactical, reactive mode").

[105] Department of Defense General Counsel Jeh Johnson affirmed as much in a 2012 speech, reminding us that the United States and its allies cannot "capture or kill every last terrorist who claims an affiliation with al Qaeda"). Johnson Oxford Union Speech, *supra* note 86.

[106] For example, States generally seemed to accept Turkey's actions, noting that they were "restricted to specific actions against PKK targets in the border area of northern Iraq." T. Ruys, "Quo Vadit Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations Against the PKK in Northern Iraq", 9 *Melb. J. Int'l L.* 334 (2008), citing Maxime Verhagen, Dutch Minister of Foreign Affairs, "Beantwoording vragen van het lid Van Bommel over een Turkse invasie in Noord-Irak" (Ministerial Statement, 3 Mar. 2008). Initial reactions to Israel's operations against Hezbollah were cautiously supportive when Israel's operations focused on eliminating Hezbollah's rocket launchers and containing the kidnappers' escape routes and lines of communication, but as Israel expanded its operations to include acts perceived to be against the host state, the international community turned towards characterization and criticism of the operation as disproportionate. *See* Tams & Devaney, *supra* note 5, at 104; Watkin, *supra* note 2, at 86; Schmitt, *supra* note 57.

should be allowed if defeat of the terrorist group is the legitimate objective necessary to end the attack or threat of attacks.

A primary tactic for the United States in achieving the objective of defeating al Qaeda has been the elimination of al Qaeda's senior and mid-level leadership. The successful raid against Osama bin Laden in May 2011 is but the most well-known example; and as President Obama's top counterterrorism advisor explained later that year, "[i]f we hit Al Qaeda hard enough and often enough, there will come a time when they simply can no longer replenish their ranks with the skilled leaders that they need to sustain their operations."[107] Targeting a group's leaders appears to be a reasonable and proportionate measure in pursuing the defeat of a terrorist group. In particular, if conventional understandings of defeat — as discussed above — that rest on a commander's determination that he is unable or unwilling to continue the fight lose their traction in the terrorism context, then killing or capturing the leaders is a natural option to achieve that goal in an alternative fashion.[108]

Similarly, existing understandings of necessity and proportionality surely encompass actions to destroy, capture or neutralize a terrorist group's main bases, training camps or other facilities. United Kingdom Prime Minister David Cameron used this formulation as part of his description of his government's objectives in joining the fight against ISIS. He stated, "we want to defeat the terrorists, by dismantling their networks, stopping their funding, targeting their training camps and taking out those plotting terrorist attacks against the United Kingdom."[109] But how far do these notions of killing terrorist operatives and destroying terrorist facilities extend? One might argue that defeating a terrorist group requires that the State kill or capture every member of the group, however one defines membership in the group, no matter where located around the world and regardless of whether the person was a member of the group at the time of the attack or joined the group after the state began its self-defence operations. This argument carries

[107] E. Schmitt & M. Mazzetti, "Obama Advisor Outlines Plans to Defeat Al Qaeda", *N. Y. Times* (29 June 2001), available at http://www.nytimes.com/2011/06/30/world/30terror.html?action=click&contentCollection=World&module=RelatedCoverage&region=Marginalia&pgtype=article.

[108] There is growing research and debate about the effectiveness of this so-called "decapitation" strategy. *See e.g.*, J. Jordan, "When Heads Roll: Assessing the Effectiveness of Leadership Decapitation", 18 *J. Strat. Stud.* 719-755 (2009); Cronin, *supra* note 78; B. C. Price, "Targeting Top Terrorists: How Leadership Decapitation Contributes to Counterterrorism", 36 *Int'l Sec.* 9-46 (Spring 2012); J. Jordan, "Attacking the Leader, Missing the Mark: Why Terrorist Groups Survive Decapitation Strikes", 38 *Int'l Sec.* 7-38 (Spring 2014).

[109] Remarks by Prime Minister David Cameron, *supra* note 91.

some weight, particularly when each leader killed is quickly replaced, ideological fanaticism drives individuals to join and fight for the terrorist group, and the decentralized framework of the terrorist network belies any potential leadership ability or desire to call a halt to attacks from any and all adherents.

However, if defeating the terrorist group is a legitimate aim of self-defence and this expansive interpretation of defeating the group were to be accepted, the State's right to use force in self-defence could be boundless. As with the very meaning of defeat above, such a result is fundamentally inconsistent with the very purpose of the necessity and proportionality criteria. Although the State surely has a methodology or framework for determining if and when the terrorist group is so decimated as to no longer pose any threat, any such framework rests on significant uncertainty given the nature of terrorist groups. In addition, because this analysis is entirely intelligence-driven, there is no way for outside observers to comment in a productive manner, thus emasculating any broader effort at constraint — without access to the intelligence, another state, an advocacy group or an international organization is hard pressed to compete with the State's presentation and characterization of the relevant information as justification for continued action in self-defence.

"Degrade and destroy" is the current catch phrase for operations against ISIS, the objective President Obama set forth in September 2014. The United Kingdom uses similar justifications for acting in both individual and collective self-defence against ISIS: Prime Minister David Cameron declared that "the initial objective is to damage [ISIS] and reduce its capacity to do us harm" and further explained that dismantling — destroying — the "so-called caliphate" is essential to protecting the United Kingdom's security.[110] In these statements, destroying the group appears to mean to completely eliminate the group altogether. However, it is not clear whether that is a rhetorical statement used to garner popular support for the military operations or whether destroying the group is the actual intention, and if not, what the consequences of a disconnect between the rhetoric and the intent are for understanding the legal parameters for acting in self-defence.

In contrast, military doctrine defines destroy as a "tactical mission task that physically renders an enemy force combat-ineffective until it is reconstituted. Alternatively, to destroy a combat system is to damage it so badly that it cannot perform any function or be restored to a usable condition

[110] *Id*. (noting that "For as long as [ISIS] can pedal the myth of a so-called caliphate in Iraq and Syria . . . it will be a rallying cry for Islamist extremists all around the world, and that makes us less safe").

without being entirely rebuilt."[111] Destroy as such is more a component of or tactic for defeating a group than an overarching objective, leaving little guidance for understanding exactly what "destroy" means with regard to a terrorist group and raising the same questions that "defeat" engenders about the outer boundaries of self-defence. If destroying the group is a legitimate aim in self-defence, how do we determine when force is still necessary and how do we measure how much force is needed and for how long to achieve the goal, especially when we are not certain what destroying a terrorist group actually looks like. In addition, if it is the doctrinal definition of "destroy" that is to guide decision-makers and international law analysis, the definition's utility is limited with respect to terrorist groups — a terrorist group can be "combat-effective" with very little (as the use of box cutters on 9/11 demonstrated) and can often reconstitute much more quickly than conventional forces. If the extent of self-defence were to be limited to this doctrinal conception of "destroy," states would likely consider the parameters for self-defence to be too restrictive, because the necessity and proportionality paradigm would prevent states from taking action beyond short-term dismantling of terrorist capabilities.

B. Counterterrorism as Armed Conflict

A related issue is whether, once a State is engaged in ongoing military operations against a terrorist group in self-defence after being attacked, characterizing those hostilities as an armed conflict will change the extent to which the State is allowed to act in self-defence. Throughout most of the post-9/11 period, the United States has maintained that it is engaged in an armed conflict with al Qaeda[112] and, notwithstanding continued resistance to the notion of an armed conflict between a State and a transnational terrorist group in certain quarters, there is general acceptance that the scope of armed

[111] Field Manual 3-90-1, *supra* note 91, at B-12.

[112] All three branches of the U.S. government have demonstrated that they view the situation as an armed conflict. *See* Authorization to Use Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224(a) (2001); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (stating that the 9/11 attacks "created a state of armed conflict that requires the use of the United States Armed Forces"); Dept of Def. Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (21 Mar. 2002); *see also* Koh Address, *supra* note 21 (stating that the United States is "in an armed conflict with Al Qaeda, as well as the Taliban and associated forces"); Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 4 (2006), available at http://www.asil.org/pdfs/ilib0603212.pdf ("[T]he United States is engaged in a continuing armed conflict against Al Qaeda, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations.").

conflict can indeed encompass such a State versus non-State conflict. At the most basic level, the armed conflict paradigm raises the question of whether victory in war supplants self-defence against an attack or imminent attack as the analytical structure for assessing the lawfulness of state action. The law of armed conflict (LOAC) will, of course, govern the conduct of hostilities between the two parties and the protection of persons to minimize suffering during armed conflict.[113] However, the key issue for the instant discussion is whether the characterization as armed conflict removes the necessity and proportionality criteria from consideration and leaves the extent of self-defence — how much force against what groups and for how long — to be determined solely by the idea of victory in war.

1) Transition from Self-Defence to Victory?

Historically, a State's right to act in self-defence against an armed attack by another State was, in certain situations, "a right to resort to war."[114] Some argue that, in such a situation, necessity and proportionality are relevant at the onset of war to determine whether the victim State may respond in self-defence to the attack, but would not continue to determine the extent and parameters of the State's use of force thereafter. The attack triggers the necessity for force, but the constraint placed by the need to repel or deter the attack then fades away. As a result, a State "may prosecute its war to final victory even after the point at which this is no longer necessary to reverse or frustrate the initial use of force which provided the justification for the war."[115] Similarly, proportionality is determinative when self-defence is triggered, but only with respect to whether the decision to resort to war is proportionate to the nature and gravity of the armed attack suffered by the State.[116] Once the armed conflict is underway, the analysis changes: "[t]here is no support in the practice of States for the notion that proportionality remains relevant — and has to be constantly assessed — throughout the

[113] For an analysis of the consequences of blurring the armed conflict and self-defense justifications for targeted strikes against terrorist groups, *see* L. R. Blank, "Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications", 38 *Wm. Mitchell L. Rev*. 1655-1700 (2012).

[114] J. L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations", 41 *Am. J. Int'l L.* 872, 877 (1947).

[115] D. Rodin, *War and Self-Defense*, 112 (2002). Others continue to rely on the self-defense framework and necessity, arguing that "as long as necessity of self-defence continues to exist in the sense of an ongoing attack, which can include occupation of (part of) a state's territory or ongoing military operations aimed at facilitating an attack, or clear evidence of threat of attack in the proximate future persists, the right of self-defence will remain operative." T.D. Gill, "When Does Self-Defence End?", *in The Oxford Handbook of the Use of Force in International Law* 738, 745 (M. Weller ed., 2015).

[116] Dinstein, *supra* note 35, at 263.

hostilities in the course of war."[117] Based on this understanding of conflict, this transition from self-defence to war, from repelling an armed attack to victory, therefore means that a "[w]ar of self-defence, if warranted as a response to an armed attack, need not be terminated when and because the aggressor is driven back: rather, it may be carried on by the defending State until final victory."[118]

Taking this analytical approach from the State-on-State context to the counterterrorism arena triggers the immediate question of whether the conception of a transition from self-defence to victory only applies in the traditional environment of States going to war with other States, or whether we can conceptualize a conflict with a non-State group in the same comprehensive manner. The growing acceptance of the idea of an armed conflict between a state and a transnational terrorist group suggests that this framework can be applied to such a conflict. At the same time, the international community has pushed back against the U.S.'s expansive view of the conflict, evincing a general reluctance to accept a global or even transnational battlefield.[119] Perhaps, therefore, the idea of a transition from self-defence to victory is more conditional in the counterterrorism as armed conflict context, although we lack a set of guiding principles to determine how and on what it would be conditioned. One such example is the application of the criterion of proportionality. In the context of conflict with a transnational terrorist group, for example, it is worth considering whether the traditional argument that *jus ad bellum* proportionality no longer needs to be assessed once a conflict is underway remains reasonable. Proportionality seeks to minimize the disruption to international peace and security; as a result, one possible accommodation is that proportionality should continue to apply after a State's self-defence operations launch conflict with a terrorist group with respect to where and against which groups the conflict can or should extend. Because conflict with a transnational terrorist group is likely

117 *Id*. at 262.

118 *Id*. at 266. *See also* Kretzmer, *supra* note 65, at 258 ("under traditional laws of war, once a war had started each party could carry on fighting until victory (whatever that may mean) was achieved").

119 Int'l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 16, 32IC/15/11 (Oct. 2015) (hereinafter "ICRC Challenges Report") ("The ICRC considers that [international humanitarian law (IHL)] would begin to apply in the territory of such a State if and when the conditions necessary to establish the factual existence of a separate NIAC in its territory have been fulfilled. In other words, if persons located in a non-belligerent State acquire the requisite level of organization to constitute a non-State armed group as required by IHL, and if the violence between such a group and a third State may be deemed to reach the requisite level of intensity, that situation could be classified as a NIAC. Thus, IHL rules on the conduct of hostilities would come into effect between the parties").

to expand in time and geography, proportionality would thus help to maintain the balance between sovereignty, territorial integrity and order in the international system, and the State's inherent right of self-defence.

2) Identifying the End of Conflict

Even if victory does displace necessity and proportionality as the determinant of the extent of force when a State is in armed conflict with a transnational terrorist group, it is unclear what victory against a transnational terrorist group looks like. As one terrorism expert has noted, "[i]n this war, no one seems to know what winning is."[120] At present, neither international law nor strategic studies analysis offers effective guidance for understanding how an armed conflict against a terrorist group ends. Without tools for identifying when a conflict ends or, put another way, victory is achieved, it is difficult to delineate metrics for when a State has exceeded the parameters for the use of force against a terrorist group. For this reason, it would be wise to consider if and how necessity and proportionality can continue to play a role in assessing the reasonableness of the use and extent of the use of force.

LOAC references the end of armed conflict in international armed conflict with phrases in the Geneva Conventions such as "cessation of active hostilities"[121] and "general close of military operations."[122] At the time the Conventions were drafted, the "general close of military operations" was considered to be "when the last shot has been fired."[123] The Commentary to the Fourth Geneva Convention then provides further explanation:

> When the struggle takes place between two States the date of the close of hostilities is fairly easy to decide: it will depend either on an armistice, a capitulation or simply on *deballatio*. On the other hand, when there are

[120] Cronin, *supra* note 100, at 176.

[121] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118, 75 *U.N.T.S.* 135 (entered into force Oct. 21, 1950) (referring to the release and repatriation of prisoners of war).

[122] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 6, 75 *U.N.T.S.* 287 (entered into force Oct. 21, 1950) (denoting the end of application of the Fourth Geneva Convention in the territory of parties to the conflict upon the general close of military operations, or in occupied territory, one year after the general close of military operations); *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted by Conference* June 8, 1977, 1125 *U.N.T.S.* 3, art. 3(b) ("The application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations . . . .").

[123] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, at 815.

> several States on one or both of the sides, the question is harder to settle. It must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned.[124]

In non-international armed conflict — the relevant framework for any conflict between a State and a non-State group — treaty law provides no real methodology for identifying the end of a conflict. Common Article 3 of the Geneva Conventions does not reference the end of armed conflict and Additional Protocol II's mentions of the end of armed conflict[125] do not define or elucidate any further meaning of the concept. In one of the only judicial pronouncements addressing the end of non-international armed conflict, the International Criminal Tribunal for the former Yugoslavia (ICTY) declared that the application of LOAC — which applies only during armed conflicts — "extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved."[126]

In many conflicts, including non-international armed conflicts, these notions of "end of active hostilities," the "general close of military operations," or "peaceful settlement" are useful in demarcating the end of conflict. Armistices and peace treaties feature as the conflict-ending mechanism in most inter-State conflicts and it is not uncommon to see peace treaties or settlements bring an end to an internal conflict as well — Colombia being the most recent example.[127] In general, however, the nature of terrorism and counterterrorism is that States are not going to defeat terrorism; rather, terrorism is something to be managed, minimized, and defended against.[128] At the most basic level, "[a] war against groups of

[124] Int'l Comm. Red Cross, Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 62 (1958) (footnotes omitted). *See also* W. Heintschel von Heinegg, "Factors in War to Peace Transitions", 27 *Harv. J.L. & Pub. Pol'y* 843, 845-46 (2004).

[125] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), arts. 2(2), 6, 25, (adopted by Conference June 8, 1977), 1125 *U.N.T.S.* 609.

[126] *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[127] E. Lopez & S. Capelouto, "Colombia Signs Peace Deal with FARC", *CNN* (Nov. 13, 2016), available at http://www.cnn.com/2016/11/12/world/colombia-farc-peace/.

[128] C. Vance, "A War to Be Won, to Be Won", *Oped News* (27 May 2010), available at http://www.opednews.com/articles/A-War-to-Be-Won-to-be-Wo-by-carrie-vance-100524- 408.html ("All terrorist groups end, but terrorism, like crime, never ends." (quoting Seth G. Jones)); S. G. Jones & M. C. Libicki, How Terrorist Groups End: Lessons for Countering Al Qa'ida, xii, xvi-xvii (2008).

transnational terrorists, by its very nature, lacks a well delineated timeline."[129] Not only is it difficult to envision an end to the hostilities, but more problematic, there is at present no way of identifying what that end might look like.

Terrorist groups morph, splinter, and reconfigure, making it difficult to determine if, let alone when, they have been defeated.[130] Furthermore, the diffuse geographical nature of most conflicts with terrorist groups and the decentralized nature of such groups generally makes traditional temporal concepts unlikely to apply effectively to such conflicts. A conflict with transnational terrorist groups will not produce a surrender ceremony, the equivalent of V-E Day, or any other identifiable moment marking the end of the conflict.[131] No less, terrorist groups may launch attacks or take other action not because they are in a position of strength, but precisely because they are at a moment of existential danger. A group like al Qaeda or one of its ideological brethren may "have an innate compulsion to act — for example, it may be driven to engage in terrorist attacks to maintain support, to shore up its organizational integrity, or even to foster its continued existence."[132] Signs that might generally be understood to mean an enemy is getting stronger can thus actually be signals that it is significantly weakened; in the same way, a lack of attacks or overt action does not mean that a terrorist group is in decline.

Interestingly, the ICTY's holding that the temporal and geographic limits of LOAC range beyond the exact time and place of hostilities, a broad protective approach to the application of LOAC, can easily lead to a definition paralysis in a conflict with a terrorist group because it is unlikely that a "peaceful settlement" or "general conclusion of peace" will be achieved in any foreseeable period of time, if ever, in this type of conflict. The United States might defeat al-Qaeda in some meaningful way, ending their ability to launch any effective attacks against the United States or its allies. For example, some U.S. courts have thus talked of a time "when operations against al Qaeda fighters end, or the operational capacity of al

129 N. Balendra, "Defining Armed Conflict", 29 *Cardozo L. Rev*. 2461, 2467 (2008).

130 *See* Part II.A. *supra* & Part III.B. *infra*.

131 *See* Johnson Oxford Union Speech, *supra* note 86 ("We cannot and should not expect al Qaeda and its associated forces to all surrender, all lay down their weapons in an open field, or to sign a peace treaty with us"); Amos N. Guiora, *American Counterterrorism: The Triangle of Detention, Interrogation and Trial, Keynote Address at the Magna Carta Institute's Symposium, Towards a Global Legal Counterterrorism Model: Transatlantic Perspectives* 6 (23 Dec. 2009), *available at* http://ssrn.com/abstract=1527314 ("Precisely because there is no defined end to terrorism, a ceremony reminiscent of General MacArthur receiving Japan's surrender on the 'USS Missouri' will not take place.").

132 Cronin, *supra* note 94 at 11.

Qaeda is effectively destroyed."[133] As noted above, many analysts suggest that the United States is steadily approaching that time, if it is not already here. But other terrorist groups have already taken up the same fight and it is easy to see how the United States will still consider that it is engaged in an armed conflict with terrorist groups. The 2001 AUMF leaves open that very scenario: unlike the declarations of war against Germany and Japan in 1941, which directed the President not only to "carry on war against the Government of Germany" or the Imperial Government of Japan, but also to "bring the conflict to a successful termination,"[134] the AUMF provides no specified end.

In fact, although the United States government's latest pronouncement on legal and policy issues offers extensive and thoughtful explanations about the legal framework and reasoning behind current and anticipated U.S. counterterrorism operations, it nonetheless raises the specter of a conflict easily redefined to persist after al Qaeda's disintegration. In explaining how the government conceptualizes the end of the conflict with al Qaeda and associate forces, the report states that

> [a]t a certain point, the United States will degrade and dismantle the operational capacity and supporting networks of terrorist organizations like al-Qa'ida to such an extent that they will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States. At that point, there will no longer be an ongoing armed conflict between the United States and those forces.[135]

Note that the conceptual framework of who the United States needs to defeat (or "degrade and dismantle") is no longer "al Qaeda and associated forces," but rather "terrorist organizations like al-Qaeda," which is far more sweeping than even the already broad notion of conflict with al Qaeda. The focused nature of the tactical and operational definition of effectively destroying an enemy by dismantling and degrading their operational capacities is thus lost in the highly elastic delineation of the enemy — "terrorist organizations like al-Qaeda" offer no inherent boundaries but could simply be expanded to incorporate each new terrorist organization that appears if the State so desires.

[133] *Padilla v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002).

[134] 77th U.S. Congress. "Joint Resolution 119 of December 11, 1941, declaration of war on Germany." *U.S. National Archives and Records Administration*. Pub. L. 77-331, 55 Stat. 796, enacted December 11, 1941.

[135] Legal and Policy Frameworks, *supra* note 18, at 11.

If the extent of acceptable force in self-defence against the original terrorist attack or series of attacks is determined by the end of conflict or victory, an effective application of any such constraints depends on both a viable means for distinguishing between conflicts with different terrorist groups, and a recognized requirement that States cannot simply combine campaigns against terrorist groups into one seemingly never-ending conflict. More than fifteen years in, the United States has killed or captured hundreds of al Qaeda operatives, including Osama bin Laden and substantial portions of the group's leadership.

Yet, the more the United States fights, the longer the war's trajectory seems to grow. Twelve years after 9/11, [a] senior US Defense official . . . told Congress that the war with al-Qaeda would continue 'for 10 or 20 years' more. How could that be? Clearly Al-Qaeda is not the same organization it was a decade ago. What does success mean?[136]

These questions have enormous strategic and operational consequence. At the same time, they present telling concerns about how we can and should conceive of the extent of self-defence. One useful and thoughtful approach appears in a speech by then-Department of Defense General Counsel Jeh Johnson in late 2012:

> I do believe that on the present course, there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.
>
> At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counterterrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community – with our military

[136] Cronin, *supra* note 100, at 178.

> assets available in reserve to address continuing and imminent terrorist threats.[137]

The difference between these two operational scenarios — armed conflict with al Qaeda as an organization or periodic reliance on military force to address imminent terrorist threats — is central to parsing out how necessity and proportionality apply to cabin or guide the use of force in self-defence. Once that tipping point, or transition from conflict to law enforcement, is reached, the right of self-defence would not encompass force to the extent needed to defeat or destroy al Qaeda or any other associated group. Instead, necessity and proportionality would limit the extent of the force allowed in self-defence only to that aimed at preventing imminent terrorist attacks and threats.

As the previous sub-section discusses, the State's strategic and operational goals provide useful guidance for framing the international law parameters of self-defence against terrorist groups. Allowing a State to characterize operations against a terrorist group as armed conflict can potentially give that State *carte blanche* to set perpetually expanding aims in self-defence, a dangerous scenario. At the same time, this risk should not lead to a rejection of the notion of armed conflict with terrorist groups; rather, it should be the impetus for a more deliberate examination of what it means to be in a conflict with a terrorist group and what success looks like in such a conflict. Just as LOAC mandates that the determination of the existence of armed conflict must be based on an objective analysis of the situation of violence, not the claims or goals of the parties to the conflict, so it is essential that the extent of force allowed in self-defence be tethered to an objective analysis of legitimate aims of self-defence and how such aims should be understood. Otherwise, the self-defence to armed conflict to victory progression will lead to unfettered state discretion in the amount, degree and duration of force allowed.

III. INITIAL SUCCESS AND THE CHANGING FACE OF SELF-DEFENCE

Beyond the challenges of assessing the extent of force in self-defence that is allowed in pursuit of the various possible legitimate objectives of self-defence, several particular characteristics of transnational terrorist groups and military operations against such groups introduce another set of questions as well. These questions derive from the shifting nature of the military operations and of the terrorist group as the State enjoys initial

[137] Johnson Oxford Union Speech, *supra* note 86.

success in its forceful responses to the terrorist group's attack or series of attacks. As a preliminary point, several factors can alter how necessity and proportionality apply to the use of force in self-defence. Some offer little useful application in the context of counterterrorism, such as if an attacking State accepts a United Nations Security Council-mandated ceasefire and provides guarantees of repetition.[138] In contrast, if, for example, the host State reversed its prior intransigence about repressing terrorist attacks from its territory and took action itself to arrest and prosecute or forcefully stop the terrorists, then the necessity for forceful action by the victim State would be significantly less and its "right of self-defence will diminish accordingly."[139] Finally, while a State would no longer have a right to continue acting in self-defence if the attacking state or group no longer poses a threat, that assessment is extraordinarily difficult to make with regard to a terrorist group, because it is part of their *modus operandi* to remain out of sight and then launch attacks without warning.

As a State takes forceful action in response to terrorist attacks and to prevent future attacks, the calculus with respect to the threat of those future attacks can change. If necessity and proportionality continue to apply throughout the use of force in self-defence (either because the situation is not an armed conflict or if one discounts the argument that necessity and proportionality no longer govern once a war of self-defence begins), then as the threat of future attacks diminishes, the scope of self-defence should contract accordingly because the necessity for action has lessened and the amount of force needed to attain the objective is lower. Operationally, however, this approach proves counterintuitive. If a State's initial success causes the threat of future attacks to decrease, and therefore the right of self-defence diminishes, the state would have less room for action — and the terrorist group would then likely have more space to reconstitute, maneuver and launch attacks, then re-triggering the State's right to act in self-defence. The result: a circular argument and a legal framework divorced from the operational reality of how States respond to threats, which will reduce the willingness of States to abide by the international legal parameters for action in self-defence. However, if necessity and proportionality do not continually operate to constrain or guide the extent of the use of force, then any terrorist attack would automatically trigger the State's right to use any force necessary to defeat or destroy the group, even if much less force was all that was needed to prevent further attacks. A related question arises if a State's

[138] *See* Gill, *supra* note 115, at 747 (noting that not every "measure the Council may choose to take will have that effect, but if the Council's action results in removing the necessity for the exercise of self-defence, there would be no legal basis for continuing its exercise").

[139] Schmitt, *supra* note 51, at 33.

actions in self-defence stop or forestall immediate further terrorist attacks, but the group still has the capability and intent to attack the State and is simply waiting until it has another viable opportunity, even if that might be a year or more in the future. According to classical threat analysis, the threat a group poses is based on its capabilities combined with its intent.[140] The State will make such determinations and the sources, analysis and substance of the determinations will remain classified, making any useful objective judgment of the necessity for continued forceful measures and how far those measures must go to eliminate the threat difficult, if not impossible.

Three features of the contemporary counterterrorism environment are emblematic of the need to consider how initial success and the responsive acts or maneuvers of the terrorist group affects how we consider the extent of self-defence against terrorist groups. The following sub-sections address these developments: the terrorist group finds safe haven in another State or area; the terrorist group splinters or reconstitutes as one or more new and related groups; and the terrorist group's attacks and propaganda inspire the creation of new groups or vows of allegiance from other existing groups.

A. New Territory: The Geography of Necessity and Proportionality

The story of al Qaeda is, in part, the story of how a terrorist group seeks and secures new safe havens and space to operate as it faces either law enforcement or forceful action to contain it. First operating in Afghanistan during the Soviet occupation and the corresponding armed conflict in the 1980s, al Qaeda was then based in Sudan in the early and mid-1990s before being expelled from Sudan and reestablishing its main base of operations in Afghanistan in the late 1990s. After 9/11 and the launch of Operation Enduring Freedom in Afghanistan, al Qaeda has maneuvered accordingly, seeking safe haven over the border in Pakistan and then in remote areas of Yemen. Most recently, al Qaeda's core leadership has reportedly decided "that the terror group's future lies in Syria and has secretly dispatched more than a dozen of its most seasoned veterans there . . . to start the process of creating an alternate headquarters in Syria."[141] Given that terrorist groups

[140] C. B. King, *Alternative Threat Methodology*, 4 *J. Strat. Sec.* 57, 58 (spring 2011) ("the 'traditional' method to estimate terrorist threat is to decompose threat into two components, 'intent' and 'capability,' estimate the two variables independently, and then combine them (usually, but far from always, multiplicatively) to generate a non-dimensional threat score").

[141] E. Schmitt, "Al Qaeda Turns to Syria, With a Plan to Challenge ISIS", *N.Y. Times* (May 15, 2016), available at http://www.nytimes.com/2016/05/16/world/middleeast/al-qaeda-turns-to-syria-with-a-plan-to-challenge-isis.html.

rarely have the ability to confront military forces,[142] finding new territory in which to operate is the natural response to aggressive State action against the group in the original geographical locale. As a result, regardless of "the effects of the use of repressive military force" in the immediate location, in some cases "it may result in the export of the problem to another country."[143]

The effect of this spread to another country on the State's right to use force in self-defence and the extent of that force that is, how far it reaches geographically, or whether geography is relevant at all, is unclear. Returning to the fundamental purpose of *jus ad bellum* and the United Nations Charter framework, the international legal framework prohibits the use of force in the territory of another State in order to "end the scourge of war"[144] and minimize the spiraling of violence and resort to force in the international system. It is generally understood that any time a State uses force in the territory of another State, it must do so within one of the three exceptions to the prohibition: consent, United Nations authorization, or self-defence. A terrorist group's relocation to another country therefore raises the question of whether the existing self-defence justification is sufficient to get the State across the border, so to speak, or whether the introduction of a new state's territory into the equation demands a new *jus ad bellum* analysis.

There are three possible interpretations: first, one could argue that as long as the State continues to have the right to act in self-defence against the particular group, that right extends to wherever that group or its operatives are located. Operationally, this approach has merit — if the group continues to launch attacks or present a threat of future attacks such that the State can use force in self-defence to repel or prevent such attacks, then the State should not have to wait for an attack emanating from this new territory to be able to take repressive action against the group's operatives or infrastructure there. This analysis tracks with the generally accepted argument that preventing future attacks is a legitimate objective of using force in self-defence.[145] Second, if the violence between the State and the terrorist group

[142] *See e.g.* Cronin, *supra* note 64 ("Terrorist networks, such as al Qaeda, generally have only dozens or hundreds of members, attack civilians, do not hold territory, and cannot directly confront military forces").

[143] Cronin, *supra* note 94, at 30.

[144] U.N. Charter, Preamble.

[145] *See e.g.*, Schmitt, *supra* note 451, at 25 ("unless one is willing to deny victim States a consequential right of self-defense against terrorists, it is reasonable to interpret self-defense as permitting the use of force against terrorists who intend, and have the capability, to conduct future attacks against the victim"); Ago, *supra* note 39 at para. 121 (including preventing attacks from occurring as a legitimate aim of self-defense). For the views of states engaged in self-defense against terrorist groups, *see* Clinton, Address to the Nation, *supra* note 71; D. Vidalon, "France Carries Out First Air Strikes on Islamic

constitutes an armed conflict, one could argue that the existence of the armed conflict is the sole justification needed to use force in this new location. This claim is highly contested and lies at the center of the ongoing debate about the geography of the battlefield, a complex and challenging issue.[146] These first two theories place no constraints on the extent of self-defence when a terrorist group seeks a new home in another State's territory and actually permit an expansive conception of the extent of self-defence by eliminating the need to take geography into consideration in assessing necessity and proportionality.

The third possible argument produces the opposite result. According to this interpretation, when the terrorist group seeks safe haven in a new State, necessity as a criterion of lawful self-defence would require that the State face an armed attack or imminent armed attack from the group in that location before it can take action in self-defence there against the group or its operatives. This interpretation of the impact of geographical expansion on self-defence appears to offer the greatest adherence to the prohibition on the use of force, by restricting the State's ability to resort to force. However, it consequently provides greater space for terrorist groups and other non-State groups to escalate attacks against States without the same consequences, thus undermining the overarching goal of reducing violence and also interfering with a State's basic right to protect its people and territory from attacks. Ultimately, any parameters for the extent of force in self-defence against a group scattered in different countries must weigh the authority to use force in self-defence against the general goal of minimizing the resort to force and preventing a spiraling of violence.

B. Splintering and Reconstituting Groups

In June 2002, only eight months into what is now a fifteen-plus year conflict with al Qaeda, a news report stated the following about al Qaeda:

> Al Qaeda trainees are no longer in Afghanistan learning by the thousands to build bombs or hijack planes. Osama bin Laden, if alive, is incommunicado, hampered from

State", *Sydney Morning Herald* (27 Sept. 2015) (French Prime Minister Manuel Valls stated that France is "hitting Daesh because this terrorist organization prepares its attacks against France from Syria").

146 *See* ICRC Challenges Report, *supra* note 119, at 14-16; N. Lubell & N. Derejko, "A Global Battlefield? Drones and the Geographical Scope of Armed Conflict", 11 *J. Int'l Crim. Just.* 65-88 (2011); M. N. Schmitt, "Charting the Legal Geography of Armed Conflict", 90 *Int'l Leg. Stud.* 1 (2014); L. R. Blank, "Debates and Dichotomies: Exploring the Presumptions Underlying Contentions About the Geography of Armed Conflict", 16 *Y. B. Int'l Human. L.* 297-318 (2013).

> plotting new attacks. His operations czar, Abu Zubaydah, is in US custody, and talking. His military chief, Mohammed Atef, is presumed dead.
>
> In short, Al Qaeda Central is no more. Its home turf is gone. Its command structure is broken. Its brazen freedom to recruit, communicate, and plan and to raise funds has been sharply curtailed.
>
> There's just one problem: Al Qaeda is reinventing itself. Just as a frail mother spider sends hundreds of young creeping to the far reaches of her web, Al Qaeda's core mission to wage jihad on Americans and their allies lives on through its cells and links to radical Islamic groups already dispersed around the globe.[147]

Al Qaeda has continued to be "a moving target, with experts arguing that it has changed structure and form numerous times."[148] Faced with pressure from law enforcement or State military action, terrorist groups may go underground, splinter into two or more successor groups, or reconstitute into a new group after the main leadership scatters or goes into hiding to avoid capture or death. Al Qaeda is a prime example with many such offshoots — to name but two, AQAP is the most well-known "spinoff" of what is now called "core al Qaeda," and the Khorasan Group, a target of United States strikes in Syria in 2014, is a group of "seasoned al Qaeda operatives who . . . established a safe haven to plot attacks on the West."[149] And although there is debate about ISIS's origins, the United States and many others trace ISIS back to al Qaeda, arguing that al Qaeda in Iraq, one of the original al Qaeda offshoots, reconstituted itself as ISIS after being driven underground and drastically weakened during the United States counterterrorism surge and continued presence in Iraq through 2011.[150]

147 A. Scott Tyson, "Al Qaeda Broken, But Dangerous", *Christ. Sci. Mon.* (24 June 2002).

148 Cronin, *supra* note 94, at 7. Cronin explains that "[n]o previous terrorist organization has exhibited the complexity, agility and global reach of al-Qaeda, with its fluid operational style based increasingly on a common mission statement and objectives, rather than on standard operating procedures and an organizational structure." *Id.* at 33.

149 "What is the Khorasan Group?", *BBC News* (24 Sept. 2014), available at http://www.bbc.com/news/world-middle-east-29350271.

150 "What is 'Islamic State'?", *BBC News* (2 Dec. 2015), available at http://www.bbc.com/news/world-middle-east-29052144; Remarks of Stephen W. Preston, "The Legal Framework for the United States' Use of Military Force Since 9/11", American Society of International Law Annual Meeting, April 10, 2015, available at https://www.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911.

As groups like al Qaeda or ISIS split off members to form new affiliated groups or reconstitute themselves under a new name, these changes can have ramifications for the authority of the State to act in self-defence. Is a successor group or offshoot automatically included within the State's authority to use force in self-defence, in essence as a carryover from the initial authority to respond to the original group in self-defence? Such an approach would place few, if any, limits on the breadth of the force a State can use in self-defence with respect to the groups it can attack. Alternatively, one might argue that once the potential target of State force is different in any way — by name, by composition, by location — from the original or core group, the self-defence analysis and justification needs to start anew, placing constraints on the extent of self-defence. Even if these groups "are seen as essentially pursuing a common strategy and engaging in a coordinated series of attacks originating from different locations, but forming a whole, [such that they can be treated] as a single actor and source of threat," the authority to act would then "depend upon whether in each case the requirements of necessity, proportionality, an immediacy had been met."[151]

The nascent State practice of U.S. acts and statements in the current conflict with al Qaeda and associated forces offers some fodder for analysis. The United States generally appears to take a case-by-case approach, looking for direct linkage between the successor or splinter group and core al Qaeda, but then applying the full extent of its self-defence authority once it identifies that linkage. With respect to AQAP, the United States argues that the 2001 AUMF applies to AQAP either as part of al Qaeda or as an associated force,[152] but without any further clarification or delineation. For other groups, such as al Qaeda in the Islamic Maghreb or al Shabaab, the United States has asserted self-defence authority but has not explained whether that self-defence authority is the same as that justifying operations against al Qaeda or is a separate set of authorities.[153] A speech by the then-General Counsel of the Department of Defense offers a window in the United States' thinking in this regard, however. After explaining that the United States' operations against ISIS stem from the same self-defence

[151] Gill, *supra* note 115 at 748.

[152] *See al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (Opposition to Plaintiff's Motion for a Preliminary Injunction and Memorandum of the United States in Support of Defendants' Motion To Dismiss at 1) ("The United States has further determined that AQAP is an organized armed group that is either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda.").

[153] *See* J. Daskal & S. I. Vladeck, "After the AUMF", 5 *Harv. Nat'l Sec. J.* 115, 123-26 (2014).

authority as those against al Qaeda, because of the original linkages between the two groups, the General Counsel then provided clues as to the limits of self-defence authority passed along to a group's successors or offshoots:

> The name may have changed, but the group we call ISIL today has been an enemy of the United States within the scope of the 2001 AUMF continuously since at least 2004. A power struggle may have broken out within bin Laden's jihadist movement, but this same enemy of the United States continues to plot and carry out violent attacks against us to this day. Viewed in this light, reliance on the AUMF for counter-ISIL operations is hardly an expansion of authority. After all, how many new terrorist groups have, by virtue of this reading of the statute, been determined to be among the groups against which military force may be used? The answer is zero.[154]

In contrast, he noted, it would be a "different conversation if ISIL had emerged out of nowhere a year ago, having no history with bin Laden and no more connection to current al-Qa'ida leadership than it has today."[155]

For the United States, therefore, the constraint for the extent of force in self-defence lies in the identification of which groups qualify as successors or offshoots, as opposed to new groups. This is a constraint that, at least preliminarily, protects against the valid concern that a State's response to one terrorist group's attack can quickly become a "war against terrorism" or "global war on terror" with no limits on where or against whom the state can act. However, the constraint only works to the degree that the analysis of the relevant linkages is discriminating; a State that easily finds a successor or offshoot in every terrorist group is merely paying lip service to the role that necessity and proportionality must play in determining the extent of force it can use against terrorist groups. Furthermore, it is not clear whether the United States treats the successor or offshoot connection as the only inquiry required — meaning that once that connection is made, no new or further necessity and proportionality analysis is necessary — or whether the United States freshly examines the need for forceful measures against each successor or offshoot and the reasonableness of the degree of force used.

The former methodology appears to rest on the determination that force against a successor or offshoot group is included within the self-defence aims of preventing future attacks from the original group or defeating the

[154] Remarks of Stephen Preston, *supra* note 150.
[155] *Id*.

original group, for example. This approach seems to borrow from a more conventional environment — in which military forces, militia and other fighting units belonging to a party to a conflict are presumed to be fighting for and answering to the same sovereign entity and its military leaders — and using it to make sense of the complex, rapidly changing, and uncertain world of transnational terrorism. Viewing self-defence against a terrorist group as an armed conflict makes this association of threat, necessity and proportionality both possible and justifiable, at least from the State's perspective. However, it poses a significant risk of relaxing the foundational requirements both for triggering the right of self-defence and for determining the extent of force the state can then use in carrying out that right, thus weakening the international legal prohibition on the use of force. The better approach, therefore, is to consider necessity and proportionality mandatory requirements for the use of force in self-defence against successors and offshoots, recognizing that the nature of such groups and the intelligence and threat assessments the State has made may well make such analyses quite simple and obvious. Requiring that step preserves the essential international legal infrastructure.

C. New Groups and New Allegiances

Finally, it is now common for the primary terrorist group in conflict with a State to inspire new groups and individuals to join that violent struggle and to motivate existing groups to pledge allegiance to the primary group and its leaders. Although this expanding network, as it were, is partly a response to the group's success in its initial attacks, it is also a direct effect of the State's initial success in countering the group's attacks and threat. The United States 2011 National Strategy for Counterterrorism explains that, "precisely because its leadership is under such pressure in Afghanistan and Pakistan, al Qaeda has increasingly sought to inspire others to commit attacks in its name."[156] As a result, where "al-Qa'ida has had some success in rallying individuals and other militant groups to its cause, . . . the United States faces an evolving threat from groups and individuals that accept al-Qa'ida's agenda, whether through formal alliance, loose affiliation, or mere inspiration."[157] Both al Qaeda and ISIS have sought and secured pledges of allegiance from other terrorist groups, whether for operational or rhetorical effect. Al Shabaab pledged allegiance to al Qaeda in 2009 and remains closely tied to al Qaeda, with its leader receiving training from and fighting

[156] President of the United States, National Strategy for Counterterrorism 4 (June 2011), available at https://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.
[157] *Id*. at 3.

with al Qaeda in Afghanistan[158] and al Qaeda operatives regularly noted as collaborating with al Shabaab in Somalia.[159] Over forty groups are believed to have pledged allegiance to ISIS, including Boko Haram in Nigeria and Abu Sayyaf in the Philippines, for example.[160]

As the original terrorist group secures adherents or affiliates, the parameters of the original self-defence authority are tested. For groups inspired by the main terrorist group, whether al Qaeda or ISIS or any other, but not connected operationally in any way, extending the authority to act in self-defence is a stretch indeed. However, that is not the key question here, because few would argue that a group inspired by al Qaeda but not involved in any attacks on the United States or participating directly with al Qaeda in planning or launching operations meets the test for triggering a right of self-defence. Rather, the question for the instant discussion is whether, in order to defeat al Qaeda or prevent future attacks from al Qaeda, force against these inspired but as yet unconnected groups is necessary and proportionate to *that* goal. On first glance, that appears to be a proposition that is quite difficult to support under any interpretation of necessity and proportionality as set forth above. But to the extent that the United States redefines, or even potentially redefines, its conflict with and basic objectives in combatting al Qaeda, the door opens at least a crack.

Descriptions of the shifting nature of al Qaeda and the changing United States framing of its efforts against al Qaeda offer some insight. First, al Qaeda no longer resembles its 2001 incarnation, but "has evolved into an increasingly diffuse network of affiliated groups, driven by the worldview that al-Qaeda represents."[161] Over time, it has therefore "begun to resemble more closely a 'global jihad movement', increasingly consisting of web-directed and cyber-linked groups and ad hoc cells."[162] As the United States

[158] C. Gaffey, "Why Al-Shabab is Not Joining ISIS", *Newsweek* (22 Jan. 2016), available at http://www.newsweek.com/al-shabab-not-joining-isis-418656.

[159] T. Gibbons-Neff, "Pentagon: Drone Strike Targets Senior al-Shabab Leader in Somalia", *Chi. Trib.* (1 June 2016), available at http://www.chicagotribune.com/news/nationworld/ct-drone-strike-al-shabab-somalia-20160601-story.html.

[160] P. Boghani, "Where the Black Flag of ISIS Flies: A Look at the Nine Countries Where the Terror Groups has Formal Affiliates", *Frontline* (13 May 2016), available at http://apps.frontline.org/isis-affiliates/.

[161] Cronin, *supra* note 94, at 32.

[162] *Id.* at 33 (noting that in the process of its evolution, "al-Qaeda has demonstrated an unusual resilience and international reach"). The U.S. National Strategy for Counterterrorism affixes the label "adherents" to some of these groups: "Individuals who have formed collaborative relationships with, act on behalf of, or are otherwise inspired to take action in furtherance of the goals of al-Qa'ida—the organization and the ideology—including by engaging in violence regardless of whether such violence is targeted at the

shifts its focus accordingly — to preventing the spread of radical Islamic extremism and eliminating opportunities for extremist groups to terrorize local populations as a stepping stone to a more global reach — it is important to consider to what extent force is necessary to achieving these objectives. One former National Security Council official described "winning against al Qaeda" as looking

> very much like victories against other insurgents: the spreading of security for populations in Somalia, Yemen, the Sahel, and elsewhere; the prevention of a return of al-Qaeda to those cleared areas; and the empowerment of legitimate governments that can control and police their own territories. By these standards, we have not yet defeated al Qaeda; in fact, beyond Iraq, Afghanistan, and Somalia, we have hardly engaged the enemy at all.[163]

Here it is essential, in order to preserve the purpose of necessity and proportionality as constraints on the use of force in self-defence, to separate the various components of this strategy against al Qaeda and isolate those that require force rather than law enforcement, education, propaganda or other non-forceful measures. Doing so protects against the danger of the self-defence authority being applied to any efforts at all to "stop al Qaeda" and therefore spreading the authority to use force.

With regard to groups that pledge allegiance to al Qaeda or ISIS, the analysis is more complex. Our traditional understanding of how a third State becomes a party to a conflict does not necessarily translate to the murky world of terrorist groups, and ideological affiliation or allegiance. To the extent that a new group "joins the fight" and actually participates in attacks or other military operations against the state, the inclusion of that group in the State's self-defence authority, or in the armed conflict where the appropriate framework, may well be appropriate. The United States uses the concept of "associated forces" to denote such groups.[164] This extension of self-defence authority under both international law and United States domestic law has been thoroughly debated. However, this debate has not

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United States, its citizens, or its interests." National Strategy for Counterterrorism, *supra* note 157, at 3.

[163] M. Habeck, "Can We Declare the War on al Qaeda Over?", *For. Pol'y* (27 June 2012).

[164] The United States uses "associated forces" as a "legal term of art that refers to cobelligerents of al-Qa'ida or the Taliban against whom the President is authorized to use force (including the authority to detain) based on the Authorization for the Use of Military Force." National Strategy for Counterterrorism, *supra* note 157, at 3 n.1. Further discussion of the meaning and scope of the term and the debate over the use and application of the concept of associated forces is outside the scope of this article.

necessarily addressed the central question raised by the instant analysis — how much force can the State use against such a group. That is, if a terrorist group pledges allegiance to ISIS and fights with it and the United States has the legitimate objective, as part of a self-defence-driven armed conflict, of defeating or destroying ISIS, does proportionate force in self-defence therefore automatically include the defeat or destruction of this other group? Or, is the extent of force against that group limited to what is necessary and proportionate to the goal of defeating ISIS, which possibly would be achieved before or separately from complete defeat of this group? Given the purpose of necessity and proportionality in preventing the spread of violence, the latter approach seems to accord more closely with these goals and be truer to the fundamental purpose of ensuring that the force used is no greater than that needed to end or prevent attacks on the State. At the same time, it matches appropriately with operational realities by not placing unreasonable or unworkable constraints on the state's ability to define threats and determine the appropriate response.

IV. CONCLUSION

In 2003, then Major General David Petraeus famously said to a reporter interviewing him about the war in Iraq: "Tell me how this ends."[165] Although his quip foretold the complications to come in Iraq and exposed skepticism about U.S. prospects in the absence of long-term planning for after the invasion, the question sums up the challenges of analyzing the execution of the right of self-defence against a terrorist group. Effectively assessing necessity and proportionality to judge the lawfulness of force in self-defence rests on the legitimate objective the State seeks to achieve and how the force used relates to that objective. In turn, the legitimate objective requires — or certainly should require — a firm grasp of what success means and looks like and, equally important, why force is needed to achieve that success and the amount or nature of the force needed to reach that result. Terrorism inherently muddies those waters and, somewhat inevitably, leads to a "we'll know it when we see it" characterization of success — the State's leaders can proclaim that they will have success when they degrade or destroy or dismantle the terrorist group or its operational capacity, but there is no way to quantify or describe what that end result looks like either, even though it sounds more specific.

The current jurisprudence and discourse on the international law of self-defence provides the necessary tools for analyzing when a State may resort to force in self-defence against an armed attack or imminent armed attack by

[165] R. Atkinson, "Iraq Will Be Petraeus's Knot to Untie", *Wash. Post* (7 Jan. 2007).

a terrorist group. Furthermore, it is axiomatic that, to be lawful, that use of force in self-defence must be necessary and proportionate to the objective of ending or repelling the attack. But when matched up against the complexities and particularities of counterterrorism operations, whether purely self-defence or in the context of armed conflict, the international law framework comes up wanting. Greater understanding of and detail about the objectives to be attained by using force in self-defence is essential. In particular, effective application of the law depends on further analysis and exploration of how the classic international law notions of ending or repelling an attack or imminent attack match up with the operational conceptions of degrading, defeating, or destroying a terrorist group. The idiosyncrasies of terrorism and counterterrorism also demonstrate that understanding and analyzing necessity and proportionality must be dynamic, because terrorist groups are fluid and agile and ever-changing and counterterrorism operations must be as well. Ultimately, the extent of the use of force in self-defence against terrorist groups leads to a modification of General Petraeus's question: "Tell me how this ends, so we can see what you need to do and how you can lawfully get there."

ARTICLES

THE FUTURE OF THE LAW OF ARMED CONFLICT: OSTRICHES, BUTTERFLIES, AND NANOBOTS

*Eric Talbot Jensen**

INTRODUCTION

Increasingly, we find ourselves addressing twenty-first century challenges with twentieth-century laws.[1]

As Louise Doswald-Beck correctly stated in her 1998 article, "[a]ny attempt to look into the future is fraught with difficulty and the likelihood

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1. Harold Hongju Koh, *The State Department Legal Adviser's Office: Eight Decades in Peace and War*, 100 GEO. L.J. 1747, 1772 (2012); *see also Al-Bihani v. Obama*, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring) ("War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.").

that much of it will be wrong."[2] This, in part, accounts for the military axiom that a nation is always preparing to fight the last war. In a study about future war, military historian and theorist Thomas Mackubin writes that research has shown "the United States has suffered a major strategic surprise on the average of once a decade since 1940."[3]

If this inherent lag is true about the tactics and strategy of fighting wars, it is even more true concerning the law governing the fighting of wars. Michael Reisman writes that, "[b]ecause modern specialists in violence constantly seek new and unexpected ways of defeating adversaries, the codified body of the law of armed conflict always lags at least a generation behind."[4] This law lag was recently illustrated by those who have argued for new laws to govern the post–9/11 armed conflict paradigm.[5]

The historical fact that the law of armed conflict (LOAC) has always lagged behind current methods of warfare does not mean that it always must. This Article will argue that the underlying assumption that law must be reactive is not an intrinsic reality inherent in effective armed conflict governance. Rather, just as military practitioners work steadily to predict new threats and defend against them, LOAC practitioners need to focus on the future of armed conflict and attempt to be proactive in evolving the law to meet future needs.

In a recent article in *The Atlantic*, authors Andrew Hessel, Marc Goodman, and Steven Kotler propose a hypothetical in the year 2016 where an anonymous web personality known as Cap'n Capsid posts a competition to deliver a specific virus that, unbeknownst to the competitors, is linked to the DNA of the President of the United States. The virus eventually makes its way to Samantha, a sophomore majoring in govern-

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2. Louise Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, *in* 71 INT'L L. STUD., THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 39, 39 (1998); Stephen Peter Rosen, *The Future of War and the American Military*, HARV. MAG., May-June 2002, at 29, 29 ("The people who run the American military have to be futurists, whether they want to be or not. The process of developing and building new weapons takes decades, as does the process of recruiting and training new military officers. As a result, when taking such steps, leaders are making statements, implicitly or explicitly, about what they think will be useful many years in the future."). Despite the difficulty, it is a vital requirement of militaries and one in which plenty of people are still willing to engage. *See* Frank Jacobs & Parag Khanna, *The New World*, N.Y. TIMES (Sep. 22, 2012), www.nytimes.com/interactive/2012/09/23/opinion/sunday/the-new-world.html.

3. Mackubin Thomas Owens, *Reflections on Future War*, NAVAL WAR C. REV., Summer 2008, at 61, 64.

4. W. Michael Reisman, Rasul v. Bush*: A Failure to Apply International Law*, 2 J. INT'L CRIM. JUST. 973, 973 (2004).

5. *See* NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS (David Wippman & Matthew Evangelista eds., 2005); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004); Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295 (2007); Roy S. Schondorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1 (2004); Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443 (2007).

ment at Harvard University, who ingests it and comes down with the flu. Given her symptoms, she quickly spreads billions of virus particles, infecting many of her college friends who also get flu-like symptoms, but nothing very harmful.

> This would change when the virus crossed paths with cells containing a very specific DNA sequence, a sequence that would act as a molecular key to unlock secondary functions that were not so benign. This secondary sequence would trigger a fast-acting neurodestructive disease that produced memory loss and, eventually, death. The only person in the world with this DNA sequence was the president of the United States, who was scheduled to speak at Harvard's Kennedy School of Government later that week. Sure, thousands of people on campus would be sniffling, but the Secret Service probably wouldn't think anything was amiss. It was December, after all—cold-and-flu season.[6]

This scenario may sound more like science fiction than like something you would read in a law review article. However, events like this seem inevitable as the technology of war progresses. Such events raise numerous legal issues both about the law of going to war, or *jus ad bellum*, and the LOAC, or *jus in bello*. Would this be considered a "use of force" in violation of the U.N. Charter?[7] In relation to *jus ad bellum*, would it be considered an "armed attack," giving the United States the right to exercise self-defense?[8] How would these answers be affected if Cap'n Capsid were not a state actor, but a terrorist or an individual acting on his own? With respect to the *jus in bello*, was this an attack, triggering the LOAC? If so, did it violate the principles of distinction or discrimination?[9] Is a genetically coded virus a lawful weapon?

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6. Andrew Hessel, Marc Goodman & Steven Kotler, *Hacking the President's DNA*, THE ATLANTIC (Oct. 24, 2012, 10:42 AM), http://www.theatlantic.com/magazine/archive/2012/11/hacking-the-presidents-dna/309147/.

7. U.N. Charter art. 2, para. 4. Article 2, paragraph 4 has become the accepted paradigm restricting the use of force among states. Actions that amount to a threat or use of force are considered a violation of international law. However, the international community has very different views on what the language actually means and the Charter contains no definitions.

8. U.N. Charter art. 51. The definition of armed attack is controversial. There is no agreed definition of what equates to an armed attack. Despite this lack of clarity, states seem to agree that not all armed military actions equate to an armed attack. The ICJ confirmed this in the Nicaragua case when it decided that Nicaragua's provision of arms to the opposition in El Salvador was not an armed attack. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 195 (June 27). Additionally, there are unresolved questions about the application of new technologies, such as cyber operations, to armed attack. It is still unclear what level of offensive cyber operations against a state will constitute an armed attack.

9. *See infra*, section II.C.2.b. The principle of distinction requires militaries to distinguish between civilians and combatants in the attack. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

Technological development in each of the areas highlighted in the scenario mentioned above is proceeding quickly, and not just in the United States but also amongst nations throughout the world. While much of the development is currently for peaceful purposes, there is no doubt that many, if not all, of these advances will be weaponized over time. Historically, few technologies throughout history that can be weaponized have not been.[10]

P.W. Singer, known scholar on advancing technologies and the law, has recently written,

> Are we going to let the fact that these [new technologies] look like science fiction, sound like science fiction, feel like science fiction, keep us in denial that these are battlefield reality? Are we going to be like a previous generation that looked at another science fiction-like technology, the atomic bomb? The name "atomic bomb" and the concept come from an H.G. Wells short story. Indeed, the very concept of the nuclear chain reaction also came from that same sci-fi short story. Are we going to be like that past generation that looked at this stuff and said, "We don't have to wrestle with all the moral, social, and ethical issues that come out of it until after Pandora's box is open?"[11]

Pandora's box is opening as new technologies are being developed. They will inevitably shape the future battlefield, affecting where conflicts are fought, by whom they are fought, and the means and methods used to fight.

The premise of this Article is that we are at a point in history where we can see into the future of armed conflict and discern some obvious points where future technologies and developments are going to stress the current LOAC. While the current LOAC will be sufficient to regulate the majority of future conflicts, we must respond to these discernible issues by anticipating how to evolve the LOAC in an effort to bring these future weapons under control of the law, rather than have them used with devastating effect before the lagging law can react.

Part I of this article will argue that the LOAC plays a vital signaling role in warfare that is especially needed at this time of technological innovation. Like these changing technologies, the LOAC must also evolve to face the new challenges of future armed conflict. Part II will project armed conflict into the future in three main categories—places, actors, and means and methods—and analyze how advancing technologies and techniques

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The principle of discrimination requires each specific attack, including each weapon system, to be able to differentiate in the attack and only attack intended targets. *Id.*, art. 57.

10. John D. Banusiewicz, *Lynn Outlines New Cybersecurity Effort*, U.S. DEP'T OF ST. (June 16, 2011), http://www.defense.gov/utility/printitem.aspx?print=http://www.defense.gov/news/newsarticle.aspx?id=64349.

11. P.W. Singer, Ethical Implications of Military Robotics, The 2009 William C. Stutt Ethics Lecture, United States Naval Academy (Mar. 25, 2009), *available at* http://www.au.af.mil/au/awc/awcgate/navy/usna_singer_robot_ethics.pdf.

will call into question the current LOAC's ability to adequately regulate armed conflict. This Part will identify specific principles of the LOAC, the effectiveness of which will wane in the face of state practice, and suggest emerging concepts that will allow the LOAC to evolve and maintain its relevance and virulence in armed conflict. The Article will then conclude.

I. OSTRICHES OR BUTTERFLIES

Warfare has always been an evolving concept. Throughout history, it has constantly been shaped and altered by the exigencies of nations and the moral sentiments of the global community. Yet, the paramount force behind this continual military evolution is not economic, social, or moral; rather, the greatest controlling factor has been the ever-changing limitations of wartime technology. . . . For centuries, nations have searched for and sought ways to utilize technological advancements to overcome material deficiencies.[12]

We have all heard or read about how, when faced with danger or adversity, the ostrich buries its head in the sand, hoping the bad thing will pass and leave it unharmed. While this is a myth,[13] it is also a powerful metaphor to describe a possible reaction to a threat. Compare that mythical reaction of the ostrich with the theory of the "coevolutionary arms race"[14] in plants and animals, where a change in the genetic composition of one species is in response to a genetic change in another.[15] For example, over time, the Heliconius butterfly has co-evolved with the passion vine through a series of changes and counter-changes that now link the two inextricably together. As the passion vine developed toxins to protect itself from overfeeding, the Heliconius developed the ability to internalize the toxin and then use it as a defense against its own predators. Similarly, while the Heliconius feeds on the passion vine, it also fertilizes the vine, ensuring the vine's survival.[16]

The natural phenomenon of the co-evolutionary arms race between species is instructive in considering the LOAC and its relationship with

12. Bradley Raboin, *Corresponding Evolution: International Law and the Emergence of Cyber Warfare*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 602, 603 (2011).

13. Karl S. Kruszelnicki, *Ostrich Head in Sand*, ABC SCIENCE (Nov. 2, 2006), http://www.abc.net.au/science/articles/2006/11/02/1777947.htm.

14. Richard Dawkins & John R. Krebs, *Arms Races Between and Within Species*, 205 PROC. ROYAL SOC'Y LONDON, SERIES B, BIOLOGICAL SCIENCES 489 (1979); Interview with Charles Riley Nelson, Professor, Department of Biology, Brigham Young University, in Provo, Utah (Dec. 20, 2012).

15. Paul R. Ehrlich & Peter H. Raven, *Butterflies and Plants: A Study in Coevolution*, 18 EVOLUTION 586 (1964); Daniel H. Janzen, *When is it Coevolution?*, 34 EVOLUTION 611 (1980); John N. Thompson, *Concepts of Coevolution*, 4 TRENDS ECOLOGY & EVOLUTION 179 (1989).

16. Interview with Charles Riley Nelson, Professor, Department of Biology, Brigham Young University, in Provo, Utah (Dec. 20, 2012) (explaining coevolutionary analysis using the example of the Heliconius and passion vine); *see also* Lawrence E. Gilbert, *The Coevolution of a Butterfly and a Vine*, 247 SCI. AM., Aug. 1982, at 110 (describing how species of Heliconius and passion vine have influenced each other's evolution).

advancing technology. In response to advancing technologies that will undoubtedly affect the conduct of hostilities on the future battlefield, the LOAC can play the role of the ostrich and stick its head in the sand by saying that the current rules are sufficient and all technologies must mold themselves to current rules or not be used. Alternatively, the LOAC can play the role of the butterfly and respond to future developments (or even anticipate them) and adapt or evolve sufficiently to regulate these developments in a meaningful way.

A. *Evolution*

Predicting the future is very difficult,[17] and fraught with the potential for serious error. Hence, the law of armed conflict has been mostly reactive throughout its history. The Fourth Geneva Convention of 1949[18] concerning the protection of civilians during armed conflicts did not come about until after the devastating attacks on civilians that occurred in World War II.[19] Likewise, the Additional Protocols of 1977[20] did not extend protections to victims of non-international armed conflict until decades of lobbying by the International Committee of the Red Cross (ICRC).[21]

The ICRC is engaged in a similar work now. During the recent sixty-year commemoration of the 1949 Geneva Conventions, the ICRC reported on a number of concerns looking at current and future armed conflicts where the law may need to evolve in order to address the needs of victims of armed conflict.[22] Most of these suggestions are based on reactions to current conflicts, but they clearly denote that the international community cannot take the "ostrich's" approach to impending problems. If the law is going to maintain its relevance and ability to adequately regu-

17. Katie Drummond, *Defense Whiz to Pentagon: Your Predictions are Destined to Fail*, WIRED (Oct. 28, 2011, 2:54 PM), http://www.wired.com/dangerroom/2011/10/danzig-military-predictions/ ("The U.S. government has a perfectly awful track record of predicting future events. And there's a good reason why, says the chairman of an influential think tank: it's friggin' impossible.").

18. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

19. See *Civilians protected under international humanitarian law*, INT'L COMM. RED CROSS (Oct. 29, 2010), http://www.icrc.org/eng/war-and-law/protected-persons/civilians/overview-civilians-protected.htm.

20. Protocol I, *supra* note 9, art. 43, para. 2; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

21. Eric Talbot Jensen, *Applying a Sovereign Agency Theory of the Law of Armed Conflict*, 12 CHI. J. INT'L L. 685, 693–94 (2012).

22. Jakob Kellenberger, President, Int'l Comm. Red Cross, Sixty Years of the Geneva Conventions: Learning from the Past to Better Face the Future, Address at Ceremony to celebrate the 60th anniversary of the Geneva Conventions, (Aug. 12, 2009), *available at* http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-president-120809.htm.

late armed conflict, it must take the "butterfly's" approach and be adaptive and able to evolve in the face of difficulties.[23]

Employing the ostrich's approach and failing to infuse flexibility and adaptability into the LOAC will lead to an increase in the recent phenomenon known as lawfare, or "the use of law as a weapon of war."[24] Recent examples of this phenomenon abound[25] and many LOAC scholars argue that the current LOAC regime in fact encourages non-compliance and incentivizes fighters to use the LOAC as a shield to give them an advantage when fighting LOAC-compliant forces.[26]

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23. *See* Kenneth Anderson & Matthew Waxman, *Law and Ethics for Robot Soldiers*, POL'Y REV. (Dec. 1, 2012), http://www.hoover.org/publications/policy-review/article/135336 (making a similar argument very effectively with respect to autonomous weapon systems); Louise Arbour, *10 Conflicts to Watch in 2013*, FOREIGN POLICY (Dec. 27, 2012), http://www.foreignpolicy.com/articles/2012/12/27/10_conflicts_to_watch_in_2013 (pointing to the principles of distinction between civilians and combatants and collateral damage from advanced technology as two pressures on the LOAC). *But see* Brad Allenby & Carolyn Mattick, *Why We Need New Rules of War*, SLATE (Nov. 12, 2012), http://www.slate.com/articles/technology/future_tense/2012/11/drones_cyberconflict_and_other_military_technologies_require_we_rewrite.html.

24. *See* Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, HARVARD PROGRAM ON NATIONAL SECURITY AND HUMAN RIGHTS, WORKSHOP PAPERS: "HUMANITARIAN CHALLENGES IN MILITARY INTERVENTION" 4, 5 (2001), *available at* http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf; MICHAEL N. SCHMITT, THE IMPACT OF HIGH AND LOW-TECH WARFARE ON THE PRINCIPLE OF DISTINCTION, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, INT'L HUMANITARIAN LAW RESEARCH INITIATIVE BRIEFING PAPER, 1, 7 (November 2003), *reprinted in* INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY'S CONFLICTS: CHANGES AND CHALLENGES (Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005).

25. The recent war in Iraq illustrates many examples. Tony Perry & Rick Loomis, *Mosque Targeted in Fallouja Fighting*, L.A. TIMES (Apr. 27, 2004), http://articles.latimes.com/print/2004/apr/27/world/fg-fallouja27 (attacking from protected places and using them as weapons storage sites); *Coalition Forces Continue Advance Toward Baghdad*, CNN (Mar. 24, 2003), http://transcripts.cnn.com/TRANSCRIPTS/0303/24/se.17.html (fighting without wearing a proper uniform); *The Rules of War are Foreign to Saddam*, OTTAWA CITIZEN, Mar. 25, 2003, *available at* LEXIS, Nexis Library, CURNWS File (using human shields to protect military targets); David Blair, *Human Shields Disillusioned with Saddam, Leave Iraq after Dubious Postings*, NATIONAL POST (Canada), Mar. 4, 2003, at A1, *available at* LEXIS, Nexis Library, CURNWS File (same); David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, NAT'L INT. (Sept. 1, 2003), http://nationalinterest.org/article/leashing-the-dogs-of-war-1120) (using protected symbols to gain military advantage); *South Korean Hostage Beheaded in Iraq*, TORONTO STAR, June 23, 2004, *available at* LEXIS, Nexis Library, CURNWS File (murdering prisoners or others who deserve protection); *see also* Michael Sirak, *Legal Armed Conflict*, JANE'S DEF. WKLY, Jan. 14, 2004, at 27 (listing a number of violations of the law of war committed by Iraqi military and paramilitary forces). In each of these cases, an inferior force used the superior force's commitment to adhere to the law of war to their tactical advantage.

26. *See, e.g.*, Dunlap, *supra* note 24, at 6 ("[T]here is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself."); Owens, *supra* note 3, at 70 ("Thus these enemies will try to leverage 'lawfare,' the use of the rules of warfare against the United States (while ignoring these rules themselves), by, for example, taking refuge among the civilian population in an attempt to maximize civilian casualties. In turn, adversaries employing complex

Much of the recent lawfare discussion has centered on backward military opponents or non-state actors who need to use lawfare to overcome asymmetric disadvantages.[27] However, a static and inflexible LOAC will incentivize even developed and powerful nations to use the law as a tool, rather than as a regulator. The Chinese already write of "three warfares" including "legal warfare," which is defined as "arguing that one's own side is obeying the law, criticizing the other side for violating the law, and making arguments for one's own side in cases where there are also violations of the law."[28] This Chinese view portrays the law generally "as a means of enforcing societal (and state) control of the population."[29] Presumably, this would apply to both domestic and international law.

China is, of course, not alone in potentially using lawfare to gain an edge through future technologies. The United States has come under heavy criticism recently for its use of drones in fighting transnational terrorism.[30] Though U.S. and Chinese perspectives on the law may be different,[31] the danger of a static and inflexible approach to the LOAC as future technologies emerge is equally applicable to developed and undeveloped,

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irregular warfare will take advantage of the fact that such casualties are magnified by the proliferation of media assets on the battlefield."); Jason Vest, *Fourth-Generation Warfare*, THE ATLANTIC (Dec. 1, 2001), http://www.theatlantic.com/magazine/archive/2001/12/fourth-generation-warfare/302368/ (discussing Fourth-generation Warfare which includes a recognition of asymmetric operations "in which a vast mismatch exists between the resources and philosophies of the combatants, and in which the emphasis is on bypassing an opposing military force and striking directly at cultural, political, or population targets").

27. The Council on Foreign Relations has defined lawfare as "a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives." *See* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F.L. REV. 1, 78 (2005); *Lawfare, the Latest in Assymetries*, COUNCIL ON FOREIGN REL. (Mar. 18, 2003), http://www.cfr.org/publication.html?id=5772.

28. Dean Cheng, *Winning Without Fighting: Chinese Legal Warfare*, HERITAGE FOUND. (May 21, 2012) http://www.heritage.org/research/reports/2012/05/winning-without-fighting-chinese-legal-warfare.

29. *Id.* The report also states "[n]o strong tradition that held the law as a means of constraining authority itself ever developed in China." *Id.* at 3.

30. Chris Jenks, *Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649, 651 (2010); Thomas Michael McDonnell, *Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists*, 44 GEO. WASH. INT'L L. REV. 243, 246–47 (2012); Owen Bowcott, *UN to Examine UK and US Drone Strikes*, GUARDIAN (Jan. 23, 2013), http://www.guardian.co.uk/world/2013/jan/24/un-examine-uk-afghanistan-drone-strikes; Owen Bowcott, *UN to Investigate Civilian Deaths from U.S. Drone Strikes*, GUARDIAN (Oct. 25, 2012), http://www.guardian.co.uk/world/2012/oct/25/un-inquiry-us-drone-strikes; *see* Robert P. Barnidge, Jr., *A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law*, 30 B.U. INT'L L.J. 409 (2012).

31. *See* Cheng, *supra* note 28, at 6 ("The most important strategic difference between [the United States and China] is that there is little evidence that Chinese analysts and decision-makers see legal warfare as a misuse of the law. Given the much more instrumentalist view of the law in Chinese history, the idea that the law would be employed toward a given end (in support of higher military and national goals) would be consistent with Chinese culture but problematic, if not antithetical, from the Western perspective.").

Western and non-Western nations. The international community needs to take the butterfly's approach and not that of the ostrich. It is only through being proactive and recognizing the pressures that future developments will have on the LOAC (such as where conflicts are fought, by whom they are fought, and the means and methods used to fight) that the LOAC can evolve to avoid increasing lawfare and maintain its role as regulator on the conduct of armed conflict.

B. *Signaling*

The analogy of the ostrich and the butterfly is useful to illustrate the fate of non-evolving principles in the face of a changing technological environment. Indeed, the fate of organisms is often based on their ability to understand environmental signals that are occurring around them. In this way, the analogy would seem to argue that taking a reactive approach to changing circumstances would be sufficient, especially if the reaction comes quickly. In other words, the law need not be proactive, as this Article argues, but can remain reactive, particularly if the international community decreases the reaction time and makes changes quickly in response to technological developments.

This argument might appear to be especially true in the case of international law generally, and the LOAC specifically, since they are so heavily dependent on state practice and preferences. These areas of the law develop based mainly on consensual agreements between states and also on the activities of states, particularly when done through a sense of legal obligation. These twin sources of international law are complemented by other general principles of law recognized by civilized nations such as equity, judicial decisions, and the teachings of the most highly qualified publicists.[32] As technologies develop, states will have time to consider their potential application to armed conflict and then deliberate on the best way to apply the law to changing circumstances. If nothing else, this approach will certainly maintain the maximum freedom to maneuver for states that are developing new technologies.

This approach would continue millennia of LOAC formulation where custom ripened over time. Increasing the speed with which actions ripen

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32. See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute], which states:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

into customary international law would also be beneficial. However, relying solely on quick reaction to technological developments ignores the vital signaling role that the LOAC plays in the development of state practice.

The signaling value of the LOAC is clear from the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (GPI). Article 36 of GPI, titled "New weapons," states:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.[33]

This article requires every state that is contemplating developing a new technology or weaponizing an existing technology to ensure that such development complies with the LOAC. In other words, the LOAC signals to states what is permissible and what is not even at the stage of study and development of new weapons.[34]

U.S. practice in this area is very clear. Even prior to GPI coming into effect, the United States required such a review,[35] and it is now codified in Department of Defense Directive 5000.01, which states:

> The acquisition and procurement of DoD weapons and weapon systems shall be consistent with all applicable domestic law and treaties and international agreements (for arms control agreements, see DoD Directive 2060.1 (Reference (lm), customary international law, and the law of armed conflict (also known as the laws and customs of war). An attorney authorized to conduct such legal reviews in the Department shall conduct the legal review of the intended acquisition of weapons or weapons systems.[36]

Each military service has an attorney designated to do such reviews.[37]

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33. Protocol I, *supra* note 9, art. 36; *cf.* Duncan Blake & Joseph S. Imburgia, *"Bloodless Weapons"? The Need to Conduct Legal Reviews of Certain Capabilities and the Implications of Defining Them as "Weapons"*, 66 A.F. L. REV. 157, 159, 161 (2010) (discussing the application of legal reviews to certain future and developing weapons).

34. Neil Davison, *How International Law Adapts to New Weapons and Technologies of Warfare*, INTERCROSS BLOG (Dec. 4, 2012), http://intercrossblog.icrc.org/blog/how-international-law-adapts-new-weapons-and-technologies-warfare.

35. GEOFFREY S. CORN, ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 203 (2012).

36. Dept. of Def. Directive 5000.01, The Defense Acquisition System ¶ E1.1.15 (D.O.D. 2003) (Certified Current as of Nov. 20, 2007), *available at* http://www.dtic.mil/whs/directives/corres/pdf/500001p.pdf.

37. For an example of a weapon review, see CORN, ET AL., *supra* note 35, at 228–31 (2012).

This requirement would clearly apply to all new and developing technologies that states may be considering. In such cases, the proposed weapon or means or method of warfare would be reviewed by a legal adviser who would determine its legality under the current law. In many cases, this review might be quite easy. However, it is here that Harold Koh's quote from the beginning of this Article[38] is most relevant. The legal adviser performing the review will look to the current LOAC for signals as to the legality of a proposed weapon, but that may prove difficult if the existing law does not adequately apply to the future weapon. In the absence of apparently applicable law, each legal adviser or nation is left to a discretionary decision that may lead to uneven application of LOAC constraints.

In addition to the legal review at the research and development stage, the law also requires a legal review at the point the weapon is employed. Article 82 of the same Protocol, titled "Legal Advisers in Armed Forces," states:

> The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the *appropriate* instruction to be given to the armed forces on this subject.[39]

It is clear from this provision that an otherwise lawful weapon can be employed in an unlawful way. Additionally, advanced technologies might provide tactical options that otherwise do not exist. In each case, the legal adviser must be available to the commander to provide legal advice, but the legal adviser will be looking to the LOAC for signals as to how to apply the LOAC in that specific situation. If the law is not specific to that potential employment or tactic, the legal adviser must be able to extrapolate existing rules to new technologies.

The recent development and deployment of cyber weapons demonstrates that applying existing rules to new technologies will present difficulties. Over the past decade, numerous statements and articles have been written on the application of the law to cyber operations, often coming out with different conclusions. Some have argued that existing law is sufficiently flexible to respond to new technologies such as cyber capabilities,[40]

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38. Koh, *supra* note 1 ("Increasingly, we find ourselves addressing twenty-first century challenges with twentieth-century laws.").

39. Protocol I, *supra* note 9, art. 86 (emphasis added).

40. Michael N. Schmitt, *IHL Challenges Series—Part III on New Technologies*, INTERCROSS (June 17, 2013), http://intercrossblog.icrc.org/blog/ihl-challenges-series-part-iii-new-technologies; *cf.* Cordula Droege, *Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians*, 94 INT'L REV. RED CROSS 533 (2012).

while others argue that a whole new set of rules should be written to provide proper guidance.[41]

In response to this ongoing debate, a group of international LOAC experts embarked on a three-year process to determine how the LOAC applied to cyber operations.[42] Headed by Michael N. Schmitt, a renowned cyber scholar,[43] the experts found that they had to interpret or evolve the law in certain areas for it to sufficiently provide guidance to cyber operators. For example, most of the experts determined that the traditional definition of "attack" was insufficient to determine when the LOAC applied to cyber activities. Instead, a cyber action that affected the functionality of a cyber system might also be considered an attack.[44]

This example is representative of similar difficulties that will occur as new technologies are developed and used. For example, in the scenario quoted from *The Atlantic* at the beginning of this article, would the employing of the virus in the proposed way violate the principle of distinction, even though it was absolutely discriminating in the attack? Similar issues will be raised below.

There is no doubt that legal advisers have been extrapolating rules to new technologies throughout history. But as will be shown below, the kinds of technological advances in weapons and tactics will be unprecedented over the next few decades, applying tremendous stresses on the LOAC. Because of the important signaling role the LOAC plays in providing guidance to states and their legal advisers, particularly during research and development, the international community needs to begin now to analyze these future weapons and tactics and proactively provide guidance on the application of the LOAC to future armed conflict.

II. THE FUTURE OF THE LAW OF ARMED CONFLICT

The nature of armed conflict, and of the causes and consequences of such conflict, is continuing to evolve. IHL must evolve too.[45]

Jakob Kellenberger's statement above, as the president of the ICRC, reflects the fundamental need to evolve IHL to the changing nature of armed conflict. The ICRC's approach is not in disagreement with that of

41. Alireza Miryousefi & Hossein Gharibi, *View from Iran: World Needs Rules on Cyberattacks*, CHRISTIAN SCIENCE MONITOR (Feb. 14, 2013), http://www.csmonitor.com/Commentary/Opinion/2013/0214/View-from-Iran-World-needs-rules-on-cyberattacks-video; Jody R. Westby, *We Need New Rules for Cyber Warfare*, N.Y. TIMES (Mar. 1, 2013), http://www.nytimes.com/roomfordebate/2013/02/28/what-is-an-act-of-cyberwar/we-need-new-rules-of-engagment-for-cyberwar.

42. THE TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 1 (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL]. Note that the author was one of the participants in the formulation of the Manual.

43. *Michael N. Schmitt: Faculty Profile*, U.S. NAVAL WAR C., https://www.usnwc.edu/Academics/Faculty/Michael-Schmitt.aspx (last visited Mar. 9, 2014).

44. TALLINN MANUAL, *supra* note 42, at 156–159.

45. Kellenberger, *supra* note 22.

the International Court of Justice (ICJ), as stated in the 1996 Nuclear Weapons Advisory Opinion:

> However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present, and those of the future.[46]

The assumption that the "intrinsically humanitarian character of the legal principles" of the LOAC applies to future forms of warfare does not mean that the principles cannot evolve. Rather, the decision by the ICJ that the new technology of nuclear weapons continued to be regulated by the LOAC demonstrates that the ICJ views the law as adaptive to new weapon systems even on LOAC's core fundamental principles.

Many commentators have discussed the need for change in various aspects of the laws applicable to the initiation and continuation of armed conflict,[47] including the division of international law into *jus ad bellum* and

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46. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 259, ¶ 86 (July 8).

47. *See* Brooks, *supra* note 5, at 684 ("In the long run, the old categories and rules need to be replaced by a radically different system that better reflects the changed nature of twenty-first century conflict and threat."); Interview with Peter W. Singer, Senior Fellow, the Brookings Institute, *available at* http://www.abc.net.au/lateline/content/2012/s3442876.htm ("I think the way to think about this is that when we look at the laws of war that are set for—that are supposed to guide us today, they date from a year when the most important invention was the 45 RPM vinyl record player. We don't listen to music on vinyl record players anymore. I'm guessing a lot of the audience might never have listened to music on a vinyl record player anymore. And yet, the laws of war from that year, we still try and apply today. And so it doesn't mean that the laws of war, you know, you need to throw them out, but it does mean that they're having a real hard time."); *see also* Sylvain Charat, *Three Weapons to Fight Terror*, WASH. TIMES (Sept. 9, 2004), http://www.washingtontimes.com/news/2004/sep/8/20040908-085545-9034r/. Judge George H. Aldrich identified "those aspects of the law that are most in need of further development in the early years of the next century" for international armed conflicts as:

> (1) entitlement of those who take up arms to combatant and prisoner-of-war status;
>
> (2) protection of noncombatants from the effects of hostilities; and
>
> (3) compliance mechanisms, including external scrutiny, repression and punishment of offenses, and the right of reprisal; and
>
> in other armed conflicts—
>
> (1) the extent of regulation by international law when those conflicts are noninternational; and
>
> (2) the applicability of international law when those conflicts are partly international and partly noninternational.

jus in bello,[48] evolution of law to accommodate potential need for preemptive self-defense,[49] the bifurcation of the LOAC between international armed conflicts and non-international armed conflicts,[50] the application of the law to state and non-state actors,[51] and the geographic applicability and limitations of the LOAC to the "active conflict zone,"[52] to name just a few. P.W. Singer framed the question nicely when he asked, "[h]ow do we catch up our twentieth century laws of war that are so old right now they qualify for Medicare to these twenty-first century technologies?"[53]

The prescriptions for solving the current problem include calls for specific adjustments to discrete areas of the current LOAC, but Rosa Brooks has argued for "a radical reconceptualization of national security law and the international law of armed conflict."[54] If catching the law up to current technologies, strategies, and tactics requires a "radical reconceptualization" of the LOAC, it certainly behooves the international community to be proactive in anticipating the future evolution of the LOAC to accommodate changes in future armed conflict.

The next Part of this article will briefly analyze elements of the future battlefield, focusing on "places," or where conflicts are fought; "actors," or by whom they are fought; and "means and methods," or how they are fought. The purpose of the analysis is to highlight areas of the LOAC that will struggle to deal with the future changes that are likely to occur, and to

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George H. Aldrich, *The Hague Peace Conferences: The Laws of War on Land*, 94 AM. J. INT'L L. 42, 42 (2000).

48. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1 (2004); Sean D. Murphy, *Protean Jus ad Bellum*, 27 BERKELEY J. INT'L L. 22 (2009); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47 (2009).

49. W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82 (2003).

50. Brooks, *supra* note 5, at 711–14; Jensen, *supra* note 21; Francisco Forrest Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*, 64 SASK. L. REV. 347 (2001); Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499 (2005).

51. Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives, and Targeted Killing*, 15 DUKE J. COMP. & -INT'L L. 281, 281 (2005) ("The conduct of military operations at the commencement of the 21st century has also shone a bright spotlight on traditional tensions in humanitarian law, such as the application of that law to conflicts between state and non-state actors.").

52. Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, 161 U. PA. L. REV. 1165, 1212; Frédéric Mégret, *War and the Vanishing Battlefield*, 9 LOY. U. CHI. INT'L L. REV. 131 (2011).

53. Singer, *supra* note 11.

54. Brooks, *supra* note 5, at 747. The author further states that "it is becoming more and more difficult to know how to characterize, as a matter of law, the kinds of threats that increasingly face the U.S. and other nations, and it is therefore becoming harder and harder to determine the appropriate legal responses to these threats. The old categories have lost their analytical and moral underpinnings, but we have not yet found alternative paradigms to replace them." *Id.* at 744.

begin a discussion on how the LOAC needs to evolve to maintain its ability to regulate armed conflict in the future.

A. *Places*

The traditional paradigm of armed conflict assumes that at any given time, it will be readily apparent where the armed conflict is taking place, and where it is not. To put it another way, the traditional paradigm assumes clear spatial boundaries between zones of war and zones of peace.[55]

For the entire history of mankind, armed conflict has been confined to breathable air zones—the land, the surface of the ocean, and recently the air above the land in which land-based aircraft can fly. Additionally, the post-Westphalian system was built on the foundation of state sovereignty and the clear demarcation and control of borders.[56] Armed conflicts occurred within specific spatial and temporal limits. As a result, the laws governing armed conflict have been built around certain presumptions about where armed conflict will occur. In the future, these presumptions will no longer be true. The LOAC will have to adjust to account for the emerging factors affecting where armed conflicts take place.

1. Emerging Factors

As technology advances, armed conflict will no longer be restricted to breathable air zones. Instead, it will occur without respect to national borders, underground, on the seabed, in space and on celestial bodies such as the moon, and across the newly recognized domain of cyberspace.[57]

a. Global Conflict

The phenomena of global conflict has already begun to stress the LOAC[58] as the United States has struggled to confront a transnational non-state terrorist actor that does not associate itself with geographic boundaries. As will be discussed in Subsection B, the ability to communicate globally through social media will likely produce organized (armed) groups that will not be bound by geographic boundaries and as such will not see themselves as representing a specific geographic collective. Rather, the boundaries will revolve around affiliations, interests, and ideologies. As Mack Owens has written:

> Thus multidimensional war in the future is likely to be characterized by distributed, weakly connected battlefields; unavoidable urban battles and unavoidable collateral damage exploited by the

55. *Id.* at 720.

56. Jensen, *supra* note 21, at 707–09.

57. *See* David Alexander, *Pentagon to Treat Cyberspace as "Operational Domain"*, REUTERS (Jul. 14, 2011), http://www.reuters.com/article/2011/07/14/us-usa-defense-cybersecurity-idUSTRE76D5FA20110714.

58. Mégret, *supra* note 52, at 132 (arguing that the "death of the battlefield significantly complicates the waging of war and may well herald the end of the laws of war as a way to regulate violence").

> adversary's strategic communication; and highly vulnerable rear areas. On such battlefields, friends and enemies are commingled, and there is a constant battle for the loyalty of the population.[59]

This issue is amply illustrated through the U.S. practice of drone strikes on terrorists associated with al-Qaeda but not located in Afghanistan.[60] The focused outcry about U.S. reliance on authorities granted by the law of armed conflict even though outside the geographic confines of the recognized battlefield[61] highlights the current paradigm's assumptions about the LOAC's applications to territory. As global communications allow participants in armed conflict to be more widely dispersed across the world, it is unlikely that states will allow themselves to be attacked by transnational actors because they are not located within a specific geographic region that has been designated as the "battlefield."

b. Seabed

Currently the seabed and even non-surface waters have seen very little armed conflict.[62] Submarine vessels have engaged surface vessels but there has been almost no conflict between submarines and none from the seabed. This is likely to change dramatically with technological improvements. For example, China has developed submersibles that can reach 99.8 percent of world's seabed.[63] As more and more underwater vehicles become unmanned, the need for breathable air dissipates. Underwater drones will almost certainly become armed and underwater engagements will quickly follow.

Similarly, the seabed will likely become militarized, once the need for air is erased. Not only could sensors be used to track surface and subsurface traffic, but also armaments will likely soon follow and the seabed will become another area where states will employ weapons systems.

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59. Owens, *supra* note 3, at 71.

60. Cora Currier, *Everything We Know So Far About Drone Strikes*, PROPUBLICA (Jan. 22, 2013), http://www.propublica.org/article/everything-we-know-so-far-about-drone-strikes.

61. Daskal, *supra* note 52.

62. Two treaties provide limitations on certain military activities on the sea bed. *See* Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water, Aug. 5, 1963, T.I.A.S. No. 5433, 480 U.N.T.S. 43; Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115 [hereinafter Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Sea-Bed]. These agreements, however, only apply to nuclear weapons and do not limit the transport or use of nuclear weapons in the waters above the seabed.

63. Gordon G. Chang, *China Explores the Seabed Near America*, WORLD AFF. (July 25, 2011), http://www.worldaffairsjournal.org/blog/gordon-g-chang/china-explores-seabed-near-america.

c. Subterranean

Similar to the seabed, the ability to place weapons systems underground and employ them effectively against an enemy is beginning to develop.[64] Not only is it almost certain that underground weapons will attack surface targets, but it is also clear that they could be used to create surface effects through underground explosions and other means of manipulation. This will probably include the creation of earthquakes, tsunamis, and other surface effects that will severely affect an enemy. This portion of the earth is currently not weaponized,[65] but it will be in the future.

d. Space and Celestial Bodies

Space and the free use of space have become vital to the functioning of the modern military. In fact, "[a] Government Accountability Office report . . . showed major Defense space acquisition programs 'have increased by about $11.6 billion'—321 percent—from initial estimates for fiscal years 2011 through 2016."[66]

U.S. Air Force Gen. William Shelton, who is the head of Space Command, recently stated that "[o]ur assured access to space and cyberspace is foundational to today's military operations and to our ability to project power whenever and wherever needed across the planet."[67] Similarly, Army Lt. Gen. Richard Formica stated, "If the Army wants to shoot, move or communicate, it needs space."[68] Formica added that because of the Army's dependency on these systems, they "have to be defended."[69]

These quotes refer mostly to the use of satellites, but despite current legal restrictions, it is very likely that the use of the moon and potentially other celestial bodies will soon follow.[70] Space systems such as satellites

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64. *See* Geoff Manaugh, *Drone Landscapes, Intelligent Geotextiles, Geographic Countermeasures*, BLDG BLOG (Jan. 11, 2012), http://bldgblog.blogspot.com/2012/01/drone-landscapes-intelligent.html.

65. *See* Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Sea-Bed, *supra* note 62.

66. Walter Pincus, *Hearings Show Our Dependence on Military Space Technology*, WASH. POST (Mar. 26, 2012), http://articles.washingtonpost.com/2012-03-26/world/35448260_1_military-space-space-command-aehf.

67. *Id.*

68. *Id.*

69. *Id.*

70. The 1967 Outer Space Treaty limits military activities in outer space. Article IV states:

> States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.
>
> The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military per-

can be defended and attacked both from space and from the ground. Both China and the United States have conducted recent anti-satellite operations and established that both have that capability.[71] Space has already begun to be weaponized[72] and that trend will continue and increase in speed and lethality.

e. Cyberspace

Much has already been written about cyberspace. The Chinese have created a separate department of their military to handle the military aspects of cyberspace.[73] The United States recently created Cyber Command to specifically plan and control U.S. military cyber operations.[74] Army General Keith Alexander not only commands Cyber Command but also heads the National Security Agency.[75] Currently, 140 nations either already have or are actively building cyber capabilities within their military,[76] with Brazil being one of the most recent to make that decision.[77]

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sonnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the Moon and other celestial bodies shall also not be prohibited.

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

71. Amy Chang, *Indigenous Weapons Development in China's Military Modernization*, U.S.-China Econ. & Sec. Rev. Commission (Apr. 5, 2012), http://www.uscc.gov/researchpapers/2012/China-Indigenous-Military-Developments-Final-Draft-03-April2012.pdf; Angela Webb, *Joint Effort Made Satellite Success Possible*, Free Republic (Feb. 26, 2008), http://www.freerepublic.com/focus/f-news/1976747/posts; *Concern Over China's Missile Test*, BBC News (Jan. 19, 2007), http://news.bbc.co.uk/2/hi/asia-pacific/6276543.stm.

72. Blake & Imburgia, *supra* note 33, 173–76; Jameson W. Crockett, *Space Warfare in the Here and Now: The Rules of Engagement for U.S. Weaponized Satellites in the Current Legal Space Regime*, 77 J. Air L. & Com. 671 (2012).

73. Tania Branigan, *Chinese Army to Target Cyber War Threat*, The Guardian (July 22, 2010), http://www.guardian.co.uk/world/2010/jul/22/chinese-army-cyber-war-department.

74. Andrew Gray, *Pentagon Approves Creation of Cyber Command*, Reuters (June 23, 2009), http://www.reuters.com/article/2009/06/24/us-usa-pentagon-cyber-idUSTRE55M78920090624.

75. *Biography: Director of the NSA/CSS*, Nat'l Sec. Agency, http://www.nsa.gov/about/leadership/bio_alexander.shtml (last visited Mar. 9, 2014).

76. Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Casualties*, 13 SMU Sci. & Tech. L. Rev. 249, 249 (2010); Graham H. Todd, *Armed Attack in Cyberspace: Deterring Asymmetric Warfare with an Asymmetric Definition*, 64 A.F. L. Rev. 65, 96 (2009).

77. Pedro Ozores, *Eyeing Major Events, Brazil to Form Body to Fight Cyber Attacks*, BNAmericas (Dec. 28, 2012), http://www.bnamericas.com/news/technology/eyeing-major-events-brazil-to-form-body-to-fight-cyber-attacks.

Recent revelations concerning Stuxnet[78] and Flame[79] make it clear that nations are already using cyberspace to conduct military activities that cause harm similar to kinetic operations. Nations are also stealing technologies and trade secrets through cyber operations.[80] These cyber thefts have not yet been equated with an attack but may be so treated in the future as the seriousness of the thefts continues and increases. Cyberspace has certainly been militarized by states and will continue to be so, and on an increasing basis.[81]

One of the most important aspects of cyberspace is that, unlike the weaponization of space or the seabed, it does not require a nation to conduct "military" activities in cyberspace. There are numerous examples of private hackers, organized groups, and business organizations using the Internet to do great harm to both private and public entities.[82] The accessibility of the militarization of cyberspace makes it somewhat unique in the future of armed conflict, which will be discussed below.

Most important for this discussion is the lack of boundaries in cyberspace. While the computer used to conduct the "attack" must be in one geographic location and work through a server in a specific geographic location, the lethal electrons will traverse many nations in their path to the requested destination. Further, to this point, states have been unwilling to take responsibility for cyber "attacks" that emanate from within their geographic boundaries,[83] leaving only criminal process as the means of seeking redress for non-state-actor-sponsored attacks, a process that has seldom proven successful.[84]

2. Emerging Law

The emerging factors discussed above will create stress on the current underpinnings and general principles of the LOAC. Fundamental ideas, such as territorial sovereignty, upon which the state-centric LOAC is based, will diminish in importance. The current doctrine of neutrality will

78. Amr Thabet, *Stuxnet Malware Analysis Paper,* CODEPROJECT (Sept. 9, 2011), http://www.codeproject.com/Articles/246545/Stuxnet-Malware-Analysis-Paper.

79. *Full Analysis of Flame's Command and Control Servers*, SECURELIST (Sept. 17, 2012, 1:00 PM), http://www.securelist.com/en/blog/750/Full_Analysis_of_Flame_s_Command_Control_servers.

80. *See, e.g.*, Peter Foster, *China Chief Suspect in Major Cyber Attack*, DAILY TELEGRAPH (Aug. 3, 2011), http://www.telegraph.co.uk/technology/news/8679658/China-chief-suspect-in-major-cyber-attack.html.

81. Noah Shachtman, *DARPA Looks to Make Cyberwar Routine with Secret "Plan X"*, WIRED, (Aug. 21, 2012), http://www.wired.com/dangerroom/2012/08/plan-x/.

82. Mathew J. Schwartz, *Anonymous Attacks North Korea, Denies Targeting South*, INFO. WEEK (June 25, 2013), http://www.informationweek.com/security/attacks/anonymous-attacks-north-korea-denies-tar/240157253; *Global Network of Hackers Steal $45 Million from ATMs*, CNBC (May 10, 2013), http://www.cnbc.com/id/100726799.

83. *See, e.g.*, *The Cyber Raiders Hitting Estonia*, BBC NEWS, May 17, 2007, http://news.bbc.co.uk/2/hi/europe/6665195.stm.

84. *See, e.g.*, Clifford J. Levy, *What's Russian for 'Hacker'?*, N.Y. TIMES (Oct. 21, 2007), http://www.nytimes.com/2007/10/21/weekinreview/21levy.html?pagewanted=all&_r=0.

be impossible to apply. Certain specific international agreements that impact the LOAC will likely be ignored or abrogated as technological capabilities increase. As these stresses develop, the LOAC will need to adjust to maintain its relevance to future armed conflicts.

a. Territorial Sovereignty

Since the inauguration of the Westphalian system, one of the indicia of statehood is a designated territory. This was memorialized in the Montevideo Convention[85] and has been part of recent discussions on statehood in both Kosovo[86] and Palestine.[87] Assumed in this attachment of territory to statehood is the authority and obligation to control that territory, including the use of force within designated borders and the use of force from within designated borders that will have effects outside the territory.[88]

It is this assumption that led to the bifurcation of the LOAC into rules governing international armed conflicts (IACs) and separate rules governing non-international armed conflicts (NIACs).[89] When the United States was faced with conducting an armed conflict with a transnational actor after the terrorist attacks of 9/11, it struggled to apply the appropriate rules.[90] It seems clear that applying the NIAC rules to a transnational armed conflict was clearly outside the meaning of the Geneva Conventions as originally signed.[91] Despite this, the U.S. Supreme Court eventually determined that certain LOAC provisions formed a minimum set of rights that applied to all armed conflicts, regardless of unbounded geography.[92]

It is almost certain that armed conflicts in the future will continue to be carried out by organized groups who will be found outside a limited geographic scope. To the extent that the LOAC would prevent the applica-

85. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 LNTS 19.

86. William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115 (2009).

87. JOHN QUIGLEY, THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT 209–11 (2010).

88. *See* PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 81–90, 96–118 (2002); Frederic Gilles Sourgens, *Positivism, Humanism, and Hegemony: Sovereignty and Security for Our Time*, 25 PENN. ST. INT'L L. REV. 433, 443 (2006) (citing sixteenth-century writer Bodin as defining sovereignty as "the absolute and perpetual power of the commonwealth resting in the hands of the state").

89. *See generally* Jensen, *supra* note 21; James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313 (2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PYAXX/$File/irrc_850_Stewart.pdf (describing the history of the development of the Geneva Conventions).

90. Jensen, *supra* note 21, at 685–88.

91. ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 36–39 (2010).

92. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628–32 (2006).

tion of force in accordance with current U.S. practice, a reinterpretation of the LOAC will be necessary. Additionally, the specific application of LOAC provisions, such as non-movement of security detainees,[93] would need to be reinterpreted in light of transnational groups during armed conflict.

Future conflicts will also raise questions about the ability of states to control the use of force from within their territory during armed conflicts in the same way as they currently do. For example, even now, during peacetime, nations have claimed that they cannot be responsible for cyber activities that emanate from within their borders.[94] The obligation to prevent transboundary harm that was clearly articulated in the Trail Smelter Arbitration,[95] and made applicable to situations of armed conflict in the Corfu Channel case,[96] has not prevented states from disclaiming responsibility for cyber actions from within their borders during armed conflict.[97]

As will be discussed below, the globalization of social networking will allow linkages between people of many different nationalities who might take forceful actions during armed conflict. These individuals will be acting not as citizens of any particular country but as members of transnational ideological groupings, and nations will find these individuals difficult to control. While the inability of a state to control all the actions of its individual residents is not new, the capability for those residents to readily harness state-level violence, such as cyber tools, and then direct that state-level violence across boundaries is relatively new and will only become more possible with technological advances.

The transnational nature of fighters and the decreasing ability of states to control the emanation of state-level violence from within their sovereign territory will likely frustrate the current understanding of the application of the LOAC. The idea of a geographically limited conflict is difficult to maintain when organized (social networking) groups are using state-level violence from multiple (neutral) states across the world.[98]

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93. Geneva Convention, *supra* note 18, art. 49.

94. Shashank Bengali, Ken Dilanian & Alexandra Zavis, *Chinese Cyber Attack Disclosures*, L.A. TIMES (June 5, 2013),http://timelines.latimes.com/la-fg-china-cyber-disclosures-timeline/; *see also*, *Cyber Intelligence: Setting the Landscape for an Emerging Discipline*, INTELLIGENCE & NAT'L SEC. ALLIANCE 8 (Sept. 2011), https://images.magnetmail.net/images/clients/INSA/attach/INSA_CYBER_INTELLIGENCE_2011.pdf.

95. Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1965–66 (1941).

96. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

97. *See* John Markoff, *Before the Gunfire, Cyberattacks*, N.Y. TIMES (Aug. 12, 2008), http://www.nytimes.com/2008/08/13/technology/13cyber.html.

98. *See* Mathew J. Schwartz, *Anonymous Takes Down North Korean Websites*, INFORMATIONWEEK (Apr. 16, 2013), http://www.informationweek.com/security/attacks/anonymous-takes-down-north-korean-websit/240152985 (describing the hacktivist group Anonymous's disruption of North Korean websites).

b. Neutrality

As implied above, the doctrine of neutrality will also come under pressure in future conflicts where the geography of the battlefield is less confined. States that are not participants in armed conflict and that wish to maintain their neutrality will find it difficult to effectively do so when individuals' actions from within their geographic borders will involve state-level violence. For example, assume a citizen of a neutral country decides to conduct a cyber attack against one of the belligerent countries. To maintain its neutrality, the neutral country must prevent such attacks.[99] Alternatively, the attacked country may use self-help to stop the attacks. This is not new.[100] However, what is new is the level of violence that individuals can readily muster and the global scale of organization and reach of these individual participants.

When individuals from eighty neutral countries can organize themselves to attack simultaneously and instantaneously with state-level violence at different targets in the belligerent state, the doctrine of neutrality and a belligerent's ability to respond become almost meaningless. The belligerent state may not have time to determine the neutral state's willingness or ability to intervene or stop the attack. Under the current LOAC doctrine of neutrality, such activities would likely lead to the belligerent declaring the neutral as a hostile party to the conflict.[101]

Additionally, when an individual launches a cyber attack, the malware will inevitably flow through the infrastructure of neutral states. Under Article 8 of Hague V, "A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals."[102] This provision is one of the very few codified provisions in the LOAC that refer to neutrality and electronic communications. Yet, when considering Article 8 specifically, the group of experts who wrote the Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual) could not agree on its specific applicability to cyber operations.[103] The experts did agree that the provisions of the LOAC applicable to neutrality were difficult to apply in the context of cyber war and "need to be interpreted."[104] This approach by the Tallinn

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99. Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 5, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654 [hereinafter Hague Convention (V)].

100. *See* U.S. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, ch. 7.3 (2007) [hereinafter COMMANDER'S HANDBOOK]; R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938); Catherine Lotrionte, *State Sovereignty and Self-Defense in Cyberspace: A Normative Framework for Balancing Legal Rights*, 26 EMORY INT'L L. REV. 825 (2012).

101. *See* COMMANDER'S HANDBOOK, *supra* note 100, at ch. 7.2.

102. Hague Convention (V), *supra* note 99, art. 8.

103. TALLINN MANUAL, *supra* note 42.

104. *Id.*; *see generally* Eric Talbot Jensen, *Sovereignty and Neutrality in Cyber Conflict*, 35 FORDHAM INT'L L. J. 815 (2012).

Manual should signal to the international community the need to look more closely at the LOAC, at least within the context of cyberspace, and acknowledge that review and revision is necessary.

c. International Agreements

Finally, though not strictly a matter of the LOAC, there are numerous international agreements that affect the militarization of specific areas and the application of the LOAC to activities in these areas. For example, the Outer Space Treaty limits some military activities in space but has no specific provision prohibiting the use of conventional weapons (or for example, lasers) in outer space that may be used against targets in orbit, on celestial bodies, or on the Earth.[105]

Other treaties[106] also limit or affect the use of Earth's "places" for military purposes. However, these agreements, to the extent that states will continue to follow them in the future, serve only to limit states. As will be discussed below, the actors of armed conflict are going to dramatically change and increase, including a significant variety of non-state entities that will have no legal obligations under these international agreements and may or may not be effectively constrained by states. As emphasized below, the LOAC will have to reach out to these other actors to regulate Earth's "places" during future armed conflict.

B. *Actors*

The potential range of 'new actors' whose actions have repercussions at the international level is of course vast. While many of these 'new actors' have in fact been around for some time, they have called into question—and will continue to call into question—some of the more traditional assumptions on which the international legal system is based.[107]

From the very beginnings of human conflict, fighters have created rules to govern their war-like conduct.[108] As argued by Krauss and Lacey,

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105. *See* Ricky J. Lee, *The Jus Ad Bellum In Spatialis: The Exact Content and Practical Implications of the Law on the Use of Force in Outer Space*, 29 J. SPACE L. 93, 95–98 (2003); *see also* P.J. Blount, *Limits on Space Weapons: Incorporating the Law of War into the Corpus Juris Spatialis*, Int'l Austronautical Fed'n, IAC-08.E8.3.5 (2008); Deborah Housen-Couriel, *Disruption of Satellites ad Bellum and in Bello: Launching a New Paradigm of Convergence*, 45 ISR. L. REV. 431 (2012).

106. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3; Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Sea-Bed, *supra* note 62.

107. Kellenberger, *supra* note 22.

108. *See* William C. Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 641 n.12, 697–710 (2004); Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 182–85 (2000); Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. TOL. L. REV. 111, 114 (2001).

these were rules "written by the utilitarians for the warriors."[109] While the quality and content of these rules ebbed and flowed over time, this progression resulted in a definition of a combatant as an agent for a state that provided authorities for individuals to take part in otherwise illegal conduct (such as killing others) so long as that conduct was in compliance with rules established by the state.[110] Because these rules were initially based on reciprocal application, they established strict qualifications for who could act with this impunity—rules that were codified in the 1899/1907 Hague Convention[111] and in greater detail in the 1949 Geneva Convention for the Protection of Prisoners of War.[112]

Concurrently, the LOAC has developed rules for the treatment of those not acting as fighters but as the victims of armed conflict. The treatment has moved from a point where non-fighters were treated as the spoils of war,[113] to a time when non-fighters were considered part of the targetable enemy,[114] to the current paradigm where militaries are strictly prohibited from targeting civilians,[115] so long as they do not "take a direct part in hostilities."[116]

As a result of these provisions, actors on the battlefield are divided into either combatants or civilians and, in fact, are defined in relation to each other. As Article 50 of GPI states, "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3), and (6) of the Third Convention and in Article 43 of this Protocol."[117] This clean division between two types of battlefield actors is among the current LOAC principles that will be stressed in future armed conflict.

1. Emerging Factors

The seemingly clear bifurcation between combatants and civilians that was established in 1949 was already eroding in the armed conflicts leading up to the 1970s, causing the ICRC to recommend relaxing the require-

109. Eric S. Krauss & Michael O. Lacey, *Utilitarian vs. Humanitarian: The Battle Over the Law of War*, PARAMETERS, Summer 2002, at 73, 73.

110. Jensen, *supra* note 21, at 710–11.

111. Regulations Concerning the Laws and Customs of War on Land, annex to Convention (IV) Respecting the Laws and Customs of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, *available at* http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument [hereinafter Hague Regulations].

112. *See* Geneva Convention, *supra* note 18, at art. 4.

113. 3 THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 45 (Jean S. Pictet ed., 1960), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf [hereinafter Geneva Conventions Commentary].

114. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD arts. 15-25 (1863), *available at* http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument.

115. Protocol I, *supra* note 9, arts. 51.2, 52.1.

116. *Id.* at art. 51.3.

117. *Id.* at art. 50.1.

ments for qualification of a combatant which was then codified in GPI.[118] Recent armed conflicts have demonstrated the difficulty of determining when a civilian takes "a direct part in hostilities."[119]

Future armed conflict will undoubtedly increase the consternation over defining actors on the battlefield. The differentiation between civilians and combatants will become more blurred as global technologies allow linkages and associations among people that were not possible in 1949 or 1977. The following sections analyze emerging factors that will stress LOAC understandings of civilians, organized armed groups, and combatants.

a. Civilians

The current LOAC is clear that "the civilian population as such, as well as individual civilians, shall not be the object of attack . . . unless and for such time as they take a direct part in hostilities."[120] Despite the seeming clarity of the rule, applying the rule to civilians on the future battlefield is surprisingly difficult.[121] This rule will be discussed in two parts below, the first dealing with the prohibition on attacking civilians and the second on the meaning of direct participation in hostilities.

i. Prohibition on Attacking Civilians

Future technologies, such as the virology discussed in the scenario at the beginning of this Article, will be enhanced or facilitated by using the civilian population to either spread or host the eventual weapon. Attackers who use viruses or nanotechnologies or genetic mutators will find their attacks facilitated by using the civilian population to propagate their weapons. The nanobot will be released generally into the population and then trigger its payload based on finding the correct DNA sequence or other similar marker.

Cyber attackers will find the same methodologies useful. They will create malware that spreads broadly throughout civilian systems until it finds the specific computer system it is designed to attack and then conduct its attack. The details on these means and methods will be discussed in greater detail below, but the important aspect of these attacks for this section is that they are facilitated or hosted by civilians or civilian objects.

These types of systems are unlike prior chemical or biological weapons because they do not necessarily have deleterious effects on the host and certainly don't take full effect on the host, but rather save their full

118. *Id.* at art. 44.3. Although there is no official statement on this point, it appears that this provision is one of the reasons that the United States has not ratified Protocol I. *See* Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions,* 2 AM. U. J. INT'L L. & POL'Y 419 (1987).

119. Protocol I, *supra* note 9, art. 51.3.

120. *Id.* at arts. 51.2, 51.3.

121. *See* R. George Wright, *Combating Civilian Casualties: Rules and Balancing in the Developing Law of War*, 38 WAKE FOREST L. REV. 129, 129–36 (2003).

effect for the target. Thus, the civilian or civilian object can facilitate the attack without feeling much, if any, of the effects. This approach to disseminating a weapon system will stress the LOAC as future technologies continue to develop.

ii. Direct Participation in Hostilities

Not all civilians enjoy complete protection from being attacked. As GPI states, civilians forfeit their protection from attack if they take a direct part in hostilities.[122] The actual meaning of these words and their practical application on the battlefield has been a matter of great debate.[123] In response to the debate, the ICRC issued its "Interpretive Guidance on the Notion of Direct Participation in Hostilities"[124] (DPH Guidance), which was intended to provide guidance on what actions by civilians rose to the level of direct participation. While this publication is not without controversy[125] and certainly does not purport to be a statement of the law, it provides an interesting basis for analysis.

The DPH Guidance lays out three cumulative criteria for a civilian to be directly participating.[126] The first is that there must be a certain threshold of harm.[127] The harm should "adversely affect the military operations or military capacity of a party to an armed conflict, or . . . inflict death, injury or destruction on persons or objects protected against direct attack."[128] The second criterion is that there must be direct causation.[129] The act must be designed to directly cause harm, or part of a concrete and coordinated military operation of which the act constitutes an integral part.[130] Finally, there must be a belligerent nexus between the act and the conflict.[131] In other words, the act must be designed to directly cause the required threshold of harm in support of a party to the conflict.[132]

However "direct participation" is defined, future weapons systems and tactics will likely increase the number of civilians who become actors on the battlefield, either intentionally or otherwise. Some examples follow.

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122. Protocol I, *supra* note 9, art. 51.3.

123. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 90 INT'L REV. RED CROSS 991, 993–94 (2008), *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf.

124. *Id.* at 1006–09.

125. Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2010).

126. Melzer, *supra* note 123, at 1016.

127. *Id.*

128. *Id.*

129. *Id.* at 1019.

130. *Id.* at 1019–25.

131. *Id.* at 1025.

132. *Id.* at 1026.

a) Tools

In the scenario from *The Atlantic* at the beginning of this Article, Samantha has no idea that she is playing a role in the attack on the President of the United States. She is undoubtedly an innocent instrumentality or tool in the attack plan. Nevertheless, she is a key component of the attack and her ingestion of the virus and subsequent spreading of the virus is vital to the operation. Is she directly participating in hostilities though she has no intention of taking part? Does her lack of intention make targeting her any less vital?

Many other future means and methods of warfare will use civilians as tools in the attack as well, including genomics and nanotechnologies. Cyber operations already struggle with this issue.[133] The use of civilians as tools to facilitate advanced technological attacks requires a reconsideration of the rules on direct participation.

b) Transnational Communities of Interest

The rise of social networking and its ability to instantaneously link together individuals and groups from across the globe is just beginning to be explored as a social phenomenon. Negative aspects of this global linkage are already being felt across various levels of society, including the business world.[134]

Jeffrey Walker has termed these groups "instantaneous transnational communities of interest" and argues that "It's simply no longer necessary to have a state sponsor for an interested group of people to effect changes within the international community."[135] Anthony Lake, former National Security Advisor to President Clinton, described these instantaneous transnational communities of interest as "technology enabling local groups to forge vast alliances across borders, and . . . a whole host of new actors challenging, confronting, and sometimes competing with governments on turf that was once their exclusive domain."[136]

Social networking's effects on armed conflict have also already begun to surface[137] and will only increase over time. As Philip Bobbitt has writ-

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133. TALLINN MANUAL, *supra* note 42, at 119–20; Collin Allan, *Attribution Issues in Cyberspace*, 13 CHI.-KENT J. INT'L & COMP. L. 55, 57 (2013).

134. BOB HAYES & KATHLEEN KOTWICA, TREND RESEARCH: CRISIS MANAGEMENT AT THE SPEED OF THE INTERNET, SECURITY EXECUTIVE COUNCIL (2013), *available at* https://www.securityexecutivecouncil.com/secstore/index.php?main_page=product_info&cPath=77_66&products_id=361.

135. Jeffrey K. Walker, *Thomas P. Keenan Memorial Lecture: The Demise of the Nation-State, the Dawn of New Paradigm Warfare, and a Future Profession of Arms*, 51 A.F. L. REV. 323, 329–30 (2001).

136. *Id.* at 133, 330 (citing ANTHONY LAKE, 6 NIGHTMARES 281–82 (2000)).

137. *See* George Griffin, *Egypt's Uprising: Tracking the Social Media Factor*, PBS (Apr. 20, 2011), http://www.pbs.org/newshour/updates/middle_east/jan-june11/revsocial_04-19.html.

ten, "The internet enabled the aggregation of dissatisfied and malevolent persons into global networks."[138]

Audrey Kurth Cronin likens social networking to the *levée en masse* and argues that it allows cyber mobilization of people across the entire globe on issues of common ideology.[139] She writes:

> The evolving character of communications today is altering the patterns of popular mobilization, including both the means of participation and the ends for which wars are fought. . . Today's mobilization may not be producing masses of soldiers, sweeping across the European continent, but it is effecting an underground uprising whose remarkable effects are being played out on the battlefield every day.[140]

As social networking continues to embed itself as a societal norm, people will begin to view themselves less as Americans, or Germans, or Iranians, and more as members of global ideologies created, maintained, and mobilized over social media.[141]

Through social media, individuals will be able to recruit, provide financial support, collect intelligence, pass strategies and information, forward ideas and instructions for munitions, create and solidify plans of action, and coordinate attacks. These events will occur far from any existing battlefield but will have profound and immediate effects on hostilities, creating a global group of direct participants who will meet the legal criteria for targeting.

c) Hacktivists

The role of hacktivists has already been demonstrated in conflicts between Russia and Estonia[142] and between Russia and Georgia.[143] Though there has been no evidence to date to attribute these actions to states, David Hoffman argues that "States like China and Russia now encourage groups of freelance hackers to do their dirty work, allowing plausible deniability."[144]

Additionally, other groups of hacktivists, which are clearly not state-sponsored or state-aligned, have been able to apply state-level force and create significant effects in armed conflicts. For example, the global collec-

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138. Philip C. Bobbitt, Inter Arma Enim Non Silent Leges, 45 SUFFOLK U. L. REV. 253, 259 (2012).

139. *See, e.g.*, Audrey Kurth Cronin, *Cyber-Mobilization: The New* Levée en Masse, PARAMETERS, Summer 2006, at 77, 77.

140. *Id.* at 84–85.

141. *See* Thomas J. Holt & Max Kilger, *Examining Willingness to Attack Critical Infrastructure Online and Offline*, 58 CRIME & DELINQUENCY 798 (2012).

142. Allan, *supra* note 133, at 59.

143. *Id.*

144. David E. Hoffman, *The New Virology: From Stuxnet to Biobombs, the Future of War by Other Means*, FOREIGN POL'Y, Mar.-Apr. 2011, *available at* http://www.foreignpolicy.com/articles/2011/02/22/the_new_virology.

tive "Anonymous" has engaged in activities against states during armed conflict with the intent to influence government behavior.[145]

Because hacktivists participate along a spectrum of activities with varying associations, it is very difficult to determine each individual's level of participation. Unless the collective work of a hacktivist group rises to the level of an organized armed group (see below), it is difficult to treat it as a collective when making targeting determinations. Many individuals, though part of the organization, may just be tools (see above) on any specific operation.

In addition to groups, individuals often act alone in this capacity and can also cause great damage. One of the first monumental "hacks" in the United States was the "solar sunrise," which ended up being the work of three individuals—a man in Israel and two teenagers in California.[146]

Hacktivism is unique to computer operations, but civilian activism is not. As the world progresses toward future armed conflict, activists and activist groups in other areas will certainly coalesce. Genomics and nanotechnology will have their own Cap'n Capsid and the international community will have to figure out how to deal with them under the LOAC.

d) "Arms" Dealers

As is discussed below in Section II(C), a wide variety of new means and methods of warfare will emerge as future technologies develop. Similar to computer malware from the hacktivists of the prior section and bioengineers from the scenario at the beginning of this article, some of these new technologies will not be limited to development by states. Some will be developed and marketed by individuals, organized groups, criminal organizations, and corporations. There is already a large market for cyber "arms" that is very lucrative and is sourced almost exclusively by non-state actors.[147]

Some of these arms dealers may also be users of the arms, which will make their legal classification simpler; but many will not be users, but mere producers. For them, this will be a business opportunity, just as it is for many contemporary arms dealers who deal in traditional arms. However, the spread of technology and the needs of future armed conflict will open this line of work to a much broader and previously innocuous group of individuals. At some point, do these creators of modern arms become

145. *See* Jana Winter & Jeremy A. Kaplan, *Communications Blackout Doesn't Deter Hackers Targeting Syrian Regime*, FOX NEWS (Nov. 30, 2012), http://www.foxnews.com/tech/2012/11/30/hackers-declare-war-on-syria/#ixzz2Ht69GA1J.

146. Kevin Poulsen, *Solar Sunrise Hacker 'Analyzer' Escapes Jail*, THE REGISTER (June 15, 2001), http://www.theregister.co.uk/2001/06/15/solar_sunrise_hacker_analyzer_escapes/. The FBI made a documentary about the hacks. Fed. Bureau of Investigation, *Solar Sunrise Documentary*, SECURITY TUBE, http://www.securitytube.net/video/189 (last visited Mar. 9, 2014).

147. *See* Michael Riley & Ashlee Vance, *Cyber Weapons: The New Arms Race*, BUSINESS WEEK (July 20, 2011), http://www.businessweek.com/magazine/cyber-weapons-the-new-arms-race-07212011.html.

participants in the conflict? If not, can they assume that they can continue to take these actions with relative impunity?

e) Nongovernmental Organizations

Nongovernmental organizations (NGOs) deserve mention here also. Though they are unlikely to become actors on the future battlefield, they are expanding their participation in international governance.[148] One need only look at their efforts in the area of anti-personnel landmines to see how significant an effect NGOs can have in the formulation and alteration of the LOAC.[149] It seems likely that the trend of greater influence by NGOs will increase and that as the international community struggles to evolve the LOAC in response to future places, actors, and means and methods of warfare, NGOs will have a seat at the table. Their involvement in law formulation may provide a vehicle for the incorporation of each NGO's individual agenda, whatever that may be. While this may or may not result in positive effects on LOAC development, the point is that NGOs' role is increasing which is likely to lead to different results than in the past.

b. Organized "Armed" Groups

One of the great clarifications urged by the DPH Guidance is the recognition that civilians often form themselves into organized armed groups and that membership in these groups should result, to varying degrees, in a forfeiture of civilian protections.[150] These groups, in many varieties, are likely to increase in future armed conflict. Some examples are discussed below.

i. Non-traditional "Armed" Groups

One of the most important potential changes to the idea of organized armed groups in the future is what it means to be armed. In the discussion above, transnational communities of interest and hacktivist groups were treated as individuals who might directly participate in hostilities. This was based on a more traditional view of "armed," meaning kinetic, weapons. However, many future technologies will produce, as in the scenario at the beginning of this article, weapons or things that can be used as weapons that are very different than the traditional view of "arms."

For example, is "Anonymous" an organized armed group? It possesses state-level force with its ability to infiltrate and affect governmental (and corporate) computer systems. Would a transnational community of interest that has gathered DNA samples on world leaders and is willing to

148. Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 183 (1997).

149. Walker, *supra* note 135, at 330.

150. For example, the ICRC's DPH Guidance allows for targeting based on membership in an organized armed group when combined with a continuous combat function within the organization. Melzer, *supra* note 123, at 1006–09.

sell them to the highest bidder be an organized armed group? Or a group of individuals who work together to build a virus that will transport a genomic mutator? Or a transnational group of concerned scientists who publish openly nanotechnology processes or offer their services so everyone can enjoy the benefits of nanotechnology?

The future is likely to present numerous groups of varying composition and intent that do not possess traditional arms, but control or create the means to do great harm. These groups will stress the current application of targeting law, including the determination of lawful targets (as will be discussed below), even with the clarification of organized armed groups.

ii. Traditional "Armed" Groups

In addition to the non-traditional armed groups, the types and activities of more traditional armed groups will also expand. Four examples are discussed briefly below.

a) Private Security Companies

Much has been written recently concerning the use of private contractors, and particularly private security companies (PSC).[151] The use of contractors in current military operations has added pressures to the definition of actors on the battlefield.[152] Private contractors are involved in providing a wide array of services[153] and according to the ICRC, the trend of militaries outsourcing traditional military functions to private contractors is "likely to increase in the years ahead."[154]

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151. John R. Crook, *Contemporary Practice of the United States Relating to International Law: International Law and non-State Actors: United States Supports Conclusion of Code of Conduct for Security Companies*, 105 AM. J. INT'L L. 156 (2011); Daniel P. Ridlon, *Contractors or Illegal Combatants? The Status of Armed Contractors in Iraq*, 62 A.F. L. REV. 199 (2008).

152. FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnardt eds., 2007); Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 214 (2005); Christopher J. Mandernach, *Warrior Without Law: Embracing a Spectrum of Status for Military Actors*, 7 APPALACHIAN J. L. 137 (2007).

153. Greg Miller & Julie Tate, *CIA's Global Response Staff Emerging From the Shadows After Incidents in Libya and Pakistan*, WASH. POST, Dec. 26, 2012, *available at* http://articles.washingtonpost.com/2012-12-26/world/36015677_1_security-for-cia-officers-cia-compound-benghazi; Craig Whitlock, *U.S Expands Secret Intelligence Operations in Africa*, WASH. POST (June 13, 2012), http://articles.washingtonpost.com/2012-06-13/world/35462541_1_burkina-faso-air-bases-sahara.

154. Kellenberger, *supra* note 22.

In response to abuses,[155] good work is already being done in this area[156] and more will continue to be done. However, this work is unlikely to constrain how these groups are used in the future. Governments will continue to hire PSCs to provide security to people and places on the battlefield. Even if not intentionally, the PSCs will continue to find themselves in the midst of situations requiring the use of force. It is quite possible that at some future point, some states will contract out their entire state armed forces and designate them as combatants representing the state. If this occurs, significant businesses will arise whose purpose is to provide state forces for hire. These groups of fighters, though likely compliant with the LOAC, will also be loyal to their paymaster rather than a specific state.

b) Corporate Participation and Armies

In addition to private armies for hire, corporations will do even more to provide their own security, especially in regions of instability. ExxonMobil in Indonesia and Talisman Energy in Sudan have already "hired" and controlled national military forces to protect their business interests.[157] Past corporate involvement in armed conflict includes "unlawful taking of property, forced labor, displacement of populations, severe damage to the environment, and the manufacture and trading of prohibited weapons."[158] Recent events where corporate assets were attacked and employees held hostage[159] would increase and cause corporations to reconsider their protective posture.

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155. Press Release, Federal Bureau of Investigation, Academi/Blackwater Charged and Enters Deferred Prosecution Agreement (Aug. 7, 2012), *available at* http://www.fbi.gov/charlotte/press-releases/2012/academi-blackwater-charged-and-enters-deferred-prosecution-agreement.

156. *See, e.g.*, JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40991, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES (2010); Rep. of the Working Group on the Use of Mercenaries As a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Human Rights Council 15th Sess., U.N. Doc. A/HRC/15/25 (July 2, 2010), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/151/55/PDF/G1015155.pdf?OpenElement.

157. Jonathan Horlick, Joe Cyr, Scott Reynolds & Andrew Behrman, *American and Canadian Civil Actions Alleging Human Rights Violations Abroad by Oil and Gas Companies*, 45 ALTA. L. REV. 653, 657–58 (2008); *see also* Note, *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025 (2001).

158. Regis Bismuth, *Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing Between International and Domestic Legal Orders*, 38 DENV. J. INT'L L. & POL'Y 203, 204 (2010); *see also* ICRC, BUSINESS AND INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION TO THE RIGHTS AND OBLIGATIONS OF BUSINESS ENTERPRISES UNDER INTERNATIONAL HUMANITARIAN LAW 24 (2006); Erik Mose, *Corporate Criminal Liability and the Rwandan Genocide*, 6 J. INT'L CRIM. JUST. 973, 974 (2008).

159. Aomar Ouali & Paul Schemm, *Desert Drama: Islamists Take Hostages in Algeria*, ASSOCIATED PRESS (Jan. 16, 2013), http://hosted2.ap.org/APDEFAULT/3d281c11a96b4ad082fe88aa0db04305/Article_2013-01-16-Algeria-Kidnapping/id-1b29673dae1745f686acac504f96c598.

Many corporations have far greater resources than the states in which they operate. The search for profit will drive them to protect their assets in areas where governments cannot control the territory. In many cases, this territory will be contested and in an area already enflamed by internal armed conflict. These corporate armies will be tasked with protecting corporate assets, employees, and resources, but will find themselves involved in the armed conflicts raging about them.

c) Global Criminal Enterprises

Another group that could also be discussed under "Organized Armed Groups" below is global criminal enterprises, such as the various organized narcotics organizations operating in Mexico and other parts of Central and South America. Reports place the number of armed fighters in Mexico alone at over 100,000,[160] a number much larger than in most recent armed conflicts.

In addition to narcotics organizations, global criminal enterprises are involved in counterfeiting, money laundering, arms smuggling, and the sex trade to name just a few.[161] Many of these criminal enterprises have links to armed conflict and even contain factions within their business whose role is to conduct military-type tasks necessary for the business enterprise. However, all of these global organizations are likely to appear on future battlefields in order to conduct their business.

d) State Paramilitaries

The large-scale operation of armed drones by the CIA portends a shift in the use of paramilitary organizations in the future. While the CIA has, from its inception, been involved in covert operations that resulted in military-type activities, the scale and openness of current operations is qualitatively different.[162] There is very little difference between the drone strikes conducted by the U.S. military and those done by the CIA, except perhaps in their regulation by the LOAC.[163]

These activities by the United States will likely set an example for other countries that also have similar agencies and will begin to use them more openly in similar ways. Future armed conflicts will undoubtedly involve intelligence and other paramilitary agencies operating openly and using military weapons and tactics.

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160. Carina Bergal, *The Mexican Drug War: The Case For A Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042, 1066 (2011).

161. JOHN EVANS, CRIMINAL NETWORKS, CRIMINAL ENTERPRISES 2 (1994) *available at* http://www.icclr.law.ubc.ca/publications/reports/netwks94.pdf.

162. *See* Richard M. Pious, *White House Decisionmaking Involving Paramilitary Forces*, J. NAT'L SEC. L & POL'Y (Jan. 24, 2012), http://jnslp.com/2012/01/24/white-house-decision-making-involving-paramilitary-forces/.

163. *See US: Transfer CIA Drone Strikes to Military Ensure Intelligence Agency Abides by International Law*, HUMAN RIGHTS WATCH (Apr. 20, 2012), http://www.hrw.org/news/2012/04/20/us-transfer-cia-drone-strikes-military.

c. State Forces

Significant changes will occur in future armed conflict even to recognized state forces. The changing methods of warfare will undermine the traditional criteria for combatants, and the incorporation of autonomous weapons into regular armed forces will diminish the role of humans in targeting decisions.

i. Combatant's Traditional Criteria

Article 1 of the Annex to Hague Convention (IV) respecting the Laws and Customs of War on Land states that:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."[164]

These qualifications for militias are repeated in the GPI.[165] Though textually limited to militias and volunteer corps who are working with a party to

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164. Hague Regulations, *supra* note 111, art. 1.

165. Article 4 states:

> Art 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.

See Geneva Convention, *supra* note 18, at art. 4.

the conflict, the common understanding is that state forces will also meet these criteria.[166] The difficulty with "armed groups" and these criteria has been alluded to above, but it also exists with traditional state forces.

States (and other organized groups) are employing weapons from great distances where the uniform of the targeter is indiscernible by the eventual target. The eventual target of malware launched from the National Security Agency in Maryland will be completely unaware of whether the person who launched the malware was wearing a uniform or civilian clothes. The development and employment of viruses or genomic mutators will likely be done far from the active battlefield.

Even if created and employed by uniformed personnel, when the virus, nanobot, or computer malware reaches its intended target, it will contain no marking that notifies the victim of the identity of the attacker. In fact, in many of these future weapons systems, anonymity is vital to the success of the operation. As future technologies develop, the issue of "having a fixed distinctive sign recognizable at a distance [and] . . . carrying arms openly"[167] will pressure the LOAC to account for modern armed conflict practices.

ii. Autonomous Weapon Systems

Autonomous weapons have become a very important discussion in the area of the law governing future weapons systems. They include robots, unarmed and armed unmanned aerial and underwater vehicles,[168] auto-response systems such as armed unmanned sentry stations,[169] and a host of other developing weapon systems. The systems will be discussed in greater detail below as means and methods, but they are raised here because the more autonomous they become, the more like "actors" they appear.

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166. According to 3 GENEVA CONVENTIONS COMMENTARY, *supra* note 113, at 52:

> The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians. The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt.

167. Hague Regulations, *supra* note 111, art. 1.

168. Damien Gayle, *Rise of the Machine: Autonomous Killer Robots 'Could Be Developed in 20 Years'*, DAILY MAIL (Nov. 20, 2012), http://www.dailymail.co.uk/sciencetech/article-2235680/Rise-Machines-Autonomous-killer-robots-developed-20-years.html; *Marlin*, LOCKHEED MARTIN, http://www.lockheedmartin.com/us/products/marlin.html (last visited Mar. 9, 2014).

169. Jonathan D. Moreno, *Robot Soldiers Will Be a Reality—And a Threat*, WALL STREET J. (May 11, 2012), http://online.wsj.com/article/SB10001424052702304203604577396282717616136.html.

The military use of robots will sufficiently illustrate the point. It is clear that the general use of robots in armed conflict is increasing.[170] According to Peter Singer, a well-known expert on the issue of robotics and armed conflict,[171] "besides the U.S., there are 43 other nations that are also building, buying and using military robotics today."[172] Remotely controlled armed robots entered action in Iraq in summer of 2007.[173] This is a trend that will clearly continue. A report that the "Joint Forces Command drew up in 2005 . . . suggested autonomous robots on the battlefield will be the norm within 20 years,"[174] and a recent report written by the U.S. Department of Defense (DoD), titled *Unmanned Systems Integrated Roadmap FY2011-2036*, stated that it "envisions unmanned systems seamlessly operating with manned systems while gradually reducing the degree of human control and decision making required for the unmanned portion of the force structure."[175]

It appears the intent is to increase the autonomy with which these weapon systems will function, causing Singer to point out that robotics is "changing not just the 'how' [of warfare] but the 'who.'"[176] Future robots may use "brain-machine interface technologies" or "whole brain emulation."[177] The potentially autonomous nature of robots means that they will become actors on the battlefield, as well as means and methods of warfare.

Singer describes this dramatically changing advance in robotic technology as a revolution:

> Carrying forward, that means that our [robotic] systems . . . will be a billion times more powerful than today within 25 years. I'm not saying a billion in a sort of amorphous, meaningless, Austin-Powers' one billion. I mean literally take the power of those systems and multiply them times 1 with 9 zeros behind it. What that means is that the kind of things people used to talk about only at science

170. John Markoff, *U.S. Aims for Robots to Earn Their Stripes on the Battlefield*, INT'L HERALD TRIBUNE (Nov. 27, 2010), at 1.

171. Singer is currently the director of the 21st Century Security and Intelligence and a senior fellow in foreign policy at Brookings. He has authored numerous articles and books on future weapons, with particular emphasis on robotics. *See* Peter W. Singer, BROOKINGS, http://www.brookings.edu/experts/singerp (last visited Mar. 9, 2014).

172. Steve Kanigher, *Author Talks about Military Robotics and the Changing Face of War*, LAS VEGAS SUN (Mar. 17, 2011), http://www.lasvegassun.com/news/2011/mar/17/military-robotics-and-changing-face-war/.

173. Stew Magnuson, *Gun Toting Robots See Action in Iraq*, NAT'L DEF. MAG. (Sept. 2007), http://www.nationaldefensemagazine.org/archive/2007/September/Pages/RifleToting4435.aspx.

174. P.W. Singer, *In the Loop? Armed Robots and the Future of War*, DEF. INDUSTRY DAILY (Jan. 28, 2009, 20:09), http://www.defenseindustrydaily.com/In-the-Loop-Armed-Robots-and-the-Future-of-War-05267/.

175. U.S. DEP'T OF DEF., UNMANNED SYSTEMS INTEGRATED ROADMAP FY2011-2036, 3 (2011), *available at* http://www.defenseinnovationmarketplace.mil/resources/UnmannedSystemsIntegratedRoadmapFY2011.pdf.

176. Singer, *supra* note 11, at 10.

177. Moreno, *supra* note 169.

> fiction conventions like Comic-Con now need to be talked about by people like us, need to be talked about by people in the halls of power, need to be talked about in the Pentagon. We are experiencing a robots revolution.[178]

In response to these advances, the DoD recently issued a Directive titled "Autonomy in Weapon Systems"[179] that applies to the "design, development, acquisition, testing, fielding, and employment of autonomous and semi-autonomous weapon systems, including guided munitions that can independently select and discriminate targets."[180] The Directive states that "It is DoD policy that . . . [a]utonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force."[181]

In the same week the DoD Directive was issued, Human Rights Watch issued a report[182] calling for a multilateral treaty that would "prohibit the development, production and use of fully autonomous weapons."[183] The Directive and Report have sparked a great deal of discussion,[184] much of which has revolved around the ability of an autonomous weapon to make decisions as required by the LOAC.[185]

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178. Singer, *supra* note 11.

179. Dept. of Def., Directive, 3000.09, Autonomy in Weapon Systems (D.O.D. 2012). The Directive followed a DoD Defense Science Board Task Force Report on "The Role of Autonomy in DoD Systems" that was issued in July of 2012. DoD DEFENSE SCIENCE BOARD, THE ROLE OF AUTONOMY IN DOD SYSTEMS (2012), *available at* http://www.fas.org/irp/agency/dod/dsb/autonomy.pdf.

180. Dept. of Def., Directive, 3000.09, Autonomy in Weapon Systems ¶ 2a(2), (D.O.D. 2012). The Directive "[d]oes not apply to autonomous and semi-autonomous cyberspace systems for cyberspace operations; unarmed, unmanned platforms; unguided munitions; munitions manually guided by the operator (e.g. laser- or wire-guided munitions); mines; or unexploded explosive ordnance." *Id.* ¶ 2b.

181. *Id.* ¶ 4a.

182. HUMAN RIGHTS WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS (2012), *available at* http://www.hrw.org/sites/default/files/reports/arms1112ForUpload_0_0.pdf.

183. *Id.* at 46.

184. *See, e.g.*, Kenneth Anderson, *Readings: Autonomous Weapon Systems and Their Regulation*, LAWFARE: HARD NAT'L SEC. CHOICES (Dec. 11, 2012, 6:26 PM), http://www.lawfareblog.com/2012/12/readings-autonomous-weapon-systems-and-their-regulation/; Kenneth Anderson, *Autonomous Weapon Systems and Their Regulation—A Flurry of Activity*, THE VOLOKH CONSPIRACY (Dec. 12, 2012, 9:32 PM), http://www.volokh.com/2012/12/12/autonomous-weapon-systems-and-their-regulation-a-flurry-of-activity/; Jordana Mishory, *Carter: Human Input Required For Autonomous Weapon Systems*, UNMANNED SYSTEMS ALERT (Nov. 28, 2012) http://unmannedsystemsalert.com/Unmanned-Systems-General/Public-Content/carter-human-input-required-for-autonomous-weapon-systems/menu-id-1004.html?S=LI#%21; Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to Critics*, HARV. NAT'L. SEC. J. (Feb. 5, 2013), http://harvardnsj.org/wp-content/uploads/2013/02/Schmitt-Autonomous-Weapon-Systems-and-IHL-Final.pdf.

185. Spencer Ackerman, *Pentagon: A Human Will Always Decide When a Robot Kills You*, WIRED (Nov. 26, 2012, 6:12 PM), www.wired.com/dangerroom/2012/11/human-robot-kill.

Despite the DoD Directive, the international community must recognize that at some point, fully autonomous weapon systems will likely inhabit the battlefield (and may eventually become the predominant players) and will be making decisions that we now think of as requiring human intervention.[186] This will stress our current understanding and application of the LOAC, and force an evolution in how we apply LOAC principles.

2. Emerging Law

The section above has touched only briefly on some of the emerging factors regarding actors on the battlefield that will place stresses on the LOAC in future armed conflicts. Anticipating these emerging factors, the law will need to evolve to respond to technological developments and signal appropriate regulation.

a. Attack

The proscription dealing with civilians is against making them the object of "attack." The meaning of attack is defined in GPI as "acts of violence against the adversary, whether in offence or in defence."[187] The strict reading of this treaty language is that civilians are only protected from acts of violence. As clearly argued by Paul Walker, most cyber activities will not reach the threshold of an attack,[188] meaning they are not proscribed. Cyber (and other) activities that cause mere inconvenience are legitimate, even when directed at the civilian population.[189] This argument will arise again below under means and methods of warfare because there are any number of potential or future weapons that will likely fall under the threshold of an "act of violence." If so, as a matter of targeting, civilians are not protected from these activities that do not amount to an attack.

For example, recalling the scenario from the beginning of the article, it is unclear whether the voluntary ingestion of a pill or even the inhalation of a nanobot would be considered an attack. Likewise, it is unclear that infection with a flu-like virus or even a viral gene alteration that had no effect on an individual would be considered an attack. Therefore, under the current LOAC, such activities may be permitted.

One might argue that Article 51 of GPI requires that "the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations,"[190] and "military operations" is a category much broader than "attacks." However, even Article 51 only pro-

186. Anderson & Waxman, *supra* note 23.

187. Protocol I, *supra* note 9, at art. 49.1.

188. Paul A. Walker, *Rethinking Computer Network "Attack": Implications for Law and U.S. Doctrine*, 1 NAT'L SEC. L. BRIEF 33 (2011), *available at* http://digitalcommons.wcl.american.edu/nslb/vol1/iss1/3.

189. TALLINN MANUAL, *supra* note 42.

190. Protocol I, *supra* note 9, art. 51.1.

tects civilians against "dangers," a term that is not clearly defined and might not include flu-like symptoms. Similarly, Article 57.1 states that "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."[191] The commentary defines military operations as "any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat,"[192] but does not explain what it means to "spare" the population or define "constant care."[193]

With the future development of weapons that will undoubtedly fit below the attack threshold of "acts of violence," it will be important to clarify the LOAC as it pertains to targeting of civilians as actors in armed conflict. If the LOAC is designed to protect civilians from the effects of armed conflict, more detail is necessary here.

b. Status and Conduct

Targeters justify attacking individuals based on either their status or their conduct. Combatants are targetable simply based on their status. The LOAC also allows targeting of members of the military wing or an organized armed group based on their status as members.[194] Almost all others are targetable based solely on their conduct. In other words, the normal civilian has to do something to bring himself within the crosshairs of a targeter. As discussed above, future technologies will cause us to rethink how we currently understand both status and conduct.

Beginning with civilians, under the current DPH Guidance, it is unlikely that Samantha in the scenario that begins this article would be targetable. She is an unknowing facilitator of a uniquely lethal virus. Perhaps the virus could be targeted with lethal force, effectively amounting to the targeting of Samantha, but one can imagine a different scenario where Samantha might, instead of walking to the place where the U.S. President would be speaking, merely prepare food that was going to be served at a luncheon or package flowers that were going to be delivered to the White House. Does she become targetable once she has ingested the virus and remain targetable for the life of the virus, potentially for the rest of her life? The current LOAC does not seem to contemplate such a reading. One could argue that she does not directly participate at any point in her life (though she carries the virus) until she plans on coming into direct contact with the President, but the burden on targeters to maintain awareness of her until she decides to take direct part is overly burdensome, par-

191. *Id.* art. 57.1.

192. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 680 (Sandoz et al. eds., 1987) [hereinafter RED CROSS COMMENTARY].

193. For a discussion on this issue relative to cyber operations, see TALLINN MANUAL, *supra* note 42; Eric Talbot Jensen, *Cyber Attacks: Proportionality and Precautions in Attack*, 89 INT'L L. STUD. 198, 202 (2013).

194. *See, e.g.*, Melzer, *supra* note 123, at 1036.

ticularly once she has inadvertently passed the virus to others who now also presumably carry the threatening virus.

Similar difficulties arise from social networking and transnational communities of interest. As civilians attach themselves to causes, and then work through social media to forward that cause, do they become targetable? For example, are the tens of thousands of individuals targetable who forward a message trying to garner support for a rebel group? What if they are seeking information that might help the rebel group attack opposing forces?

In a variation on the same theme, can a state mobilize its citizens to accomplish national security goals through social media and not forfeit their protected status? Chris Ford proposes that the federal government use social networking methods to involve U.S. citizens "into a nation-wide program designed to address discrete security issues."[195] Would this make the citizens targetable?

Similarly with hacktivists, could Georgia have targeted the Russian hacktivists who were degrading the government's ability to exercise command and control of their military forces? Whatever response Georgia would have contemplated would certainly be bound by the principle of proportionate response, but even the authority to target the hacktivists is unclear under the current application of the LOAC.

This prospect of using civilians as unwitting tools is an area where the LOAC is not fully developed. Many of the answers to these questions are undoubtedly fact-specific, but the use of these future technologies will force the international community to reconsider its application of LOAC immunity.

The same questions exist concerning civilian property. Collin Allan has highlighted the difficulties of the computer system that has been taken over remotely and acts as part of the attack but whose owner has not made any affirmative decision to participate in the attack.[196] Perhaps that civilian property is transformed into a military objective, but if so, that would potentially implicate hundreds of thousands of computers that have been incorporated into powerful botnets and used for nefarious purposes.[197]

This status and conduct difficulty will also be magnified as new "armed" groups, including PSCs, corporate armies, and paramilitaries, become more prominent on the battlefield. Presumably, the Taliban could target a member of the CIA who was flying an armed drone with the intent of attacking members of the Taliban, based on his conduct. Since the CIA now has a continuing program of targeting with armed drones, is the entire CIA (or even the portion who work with the drones) targetable

195. Christopher M. Ford, *Twitter, Facebook and Ten Red Balloons: Social Network Problem Solving and Homeland Security*, 7 HOMELAND SECURITY AFF. J. 1, 1–2 (2011), *available at* http://www.hsaj.org/?article=7.1.3.

196. Allan, *supra* note 133, at 78–81.

197. *See* Pierre Thomas & Jack Cloherty, *FBI, Facebook Team Up to Fight 'Butterfly Botnet'*, ABC NEWS (Dec. 12, 2012), http://abcnews.go.com/Technology/butterfly-botnet-targets-11-million-including-computer-users/story?id=17947276.

based on status, not conduct? Similar analysis would apply to PSCs or corporate armies.

In addition to the question of lawfully targeting corporate armies or PSCs, there is an issue of how the LOAC should respond to their increasing presence on the battlefield. Many will argue that holding to the current LOAC, which does not authorize them to participate with any status on the battlefield, is the right way to proceed. But the realities of future armed conflict and the prevalence of these actors may lead to a different conclusion.

And finally, in the area of status and conduct there is the traditional requirement of marking or wearing a uniform and carrying arms openly. This is an area that is ripe for LOAC evolution. Both Sean Watts[198] and Rosa Brooks[199] have written convincingly, challenging the value of the traditional requirements that combatants "have a fixed distinctive emblem recognizable at a distance," and "carry arms openly"[200] as being "detach[ed] from reality."[201] In an age where an ever-increasing number of weapons are initiated, launched, or activated from a time and place distant from the victim, wearing uniforms and carrying your weapon openly seems of little value.[202]

Does it really matter to the victim if the individual launching the computer malware from his office in Maryland is wearing a uniform or not? Would it be much more meaningful if the malware itself was "marked" as coming from the United States? When the President collapses from ingesting the virus created in the scenario that begins this Article, would it do more to protect innocent victims of the armed conflict from the United States' retaliation if the virus was somehow marked or if Cap'n Capsid was wearing a uniform while he took his actions in sending the virus to Samantha?

Each cruise missile launched by the United States is marked with a U.S. flag, though it is unlikely that anyone will ever see the flag as it flies toward its target. But the idea of marking the weapon may set the pattern for future "over the horizon" or "shoot and forget" weapons. One of the intents in originally requiring combatants to wear uniforms was to make clear that the attacker represented a sovereign. Accomplishing this with viruses, genomics, nanotechnology, and cyber attacks will force the international community to reexamine the traditional criteria for combatants.

c. "Human" Discretion

Much of the legal consternation over robotics and other autonomous weapons systems is the discomfort with non-human decision making in

198. Sean Watts, *Combatant Status and Computer Network Attack*, 50 VA. J. INT'L L. 391 (2010).

199. Brooks, *supra* note 5.

200. Hague Regulations, *supra* note 111, art. 1.

201. Watts, *supra* note 198, at 446.

202. Brooks, *supra* note 5, at 756–57.

armed conflict, or the "human-out-of-the-loop" weapons. The Human Rights Watch Report referenced above categorized autonomous weapons into three categories:

- HUMAN-IN-THE-LOOP WEAPONS: Robots that can select targets and deliver force only with a human command;
- HUMAN-ON-THE-LOOP WEAPONS: Robots that can select targets and deliver force under the oversight of a human operator who can override the robots' actions; and
- HUMAN-OUT-OF-THE-LOOP WEAPONS: Robots that are capable of selecting targets and delivering force without any human input or interaction.[203]

Currently, it is unclear what having a human "in the loop" actually means[204] and whether it will result in fewer targeting mistakes.[205] What does seem to be clear is that having a human in the loop just makes the communication link between the robot and human the vulnerability.[206]

Despite this discomfort with a lack of legal precedent, technology continues to push forward, attempting to make robots more and more capable of independent decision making. Dyke Weatherington, DoD Deputy Director of Unmanned Warfare said, "I don't see any program going down that path (yet). There are legal and ethical issues, and I just don't think either the department or the technology is ready to do that."[207] Dr. Arkin, Director of the Mobile Robot Laboratory at Georgia Technical College, says that robots "will not have the full moral reasoning capabilities of humans, but I believe robots can—and this is hypothesis—perform better than humans."[208] There is certainly an argument to be made that a robot that is not subject to the emotions of the situation, dependence on inaccuracies and limitations of human sensory perception, and driven to make decisions based on frail human survivability will "perform better" and be less likely to engage an inappropriate target.

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203. HUMAN RIGHTS WATCH, *supra* note 182.

204. Singer, *supra* note 174.

205. *See id.*

206. *Id.*

207. Tara McKelvey, *Human Input at an End as Killer Robots do the Thinking*, THE AUSTRALIAN (May 21, 2012) at 1. For a discussion of the ethical issues, see Ken Anderson, *An Ethical Turing Test For Autonomous Artificial Agents*, CONCURRING OPS. (Feb. 17, 2012, 11:47 AM), http://www.concurringopinions.com/archives/2012/02/an-ethical-turing-test-for-autonomous-artificial-agents.html.

208. Gary E. Marchant et al., *International Governance of Autonomous Military Robots*, 12 COLUM. SCI. & TECH. L. REV. 272, 279–80 (2011) (listing several reasons why autonomous robots may be able to outperform humans under combat conditions including: the ability to act conservatively, they can be used in a self-sacrificing manner if needed and appropriate without reservation by a commanding officer, and they can be designed without emotions that cloud their judgment); McKelvey, *supra* note 207; *Cry Havoc, and Let Slip the Highly Ethical Robots of War*, THE AM. PROSPECT (Aug. 9, 2011), http://prospect.org/article/cry-havoc-and-let-slip-highly-ethical-robots-war.

Autonomous weapons on the battlefield will increase and the autonomy of those weapon systems will also increase, raising serious questions about how the LOAC can deal with these issues.[209] As Jonathan Moreno has noted, "The various international agreements about weapons and warfare do not cover the convergence of neuroscience and robotic engineering."[210]

At what point do we determine that we have sufficiently programmed a weapon system such that it can legally respond to external information and stimuli in order to make a lethal decision? If the weapon acts incorrectly and unlawfully kills someone, who is responsible? Do we put the system on trial, its designer, its programmer, the soldier who set it up, or the commander who determined it could be used in that situation? As Vik Kanwar writes when reviewing Singer's *Wired for War*:

> From the point of view of the international lawyer, the concern is not asymmetry of protection, but rather that one side might be shielded from legal consequences. For a series of partially coherent reasons, the "human element" is seen as "indispensible": for providing judgment, restraint, and ultimately responsibility for decisions.[211]

All of these questions, and many more, raise legal issues that are as yet unresolved but will need to be resolved as technology propels us toward the greater use of autonomous weapons. It is unlikely that the international community will respond to Human Rights Watch's call for an international agreement to ban autonomous weapons. History does not support that idea.[212] Therefore, the international community needs to begin now to think of how the LOAC must evolve to respond.[213]

C. *Means and Methods*

"Few weapons in the history of warfare, once created, have gone unused."

U.S. Deputy Defense Secretary William J. Lynn III[214]

The quote above by William Lynn highlights the need to evolve the LOAC to regulate new technologies. Once developed, weaponized technologies almost inevitably find their way onto the battlefield. In the few instances where the technologies have not been used, or at least used in a

209. Anderson & Waxman, *supra* note 23.

210. Moreno, *supra* note 169.

211. Vik Kanwar, *Review Essay: Post-Human Humanitarian Law: The Law of War in the Age of Robotic Weapons*, 2 HARV. NAT'L SEC. J. 616, 620 (2011).

212. *See* Banusiewicz, *supra* note 10.

213. Anderson and Waxman make this argument very effectively concerning autonomous weapons in their article, *Law and Ethics for Robot Soldiers*. Anderson & Waxman, *supra*, note 23.

214. Banusiewicz, *supra* note 10.

limited fashion, it has been largely based on legal restrictions.[215] The means and methods discussed below will also require the international community to consider whether the current LOAC is sufficient to adequately regulate their use, and where not, consider what evolutions to the LOAC are necessary.

1. Emerging Factors

Weapons technology is always advancing. The means of conducting hostilities and the methods for employment of those means will continue to develop at an incredible pace over the next few decades. Many of these future technologies, some of which are discussed below,[216] will spring from peaceful advances that greatly benefit the world at large, but when weaponized, create difficult regulatory and response problems.[217]

a. Means

The means of armed conflict generally refers to the weapon used to engage a target, whether that weapon is a rifle fired by a fighter, an explosive round fired from an artillery tube, or a bomb dropped from an aircraft. Research continues to develop weapons that are more lethal, more accurate, more survivable, and less expensive. Future weapons will develop in response to perceived needs by the military, constrained by the LOAC. This section is certainly not comprehensive, but will discuss some

215. *See, e.g.*, Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. Treaty Doc. No.103-21, 1974 U.N.T.S. 3 [hereinafter Chemical Weapons Convention].

216. There is no way to adequately describe even a small number of the new technologies that will become a common part of future armed conflicts. *See* Blake & Imburgia, *supra* note 33, at 162–63; David Axe, *Military Must Prep Now for 'Mutant' Future, Researchers Warn*, WIRED (Dec. 31, 2012, 6:30 AM), http://www.wired.com/dangerroom/2012/12/pentagon-prepare-mutant-future/; Patrick Lin, *Could Human Enhancement Turn Soldiers Into Weapons That Violate International Law? Yes*, THE ATLANTIC, (Jan. 4, 2013), http://www.theatlantic.com/technology/print/2013/01/could-human-enhancement-turn-soldiers-into-weapons-that-violate-international-law-yes/266732/; Anna Mulrine, *Unmanned Drone Attacks and Shape-shifting Robots: War's Remote-control Future*, CHRISTIAN SCI. MONITOR (Oct. 22, 2011), http://www.csmonitor.com/USA/Military/2011/1022/Unmanned-drone-attacks-and-shape-shifting-robots-War-s-remote-control-future; Noah Schachtman, *DARPA's Magic Plan: 'Battlefield Illusions' To Mess With Enemy Minds*, WIRED (Feb. 14, 2012), http://www.wired.com/dangerroom/2012/02/darpa-magic/; Noah Schachtman, *Suicide Drones, Mini Blimps and 3D Printers: Inside the New Army Arsenal*, WIRED (Nov. 21, 2012), http://www.wired.com/dangerroom/2012/11/new-army-arsenal/; Mark Tutton, *The Future of War: Far-out Battle Tech*, CNN (Dec. 16, 2011), http://www.cnn.com/2011/12/15/tech/innovation/darpa-future-war/index.html.

217. Hoffman, *supra* note 144, at 78 ("Both cyber and bio threats are embedded in great leaps of technological progress that we would not want to give up, enabling rapid communications, dramatic productivity gains, new drugs and vaccines, richer harvests, and more. But both can also be used to harm and destroy. And both pose a particularly difficult strategic quandary: A hallmark of cyber and bio attacks is their ability to defy deterrence and elude defenses.").

of the new weapons technologies that are being developed or researched to highlight some of the areas where the LOAC will need to evolve.

i. Drones

Drones are a quickly developing technology, and their use has been widely documented.[218] In addition to the armed drones so often the topic of discussion in the media,[219] the United States is using unmanned, unmarked turboprop aircraft in places like Africa to "record full-motion video, track infrared heat patterns, and vacuum up radio and cellphone signals."[220] Drones are now a component of local law enforcement and the U.S. Federal Aviation Administration is going to pass laws regulating the use of domestic airspace for drones,[221] in anticipation of a dramatic increase in drone space requests.

As the technology continues to develop, not only would drone capabilities increase, but also drone size will significantly decrease. The United States is currently designing drones as small as caterpillars and moths that replicate flight mechanics so they can "hide in plain sight."[222] Eventually, drones will be measured in terms of nanometers and be capable of travel through the human body.[223]

In addition to decreasing the size of drones, the technology to arm these microscopic drones continues to increase. Through innovative weapons technologies,[224] genomics,[225] and other miniaturization advances, future nanodrones will be lethal and pervasive, amongst the population generally and continuously transmitting data back to the drone's controllers. Singer describes them as a "game changer" on the level with the atomic bomb.[226]

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218. Peter Bergen & Katherine Tiedemann, *Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan*, FOREIGN AFF., July-Aug. 2011, at 12, 13 (2011); *see also*, Tony Rock, *Yesterday's Laws, Tomorrow's Technology: The Laws of War and Unmanned Warfare*, 24 N.Y. INT'L L. REV. 39, 42 (2011) (talking about the use of drones and its legal implications).

219. Bergen & Tiedemann, *supra* note 218, at 17.

220. Whitlock, *supra* note 153.

221. Wells C. Bennett, *Unmanned at Any Speed: Bringing Drones into Our National Airspace*, BROOKINGS (Dec. 14, 2012), http://www.brookings.edu/research/papers/2012/12/14-drones-bennett.

222. Elisabeth Bumiller & Thom Shanker, *War Evolves With Drones, Some Tiny as Bugs*, N.Y. TIMES (June 20, 2011), at A1, *available at* http://www.nytimes.com/2011/06/20/world/20drones.html?pagewanted=all.

223. *See* Blake & Imburgia, *supra* note 33, at 180.

224. Mike Hanlon, *Recoilless Technology Provides Killer App for UAVs*, GIZMAG (Dec. 11, 2006), http://www.gizmag.com/go/6590/.

225. See *infra* Part II.C.1.a.vii.

226. Interview with Peter W. Singer, *supra* note 47 ("I think the way to think about [unmanned drones] is they are a game-changer when it comes to both technology, but also war and the politics that surrounds war. This is an invention that's on the level of gunpowder or the computer or the steam engine, the atomic bomb. It's a game changer.").

Technology will also make drones accessible to many more actors than states. Currently, "for about $1,000, you can build your own version of the Raven drone."[227] General access to miniaturized drones will soon follow. Eventually, a disgruntled adversary or disaffected civilian will not need Samantha to carry the virus to the President, but a microdrone with the ability to inject the virus into the President's system.

ii. Cyber

In recent surveys by *Foreign Policy*, cyber capabilities were viewed as the most dangerous of emerging capabilities.[228] Like drones, cyber operations have been written about extensively,[229] including the new Tallinn Manual, which gives guidance on the application of LOAC to cyber operations in armed conflict.[230] As mentioned above, many nations are developing cyber capabilities,[231] and some speculate that cyber operations will become such a part of future conflict that "eventually, the Cyber Force will need to become a separate military branch because of cyberspace's international use as a battlefield that directly affects households, corporations, universities, governments, military, and critical infrastructures."[232]

The increasing prevalence and complexity of cyber weapons is without dispute. The Stuxnet[233] malware "infected about 100,000 computers worldwide, including more than 60,000 in Iran, more than 10,000 in Indo-

227. Singer, *supra* note 11.

228. Elizabeth Dickinson, *The Future of War*, FOREIGN POL'Y, Mar.-Apr. 2011, at 64, *available at* http://www.foreignpolicy.com/articles/2011/02/22/the_future_of_war (describing that out of sixty-two top professionals, policymakers, and thinkers in the military world, twenty-four reported drones and other unmanned technologies to be the most innovative in the last decade but the highest response for the most dangerous innovation was cyberwarfare). In the 2012 survey, of seventy-six top professionals, policymakers, and thinkers in the military world, twenty-four (the majority by ten) thought that cyber operations was the area where the Chinese were catching up with U.S capabilities the fastest. Margaret Slattery, *The Future of War*, FOREIGN POL'Y, Mar.-Apr. 2012, at 78, *available at* http://www.foreignpolicy.com/articles/2012/02/27/The_Future_of_War?print=yes&hidecomments=yes&page=full.

229. COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW (Michael N. Schmitt & Brian T. O'Donnell, eds., 2002); Eric Talbot Jensen, *Unexpected Consequences From Knock-on Effects: A Different Standard for Computer Network Operations?*, 18 AM. U. INT'L L. REV. 1145 (2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987553; Michael N. Schmitt, *The Principle of Distinction in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143 (1999); Watts, *supra* note 198, at 392; Sean Watts, Cyber Perfidy and the Law of War (unpublished manuscript)(on file with author).

230. TALLINN MANUAL *supra* note 42, at 75–202.

231. See *supra* Part II.A.1.e.

232. Natasha Solce, Comment, *The Battlefield of Cyberspace: The Inevitable New Military Branch—The Cyber Force*, 18 ALB. L.J. SCI. & TECH. 293, 318 (2008).

233. *See generally* Thabet, *supra* note 78.

nesia and more than 5,000 in India;"[234] the recent Flame malware[235] "exceeds all other known cyber menaces to date" according to Kapersky Lab and CrySys Lab which discovered the malware.[236]

One of the great allures of cyber weapons is their bloodless nature,[237] but ethicists worry about the impact of that on armed conflict. "With cyberweapons, a war theoretically could be waged without casualties or political risk, so their attractiveness is great—maybe so irresistible that nations are tempted to use them before such aggression is justified."[238]

Another aspect of cyber means of armed conflict is its ready access to non-state actors. Individual hackers have been known to develop sophisticated malware and cause great damage.[239] Particularly in cyber operations, one of the great dangers is reengineering or copycats.[240] As reported by David Hoffman,

> Langner [who first discovered the Stuxnet malware] warns that such malware can proliferate in unexpected ways: "Stuxnet's attack code, available on the Internet, provides an excellent blueprint and jump-start for developing a new generation of cyber warfare weapons." He added, "Unlike bombs, missiles, and guns, cyber weapons can be copied. The proliferation of cyber weapons cannot be controlled. Stuxnet-inspired weapons and weapon technology will soon be in the hands of rogue nation states, terrorists, organized crime, and legions of leisure hackers."[241]

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234. Holger Stark, *Stuxnet Virus Opens New Era of Cyber War*, SPIEGEL ONLINE INT'L (Aug. 8, 2011, 3:04 PM), http://www.spiegel.de/international/world/mossad-s-miracle-weapon-stuxnet-virus-opens-new-era-of-cyber-war-a-778912.html. Admittedly, Stuxnet was governed by the *jus ad bellum*, but similar malware will undoubtedly be used during armed conflict in the future. For an analysis of Stuxnet under the *jus in bello*, see Jeremy Richmond, *Evolving Battlefields: Does Stuxnet Demonstrate a Need for Modifications to the Law of Armed Conflict?*, 35 FORDHAM INT'L L.J. 842 (2012).

235. *See generally Full Analysis of Flame's Command and Control Servers*, *supra* note 79.

236. *Flame Virus Update: UK Servers Used to Control Malware*, INT'L BUS. TIMES NEWS (June 6, 2012, 1:10 PM), http://www.ibtimes.co.uk/articles/349195/20120606/flame-update-servers-shut-down.htm.

237. Blake & Imburgia, *supra* note 33, at 181–83.

238. Patrick Lin, Fritz Allhoff & Neil Rowe, *Is it Possible to Wage a Just Cyberwar?*, THE ATLANTIC (June 5, 2012, 11:24 AM), http://www.theatlantic.com/technology/archive/2012/06/is-it-possible-to-wage-a-just-cyberwar/258106/.

239. David Kleinbard & Richard Richtmyer, *U.S. Catches 'Love' Virus: Quickly Spreading Virus Disables Multimedia Files, Spawns Copycats*, CNNMONEY (May 5, 2000, 11:33 PM), http://money.cnn.com/2000/05/05/technology/loveyou/.

240. Mark Clayton, *From the Man Who Discovered Stuxnet, Dire Warnings One Year Later*, CHRISTIAN SCI. MONITOR (Sept. 22, 2011), http://www.csmonitor.com/USA/2011/0922/From-the-man-who-discovered-Stuxnet-dire-warnings-one-year-later.

241. Hoffman, *supra* note 144.

iii. Robots

Again, the use of robots has been well documented, along with many of the issues they create.[242] Though the use of robotics has not progressed as far as that of drones and cyber operations, their use is increasing in armed conflict. As noted by Singer,

> When the U.S. military went into Iraq in 2003, it had only a handful of robotic planes, commonly called "drones" but more accurately known as "unmanned aerial systems." Today, we have more than 7,000 of these systems in the air, ranging from 48-foot-long Predators to micro-aerial vehicles that a single soldier can carry in a backpack. The invasion force used zero "unmanned ground vehicles," but now we have more than 12,000, such as the lawnmower-size Packbot and Talon, which help find and defuse deadly roadside bombs.[243]

Singer further argues that "literally thousands of Americans are alive today because of [ground and air robotic systems]. They offer precision on the battlefield never imagined before, as well as remove many dangers to our forces."[244]

Robots will be used for both lethal and less than lethal operations. Bobby Chesney speculates on the potential use of robots in capturing as opposed to killing enemies on the battlefield. He admits this possibility is "far-fetched" now, but says he "would not be surprised to learn that a robotic descent/secure/ascent technology already is in development."[245]

Retired Army Colonel Thomas Adams argues that "Future Robotic weapons 'will be too fast, too small, too numerous and will create an environment too complex for humans to direct.' . . . Innovations with robots 'are rapidly taking us to a place where we may not want to go, but probably are unable to avoid.'"[246] Testing and development continue[247] as robots take a more active role in hostilities.

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242. *See generally* PETER W. SINGER, WIRED FOR WAR (2009).

243. P. W. Singer, *We. Robot*, SLATE (May 19, 2010), http://www.slate.com/articles/news_and_politics/war_stories/2010/05/we_robot.html; *see also* Bumiller & Shanker, *supra* note 222.

244. Steve Kanigher, *Author Talks About Military Robotics and the Changing Face of War*, LAS VEGAS SUN (Mar. 17, 2011, 2:01 AM), http://www.lasvegassun.com/news/2011/mar/17/military-robotics-and-changing-face-war/ (quoting Singer).

245. Robert Chesney, *Robot Rendition: Will There One Day Be Machines That Capture Rather Than Kill?*, LAWFARE: HARD NAT'L SEC. CHOICES (Aug. 10, 2012, 5:41 PM), http://www.lawfareblog.com/2012/08/robot-rendition-will-there-one-day-be-machines-that-capture-rather-than-kill/.

246. *Robots on Battlefield: Robotic Weapons Might be the Way of the Future, But They Raise Ethical Questions About the Nature of Warfare*, TOWNSVILLE BULL. (Austr.), Sept. 18, 2009, at 210.

247. Peter Finn, *A Future for Drones: Automated Killing*, WASH. POST (Sept. 19, 2011), http://articles.washingtonpost.com/2011-09-19/national/35273383_1_drones-human-target-military-base.

iv. Nanotechnology

Nanotechnology is "the understanding and control of matter at the nanoscale, at dimensions between approximately 1 and 100 nanometers, where unique phenomena enable novel applications."[248] As stated by Lieutenant Commander Thomas Vandermolen, "Nanoscience is in its infancy" and its "true practical potential is still being discovered."[249] It has already "exploded from a relatively obscure and narrow technical field to a scientific, economic and public phenomenon."[250]

The United States has embraced nanotechnology development. The National Nanotechnology Initiative is a federal interagency activity that was established in 2000. It is managed by the National Science and Technology Council and its goal is to "expedite[ ] the discovery, development and deployment of nanoscale science and technology to serve the public good, through a program of coordinated research and development aligned with the missions of the participating agencies."[251] Nanotechnology has already yielded amazing results[252] including "a nanoparticle that has shown 100 percent effectiveness in eradicating the hepatitis C virus in laboratory testing."[253]

Because of its potential and its infancy, the U.S. Government has passed legislation concerning nanotechnology, creating a National Nanotechnology Program (NNP) and a National Nanotechnology Coordination Office (NNCO).[254] The responsibilities of the NNCO are to

> (1) establish the goals, priorities, and metrics for evaluation for federal nanotechnology research, development, and other activities;

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248. *Frequently Asked Questions*, NAT'L NANOTECHNOLOGY INITIATIVE, http://nano.gov/nanotech-101/nanotechnology-facts (last visited Mar. 9, 2014).

249. Thomas D. Vandermolen, *Molecular Nanotechnology and National Security*, AIR & SPACE POWER J. (Fall 2006), http://www.au.af.mil/au/cadre/aspj/airchronicles/apj/apj06/fal06/vandermolen.html.

250. Kenneth W. Abbot, Douglas S. Sylvester & Gary E. Marchant, *Transnational Regulation of Nanotechnology: Reality or Romanticism?*, *in* INTERNATIONAL HANDBOOK ON REGULATING NANOTECHNOLOGIES (Edward Elgar ed. 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424697.

251. *NNI Vision, Goals, and Objectives*, NAT'L NANOTECHNOLOGY INITIATIVE, http://www.nano.gov/about-nni/what/vision-goals (last visited Mar. 9, 2014).

252. *See* David Brown, *Making Steam Without Boiling Water, Thanks to Nanoparticles*, WASH. POST (Nov. 19, 2012), http://articles.washingtonpost.com/2012-11-19/national/35505658_1_steam-nanoparticles-water.

253. Dexter Johnson, *Nanoparticle Completely Eradicates Hepatitis C Virus*, SPECTRUM (July 17, 2012), http://spectrum.ieee.org/nanoclast/semiconductors/nanotechnology/nanoparticle-completely-eradicates-hepatitis-c-virus?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+IeeeSpectrumSemiconductors+%28IEEE+Spectrum%3A+Semiconductors%29; *accord "Nanorobot" Can be Programmed to Target Different Diseases*, PHYS.ORG (July 16, 2012), http://phys.org/news/2012-07-nanorobot-diseases.html.

254. 15 U.S.C. § 7501 (2006).

(2) invest in federal research and development programs in nanotechnology and related sciences to achieve those goals; and

(3) provide for interagency coordination of federal nanotechnology research, development, and other activities undertaken pursuant to the Program.[255]

The legislation does not mention military uses of nanotechnology, but it does task the NNP with "ensuring that ethical, legal, environmental, and other appropriate societal concerns, including the potential use of nanotechnology in enhancing human intelligence and in developing artificial intelligence which exceeds human capacity, are considered during the development of nanotechnology."[256]

Nanotechnology research is booming. The U.S. Government Accountability Office reports that:

> From fiscal years 2006 to 2010, the National Science and Technology Council reported more than a doubling of National Nanotechnology Initiative member agencies' funding for nanotechnology environmental, health, and safety (EHS) research—from approximately $38 million to $90 million. Reported EHS research funding also rose as a percentage of total na-

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255. 15 U.S.C. § 7501(a) (2006).

256. 15 U.S.C. § 7501(b)(10) (2006). In response to concerns about the ethics of nanotechnology, the President's Council of Advisors on Science and Technology, in its report of April 2008 on nanotechnology, concluded:

> [T]here are no ethical concerns that are unique to nanotechnology today. That is not to say that nanotechnology does not warrant careful ethical evaluation. As with all new science and technology development, all stakeholders have a shared responsibility to carefully evaluate the ethical, legal, and societal implications raised by novel science and technology developments. However, the[re is] . . . no apparent need at this time to reinvent fundamental ethical principles or fields, or to develop novel approaches to assessing societal impacts with respect to nanotechnology.

PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., NATIONAL NANOTECHNOLOGY INITIATIVE: SECOND ASSESSMENT AND RECOMMENDATIONS OF THE NNAP (2008), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST-NNAP-NNI-Assessment-2008.pdf. Marchant, et al. have written:

> More recently, codes of conduct have emerged at the forefront of discussions to restrict the use of genetic engineering to create new biological weapons. Although there are concerns that unenforceable codes of conduct will not provide strong enough assurances against the creation of new genetically engineered biological weapons, they may play an important bridging role in providing some initial protection and governance until more formal legal instruments can be negotiated and implemented. In the same way, codes of conduct may play a similar transitional role in establishing agreed-upon principles for the military use of robots.

Gary E. Marchant et al., *International Governance of Autonomous Military Robots*, 12 COLUM. SCI. & TECH. L. REV. 272, 307 (2011).

> notechnology funding over the same period, ending at about 5 percent in 2010.[257]

In addition to the United States, countries like China and Russia are also "openly investing significant amounts of money in nanotechnology."[258]

The potential benefits of nanotechnology for military purposes have quickly become apparent. As early as 2006, Forbes reported:

> The Department of Defense has spent over $1.2 billion on nanotechnology research through the National Nanotech Initiative since 2001. The DOD believed in nano long before the term was mainstream. According to Lux Research, the DOD has given grants totaling $195 million to 809 nanotech-based companies starting as early as 1988. Over the past ten years, the number of nanotech grants has increased tenfold.[259]

Blake and Imburgia believe that nanotechnology will have a profound effect on both means and methods of warfare:

> Scientists believe nanotechnology can be used to develop controlled and discriminate biological and nerve agents; invisible, intelligence gathering devices that can be used for covert activities almost anywhere in the world; and artificial viruses that can enter into the human body without the individual's knowledge. So called "nanoweapons" have the potential to create more intense laser technologies as well as self-guiding bullets that can direct themselves to a target based on artificial intelligence. Some experts also believe nanotechnology possesses the potential to attack buildings as a "swarm of nanoscale robots programmed only to disrupt the electrical and chemical systems in a building," thus avoiding the collateral damage a kinetic strike on that same building would cause.[260]

Nanotechnology also has the:

> potential to drastically enhance military operations and safety as well as homeland security. Advances in lightweight, nanoscale-engineered materials will protect soldiers on the battlefield from bullets and shrapnel while giving them extreme mobility. In case of injury, engineered bandages with embedded antimicrobial na-

257. *US Government Accountability Office Releases Report on Nanotechnology EHS Research Performance*, NANOWERK NEWS (June 22, 2012), http://www.nanowerk.com/news2/newsid=25691.php.

258. Blake & Imburgia, *supra* note 33, at 180.

259. Josh Wolfe & Dan van den Bergh, *Nanotech Takes on Homeland Terror*, FORBES (Aug. 14, 2006, 6:00 AM), http://www.forbes.com/2006/08/11/nanotech-terror-cepheid-homeland-in_jw_0811soapbox_inl.html.

260. Blake & Imburgia, *supra* note 33, at 180 (citations omitted).

> noparticles will stop deep bleeding in a matter of minutes and keep the wound free from infection.[261]

Recently, French scientists "report[ed] the first attempt to control the combustion and the detonation properties of a high explosive through its structure."[262]

Nanotechnology is likely to improve the strength and longevity of machinery,[263] advance stealth technology,[264] allow the creation of more powerful and efficient bombs,[265] and result in miniature nuclear weapons.[266] It will eventually allow for the creation of microscopic nanobots that can be controlled and used as sensors to gather information or as weapons to carry lethal toxins or genomic alterers into the bodies of humans.[267]

Nanotechnology is a development with almost unlimited applications to future armed conflict. It will make weapons smaller, more mobile, and more potent. It will provide easier, quicker, and more accurate means of collecting information. It will allow greater range, effect, and lethality. For actors with the technology, it has the potential to completely change armed conflict as we know it.

v. Directed Energy

Directed energy weapons include lasers of various magnitude, microwave and millimeter-wave weapons. These weapon systems are based on relatively new technology and almost all are still in the early stages of development. Despite this, in a report by the U.S. Defense Science Board dealing with directed energy,[268] the co-chairs lament the lack of focus on what they term a "transformational 'game changer'."[269] Though the DoD

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261. Wolfe & van den Bergh, *supra* note 259.

262. *Military Nanotechnology: High Precision Explosives Through Nanoscale Structuring*, NANOWERK NEWS (June 5, 2008), http://www.nanowerk.com/spotlight/spotid=5956.php.

263. *Benefits and Applications*, NAT'L NANOTECHNOLOGY INITIATIVE, http://nano.gov/you/nanotechnology-benefits (last visited Mar. 9, 2014).

264. Clay Dillow, *Carbon Nanotube Stealth Paint Could Make Any Object Ultra-Black*, POPSCI (Dec. 6, 2011, 12:15 PM), http://www.popsci.com/technology/article/2011-12/paint-imbued-carbon-nanotubes-could-make-any-object-absorb-broad-spectrum-light.

265. Adrian Blomfield, *Russian Army 'Tests the Father of All Bombs'*, TELEGRAPH (Sept. 12, 2007, 12:01 AM), http://www.telegraph.co.uk/news/worldnews/1562936/Russian-army-tests-the-father-of-all-bombs.html.

266. *Military Uses of Nanotechnology: The Future of War*, THENANOAGE.COM, http://www.thenanoage.com/military.htm (last visited Mar. 9, 2014).

267. Scientists and the University of California, Berkeley, are already working on the Micromechanical Flying Insect Project. *Micromechanical Flying Insect*, U. CAL. BERKELEY, http://robotics.eecs.berkeley.edu/~ronf/mfi.html/index.html (last visited Mar. 9, 2014); *Nanotech Weaponry*, CENTER FOR RESPONSIBLE NANOTECHNOLOGY (Feb. 12, 2004), http://www.crnano.typepad.com/crnblog/2004/02/nanotech_weapon.html; Caroline Perry, *Mass-Production Sends Robot Insects Flying*, LIVE SCI. (Apr. 18, 2012, 5:51 PM), http://www.livescience.com/19773-mini-robot-production-nsf-ria.html.

268. DEF. SCI. BD. TASK FORCE, DIRECTED ENERGY WEAPONS (2007), *available at* http://www.acq.osd.mil/dsb/reports/ADA476320.pdf.

269. *Id.* at vii.

is working on a number of potential systems, "years of investment have not resulted in any currently high-operational laser capability."[270] There are a number of functioning systems such as the Airborne Laser and the Advanced Tactical Laser,[271] but these systems have not proven to be effective battlefield weapons to this point,[272] though the Navy recently shot down a drone with ship-mounted laser.[273]

Despite these recent setbacks, directed energy weapons of various types are likely to be deployed in future armed conflicts. They will be used as maritime, airborne, land-based, and space-based systems. They will be used both as lethal and non-lethal variants.[274]

vi. Biological Agents

Biological agents have rarely appeared in armed conflict since the early twentieth century.[275] However, "[s]ince 2001, senior members of both the Obama and Bush administrations, who have reviewed classified intelligence, have consistently placed biodefense at or near the top of the national-security agenda."[276] A 2008 report on the use of weapons of mass destruction, including biological agents, believes that "a weapon of mass destruction will be used in a terrorist attack somewhere in the world by the end of 2013" and that "terrorists are more likely to be able to obtain and use a biological weapon than a nuclear weapon."[277] Though such an attack has not materialized, the concern about such capability is still valid as evidenced by the fact that the FBI has recently established a Biological Countermeasures Unit that monitors the growing Do-It-Yourself Biology

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270. *Id.*

271. Blake & Imburgia, *supra* note 33, at 177.

272. DEF. SCI. BD. TASK FORCE, *supra* note 268, at 21–29.

273. Spencer Ackerman, *Watch the Navy's New Ship-Mounted Laser Shoot Cannon Kill a Drone*, WIRED (Apr. 8, 2013), http://www.wired.com/dangerroom/2013/04/laser-warfare-system/.

274. *See generally* DEF. SCI. BD. TASK FORCE, *supra* note 268; Fritz Allhof, *Why Does International Law Restrict Nonlethal Weapons More Than Deadly Ones?*, SLATE (Nov. 13, 2012), http://www.slate.com/articles/technology/future_tense/2012/11/nonlethal_weapons_and_the_law_of_war.html.

275. 137 nations are parties to the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Gas Protocol], and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062; *see* Stefan Riedel, *Biological Warfare and Bioterrorism: A Historical Review*, 17 BAYLOR U. MED. CENTER PROCEEDINGS 400 (2004).

276. Wil S. Hylton, *How Ready are We for Bioterrorism?*, N.Y. TIMES (Oct. 26, 2011), http://www.nytimes.com/2011/10/30/magazine/how-ready-are-we-for-bioterrorism.html?pagewanted=all.

277. BOB GRAHAM ET AL., WORLD AT RISK: THE REPORT OF THE COMMISSION ON THE PREVENTION OF WMD PROLIFERATION AND TERRORISM, xv (2008), *available at* http://www.absa.org/leg/WorldAtRisk.pdf.

(DIYbio) movement.[278] The general consensus is that although the United States has made progress in its biodefenses, we are far from being adequately prepared.[279]

Recent advances in laboratory technology have allowed access to these horrific weapons to a much more general audience. Brett Giroir, former Director at the Defense Advanced Research Projects Agency (DARPA) argues that

> [w]hat took me three weeks in a sophisticated laboratory in a top-tier medical school 20 years ago, with millions of dollars in equipment, can essentially be done by a relatively unsophisticated technician. . . . A person at a graduate-school level has all the tools and technologies to implement a sophisticated program to create a bioweapon.[280]

Michael Daly writes that "there is already information in public databases that could be used to generate highly pathogenic biological warfare agents,"[281] and "biohacker communities have popped up around the globe, with hundreds of do-it-yourself biologists testing their experimental prowess."[282]

In addition to increased access, the methods of contamination make biological agents catastrophically dangerous. As Wil Hylton argues,

> The specter of a biological attack is difficult for almost anyone to imagine. It makes of the most mundane object, death: a doorknob, a handshake, a breath can become poison. Like a nuclear bomb, the biological weapon threatens such a spectacle of horror—skin boiling with smallpox pustules, eyes blackened with anthrax lesions, the rotting bodies of bubonic plagues—that it can seem the province of fantasy or nightmare or, worse, political manipulation.[283]

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278. *See* Todd Kuiken, *DIYbio: Low Risk, High Potential*, THE SCIENTIST (Mar. 1, 2013), http://www.the-scientist.com/?articles.view/articleNo/34443/title/DIYbio—Low-Risk—High-Potential/; *On Guard Against WMD*, FBI (Feb. 21, 2012), http://www.fbi.gov/news/stories/2012/february/wmd_022112.

279. Wil S. Hylton, *How Ready are We for Bioterrorism?*, N.Y. TIMES, (Oct. 26, 2011), http://www.nytimes.com/2011/10/30/magazine/how-ready-are-we-for-bioterrorism.html?pagewanted=all.

280. *Id.*

281. Michael J. Daly, *The Emerging Impact of Genomics on the Development of Biological Weapons: Threats and Benefits Posed by Engineered Extremophiles*, 21 CLINICS IN LABORATORY MED. 620, 621 (2001), *available at* http://www.usuhs.mil/pat/deinococcus/FrontPage_DR_Web_work/Pages/Lab_info/Daly_papers/clinicsLabMedicineVol21No3.pdf.

282. Hanno Charisius et al., *Becoming Biohackers: Learning the Game*, BBC FUTURE (Jan. 22, 2013), http://www.bbc.com/future/story/20130122-how-we-became-biohackers-part-1.

283. Hylton, *supra* note 276.

In combination with advances in nanotechnology, biological agents become even more deadly. As Immanuel has written, "the application of nanobiotechnology for engineering biological weapons opens pathways for an entirely new class of biology based nanoweapons. They could be self-replication or non-replicating, remotely operable and extremely destructive."[284]

Biological agents also pose some unique problems for deterrence and interdiction. Graham Allison, the founding Dean of Harvard's John F. Kennedy School of Government and a leading expert on nuclear proliferation, argues that biological terrorism presents some problems even more difficult than nuclear terrorism:

> Nuclear terrorism is a preventable catastrophe, and the reason it's preventable is because the material to make a nuclear bomb can't be made by terrorists. But in the bio case—oh, my God! Can I prevent terrorists from getting into their hands anthrax or other pathogens? No! Even our best efforts can't do that. I think the amazing thing is that one hasn't seen more bioterrorism, given the relative ease of making a bioweapon and the relative difficulty of defending.[285]

The combination of increasing accessibility, the difficulty of detection and interdiction, and the potentially catastrophic nature of biological weapons makes them a very appealing weapon for not only terrorists, but also for nation-states. Despite current legal prohibitions, biological weapons will remain a possible (and likely) weapon in armed conflict.

vii. Genomics

Genomics is the "study of genes and their function."[286] The rapid advances in genomics[287] have had a multitude of benefits for modern medicine and science in general. The costs are rapidly decreasing and accessibility rapidly increasing.

> A couple of decades ago, it took three years to learn how to clone and sequence a gene, and you earned a PhD in the process. Now, thanks to ready-made kits you can do the same in less than three days . . . [T]he cost of sequencing DNA has plummeted, from

284. Gifty Immanuel, *Biotechnology by Bioterrorism: Implications for Clinical Medicine, Biotechnology*, 12 BIOTECHNOLOGY 1, 4 (2007), *available at* http://www.eolss.net/Sample-Chapters/C17/E6-58-11-18.pdf.

285. Hylton, *supra* note 276 (quoting Graham Allison).

286. *Definition of Genomics*, MEDICINENET.COM, http://www.medterms.com/script/main/art.asp?articlekey=23242 (last visited Mar. 9, 2014).

287. Hoffman, *supra* note 144, at 78 ("One thing is certain: The technology for probing and manipulating life at the genetic level is accelerating. . . . But the inquiry itself highlighted the rapid pace of change in manipulating biology. Will rogue scientists eventually learn how to use the same techniques for evil?").

> about $100,000 for reading a million letters, or base pairs, of DNA code in 2001, to around 10 cents today.[288]

However, calls for controls on genetic research and development are increasing.[289]

Some scientists and concerned advocates argue for caution and restraint because "vulnerability arises from the relative ease with which this digital genetic code can be accessed, translated, and incorporated into conventional genetic technologies."[290] Machi and McNeill state that:

> In today's market it costs just a few thousand dollars to design a custom DNA sequence, order it from a manufacturer, and within a few weeks receive the DNA in the mail. Since select agents are currently not defined by their DNA sequences, terrorists can actually order subsets of select agent DNA and assemble them to create entire pathogens.[291]

They similarly estimate that "by 2020 malefactors will have the ability to manipulate genomes in order to engineer new bioterrorism weapons."[292]

The range of nefarious possibilities through the use of genes is very broad. As proposed at the beginning of this article, stealth viruses could be introduced covertly through agricultural infestation or nanobots into the genomes of a given population, and then triggered later by a signal.[293] "Bionanobots might be designed that, when ingested from the air by humans, would assay DNA codes and self-destruct in an appropriate place (probably the brain) in those persons whose codes had been program-

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288. Charisius et al., *supra* note 282.

289. *See* Brian Vastag, *Environmental Groups Call for Tighter Regulation of 'Extreme Genetic Engineering,'* WASH. POST (Mar. 13, 2012), http://articles.washingtonpost.com/2012-03-13/national/35447443_1_synthetic-biology-environmental-groups-synthetic-organisms.

290. Daly, *supra* note 281, at 620; *see also* Anthony C. Littrell, *Biological Weapons of Mass Destruction: The Present and Future Threat*, CONFRONTING TERRORISM, 2002, at 339, *available at* http://digitalcorpora.org/corp/nps/files/govdocs1/065/065912.pdf; Melinda Willis, *Dangers of Genetically Engineered Weapons*, ABC NEWS (Oct. 5, 2011), http://abcnews.go.com/Health/story?id=117204&page=1#.T-3ze44zzbx.

291. Ethel Machi & Jena Baker McNeil, *New Technologies, Future Weapons: Gene Sequencing and Synthetic Biology*, HOMELAND SECURITY 2020, at 1 (Aug. 24 2010), *available at* http://thf_media.s3.amazonaws.com/2010/pdf/wm2986.pdf.

292. *Id.*; according to Paul Hansen's review, Jeffery Lockwood's book, *Six-Legged Soldiers*, describes how insects have been used in war over the last 100,000 years and suggests some possibilities for genomics and insects in the future. Paul Hansen, *Six-Legged Soldiers: Using Insects as Weapons of War by Jeffery A. Lockwood*, 13 J. MILITARY & STRATEGIC STUD. 140 (2009), *available at* http://jmss.org/jmss/index.php/jmss/article/viewFile/375/395. Lockwood also details "the possibility of future human-made genomic infused mosquito weapons in North America," specifically "the potential of insects to be used in future conflicts; terrorist attacks with crop destroying beetles, fireflies as natural guardians against biological attack, or cyborgs used for bomb detection based on the body of a cockroach as the ultimate indestructible and mobile platform." *Id.*

293. Mae-Wan Ho, *GM & Bio-Weapons in the Post-Genomics Era*, INSTITUTE OF SCIENCE IN SOCIETY (Apr. 30, 2002), http://www.i-sis.org.uk/gmbiopost.php.

med."[294] The genomic material could be designed to cause a wide array of results "including death, incapacitation, [and] neurological impairment."[295]

Some domestic legal restrictions are beginning to appear.[296] But the field of genomics and its potential weaponization is still new and difficult to accurately project or regulate. Even with this limited amount of information, it raises some important impacts on the LOAC that will be discussed below.

b. Methods

The method of targeting is most often a matter of tactics where the commander decides how and when to employ a weapon system. Commanders and individuals must not only concern themselves with the weapon they are using, but also with the way in which they are using it. Advancing technology allows weapons to be employed in creative ways that raise interesting legal issues.

i. Latent Attacks

Perhaps one of the most feared methods of attack is the latent attack. This type of attack is characterized by the placing or embedding of some weapon in a place or position where it will not be triggered until signaled sometime in the future or activated by some future action. Some latent attacks may even be triggered by the victim himself. As mentioned above in relation to genomics and biological weapons, latent attacks are a fertile area for development of stealth viruses and similar weapons. "The concept of a stealth virus is a cryptic viral infection that covertly enters human cells (genomes) and then remains dormant for an extended time. However, a signal by an external stimulus could later trigger the virus to activate and cause disease."[297] The unique aspect of this is that the viral genetic material might be implanted into the victim far in advance by a nanobot and potentially never activated or only activated upon some signal by the attacker or some other event, either triggered by an unknowing third party or the victim himself.

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294. John L. Petersen & Dennis M. Egan, *Small Security: Nanotechnology and Future Defense*, 8 DEF. HORIZONS, Mar. 2002, at 1, 3, *available at* http://www.carlisle.army.mil/DIME/documents/DH08.pdf.

295. Neil Davison, *Biochemical Weapons: Lethality, Technology, Development, and Policy*, BRADFORD NON-LETHAL WEAPONS RESEARCH PROJECTS (May 8, 2004), http://www.brad.ac.uk/acad/nlw/research_reports/docs/biochemical_weapons_May04.pdf (quoting J. Petro, et al., *Biotechnology: Impact on Biological Warfare and Biodefense*, 1 BIOSECURITY AND BIOTERRORISM: BIODEFENSE STRATEGY, PRACTICE, AND SCIENCE 161, 168 (2003)).

296. Charisius et al., *supra* note 282.

297. Michael J. Ainscough, *Next Generation Bioweapons: Genetic Engineering and Biological Warfare*, *in* THE GATHERING BIOLOGICAL WARFARE STORM 165, 176–77, 180 (Barry R. Schneider & Jim A. Davis eds., 2002), *available at* http://www.bibliotecapleyades.net/ciencia/ciencia_virus08.htm.

The method of implanting the attack far in advance of its likely use is not unique to biological agents and genomics. Latent computer attacks have already caused concern[298] and continue to grow in appeal. Consider the manufacture of computer components. It is certainly possible that manufacturers of computer materials could embed source code in the hardware of computer components that would trigger certain functions or operations by that computer at a future time.[299] Similarly, consider weapons or military equipment sales. As countries sell military hardware to other countries, it is entirely possible that latent code has been implanted that might affect its future function. For example, the United States sells F-16 aircraft to numerous countries around the world. It seems not only plausible, but perhaps irresponsible to not implant in the computer functions of that aircraft some computer code that will not allow the F-16 to engage aircraft that it identifies as belonging to the United States.

The ability to perform latent attacks and keep them hidden until the appropriate time is a technological question, but it seems unlikely that if the potential for such actions exists, it would not be used extensively, even against current allies, as a hedge against changing political landscapes and alliances.

ii. Camouflage

It is clear that camouflaging soldiers or military equipment is a legitimate ruse of war and raises no LOAC issues generally.[300] However, future developments will allow camouflage in a different way than used before. Prior uses of camouflage included both blending in with the natural environment and mimicking other environments.[301] For example, dressing in a camouflaged uniform allowed soldiers to blend into their environment, but the nature of the uniform was known to opposing forces. Painting vehicles to match the anticipated terrain did not change the form of the vehicle.

New technologies will use electronic sensors to "project images of the surrounding environment back onto the outside of the vehicle enabling it to merge into the landscape and evade attack."[302] Use of this type of camouflage in cities or urban environments might actually project a tank to be a civilian object such as a car. Similar technology is being developed for individuals as well.[303]

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298. Steve Stecklow, *U.S. Nuclear Lab Removes Chinese Tech Over Security Fears*, REUTERS (Jan. 7, 2013, 3:32 PM), http://www.reuters.com/article/2013/01/07/us-huawei-alamos-idUSBRE90608B20130107.

299. *Wary of Naked Force, Israel Eyes Cyberwar on Iran*, REUTERS, (Jul. 7, 2009), http://www.ynetnews.com/articles/0,7340,L-3742960,00.html.

300. Sean Watts, *Law-of-War Perfidy*, on file with author.

301. *Id.*

302. Sean Rayment, *Invisible Tanks Could Be On Battlefield Within Five Years*, TELEGRAPH (Jan. 9, 2011, 9:30 AM), http://www.telegraph.co.uk/news/uknews/defence/8247967/Invisible-tanks-could-be-on-battlefield-within-five-years.html.

303. *See, e.g.*, Charley Cameron, *Quantum Stealth Camouflage is a Hi-Tech Invisibility Cloak*, INHABITAT (Dec. 22, 2012), http://inhabitat.com/quantum-stealth-camouflage-is-a-hi-

Other forms of "camouflage" for modern weapons might include hiding specific computers or information through making it appear to be something else,[304] or piggybacking harmful malware or biological or genetic agents on useful or benign agents. These types of methods of attack, though not new in theory, will be much more prevalent because of the nature of new technologies and weapons in future armed conflict.

2. Emerging Law

Technologically advanced means and methods of warfare will change the way armed conflict occurs. As David Ignatius comments,

> The 'laws of war' may sound like an antiquated concept in this age of robo-weapons. But, in truth, a clear international legal regime has never been more needed: It is a fact of modern life that people in conflict zones live in the perpetual cross hairs of deadly weapons. Rules are needed for targets and targeters alike.[305]

The LOAC must respond by evolving in several specific but fundamental areas. The section below will outline some of the areas where adaptation is most needed.

a. Attack

As discussed above,[306] the LOAC provisions apply most completely and forcefully only to actions that are deemed an "attack." The meaning of attack is defined in GPI as "acts of violence against the adversary, whether in offence or in defence."[307] Many operations conducted with new technologies will not reach the threshold of an attack, meaning they are not proscribed. This has already been discussed with reference to cyber operations, but it equally applies to the other means and methods dis-

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tech-invisibility-cloak/; Damien Gayle, *The Camouflage Fabric 'That Can Make Soldiers INVISIBLE'*, DAILY MAIL (Dec. 10, 2012), http://www.dailymail.co.uk/sciencetech/article-2245935/The-camouflage-fabric-make-soldiers-INVISIBLE-Company-claims-Pentagon-backing-miracle-material.html.

304. Eric Talbot Jensen, *Cyber Deterrence*, 26 EMORY INT'L L. REV. 773 (2012).

305. Gary Marchant et al., *Nanotechnology Regulation: The United States Approach*, *in* NEW GLOBAL FRONTIERS IN REGULATION: THE AGE OF NANOTECHNOLOGY 189 (Graeme Hodge et al. eds., 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1305256; Kenneth W. Abbot et al., *supra* note 245; Kenneth W. Abbott, et al., *A Framework Convention for Nanotechnology*, 36 ENVTL. L. REP. 10931 (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946777; Gary E. Marchant et al., *A New Soft Law Approach to Nanotechnology Oversight: A Voluntary Product Certification Scheme*, UCLA J. ENVTL. L. & POL'Y (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483910; Gary E. Marchant et al., *Risk Management Principles for Nanotechnology*, 2 NANOETHICS 43 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020104; David Ignatius, *Dazzling New Weapons Require New Rules for War*, WASH. POST (Nov. 11, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/10/AR2010111005500.html.

306. *See supra*, Part II.B.2.a.

307. Protocol I, *supra* note 9, art. 49.1.

cussed above. For example, the use of a nanobot to infiltrate an individual's body and collect data and then transmit that data to an adversary may seem more like espionage than an attack, despite its invasive nature. Similarly, the spreading of a gene[308] that creates an allergic sensitivity to pollen may have significant effect on a fighting force, but might not be termed an act of violence.

Perhaps more vexing with respect to the LOAC definition of attack is its inability to clearly demarcate the temporal limitations on actions. Recalling the example at the beginning of this article, when does the attack occur? Is it when the virus is sent to Samantha? Is it when Samantha ingests the virus? Does Samantha attack all of her friends, associates, and unwitting accomplices by spreading the virus through proximity? Does the attack occur when the first infected person, whether Samantha or someone who has caught the virus from her, enters an area where she is proximate to the President? What about when the President actually ingests the virus? Or is it not an attack until the virus actually begins to do its genetic work on the President? If an analogy to a mine or explosive is appropriate, the attack would not occur until the virus actual began to take effect in the President. That would mean that no proportionality analysis was necessary for such an attack, since there would be no collateral damage from that specific attack. Such a conclusion does not seem to support the purposes of the LOAC in protecting non-participants from the effects of armed conflict.

Similar scenarios can be created with most future weapons that have latent effects. Computer viruses may sit resident in computer systems until activated by the attacker or victim (or third party–see below). Swarms of microrobots may cross a nation's borders and take up residence at various critical points, awaiting the activation signal to commence their operations.[309] As advancing technologies are developed that might affect future

308. With respect specifically to genetic weapons, some commentators believe that all genetic weapons are already prohibited by the provisions of the 1925 Gas Protocol, Gas Protocol, *supra* note 275, and the 1972 Biological Weapons Convention which proscribes "microbial or other biological agents, or toxins[,]" Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *supra* note 277. For example, Louise Doswald-Beck, in a presentation on the application of the LOAC to future wars, stated:

> Mention must be made of a potential new method of warfare that is already prohibited in law but that could have horrific effects if developed, namely genetic weapons. The specter of this as well as of new and obviously preliminary developments in bio-technology has already motivated States to begin negotiations for the development of verification methods for the Biological Weapons Convention.

Louise Doswald-Beck, *supra* note 2, at 44. However, this position is not universally accepted. Additionally, even if states accepted that they were limited in the use of genetic weapons and honored their obligations, those arms control conventions do not bind non-state actors and certainly wouldn't be a deterrent to terrorist organizations.

309. This scenario could also cause some reflection on the adequacy of the *jus ad bellum* under the U.N. Charter.

conflict, the LOAC will need to be ready to not only proscribe illegal behavior, but also signal in advance what kinds of behavior are prohibited.

b. Distinction and Discrimination

Article 48 of GPI embodies the foundational LOAC principle of distinction and states that "belligerents may direct their operations only against military objectives."[310] This rule is complemented by Article 51, paragraph 2 which states that "the civilian population as such, as well as individual civilians, shall not be the object of attack."[311] This rule is considered to be customary international law and binding on all nations, whether parties to the Additional Protocols or not.[312]

Discrimination in the attack, or the prohibition on indiscriminate attacks, is "an implementation of the principle of distinction"[313] and is codified in GPI, Article 51.4.[314] As discussed above, these restrictions only apply to "attacks," but even if one takes a very broad view of what constitutes an attack, the LOAC still struggles to signal effectively in the case of future weapons. For example, in the virus scenario from the beginning of the article, it appears that the lethal aspect of the virus can be and is directed at a specific military objective, and therefore not indiscriminate. Article 51.4(c) might allow one to argue that the virus was not discriminate in the attack because it was "of a nature to strike military objectives [the President in this case] and civilians or civilian objects without distinction."[315] However, the argument might be made equally convincingly that the virus did not "strike" civilians; it merely used or inconvenienced civilians.

A similar analysis can be made with cyber operations. Some have already made the argument that as a result of the use of Stuxnet by the United States, "contemporary warfare will change fundamentally" if cyber warfare is not regulated by international agreement.[316] Speaking specifically about distinction and discrimination, Patrick Lin, Fritz Allhoff, and Neil Rowe write:

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310. Protocol I, *supra* note 9, art. 48.

311. *Id.* art. 51.2.

312. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3 (2005), *available at* http://www.icrc.org/eng/resources/documents/publication/pcustom.htm.

313. 1 HENCKAERTS & DOSWALD-BECK, *supra* note 312, at 43.

314. Protocol I, *supra* note 9, art. 51.4.("Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.").

315. *Id.* art. 51.4.

316. Misha Glenny, *A Weapon We Can't Control*, N.Y. TIMES (June 14, 2012), http://www.nytimes.com/2012/06/25/opinion/stuxnet-will-come-back-to-haunt-us.html?_r=0.

> It is unclear how discriminatory cyberwarfare can be. If victims use fixed Internet addresses for their key infrastructure systems, and these could be found by an adversary, then they could be targeted precisely. However, victims are unlikely to be so cooperative. Therefore, effective cyberattacks need to search for targets and spread the attack, but as with biological viruses, this creates the risk of spreading to noncombatants: while noncombatants might not be targeted, there are also no safeguards to help avoid them. The Stuxnet worm in 2010 was intended to target Iranian nuclear processing facilities, but it spread far beyond intended targets. Although its damage was highly constrained, its quick, broad infection through vulnerabilities in the Microsoft Windows operating system was noticed and required upgrades to antivirus software worldwide, incurring a cost to nearly everyone. The worm also inspired clever ideas for new exploits currently being used, another cost to everyone.[317]

The apparent difficulties in applying the principles of distinction and discrimination[318] to potential uses of future weapons implies that an evolved LOAC would provide better protections to victims of armed conflicts.

c. Precautions and Re-engineering

Article 57 of the GPI is titled "Precautions in Attack"[319] and requires the commander or fighter to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects"[320] and "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[321]

During the ratification process for the Protocol, there was great debate about what the term "feasible" meant.[322] Ultimately, "feasible" was generally understood "to mean that which is practicable or practicably

317. Lin et al., *supra* note 238.

318. *See* TALLINN MANUAL, *supra* note 42, at 157; Jensen, *supra* note 193, at 213–14.

319. Protocol I, *supra* note 9, arts. 57.2(a)(i)–(ii), 58.

320. *Id.* art. 57.2(a)(i).

321. *Id.* art. 57.2(a)(ii).

322. 14 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), at 199 (1978); Jensen, *supra* note 193, at 209.

possible, taking into account the circumstances ruling at the time."[323] This is the accepted standard when considering an attack.[324]

One of the interesting aspects of many future weapons systems that is different than historical weapon systems is the ability to re-engineer these weapons. Historically, when an attacker dropped a bomb on his adversary, he did not have to think of potential uses his adversary might make of that bomb. It was destroyed amidst the heat, blast, and fragmentation of the explosion. The same is not true of many future weapons. For example, when an attacker uses a virus or computer malware, the enemy can see those weapons, recover them, analyze their composition, and then re-create or re-engineer them and reuse that weapon. This would be equivalent to the United States, after using its new stealth aircraft in the fight against Saddam Hussein in Iraq, simply landing one of the aircraft at an Iraqi airport and inviting Saddam to give the aircraft to his scientists for analysis. Viruses, computer malware, genetic material, and many other future weapon systems do not self-destroy on impact. Re-engineering has already occurred in the case of computer malware[325] and will undoubtedly continue to do so with other modern and future weapon systems.

This raises the question of whether these new technologies lead to a requirement for commanders to consider the potential effects from re-engineering as part of their attack analysis. In other words, assume a commander has the following plan. He will release a swarm of microrobots, perhaps in the form of flies, that injects the general population with a deadly but limited toxin that will only become lethal when combined with a known vaccination usually given only to military. He knows that his toxin is very discriminate in the attack, but he also knows that some enterprising geneticist might come along and reengineer his virus to affect the population more generally, having lethal effect on millions instead of one. If his discreetly targeted toxin has the ability to be re-engineered and used to kill thousands or millions, must he consider that as part of his analysis when deploying the toxin?

d. Marking

The LOAC requirement of marking and its relation to future armed conflict has been addressed earlier in relation to actors on the battle-

323. Letter from Christopher Hulse, Ambassador from the U.K. to Switz., to the Swiss Gov't (Jan. 28, 1998), *available at* http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument (listing the United Kingdom's reservations and declarations to Additional Protocol I, and explaining in paragraph (b) that "[t]he United Kingdom understands the term 'feasible' as used in the Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations"); *see also* JOINT DOCTRINE & CONCEPTS CENT., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 81 n. 191 (2004) (suggesting the same interpretation for the word "feasible").

324. Jensen, *supra* note 193, at 209–11.

325. Hoffman, *supra* note 144, at 80; *see* Ted Samson, *Hackers Release Decrypted Stuxnet Code—But Don't Panic*, INFOWORLD (15 Feb. 2011), http://www.infoworld.com/t/malware/hackers-release-decrypted-stuxnet-code-dont-panic-685.

field.[326] The fundamental principle is that an attacker is required to distinguish himself in the attack.[327] Similar concerns exist with relation to means and methods. Even if the actors are distinguishing themselves, to what extent is there or should there be a requirement that the weapon be distinguishable? For example, in the virus scenario, the victim state could have taken precautions had it been able to distinguish Samantha's flu-like symptoms from a potentially deadly virus. As future weapons transform from "over the horizon" to "from everywhere," the LOAC will need to provide some way for the victim to identify the attacker.

One of the more obvious examples of this is brought about by advances in camouflage, discussed above. As both vehicles and individuals use advanced technology to look like the surrounding environs, it is likely that both vehicles and fighters will take on civilian aspects. A tank that is parked amongst civilian vehicles and takes on their visual attributes may cross the line between ruse and perfidy. Is a genetically linked virus, masquerading as the common flu, significantly different? Similar concerns may exist in cyber warfare.[328]

Conclusion

The rule of law is the civilian's best bulwark not only against his own government but against those who would hold him hostage to their political objectives by threatening him with violence.[329]

When Samantha and the others to whom she has already spread the virus enter the auditorium where the President will soon be speaking and carry with them the genetically targeted virus, they will be launching the LOAC on a course it is not currently prepared to travel. It is likely that many nations are on the brink of developing similar capabilities and they will undoubtedly be used in the future.

As Professor Bobbitt states above, the rule of law is vital to protecting the victims of armed conflict from the effects of armed conflict.[330] The LOAC's role as a signaling mechanism to states and other developers of future technologies that will appear on the battlefield is vital to continuing to limit hostilities with legal proscriptions. Future changes in the places, actors and means and methods of armed conflict will stress the LOAC's ability, as currently understood and applied, to sufficiently regulate that conflict.

Now is the time to act. In anticipation of these developments, the international community needs to recognize the gaps in the current LOAC and seek solutions in advance of the situation. As the LOAC evolves to

326. *See supra*, section II.B.1.c.i.

327. Protocol I, *supra* note 9, art. 44.3.

328. Lin et al., *supra* note 238.

329. Bobbitt, *supra* note 138, at 260.

330. *See id.*

face anticipated future threats, its signaling function will help ensure that advancing technologies comply with the foundational principles of the LOAC and that future armed conflicts remain constrained by law.

Keynote Article

Future War, Future Law

Eric Talbot Jensen*

ABSTRACT

Advancing technology will dramatically affect the weapons and tactics of future armed conflict, including the "places" where conflicts are fought, the "actors" by whom they are fought, and the "means and methods" by which they are fought. These changes will stress even the fundamental principles of the law of armed conflict, or LOAC. While it is likely that the contemporary LOAC will be sufficient to regulate the majority of future conflicts, the international community must be willing to evolve the LOAC in an effort to ensure these future weapons and tactics remain under control of the law.

Though many of these advancing technologies are still in the early stages of development and design, the time to act is now. In anticipation of these developments, the international community needs to recognize the gaps in the current LOAC and seek solutions in advance of the situation. As the LOAC evolves to face anticipated future threats, it will help ensure that advancing technologies comply with the foundational principles of the LOAC and future armed conflicts remain constrained by law.

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I would like to express my gratitude to the *Minnesota Journal of International Law* for inviting me to this

* Associate Professor, Brigham Young University Law School. The author wishes to express gratitude to the staff of the *Minnesota Journal of International Law* for having the foresight to organize a symposium on such an important issue and for editorial assistance on the article. The author also expresses gratitude to Allison Arnold and Aaron Worthen for invaluable research assistance. A video recording of this speech can be found on the *Minnesota Journal of International Law's* website, http://www.minnjil.org/?page_id=913.

symposium, and really, for having this symposium. This is a very important subject and one which, if we do not engage on now, we will miss an opportunity to really have an impact on the future of the law of armed conflict.

In a recent address, Harold Koh, the State Department Legal Advisor, said "Increasingly, we find ourselves addressing twenty-first-century challenges with twentieth-century laws."[1] Mr. Koh is not the only person to espouse this belief.[2] The twenty-first century challenges that Mr. Koh is referring to involve rapidly advancing technologies and changing tactics that are beginning to seriously challenge even the foundational principles of the Law of Armed Conflict, or LOAC.[3] I would like to spend the next few minutes discussing what I think are some waning factors in future armed conflicts and the resulting waning legal norms and then attempt a brief peek into the future factors that will emerge from advancing technologies and even posit some suggestions concerning emerging legal norms.

I do this with some trepidation. As Louise Doswald-Beck stated, "Any attempt to look into the future is fraught with difficulty and the likelihood that much of it will be wrong."[4] However, I believe that we are currently at a point when we can see into the future of armed conflict and project, at least to some degree, the effect of advancing technologies on armed conflict and the governing LOAC. It is likely that the

1. Harold Hongju Koh, *The State Department Legal Adviser's Office: Eight Decades in Peace and War*, 100 GEO. L.J. 1747, 1772 (2012).

2. *See* Rosa Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 745 (2004); P.W. Singer, Address at the United States Naval Academy William C. Stutt Ethics Lecture: Ethical Implications of Military Robotics (Mar. 25, 2009), http://www.au.af.mil/au/awc/awcgate/navy/usna_singer_robot_ethics.pdf.

3. *See* Koh, *supra* note 1, at 1772.

4. Louise Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, *in* 71 NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 39, 39 (Michael N. Schmitt & Leslie C. Green eds., 1998); *see also* Stephen Peter Rosen, *The Future of War and the American Military*, HARV. MAG., May–June 2002, at 29 ("The people who run the American military have to be futurists, whether they want to be or not. The process of developing and building new weapons takes decades, as does the process of recruiting and training new military officers. As a result, when taking such steps, leaders are making statements, implicitly or explicitly, about what they think will be useful many years in the future."). Despite the difficulty, it is a vital requirement of militaries and one in which plenty of people are still willing to engage. *See* Frank Jacobs & Parag Khanna, *The New World*, N.Y. TIMES (Sept. 22, 2012), http://www.nytimes.com/interactive/2012/09/23/opinion/sunday/the-new-world.html.

contemporary LOAC will be sufficient to regulate the majority of future conflicts, but we must be willing and able to evolve the LOAC in an effort to ensure these future weapons and tactics remain under control of the law.

Our current situation is not unlike those who met at the Lateran Council of 1139.[5] Tradition has it that at the council, one of the issues raised was the new invention of the crossbow.[6] The crossbow caused alarm for several reasons. First, it allowed killing at a distance, which was not the traditional way of combat.[7] Secondly, it allowed a peasant who was properly trained to kill a knight.[8] This combination meant that a peasant, who was traditionally of little value as a fighter, could now kill a knight, an asset of great value and a major investment in training and equipment.[9]

Consequently, the Council outlawed the use of the crossbow, at least when Christians were fighting each other.[10] Of course, that legal prohibition hardly survived the vote that was taken to sustain it.[11] The important point this example makes is that as we contemplate future technologies and their linkage with the law, we have to take a practical view. We cannot assume that we can merely pronounce a developing weapon or tactic as illegal and expect universal compliance.[12] That is not the lesson history teaches us.[13]

5. *See generally* Harold E. Harris, *Modern Weapons and the Law of Land Warfare*, 12 MIL. L. & L. WAR REV. 7, 9 (1973).

6. Martin van Creveld, *The Clausewitzian Universe and the Law of War*, J. CONTEMP. HIST. 403, 416 (1991).

7. *Id.*

8. *Id.*

9. *See id.* ("The story of the early firearms which, by enabling a commoner to kill a knight from afar, threatened the continued existence of the medieval world, is well known.").

10. Harris, *supra* note 5, at 9; Donna Marie Verchio, *Just Say No? The SIrUS Project: Well-Intentioned, But Unnecessary and Superfluous*, 51 A.F. L. REV. 183, 187 (2001).

11. *See* W.T. Mallison, Jr., *The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, 36 GEO. WASH. L. REV. 308, 316 (1967) (discussing the continued use of the crossbow after the ban).

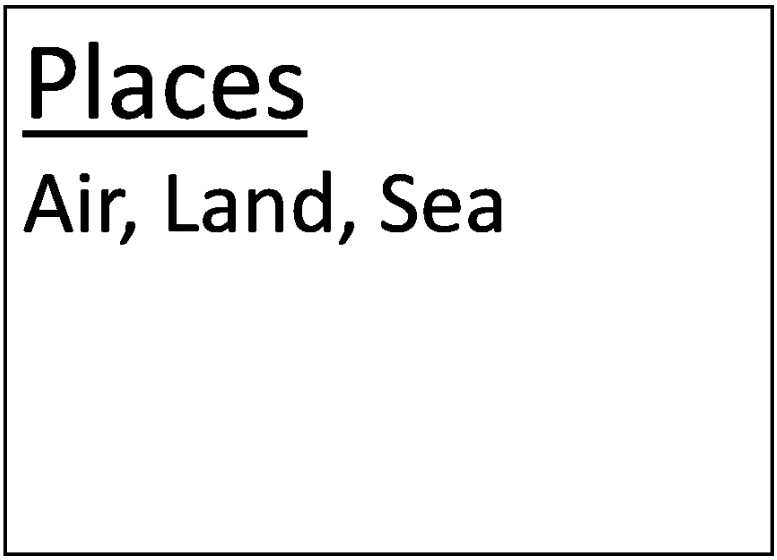
12. *Id.*

13. Vericho, *supra* note 10, at 187 ("The situation at that point in history is the same we observe today-no weapon has been effectively restricted or eliminated by international regulation.").

For convenience of my analysis, I will focus on the "places" where conflicts are fought, the "actors" by whom they are fought, and the "means and methods" by which they are fought. I remind you that predicting the future is not a promising line of work, and I do this hesitantly. My guess is that many of you will take issue with my characterization of what the future holds. However, I hope that even if you disagree with me, you will see the value of having the discussion and engaging on the issue of evolving the law of war in order to maintain its relevance in your version of the future.

Lest I be misunderstood, I am certainly not saying that these principles of law are no longer binding or useful in any situations throughout the world. Undoubtedly, advancing technologies which test these laws will emerge gradually and unequally among the international community. The majority of the current LOAC will continue to apply to most armed conflicts for the foreseeable future, but as technologies continue to advance, particularly among the advanced nations of the world, the LOAC will need to evolve to keep pace with innovation.

I. PLACES



Throughout history, armed conflict has taken place in "breathable air" zones—the land, the surface of the ocean, and recently the air above the land.[14] As the LOAC developed, these breathable air zones were concurrently being divided into areas of sovereign control,[15] with the exception of the high seas and the commons, such as the poles.[16] The effect of this was that the LOAC developed around rules governing sovereign territory and was based on presumptions about where armed conflict would occur.[17] These presumptions are now losing their applicability, requiring the international community to

14. *See* David Alexander, *Pentagon to Treat Cyberspace as "Operational Domain"*, REUTERS, July 14, 2011, *available at* http://www.reuters.com/article/2011/07/14/us-usa-defense-cybersecurity-idUSTRE76D5FA20110714 (identifying the "air, land and sea" as traditional areas of operational domain for the military).

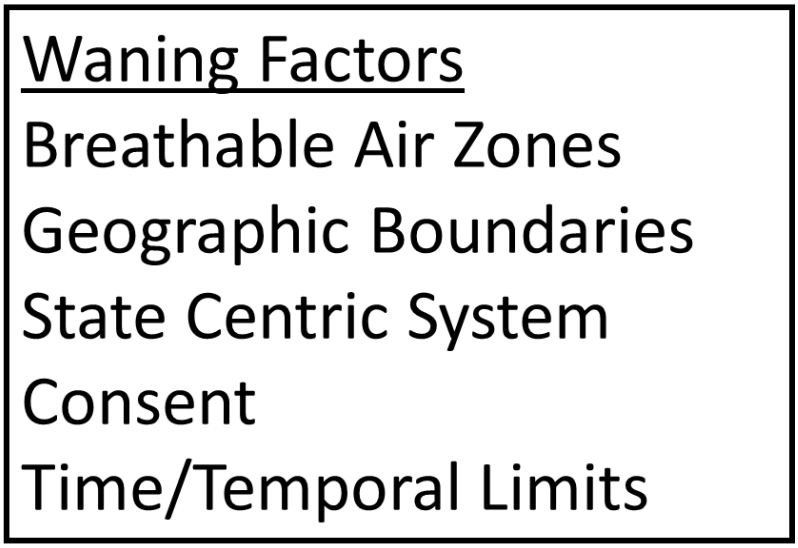
15. Eric Talbot Jensen, *Applying a Sovereign Agency Theory of the Law of Armed Conflict*, 12 CHI. J. INT'L L. 685, 707–09 (2012).

16. *See generally* Ron Purver, *Security and Arms Control at the Poles* 39 INT'L J.888, 888–92 (1984) (discussing historical examples of the use of the poles for military purposes and noting that military operations in the poles were eventually banned for all countries in the first article of the Antarctic Treaty).

17. *See* Singer, *supra* note 2 at 14–16 (noting that "going to war" has meant the same thing for 5,000 years and the changing nature of law raises legal questions never before considered).

reconsider the validity of many LOAC provisions.[18]

A. WANING FACTORS



I will not discuss each of my proposed waning factors, but several deserve specific mention. As I mentioned a moment ago, one of the most important waning factors in future conflict is the limitation to breathable air zones.[19] As I will discuss later concerning "actors," the limitation of operating in breathable air zones is swiftly disappearing.[20] Miniaturization and robotics are opening areas to use that have previously not been available.[21] We will soon not think of the ability to breath as a limitation on our ability to operate. As technology increases, military planners will not feel constrained by human restrictions, but will find other tools that can function equally

18. *Id.* at 16 (suggesting one reason the LOAC needs to be reconsidered is that modern enemies know the laws and are using them to their advantage).

19. Alexander, supra note 14.

20. *Id.* (discussing the increased need for protection from cyber-attacks and suggesting the United States has suffered $1 trillion in economic losses as a result of past cyber-attacks).

21. Jon Cartwright, *Rise of the Robots and the Future of War*, THE OBSERVER (Nov. 20, 2010), http://www.guardian.co.uk/technology/2010/nov/21/military-robots-autonomous-machines (discussing the increasing role of robots in warfare and how technological developments will likely change warfare).

well in these areas that lack breathable oxygen.[22]

Just as advancing technologies have opened access to new areas, existing geographic boundaries are beginning to feel pressure from scientific innovation. Armed conflict has for centuries been based on the Westphalian style demarcation of boundaries.[23] Crossing the boundary with your army was a sign that armed conflict had begun.[24] People on one side of the boundary generally associated themselves with one group of fighters and people on the other side with the other group.[25] This perspective on geographic boundaries is diminishing.[26] Individuals do not necessarily limit themselves or their emotional or patriotic attachments by the geographic boundaries which surround them.[27] Other means of association, such as global social networking, are lessening the perceived binding nature of geographic affiliations.[28]

Speaking of Westphalia, the system of state supremacy instituted by the post-Westphalian peace is quickly eroding.[29] States find their sovereignty threatened both politically and

22. Nick Hopkins, *Militarisation of Cyberspace: How the Global Power Struggle Moved Online*, THE GUARDIAN (Apr. 16, 2012), http://www.guardian.co.uk/technology/2012/apr/16/militarisation-of-cyberspace-power-struggle (discussing an assertion made by the head of the US Military, General Martin Dempsey, that the United States needed to fully include space and cyberspace operations along with its traditional air-land-sea operations).

23. *See generally* PHILIP C. BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 75–143, 501–538 (2002) (detailing historical armed conflicts and describing how boundaries factored into the conflicts).

24. *See* Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 CORN. L. REV. 45, 67–77 (November 2007).

25. *See* Koh, *supra* note 1, at 1772 (suggesting the traditional actors in wars were blocs of countries, but the actors in future conflicts will likely be "networks of actors connected in countless tangible and intangible ways").

26. *Id.*; Frederic Megret, *War and the Vanishing Battlefield*, 9 LOY. U. CHI. INT'L L. REV. 131, 131–33 (2011) (discussing the classic notion of a battlefield and its diminishing relevance in modern conflicts).

27. *See* Singer, *supra* note 2, at 11 (discussing a fundraiser held by college students at Swarthmore to take a stand against genocide in Darfur in which the proceeds were used to enter negotiations to rent drones to deploy to Sudan).

28. *See* Koh, *supra* note 1, at 1771–72 ("[W]e live in an age not divided by a Berlin Wall but linked by a World Wide Web.").

29. *See generally* Bobbitt, *supra* note 7, at 283–342, 667–807 (discussing how the development of the market-state and increasing number of global problems such as AIDS, environmental issues, and the changing landscape of war are eroding traditional notions of state sovereignty).

territorially by a number of emerging forces, supra- and supernational in nature.[30] It used to be that States were the final speaker on issues considered incident to sovereignty, such as the internal and external use of force, domestic policing, treatment of citizens, and relations with peers.[31] State-centricity as the sole way of viewing the world is waning and being overtaken by other views that have much more traction today.[32] I am not arguing that the state system is going away, but that its exclusivity—and possibly its supremacy in relation to certain previously sovereign prerogatives—is evaporating.

Finally, just a word about consent; much has been said lately about consent as the basis for extraterritorial military actions. The United States continues to rely—at least in part—on consent for its prosecution of the war on terror in countries such as Yemen and Pakistan.[33] The question remains unanswered as to whether, if that consent were removed, the United States would cease military operations it could justify under a self-defense argument.[34] I believe that the U.S. is setting a precedent that will inevitably weaken the doctrine of consent and, coupled with the weakening of geographic borders, allow future military actions under various self-defense theories that will dramatically weaken the need for consent.

30. *Id.*

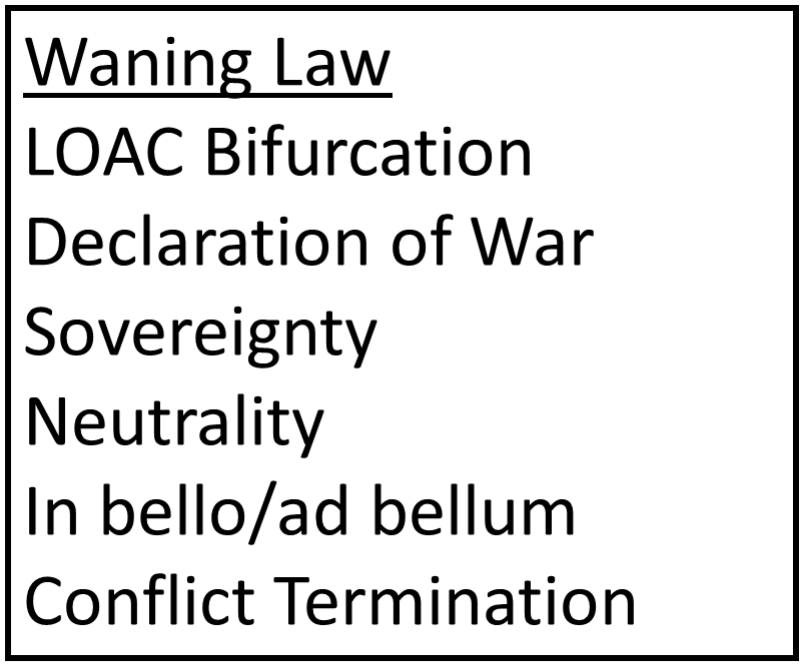
31. *See* Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 7–8 (1998).

32. *Id.* (discussing the abundance of scholarship produced by economists, businessmen, political scientists, and journalists that suggests the state-centric model is on the decline).

33. Greg Miller, *Yemen's Leader Says He Approves All Drone Strikes*, WASH. POST, Sept. 30, 2012, at A3; Adam Entous, Siobhan Gorman & Evan Perez, *U.S. Unease Over Drone Strikes*, WALL ST. J. (Sept. 26, 2012), http://online.wsj.com/article/SB10000872396390444100404577641520858011452.html.

34. Entous, Gorman & Perez, *supra* note 33 (noting the United States believes it has broad authority to defend itself against those who planned the attacks of September 11, 2001).

B. WANING LAW



The waning of these (and other) factors will impact the law and particularly the LOAC. As geographic boundaries lose meaning and the primacy of states wanes, a number of particular LOAC principles will face increasing attack.

The bifurcation of the LOAC between international armed conflicts, or IACs, and non-international armed conflicts, or NIACs, is already under fire.[35] The International Committee of the Red Cross, or ICRC,[36] as well as international tribunals[37]

35. Jensen, *supra* note 15, at 702–706.

36. *See* Jakob Kellenberger, ICRC President, Address at the Sixtieth Anniversary of the Geneva Conventions: Sixty Years of the Geneva Conventions: Learning from the Past to Better Face the Future (Aug. 12, 2009), http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-president-120809.htm; Jakob Kellenberger, ICRC President, Address at the Follow-Up Meeting to the Sixtieth Anniversary of the Geneva Conventions: Strengthening Legal Protection for Victims of Armed Conflicts (Sept. 21, 2010), http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm.

37. In addition to the quote beginning Section V, the *Tadić* Appellate Court also argued that "[i]f international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the [bifurcation between

and renowned scholars[38] have all argued that the LOAC bifurcation has lost its usefulness. In a powerful quote by the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Court stated "What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."[39] The division of the binding nature of LOAC principles, those that apply to NIACs and those that apply to IACs, is quickly becoming obsolete.[40]

Little needs to be said about the declaration of war, a now antiquated idea.[41] As Robert Turner has written, "Although conflicts between and among states continue, no state has issued a formal declaration of war [since the 1948 Arab-Israeli War]."[42] Similarly, the idea that conflicts terminate with a formal agreement on cessation of hostilities also lacks currency.[43] It is hard to imagine the United States signing a peace accord with the various iterations of al-Qaeda to signify the formal end to that conflict.[44]

IAC and NIAC] should gradually lose its weight." Prosecutor v Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

38. *See* Emily Crawford, *Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts*, 20 LEIDEN J. INT'L L. 441, 483–84 (2007); Avril McDonald, *The Year in Review*, 2 Y.B. INT'L HUMANITARIAN L. 113, 121 (1998) ("With the increase in the number of internal and internationalised armed conflicts is coming greater recognition that a strict division of conflicts into internal and international is scarcely possible, if it ever was."); *see also* Michael Reisman, Remarks at a Panel on the Application of Humanitarian Law in Noninternational Armed Conflicts (Apr. 18, 1991), *in* 85 AM. SOC'Y INT'L L. PROC. 83, 85 (suggesting a bifurcated system serves as "a sweeping exclusion device that permits the bulk of armed conflict to evade full international regulation"); Michael N. Schmitt, Yoram Dinstein & Charles H.B. Garraway, *The Manual on the Law of Non-International Armed Conflict: With Commentary*, INT'L INST. HUMANITARIAN L. (2006), http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf (suggesting that laws addressing the growing problems created by NIACs need to be developed).

39. Prosecutor v Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

40. *See supra* notes 35–39 and accompanying text.

41. ROBERT F. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 25 (1983).

42. *Id.*

43. Brooks, *supra* note 2, at 725–729 (noting the erosion of temporal restrictions on some international conflicts).

44. *Id.* at 726 (suggesting a peace accord between the United States and al-Qaeda is unlikely for several reasons, including the nature of the "war on

While technically not a part of the LOAC, the distinction between the applicability of the *jus ad bellum*, or the law of going to war, and the *jus in bello*, or the LOAC, is also on the wane.[45] Current technologies such as cyber warfare have led many to discuss the difficulty of determining when states are actually in armed conflict.[46] Future technologies will make that an even more difficult distinction to make as the idea of crossing a border to signal hostilities becomes increasingly anachronistic.[47]

Finally for this section, the law of neutrality will also become less and less applicable as geographic boundaries become more porous and states struggle to maintain the monopoly of violence. The soon-to-be-published "Tallinn Manual on the International Law Applicable to Cyber Warfare,"[48] in which I participated, struggled to apply the doctrines of neutrality to cyber warfare and acknowledged that the current rules need to evolve to deal effectively with future technologies.[49]

terrorism" and fact that al-Qaeda is not a state and as such may not be able to enter a formal peace agreement).

45. Eyal Benvenisti, *Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors*, 34 YALE J. INT'L L. 541, 541–42 (2009).

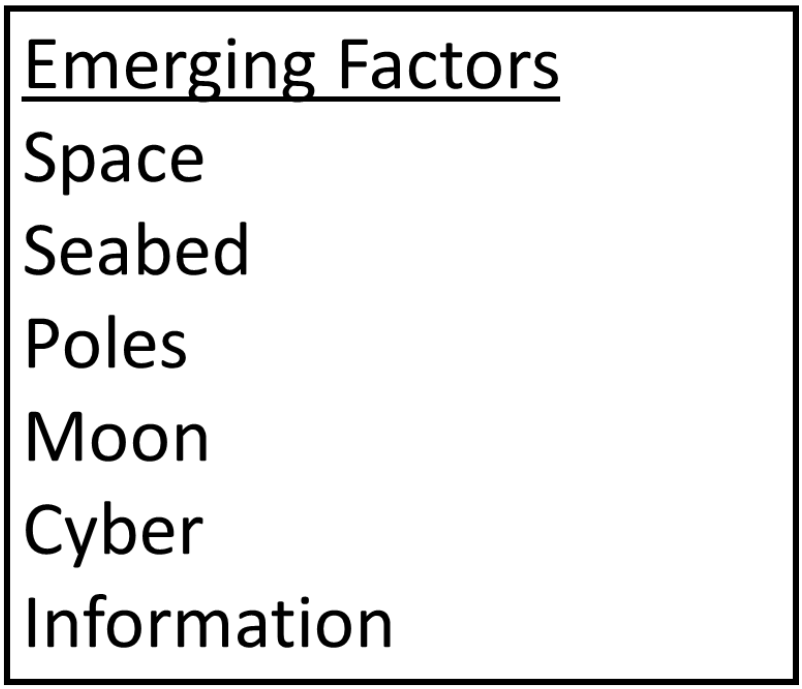
46. Sean Watts, *Low-Intensity Computer Network Attack and Self-Defense*, *in* 87 INT'L L. STUD. 59, 71–72 (Raul A. "Pete" Pedrozo & Daria P. Wollschlager eds., 2011).

47. *See id.*; Megret, *supra* note 26, at 132 (noting that the notion of the traditional "battlefield" is disappearing).

48. THE TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 214 (Michael N. Schmitt ed.) (forthcoming March 2013).

49. *Id.* at 212, *see generally* Eric Talbot Jensen, *Sovereignty and Neutrality in Cyber Conflict*, 35 FORDHAM INT'L L.J. 815, 838–841 (2012).

C. EMERGING FACTORS



The lack of limitation to breathable air zones will move armed conflict to areas where it is currently not occurring.[50] Future armed conflicts will occur without respect to national borders, on the seabed, under the ground, and in space.[51] It will also occur across the newly recognized domain of cyberspace.[52] And it will occur in all of these places simultaneously.

The United States has already demonstrated in its "Global War on Terror" that the LOAC is not well prepared to regulate an armed conflict against a transnational non-state terrorist actor who does not associate itself with geographic boundaries.[53] The waning geographic affiliation and increasing global social affiliation which will be discussed more later will create transnational linkages between previously unconnected people

50. *See* Hopkins, *supra* note 22.

51. *Id.*

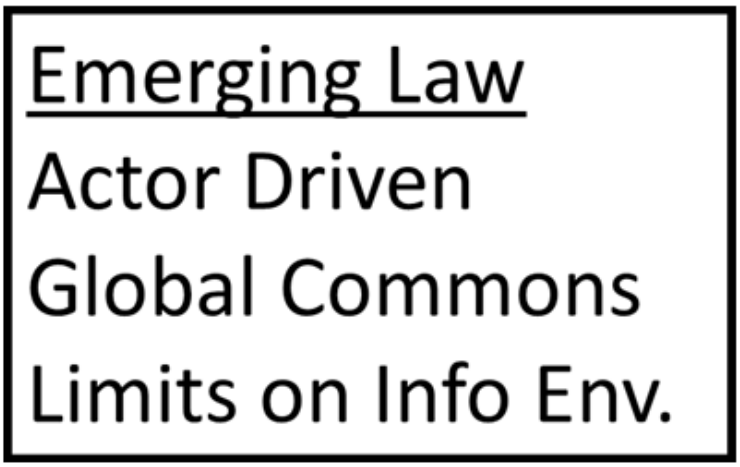
52. Alexander, *supra* note 14.

53. Megret, *supra* note 26, at 132 (arguing that the "death of the battlefield significantly complicates the waging of war and may well herald the end of the laws of war as a way to regulate violence).

will make identifying the battlefield extremely difficult. Mackubin Owens has written that "multidimensional war in the future is likely to be characterized by distributed, weakly connected battlefields."[54]

Few of these areas have seen armed conflict to this point.[55] And perhaps that will continue. However, as technology advances and these areas become available for weaponization, or at least for the placement of sensors, the temptation to militarize these areas will be irresistible.[56]

D. EMERGING LAW



Many of these individual domains just discussed are regulated by a treaty regime. For example, the Outer Space Treaty discourages military activities in space.[57] There is also a treaty which prohibits the use of nuclear weapons on the ocean floor or seabed.[58] These international agreements will become

54. Mackubin Thomas Owens, *Reflections on Future War*, 61 NAVAL WAR C. REV. 61, 71 (2008).

55. *See* Hopkins, *supra* note 22 (suggesting more sophisticated tools of cyber-warfare exist but have rarely been used).

56. *Id.* (suggesting the potential to conduct future military operations in space and cyberspace).

57. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies arts. 3-4, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 201.

58. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115.

more and more difficult to apply and to comply with.[59]

Even if states continue to regard these rules as binding in the face of the transformation of geographic boundaries, these agreements still serve only to bind states.[60] The continuing diversification of actors in armed conflict will force states to consider whether they should remain militarily outside of these areas while non-state actors begin to operate within;[61] states will reconsider their legal obligations and take actions to establish control in these currently unmilitarized areas.[62] Laws might form to authorize states to exclude non-state actors from operating in these areas.[63] A new regime established around the global commons, ensuring state access but allowing states to enforce exclusion to non-state actors, could develop.[64]

Many possibilities exist for resolution here, but the new legal answer will revolve around actors, rather than geographic boundaries. The commons will be accessible by certain actors, rather than open to all.

This focus on actors and their impact on the places where armed conflict will occur in the future provides an excellent transition to the next area of emphasis—actors in future armed conflict.

59. *See* Doswald-Beck, *supra* note 4 ("In the light of such developments, States cannot continue to simply assume that the present scope of application of humanitarian law treaties suffices.").

60. *See id.* ("Recent attempts by the government of Colombia to indicate clearly that the new treaty banning antipersonnel mines applies to non-State entities ran into difficulties when certain Western governments could not accept the proposition that such entities might have responsibilities under international law.").

61. Mégret, *supra* note 26, at 145, 148-151.

62. *See id.* at 149, 151 ("However, it is not only 'transnational terrorists' who fundamentally change the nature of the battlefield, but also the states that chose to follow them on that terrain, effectively fighting 'a war' as if it unfolded on a 'global battlefield.'. . . [H]umanitarians have been tempted to extend the scope of the battlefield to make sure that as much violence as possible falls under its constraints.").

63. See Wolff Heintchel von Heinegg, *Current Legal Issues in Martime Operations*, 80 INT'L L. STUD. 207, 216 for precedent on exclusion zones in the context of, and questionable legality, under traditional LOAC.

64. *See id.*

II. ACTORS

The Geneva Conventions and Additional Protocols categorize everyone in armed conflict as either combatants or civilians.[65] The United States continues to assert that there is a small category of individuals who exist in the twilight between these two categories, most recently known as "unprivileged belligerents."[66] Within the category of civilians are individuals who forfeit their protections by taking a "direct part in hostilities."[67] As the post 9-11 "War on Terror" has progressed, this category has been understood to include organized armed groups[68] (e.g. terrorist organizations). There is much we could

65. Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 4, 6, Aug. 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 50, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

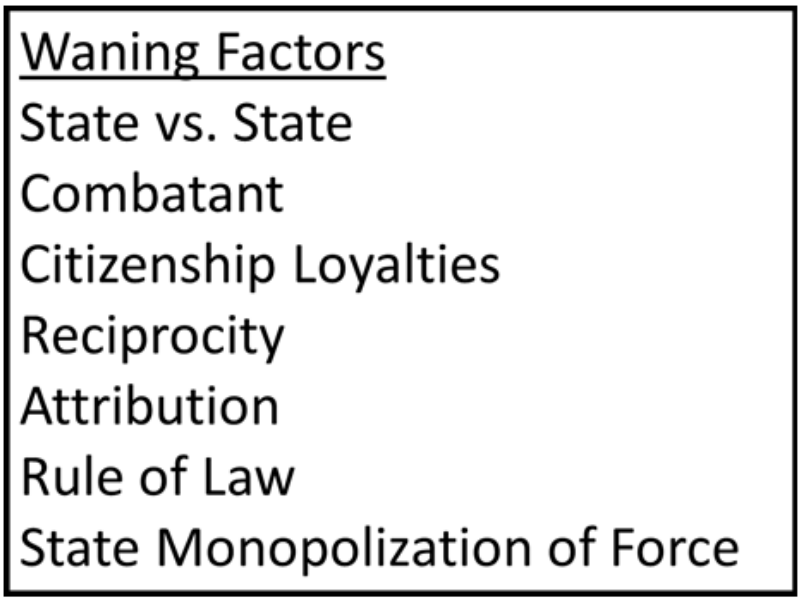
66. *See* In re Guantanamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In Re: Guantanamo Bay Detainee Litigation, NO. 08-0442 (D.D.C., filed March 13, 2009); *Prosecuting Terrorists; Civilian and Military Trials for GTMO and Beyond: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security of the S. Comm. on the Judiciary*, 111th Cong. 47 (2009) (statement of Michael J. Edney, Counsel, Gibson, Dunn & Crutcher, LLP.).

67. Protocol I, *supra* note 65, art. 51.

68. Nils Melzer, Int'l Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 90 INT'L REV. RED CROSS 991, 1006-09

say about these categorizations, but the waters on these issues will get deeper and murkier.

A. WANING FACTORS



As mentioned previously, the LOAC was formulated largely based on a Westphalian model of state sovereignty.[69] Principles such as reciprocity[70] and the state's monopolization of force[71] were foundational principles which undergird the LOAC, especially the provisions applying to actors on the battlefield. However, the notion of a battlefield populated by only organized state militaries who comply with all aspects of the LOAC is not what future battlefields will be like, if they ever were like that.[72] Modern battlefields are fluid and ill-defined spaces where the actors are seldom clearly identified[73]

(2008), *available at* http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm.

69. *See generally* BOBBITT, *supra* note 23, at 75–143, 501–538.

70. *See* Doswald-Beck, *supra* note 4, at 41 ("[R]eciprocity did become important with the introduction of new rules in treaties, namely, the international law rule that parties need to be bound by the treaties in question.").

71. Jensen, *supra* note 15, at 708, 715.

72. Kellenberger, *supra* note 36.

73. Sean Watts, *Law-of-War Perfidy* (unpublished manuscript) (on file with author.).

and often not even present at the place of attack.[74]

The vast majority of the armed conflicts in recent decades have not been between states, but between states and non-state actors or between two groups of non-state actors.[75] Advancing technologies will make this phenomena even more pronounced.[76] The ability of non-state actors to exert state-level violence combined with the diminishing association of individuals and groups to states will result in the waning of many factors currently prevalent in armed conflict.[77]

A result of the decreasing number of armed conflicts between states is that fewer and fewer conflicts occur between "combatants" and more and more involve some form of "fighters," whether those be organized armed groups, narco-terrorists, or individuals who are directly participating in hostilities.[78] The changing nature of participants in armed conflict should cause a reassessment of the applicability of the current LOAC paradigm. This process has already begun with the ICRC's issuance of the Interpretive Guidance on Direct Participation in Hostilities.[79] This tacit acceptance that the current understanding that the LOAC needs updated is a harbinger of things to come. Future armed conflict will undoubtedly increase the difficulty of defining actors on the battlefield.[80] The differentiation between fighters and non-fighters will become even more blurred as global technologies allow linkages and associations among people not contemplated in 1949 or 1977.[81]

In addition to the categorization of participants in armed

74. Megert, *supra* note 26, at 154 ("[T]his will cover crimes committed outside actual battle zones but that nonetheless display a strong element of connection to them.").

75. Themnér, Lotta Themnér & Peter Wallensteen, 2012. *Armed Conflicts by Type, 1946-2011*, 49(4) JOURNAL OF PEACE RESEARCH 565, 566, 568 (2012), *available at* http://www.pcr.uu.se/digitalAssets/122/122552_conflict_type_2011.pdf.

76. *See* Watts, *supra* note 46, at 61 ("Second, and related, CNA will produce a significantly expanded cast of players, creating a complex and uncontrollable multipolar environment comprising far more States and non-State actors pursuing far more disparate interests than in previous security settings. CNA are unprecedented conflict levelers.").

77. *See id.* at 62, 73, 76 ("Either one accepts a real threat to the positive jus ad bellum's claim to law, or one accepts very real threats to States' security as a trade-off for preserving legal idealism.").

78. *See* Jensen, *supra* note 15; Crawford, *supra* note 38, at 442.

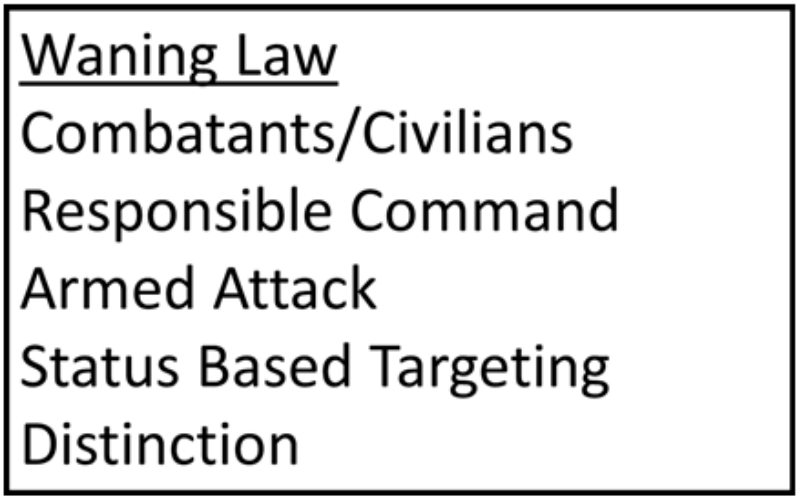
79. *See* Melzer, *supra* note 68.

80. *See* Mégret, *supra* note 26, at 138; Watts, *supra* note 46.

81. *See* Mégret, *supra* note 26, at 138; Brooks, *supra* note 2, at 677.

conflict, the ability to attribute actions in armed conflict to specific actors is being significantly undermined through the use of advancing technologies. Cyber operations are a good example of this difficulty. The difficulty of attributing cyber actions has been well documented.[82] The ability to hide one's identity or appear to be someone else is more problematic with stand-off weapons such as cyber weapons. Future weapons will continue to make attribution difficult, forcing the international community to reevaluate the approach to attribution.

B. WANING LAW



The increasing conflation of fighters and civilians will devalue the legal distinctions between combatant and civilian as categories that determine protections from targeting.[83] To the extent that the legal classification is useful in current armed conflicts, its utility will decrease as asymmetrical disadvantages force non-state fighters to seek anonymity while taking part in hostilities.[84]

The results of this conflation will undermine the current regime of status-based targeting and instead require most targeting decisions to be based on conduct.[85] Recent conflicts in

82. Collin Allan, *Attribution Issues in Cyberspace*, CHI.–KENT J. INT'L & COMP. L. (forthcoming May 2013).

83. Brooks *supra* note 2, at 730-31, 761.

84. *See* Watts, *supra* note 46, at 72-73.

85. *See* Brooks, *supra* note 2, at 706, 756-57 ("Thus, for instance, one's

Iraq and Afghanistan have already verified this emerging trend.[86] Status-based targeting will only be applicable to a very limited number of circumstances and will force states to look for other means of determining targets.[87]

The inability to meaningfully differentiate between actors on the battlefield will have a detrimental effect on the bedrock principle of distinction.[88] As states suffer devastating effects from non-attributable sources, the pressure for an evolved understanding of the principle of distinction will be great. For example, protecting a nation's critical infrastructure from computer attack[89] may be so important that attribution (and even individualized distinction) may become a casualty of the need to prevent significant social harm.[90]

status as a 'lawful combatant' under the Geneva Conventions hinges, as a threshold matter, not on one's substantive actions but on certain questions of form: whether one is under responsible command, whether one wears 'a fixed distinctive sign recognizable at a distance,' and whether one carries arms openly. . . . Status as a lawful combatant should not hinge on whether a person is 'commanded by a person responsible for his subordinates,' has a 'fixed distinctive sign recognizable at a distance' (e.g, a uniform or other sign by which combatants can be visually distinguished from civilians), or whether she 'carr[ies] arms openly.'").

86. *Id.* passim.

87. *See* Watts, *supra* note 46 ; Mégret, *supra* note 26.

88. *See* Mégret, *supra* note 26.

89. *See* Sean M. Condron, *Getting it Right: Protecting American Critical Infrastructure in Cyberspace*, 20 HARV. J. L. & TECH. 403, 421 (2007).

90. *See id.*

C. EMERGING FACTORS

At the sixty-year commemoration of the Geneva Conventions, then-President of the ICRC, Jakob Kellenberger, stated that "the potential range of 'new actors' whose actions have repercussions at the international level is of course vast. While many of these 'new actors' have in fact been around for some time, they have called into question—and will continue to call into question—some of the more traditional assumptions on which the international legal system is based."[91]

I divide my remarks in this area into two subcategories:

91. Jakob Kellenberger, President, Int'l Red Cross, Sixty Years of the Geneva Conventions and the Decades Ahead at the Conference on the Challenges for IHL posed by New Threats, New Actors and New Means and Methods of War, ICRC (Sept. 11, 2009), http://www.icrc.org/eng/resources/documents/statement/geneva-convention-statement-091109.htm.

emerging factors concerning influences on "existing actors" and emerging factors concerning "new actors." I will begin with the latter category.

This Article has already alluded to the break-down of geographic boundaries and the resulting traditional associations. Modern and future social networking capabilities will allow instantaneous linkages between individuals and groups from across the globe. These "instantaneous transnational communities of interest" mean that, as Jeffrey Walker argues, "[i]t's simply no longer necessary to have a state sponsor for an interested group of people to effect changes within the international community."[92] Anthony Lake describes how these instantaneous transnational communities of interest use "technology to forge vast alliances across borders, and . . . a whole host of new actors challenging, confronting, and sometimes competing with governments on turf that was once their exclusive domain."[93] Philip Bobbitt has written, "The internet enabled the aggregation of dissatisfied and malevolent persons into global networks."[94]

Social networking's effects on armed conflict have already been demonstrated during the Arab Spring.[95] The future effects of this phenomenon will undoubtedly increase over time. Audrey Kurth Cronin draws the analogy between social networking and the *levée en masse*. She argues that it allows cyber mobilization of people across the entire globe on issues of common ideology.[96] The result of this expanding social networking linkage is that people will begin to view themselves less as Americans or Germans or Iranians and more as members of global ideologies created, maintained, and mobilized through social media.[97] The resulting cultural

92. Jeffrey K. Walker, *Thomas P. Keenan Memorial Lecture: The Demise of the Nation-State, the Dawn of New Paradigm Warfare, and a Future Profession of Arms*, 51 A.F. L. REV. 323, 329330329-30 (2001).

93. Walker, *supra* note 92, at 330 (quoting ANTHONY LAKE, SIX NIGHTMARES: REAL THREATS IN A DANGEROUS WORLD AND HOW AMERICA CAN MEET THEM 281–82 (2000)).

94. Philip C. Bobbitt, *Inter Arma Enim Non Silent Leges, View of Law and War*, 45 SUFFOLK U. L. REV. 253, 259 (2012).

95. George Griffin, *Egypt's Uprising:Tracking the Social Media Factor*, PBS.ORG (Apr. 20, 2011), http://www.pbs.org/newshour/updates/middle_east/jan-june11/revsocial_04-19.html.

96. Audrey Kurth Cronin, *Cyber-Mobilization: the New Levée en Masse*, 36 PARAMETERS 77 passim (2006).

97. *See* Michigan State University News, *Civilian Cyber-Warriors Not*

uncertainty will provide a means and incentive for like-minded individuals to connect and interact on areas of agreement that are not determined by geographic borders or national affiliation.

These groups will use social networks to recruit, gather resources, provide financial support, collect and pass intelligence, and create and transmit plans of action including attacks. The communications will occur far from where the effects of the communications will eventually be felt, but could conceivably have significant effects on ongoing armed conflicts.

A current example of a developing trend is the computer activist group known as "Anonymous."[98] In addition to state-affiliated hacking groups and their documented participation in armed conflict,[99] hacktivists, who have organized themselves around a social theme or ideology, such as the members of Anonymous, have also started to take part in armed conflict.[100]

While many of the participants are conscious of the influence of social networking on armed conflict, advancing technology will increase the likelihood that individuals and groups will become unwitting "direct participants." As will be discussed later, the use of future technologies such as virology and nanotechnology will allow attackers to increase the reach of their weapons by using the civilian population to propagate their weapons.[101] A DNA-coded virus will eventually reach its target after harmlessly passing through the population.[102]

Cyber attackers will use the same methodology. As with

Driven by Patriotism, MICH. ST. U. RES. (Sept. 10, 2012), http://research.msu.edu/tags/cyber-warriors.

98. *Anonymous*, N.Y. TIMES (Mar. 8, 2012), http://topics.nytimes.com/top/reference/timestopics/organizations/a/anonymous_internet_group/index.html.

99. Collin Allan, *supra* note 82; David E. Hoffman, *The New Virology: From Stuxnet to Biobombs, The Future of War by Other Means*, 185 FOREIGN POL'Y 78, 80 (2011), *available at* http://www.foreignpolicy.com/articles/2011/02/22/the_new_virology?print=yes&hidecomments=yes&page=full.

100. Jana Winter & Jeremy A. Kaplan, *Communications Blackout Doesn't Deter Hackers Targeting Syrian Regime*, FOXNEWS.COM (Nov. 30, 2012), http://www.foxnews.com/tech/2012/11/30/hackers-declare-war-on-syria/#ixzz2Ht69GA1J.

101. *Id.*

102. Andrew Hessel, Marc Goodman & Steven Kotler, *Hacking the President's DNA*, ATLANTIC MAG. (Nov. 2012), http://www.theatlantic.com/magazine/archive/2012/11/hacking-the-presidents-dna/309147/.

STUXNET,[103] malware will be fashioned to spread broadly through the internet but only cause damage to specific systems in a precision targeted attack.[104] For this to work, individual civilians and their computer systems will be a vital, though unwitting, part of the attack. Similarly, hacktivists, such as the members of Anonymous, participate along a spectrum of activity. Some may be writers of harmful code; others may be coordinators of the attack. Still others may simply leave their computers on, allowing those running the malware to slave their computers and put them to a nefarious use. In this way, they may become unwitting participants. However, to the individual or state being attacked, there will be almost no timely way of ascertaining the difference. Nations will struggle to deal with how to classify and then respond to such individuals, especially when the groups are extremely large and geographically dispersed.[105]

In addition to influences on actors, future technologies will create wholly new actors that are either a limited part, or not part at all, of the current paradigm.[106] These new actors will nonetheless emerge as important factors in future armed conflict. These include those who deal in new types of weapons—referred to as "new arms" dealers—global criminal enterprises, corporate armies and robots or autonomous weapon systems.

Advancing technology will provide a wide array of new weapons, many of which do not require state financing and organization to produce or market. In addition to computer hacktivists, bio engineers who are creating viruses and other DNA-linked tools are springing up around the world.[107] There is already a very lucrative market for cyber "arms." It is

103. *See Factbox: What is Stuxnet*, REUTERS (Sept.. 24, 2010), http://www.reuters.com/article/2010/09/24/us-security-cyber-iran-fb-idUSTRE68N3PT20100924.

104. *See* Jeremy Richmond, *Evolving Battlefields: Does Stuxnet Demonstrate a Need For Modifications to the Law of Armed Conflict?* 35 FORDHAM INT'L L.J. 842 passim ((March 2012).

105. *See* Pierre Thomas &and Jack Cloherty, *FBI, Facebook Team Up to Fight 'Butterfly Botnet'*, ABC NEWS (Dec. 12, 2012), available at http://abcnews.go.com/Technology/butterfly-botnet-targets-11-million-including-computer-users/story?id=17947276.

106. *See* Watts, *supra* note 46.

107. Hanno Charisius, Richard Friebe & Sascha, & Karberg, *Becoming Biohackers: Learning the Game*, BBC FUTURE (Jan. 22, 2013), http://www.bbc.com/future/story/20130122-how-we-became-biohackers-part-1.

sourced almost exclusively by non-state actors.[108] A similar market for biological and genetic weapons will undoubtedly emerge.[109] Many of these individuals or groups will see this as a business, not as dealing in weapons. Nevertheless, in some instances, they will produce, transport, and even sometimes unleash these new types of weapons on the targets.

In addition to these relatively unorganized groups, a number of highly organized armed groups will emerge on the future battlefield. These include corporate armies, including private security companies (PSCs), and global criminal enterprises.[110] Recent events in Algeria[111] are making corporations rethink their reliance on state forces for protection of multi-billion dollar complexes. Corporate assets will continue to exist in unstable areas and even in areas of armed conflict. Businesses whose annual revenue exceeds that of the gross domestic product of the country in which they have assets are unlikely to continue to rely on state forces or police for protection if such protection fails. Rather, they will hire private security companies or raise their own armies to ensure the safety of their personnel and assets. ExxonMobil in Indonesia and Talisman Energy in Sudan have already "hired" and/or controlled national military forces to protect their business interests.[112] As armed conflicts ebb and flow, these corporate armies will inevitably become involved in armed conflicts, stressing the current application of the LOAC.[113] Corporate

108. Michael Riley & Ashlee Vance, *Cyber Weapons: The New Arms Race*, BUSINESSWEEK (July 20, 2011), http://www.businessweek.com/magazine/cyber-weapons-the-new-arms-race-07212011.html.

109. *See* Charisius, *supra* note 107; Hessel, *supra* note 102.

110. *See generally* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnhardt eds., 2007).

111. Aomar Ouali & Paul Schemm, *Al-Qaida-linked Militants Seize BP Complex in Algeria, Take Hostages Over Mali Intervention*, YAHOO! NEWS, Jan. 16, 2013, http://news.yahoo.com/al-qaida-linked-militants-seize-bp-complex-algeria-185156149.html.

112. Jonathan Horlick et al., *American and Canadian Civil Actions Alleging Human Rights Violations Abroad by Oil and Gas Companies*, 45 ALTA. L. REV. 653, 657–58 (2008); *see also Developments in the Law, International Criminal Law*, 114 HARV. L. REV. 1943, 2025, 2029–30 (2001).

113. *See generally* FROM MERCENARIES TO MARKET, *supra* note 110; Eric Talbot Jensen, *Combatant Status: Is it Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 214 (2005); Christopher J. Mandernach, *Warriors Without Law: Embracing a Spectrun of Status for Military Actors*, 7 APPALACHIAN J.L. 137 (2007). Christopher J.

armies have already been implicated in "unlawful taking of property, forced labor, displacement of populations, severe damage to the environment, and the manufacture and trading of prohibited weapons."[114] This trend will increase in the future.

Another emerging factor is the role played by global criminal enterprises. These would include organizations such as the narco-traffickers operating in Mexico and other parts of Central and South America.[115] Reports place the number of armed fighters supporting the narco-trafficking in Mexico alone at over 100,000.[116] This army is substantially larger than the armies involved in most recent armed conflicts.

Global criminal enterprises are also involved in other illegal activity, including money laundering, arms smuggling, counterfeiting, and the sex trade.[117] Criminal enterprises often have links to armed conflict because of the goods or services that they offer.[118] As demand for their goods increases, the number of criminal enterprises will only increase.

We have just heard a truly superb discussion on robotics and autonomous weapon systems.[119] I will just add a few comments of my own. I will revisit these weapons under the category of means and methods of warfare, but to the extent that robots or other similar weapons systems become autonomous, they must also be considered as actors. We have

114. Regis Bismuth, *Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing Between International and Domestic Legal Orders*, 38 DENV. J. INT'L L. & POL'Y 203, 204 (2010); *see also* Int'l Comm. of the Red Cross, *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises Under International Humanitarian Law* 24 (2006); Erik Mose et al., *Corporate Criminal Liability and the Rwandan Genocide*, 6 J. INT'L CRIM. JUST. 947, 973–974 (2008).

115. Carina Bergal, Note, *The Mexican Drug War: The case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042, 1066–72 (2011).

116. *Id.* at 1066.

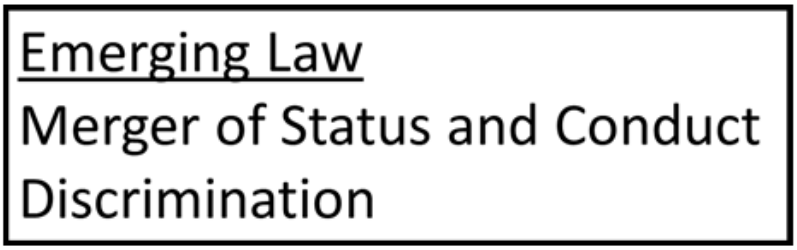
117. John Evans, *Criminal Networks, Criminal Enterprises*, UNIV. B. C., INT'L CTR. FOR CRIMINAL LAW REFORM, at 2, http://www.icclr.law.ubc.ca/publications/reports/netwks94.pdf (last visited Feb. 24, 2013).

118. *Id.*

119. To review these discussions, please see other Articles in 22 MINN. J. INT'L L. (Summer 2013), as well as some articles found in 23 MINN. J. INT'L L. (forthcoming Winter 2014). To see video recordings of the discussions that took place at the 2013 Symposium, please see the *Minnesota Journal of International Law's* website, http://www.minnjil.org/?page_id=913.

discussed both the Department of Defense's recently issued Directive titled "Autonomy in Weapon Systems,"[120] which says "autonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force,"[121] and the Human Rights Watch report[122] calling for a multilateral treaty that would "prohibit the development, production and use of fully autonomous weapons."[123] My personal prognostication is that fully autonomous weapon systems will absolutely make their way onto the battlefield and eventually become the predominant actors. Having been in combat, I believe that controlled and regulated use of autonomous weapons systems can provide more reliable responses in many cases than relying on human senses and decision making. I am firmly convinced it is not a matter of "if," but "when."

D. EMERGING LAW



We could spend much more time discussing the emerging factors that will affect the actors in future armed conflict, but let's move to a discussion of the emerging law. I will highlight two points that I think are important to this discussion: the first is the merging of status and conduct by actors, and the second is the effects on the principle of discrimination.

120. DEP'T OF DEF., DIRECTIVE NO. 3000.09, AUTONOMY IN WEAPON SYSTEMS (Nov. 21, 2012). This Directive followed a DoD Defense Science Board Task Force Report issued in July of 2012. DEP'T OF DEF. DEF. SCI. BOARD, THE ROLE OF AUTONOMY IN DOD SYSTEMS (July 2012), *available at* http://www.fas.org/irp/agency/dod/dsb/autonomy.pdf.

121. DEP'T OF DEF., DIRECTIVE NO. 3000.09, AUTONOMY IN WEAPON SYSTEMS (Nov. 21, 2012).

122. HUMAN RIGHTS WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS (2012), *available at* http://www.hrw.org/sites/default/files/reports/arms1112ForUpload_0_0.pdf.

123. *Id.* at 5, 46.

As alluded to previously, individuals are targeted based on either their status as combatants or fighters or on their inappropriate conduct as civilians. Emerging technologies and tactics will make states want to blur these distinctions. For example, the members of "Anonymous" who are preventing the military leadership from communicating to subordinates are likely taking a direct part in hostilities and are therefore targetable. However, if the attack is generated by thousands of slaved computers, some owned by witting participants, others by unwitting participants, what are the targeting options for the target state? Further, is the civilian recreational hacker who develops the malware or establishes the botnet targetable?

In the area of virology, is the designer of the DNA-linked virus targetable, even if he or she is just selling it to a customer? It is unclear if that individual would be a direct participant, especially if he did not know the eventual target of the viral attack. What about an organization who sells such DNA-linked viruses to the highest bidder? What about the completely unwitting carrier of the virus who is about to enter the auditorium where the President is about to speak and doesn't know that she is going to infect the President with the lethal virus?[124]

Transnational social networking communities present similar problems. As individuals pass along vital information, including attack plans, do they become targetable? Their counterparts in a geographically contained kinetic conflict would be. Does the fact that these interactions occur thousands of miles from the intended event and the originating group make a targeting difference?

Transitioning now to the principle of discrimination, the LOAC requires attackers to discriminate in the attack.[125] We could have a long discussion about what the word "attack" means with respect to these new technologies, but I will delay that to discuss the impact of new actors on the principle of discrimination. Much has already been said about the need for human discretion in the attack as it relates to autonomous weapon systems. I will add my own thoughts just to say that the requirement is that the attack is discriminate, not that a human make the decision as to whether to conduct the attack

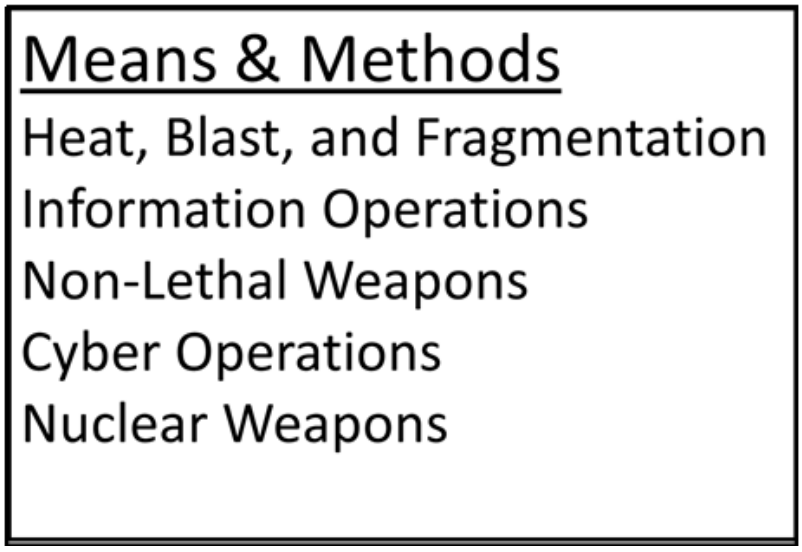
124. Hessel, *supra* note 102.

125. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, *supra* note 25, 1125 U.N.T.S. at 29.

or not.

We are making and using computer malware that is making the ultimate decision on discrimination in the attack. Stuxnet had been programmed to and was presumably acting on its own when it identified the computer controlling the centrifuges and then conducted the "attack" on that computer. Emerging weapon systems will increasingly be making those decisions through automated or natural processes that are based on controlled circumstances. To the extent that our current interpretation of discrimination is bothered by that, we may have to evolve that LOAC understanding. I think it is clear that autonomous weapons on the battlefield will increase, and the autonomy of those weapon systems will also increase. To the extent that we need to adjust the current understanding of discrimination in the attack, the LOAC needs to be responsive and evolve in order to ensure that these "actors" act responsibly.

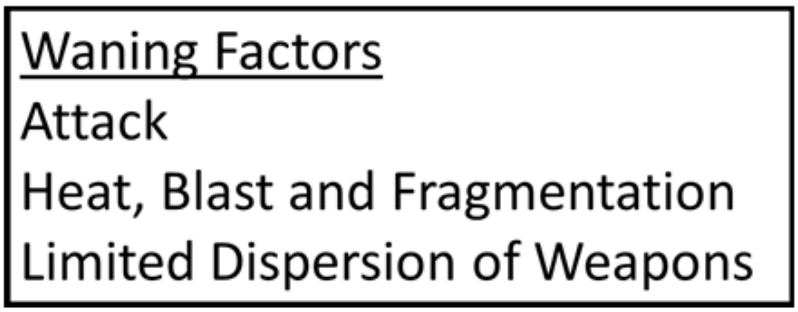
III. MEANS AND METHODS



Moving now to means and methods of warfare, since the development of gunpowder, modern conflicts have been characterized by heat, blast, and fragmentation. We have recently included some innovative means of conflict including numerous non-lethal weapon systems which have proven to be

very effective. You will also note that I have cyber operations in the category of existing means and methods, though I do not believe that states have even begun to tap into the potential cyber operations presents.

A. WANING FACTORS



Despite the fact that all of these means and methods will continue to be a vital part of future armed conflicts, they will not maintain the role they currently have. For example, while most weapons will still likely use heat, blast, and fragmentation as the primary source of injury, the proportion of such weapons that are produced and used in any armed conflict will steadily decrease. As other weapons that use advanced technology enter the arsenal, they will provide more options to the commander and will better suit his needs. For example, if a commander had access to a DNA-linked virus that would effectively kill an enemy leader, he could avoid all the LOAC concerns such as proportionality and distinction that would be part of a targeting analysis using heat, blast, and fragmentation weapons such as a missile.

Similarly, the idea of an "attack" will wane in the face of new weapons. The meaning of attack is defined in API as "acts of violence against the adversary, whether in offence or in defence."[126] This definition is mired in the armed conflict of heat, blast, and fragmentation which was characterized by violence. However, such a definition is not clear enough to adequately address the weapons of the future. Is a cyber-attack an act of violence? What about infecting someone with a virus? Certainly the victim of the DNA-linked virus is attacked, but what about the intermediate carrier who is merely infected but

126. *Id.* art. 49, at 25.

has no effects?

The important point this raises is that if infecting a host carrier (or a thousand host carriers) with a DNA-linked virus that has no physical effects is not an attack, the majority of the LOAC principles would not apply to that action and would not limit a commander's ability to conduct such an action. A similar analysis applies to cyber actions. Cyber operations that merely cause inconvenience are likely not attacks and can therefore potentially be targeted at civilians.[127] Given the underlying purposes of the LOAC, it is unlikely that this understanding of "attack" can survive these new weapon systems and will have to evolve to provide the protections expected from the LOAC.

One of the characteristics of heat, blast, and fragmentation weapons was a limited dispersal. The military has computer programs which model the blast radius of weapons to assist commanders in making a correct proportionality analysis. The limited dispersion of the weapon system is not an exact science, but it is generally discernible. This may not be true of many future weapon systems.

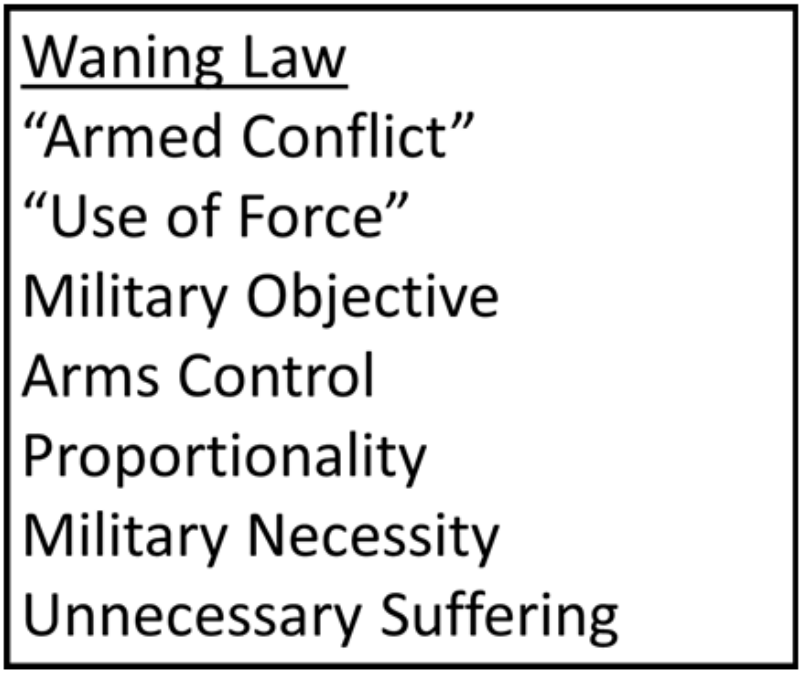
Stuxnet again provides an interesting perspective on this topic. Despite its creators' apparent best attempts, the malware made it onto computers that it was not intended to infect.[128] Though it did not have negative effects on those computers,[129] its dispersal was still not tightly controlled. Similar problems will occur with other future weapons systems. The inability to project the actual dispersal of some future weapons will make this a waning principle in the conduct of future armed conflict.

127. *See* THE TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, *supra* note 18, at 91–95, 133.

128. *See* Holger Stark, *Mossad's Miracle Weapon: Stuxnet Virus Opens New Era of Cyber War*, SPEIGEL ONLINE, Aug. 8, 2011, http://www.spiegel.de/international/world/mossad-s-miracle-weapon-stuxnet-virus-opens-new-era-of-cyber-war-a-778912.html.

129. Richmond, *supra* note 104, at 860–61.

B. WANING LAW



I anticipate that my list of waning law will be quite controversial, but remember that I am not necessarily saying that these principles will disappear. My argument is that they will wane as we currently know them. For example, though it is not a LOAC principle, consider for a minute the *jus ad bellum* principle of "use of force" as used in the UN Charter. This is applicable here because presumably a use of force would be governed by the LOAC. What level of cyber operation equates to a "use of force?" There are differing views, though I think the predominant view now is the effects test initially set out by Michael Schmitt. However, like the previous discussion of "attack," these legal terms need to evolve to maintain their currency and ability to regulate future armed conflict.

Similarly, the LOAC defining principle of "armed conflict" will wane as well. The LOAC is not triggered until there is an armed conflict. Traditionally, this required some level of hostilities.[130] In an era of bloodless weapons, as Blake and

130. *See generally* Commentary, Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 22–23 (Jean S. Pictet ed., 1960),

Imburgia call them,[131] is the trigger of "armed conflict" going to be clear enough to regulate conflict? When is a cyber-operation "armed?" Or the dispersion of nanobots? Or the spreading of **GENOMIC** altering viruses?

These weapons will also make us reconsider time-honored LOAC principles such as military objective, unnecessary suffering, and proportionality. For example, one of the potentially unanticipated consequences of Stuxnet is that it has the possibility of being reengineered and reused.[132] Bernhard Langner who first discovered Stuxnet warns that such malware can proliferate in unexpected ways: "Stuxnet's attack code, available on the Internet, provides an excellent blueprint and jump-start for developing a new generation of cyber warfare weapons. . . . Unlike bombs, missiles, and guns, cyber weapons can be copied. The proliferation of cyber weapons cannot be controlled. Stuxnet-inspired weapons and weapon technology will soon be in the hands of rogue nation states, terrorists, organized crime, and legions of leisure hackers."[133]

The possibility of reengineering raises an interesting question about the proportionality analysis for commanders. With heat, blast, and fragmentation weapons, commanders did not have to concern themselves with the potential of the weapon being reused. However, with cyber malware such as Stuxnet, or with a DNA-linked virus, or with a genetic mutation, the malware, or virus or mutation remain and can be reengineered, reused and resold, potentially leading to significant impacts, including death and injury, on civilians who were never even implicated in the original attack. Must the commander consider this potentiality as he does his proportionality analysis prior to using the weapon? I think the LOAC does not yet provide a clear answer for that question. To the extent that experts have opinions, I have found them to differ widely.

Finally, another waning legal norm is arms control. Arms

available at http://www.icrc.org/ihl.nsf/COM/375-590007?OpenDocument.

131. Duncan Blake & Joseph S. Imburgia, *"Bloodless Weapons"? The Need to Conduct Legal Reviews of Certain Capabilities and the Implications of Defining Them as "Weapons"*, 66 A.F. L. REV. 157 (2010).

132. *See* Mark Clayton, *From the Man Who Discovered Stuxnet, Dire Warnings One Year Later*, CHRISTIAN SCI. MONITOR (Sept. 22, 2011), http://www.csmonitor.com/USA/2011/0922/From-the-man-who-discovered-Stuxnet-dire-warnings-one-year-later.

133. David E. Hoffman, *supra* note 42 (*quoting* Ralph Langer, the German industrial control systems security expert who discovered Stuxnet).

control has been an effective means of limiting states in the production and use of certain weapons, such as chemical[134] or biological agents,[135] as well as nuclear weapons.[136] However, these international agreements have legally bound states but do not reach non-state actors. In an age where many new means and methods of warfare are not controlled or controllable by states, but can be created in an individual's garage[137] or office, arms control agreements lose much of their value. Until the international community finds a way to get individuals to agree to weapons controls and voluntarily comply, arms control agreements will have limited utility for many future weapon systems.

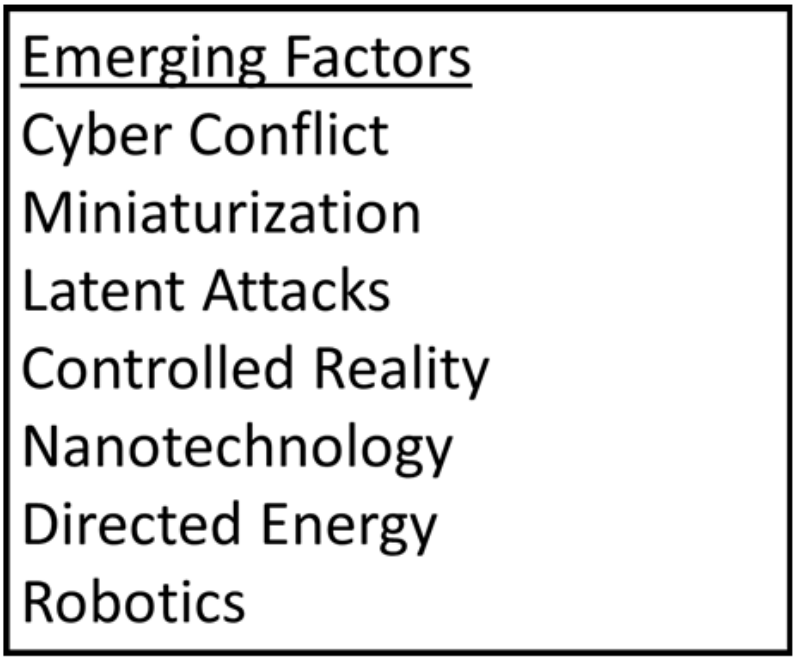
134. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, 3 U.N.T.S. 1974.

135. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *opened for signature* Apr. 10, 1982, *available at* http://www.icrc.org/ihl.nsf/FULL/450?OpenDocument.

136. Treaty on the Non-Proliferation of Nuclean Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483 (entered into force Mar. 5, 1970).

137. Wil S. Hylton, *How Ready Are We for Bioterrorism*? N.Y. TIMES, Oct. 26, 2011, http://www.nytimes.com/2011/10/30/magazine/how-ready-are-we-for-bioterrorism.html?pagewanted=all&_r=0.

C. EMERGING FACTORS



U.S. Deputy Defense Secretary William J. Lynn III recently stated that "few weapons in the history of warfare, once created, have gone unused."[138] This quote reinforces the point demonstrated by the Lateran Council that once a weapon or technology that can be weaponized is developed, it almost inevitably ends up on the battlefield. Specific arms control regimes have had some success in this area, but the general rule is that technology drives weapon development and those developed are eventually used in warfare.

I will start with cyber conflict. While cyber technology is not really new, its future uses leave it squarely in the category of emerging factors. The potential uses, and dangers, of cyber technology are only beginning to be understood. Cyber capabilities were viewed by top national security professionals and policymakers as the most dangerous of emerging capabilities in a recent survey conducted by *Foreign Policy*.[139]

138. John D. Banusiewicz, *Lynn Outlines New Cybersecurity Effort*, FED. INFO. & NEWS DISPATCH, INC., June 16, 2011.

139. *See The FP Survey: The Future of War*, FOREIGN POL'Y, Mar./Apr. 2012, http://www.foreignpolicy.com/articles/2012/02/27/The_Future_of_War?print=ye

Of course, the general availability of cyber means of armed conflict is part of what causes the concern. Many nations, including both China and the United States, have institutionalized their cyber forces.[140] A recent estimate suggests that 140 nations already have or are actively building cyber capabilities within their military.[141] The recent malware packages known as Stuxnet, Flame, and Red October aptly illustrate that states are already using cyber space to conduct military activities that cause harm, similar to kinetic operations.[142]

Additionally, non-state actors and even individuals have access to cyber weapons. Symantec estimates that Stuxnet could be created by as few as five to ten highly trained computer technicians in as little as six months.[143] Non-state actors have been known to develop sophisticated malware that cause great damage.[144]

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s&hidecomments=yes&page=full (ranking cyberwarfare at a 4.6 on a 1-7 scale, 1 being the largest threat and 7 being the least threat); Micah Zenko, *The Future of War*, FOREIGN POL'Y, Mar./Apr. 2011, http://www.foreignpolicy.com/articles/2011/02/22/the_future_of_war. (Mar./Apr.

140. *See* Tania Branigan, *Chinese Army to Target Cyber War Threat*, THE GUARDIAN, July 22, 2010, http://www.guardian.co.uk/world/2010/jul/22/chinese-army-cyber-war-department; Andrew Gray, *Pentagon Approves Creation of Cyber Command*, REUTERS, June 23, 2009, http://www.reuters.com/article/2009/06/24/us-usa-pentagon-cyber-idUSTRE55M78920090624; Graham H. Todd, *Armed Attack in Cyberspace: Deterring Asymmetric Warfare with an Asymmetric Definition*, 64 A.F. L. REV. 65, 96 (2009).

141. Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Casualties*, 13 SMU SCI. & TECH. L. REV. 249, 249 (2010).

142. *See STUXNET Malware Analysis Paper,* CODEPROJECT (Sep. 11, 2011), http://www.codeproject.com/Articles/246545/Stuxnet-Malware-Analysis-Paper (explaining Stuxnet was created to sabotage Iran's nuclear program); *Full Analysis of Flame's Command and Control Servers*, SECURELIST (Sep. 17, 2012), http://www.securelist.com/en/blog/750/Full_Analysis_of_Flame_s_Command_Control_servers (explaining Flame malware, the advanced cyber-espionage tool, was a large scale campaign targeting several countries in the Middle East); *Red October Computer Virus Found*, TELEGRAPH (Jan. 14, 2013), http://www.telegraph.co.uk/technology/news/9800946/Red-October-computer-virus-found.html (explaining Red October focused targeting countries in eastern Europe).

143. Josh Halliday, *STUXNET Worm is the 'Work of a National Government Agency'*, THE GUARDIAN, Sept. 24, 2010, http://www.guardian.co.uk/technology/2010/sep/24/stuxnet-worm-national-agency.

144. *See* David Kleinbard & Richard Richtmyer, *U.S. Catches 'Love' Virus: Quickly Spreading Virus Disables Multimedia Files, Spawns Copycats*, CNNMONEY, May 5, 2000, http://money.cnn.com/2000/05/05

Moving on to nanotechnology, it is "the understanding and control of matter at the nanoscale, at dimensions between approximately 1 and 100 nanometers, where unique phenomena enable novel applications."[145] Nanotechnology has already proven its value.[146] For example, "a nanoparticle . . . has shown 100 percent effectiveness in eradicating the hepatitis C virus in laboratory testing."[147] The U.S Government Accountability Office reported:

> From fiscal years 2006 to 2010, the National Science and Technology Council (NSTC) reported more than a doubling of National Nanotechnology Initiative (NNI) member agencies' funding for nanotechnology environmental, health, and safety (EHS) research—from approximately $38 million to $90 million. Reported EHS research funding also rose as a percentage of total nanotechnology funding over the same period, ending at about 5 percent in 2010.[148]

And the United States is not alone. China and Russia are also "openly investing significant amounts of money in nanotechnology."[149]

As with other innovations, nanotechnology is well on its way to being at the forefront of military operations. Between

/technology/loveyou/ (describing how the "I Love You" virus swept through banks, securities firms, and Web companies causing damage).

145. *What it is and How it Works*, NAT'L NANOTECHNOLOGY INST., http://nano.gov/nanotech-101 (last visited Feb. 6, 2013).

146. David Brown, *Making Steam Without Boiling Water, Thanks to Nanoparticles*, WASH. POST, Nov. 19, 2012, http://articles.washingtonpost.com/2012-11-19/national/35505658_1_steam-nanoparticles-water ("It shows you could make steam in an artic environment.").

147. Dexter Johnson, *Nanoparticle Completely Eradicates Hepatitis C Virus*, IEEE SPECTRUM (July 17, 2012), http://spectrum.ieee.org/nanoclast/semiconductors/nanotechnology/nanoparticle-completely-eradicates-hepatitis-c-virus?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+IeeeSpectrumSemiconductors+%28IEEE+Spectrum%3A+Semiconductors%29; *see also "Nanorobot" Can be Programmed to Target Different Diseases*, PHYS.ORG, July 16, 2012, http://phys.org/news/2012-07-nanorobot-diseases.html (explaining the programmable nature of the nanoparticle makes it useful against cancer and other viral infections).

148. *US Government Accountability Office Releases Report on Nanotechnology EHS Research Performance*, NANOWERK, June 22, 2012, http://www.nanowerk.com/news2/newsid=25691.php.

149. *See* Blake & Imburgia, *supra* note 131, at 180.

2001 and 2006, the Department of Defense spent over $1.2 Billion on nanotechnology research.[150] Blake and Imburgia argue that nanotechnology will significantly affect future weapons and warfare. They write:

> Scientists believe nanotechnology can be used to develop controlled and discriminate biological and nerve agents; invisible, intelligence gathering devices that can be used for covert activities almost anywhere in the world; and artificial viruses that can enter into the human body without the individual's knowledge. So called 'nanoweapons' have the potential to create more intense laser technologies as well as self-guiding bullets that can direct themselves to a target based on artificial intelligence. Some experts also believe nanotechnology possesses the potential to attack buildings as a 'swarm of nanoscale robots programmed only to disrupt the electrical and chemical systems in a building,' thus avoiding the collateral damage a kinetic strike on that same building would cause.[151]

Nanotechnology will also eventually produce more powerful and efficient bombs, and result in miniature nuclear weapons.[152] It will lead to the creation of microscopic nanobots that can act as sensors to gather information or as weapons to attack humans.[153] The results of nanotechnology will be

150. Josh Wolfe & Dan van den Bergh, *Nanotech Takes on Homeland Terror*, FORBES.COM, Aug. 14, 2006, http://www.forbes.com/2006/08/11/nanotech-terror-cepheid-homeland-in_jw_0811soapbox_inl.html.

151. *See* Blake & Imburgia, *supra* note 131, at 180.

152. *Military Uses of Nanotechnology: The Future of War*, THENANOAGE.COM, http://www.thenanoage.com/military.htm (last visited Feb. 7, 2013).7, 2013).

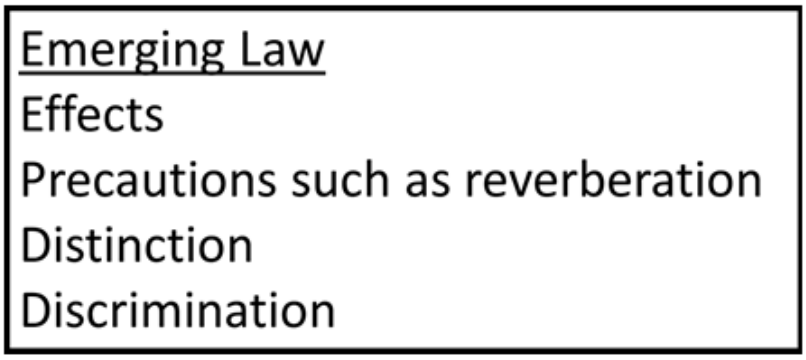
153. Scientists and the University of California, Berkeley, are already working on the Micromechanical Flying Insect Project; *see Micromechanical Flying Insect*, U.C. BERKELEY, http://robotics.eecs.berkeley.edu/~ronf/mfi.html/index.html (last visited Feb. 7, 2013) (describing the goal of micromechanical flying insect project is to develop a 25 mm device capable of sustained autonomous flight); *Nanotech Weaponry*, CENTER FOR RESPONSIBLE NANOTECHNOLOGY (Feb. 12, 2004), http://www.crnano.typepad.com/crnblog/2004/02/nanotech_weapon.html (explaining molecular manufacturing could lead to a weapon capable of seeking and injecting toxin into unprotected humans); Caroline Perry, *Mass-Production Sends Robot Insects Flying*, LIVE SCI., Apr. 18, 2012,

weapons that are smaller, more mobile, and more potent; sensors that are quicker and more accurate, and platforms with greater range, effect, and lethality.

In addition to the means of warfare I have discussed, let me also discuss a method of attack—the method of latent attack. A latent attack is when a weapon of some kind is placed in position, but will not be triggered until sometime in the future. The attack may be triggered by a signal sent by the weapon's creator or even by the victim's own actions. Though possible with viruses and nanotechnology delivery systems, the classic latent attack is done via computer malware.[154] The application of this form of emerging warfare as it relates to sales of weapons or military equipment is significant.

To illustrate, assume the United State sells F-16 aircraft to other countries, some of which the United States is not sure will remain allies. As a precautionary measure, the aircraft engineers embed some code in the targeting system that prevents that aircraft from targeting United States aircrafts. Such a valuable capability and tactic raises interesting legal issues which I will discuss next.

D. EMERGING LAW



Emerging technology will require emerging law. There are

http://www.livescience.com/19773-mini-robot-production-nsf-ria.html (stating a new technology will soon allow clones of robotic insects to be mass produced).

154. The Los Alamos National Laboratory in New Mexico, responsible for maintaining America's arsenal of nuclear weapons, discovered its computer systems contained Chinese-made network switches which are used to manage data traffic on computer networks. *See* Steve Stecklow, *U.S. Nuclear Lab Removes Chinese Tech Over Security Fears*, REUTERS, Jan. 7, 2013, http://www.reuters.com/article/2013/01/07/us-huawei-alamos-idUSBRE90608B20130107.

two particular areas of emerging law that I will discuss and both need to evolve in order to keep pace with advancing technologies. The first emerging area of law is the principles of distinction and discrimination.

Article 48 of API states the foundational LOAC principle of distinction: belligerents may "direct their operations only against military objectives."[155] API Article 51, paragraph 2 reinforces that norm: "The civilian population as such, as well as individual civilians, shall not be the object of attack."[156] In contrast, the principle of discrimination, or the prohibition on indiscriminate attacks, comes from API Article 51.4, and prohibits attacks which are "not directed at a specific military object" and "those which employ a method or means of combat which cannot be directed at a specific military objective" or "which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[157] The principle of discrimination is considered "an implementation of the principle of distinction."[158]

Future weapons present options that are difficult to analyze under the existing law. For example, assume that the United States wants to kill a foreign enemy leader and chooses to do so by way of a DNA-linked virus. In order to get the virus into the vicinity of the enemy leader, a covert operator spreads the virus liberally in the area where the covert operator frequents. The virus will infect thousands of civilians but will only have a lethal effect on the enemy leader. I remind you, first of all, that these restrictions only apply to "attacks." Analyzing the law, one might argue that API Article 51.4(c) would preclude the attack because it was "of a nature to strike military objectives (the enemy leader) and civilians or civilian objects without distinction." However, one might equally make the argument that the attack did not "strike" civilians; it merely used or inconvenienced civilians. The attack ultimately discriminated when it finally exercised its lethal payload on the

155. *See* Protocol I, *supra* note 65, art. 48.

156. *See id.* art. 51.2.

157. *See id.* art. 51.4.

158. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 43 (Cambridge Univ. Press 2005), *available at* http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.

enemy leader. Is infecting the general populace a violation of distinction even though the virus is absolutely discriminating in the attack?

Jeremy Richmond made a similar analysis of the Stuxnet computer malware and concluded that had it been used during armed conflict, it would have complied with the LOAC despite its general dispersion.[159] Further clarity in this area of emerging technology will provide guidance to states as future technologies develop and continue to be used.

I have already introduced the idea of precautions and the potential impact of re-engineering as a factor in the commander's proportionality analysis. API Article 57 requires that commanders do "everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects"[160] and "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[161]

Does that mean that a commander cannot choose to use a weapon that can potentially be re-engineered and used again against civilians? Or does it mean that he has to weigh the likelihood of it being re-engineered and the likelihood of it being used against civilians? Or does it mean that he has to do everything feasible to prevent it from being re-engineered without having to consider the potential effects if it is?

Currently, the law is unclear as to the application of the proportionality standard to this analysis. This is another area where, as technology advances, the law should advance as well.

IV. CONCLUSION

Let me now conclude with a quote from David Ignatius. He stated:

> The 'laws of war' may sound like an antiquated concept in this age of robo-weapons. But, in truth, a clear international legal regime has never been more needed: It is a fact of modern life that people in conflict zones live in the perpetual cross hairs of deadly weapons. Rules

159. *See* Richmond, *supra* 104, at 894.
160. *See* Protocol I, *supra* note 65, art. 57.2(a)(i).
161. *See id.* art. 57.2(a)(ii)

> are needed for targets and targeters alike.[162]

I would add that it is not just people living in combat zones, but potentially people anywhere in the world are in the cross hairs of deadly weapons.

Now is the time to act. In anticipation of these developments, the international community needs to recognize the gaps in the current LOAC and seek solutions in advance of a future situation. As the LOAC evolves to face anticipated future threats, it will help ensure that advancing technologies comply with the foundational principles of the LOAC and future armed conflicts remain constrained by law.

162. David Ignatius, *Dazzling New Weapons Require New Rules for War*, WASH. POST, Nov. 11, 2010; *see generally* Gary Marchant, Douglas Sylvester & Kenneth W. Abbott, *Nanotechnology Regulation: The United States Approach*, *in* NEW GLOBAL FRONTIERS IN REGULATION: THE AGE OF NANOTECHNOLOGY 189 (Graeme Hodge et al. eds., 2007); Kenneth W. Abbot, Douglas S. Sylvester & Gary E. Marchant, *Transnational Regulation of Nanotechnology: Reality or Romanticism?*, *in* INTERNATIONAL HANDBOOK ON REGULATING NANOTECHNOLOGIES (Edward Elgar ed., forthcoming); Kenneth W. Abbott, Gary E. Marchant, & Douglas J. Sylvester, *A Framework Convention for Nanotechnology*, 36 ENVTL. L. REP. 10931 (2006); Gary E. Marchant, Douglas J. Sylvester & Kenneth W. Abbott, *A New Soft Law Approach to Nanotechnology Oversight: A Voluntary Product Certification Scheme*, 28 UCLA J. ENVTL. L. & POL'Y. 123 (2010).

Places
Air, Land, Sea
Actors
Combatants
Civilians
DPH
Terrorists
Organized Armed Groups
Narco Terrorists
Means & Methods
Heat, Blast, and Fragmentation
Information Operations
Non-Lethal Weapons
Cyber Operations
Nuclear Weapons
Warfare Factors
Breathable Air Zones
Geographic Boundaries
State Centric System
Context
Time/Temporal Limits
Warfare Law
LOAC Bifurcation
Declaration of War
Sovereignty
Neutrality
In bello/ad bellum
Conflict Termination
Warfare Factors
State vs. State
Combatant
Citizenship Loyalties
Reciprocity
Attribution
Role of Law
State Monopolization of Force
Warfare Law
Combatants/Civilians
Resp. Command
Armed Attack
Status Based Targeting
Distinction
Warfare Factors
Weapons
Heat, Blast and Frag.
Limited Dispersion of Weapons
Warfare Law
"Armed Conflict"
"Use of Force"
Military Objective
Arms Control
Proportionality
Military Necessity
Unnec. Suffering
Emerging Factors
Space
Seabed
Poles
Moon
Cyber
Information
Emerging Law
Actor Driven
Global Commons
Limits on Info Env.
Emerging Factors
Robotics
Human "Tools"
Social Networks
Corporate Armies
"New Arms" Dealers
Cultural Uncertainty
Global Criminal Enter.
Arms/Actors Ebay
Lawfare
Emerging Law
Merger of States and Conduct
Discrimination
Emerging Factors
Cyber Conflict
Miniaturization
Latent Attacks
Controlled Reality
Nanotechnology
Directed Energy
Robotics
Emerging Law
Effects
Precautions such as reverberation
Distinction
Discrimination

12-31-2007

The ICJ'S Uganda Wall: A Barrier to the Principle of Distinction and an Entry Point for Lawfare

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THE ICJ'S "UGANDA WALL": A BARRIER TO THE PRINCIPLE OF DISTINCTION AND AN ENTRY POINT FOR LAWFARE

ERIC TALBOT JENSEN[a]

To determine the magnitude, causes, distribution, risk factors and cumulative burden of injury in a population experiencing armed conflict in northern Uganda since 1986...we took a multistage, stratified, random sampling from the Gulu district...1 of 3 districts in Northern Uganda affected by war since 1986... A similar rural district (Mukono) not affected by war was used for comparison...Of the study population, 14% were injured annually...Only 4.5% of the injured were combatants...The annual mortality of 7.8/1000 in Gulu district is 835% higher than that in Mukono district.[1]

The risk to civilians in armed conflict has steadily risen since World War II,[2] and the United Nations currently estimates that ninety percent of the casualties in modern armed conflict are women and children, presumably civilians.[3] This is particularly deplorable given that the 1949 Geneva Convention Relative to the

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1. Ronald R. Lett, Olive Chifefe Kobusingye, & Paul Ekwaru, *Burden of Injury During the Complex Political Emergency in Northern Uganda*, 49 CAN. J. OF SURGERY 51, 51 (2006).

2. *See, e.g.*, Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 75 (2005). *See also* Lett, et al., *supra* note 1, at 51 (stating, "The proportion of civilian war-related deaths has increased from 19% in World War I, 48% in World War II, to more than 80% in the 1990s. Civilians are used as shields to protect the military, abducted, enslaved, tortured, raped and executed.").

3. UNICEF, CHILDREN IN CONFLICT AND EMERGENCIES, http://www.unicef.org/protection/index_armedconflict.html; See also Lisa Avery, The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of Intentional Victimization of Women and Children in War, 51 LOY. L. REV. 103, 103 (2005) (stating, "During the last decade alone, two million children were killed, another six million were seriously injured or left permanently disabled, and twice that number of children were rendered homeless by the ravages of war.").

Protection of Civilian Persons in Time of War[4] (GCC) was written in response to the dramatic numbers of civilian casualties in World War II.[5] There are, undoubtedly, a number of reasons for this increase.[6] However, one of the most significant reasons for the rise in civilian deaths has been the mingling of combatants[7] with civilians on the battlefield.[8]

Nowhere has this been more obvious than in the recent conflict in Iraq. Not only have insurgents such as Abu Musab al-Zarqawi specifically targeted civilians,[9] but they have also refused to distinguish themselves from the civilian population.[10] Rather, they have chosen to blend in with the local populace,

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4. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287 [hereinafter Convention Relative to the Protection of Civilians].

5. *See, e.g.*, LTC Paul Kantwill & MAJ. Sean Watts, *Hostile Protected Persons or "Extra-Conventional Persons:" How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681, 725 (2005), *and* Reynolds, *supra* note 2, at 58; HISTORY LEARNING SITE, CIVILIAN CASUALTIES OF WORLD WAR II, http://www.historylearningsite.co.uk/civilian_casualties_of_world_war.htm (estimating civilian casualties to amount to more than half of the total casualties during WWII).

6. *See* Judith Graham & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 COLUM. HUM. RTS. L. REV. 1, 10-11 (2000) (arguing that the use of indiscriminate weapons such as landmines is a significant factor; *and* R George Wright, *Combating Civilian Casualties: Rules and Balancing in the Developing Law of War*, 38 WAKE FOREST L. REV. 129, 131 (2003) (arguing that some weaker foes intentionally target civilians for the sake of military necessity or perceived necessity).

7. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Though there may be a few exceptions, persons on the battlefield can generally be divided into three categories: combatants, noncombatants, and civilians. Combatants are those members of the armed forces that meet the qualifications of Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War); Convention Respecting the Laws and Customs of War on Land, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, § 1, ch. 1, art. 3, Oct. 18, 1907, 1907 U.S.T. LEXIS 29, 1 Bevans 631 (Noncombatants are also members of the armed forces under Article 3 of the Annex on Regulations Respecting the Laws and Customs of War on Land to the Hague Convention (IV) respecting the Laws and Customs of War on Land); Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 43, June 8, 1977, 1125 U.N.T.S. 3, *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079 (Noncombatants include combatants who meet the above definition who are *hors de combat* and other members of the armed forces such as chaplains and medical personnel. Civilians are not covered by the above definitions. However, in many cases, including works and articles cited herein, noncombatants is used more generally to include all who are not combatants).

8. Reynolds, *supra* note 2, at 75-77 (arguing that "concealment warfare," or the mixing of military personnel or targets with civilians, has been partially responsible for this increase).

9. John Ward Anderson & Jonathan Finer, *The Battle for Baghdad's Future; Three Years After Its Fall, Capital Is Pivotal to U.S. Success in Iraq, Officers Say*, WASH. POST, Apr. 9, 2006, at A17; Julian E. Barnes, *Sliding Toward an Uncivil War*, U.S. NEWS & WORLD REPORT, March 6, 2006, at 14-15; Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733 (2005).

10. *See CNN Live Event: Coalition News Briefing* (CNN television broadcast Apr. 11, 2004) (Transcript No. 041101CN.V54) (BG Kimmitt stating, "At 4:45, while moving from (UNINTELLIGIBLE) to clear an armed enemy—a coalition force was ambushed by enemy elements of unknown size. Reports indicate at least 20 rocket grenades were observed during the course of the

making it much more difficult for coalition and Iraqi military to distinguish between the insurgents and the innocent bystanders.[11] The obvious result of such tactics is to increase the danger to civilians. This creates a difficulty for those who are trying to comply with the law of war.

> When faced with such opponents, militaries intent on complying with the Law of War struggle between the requirements of distinction and their desire to protect non-combatants, and the practical reality of protecting their force from fighters... who act as combatants when engaging in combat but dissolve into the crowd of non-combatants when faced with opposing military forces.[12]

This intermixing of combatants with civilians while engaging in hostilities violates one of the most fundamental principles of the law of armed conflict: the principle of distinction. This bedrock principle of the law of war requires those involved in conflict to mark themselves so they can be distinguished from those who are not involved in combat. The most common method of compliance is for combatants to wear a uniform, but other methods of setting a combatant apart from a non-combatant are also authorized.[13] By requiring distinction, both combatants and civilians know who is involved in the combat and who is not. Thus, they can both make informed decisions of how to proceed in a combat environment.

The derogation from the principle of distinction is among the most serious issues facing the law of war today.[14] As combatants relax the requirement obliging them to mark themselves, erosion of this distinction will lead to greater intermixing of combatants with civilians. Increased civilian casualties will inevitably result because of the inability to discern who is "targetable" and who is not. Unfortunately, the current trend in the development of the law of war seriously undermines the principle of distinction by allowing, or even encouraging, would-be fighters to evade distinguishing themselves. Instead, these combatants seek the protections of civilians while not accepting the responsibilities of eschewing combatants' acts. This is a devastating trend that must be reversed or it will result in the destruction of the current law of war.

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engagement. Forty to 50 armed individuals were observed, some wearing black pajamas, uniforms, others wearing civilian clothes.").

11. *See CNN Live Sunday: U.S. Helicopter Shot Down in Iraq, Both Pilots Killed; 7 Chinese Citizens Taken Hostage in Iraq* (CNN television broadcast Apr. 11, 2004) (Transcript No. 041104CN.V36) (quoting a military spokesperson as saying:

> We are working at a disadvantage...The lack of uniforms, so that you can't define the enemy very well. And the intertwining of the enemy with combatants is very, very difficult. So you've got combatants and non-combatants mixed together intentionally...[I]f you think about just the way that, for instance, the Shi'ias could basically in this area right here, thousands of pilgrims on their way into this region right here, and the militia being able to just take off the black uniforms, and blend right in, into all those pilgrims).

12. Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L. L. 209, 211 (2005).

13. Major William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 106-09 (2003).

14. *See* George H. Aldrich, *The Hague Peace Conferences: The Laws of War on Land*, 94 AM. J. INT'L. L. 42, 42 (2000) (listing combatant status and protection of civilians as two of the top five areas of the law that need further development in the early 21st century).

This paper will briefly introduce the principle of distinction, reviewing its basis in customary international law and early conventional codifications. The Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (GPI) will then be analyzed and proffered as the beginning of the official derogation from the principle of distinction and the genesis of an increasing disregard of the requirement that combatants distinguish themselves from civilians. Two recent cases from the International Court of Justice (ICJ), the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory[15] and the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda),[16] will then be discussed and criticized for promoting the same trend, giving official incentive for nations to use non-uniformed insurgents rather than official militaries who would be expected to comply with the law of armed conflict. The significant danger this poses to the law of war in the age of asymmetrical lawfare will then be illustrated. Finally, some recommendations will be made as to steps the international community can take to reinstate the principle of distinction and reinvigorate the protections afforded to civilians.

I. PRINCIPLE OF DISTINCTION

"At the very heart of the law of armed conflict is the effort to protect non-combatants by insisting on maintaining the distinction between them and combatants."[17] This principle "prohibits direct attacks on civilians or civilian objects"[18] and is codified in Article 48 of the GPI[19] which states, "In order to

15. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9) [hereinafter Advisory Opinion No. 131].

16. Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo *v.* Uganda) (Order of Dec. 19, 2005), *available at* http://www.icj-cij.org/docket/files/116/10455.pdf (last visited Oct. 10, 2007) [hereinafter Dem. Rep. Congo v. Uganda].

17. W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM .J. INT'L .L. 852, 856 (2006).

18. Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148 (1999).

19. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), *supra* note 7, at art. 48. (Concerning article 48, the Commentary to GPI states:

> The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 (1) and in Geneva from 1864 to 1977 (2) is founded on this rule of customary law. It was already implicitly recognized in the St. Petersburg Declaration of 1868 renouncing the use of certain projectiles, (3) which had stated that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy." Admittedly this was concerned with preventing superfluous injury or unnecessary suffering to combatants by prohibiting the use of all explosive projectiles under 400 grammes in weight, and was not aimed at specifically protecting the civilian population. However, in this instrument the immunity of the population was confirmed indirectly);

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Commentary, part IV, § 1, ch. 1, art. 48, para.

ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[20] However, this principle only attained such general acceptance after a long history of slow evolution in the laws of armed conflict. This evolution began millennia ago and arose out of recognition that regulating conflict, even if only to a limited degree, would have benefits.[21]

Many ancient cultures had rules concerning the conduct of hostilities.[22] As these rules evolved through time and culture, their focus was to provide protections for those who were engaged in hostilities and were acceptable only if they provided some military advantage or fulfilled some military purpose.[23] For example, as early as the 5th century B.C., Sun Tzu wrote, "Treat the captives well, and care for them... Generally in war the best policy is to take a state intact; to ruin it is inferior to this."[24] Sun Tzu's apparent concern for captives and enemy property and persons was not born from a humanitarian desire to preserve his adversary but as part of the overall goal to conquer that enemy. Contrast Sun Tzu's tactics with that of the Roman armies during the 5th and 6th centuries. Although they had rules about military conduct in war, "Plunder was general; and no distinction was recognized between combatants and noncombatants"[25] because the military's need to plunder was too great. Similar approaches were taken by the Babylonians, Hittites, Persians, Greeks, and others.[26] Any protections granted to noncombatants and civilians grew generally out of a utilitarian view of warfare and not from an ideological desire to preserve them from the horrors of war.[27]

During the age of chivalry, the customs and usages of war continued to take a utilitarian view and developed rather intricate rules for plunder[28] and siege.[29]

1863, *available at* http://www.icrc.org/ihl.nsf/COM/470-750061?OpenDocument [hereinafter GPI Commentary].); *see also* Ferrell, III, *supra* note 13 (offering an excellent discussion on the practical application of the principle of distinction, and particularly the provisions of GPI, to special operations forces).

20. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), *supra* note 7, at art. 48.

21. *Id.* at Preamble.

22. *See, e.g.*, William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L. J. 639, note 12 (2004).

23. *Id.* at 697-710 (presenting an excellent overview of this concept).

24. SUN TZU, THE ART OF WAR 76 (Samuel Griffith trans., Oxford Univ. 1963).

25. Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. Tol. L. Rev. 111, 114 (2001) (giving an excellent overview of the laws of war during the Age of Chivalry).

26. Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL. L. REV. 176, 182-85 (2000).

27. *See, e.g.*, David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, THE NAT'L INTEREST, Fall 2003, at 6 (stating, "The reasoning behind the practical nature of both customary law and the Geneva Conventions was obvious: a humanitarian 'law' that impeded the ability of states to defend their vital interests would, in practice, amount to nothing but a series of pious aspirations.").

28. *See* Wingfield, *supra* note 25 at 115-16 (stating:

> To preserve discipline and guarantee a fair distribution, the booty was usually gathered centrally and then distributed after the battle to each soldier in accordance with his rank and merit. The precise

They contained a number of very important rules for relations between fighters, such as ransom[30] and parole,[31] as well as combat rules, such as the distinction between ruses and perfidy.[32] As the feudal system gave way to the rise of the nation state, and its dominance as the major player in international relations,[33] knights also gave way to the use of professional armies. While civilians had been incidental to the conflicts up to this point, this transition broadened the scope of who participated in hostilities. As Nathan Canestaro writes:

> The erosion of the line between civilians and the professional military began with the fundamental changes in warfare seen in the Napoleonic era. The expanding scale of warfare, the advent of popular revolutions in some European countries, especially France, and repeated clashes between professional soldiers and armed peasantry during the Napoleonic wars, brought commoners into warfare in significant numbers for the first time.[34]

With this increase in the scope of hostilities, the battlefield was prepared for a renewed focus on the laws governing war, including the consideration of noncombatants and civilians.

By the middle of the 19th century, nations began to codify the rules that had developed up to that point.[35] Examples of this include the 1863 Lieber Code,[36] the

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customs governing the division of spoil varied from country to country, but everywhere this distribution created a legally recognized, heritable, and assignable right of property in the captured objects. Military historians have long admired the close coordination between English naval forces patrolling along the coast of northern France and the English land armies pillaging the interior of the country. The admiration is not misplaced; but it is worth remarking that this fleet not only provided food and supplies to the army. It also acted as a kind of floating safe-deposit box for the troops, who could be sure that their loot would get back to their families in England even if they did not survive the campaign).

29. *Id.* at 117-19 (stating:

> A siege began when a herald went forward to demand that a town or castle admit the besieging lord. If the town agreed, this constituted surrender, and the lives and property of the townspeople would be protected. If the town refused to surrender, however, this was regarded by the besieging lord as treason, and from the moment the besieger's guns were fired, the lives and property of all the town's inhabitants were therefore forfeit . . . . Strictly speaking, the resulting siege was not an act of war but the enforcement of a judicial sentence against the traitors who had disobeyed their prince's lawful command).

30. *Id.* at 116-17; Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, 1997 ARMY LAW. 4, 4 (1997) (noting, "The practice of not killing one's captives, however, was rooted in fiscal reasons, not humanitarian reasons.").

31. *See* Maj. Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 201-08 (June, 1998).

32. *Wingfield, supra* note 25, at 131.

33. *See* Nathan A. Canestaro, *"Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq*, 43 COLUM. J. TRANSNAT'L L. 73, 83 (2004) (noting, "The principle that the right to wage war is limited to sovereign authority was asserted by the prominent Sixteenth Century legal scholar and father of international law, Hugo Grotius . . . .").

34. *Id.* at 84.

35. *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 706 (2004) (arguing that the codification of the modern law of armed conflict is a generally western notion).

36. DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF

1868 Declaration of St. Petersburg,[37] the unratified Brussels Conference of 1874,[38] the Hague Conventions of 1899 and 1907,[39] and the 1909 Naval Conference of London.[40] These conventions came to be known as the "Hague tradition."[41]

The Hague tradition, typified by the 1907 Hague Regulations, became the foundation upon which all modern laws of armed conflict are built,[42] and they embody concepts still valid today.[43] This Hague tradition focused on the

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CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3 (3rd ed. 1988) (An analysis of the provisions of the Lieber Code show that it "acknowledge[s] the supremacy of the warrior's utilitarian requirements even though explicitly referring to the need to balance military necessity with humanitarian concerns."); Eric Krauss & Michael Lacey, *Utilitarian vs. Humanitarian: The Battle Over the Law of War,* PARAMETERS, Summer 2002, at 76, *available at* http://www.carlisle.army.mil/USAWC/Parameters/02summer/lacey.htm; Reynolds, *supra* note 2, at 7-8 (writing:

> The Lieber Code specifically prohibited the targeting of civilians and civilian objects. It also recognized that collateral damage should be avoided, but was acceptable if it was the result of an attack on a legitimate military objective. The Lieber Code articulates basic principles of the law of war, including the principle of military necessity in Articles 14 and 15. "Military necessity [consists of] . . . those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war." Further, "Military necessity admits of all direction of destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable . . . ." Lieber defined the principle of distinction when he stated, "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit").

37. SCHINDLER & TOMAN, *supra* note 36, at 101, *available at* http://www.icrc.org/IHL.nsf/FULL/130?OpenDocument (stating in the preamble, "The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.").

38. *Id.* at 25, *available at* http://www.icrc.org/IHL.nsf/FULL/135?OpenDocument (though civilians are not defined, Article 9 deals with combatants and states:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. That they be commanded by a person responsible for his subordinates;
> 2. That they have a fixed distinctive emblem recognizable at a distance;
> 3. That they carry arms openly; and
> 4. That they conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia constitute the army, or form part of it, they are included under the denomination 'army').

39. *Id.* at 63-103.

40. *Id.* at 843.

41. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?* 90 CORNELL L. REV. 97, 108-09 (2004) (stating:

> The jus in bello is further subdivided into Geneva law and Hague law. Comprised principally of the four 1949 Geneva Conventions and the two 1977 Additional Protocols, Geneva law is a detailed body of rules concerning the treatment of victims of armed conflict. Embodied principally in the 1899 and 1907 Hague Conventions, Hague law prescribes the acceptable means and methods of warfare, particularly with regard to tactics and general conduct of hostilities. Though Geneva law and Hague law overlap, the terminology distinguishes two distinct regimes: one governing the treatment of persons subject to the enemy's authority (Geneva law), and the other governing the treatment of persons subject to the enemy's lethality (Hague law). International humanitarian law embraces the whole jus in bello, in both its Geneva and Hague dimensions).

42. Christopher L. Blakesly, *Ruminations on Terrorism & Anti-Terrorism Law & Literature*, 57 U. MIAMI L. REV. 1041, 1064-65 (2003).

43. Int'l. & Operational Law Dep't, The Judge Advocate General's Legal Center and School, U.S.

combatants and was based on a utilitarian view of warfare not only to provide limited protections for fighters while in battle but also to maintain the warrior ethos of chivalry.[44] Commenting on the utilitarian nature of the Hague tradition, George Aldrich wrote, "The 1907 Hague Regulations contain very few provisions designed to protect civilians from the effects of hostilities. Aside from the prohibition on the employment of poison or poisoned weapons, which was primarily intended to protect combatants, the only such rules are Articles 25-28."[45]

This era of codification, steeped in the notion of the law of war being a tool for combatants rather than an external limitation, is typified by the statement traditionally attributed to the German Chancellor, Otto von Bismarck: "What leader would allow his country to be destroyed because of international law?"[46] International law was formed from the combatant's point of view, not the noncombatant.

Concurrent with the codification of the utilitarian law of war in the middle of the 19th century, others began exercising an increasingly prominent voice relating to the laws of armed conflict.[47] These voices expressed concern for the victims of armed conflict, which were initially combatants, but later included noncombatants and civilians. The founding of the International Committee of the Red Cross (ICRC) after Henri Dunant's experience at the 1859 Battle of Solferino[48] and the subsequent 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field[49] with its accompanying Additional Articles of 1868[50] are examples of the developing movement. This was followed by

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ARMY, JA 422, OPERATIONAL LAW HANDBOOK, 12-15 (Derek I. Grimes ed., 2006).

44. *See Wingfield*, *supra* note 25, at 135-36.

45. *See* Aldrich, *supra* note 14, at 50 (continuing:

> Article 25 forbids the bombardment 'of towns, villages, dwellings, or buildings which are undefended.' By undefended, it was clear that the article meant that there were no defending armed forces in the town or other area in question or between it and the attacking force and consequently that it was open for capture by the attacker. It clearly did not apply to towns, villages, and so forth, that were in the hinterland and consequently were not open to immediate capture – or, in 1907, even to bombardment. Essentially, the article was a commonsense prohibition against bombarding something that could be taken without cost to the attacker. Articles 26 and 27 were precautionary measures, and neither suggests that its primary object was to minimize civilian casualties, although they might have provided some beneficial incidental effects for civilians in places under siege or bombardment. Article 28, which prohibits pillage, protects civilians only after the fall of the town or place and was necessary to make clear that the ancient custom permitting pillage of places that had resisted sieges was no longer acceptable).

46. *See* Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 63-64 (1994).

47. *See* LOUISE DOSWALD-BECK, *Implementation of International Humanitarian Law in Future Wars, in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 42 (Naval War College International Law Studies, vol. 71) (Michael N. Schmitt & Leslie C. Green eds., 1998) (arguing the advance in weapons technology also drove states to try and enact laws to limit warfare).

48. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, *From the Battle of Solferino to the Eve of the First World War*, at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNVP (providing a concise history of Dunant, including the Battle of Solferino).

49. SCHINDLER & TOMAN, *supra* note 36, at 279.

50. *Id.* at 285.

continuing codifications such as the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[51]

These humanitarian efforts focused on greater protections for combatants and became known as the "Geneva tradition"[52] because the ICRC was headquartered in Geneva, Switzerland, and many of the early conferences were held there. These innovations were welcomed by the combatants and are still accepted as imbedded in the practical realities of warfare.[53]

WWII exhibited an exponential rise in wartime costs to civilians, both in terms of lives lost and in property damage.[54] Increasingly lethal technology and weapons led to increasing effects on civilians.[55] "At the end of the nineteenth century, the overwhelming percentage of those killed or wounded in war were military personnel. Toward the end of the twentieth century, the great majority of persons killed or injured in most international armed conflicts have been civilian non-combatants."[56] This disturbing direction of warfare heightened the concern for the victims of warfare, particularly after the devastation of WWII.

In the years immediately following the war, a shifting of focus continued to add protections for combatants and noncombatants but also began to intertwine them with protections for civilians.[57] Codification of this shift began with the four 1949 Geneva Conventions.[58] While the first three Geneva Conventions[59] built upon preexisting established principles that survived WWII and were aimed at treatment of members of the armed forces, the Convention (IV) relative to the Protection of Civilian Persons in Time of War[60] extended certain protections to civilians based on their status as non-participants in the conflict.[61] All four conventions were advances in humanitarian law and proscribed many of the horrors of WWII in order to prevent them from occurring again. In fact, the fourth convention required military commanders to modify operations based solely on their potential effects on the civilians on the battlefield.

Underlying all four conventions was the idea that all persons on the battlefield could be divided into three distinct groups (combatants, noncombatants or

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51. *Id.* at 301.

52. *See Wingfield*, *supra* note 25, at 134-35.

53. DOSWALD-BECK, *supra* note 47, at 41.

54. Compare the estimated number of deaths in WWII (http://www.valourandhorror.com/DB/BACK/Casualties.htm) with those in WWI (http://www.vw.cc.va.us/vwhansd/HIS122/WWIcasualties.html).

55. Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 326 (1951).

56. Aldrich, *supra* note 14, at 48.

57. *See* Rivkin & Casey, *supra* note 27, at 60-61.

58. Bradford, *supra* note 22, at 765-70.

59. SCHINDLER & TOMAN, *supra* note 36, at 305-425.

60. *Id.* at 427-85.

61. Krauss & Lacey, *supra* note 36, at 77 (noting, "[p]revious conventions had forced the utilitarians to deal with issues such as the treatment of the sick and wounded and prisoners of war . . . [t]he Civilian Convention for the first time placed affirmative obligations . . to address the food, shelter, and health-care needs of civilians").

civilians), and that it is unlawful to target those who were not combatants.[62] Although no definition was provided for persons who were not combatants, all who wanted the protections and privileges of prisoners of war were obliged to strictly comply with Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).[63] This includes a requirement for all to distinguish themselves from the local populace who were not engaging in combatant activities.

In the two decades that followed the 1949 Geneva Conventions, the global political climate developed into a bi-polar world, with the United States and its North Atlantic Treaty Organization members directly opposing the Soviet Union and its supporting Warsaw Pact members. The most significant aspect of this bi-polar world was the lack of armed conflict between the major powers.[64] While many conflicts erupted across the globe, they were characterized by struggles for self-determination or other small-scale wars where nations acted as surrogates for the superpowers.[65] These wars were not characterized by the massing of large, uniformed, state-sponsored armies, but rather by small groups of often unorganized and un-uniformed freedom fighters.[66]

During one such war, the Vietnam War, numerous allegations arose that many of the provisions of the Geneva Conventions were disregarded,[67] including fighters not distinguishing themselves in the conduct of battle. In response to these violations and in an attempt to update the 1949 Geneva Conventions,[68] the ICRC led the world[69] in adopting the 1977 Protocols to the Geneva Conventions.[70]

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62. Maj. Charlotte M. Liegl-Paul, *Civilian Prisoners of War: A Proposed Citizen Code of Conduct*, 182 MIL. L. REV. 106, 113 (2004); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8), *available at* http://www.icj-cij.org/docket/files/95/7495.pdf [hereinafter Legality of the Threat Opinion] (holding, "The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following . . . States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets").

63. SCHINDLER & TOMAN, *supra* note 36, at 355-425.

64. *See* Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 462-65 (2003).

65. *See* Thomas M. Franck, *The UN and the Protection of Human Rights: When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 61 (2001).

66. *Id.* at 60-61.

67. Cara Levy Rodriguez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805, n.130 (1999) (referencing the alleged American violations of the law of war); Jeffrey F. Addicott & William A. Hudson, *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 174-75 (1993) (referencing the alleged North Vietnamese violations of the law of war); *Cf.* Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 43 (1995) (stating that law of war violations were not prosecuted during this time period because of the superpower deadlock between the United States and the Soviet Union).

68. Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 679 (1994); Aldrich, *supra* note 14, at 45 ("In the years since the Geneva Conventions were concluded in 1949, the world has clearly changed greatly. A majority of the present states did not exist as states in 1949, and many of them gained their independence only after armed struggles against colonial powers.").

69. Lee A. Casey & David B. Rivkin, Jr., *Double-Red-Crossed*, THE NAT'L INT. 63, 67 (2005);

These Protocols, and particularly the Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (GPI), accomplished the complete amalgamation of the Hague and Geneva traditions, breaking through that invisible barrier that had seemed to divide the two regulatory streams,[71] but at the expense of the "historic rule" of distinction.[72]

II. GPI AND THE EROSION OF THE PRINCIPLE OF DISTINCTION

One hundred and sixty-seven states are parties to GPI,[73] with an additional five countries that have signed but not yet ratified the text,[74] including the U.S.[75] Article 1 of GPI states the coverage of the Protocol:

> Art 1. General principles and scope of application....
>
> 3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
>
> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[76]

The reference to Common Article 2 of the 1949 Geneva Conventions is important in that it limits the application both to whom and when it applies.[77] Common Article 2 states:

> Art 2. In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 46 (1984).

70. SCHINDLER & TOMAN, *supra* note 36, at 551-629.

71. Legality of the Threat Opinion, *supra* note 62, at 256 ("These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.").

72. Reisman, *supra* note 17, at 856-57.

73. International Humanitarian Law –Treaties and Documents, available at http://www.icrc.org/ihl.nsf/CONVPRES?OpenView.

74. *Id.*

75. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) (As a signatory, but not party, to the GPI, the U.S. has the obligation to not "defeat the object and purpose" of its provisions).

76. SCHINDLER & TOMAN, *supra* note 36, at 558

77. Murphy, *supra* note 69, at 49.

> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a Party to the present Convention, the Powers who are Parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[78]

By their text, the application of the Conventions is limited to High Contracting Parties and to the three specific fact patterns: 1) declared war, 2) any other armed conflict even if the state of war is not recognized, and 3) partial or total occupation. The limit of the scope of the application to "High Contracting Parties" has been overcome by the acceptance of all four Geneva Conventions as customary international law, binding on all nations whether or not they are signatories.[79] However, the three specific fact patterns have not been expanded by any such generally accepted declaration. Therefore, that portion of the scope of common Article 2 is the substance that is directly incorporated into Article 1, paragraph 3, of GPI, limiting its scope and application.

Paragraph 4 of GPI, however, appears to expand the reach of the Protocol despite the language of paragraph 3.[80] In stating that "[t]he situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," the article establishes a potential overlap between the two paragraphs and the simultaneously promulgated Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (GPII).[81]

GPII's scope and application is stated in Article 1:

> Art 1. Material field of application
>
> 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such

78. SCHINDLER & TOMAN, *supra* note 36, at 361-62.

79. *See* Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL'Y SYMP. 47, 50 (1999).

80. Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 598 (1983); Murphy, *supra* note 69, at 49-50.

81. SCHINDLER & TOMAN, *supra* note 36, at 558.

> control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
>
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[82]

If the apparent division between the two Protocols is intended to be international versus non-international armed conflicts as the titles suggest, the scope of GPII was seriously eroded at inception by the expansion of GPI to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," conflicts that are the prototype for non-international, or internal, armed conflicts.[83] Further, similar to GPI, the statement that GPII "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application" seems to be clear until the succeeding reference to Article 1 of GPI.

The United States strongly objects to this expansion of the coverage of the law of armed conflict and provides that as one of the reasons it refuses to ratify GPI.[84] In his Letter of Transmittal to the Senate, President Ronald Reagan stated:

> Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology.[85]

This is important to the present discussion because it was this expansion coupled with the desire to cover fighters engaged in "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" that has led to

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82. *Id.* at 621.

83. *Id.* at 558. *But see* GPI Commentary, *supra* note 19, at para. 86-87, 90 (arguing that Common Article 2 initially contemplated inclusion of such conflicts, wars of liberation are really of an international character, and that wars of national liberation should be covered by the laws of armed conflict because of their characteristics, such as the intensity of the conflict).

84. *See* Remarks of Judge Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460, 463-71 (1987); Michael Lacey, *Passage of Amended Protocol II*, 2000 ARMY LAW. 7, n.3 (2000).

85. Ronald Reagan, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: Letter of Transmittal*, 81 AM. J. INT'L. L. 910, 911 (1987).

GPI's derogation from the principle of distinction.[86] By including those types of conflicts, which were traditionally not covered by the laws of combatant status, they included many fighters who traditionally do not comply with the requirements of combatant status.

Against the backdrop of expanded coverage, the Protocol then redefines the requirements for combatant status. After discussing a state's armed force in Article 43, GPI Article 44 provides:

> Article 44—Combatants and prisoners of war
>
> 1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
>
> 2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
>
> 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
>
> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).
>
> 4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the

86. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol on the Protection of Victims of International Armed Conflict].

> case where such a person is tried and punished for any offences he has committed.
>
> 5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.
>
> 6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.
>
> 7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.
>
> 8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.[87]

Article 44 was one of the most controversial provisions of the drafting convention,[88] and rightly so. It represents a significant change to the law of war. By reducing the requirement to participate in hostilities as a combatant to merely requiring an attacker to carry his arms openly,[89] the Protocol strikes a blow to the rule that has become the bedrock principle of civilian protection. As Professor Michael Reisman writes, "Article 44 constitutes a considerable relaxation, for at least one side to a conflict, of the historic requirement, as well as of the sanction that functioned as an enforcement mechanism. This change was not accomplished inadvertently."[90]

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87. *Id.* at art. 44.

88. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 para. 1684 (J. Pictet et al. eds., 1987), *available at* http://www.icrc.org/ihl.nsf/COM/470-750004?OpenDocument [hereinafter Pictet, COMMENTARY].

89. *See* Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Article 4 of the GPW sets out the requirements for irregular forces to be given combatant status and prisoner of war privileges); Sofaer, *supra* note 84 at 466-67 (asserting that the provisions of article 44 undermine the protection for civilians and provide support for terrorist activities); John C. Yoo & James C. Ho, *The New York University-University of Virginia Conference on Exploring the Limits of International Law: The Status of Terrorists*, 44 VA. J. INT'L L. 207, 225-28 (2003) (discussing article 44 and arguing that it dilutes the protections to civilians by encouraging unlawful combatants such as terrorists to engage in hostilities without complying with the traditional requirements of article 4 of the GPW); *But see* Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. LAW 721, 741-43 (2001) (arguing that the protections for civilians is still the main focus of the Protocol despite the expansion of the term combatant).

90. Reisman, *supra* note 17, at 858.

The target of this relaxation was "guerilla warfare," a "modern battlefield... phenomenon" which can not be ignored.[91] Pictet states in his commentary:

> Guerrilla fighters will not simply disappear by putting them outside the law applicable in armed conflict, on the basis that they are incapable of complying with the traditional rules of such law. Neither would this encourage them to at least comply with those rules which they are in a position to comply with, as this would not benefit them in any way.[92]

This argument makes a mockery of paragraph 3's recounting of the basis for the principle of distinction: "the protection of the civilian population from the effects of hostilities."[93] While it may widen the scope of those who are classified as combatants, it fatally blurs the distinction between combatants and civilians.

Specifically, by allowing battlefield fighters to attack without wearing a uniform or other distinguishing element, GPI has completely undermined the reciprocal underpinnings of the principle.

> The venerable requirement imposed on combatants that, to be lawful, they must wear uniforms and bear arms openly is an indispensable and easily implemented and policed means for protecting noncombatants. Without these distinctive insignia, belligerents cannot distinguish adversaries from civilians, with predictable results.[94]

The predictable results include increased civilian casualties, as has been so clearly illustrated by recent events in Iraq.[95] In a conflict where soldiers are incapable of discerning between civilians and illegal fighters, "They must decide either not to shoot those who appear to be noncombatants and risk being killed, or attempt to distinguish between combatants and noncombatants, and in doing so, knowingly accept the risk of killing noncombatants for self-preservation."[96]

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91. Pictet, COMMENTARY, *supra* note 88, para. 1684.

92. *Id. But see* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 19–20 (2004) (arguing that the delegates to the 1949 Geneva Conventions did not want to grant combatant protections to groups fighting against their own government).

93. Protocol on the Protection of Victims of International Armed Conflict, at art. 44, para. 3.

94. Michael Reisman, Holding the Center of the Law of Armed Conflict, 100 AM. J. INT'L. L. 852, 856 (2006); See also Derek Jinks, The Changing Laws of War: Do We Need a New Legal Regime After September 11?: Protective Parity and the Laws of War, 79 NOTRE DAME L. REV. 1493, 1497 (2004) (stating:

> the protection of noncombatants from attack is predicated on a clear distinction between combatants and noncombatants. If attacking forces cannot distinguish between enemy soldiers and civilians, this type of rule cannot work well....It is the goal of protecting innocent civilians that requires a sharp line between combatants and noncombatants).

95. Glenn Kutler, *Iraq Coalition Casualty Count*, iCasualties.org, http://icasualties.org/oif/IraqiDeaths.aspx (last visited July 28, 2007) (where claims of civilian deaths in Iraq are tracked and estimated. These large numbers of civilian deaths is attributable at least in part, if not in large part, to the intermixing of unlawful combatants with civilians); *CNN Live Event*, *supra* note 10; *CNN Live Sunday*, *supra* note 11.

96. Jensen, *supra* note 12, at 224; Mark D. Maxwell, *The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?* 9/1/04 MIL. REV 17, at 23 ("Absent this ability

President Reagan recognized this and stated in his Letter of Transmittal to GPI that it:

> would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form.[97]

Not content to stop at paragraph 3 with its dangerously relaxed provisions for combatant status, the Protocol explicitly confirms the disadvantage to uniformed militaries in paragraph 7 by requiring them to continue to fight in the traditional methods despite being faced with foes who do not.[98] It does not take much military savvy as an insurgent leader to figure out how to take advantage of a legal system where only one side is required to mark themselves as combatants and the other side has the opportunity to hide amongst those it is illegal for the uniformed armies to kill.

Thanks at least in part to the natural results of Protocol I's derogation from the combatant status requirements, Gabriel Swiney states, "[T]he Principle of Distinction is violated across the world, often openly so, and that problem is getting worse. Something must be done."[99] Something has been done. Two recent cases have been taken to the International Court of Justice (ICJ) giving this international adjudicative body a chance to reestablish the sanctity of the principle of distinction and halt or even reverse the path of erosion begun by GPI. Unfortunately, the ICJ did the exact opposite and turned a perverse authorization to conduct military operations from amongst the noncombatant population into an illicit incentive to do so.

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to distinguish between lawful and unlawful combatants, an enemy might well be left with one of two targeting choices: do not engage any civilians, even though some are engaging its forces, or engage every enemy civilian on the battlefield. The latter choice will likely prevail."); Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 335 (1951) (arguing this as a reason why the existence of a *levee en masse* will likely force the invader to treat all civilians as hostile).

97. Ronald Reagan, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: Letter of Transmittal*, 81 AM. J. INT'L. L. 910, 911 (1987); Pictet, COMMENTARY, *supra* note 88, para. 1679 (Coming close to admitting the danger to civilians of this situation in the Commentary where he writes that "distinction between combatants and non-combatants may be more difficult as a result, but not to the point of becoming impossible.").

98. *See* Ferrell, *supra* note 13, at 105 (writing:

> [T]he [law of war] places a duty on parties to a conflict to distinguish combatants from civilians. This is a reciprocal duty, requiring all parties to distinguish among enemy combatants and civilians when conducting military operations and to ensure a party's own armed forces are distinguishable from enemy combatants and civilians.

99. Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733 (2005) (arguing then for replacing the principle of distinction with the Principle of Culpability which is based on each individual's actions rather than his status as a noncombatant.).

III. THE ICJ INCENTIVIZES THE USE OF FORCES THAT DO NOT DISTINGUISH THEMSELVES

The ICJ was established at the San Francisco Conference of 1945[100] to be the "principal judicial organ" of the United Nations.[101] Its jurisdiction is non-compulsory[102] but limited to state parties[103] except for specific exceptions such as a request for an advisory opinion from the General Assembly.[104] It was just such a request from the General Assembly that precipitated the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, known as the Wall Advisory Opinion.[105]

A. The Wall Advisory Opinion

In the Wall Advisory Opinion, the General Assembly asked the Court to provide an advisory opinion on the issue of:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?[106]

The question resulted from the construction of a large wall,[107] or fence as the Israeli Supreme Court called it,[108] that meandered through the occupied territory of the West Bank.[109] The ICJ determined that the wall was illegal for a number of reasons,[110] with one of its major objections being that the path of construction

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100. Int'l Court of Justice, *The Court,* http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm (for a short history of the ICJ).

101. *See* U.N. Charter, art. 92.

102. *See* STATUTE OF THE INT'L COURT OF JUSTICE, art. 36, 3 Bevans 1179; 59 Stat. 1031, T.S. No. 993.

103. *See id.* at art. 34.

104. *Id.* at arts. 65-68; U.N. Charter, art. 96

105. *See* Advisory Opinion No. 131, *supra* note 15.

106. *Id.* at para. 66.

107. This is the term used by the ICJ. *See* Karin Calvo-Goller, *Jurisdiction and Justiciability: More Than a Huge Imbalance: The ICJ's Advisory Opinion on the Legal Consequences of the Construction of the Barrier*, 38 ISR. L. REV. 165, 168-89 (2005) (arguing that the use of the term Wall illustrates the ICJ's purposeful misconstruing of the case); Emanuel Gross, *Combating Terrorism: Does Self-Defense Include the Security Barrier? The Answer Depends on Who You Ask*, 38 CORNELL INT'L L.J. 569, 571 (2005) (arguing that the Courts use of "this particular loaded term . . . would most likely cause people - even if unfamiliar with the issue - to feel a sense of aversion and antipathy towards a structure of this kind because of the immediate negative connotations of the expression.").

108. H.C.J. 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] IsrSC 1 (Barak, C.J.) (The Israeli Supreme Court used the term "fence"); *Cf.* Joshua Kleinfeld, *The Legal Status of the Barrier Between Israel and the Occupied Territory: For International Law, Against the International Court* (on file with author) (discussing the prejudging nature of the title given to the construction).

109. *See* Kleinfeld, *supra* note 108 (The facts concerning the actual location of the wall at various periods is a matter of dispute).

110. *Id.* (analyzing the ICJ decision with some dissatisfaction for various reasons) ; *See also,*

appeared to be an attempt to illegally take Palestinian lands or at least prejudge any future negotiations on where the permanent boundary should be.[111]

In response to allegations of illegality, Israel argued that the fence was a self-defense measure under Article 51 of the UN Charter,[112] which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[113]

The Israeli permanent representative to the UN General Assembly, Ambassador Dan Gillerman, stated prior to the ICJ case:

> [A] security fence has proven itself to be one of the most effective non-violent methods for preventing terrorism in the heart of civilian areas. The fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter. International law and Security Council resolutions, including resolutions 1368 (2001) and 1373 (2001), have clearly recognized the right of States to use force in self-defence against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end.[114]

It was Israel's contention that the fence was legal as a measure of self-defense and that it represented a humane and proportionate response to the terror attacks. The ICJ disagreed.

In response to Israel's Article 51 claim, the Court said:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a

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Alberto De Puy, *Bringing Down the Barrier: A Comparative Analysis of the ICJ Advisory Opinion and the High Court of Justice of Israel's Ruling on Israel's Construction of a Barrier in the Occupied Territories*, 13 TUL. J. INT'L & COMP. L. 275 (2005); Karin Calvo-Goller, *Jurisdiction and Justiciability: More Than a Huge Imbalance: The ICJ's Advisory Opinion on the Legal Consequences of the Construction of the Barrier*, 38 ISR. L. REV. 165 (2005); Rebecca Kahan, *Building a Protective Wall Around Terrorist—How the International Court of Justice's Ruling in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations*, 28 FORDHAM INT'L L.J. 827 (2005); Sean D. Murphy, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Territories: Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L. L. 62 (2005); Emanuel Gross, *Combating Terrorism: Does Self-Defense Include the Security Barrier? The Answer Depends on Who You Ask*, 38 CORNELL INT'L L.J. 569 (2005).

111. Advisory Opinion No. 131, *supra* note 15, at para. 121. *See also* U.N. GA Press Release GA/10179, *General Assembly, in Resumed Emergency Session, Demands Israel Stop Construction of Wall, Calls on Both Parties to Fulfill Road Map Obligations* (Oct. 21, 2003); De Puy, *supra* note 110, at 297-99.

112. *Id.* at para. 116, 138.

113. U.N. Charter art. 51.

114. Sean D. Murphy, *AGORA: ICJ Advisory opinion on Construction of a Wall in the Occupied Palestinian Territory: Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?*, 99 AM. J. INT'L L. 62, 62 (2003) (quoting U.N. GAOR, Emergency Special Sess., 21st mtg. at 6, U.N. Doc. A/ES-10/PV.21 (Oct. 20, 2003)).

> foreign State.
>
> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368(2001) and 1373(2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.
>
> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.[115]

The fact that Israel has been subject to serious terror attacks is not in dispute. However, the Court declined to recognize those attacks as justification for Israel's actions.[116] Rather, the Court held that the right to respond in self-defense only arises when state action is involved. This restrictive reading of self-defense has been met with significant disagreement,[117] including among several of the Court's own Judges.[118]

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115. Advisory Opinion No. 131, supra note 15, at para. 139.

116. *See* Murphy, *supra* note 114, at 71-75.;

117. Murphy, *supra* note 114, at 62-63 (providing a detailed analysis of why the court erred in its analysis of article 51 by limiting armed attacks to states and stating eloquently:

> The position taken by the Court with respect to the *jus ad bellum* is startling in its brevity and, upon analysis, unsatisfactory. At best, the position represents imprecise drafting, and thus calls into question whether the advisory opinion process necessarily helps the Court "to develop its jurisprudence and to contribute to the progress of international law." At worst, the position conflicts with the language of the UN Charter, its *travaux preparatoires*, the practice of states and international organizations, and common sense. In addition to the lack of analytical reasoning, the Court's unwillingness to pursue an inquiry into the facts underlying Israel's legal position highlights a disquieting aspect of the Court's institutional capabilities: an apparent inability to grapple with complex fact patterns associated with armed conflict. Overall, the Court's style in addressing the *jus ad bellum* reflects an *ipse dixit* approach to judicial reasoning; the Court apparently expects others to accept an important interpretation of the law and facts simply because the Court says it is so).

118. *See* Advisory Opinion No. 131, supra note 15, at para. 33 (separate opinion of Judge Higgins) (Writing:

> I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State. *That* qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) (Merits, Judgment, I.C.J. Reports 1986*, p. 14). It there held that military action by irregulars could constitute an armed attack if these were sent by or on behalf of the State and if the activity "because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces" (*ibid.*, p. 103, para. 195). While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere (R. Higgins, *Problems and Process: International Law and How We Use It*, pp. 250-251));

Advisory Opinion No. 131, supra note 15, at para. 6 (separate opinion of Judge Burgenthal) (writing "the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State."); Advisory Opinion No. 131, supra note 15, at para.

After analyzing the Court's decision in the Wall Advisory Opinion, Professor Sean Murphy concludes:

> [T]he upshot of the Court's present jurisprudence appears to be that under the UN Charter, (1) a state may provide weapons, logistical support, and safe haven to a terrorist group; (2) that group may then inflict violence of any level of gravity on another state, even with weapons of mass destruction; (3) the second state has no right to respond in self-defense against the first state because the first state's provision of such assistance is not an "armed attack" within the meaning of Article 51; and (4) the second state has no right to respond in self-defense against the terrorist group because its conduct cannot be imputed to the first state, absent a showing that the first state "sent" the terrorist group on its mission. Such a legal construct, if intended, seems unlikely to endure.[119]

Professor Murphy's sobering assessment of the impact of the Court's decision is even more worrisome when its consequences to the principle of distinction are considered.

Imbedded in the Court's exposition of the right of self-defense is a crucial point concerning the principle of distinction and its continuing derogation. As mentioned above, the principle of distinction is designed to separate combatants from non-combatants in an effort to preserve the noncombatant population by disqualifying them as targets. In exchange for this willingness to be marked as a target (and meet the other qualifications of combatant status), combatants receive many benefits.[120] The greatest of these benefits is combatant immunity, which grants immunity for warlike acts, as long as fighters comply with the laws of war. Ideally, these incentives would be sufficient to entice those who want to engage in battlefield activities to legitimize themselves by meeting the requirements of GPW Article 4, including distinguishing themselves from the noncombatant populace. This can be done, in part, by becoming a member of a state's armed forces with its requirements of distinction, or otherwise clearly distinguishing oneself as part of an organized fighting group. Of course, the drawback to this commitment to distinction is that a fighter can no longer blend into the civilian noncombatant population and attack with some level of anonymity.

Even if the incentives were insufficient to entice individuals, the reciprocal benefits that would accrue to states from having all fighters clearly distinguished and subsequently eligible for combatant privileges should convince states to comply with the requirements of marking their forces. The argument is that as nations fight in compliance with the laws of war, honoring the principle of distinction not only benefits its uniformed armed forces by clearly identifying the

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35 (separate opinion of Judge Kooijmans) (While not agreeing that Israel could invoke article 51 based on the fact that the terrorist activities come from within Israel, writes that Security Council Resolutions 1368 and 1373 provide a basis for Israel's argument).

119. Murphy, *supra* note 114, at 66.

120. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 7 (discussing the methods and means of warfare and the treatment of prisoners).

enemy, but also preserves its noncombatant civilian population. However, the ICJ's decision in the Wall Advisory Opinion has now tacitly removed that incentive both from states and from fighters who want to commit combatant acts from a position that gives them the cover of civilians.

The ICJ's decision gives states less incentive to use their armed forces when attacking another nation because unless the attacks can be attributed to a state, the target state does not attain the right to respond in self-defense. In other words, a state now has to balance the benefits it will gain from attacking with clearly marked armed forces against the benefits it will accrue if it opts to work clandestinely[121] through non-uniformed forces that it can support from a distance and still accomplish its goals but that it also knows will not give the target state the right to respond in self-defense. If a state thinks it can act through some armed rebel group and accomplish its aggressive purposes without having to fear military retribution, it will most certainly be more tempted to act. The inevitable result will be states making the decision to use armed rebels rather than uniformed state forces. This decision will undermine the principle of distinction by placing more fighters on the battlefield who may or may not decide to distinguish themselves from the local population.

While this unfortunate result of the Court's decision may not further affect the complex situation in Israel and Palestine,[122] the Court should be prescient enough to project the impact of its rulings on other evident scenarios. In the end, there has

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121. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para 195 (June 27) (Holding:

> There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry our acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.).

See Michael N. Schmitt, *The Rule of Law in Conflict and Post-Conflict Situations: U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL'Y 737, 751 (2004) (discussing the meaning of the Nicaragua case: "only attacks of a particular scale and of certain effects are 'armed attacks' justifying a military response in self-defense."). *But see* Advisory Opinion No. 131, supra note 15, at note 15 (making no mention of the scale of the attacks as a criterion for invoking self defense).

122. *See Lebanese talk show discusses UN team investigating Al-Hariri death*, BBC WORLDWIDE MONITORING, Sep. 10, 2005; *Italy, United States Reaffirm Solidarity Against Terror*, STATE NEWS SERVICE, July 13, 2005 (Israel faces both uniformed and non-uniformed armed groups that act along a spectrum of almost full state sponsorship to only limited financial or ideological backing. It is unclear that this situation will change drastically as a result of the ICJ's ruling).

been little direct impact on the situation in Israel as a result of the ICJ ruling,[123] but the effects of the Court's narrow construction of armed attack have already eroded the principle of distinction. This is exactly the opposite direction international law should be moving.[124]

Despite Professor Murphy's caution to the Court,[125] it has taken one more step down the path of undermining the principle of distinction, the step from tacitly approving to explicitly encouraging states to use armed militant groups who shun the rules of distinction and purposefully practice illegal battlefield tactics. This step occurred in the Case Concerning Armed Activities on the Territory of the Congo,[126] otherwise known as Congo v. Uganda.

B. Congo v. Uganda

The Case Concerning Armed Activities on the Territory of the Congo[127] arose from incidents that occurred between Uganda and the Democratic Republic of the Congo (DRC) from the late 1990s through 2004. In its application, the DRC alleged:

> acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity. ... Such armed aggression by Ugandan troops on Congolese territory has involved *inter alia* violation of the sovereignty and territorial integrity of the Democratic Republic of the Congo, violations of international humanitarian law and massive human rights violations.[128]

In the counterclaims and defenses, Uganda alleged, among other things, that it was acting in self-defense in compliance with Article 51 of the UN Charter.

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123. Press Release, General Assembly Emergency Session Overwhelmingly Demands Israel's Compliance with International Court of Justice Advisory Opinion, U.N. DOC. GA/10248 (July 20, 2004). *See* Fr. Robert L. Araujo, S.J., *Implementation of the ICJ Advisory Opinion – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [do not] Make Good Neighbors?*, 22 B.U. INT'L L.J. 349, 387-96 (2004) (explaining the discussions concerning the General Assembly resolution, issued as a result of the Advisory Opinion, which was approved by a vote of 150 for, 6 against, and 10 abstaining).

124. Jensen, *supra* note 12, at 226.

125. Murphy, *supra* note 114, at 76 (writing:

> The Court would do well to heed these concerns. Its docket currently includes cases relevant to the *jus ad bellum*, such as those brought by the Democratic Republic of the Congo against Rwanda and Uganda. They are opportunities for the Court not only to decide concrete cases, but to help clarify in a cogent and thoughtful way the status of international law in its most critical area. States are willing to yield power to an international court of fifteen individuals only when they believe that the court's findings reflect higher levels of deliberation than are found within any one state's machinery. Findings that lack deep levels of reasoning, that fail to take account of and rebut divergent lines of thinking, are not salutary for any court, let alone one that holds itself up as the "supreme arbiter of international legality.").

126. Dem. Rep. Congo v. Uganda, *supra* note 16.

127. *Id.*

128. Application Instituting Proceedings, Armed Activities on the Territory of the Congo (Dem. Rep. Congo *v.* Uganda) (filed in the Registry of the Court June 23, 1999), *available at* http://www.icj-cij.org/icjwww/idocket/ico/icoapplication/ico_iapplication_19990623.pdf.

Uganda claimed that their forces were initially in the DRC at the invitation of then-president Joseph Kabila in order to control "anti government rebels who were active along the Congo-Uganda border, carrying out in particular cross-border attacks against Uganda."[129]

Although President Kabila subsequently removed this consent,[130] Uganda claimed that the cross-border attacks by armed rebels continued and that Uganda was required to take armed actions in self defense into the DRC to prevent these armed attacks.[131] Uganda further claimed that this intervention was warranted as the rebels "fled back to the DRC,"[132] and that the DRC was unable to stop the attacks.[133] The situation left Uganda with no other option than to suffer the attacks or to act in self-defense. A document produced by the Ugandan High Command lists the five stated reasons justifying its actions in self-defense:

> 1. To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
>
> 2. To enable UPDF neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
>
> 3. To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.
>
> 4. To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
>
> 5. To be in position to safeguard the territory integrity of Uganda against irresponsible threats of invasion from certain forces."[134]

Given the purposes of this paper, only the fourth reason need be considered here.[135]

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129. Dem. Rep. of Congo v. Uganda, *supra* note 16, para. 45.

130. *Id.* at para. 53.

131. *Id.* at para. 92.

132. *Id.* at para. 109.

133. *See* Michael N. Schmitt, *The Rule of Law in Conflict and Post-Conflict Situations: U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL'Y 737, 760 (2004) (arguing that where a state is unable or unwilling to prevent attacks from its territory, the attacked state "may non-consensually cross the border for the sole purpose of conducting counterterrorist operations, withdrawing as soon as it eradicates the terrorist threat.").

134. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 109.

135. *See* Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STAN. J. INT'L L. 207, 217-221 (2002) (Paragraph 2 appears to give rise to a claim of anticipatory self-defense under customary international law). *But see* Dem. Rep. Congo v. Uganda, *supra* note 16, para. 143 (Uganda never made the claim of anticipatory defense. In any case, such a claim may not have mattered as the ICJ, in a broad statement, proclaimed, "The Court first observes that the objectives of Operation 'Safe Haven', as stated in the Ugandan High Command document, were not consonant with the concept of self-defence as understood in international law.").

The fourth reason alleges actual attacks across the border by armed insurgents that resulted in death or injury to Ugandans.[136] The importance of this allegation is that it raised an issue for the ICJ's consideration that they did not face previously, at least according to Judge Kooijman's separate opinion, in the Wall Advisory Opinion.[137] If Judge Kooijmans was right, the ICJ's decision in the Wall Advisory Opinion can be read as claiming that these attacks were not armed attacks because they were internal to Israel, coming from within its controlled territory. Therefore, they did not justify a response in self-defense under Article 51 of the UN Charter. No such claim of internal attacks is made here. Rather, the fourth justification in the High Command document alleges attacks by armed rebels that originated from the DRC.

Uganda argued that during the period of 1998 to 2003, "the changed policies of President Kabila had meant that co-operation in controlling insurgency in the border areas had been replaced by 'stepped-up crossed-border attacks against Uganda by the ADF which was being re-supplied and re-equipped by the Sudan and the DRC government.'"[138] The DRC admitted that these attacks had taken place but claimed that the ADF alone was responsible. The Court also acknowledged that the attacks took place and took notice of an independent report that "seem[s] to suggest some Sudanese support for the ADF's activities. It also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border... However, the Court does not find this evidence weighty and convincing."[139]

Though not explicitly stated, it appears the Court is not swayed by this information because it is only looking for evidence of armed attacks tied to a nation state. In concluding the section of the opinion concerned with the use of force, the Court states:

> It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate

136. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 143.

137. Advisory Opinion No. 131, supra note 15, para. 36 (separate opinion of Judge Kooijmans) (stating:

> The argument which in my view is decisive for the dismissal of Israel's claim that it is merely exercising its right of self defence can be found in the second part of paragraph 139. The right of self defence as contained in the Charter is a rule of international law and thus relates to international phenomena. Resolutions 1368 and 1373 refer to acts of international terrorism as constituting a threat to international peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 and 1373 and that consequently Article 51 of the Charter cannot be invoked by Israel).

138. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 120.

139. *Id.* at para. 51.

> from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 *(g)* of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.
>
> For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate.[140]

By determining that attacks occurred by armed rebels across the border from the DRC into Uganda, and then finding that because there was no "satisfactory proof of the involvement" of the DRC or any other "state," no right to self-defense accrued to Uganda, the Court has taken the bad ruling in the Wall Advisory Opinion and advanced it one step further. By refusing "to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces," the Court has ignored the reality of the situation. Further, the Court not only passed up a chance to right a ship that was heading the wrong direction, but has instead added hurricane-force winds to the sails, as recognized by ICJ Judges Kooijmans and Simma.[141]

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140. *Id.* at para. 53.

141. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 27 (separate opinion of Judge Kooijmans) (stating:

> The Court seems to take the view that Uganda would have only been entitled to self-defence *against the DRC* since the right of self-defence is conditional on an attack being attributable, either directly or indirectly, *to a State* . . . But, as I already pointed out in my separate opinion to the 2004 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Article 51 merely "conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years". I also observed that this interpretation no longer seems to be shared by the Security Council, since in resolutions 1368 (2001) and 1373 (2001) it recognizes the inherent right of individual or collective self-defence without making any reference to an armed attack by a State).

Judge Kooijmans proposes an alternative based on his belief of current international law and grounded in the realities of the current world. He writes:

> If the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is

This holding has the effect of encouraging every government that has aggressive designs on its neighbor to covertly create, train, and supply non-uniformed, armed rebels within its territory because even if the support meets the "direct or indirect involvement" standard first articulated in Nicaragua.[142] The current Court's unwillingness to address the quantum of attack necessary to trigger the right to self-defense is a step backward from the standard of "acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack"[143] pronounced in Nicaragua. In other words, by making discernable "direct or indirect" involvement by a state a necessary "precondition" to the use of force in self-defense, the Court has given aggressive states a clear incentive to support, even encourage, attacks by armed rebel groups because they will not invoke the targeted state's right to respond in self-defense against either the rebels or the supporting state.

As a continuation of the Wall Advisory Opinion, this decision has devastating effects on the principle of distinction. By prohibiting a response in self-defense to external armed rebel attacks, regardless of the quantum, the Court encourages rogue states to carry out their illegal aggressive designs through un-uniformed, armed rebels who are virtually indistinguishable from the local population save for actually shooting their weapons in the attack. Because of the Court's regrettable decision, these rogue actors now see a way to orchestrate large scale armed violence without creating a right of self-defense for their victims and simultaneously increasing the survivability of their attackers by clothing them in the protections of civilians. This is truly a catastrophic development given modern battlefield tendencies.

As recognized by the Security Council in their resolutions 1368 and 1373,[144] the world is not the same place it was prior to September 11, 2001. Since those attacks, the major threats to international peace and security have not centered in only state actors, but also in non-state actors, many of whom have an international reach.[145] The standard for the exercise of self-defense by a state ought to be

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no attacker State, and the Charter does not so require).

See also Dem. Rep. Congo v. Uganda, *supra* note 16, para. 13 (separate opinion of Judge Simma) (concurring with Judge Kooijmans' understanding of current international law and writing:

> I also subscribe to Judge Kooijmans' opinion that the lawfulness of the conduct of the attacked State in the face of such an armed attack by a non-State group must be put to the same test as that applied in the case of a claim of self-defence against a State, namely, does the scale of the armed action by the irregulars amount to an armed attack and, if so, is the defensive action by the attacked State in conformity with the requirements of necessity and proportionality?).

142. *See* Murphy, *supra* note 114, at 65-66.

143. Nicar. v. U.S., *supra* note 121, para. 103-104; Dem. Rep. Congo v. Uganda, *supra* note 16 (separate opinion of Judge Simma).

144. S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/Res/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/Res/1373 (Sept. 28, 2001). *See also* Vincent-Joel Proulx, *Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615, 627 (2005) (arguing that the international community is moving to a system where states are held indirectly liable for the actions of entities within their borders).

145. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 8-13 (September, 2002), *available at http://www.whitehouse.gov/nsc/nss/2006.*

"armed attack," from whatever source it springs. Only under this standard can states adequately protect themselves against modern threats.[146]

More importantly for this paper, utilizing this standard of armed attack, regardless of whether it is state sponsored or not, will also reverse the continuing trend of incentivizing states to "use" forces other than their nation's uniformed forces who do not feel compelled to distinguish themselves from the local populace in order to avoid giving rise to the right of self-defense. This trend began two decades ago with the Nicaragua decision,[147] but the ICJ has taken a definite turn in the wrong direction with their decision in the Wall Advisory Opinion and digressed even further with the recent Congo v. Uganda case. It is not coincidental that during this same time period since Nicaragua, there has been a rise in the use of law of war provisions as a tool against legally compliant nations in battle. This type of warfare is known as lawfare.[148]

IV. THE EROSION OF THE PRINCIPLE OF DISTINCTION AND THE RISE OF LAWFARE

Modern warfare is no longer typified by the arrangement of major armies along a two dimensional battle line.[149] In fact, modern warfare has even moved beyond the concept of three-dimensional "air land battle"[150] to the 360-degree concept of the common operational environment[151] where attacks can come from any direction and from any source. This new battlespace concept is intricately entwined with the concept of asymmetrical warfare.

Asymmetrical warfare describes the modern reality that wars are not being fought between equal or nearly equal armies on a defined battlefield. As now Major General (MG) Charles Dunlap, Jr.[152] writes, "In broad terms, 'asymmetrical' warfare describes strategies that seek to avoid an opponent's

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146. *See* Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH J. INT'L L. 513, 540-44 (2003) (arguing this point specifically in connection with defending against cross border attacks from non-state actors that amount to armed attack).

147. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 21 (separate opinion Judge Kooijmans).

148. *See Lawfare, The Latest in Asymmetries*, Council on Foreign Relations, Mar. 18, 2003, *http://www.cfr.org/publication.html?id=5772* (defining lawfare as "a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.").

149. *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 730 (2004) ("[E]ven the battles of the nineteenth century rarely fit this paradigm, and modern conflict fits this paradigm still less well."); Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733, 743 (2005) ("Wars between powerful states, those conflicts that prompted the development of humanitarian law, are increasingly rare. Instead of large-scale combat between organized militaries, modern warfare is becoming asymmetrical. Insurgencies, not armies, are the norm.").

150. *See* John J. Romjue, *The Evolution of the AirLand Battle Concept*, AIR U. REV. (1984), *available at* http://www.airpower.maxwell.af.mil/airchronicles/aureview/1984/may-jun/romjue.html.

151. *See The Contemporary Operational Environment (COE)*, OPERATION ENDURING FREEDOM TACTICS, TECHNIQUES AND PROCEDURES HANDBOOK NO. 02-8, STRATEGYPAGE.COM, *available at http://www.strategypage.com/articles/operationenduringfreedom/chap1.asp* (last visited Apr. 2, 2006).

152. *See* Official Website of the United States Air Force, *http://www.af.mil/bios/bio.asp?bioID=5293*
(Showing that at the time of this writing, MG Charles Dunlap, Jr. had recently been promoted to the rank of Major General and assigned as Deputy Judge Advocate General of the Air Force).

strengths; it is an approach that focuses whatever may be one sides comparative advantages against their enemy's relative weaknesses."[153] In this type of conflict, the disadvantaged party is unlikely to succeed by squaring off with its opponent in a typical force on force military struggle. Instead, the disadvantaged party must seek to use the comparatively low-tech tools at its disposal to gain the comparative advantage.[154] One of the most tempting and potentially successful low-tech tools in this fight is international law, particularly the principle of distinction.[155]

The use of law as a tool of warfare is not inherently good or bad. The laws of war have generally had a mitigating effect on warfare. But, like any tool of warfare, "it is how the law is used that defines its nature and value."[156] As David Rivken and Lee Casey argue, "international law may become one of the most potent weapons ever deployed."[157] In this form of warfare, a group or state that is facing a nation committed to comply with the laws of war will choose to openly violate the law not only for the tactical advantage gained but for the strategic benefit that arises.[158] The compliant nation, still committed to law of war compliance, is thus disadvantaged.

This form of asymmetrical warfare has come to be known as "lawfare," or "the use of law as a weapon of war."[159] It takes many forms but is always pointed at striking where a more superior but legally bound military force is more constrained than a less superior but legally unconstrained force.[160] The recent war in Iraq illustrates many examples of this,[161] including attacking from protected

153. Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 USAFA J. Leg. Stud. 71, 72 (1997/1998). *See also* W. Chadwick Austin and Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 293-94, 301-02 (2006).

154. Michael N. Schmitt, *The Impact of High and Low-Tech Warfare on the Principle of Distinction*, 1, 2, 12-13, Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative Briefing Paper (2003), *reprinted in* INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY'S CONFLICTS: CHANGES AND CHALLENGES (Lausanne: Editions Interuniversitaires Suisses, Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005), *available at* http://www.michaelschmitt.org/Publications.html.

155. *See* Michael N. Schmitt, *The Principle of Discrimination in the 21st Century*, 2 YALE HUM. RTS. & DEV. L.J. 143, 157 (1999) (discussing the effects of technology on the principle of distinction and arguing that as the gap widens between the "haves and have-nots," the asymmetrical disadvantage of the have-nots will tempt them to abandon the principle of distinction).

156. Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 ARMY LAW. 1, 7 (2006).

157. Colonel Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 4, 5 (2001), *available at* http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf (last visited June 28, 2004).

158. *See* Reynolds, *supra* note 2, at 102-03 (stating, "[P]ublic support can be lost based on the number of civilian casualties. A March, 2003 Gallup poll indicates 57 percent of those surveyed would oppose a war in Iraq because 'many innocent Iraqi citizens would die.'").

159. *See* Dunlap, Jr., *supra* note 157; Schmitt *supra* note 154, at 17. *See also* Austin & Kolenc, *supra* note 153, at 306-310.

160. *See* William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L. J. 639, 673-74 (2004).

161. *See Announcing the Inaugural Combined Arms Center Commanding General's 2006 Special*

places and using protected places or objects as weapons storage sites,[162] fighting without wearing a proper uniform,[163] using human shields to protect military targets,[164] using protected symbols to gain military advantage,[165] and murdering of prisoners or others who deserve protection.[166] In each of these cases, an inferior force used the superior force's commitment to adhere to the law of war to its tactical advantage.

Unfortunately, the most typical and also most damaging form of lawfare in recent conflicts has been the decision of disadvantaged combatants to not distinguish themselves from the local populace.[167] And it appears that this trend is on the rise, even amongst major military powers.[168] As MG Dunlap has written, "If international law is to remain a viable force for good in military interventions, lawfare practitioners cannot be permitted to commandeer it for malevolent purposes."[169] Regrettably, the aforementioned ICJ decisions have made it much easier for practitioners of lawfare to use the law of war against compliant nations. Rebecca Kahan highlights this point: "For years, the international community has embraced the idea that targeting civilians violates principles of international

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Topics Writing Competition: "Countering Insurgency," HEADQUARTERS GAZETTE (Society for Military History, Leavenworth, KS), Winter 2006, at 12, *available at http://leavenworth-net.com/lchs/12658%Headquarters.pdf* (highlighting the U.S. Army's recognition of the seriousness of the use of lawfare in Iraq. In a recent announcement from the Combined Arms Center at Ft. Leavenworth, Kansas, the Military Review is sponsoring a writing competition seeking articles specifically on issues dealing with counter insurgency, including "lawfare." The announcement begins by stating that "The Army absolutely needs to understand more about counterinsurgency—nothing less than the future of the civilized world may depend on it.").

162. *See* Tony Perry & Rick Loomis, *Mosque Targeted in Fallouja Fighting*, L.A. TIMES, April 27, 2004, at A1.

163. *See Coalition Forces Continue Advance Toward Baghdad*, CNN LIVE EVENT/SPECIAL, March 24, 2003.

164. *See The Rules of War are Foreign to Saddam*, OTTAWA CITIZEN, March 25, 2003; David Blair, *Human Shields Disillusioned with Saddam, Leave Iraq after Dubious Postings*, NATIONAL POST (CANADA), March 4, 2003, *available at* http://www.FPinfomart.ca.

165. Rivkin & Casey, *supra* note 27, at 65.

166. *See* Robert H. Reid, *South Korean Hostage Beheaded in Iraq*, TORONTO STAR, June 23, 2004, at A1, *available at* WL 6081419; *See also* Michael Sirak, *Legal Armed Conflict*, JANE'S DEFENSE WEEKLY, Jan. 14, 2004, at 27 (listing a number of violations of the law of war committed by Iraqi military and paramilitary forces).

167. *See* Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733, 735 (2005) (stating, "[t]he Principle of Distinction is violated across the world, often openly so, and that problem is getting worse." The author then argues for replacing the principle of distinction with the Principle of Culpability which is based on each individual's actions rather than his status as a noncombatant).

168. *See* Col Wang Xiangsui, Chinese Air Force, *as quoted by* John Pomfret in *China Ponders New Rules of 'Unrestricted Warfare,'* WASH. POST, Aug. 9, 1999, at 1, *quoted in* Dunlap, *supra* note 158, at 36 (where a senior member of the Chinese Air Force recently stated "War has rules, but those rules are set by the West . . . if you use those rules, then weak countries have no chance . . .We are a weak country, so do we need to fight according to your rules? No.").

169. Dunlap, *supra* note 157, at 36; *See also* Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 ARMY LAW. 1, 16 (2006) (arguing that strategic lawyering can be a force to fight the effects of lawfare).

law."[170] She then contrasts the actions of those who practice lawfare; "terrorist organizations have adopted this strategy [of violating international law] as part of their policy."[171] The fact that terrorists and others find sympathy for the use of their tactics from the ICJ and others only emboldens them. It also emboldens state leaders who cannot otherwise use the military instrument in their aggressive designs for fear of military retribution.

As a result of the Wall and Uganda decisions by the ICJ, state leaders have incentive to "use" other armed groups to accomplish their military attacks on neighbors rather than their official uniformed armed forces because the latter would trigger the target nation's right of self-defense. On the other hand, if they maintain their support to armed groups below a standard that the ICJ will attribute to the state, the state can effectively work toward the destabilization of a neighboring country without fear of a legal response in self-defense. If an illegal response does come, the nation cannot only respond in self-defense, though the original aggressor, but also claim to be the legally compliant state. The clear result of this is more fighters on the battlefields of the world who are not distinguished or distinguishable from the local populace. This can only result in more civilian casualties and greater derogation from the laws of war.

V. THE NEED FOR A RETAINING WALL TO STOP THE EROSION

The erosion of the principle of distinction poses a danger too great for the international community to sit idly. Steps must be taken to incentivize all battlefield fighters to comply with the laws of war, particularly with those rules that distinguish them from the local populace. Some such incentives have already been proposed.[172] However, incentives on an individual basis need to be augmented by institutional incentives that remove the incentives of states to derogate from this fundamental rule.

The first remedial action that must be taken is for the ICJ to reverse its misapplication of the concept of armed attack. Regardless of whether customary international law ever recognized armed attack as restricted only to states, it does not and should not now.[173] As clearly implied by the UN Security Council in resolutions 1368 and 1373[174] and confirmed by Judges Kooijmans and Simma in their separate opinions,[175] armed attacks invoke a state's right of self defense

170. Kahan, *supra* note 110, at 827-28.

171. *Id.*

172. *See generally* Jensen, *supra* note 12 (proposing five incentives to encourage combatants to distinguish themselves from civilians).

173. *See* Schmitt, *supra* note 146, at 536-540.

174. *See* Kathleen Renee Cronin-Furman, *The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship*, 106 COLUM. L. REV. 435, 463 (2006) (arguing that the conflict between the ICJ and Security Council is not new and that "[t]he ICJ's failure to conform its reasoning to international political realities, as evinced in the Wall Opinion, seriously threatens the ICJ's credibility." The author proposes, "According the Security Council's pronouncements primacy in the consideration of customary law would be an effective way to resolve this issue. It would preserve the ICJ's judicial discretion while at the same time recognizing the Security Council's paramount importance to the maintenance of international peace and security.").

175. *See* Dem. Rep. Congo v. Uganda, *supra* note 16 (separate opinions of Judge Simma and Judge

whether they are generated by a state or not. Armed attack should be understood as a quantum requirement, not a source requirement.[176] Any other reading would incentivize the use of irregulars to do what regular forces could not, striking at the heart of the fundamental principle of distinction in international law and significantly degrade fundamental protections currently afforded to civilians.

Secondly, the Security Council must issue a more explicit and definitive statement on the quantum nature of armed attack. As the Security Council is increasingly confronted with threats to international peace and security by the onslaught of terrorism and similar multinational non-state actors, it is in the Security Council's interest, and the interest of all United Nations' member states, to have a definitive statement on this issue. As such, the Security Council should recognize a state's inherent right to defend itself against attack so long as the response is proportional and necessary. The Security Council could easily reconfirm these bedrock principles and apply them in the light of the current international system.

Finally, organizations such as the ICRC that identify protection of noncombatants and civilians as part of their charter[177] ought to encourage the enactment of laws that will advance this vital interest. As Professor Reisman has pointed out,[178] those who have advocated for GPI should now reflect on its results. In an effort to give protections to certain battlefield actors, they have dramatically degraded the principle of distinction. A better approach is to insure that noncombatants and civilians are protected, even if it means that some battlefield actors who choose to participate without meeting the requirements of GPW Article 4, are not given combatant privileges. It is not an overly arduous requirement that all battlefield actors distinguish themselves to be viewable at a distance in some way. This does not even require a uniform, merely a distinguishing marking that sets battlefield fighters apart from civilians.[179] The ICRC should take the lead on revisiting this issue amongst NGOs and work toward reestablishing the safety wall around civilians as opposed to eroding those protections.

While these three recommendations will certainly not prevent any future civilian casualties, they would help establish a clear legal standard for state actions that would remove the existing incentives to "use" armed groups to avoid giving

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Kooijmans).

176. *See* Schmitt, *supra* note 121, at 750-52 (discussing the effects basis for understanding the right of self-defense in the ICJ's decision in Nicaragua).

177. See the ICRC Mission Statement, *available at* http://www.icrc.org/HOME.NSF/060a34982cae624ec12566fe00326312/125ffe2d4c7f68acc1256ae300394f6e?OpenDocument, which states:

> The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

178. Reisman, *supra* note 17, at 856.

179. Ferrell, *supra* note 13, at 106-09.

rise to the right of self-defense. Such a move would enhance the principle of distinction and reinvigorate the protections provided to civilians on the battlefield.

VI. CONCLUSION

The recent erosion of the principle of distinction has certainly been one of the factors leading to an increasing number of noncombatant deaths on modern battlefields. The international law principle that makes this conduct illegal is firmly rooted in the law of war but has been weakened by provisions of GPI that are designed to provide greater protections to battlefield fighters. As history has borne out, trying to widen the group who gain combatant protections has inevitably weakened the protections provided for noncombatants and civilians and brought more innocent bystanders within the hostile fire of warring parties.

The recent decisions of the ICJ have taken this derogatory step even further. In the Wall Advisory Opinion, the ICJ held that "numerous indiscriminate and deadly acts of violence against its civilian population"[180] by a non-state actor from within its own territory did not give Israel the right to respond in self-defense, even if that response was non-lethal. The ICJ went a step further in the Congo v. Uganda ruling when it immunized any action from raising the right of self-defense, regardless of the scale, as long as it was committed by a non-state entity or group. This holding gives tremendous incentive to states that are aggressive toward their neighbors to support and even assist armed groups who are carrying out significant attacks, attacks which would give rise to the right of self-defense if done by government armed forces.

These decisions, taken despite prior UN Security Council resolutions proclaiming otherwise, dramatically erode the principle of distinction. They not only remove the incentive to comply with the law of war, but they actually give a disincentive to do so because it gives the target state a legal right to respond with proportional armed force. The result will be fewer and fewer marked combatants on modern battlefields and greater and greater civilian casualties who get inadvertently mixed in with those who are engaging in hostilities by relying on the protections of the noncombatant identity to pursue their militant goals.

These unfortunate erosions of the law of war aggravate the asymmetrical warfare approach of lawfare, or using the law of war as a weapon against a compliant enemy. Lawfare is a growing methodology to warfare, contemplated not only by small nations and groups, but also by large armies. Sadly, the ICJ's decisions add a false legal gloss to these actions. If this trend is allowed to continue, the principle of distinction will soon dwindle into a meaningless rule.

The Security Council must take the lead on more clearly and explicitly stating the quantum nature of armed conflict rather than reliance on the source of the action for qualification. The ICJ must follow the Security Council's lead and reverse the direction in which the Court is heading by redefining armed attack to be an effects-based test, rather than a claim that can only be invoked if the attacker is a state actor. Finally, the ICRC must take the lead in reevaluating its advocacy

180. Advisory Opinion No. 131, *supra* note 15, at para. 141.

of a principle that supplies greater protections to all battlefield fighters but has the practical effect of endangering civilians. The principle of distinction must remain the foundational principle of the law of war. The Israeli Wall must be torn down and the entry point for lawfare blocked. In its place, a bridge should be built, allowing civilians to cross back into a realm where they are protected and their safety is legally enshrined.

3

LEVERAGING EMERGING TECHNOLOGY FOR LOAC COMPLIANCE

By Eric Talbot Jensen[1] and Alan Hickey[2]

I. INTRODUCTION

The International Committee of the Red Cross (ICRC), in conjunction with the government of Switzerland, has recently introduced an initiative on strengthening compliance with the law of armed conflict (LOAC).[3] According to the ICRC, the lack of compliance with the LOAC is "probably the greatest current challenge to . . ."[4] and the "principal cause of suffering during armed conflict."[5] A major effort of the initiative is to create a forum for exchanges between States on compliance issues,[6] hoping that open discussion will lead "to enhancing and ensuring the

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[2] JD, Brigham Young University Law School

[3] *See generally* Jelena Pejic. *Strengthening Compliance with IHL: The ICRC-Swiss Initiative*. 98 INT'L REV. OF THE RED CROSS 315, 315–30 (2016).

[4] *Id.* at 316.

[5] *Status of additional protocols relating to the protection of victims of armed conflicts: ICRC statement to the United Nations, 2016*, ICRC.ORG, https://www.icrc.org/en/document/status-additional-protocols-relating-protection-victims-armed-conflicts-icrc-statement-0 (last visited May 1, 2018).

[6] Peter Maurer, Pres. of the ICRC, Establishing a Dedicated IHL Compliance System, Opening

effectiveness of mechanisms of compliance with IHL."[7]

Resolution 2 of the 32nd International Conference of the Red Cross and Red Crescent called for called for

> the continuation of an inclusive, State-driven intergovernmental process based on the principle of consensus after the 32nd International Conference and in line with the guiding principles enumerated in operative paragraph 1 to find agreement on features and functions of a potential forum of States and to find ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums in order to submit the outcome of this intergovernmental process to the 33rd International Conference."[8]

Speech at the Third Meeting of States on Strengthening Compliance with International Humanitarian Law (June 30–July 1, 2014), https://www.icrc.org/eng/resources/documents/statement/2014/06-30-compliance-ihl-maurer.htm; Emanuela-Chiara Gillard, *Promoting Compliance with International Humanitarian Law*, CHATHAM HOUSE 2, 1–8 (2016), https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-10-05-promoting-compliance-ihl-gillard.pdf.

[7] Claudia McGoldrick, *The future of humanitarian action: an ICRC perspective*, 93 INT'L REV. OF THE RED CROSS 965, 985 (2011).

[8] 32nd INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT, Geneva, Switzerland 8-10 December 2015. Strengthening compliance with international humanitarian law: Resolution 2, http://rcrcconference.org/wp-content/uploads/2015/04/32IC-

Efforts in this area continue in preparation for the 33rd International Conference.

Concurrent with the recognition of the need for greater compliance with the LOAC is a vibrant discussion on the role of emerging technologies in modern warfare.[9] While many have raised a cautionary voice about the ability of the LOAC to constrain advanced weapons systems,[10] there is a clear recognition that all emerging technologies that are weaponized must comply with the LOAC.[11]

This focus on constraining emerging technologies has caused the unfortunate result of limiting attention on the ability of emerging technologies to increase LOAC compliance. In fact, advanced weapon systems provide significant opportunities for armed forces to dramatically improve LOAC compliance and substantially increase the protection for civilians during armed conflict. Increased use of emerging technologies, applied in ways focused on protection of civilians and civilian objects, would undoubtedly increase LOAC compliance.

AR-Compliance_EN.pdf.

https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/voelkerrecht/32IC-AR-Resolution_EN.pdf

[9] https://www.icrc.org/en/document/asia-new-weapons-international-humanitarian-law;

https://www.icrc.org/en/war-and-law/weapons/ihl-and-new-technologies

[10] https://www.theguardian.com/technology/2017/aug/20/elon-musk-killer-robots-experts-outright-ban-lethal-autonomous-weapons-war

[11] https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm

However, many of the current issues with LOAC compliance are rooted in the limitation that parties to an armed conflict are only required to do what is "feasible" to protect civilians and civilian objects during hostilities. This would, of course, apply to the employment of emerging technologies. An understanding of feasibility that is enlightened by the use of emerging technologies will dramatically increase the effectiveness of steps parties to an armed conflict can take to protect the civilian population. Further, the effectiveness and ease of application of these emerging technologies should be reflected in what the international community accepts as feasible actions by the parties to an armed conflict.

Part II of this article will briefly describe the principles of the law of armed conflict that apply to lethal military operations. Part III will identify the role of "feasibility" in non-compliance and note its role as an escape valve by which parties to the armed conflict justify inaction in protecting civilians. Part IV will identify emerging technologies that are to varying degrees both ubiquitous and inexpensive that could be feasibly used to assist in the protection of civilians. This Part will further argue that the international community's understanding of "feasible" should include the employment of these emerging technologies, requiring both States and commanders to consider their use as part of the legal obligation to apply feasible precautions in both the attack and in defense. The paper will conclude in Part V.

II. PRINCIPLES OF THE LOAC

The law of armed conflict is a historic and evolving set of rules based on a mixture of moral

and ethical concerns and perceived reciprocal benefits. Underlying the entire scheme are several foundational principles that provide the intellectual and practical basis for the modern rules. The two foundational principles most important for consideration of the current topic of the value of emerging technologies for increasing LOAC compliance are the principles of distinction and proportionality. Additionally, the more modern application of those principles is found in the rules on precautions, both in the attack and in the defense. A brief analysis of these four principles, including examples of non-compliance, will allow a more in-depth review of the doctrine of feasibility in Part III.

A. Distinction

The principle of distinction has a long history in the LOAC and has been referred to as the "grandfather" of all LOAC principles. It was codified as early as the Lieber Rules,[12] confirmed in the Hague Rules,[13] and its most current formulation comes from Article. 48 of API which states

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian

[12] Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 19 (1863) *reprinted in* Schindler & Toman, THE LAWS OF ARMED CONFLICTS 315 (Dietrich Schindler & Jiri Toman eds., 2004).

[13] Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 25, Oct. 18, 1907, 36 Stat. 2277

population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[14]

To facilitate this distinction between civilians and military objectives, individuals are generally grouped into two categories—civilians and combatants[15]—and combatants are obligated to distinguish themselves from the civilian population.[16] Civilians and civilian objects are then protected from the dangers of military operations[17] and "shall not be the object of attack"[18] as long as civilians don't "take a direct part in hostilities."[19]

These rules are generally accepted as customary international law in both international

[14] Protocol Additional to the Geneva Convention of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, art. 48, 1125 U.N.T.S. 3 [hereinafter AP I].

[15] *Id.* at art. 50.

[16] *Id.* at art. 44.

[17] *Id*. at art. 51.1; The ICRC *Commentary* adds, "The term 'military operations' should be understood to mean any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat." Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 680 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter AP Commentary].

[18] AP I, *supra* note 14, at art. 51.2.

[19] *Id*. at art. 51.3.

armed conflicts (IACs) and non-international armed conflicts (NIACs).[20] Further, the US Department of Defense Law of War Manual embraces distinction as one of the core LOAC principles, defining it as an obligation to "distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects."[21]

In other words, it is fundamental to the LOAC for those engaged in armed conflict to distinguish themselves from the civilian population and to only direct their military operations against other fighters. Concurrently, if civilians want to enjoy the benefits of this protection, they must refrain from taking a direct part in the hostilities. These mutually reinforcing obligations are designed to protect non-fighters from the effects of armed conflict to the maximum extent possible.

B. Proportionality

Complementary to the principle of distinction is the rule of proportionality. The rule is often defined as requiring commanders to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military

[20] *See generally* 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES, PART I (2005) [hereinafter CIHL STUDY]

[21] U.S. DEP'T OF DEF. OFFICE OF GEN. COUNSEL, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 2.5 (2015) (updated Dec. 2016) [hereinafter DoD LOWM].

advantage anticipated."[22] The rule of proportionality recognizes that it is likely impossible to prevent all civilian deaths, even when correctly applying the principle of distinction during an armed conflict. However, excessive civilian casualties are prohibited.

Like the principle of distinction, proportionality is accepted as customary international law in both IACs and NIACs.[23] The DoD Law of War Manual defines the rule of proportionality as the obligation to "refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained."[24] The Manual further points out that this rule

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[22] AP I, *supra* note 14, at art. 57.2(a)(iii). The Commentary notes that

> The concept of proportionality occurs twice in Article 57: in the sub-paragraph under consideration here and in sub-paragraph (b) following it. However, it is also found in Article 51 *(Protection of the civilian population),* paragraph *5(b).* It occurs again in Protocol II (Article 3, paragraph 3(c)) annexed to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, with regard to land mines laid outside military zones. In these four cases the wording used is deliberately identical.

AP Commentary, *supra* note 17, at 683.

[23] *See* CIHL Study, *supra* note 20, Rule 14.

[24] DoD LOWM, *supra* note 21, at ¶ 5.10.

does not provide any protection to military objectives, but only to "persons and objects that may not be made the object of attack."[25]

The rule of proportionality, then, in contrast to the principle of distinction which protects civilians from attack, protects civilians who are not the direct object of attack but may be incidentally injured due to the effects of an otherwise lawful attack. Applying the rule of proportionality may result in a commander deciding to cancel or suspend an attack.[26]

C. Precautions in the Attack

Listed alongside the rule of proportionality in the DoD Law of War Manual is the duty those military operators who are conducting attacks to apply feasible precautions. The Manual states the obligation as requiring combatants to "take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack."[27]

Article 57 of Additional Protocol I (API) states eight specific precautionary requirements, two of which are restatements of the proportionality rule. All eight precautionary measures obligate Parties through the use of the term "shall." Even Article 57.1 which imposes the least

[25] *Id.* at ¶ 5.10.1.

[26] AP I, *supra* note 14, at art. 57.2(b).

[27] DoD LOWM, *supra* note 21, at ¶ 5.10.

defined requirement of taking "constant care" to spare the civilian population uses the mandatory language of "shall." Other precautions in Article 57 include verifying that targets are neither civilians nor civilian objects,[28] selecting means and methods that will avoid or at least minimize civilian casualties and damage,[29] refraining from attacks that violate the rule of proportionality,[30] canceling or suspending on-going attacks if it is discovered that they will violate the rule of proportionality,[31] providing warnings to the civilian population,[32] selecting the target that will cause the least incidental civilian injury and damage in cases where there is more than one target that provide similar military advantage,[33] and applying the LOAC rules to attacks at sea or in the air."[34]

These precautions are generally accepted to be customary international law and are binding on nations in both IACs and NIACs.[35]

D. Precautions Against the Effects of Attacks

[28] AP I, *supra* note 14, at art. 57.2(a)(i).

[29] *Id.* at art. 57.2(a)(ii).

[30] *Id.* at art. 57.2(a)(iii).

[31] *Id.* at art. 57.2(b).

[32] *Id.* at art. 57.2(c).

[33] *Id.* at art. 57.3.

[34] *Id* at art. 57.4.

[35] *See* CIHL Study, *supra* note 20, Rules 15-21.

In addition to precautions when attacking, defending forces also have precautionary obligations.[36] As Bothe, Partsch and Solf said in discussing the "precautions" provisions of API:

> The obligation to take precautions to protect the civilian population and civilian objects against the collateral effects of attacks is a complementary one shared by both sides to an armed conflict in implementation of the principle of distinction. . . Article 58 is the provision applicable to the party having control over the civilian

[36] As Queguine has argued,

> Contrary to what is sometimes maintained, Additional Protocol I does not introduce a fundamental imbalance between the precautions required of the defender and those required of the attacker. Responsibility for applying the principle of distinction rests equally on the defender, who alone controls the population and objects present on his territory, and on the attacker, who alone decides on the objects to be targeted and the methods and means of attack to be employed. Consequently, only a combination of precautions taken by all belligerents will effectively ensure the protection of the civilian population and objects.

Jean-Francois Queguiner, Precautions Under the Law Governing the Conduct of Hostilities, 88 IRRC 793, 820-21 (2006).

> population to do what is feasible to attain this goal. It is complementary to, and interdependent with, Art. 57 which implements, in somewhat more mandatory terms, the obligations of the attacking Party in this regard.[37]

Infusing the role of the defender with even more importance, Hays Parks argues that "[i]f the new rules of Protocol I are to have any credibility, the predominant responsibility must remain with the defender, who has control over the civilian population."[38]

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[37] Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, New Rules for Victims of Armed Conflicts 413 (2013). Long-time US DoD Law of War expert Hays Parks agrees and states:

> the reason behind the requirement for warning stated in Hague Conventions IV and IX, and in article 57(2)(c) of Protocol I: it enables the Government controlling the civilian population to see to its evacuation from the vicinity of military objectives that might be subject to attack; it also permits individual civilians to remove themselves and their property from high-risk areas. There is little else that an attacker can do to avoid injury to individual civilians or the civilian population as such. Any attempt to increase an attacker's responsibility - particularly where a defender has failed or elected not to discharge his responsibility for the safety of the civilian population - will prove futile.

W. Hays Parks, Air War and the Law of War, 32 Air Force Law Review 1, 158 (1990).

[38] Parks, *supra* note 37, at 153-54 (1990). Law of War expert, Matthew C. Waxman

This view is echoed in the U.S. DoD law of War Manual which states "[t]he party controlling civilians and civilian objects has the primary responsibility for the protection of civilians and civilian objects. The party controlling the civilian population generally has the greater opportunity to minimize risk to civilians."[39]

Given this logic, Article 58 endeavors to properly place responsibility on the defender by focusing on two main obligations. The first is to segregate military objectives from civilians

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demonstrates the logic of this when he argues:

> First, the defending force often has substantial control (whereas the attacker has none) over where military forces and equipment are placed in relation to the civilian population. Second, the defending power often has better information than the attacker about where civilian persons and property actually are, and is therefore better positioned to avoid knowingly leaving them in harm's way. And, third, the defender's actions—including its proper efforts to protect itself by resisting attack—may contribute to the danger facing noncombatants. The defender's choice of strategy, too, will significantly determine the extent to which civilians are vulnerable to possible attack.

Matthew C. Waxman, International Law and the Politics of Urban Air Operations, 16 (2000).

[39] DoD LOWM, *supra* note 21, at 187.

(paragraphs (a) and (b)). This includes not placing military objectives near civilians and removing any civilians from areas where military objectives are located. The second obligation is to protect civilians and civilian objects under the military control from the dangers inherent in military operations (paragraph (c)). These specific obligations will now be discussed in further detail.

This specific provision is not echoed in NIAC rules and is binding, therefore, only on Parties to the Protocol and only in IACs.[40] However, the ICRC has argued that it is considered part of customary international law[41] as an application of the principles of distinction and

[40] The DoD LOW Manual also does not accept Article 58 as customary international law but does argue that:

> Outside the context of conducting attacks (such as when conducting defense planning or other military operations), parties to a conflict should also take feasible precautions to reduce the risk of harm to protected persons and objects from the effects of enemy attacks. In particular, military commanders and other officials responsible for the safety of the civilian populations must take reasonable steps to separate the civilian population from military objectives and to protect the civilian population from the effects of combat.

DoD LOWM, *supra* note 21, at 271-72. This use of the word "must" reflects the United States' understanding of the obligations set out in Article 58.

[41] CIHL Study, *supra* note 20, at Rules 22-24; Michael, N. Schmitt, Charles H.B. Garraway &

proportionality. Additionally, in 2003, at its 28th International Conference, the ICRC identified the requirements of the defender to protect the civilian populations as one of the areas that needed greater emphasis.[42]

E. Summary

These are just a few of the foundational principles of LOAC that apply most directly to the law of targeting and, coincidentally, that are most modified by what is "feasible." It is to this doctrine of feasibility that this article now turns.

III. FEASIBILITY

Four of the eight provisions discussed above with respect to "Precautions in the Attack" and the entirety of the "Precautions Against the Effects of Attacks" are not absolute in their application. Rather, the attacker or defender need only apply these rules when it is "feasible."[43] It

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Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict with Commentary*, ¶ 2.3.7 (2006), *reprinted in* 36 Isr. Y. Hum. Rtx. (special supplement) (Yoram Dinstein & Fania Domb eds., 2006).

[42] International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2-6 December 2003, at 14 *available at* https://www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf.

[43] Articles 57.2(a)(i), 57.2(a)(ii) and 58 of AP I expressly use the term feasible as a limitation on

seems obvious then, that understanding the meaning of "feasible" will give important insight into the obligations to which it applies.[44]

A. Negotiating History

During the course of the negotiations of API, the national representatives were anxious to set a standard that would require diligence on the part of the commander but would not be one with which it was beyond his capability to comply. As a result, the use of the term "feasible" began to appear in several sections of proposed language, acting as a limitation on specific obligations during armed conflict.[45] It became clear that the repeated use of the term required some common understanding of its meaning and application.[46]

John Redvers Freeland, head of UK delegation during several of the sessions, clarified that

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the requirement of the corresponding rule. Article 57.2(c) using the language "unless circumstances do not permit," and Article 57.4 requires Parties to "take all reasonable precautions." *See* AP I, *supra* note 14.

[44] See generally The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare, 93 Int'l L. Stud. 322, 373-88 (2017) (hereinafter Challenges).

[45] *Id.,* at 373 (2017) where the authors state "The [Study Group] noted that the general understanding of feasibility is the same for both precautions in attack and precautions against the effects of attacks."

[46] *Id.,* at 210.

the words "to the maximum extent feasible" related to what was "workable or practicable, taking into account all the circumstances at a given moment, and especially those which had a bearing on the success of military operations."[47] S.H. Bloembergen, representing the Netherlands, was in agreement, stating that "feasible" should be "interpreted as referring to that which was practicable or practically possible, taking into account all circumstances at the time."[48] According to the Official Record of the Conference, at least eight other states joined with the UK and Netherlands on this interpretation with respect to the meaning of the term feasible in Article 58 as well as the numerous other articles that use that term.[49]

This interpretation is also reflected in the ICRC commentary to Article 57 which states:

The words "everything feasible" were discussed at length. When the article was

[47] VI OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA 1974-77 (1978) at 214, http://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html (hereinafter VI Official Records). *See also* Challenges, *supra* note 44, at 374-76 (2017) for additional uses of the term and their definition.

[48] Official Records, *supra* note 47, at 214.

[49] Julie Gaudreau, The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims, International Review of the Red Cross, No. 849, March 2003, pp. 143, 156-57 (2003); Eric Talbot Jensen, *Article 58 and Precautions Against the Effects of Attacks in Urban Areas*, 98 INT'L REV. OF THE RED CROSS 147, 163-66 (2016).

> adopted some delegations stated that they understood these words to mean everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations. The last-mentioned criterion seems to be too broad, having regard to the requirements of this article. There might be reason to fear that by invoking the success of military operations in general, one might end up by neglecting the humanitarian obligations prescribed here. Once again the interpretation will be a matter of common sense and good faith. What is required of the person launching an offensive is to take the necessary identification measures in good time in order to spare the population as far as possible. It is not clear how the success of military operations could be jeopardized by this.[50]

With respect to the use of "feasible" in Article 58, there was discussion concerning to which portions of Article 58 the use of the term should apply. Initially, there was disagreement on this issue. Brigadier General Wolfe, the Canadian representative, proposed that the limiting language of "to the maximum extent feasible" be applied to the entire provision.[51] The proposed amendment

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[50] AP Commentary, *supra* note 17, at 681–82.

[51] 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA 1974-77 (1978) at 199, http://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html (hereinafter XIV Official Records).

was eventually accepted by consensus.[52]

B. Post API Commentary

Since the formulation and ratification of API, States and commentators have discussed the meaning of feasibility, particularly with respect to precautions. For example, the U.S. DoD Law of War Manual lists five examples of "circumstances" which may impact the feasibility of a precaution. They are:

- The effect of taking the precaution on mission accomplishment;

- Whether taking the precaution poses risk to one's own forces or presents other security risks;

- The likelihood and degree of humanitarian benefit from taking the precaution;

- The cost of taking the precaution, in terms of time, resources, or money;

- Whether taking the precaution forecloses alternative courses of action.[53]

[52] *Id.*, at 304; Jensen, *supra* note 49, at 166.

[53] DoD LOWM, *supra* note 21, at 190.

These examples, while not meant to be exclusive, provide insight into how at least one State expects its commanders to determine what is feasible.

Writers in the area have also consider such factors and tend to advocate for a strong application of the rules and that such action would significantly strengthen the practical protections for civilians. For example, Kalshoven and Zegveld argue that:

> It is a truism that effective separation of civilians and civilian objects from combatants and military objectives provides the best possible protection of the civilian population. It is equally obvious that in practice, this may be very difficult, if not impossible, to realise. This much is certain, however, that parties must, "to the maximum extent feasible", endeavour to bring about and maintain the above separation.[54]

Bloembergen's reference to "taking into account all circumstances at the time"[55] mentioned above has been understood to allow for the fact that a State's or commander's decisions are limited by his circumstances and knowledge at the time, and therefore such decisions should not be subject to subsequently informed analysis. This expression stems from the WWII prosecution of German

[54] Frits Kalshoven and Liesbeth Zegveld, Constraints on the Waging of War, at 117 (2011, 4th ed.).

[55] VI Official Records, *supra* note 47, at 214.

General Lothar Rendulic.[56] General Rendulic anticipated a swiftly advancing Russian force and conducted a scorched earth policy in Finnmark to inhibit troop movement. In adjudicating Rendulic's responsibility for wanton destruction of property without military necessity, the Court determined that the legal standard was "consideration to all factors and existing possibilities" as they "appeared to the defendant at the time."[57] This same standard is understood to apply to the feasibility of precautions in the defense.

The general consensus is that there has been an increasing focus on precautions since the codification of API, but there has been general acceptance of the application of feasibility and of its understanding of what is practical in the course of armed conflict.

C. Conclusion

Both at the time precautions were codified in API, and in application since, feasibility has presented a limiting factor to the requirements of both the attacker and defender with respect to applicable precautions. States recognized the practical difficulties some precautions might present

[56] *See* United States v. Wilhelm List, et. al, XI Trials Of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No. 10, 1295 (1950) [hereinafter Hostage Judgment]; *See also* Eric Talbot Jensen, *Unexpected Consequences From Knock-On Effects: A Different Standard for Computer Network Operations?*, 18 Am. U. Int'l L. Rev. 1145, 1181-83 (2003).

[57] Hostage Judgement, *supra* note, 56, at 1296.

and have continued to embrace feasibility as the test for the implementation of the obligation. The article now turns to how emerging technology might influence the understanding of feasibility and its application in armed conflict.

IV. LEVERAGING EMERGING TECHNOLOGIES

There is no need to devote effort to describing the ever-increasing development of technology across the world. These emerging technologies have dramatically influenced the conduct of warfare in the past and will continue to do so in the future.[58] In many cases, the emergence of technology has led to increasing destructiveness of weapons systems. It has also led to enhanced precision of lethal weapons.[59]

Little has been written about non-lethal technologies and their potential to provide meaningful additional protections for civilians and civilian objects. Importantly, the effectiveness and ease of application of many of these emerging technologies make them extremely feasible to incorporate by both the attacker and defender. In fact, as will be demonstrated below, these

[58] *See generally* Eric Talbot Jensen, *The Future of the Law of Armed Conflict: Ostriches, Butterflies, and Nanobots*, 35 Mich. J. Int'l L. 253 (2014).

[59] *See* Christopher B. Puckett, *In This Era of Smart Weapons, is a State Under and International Legal Oblication to use Precision-Guided Technology in Armed Conflict*, 18 EMORY INT'L. L. REV. 645 (2004).

emerging technologies are so accessible, and will only become more so with the passage of time, that their employment should be reflected in what the international community accepts as feasible by the parties to an armed conflict.

A. An Evolving Standard

The clarity of the standard of feasibility does not mean that the requirements to meet the standard are static. In fact, the commonly accepted understanding that feasible means "that which was practicable or practically possible, taking into account all circumstances at the time"[60] implies that the standard might change over time and in different circumstances. The evolving nature of the "feasible" standard is especially important in light of emerging technologies. As forces participate in armed conflict, advanced technology will provide increased capabilities to comply with precautionary measures that are feasible, even if they weren't feasible months or years prior. In other words, though "feasibility" is absolutely an important standard that must be maintained in assessing compliance with precautions in both the attack and the defense, it is also an evolving standard that must take account of developing technology.[61]

Bill Boothby, writing with respect to new technology and the LOAC, has already reflected this idea. He argues:

[60] VI Official Records, *supra* note 47, at 214.

[61] Jensen, *supra* note 49, at 173-75.

> In considering the legal implications of futuristic new technologies, it is important to bear in mind that the law of targeting, for example, is replete with relative language: . . . and so is the "maximum extent feasible" in Article 58 of Additional Protocol I. Those relative notions seem likely to be capable of adaptive interpretation as technological development improves.[62]

An example illustrates Boothby's point. Targeting mobile enemy positions in WWII that were deep behind enemy lines often had to be done on limited and potentially stale intelligence. The emergence of satellite imagery has revolutionized the accuracy of targeting through real-time intelligence.[63] For States that have ready access to such intelligence, it seems likely that the international community would consider the use of such intelligence in targeting decisions to be feasible. Similarly, when a defender uses indirect fire against an enemy that has counter-battery radar, that defender should anticipate counter-fire in response to its attack and endeavor to segregate or protect civilians and civilian objects in accordance with Article 58 of API.

The ICRC has agreed with this approach, stating "[a]s access to advancing technology that could assist the defender in applying precautions becomes more pervasive, the expectation that defenders will make use of those technologies should increase."[64] In fact, the ICRC has recently

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[62] William H. Boothby, The Legal Challenges of new Technologies: An Overview 25 *in* New Technologies and the Law of Armed Conflict (H. Nasu and R. McLaughlin, eds.) (2014).

[63] *See* Puckett, *supra* note 59.

[64] Jensen, *supra* note 49, at 174.

published a commentary on the implications of new technologies in armed conflict, where the author concludes,

> [e]Examining legal issues such as these will only become increasingly relevant to situations of armed conflict, as it is reasonable to assume that parties to the conflict will use all available means at their disposal—including new information and communications technologies—to interact with civilians. It is therefore worth emphasising that IHL could and should be applied also to operations using these new technologies.[65]

While counter-battery radar and real time satellite imagery are only available to sophisticated and well-financed forces, there are a number of emerging technologies such as the communication capabilities discussed by the ICRC that are readily available and relatively inexpensive that could be purchased and used by the vast majority of armed forces currently involved in armed conflict. The accessibility and potential effectiveness of these technologies in protecting civilians and civilian objects should demand that the armed forces incorporate them in

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[65] Ponthus Winther, Military Influence Operations & IHL: Implications of New Technologies October 27, 2017, available at http://blogs.icrc.org/law-and-policy/2017/10/27/military-influence-operations-ihl-implications-new-technologies/?utm_source=ICRC+Law+%26+Policy+Forum+Newsletter&utm_campaign=51edbd5bb7-EMAIL_CAMPAIGN_2017_10_27&utm_medium=email&utm_term=0_8eeeebc66b-51edbd5bb7-69070909&mc_cid=51edbd5bb7&mc_eid=423dc3b81a

their military operations as feasible precautionary measures. Examples of these emerging technologies are discussed below.

B. Examples of Emerging Technologies

A host of advanced technologies already exist or are near production that could feasibly be used during armed conflict to better protect civilians and civilian objects. The following examples will be loosely grouped into three categories: sensors, communication devices and markers.

1. Sensors

One of the emerging technologies that is becoming more affordable and more pervasive is the use of sensors. Though the following sections will highlight specific types of sensors, they will work best in combination with both other sensors and other advanced technologies. DARPA is already very interested in the possibilities combinations of such sensors provide. In discussing the new Squad X Core Technologies program, DARPA states:

> To succeed in their missions, military units must have a robust, multi-faceted picture of their operational environments, including the location, nature and activity of both threats and allied forces around them. Technology is making this kind of rich, real-time situational awareness increasingly available to airborne and other vehicle-assigned forces, along with a capacity to deploy precision armaments more safely, quickly and effectively. Dismounted infantry squads, however, have so far

> been unable to take full advantage of some of these highly effective capabilities because many of the technologies underlying them are too heavy and cumbersome for individual Soldiers and Marines to carry or too difficult to use under demanding field conditions.
>
> DARPA's Squad X Core Technologies (SXCT) program aims to develop novel technologies that could be integrated into user-friendly systems that would extend squad awareness and engagement capabilities without imposing physical and cognitive burdens. The goal is to speed the development of new, lightweight, integrated systems that provide infantry squads unprecedented awareness, adaptability and flexibility in complex environments, and enable dismounted Soldiers and Marines to more intuitively understand and control their complex mission environments.[66]

This desire to provide better situational awareness, even at the lowest levels of tactical actions, is indicative of not only the market for these types of emerging technologies, but also the benefit that is seen to be gained. As sensors increase the battlefield awareness of fighters, it will allow both attackers and defenders to use that greater situational awareness to not only control their own fires but also (particularly in the case of the defender) direct their combat actions away from civilians.

[66] https://www.darpa.mil/program/squad-x-core-technologies

a. Acoustic

Acoustic sensors have been used on the battlefield since World War I.[67] Modern battlefield applications include small (4.25" DIA X 6.5" tall) acoustic ground sensors[68] as well as vehicle-mounted sensors.[69] Recent work has been done on mounting acoustic sensors to small balloons and then networking the data into a larger sensor network for provide the military with real-time intelligence on both enemy and civilian forces.[70] Additionally, work has been done on building robots that can acoustically locate gunfire and identify its source.[71]

Civilian systems that are currently in use, such as acoustic sensors to monitor traffic,[72]

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[67] B. Kaushik, Don Nance, and K. K. Ahuja, A Review of the Role of Acoustic Sensors in the Modern Battlefield (2005), available at https://ccse.lbl.gov/people/kaushik/papers/AIAA_Monterey.pdf

[68] http://www.signalsystemscorp.com/3DASU_brochure.pdf

[69] http://www.signalsystemscorp.com/asu.html

[70] C. Reiff, T. Pham, M. Scanlon, and J. Noble, A. Van Landuyt, J. Petek and J. Ratches, ACOUSTIC DETECTION FROM AERIAL BALLOON PLATFORM, http://www.dtic.mil/dtic/tr/fulltext/u2/a432916.pdf.

[71] Battlefield Robot Can Detect Snipers, http://www.nbcnews.com/id/9608603/ns/technology_and_science-innovation/t/battlefield-robot-can-detect-snipers/#.WeDUl2iPK70.

[72] Barbara Barbagli, Gianfranco Manes, and Rodolfo Facchini, Acoustic Sensor Network for

could also be employed to provide protections for civilians. Such systems could not only be used to monitor the potential movement of enemy vehicles and provide early warning to civilians but also be used to monitor civilians traffic, providing armed forces with situational awareness as to civilian vehicular movement.

b. Seismic

Seismic sensors are also an area where fighters can readily produce increased situational awareness in an effort to better protect civilians. Civilian uses already include seismic sensing tied to cell phones to provide early warning of potential earthquakes in California.[73] Military applications of seismic sensors have been around since the early 1980s and have been steadily improving.[74] A host of new systems are now being used[75] both on ground and underwater.[76]

Vehicle Traffic Monitoring (2012), https://www.researchgate.net/profile/G_Manes/publication/260385445_Acoustic_Sensor_Network_for_Vehicle_Traffic_Monitoring/links/556713fa08aeccd777377ff0/Acoustic-Sensor-Network-for-Vehicle-Traffic-Monitoring.pdf.

[73] (http://seismo.berkeley.edu/blog/2016/02/11/seismic-sensors-by-the-million.html)

[74] https://fas.org/man/dod-101/sys/land/rembass.htm

[75] http://www2.l3t.com/cs-east/pdf/bais.pdf

[76] Alain Lemer and Frederique Ywanne, Acoustic/Seismic Ground Sensors for Detection, Localization and Classification on the Battlefield (2006), available at

Many of these systems are inexpensive and have relatively long battery life. They could easily be placed in areas of regular civilian traffic to provide situational awareness of civilian movement, allowing the military commander to avoid military operations in those areas or to track the movement of civilians out of areas that could then be used for military operations with lower risk to civilians.

c. Visual

Though more expensive than some of the previously mentioned sensors, visual sensors provide another excellent method for fighters to increase protections for civilians and civilian objects. There are a large number of options that provide a wide array of capabilities. For example, there are mobile vehicle cameras[77] as well as cameras that can be static.[78] These cameras can be

https://ntrl.ntis.gov/NTRL/dashboard/searchResults/titleDetail/ADA479047.xhtml.

[77] https://www.amazon.com/OldShark-Dashboard-Recorder-G-Sensor-Recording/dp/B01DLWBPCA/?tag=aboutcom02lifewire-20&ascsubtag=4062264%7Cgoogle.com%7C%7C%7C%7C2%7C)

[78] Bastian Leibe, Konrad Schindler, Nico Cornelis, and Luc Can Gool, *Coupled Object Detection and Tracking from Static Cameras and Moving Vehicles*, available at https://www.vision.ee.ethz.ch/publications/papers/articles/eth_biwi_00556.pdf (last accessed June 8, 2018).

connected to the internet and then operated from mobile phones or other devices.[79] Some rely on batteries or direct power, while others operate on solar power.[80]

One of the most intriguing use of visual sensors in modern conflict has been demonstrated by very small drones that provide excellent situational awareness for combat forces. Personal drones that cost less than $2,000 and have a 4-mile flight radius have been used quite effectively in the fight against ISIS, for example.[81]As recently reported in the Wall Street Journal:

> The latest advance in Mosul was aided in part by the drones, quadcopters that are small enough to carry in a backpack, sell for about $1,500 commercially and are rigged with cameras on the underside.
>
> Iraqi counterterrorism forces have said they used quadcopters to supply aircraft with the U.S.- led coalition with some of their first targets in the Old City.
>
> Iraq's federal police say they do the same.
>
> Islamic State terrorized Iraqi forces earlier in the battle for the city by using their

[79] (http://thewirecutter.com/reviews/best-wireless-outdoor-home-security-camera/)

[80] (https://www.eyetrax.net/solar-powered-motion-activated-cellular-camera-how-it-works)

[81] (https://store.dji.com/product/mavic-pro?set_country=us&gclid=CLOazZ_BjNQCFceLswodr9EOaw)

own drones rigged to drop grenades. Now, Iraq's security forces have turned the technology against the militants.

At a command post near the front lines, American combat advisers huddled days ago around stacks of high--tech communications equipment and screens with feeds from multimillion-dollar aircraft while they waited patiently for an Iraqi quadcopter to give them the battlefield intelligence needed for an airstrike.

"Using the Iraqi drones is something new," said Brig. Gen. Walid Khalifa, deputy commander of the Iraqi Army's 9th Division. "We see the enemy and we decide its location and we give the coordinates of targets. It's faster than before."[82]

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[82] Ben Kesling and Ghassan Adan, "Low-Tech Gadgets Steer Battle to Retake Rest of Mosul," *The Wall Street Journal* (Europe Edition), pg. A3, 21 June 2017. The article continued:

When Iraqi drone pilots fly a quadcopter over a target—and bring that target up on screen, showing militants fighting Iraqi troops in high definition—Col. Browning said he gets what he needs to authorize a strike in seconds.

"We're able to deliver joint fires essentially at their command," he said, referring to airstrikes, artillery and other weapons.

Iraqi troops have been tinkering with quadcopters to make it possible for them to

d. Thermal

The last example in the area of sensors is thermal sensor. Though generally more expensive than simple visual sensors, they provide the same kind of clarity on civilian movements, even in darkness. The availability of thermal mapping services[83] may be limited in areas of armed conflict, but the tools to conduct thermal surveillance are available on the open market and can be purchased and employed in a number of effective ways.

As with the vast majority of sensors currently available, thermal sensors can be connected to the internet and the data can be live-streamed in a way that provides real-time intelligence. Such data would be invaluable to fighters who were endeavoring to avoid targeting civilians or who were trying to segregate military operations from places where civilians were present.

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fly farther and still provide real--time video feeds in dense parts of Mosul.

> Col. Browning said Iraqi drone technicians had fitted drones with bigger batteries, giving them extended range. If one falls from the sky or gets shot down, they launch another at little cost, he said.

Ben Kesling and Ghassan Adan, "Low-Tech Gadgets Steer Battle to Retake Rest of Mosul," *The Wall Street Journal* (Europe Edition), pg. A3, 21 June 2017.

[83] (http://www.resourcemappinggis.com/app_aerial.html)

e. Conclusion

In conclusion, the effectiveness and ease of acquisition and application make sensors an extremely important capability with respect to protecting civilians on the battlefield. Because of their ease of application and effectiveness, militaries should consider them in conducting military operations, and nations should seriously consider them when determining what precautions are "feasible".

2. Communication Devices

Sensors are generally passive collectors that can provide important data concerning civilian locations and movements. In contrast, communication devices are generally active devices that allow fighters to send and receive messages from the civilian population. The devices are roughly categorized below as one-way devices and devices that allow two-way communication.

a. One-Way

One-way communication systems are used widely as part of emergency response systems.[84] They also have been used to notify individuals of certain criminal activity, such as child kidnappings.[85] These systems can communicate in any number of ways, but the most often used

[84] https://www.ready.gov/alerts; (http://www.emergencyalert.gov.au/)

[85] https://www.amberalert.gov/

methods appear to be email[86] and cell phone.[87]

The benefits of these systems have been widely accepted and have promoted their widespread use. Similar systems have already been used in armed conflict, with the most publicized use probably being the use by the Israeli Defense Forces (IDF) to warn civilians of impending attacks.[88] The IDF has also used one-way warnings to let civilians know that the IDF was going to conduct military operations in the area where they currently were located and instructing them to leave the area or to stay in shelter where they currently were.[89] Prepositioned or mobile loudspeakers could also provide effective warning devices.[90]

Though not embraced widely in other armed conflicts, one-way cell phone and other messages could be a great source of feasible precautions designed to protect civilians and civilian objects. The effective use by Israel is an example of the feasibility of such programs and the accessibility and relatively low cost make these methods feasible for almost all fighting forces.

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[86] (https://www.alertmedia.com/emergency-mass-notification)

[87] https://www.nap.edu/read/15853/chapter/2#9

[88] https://www.haaretz.com/idf-to-experiment-with-informing-the-public-via-text-messages-1.305621.

[89] https://www.nytimes.com/2014/07/09/world/middleeast/by-phone-and-leaflet-israeli-attackers-warn-gazans.html.

[90] (https://www.fedsig.com/product/modulator%C2%AE-ii-electronic-siren-series); (http://www.sentrysiren.com/warning-sirens-products/outdoor-warning-sirens/)

b. Two-Way

Of course, many of the previously mentioned one-way communication methods can also be two-way methods. For example, when an amber alert is sent concerning a kidnapped child, a phone number is provided to call if the person who received the notification has important information.[91] Similar methodologies could be employed more generally in appropriate circumstances.

In cases where fighters were attempting to protect civilians, two-way communications may raise risks of civilians directly participating in hostilities, an issue that commanders would have to be cognizant of. However, in the right circumstances, two-way communication systems would provide an excellent way for fighters to not only warn civilians but also gather information concerning their location and movements. For example, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo established a Community Alert Network where locals can use UN distributed mobile phones to provide warning of imminent attacks.[92]

Of course, as with all of these emerging technologies, a nefarious fighting force could use these same technologies to facilitate attacks on civilians, but that possibility should not prevent

[91] https://www.amberalert.gov/

[92] New Technology for Peace & Protection: Expanding the R2P Toolbox by Lloyd Axworthy and A. Walter Dorn - http://www.mitpressjournals.org/author/Dorn%2C+A+Walter

legitimate fighting forces from introducing them as feasible options to comply with their precautionary obligations.

3. Markers

Other emerging technologies that impact what is feasible with respect to precautions include various forms of markers or marking systems. The systems are categorized below as visual, olfactory, and aural, but, of course, many effective markers will use elements of all three.

a. Visual

Visual markers are as old as armed conflict itself. They have been used to identify affiliations as well as signal battle commands. For purposes of this article, visual markers can also be used to mark areas where civilians might find safe refuge, direct civilians away from danger, or provide mobile signals of civilian movements, among other possible uses.

Colored smoke has a long history in armed conflict and continues to present simple, cheap, and easy methods to mark, direct, and protect civilian populations.[93] The use of flares or smoke producing agents can be tied effectively to colors, such as green smoke denoting a safe area and red meaning danger. Products that could be used for these purposes are used broadly in a large

[93] http://www.orionsignals.com/products/smoke-flares.html

number of forums and are easy to acquire.[94]

Similar to smoke or flares, simple paint or chalk could also serve these purposes. For maximum flexibility, such markings could be delivered by drone or vehicle. Ideally, markings systems would be widely published so that the civilian population would understand clearly what each marking meant, but basic use of red as danger and green as safe may be effective in emergency situations.

b. Olfactory

In addition to visual markings, olfactory markings could be an effective, feasible precaution. There are a large number of options for both smell and delivery system. A maloderant known appropriately as "Skunk" has been used both in law enforcement and LOAC scenarios.[95] Potential use of pleasant smells, either alone or as a contrast, might also be used to help in the protection of civilians.

Potential complications with the prohibition on the use of chemical agents[96] would need to

[94] http://www.enolagaye.com/wire-pull-smoke-grenades/

[95] http://www.defenseone.com/technology/2015/04/americas-police-will-fight-next-riot-these-stink-bombs/111430/

[96] Convention on the Prohibition of the Development, Production, Stockpilling and Use of Chemical Weapons and on Their Destruction Chemical Weapons Convention (CWC), Jan. 13,

be considered if olfactory signals were to be used widely on the battlefield, but just as the U.S. has reserved its ability to use riot control agents in certain circumstances, states could distinguish its use of such olfactory markers from conduct that would equate to a violation. Additionally, as the use of olfactory markers becomes more prevalent, its potential for misidentification will decrease.

c. Aural

Loud bangs or other audible signals are also a feasible precaution that is easily accessible and can be very effective in protecting the civilian population. Flash bang grenades are already widely used both by law enforcement[97] and by militaries.[98] They are also relatively easy to construct from normal household items.[99] Their combination of visual and aural signal makes them especially effective.

As mentioned above, the use of loudspeakers as a one-way communication device also doubles as an aural marking system. Either mobile or static speakers could be used to send warnings to the civilian population or provide direction as to where or whether to move.[100] These

1993, 1974 UNTS 45.

[97] http://www.npr.org/2015/01/18/378200407/investigation-reveals-rampant-use-of-flashbang-grenades-by-police

[98] https://www.defensemedianetwork.com/stories/tools-of-the-trade-the-flash-bang-grenade/

[99] http://www.instructables.com/id/How-to-make-a-Flash-Bang-Flash-grenade/

[100] https://www.fedsig.com/product/modulator%C2%AE-ii-electronic-siren-series;

speakers could have specific pre-recorded messages that triggered in combination with other sensors or that just played upon remote command.

C. "All Circumstances at the Time"

This list represents a small sampling of the technologies that are available or under development. The passage of time will only provide more capabilities and a more diverse range of capabilities and platforms. Further, all of these technologies are reasonably inexpensive, and the costs are lowering as research and development continue. They provide easily accessible and easily employable means that could provide dramatically increased situational awareness, which could easily be utilized to provide greater protections for civilians and civilian objects.

Despite the ubiquity of many of these technologies and ease of purchase and employment, the principle of feasibility applies both to encourage use of advancing technology and recognize that legitimate constraints exist. The argument above, that considering all circumstances at the time might condemn states and commanders who don't apply readily available and extremely effective technologies in order to protect civilians and civilian objects, also recognizes that accessibility and ubiquity are relative terms. For example, the fact that many of these technologies are available at local electronics stores in the military's nation does not mean they are accessible to the commander at the time he or she needs them. Many militaries will only allow employment of weapons and other systems that can be purchased through the general acquisition system and

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http://www.sentrysiren.com/warning-sirens-products/outdoor-warning-sirens/

are in the logistics inventory. While this does not undermine the argument of applying feasible precautions, it does recognize that until the State has conducted the analysis at a national level and determined such tools should be purchased and provided to commanders, those commanders may not have them "available" to employ.

Similarly, as with the use of advanced lethal weapons, many States, including the United States, remain clear that the LOAC does not require the use of the most advanced possible weapons in every case. For example, the United States is clear that the LOAC does not require the use of precision guided munitions every time they are available.[101] Rather, the commander must consider the availability and quantity of those weapons, along with other potential missions when considering the proper application of precautions.

In other words, in arguing for an evolved standard of "feasibility" that includes emerging technologies that could have a significant benefit to the protection of civilians and civilian objects, it must be clear that whether a particular option is available to a commander will need to be a detailed analysis including more than simply pointing to a website where a specific technology is generally offered for sale.[102] On the other hand, States should be on notice that these technologies are available and, recognizing their LOAC obligations, begin to take steps to make such technologies truly available in "the circumstances at the time."[103]

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[101] DoD LOWM, *supra* note 21, para. 5.2.3.2.

[102] Challenges, *supra* note 44, at 377.

[103] See UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*,

D. Conclusion

The use of these types of emerging technologies was dramatically illustrated recently when North Korea launched a missile over the Japanese island of Hokkaido. The Japanese government used a number of systems similar to those addressed above to warn its people of the launch and the potential danger it posed.[104] Similar usages are very feasible in modern conflict as precautions in both attack and defense. In fact, the understanding of the feasibility limitation on precautions required in military operations should include a recognition of the value of emerging technology and its potential to significantly protect civilians in armed conflict.

On the other hand, as stated in the US DoD Law of War Manual,

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16 December 1966, United Nations, Treaty Series, vol. 993, at p. 3. Art. 2 states: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." The use of "maximum of its available resources" provides an example of the international community agreeing to a very high standard with respect to resource commitment.

[104] http://www.independent.co.uk/news/world/asia/north-korea-missile-launch-japan-millions-warning-messages-hokkaido-take-cover-alarm-sirens-shinzo-a7917511.html

> The obligation to take feasible precautions is a legal requirement. However, the determination of whether a precaution is feasible involves significant policy, practical, and military judgments, which are committed to the responsible commander to make in good faith based on the available information.[105]

In many cases, the commander can only make that determination once his State has made such systems available to him or her. As the international community continues to consider and evolve the understanding of what is "feasible," States should make these technologies available to commanders and build doctrine and tactics to encourage their employment. Such actions have the potential to dramatically increase the protection of both civilians and civilian objects in modern armed conflict.

V. CONCLUSION

Compliance with LOAC is a continual problem that nations and other international actors such as the ICRC struggle to reinforce. Some excuses for non-compliance are rooted in the limitation that parties to an armed conflict are only required to do what is "feasible" to protect civilians and civilian objects during hostilities. An understanding of feasibility that is enlightened by the use of emerging technology will dramatically increase the effectiveness of steps parties to an armed conflict can take to actually protect the civilian population. Further, the effectiveness and ease of application of these emerging technologies should be reflected in what the international

[105] DoD LOWM, *supra* note 21, at para. 5.2.3.3.

community accepts as feasible by the parties to an armed conflict.

LUNCHEON
Expert Discussion: Legality of January U.S. – Iran Exchange of Force

Lawful Self-Defense vs. Revenge Strikes: Scrutinizing Iran and U.S. Uses of Force under International Law

by Geoffrey S. Corn and Rachel VanLandingham, Lt Col, USAF (Ret.)

January 8, 2020

"The fierce revenge by the Revolutionary Guards has begun," Iran's Islamic Revolutionary Guard Corps announced after Iran launched over a dozen ballistic missiles against two U.S. military bases in Iraq late Tuesday evening. This attack takes place against the backdrop of Iranian leadership's promises of forceful retaliation for the U.S. drone strike in Iraq last week that killed General Qassem Soleimani, Iran's leading military figure. Indeed, Iran's senior most officials have been promising revenge for days, with no claim that they anticipated future U.S. strikes. More specifically, within hours of the U.S. strike last week, Iran's Supreme Leader Ali Khamenei vowed "forceful revenge" for General Soleimani's death; Iran's United Nations ambassador characterized the U.S. attack as "an act of war" and repeated Khamenei's threat, crowing that Soleimani's death would be met with "revenge, a harsh revenge." Gen. Hamid Sarkheili of the Iranian Revolutionary Guard told a crowd of Soleimani mourners on Monday that, "[w]e are ready to take a fierce revenge against America…American troops in the Persian Gulf and in Iraq and Syria are within our reach." And as if to punctuate their motivation, the Iranian missile attack was accompanied by this familiar refrain of "fierce revenge."

Iran may think it is justified in what it calls revenge, but its actions and rhetoric are fundamentally inconsistent with international law, ironically the very law Iran invoked to condemn the U.S. attack. Revenge (often called retaliation) is not a lawful basis for a State's use of armed force. Instead, international law permits a State to use force against another State (or in the view of many, including the United States, non-state organized armed groups) only when *necessary* to defend against an imminent, actual, or ongoing unlawful armed attack, or pursuant to a United Nations Security Council resolution. Neither of these bases justify revenge, retaliation, or reprisal; and neither seemed to justify Iran's threats or attack. Indeed, despite the rhetoric Iran appears to actually

understand this, which likely explains why following the missile attack Iran's Foreign Minister posted on Twitter that the country "took & concluded proportionate measures in self-defense" (contradicting nearly a week of threats of revenge).

Invoking the rhetoric of self-defense does not *ipso facto* justify a State's use of military force absent a reasonable basis to conclude the State faced one of the triggering justifications for such necessary self-help action. This applies equally to the United States and Iran, both of which have now launched attacks that could easily be viewed as acts of retribution. Accordingly, if Iran did what it actually promised – launch a military attack to retaliate for the U.S. Soleimani strike and not based on an imminent threat of armed attack by the U.S. — Iran has, paradoxically, engaged in the same illegality it has been condemning.

Self-defense on the international level, like self-defense in any other context, is a legal justification that requires the use of force to be *absolutely necessary* to protect against an imminent threat of unlawful violence. If that act of violence is completed, this self-help justification expires, unless the victim reasonably perceives an *ongoing* threat. This "timeliness" aspect of self-defense necessity functions to prohibit a victim of unlawful violence from transforming a genuine self-protection justification into a justification to take revenge.

That is, a U.S attack purely in retribution for earlier Iranian attacks is squarely prohibited by international law, specifically the United Nations Charter. Like an act of self-defense in the individual context, in which responses to and retribution for past violent acts is ceded to the criminal justice system, international law cedes legal authority for enforcement of international law – including violent punishment of aggressors – to the U.N. Security Council. Though greatly embryonic compared to domestic law enforcement systems, and often hobbled by the impact of the veto power vested in the five permanent members of the Security Council (including the United States), this international legal structure with all its limits and flaws remains the primary (if not exclusive) means by which a State responsible for a *completed* act of unlawful aggression is subjected to sanction.

The core of this international superstructure adopted to limit situations when States may legitimately use military force to protect their interests is the presumptive prohibition against the use or threatened use of force by States laid out in Article 2(4) of the U.N.

Charter:

> "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*"

Just as the use of individual force has long been domestically illegal – criminal – as a means of resolving disputes or for any reason, the U.N. Charter applies this proscription to States, prohibiting military force (or its threat) as an instrument of international relations.

But like any society, this prohibition cannot guarantee compliance. Accordingly, if and when a State is a victim of an actual or imminent unlawful armed attack it may, pursuant to Article 51 of the U.N. Charter, take necessary self-help military action to protect itself, and must notify the Security Council of such action to give it an opportunity to take further action. And again, mirroring domestic law, this self-help exception to the prohibition against the use force comes with three customary requirements: imminence, necessity, and proportionality. Accordingly, *once the threat is terminated* it must turn to the Security Council to authorize any subsequent use of force needed to restore or maintain international peace and security. It cannot simply decide to exceed the necessity of self-help and engage in its own revengeful or punitive military attacks against the aggressor state.

A victim of unlawful conduct, be it an individual or a State, is simply not legally justified in using force to "punish" or "sanction" the unlawful aggressor, whether it characterizes its action as revenge, reprisal, or anything else. While such actions of reprisal or revenge may be appealing to many and even generate public empathy by the aggrieved party, a society built on the rule of law limits the authority to engage in self-help violence to only those situations where it is necessary to protect the victim and restore the status quo ante.

Applying this legal equation to current events is complicated by the limited access to the intelligence and other information that ostensibly informed the U.S. decision to launch the attack on Soleimani. Other commentators quickly concluded the U.S. acted illegally, just as many will make the same assertion about Tuesday night's attack by Iran. In contrast, we simply refuse to assume we know enough at this point for such certitude.

But we do know that U.S. officials (unfortunately with an exception of our President) have been using all the right terminology to make the case that the Soleimani strike was a lawful response to an imminent unlawful threat, and now Iran seems to be backtracking in an effort to do the same. We also know that both States can now point to prior recent attacks to bolster their assertions of self-defense. However, **while these prior incidents are certainly relevant to assessing future intentions and capabilities, they did not, standing alone, provide a legal justification for Iran or the U.S. to launch attacks**.[1] However, this record was certainly relevant to the assessment of intelligence indicating an adversaries capabilities and whether more was about to come. It's important to monitor when, for example, the deaths of 608 Americans in Iraq – which occurred between 2003 and 2011 – are being attributed to Soleimani for the valid purposes of this kind of intelligence assessment or for an invalid understanding of the legal basis for the use of force. Along these lines, rhetoric contributes little to a meaningful assessment of self-defense legitimacy and may often contribute to claims of invalid revenge. For example, assertions by current (and former) U.S. officials that Soleimani has the blood of hundreds of American troops on his hands may be understandable as they seek to highlight the extent of his involvement with actors hostile to U.S. forces and interests, but contributes to the perception that the attack was more about revenge than self-defense. Scrutiny of the factual basis for the claim of self-defense should therefore be a key focus of Congressional efforts to ensure this high-stakes decision on the administration's part complied with the law we as a nation and our military champion.

This is why we believe it is so essential that the U.S. administration articulate to the American people and the broader international community a compelling case that it made a reasonable and credible assessment that its Soleimani attack was necessary to prevent *another* unlawful attack on U.S. military personnel or U.S. facilities – and that such projected attack was *imminent*, leaving no reasonable time for non-forceful measures to obviate such threat.

It is also why it is *per se* illegal for Iran to threaten the use of military force to take revenge, even if they pretend to demonstrate respect for international law by emphasizing they will only attack U.S. military targets in a "proportional" way. And it is why Iran *and* the United States should be forthcoming with the information that led to their respective asserted determinations that their attacks were necessary to prevent *subsequent* imminent uses of force by their antagonist.

In contrast to Iran's near-constant refrain of revenge as its basis for a threatened strike – despite claiming that Tuesday's attack was lawful self-defense – on the other side of the world the Trump Administration has been consistently claiming its strike last week was indeed internationally lawful as an exercise of the inherent right of self-defense. The U.S. immediately invoked the inherent right of self-defense as the principal U.S. legal authority to justify its drone strike in Iraq targeting General Soleimani. The United States attacked the general because, per the State Department, he was planning "imminent attacks against American personnel and facilities in Lebanon, Iraq, Syria and beyond." Secretary of State Pompeo explained that Americans "are safer in the region" after the U.S. drone strike, because Soleimani's anticipated actions involved an "imminent attack" that "would have put hundreds of lives at risk." The Chairman of the Joint Chiefs of Staff, General Milley, affirmed that the U.S. had "the intelligence I saw– that was compelling, it was imminent, and it was very, very clear in scale, scope.." And President Trump claimed the morning after the strike that, "[w]e took action last night to stop a war, we did not take action to start a war," and he too called the Soleimani's threat of an attack "imminent."

The stakes involved in the U.S. military strike and the escalation we now know it generated implicate a wide array of diplomatic, political, and strategic considerations. It is therefore logical and appropriate to scrutinize the U.S. claim of self-defense justification, something that began almost as soon as the attack was executed. And the Iranian missile strike of Tuesday evening should be subjected to the same scrutiny.

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Image: President Donald Trump speaks from the White House on January 08, 2020 addressing the Iranian missile attacks that took place on the previous night in Iraq (Win McNamee/Getty Images)

[1] The one qualifier to this is the possibility that these attacks are occurring in the context of an ongoing armed conflict between the United States and Iran. While such an armed conflict must be assessed factually, it does seem relevant that neither the United States nor Iran seem to be invoking this theory of legality. Instead, each side seems to be treating its attacks as a "one off" measure, whether based on an assertion of self-defense or revenge. Certainly these attacks themselves qualify as armed conflicts subject to law of armed conflict regulatory rules. What is far more complicated is whether each attack qualifies as a distinct armed conflict terminating when the attack terminates, or whether there is now an ongoing armed conflict? Because both the U.S. and Iran have invoked the self-defense as the justification for *each* action, our analysis is limited to the invalidity of revenge or reprisal as a justification for such actions.

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LAWFARE

INTERNATIONAL LAW: SELF-DEFENSE

The Aborted Iran Strike: The Fine Line Between Necessity and Revenge

By **Geoffrey S. Corn** Tuesday, June 25, 2019, 8:16 AM

The president announced on June 21 that he had called off a potential U.S. military strike on Iran in response to Iran's shootdown of a U.S. Navy remotely piloted vehicle (RPV). The strike, according to the president, could have incurred casualties of as high as 150 people—information that has sparked discussion over the proportionality of such a response under international law. Before jumping to this debate, however, there is another issue that needs to be considered first: the question of necessity.

In one of the great scenes from the movie "Anatomy of a Murder," defense counsel Paul Biegler is asked to defend Lieutenant Manion, charged with murder for shooting his victim, Barney Quill, at point-blank range after Manion's wife told him Quill raped her. Biegler meets with Manion and tells him the facts don't support a justification defense. Manion erupts, "Why? Why wasn't I justified killing the man who raped my wife?" Biegler responds, "Time element. If you had caught him in the act you would have been justified. But you didn't; you shot him later. That's murder, premeditated *and with vengeance*" (emphasis added).

Whether considering self-defense (or defense of others) in the domestic or international context, Biegler's explanation highlights one of the most important limitations on such a claim of justification: It may never be invoked to justify an act of revenge in response to an unlawful threat that is no longer ongoing or imminent. This is a key component of self-defense necessity in any context, and it reflects that the legal justification to engage in conduct that would otherwise be unlawful begins—and ends—with genuinely necessary self-protection. More specifically, Biegler educated his client that the law justifies action taken for self-help in response to an unlawful threat or act of violence only to prevent or terminate that threat, *not* to punish the assailant or take revenge.

One would expect that a similar discussion occurred within the U.S. government regarding the planned strike against Iran. While the context was unquestionably different, the key principle Biegler explained to Manion—that self-defense never justifies an act of retaliation once the unlawful threat no longer exists—is just as relevant as it was in "Anatomy of a Murder." The U.S. framed the strike in the language of self-defense. But given that the strike was responding to Iran's shootdown of the Navy RPV, which was already over by the time the strike would have taken place, is this self-defense argument legitimate?

In the context of international law, there are certainly situations when military action based on an asserted justification of self-defense will lawfully occur after an unlawful attack. The critical inquiry in such situations is whether a use of force conducted *after* an unlawful armed attack is legitimately necessary to protect against *continuing* unlawful violence or was instead an act of retaliation or vengeance. This is an especially complicated aspect of assessing compliance in the domain of international security and law. In the international domain, unlike the domestic individual self-defense situation presented in the movie scene, it is not necessarily unreasonable for a victim state to assess an attack as an initial foray into a broader aggressive operation or campaign. In such situations, a proportional act in response to an initial attack may eliminate or deter the reasonably anticipated ongoing threat and, thereby, fall within the scope of self-defense necessity.

President Trump's aborted plan to respond to the Iranian attack on the U.S. RPV is certainly not the first time that the U.S, or another state, has invoked the inherent right of self-defense to justify what appear to be retaliatory strikes. Consider the U.S. attacks against Libya in response to the 1986 Berlin discotheque bombing or against Iraq in response to the failed 1993 attempt to assassinate former President George H.W. Bush. The 1989 U.S. invasion of Panama provides an even more compelling example. According to a U.S. General Accounting Office report, the U.S. State Department pointed to the defense of U.S. nationals and military personnel in Panama as among the justifications for the invasion that toppled General Manuel Noriega's regime. In the abstract, that claim is not controversial. However, this assertion of self-defense was triggered strictly by two isolated incidents of Panama Defense Forces (PDF) violence against off-duty U.S. military personnel, including one U.S. service member who was shot and killed while evading a roadblock. It's difficult to see a pattern of future violence based on those two instances that made it necessary to invade in order to prevent such future acts.

Setting aside the question of proportionality, it is easy to appreciate how readily this theory of international legal justification to an anticipated ongoing threat of unlawful violence can be exploited as a subterfuge to engage in retaliatory strikes. In Panama, was it reasonable for the United States to treat these two incidents as a justification for self-defense military action? Or were these incidents exploited to justify an otherwise unlawful invasion of another sovereign country? And while the scale of the aborted attack on Iran was almost certainly nothing like the invasion of Panama (at least let's hope not), scale is really a secondary issue in relation to legality. The first and essential issue is the same one Paul Biegler had to explain to Lieutenant Manion: Was the use of force a *necessary* measure to repel an act of unlawful violence, or had the use of force become unnecessary because that act of unlawful violence had terminated and was not the opening salvo of a broader campaign?

There is no easy answer to this question. Even in Panama, it was not implausible for President Bush to view the two acts of PDF violence as an indication that the Noriega regime had decided to cross a line of continuing violence after nearly two years of tense standoff. (It is ironic that the motto of the U.S. Army in Panama was "no ground to give," while the motto of the PDF was "ni un paso atrás," meaning "not one step back.") If that were true, the risk of hesitation to the tens of thousands of U.S. citizens living in and around Panama City was substantial. Had a broader campaign of violence been unleashed, it would have been nearly impossible for the U.S. military to protect all U.S. citizens in that country.

Such critiques will always be frustrated by the inevitable secrecy that cloaks government decision-making: Without access to the information relied on to justify such action, it is hard to know why a government may have assessed what appears to have been a one-off incident to constitute a much more ominous indication of further imminent violence. Perhaps the very nature of attacks that bear the hallmarks of vengeance necessitates greater transparency regarding the intelligence and other indicators that ostensibly provide that justification. While such fuller disclosure by a state is not likely to be viewed as legally obligatory, from both a deterrence and a legitimacy perspective it seems that the state that engages in attacks that seem so outwardly retaliatory in nature owes the public more than just an invocation of self-defense.

The conversation about the proportionality of the proposed strike is certainly important. But these situations demand more scrutiny on the predicate question of self-defense necessity in order to clarify the line between legitimate justification and unjustified revenge.

Topics: International Law: Self-Defense, International Law, Iran

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LAWFARE

INTERNATIONAL LAW

Soleimani and the Tactical Execution of Strategic Self-Defense

By **Geoffrey S. Corn**, **Chris Jenks** Friday, January 24, 2020, 2:54 PM

The United States claims to have "exercised its inherent right of self-defense" in accordance with Article 51 of the U.N. Charter in conducting a drone strike in Iraq targeting Iranian Major General Qassem Soleimani. Most commentators have similarly focused on *jus ad bellum* questions: whether the strike met the requisite standards of imminence, necessity and proportionality and whether Soleimani—the commander of the Quds Force, a military unit within Iran's Islamic Revolutionary Guard Corps specializing in unconventional warfare—qualified as a legitimate military target under the law of armed conflict. But at least one prominent international law expert recently asserted that those standards—imminence, in particular—were "irrelevant" to the question of the strike's legality under international law.

In his recent *Lawfare* post, Michael Glennon contends that there was no basis for the U.S. to invoke targeting principles derived from the law of armed conflict because the Iranian armed attack the U.S. ostensibly assessed as "imminent" had not yet been conducted. In other words, because no armed conflict existed at the time the U.S. targeted Soleimani, the U.S. attack violated the U.N. Charter, *even if it was executed to preempt an imminent Iranian armed attack directed under Soleimani's command and control*. We believe this interpretation is deeply flawed. It defies the rules governing the tactical execution of an invocation of strategic self-defense authority and cuts against both historic practice and common sense.

We do not wish to assess whether the U.S. claim of a *jus ad bellum* justification for the strike was based on a credible imminence assessment or whether the decision was consistent with the requirements of necessity and proportionality. We believe the inquiry and debate on these questions is, contrary to Glennon's assertion, not only relevant but the dispositive questions to assess the validity of the asserted U.S. legal justification. Instead, we write to raise what we believe is a critical question that Glennon's "imminence irrelevance" theory seems to simply bypass: Which international law regulates tactical execution when a state employs military force to intercept or preempt an imminent armed attack pursuant to Article 51's inherent right of individual or collective self-defense?

This, we believe, is a critically important question. Glennon asserts that the killing of Soleimani was unlawful even assuming *arguendo* the attack was an exercise of the inherent right of self-defense. If Glennon's assertion is accurate, then the state must constrain tactical execution to measures consistent with peacetime use of force rules and may use military force pursuant to the law of armed conflict only *after* it has suffered the consequences of the imminent armed attack. Glennon's argument implies that, even assuming the U.S. acted in order to preempt an imminent armed attack (in a fashion usually considered to be consistent with the Article 51 right of self-defense), the strike was per se a violation of the U.N. Charter because the U.S. was not in an armed conflict at the time it conducted the attack on Soleimani.

It follows from Glennon's argument that the strike is legally indistinguishable from a strike on any other foreign government official in the territory of another nation during a time of peace. Glennon's argument means that preemptive self-defense is no longer a legally viable claim.

This view of the legal framework governing a state's execution of the inherent right to self-defense explains why Glennon has joined the chorus of commentators characterizing the attack that killed Soleimani as an "assassination." But this characterization seems invalid if the credible threat of an imminent Iranian armed attack indeed qualified as triggering an armed conflict and Soleimani was reasonably assessed as a military operational leader of the entity planning to conduct that attack and a legitimate military target. Thus, we agree with Shane Reeves and Winston Williams that "[the]debate over whether the action was an assassination is unhelpful in determining whether there was a legal basis under international law for the air strike." The legal basis for the U.S. airstrike was the assessed imminence of an unlawful Iranian armed attack. Whether the *individuals* targeted to preempt that imminent threat were subject to an "assassination" (meaning an unlawful killing) or were themselves *lawful* objects of attack (the antithesis of assassination) turns on the secondary question: Was the killing a lawful tactical execution of that self-defense justification? In other words, does the law of armed conflict or peacetime international law govern the killing? For us, the answer to that question is clear: When a state employs military force to defend itself against an imminent armed attack, tactical execution is regulated by the law of armed conflict.

The assertion that the attack against Soleimani was an assassination presupposes the inapplicability of the law of armed conflict. But this suggests an odd legal equation: that applicability of the law of armed conflict includes some type of inherent "offer and acceptance" principle that it is not until the state is the victim of an *actual* armed attack that its "acceptance" in the form of military response qualifies as an armed conflict. We believe this is an erroneous interpretation of the armed conflict triggering threshold. In our view, if a state reasonably determinesthat military action is necessary to intercept or preempt an imminent armed attack, that military action indicates the existence of an armed conflict. Thus, *jus in bello* rules govern the tactical execution of military action to achieve that self-defense objective, including who and what qualifies as a lawful object of attack.

Glennon's attempt to support his argument with reference to the U.S. military's World War II killing of Admiral Isoroku Yamamoto—the architect of the Pearl Harbor attack and commander in chief of the Japanese Navy—seems equally misplaced. Drawing a contrast between the U.S. attack on Yamamoto and the attack on Soleimani indicates the belief that the law of armed conflict has no relevance to the legality of a military response to an imminent armed attack, but only to military action after that armed attack has been conducted. Glennon claims that "Admiral Yamamoto's plane was a legitimate military target" *only* because the engagement was during an ongoing armed conflict. We certainly agree that Yamamato was a legitimate military target. But Glennon's broader contention is that Yamamoto, unlike Soleimani, qualified as a lawful subject of attack because the armed conflict in question was already ongoing.

Consider the import of Glennon's approach. Imagine that on December 6, 1941, the United States learned of an imminent Japanese armed attack on the U.S. Navy at Pearl Harbor, that Yamamoto had planned the attack and was in command of the forces that would carry out the attack. Imagine that in this situation, the U.S. had the ability to launch a targeted strike against Yamamoto in self-defense. According to Glennon, such U.S. action would be illegal under international law as Yamamoto could not *yet* be characterized as a lawful object of attack but instead was a government official in a status no different from a diplomat encountered during a time of peace. One wonders what Professor Glennon thinks a state should do under those circumstances once it reasonably assesses the imminence of an armed attack? Attempt to arrest the enemy operational commander? File a diplomatic demarche? Or patiently await the attack and potential injury and death of its citizens and damage and destruction to its property? Not only are such options illogical, they are not consistent with the practice nor law of self-defense.

There are of course other examples besides that historical counterfactual. During the last two decades of the Cold War, there was growing public and political momentum in the United States to disavow any "first use" of nuclear weapons—that the U.S. should adopt a policy that it would use these weapons only *after* a nuclear attack from the Soviet Union. But why did every U.S. president, not to mention our NATO allies, resist this effort? The answer seems clear: because they knew that *if* presented with intelligence indicating an imminent Soviet nuclear attack, the United States was prepared to act in self-defense to preempt that imminent threat by attacking a wide range of strategic and operational targets. Those attacks would have been conducted pursuant to the law of armed conflict because few would question that the legitimate assessment that an attack was coming and the subsequent use of force in self-defense would indicate the existence of an armed conflict. And, although on a scale far greater than the Soleimani attack, our missiles would have legitimately targeted enemy military leadership and the command, control and communications capabilities those leaders relied on to conduct their own military operations.

Ultimately, we believe there is great risk in confusing the function of the two branches of the *jus belli*. The *jus ad bellum* dictates the strategic legality and scope of a state's use of military force in self-defense. Imminence is not only relevant to the exercise of this strategic inherent right, it is an essential predicate—along with necessity, proportionality and a legitimate military target—for any responsive use of force to qualify as lawful. The determination that the state faces an imminent armed attack and employs force in self-defense therefore represents an *ipso facto* determination that the situation qualifies as an armed conflict triggering the *jus in bello* for purposes of regulating the tactical execution of defensive operations. Thus, when a state invokes self-defense authority and uses force, it triggers *jus in bello*, and the tactical execution of military action to achieve the strategic self-defense objective is governed by the law of armed conflict. The relevant question then becomes whether the individual is a legitimate target. Where a military officer in command of the forces and capabilities creating the imminent threat of armed attack is lawfully and successfully subjected to attack, the killing was legally justified.

At a minimum, with the first "shot fired"—the first missile the U.S. launched—an armed conflict between the U.S. and Iran existed. At the time Soleimani was targeted, there seems to be no credible basis to conclude that he did not qualify as a legitimate military target. His role as the operational commander of the unconventional forces triggering the U.S. right of self-defense rendered him a lawful target pursuant to the law of armed conflict. Accordingly, the imminence of the armed attack he was ostensibly orchestrating was indeed relevant to the assessment of attack legality. That imminent armed attack triggered the Article 51 right of self-defense, and the U.S. responsive use of force triggered the law of armed conflict. The only way imminence could be irrelevant is if there was no armed conflict until *after* the United States conducted its attack. Interpreting international law to reach that conclusion would produce a fundamental and profoundly troubling gap between the manner in which states defend themselves against imminent threats of armed attack and the law they are obligated to respect.

Topics: International Law, Iran

Tags: Qassem Soleimani, Law of Armed Conflict

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The killing of General Soleimani was lawful self-defense, not "assassination"

sites.duke.edu/lawfire/2020/01/03/the-killing-of-general-soleimani-was-lawful-self-defense-not-assassination/

Charlie Dunlap, J.D.

January 3, 2020

Today a news reporter asked whether the killing of General Qasem Soleimani, who led the Islamic Revolutionary Guard Corps-Quds Force (a U.S.-designated terrorist organization), amounted to "assassination" as proscribed in Executive Order (EO) 12333. In a word "no"; rather, based on the facts we currently have, it was a legitimate act of self-defense under international law. It's important to make the legality of the action clear as 3,000 U.S. troops head to the Middle East as a further deterrence against Iranian attacks.

Troops headed to the Middle East, January, 2020

The facts as we know them

Here's the text of the Pentagon news release about what happened (emphasis added):

At the direction of the President, the U.S. military has taken decisive defensive action to protect U.S. personnel abroad by killing Qasem Soleimani, the head of the Islamic Revolutionary Guard Corps-Quds Force, **a U.S.-designated Foreign Terrorist Organization**.

General Soleimani was actively developing plans to attack American diplomats and service members in Iraq and throughout the region. General Soleimani and his Quds Force were **responsible for the deaths of hundreds of American and coalition service members and the wounding of thousands more**. He had orchestrated attacks on coalition bases in Iraq over the last several months – including the attack on December 27th – culminating in the death and wounding of additional American and Iraqi personnel. **General Soleimani also approved the attacks on the U.S. Embassy in Baghdad that took place this week.**

This strike was aimed at deterring future Iranian attack plans. The United States will continue to take **all necessary action to protect our people** and our interests wherever they are around the world.

Secretary of State Pompeo added some detail in a press conference:

"President Trump made the decision, a serious decision which was necessary. ***There was an imminent attack****.* ***The orchestrator, the primary motivator for the attack was Qasem Soleimani, an attempt to disrupt that plot****. You all have been talking this morning about the history of who Qasem Soleimani is. He's got hundreds of American lives' blood on his hands.* ***But what was sitting before us was his travels throughout the region and his efforts to make a significant strike against Americans****. There would have been many Muslims killed as well – Iraqis, people in other countries as well.* ***It was a strike that was aimed at both disrupting that plot, deterring further aggression, and we hope setting the conditions for de-escalation as well."*** (Emphasis added.)

Gen. Mark Milley, Chairman of the Joint Chiefs of Staff, said the U.S. had **"clear and unambiguous"** intelligence that **Soleimani was planning a stepped up "campaign of violence"** against Americans. (Emphasis added.)

The *Washington Post* reported these remarks from the President:

President Trump accused Maj. Gen. Qasem Soleimani of **plotting "sinister attacks"** against U.S. personnel in the Mideast before a U.S. airstrike killed him.

"We took action last night to stop a war," Trump said during remarks made from his Mar-a-Lago resort in Florida. "We did not take action to start a war."

Does disrupting a "sinister attack" that was, according to Secretary Pompeo, "imminent," constitute "assassination" under EO 12333?

EO 12333

The best discussion of EO 12333 with respect to assassination is still the 1989 Department of the Army memorandum by W. Hays Parks. It notes that paragraph 2.11 of the EO does state that "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." However, it also points out that, in general, "assassination involves murder of a targeted individual for political purposes." Here's the key part:

"[EO 12333's] intent was not to limit lawful self defense options against legitimate threats to the national security of the United States or individual U.S. citizens. Acting consistent with the Charter of the United Nations, a **decision by the President to employ** clandestine, low visibility or **overt military force would not constitute assassination** if U.S. military forces were employed **against** the combatant forces of another nation, a guerrilla force, or **a terrorist or other organization whose actions pose a threat** to the security of the United States."

Additionally, Parks makes it clear that it isn't "assassination" simply because an *individual* is targeted in an otherwise lawful military operation. (And he provides plenty of examples). In any event, the killing of Soleimani wasn't for "political purposes" as in assassination, but rather to try to *defend* against an *imminent attack* on U.S. and allied persons and interests. Still, can a nation lawfully act to disrupt an attack that hasn't yet taken place?

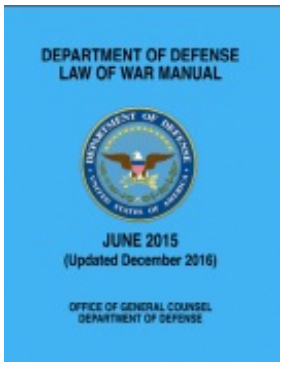
Anticipatory self-defense

Article 51 of the UN Charter memorializes every nations' "inherent right of self-defense." This "inherent right" is widely understood to include "anticipatory self-defense." As Alexander Potcovaru explains (citing Ashley Deeks book chapter):

"Anticipatory self-defense often corresponds with the standard established in the famous 1837 *Caroline* case, in which British soldiers in Canada crossed the Niagara River to attack and send over Niagara Falls the American steamship *Caroline* that was assisting Canadian rebels. The British asserted that they attacked in self-defense, but then-Secretary of State Daniel Webster wrote in correspondence with the British government in 1842 that the use of force prior to suffering an attack qualifies as legitimate self-defense only when the need to act is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."

The Department of Defense Law of War Manual issued during the Obama Administration (but maintained without change during the Trump Administration) incorporates the concept of anticipatory self-defense where the threat is imminent:

1.11.5.1 Responding to an Imminent Threat of an Attack. The text of Article 51 of the Charter of the United Nations refers to the right of self-defense "if an armed attack occurs against a Member of the United Nations." Under customary international law, States had, and continue to have, **the right to take measures in response to imminent attacks**. (Emphasis added; citations omitted).



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1.11.5.3 Use of Force to Protect Nationals Abroad. A State's right to use force in self-defense may be understood to include the right to use force to protect its nationals abroad. **The United States has taken action to protect U.S. nationals abroad when the government of the territory in which they are located was unwilling or unable to protect them. A State need not await actual violence against its nationals before taking such action if an attack against them is imminent**. (Emphasis added; citations omitted).

When is an attack "imminent"?

So how do we determine of an attack is "imminent"? In another Obama Administration document (also not disavowed by the Trump administration) this was the explanation:

"Under the jus ad bellum, a **State may use force in the exercise of its inherent right of self defense not only in response to armed attacks that have already occurred, but also in response to imminent attacks before they occur.** When considering whether an armed attack is imminent under the jus ad bellum for purposes of the initial use of force against another State or on its territory, the United States analyzes a variety of factors. **These factors include "the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage."** Moreover, "**the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent** for purposes of the exercise of the right of self-defense, **provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.**" Finally, as is now increasingly recognized by the international community, **the traditional conception of what constitutes an "imminent" attack must be understood in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations."** (Emphasis added; citations omitted).

What about the fact that the operation was conducted in Iraq? As noted above in the DoD Law of War Manual, the U.S. subscribes to the view that it will take "action to protect U.S. nationals abroad when the government of the territory in which they are located was unwilling or unable to protect them." A "growing number of States" agree with the U.S. (as do I) that this is the correct interpretation of international law. There doesn't seem to be any evidence that Iraq was willing or able to do what was necessary to disrupt Soleimani's plotting against Americans and their allies.

Not an "act of war"

In the *New Yorker* Robin Wright heatedly headlined that "The Killing of Qassem Suleimani Is Tantamount to an Act of War." She wrote:

Was the U.S. attack an act of war? Douglas Silliman, who was the U.S. Ambassador to Iraq until last winter and is now the president of the Arab Gulf States Institute in Washington, told me that the death of Suleimani was the equivalent of Iran killing the commander of U.S. military operations in the Middle East and South Asia. "If Iran had killed the commander of U.S. Central Command, what would we consider it to be?"

A few major points: 1) notwithstanding Ambassador Silliman's suggestion, there is no legal (or moral) equivalency between General Suleimani and the the U.S. Central Command commander (Marine General Kenneth McKenzie). Among many other things, Suleimani headed a terrorist organization, as General McKenzie does not; 2) there is no concept of "act of war" in international law (it's really a political term); and 3) to the extent it is somehow being suggested that Iran would have a legal right to respond, it is simply wrong.

Because Suleimani was engaged in internationally wrongful acts such as terrorism and more, Iran had no legal right, for example, to react in "self defense" of him or any such wrongdoer. International law does not countenance "anticipatory self-defense" in response to acts of lawful self-defense. If Iran wants to preclude further U.S. strikes, it just has to stop planning attacks against Americans and their allies. It really is that simple.

What is more is that the U.S. action is over (unless Iran continues to plot) so there is nothing to act in self-defense against. As President Trump said, "We did not take action to start a war." Finally, besides not permitting a nation to use of force to defend terrorists actively plotting mayhem, international law also does not permit – under any circumstances – the use of force simply for vengeance.

Bottom line

Again, given the facts as we know them, there is ample basis under international law to conclude that the U.S.'s strike against General Soleimani was an act within the purview of "inherent self-defense" as authorized by the UN Charter, and not an unlawful "assassination."

Still, as we like to say on Lawfire®, check the facts and the law, assess the argument, and decide for yourself!

White House '1264 Notice' and Novel Legal Claims for Military Action Against Iran

by Ryan Goodman

February 14, 2020

To its credit, the Trump administration has submitted a newly released notice to Congress, describing the legal and policy basis for the Jan. 2 airstrike against Qassem Soleimani, Iran's top military commander. The notice was required within 30 days of the administration's change to its self-proclaimed legal framework for use of military force. The reporting requirement is thanks to a recent statutory provision (under section 1264 of the National Defense Authorization Act) as explained by Rita Siemion and Benjamin Haas.

To its discredit, however, the administration's notice raises very serious concerns about the legal basis for the strike and the president's failure to go to Congress beforehand. What should also not be lost in any analysis of it are the assertions it makes about the administration's ability to engage in future military action against Iran. In that respect, the notice should be read alongside a Jan. 27 "Statement of Administration Policy" by the Office of Management and Budget concerning the 2002 Authorization for Use of Military Force (AUMF) Against Iraq, including the administration's claim that it already has congressional approval to wage a military campaign against Iran—and units of *Iraqi armed forces*.

The administration's positions amount to a fundamental revision of existing legal foundations for military action against Iran that can be undertaken by this and future presidents. Some of the underlying propositions are so extraordinary that it's unclear if the administration has sufficiently considered their implications. I offer the following observations to identify those implications and other concerns with the administration's position. The fundamental revision cannot withstand close legal scrutiny.

As a side note: the notice states that it is accompanied by a classified annex. That annex might include reference to the widely reported, accompanying U.S. strike on Jan. 2 against another Iranian military commander, Abdul Reza Shahlai, in Yemen.

1. Drops claim that Soleimani posed an "imminent" threat

The claim that Soleimani posed an imminent threat of attack has been a central plank in the administration's public justification for the Jan. 2 strike and for not going to Congress before taking action. When submitting a formal written statement to Congress, however, that justification drops out.

The absence of an imminent threat is relevant not only to the legal and policy basis for the strike on Jan. 2. It is also relevant for potential *future* military action. The administration's position appears to boil down to an assertion that it can use military force against Iran without going to Congress even if responding to a threat from Iran that is not urgent or otherwise imminent.

The notice also engages in a sleight of hand. It refers to imminence as a potential element of the constitutional framework (a sufficient but not necessary condition for the President to use force under Article II), but never applies that element to the facts. Instead, in all instances in which the notice refers to the facts justifying the Jan. 2 strike, it does not describe the threat as an imminent one. As one example:

> The President directed this action in response to **an escalating series of attacks in preceding months** by Iran and Iran-backed militias on United States forces and interests in the Middle East region. The purposes of this action were to protect United States personnel, to deter Iran from conducting or supporting **further attacks** against United States forces and interests, to degrade Iran's and Qods Force-backed militias' ability **to conduct attacks** and to end Iran's strategic escalation of attacks on, and threats to United States interests." (emphasis added)

Similarly, in describing the international legal basis for the strike, the notice states, "the strike targeting Soleimani in Iraq was taken … in response to a series of escalating armed attacks that Iran and. Iran-supported militias had **already conducted** against the United States. … Although **the threat of further attack existed**, recourse to the inherent right of self-defense was justified sufficiently by the **series of attacks that preceded** the January 2 strike" (emphasis added). And in another passage, the notice strangely refers to the U.S. military's intention to "deter future Iranian **attack plans**" (emphasis added). Not attacks, but attack plans. That sounds like the statement that the Department of Defense issued on Jan. 2 immediately following the strike. The Pentagon, at the time,

also refrained from any reference to a threat of imminent attack. Instead it referred to Soleimani's "**actively developing plans** to attack" and "deterring future Iranian **attack plans**." But "actively developing plans to attack" and "attack plans" sounds like something that has been going on for years, and many of those plans may be contingencies for if and when the United States uses force. As former Trump administration CIA official Douglas London wrote at *Just Security*:

> I do not debate we had intelligence regarding any number of prospective attacks Iran was facilitating through proxies in Iraq, and elsewhere. But don't we always? The Iranians design potential operations at various degrees of lethality and provocation, some of which they will execute, others to put aside for a rainy day. It's what they do.

The important point for our constitutional system of government is why then the Trump administration decided to strike Iran's top military commander when it did, and what justification could there be for not going to Congress beforehand.

As a side note: It is difficult to imagine how the strike against Shahlai would have simultaneously met the test of imminence. The U.S. embassy in Yemen has been closed since Feb. 2015, and the United States does not have a significant troop presence in Yemen. Was Shahlai about to strike the United States inside Yemen as Soleimani was about to strike the United States from inside Baghdad? That also seems difficult to square with statements by Secretary of State Mike Pompeo and other officials that the administration did not know the location of the future threats.

2. Claims of Iran's responsibility for militias that could boomerang against United States' support for militia and other military partners

The administration's position is based on an unstated premise: that Iran is legally responsible for the acts of so-called proxy forces. The notice aggregates—one might say, conflates—military actions of Iranian-backed militias (e.g., the attack on an Iraqi base that killed a US contractor) with the military actions of Iran (e.g., shoot down of the US drone) as a justification for striking Iran. But that only works if Iran is legally responsible for the actions of those militias. So then, what theory of "attribution" under the law of state responsibility is the administration claiming applies? Under international law, there

are two competing tests for attribution – a very high threshold of "effective control" and a lower threshold of "overall control." International courts have split over which is the proper test. So which is it for the Trump administration?

Here are some important dimensions of this issue to consider:

First, Professor Oona Hathaway has written that it would be very difficult for Iran to meet either of these tests in its relationships with various militias.

Second, the administration's earlier statements used terms to describe the relationship between Iran and militias that would not meet either test. Concepts like state "support" and "backing" an armed group do not make the cut. Yet, the War Powers Resolution report submitted by the White House to Congress on Jan. 4 (at least in its unclassified sections) refers to "Iran-**backed** militias" and "Qods Forces-**backed** militias." In the U.S. report to the United Nations on Jan. 8, Ambassador Kelly Craft referred to "Iran-**supported**," "**supporting**," and "Qods Force **supported** militias."

The notice includes new language—the term "direction"—that sounds more like a relationship that might meet the overall or effective control tests. It's curious to know what explains this gradual shift in the administration's language over time. More fundamentally, the notice indicates that the United States used force against Iran in some cases only for Iran's "support" to militias. The following sentence deserves close scrutiny:

> "The use of military force against Iranian Armed Forces was tailored narrowly to the identified Qods Force target's presence in Iraq and **support to, including in some cases direction of,** Iraqi militias that attacked United States personnel." (emphasis added)

This sentence appears to be an admission that "support" is broader than and does not always include "direction" by Iran—and that the United States has used force on the basis of Iran's "support" to militias alone.

A very significant implication of all this is the extraordinary consequences of a lower threshold of attribution that the administration may be setting for the global community and for other actors to use against the United States when we support non-state armed groups. The International Court of Justice's rationale for setting a very high threshold

was likely to avoid interstate conflict. A lower threshold could transform many proxy conflicts around the world into direct warfare between states by attributing the actions of nonstate actors to their state patrons. What's more, a lower threshold might put the United States on the hook – legally and politically – for abuses committed by non-state armed groups we support. Just think of the Syrian Kurds (YPG) and other Syrian opposition groups, the Kosovo Liberation Army (which a top US official labelled a terrorist group a few months before supporting them), the Northern Alliance, and various militia in Iraq. Does the Trump administration believe the United States is fully responsible for the violations committed by those armed groups and other groups we might support now or in future? What's more, one of the armed groups in the Trump administration's calculus is Iran's support for part of the Iraqi state's own armed forces. So, the same attribution rule might be applied to the United States' support for other state military forces (think: Saudi Arabia's bombing campaign in Yemen). Of course there may be sound humanitarian reasons to apply a lower threshold of attribution too. Where to set the threshold for attribution involves a delicate balance. There's good reason to doubt the administration has sufficiently thought through the implications.

Finally, whatever the legal or policy test the administration is using for attribution, does the intelligence community's assessment back up the claim that the relationships between Iran and various militia groups in fact meet the test? And what degree of confidence could the intelligence community provide? Is the administration using the concept of "support" as a fallback, because that's all the intelligence community as a whole can support with a sufficiently high degree of confidence?

3. Avoids a key variable: Risk of escalation

The notice avoids a key variable for adjudicating whether the president acted within his Article II powers as Commander-in-Chief: The risk of escalation to war with Iran. Even expansive views of the president's authority presented over time by the Justice Department's Office of Legal Counsel (including its 2018 opinion on the US strikes against Syria) assign great weight to this variable. A Top Expert Backgrounder by Brian Egan (former State Department Legal Adviser, former National Security Council Legal Adviser) and Tess Bridgeman (former National Security Council Deputy Legal Adviser) written several months before the Soleimani and Shahlai strikes explains:

> [E]ven in the OLC's view, the threshold for "war" in the constitutional sense is more easily met when the use of force at issue is against another nation state (rather than in its territory but with its consent) where there is a high likelihood of escalation. Although Iran is not a nuclear power, which would necessarily affect that calculus, its capacity as a nation-state with a strong military, including its cyber and ballistic missile capabilities, are relevant factors in this analysis, as is the extent of U.S. exposure given its significant footprint in the region where Iranian military forces (and their proxies) are present and active. The scope of U.S. objectives for the use of force will also affect the analysis, especially if those objectives are likely to require sustained operations or engender use of force in response by Iran. Those factors may distinguish this case from the U.S. strikes against Syria, for example.

The substantial risk of escalation as a result of the Soleimani and Shahlai strikes should have required the President to obtain prior congressional authorization for the use of force. In terms of the specific risk assessment, former Trump administration CIA official Douglas London made two important points. First, the risk of such escalation has been a consistent part of intelligence briefings. "Intelligence assessments on the anticipated escalatory paths Iran would follow in response to kinetic U.S. retaliatory measures have been consistent and well briefed to every president," wrote London. Second, as other experts have observed, the absence of a stronger response from Iran in the past month is no assurance at all. London explained that the regime is likely to employ a range of highly escalatory military actions against the United States without claiming attribution. Former senior CIA official, Marc Polymeropoulos, who served in the Trump administration until mid-2019, wrote at *Just Security*, "The U.S. and Iran are at the brink of open conflict and face years of asymmetric warfare because of the Soleimani killing." And then there's Iran's nuclear program. "Israeli intelligence officials have also determined that the escalating tensions have made Iran only more determined to gain a nuclear weapon, and to take concrete steps toward amassing enough nuclear fuel to build one," the New York Times reported on Feb. 13.

The administration may try to claim that its actions were de-escalatory. At least that has been part of the public messaging. Even if true, the substantial likelihood of being wrong means this was no decision for one man to make. It required going to Congress. The assertion of de-escalation also notably rests on the underlying claim that Iran was

engaged in "an escalating series of attacks in preceding months," as the notice, the White House War Powers report, another OMB Statement (on Feb. 12), and the US letter to the United Nations have each stated. But is that claim accurate?

First, as discussed above, a subset of these attacks were by militia groups, and it's not clear what level of support Iran provided. Second, a major inflection point was the Dec. 27 strike on an Iraqi base that killed a US contractor; however there's reason to doubt the administration's public representations of that incident. The Iranians reportedly did not intend to harm any personnel or escalate the low-level conflict—and the US intelligence community knows that to be the case. The New York Times reported:

> "American intelligence officials monitoring communications between Kataib Hezbollah and General Suleimani's Islamic Revolutionary Guards Corps learned that the Iranians wanted to keep the pressure on the Americans but had not intended to escalate the low-level conflict. The rockets landed in a place and at a time when American and Iraqi personnel normally were not there and it was only by unlucky chance that Mr. Hamid was killed, American officials said."

A recent report by the New York Times raises questions whether the Dec. 27 strike was even carried out by the Iran-backed militia group (Kataib Hezbollah) or instead by ISIS.

Assuming the Dec. 27 strike was carried out by the Iranian-backed militia, the US response was highly provocative and crossed a new line. The US military launched multiple attacks against Kataib Hezbollah, which is a formal part of the Iraqi armed forces. The U.S. strike reportedly killed at least 25 members of Kataib Hezbollah and injured at least 50 more. When groups stormed the US embassy in response, one of the most highly respected former US ambassadors, Thomas Pickering remarked on the U.S. responsibility for escalation:

> "One wonders, however, how much consideration was given to the bombing of Kataib Hezbollah in Iraq....
> If this is part of an extreme pressure campaign against Iran, and it appears to be, it doesn't appear as if, yet, it has developed the kind of deterrent function that it's supposed to. And one hopes that it will. But nevertheless, the continued ongoing nature of this particular conflict — and one has to call it a conflict now — of escalating pressure with no apparent basis for finding a way to turn that pressure into a diplomatic outcome does seem to be, once again, risking something that some of us call the bluff trap.
> You use military force. If one of the sides doesn't back down, and that's the only option, then in fact, you keep raising military force. And you know, sooner or later that looks like a war, acts like a war, and becomes a war."

The office of Iraq's Prime Minister condemned the US action, describing "the American attack **on the Iraqi armed forces** as an unacceptable vicious assault that will have dangerous consequences." Senior Iraqi officials appeared to blame the storming of our embassy on the United States' action. In terms of future escalation, it should be noted that the Jan. 2 strike killed not only Soleimani but also the head of Kataib Hezbollah (see Crispin Smith's analysis for the significance of that action). As a sign of the escalatory environment, the Pentagon hurried thousands of additional troops to the region following the Soleimani strike.

There's also reason to doubt the clarity of the picture presented by the United States on some incidents involving Iran in the months preceding the Soleimani strike. For example, when US officials stated there was an increased threat from Iran in the region in summer 2019, a senior British military official contradicted that account. As another example, although the administration claimed that Iran's shoot down of a US drone involved an unlawful use of force, significant legal questions remain about the position of the drone and its activities at the time. There are also good reasons to conclude that the US cyber operation in response to the drone shoot down crossed the line of a use of force, and its effects on Iran's military reportedly exceeded the United States' intended consequences.

None of this is to deny Iran has engaged in highly malicious military actions against the United States and our allies and partners in recent months, including the major strike on Saudi oil installations on Sept. 14. However, the full picture appears to be far different

from that presented by the Trump administration of a one-sided, aggressive ratcheting up by Iran. The weaknesses of the administration's claims on this score undermine the premise for the operation against Soleimani and doing so without going to Congress beforehand. Once again, there may be sound policy reasons for taking military action against Iran, but especially under what appears to be a proper understanding of the surrounding circumstances, it was not and is not a decision for one person alone to make.

4. Claims that Congress has already authorized military actions against Iran

An astonishing claim set forth in the new notice is that Congress has already authorized the administration to engage in wide-ranging military actions against Iran due to the 2002 Authorization for Use of Military Force Against Iraq. The OMB's Jan. 27 Statement staked out a similar position, but did not receive significant public attention coming in the midst of the Senate impeachment trial. The notice makes even clearer that the administration's position is *not limited to unit self-defense* of US and partner forces who come under fire from third parties (including Iranian-backed forces) while combatting ISIS. Rather the administration appears to be taking the position that Iranian forces, now designated as a terrorist organization, constitute a more general threat that triggers application of the 2002 Iraq-AUMF. Steve Vladeck and I have written an extended analysis that debunks this highly flawed position. The position is neither based on the best understanding of the law nor a "legally available" interpretation of the law (a lower standard that government lawyers sometimes use to satisfy their policy clients).

The notice uses vague language that appears to obfuscate when exactly administration lawyers changed their interpretation of the 2002 AUMF. The OMB states that the 2002 AUMF has "**long** been understood" to apply to Iran. The notice includes similar language ("long relied" and "longstanding interpretation"). But there's every reason to be doubtful. The Acting State Department Legal Adviser Marik String told the Senate the opposite in a public hearing in July 2019. Then-Secretary of the Army Mark Esper similarly assured the Senate in July 2019 that the 2002 AUMF did not authorize military force against Iran in his nomination hearing for Defense Secretary. There's also a dilemma here for the administration. The administration was required by statute to submit the notice within 30 days of any change in its position (and String promised he would do so). Then which is it? Did the administration fail to comply with statutory reporting requirement or did the administration reach its new view of the 2002 AUMF

only in the past few weeks? Even more significantly for the rule of law is whether the administration's lawyers reached this conclusion about the authority to kill before or after the Soleimani strike.

Finally, the administration's position is significantly undercut by the House's passage of HR.5543 (on Jan. 30) and the Senate's passage of S.J.Res. 68 (on Feb. 13). Both bills include explicit congressional findings that no current statute—including the 2001 and 2002 AUMFs—authorizes force against Iran. Regardless of a presidential veto, a strong bipartisan majority in both houses of Congress have now clearly repudiated, through congressional findings, the idea put forward by the administration.

5. Fails under international law

Much of the preceding analysis affects whether the U.S. military operation against Soleimani (and Shahlai) complied with the UN Charter's prohibition on the use of force except in self-defense. As I have previously written, the answer to that question has direct implications for the President's domestic legal authority. Leading legal experts have raised serious concerns about whether the Soleimani strike violated international law, including Geoffrey Corn and Rachel VanLandingham, Adil Haque, Oona Hathaway, Marko Milanovic, and others.

Since those scholars wrote, other information has come to light such as the New York Times report that the Iranians did not intend to harm any personnel or escalate the low-level conflict in the Dec. 27 attack on the Iraq base. As Marty Lederman observed, if that reporting is accurate, it would knock another leg out from under the administration's claim to have complied with international law in its direct response to the Dec. 27 attack —and, as a consequence, the president's Article II authority to have undertaken that military action without congressional authorization.

The notice omits a legal question concerning the rules governing the targeting killing of Soleimani. One may wonder if the administration lawyers across the agencies failed to arrive at a common conclusion. The issue here involves questions whether international human rights law applies (which might label the strike an extrajudicial killing or assassination) and whether the law of armed conflict applies. (And by international human rights law, I include extraterritorial application of customary international law, not just treaties which may have peculiar jurisdictional constraints.) Regardless of the

outcome to those questions, surely the administration is not claiming that the law of self-defense is a sufficient basis for addressing this issue, for that too would be legally unsustainable.

As a final note, regardless of the *legal* justification, the Soleimani strike represents a significant shift in U.S. *policy* by migrating targeting killing developed in the global war on terror for use against state actors. (Read Anthony Dworkin's analysis, "Soleimani Strike Marks a Novel Shift in Targeted Killing, Dangerous to the Global Order.") By statute, the 1264 notice was required to address not only the legal framework but the policy framework as well. The notice fails to do so on this question of profound importance.

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FUTURE WAR AND THE WAR POWERS RESOLUTION

Eric Talbot Jensen[*]

ABSTRACT

Since its passage in 1973 over the veto of then-President Nixon, the War Powers Resolution (WPR) has been laden with controversy. Labeled as everything from ineffective to unconstitutional, the WPR has generally failed in its design to require notification and consultation to Congress by the President. Despite numerous proposals to amend the WPR, it continues to languish in the twilight of Executive war powers, and its future is bleak.

With emerging technologies such as drones, cyber tools, nanotechnology, and genomics, the ineffectiveness of the WPR will prove even more profound. The WPR's reliance on "armed forces" and "hostilities" as triggers for the reporting and consulting requirements of the statute will prove completely inadequate to regulate the use of these advanced technologies. Rather, as the President analyzes the applicability of the WPR to military operations using these advancing technologies, he will determine that the WPR is not triggered and he has no reporting requirements. Recent conflicts (or potential conflicts) in Libya, Syria and Iraq highlight this inevitability.

For the WPR to achieve the aim it was originally intended to accomplish, Congress will need to amend the statute to cover emerging technologies that do not require "boots on the ground" to be effective and which would not constitute "hostilities." This article proposes expanding the coverage of the WPR from actions by armed forces to actions by armed forces personnel, supplies or capabilities. The article also proposes expanding the coverage of the statute to hostilities and violations of the sovereignty of other nations by the armed forces.

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INTRODUCTION

As United States President Barack Obama contemplated taking military action against Syria in the wake of alleged chemical attacks, he stated that he had authority to do so without Congressional approval.[1] However, after deciding to consult Congress, he was told that the wording of any resolution that would receive Congressional approval would have to be narrowly tailored, limiting the use of armed forces both in time and type.[2] In fact, Senator John McCain threatened that if President Obama were to put "boots on the ground" in Syria, he would face impeachment.[3] These preconditions for Congressional approval invoke the traditional tension between Congress's constitutional power to "declare war"[4] on one hand and the Executive's foreign affairs power and the President's role as Commander in Chief on the other.[5]

The debate is not new. Books,[6] judicial opinions,[7] commission reports,[8] law reviews,[9] and newspapers[10] regularly discuss this tension between Congress

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[1] Matthew Larotonda & Jon Garcia, *President Obama Seeks Congressional Approval for Syria Action*, ABC NEWS, (Aug. 31, 2013), http://abcnews.go.com/Politics/president-obama-seeks-congressional-approval-syria-action/story?id=20127274 (quoting President Obama, who said, "I believe I have the authority to carry out this military action without specific congressional authorization . . .").

[2] Karen Tumulty, *Reps. Chris Van Hollen, Gerry Connolly draft narrow authorization of force in Syria*, WASH. POST (Sept. 3, 2013), http://www.washingtonpost.com/politics/van-hollen-connolly-draft-narrow-authorization-of-force-in-syria/2013/09/03/7cbc6b60-14c0-11e3-b182-1b3bb2eb474c_story.html.

[3] Sean Sullivan, *McCain: Obama would face impeachment if he puts "boots on the ground" in Syria*, WASH. POST, Sept. 6, 2013, http://www.washingtonpost.com/blogs/post-politics/wp/2013/09/06/mccain-obama-would-face-impeachment-if-he-puts-boots-on-the-ground-in-syria/.

[4] U.S. CONST. art. 1, § 8, cl. 11.

[5] U.S. CONST. art. 2, § 2, cl. 1.

[6] *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990); MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 1 (2013).

[7] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[8] *See* JAMES A. BAKER, III ET AL., UNIV. OF VA., MILLER CTR. OF PUB. AFFAIRS, NAT'L WAR POWERS COMM'N REPORT 11–19 (2008), *available at* http://millercenter.org/policy/commissions/warpowers/report.

[9] *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Michael A. Newton, *Inadvertent* Implications of the War Powers Resolution, 45 CASE W. RES. J. INT'L L. 173, 179–80 (2012); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 CORNELL L. REV. 45 (2007); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander In Chief*, 80 VA. L. REV. 833, 835 (1994); Robert F. Turner, *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud That Contributed Directly to the 9/11 Attacks*, 45 CASE. W. RES. J. INT'L L. 109 (2012); Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A. L. REV. 683 (1984), *available at* http://digitalcommons.lmu.edu/llr/vol17/iss3/5.

and the President on the use of military force. The debate has been characterized by what seems to be an ever-increasing adventurism by the President and an ever-decreasing willingness to exert power by the Congress.[11] Perhaps the last show of real strength in the debate from Congress came in the immediate aftermath of the Vietnam War.[12] With the President in crisis,[13] Congress passed a joint resolution that became known as the War Powers Resolution (WPR).[14] It was intended to re-exert Congress's power over war making and force the President to provide notification and seek approval for the use of the military.[15] After passage, President Nixon immediately vetoed the Resolution, claiming it was clearly an unconstitutional infringement on his role as the Executive.[16]

Congress responded by overriding President Nixon's veto on November 7, 1973.[17] Almost immediately, the War Powers Resolution became a source of great controversy. In addition to President Nixon and his successors,[18] scholars[19] have claimed the WPR is an unconstitutional infringement on Commander-in-Chief powers. These constitutional issues can be broadly characterized in two major categories: the allocation of war powers between the President and Congress; and, the requirement for the President to withdraw

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[10] *See, e.g.*, Stephen G. Rademaker, *Congress and the myth of the 60-Day Clock*, WASH. POST (May 24, 2011), http://articles.washingtonpost.com/2011-05-24/opinions/35233150_1_libya-operation-war-powers-resolution-president-obama; Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16.

[11] Geoffrey S. Corn, *Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality*, 14 LEWIS & CLARK L. REV. 687, 690 (2010). "Presidents will invariably interpret the failure of Congress to affirmatively oppose such initiatives as a license to continue operations." *Id.*; John Yoo, *Like It or Not, Constitution Allows Obama to Strike Syria Without Congressional Approval*, FOX NEWS, Aug. 30, 2013, http://www.foxnews.com/opinion/2013/08/30/constitution-allows-obama-to-strike-syria-without-congressional-approval/ (summarizing the historical tension between Congress' power to declare war and the President's role as Commander in Chief).

[12] Louis Fisher & David Gray Adler, *The War Powers Resolution: Time To Say Goodbye*, 113 POL. SCI. Q. 1 (1998). "The War Powers Resolution (WPR) of 1973 is generally considered the high-water mark for congressional reassertion in national security affairs." *Id.*

[13] Newton, *supra* note 9, at 179–80 (explaining that President Nixon was in the throes of the Watergate scandal at this time).

[14] War Powers Resolution of 1973, Pub. L. No. 93-148 §8, 87 Stat. 559 (codified as 50 U.S.C. §§ 1541–1548 (2006)).

[15] *Id.* at § 1541.

[16] Veto of War Powers Resolution, 9 WEEKLY COMP. PRES. DOC. 1285 (Oct. 24, 1973).

[17] 119 Cong. Rec. 36, 198, 221–22 (1973)) (Senate); *id.* at 36, 221–22 (House).

[18] For example, see President Nixon's explanation of his veto of the proposed law. Veto of War Powers Resolution, 9 WEEKLY COMP. PRES. DOC. 1285 (Oct. 24, 1973). 5 Pub. Papers 893 (Oct. 24, 1973).

[19] *See, e.g.*, BAKER ET AL., *supra* note 8, at 23; Abraham D. Sofaer, *The War Powers Resolution: Fifteen Years Later*, 62 TEMP. L. REV. 317, 326 (1989); Turner, *supra* note 9.

forces either after sixty days of inaction by Congress approving the deployment or after a concurrent resolution by Congress.[20]

One of the topics that has received insufficient attention in the continuing discourse, and the topic of this article, is the potential impact and applicability of the WPR to future armed conflicts.[21] The world stands on the threshold of incredible advances in weapons technology that are of such a qualitative nature the borders of the current laws governing the use of force will be pushed.[22] The use of cyber tools to accomplish military operations, the development and weaponization of nanotechnology, the linkage of virology to individual or group DNA, the automation of weapons systems, and the development of robotics all represent likely aspects of future armed conflicts whose effects on the WPR have not yet been considered.

The WPR is not sufficiently clear with respect to its application to future weapon systems. The triggering language of "in any case in which United States Armed Forces are introduced—(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; [or] (2) into the territory, airspace or waters of a foreign nation," was written in an era where the means and methods of armed conflict were centered on humans interacting on a geographically limited battlefield.[23] Though this will continue to be true in the future for most armed conflicts, technologically advanced nations such as the United States are developing and will continue to develop new weapons that will not require human interaction in combat to be effective.[24] The current language of the WPR is ineffective to ensure Congressional participation in the President's use of these weapons. If Congress intends the WPR to act as a restraint on presidential use of force in the future, the WPR needs to be amended to clarify that "boots on the ground" and hostilities are not the only required trigger to invoke the WPR's provisions.

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[20] RICHARD F. GRIMMETT, THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS, CONG. RESEARCH SERV. 6–9 (2010).

[21] Newton, *supra* note 9, at 181.

[22] *See* Eric Talbot Jensen, *The Future of the Law of Armed Conflict: Ostriches, Butterflies, and Nanobots*, 35 MICH. J. INT'L L. 253 (2014).

[23] *See* 50 U.S.C. § 1543.

[24] Because this Article will deal specifically with U.S. domestic legislation known as the War Powers Resolution, the paper will focus on emerging technologies and weapons within the context of the United States.

Part I of this paper will highlight some of the advancing technologies and resulting current and future weapons systems that the United States has and will have in its arsenal. Part II will briefly discuss the passage of the War Powers Resolution and the demonstrated intent of Congress. Part II will then address the triggering language of the WPR, including its original understanding, and its subsequent evolution. Part III will demonstrate the inadequacy of the current language of the WPR to effectively apply to future weapon systems. Part IV will analyze various proposed amendments to the WPR, show how they also do not account for future technologies, and then propose a simple amendment to the WPR that will accomplish this important objective.

I. FUTURE ARMED CONFLICT

It would be nearly impossible to accurately guess what weapons technologies will be developed in the future, or even in the next few decades. However, what does seem clear is that weapons technology is advancing at a rapid rate and that this trend will continue.[25] Many of these advancing technologies will be so qualitatively different from current means and methods of warfare that they will undercut the fundamental understanding of the WPR and Congress's intent to regulate the use of military force by the President.

The following section will briefly describe some of the known areas of advancing technology in weapons. The focus will be on discussing weapons that will likely raise important questions as to the applicability and effectiveness of the WPR as those weapons are put into use. The means of

[25] There is no way to adequately describe even a small number of the new technologies that will become a common part of armed conflict in the future; *see* Duncan Blake & Joseph Imburgia, *"Bloodless Weapons"? The Need to Conduct Legal Reviews of Certain Capabilities and the Implications of Defining Them as Weapons*, 66 A.F. L. REV. 157 (2010); David Axe, *Military Must Prep Now for 'Mutant' Future, Researchers Warn*, WIRED.COM (Dec. 31, 2012, 6:30 AM), http://www.wired.com/dangerroom/2012/12/pentagon-prepare-mutant-future/; Patrick Lin, *Could Human Enhancement Turn Soldiers Into Weapons That Violate International Law? Yes*, THE ATLANTIC (Jan. 4, 2013), http://www.theatlantic.com/technology/print/2013/01/could-human-enhancement-turn-soldiers-into-weapons-that-violate-international-law-yes/266732/; Anna Mulrine, *Unmanned Drone Attacks and Shape-shifting Robots: War's Remote-control Future*, CHRISTIAN SCI. MONITOR (Oct. 22, 2011), http://www.csmonitor.com/USA/Military/2011/1022/Unmanned-drone-attacks-and-shape-shifting-robots-War-s-remote-control-future; Noah Schachtman, *Suicide Drones, Mini Blimps and 3D Printers: Inside the New Army Arsenal*, WIRED.COM (Nov. 21, 2012), http://www.wired.com/dangerroom/2012/11/new-army-arsenal/; Noah Schachtman, *DARPA's Magic Plan: 'Battlefield Illusions' To Mess With Enemy Minds*, WIRED.COM, (Feb. 14, 2012), http://www.wired.com/dangerroom/2012/02/darap-magic/; Mark Tutton, *The Future of War: Far-out Battle Tech*, CNN.COM (Dec. 16, 2011), http://www.cnn.com/2011/12/15/tech/innovation/darpa-future-war/index.html.

warfare will be addressed first, followed by a shorter section on methods of warfare.

A. Means of Warfare

The means of warfare, or armed conflict as it is more generally described in modern usage, refers to the implements used to conduct the conflict.[26] More broadly, they can be thought of as the weapons of warfare, such as rifles, artillery shells, or bombs.[27] As the products of advancing research, future weapons will be more lethal, more accurate, more survivable, and less expensive. Most importantly for this article, they will also be less human. In other words, as these emerging weapons do their harm, they will create greater distance, both in time and space, between the weapon's deleterious effects and the human that creates, authorizes, initiates, or uses them. The following examples demonstrate the point and provide instructive illustrations as to why the WPR is becoming less and less effective as a means of ensuring Congressional input on the use of military force, as will be discussed in Part III.

1. Drones

Drones are a quickly developing technology whose use has been widely documented.[28] Both armed and unarmed drones are being used in combat zones, along borders,[29] and across the world.[30] Within the U.S. drones are being used by local law enforcement and the U.S. Federal Aviation

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[26] *See* Blake & Imburgia, *supra* note 25, at 168–69.

[27] *Id*. at 170.

[28] *See* Peter Bergen & Katherine Tiedemann, *Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan*, 90 FOREIGN AFF. 12 (2011); Mark Bowden, *The Killing Machines: How to Think About Drones*, THE ATLANTIC (Sept. 2013), *available at* http://www.theatlantic.com/magazine/archive/2013/09/the-killing-machines-how-to-think-about-drones/309434/; *see also*, Tony Rock, *Yesterday's Laws, Tomorrow's Technology: The Laws of War and Unmanned Warfare*, 24 N.Y. INT'L L. REV. 39 (2011) (discussing the use of drones and their legal implications).

[29] Perry Chiaramonte, *UN using drones to monitor Congo border, fleet to grow this spring*, FOX NEWS, (Mar. 1, 2014), http://www.foxnews.com/world/2014/03/01/un-using-drones-to-monitor-congo-border-fleet-to-grow-this-spring/; Tim Gaynor, *U.S. drones to watch entire Mexico border from September 1*, REUTERS (Aug. 30, 2010), http://www.reuters.com/article/2010/08/30/us-usa-immigration-security-idUSTRE67T5DK20100830.

[30] Bergen & Tiedemann, *supra* note 28; Craig Whitlock, *U.S Expands Secret Intelligence Operations in Africa*, WASH. POST (June 13, 2012), http://articles.washingtonpost.com/2012-06-13/world/35462541_1_burkina-faso-air-bases-sahara.

Administration has been tasked with determining how to regulate the use of domestic airspace for drones.[31]

As the technology continues to develop, drones' lethality and capability will dramatically increase, while their size and detectability will dramatically decrease.[32] In combination with other advancing technologies discussed below, the United States will soon be able to deploy miniature (microscopic) drones in large quantities from great distances and which have significant lethal and non-lethal effects. Their potential for affecting future warfare has caused P.W. Singer to describe drones as a "game changer" on the level with the atomic bomb.[33]

Important for this article, drones can be remotely guided[34] or even preprogrammed.[35] No human need be anywhere close to the drone as it takes its lethal or non-lethal action. Rather, large numbers of drones can be engaged in significant actions at great distances and at delayed times from the pilots who both fly the drones and direct the action.[36] This resulting lack of risk to U.S. military personnel has already been the topic of much discussion, especially among ethicists who worry that the "low-cost" of war will make it too easy of an option.[37] These same characteristics will also cause concerns

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[31] WELLS C. BENNETT, UNMANNED AT ANY SPEED 55 (2012), *available at* http://www.brookings.edu/research/papers/2012/12/14-drones-bennett.

[32] Elisabeth Bumiller & Thom Shanker, *War Evolves With Drones, Some Tiny as Bugs*, N.Y. TIMES (June 19, 2011), http://www.nytimes.com/2011/06/20/world/20drones.html?pagewanted=all.

[33] *US Expert Discusses Robotics in War*, AUSTL. BROAD. CORP. (Feb. 29, 2012), http://www.abc.net.au/lateline/content/2012/s3442876.htm.

> I think the way to think about [unmanned drones] is they are a game-changer when it comes to both technology, but also war and the politics that surrounds war. This is an invention that's on the level of gunpowder or the computer or the steam engine, the atomic bomb. It's a game changer.

Id.

[34] Bryony Jones, *Flying Lessons: learning how to pilot a drone*, CNN (June 30, 2011, 8:32 AM), http://www.cnn.com/2011/WORLD/europe/06/29/drone.flying.lesson/.

[35] Mike Hanlan, *Little Bird–Helicopter Without a Pilot*, GIZMAG (July 12, 2006), http://www.gizmag.com/go/5863/.

[36] *See* Patrick Lin, *Drone-Ethics Briefing: What a Leading Robot Expert Told the CIA*, THE ATLANTIC (Dec. 2011), *available at* http://www.theatlantic.com/technology/print/2011/12/drone-ethics-briefing-what-a-leading-robot-expert-told-the-cia/250060/.

[37] See*, e.g.*, *id*. ("Some critics have worried that UAV operators—controlling drones from half a world away—could become detached and less caring about killing, given the distance, and this may lead to more unjustified strikes and collateral damage.").

with respect to the intended purposes of the WPR,[38] as will be discussed in Part III.

2. Cyber

Cyber tools are already demonstrating their effectiveness. Recent cyber incidents include facilitating the theft of millions of dollars from automated teller machines,[39] state-sponsored theft of corporate trade secrets,[40] and the disruption of government communication systems during a military attack.[41] The infamous STUXNET[42] malware "infected about 100,000 computers worldwide, including more than 60,000 in Iran, more than 10,000 in Indonesia and more than 5,000 in India"[43] in the process of destroying almost 1,000 centrifuges in an Iranian nuclear facility.[44] The recent Flame malware[45] was designed to gather immense amounts of secretive government data and "exceeds all other known cyber menaces to date" according to Kapersky Lab and CrySys Lab which discovered the malware.[46]

Similar to drones, cyber operations have also been written about extensively,[47] including the recently published Tallinn Manual on the

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[38] *See* Julia L. Chen, *Restoring Constitutional Balance: Accommodating the Evolution of War*, 53 B. C. L. Rev. 1767, 1788–90 (2012).

[39] Marc Santora, *In Hours, Thieves Took $45 Million in A.T.M. Scheme*, N.Y. TIMES (May 10, 2013), at A1.

[40] Lee Ferran, *Report Fingers Chinese Military Unit in US Hack Attacks*, ABC NEWS (Feb. 18, 2013), http://abcnews.go.com/Blotter/mandiant-report-fingers-chinese-military-us-hack-attacks/story?id=18537307.

[41] Collin Allan, *Direct Participation in Hostilities from Cyberspace*, 54 VA. J. INT'L L. 173, 174 n.5 (2013); Paulo Shakarian, *The 2008 Russian Cyber Campaign Against Georgia*, MIL. REV. 63 (Dec. 2011).

[42] Amr Thabet, *STUXNET Malware Analysis Paper,* CODEPROJECT (Sept. 6, 2011), http://www.codeproject.com/Articles/246545/Stuxnet-Malware-Analysis-Paper.

[43] Holger Stark, *Stuxnet Virus Opens New Era of Cyber War*, SPIEGEL ONLINE (Aug. 8, 2011, 3:04 PM), http://www.spiegel.de/international/world/mossad-s-miracle-weapon-stuxnet-virus-opens-new-era-of-cyber-war-a-778912.html. Admittedly, STUXNET was governed by the *jus ad bellum*, but similar malware will undoubtedly be used during armed conflict in the future. For an analysis of STUXNET under the *jus in bello*, see Jeremy Richmond, *Evolving Battlefields: Does STUXNET Demonstrate a Need for Modifications to the Law of Armed Conflict?*, 35 FORDHAM INT'L L.J. 842 (2012).

[44] *See* Atika Shubert, *Cyber Warfare: A Different Way to Attack Iran's Reactors*, CNN (Nov. 8, 2011), http://www.cnn.com/2011/11/08/tech/iran-stuxnet/.

[45] *Full Analysis of Flame's Command and Control Servers*, SECURELIST (Sept. 17, 2012, 1:00 PM), http://www.securelist.com/en/blog/750/Full_Analysis_of_Flame_s_Command_Control_servers.

[46] David Gilbert, *Flame Virus Update: UK Servers Used to Control Malware*, INT'L BUS. TIMES NEWS (June 6, 2012), http://www.ibtimes.co.uk/articles/349195/20120606/flame-update-servers-shut-down.htm.

[47] *E.g.* Michael N. Schmitt, *The Principle of Distinction in 21st Century Warfare,* 2 YALE HUM. RTS. & DEV. L.J. 143 (1999); Sean Watts, *Combatant Status and Computer Network Attack*, 50 VA. J. INT'L L. 391 (2010); MICHAEL N. SCHMITT ET AL., 76 INTERNATIONAL LAW STUDIES: COMPUTER NETWORK ATTACK AND

International Law Applicable to Cyber Warfare (Tallinn Manual) which provides rules and commentary on the application of the law of armed conflict (LOAC) to cyber operations.[48] Many nations are embracing the capabilities that cyber tools provide[49] because of their bloodless nature[50] and the increased set of targets to which such tools provide access.[51]

In addition to nations, cyber tools are increasingly available to non-state actors. Individual hackers have been known to develop sophisticated malware and cause great damage.[52] Large markets have now developed around the production and sale of cyber tools,[53] making them available to the highest bidder at very reasonable prices. One of the unique characteristics of cyber tools is their propensity to be reengineered or "copycatted."[54] As reported by David Hoffman,

> Langner [who first discovered the STUXNET malware] warns that such malware can proliferate in unexpected ways: "Stuxnet's attack code, available on the Internet, provides an excellent blueprint and jump-start for developing a new generation of cyber warfare weapons." He added, "Unlike bombs, missiles, and guns, cyber weapons can be copied. The proliferation of cyber weapons cannot be controlled. Stuxnet-inspired weapons and weapon technology will soon be in the hands of rogue nation states, terrorists, organized crime, and legions of leisure hackers."[55]

INTERNATIONAL LAW (2002); Eric Talbot Jensen, *Unexpected Consequences From Knock-on Effects: A Different Standard for Computer Network Operations?*, 18 AM. U. INT'L L. REV. 1145, 1150 (2003).

48 THE TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 4–5 (Michael N. Schmitt ed., 2013) (hereinafter THE TALLINN MANUAL).

49 Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Casualties*, 13 SMU SCI. & TECH. L. REV. 249, 249 (2010); Graham H. Todd, *Armed Attack in Cyberspace: Deterring Asymmetric Warfare with an Asymmetric Definition*, 64 A.F. L. REV. 65, 96 (2009).

50 Blake & Imburgia, *supra* note 25, at 181–83.

51 *See generally* THE TALLINN MANUAL, *supra* note 48; Eric Talbot Jensen, *President Obama and the Changing Cyber Paradigm*, 37 WILLIAM MITCHELL L. REV. 5049 (2011).

52 *E.g.*, David Kleinbard & Richard Richtmyer, *U.S. Catches 'Love' Virus*, CNNMONEY (May 5, 2000, 11:33 PP), http://money.cnn.com/2000/05/05/technology/loveyou/.

53 Michael Riley & Ashley Vance, *Cyber Weapons: The New Arms Race,* Bloomberg Businessweek (July 20, 2011), http://www.businessweek.com/magazine/cyber-weapons-the-new-arms-race-07212011.html.

54 Mark Clayton, *From the man who discovered Stuxnet, dire warnings one year later*, CHRISTIAN SCI. MONITOR (Sept. 22, 2011), http://www.csmonitor.com/USA/2011/0922/From-the-man-who-discovered-Stuxnet-dire-warnings-one-year-later.

55 David E. Hoffman, *The New Virology*, 185 FOREIGN POL'Y 78, 78 (2011), *available at* http://www.foreignpolicy.com/articles/2011/02/22/the_new_virology?print=yes&hidecomments=yes&page=full.

Because of the proliferation of cyber tools across all levels of society, the United States will continue to need to develop and use cyber capabilities to conduct both defensive protective measures, but also offensive cyber actions. In fact, the Air Force recently announced that it has classified six specific cyber tools as "weapons"[56] and Congress recently provided authorization for the United Stated Department of Defense ("DoD") to conduct "offensive operations in cyberspace."[57] Additionally, U.S. Cyber Command, General Keith Alexander, announced in March 2013 that the Pentagon will have 13 offensive cyber teams by fall 2015.[58]

In addition, the Guardian newspaper recently reported that President Obama "ordered his senior national security and intelligence officials to draw up a list of potential overseas targets for U.S. cyber-attacks,"[59] and the Washington Post reported that "U.S. intelligence services carried out 231 offensive spy-operations in 2011."[60]

Cyber weapons are, and will continue to be, a part of the United States' military arsenal. As will be seen in Part III, the distance in both time and space by which these cyber tools can be effectively used demonstrates the ineffectiveness of the WPR in future armed conflicts.[61]

3. Robots and Autonomous Weapons

The use of robotics and autonomous systems by the United States military has not progressed as far or as fast as that of drones and cyber operations, but their use is clearly increasing. As noted by Singer,

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[56] Andrea Shalal-Esa, *Six U.S. Air Force Cyber Capabilities Designated "Weapons"*, REUTERS (Apr. 8, 2013), http://www.reuters.com/article/2013/04/09/net-us-cyber-airforce-weapons-idUSBRE93801B20130409.

[57] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, Sec. 954, 125 Stat. 1298, 354 (2011).

[58] Ellen Nakashima, *Pentagon Creating Teams to Launch Cyberattacks as Threat Grows* (Mar. 12, 2013), WASH. POST, http://articles.washingtonpost.com/2013-03-12/world/37645469_1_new-teams-national-security-threat-attacks.

[59] Glenn Greenwald & Ewen MacAskill, *Obama Orders US to Draw Up Overseas Target Lists for Cyber-Attacks*, GUARDIAN (June 7, 2013), http://www.theguardian.com/world/2013/jun/07/obama-china-targets-cyber-overseas.

[60] Barton Gellman & Ellen Nakashima, *U.S. Spy Agencies Mounted 231 Offensive Cyber-Operations in 2011, Documents Show*, WASH. POST (Aug. 30, 2013), http://www.washingtonpost.com/world/national-security/us-spy-agencies-mounted-231-offensive-cyber-operations-in-2011-documents-show/2013/08/30/d090a6ae-119e-11e3-b4cb-fd7ce041d814_story.html.

[61] *See also* Chen, *supra* note 38, at 1790–92.

> When the U.S. military went into Iraq in 2003, it had only a handful of robotic planes, commonly called "drones" but more accurately known as "unmanned aerial systems." Today, we have more than 7,000 of these systems in the air, ranging from 48-foot-long Predators to micro-aerial vehicles that a single soldier can carry in a backpack. The invasion force used zero "unmanned ground vehicles," but now we have more than 12,000, such as the lawnmower-size Packbot and Talon, which help find and defuse deadly roadside bombs.[62]

Thomas Adams, a retired Army Colonel, argues that "[f]uture Robotic weapons 'will be too fast, too small, too numerous and will create an environment too complex for humans to direct,'" and "[i]nnovations with robots 'are rapidly taking us to a place where we may not want to go, but probably are unable to avoid.'"[63]

The development and use of autonomous systems, including robots, unarmed and armed unmanned aerial and underwater vehicles,[64] auto-response systems such as armed unmanned sentry stations,[65] and a host of other similar weapon systems is clearly increasing.[66] In addition to the United States, "there are 43 other nations that are also building, buying and using military robotics today."[67] In 2005, a published military report "suggested autonomous robots on the battlefield will be the norm within 20 years,"[68] and a recent DoD report titled *Unmanned Systems Integrated Roadmap FY2011-2036*, stated that it "envisions unmanned systems seamlessly operating with manned systems

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[62] Peter W. Singer, *We, Robot*, SLATE (May 19, 2010), http://www.slate.com/articles/news_and_politics/war_stories/2010/05/we_robot.html; *see also* Elisabeth Bumiller & Thom Shanker, *War Evolves With Drones, Some Tiny as Bugs*, N.Y. TIMES (June 19, 2011), http://www.nytimes.com/2011/06/20/world/20drones.html?pagewanted=all&_r=0.

[63] *Robots on Battlefield: Robotic Weapons Might be the Way of the Future, But They Raise Ethical Questions About the Nature of Warfare*, TOWNSVILLE BULL. (Sept. 18, 2009).

[64] Damien Gayle, *Rise of the Machine: Autonomous killer robots 'could be developed in 20 years'*, DAILYMAIL (Nov. 20, 2012), http://www.dailymail.co.uk/sciencetech/article-2235680/Rise-Machines-Autonomous-killer-robots-developed-20-years.html.

[65] Jonathan D. Moreno, *Robot Soldiers Will Be a Reality—And a Threat*, WALL ST. J. (May 11, 2012, 6:07 PM), http://online.wsj.com/article/SB10001424052702304203604577396282717616136.html.

[66] John Markoff, *U.S. aims for robots to earn their stripes on the battlefield*, INT'L HERALD TRIBUNE (Nov. 27, 2010).

[67] Steve Kanigher, *Author talks about military robotics and the changing face of war*, LAS VEGAS SUN (Mar. 17, 2011, 2:01 AM), http://www.lasvegassun.com/news/2011/mar/17/military-robotics-and-changing-face-war/.

[68] P.W. Singer, *In the Loop? Armed Robots and the Future of War*, DEFENSE INDUSTRY DAILY (Jan. 28, 2009, 20:09), http://www.defenseindustrydaily.com/In-the-Loop-Armed-Robots-and-the-Future-of-War-05267/.

while gradually reducing the degree of human control and decision making required for the unmanned portion of the force structure."[69]

Current controversy has erupted around autonomous systems when the DoD issued *Autonomy in Weapon Systems,*[70] a directive that applies to the "design, development, acquisition, testing, fielding, and employment of autonomous and semi-autonomous weapon systems, including guided munitions that can independently select and discriminate targets."[71] The Directive deals specifically with the autonomous nature of future systems and states that "It is DoD policy that . . . [a]utonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force."[72] Immediately following the issuance of the DoD Directive, Human Rights Watch published a report[73] calling for a multilateral treaty that would "prohibit the development, production, and use of fully autonomous weapons."[74] This report has, in turn, been assailed by law of war experts who attack the underlying legal and practical assumptions it contains.[75]

At this point, it is unclear how the issues surrounding robots and autonomous weapon systems will all resolve, but it seems very unlikely that the military will abandon such a useful tool. In fact, it seems much more likely that research, development, and employment of robots and autonomous systems, including autonomous weapon systems, will continue to increase and become an even larger portion of the military arsenal. The employment of these non-human weapons has significant potential impact on the effectiveness of the WPR, as will be discussed below.

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[69] U.S. DEP'T OF DEFENSE, UNMANNED SYSTEMS INTEGRATED ROADMAP FY2011-2036 (2011), *available at* http://www.acq.osd.mil/sts/docs/Unmanned%20Systems%20Integrated%20Roadmap%20FY2011-2036.pdf.

[70] U.S. DEP'T OF DEFENSE, DIRECTIVE No. 3000.09, AUTONOMY IN WEAPON SYSTEMS (Nov. 21, 2012). The Directive followed a DoD Defense Science Board Task Force Report that was issued in July of 2012. U.S. DEP'T OF DEFENSE SCIENCE BOARD, THE ROLE OF AUTONOMY IN DOD SYSTEMS (July 2012), *available at* http://www.fas.org/irp/agency/dod/dsb/autonomy.pdf.

[71] DEPARTMENT OF DEFENSE, DIRECTIVE No. 3000.09 § 2(a)(2), The Directive does not apply to "autonomous and semi-autonomous cyberspace systems for cyberspace operations; unarmed, unmanned platforms; unguided munitions; munitions manually guided by the operator (e.g. laser- or wire-guided munitions); mines; or unexploded explosive ordnance." *Id*. § 2(b).

[72] *Id.* § 4(a).

[73] HUMAN RIGHTS WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS (2012*), available at* http://www.hrw.org/sites/default/files/reports/arms1112ForUpload_0_0.pdf.

[74] *Id.* at 5.

[75] *See, e.g.,* Michael Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, 4 HARV. NAT'L SEC. J. 1 (2013).

4. Nanotechnology

According to a U.S. government website, "[n]anotechnology is the understanding and control of matter at the nanoscale, at dimensions between approximately 1 and 100 nanometers, where unique phenomena enable novel applications."[76] In the United States, the National Science and Technology Council oversees nanotechnology development with the goal to "expedite[] the discovery, development and deployment of nanoscale science, engineering, and technology to serve the public good through a program of coordinated research and development aligned with the missions of the participating agencies."[77] China and Russia are also "openly investing significant amounts of money in nanotechnology."[78]

The U.S. DoD was quick to recognize the potential benefits of nanotechnology. In 2006, Forbes reported:

> The Department of Defense has spent over $1.2 billion on nanotechnology research through the National Nanotech Initiative since 2001. The DOD believed in nano long before the term was mainstream. According to Lux Research, the DOD has given grants totaling $195 million to 809 nanotech-based companies starting as early as 1988. Over the past ten years, the number of nanotech grants has increased tenfold.[79]

Potential applications of nanotechnology to military purposes are numerous. Blake and Imburgia, both military lawyers, have written:

> Scientists believe nanotechnology can be used to develop controlled and discriminate biological and nerve agents; invisible, intelligence gathering devices that can be used for covert activities almost anywhere in the world; and artificial viruses that can enter into the human body without the individual's knowledge. So called "nanoweapons" have the potential to create more intense laser technologies as well as self-guiding bullets that can direct themselves to a target based on artificial intelligence. Some experts also believe nanotechnology possesses the potential to attack buildings as a

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[76] *What it is and How it Works*, NANO.GOV, http://www.nano.gov/nanotech-101/what (last visited Mar. 5, 2013).

[77] *NNI Vision, Goals, and Objectives*, NANO.GOV, http://www.nano.gov/about-nni/what/vision-goals (last visited Mar. 5, 2013).

[78] Blake & Imburgia, *supra* note 25, at 180.

[79] Josh Wolfe & Dan van den Bergh, *Nanotech Takes on Homeland Terror*, FORBES.COM (Aug. 14, 2006, 6:00 AM), http://www.forbes.com/2006/08/11/nanotech-terror-cepheid-homeland-in_jw_0811soapbox_inl.html.

> "swarm of nanoscale robots programmed only to disrupt the electrical and chemical systems in a building," thus avoiding the collateral damage a kinetic strike on that same building would cause.[80]

Foreseeable weapons advances from nanotechnology include improving the strength and longevity of machinery,[81] advances in stealth technology,[82] allowing the creation of more powerful and efficient bombs,[83] and the miniaturization of nuclear weapons.[84] Perhaps most importantly for this article, nanotechnology will likely eventually allow for the creation of microscopic nanobots that can not only act as sensors to gather information, but also serve as delivery systems for lethal toxins or genomic alterers into human bodies.[85]

Nanotechnology will make weapons smaller, more mobile, and more potent. It will provide easier, quicker, and more accurate means of collecting information. It will allow greater range, effect, and lethality. And it will do all of this at great distances from any human influence and with kinetic effects that cover the full spectrum of possibilities. The WPR currently does not seem to encompass the military application of such technology.

5. Virology and Genomics

These two areas of advancing technologies are early in their development. Insofar as they overlap with biological weapons, such use by nations has already been internationally prohibited.[86] However, their increased accessibility to the general public has raised grave concerns amongst

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[80] Blake & Imburgia, *supra* note 25, at 180 (citations omitted).

[81] *Benefits and Applications*, NAT'L NANOTECHNOLOGY INST., http://nano.gov/you/nanotechnology-benefits (last visited Oct. 2, 2012).

[82] Clay Dillow, *Carbon Nanotube Stealth Paint Could Make Any Object Ultra-Black*, POPSCI (Dec. 6, 2011, 12:15 BST), http://www.popsci.com/technology/article/2011-12/paint-imbued-carbon-nanotubes-could-make-any-object-absorb-broad-spectrum-light.

[83] Adrian Blomfield, *Russian Army 'Tests the Father of All Bombs'*, TELEGRAPH (Sept. 12, 2007, 12:01 AM), http://www.telegraph.co.uk/news/worldnews/1562936/Russian-army-tests-the-father-of-all-bombs.html.

[84] *Military Uses of Nanotechnology: The Future of War*, THENANOAGE.COM, http://www.thenanoage.com/military.htm (last visited Feb. 7, 2013).

[85] Scientists and the University of California, Berkeley, are already working on the Micromechanical Flying Insect Project. *Micromechanical Flying Insect*, U. CAL. BERKELEY, http://robotics.eecs.berkeley.edu/~ronf/mfi.html/index.html (last visited Feb. 7, 2013); *Nanotech Weaponry*, CENTER FOR RESPONSIBLE NANOTECHNOLOGY (Feb. 12, 2004), http://www.crnano.typepad.com/crnblog/2004/02/nanotech_weapon.html; Caroline Perry, *Mass-Production Sends Robot Insects Flying*, LIVE SCI. (Apr. 18, 2012, 5:51 PM), http://www.livescience.com/19773-mini-robot-production-nsf-ria.html.

[86] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction art. I, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062.

successive United States administrations; to the extent that natural or synthetic viruses and similar naturally occurring organisms do not fall within the proscriptions of international law, they provide potentially potent weapons or weapons platforms, especially in combination with advances in genomics.[87] Additionally, such international regulation only applies to States,[88] and any impact on non-state actors depends on domestic implementation of the Treaty provisions and effective enforcement, normally through criminal actions that only take effect after the crime has occurred.[89]

Genomics is the "study of genes and their function."[90] The rapid advances in genomics[91] have not only provided numerous benefits for modern medicine and science in general, but have also provided the opportunity for significant weapons advancements. "A couple of decades ago, it took three years to learn how to clone and sequence a gene, and you earned a PhD in the process. Now, thanks to ready-made kits you can do the same in less than three days . . . the cost of sequencing DNA has plummeted, from about $100,000 for reading a million letters, or base pairs, of DNA code in 2001, to around 10 cents

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[87] Will S. Hylton, *How Ready are We for Bioterrorism?*, N.Y. TIMES (Oct. 26, 2011), http://www.nytimes.com/2011/10/30/magazine/how-ready-are-we-for-bioterrorism.html?pagewanted=all; BOB GRAHAM ET AL., WORLD AT RISK: THE REPORT OF THE COMMISSION ON THE PREVENTION OF WMD PROLIFERATION AND TERRORISM, xv (2008), *available at* http://www.absa.org/leg/WorldAtRisk.pdf; A former director at the Defense Advanced Research Projects Agency, or DARPA, argues that "What took me three weeks in a sophisticated laboratory in a top-tier medical school 20 years ago, with millions of dollars in equipment, can essentially be done by a relatively unsophisticated technician. . . . A person at a graduate-school level has all the tools and technologies to implement a sophisticated program to create a bioweapon." Wil S. Hylton, *Warning: There's Not Nearly Enough Of This Vaccine To Go Around*, N.Y. TIMES SUNDAY MAGAZINE, Oct. 30, 2011, at MM26. Similarly, Michael Daly writes that "there is already information in public databases that could be used to generate highly pathogenic biological warfare (BW) agents." Michael J. Daly, *The Emerging Impact of Genomics on the Development of Biological Weapons: Threats and Benefits Posed by Engineered Extremophiles*, 21 CLINICS IN LABORATORY MED. 619, 621 (2001), *available at* http://www.usuhs.edu/pat/deinococcus/pdf/clinicsLabMedicineVol21No3.pdf.

[88] *See generally,* Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062.

[89] *See, e.g.*, S.C. Res. 1540, paras. 2-3, U.N. Doc. S/RES/1540 (Apr. 28, 2004) (calling on member States to develop domestic procedures to enforce treaty provisions relating to non-state actors' use of nuclear, chemical or biological weapons).

[90] MedicineNet.com, *Definition of Genomics*, (Oct. 26, 2014) at http://www.medterms.com/script/main/art.asp?articlekey=23242.

[91] David E. Hoffman, *The New Virology: The future of war by other means*, FOREIGN POLICY, p. 78, March/April 2011, *available at* http://www.foreignpolicy.com/articles/2011/02/22/the_new_virology?print=yes&hidecomments=yes&page=full where the author states, "One thing is certain: The technology for probing and manipulating life at the genetic level is accelerating. . . . But the inquiry itself highlighted the rapid pace of change in manipulating biology. Will rogue scientists eventually learn how to use the same techniques for evil?"

today."[92] The ability to tailor a weapon to the exact DNA of your intended target would allow for precision targeting in a way not formerly possible.

For example, Andrew Hessel, Marc Goodman, and Steven Kotler, writing recently in the Atlantic, proposed a hypothetical where a virus that was genetically coded to the President of the United States was created and transmitted through unwitting individuals with lethal effect on only the President.[93] Advances in genomics, particularly linked to similar advances in virology and nanotechnology, move this hypothetical from the world of science fiction to the realm of potential weapons.

As with the prior weapons discussed in this section, viral and genomic weapons have effects at great distances, in both time and space, from their initiator. There is no requirement for the human designer or user to be on the same continent when the lethal effect occurs. Furthermore, the pinpoint accuracy of a genetically coded weapon could limit the scale in such a way as to stay far below the level of armed conflict.

B. Methods of Warfare

In contrast to means of warfare, the method of warfare is not about the weapon or means of warfare itself, but about how warfare is conducted—the tactics of warfare.[94] For example, the use of camouflage is considered a ruse[95] and is a method of warfare. Advancing technologies will allow for new and innovative methods of warfare that will raise interesting legal issues. One in particular is worth mentioning here—latent attacks.

1. Latent Attacks

Latent attacks are "characterized by the placing or embedding of some weapon in a place or position where it will not be triggered until signaled

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[92] Charisius, Friebe, and Karberg, *Becoming Biohackers: Learning the Game*, BBC (Jan. 22, 2013), *available at* http://www.bbc.com/future/story/20130122-how-we-became-biohackers-part-1.

[93] Andrew Hessel, Marc Goodman & Steven Kotler, *Hacking the President's DNA*, ATLANTIC MAGAZINE (Nov. 2012), http://www.theatlantic.com/magazine/archive/2012/11/hacking-the-presidents-dna/309147/.

[94] *Methods of Warfare*, PRC MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE, http://www.ihlresearch.org/amw/manual/section-a-definitions/v (last visited Dec. 14, 2014).

[95] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, U.N. Doc A/32/144, art. 37.2 (June 8, 1977); *see also* GEOFFREY CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 223–24 (2012) (discussing ruses versus perfidy).

sometime in the future or activated by some future action."[96] The eventual attack may be triggered by a remote signal or specific occurrence and may even be triggered by the victim himself.[97] For example, consider viral genetic material that is implanted by a nanobot into the intended victim far in advance of a future attack. The latent but lethal genetic material may only be activated upon some signal by the attacker or some other event, potentially by an unknowing third party or the victim himself, such as ingesting some supposed antidote. Additionally, the triggering event may never occur, but the potential would always be there.

Latent computer attacks are already well documented.[98] Embedded source code in the hardware of computer components or software found on computers would provide an adversary with a powerful future weapon.[99] For example, consider that the United States sells F-16 aircraft to numerous countries throughout the world. The United States could certainly implant in the computer functions of that aircraft some computer code that will not allow the F-16 to engage aircraft that it identifies as belonging to the U.S. military. In fact, if the U.S. has this capability, it may be irresponsible to not take such pre-emptive actions. As the largest producer of weapons worldwide,[100] and one of the largest exporters,[101] latent attacks should be an important consideration for the U.S. military industrial complex.

The capability to implant, hide and trigger latent attacks is technologically dependent. But as the ability to do so continues to develop, it seems clear that the United States and other technologically capable nations, would likely use such technology, even against current allies, as a hedge against future changes in the geopolitical situation. As with the means of warfare discussed above, this method of attack would take place in time and space at great distances from the initial human action, taking it outside the current regulation of the WPR.

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[96] Jensen, *supra* note 22, at 309.

[97] *Id.*

[98] Steve Stecklow, *U.S. Nuclear Lab Removes Chinese Tech Over Security Fears*, REUTERS (Jan. 7, 2013, 3:32 PM), http://www.reuters.com/article/2013/01/07/us-huawei-alamos-idUSBRE90608B20130107; Jayadeva Ranade, *China and the Latent Cyber Threat*, 1 National Defense and Aerospace Power 1 (2010).

[99] *Wary of Naked Force, Israel Eyes Cyberwar on Iran*, REUTERS, (July 7, 2009), http://www.ynetnews.com/articles/0,7340,L-3742960,00.html.

[100] Stockholm International Peace Research Institute, The SIPRI Top 100 arms-producing and military services companies in the world, excluding China, 2012, *available at* http://www.sipri.org/research/armaments/production/Top100.

[101] Stockholm International Peace Research Institute, TIV of arms exports from all, 2012-2013, *available at* http://armstrade.sipri.org/armstrade/html/export_values.php.

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In all of these cases, where the human connection is attenuated and the type of action is different from the normal kinetic model, there are significant impacts on the application of the WPR. It is to this topic that the paper now turns.

II. THE WAR POWERS RESOLUTION

The WPR is a federal law intended to inhibit the President's ability to use military force in a situation of armed conflict without involving Congress.[102] Both its constitutionality and its practicality have been seriously questioned in the past,[103] including a very detailed discussion between the Executive and Legislative branches in connection with United States' support to military operations in Libya in 2011.[104] The next part will provide a brief historical background. The part will be followed by an introduction to the text of the Resolution, with emphasis on those portions pertinent to the thesis of this article. Issues raised by those specific provisions will then be discussed.

A. History

In the early 1970's, discontent with the Vietnam War was spreading throughout the citizenry of the United States[105] and the Congress. Congress demonstrated its frustration with the situation by repealing the Gulf of Tonkin Resolution, which was the Congressional grant of authority for the war.[106] With the publication of the Pentagon Papers[107] in June 1971, Congress felt betrayed by successive Presidential administrations that, it appeared, had not been keeping Congress fully informed of the military actions in Indochina.[108]

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[102] WPR, sec. 2(a).

[103] GRIMMETT, *supra* note 20, at 6; BAKER ET AL., *supra* note 8, at 24; Fisher & Adler, *supra* note 12, at 10–14; Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367, 385–90 (1988).

[104] See e.g. Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16; Stephen G. Rademaker, *Congress and the Myth of the 60-Day Clock*, WASH. POST (May 24, 2011), http://articles.washingtonpost.com/2011-05-24/opinions/35233150_1_libya-operation-war-powers-resolution-president-obama.

[105] Joseph Carroll, *The Iraq-Vietnam Comparison*, GALLUP (June 15, 2004), http://www.gallup.com/poll/11998/iraqvietnam-comparison.aspx.

[106] Pub. L. No 91-672, Sec. 12, 84 Stat. 2053 (1971).

[107] *The Pentagon Papers*, WASH. POST, http://www.washingtonpost.com/wp-srv/nation/specialreports/pentagon-papers/ (last visited Oct. 22, 2013).

[108] Hedrick Smith, *Mitchell Seeks to Halt Series on Vietnam, but Times Refuses*, N.Y. TIMES, June 15, 1971, at 1.

In response, Congress passed the Mansfield Amendment[109] which "declared to be the policy of the United States to terminate at the earliest possible date all military operations of the United States in Indochina."[110]

Despite this Congressional action, military involvement continued, and Congress turned to another source for stopping the war—funding. On May 31, 1973, Congress passed a bill telling the President that "None of the funds herein appropriated under this act or heretofore appropriated under any other act may be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia or in or over Laos by United States forces."[111] President Nixon vetoed the bill but was forced to the bargaining table.[112] After negotiations, Congress passed a Joint Resolution which the President did not veto which stated "Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia."[113]

During this same period, a stream of judicial cases flooded the Courts from citizens,[114] members of the military,[115] and eventually members of Congress.[116] The results of these cases were mixed, and no clear standard was achieved as to the differing roles of Congress and the President in the use of the military. Though President Nixon complied with the Joint Resolution by ceasing bombing on August 14, 1973, Congress was left dissatisfied with their role in the Vietnam War and felt a great need to reign in Presidential power to engage the military in hostilities.[117] That chance came in October 1973.[118]

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[109] Pub. L. No. 92-156, Sec. 601(a), 85 Stat. 423. 430 (1971).

[110] *Id.*

[111] 29 Cong. Q. Almanac 102 (1973).

[112] D.H.H., *The War Powers Resolution: A Tool for Balancing Power Through Negotiation*, 70 VA. L. REV. 1037, 1039 (1984).

[113] Pub. L. No 93-52, Sec 108. 87 Stat. 130 (July 1, 1073).

[114] *See, e.g.*, Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970); Campen v. Nixon, 56 F.R.D. 404 (N.D. Cal. 1972).

[115] *See* Da Costa v. Laird, 448 F.2d 1368 (2d Cir.), *cert. denied*, 405 U.S. 979 (1972); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Luftig v. McNamara, 373 F.2d 664, 665–66 (D.C. Cir.).

[116] *See* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir.), *cert. denied*, 416 U.S. 936 (1974).

[117] *See* Fisher & Adler, *supra* note 12, at 1, 4, 10.

[118] *Id*. at 1–6.

As early as May 3, 1973, Representative Zablocki introduced a Joint Resolution that would require the President to work more closely with Congress when initiating military actions.[119] The House passed the proposed legislation on July 18[120] and the Senate on July 20.[121] It was reported to the Joint Conference Committee on October 4,[122] and agreed to by the Senate on October 10[123] and the House on October 12.[124] The legislation was then sent to the President who vetoed it on October 24.[125]

The President raised several issues in his veto,[126] including the claim that the legislation was clearly unconstitutional because it "would attempt to take away, by mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years."[127] President Nixon further argued that the legislation "would seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis."[128] He also chided the Congress for trying to set up automatic cut-offs of authority without requiring particular action by Congress, arguing that "[i]n [his] view, the proper way for the Congress to make known its will on such foreign policy questions is through a positive action."[129]

Many of President Nixon's arguments remain pertinent today in the continuing discussion of the constitutionality, as well as prudence, of the War Powers Resolution.[130] Nevertheless, an emboldened Congress[131] overrode the

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119 H.R.J. Res. 542 93rd Cong. 1973, *available at* http://www.gpo.gov/fdsys/pkg/STATUTE-87/pdf/STATUTE-87-Pg555.pdf.

120 *Bill Summary & Status 93rd Congress (1973–1974) H.J. Res. 542 All Information*, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d093:HJ00542:@@@L&summ2=m& (last visited Nov. 12, 2013).

121 *Id*.

122 *Id*.

123 *Id*.

124 *Id*.

125 *Id*.; Veto of War Powers Resolution, 9 WEEKLY COMP. PRES. DOC. 1285 (Oct. 24, 1973).

126 Veto of the War Powers Resolution, 5 PUB. PAPERS 893, 893–95 (Oct. 24, 1973).

127 *Id*. at 893.

128 *Id*.

129 *Id*. at 894–95.

130 *See*, *e.g.*, *The War Powers Resolution Debate Continues*, CONST. DAILY (Sept. 4, 2013), http://blog.constitutioncenter.org/2013/09/the-war-powers-resolution-debate-continues/ (describing both sides of the current debate); Robert F. Turner, *Why the War Powers Resolution Isn't a Key Factor in the Syria Situation*, CONST. DAILY (Aug. 30, 2013), http://blog.constitutioncenter.org/2013/08/why-the-war-powers-resolution-isnt-a-key-factor-in-the-syria-situation/ (arguing that President Nixon's arguments against the WPR are still valid today).

131 *See* Michael A. Newton, *Inadvertent Implications of the War Powers Resolution*, 45 CASE W. RES. J. INT'L L. 173, 179–80 (2012).

President's veto, and the War Powers Resolution became law on November 7, 1973.

Since the passage of the WPR, every President has questioned the constitutionality of the War Powers Resolution as an "unconstitutional infringement on the President's authority as Commander-in-Chief."[132] There is only one instance when the President has mentioned the WPR in sending a notification to Congress and that was after the event had occurred.[133] There have been numerous examples of President's filing reports "consistent with" their WPR obligations,[134] but generally with at least implicit and often explicit disclaimers as to the applicability of the WPR.[135] As of 2012, "Presidents have submitted 132 reports to Congress as a result of the War Powers Resolution. Of these, President Ford submitted 4, President Carter 1, President Reagan 14, President George H. W. Bush 7, President Clinton 60, President George W. Bush 39, and President Barack Obama 11."[136]

There have also been a number of instances where armed forces have been deployed into potentially hostile environments, yet the President has not filed any kind of a report with Congress.[137] In at least some of these instances, the President has determined not to file, based on an opinion of the Department of Justice's Office of Legal Counsel (OLC) which was issued with respect to the deployment of U.S. military forces to Somalia in 1992.[138] According to the OLC, President Clinton did not need to consult with or report to Congress

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[132] *See* GRIMMETT, *supra* note 20, at 6; RICHARD F. GRIMMETT, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 2 (2012); *see* BAKER ET AL., *supra* note 8, at 26.

[133] *See* GRIMMETT, *supra* note 20, at 2; *see* BAKER ET AL., *supra* note 8, at 2 (referring to the 1975 seizure of the *Mayaguez* and the President's filing "cited section 4(a)(1), which triggers the time limit, . . . [but] in this case the military action was completed and U.S. armed forces had disengaged from the area of conflict when the report was made.").

[134] *See generally* Letter from Barack Obama, U.S. President, to John Boehner, U.S. Speaker of the House (June 14, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/14/letter-president-regarding-war-powers-resolution (regarding the War Powers Resolution); Letter to Congressional Leaders Reporting on the Deployment of United States Military Personnel as Part of the Kosovo International Security Force, 2 PUB. PAPERS 1544, 1544 (Nov. 14, 2003), *available at* http://www.gpo.gov/fdsys/pkg/PPP-2003-book2/pdf/PPP-2003-book2-doc-pg1544.pdf; Letter to Congressional Leaders on the Situation in Somalia, 1 PUB. PAPERS 836, 836 (June 10, 1993); Letter to Congressional Leaders on the Persian Gulf Conflict, 1 PUB. PAPERS 52, 52 (Jan. 18, 1991), *available at* http://www.gpo.gov/fdsys/pkg/PPP-1991-book1/pdf/PPP-1991-book1-doc-pg52.pdf; Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Reprisal Against Iran, 2 PUB. PAPERS 1212, 1212 (Oct. 20, 1987), *available at* http://www.reagan.utexas.edu/archives/speeches/1987/102087e.htm.

[135] *See* GRIMMETT, *supra* note 20, at 2–3, 81.

[136] *See* GRIMMETT, *supra* note 132, at 17.

[137] *See* GRIMMETT, *supra* note 20, at 74.

[138] Authority to Use United States Military Forces in Somalia, 16 OP. O.L.C. 6, 6 (1992).

because "Attorneys General and this Office 'have concluded that the President has the power to commit United States troops abroad' as well as to 'take military action, for the purpose of protecting national interests.'"[139]

A brief analysis of the text will demonstrate why the Executive objects to Congress's actions in the WPR.

B. Text

The WPR is divided into ten sections.[140] Section 1 simply states the title, and Section 2 gives the purpose and policy of the legislation, stating Congress's purpose is to "fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."[141] This purpose statement stakes out Congress's position early, that the use of the military in armed conflict requires both branches of government.

Section 3 is titled "Consultation" and states that "[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities."[142] This, of course, is made to address one of Congress's major complaints during the Vietnam War.

Section 4, which will be analyzed in detail in the next section, is one of the most contentious, and the most significant for the purposes of this Article.[143] The section is titled "Reporting" and establishes reporting requirements for the President to the Congress under specified circumstances.[144]

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[139] *Id*. The OLC issued a similar opinion in relation to the 2011 military operation in Libya stating that Congress's authority under the "declare war" clause of the Constitution only applied to armed conflicts that were "prolonged and substantial . . . typically involving exposure of U.S. military personnel to significant risk over a substantial period." Authority to Use Military Force in Libya, 35 OP. O.L.C. 1, 24 *available at* http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf. *See also* Chen, *supra* note 38, at 1798; Newton, *supra* note 9, at 186.

[140] *See generally* War Powers Resolution, 15 U.S.C. §§ 1541–1548 (2012).

[141] *Id.* § 1541(a).

[142] *Id.* § 1542.

[143] *Id*. § 1543.

[144] War Powers Resolution, 50 U.S.C. § 1543 (2012).

Section 5 also generates significant controversy, especially by those who think the WPR is unconstitutional.[145] It requires the President to terminate hostilities and remove forces after sixty days without Congress taking any further action.[146] This contested language in the WPR is likely moot after the 1997 Supreme Court case of *Raines v. Byrd*,[147] which will be discussed below.

Sections 6 and 7 are mostly procedural. Section 8 is titled "Interpretation" and states that nothing in the resolution "shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution."[148]

Section 9 deals with the separability of provisions within the Resolution,[149] and Section 10 is administrative.[150]

C. Issues

For the purposes of this paper, Section 4 contains the language at issue with respect to future armed-conflict.[151] However, Section 5 contains the most onerous requirements on the President and represents the most invasive move into what the President would claim as his exclusive authority as commander-in-chief.[152] Therefore, a discussion of Section 5 is warranted first.

1. Section 5

As stated above, Section 5 of the WPR requires the President, in the absence of action by Congress, to withdraw any "United States Armed Forces" within sixty calendar days.[153] President Nixon and subsequent Presidents have

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145 *See e.g.* Stephen G. Rademaker, *Congress and the Myth of the 60-Day Clock*, WASH. POST, May 24, 2011, http://articles.washingtonpost.com/2011-05-24/opinions/35233150_1_libya-operation-war-powers-resolution-president-obama (discussing the controversy concerning Section 5 of the WPR).

146 War Powers Resolution, 50 U.S.C. § 1545 (2012).

147 Raines v. Byrd, 521 U.S. 811 (1997).

148 War Powers Resolution, 50 U.S.C. § 1547 (2012).

149 *Id*. § 1548.

150 *Id*. § 1541(c).

151 *Id*. § 1544.

152 *See id*. § 1545.

153 *Id*. § 1544(b) states:

> Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543 (a)(1) of this title, whichever is earlier, the President shall terminate any use of

argued that Congress cannot, by inaction, bind the President to take action with respect to the use of armed forces.[154] The President's arguments seem to have received Supreme Court approval in *Raines v. Byrd*,[155] a Supreme Court case concerning the Line Item Veto Act.[156]

In *Raines v. Byrd*, the members of Congress claimed that passage of the line item veto "causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally."[157] The Supreme Court responded that this equated to a "loss of political power, not loss of any private right,"[158] and decided that "individual Members of Congress do not have sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing."[159]

This decision became important with respect to the WPR in 1999 when Representative Tom Campbell and other members of Congress filed a complaint for declaratory relief to stop President Clinton's action with respect to the use of force in Kosovo.[160] Campbell sought

> a declaration from the judicial branch that the President, the head of the executive branch, has violated the War Powers Clause of the Constitution and the War Powers Resolution by conducting air strikes in the Federal Republic of Yugoslavia without congressional authorization.[161]

United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress

(1) has declared war or has enacted a specific authorization for such use of United States Armed Forces,

(2) has extended by law such sixty-day period, or

(3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

154 *See* Rademaker, *supra* note 145.

155 Raines v. Byrd, 521 U.S. 811 (1997).

156 Line Item Veto Act of 1996, 2 U.S.C. §§ 691–692 (1996).

157 *Raines*, 521 U.S. at 821.

158 *Id.*

159 *Id.* at 830.

160 Campbell v. Clinton, 52 F.Supp.2d 34, 35 (D.D.C. 1999), *aff'd* 203 F.2d 19 (D.C. Cir. 2000).

161 *Id.* at 39–40.

The District Court, relying on *Raines v. Byrd*,[162] held that

> the courts will apply Raines and Coleman rigorously and will find standing only in the clearest cases of vote nullification and genuine impasse between the political branches. Under the circumstances presented in this case, the Court cannot conclude that plaintiffs have standing to bring this action, and the case therefore will be dismissed.[163]

Similarly, on appeal, the D.C. Circuit Court again relied on *Raines v. Byrd*, stating that "[t]he question whether congressmen have standing in federal court to challenge the lawfulness of actions of the executive was answered, at least in part, in the Supreme Court's recent decision in *Raines v. Byrd*."[164] The Court went on to affirm the District Court's holding and deny the appeal.[165]

As Professor Geoff Corn has argued, the decision in Raines "confirms a consistent course followed by the judiciary when asked to adjudicate the legality of presidential decisions to engage the United States Armed Forces in hostilities: focus on whether such a challenge presents a truly ripe issue."[166] Corn goes on to argue that "[a] challenge will only be cognizable if Congress manifests express opposition to such action. Thus, the legality of war making is not based on a theory of unilateral presidential war power, but on a theory of cooperative policy making by the two branches of government who share this awesome authority."[167]

These decisions fit nicely into Justice Jackson's framework in his now-famous concurrence in the *Youngstown Sheet & Tube Co. v. Sawyer*.[168] In a situation such as that contemplated by Section 5 where the Congress has taken no action, the President can "only rely on his own independent powers."[169] Further, "congressional inertia, indifference or quiescence may sometimes, at

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[162] *Id.* at 40 (stating "[t]he legal landscape with respect to legislative standing was altered dramatically by the Supreme Court in its first Line Item Veto decision, Raines v. Byrd, 521 U.S. 811, 138 L. Ed. 2d 849, 117 S. Ct. 2312 (1997). Virtually all of this Circuit's prior jurisprudence on legislative standing now may be ignored, and the separation of powers considerations previously evaluated under the rubric of ripeness or equitable or remedial discretion now are subsumed in the standing analysis.").

[163] *Id.* at 45.

[164] Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000) (citations omitted).

[165] *Id.* at 19.

[166] Geoffrey S. Corn, C*ampbell v. Clinton: The "Implied Consent" Theory of Presidential War Power is Again Validated*, 161 MIL. L. REV. 202, 214 (1999).

[167] *Id.* at 214–15.

[168] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952).

[169] *Id.* at 637.

least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[170]

In other words, the "practice of the President relying on the implied support of Congress, Congress allowing the President to take war-making initiatives and manifesting its consent through less than express authorization, and courts declining to intervene so long as such support was evident"[171] appears to take any bite out of Section 5. As long as Congress does not take action, the President is unlikely to have a Court intervene for non-compliance with the withdrawal requirements of the WPR.

2. Section 4

Because Section 5 of the WPR is now assumed by most constitutional scholars to be unconstitutional, the real power in the WPR is left to Section 4. This section lays out the triggers for the application of the Resolution. The section states:

> **SEC. 4.** (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—
>
> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;
>
> the president shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—
>
> (A) the circumstances necessitating the introduction of United States Armed Forces;
>
> (B) the constitutional and legislative authority under which such introduction took place; and
>
> (C) the estimated scope and duration of the hostilities or involvement.

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170 *Id.*

171 Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1190 (2001).

> (b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad
>
> (c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.[172]

This section sets up two threshold queries when determining whether the WPR has been triggered: whether there is an introduction of armed forces; and whether that introduction is into current or imminent "hostilities," enters the geographic space of another state while equipped for combat, or substantially enlarges current deployments.[173] These two queries will be discussed next.

a. Armed Forces

Because the involvement of the armed forces is a trigger for the WPR, it is important to determine what "armed forces" means in U.S. domestic law in order to analyze the application of the statute to potential future armed conflicts and the ability of the WPR in its present form to effectively accomplish the will of Congress with respect to their view of separation of powers and the use of force.

Within the WPR itself, there is a provision that provides examples of what Congress was targeting with the WPR. In 50 U.S.C. § 1547(c), the statute states:

> For purposes of this chapter, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.[174]

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172 War Powers Resolution, 50 U.S.C. § 1543 (2012).
173 *Id.*
174 *Id.* § 1547(c).

In defining the term "armed forces"[175] for the purposes of the WPR, the statute refers to "members of such armed forces," seemingly making clear that the assumption in the drafting was the involvement of actual personnel. As a result, in Congressional usage, the use of the term armed forces has often been substituted with by reference to putting "boots on the ground," meaning members of the armed forces being placed in the area of operations and at risk from operations.

This usage is supported by the discussion of the WPR within Congress. For example, while arguing in support of the Bill, Representative Annunzio stated:

> We must create a situation, in law, where Americans can know that their sons will be sent into hostilities which are clearly understood and clearly accepted, and that unless that action has the approval of Congress, it should not continue until it becomes, like the Vietnam war, the longest war ever fought in our history, for a purpose still not clearly understood, and against an enemy still not clearly defined.[176]

This reference to "sons" shows that the chief concern at the time was the sending actual troops into harm's way, not just military materials.

Representative Matsunaga who also supported the passage of the WPR, stated: "First, it specifies that the President should consult in every possible instance with congressional leaders before committing American troops to hostilities."[177] The use of the word "troops" instead of "Armed Forces" seems to be a clear indication that he was concerned about actual people in combat and not just military materials.

These sentiments are also reflected by Representative Reid who argued that "[T]his bill does provide a new mechanism whereby Congress and, indeed, any Member of Congress can bring to a vote a preferential motion to end hostilities where U.S. troops have been committed."[178] As with Representative Matsunaga, the use of the word troops here indicates that the placing of actual

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[175] The term "armed forces" is defined in 10 U.S.C. § 101a(4): "The term 'armed forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard." While this is an important narrowing of the term, it is not extremely helpful for the purposes of this analysis as it does not make a differentiation between personnel and equipment. Many future technologies will not involve personnel in the same way current technologies do, but be much more separated by time and distance.

[176] 119 CONG. REC. H6231, H6281 (daily ed. July 18, 1973) (statement of Rep. Annunzio). Mr. Annunzio, also emphasized Congress' important role in determining if "this Nation should involve itself in major hostilities, committing large numbers of troops and large quantities of our national treasure." *Id.* at H6280.

[177] *Id.*

[178] *Id.* at H6278.

military members on the ground, or "boots on the ground," was the prevailing thought.

Members of the Senate were equally clear on this issue. Senator Griffin, speaking of an amendment he proposed, stated, "[f]inally, provision is made in the amendment so that any cessation of funding of operations would not imperil the safety of the Armed Forces."[179] This appears to be a reference focused on military personnel as opposed to materiel.

Additionally in a conversation on the record between Senator Johnston and Senator Javits, Senator Johnston voiced some concern about whether the language of the bill, which he said "speaks of introducing our troops in hostilities," would actually cover the actions in Vietnam, where "our troops were originally sent there to guard an Air Force base."[180] Senator Javits replied that there was imminent danger of hostilities when the troops were sent to guard the Air Force Base and then the following exchange took place:

> Senator Johnston: "Then the term 'introducing hostilities' means introducing troops into the country if hostilities are taking place?"
>
> Senator Javits: "That is exactly right."
>
> Senator Johnston: "And where they are not employed initially for hostilities?"
>
> Senator Javits: "That is precisely right."[181]

The focus on sending "troops" into hostilities in the conversation regardless of the status of the "hostilities" highlights that the Senators involved believed that "troops" were the real concern meant to be covered by the statute, rather than material or non-personnel items.

Two more examples are useful. Senator Tunney who spoke in support of the bill stated, "This is not to deny that many situations might require an American military presence. It is to stress that the methods selected by recent American Presidents for introducing and maintaining American troops in hostilities indicate that defects exist in the process by which war-making decisions are made."[182] Similarly, Senator Huddleston who was a co-sponsor of the WPR, in arguing the constitutional basis for the statute, said

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179 119 CONG. REC. 14159, 14208 (daily ed. July 20, 1973).
180 *Id.* at 14208.
181 *Id.* at 14209.
182 *Id.* at 14215.

> The basis for legislative power in the committing of troops to hostilities abroad rests in article I, section 8 of the Constitution which authorizes Congress to provide for the common defense, to declare war, to raise and support—for up to 2 years at a time—the Army and Navy, to make rules to regulate and govern the military forces . . ."[183]

These references to "troops" is a clear indication that the focus of the WPR was actual soldiers, sailors, airmen, and marines—not their equipment, military materiel, or other property. "Armed forces" was meant to mean people from the very beginning.[184]

Recent operations have confirmed the continuing reliance by the Executive on "boots on the ground" as the trigger for WPR constraints. In response to a question directly about the application of the WPR to the 2011 military operations in Libya, President Obama stated,

> I spoke to the American people about what we would do. I said there would be no troops on the ground . . . We have done exactly what I said we would do. We have not put any boots on the ground . . . But do I think that our actions in any way violate the War Powers Resolution? The answer is 'no.' So I don't even have to get to the constitutional question."[185]

In response to President Obama's reading of the WPR, Minority Leader of the House of Representative, Nancy Pelosi agreed. "The limited nature of this

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[183] *Id.* at S14216 (statement of Sen. Huddleston).

[184] Two potential arguments against this interpretation are the following: First, Congress indicated in other documents, such as a 1966 treaty with the Republic of Korea, that it could distinguish between "United States Armed Forces" and "members of the United States Armed Forces." Facilities and Areas and the Status of United States Armed Forces in Korea, U.S.-S. Kor., July 9, 1966, 17 U.S.T. 1677 (defining "members of the United States armed forces" as an independent phrase than United States armed forces itself for purposes of the treaty). Indeed, the WPR itself includes the assignment of "members of such armed forces" to command and accompany the military forces of other countries within the Act's definition of the phrase "introduction of United States Armed Forces." War Powers Resolution, 50 U.S.C. § 1547(c) (2012). Thus, if Congress wanted the President to be restricted by the WPR only when actual members of the United States Armed Forces were introduced into another country, it could, and should, have said so. Second, Congress' intent in enacting the WPR was not merely to prevent the President from unilaterally placing members of the United States Armed Forces into harm's way. This is evident from the fact that the WPR does not require written reports from the President for some deployments that are not aimed at starting hostilities. *See id.* §1543(a)(2). Consequently, the full text of the WPR appears to be aimed at forbidding the President from circumventing Congress' constitutional right to declare war. This aim would certainly be consistent with a broader interpretation of the phrase "introduction of United States Armed Forces" than one that requires boots on the ground. Despite these potential arguments, the weight of evidence seems to clearly indicate that Congress was intending to protect actual military personnel when it passed the WPR.

[185] CNS News, *Obama Won't Answer If War Powers Resolution Is Constitutional*, YOUTUBE (June 29, 2011), https://www.youtube.com/watch?v=uXwDkPu0IpU.

engagement allows the president to go forward. I'm satisfied that the president has the authority he needs to go ahead. If we had boots on the ground . . . then that's a different story."[186]

Even more recently, in response to the deployment of 130 troops to Iraq in the face of advancing ISIS forces, Secretary of Defense Chuck Hagel "stressed that the latest deployment 'is not a combat-boots-on-the-ground operation.'"[187] This continuing reliance on whether there are "boots on the ground" when classifying a conflict for domestic law purposes reinforces the original understanding of the WPR as this being a trigger for the application of the statute. As will be discussed in Part III, the future technologies discussed above will allow the President to engage in significant uses of military power with almost no chance of triggering the statute.

b. Hostilities

The first potential way of meeting the second trigger for the WPR is "hostilities." By introducing armed forces into hostilities, the full WPR is effectuated. However, what defines hostilities is not clear,[188] especially in light of new technologies.

In the 1973 debates over the WPR, the principal sponsor, Senator Jacob K. Javits, was asked at a House of Representatives hearing whether the term 'hostilities' was problematic because of "the susceptibility of it to different interpretations," making this "a very fuzzy area."[189] Senator Javits acknowledged the vagueness of the term but suggested that it was a necessary feature of the legislation: "There is no question about that, but that decision would be for the President to make. No one is trying to denude the President of authority."[190]

This approach of looking to the Executive Branch for a definition of "hostilities" has continued since the WPR's passage, causing one scholar to

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[186] Mike Lillis, *Pelosi backs Obama on Libya*, THE HILL, June 16, 2011, *available at* http://thehill.com/homenews/house/166843-pelosi-backs-obama-on-libya.

[187] Patrick Goodenough, *"Not a Combat-Boots-on-the-Ground Operation," Says Hagel, Announcing 130 More Troops to Iraq*, CNSNEWS, (Aug. 12, 2014, 10:16 PM), http://cnsnews.com/news/article/patrick-goodenough/not-combat-boots-ground-operation-says-hagel-announcing-130-more.

[188] James Nathan, *Salvaging the War Powers Resolution*, 23 PRESIDENTIAL STUD. Q. 235, 244–46 (1993); James Nathan, *Revising the War Powers Act*, 17 ARMED FORCES & SOC'Y 513, 522–23 (1991).

[189] *War Powers: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the H. Comm. on Foreign Affairs*, 93d Cong. 22 (1973) (statement of Peirre S. du Pont IX).

[190] *Id.*

argue that "[f]rom the beginning, it appears that Congress has largely left the determination of 'hostilities' to executive practice."[191] As evidence of this practice, two years after the passage of the WPR, Congress sought clarification from the Executive Branch as to the meaning of the term "hostilities."[192] Monroe Leigh, Legal Adviser of the Department of State, and Martin Hoffman, Defense Department General Counsel, answered that the Executive Branch understood the term "to mean a situation in which units of the U.S. Armed Forces are actively engaged in exchanges of fire with opposing units of hostile forces."[193]

The House Report of the WPR stated that "[t]he word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope," but the Executive Branch argues that neither the legislation nor its drafting history provides any more clarity to its meaning.[194] In recent hearings before Congress, Department of State Legal Adviser Harold Koh acknowledged that "hostilities" is an inherently ambiguous legal standard and stated that in his opinion:

> [T]he legislative history of the resolution makes clear there was no fixed view on exactly what the term "hostilities" would encompass. Members of Congress understood that the term was vague, but specifically declined to give it more concrete meaning, in part to avoid unduly hampering future Presidents by making the resolution a "one size fits all" straitjacket that would operate mechanically, without regard to particular circumstances.[195]

As further explained by Mr. Koh, recent Administrations have established four factors that help determine on a case-by-case basis whether "hostilities"

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[191] Allison Arnold, *Cyber Hostilities and the War Powers Resolution*, 217 MIL. L. REV. 174, 184 (2013). Congress has passed legislation since the WPR that defines "hostilities." Military Commissions Act, 10 U.S.C. § 948(a)(9) (2006) & Military Commissions Act, 10 U.S.C. § 948a(9) (2009) defines "hostilities" as "any conflict subject to the laws of war." However, this definition appears in the Military Commissions Act and is designed to establish jurisdiction for the purposes of individual criminal liability and does not seem in any sense to be applicable to the application of the WPR. However, as will be discussed in Part IV, such a definition would be useful in adding strength to the WPR as a Congressional restraint on the President.

[192] *Libya and War Powers: Hearing Before the Comm. on Foreign Relations*, 112th Cong. 13–14 (2011) [hereinafter *Libya Hearing*] (prepared statement of Hon. Harold Koh, Legal Advisor, U.S. Department of State, Washington, DC).

[193] *Id.*; *see also* Arnold, *supra* note 191, at 184.

[194] H.R. Rep. No. 93-287, at 2351 (1973).

[195] *Id.*

exist.[196] These four factors are "whether the mission is limited, whether the risk of escalation is limited, whether the exposure is limited, and whether the choice of military means is narrowly constrained."[197] It was an analysis of these four factors that allowed President Obama to determine the WPR was not implicated in the 2011 coalition military operations against Libya because the action involved only "intermittent military engagements" which would not require the withdrawal of forces under the WPR.[198] Mr. Koh added that the U.S. military actions in Libya were "well within the scope of the kinds of activity that in the past have not been deemed to be hostilities for purposes of the War Powers Resolution."[199]

Not all members of Congress agreed with President Obama's interpretation of the term. Congressman John Boehner argued that the actions in Libya were clearly hostilities.

> You know, the White House says there are no hostilities taking place," said U.S. House Speaker John Boehner, a Republican. "Yet we've got drone attacks underway. They're spending $10 million a day, part of an effort to drop bombs on Gadhafi's compounds. It just doesn't pass the straight-face test in my view, that we're not in the midst of hostilities.[200]

Others took a similar view. Representative Brad Sherman argued that the WPR was "the law of the land" and that "if the president deploys forces, he's got to seek Congressional authorization or begin pulling out after 60 days. Too many presidents have simply ignored the law . . . [w]hen you're flying Air Force bombers over enemy territory, you are engaged in combat."[201]

In addition to members of Congress, some of the most notable War Powers academics also thought the military operations in Libya may qualify under the statute. Professor Robert Chesney argued that when compared with other

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196 *Id.* at 21.

197 *Id.*

198 *Id.* at 14, 16.

199 *Id.* at 21. S*ee also* MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 1-3 (2013); Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16 (adding that the "limited nature of this particular mission [in Libya] is not the kind of 'hostilities' envisioned by the War Powers Resolution").

200 Angie Drobnic Holan & Louis Jacobson, *Are U.S. Actions in Libya Subject to the War Powers Resoultion? A Review of the Evidence*, POLITIFACT.COM (June 22, 2011, 11:38 AM), http://www.politifact.com/truth-o-meter/article/2011/jun/22/are-us-actions-libya-subject-war-powers-resolution/.

201 *Id.*

historical actions and Executive and Legislative responses, the operations in Libya could be considered hostilities.[202]

Despite objections, the President pressed ahead with military operations and, as noted above, continues to do so in more current operations such as in Iraq.[203] In fact, as one scholar has recently written, "Truman, Ford, Kennedy, Johnson, Nixon, Reagan, George H.W. Bush, Clinton and Obama all claimed the power to initiate hostilities without congressional authorization."[204] President Obama's decision to follow the four factors as defining criteria for the WPR allowed considerable freedom of activity. A similar decision by future presidents will have significant impacts on the future application of the WPR to conflicts involving emerging technologies.

3. Geographic Space

The other possibility from the second part of the WPR trigger is the introduction of armed forces "equipped for combat" into the "territory, airspace or waters of a foreign nation."[205]

The House of Representatives Report on the WPR provides some insight into Congress' intent in using this language. According to the Report, Congress intended the WPR to apply to

> the initial commitment of troops in situations in which there is no actual fighting but some risk, however small, of the forces being involved in hostilities. A report would be required any time combat military forces were sent to another nation to alter or preserve the existing political status quo or to make the U.S. presence felt. Thus, for example, the dispatch of Marines to Thailand in 1962 and the quarantine of Cuba in the same year would have required Presidential reports. Reports would not be required for routine port supply calls, emergency aid measures, normal training exercises, and other noncombat military activities.[206]

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202 Robert Chesney, *White House Clarifies Position on Libya and the WPR: US Forces Not Engaged in "Hostilities"*, LAWFARE (June 15, 2011, 3:46 PM), http://www.lawfareblog.com/2011/06/white-house-clarifies-position-on-libya-and-the-wpr-us-forces-not-engaged-in-hostilities/.

203 *See* Kristina Wong, *Iraq Clock Ticks for Obama*, THE HILL (Aug. 19, 2014, 6:00 AM), http://thehill.com/policy/defense/215451-obama-tiptoeing-around-war-powers-limits.

204 MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 7 (2013).

205 H.R. REP. NO. 93-287, at 2352 (1973).

206 *Id.*

This particular aspect of the WPR trigger has not seemed to be decisive in WPR discussions. There have certainly been situations where this language would have seemed to apply—such as Kosovo and Libya—but it has not been dispositive in bringing the Executive Branch to accept the applicability of the WPR and comply with the notification procedures. This language will be even less consequential with respect to future military operations involving advanced technologies because of its its tie to the definition of armed forces, as will be discussed below.

4. Substantial Enlargement

The House Report again sheds some light on what Congress intended with this WPR trigger. According to the Report, the word "substantially" was meant to be a "flexible criterion."[207] The Report provides some examples of when this trigger would be met:

> A 100-percent increase in numbers of Marine guards at an embassy—say from 5 to 10—clearly would not be an occasion for a report. A thousand additional men sent to Europe under present circumstances does not significantly enlarge the total U.S. troop strength of about 300,000 already there. However, the dispatch of 1,000 men to Guantanamo Bay, Cuba, which now has a complement of 4,000 would mean an increase of 25 percent, which is substantial. Under this circumstance, President Kennedy would have been required to report to Congress in 1962 when he raised the number of U.S. military advisers in Vietnam from 700 to 16,000.[208]

As with the language concerning geographic borders, this language has also not been argued in past military operations and is unlikely to have much effect in future operations, again because of its tie to the definition of "armed forces." A substantial enlargement would require an initial use of armed forces.

III. INEFFECTIVENESS OF THE WPR

Recall the earlier discussion of Congress's purpose in passing the WPR.[209] At the time, Congress felt disenfranchised in their constitutional role in war-making.[210] In the wake of the Vietnam War, Congress felt that successive

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207 *Id.*

208 *Id.*

209 *See supra* Part II.A.

210 *See* Judah A. Druck, *Droning On: The War Powers Resolution and the Numbing Effect of Technology-Driven Warfare,* 98 CORNELL L. REV. 209, 213 (2012).

Presidents from both political parties had ignored the Constitutional design of shared national security powers with respect to using military force.[211] Congress passed the WPR to force the President to acknowledge that Congress also had a role in the use of the military and to add some definition to what that role was, with an emphasis on consultation.[212] Given the likely unconstitutionality of Section Five after *Raines v. Byrd* and subsequent Court decisions, the fourth section's requirements on reporting become the primary methodology for Congress to ensure consultation.

Considering the discussion in the previous Part that highlighted issues with the WPR, this Part will now analyze the future weapon systems discussed in Part I in light of the issues with the WPR to conclude that the WPR will be ineffective in controlling the use of these advanced technologies by the President as currently understood and applied.

A. Armed Forces

As discussed above, the term "armed forces" has generally been understood to mean members of the United States military.[213] The often-used phrase of "boots on the ground" would be even more restrictive and not include many operations, such as typical Navy and Air Force operations where no U.S. personnel are utilized in a way that they might come into physical contact with an opposing force. As mentioned above, Senator Boehner didn't seem to take the view that the Air Force and Navy were excluded.[214] Under either interpretation, the use of advanced technologies calls into question the effectiveness of the WPR in accomplishing Congress's goal of forcing the President to consult before engaging in activities that might lead to hostilities. Several examples will adequately illustrate this point.

1. Drones

The use of drones obviously raises issues with respect to the composition of "armed forces" within the WPR. Any remotely piloted drone would by definition be a situation where the operator was not on the ground where the weapon's effects were to occur. In the military operations against terrorists, the

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211 *See* Edwin B. Firmage, *The War Power of Congress and Revision of the War Powers Resolution*, 17 J. CONTEMP. L. 237, 237 (1991).

212 *See* Druck, *supra* note 210, at 213–14.

213 *See supra* Part II.C.2.a.

214 *See supra* Part II.C.2.b.

President has claimed authority to use drones based on Congressional action in passing the Authorization to Use Military Force (AUMF)[215] but it is unclear whether the President believes he must have authority to use drones in other situations, even armed drones. There does not appear to be any statement by the Executive Branch that the use of armed drones involves the introduction of armed forces under the WPR. Prior reports that the President has filed "consistent with" the WPR reporting requirements have not included reports on drone usage.

Additionally, the President's determination that the limited use of Air Force personnel during the military operations in Libya did not trigger his reporting requirements under the WPR[216] make it seem clear that the use of armed drones would certainly not do so either. In Libya, aircrews were actually entering Libyan airspace.[217] The use of armed drones would not only not involve "boots on the ground" but would not even involve "boots in the air." As long as the introduction of armed forces is equated to "boots on the ground," the use of armed drones will not meet that trigger.

Alternatively, one could argue that the WPR language is sufficient to include the employment of drones. Drones certainly can mimic troops in many ways. They can enter into foreign nations; they can be flown to those nations in large numbers; and they can add to the number of drones that are already in that nation and that are equipped for combat. Indeed, the use of the word "repair"[218] in the WPR could be understood to imply that the phrase "United States Armed Forces" encompasses materials used by the Armed Forces and not just human members of the Armed Forces. However, the practice of past and current Presidents has been to treat drones as if they were not "armed forces" for WPR reporting purposes.

As technology increases and drones become smaller (eventually microscopic when combined with advances in nanotechnology), and more lethal, with longer loiter capabilities, and are created in great masses, they will present a very capable weapons and reconnaissance platform. Such a capability will be a very effective asset to use in military operations and will undoubtedly be so.

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215 *See* Milena Sterio, *The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law*, 45 CASE W. RES. J. INT'L L. 197, 198 (2012).

216 Savage & Landler, *supra* note 199.

217 *Libya Hearing*, *supra* note 192, at 24.

218 50 U.S.C. § 1543(a)(2) (2006).

For example, assume that an insurgent group rises in a country that is an ally to the United States and threatens to overthrow the government and establish a government that is not friendly to the U.S. The allied government seeks military assistance from the President, who determines that sending a fleet of 100 unmanned armed drones to quickly and decisively engage the insurgent group would be an effective military option. Pilots located in Nevada would fly the drones, and an airport in a neighboring country would launch and maintain them. No U.S. persons would actually be deployed to the allied country where the insurgency is occurring. Under the current pattern of analysis, such action will not trigger the WPR, despite the significant destructive effect the drones would cause.

2. Cyber Operations

Further, consider the use of cyber technologies. These advanced weapons can be initiated far from any battlefield and in a place remote from the intended victim of the action. As already discussed, one of their greatest appeals is their effectiveness without putting those using them in harm's way.[219] Because of this, the nature of cyber operations have caused at least one cyber scholar to speculate that there should be a "duty to hack" because of the bloodless nature, both to the attacker and the victim, of cyber operations.[220]

The example of the recent STUXNET malware is instructive. STUXNET appears to have been a well planned and highly effective cyber operation which resulted in the physical destruction of almost 1,000 centrifuges used in the nuclear enrichment process.[221] It is alleged to have been the work of the U.S. and Israel.[222] However, no member of the military ever stepped foot in Iran or even flew over Iran in connection with the operation so far as the world knows.[223] In other words, the U.S., assuming the U.S. was involved, was able

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219 *See also* Blake & Imburgia, *supra* note 25, at 183.

220 *See* Duncan B. Hollis, *Re-Thinking the Boundaries of Law in Cyberspace: A Duty to Hack?, in* CYBERWARE: LAW & ETHICS FOR VIRTUAL CONFLICTS (J. Ohlin et al. eds., forthcoming Mar. 2015).

221 *See* David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (June 1, 2012), http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.

222 William J. Broad, John Markoff & David E. Sanger, *Israeli Test on Worm Called Crucial in Iran Nuclear Delay*, N.Y. TIMES (Jan. 15, 2011), at A1.

223 *See* Robert Lee, *The History of Stuxnet: Key Takeaways for Cyber Decision Makers*, AFCEA INTERNATIONAL, http://www.afcea.org/committees/cyber/ (follow "Robert Lee-The History of Stuxnet" hyperlink) (last visited Nov. 10, 2014).

to accomplish a priority national security goal that would have required significant military assets if done through some other, more kinetic, means.

Presumably, if the President had decided to use kinetic operations, surely the specter of the WPR would have been raised. If an attack by Air Force assets or a mission for some special operations unit, similar to the one that killed Osama Bin Laden,[224] had been used similar effects may have occurred. But, because the entire operation was done through cyber means, it appears that neither the President, nor Congress felt that the WPR was implicated. There were no "boots on the ground," and the operative United States assets were presumably far from the territory of Iran and likely operating within the territory of the United States or one of its allies.

This apparent perception that the President can conduct a significant military action that would otherwise involve the WPR but does not, because it was accomplished through the use of cyber means, should serve as a warning to Congress. If the President feels comfortable executing STUXNET without consultation, it would be hard to envision a category of cyber actions that would cause the President to think he should notify Congress.

As Arnold points out, Congress has engaged to some degree on the issue of cyber activities by passing the National Defense Authorization Act.[225] The 2012 National Defense Authorization Act contained a provision that authorized cyber activities, subject to the War Powers Resolution.[226] Of course, being "subject to" the WPR does not mean it applies. It simply means that *when* it applies, the Executive Branch will comply with its requirements.[227] In its Cyberspace Policy Report, the DoD responded to the question by the Senate: "[w]hat constitutes use of force in cyberspace for the purpose of complying

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[224] Peter Bergen, *Who Really Killed bin Laden?*, CNN (Mar. 27, 2013, 6:46 PM), www.cnn.com/2013/03/26/world/bergen-who-killed-bin-laden/.

[225] Arnold, *supra* note 191, at 176.

[226] National Defense Authorization Act of 2012, Pub. L. No. 112-81, § 954, 125 Stat. 1298, 1551 (2011) which states:

> Congress affirms that the Department of Defense has the capability, and upon direction by the President may conduct offensive operations in cyberspace to defend our Nation, Allies and interests, subject to—
> (1) the policy principles and legal regimes that the Department follows for kinetic capabilities, including the law of armed conflict; and
> (2) the War Powers Resolution (50 U.S.C. 1541).

[227] *See* Arnold, *supra* note 191, at 177.

with the War Powers Act."[228] The answer demonstrates the elusive nature of categorization of these future weapons.

> The requirements of the War Powers Resolution apply to "the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."
>
> Cyber operations might not include the introduction of armed forces personnel into the area of hostilities. Cyber operations may, however, be a component of larger operations that could trigger notification and reporting in accordance with the War Powers Resolution. The Department will continue to assess each of its actions in cyberspace to determine when the requirements of the War Powers Resolution may apply to those actions.[229]

The DoD's assessment of each of its cyber actions will no doubt occur given the Executive Branch's understanding of the WPR discussed above. Such an assessment is unlikely to prove much of a constraint on presidential actions, as the threshold for triggering the WPR is so high.

3. Other Emerging Technologies

Other advanced weapon systems, such as those involving nanotechnology and genomics, are similar to those discussed above. In each of these cases, there will certainly be human involvement in the design, creation, and utilization of these weapons, but all of this will take place far from any battlefield and from the area where the effects of the weapon are designed to take place. There will be no "boots on the ground."

Even in the case of robots and autonomous weapons, it is unclear how the "boots on the ground" standard will apply. To the extent that "boots on the ground" refers to putting American lives at risk, the President would have a clear argument that these should be treated similar to drones, and not be considered as crossing that threshold.

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[228] U.S DEP'T OF DEF. CYBERSPACE POLICY REPORT: A REPORT TO CONGRESS PURSUANT TO THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011 9 (2011), *available at* http://www.defense.gov/home/features/2011/0411_cyberstrategy/docs/NDAA%20Section%20934%20Report_For%20webpage.pdf.

[229] *Id.*

For example, assume the same scenario above where an ally is seeking help from the U.S. against an insurgency. As part of the response, the President wants to install autonomous sentry systems to guard several key government sites from potential attack. Though the use of these systems may lead to significant casualties, there would be no U.S. persons in the allied country—no "boots on the ground." The Executive Branch is unlikely to deem such action as triggering the reporting and consultation requirements of the WPR.

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Generally then, the current understanding of "armed forces" will not provide limits on the presidential use of power under the WPR with respect to many emerging technologies. Looking to "boots on the ground" as the clarifying paradigm of what the introduction of armed forces means under the statute will not provide Congress with the notification and consultation it desires. In order to continue the validity of the WPR as a notification tool for Presidential actions in future military operations, Congress will need to elucidate a different understanding of the term "armed forces."

B. Hostilities

The Executive Branch's measure for "hostilities" also favors action by the President without implicating the WPR with respect to future technologies. As stated by Harold Koh, the four determining factors are "whether the mission is limited, whether the risk of escalation is limited, whether the exposure is limited, and whether the choice of military means is narrowly constrained."[230] Importantly, it appears that the determination of how each military operation fits into these four factors is an Executive Branch determination, not one for Congress.[231] It is unlikely that future military operations using the advanced technologies discussed above will be considered "hostilities," as defined by these four factors, in a way that will meaningfully constrain the President with respect to the WPR.

1. Drone Operations

When considered in light of the four hostilities factors, drones become an even more attractive tool for the President when deciding to use lethal military

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[230] *Libya Hearing, supra* note 192, at 21.

[231] *Libya and War Powers: Hearing Before the Comm. on Foreign Relations,* 112th Cong. 21 (2011) (statement of Harold Koh).

force. In the current attack on terrorist targets, every target is considered a unique operation and gets individual approval.[232] It is hard to imagine a more limited mission. Because the current missions in places like Yemen are done with host nation approval,[233] the risk of escalation is minimal, as more than a decade of drone operations has proven. With no "boots on the ground," exposure of U.S. personnel is obviously limited and drones present a very tailored choice of means of action. In other words, it appears that judging hostilities by the Executive Branch's four criteria seems tailor-made for a President who favors drone operations.[234]

Indeed, current practice confirms this approach. The President's on-going use of armed drones against terrorists has never been understood as "hostilities" by the Executive Branch.[235] Congress is often notified in advance or shortly after a drone strike, but the President has never conceded that this information was shared in compliance with the WPR. Again, Executive practice is creating a "gloss"[236] that will be relied on by future Executives.

2. Cyber Operations

Allison Arnold has recently published an excellent analysis of whether "cyber hostilities" would trigger the WPR, concluding that "it is unlikely that the executive branch would deem stand-alone offensive military operations in cyberspace as 'hostilities' triggering the War Powers Resolution."[237] Arnold's conclusions are exactly right.

Similar to drones, a number of significant and serious cyber operations would fall below the threshold of hostilities as described by the four factors.

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[232] *See* Michael Crowley, *Holder: Obama's New Drone-Strike 'Playbook' Has Arrived,* TIME, May 22, 2013, at 1.

[233] Greg Miller, *Yemeni President Acknowledges Approving U.S. Drone Strikes,* WASH. POST (Sept. 29, 2012), http://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-afff-d6c7f20a83bf_story.html.

[234] Charlie Savage and Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation,* N.Y. TIMES, June 15, 2011 at 2 ("The administration's theory implies that the president can wage a war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution's time limits." (quoting Jack Goldsmith)).

[235] *See id*. at 2.

[236] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."); Corn, *supra* note 11, at 690 n.13.

[237] Arnold, *supra* note 191, at 192.

Perhaps the most contested factor would be the risk of escalation. Many cyber experts have written about the potential for escalation in cyber operations.[238] However, the anonymous nature of the Internet and the difficulties of attribution[239] dramatically temper the risk of escalation.

Once again, the example of the recent STUXNET malware is instructive. Assuming that the United States was involved,[240] the President initiated an act which most experts and commentators in the area believe violated the international law prohibition on the use of force and may even have been an armed attack.[241] As mentioned above, a similar attack on such a scale using kinetic means would seem to trigger the WPR. However, Arnold analyzes STUXNET using the four factors and determines that a military operation even of that scale, done solely by cyber means, would not trigger the WPR.[242] Assuming the U.S. was involved in STUXNET, the President seems to agree with Arnold's analysis since neither President Bush nor President Obama notified Congress of the "cyber hostilities."[243]

As a practical matter, with respect to the factor of escalation, the anonymity of a cyber attack weighs in favor of such attacks not being hostilities. It was almost two years before computer analysts could attribute the attack to Israel

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238 Eugene Kapersky, *Space Escalation of Cyber-Warfare is a Call for Action*, *available at* http://www.kapersky.com (Oct. 16, 2012); MARTIN C. LIBICKI, CRISIS AND ESCALATION IN CYBERSPACE (Rand Corporation 2012) *available at* http://www.rand.org/pubs/monographs/MG1215.html; Vincent Manzo, *Deterrence and Escalation in Cross-domain Operations: Where Do Space and Cyberspace fit?* INSTITUTE FOR NATIONAL AND STRATEGIC STUDIES (Dec. 2011), *available at* http://csis.org/files/media/csis/pubs/111201_manzo_sf272.pdf:///U:/Publications/Current/WPR/Sources/Manzo%20-%20INSS.pdf.

239 Michael Schmitt, *'Below the Threshold' Cyber Operations: The Countermeasures Response Option and International Law*, 54 VA. J. INT'L L. (*forthcoming*); Jack Beard, *Legal Phantoms in Cyberspace: The Problematic Status of Information as a Weapon and a Target Under International Humanitarian Law*, 47 VAND. J. TRANSNAT'L L. 67 (2014); Susan Brenner, *Cyber-threats and the Limits of Bureaucratic Control*, 14 MINN. J.L. SCI. & TECH. 137 (2013); Bradley Raboin, *Corresponding Evolution: International Law and the Emergence of Cyber Warfare*, J. NAT'L ASS'N L. JUD. 602 (2011); Erik Mudrinich, *Cyber 3.0: The Department of Defense Strategy for Operating in Cyberspace and the Attribution Problem*, 68 A.F. L. REV. 167 (2012); MARTIN C. LIBICKI, CYBERDETTERENCE AND CYBERWARFARE, 76–78 (Rand Corporation 2009); Duncan B. Hollis, *An e-SOS for Cyberspace*, 52 HARV. INT'L L.J. 373, 397–401 (2011); Jonathan Soloman, *Cyberdeterrence between Nation-States Plausible Strategy or a Pipe Dream?*, 5 STRATEGIC STUDIES Q. 1, 5–10 (2011); Commander Todd C. Huntley, *Controlling the Use of Force in Cyber Space: The Application of the Law of Armed Conflict During A Time of Fundamental Change in the Nature of Warfare*, 60 NAVAL L. REV. 1, 34–35 (2010).

240 *Iran Blames U.S., Israel for Stuxnet Malware*, CBS NEWS (Apr. 16, 2011), http://www.cbsnews.com/news/iran-blames-us-israel-for-stuxnet-malware/.

241 *See generally* THE TALLINN MANUAL, *supra* note 48, at 42–45 (Michael N. Schmitt ed., 2013).

242 *See* Arnold, *supra* note 191, at 191.

243 *See* Ashley Deeks, *The Geography of Cyber Conflict: Through a Glass Darkly*, 89 INT'L L. STUD. 1, 17 (2013).

and/or the U.S. and then without certainty.[244] Though Iran called for retribution,[245] the passage of time had severely limited Iran's legal options.

3. Other Emerging Technologies

The President's application of the four factors for determination of the existence of hostilities is equally unlikely to apply to many potential uses of advanced technologies. For example, the use of robots or autonomous weapons provides little risk to U.S. persons. An anonymous infiltration of nanobots into another nation's steel manufacturing industry to create flawed material is unlikely to result in an escalation of conflict. Establishing a series of autonomous sentry sites as discussed above is a very narrow and limited response to a call for help from an ally and unlikely to result in risk to the United States. These and other potential uses of emerging technologies will not meet the common understanding of hostilities yet are almost certainly the kinds of Executive actions about which Congress is hoping to be notified.

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Emerging technologies, including those discussed above, will open a wide array of new military options to the President. And the uses of these technologies are under regulated by the current WPR. Because the President's obligation to notify Congress under the WPR is tied to the onset of hostilities, and the employment of these future technologies will not equate to hostilities in most instances, the use of drones, cyber and other emerging technologies will not trigger the Executive's obligation to provide notice to Congress. If this does not meet the intent of Congress in the desire for notification and consultation, it must do something to pull these types of Executive action under the current WPR.

IV. AMENDING THE WPR

Given the clear inadequacies of the WPR, the recognition of the need for revision has been widespread, beginning with the statute's original sponsors.[246]

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244 Ellen Nakashima & Joby Warrick, *Stuxnet was Work of U.S. and Israeli Experts, Officials Say*, WASH. POST (June 2, 2012), http://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gJQAlnEy6U_story.html#.

245 Nicole Perlroth & Quentin Hardy, *Bank Hacking Was the Work of Iranians, Official Say*, N.Y. TIMES (Jan. 8, 2013), http://www.nytimes.com/2013/01/09/technology/online-banking-attacks-were-work-of-iran-us-officials-say.html?_r=0.

246 BAKER ET AL., *supra* note 8, at 21.

Time has only deepened that conviction. The sections below look at previously proposed solutions and then advance a new solution to the WPR that will allow it to cover the use of advanced technologies discussed in this article.

A. Previously Proposed Solutions

There have been several suggestions of ways to amend the WPR to make it more effective in current operations. Various legislative proposals, Commission Reports and scholarly articles have all recognized the problems with the existing WPR and proposed solutions to problems. These potential solutions will be discussed below. However, despite the merit of many of these proposals, none of them would effectively accomplish Congress's intent of ensuring notification and consultation with respect to the use of emerging technologies in future armed conflicts.

1. Legislative Proposals[247]

Since the passage of the WPR, there has been a consistent call to repeal the legislation[248] and "rely on traditional political pressures and the regular system of checks and balances, including impeachment"[249] to control Executive actions. On June 7, 1995, the House of Representatives actually voted on a bill to repeal the WPR which failed by a vote of 217 to 201.[250] The bill looked like it would pass until forty-four Republicans switched sides and voted against the measure in order to not strengthen the then-democratic President, Bill Clinton.[251]

There have also been a number of legislative attempts to amend the WPR, in light of its acknowledged shortcomings. One of the most significant was a

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at http://millercenter.org/policy/commissions/warpowers/report.

[247] *See* GRIMMETT, *supra* note 20, at 44–48 (outlining and discussing proposed amendments to the WPR since its inception).

[248] For example, in 1988, the Senate Foreign Relations Subcommittee on War Powers held extensive hearings after President Reagan's decision to reflag Kuwaiti tankers in the Persian Gulf. During those hearings, many national security experts and former government employees urged the subcommittee to seek repeal of the WPR. *See The War Power After 200 Years: Congress and the President at a Constitutional Impasse*, Hearings Before the Special Subcommittee on War Powers of the Senate Committee on Foreign Relations, 100th Congress (1989); Biden & Ritch, *supra* note 103, at 370.

[249] Fisher & Adler, *supra* note 12, at 1 (arguing that "outright repeal would be less risky than continuing along the present path.").

[250] *See* GRIMMETT, *supra* note 20, at 2; Fisher & Adler, *supra* note 249, at 15.

[251] Fisher & Adler, *supra* note 12, at 16.

Use of Force Act proposed by Senator Biden in a 1989 law review article.[252] The proposed Act listed a number of circumstances where the President could use force without further authorization from Congress.[253] The proposal would then define the "use of force" as "the introduction of United States Armed Forces into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances."[254] The Act would have also established a consultative group, mandating meetings between certain Members of Congress and various Executive Branch officials, including the President, where discussion would occur but consent would not be required.[255]

Another attempt at amendment was the War Powers Resolution Amendment of 1988,[256] known as the Byrd-Warner amendments, but also supported by Senators Nunn and Mitchell. In explaining his reasoning behind the Bill, Senator Byrd stated that the intent of the amendments was to "change[] the presumption of the current War Powers Resolution, which is that U.S Armed Forces must withdraw from situations of hostilities or imminent hostilities within 60 days unless Congress specifically authorizes their continued presence."[257] No Congressional action was taken on this proposal.[258]

None of these legislative proposals have passed, nor would they have effectively dealt with emerging technologies. Further, there are no legislative proposals that would have solved the "armed forces" or "hostilities" problem in a way that would have covered future developments in armed conflict.[259]

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252 *See* Biden & Ritch, *supra* note 103, at 367.

253 *Id.* at 398–99. Senator Biden, wary of those who would respond by saying this was too excessive a grant of authority to the President, responded by writing that "while generous in scope, this affirmation of authorities would also define and limit what the President can do and what justifications he can properly use." *Id.*

254 *Id.*at 401.

255 *Id.* at 402–03.

256 "War Powers Resolution Amendments of 1988," S.J. Res. 323, 100th Cong., 2d. Sess. (1988). Representative Lee Hamilton introduced a companion bill in the House of Representatives, H.R. J. Res. 601, 100th Cong., 2d Sess. (1988).

257 134 CONG. REC. S6174 (daily ed. May 19, 1988); *see* Biden & Ritch, *supra* note 103, at 393.

258 *See* GRIMMETT, *supra* note 20, at 24.

259 *See* Military Commissions Act, 10 U.S.C. § 948a(9) (2006); Military Commissions Act, 10 U.S.C. §948a(9) (2009) (though this definition would provide some interesting legal interpretations if applied to the WPR, it was clearly passed specifically to grant jurisdiction for military commissions who are trying members of terrorist groups covered by that statute and was never intended to apply to the WPR).

2. War Powers Consultation Act of 2009

Recognizing the ineffective history of the WPR, the University of Virginia's Miller Center of Public Affairs[260] invited a number of former government experts on national security, including two former Secretaries of State who served as co-chairs, to "identify a practical solution to help future Executive and Legislative Branch leaders deal with the issue [of war powers]."[261] The National War Powers Commission Report that was produced by the invitees proposed legislation which the Report calls the War Powers Consultation Act of 2009 (WPCA) and urges Congress to pass the Act and the President to sign it.[262] The Act tries to meet the most important needs of both the President and the Congress.[263]

The proposed WPCA does a number of things meant to correct existing flaws in the WPR. The WPCA would create a "Joint Congressional Consultation Committee" consisting of some of the key members of Congress[264] with whom the President would be "encouraged to consult regularly with."[265] It requires the President to consult the Committee only with respect to "deployment of United States armed forces into significant armed conflict"[266] which is defined as "(i) any conflict expressly authorized by Congress or (ii) any combat operation by U.S. armed forces lasting more than a

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260 THE MILLER CENTER, http://millercenter.org (a nonpartisan institute that seeks to expand understanding of the presidency, policy, and political history, providing critical insights for the nation's governance challenges).

261 BAKER ET AL., *supra* note 8.

262 *Id.* at 10.

263 *Id.* at 9. The Report states:

> We recognize the Act we propose may not be one that satisfies all Presidents or all Congresses in every circumstance. On the President's side of the ledger, however, the statute generally should be attractive because it involves Congress only in "significant armed conflict," no minor engagements. Moreover, it reverses the presumption that inaction by Congress means that Congress has disapproved of a military campaign and that the President is acting lawlessly if he proceeds with the conflict. On the congressional side of the ledger, the Act gives the Legislative Branch more by way of meaningful consultation and information. It also provides Congress a clear and simple mechanism by which to approve or disapprove a military campaign, and does so in a way that seeks to avoid the constitutional infirmities that plague the War Powers Resolution of 1973. Altogether, the Act works to gives [sic] Congress a sear at the table; it gives the President the benefit of Congress's counsel; and it provides a mechanism for the President and the public to know Congress's views before or as a military campaign begins.

Id.

264 *Id.* at 9–10.

265 *Id.* at 36.

266 *Id.* at 37.

week or expected by the President to last more than a week."[267] The proposed WPCS also reverses the highly contested portion of the WPR which requires the President to remove troops based on Congressional inaction and instead requires Congress to take action by formally approving or disapproving of the President's decision to deploy troops.[268]

Despite the quality of the participants in the Commission and the vast experience in Government service upon which they relied, Congress has not chosen to adopt the Report's recommendations and pass the WPCA. However, Senators McCain and Kaine introduced the WPCA as a bill on the Senate floor on January 16, 2014.[269] At the time of writing, it seems very unlikely that the Bill will pass, but this is at least a signal of the quality of the WPCA recommendations.

However, though scholars have also found that the WPCA would represent many improvements to the WPR, it would not avoid the most contentious of WPR issues, the triggering mechanism. As Prof. Corn writes, using the term "significant armed conflict" as the trigger does not solve the problem because it "creates the same inherent risk for one critical reason: it is not tethered to a military operational criterion."[270]

Similarly, the proposed WPCA would also be as ineffective as the WPR in regulating future armed conflicts. Its continuing reliance on the term "armed forces" leaves one of the major issues with respect to future technologies unsolved. Further, removing the term "hostilities" and substituting for it the term "significant armed conflict" is equally unhelpful. Not only does the definition of "significant armed conflict" includes the term "armed forces," but "like the failed concept of 'hostilities[] or . . . situations where imminent involvement in hostilities is clearly indicated by the circumstances,' the concept of 'armed conflict' will almost inevitably be susceptible to interpretive debate."[271]

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267 *Id.* at 10.

268 *Id.* at 47–48.

269 *See Floor Remarks by Senator John McCain Introducing War Powers Consultation Act* (Jan. 16, 2014), http://www.mccain.senate.gov/public/index.cfm/2014/1/floor-remarks-by-senator-john-mccain-introducing-war-powers-consultation-act (last visited Oct. 28, 2014).

270 Corn, *supra* note 11, at 713–14 (2010).

271 *Id.* at 693–94.

Though the WPCA may have made an improvement on the current debates concerning the WPR, it would not provide a solution to future armed conflicts.[272]

3. Rules of Engagement (ROE)

Perhaps the most useful of these proposals is the recommendation by Professor Corn to tie the WPR[273] requirement to notify Congress to the Executive Branch's determination that mission-specific supplemental measures to the Standing Rules of Engagement[274] are needed. Corn recognizes the importance of the "trigger" in making the WPR more effective[275] and argues that "[l]inking such notification to the authorization of 'mission specific' Rules of Engagement . . . will substantially contribute to the efficacy of the historically validated war-making balance between the President and Congress."[276]

As Corn explains, when the President takes actions with military forces, other than traditional defense of the United States,[277] he normally authorizes the use of force to accomplish specific missions.[278] In other words, when the President sends military personnel to attack an enemy, he provides them with ROE that authorize them to use force outside of self-defense to accomplish a mission.[279] Such measures may include declaring certain individuals or members of organized groups as "declared hostile forces" who can be attacked on sight.[280]

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272 Chen, *supra* note 38, at 1801.

273 Corn, *supra* note 11, at 695. Professor Corn actually makes his recommendations in light of the WPCA discussed above. However, his recommendations would be just as effective if amended to the WPR and since the WPCA does not seem likely to be passed by Congress, this article will treat Corn's recommendations as if they were made concerning the WPR.

274 The Standing Rules of Engagement is a document promulgated and maintained by the Chairman of the Joint Chiefs of Staff that "establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all military operations and contingencies and routine Military Department functions." Chairman of the Joint Chiefs of Staff, Instruction 3121.01B, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES A-1 (June 13, 2005).

275 Corn, *supra* note 11, at 694–95.

276 *Id.* at 695.

277 *Id.* at 715.

278 *Id.* at 719–23.

279 For a broad discussion on ROE, see Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 803–24 (2008).

280 Chairman of the Joint Chiefs of Staff, Instruction 3121.01B, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES A-2 to A-3 (June 13, 2005).

Corn then postulates that the invocation of mission-specific ROE provide a "more effective consultation trigger"[281] for WPR activation because they "reveal the constitutional demarcation line between responsive uses of military force and proactive uses of such force—a line that has profound constitutional significance. Authorizing employment of the armed forces under such proactive use of force authority implicates the constitutional role of Congress in war-making decisions."[282] According to Corn, Congress's ambivalent reactions to Presidential uses of force are the reason a more recognizable trigger is necessary.

> It is precisely because of [congressional ambivalence] that a meaningful and operationally pragmatic notification trigger is so important. Because any initiation of hostilities beyond the limited scope of responsive/defensive actions will require authorization of supplemental ROE measures, a coextensive congressional notification requirement triggered by ROE approval will provide Congress the opportunity to exercise its constitutional role.[283]

Under Corn's proposal, anytime the President deployed military personnel and gave them mission-specific ROE, the notification and consultation provisions of the WPR would be triggered. It is unlikely that President's would avoid providing the military with the appropriate ROE simply to avoid the WPR because the risks to military personnel would be too great.

As useful as Professor Corn's suggestion might be if applied to today's WPR, it would not sufficiently resolve the problems of emerging technologies. In many instances, those who use cyber tools will be governed by ROE; however, there will certainly be times when they are not. A similar situation likely exists for drones. Because of the special approval process used for armed drone attacks, a formal mission-specific ROE may not be promulgated to govern the use of force, particularly if it is an attempt at an individual target. The use of nanotechnology and drones pose the same problems with respect to ROE. Certainly offensive uses of these weapons will be so highly controlled, at least initially, that reliance on a supplemental mission-specific ROE measure will not be sufficient to accomplish the notification and consultation requirements.

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281 Corn, *supra* note 11, at 694.
282 *Id.* at 724.
283 *Id.* at 728.

Perhaps most importantly, the pressure for the President to issue mission accomplishment ROE in order to preserve the lives of military personnel will not exist with non-human weapons such as drones, cyber tools, autonomous weapons, etc. This will allow the President to manipulate the use of ROE in order to prevent the requirement to go to Congress. In other words, in a situation where the President would issue mission-specific ROE such as sending a SEAL team into Pakistan to capture or kill Osama bin Laden, the issuance of mission-specific ROE would be completely unnecessary if the same mission were going to be accomplished by an armed unmanned drone or by a lethal nanobot carrying a genomic identifier.

4. All Offensive Strikes

Along with Allison Arnold,[284] Julia Chen is among the first to recognize the inadequacies of the WPR in confronting modern technologies. Chen argues that the WPR "can no longer accomplish its intended purpose and should be replaced by new war powers framework legislation."[285] She proposes that the WPR, or WPCA, be amended to cover "all offensive strikes."[286]

Chen's proposal is intended to include all personnel who might be engaged in offensive military operations, not just military personnel,[287] as originally proposed by Senator Thomas Eagleton.[288] She argues that the Constitution's grant of Congressional power over letters of marque and reprisal indicate that Congress should use the War Powers framework to control civilian agencies, such as the CIA, that might also involve themselves in armed conflict.[289]

However, as Chen rightly acknowledges, other statutory authorities regulate the CIA and other intelligence activities conducted by U.S. citizens.[290] Additionally, civilian agencies, and even civilians who accompany military forces, have no authority to participate in offensive military actions under the Laws of Armed Conflict (LOAC).[291] When they do so, they lose their

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284 Arnold, *supra* note 191, at 176–77.

285 Chen, *supra* note 38, at 1795.

286 *Id.* at 1802.

287 *Id.* at 1785–88.

288 119 CONG. REC. 25,079 (1973) (statement of Sen. Thomas F. Eagleton).

289 Chen, *supra* note 38, at 1797.

290 Chen concedes that intelligence activities are currently governed by statutes such as the Intelligence Oversight Act of 1991, 50 U.S.C. § 413 (as amended).

291 *See generally* CORN, ET AL., *supra* note 95, at 131–57 (explaining the status of civilians under the LOAC).

protections[292] and may be prosecuted for their war-like acts.[293] When Congress authorizes the President to exercise the nation's war powers, it is not intending to authorize civilian participation in hostilities.[294] This is amply illustrated by the fact that in the current fight against terrorist organizations around the world, the AUMF does not relieve the President of making Presidential findings under 50 U.S.C. Sec. 413b(a).[295]

Additionally, using the term "offensive" would apply nicely to most existing technologies but will not fit as well with future technologies. For example, in the case of a latent attack discussed above,[296] the triggering mechanism may be the victim's own actions, such as targeting a certain weapon or platform. Further, many future cyber activities may be created and used as defensive capabilities but have an autonomous strike-back capability that would be defensive in nature but still have impacts against foreign systems. Autonomous weapons systems would have the same characteristics.

Because of these issues, though Chen's proposal would also accomplish the much-needed extension of the WPR over some emerging technologies, it is underinclusive of certain technologies and too expansive in creating a situation where the President would be overregulated in his exercise of Executive authority.

* * * *

Despite the numerous attempts to modify the WPR, it does not appear that any of the existing suggestions are sufficient to ensure the notification and consultation that Congress is seeking from the President, particularly with respect to emerging technologies. The next section will propose an amendment to the WPR that will solve this problem.

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[292] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3; CORN, ET AL., *supra* note 95, at 168–70.

[293] CORN, ET AL., *supra* note 95, at 468.

[294] The drafters of the WPCA recognized this distinction and specifically excluded "covert actions" from its coverage. BAKER, ET AL., *supra* note 8, at 36.

[295] Bob Woodward, *CIA Told To Do 'Whatever Necessary' to Kill Bin Laden*, WASH. POST, Oct. 21, 2001, at A1.

[296] *See infra* Part I.B.1.

B. A Proposal for Future Armed Conflicts

As mentioned throughout this article, the primary weakness of the WPR with respect to future armed conflicts is the inability of the triggering mechanisms to adequately regulate emerging technologies. The limited application to only "armed forces" and the current understanding of "hostilities" is unable to capture the kinds of military actions the President will likely take in the future, leaving Congress without a mechanism to force notification and consultation. Each of these terms must be expanded to accomplish the WPR's[297] stated goal of assisting Congress in playing its constitutional role in war making.

1. Supplies or Capabilities

The inadequacy of the term "armed forces" has been discussed at length.[298] It is clear that many of the emerging technologies will not involve "boots on the ground" or even in the airspace.[299] These technologies will be planned, created, and initiated by humans, but humans will be distant in both time and space from their lethal effects. In order to cover these types of future military operations, the WPR needs to clarify its applicability to these "humanless" means and methods of warfare.

The solution to this dilemma is to add language that includes "capabilities" to the coverage of the WPR. In other words, the language from Section 4(a)[300] would be amended from its current form of "In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—"[301] to read "In the absence of a declaration of war, in any case in which United States Armed Forces *personnel, supplies or capabilities* are introduced *or effectuated*—."

By adding the proposed language, the statute would be clear as to what elements of the armed forces were governed by the statute. While the current statute is only understood to govern personnel, adding "supplies" and

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297 These suggestions apply equally to the WPCA if Congress decides to pass Senator McCain's proposed legislation. *See generally* Floor Remarks by Senator John McCain Introducing War Powers Consultation Act (Jan. 16, 2014), http://www.mccain.senate.gov/public/index.cfm/2014/1/floor-remarks-by-senator-john-mccain-introducing-war-powers-consultation-act (last visited Oct. 28, 2014).

298 *See generally infra* Part III.A.

299 *See generally infra* Part I.A.

300 War Powers Resolution § 4(a), 50 U.S.C. §§ 1541-1548 (1973). The added language would also be used in the other areas of the WPR where section 4(a)'s language is reproduced.

301 *Id.*

"capabilities" would extend the statute to cover the emerging technologies discussed in this paper.

The statute would also need to include the following definitions in order to provide clarity:

Armed Forces Personnel - For purposes of this chapter, the term "Armed Forces Personnel" means personnel who are members of or belong to the armed forces as defined in 10 U.S.C. Sec. 101(a)(4).

Armed Forces Supplies - For purposes of this chapter, the term "Armed Forces Supplies" has the same meaning as 10 U.S.C. Sec. 101(a)(14). It does not include goods and services transferred under Title 22 of the United States Code.

Armed Forces Capabilities - For purposes of this chapter, the term "Armed Forces Capabilities" means any service, process, function, or action that is used, directed, initiated, established, or created by the armed forces (as defined in 10 U.S.C. Sec. 101(a)(4)) that produces or results in an effect or condition designed to accomplish a military objective.

The definition of "Armed Forces Capabilities" is designed to be very inclusive but limited to military capabilities. The President will have many other capabilities that he can choose to use that will not be regulated by this statute but will be regulated elsewhere. It is also specifically designed to include future technologies like those discussed above, and others yet to be developed.

Adding the word "effectuate" to the statute would cover some weapons systems like cyber tools, that might be introduced at one point, but sit dormant until needed in the future. At the future time, when the tool was effectuated and its effects initiated, the President would need to notify Congress.

The amendment of this language triggering the application of the WPR will vastly increase the coverage of the notification responsibility of the President, particularly with respect to emerging technologies.

2. Violation of Sovereignty

The second trigger, that of "hostilities," would also need to be adapted for future technologies. The Executive Branch's definition of hostilities has become too narrow over time and the capabilities of emerging technologies

will largely fall outside that definition. The scope of the second trigger needs to have a geographic element as well as a descriptive element. Some actions that will never be significant enough to reach the level of "hostilities," may still violently offend another nation and lead to armed conflict.

In order to minimize the problems from maximizing the coverage, the current phrase in Section 4(a) of the WPR that states "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances"[302] should be amended to read "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, *or that violate the sovereignty of a foreign nation*."

The addition of the violation of sovereignty will increase the scope of the WPR to include those areas not currently covered by hostilities. Using cyber tools similar to STUXNET, which do not risk much escalation or present much exposure to U.S. forces, will still be covered if they were used or designed to have effects in the sovereign territory[303] of another nation. A similar analysis would apply to the use of nanotechnology or genomics, bringing these future technologies under the coverage of the WPR.

Using the word "violate" removes consensual activities that do not equate to hostilities. Tying the statute to a violation of sovereignty goes to the heart of what the WPR was meant to accomplish by ensuring the President notifies and consults with Congress before taking actions that might lead to war. In many cases, violations of sovereignty can be considered a "use of force"[304] or escalate into a "use of force" under the United Nations Charter paradigm.[305] This is particularly true of violations of sovereignty by the military.

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302 War Powers Resolution § 4(a)(1).

303 There has been much discussion on the issue of applying the doctrine of sovereignty to cyber operations. In the author's opinion, the Tallinn Manual contains the best discussion of the issues. *See generally* THE TALLINN MANUAL, *supra* note 48, at 42–53. *See also* Eric Talbot Jensen, *Cyber Sovereignty: The Way Ahead*, 50 TEX. INT'L L.J. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466904.

304 U.N. Charter art. 2, para. 4.

305 The current regime for regulating force by states is found in the United Nations Charter. A complete analysis of this regime is beyond the scope of this paper. Suffice it here to say that Article 2.4 of the Charter states the basic obligation of states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id*. There is a vast array of literature on this subject. *See* Albrecht Randelzhofer, *Article 2*(4), *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 114–36 (Bruno Simma et al. eds., 3d ed. 2012); Applicable to the topic of this article, several commentators have written about the application of the "use of force" paradigm specifically to cyber operations. *See generally* THE TALLINN MANUAL, *supra* note 48, at 42–53; Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back*

The statute would not preclude all violations of a state's sovereignty, and the President would still have considerable room to effect foreign relations with other Executive assets. But the use of the military to violate the sovereignty of another state would trigger the WPR requirements.

CONCLUSION

Congress initially passed the WPR because it felt that it was unable, under the practice at the time, to meaningfully engage with the Executive on war-making issues. The recent events in Libya, Syria, and Iraq reinforce the fact that the WPR has not solved this Constitutional issue. Reliance on the triggers of "armed forces" and "hostilities" have not resulted in the notification and consultation Congress was seeking with respect to war-making.

These WPR triggers will be even less effective as emerging technologies develop and are used in future armed conflicts. Cyber tools, unmanned and autonomous weapons and weapons systems, nanotechnology, genomics and a host of other future developments provide effective tools for the President to use as Commander-in-Chief of the armed forces and fall outside the current WPR. The President will be able to utilize these and other future capabilities without triggering the WPR requirements.

Amending the WPR to include supplies and capabilities and to cover actions that violate the sovereignty of a foreign nation will increase the coverage of the WPR and effectuate the intention of Congress to regain their Constitutional role in war-making.

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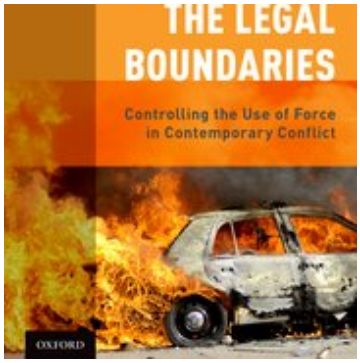
to the Future of Article 2(4), 36 YALE J. INT'L L. 421, 427 (2011); Michael N. Schmitt, *Cyber Operations and the Jus Ad Bellum Revisited*, 56 VILL. L. REV. 569, 587 (2011).

Participation in Shadow Welfare

MÉLANGE DU MERCREDI/FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT

November 30, 2016 / Ken Watkin

Welcome to **Mélange du Mercredi** (Wednesday Mix). Each week, we highlight one of the latest and greatest in reading, film and other scholarly resources, focusing on a variety of issues pertaining to international humanitarian law. As always, if you have suggestions, or would like to submit a post on something you feel our readers will also enjoy, we're happy to include them. Just email Editor Niki Clark.



This week Kenneth Watkin has written a summary exclusively for **Intercross** of his new book, **Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict (Oxford University Press, 2016).**

The international law governing armed conflict is at a crossroads. A well-established framework of law that has primarily been designed to control the resort to, and conduct of inter-State conflict is now being forced to confront 21st Century violence. The contemporary threats are significantly different than those of the previous century. While the danger of inter-State conflict remains real, the predominate security threats involve insurgencies with violence sometimes bordering on the level of inter-State conflict, transnational terrorism, and criminal gangs transcending national borders. Even when conventional war between States has occurred it has been followed by lengthy counterinsurgencies where terrorism and criminal activity have flourished. These subsequent internal conflicts have presented a much more significant challenge than simply defeating the State's conventional forces

Conflict between states and non-state groups is not new. What is new is that non-State actors increasingly operate transnationally. For example, the Islamic State and Al Qaeda have been recognized by the United Nations as global threats. Non-State actors do not respect the borders upon which the State-focused international law system is based. The impact of transnational terrorism has been felt in such

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INTERCROSS RESOURCES

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violence spectrum where the armed conflict and law enforcement paradigms overlap. A particular challenge for international law is how to deal with threats that resemble “criminal insurgencies”, such as where drug trafficking paramilitary gangs take on the attributes of insurgent groups challenging the State in a competition for ungoverned or poorly governed spaces. Added to this are uniquely criminal gangs focused on economic gain. These groups thrive in regions where governance is weakest, and seek to perpetuate ineffective governance instead of seizing the reins of government. They engage in acts such as piracy and hostage taking that threaten the citizens of more stable States.

One of the greatest challenges facing the international legal community is the historically State centric focus of international law with its overwhelming emphasis on inter-State warfare. While there is a relatively well developed body of treaty and customary law applicable to international armed conflict, the same cannot be said for conflict with non-State actors. Further, there is an interpretive preference to treat the various bodies of law impacting on armed conflict in an exclusionary fashion. Those laws include international humanitarian law; the law governing the recourse to war, including State self-defence; international human rights law; domestic law, including human rights law; and international criminal law. In addition, international lawyers have a communication challenge. The highly technical, and even insular nature of this aspect of international law is reflected in the tendency by international lawyers to use Latin (e.g. *jus ad bellum*, *jus in bello, lex specialis, lex lata*) to describe concepts that need to be communicated to a 21st Century audience. The use of such terms does not effectively contribute to resolving these complex strategic and operational challenges.

Practitioners often find themselves struggling to simultaneously apply these international and domestic

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attempt to apply these areas of law. The boundaries placed around these bodies of law are twofold. First, there is the outer limits of established treaty and customary law, which is in turn limited by a historic focus on inter-State conflict. Secondly, internal barriers are frequently applied between each area of law. One example of the internal boundaries is the separation of the law governing State self-defence from humanitarian law. The purpose is to ensure the application of the latter body of law equally to all belligerents notwithstanding the purpose for which they are fighting. Another example of the separation between bodies of law has become almost ideologically charged. In that regard it is not uncommon to have the respective proponents of international humanitarian law and human rights law deny any application of the other body of law in the midst of armed conflict. The emphasis on legal boundaries results in formal, and frequently rigid, approaches towards applying each legal framework. Such formalism does not work well in practice. In this respect, the theoretical discussion can often appear to be far removed from the practical security challenges facing States.

However, while lawyers seem increasingly mired in debate about such issues the nature of conflicts involving 21st Century security threats is forcing reconsideration of these categorical approaches. As Adam Roberts has noted the separation between the law relating to State self-defence and humanitarian law "has never been absolute", and conflicts within States and against terrorism "have always raised difficult challenges in relation to the application—let alone the equal application—of the laws of war." Contemporary conflict is forcing legal practitioners to consider the application of law in its broadest sense. This has led to the adoption of the doctrinal term "operational law" to describe the wide range of international and domestic laws impacting on military operations. The change toward a more holistic approach is also reflected in Harold Koh's 2010 reference to "the law of 9/11", and a

determine how these bodies of law interface and interact. This issue can arise in a myriad of contexts including the simultaneous application of the law governing State self-defence and humanitarian law, the human rights and humanitarian law interface, the post 9/11 “drone war”, the categorization of conflict, and the protection of nationals.

Notwithstanding the “secularization” of international law a basis for assessing the interaction of these bodies of law arises from their grounding in Just War theory. Of particular relevance is the “proper authority” principle, which makes the State the focus of the external use of force (international armed conflict), as well as responsible for the maintenance of order over those being governed (conflict not of an international character). It is the obligations of governance that mandates the application of human rights based norms whether operating within the State’s own territory, or, consistent with an increasingly accepted view, externally within another (e.g. occupation, assistance to another State fighting an insurgency). However, one challenge in assessing how the various bodies of law interact is reflected in the often confusingly common use of Just War based terminology such as necessity, proportionality, imminence, immediacy, etc. For example, despite their shared origins, terms like necessity and proportionality do not mean the same thing when dealing with State self-defence, humanitarian law, or human rights based law enforcement.

Turning first to the interface been humanitarian law and the law governing State self-defence, two theories have been developed. Considered largely in the context of inter-State warfare one theory argues for an “overarching” application of the law controlling State self-defence, and the other a more “limited” approach. Under the “overarching” theory the State self-defence principles governing the use of force are seen as having a continuing impact throughout the subsequent conflict, even controlling how hostilities are

acknowledges a continuing application of self-defence principles during limited defensive reactions by States, but significantly not in the context of a war involving a comprehensive inter-State use of force. Following the attacks of 9/11 there has been an increasing acceptance that self-defence can be exercised by States against non-State actors without the threat posed by the latter group being attributed to a State. This raises the issue of the applicability of the “overarching” and “limited” theories to these defensive responses. However, an armed conflict with non-State actors can never constitute a “war” as contemplated by the more limited theory. This means that the law governing State self-defence continues to apply throughout the conflict with non-State actors regardless of whether the “overarching” or more “limited” theory applies. Therefore, as States take defensive action against these groups they must reconcile the interaction between the law governing their course to war and that applicable to the conduct of hostilities.

What does this mean in practical terms? The interaction of the two bodies of law is best considered in the context of the levels of war: strategic, operational and tactical. The law governing the recourse to war is not superior to, nor does it trump humanitarian law. The State self-defence principles do not apply directly to the operational and tactical direction provided to military commanders. Issues central to the conduct of hostilities: what constitutes a lawful military objective, how collateral effects from an attack are assessed, or the lawfulness of weapons are determined by international humanitarian law. Where the two bodies of law interact is at the strategic level with the nature and scope of the justifiable defensive response determining the range of military action undertaken by the State. In this context self-defence principles may restrict what valid military objectives are struck, the number of attacks carried out, and their location. The self-defence principle of proportionality may also influence the boundaries of an

There is also a requirement to consider the interface and overlap of international human rights and humanitarian law. This has become one of the most significant, disputed and enduring legal issues arising in the post 9/11 period. There has, in many respects, been a strategic level battle for "control" waged by proponents of the two governing legal frameworks. Unfortunately, this battle between theorists has largely been divorced from the situation facing security forces on the ground. Masked behind exclusionary arguments as to which body of law applies is the reality that human rights norms have always been an integral part of humanitarian law. In addition, military forces have long had to apply a law enforcement approach particularly when confronting non-State actors fighting amongst the people (e.g. occupation, counterinsurgency). In this respect military commanders and other State security personnel face daily dilemmas regarding the use of force that can fall under either, or both legal regimes.

Unfortunately, more time and effort has been spent on assessing the differences between these bodies of law than considering their similarities and intimate history. Historically, these legal frameworks have a shared grounding in religious humanism and morality. Since World War II the understanding of the relationship between human rights and humanitarian law has been affected by periods of neglect, forced integration, divergence and finally growing reconciliation. As can be seen from the treaty law alone international humanitarian law (e.g. the *Fourth Geneva Convention*, Common Article 3, *Additional Protocol I*, Article 75 and *Additional Protocol II*, Article 4) incorporates substantial human rights law provisions. There has also been an acceptance by States, courts and academics of the customary nature of human rights law. Whether by operation of customary law, or because human rights norms are incorporated into humanitarian law, the result is they apply to contemporary operations even where States deny the extra-territorial application of treaty law, or

The renewed interest in human rights norms is directly linked to State involvement in counterinsurgency, counterterrorism and countering criminal activity even in the midst of armed conflict. This reality is perhaps best represented in the 2015 United States Army *Operational Law Handbook*, which has a stand-alone chapter on human rights. Further, as is reflected in its 2014 *Department of Defense Detainee Program* directive (para. 3a.) the United States has substantively moved toward the application of human rights norms as part of humanitarian law in respect of detainees regardless of how a conflict is characterized. The operating environment is simply too complex to keep these bodies of law trapped within their "silos". However, acknowledgement of the simultaneous and complementary application of both human rights and humanitarian law is just the beginning of the discussion. In assessing which body of law is applicable it is necessary to consider the limits of each normative regime. For example, as was highlighted in the 2006 Israeli *Targeted Killing Case* (para. 40), the applicability of a human rights based capture approach is itself limited by the ability of the security forces to physically control the area in which the operation will take place, and assessments of the risk posed to those forces and uninvolved civilians. Further, the group nature of the IED threat highlights the necessity of frequently privileging a conduct of hostilities based approach over a law enforcement one.

The existence of the overlap between human rights and humanitarian law was acknowledged in the International Court of Justice *Wall Case* (para. 106) when it indicated there are situations that "may be matters of both these branches of international law." However, what has not occurred is an in depth consideration of what this means in practice. As States confront organized armed groups hiding amongst civilians they are placed in the position of considering not only the overlap between these bodies of law, but also their convergence in application and tactical

collateral effects resulting from attacks. Lower level threats, the development of specialized police forces, as well as an increasing acknowledgment that human rights law authorizes the use of deadly force (e.g. when confronting hostage takers, suicide bombers) means that body of law can offer an effective, but overall less violent means for dealing with many security threats. As a result, States can and do make a policy choice to apply the more restrictive law enforcement paradigm either on its own, or in conjunction with a conduct of hostilities approach. This is reflected in the post 9/11 migration of operations from "kill or capture" to "capture or kill" missions, and finally to ones seeking the *arrest* or killing of insurgents and terrorists. Whatever the reasons for the fight amongst some lawyers about whether humanitarian or human rights law should prevail there is increasing reliance by States on their simultaneous application. That acceptance is often directly linked to the "police primacy" requirements of counterinsurgency and counterterrorism doctrine.

With the application of humanitarian law being dependent upon the existence of an armed conflict one challenge confronting international lawyers is categorizing violence with non-State actors. That fight can occur in the context of inter-State warfare, its non-international counterpart, or as part of law enforcement operations. It has been argued international armed conflicts can be interpreted to be occurring when non-State actors are controlled, or harboured and supported by a State; because of a non-consensual crossing of State borders to attack terrorists; through the application the *Additional Protocol I*, Article 1(4) "wars of national liberation" provision; or because of the now dated "recognition of belligerency" theory. The Israeli *Targeted Killing Case* refers to "conflicts of an international character", and Yoram Dinstein to "extra-territorial law enforcement". There are also post 9/11 "transnational armed conflicts" and the United States, *Hamdan vs. Rumsfeld*, decision indicating that armed conflict between States and

States, and those that “spill over” to adjacent States being viewed as non-international conflicts. Further, international and non-international armed conflicts may be seen as occurring simultaneously in the same geographic space. The lack of consensus, the novelty of a number of these theories, their complexity, and the opportunity for terminological confusion is not helpful. It should come as no surprise that practitioners increasingly simply ask the question whether an “armed conflict” is in existence, rather than engage in this categorization debate.

Adding to the legal debate is a further disagreement regarding the threshold for non-international armed conflict. There is a general acceptance of the *Tadić* criteria of intensity of violence (protracted violence) and group organization. However, there is also growing recognition that reliance on the protracted nature of the violence, or the exclusive use of the *Tadić* criteria cannot adequately address all contemporary threats. There is a danger that setting the threshold for non-international armed conflict too high not only wrongly categorizes the violence, but also asks human rights based law enforcement to perform a role it cannot carry out without significantly altering its governing principles. Instead, there is an increasing reliance on the *Additional Protocol II* Article 1(2) threshold criteria of violence having to exceed “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” constituting an armed conflict, or a “totality of the circumstances” approach that considers a broader range of factors. In this respect consideration of tactics and weapons used by the organized armed group, the type of State forces required to defeat the armed group, and the purpose for which the violence is occurring (i.e. a political or conversely an economic goal) more realistically addresses current threats. This is especially the case when they involve what might be viewed as “one off” attacks, such as those experienced in Mumbai (2008), Benghazi (2012), the Westgate Mall in

Consideration of the multiple bodies of law applicable to contemporary operations is also reflected in largely unresolved debates about “direct action” counterterrorist missions, and defensive action to defend nationals. Counterterrorist action largely takes the form of Special Forces missions or the use of airpower, with drone strikes attracting the most controversy. The suggested analytical frameworks can be referred to as a restricted “Law Enforcement” theory, the permissive “Conduct of Hostilities” approach, and the “Self-Defense” option. While the law enforcement framework may be seen as too restrictive, the other two options are often viewed as being overly destructive, and ones that are too easy to apply. The approach chosen by the Obama administration has been to temper a conduct of hostilities approach with human rights like restrictions (e.g. consider capture before killing, restrictive “certainty” thresholds for application). While an “unable or unwilling” justification for such cross border attacks continues to attract criticism it is also clear a number of States, including European ones, have accepted the need to act in Syria on the basis that the territorial government does not exercise adequate control over the areas from which the terrorist threat is generated.

Similarly, States have long taken action in other countries to protect their nationals. While controversial this is an activity the international community has consistently accepted, or at least tolerated, particularly in the ungoverned spaces of the world. It has been variously justified as law enforcement, forceful countermeasures, self-defense in response to an armed attack, proportionate defensive measures, noncombatant evacuation operations, or simply the defense of nationals. Transnational hostage rescues can occur across the spectrum of violence including inter-State warfare (e.g. Entebbe, 1976), armed conflict with non-State actors (Sierra Leone, 2000), and human rights based law enforcement against criminal gangs (e.g. Somalia, 2012). These operations have demonstrated a growing

to perform cross-border law enforcement based operations.

One issue that receives little attention is how human rights law relates to the State self-defence legal framework governing many international operations. While they share common Just War roots, principles such as necessity, imminence, proportionality and last resort are traditionally interpreted in a more restrictive fashion under human rights law. In other words, an interpretation that reflects the exercise of personal self-defense under domestic criminal law. This means that transnational law enforcement action should fit comfortably within a broader overarching national self-defence framework. However, a particular challenge in assessing how force is controlled at the tactical level is the dominant position that the right to act in self-defense in its recourse to war form has attained in the international law dialogue about the use of force. How broadly or narrowly that right is assessed can have a significant impact on how human rights based the law enforcement authority to use force is interpreted to apply. One challenge is that law enforcement is not solely limited to acting in individual self-defence, meaning greater authority to use force for mission accomplishment (i.e. enforce the law) must be accommodated within the overarching legal framework. Indeed, depending on the operation, State self-defence principles must accommodate both humanitarian law and human rights law based authority to use force.

Challenges have arisen in the context of interpreting self-defence Rules of Engagement (ROE), UN peacekeeping and the US Standing ROE (SROE). For example, ROE doctrine often struggles to provide a homogenous interpretation of self-defence for national, unit and more individualized uses of force. For peacekeeping an exceptionally narrow interpretation of governing self-defence principles in the 1990s proved inadequate to address threats faced during increasingly complex UN

including the maintenance of law and order. Finally, there is a danger in an SROE context that expansive State self-defence based interpretations of imminence will be incorporated into rules intended to be applied in a traditionally more restricted law enforcement context.

There is a narrowing operational and normative gap between the conduct of hostilities and law enforcement paradigms as military forces are tasked with policing duties, or the police are required to conduct operations to counter IEDs, suicide bombers and hostage takers. With security forces frequently applying law enforcement based tactics, either as a matter of law or policy, there needs to be consideration of the limits of that body of law. Those limits are practical in nature, found in an overreach in application by courts, and caused by limitations of interpretation. The practical limits are evident in the Northern Ireland "shoot to kill" controversy, which raised questions regarding the point at which law enforcement may no longer be an effective, or appropriate framework to deal with armed conflict related violence. That conflict is often relied on to suggest contemporary terrorism is fundamentally a law enforcement matter. However, success in Northern Ireland was dependent upon a number of factors such as good governance, an established and responsive justice system, a capable functioning police force, an ability to exercise control in an area of operations, and an environment where cultural similarities facilitated rather than hindered operations. Those factors are not easily replicated in the failed States or ungoverned spaces where most contemporary operations take place. Further, the employment of police forces in a conflict role can lead to a militarization of the police. The development and use of police for "military" missions can undercut counterinsurgency and counterterrorism efforts leading to an increase in insecurity for the civilian population.

Despite the European Court of Human Rights recognition of

that body of law to interpret human rights law during non-international armed conflict. There is also the question whether the European court will continue to apply human rights based principles when assess aerial bombing (e.g. *Kerimova Case*), which is clearly hostilities related. Further, by indicating humanitarian law will be applied "as far as possible" (*Hassan Case*, para 104) in interpreting the application of human rights treaty provisions during armed conflict, the court seems to suggest an overarching application for human rights law. This is a role that body of law is neither designed, nor intended to have. Interpretive limitations placed on the applicability of human rights law are evident in the German Constitutional Court 2006 handling of the shoot down of hijacked aircraft. While important principles such as human dignity were emphasized in striking down legislation permitting the military to counter such attacks by terrorist groups the decision did not provide a practical solution to a real-world threat. Further the Court avoided making the very value judgments that must be made by military personnel on a regular basis thereby providing support for an argument doubting that human rights law can adequately regulate these threats during hostilities. It is also important that a human rights based approach and its terminology not be used to mask when force is used as part of the conduct of hostilities. While the 2013 United States drone policy applies human rights principles it primarily remains a humanitarian law based endeavour.

Facing the unique and dangerous security threats of the 21st Century requires an approach based not on a "hybrid" model, but rather one that holistically encompasses law enforcement as well as conventional, and irregular armed conflict. It is this "holistic" approach that underpins the concept of "operational law". Contemporary threats from non-State actors will require a re-assessment as to when armed conflict with non-State actors commences. This is particularly evident in respect of "one off" attacks where

violence does not reflect the nature of many security challenges facing States, or the type of response required to defeat it. Despite 15 years of comprehensive military action, it is law enforcement that has become a defining feature of many security operations. The challenge is determining when such a response is required by law, or is the preferred State response for meeting the goal of maintaining order.

In many cases the human rights based paradigm must be applied as a matter of law (e.g. dealing with criminal gangs, occupation, or addressing violence by civilians not taking a direct part in hostilities). However, it is also frequently adopted by States as a matter of policy, particularly within their own territory. Indeed, it is usually the default approach. This policy approach is frequently extended to external military operations such as counterinsurgency where the law enforcement model provides a less violent, but often very effective method for dealing with the security threat. It is not evident beyond a formalist limitation attached to national borders why States should not be required, consistent with their role as a “proper authority”, to demonstrate a special trust toward uninvolved civilians regardless of nationality during cross-border deployments against non-State actors. In what is often a battle for legitimacy a key indicator of success against non-State actors, and ultimately indicative of a return to normalcy, is the ability of a State to manage that threat with a law enforcement response. The result is that law enforcement should be privileged over the conduct of hostilities where it can effectively address the threat.

It will be an exceptional situation where some or all of the bodies of law impacting the conduct of counterinsurgency and counterterrorism operations do not have to be applied simultaneously. Hence a holistic approach, which includes the law enforcement option, provides States and their security personnel a full range of potential responses. It

violence, and allow security officials to make operational choices uniquely tailored to the nature of that threat. To be able to do so State legal advisors must be educated and trained not only in international humanitarian law, but also to a far greater extent in human rights law (international and domestic), the law governing the recourse to war, and international criminal law. Despite the need to re-calibrate after a decade and a half of counterinsurgency/counterterrorism operations neither States, nor their legal advisors can afford to return to a traditionally exclusive focus on inter-State conflict. At the same time, the academic community needs to work to reduce the overall lack of certainty compounded by numerous often diverse theories regarding foundational legal issues. Importantly, these theories must be capable of being applied in an effective manner, lead to success, and prioritize the protection of the civilian population. An emphasis needs to be placed on determining their practical effect. It is crucial that the boundaries of the various applicable bodies of law are not allowed to be barriers to maintaining law and order, and protecting civilians regardless of where they might live.

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Proportionality and 150 Iranian Lives: Do They "Count"?

by Kenneth Watkin

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CNN reported on Aug. 1 that Retired Admiral William McRaven, the former Navy SEAL who led the Bin Laden raid, weighed in on President Donald Trump's claim that he called off a strike at the last minute in response to the Iranian shootdown of an unmanned U.S. drone when he learned of the likely number of casualties. The *New York Times* editorial board reported in late June that Mr. Trump had concluded that the possible deaths of 150 Iranians "would not have been proportionate to the Iranian downing of a robotic spy plane." Admiral McRaven indicated that it was hard to believe the President only learned of the casualty count just prior to the strike commencing, since "the casualty count is almost always part of the military's briefing when it comes to a strike on a target." Further, "this idea that it was only through the President's restraint that we got as far as we did, I think the bigger question is: Why did we get that far?" However, Admiral McRaven is reported to have been ultimately happy with the President's decision not to carry out the strikes, and he agreed it would not have been a proportionate response. As *Newsweek* indicated, Admiral McRaven "explained that the response to an incident like a drone shoot down should be a proportional strike, one that does not risk uncontrolled escalation."

These comments over a month after the incident are of interest for a number of reasons. First, they highlight the now common practice by retired senior military officers to publicly critique the President's national security processes and decisions. While Admiral McRaven expressed approval of this decision, the weight of this commentary has been far less favorable. This implicates the interface between the political and national security communities, highlighting the degree to which a rift has grown between a number of highly respected senior retired United States general/flag officers and their President regarding the use of military forces. For example, Retired General Stanley McChrystal is previously reported to have stated he believed President Trump was dishonest and immoral. This rift is obviously based on mistrust of the probity of the President's

statements. For those in the military community, both serving and retired, for whom honesty and honor are sacrosanct principles, these comments about the Commander in Chief are undoubtedly sobering.

Second, the statements by Admiral McRaven also shows the degree to which his views and that of the President are ultimately aligned (assuming the President's rationale not to strike rested solely on a concern with proportionality). Their common ground centers on the issue of the proportionality of a defensive response to the use of force by an opposing State and the references to casualties in that analysis. This is noteworthy because there remains considerable disagreement amongst international lawyers regarding whether casualties, including civilian casualties, must be considered when assessing the proportionality of a State's recourse to force in response to an armed attack (the *jus ad bellum*). Given the continuing tensions in the Gulf and the high stakes involved, the lack of consensus amongst international lawyers deserves closer analysis.

There are two legal schools of thought on this issue. One concentrates on blunting the military capability of the attacking State. Mike Schmitt has argued in a recent Just Security piece regarding this incident that

> "a [*jus ad bellum*] proportionality analysis would focus on the scale and scope of the forceful response that would be required to deprive Iranian forces of the ability to launch the pending attacks and/or convince Iranian authorities to refrain from conducting them.... However, in making such an assessment, it is essential to understand that the issue would not be the possible casualties that might result, but rather the effect of the strikes upon continued Iranian attacks."

Assessing civilian casualties would be a matter for international humanitarian law (IHL), not a component of the initial *jus ad bellum* analysis, which is a separate inquiry. Others support this approach, as is reflected in past commentary by Laurie Blank reported in the Washington Post that "[i]mportantly, this [*jus ad bellum*] rule of proportionality does not address civilian casualties. That is the task of the law of war principle of proportionality."

The alternate method of assessing the legality of State action in self-defense considers not only the force used in the attack and the response, but also the damage and casualties that can result. This view has perhaps been most broadly stated by Judith Gardam in her 2004 book, *Necessity, Proportionality and the Use of Force by States* (p.

168), where she indicates the requirements of self-defense proportionality regulate the means and methods of warfare and targets, and must consider "the anticipated overall scale of civilian casualties, the level of destruction of enemy forces, and finally damage to territory, the infrastructure of the target State and the environment generally." These competing views point to a fundamental divide within the international legal community regarding the role of proportionality when assessing a State action in self-defense.

Which viewpoint is right? Do the Iranian lives not count (literally) as a State makes decisions that can lead to broader conflict? Is the consideration of civilian casualties truly best left to IHL, the law governing the conduct of hostilities (*jus in bello*), alone and not considered under self-defense law? What effect does the law governing the State recourse to war have on the actual conduct of hostilities? As it turns out the issue of whether casualties, and in particular civilian casualties, have to be considered as part of a recourse to the use of force by States raises a number of questions about how the *jus ad bellum* and the *jus in bello* interact with one another. It also highlights that a traditional theoretical approach, which suggests these bodies of law operate separately from one another, does not reflect the reality of the practice of international law. Therefore, it will be helpful to look at the content of the self-defense "proportionality" rule and then address how the two bodies of law interact.

Jus ad Bellum Proportionality

So, what is assessed under *jus ad bellum* proportionality? The analysis is complicated by their common roots in Just War theory with both bodies of law relying on the principles of "necessity" and "proportionality," although interpreted differently for each body of law. Notwithstanding the narrower approach that concentrates on weighing the counterforce applied in response to an armed attack, there are strong arguments supporting a wider assessment of *jus ad bellum* proportionality extending to the consideration of damage and casualties. The "roots" of this broader assessment can be found in the iconic 1837 *Caroline Case* with Daniel Webster's reference "local authorities of Canada" having to establish they "did nothing unreasonable *or excessive*" in seizing and destroying a rebel ship, the *Caroline*, located in American waters.

A more contemporary reference to excessiveness is found in the 2005 Chatham House, *Principles of International Law on the Use of Force by States in Self-defence*, where Rule 5 states: "The force used, taken as a whole, must not be excessive in relation to the need

to avert or bring the attack to an end," but also that "[t]he physical and economic consequences of the force used *must not be excessive* in relation to the harm expected from the attack." Yoram Dinstein states in his latest edition of *War, Aggression and Self-defence* that assessing self-defense proportionality in situations other than a "war" between States (i.e. in a more limited "on-the-spot reaction" or what he terms a "defensive armed reprisal") involves a comparison by means of "a rough calculation of the acts of force and counter-force used, *as well as the casualties and damage sustained*." (p. 282) Notably, no indication is made as to whether those casualties are limited to military personnel.

Another source of support for the position that casualties are part of the proportionality assessment in assessing the lawfulness of a State's defensive response can be found in the 1996 International Court of Justice (ICJ) *Nuclear Weapons Case*, where it was ruled "a use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law." (para. 42). The nature of nuclear weapons inevitably raises the issue of their potentially indiscriminate effect on civilians. According to the ICJ's ruling, a determination that a use of such weapons is "illegal" due to the excessive incidental loss of civilian life, injury to civilians, or damage to civilian objects (Article 51(5)(b) of *Additional Protocol I*) would certainly be relevant to whether the State self-defense response itself was excessive. Importantly, even if their use was not viewed as being excessive under IHL it might still be considered so under the *jus ad bellum*. This is because the role of the *jus ad bellum* is different. Those restrictions are very much a product of the 20th Century inter-war effort to limit the recourse to war, which was at its heart "anti-war." Certainly, IHL, such as the then relatively recent 1907 Hague Regulations, had done little to limit the ravages of World War I.

As the 17.7 million combatant and 39 million civilian deaths during World War II again established, States are capable of incredible violence. It may be that the past two decades of concentrating on drone strikes against non-State actors under an ongoing, if frequently controversial, self-defense envelope has resulted in an over emphasis being placed on the protections provided for civilians by humanitarian law to the exclusion of other important legal considerations. Perhaps one of the outcomes of States now

focusing more on near peer, and peer to peer inter-State conflict, alongside ongoing conflicts against non-state actors, will be a deeper consideration by international lawyers of the broader role and principles of the *jus ad bellum*.

The Interaction Between *Jus ad Bellum* and *Jus in Bello* Proportionality

The interaction between proportionality, as assessed under IHL, and the test for State self-defense analyzed under the *jus ad bellum* can occur in a number of ways. Certainly, the consideration of "casualties," and in particular civilian casualties, has arisen *a posteriori*. That is almost inevitable since for observers outside the military planning process it provides the most concrete evidence of the results of a decision to act. *Jus ad bellum* proportionality may also be assessed during the planning stages of a State response and throughout its execution. A State decision to contemplate the use force must come first, and in making and executing such a decision an interaction with IHL is inevitable.

As explained in the ICJ *Oil Platforms Case*, a strike by the United States against Iranian assets on April 14, 1988, which included attacks on oil platforms and the destruction of two Iranian frigates, occurred four days after an American warship struck a mine. During U.S. operational planning leading up to that strike, the targeting process would have identified military objectives, considered the military advantage to be gained from an attack and assessed the potential for collateral civilian casualties and damage. At the same time, the *jus ad bellum* proportionality assessment could and should have looked at those potential civilian casualties and damage as well as the impact on Iranian military personnel and materiel before striking. Although civilian casualties may be justified when weighed against the military advantage to be gained from attacking a military objective, they may not be necessarily in the context of limiting the recourse to war. This could lead to the consideration of other possible available targets that obtain the required effect without the same level of accompanying casualties or damage. The process can become interactive with the *jus ad bellum* proportionality consideration encompassing a broader range of factors that includes assessing the outcome of the IHL-based targeting process. It is noteworthy that in notifying the Security Council of its actions under Article 51 of the United Nations Charter the United States government stated: "All feasible measures have been taken to minimize the risk of civilian damage or casualties" (*Oil Platforms Case*, para. 67). Compliance with IHL obligations regarding potential civilian casualties was incorporated into self-defense reporting obligations.

Another area of controversy in the legal community has been the degree to which the law governing self-defense remains relevant once a decision to act is made. Again, it should come as no surprise there are two general approaches. The first is an "overarching" application of that law such that State defensive action is constrained by the principles of necessity and proportionality throughout the existence of a conflict. The second is a more "limited" theory where a distinction is made between traditional warfare between States, and isolated defensive exchanges and border skirmishes. It exempts significant armed conflict between States from the continued influence of the *jus ad bellum* after the conflict commences.

However, the divide between these two interpretations of international law is not as significant as might initially be believed. The "overarching" theory accepts that as a conflict expands in scope and intensity the law governing self-defense has a lessening influence (e.g. during total war, geographic restrictions on where hostilities occur would not be controlled by a proportionality assessment). And under the "limited" approach, minor exchanges not rising to the level of "war," such as the recent one arising from the Iranian shoot down of an unarmed drone, fall well within the type of situation where the self-defense principle of proportionality would continue to govern State action.

Distinct from the debate among the "limited" and "overarching" theories of the *jus ad bellum*'s continued application during armed conflict, the interaction between these two bodies of law was the subject of vigorous debate in the development of the 1995 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. Disagreement "centered on whether the principles of necessity and proportionality are applicable in a strategic sense only, or also on a tactical level [Rule 4, p. 77]." Application of the *jus ad bellum* at the tactical level could directly restrict the choice of targets and the methods and means of warfare, a clear IHL role. However, the ICRC Customary International Humanitarian Law study notes many States take the view in respect of targeting that "they will consider the military advantage to be anticipated from an attack as a whole and not from parts thereof" (Vol. I, Rule 8, p. 31), and the 1998 Rome Statute refers to the "overall military advantage anticipated" (Article 8(2)(b)(iv)). This suggests a strategic level assessment under IHL, which provides the space for an interaction between the two bodies of law at that level rather than the *jus ad bellum* having a direct tactical impact. It is at the strategic level that the law governing the State self-defesce response, and IHL, is best assessed.

Under the "strategic" approach described above, self-defense proportionality does not usurp the role of the law governing targeting, but it could still influence the boundaries of State action when acting in self-defense. The initial identification of lawful military objectives, the weapons used, and the assessment of expected civilian casualties and damage remain IHL issues. However, at the strategic level, the self-defense proportionality test may restrict which valid military objectives are struck, and the number of attacks. What remains under debate is whether the scale of anticipated civilian casualties affects whether those attacks take place at all, although clearly it is my view that it does. Added to this is the consideration of opposing military casualties. The self-defense test is different than, but not divorced from the IHL analysis.

Assessing Civilian Casualties in *Jus ad Bellum* Proportionality is the Right Approach

One point is both clear and notable: all voices on this issue strongly agree that excessive civilian risk resulting from an action in self defense necessitates the state forego or modify an attack, even if they might not agree on the phase at which that consideration produces that effect. However, given that the right to life is a deeply held principle in both war and peace; and the United Nations (UN) Charter, which articulates the State right to self-defense, was intended "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind," it is difficult to see how civilian casualties would not be relevant to the question of whether a State use of force is "proportional."

The United States unquestionably carries a proverbial big stick. Admiral McRaven, who knows better than most the benefits and costs of wielding that stick, offers an important reminder on why it is often more prudent to follow President Roosevelt's advice to speak "softly." Indeed, the past two decades have clearly established, once the "dogs of war" are unleashed they are difficult to bring back to heel. A broad legal interpretation that accepts potential casualties have to be considered in determining the proportionality of a response to an armed attack ultimately seems more in tune with UN Charter history, its principles, and its goals. I believe the result is that by considering the potential for 150 Iranian casualties when determining the appropriateness of the response to the shootdown of the unmanned drone, the approach apparently taken by the United States President, those who advised him, and Retired Admiral McRaven is firmly grounded in law.

IMAGE: Iran's Ambassador to the United Nations Majid Takht Ravanchi holds up maps of the Strait of Hormuz while speaking to the media before a meeting with other UN members on the escalating situation with the United States at United Nation headquarters on June 24, 2019 in New York City. The Trump administration imposed fresh sanctions on the country following the shooting down by Iran of a U.S. surveillance drone over the Strait of Hormuz. (Photo by Spencer Platt/Getty Images)

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Accountability Fatigue: A Human Rights Law Problem for Armed Forces?

by Kenneth Watkin

November 1, 2018

Retired United States General David Petraeus added an important international voice to a chorus of senior United Kingdom political leaders, military commanders, veterans and retired soldiers who have expressed concern about the impact that investigations into alleged misconduct in Northern Ireland, Iraq and Afghanistan are having on the British military. General Petraeus' comments center on the "judicialization" of conflict; the increasing friction between human rights and humanitarian law; and the effect such developments will have on operational effectiveness if the United Kingdom cannot "reform the legal framework within which it fights, and restore the primacy of the law of armed conflict." A particular concern is the European Court of Human Rights' displacement of humanitarian law by human rights law.

Certainly, observing from the other side of the Atlantic it is easy to see that the British armed forces are undergoing accountability fatigue. The Defence website set up to help veterans indicates that serving and retired Army personnel are involved in legal processes arising "from legacy operations including criminal investigations under the Service Justice System (SJS), civilian criminal investigations, civil litigation, inquests and, when directed, public enquiries." Reviews of military conduct have included the Chilcott, Gibson, Al Sweady, Baha Mousa, and Saville inquiries, as well as the Iraq Fatality Investigations (IFI). Investigations such as those undertaken by the Iraq Historic Allegations Team (IHAT) and the Northern Ireland Historical Enquiries Team (HET) and successor inquiries have been directed by the UK Government. Further, United Kingdom courts, the European Court of Human Rights and the prosecutor of International Criminal Court (ICC) have become involved in aspects of the treatment of detainees.

The number of reported allegations, spanning both domestic and international operations, have been truly astonishing: over 3,500 and 551 allegations of abuse or torture of detainees for Iraq and Afghanistan respectively, and 354 incidents of alleged unlawful killing associated with Northern Ireland. In the latter case some of these

allegations stretch back to the 1970s. The track record of the authorities in laying criminal charges is not good. By June 2018 the Service Police Legacy Investigations team, which inherited the IHAT caseload, closed 88 percent of the files without charges being laid, with only 143 allegations remaining under review. Clearly allegations must be properly vetted and investigated, however, these investigations, frequently set up to meet real and perceived requirements under the European Convention on Human Rights, appear to have adversely impacted individual soldiers and the military as a whole while achieving little. Maintaining confidence in military compliance with international legal obligations is essential. However, that goal may be at risk of being overshadowed by the negative perceptions these investigatory processes have created.

General Petraeus' reference to the two main governing legal frameworks, human rights law and international humanitarian law (IHL), highlights a complex strategic conflict for primacy that has been taking place between interpreters of both bodies of law since the early 1990s. It is a conflict made more difficult by a human rights perspective that exhibits little confidence in the independence and impartiality of the military investigatory or judicial process, and prefers oversight to be carried out almost exclusively by civilian actors. The challenge manifests itself in disputes regarding the role human rights law performs during armed conflict, and the degree to which States and their military forces can properly regulate their own activities.

The conflict between these bodies of law finds its roots in the failure of the human rights backed 1977 *Additional Protocols* to the 1949 Geneva Conventions to gain universal acceptance; that the *Protocols* did not apply to the lower intensity conflicts the human rights community was particularly interested in; and there was a renewed desire by that community to remain separate from its IHL counterpart, which ended a previous effort through the *Protocols* to harmonize the two bodies of law. In addition, the historic trend of a major reassessment of IHL treaties every 25 years had by the late 1990s been replaced with the view that the effort should be on implementing the existing humanitarian law.

At the same time international criminal law increasingly became a focus of the international legal community. This emphasis on accountability saw the development of ad hoc international criminal tribunals and the 1998 Rome Statute of the International Criminal Court (ICC). It also stands out as a particularly strong form of "naming and shaming". At the same time the human rights community acted to inject human rights

law into the regulation of military operations that qualify as "armed conflict." Debates erupted amongst human rights and humanitarian law advocates as to which body of law was the governing *lex specialis*, and as to the extent to which human rights treaty law had extra-territorial application to State armed forces engaged in complex contemporary armed conflicts. As General Petraeus notes, the United States has taken aggressive action to avoid such international oversight. It is a trend that is reflected in a backlash primarily, but not exclusively by African States against the ICC, and in the failure of States to arrest the indicted President of Sudan.

What makes this debate academically fascinating, but practically frustrating and potentially operationally dangerous is that concerted efforts to resist the application of human rights law are inconsistent with the tactical challenges facing military commanders. Many of those challenges require the application of human rights law, or norms. Obligations such as maintaining order as an occupying power, the rescue of hostages seized by criminal gangs and thwarting crime-based funding for terrorist groups mean that military forces frequently engage in human rights based law enforcement even during armed conflict. Importantly, the "law of armed conflict" itself is replete with human rights norms and obligations, and customary international human rights law has universal jurisdiction and therefore applies to all areas where military forces operate. Moreover, it forms the subject matter of many investigations. Indeed, the alleged abuse and torture of detainees is clearly prohibited under both bodies of law. The United States Army, Judge Advocate General, *Operational Law Handbook*, which "provides references and describes tactics and techniques for the practice of operational law," has a whole chapter dedicated to international human rights law. The question is not so much whether human rights law and norms must be applied, but rather how they should be interpreted and applied under the circumstances of armed conflict.

However, problems arise when advocates or courts seek to impose a unitary human rights-based solution in conflict situations, or fail to acknowledge that military investigatory bodies can meet international legal requirements of independence and impartiality. In the case of the UK there is good reason to be concerned. The European Court of Human Rights, to which that country is likely to remain subject following "Brexit,", has been at the forefront of the effort to impose a predominately human rights law based regulation of contemporary conflict. This can be most obviously noted regarding the use of force. In addition to the extra-territorial application of that Convention to external conflicts, the Court has, in respect of non-international conflict,

uniquely applied human rights law as a "*normal* legal background" even when dealing with the use of airpower and artillery to suppress an "illegal armed insurgency." However, there is nothing "normal" about tactical situations where insurgent forces turn towns into fortresses, seek to shoot down aircraft, or conduct large-scale military action. While the Court has incorporated some IHL concepts into its analysis of use of force situations this has been invariably applied within the restraining principles of human rights law: a strict necessity test, using no more force than absolutely necessary, and the requirement that the force used is strictly proportionate. These human rights principles were not developed to regulate the conduct of hostilities.

A partially dissenting opinion in the 2017 Beslan School Case perhaps best reflects that court's strict adherence to human rights law. The judge stated he was satisfied the majority was faithful to the standards for the use of lethal force in large-scale anti-terrorist operations by "dealing with them as with *any other law-enforcement operation* and refusing to apply the paradigm of the law on armed conflicts to them." This approach was applied to a hostage rescue operation involving the use of flamethrowers, grenade launchers and tank main gun rounds against Chechen insurgents. In contrast, the European Court of Human Rights has more recently directly relied on international humanitarian law when interpreting the application of human rights law during inter-State conflict. Yet even here it was also careful to include the modifying words "so far as is possible." Both human rights and humanitarian law apply during armed conflict. However, this wording suggests a possible residual supervisory function for human rights law that is not justified by either the history or the widely accepted application of IHL.

In his excellent book on non-international armed conflict Sandesh Sivakumaran has noted "there should not be a rush to judgement that international human rights law holds the answer to all the problems." It is not clear why the European Court could not, like its Inter-American counterpart does, apply humanitarian law when interpreting their human rights law mandate during non-international armed conflicts. Just as there is a contemporary concern over the militarization of the police, there should be a similar disquiet regarding human rights law overreach.

Operationally, General Petraeus has identified that an overemphasis on human rights law has made it challenging to operate with European nations in a Coalition environment. For example, different national approaches toward the detention of insurgents in Afghanistan were evident when General Petraeus took action in 2010 to end the

application to United States military forces of an ISAF rule requiring the release or transfer of detainees to Afghan authorities after 96 hours. The 96 hour authority to detain has since been the subject of litigation in the United Kingdom in the Serdar Mohammed case, which highlighted a divide between nations such as the United States and Canada that have relied on a customary IHL basis for such detention and European ones requiring a European Convention on Human Rights justification. The UK court rejected an IHL basis and relied instead on a United Nations Security Council Resolution authority. The requirement for a UNSCR prompted Fiannoula Ni Aoiáin to note that a fragmentation and confusion over legal regimes could result where there is no UNSC involvement, and while the Convention and its due process requirements should not be abandoned "it may mean being better prepared to engage the application of the law of armed conflict and for human rights courts to show some humility in engaging the interface between both legal systems."

A clear majority of States are not subject to the European Convention on Human Rights. Importantly, judicial decisions that do not accurately reflect the operational situation faced by security forces or fail to recognize the need to engage an enemy with levels of violence best regulated by IHL run a very real risk of undermining the credibility of the court. By contrast, civilian courts in other States, such as Canada, the United States, and Israel have demonstrated a greater willingness to apply IHL in the present security context.

Issues have also arisen regarding the appropriate means of conducting judicial oversight. There has been a trend by some human rights advocates to equate adequate independence with civilian judicial actors. It has even been suggested that military tribunals be abolished, or their jurisdiction restricted to military offences that would not include the abuse and torture of detainees. This viewpoint may be influenced by the European context where most civil law countries use civilian courts to exercise jurisdiction over the military, at least during peace time. However, this is not the "international" standard. The prioritizing of civilian judicial oversight can be contrasted with the Israeli Turkel Commission report which, after reviewing the mechanisms for examining complaints of violations of IHL in mainly common law countries, supported the use of military judicial processes for such investigations.

There is an essential role to be performed by both civilian and military accountability mechanisms. However, in the UK experience there appears to have developed an unhealthy "us versus them" mentality, which can only further exacerbate the lack of confidence expressed by veterans and serving military personnel regarding legal oversight. The pushback extends to statements by the Prime Minister, Secretary of State, unionist and Conservative politicians that the Police Service of Northern Ireland investigation of legacy cases is wrongly focused on killings by the Army, even though this appears to be factually incorrect. Such negative responses must be assessed against factors such as the findings of the Iraq related inquiries, a recent civil court proceeding accepting that there was wrongdoing, and the important role legacy investigations can play in reconciliation. While many allegations have been called into question it also seems evident there were systemic issues that need to be addressed regarding the military treatment of detainees.

The British armed forces are highly professional and widely respected. Their commanders and legal advisors know that allegations of misconduct must be addressed. Isolated criminal acts can occur in any organization, but large-scale allegations of abuse frequently reflect broader issues of leadership, military culture and ethics. Unfortunately, during the post 9/11 period the torture and abuse of detainees has not been limited to the armed forces, with some civilian leaders, legal advisors and security agencies also being engaged in enabling or conducting such illegal activity. Civilian judicial systems have also struggled to hold perpetrators to account. That civilian engagement is not a panacea is evident from the havoc that has been created regarding the Iraq detainee investigations as a result of misconduct by a lawyer spearheading the identification of abuse claimants. The accountability solution cannot be found in a unitary application of human rights law or civilian judicial oversight. It also cannot be addressed through denying the applicability of such law or denying the necessity for civilian oversight such as through public inquiries.

What is required is a balanced approach that recognizes both human rights law and IHL apply, and that the armed forces themselves have an important, indeed, essential oversight role to perform. It is a role that can be enhanced by taking steps to increase confidence, both within and outside the armed forces, regarding the independence of investigatory bodies. Other States have addressed issues of independence by creating a statutorily empowered uniformed Director of Military Prosecutions, setting up joint civilian/military inquiries, and even appointing foreign observers. As stated, the problem

is not human rights law, it is the interpretation of that law in a manner that reflects the needs of all stakeholders operating in a very complex and challenging security environment.

Photo: U.K. Ministry of Defence/Army

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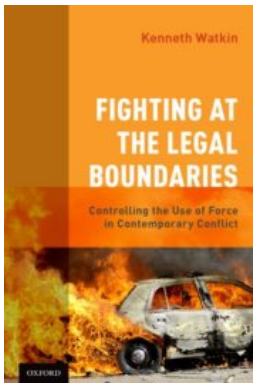
Drones, the Mullah, and legal uncertainty: the law governing State defensive action



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BY KENNETH WATKIN (HTTPS://BLOG.OUP.COM/AUTHORS/KENNETH-WATKIN/)

JULY 11TH 2016

The 21 May 2016 drone strike (http://www.defense.gov/News/News-Releases/News-Release-View/Article/778259/statement-by-pentagon-press-secretary-peter-cook-on-us-airstrike-against-taliba) that killed Taliban leader Mullah Mansour riding in a taxi in Pakistan's Baluchistan province, raises questions about the law governing State defensive action. Fourteen years after the first US counterterrorist drone strike in Yemen, legal consensus remains elusive.

Possible analytical frameworks can be termed the restricted “Law Enforcement” theory, the permissive “Conduct of Hostilities” approach, and the “Self-Defense” option. The “Law Enforcement” theory applies traditional highly restrictive interpretations of State self-defense. While accepting drone use within existing “combat zones”, external action is limited to human rights law based policing and is largely reliant on territorial State consent. Drone strikes are seen as being incompatible with policing (https://fas.org/irp/congress/2010_hr/042810oconnell.pdf). “Terrorist” groups are viewed as small organizations using low levels of force (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654049). This perspective applies a 20th Century view of terrorism that avoids the case law (http://www.icj-cij.org/docket/files/70/6503.pdf) threshold justifying State self-defense, or finding an armed conflict exists when applying the *Tadić (http://www.icty.org/x/cases/tadic/acdec/en/51002.htm)* based criteria of group organization and intensity of violence. For Afghanistan a variation (http://www.oxfordresearchgroup.org.uk/sites/default/files/ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf) of this theory accepts a limited “spillover” into some of Pakistan’s border regions, but this would not include Baluchistan. Exceptionally, drone use in a law enforcement context is viewed as possible, but without permitting collateral casualties. The “Law Enforcement” model seeks to restrict drone use to “hot battlefields” spawning debate about the “geography of war”. Notably it runs afoul of Sun Tzu’s principle of knowing your enemy. Transnational terrorists are part of broader insurgencies organized as hierarchical, horizontal and cellular armed groups, rather than independent components of a “leaderless jihad”. “Law Enforcement” proponents rely on international boundaries to limit violence involving Salafi jihadists. Unfortunately, as recognized by the United Nations (http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2249.pdf), this enemy has more global aspirations.

The “Conduct of Hostilities” approach authorizes action (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801179&download=yes) where a State is “unwilling or unable” to police transnational threats emanating from within its borders. The historical “unwilling or unable” principle finds new life in contemporary debate. This theory depends on a post 9/11 recognition of the right to act in self-defense against non-State actors, an importation of neutrality law principles (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971326) to non-State conflict, and the use of hostilities rules against targets seen as directly participating in an armed conflict. The State self-defense principle of imminence and the humanitarian law concept of direct participation in hostilities (DPH) appear to blend with targets seen as continuously planning attacks. Unfortunately, the potential for overbreadth is enhanced by failing to fully address neutrality law requirements of considering feasible and timely alternatives, and only a strictly necessary use of force; consider the restraining impact State self-defense principles; or transparently articulate the DPH criteria applied. Finally, the “Self-Defense” option, whether described as “naked self” defense (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783) or a more robust (http://law-wss-01.law.fsu.edu/journals/transnational/vol19_2/paust.pdf) application of self-defense principles, appears as a form of “gap filling” where law enforcement rules are not applicable to drone strikes, and an armed conflict is seen technically not to exist. Effectively, humanitarian law based rules are applied under the rubric of self-defense.

Problematically, over-reliance on the territorial State under the “Law Enforcement” theory means non-State actors can gain impunity in poorly policed territory forcing the threatened State into a reactive mode enhancing the risk to its own citizens. A security “black hole” has to be avoided. Unfortunately, the more permissive “Conduct of Hostilities” and “Self-defense” approaches appear to exclude policing options and introduce a potentially broader use of force in otherwise “peaceful” territory. It also raises the legal issue of applying of hostilities rules outside of armed conflict.

What is the solution? One approach, the 2013 US Drone policy (http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?_r=0), applies the “unwilling or unable” test, but limits an armed conflict based approach through a restraining application of human rights principles, and a stricter test of “near certainty” than the “reasonable belief” standard applicable under either human rights (http://hudoc.echr.coe.int/eng?i=001-57943), or humanitarian law (http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf). As seen in the Syria context (https://www.justsecurity.org/28167/legal-map-airstrikes-syria-part-1) States have started to embrace the “unwilling or unable” theory justifying defensive action. However, to gain wider acceptance it cannot be unfettered. It must include a holistic application of all available bodies of law including an overarching application of State self-defense principles; consideration of feasible alternatives (e.g. capture); applying law enforcement where required (e.g. non-DPH civilians), or when feasible; using appropriate DPH criteria, and demonstrating greater sensitivity to the strategic impact of collateral casualties. These criteria could readily be applied to the Mansour strike.

A May 2016 UK Parliamentary Committee report (http://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf) demonstrates consensus on the law may be far off. That report accepted the UK right to act in self-defense against members of the Islamic State in Syria, but raised a number of questions including the basis for applying the “law of war” outside of an armed conflict, and whether such action was governed by the European human rights law. The European Court of Human Rights has previously sought to regulate aerial attacks (http://hudoc.echr.coe.int/eng?i=001-104662), however, this raises questions of human rights law overreach, whether a traditionally restrictive authority to use force can effectively counter group threats and attendant threats of violence; and the longer-term normative impact should human rights governing principles be expanded. Human rights law may be more effectively applied in situations of governance, such as in post invasion Iraq, than extended to areas beyond a State’s physical control by means of a Hellfire missile fired at threatening members of an organized armed group.

Meanwhile strikes are occurring, people are dying. Fundamental questions need to be asked about whether the threshold for armed conflict is properly set, how civilians can be effectively protected from “one off” non-State actor attacks, the limits of human rights law, and how best to win a conflict that is ultimately about governance and values.

Featured image credit: ‘Valley of Kohlu’. Photo by Umer Malik. CC-BY-SA-2.0 via Flickr. (https://www.flickr.com/photos/a_perfect_heart/9394131065/)

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Reflections on Targeting: Looking in the Mirror

by Kenneth Watkin

June 16, 2016

Questions about targeting the "money" of the self-styled Islamic State (IS) have been raised in this forum. Images of missile strikes on financial warehouses and money floating in the air, literally scattered to the winds, provide tangible evidence of the efficacy of this aspect of the strategic air campaign being conducted by Coalition powers. In newspaper reports, government sources confirm the negative impact on IS by suggesting its fighters have had their pay cut in half, and discontent is being sown amongst their ranks to the point some fighters are seeking to defect.

As Marty Lederman has recently highlighted when introducing Ryan Goodman's excellent contribution to the discussion, many questions remain, most notably, "does this mean that virtually all economic enterprises are legitimate targets, simply because of the indirect advantages they offer to the military arm of the state?" This is an issue also identified by Daphne Richmond-Barak in an earlier post when she noted:

> I doubt we would accept an interpretation of the law that would regard states' cash as a legitimate target because the funds are used to finance the military effort. We would likely object that the money also finances a plethora of other non-war related projects.

Money provides important "fuel" for the insurgent/terrorist efforts of IS, al-Qaeda, and myriad other non-State armed groups fighting States, with their military operations being funded through a variety of means including kidnapping, smuggling, extortion, and other criminal activity. As al-Qaeda theorist Abu Mus'ab al-Suri identified, it is "high financial capabilities" that enables cells to operate both inside and outside "Islamic" territory (against the "near" and "far" enemy).

However, what is different about the Coalition's recent cash-targeting attacks is the use of kinetic force rather than law enforcement to physically destroy the money, as well as portions of the financial infrastructure of IS. The broadening of potential targets to those that are "war-sustaining" raises questions about the potential for overreach in terms of the targets struck, excessive collateral civilian death and injury, and adverse humanitarian effects for the vast majority of civilians who are not taking a direct part in hostilities.

"War-Sustaining" vs. "Military Action"

Some of the current discussion has centered on whether the US's substitution of the wording "war-sustaining" for "military action" in Additional Protocol I's definition of military objective represents a broadening of the types of objects that can be lawfully attacked. The shift raises crucial questions, including: What are the limits on targeting under the "war-sustaining" approach? The legal framework introducing restrictions on targeting was largely developed in response to the horrific civilian casualties and wide-spread destruction during the "total war" of World War II. It is worth remembering strategic bombing played a significant role in that destruction.

While various arguments have been put forward suggesting "military action" encompasses "war-sustaining," such an interpretation must be tempered with the contrary view found in the 1995 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. The manual's accompanying Explanation states:

> The Round Table [with many AP I country participants] considered whether or not it should include the expression 'military action' or some alternative expression such as 'war effort' or 'war sustaining' and eventually decided that these alternative expressions were too broad. (para. 40.12)

Ryan relies on the Bothe, Partsch, and Solf *New Rules for Victims of Armed Conflict* in reaching the conclusion that, under some circumstances, a revenue-generating object can make an effective contribution to military action. However, that 1982 publication does not appear to represent the views of most contemporary humanitarian law scholars, and he acknowledges a narrower view of military objects is reflected in the views of experts found in recent manuals on air and missile (2010) and cyber warfare (2013).

Even if the US did not feel the "war-sustaining" wording broadened the meaning of "military objective" when it was developed, it is still evident that was the "operationalized" effect. In discussions I have had over the years with practitioners, including from the US, that is exactly how it has been understood: a broader set of targets based on a unique US Civil War precedent.

One might even ask why, if "war sustaining" effectively means "military action," was there a need to adopt US-specific wording? It might have been a reaction to the ICRC's tactical view of targeting. However, the strategic aspects of targeting were recognized by States (i.e., "overall" anticipated military advantage wording of Article 8(2)(b)(iv) of the 1998 Rome Statute) long before the US specific "war-fighting, or war-sustaining" approach was transferred from national military doctrine into legislation through the Military Commissions Act. While it is not clear this was consciously done to ensure a different standard for US operations, the effect appears to be one of solidly placing the country in an outlier position. This is not a unique position for the US to be in regarding AP I, although it has recognized the convention-based targeting provisions are generally reflective of customary international law.

Small Differences With Potentially Large Consequences

It can be argued the "delta" between targeting in strategic air campaigns (particularly when combined with air or maritime blockades) conducted under a more limited AP I interpretation, and a broader "war-sustaining" approach is a narrow one. The "war-sustaining" concept has its roots in naval and air warfare, which historically invoke broader issues of economic warfare. However, a difference still exists, even if a limited number of States may be willing to target IS on this basis. As with the greater recognition of the right of a State to act in self-defense, renewed reliance on the historic "unwilling and unable" test, adoption of the *Hamdan v. Rumsfeld* non-international armed conflict categorization, and increasing emphasis on the intensity of violence standard under the *Tadić* criteria for armed conflict, traditional interpretations of international law have been forced to change as States react to 21st century non-State actor threats. Is this broadening of potential targets simply part of that trend?

One concern is it represents an importation of "Just War" principles where special/different rules are applied against "bad" actors. The question must be asked whether the use of a "war-sustaining" targeting standard against IS has largely escaped

critical comment because it is being carried out against such a reprehensible "terrorist" organization. What about the foundational "equal application principle" of IHL where the law is viewed as applying equally to all parties without consideration of the justness of their cause?

If Just War principles are creeping into the fight against IS, that represents yet another slippery slope that should be approached with caution. It might be argued these "terrorist" organizations constitute a different type of enemy, organizationally and operationally, making money an essential operational "center of gravity." This argument appears to founder on the reality that jihadists have embraced revolutionary warfare doctrine with the third stage involving the adoption of semi-conventional military operations and State-like governance responsibilities over territory. Indeed, while strategic bombing traditionally has significantly less application to non-State actor conflict, revenue-generating targets are available to be struck exactly because IS governs territory.

Looking in the "War-Sustaining" Mirror

What should cause pause is what this means for conflicts between States. If it is permissible to attack a revenue-generating industry of this non-State actor (e.g., oil production), as well as the warehouses and even private residences housing "cash," does that mean these are also valid targets in inter-State conflict? What parts of a legitimate State's economy, such as that of the United Sates, would be off limits in a "war-sustaining" targeting paradigm?

Ryan has identified one limiting factor might be "that the economic contributions should be confidently traced through a strong causal connection to an enemy's military action." It is not clear if that was done in the case of IS, or how confidently it could be assessed regarding warehouses of cash amassed not only by criminal activity, but also from forms of "taxation." Were these targets repositories of money used exclusively, or even predominately, to pay fighter's salaries and acquire weapons, or were they and the attendant storage sites associated with a governance function? As Daphne notes in her post, some of money "was likely destined for the civilian population either through subsidies, social work, judicial services, or school funding." This is exactly what needs to

be established before strikes are conducted. A public accounting of the exact nature of the causal connection would be helpful legally, from a public relations perspective, and to properly situate future arguments concerning reciprocity.

In a world where States have increasing access to high-tech arsenals (including cyber weapons) capable of inflicting strategic damage, the possible targeting of economic engines of modern States — which ultimately fuel their security and military activities — should be looked at closely and soberly through the "cold stark mirror of reciprocity."

Personnel Reflections

This is not the only "reflection" that should be closely studied. What about the persons working in those industries and managing the economic affairs of a State? With the lawful targeting of persons being restricted to members of organized armed groups and individual civilians taking a direct part in hostilities (DPH), how is such membership and participation defined? Contrary to the narrower criteria identified in the ICRC *Interpretive Guidance on the Notion of Direct Participation*, many States recognize that targeting of members of an organized armed group should include persons performing a combat support and combat service support analogous to State armed forces. Individual civilians may also be at risk when providing direct logistics support. However, this "direct" support does not encompass the full breadth of the US concepts of providing "substantial" or "material" support to terrorism applied when detaining and trying persons during the post-9/11 conflict.

There is a significantly narrower legal authority to kill direct participants in hostilities than to detain or prosecute their "supporters" under international law. Key factors in meeting the international test can include the position a person holds within an organized armed group, and the causal connection between the function being performed and actual conduct of hostilities. Abu Sayyaf, the financier killed in a 2015 Special Forces raid, was a lawful target because of his position and the function he performed within the IS armed group. However, it is not clear a person working in a "money" warehouse, like a worker at an oil field, is not simply a civilian performing an administrative role related to governance or participating in commerce rather than taking a direct part in hostilities. This matters in terms of the proportionality assessment applied during targeting.

Without positive evidence to the contrary, that worker's anticipated death or injury would have to be assessed as a potential collateral casualty (see Beth Van Schaack's post regarding oil tanker drivers for more on this point).

Reference in the 2015 Defense Department *Law of War Manual* to factory workers in rear areas not directly participating in hostilities (p. 228) goes some way in addressing this issue. However, the *Manual* (p. 1048) also relies on Daniel Bethlehem's self-defense Principle 9 indicating the failure of a territorial State to prevent "material support" to terrorism underpins a threatened State's right to act in self-defense. Daniel's threshold Principles (p. 6, note c) seek to distinguish direct participation in a self-defense context from its humanitarian law meaning, although Principle 7 suggests armed action can be taken in defense against those taking "a *direct part* in … [armed] attacks through the provision of *material support essential to the attacks*." It is not clear what "material support" encompasses in these Principles, or its relationship to DPH. As outlined in *Humanitarian Law Project*, "material support" is an exceptionally broad concept under US law. Given the limited public disclosure of US targeting standards, it is not clear whether this is another area where nation-specific terms might impact on targeting. If so, this would constitute a significantly broader interpretation of DPH, and will be at odds with the international consensus on this issue. To ensure clarity, it should be emphasized that the broader "substantial" or "material" support terms are not relied on when targeting in a self-defense or any other context.

* * *

The use of airpower is an important element of the overall action being taken to defeat IS. History has shown that limits matter in terms of restricting the death and destruction associated with armed conflict. Demonstrating what those limits are, both by word and deed, can have an important humanitarian effect in existing and, as importantly, future conflict. In this regard treating others as you would want to be treated is an essential element of human conduct, especially in warfare.

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Medical Care in Urban Conflict

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

The provision of medical care to the sick and wounded during armed conflict is a foundational humanitarian law obligation. This can be seen in the genesis of the International Committee of the Red Cross (ICRC) with Henry Dunant's work following the 1859 Battle of Solferino.[1] Obligations regarding the collection, treatment, and care of the sick and wounded, both military and civilian, are firmly grounded in treaties such as the 1949 Geneva Conventions and their 1977 Additional Protocols.[2] During international armed conflict the First Geneva Convention provides a comprehensive regime for the protection of wounded and sick members of armed forces and other associated forces who have fallen into enemy hands, while Additional Protocol I expands these protections to civilians.[3] The protection provided in non-international armed conflict is rooted in Common Article 3 of the 1949 Geneva Conventions, as well as Additional Protocol II. Further, as was noted in the 2005 ICRC *Customary International Humanitarian Law* study, State practice establishes that the search for, collection, and treatment of the

1. *See Founding and Early Years of the ICRC (1863-1914)*, ICRC (May 12, 2010), https://www.icrc.org/en/document/founding-and-early-years-icrc-1863-1914

> The Red Cross came into being at the initiative of a man named Henry Dunant, who helped wounded soldiers at the battle of Solferino in 1859 and then lobbied political leaders to take more action to protect war victims. His two main ideas were for a treaty that would oblige armies to care of all wounded soldiers and for the creation of national societies that would help the military medical services.

2. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S.; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609.

3. GEOFFREY CORN, KENNETH WATKIN & JAMIE WILLIAMSON, LAW IN WAR: A CONCISE OVERVIEW 90 (2018); *see also* Additional Protocol I, *supra* note 2, art. 8(1) ("'Wounded' and 'sick' means persons, whether military or civilian, who . . . are in need of medical assistance or care and who refrain from any act of hostility.").

wounded, sick, and shipwrecked is "a norm of customary international law applicable in both international and non-international armed conflicts."[4]

However, in the twenty-first century States and other participants in conflict are facing new challenges in meeting these humanitarian obligations. One area of particular concern is the shift of contemporary operations to urban population centers, which themselves are undergoing dramatic growth. Most of these urban-based conflicts are occurring in the context of terrorism and insurgencies, challenging the ability of the State to govern, contain the violence, and ultimately control those populations with peacetime human rights-based rules. A focus on "counterterrorism"[5] that frequently includes a blend of policing and military responses has created a complex legal and operational situation in which medical care must be provided.

The following analysis of the provision of medical care in contemporary urban conflict will be addressed in five parts. Part II discusses the change in the operational environment to one increasingly taking place in urban areas. Part III addresses the determination of when an "armed conflict" actually exists and the impact of conflict characterization on the legal regime governing the provision of medical care. A particular focus will be the situation brought about by court rulings and State policy choices that frequently favor human rights-based law enforcement responses. The fourth Part addresses the availability of medical services to military personnel and civilians during armed conflict. Part V looks at the destructive impact of urban conflict, particularly on civilians found in that battlespace. Finally, Part VI provides an overview of the types of casualties that can result from urban combat.

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4. 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 396 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL].

5. U.S. DEPARTMENT OF DEFENSE, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2018), http://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf ("Activities and operations taken to neutralize terrorists and their organizations and networks in order to render them incapable of using violence to instill fear and coerce governments or societies to achieve their goals.").

II. URBAN CONFLICT AND THE CHANGING NATURE OF WARFARE

While humanitarian law is universal, how it is applied is by necessity contextual.[6] From a treaty perspective, the requirement to provide medical care in armed conflict was primarily developed in the context of international armed conflict. However, even with respect to inter-State armed conflict, warfare has changed over the past century. As has been noted, "While statistics vary among studies, there is no question that beginning with World War II, the ratio of civilian to military casualties in war has steadily increased. Many experts believe that today 90 percent of casualties are civilian."[7] Since the end of the Cold War, there has been a proliferation of "non-international armed conflicts" resulting in military forces being engaged in a wide range of military operations. Those operations have spanned a spectrum from high-end conventional style combat in urban environments, such as Fallujah and Mosul in Iraq, Raqqa and Damascus in Syria, and Marawi in the Philippines, to United Nations-mandated peace support operations in Mali.

Of note, the conflict in Mali is representative of a unique aspect of contemporary conflict. While the jihadist groups involved do not pose a monolithic threat, at its heart the violence in Mali is part of a complex transnational, and therefore international, insurgent threat against the governments of the Sahel region of Africa.[8] It was the threat of the seizure of the Malian capital of Bamako by jihadists that prompted French military intervention in 2013.[9] Since then, the city has witnessed periodic terrorist violence.[10]

It is the transnational threat posed by non-State actors, ranging from criminal groups challenging State governance to a complex web of jihadist

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6. Geoffrey S. Corn, *Humanitarian Regulation of Hostilities: The Decisive Element of Context*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 763, 765 (2018).

7. *Id.* at 764.

8. Firle Davies & Alistair Leithead, *The War in the Desert: Why the Sahara Is Terror's New Frontline*, BBC NEWS (June 21, 2018), https://www.bbc.co.uk/news/resources/idt-sh/war_in_the_desert. For an overview of the jihadist threat in the Sahel, see CHRISTOPHER S. CHIVVIS, THE FRENCH WAR ON AL QA'IDA IN AFRICA 7–8 (2016).

9. CHIVVIS, *supra* note 8, at 93–111.

10. *See, e.g.*, Mamadou Tapily, Peter Walker & Charlie English, *Mali Attack: More Than 20 Dead after Terrorist Raid on Bamako Hotel*, BBC NEWS (Nov. 20, 2015), https://www.theguardian.com/world/2015/nov/20/mali-attack-highlights-global-spread-extremist-violence; *see also Mali Takes Terrorist Threat Seriously, Especially in Bamako*, APA NEWS (Aug. 16, 2017), http://apanews.net/index.php/en/news/mali-takes-terrorist-threat-seriously-especially-in-bamako.

organizations seeking to establish a global caliphate that has made the operational environment so complex.[11] The security situation is further complicated by the link between criminal activity and terrorism/insurgency, and the degree to which urban areas in some parts of the world have become an operational magnet for warlords and others challenging government authority.[12] Importantly, conflict with non-State actors, whether internal to a State or transnational in character, has increased the requirement not only to consider international humanitarian law obligations, but also obligations imposed by human rights law. As will be discussed, this development can have significant impact on obligations regarding medical care.

There is considerable merit to the theory that champions the approach that "war is war" regardless of whether an armed conflict is fought in an intra-State, inter-State, or transnational context.[13] This is particularly true regarding humanitarian obligations since human suffering is common to all types of conflict. Warfare conducted in the "regions of savagery" contemplated by jihadist doctrine[14] can be just as vicious and destructive as conventional inter-State conflict. Traditionally, terrorism and insurgency were most often associated with guerrilla groups operating from inhospitable wooded and mountainous areas of a country, and therefore, more difficult places for State security forces to operate. However, the regions of savagery of contemporary conflict now extend to "a city, or a village, or two cities, or a district, or part of a large city."[15] There has been a dramatic shift over the past two decades to terrorists and insurgents operating in population centers.

The conduct of hostilities in these urban environments reflects the reliance on a three-stage guerrilla warfare strategy that culminates in a liberation stage where "guerrillas enter operations that are semi-regular and others that are regular, and they control some areas from which they launch operations

11. KENNETH WATKIN, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT 159–213 (2016).

12. ANTONIO GIUSTOZZI, EMPIRES OF MUD: WARS AND WARLORDS IN AFGHANISTAN 21 (2009).

13. HEW STRACHAN, THE DIRECTION OF WAR 207–09 (2013) (outlining the importance of a unitary vision of war).

14. ABU BAKR NAJI, THE MANAGEMENT OF SAVAGERY: THE MOST CRITICAL STAGE THROUGH WHICH THE UMMA WILL PASS [16] (William McCants trans., 2006), https://azelin.files.wordpress.com/2010/08/abu-bakr-naji-the-management-of-savagery-the-most-critical-stage-through-which-the-umma-will-pass.pdf.

15. *Id.*

to liberate the rest of the country."[16] The combat that occurred in the streets of Mosul, Raqqa, and Damascus resembles urban fighting within conventional armed conflict. In Afghanistan, the long-term U.S. military strategy, which hinges on defending population centers while ceding much of the remote countryside to the Taliban, inevitably means that clashes will occur within urban areas. This was graphically demonstrated in August 2018 in Ghazni with the Taliban assault on that city. While Ghazni was ultimately left in the hands of the Afghan government, the Taliban claimed, "the conquest of this city signifies the failure of yet the latest American strategy," and "[t]he experience of Ghazni has proven that no defensive belts of cities can withstand the offensive prowess of the Mujahideen."[17] The war for the control of towns and cities of Afghanistan is far from over.

This increasing shift towards warfare in cities and towns is accelerated by a migration of the world's population to urban environments. By 2008, 50 percent of the world population lived in cities.[18] It is estimated that by 2050, this amount will increase to 66 percent.[19] Further, a significant proportion of this population will live in less-developed countries.[20] For example, the Institute for Security Studies predicts that by 2030, "Lagos, Cairo and Kinshasa will each have to cater for over 20 million people, while Luanda, Dar es Salaam and Johannesburg will have crossed the 10 million mark."[21] Likewise, Sullivan notes, "[c]ontemporary megacities may include global cities and global slums (neighborhoods where transnational gangs dominate

16. BRYNJAR LIA, ARCHITECT OF GLOBAL JIHAD: THE LIFE OF AL-QAIDA STRATEGIST ABU MUS 'AD AL-SURI 472 (2008); *see also* AL-QA'IDA'S DOCTRINE FOR INSURGENCY: ABD AL-AZIZ AL-MUQRIN'S "A PRACTICAL COURSE FOR GUERRILLA WAR" 12 (Norman Cigar trans., 2008); MICHAEL W. S. RYAN, DECODING AL-QAEDA'S STRATEGY: THE DEEP BATTLE AGAINST AMERICA 230 (2013); ALI SOUFAN, ANATOMY OF TERROR: FROM THE DEATH OF BIN LADEN TO THE RISE OF THE ISLAMIC STATE 286–87 (2017).

17. W. J. Hennigan, *Exclusive: Inside the U.S. Fight to Save Ghazni from the Taliban*, TIME (Aug. 23, 2018), http://time.com/longform/ghazni-fight-taliban/.

18. ANTHONY JAMES JOES, URBAN GUERRILLA WARFARE 1–2 (2007).

19. POPULATION DIV., U.N. DEP'T OF ECON. & SOC. AFFAIRS, WORLD URBANIZATION PROSPECTS: THE 2014 REVISION HIGHLIGHTS, at 1, U.N. Doc. ST/ESA/SER.A/352 (2014), https://esa.un.org/unpd/wup/Publications/Files/WUP2014-Highlights.pdf.

20. *Id.* at 2.

21. Julia Bello-Schünemann, *Africa's Future Is Urban*, INSTITUTE FOR SECURITY STUDIES (Dec. 2, 2016), https://issafrica.org/iss-today/africas-future-is-urban.

local turf and are globally connected to transnational criminal networks)."[22] This means warfare and associated insecurity occurring in cities and surrounding urban areas with up to three times the population of New York City.[23]

Adding to the complexity of this operating environment is the fact that most of these people live in littoral regions.[24] This means providing security to urban areas must involve all components of military and security forces: land, air, and naval military forces, police forces, and the coast guard. The threat to littoral urban centers was most graphically displayed in Mumbai in 2008 where military, paramilitary, and police units were required to deploy to counter an exceptionally destructive sea borne attack on that city by the Pakistan based LeT terrorist group.[25] During that attack ten terrorists "were able to hold the world's fourth largest city to ransom, killing 166 and injuring more than 300 over three nights of horror."[26]

Urban conflict in this century presents new challenges, while also resurrecting many old ones. In terms of new challenges, fighting among an urbanized civilian population means, "[m]edical intervention includes pre-hospital emergency medical services and in-hospital care. Responding to injuries caused by terrorism, insurgency, and war form a situation of 'conflict disaster' demanding new protocols such as tactical medics and 'counterterrorism medicine.'"[27] Regarding the provision of medical care, State security forces must also interface with specific actors on the urban battlefield "where civil defense and non-governmental organizations—such as Médecins Sans Frontières (MSF), the International Committee of the Red Cross (ICRC), Syria's

22. John P. Sullivan, *The Urban Imperative: War, Terrorism, and Insecurity in Mega Cities*, STRATFOR (Feb. 13, 2018), https://worldview.stratfor.com/horizons/fellows/dr-john-p-sullivan/13022018-urban-imperative-war-terrorism-and-insecurity-megacities.

23. James Barron, *New York City's Population Hits a Record 8.6 Million*, NEW YORK TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/nyregion/new-york-city-population.html.

24. DAVID KILCULLEN, OUT OF THE MOUNTAINS: THE COMING OF AGE OF THE URBAN GUERRILLA 30 (2013) (noting that 75 percent of the world's cities are coastal and that 80 percent of the population lives within sixty miles of the coastline).

25. *Id.* at 57–60.

26. CATHY SCOTT-CLARK & ADRIAN LEVY, THE SIEGE: 68 HOURS INSIDE THE TAJ HOTEL 277 (2013).

27. Sullivan, *supra* note 22.

White Helmets, and Save the Children (which was recently attacked in Jalalabad)—provide aid and care to the besieged and threatened populations."[28] Elsewhere the siege of cities, such as that of the port city of Al Hudaydah, Yemen,[29] air and naval blockades occurring off the coast of that country,[30] and the naval blockade of Gaza[31] are forcing participants to reassess older humanitarian law rules concerning the obligations of conflict participants towards the civilian population.[32] Among the challenges in this context is access to life-saving medication for besieged or blockaded civilians.[33]

III. WHICH LEGAL FRAMEWORK GOVERNS THE PROVISION OF MEDICAL CARE?

An essential, indeed foundational, question is what body of law governs the provision of medical care to those in need arising from violence in urban areas. Of course, an armed conflict must exist for international humanitarian law—and with it the obligations regarding medical care—to apply. In the absence of such conflict, the provision of medical care is governed exclusively by human rights law.[34] As the second decade of the twenty-first century ends, there has been a renewed focus by major military powers, such as the United States, on near peer warfare between States. However, international armed conflicts are not occurring directly between those powers, and con-

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28. *Id.*

29. Mohammed Ali Kalfood & Margaret Coker, *Saudis Escalate Siege of Port in Yemen, Alarming Aid Groups*, NEW YORK TIMES (Aug. 2, 2018), https://www.nytimes.com/2018/08/02/world/middleeast/yemen-saudi-hudaydah-missiles.html.

30. *Yemen: Coalition Blockade Imperils Civilians: UN Should Sanction Senior Saudi Leaders*, HUMAN RIGHTS WATCH (Dec. 7, 2017), https://www.hrw.org/news/2017/12/07/yemen-coalition-blockade-imperils-civilians [hereinafter *Yemen: Coalition Blockade*].

31. 1 JACOB TURKEL ET AL., THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, ¶¶ 48–64, at 53–69 (2011), http://turkel-committee.gov.il/files/wordocs//8707200211english.pdf.

32. *See, e.g.*, PHILLIP DREW, THE LAW OF MARITIME BLOCKADE: PAST, PRESENT AND FUTURE (2017).

33. *Yemen: Coalition Blockade*, *supra* note 30.

34. Katherine H.A. Footer & Leonard S. Rubenstein, *A Human Rights Approach to Health Care in Conflict*, 95 INTERNATIONAL REVIEW OF THE RED CROSS 167, 168 (2013) ("In some circumstances of political volatility or violence, attacks on health care providers, facilities, transports, and patients take place, but IHL does not apply at all, because no armed conflict exists.").

flicts not of an international character remain the predominate form of warfare. This can be seen in *The War Report: Armed Conflicts in 2017*, which indicates that at least fifty-five armed conflicts occurred that year.[35] Thirty-eight of these were viewed as non-international ones, while ten of the remaining seventeen international armed conflicts between States were belligerent occupations, such as Israel's occupation of the Palestinian West Bank.[36] The international armed conflicts that occurred have included short-lived ones "between Libya and Egypt, Israel and Syria, as well as Turkey and Iraq."[37] As a result, it is non-international armed conflicts, many of which are protracted and transcend national borders, which continue to dominate the security dialogue.

The non-State actor threat encompasses a wide range of violence that can involve isolated terrorist incidents, insurgent groups engaging in guerrilla warfare, or armed conflict, such as has occurred with the Islamic State, which approximates conventional warfare. Not all non-State actor violence rises to the level of an armed conflict. One area of considerable debate in the post-9/11 security environment is when violence occurring between States and non-State actors crosses the armed conflict threshold. For much of the period following the attacks of 9/11 a segment of the international community focused on requiring a high threshold for the existence of an armed conflict in a non-international context. That threshold is primarily based on the *Tadić* criteria of "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[38]

The debate has largely centered on limiting when a determination is made that a conflict exists, particularly in relation to transnational terrorist attacks. Terrorism is equated with criminal activity to be controlled by States exercising sovereignty over their own territory. This has included suggestions that "individual acts of terrorism that have been occurring around the world, in Mumbai, London, Madrid, Casablanca, Glasgow, or Bali, to name just a

35. THE WAR REPORT: ARMED CONFLICTS IN 2017, at 17 (Annyssa Bella ed., 2018).

36. *Id.*

37. *Id.*

38. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

few places" would not meet the criteria for the application of Common Article 3.[39] However, this "individualized" approach towards assessing contemporary terrorism is significantly challenged by a transnational jihadist threat that is linked in a common cause to create its own system of governance.

Over-reliance on the *Tadić* threshold has at times seemed inconsistent with the broader interpretation applied to the applicability of Common Article 3 prior to 9/11. As was noted in *Abella v. Argentina*, a 1997 Inter-American Commission on Human Rights report,

> [t]he most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. The line separating an especially violent situation of internal disturbances from the "lowest" level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.[40]

This interpretation seems at odds with one that seeks to set a high threshold for the existence of an armed conflict.

Further, in the post-9/11 period there has been a greater recognition of the transnational threat that jihadist groups can pose to international peace and security.[41] Indeed, the threat posed by Al-Qaeda, the Islamic State, and other jihadist groups in various locations transcends multiple geographic borders.[42] It is difficult to argue that the violence of these groups constitutes isolated or "individual" acts of terrorism when their linkage is perhaps more accurately being described as "Al Qaeda and Associated Movements (AQAM),"[43] or broadly as the "Jihadist Movement."[44]

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39. Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 1, 8–9 (2011).

40. Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 153 (1997), http://hrlibrary.umn.edu/cases/1997/argentina 55-97a.html.

41. *See, e.g.*, S.C. Res. 2249, pmbl. (Nov. 20, 2015) (recognizing the global nature of the Islamic State threat).

42. WATKIN, *supra* note 11, at 295–98.

43. ABDEL BARI ATWAN, AFTER BIN LADEN: AL QAEDA, THE NEXT GENERATION 15 (2012).

44. See WATKIN, *supra* note 11, at 198–99, for a discussion of the "Jihadist Movement."

As has been noted by the ICRC, the question of whether an armed conflict exists can "make a vital difference to the survival, well-being, and dignity of the victims of a conflict."[45] This is because Common Article 3 "ensures that the Parties to that conflict are under an international legal obligation to grant certain fundamental protections to the victims of the conflict and to respect the rules on the conduct of hostilities. Humanitarian law binds all Parties to the conflict, State and non-State alike."[46] Over the history of the development of international humanitarian law, protections regarding medical care "have become more extensive and detailed."[47] However, their applicability as a matter of law requires the existence of an armed conflict.

This is not to suggest "all IHL [international humanitarian law] medical-care measures are universally applicable to all armed conflicts."[48] While many rules applicable to international armed conflicts are viewed as being customary in nature and applicable to non-international conflicts, some differences remain. For example, in non-international armed conflict there are no humanitarian law limitations on the detention or retention of medical personnel.[49] That said, the international humanitarian law provisions provide a more detailed and comprehensive set of protections for those requiring medical care since,"[u]nlike IHL, which has rules designed specifically to address the respect and protection of health care in armed conflict, HRL [human rights law] instruments are formulated in more general terms."[50]

It is widely accepted that human rights law protections regarding health do continue to apply during all types of armed conflict and other situations of violence. This includes Article 12 of the International Covenant on Economic, Social and Cultural Rights, which recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental

45. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION OF 1949: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, ¶ 388, at 141 (2016) [hereinafter 2016 COMMENTARY ON THE FIRST GENEVA CONVENTION].

46. *Id.*

47. Footer & Rubenstein, *supra* note 34, at 168.

48. DUSTIN A. LEWIS, NAZ K. MODIRZADEH & GABRIELLA BLUM, MEDICAL CARE IN ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AND STATE RESPONSES TO TERRORISM 6 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657036.

49. *Id.* at 7.

50. Footer & Rubenstein, *supra* note 34, at 171.

health."[51] This has been interpreted to require the "equitable distribution [of] and access to health facilities, goods and services," the provision of "essential medicines," and the formulation of a "national health plan or policy."[52] In this respect, "IHL does not generally cover these dimensions of health services, as it focuses on impartiality in responding to individuals in immediate need of care rather than on the structure and availability of services."[53] The operational challenge is that not all States agree that international human rights treaty law has extraterritorial applicability, thereby limiting the extension of these rights for some participants during overseas operations.[54] Further, it is difficult to argue that customary human rights law, which does have universal application, encompasses this treaty right.

Questions regarding how human rights law is interpreted to ensure the provision of non-discriminatory and effective medical care also arise in "circumstances where no armed conflict exists, but where health workers, facilities, patients, and ambulances are subject to threats, attacks, and other forms

51. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

52. UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN CONFLICT ¶ 35, at 11 (2015), https://www.ohchr.org/Documents/Issues/ESCR/E-2015-59.pdf; *see also* Footer & Rubenstein, *supra* note 34, at 180; U.N. Economic and Social Council, Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social And Cultural Rights: General Comment No. 14, ¶ 34, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), http://www.un.org/en/ga/search/view_doc.asp?symbol=E/C.12/2000/4 (noting that among the obligations is for States to refrain from "limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law").

53. Footer & Rubenstein, *supra* note 34, at 181.

54. Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 119, 141 (2005) ("The obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict."); U.N. Human Rights Committee, Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 4, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) (noting that the United States maintains the position that the Covenant does not apply to individuals under its jurisdiction, but outside its territory); Human Rights Committee, Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to Life, Comments by the Government of Canada, ¶ 7 (Oct. 23, 2017), https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx (then follow "Canada" hyperlink) (setting forth the Canadian view that the "jurisdictional competence of a State is primarily territorial," and that an expansion beyond the territory of the State "would impinge on well-established principles of sovereignty").

of interference and denial, HRL fills an important gap."[55] Of particular note, it is solely human rights law that applies in those situations. Examples include the 2011 political unrest in Bahrain, the situation in Syria before a determination there was an armed conflict, and in the volatile regions of Nigeria where vaccination workers have been attacked.[56]

However, setting a very high legal threshold for armed conflict can mean that State authorities are confronted with levels of violence that factually reach levels normally associated with warfare. In those situations, in order to provide proper medical care to the victims of that violence human rights law will likely have to begin to be interpreted in a fashion that approximates the more specific protective rules of international humanitarian law. The potential problem this creates is that important obligations regarding the provision of medical care integral to that body of law may be not be incorporated. Acknowledging the existence of an armed conflict in circumstances where the levels of violence factually indicate one exists provides the most robust and best articulated protections for both civilian populations and the participants in the conflict.

More recently, there has been a greater recognition of a "totality of the circumstances" approach that expands the criteria to be considered when assessing if an armed conflict with non-State actors is in existence.[57] This has included looking towards the standard of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" found in Article 1(2) of Additional Protocol II as a dividing line between armed conflict and situations of ordinary crime that solely demand a human rights-based law enforcement response. Similarly, the requirement to deploy military forces, while not determinative on its own, provides another important factor that needs to be considered when assessing whether an armed conflict is occurring.

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55. Footer & Rubenstein, *supra* note 34, at 187.

56. *Id.* at 168.

57. *See* Prosecutor v. Boškoski and Tarčulovski, Case No. IT-04-82-T, Judgment, ¶ 257 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008) http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf (referencing the totality of circumstances); *see also* Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 693, 731–45 (2013); Geoffrey S. Corn, *Legal Classification of Military Operations*, *in* U.S. MILITARY OPERATIONS: LAW POLICY, AND PRACTICE 67, 74–75 (Geoffrey S. Corn, Rachel E. VanLandingham & Shane R. Reeves eds., 2016); WATKIN, *supra* note 11, at 375–78.

The notion that an armed conflict can occur in a relatively short period of fighting is reflected in the 1997 *Abella v. Argentina* report, which found an armed conflict lasting only thirty hours.[58] It is an interpretation that has once again gained prominence as the world has struggled with transnational terrorism in the post-9/11 period. Applying a "totality of the circumstances approach" to incidents such as the 2000 Sierra Leone hostage rescue (4 hours), the 2008 Mumbai attack (68 hours), the 2012 assault on U.S. facilities in Benghazi (13 hours), and the 2013 Westgate Mall attack in Nairobi (80 hours) all point towards the existence of armed conflicts, either as part of a broader conflict, or as a "one-off" attack of a relatively short duration.[59]

A more flexible approach towards conflict characterization is also reflected in the ICRC's 2016 *Commentary on the First Geneva Convention* where it is noted that "hostilities of only a brief duration may still reach the intensity level of a non-international armed conflict if, in a particular case, there are other indicators of hostilities of a sufficient intensity to require and justify such an assessment."[60] This *Commentary* incorporates the earlier Pictet *Commentary* reference to the use of State military forces as one of the criteria to be considered in assessing if an armed conflict exists.[61] The 2016 Commentary indicates that "the requisite degree of intensity may be met . . . when the government is obliged to use military force against the insurgents, instead of mere police forces."[62] While some States, such as Canada, may also use their military forces in a domestic law enforcement role,[63] it remains that the use of military forces to counter threats posed by non-State actors is a relevant

58. Abella v. Argentina, *supra* note 40, ¶ 1.

59. WATKIN, *supra* note 11, at 293, 367–68; *see also* KILCULLEN, *supra* note 24, at 52–66 (outlining the Mumbai assault); MITCHELL ZUCKOFF, 13 HOURS: THE INSIDE ACCOUNT OF WHAT REALLY HAPPENED IN BENGHAZI 254–80 (2014); Daniel Howden, *Terror in Nairobi: The Full Story behind al-Shabaab's Mall Attack*, GUARDIAN (London), (Oct. 4, 2013), https://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya.

60. 2016 COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 45, ¶ 440.

61. *See* OSCAR M. UHLER ET AL., COMMENTARY TO GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR GENEVA 35 (1958) (noting specifically paragraph 1.A.2).

62. 2016 COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 45, ¶ 431.

63. BERND HORN, NO ORDINARY MEN: SPECIAL OPERATIONS FORCES MISSIONS IN AFGHANISTAN 59–62 (2016)(setting out the history of Joint Task Force 2 and its taking over the domestic hostage rescue role from the Royal Canadian Mounted Police in 1993).

factor in determining if an armed conflict is in existence.[64] The ICRC Commentary, in effect, supports the "totality of the circumstances" approach that additional and more flexible factors should be applied when assessing whether an armed conflict exists.

Despite this move towards a more flexible interpretation of the armed conflict threshold, there are additional conflict categorization issues that could have significant impact on the provision of medical care during contemporary conflict. In this context, viewing terrorism as a criminal matter can have a particularly important consequence in two ways.

The first is the degree to which "states penalize—during wartime (as well as peacetime)—diverse forms of support, sometimes including medical care, to terrorist organizations," such that "counterterrorism policies recast medical care as a form of illegitimate support to the enemy," or "reject the corollary proposition that a terrorist organization may assign a medical corps to work under its authority."[65] The counterterrorism approach can often "prevent donors from affiliating with, funding or providing support to any NSAG-provided health activities," and reduce "the 'risk appetite' of many faith-based humanitarian organizations to engage with certain armed groups."[66] This outcome is entirely inconsistent with humanitarian need. As has been clearly stated in a study of humanitarian obligations, "no one may be harassed, harmed, prosecuted, convicted, or punished for having provided medical care to the wounded and sick, regardless of the nationality, religion, status or affiliation with a party to the conflict of the person receiving such care."[67] What is required is an approach "for all armed conflicts: that once out of the fight, all wounded and sick fighters (and all wounded and sick civilians) should be cared for, and no one should be penalized for giving that care. In short, medical care should be above the conflict."[68]

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64. *See also* Prosecutor v. Boškoski and Tarčulovski, *supra* note 57, ¶ 190 (emphasis added) (noting that the Court references the armed forces' engagement with terrorists as a factor in determining whether an armed conflict exists).

65. LEWIS, MODIRZADEH & BLUM, *supra* note 48, at ii.

66. LOUIS LILLYWHITE, CHATHAM HOUSE, NON-STATE ARMED GROUPS, HEALTH AND HEALTHCARE 5 (2015), https://www.chathamhouse.org/event/non-state-armed-groups-health-and-healthcare (follow "Meeting Summary" hyperlink).

67. DAPO AKANDE & EMANUELA-CHIARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT ¶ 86, at 33 (2016), https://www.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf.

68. LEWIS, MODIRZADEH & BLUM, *supra* note 48, at 146.

Second, there is the impact of both legal and policy approaches that treat threats by non-State actors to States as a "normal" criminal matter, often when States are being faced with robust insurgencies involving large-scale violence. Focusing on this second issue is especially important since the decision to apply human rights law, either as a matter of law or policy, can have a significant impact on the scope of medical care obligations and the degree of clarity with which they are articulated during counterterrorism and counterinsurgency operations. In practical terms, the legal source for the provision of medical care is not always immediately evident in the contemporary security environment. There are numerous situations, which, due to the nature of the groups and the intensity of the violence involved, can qualify as armed conflicts. This would suggest that humanitarian law, supported by human rights law would govern the provision of medical care. However, courts and States frequently assess these situations of violence solely through a human rights-based law enforcement lens.

The application of human rights law, particularly regarding the use of force can, and frequently should, be the preferred State approach from a policy perspective.[69] This preference is logical because a law enforcement response has the advantage of lowering the levels of violence, as well as maintaining an atmosphere of "normalcy" that ultimately serves as a key indicator of success in a struggle against groups seeking to undermine State governance.[70] The challenge is that at times the desire to maintain a human rights law/law enforcement response does not match the threat posed by the non-State actor, the overall levels of violence, or the nature of the State response. The levels of violence and the suffering experienced by the civilian population are not "normal" at all. This leads to the question of how, or even whether, in those situations the more protective international humanitarian law provisions regarding medical care could be applied during situations that qualify as armed conflict, but which may be viewed by a court or the State exclusively through a human rights lens.

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69. See WATKIN, *supra* note 11, at 592–95, for a discussion of the policy choice frequently made by States to apply a law enforcement approach.

70. Adrian Gueleke, *Secrets and Lies: Misinformation and Counter-Terrorism*, *in* ILLUSIONS OF TERRORISM AND COUNTER-TERRORISM 95, 99 (Richard English ed., 2015) (noting that "criminalization" is identified as one of the phases of a State's response to politically motivated violence. It is also noted that "[t]he attraction of this strategy in the context of internal challenge to the state is the implication that the state is sufficiently legitimate that the problem can be dealt with in the context of normal policing.").

The best examples of a strict adherence to a human rights law approach can be found in the European Court of Human Rights (ECtHR) jurisprudence dealing with internal insurgencies and terrorist threats. While that Court has relied on international humanitarian law "as far as possible" to interpret its human rights law mandate regarding international armed conflict,[71] it has chosen not to do so in respect of hostilities internal to its member States. Rather than overtly relying on humanitarian law when confronted with situations of internal armed conflict, it has chosen to apply a more expansive interpretation of human rights law.

For example, it has applied human rights law to military operations during the Chechen conflict, although in terms of the use of force, the Court has had to significantly increase the tolerance that body of law has traditionally displayed towards violence and civilian casualties. This has been done by borrowing humanitarian law concepts without actually applying that body of law. The Court applied this approach during the protracted Chechen-Russian conflict. Those hostilities had clearly crossed the threshold of armed conflict, including two highly destructive battles between 1994 and 1996 for the control of the city of Grozny. During a 1995 assault on that city "the intensity of artillery fire reached the level of World War II battles"[72] and "Russian military actions displayed an almost complete indifference towards casualties."[73] These elevated levels of violence continued into the twenty-

71. *See* Varnava v. Turkey, 2009-V Eur. Ct. H.R. 13, ¶ 185 (2009), http://hudoc.echr.coe.int/eng/?i=001-94162 (noting that in a case arising from the 1974 Turkish invasion of Cyprus, the Court ruled Article 2 of the European Convention on Human Rights, the Right to Life, must be interpreted as far as possible in light of international humanitarian law provisions applicable during international armed conflict); *see also* Hassan v. United Kingdom, 2014-VI Eur. Ct. H.R. 1, ¶ 101–02, http://hudoc.echr.coe.int/eng?i=001-146501. The *Hassan* decision dealt with the occupation of Iraq. By adopting the modifying words "as far as possible," the Court appears to be suggesting that human rights law might perform a supervisory function altering the application of international humanitarian law during armed conflict. There is simply nothing in the development of those two bodies of law, or in respect of their practical application that suggests this to be the case. *See id.*

72. JOES, *supra* note 18, at 145.

73. *Id.* (citing RAYMOND FINCH, WHY THE RUSSIAN MILITARY FAILED IN CHECHNYA 7 (1998)).

first century as demonstrated by Russian military operations involving air and artillery strikes,[74] as well as the Moscow and Beslan hostage incidents.[75]

Notably, the ECtHR has consistently dealt with State military and other security forces engaged in what can readily be described as combat as a "law enforcement body in a democratic society."[76] Indeed, the Court assessed its actions against a "normal legal background."[77] The Court took this position even for situations where the force included airpower and artillery employed to suppress an "illegal armed insurgency."[78] Clearly, these military means and methods are most readily associated with the conduct of hostilities; they are not "normally" applied in law enforcement operations.

While sometimes relying on humanitarian law concepts, such as those found in the targeting proportionality test,[79] the Court has applied them within the restraining principles of human rights law: a strict and compelling test of necessity, using no more force than necessary, and the requirement that the force used be strictly proportionate.[80] This blending of principles, without acknowledging their grounding in the law governing hostilities, is also evident in the acceptance by the Court of significant levels of collateral casualties (129 hostages) that occurred during the 2002 Moscow theater hostage rescue.[81] In contrast, the traditional human rights law approach has been very reluctant to accept any collateral casualties during a policing operation.

The ECtHR also incorporated the humanitarian law concept of indiscriminate weapons into its 2016 judgment regarding the 2004 Beslan school siege.[82] The weapons used during this "counter-terrorist" operation included

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74. *See* Isayeva v. Russia, App. Nos. 57947/00, 57948/00, 57949/00 (2005) (ECtHR), http://hudoc.echr.coe.int/eng?i=001-68379; Isayeva v. Russia, App. No. 57959/00 (2005) (ECtHR), http://hudoc.echr.coe.int/eng?i=001-68381 [hereinafter Isayeva II].

75. *See* Finogenov v. Russia, 2011-VI Eur. Ct. H. R. 365; Tagayeva v. Russia, App. No. 26562/07 and 6 other applications (2017) (ECtHR), http://hudoc.echr.coe.int/ eng?i=001-172660.

76. Finogenov, *supra* note 75; Tagayeva, *supra* note 75, ¶ 600 (emphasis added).

77. Kerimova v. Russia, App. Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, ¶ 253 (2011) (ECtHR), http://hudoc.echr.coe.int/eng?i=001-104662 (emphasis added).

78. *Id.* ¶ 246; *see also* Isayeva II, *supra* note 74, ¶¶ 190–91.

79. *See*, *e.g.*, Isayeva II, *supra* note 74, ¶ 176.

80. *Id.* ¶ 173; *see also* Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 59, ¶ 79, http://hudoc.echr.coe.int/eng?i=001-58200 (noting that a restrictive application of human rights law in an anti-terrorism context had been clearly articulated.).

81. Finogenov, *supra* note 75, ¶¶ 231–36.

82. Tagayeva, *supra* note 75, ¶ 609.

flamethrowers, grenade launchers, large-caliber machine guns, and tanks firing high-fragmentation shells.[83] However, in confirming a reluctance to view these incidents as occurring in an armed conflict, one judge noted in his partial dissent: "I am satisfied that the majority remained faithful to the Court's standards on the use of lethal force in large-scale anti-terrorist operations, dealing with them as with *any other law-enforcement operation* and refusing to apply the paradigm of the law on armed conflicts to them."[84] The result of this jurisprudence is that there is now significantly greater authority for the use of force than was traditionally authorized under the human rights paradigm, but a far more restrictive approach to the use of force than would ordinarily be authorized under the law governing the conduct of hostilities.

On one level, the approach of the ECtHR could be said to track the unique threat posed by many non-State actors. From a practical perspective, the normative gap between humanitarian and human rights law—particularly as it relates to use of force by State actors—is often significantly reduced during counterinsurgency and counterterrorism operations. When fighting "among the people" military forces frequently have to limit their use of force. For example, military forces may apply a threat-based response rather than one based on the status of the individual. In contrast, police agencies are often confronted with situations demanding a greater use of lethal force than ordinarily required. Moreover, other common counterinsurgency principles, such as adopting a police primacy approach[85] and privileging capture over killing insurgents/terrorists, reflect a different operational approach in which the use of lethal force is minimized.

However, as Sandesh Sivakumaran noted after his review of efforts by courts to use human rights law to directly regulate non-international armed conflict, "there should not be a rush to judgement that international human rights law holds the answer to all the problems."[86] A particular challenge presented by this jurisprudence is the lack of flexibility that accompanies legal rulings such as those of the ECtHR. When a State makes a policy choice to adopt a police primacy approach during its counterterrorism operations it retains the option of conducting more traditional hostilities when warranted. What is left unaddressed in the jurisprudence of the Court is whether this

83. *Id.* ¶ 608.

84. *Id.* ¶ 1, at 168 (partial dissent by Pinto De Albuquerque, J.) (emphasis added).

85. DAVID H. BAYLEY & ROBERT M. PERITO, THE POLICE IN WAR: FIGHTING INSURGENCY, TERRORISM, AND VIOLENT CRIME 68–69 (2010).

86. SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 99 (2012).

blended form of law can effectively address the full range of security threats posed by many non-State actors.

The more permissive international humanitarian law rules governing hostilities, including during non-international armed conflicts, and the humanitarian obligations enshrined in that body of law were developed out of necessity. It is difficult to see how the ECtHR approach could adequately address the violence that occurred in cities such as Grozny, Mosul, Fallujah, or Raqqa. With its individualized approach, human rights law is not well suited to address widespread and intensive violence, the nature of military operations, or the use of force frequently associated with armed conflict. At times, the Court's adherence to restrictive human rights principles appears to be disconnected from the realities of the security situation involved and the threat facing States, particularly during urban conflict. One commentator, noting the challenges caused by the ECtHR approach towards detention in non-international armed conflict, concludes that while due process requirements flowing from the European Convention on Human Rights cannot be abandoned, "it may mean being better prepared to engage the application of the law of armed conflict and for human rights courts to show some humility in engaging the interface between both legal systems."[87]

If the decisions of courts are disconnected from the situation on the ground, there is a very real danger that the credibility of the legal paradigm involved, and its ability to control the violence, will be undermined. It could also have an adverse impact toward establishing and enforcing obligations on the provision of medical care. If what is needed is compliance with international humanitarian law rules, over reliance on human rights law could adversely affect the provision of humanitarian relief. In contrast, while a State may choose to apply a more restrictive policing approach during armed conflict, it will still be bound by its more protective legal obligations toward the victims of the conflict set out in international humanitarian law. The human rights law-dominate approach of the ECtHR can be contrasted with the example set by the Inter-American Court of Human Rights and the Inter-

87. Fionnuala Ni Aoláin, *To Detain Lawfully or Not to Detain: Reflections on UK Supreme Court Decision in Serdar Mohammed*, JUST SECURITY (Feb. 2, 2017), https://www.justsecurity.org/37013/detain-lawfully-detain-question-reflection-uk-supreme-court-decision-serdar-mohammed/; *see also* Kenneth Watkin, *Accountability Fatigue: A Human Rights Law Problem for Armed Forces?*, JUST SECURITY (Nov. 1, 2018), https://www.justsecurity.org/61318/accountability-fatigue-human-rights-law-problem-armed-forces-petraeus-united-kingdom/.

American Commission on Human Rights, both of which relied on international humanitarian law to interpret their human rights law mandate in assessing non-international armed conflict.[88]

Applying human rights law to address the use of force by States during exceptional circumstances also raises the possibility of "human rights overreach." Here, human rights law, developed to regulate society in peacetime, is applied to acts of violence associated with armed conflict. In doing so human rights law is altered to the point that it begins to reflect its humanitarian law counterpart.[89] In effect, the "militarization" of human rights law is like the contemporary militarization of police forces in that it has the potential to have a long-term negative impact on both the law and society.[90]

What is not clear is how the ECtHR would rule regarding obligations for the provision of medical services in a conflict like Chechnya, which was internal to Russia. Fortunately, the consequence of militarizing this aspect of human rights law is less problematic than questions arising from the use of force. A key issue is one of clarity, and whether a court will go far enough to ensure the same level of protection under human rights law as is available for victims of conflict under international humanitarian law. In other words,

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88. *See, e.g.*, Bámaca Velásquez v. Guatemala, Judgment, Merits, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 208–09 (Nov. 25, 2000), http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf

> Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.
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> Indeed, there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This Court has already indicated in the Las Palmeras Case (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.

89. See WATKIN, *supra* note 11, at 252–59, for a more detailed discussion of "human rights overreach."

90. RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 333–36 (2013); *see also* AMERICAN CIVIL LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING (2014), https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rel1.pdf.

can it meet the humanitarian need? It is also not certain that medical services grounded in a human rights law-focused model would place the same obligations on all participants in the conflict. The traditional view is that international human rights law does not bind non-State actors, although arguments have been presented that it does, or at least should.[91] The simplest approach, and one realistically grounded in the scope and scale of violence, as well as the degree of suffering of the victims of the conflict, would be to acknowledge the existence of an armed conflict and apply humanitarian law.

It is not, however, only judicial scrutiny of security operations that has highlighted the application of a human rights law-based response when addressing levels of violence more readily associated with armed conflict. It frequently arises with States deciding to apply a human rights-based law enforcement response to "terrorism" and other challenges to their authority. This approach may be motivated by a variety of considerations, including the traditional reluctance exhibited by States to acknowledge an armed conflict exists within its borders, a desire to demonstrate a successful strategy through the maintenance of an aura of normalcy and control, or a conscious decision by a State to apply a law enforcement response because it can, in the prevailing circumstances, limit the overall violence. To be certain, there are significant advantages from a policy perspective in adopting a law enforcement response to non-State actor threats, even when an armed conflict is in existence. States should be encouraged to default to this approach whenever possible.[92] However, such an approach is only sustainable when a human rights law-based approach is feasible and effective in countering the threat actually being posed.

The iconic example where such a strategy was successfully applied over a significant period was the nearly thirty-year Northern Ireland "Troubles." The United Kingdom consistently adopted the position that this complex security situation, which rose to the level of an insurgency,[93] was a criminal

91. *See* SIVAKUMARAN, *supra* note 86, at 95–97.

92. WATKIN, *supra* note 11, at 616.

93. *See* Mark Cochrane, *The Role of the Royal Ulster Constabulary in Northern Ireland*, *in* POLICING INSURGENCIES: COPS AS COUNTERINSURGENTS 107, 108 (C. Christine Fair & Sumit Ganguly eds., 2014); WILLIAM MATCHETT, SECRET VICTORY: THE INTELLIGENCE WAR THAT BEAT THE IRA 7 (2016) ("No one called it an insurgency, but it was."); Steven Haines, *Northern Ireland 1968–1998*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 117, 135 (Elizabeth Wilmshurst ed., 2012) (acknowledging the existence of an insurgency in Northern Ireland).

matter.[94] The UK's ability to do so was the direct result of robust and effective mechanisms of government, including police, lawyers, courts, and prisons, as well as reliance on local intelligence personnel.[95] While there was considerable controversy regarding the use of force, it continued to be assessed under a human rights law paradigm. In contrast, it has proven extremely difficult to replicate that success in seeking to counter insurgencies elsewhere, such as in Iraq and Afghanistan, where State governance is not as strong.[96]

The relationship between a State's choice to apply a law enforcement or armed force approach can be complex for both legal and political reasons. For example, the UK's domestic experience can be contrasted with that of Colombia, which, with a change in government in 2011, altered its characterization of its engagement with the FARC to one of an "armed conflict" from an approach that did not recognize "drug dealing terrorists as belligerents."[97] For some States, the character of the conflict is masked behind a generic reference to "counterterrorism operations." The terrorists are treated as criminals, but the operations against them are frequently conducted as hostilities. In Turkey, efforts since 2015 to deal with a decision by the Kurdistan Workers' Party (PKK) to shift from rural guerrilla tactics to urban operations was initially addressed with counterterrorism operations using "police special operations units, Gendarmerie special operations units, commandos, and other special operations teams, as well as armored Army units."[98] A failure to restore order resulted in a shift "to mirror traditional military doctrine for urban warfare: besiege and isolate a city before an as-

94. Haines, *supra* note 93, at 130; TONY GERAGHTY, THE IRISH WAR: THE MILITARY HISTORY OF A DOMESTIC CONFLICT 74 (1998) (outlining how the "Irish Strategy" became one of treating acts of paramilitary violence as the scene of a crime); KIERAN MCEVOY, PARAMILITARY IMPRISONMENT IN NORTHERN IRELAND: RESISTANCE, MANAGEMENT AND RELEASE 15 (2001).

95. FRANK LEDWIDGE, LOSING SMALL WARS: BRITISH MILITARY FAILURE IN IRAQ AND AFGHANISTAN 219–21 (2011); MATCHETT, *supra* note 93, at 85–97; Cochrane, *supra* note 93, at 112; RICHARD DOHERTY, THE THIN GREEN LINE: THE HISTORY OF THE ROYAL ULSTER CONSTABULARY GC 1922–2001, at 216–18 (2012).

96. LEDWIDGE, *supra* note 95, at 164–65; MATCHETT, *supra* note 93, at 251–66.

97. Vanessa Paz Lecompte, *Santos, Uribe Clash over Colombia Conflict*, INSIGHTCRIME (May 5, 2011), https://www.insightcrime.org/news/brief/santos-uribe-clash-over-colombia-conflict/.

98. Anna Ronell, *Urban Warfare in the Turkey-PKK Conflict and Beyond*, CENTER FOR STRATEGIC STUDIES, THE FLETCHER SCHOOL, TUFTS UNIVERSITY (Feb. 26, 2018), https://sites.tufts.edu/css/urban-warfare-in-the-turkey-pkk-conflict-and-beyond/.

sault to cut logistical support to the enemy inside, undercutting their capabilities and will to continue fighting."[99] These forms of mixed approaches can create confusion as to what principles of law are governing State action in terms of the use of force, as well as the extent of State obligations regarding the provision of humanitarian assistance.

Uncertainty can develop in other contexts. In December 2017, the Iraq government claimed final victory over the Islamic State,[100] which would ordinarily suggest the establishment of normalcy and peace. However, that non-State organization is far from defeated, with Iraq facing continued insurgent attacks[101] from an estimated 15,500 to 17,100 Islamic State fighters.[102] Likewise, Nigeria has been engaged in an armed conflict with Boko Haram from possibly as early as 2009,[103] with the government seeking to defeat the terrorist group militarily, while at the same time endeavoring to bring prosecutions against its members and supporters under criminal terrorism legislation.[104] In July 2018, the President of Nigeria announced that the northeast of the country was in a post-conflict stabilization phase, which again implies "a total end to hostilities."[105] However, hostilities continue in a region beset with insecurity from various armed groups.[106] These situations

99. *Id.*

100. Ahmed Aboulenein, *Iraq Holds Victory Parade after Defeating Islamic State*, REUTERS (Dec. 10, 2017), https://www.reuters.com/article/us-mideast-crisis-iraq-parade/iraq-holds-victory-parade-after-defeating-islamic-state-idUSKBN1E407Z.

101. GLENN A. FINE, STEVE A. LINICK & ANN CALVARESI BARR, OVERSEAS CONTINGENCY OPERATIONS: OPERATION INHERENT RESOLVE, OPERATION PACIFIC EAGLE–PHILIPPINES 19–21 (2018), https://media.defense.gov/2018/Aug/07/2001951441/-1/-1/1/FY2018_LIG_OCO_OIR3_JUN2018_508.PDF.

102. *Id.* at 3.

103. THE WAR REPORT, *supra* note 35, at 83 (indicating the armed conflict has been occurring since at least 2013.). *But see* ANDREW WALKER, U.S. INSTITUTE FOR PEACE, WHAT IS BOKO HARAM? 3–6 (2012), https://www.usip.org/sites/default/files/SR308.pdf (outlining the history of Boko Haram violence, including significant acts as early as 2009).

104. Paul Carsten, *Nigeria Jails 45 Boko Haram Suspects in Mass Trial Held in Secret*, REUTERS (Oct. 13, 2017), https://www.reuters.com/article/us-nigeria-security/nigeria-jails-45-boko-haram-suspects-in-mass-trial-held-in-secret-idUSKBN1CI2BN.

105. *Buhari Says Boko Haram-Hit NE Nigeria Now 'Post-Conflict'*, DAILY MAIL (London) (July 6, 2018), http://www.dailymail.co.uk/wires/afp/article-5926209/Buhari-says-Boko-Haram-hit-NE-Nigeria-post-conflict.html.

106. Jane Flanagan, *Boko Haram Fighters Take Back Town from Military*, TIMES (London), (Sept. 10, 2018), https://www.thetimes.co.uk/edition/world/weakened-boko-haram-captures-town-56jg858nv; Emmanuel Akinwotu, *Deadly Lack of Security Plagues Nigeria as Buhari*

raise the question of at what point normalcy returns and whether State obligations, including the provision of medical care to victims of the violence, will or should be governed exclusively by human rights law.

For many Western States, the response to the jihadist threat outwardly reflects a bifurcated approach with the reliance on a human rights or humanitarian law framework being geographically dependent. For example, the French President declared the November 13, 2015 terrorist attacks in Paris to be "an act of war that was committed by a terrorist army, a jihadist army, Daesh, against France."[107] However, the response, while including a call of military forces, invoked domestic emergency powers.[108] Externally, while already engaged in airstrikes in Iraq and Syria, the French military immediately retaliated by conducting increased bombing attacks against jihadist targets in Syria.[109] As has been noted by Gilles Kepel, "The struggle against ISIS in Syria and Iraq certainly requires military means—notably, the navy and the air force. But the fight against terrorism on French, Belgian, German or any other Western territory is first of all a matter for the police."[110]

The reason France and other Western States are able to adopt this approach domestically is that their mechanisms of governance are robust and capable, albeit frequently with the assistance of emergency powers and the use of military forces,[111] and the threat remains at a level where such a response is effective. That they cannot do so internationally reflects the fact

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Seeks Re-Election, NEW YORK TIMES (Aug. 15, 2018), https://www.nytimes.com/2018/08/15/world/africa/nigeria-zamfara-violence-buhari.html.

107. Adam Nossiter, Aurlien Breeden & Katrin Bennhold, *Three Teams of Coordinated Attackers Carried Out Assault on Paris, Officials Say; Hollande Blames ISIS,* NEW YORK TIMES (Nov. 14, 2015), https://www.nytimes.com/2015/11/15/world/europe/paris-terrorist-attacks.html.

108. *Id.*; *see also* Samuel Osborne, *France Declares End to State of Emergency Almost Two Years after Paris Terror Attacks*, INDEPENDENT (London) (Oct. 31, 2017), https://www.independent.co.uk/news/world/europe/france-state-of-emergency-end-terror-attacks-paris-isis-terrorism-alerts-warning-risk-reduced-a8029311.html.

109. Alisa J. Rubin & Anne Barnard, *France Strikes ISIS Targets in Syria in Retaliation for Attacks*, NEW YORK TIMES (Nov. 15, 2015), https://www.nytimes.com/2015/11/16/world/europe/paris-terror-attack.html.

110. GILLES KEPEL, TERROR IN FRANCE: THE RISE OF JIHAD IN THE WEST, at xviii (2015).

111. Robert Booth, Vikram Dodd, Sandra Laville & Ewen MacAskill, *Soldiers on UK Streets as Threat Raised to Critical after Manchester Bombing*, GUARDIAN (London) (May 23, 2017),

that these States, and those they support, do not exercise the same level of control in the safe havens from which the threats are being generated.

While it might be tempting to dismiss President Hollande's declaration that the 2015 Paris attacks were an act of war as being merely rhetorical in nature, it has been posited that involvement in the Coalition fighting against ISIS in Iraq and Syria extends the application of international humanitarian law to the territory of the participating States.[112] In this regard, it has been suggested by the ICRC that international humanitarian law applies in the territory of assisting States involved in an extraterritorial non-international armed conflict since they "should not be able to shield themselves from the operation of the principle of equality of belligerents under IHL once they have become a party to this type of armed conflict beyond their borders."[113] However, as noted previously, the State policy choice of remaining within a human rights law-based paradigm when it is feasible and effective has been the preferred option.

The threats to State security that potentially engage a human rights law and international humanitarian law interface extend beyond traditional insurgencies and jihadist terrorism to transnational criminal gangs. As noted by Ioan Grillo regarding the security situation in Central and South America,

> the cartels spent their billions building armies of assassins who carry out massacres comparable to those in war zones and outgun police. They have diversified from drugs to a portfolio of crimes including extortion, kidnapping, theft of crude oil, and even wildcat mining. And they have grown to control the governments of entire cities and states in Latin America.[114]

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https://www.theguardian.com/uk-news/2017/may/23/salman-abedi-police-race-to-establish-if-manchester-suicide-bomber-acted-alone (discussing the deployment of British troops during Operation Temperer following a terrorist attack in Manchester.).

112. Vaios Koutroulis, *The Fight Against the Islamic State and Jus in Bello*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 827, 848–49 (2016) ("Thus, it is plausible to consider attacks by ISIL in the territory of one of these states as falling within the context of the on-going armed conflict between the coalition and ISIL and, therefore, as regulated by IHL.").

113. INTERNATIONAL COMMITTEE OF THE RED CROSS, STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY: CONCLUDING REPORT 14 (2015), https://www.justsecurity.org/wp-content/uploads/2015/11/2015-ICRC-Report-IHL-and-Challenges-of-Armed-Conflicts.pdf.

114. IOAN GRILLO, GANGSTER WARLORDS: DRUG DOLLARS, KILLING FIELDS, AND THE NEW POLITICS OF LATIN AMERICA 6 (2016).

Although an estimated two hundred thousand persons were killed in Mexico between 2006 and 2017,[115] the Mexican government has overtly asserted that it is not facing an insurgency[116] even while periodically employing military forces in a manner that suggests the existence of an armed conflict. Indeed, although not all analysts would agree,[117] the 2017 *War Report* concluded, "Mexico's security forces were arguably engaged in non-international armed conflicts with at least the Sinaloa Cartel and the Jalisco Cartel New Generation."[118] If that analysis is correct, it is international humanitarian law that would directly govern the provision of medical care and services.

Ultimately, a State's characterization of the response to violence within its borders will have a powerful impact on the legal framework under which the provision of medical care will be assessed. Where it has acknowledged an armed conflict is in existence humanitarian law clearly can be relied on. In other situations, either because of legal interpretation or because of a State decision to treat the conflict exclusively as a law enforcement matter, human rights law will govern. In this regard, the ECtHR has demonstrated it will not consider the applicability of international humanitarian law unless the State effectively raises the issue. This can be seen in case law dealing with the Chechen conflict. In its second *Isayeva* judgment, the Court stated that when determining if "a normal legal background" applies, "[n]o martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention."[119] In similar fashion, the applicability of humanitarian law in the *Hassan* case dealing with international armed conflict was only ruled upon "where this is specifically pleaded by the respondent State."[120]

Not all courts will necessarily demonstrate such deference to the State position regarding their characterization of a conflict. Indeed, in respect of the Chechen conflict the ECtHR could have acknowledged that an armed

115. *Mexico Violence: Six Bodies Found Hanging from Bridges Near Resort*, BBC NEWS (Dec. 21, 2017), http://www.bbc.com/news/world-latin-america-42439421.

116. IOAN GRILLO, EL NARCO: INSIDE MEXICO'S CRIMINAL INSURGENCY 204 (2011).

117. *See, e.g.*, EMILY CRAWFORD, IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT 180–89 (2015).

118. THE WAR REPORT, *supra* note 35, at 83. However, the authors stress the controversial nature of this determination, stating, "It is important to note that this classification is controversial." *Id.*

119. Isayeva II, *supra* note 74, ¶ 191.

120. Hassan, *supra* note 71, ¶ 107.

conflict was in existence notwithstanding the position of the Russian government, and then apply "the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict."[121] However, given the complex political and legal factors, for many contemporary struggles between States and non-State actors it is likely that the provision of medical services will have to rely, in whole or in part, on a human rights law basis for such activities.

In situations where a State has well developed medical infrastructure and services (most frequently in urban areas), and the violence is relatively well contained by the security forces, the provision of medical care under a human rights paradigm is likely not problematic. For example, while the medical services in Northern Ireland were confronted with a horrific human toll in the aftermath of significant incidents of violence, and at times were challenged by the number and types of injuries, it effectively provided the required medical care throughout the three decades of conflict.[122] The same is true for Canada, the United States, the United Kingdom, France, Germany, Belgium, and other sufficiently developed States periodically facing jihadist attacks on their own soil. It would be expected that the medical services delivered under a human rights paradigm could meet the challenge, although adjustments may have to be made to provide effective care in terms of the number of injured and types of injuries.[123] However, the same cannot be said for the violence arising from external operations, such as those in Iraq and Syria, where humanitarian law would ordinarily have to be relied on.

When confronted with conflict in geographically remote areas or when experiencing higher levels of violence, States with less robust medical ser-

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121. *Id.* ¶ 102.

122. *See Bloody Friday: How the Troubles Inspired Belfast's Medical Pioneers*, BBC NEWS (July 20, 2012), https://www.bbc.com/news/uk-northern-ireland-18886867; Peter Froggatt, *Medicine in Ulster in Relation to the Great Famine and "the Troubles"*, 319 BRITISH MEDICAL JOURNAL 1636 (1999), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1127095/

> On 17 May 1974 Alan Crockard, then a registrar at the Royal Victoria Hospital, Belfast, holding a Hunterian professorship, delivered his valedictory lecture on 'Bullet injuries of the brain.' He reviewed over 80 patients, most from Belfast, treated in his unit over 44 months. One has to go to Chicago—in fact to the whole of Cook County, in which Chicago stands—to find so large a peacetime series.

123. Pierre Carli et al., *The French Emergency Medical Services after the Paris and Nice Terrorist Attacks: What Have We Learnt?*, 390 THE LANCET 2735 (2017).

vices can be significantly more challenged to provide medical care. For example, the Nigerian representative to the UN indicated in May 2017 "that to prevent the commission of violations of international humanitarian law in armed conflict, the critical element to achieving that objective is the respect for international human rights and humanitarian law."[124] Further, the Nigerian government established a presidential commission "to enhance the security conditions in the northeast of the country, facilitate the work of health personnel and ease the movement of medical equipment and supplies."[125] This reliance on both human rights and international humanitarian law to address contemporary conflict is increasingly becoming a standard position adopted by States and the UN.

With many States relying exclusively on human rights-based law enforcement responses to violence, not clearly indicating an armed conflict is in existence, using a geographical basis for the application of each body of law, or suggesting both bodies of law apply, the legal basis for the provision of medical care and services in contemporary conflict will frequently be framed in terms of human rights law. Due to the more general provisions of human rights law and its focus on State rather than non-State actor responsibility, humanitarian advocates are presented with a challenge when seeking to provide the necessary medical support to victims of the conflict. It is a challenge that increases exponentially when the violence experienced in urban warfare resembles that of conventional armed conflict. Since these situations are factually, and could legally be assessed as, armed conflict, the human rights dialogue will increasingly have to be framed in terms of humanitarian legal norms to be effective. This is particularly the case if the existing medical infrastructure and services cannot address the need.

IV. THE PROVISION OF MEDICAL CARE

Reflecting the battlefield roots of the humanitarian movement, the law concerning the provision of medical care has historically placed special emphasis on the collection and care of injured soldiers. For many State armed forces medevac and the ability to evacuate soldiers within what has been described as the "golden hour" from injury to treatment in a well-equipped medical

124. *Nigeria Reaffirms Commitment to Protect Civilians in Armed Conflicts*, VANGUARD (Lagos) (May 26, 2017), https://www.vanguardngr.com/2017/05/nigeria-reaffirms-commitment-protect-civilians-armed-conflicts/.

125. *Id.*

facility is frequently a condition precedent for the conduct of military operations. As Major-General David Fraser noted in respect of Canadian operations in Afghanistan in 2006:

> No soldier ever went outside the wire without ensuring that we had a medevac helicopter within the golden hour. If that was not in the concept of operations . . . I wouldn't approve it. Every man or woman had to know that they or their fellow soldiers would be taken care of in the event they were injured.[126]

This does not mean all States are capable of providing this level of medical care. In the same conflict, Afghans "were flown to Afghan medical centers with little equipment and comparatively abysmal standards of trauma care."[127] Similarly, deployment on UN operations is often conditioned on the quality of medical services available to troop contributing countries, with some countries even bringing their own medical facilities rather than relying on those provided by the UN.[128] However, particularly problematic is that receiving medical care within the "golden hour" is not the reality for many civilians caught up in the violence of urban conflict.[129]

The obligation that military forces provide non-discriminatory care to enemy wounded and sick, with treatment being based on urgent "medical reasons" alone, is clearly established.[130] However, in the context of counter-insurgency/counterterrorism operations, the reliance on paramilitary and police forces to conduct operations presents its own set of challenges since

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126. DAVID FRASER, OPERATION MEDUSA: THE FURIOUS BATTLE THAT SAVED AFGHANISTAN FROM THE TALIBAN 156 (2018); *see also* Howard R. Champion et al., *A Profile of Combat Injury*, 54 THE JOURNAL OF TRAUMA INJURY, INFECTION, AND CRITICAL CARE S13, S17 (2003) ("Evacuation times for the IDF to medical facilities compare extremely favorably with urban American Level I trauma centers: an average of 53 minutes.").

127. C. J. CHIVERS, THE FIGHTERS: AMERICANS IN COMBAT IN AFGHANISTAN AND IRAQ, at xxii (2018).

128. LESLEY CONNOLLY & HÅVARD JOHANSEN, MEDICAL SUPPORT FOR UN PEACE OPERATIONS IN HIGH-RISK ENVIRONMENTS 12 (2017), https://www.ipinst.org/wp-content/uploads/2017/04/IPI-Rpt-Medical-Support-Final.pdf.

129. INTERNATIONAL COMMITTEE OF THE RED CROSS, "I SAW MY CITY DIE": VOICES FROM THE FRONT LINES OF URBAN CONFLICT IN IRAQ, SYRIA AND YEMEN 47 (2017), https://reliefweb.int/sites/reliefweb.int/files/resources/4312_002_Urban-Warfare_web_new_EN.pdf [hereinafter I SAW MY CITY DIE] (noting that a thirteen-year-old who was shot trying to flee Mosul could not be evacuated for three to four hours).

130. Geneva Convention I, *supra* note 2, art. 12.

these forces may not be trained or equipped to implement these obligations.[131] The lack of training and equipment in turn places a particular demand on States to ensure that all security forces are properly trained to either provide or facilitate the provision of medical care to victims of the conflict before they are employed.

Even when military and other security forces are trained and equipped to address the humanitarian needs related to the wounded and sick, implementing these obligations can present an immense challenge to military commanders due to the concentration of civilians in urban environments. While steps may be taken to encourage the evacuation of most of the civilian population from a city, as happened in 2004 in Fallujah,[132] this may not always be possible or desirable. For example, in Mosul in 2016, the Iraqi government told civilians to stay within the city in order to avoid a humanitarian crisis,[133] although by August 2017, an estimated 140,000 families had fled, with 100,000 families remaining in the city.[134]

Security forces inevitably will have to conserve medical resources in any fight to retake a city. Accordingly, this conservation "may result in the prioritization of collection, care, and treatment of military wounded and sick," although in respect of civilians "intervening in extreme cases, where failing to do so will result in loss of life, limb, or sight will almost always be an authorized action."[135] In turn, this discrepancy raises the issue of what care and treatment is available to civilian wounded and sick.

The existence of a functioning medical infrastructure in urban areas can mitigate the inability of military forces to treat the civilian wounded and sick.

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131. ANTONIO GIUSTOZZI & MOHAMMED ISAQZADEH, POLICING AFGHANISTAN 41 (2012) (noting that by 2007, "it was estimated that 70 per cent of Afghan National Police time was spent fighting the insurgency as opposed to law and order tasks").

132. THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 398–99 (2007) (finding that an estimated four hundred civilians remained in the city out of a population of 250,000).

133. Tim Arango, *Iraq Told Civilians to Stay in Mosul. Now They're Paying with Their Lives*, NEW YORK TIMES (Nov. 24, 2015), https://www.nytimes.com/2016/11/24/world/middleeast/iraq-mosul-isis-civilians.html.

134. Lucy Rodgers, Nassos Stylianou & Daniel Dunford, *Is Anything Left of Mosul?: The Battle to Save the City and Its People*, BBC NEWS (Aug. 9, 2017), https://www.bbc.co.uk/news/resources/idt-9d41ef6c-97c9-4953-ba43-284cc62ffdd0.

135. CORN, WATKIN & WILLIAMSON, *supra* note 3, at 90; *see also* UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 7.3.2, at 123 (2004) ("There is no absolute obligation on the part of the military medical services to accept civilian wounded and sick—that is to be done only so far as it is practicable to do so.").

Those facilities might also be used to treat military casualties. What is not guaranteed, however, is that during combat operations civilian hospitals and clinics will be functioning, or even remain in existence. As the ICRC reported in December 2016, "only one of eastern Aleppo's nine hospitals remains fully functional, and four are completely out of service. Medical staff are exhausted and stocks severely depleted."[136] Compounding the problem can be the migration of civilians towards urban areas as the conflict unfolds. For example, in 2018 one Yemeni family fled to Mokha, which had a hospital. However, the hospital "had no surgeon, nor a proper intensive-care unit, oxygen or essential medicines."[137] Care was finally provided by a MSF facility six hours away in Aden. There, civilians were "crowding into ill-equipped hospitals and clinics with diseases, malnourished babies and injuries from land mines and unexploded munitions." [138]

Accordingly, military commanders must understand and embrace the requirement to facilitate access to civilian facilities, prioritize cooperation with the ICRC, and permit the deployment of humanitarian assistance and non-governmental organization support in order to meet the needs of the wounded and sick. However, coordination with non-governmental organizations and other humanitarian entities can present challenges. As was reported in one study looking at the provision of medical services in the 2016–2017 battle for Mosul, the Iraqi military had limited capacity and the coalition States "were unable to supply medical teams to care for civilians."[139] Further,

> [i]nternational non-governmental organizations (NGOs), stung by recent attacks on health facilities and workers, initially struggled to find their footing amid the security risks and other programming; moreover, many argued that their role has not and is not to provide frontline care, which should

136. *Everyone Wounded or Sick During Armed Conflict Has the Right to Health Care*, ICRC (Dec. 9, 2016), https://www.icrc.org/en/document/everyone-wounded-or-sick-during-armed-conflict-has-right-health-care.

137. Sudarsan Raghavan, *Running on Empty: Could Yemen's Humanitarian Crisis—the Most Dire in the World—Be about to Get Dramatically Worse?*, WASHINGTON POST (June 14, 2018), https://www.washingtonpost.com/news/world/wp/2018/06/14/feature/yemen-crisis-saudi-led-attack-on-rebel-held-city-could-worsen-human-exodus-and-famine/.

138. *Id.*

139. JOHN HOPKINS CENTER FOR HUMANITARIAN HEALTH, MOSUL TRAUMA RESPONSE: A CASE STUDY QUALITY AND EFFECTIVENESS EXECUTIVE SUMMARY – PART 2: QUALITY AND EFFECTIVENESS 2 (2018), http://www.hopkinshumanitarianhealth.org/assets/documents/Executive_summary_mosul_technical_Feb_15_2018_FINAL.PDF.

> remain the responsibility of warring factions as set out in the Geneva Conventions and Additional Protocols.[140]

Support was not available from Doctors Without Borders or the ICRC, and "[u]ltimately, WHO contracted other NGOs and a private medical company to manage the TSPs [trauma stabilization points] and field hospitals, drawing upon its experience dispatching emergency medical teams," with funding provided by U.S., European and UN sources.[141]

One of the issues identified in the study regarding the use of frontline non-military medical services to treat civilians was "concern among many humanitarian NGOs that the WHO frontline strategy undermined the perceived independence and neutrality of all humanitarian groups, thereby eroding the protections conveyed by humanitarian principles."[142] Further, the insertion of the "trauma referral pathway," which places humanitarian workers at substantial risk and may interrupt the provision of humanitarian aid, created a concern that more people could have ultimately been killed "[b]ecause most deaths in conflict settings are due to long-term, indirect, rather than direct trauma causes."[143] An unwillingness by humanitarian groups to participate complicates the ability of States to ensure adequate medical care is provided during urban conflict since those groups have become a fixture on the modern battlefield. This highlights the need for broader consultation between States and humanitarian groups prior to conducting operations.

V. THE IMPACT OF THE CONCENTRATION OF CIVILIANS IN URBAN ENVIRONMENTS

The more civilians there are concentrated in an area of combat operations, the more likely that security forces will have to contend with civilian casualties. Of course, military commanders in such situations must implement all

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140. *Id.*

141. *Id.*

142. JOHN HOPKINS CENTER FOR HUMANITARIAN HEALTH, MOSUL TRAUMA RESPONSE: A CASE STUDY APPLICATION OF HUMANITARIAN PRINCIPLES EXECUTIVE SUMMARY – PART 1: APPLICATION OF HUMANITARIAN PRINCIPLES 5 (2018), http://www.hopkinshumanitarianhealth.org/assets/documents/Executive_Summary_Mosul_Hum_Principles_Feb_15_FINAL.PDF.

143. *Id.*

feasible precautions to mitigate this risk. Such steps were taken by commanders in battles such as the 2004 retaking of Fallujah[144] and the 2016–2017 assault on Mosul,[145] although the same cannot be said in other situations of urban combat, such as Damascus.[146] Nonetheless, military assaults in urban centers remain very destructive.[147] For example, in Marawi it was reported that six months after Filipino and foreign fighters claiming allegiance to the Islamic State had stormed that urban area "[t]he heart of the city ha[d] been bombed and burned beyond recognition, its domed mosques pierced by mortar fire. Homes . . . [were] roofless, blackened."[148] The combat left 200,000 inhabitants scattered across the southern Philippines.[149] In respect of Mosul, there have been claims of casualties ranging from 5,805 to 40,000 killed.[150] Elsewhere little or no concern was demonstrated. The six-week Russian assault on Grozny in December 1994 resulted in an estimated 27,000 to 35,000 civilians killed and close to one hundred thousand wounded.[151] In Syria, during a forty-eight hour period in February 2018, it is reported that

144. Dick Camp, OPERATION PHANTOM FURY: THE ASSAULT AND CAPTURE OF FALLUJAH, IRAQ 152 (2009) (explaining the progression of force used to attack insurgent defenders).

145. Jackson Diehl, *There's Good News in Mosul — for Now*, WASHINGTON POST (Dec. 25, 2016), https://www.washingtonpost.com/opinions/global-opinions/theres-good-news-in-mosul--for-now/2016/12/25/265ad37a-c876-11e6-85b5-76616a33048d_story.html.

146. Brent Eng & José Ciro Martínez, *Why the Syrian Regime Has Been Targeting Civilian Infrastructure*, WASHINGTON POST (Apr. 16, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/16/why-the-syrian-regime-has-been-targeting-civilian-infrastructure/.

147. Margaret Coker, *After Fall of ISIS, Iraq's Second-Largest City Picks Up the Pieces*, NEW YORK TIMES (Dec. 10, 2017), https://www.nytimes.com/2017/12/10/world/middleeast/iraq-isis-mosul.html (estimating that in the nine month battle for Mosul one million persons were displaced, 60,000 homes were made uninhabitable, and 20,000 commercial and government buildings were destroyed); Susannah George & Lori Hinnant, *Few Ready to Pay to Rebuild Iraq after the Islamic State Group Defeat*, MILITARY TIMES (Dec. 28, 2017), https://www.militarytimes.com/flashpoints/2017/12/28/few-ready-to-pay-to-rebuild-iraq-after-islamic-state-group-defeat/ (noting that in Ramadi "more than 70 percent of the city remains damaged or destroyed").

148. Emily Rauhala, *Liberated and Angry*, WASHINGTON POST (Dec. 9, 2017), https://www.washingtonpost.com/sf/world/2017/12/09/liberated-and-angry-in-marawi/.

149. *Id.*

150. Rodgers, Stylianou & Dunford, *supra* note 134.

151. LOUIS DIMARCO, CONCRETE HELL: URBAN WARFARE FROM STALINGRAD TO IRAQ 187 (2012).

250 civilians were killed in the Damascus suburbs, including fifty-eight children, and another 1,000 wounded. In addition, "[a]t least 10 hospitals in eastern Ghouta were damaged by airstrikes or shelling."[152]

The danger posed to civilians has led to humanitarian efforts to limit the use of explosive or "wide area effect" weapons in urban areas,[153] although it has been noted, "explosive weapons—like bombs, rockets and shells—are not prohibited as such under humanitarian law."[154] The increased risk to civilians associated with the use of high explosive munitions in urban operational environments must be included in targeting assessments. Further, the use of wide area effect weapons can raise concerns regarding the potential for indiscriminate targeting,[155] although certain multiple launch rocket systems can fire precision guided munitions.[156] Nonetheless, it is unrealistic to expect States to readily accept blanket restrictions or prohibitions. Advocating for this "remedy"[157] without addressing the potentially critical military value of the weapons systems being considered, their accuracy, the effect of

152. Philip Issa & Bassam Mroue, *Government Bombing of Damascus Suburbs Kills More Than 100*, AP NEWS (Feb. 20, 2018), https://apnews.com/b286b967a78d4b2ab2bfb18369387b8c.

153. *See, e.g.*, *ICRC Q&A on the Issue of Explosive Weapons in Populated Areas*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 97 (2016).

154. Vincent Bernard, *Editorial: War in the Cities: The Spectre of Total War*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 1, 7–8 (2016).

155. PROTECTION OF CIVILIANS IN MOSUL: IDENTIFYING LESSONS FOR CONTINGENCY PLANNING, A CENTER FOR CIVILIANS IN CONFLICT (CIVIC) AND INTERACTION ROUNDTABLE 3 (2011), https://www.interaction.org/sites/default/files/civic-interaction-protection-of-civilians-in-mosul-october-2017_final.pdf.

156. MOSUL STUDY GROUP, U.S. ARMY, WHAT THE BATTLE FOR MOSUL TEACHES THE FORCE, NO. 17-24 U (2017), https://www.armyupress.army.mil/Portals/7/Primer-on-Urban-Operation/Documents/Mosul-Public-Release1.pdf.

157. *World at a Turning Point: Heads of UN and Red Cross Issue Joint Warning*, ICRC (Oct. 30, 2015), https://www.icrc.org/en/document/conflict-disaster-crisis-UN-red-cross-issue-warning (reporting on a joint appeal by the UN Secretary General and the President of the Red Cross to take concrete and urgent action to address human suffering, including stopping "the use of heavy explosive weapons in populated areas"); *see also* Hannah Bryce, *Stopping the Use of Explosive Weapons in Populated Areas*, CHATHAM HOUSE (Nov. 5, 2015), https://www.chathamhouse.org/expert/comment/stopping-use-explosive-weapons-populated-areas (referencing specifically the use of wide impact explosive weapons such as multi-barrelled rocket launchers).

targeting precautions, and the actual tactical situation in which they are intended to be used is a potential recipe for operational failure.[158] This is because the conduct of military operations in an urban environment is another area where "context" matters. As Geoffrey Corn has noted, banning certain weapons does not change what can be gained by an enemy operating in an urban environment, to the contrary, it will incentivize the "enemy use of such areas to gain tactical and strategic advantage."[159]

It is nearly certain that urban conflict will become more prevalent over time and that explosive weapons will have to be used during such conflicts, however, measures to limit the collateral effects of operations will be required. The motivation on the part of security forces to limit civilian casualties can be particularly evident in situations of counterinsurgency where mitigating civilian risk can itself provide a military advantage.[160] However, casualties in those situations will not be reduced to zero, nor are these counterinsurgency operations likely to be amenable solely to a human rights-based analysis even when conducted with a police primacy approach.

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158. MOSUL STUDY GROUP, *supra* note 156, at 16 (discussing the effectiveness of artillery, mortar, and multiple launch rockets as counterfire against ISIS indirect fire). Although effective, these tactics require considerable planning.

> The close fight required detailed planning to integrate and deconflict surface fires with aerial platforms. Counterfire in the dense urban environment required meticulous planning, with an emphasis on intelligence preparation of the battlefield (understanding the physical environment) and predictive and pattern analysis. In dense urban terrain, counterfire radar systems were cued with other intelligence, surveillance, and reconnaissance systems, such as MQ-1 and MQ-9, to be effective.

Id.

159. Corn, *supra* note 6, at 782.

> First, enemy forces—often less capable than their opponents—gain a natural defensive advantage from the cover, concealment, maneuverability, and access to resources in urban terrain. Second, by increasing the perception of indifference to civilians resulting from the destructive effects of urban combat, the enemy is able to exploit the civilian population in the knowledge that the infliction of casualties and the destruction of civilian property will undermine the legitimacy of the legitimate opponent's efforts.

Id.

160. WATKIN, *supra* note 11, at 254–58; *see also* LAURENT GISEL, INTERNATIONAL COMMITTEE OF THE RED CROSS, THE PRINCIPLE OF PROPORTIONALITY IN THE RULES GOVERNING THE CONDUCT OF HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 61–62 (2018), https://www.icrc.org/en/document/international-expert-meeting-report-principle-proportionality (follow PDF icon under "Download the Report") (noting that this report resulted from an international expert meeting hosted by the University of Laval on June 22–23, 2016).

Urban centers not only present operational challenges due to the sheer numbers of civilians located there, they also are unique in terms of the interconnected nature of city life. As one senior U.S. military officer has noted, "preparing for operations in dense urban areas includes not only training [to improve] the ability to fight in cities, but also to better understanding [the] 'flow'" of "people, resources, information, or things in and out of the city."[161] This means understanding "the social infrastructure, demography, governance, economics, power hierarchies, and security systems of how a city works."[162] Services vulnerable to the effects of destruction associated with military operations "include electricity, *health care*, water, waste-water collection and treatment, and solid waste disposal."[163] For example, the destruction of the water supply infrastructure "is likely to have a domino effect on other services (e.g., health)."[164] In the context of pre-planned attacks, it makes sense for military commanders "to consult experts prior to the attack, such as their medical or engineering branch, in order to estimate the incidental damage of the attack."[165] Indeed, such consultation should be expanded to all aspects of mission planning in order to avoid damage to the greatest extent possible to the infrastructure crucial to civilian survival, or, if necessary, be prepared to rehabilitate those services.

In addition, "medical units," military or civilian, "must be protected at all times" and must never be deliberately attacked.[166] The only exception to this rule is when medical personnel forfeit their protection. For example, civilian medical units being used to commit acts harmful to the enemy, but even then a cease and desist warning is required.[167] Such units can include "hospitals and other similar units, blood transfusion centres, preventative

161. Claudia ElDib & John Spencer, *Commentary: The Missing Link to Preparing for Military Operations in Megacities and Dense Urban Areas*, ARMY TIMES (July 20, 2018), https://www.armytimes.com/opinion/commentary/2018/07/20/commentary-the-missing-link-to-preparing-for-military-operations-in-megacities-and-dense-urban-areas/ (statement of Lt. Gen. Stephen J. Townsend, Commander of Operation Inherent Resolve).

162. *Id.*

163. Mark Zeitoun & Michael Talhami, *The Impact of Explosive Weapons on Urban Services: Direct and Reverberating Effects Across Space and Time*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 53, 56 (2016) (emphasis added).

164. *Id.* at 63.

165. Isabel Robinson & Ellen Nohle, *Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 107, 139 (2016).

166. Additional Protocol I, *supra* note 2, art. 12(1).

167. *Id.* art. 13(1).

medicine centres and institutes, medical depots and the medical and pharmaceutical stores of units."[168] In an urban context, the marking of medical units and transports can provide a particularly important means of helping to ensure their protection. However, "[p]ractice has shown that the failure to wear or display the distinctive emblem does not of itself justify an attack on medical or religious personnel and objects when they are recognized as such."[169] The protection is provided by the function that is performed, the symbols only facilitate identification.[170] In any event, even if a medical unit is "unauthorized," it must be "regarded as being protected according to the rules on the protection of civilian objects."[171]

Unfortunately, the Syrian conflict has witnessed numerous allegations of attacks on medical facilities.[172] A commission established by the UN Human Rights Council reporting in June 2018 found

> [a] rise in attacks against official and makeshift hospitals throughout eastern Ghouta also markedly increased during the period under review. As hostilities escalated in February, reports emerged that 28 health facilities had been attacked, destroying vital lifesaving equipment. Near constant bombardment often rendered the transport of victims impossible, which compounded their suffering, and, in some cases, led to preventable deaths.[173]

One of the challenges for participants in urban conflict is the location of medical facilities. As Additional Protocol I indicates, whenever possible they should be located so that "attacks against military objectives do not imperil their safety."[174] This has obvious applicability to temporary medical facilities. Among the challenges of providing medical care in an urban environment is the level of destruction, the unclear separation between the warring factions, quickly changing front lines, and the need to operate as close as possible to

168. CIHL, *supra* note 4, at 95.

169. *Id.* at 103–04.

170. *Id.*

171. *Id.* at 95.

172. *Syria War: Hospitals Being Targeted, Aid Workers Say,* BBC NEWS (Jan. 6, 2018), https://www.bbc.com/news/world-middle-east-42591334.

173. Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Human Rights Council, The Siege and Recapture of Eastern Ghouta, ¶ 44, U.N. Doc. A/HRC/38/CRP.3 (June 30, 2018), https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx (follow "Conference Room Paper (A/HRC/38/CRP.3)" hyperlink under "Reports 2018") [hereinafter Syria Commission of Inquiry].

174. Additional Protocol I, *supra* note 2, art. 12(4).

areas where combat is taking place. For security reasons, temporary medical facilities may have to be co-located with military personnel, including locations that are in the immediate vicinity of lawful targets, thereby increasing the risk to those facilities.

It has also been noted that "[i]n low-intensity urban conflict, it is difficult to identify a casualty and get immediate qualified care."[175] Further, medical facilities and transports may not be marked for tactical reasons. This can make the identification of the injured, medical facilities, and transports difficult. However, this alone does not account for the troubling tendency of attacks on such facilities and transports. As the UN Independent Commission on Syria noted, the "pattern of attack strongly suggests that pro-Government forces systematically targeted medical facilities, repeatedly committing the war crime of deliberately attacking protected objects, and intentionally attacking medical personnel."[176] What needs to occur is the investigation of all incidents for which credible allegations are made that such targeting has taken place.

On occasion, an investigation may not be able to reach definitive conclusions, or multiple investigations may result in different conclusions concerning the same incident. One investigation carried out by a UN Board of Inquiry looked at a September 19, 2016 aerial attack that killed ten, injured twenty-two, and destroyed $650,000 worth of humanitarian supplies being transported by a joint UN-Syrian Arab Red Crescent [SARC] humanitarian convoy near Urem al-Kubra, Syria.[177] A summary of that investigation indicates that the Board of Inquiry did not have access to the data that would allow it to definitively identify the party responsible for conducting the strike.[178] However, the Board summary also indicated it "did not have evidence to conclude the incident was a deliberate attack on a humanitarian target,"[179] and, at least in that instance, "[d]espite initial reports that a medical clinic had been destroyed, the Board found no evidence of a medical clinic neighbouring the SARC compound."[180]

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175. Champion et al., *supra* note 126, at S17.

176. Syria Commission of Inquiry, *supra* note 173, ¶ 50.

177. U.N. Secretary-General, Letter dated 21 December 2016 from the Secretary-General addressed to the President of the Security Council, Annex, ¶¶ 30–32, U.N. Doc. S/2016/1093 (Dec. 21, 2016), https://reliefweb.int/sites/reliefweb.int/files/resources/N1645820.pdf.

178. *Id.* ¶¶ 35–40.

179. *Id.* ¶ 41.

180. *Id.* ¶ 33.

In contrast, a subsequent investigation of this incident by the Independent International Syria Commission determined that the munitions used, area attacked and duration "strongly suggest that the attack was meticulously planned and ruthlessly carried out by the Syrian air force to purposefully hinder the delivery of humanitarian aid and target aid workers, constituting the war crimes of deliberately attacking humanitarian relief personnel, denial of humanitarian aid and targeting civilians."[181]

Despite the potential in some instances for differences in result it remains essential that the accountability process is invoked. Investigations may confirm or absolve liability. Where the existence of a war crime is established, appropriate enforcement action needs to be taken. They also heighten public awareness of the actions taken by conflict participants. Even if no crime is believed to have occurred, an investigation may identify changes to operational decision making, tactics, techniques, and procedures, or doctrine that can reduce future incidents.

It is also important to note that medical facilities and equipment may be misused by participants to a conflict. Protection provided to medical units ceases only if "they are used to commit, outside their humanitarian function, acts harmful to the enemy."[182] Allegations regarding the misuse of hospital facilities arose in the context of the 2014 conflict between Israel and Hamas where it was reported the Shifa Hospital in Gaza City had "become a de facto headquarters for Hamas leaders, who can be seen in the hallways and offices."[183] Israel also alleged that that "Hamas commandeered ambulances and launched attacks from hospital compounds during the conflict."[184]

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181. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 88, U.N. Doc. A/HRC/34/64 (Feb. 2, 2017), https://undocs.org/A/HRC/34/64.

182. Additional Protocol I, *supra* note 2, art. 13(1).

183. William Booth, *While Israel Held Its Fire, the Militant Group Hamas Did Not*, WASHINGTON POST (July 15, 2014) https://www.washingtonpost.com/world/middle_east/while-israel-held-its-fire-the-militant-group-hamas-did-not/2014/07/15/116fd3d7-3c0f-4413-94a9-2ab16af1445d_story.html.

184. Helena Kennedy, *The 2014 Conflict Left Gaza's Healthcare Shattered. When Will Justice Be Done?*, GUARDIAN (London) (June 29, 2015), https://www.theguardian.com/commentisfree/2015/jun/29/2014-conflict-gaza-healthcare-hospitals-war-crime-israel-hamas.

During the conflict, "17 hospitals, 56 primary healthcare facilities, and 45 ambulances were damaged or destroyed."[185] Still, even when harmful acts are carried out by civilian medical units, their protection only ceases "after a warning has been given setting, where appropriate, a reasonable time limit, and after such warning has remained unheeded."[186] Further, when targeting a military object near a medical facility careful consideration needs to be given to the proportionality assessment of incidental loss of civilian life, injury to civilians, or damage to civilian objects.[187]

VI. TYPES OF INJURIES IN URBAN ENVIRONMENTS

Combat in urban centers also raises the issue of whether the injuries suffered by military and civilians are greater or different from those occurring in a more rural setting. As has been noted recently, the focus of humanitarian groups has been on limiting the use of explosive weapons in urban settings. It does appear that the nature of armed conflict within urban settings, including the concentration of fighters and civilians, is such that greater casualties are likely to result. For military forces, cities present complex areas within which to operate. They traditionally demand a greater involvement of infantry forces and present difficult terrain to use the heavily armored vehicles that have been developed to protect those forces.

As one 2003 report noted, "[m]odern urban combat continues to be highly lethal."[188] The result can be a higher number of infantry casualties with one 1997 study reporting on the 1982 battle for Beirut indicating "[t]he chances of being injured in this operation was 49 times higher than any other operation."[189] At that time artillery was seen as the greatest single cause of injury,[190] with death by sniper fire being greater in non-urban environments

185. *Id.*; *see also* Charlotte Alfred, *Hospitals Are Supposed to be for Healing. In Gaza, They're Part of the War Zone*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.ca/entry/hospitals-bombed-gaza_n_5630606.

186. Additional Protocol I, *supra* note 2, art. 13(1).

187. *Id.* art. 57(2).

188. Champion et al., *supra* note 126, at S17.

189. RA LEITCH, HR CHAMPION & JF NAVEIN, ANALYSIS OF CASUALTY RATES & PATTERNS LIKELY TO RESULT FROM MILITARY OPERATIONS IN URBAN ENVIRONMENTS 29 (1997) (unpublished U.S. Marine Corps Commandant Warfighting Laboratory study: CWL/TechMed/11/97), http://smallwarsjournal.com/documents/urbancasstudy.pdf.

190. *Id.*; *see also* Andrew J. Schoenfeld & Philip J. Belmont, *Traumatic Combat Injuries*, *in* MUSCULOSKELETAL INJURIES IN THE MILITARY 11, 15 (Kenneth L. Cameron & Brett D.

due, it was argued, to the cover provided by the "three dimensional" less open terrain of cities.[191] Later studies witnessed a change: "Compared with previous IDF [Israel Defense Forces] urban combat in Lebanon, the recent IDF data . . . show an increase in the number of bullet wounds from 13% to 48% and a decrease in the number of shrapnel wounds from 74% to 17% of all injury types."[192]

Consistent with more recent studies, overall advances in protective equipment reduced the types of injuries with shrapnel injury more prevalent in lower extremities and other exposed areas.[193] As the authors of another study of traumatic muscular skeletal combat injuries indicate, at least with respect to those injuries: "advances in personnel protective equipment, medical evacuation, and surgical care have culminated in the fact that besides being survivable, most battle injuries can be treated to the point where there is at least the possibility of a return to duty."[194]

As with military casualties, the loss of civilian life resulting from combat operations in urban areas is significantly greater than in rural areas.[195] Those civilian injuries result from artillery fire, aerial bombing, and crush injuries from collapsing buildings and urban infrastructure. As one resident of Mosul stated, "[w]e could die either by ISIS sniper or IED [improvised explosive device] or shelled or buried by bombs."[196] Doctors working in Syria are reported to have "described patient injuries consistent with the use of bombs, shrapnel from mortars, artillery, IEDs, and gunshots."[197] Civilians also suffer from a particular disadvantage in comparison to military personnel. They do

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Owens eds., 2016) (noting that this finding is consistent with the finding that "[e]xplosive mechanisms of injury, including improvised explosive device (IED), explosively formed projectiles, rocket-propelled grenade, and landmine, have been found to account for 75–81 % of all musculoskeletal casualties incurred in Afghanistan or Iraq").

191. Leitch, Champion & Navein, *supra* note 189, at 29.

192. Champion et al., *supra* note 126, at S17.

193. Leitch, Champion & Navein, *supra* note 189, at 29.

194. Schoenfeld & Belmont, *supra* note 190, at 11.

195. I SAW MY CITY DIE, *supra* note 129, at 12 ("Civilian casualty rates are notably high: according to some estimates, they represent 92% of the deaths and injuries caused by the use of explosive weapons in populated areas, compared to 34% when these are used in other areas.").

196. *Id.*

197. Sahr Muhammedally, *Lessons from Mosul: How to Reduce Civilian Harm in Urban Warfare*, JUST SECURITY (July 20, 2017), https://www.justsecurity.org/43382/lessons-mosul-reduce-civilian-harm-urban-warfare/.

not have the same level of personal protection (e.g., body armor) available to soldiers of well-equipped armed forces.

Finally, as has been noted, the reverberating effects of explosive weapons on urban services can have considerable effect on the civilian population.[198] In this respect,

> the greatest impact of explosive weapons on urban services is a function of the extent of the damage to upstream or midstream infrastructure (i.e., that which produces or delivers the bulk of the service), the nature and extent of the reverberations downstream of the elements of any service component, the "domino effect" onto other services, and the time required to restore the service.[199]

The effect on the physical and mental health of civilians has the potential to be significantly longer term than might traditionally be thought of by military planners and commanders.[200] This means the requirement to provide medical care and other health services to civilians impacted by urban combat will extend far beyond the end of hostilities.

VII. CONCLUSION

As the world's population continues to migrate towards cities, the potential for urban violence, including armed conflict, will increase. This can already be seen with insurgent groups seizing—or attempting to seize—control of cities such as Damascus, Raqqa, Mosul, Marawi, Ramadi, and Fallujah. Urban conflict against non-State actors covers a wide range of violence from ordinary crime, to terrorism and transnational crime, to near conventional military operations. In addition, urban areas have become the site of violent attacks carried out by, or on behalf of, transnational terrorist groups as part of an effort to extend the conflict into countries its perpetrators see as a "far enemy."[201] At its most violent, urban conflict has proven to be especially deadly for combatants and the civilians impacted by the violence. Inevitably, it becomes necessary to consider whether that violence has risen to the level

198. *See* sources cited *supra* notes 163–65 and accompanying text.

199. Zeitoun & Talhami, *supra* note 163, at 68.

200. I SAW MY CITY DIE, *supra* note 129, at 61 ("In nearly all the cities undergoing conflict, the collapse of local economies or increasing demands have also affected mental health services. These are normally under-resourced at the best of times, but conflict exacerbates the problem as professionals are among those forced to flee the fighting.").

201. FAWAZ GERGES, THE FAR ENEMY: WHY JIHAD WENT GLOBAL 1 (2005).

of an armed conflict. Such a determination forms the basis for the application of international humanitarian law, which has a particular protective focus on the provision of medical care and humanitarian relief to those in need.

Characterizing a security operation as an armed conflict will determine whether international humanitarian law will apply. This characterization is rarely straightforward, especially outside the context of inter-State conflicts. The challenge may be somewhat reduced by the trend away from the post-9/11 debate that initially focused on setting a high threshold definitional standard for armed conflict towards a broader "totality of the circumstances" standard, which appears better suited to address legal classification in an era of complex non-State security threats. However, even where an armed conflict appears to exist, consideration must also be given to human rights law. This can occur for a number of reasons, including its general continued applicability during armed conflict, rulings by a court that view that body of law solely applicable to counterterrorism operations, a State's refusal to acknowledge the existence of an armed conflict, or a policy decision that a law enforcement approach will be exclusively applied to counter the terrorist or insurgent threat. The complexity of the current threat environment confronted by many States has increasingly resulted in an acknowledgement of the applicability and relevance of both bodies of law.

One downside to relying on a human rights framework is that humanitarian law provides a more comprehensive and specific body of rules governing the provision of medical care that is non-discriminatory and applies to all parties to a conflict. This does not mean that human rights law does not have a role to play, particularly since it better addresses the broader dimensions of health care. In addition, in situations where the State has robust medical services, and a law enforcement approach can be effectively applied, victims of what is in reality an armed conflict are likely to be well cared for under a human rights law paradigm. The prevalence of States using a human rights-based law enforcement approach to address non-State actor violence means that there likely will be a trend towards incorporating humanitarian-based obligations into human rights law considerations, including the provision of medical care in urban conflict.

Ideally, State military forces will be trained and equipped to provide effective medical care regardless of which legal framework they apply, or whether they are operating in an urban or rural environment. However, the challenge of dealing with civilians who are increasingly finding themselves the victims of urban conflict and other security operations will remain. While ordinarily it could be expected that medical facilities in urban areas would be

able to meet the need, there is no assurance those facilities will be functioning or that health care professionals will be available during highly destructive combat operations. This is particularly true given the mounting evidence that such facilities and services are being purposely targeted. These attacks, and the nature of urban combat, have led to a paucity of humanitarian groups operating in some areas of conflict. As a result, States have sometimes contracted with private medical service providers for the provision of front line trauma care. This, in turn, has raised questions concerning the impact on the neutrality and independence principles relied on by humanitarian groups.

There can be no doubt that the concentration of civilians in urban environments will lead to an increase in collateral injuries and death as military operations extend into the world's cities. This has led to calls for limiting the use of explosive weapons in that environment, as well as consideration being given by military commanders to the reverberating effects of damage to infrastructure such as water and electrical facilities. However, the desire to limit the collateral effects of these weapons cannot ignore their continuing relevance to military operations in urban environments.

The large number of attacks that appear to have been directed against hospitals, clinics, and medical personnel have also led to calls for investigations of these possible war crimes. Further, injuries to military personnel operating in urban environments appear to have changed over the years to an increasing percentage of bullet wounds rather than shrapnel wounds. Civilians are even less protected and are at considerable risk of suffering injuries from bombing, artillery and mortar rounds, IEDs, and gunshot wounds. With the effects of these wounds on civilians, and the general destruction of civilian infrastructure in cities likely to have a long-term effect, it is more important than ever to reinforce the detailed international humanitarian law obligations for the provision of medical care. Whether these rules are applied under that body of law or through the interpretation of human rights law, the focus should be on ensuring both military personnel and civilians are equally protected under the law.

PANEL 3
Paradigms & Policy: Proxies, Partners, & More

China and the Rule of Law: A Cautionary Tale for the International Community

by Maj. Ronald T. P. Alcala, Lt. Col. Eugene (John) Gregory and Lt. Col. Shane Reeves

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The Communist Party of China has been leading an extraordinary effort to transform the country into a *fazhi* (法制) nation or "a country under the rule of law." The phrase "*fazhi*" has become ubiquitous in China, where it is heralded in all forms of media, from simple banners and posters, to pop-up ads on the internet. In fact, China has become so enamored with *fazhi* the Party dedicated an entire session of the 18th Party Congress to the subject in 2014. We should be cautious of accepting China's endorsement of the "rule of law" at face value, however. China's notion of *fazhi*—and its conception of law more generally—differs substantially from how rule of law is universally understood. Recognizing how China's cost-benefit approach to law erodes international norms and institutions should serve as a reminder that a stable, cooperative, rules-based international order requires a commitment to the restraining power of the law.

In a 2004 report on Rule of Law and Transitional Justice, the UN Secretary General observed that central to the rule of law is the requirement that the State itself is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated. Other common characteristics of a nation under the rule of law include adherence to the principles of "supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, and avoidance of arbitrariness and procedural and legal transparency." Ultimately, rule of law requires that State power itself must be subordinate and accountable to—that is, restrained by—the law.

China's recent commitment to the "rule of law" has produced some admirable results. Its emphasis on legality in the past 20 years has generated a considerable body of sophisticated, high quality legislation. Meanwhile, an explosion in legal education—as

measured by the increase in credentialed lawyers—has cultivated an impressive bar of domestic and international legal experts, while rapid construction of China's legal infrastructure, to include courthouses and procuratorate (or prosecutors') offices, has continued at an unprecedented pace. Indeed, Chinese President Xi Jinping has been so supportive of these developments that he established an annual Constitution Day highlighting the importance of law and the Constitution in establishing *fazhi*. Then, for the first time in Party history, he swore an oath to the Constitution, just like the leader of a rule of law nation would.

Despite the Party's current encouragement of "rule of law" and its celebration of the Constitution, Chinese rule of law—officially called "socialist rule of law with Chinese characteristics"—differs fundamentally from rule of law as internationally understood. To begin with, all aspiring Chinese lawyers—at least according to the study material for one bar exam preparation course—must commit to the belief that law is subject to the "leadership of the Party." The same bar review material further states that the fundamental principle of Chinese rule of law is to "maintain the rule of the Party." Meanwhile, a recent bar exam question affirmed that "Western Capitalist Rule of Law Thought" is not an "origin" of Chinese rule of law. Accordingly, rather than promote basic principles such as the supremacy of law, legal accountability, judicial independence, and fair treatment before the law, *fazhi* is instead used as a rhetorical tool to legitimize the Party's rule. It is the Party's will restated in seemingly neutral and distinctly legal language, which draws on a long imperial tradition of legal discourse while rejecting norms of transparency and impartiality. By evoking *fazhi*, the Party seeks to attain greater credibility, and in turn inspire greater compliance, by drawing on both the high prestige accorded to rule of law and the Chinese tradition of obedience to edicts of the ruler and the precedents of the dynasty (*qianli* 前例).

It is not surprising, then, that despite the Chairman's apparent enthusiasm for the Chinese Constitution, Chinese judges are still prohibited from citing the Constitution as a source of law. The Party smartly does not want to open that Pandora's Box; doing so could wreak havoc on the Party. The heady days of *Qi Yuling versus Chen Xiaoqi*, decided in 2001, when the People's Supreme Court cited the Constitution for the first time and seemed to signal a "sprout" of true Constitutionalism in China, are long over. While the Party wants "rule of law"—in the sense of an abundance of published law recognized and followed by the people—the highest levels of the Party do not want to be subject to the law or have the Party's will ever be challenged by the law. This is a tall order as the Party

needs the system to cast a wide and credible legal net (*fawang huihui* 法网恢恢) without creating the potential to ensnare the Party itself. Moreover, the Party needs the law to give the appearance of objective impartiality while simultaneously and reliably addressing cases that are of concern to the Party. More bluntly, the Party wants the credibility of impartial and independent law without the political danger.

To successfully navigate these competing interests, the Chinese legal system has become both increasingly routine (often impartial at the case-adjudication level), yet also highly and efficiently responsive to the will of the Party. This emphasis on routine impartiality lends some credibility to the claim that China is transforming into a rule of law nation. Yet ultimately, the Chinese legal system remains an instrument of the Party. This is why it is possible for a petty criminal in Beijing's Xindian District to receive a fair trial (as one of the authors observed two years ago) while a disgraced politician like Bo Xilai may be subjected to a show-trial. The Party's current rule of law campaign sincerely and energetically seeks to promulgate laws and to compel the Chinese people to follow the law—or, as the Chinese saying goes, "to have law to follow" and to "follow the law that exists." However, while adherence to *fazhi* may resemble a commitment to ideals such as legal accountability, legal certainty, and equality before the law, in fact "law" in China is a rhetorical restatement of the Party's discretionary will using legal discourse. This should not be mistaken for rule of law as the animating (or constraining) force is not the supreme authority of law, but the will of the Party.

Moreover, structural social differences, including what Lawrence Friedman described as internal and external legal cultures, help differentiate China from a nation under the rule of law. While the structure of Chinese and Western law is relatively comparable—legislators, law enforcement, trial and appellate courts, lawyers, judges, plaintiffs, bar associations—the internal legal culture (attitudes and practices of legal professionals) of China supports Party supremacy rather than actual rule of law. Transgressions of the law by the Party, therefore, regularly go unremarked and unaddressed. For example, it would never occur to a Chinese judge to issue an injunction against an order from Xi—and even if he wanted to, the judge would realize that the external legal culture (attitudes of the general population) in China would not support his decision either.

While legal scholars need not object to China's internal conception and application of law, they may rightly object to the Chinese appropriation of the term "rule of law" to describe what it is doing. At the very least, it is important to understand how China's

pragmatic use of law, and its refusal to be restrained by inconvenient law, correlates internationally, particularly as China uses its newfound wealth to demand a greater role in international rule-making and adjudication. Ultimately, it should not be taken for granted that China's obeisance to international institutions and legal norms—like its acknowledgment of "rule of law" domestically—reflects a genuine commitment to international law. Each instance of compliance—even large-scale routine compliance—is a cost-benefit exercise for the Chinese.

Although domestic law in China almost never openly conflicts with the Party's will, the Party's ability to bend international law to its will is far more restricted. Consequently, China has embraced international law and institutions when they can be used to advance its interests and has ferociously denounced them when they have not. Admittedly, this approach to international legal norms is merely pragmatic, and many States, including the United States, commonly engage in similar behavior. However, while States understandably interpret and apply international legal norms in ways that promote their national interests, China is conceptually incapable of viewing international law—with its collection of constraints and obligations—with the same deference as the rules-based international community. China simply does not believe that law by nature of its unique normative position has the power to constrain the will of the Party itself, either domestically or internationally, and this view is supported by both China's internal and external legal cultures. China may comply with certain international norms that conflict with its national interest, not out of a respect for the rule of law, but rather as part of a pragmatic cost-benefit analysis.

China's establishment of an Air Defense Identification Zone (ADIZ) in the East China Sea provides one example of China's acceptance and use of an international legal norm to advance its national interests. ADIZs were historically employed to deconflict air traffic and protect coastal states from unwanted intrusions into their sovereign airspace. Rather than use the East China Sea ADIZ to protect its sovereign airspace, however, China instead employs the ADIZ to assert sovereignty over the disputed Senkaku Islands. As one commentator described it, China's "extraterritorial layering of sovereignty rights reverses the underlying rationale of ADIZ from defensive to offensive, from the protection of national sovereignty to the coercive extension of sovereignty beyond territorial limits." Nevertheless, China readily adopted the ADIZ because it served a purpose consistent with the will of the Party. Moreover, it cast the Party's will in a rules-based, safety-oriented international legal norm.

In contrast, China vehemently denounced the 2016 arbitral award in the *South China Sea Arbitration* because it conflicted with its national interests and the will of the Party. Established pursuant to Annex VII of the 1982 UN Law of the Sea Convention (UNCLOS), to which China is a signatory, the arbitral tribunal rejected China's claim to sovereign rights or jurisdiction over marine areas within China's self-proclaimed "nine-dash line" in the South China Sea. Notably, China refused to accept the arbitral tribunal's jurisdiction from the start, arguing that the essence of the arbitration was "territorial sovereignty," which was "beyond the scope of the Convention," and did not concern "the interpretation or application of the Convention." The arbitral tribunal, however, held that it did have jurisdiction over almost all of the Philippines' submissions and noted that despite China's non-appearance at its proceedings, "China remains a Party to these proceedings, with the ensuing rights and obligations, including that it will be bound by any decision of the Tribunal." Moreover, under UNCLOS, the international legal basis for arbitration and the effect of an award are clear: The award of an arbitral tribunal "shall be final and without appeal" and "shall be complied with by the parties to the dispute."

China's response to the arbitral award, however, was dismissive. After first denouncing the Philippines' "unilateral initiation of arbitration" (Article 1, Annex VII of UNCLOS provides that "any party to a dispute may submit the dispute to the arbitral procedure") without first seeking to settle the dispute through negotiation (the arbitral tribunal found the Philippines "did seek to negotiate with China"), the statement then proceeds to repudiate not only the award but the tribunal itself. The statement asserts that the award is "null and void" and of "no binding force," and declares that "China neither accepts nor recognizes it." More ominously, the statement then attacks the integrity of the arbitral tribunal, claiming that its conduct and award "completely deviate from the object and purpose of UNCLOS," "substantially impair the integrity and authority of UNCLOS," and are "unjust and unlawful."

China's fierce reaction should not be surprising. In China, the Party can never violate the law because the Party's will is the law. Similarly, an international decision that conflicts with the Party's will is not merely wrong, but actually illegitimate. Meanwhile, an open assessment of China's compliance with legal norms is not possible in Chinese society because the Party controls the machinery of discourse. While the internal and external legal cultures of another State might have pushed back and debated the disparagement of an international legal body, in China the Party mobilized every venue of public discourse to vilify and delegitimize the decision. In fact, the moment the arbitral decision was

issued, the Chinese universally dismissed it as *naoju* (闹剧), literally a "noisy play" or "farce," indicating that putatively legal institutions, whether domestic or international—such as the arbitral tribunal—are only useful in so far as they comport with the Party's will. This approach is consistent with China's formal conception of the rule of law.

An effective rules-based international order requires that States accept the restraining power of the law. While China has acknowledged the importance of international law and observed legal norms when convenient, China's cost-benefit approach to legal compliance ultimately rejects the supremacy and power of law as a restraining force. This view derives from its own conception of law as an expression of the Party's will, nothing more. States that engage with China and those that consider China a reliable partner or fellow adjudicator in furthering the rules-based international order should understand its cost-benefit approach to the law and, consequently, how this influences its behavior. Of course, while undermining established norms and institutions when they frustrate perceived interests may weaken respect for the rule of law over time, from the Party's perspective it's simply a matter of perfecting *fazhi*.

The views expressed here are the authors' personal views and do not necessarily reflect those of the Department of Defense, the United States Army, the United States Military Academy, or any other department or agency of the United States Government.

Photo by China Photos/Getty Images

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LAWFARE

INTERNATIONAL LAW: LOAC

Developing the Law of Armed Conflict 70 Years After the Geneva Conventions

By **Shane Reeves** Wednesday, August 7, 2019, 8:00 AM

The post below is the latest installment in Lawfare's *tradition of posting short pieces inspired by the annual Transatlantic Dialogues on International Law and Armed Conflict. This year, that event was organized and sponsored jointly by the Oxford Institute for Ethics, Law and Armed Conflict (directed by Dapo Akande), the South Texas College of Law (through the good offices of Geoff Corn), West Point's Lieber Institute for Law and Land Warfare (directed by LTC Shane Reeves), and the Robert Strauss Center for International Security and Law at the University of Texas (directed by* Lawfare's *Bobby Chesney).*

Recently the Lieber Institute for Law and Land Warfare at West Point, the Robert Strauss Center for International Security and Law at the University of Texas, the Oxford Institute for Ethics, Law and Armed Conflict, and the South Texas College of Law Houston co-sponsored the seventh annual Transatlantic Dialogues on International Law and Armed Conflict. This year's workshop took place 70 years after the adoption of the Geneva Conventions and provided a unique opportunity to reflect on the impact of these seminal treaties.

While there is no doubt the Geneva Conventions remain at the foundation of the law of armed conflict (LOAC), it is also clear that portions of these documents are difficult to reconcile with contemporary warfare. For example, Article 28 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention III) discusses the details of operating a camp canteen, including types of items that must be available, pricing and how profits are used. Article 62 in the same convention notes that "[p]risoners of war shall be paid a fair working rate of pay by the detaining authorities direct. The rate shall be fixed by said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day."

Obviously, it is difficult to find the above provisions relevant on the modern battlefield. Just as global militaries adapt doctrine, tactics and force structure to address battlefield realities, innovations in the law are necessary for effectual regulation. In other words, as the pace of change in military operations accelerates, the LOAC must also evolve or risk becoming detached from modern military realities.

Despite this necessity, new treaties are rare and customary international law is difficult to discern, as states are reticent to express concrete positions concerning the LOAC. As a result, the LOAC is glacial in adapting to the complexities of modern warfare, leaving numerous novel legal issues unaddressed.

With states generally silent, nongovernmental organizations (NGOs), expert drafted manuals and decisions of international tribunals are increasingly looked to for answers. This is logical, as these contributions are often quite valuable. Groups like the International Committee of the Red Cross (ICRC) are well versed in the LOAC and are persuasive in explaining how the law should be interpreted. Manuals, for their part, are important in helping state practitioners reach a common understanding on difficult legal topics while simultaneously stimulating dialogue. International tribunals, while ensuring LOAC compliance, offer critical explanations of how the law works in application.

Clearly, these efforts are extraordinarily important, especially as the baseline treaties underlying the LOAC age. But it is worth highlighting that states, despite their hesitancy, remain the creators of international law. NGOs, at most, indirectly influence state practice and are not empowered to develop the law. Many manuals, though often mistaken (albeit not by their drafters) as lex ferenda, are intended as restatements of the existing law intended to help state legal advisers. Finally, international courts and tribunals are limited by jurisdiction to only those states parties bound by the underlying promulgating treaty.

When states are unwilling to express their views about international law or are unable to come to bilateral or multilateral agreements, others fill this void. Humanitarian groups conduct widely publicized conferences and scholars draft lengthy manuals and handbooks that purport to explain the current state of the LOAC and international law generally. While laudable to some extent, it is important to understand the motivations and interests of the experts who conduct these projects. For example, humanitarian groups are often driven by their interest in protecting victims of armed conflict and state violence and are not motivated by the desire to protect states' military and operational interests. Similarly, academics are driven by theoretical and conceptual clarity in the law, whereas conceptual and theoretical incongruence or unclarity may reflect states' interests in operational flexibility, or unwillingness or inability to agree with other states on applicable norms. Likewise, the core function of international tribunals is dispute adjudication, not law creation or refinement.

The point is not to diminish or criticize these efforts. Rather, it is to stress the importance of state engagement in this area. At the very least, states must be willing to publicly assert when they disagree with statements of law from these various nonstate efforts.

Based on recent trends, any state development of the LOAC in the near future will be through customary international law (CIL). Of course, as noted above, CIL development is difficult and raises several problematic questions. For example, how does the international community reconcile inconsistencies in the practice of states? Is it possible to deduce specific rules from general principles? When is a state providing clarity on a view versus making a statement of opinio juris? These, along with other underlying issues, must be addressed. As Michael Schmitt and Sean Watts note, "[S]tates' legal agencies and agents should be equipped, organized, and re-empowered to participate actively in the interpretation and development of IHL."

However, the possibility that states will develop new LOAC treaties should not be completely dismissed. The devastating effects of weaponizing new technologies may eventually incentivize states to engage in the development of conventional law. For example, a significant vulnerability for an advanced state engaged in an armed conflict is its reliance on the cyber domain to operate the critical infrastructure essential for societal functions. The catastrophic results of losing the services provided by critical infrastructure are immense and potentially could result in a state's no longer being capable of conducting military operations. Therefore, recognizing the potential adverse consequences of such a cyberattack, advanced states may choose to come together to develop a narrow treaty that provides heightened protections for critical infrastructure during an armed conflict.

As Geoffrey Corn has discussed with the author, adopting narrowly scoped international agreements to avoid potentially catastrophic consequences of armed conflict is not without precedent. For example, the 1976 Environmental Modification Treaty (ENMOD) prohibits the use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other state party. The ENMOD Convention was negotiated during a period of heightened international concern about the protection of the environment during armed conflict. By the 1970s, the international community became increasingly aware that the toll of modern armed conflicts went far beyond human suffering and damage to physical property but also led to extensive destruction and degradation to the natural environment. Most notably, the widespread use of the defoliant Agent Orange in Vietnam resulted in environmental contamination leading to significant international criticism and concern. This widespread concern, coupled with the recognition that weaponizing environmental modification techniques could have devastating global effects, brought states together to develop the ENMOD Convention. In similar fashion, states may find it necessary today to develop specific treaty protections in response to global threats posed by new technologies.

This is not to say that the LOAC necessarily will progress through the development of unique rules for narrowly tailored subareas. Indeed, many states are asserting that the LOAC as a whole is up to the task of regulating all forms of armed conflict regardless of operational domain. These states seek to ensure the LOAC's development through the interaction of the structural principles of military necessity and humanitarian considerations; its cardinal principles of distinction, proportionality, and the prevention of unnecessary suffering; and its general rules governing the conduct of hostilities. States may determine that it does not serve their interests to develop the law in a compartmentalized fashion but, rather, holistically as a general body of law.

How the law develops is open to debate, but what is starkly apparent is that states must reassert their traditional stewardship over the LOAC and proactively address new legal questions. Otherwise, the LOAC will become increasingly detached from contemporary warfare as nonstate institutions fill the void without necessarily addressing state interests. This is, of course, dangerous, as it is the LOAC that ensures military necessity and humanity remain in balance and warfare does not devolve into the brutality and savagery that has for so long defined conflict.

Topics: International Law: LOAC

Tags: Geneva Convention, international law: LOAC

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LAWFARE

IRAN

Was the Soleimani Killing an Assassination?

By **Shane Reeves**, **Winston Williams** Friday, January 17, 2020, 2:12 PM

The Jan. 3 killing of Major General Qassem Soleimani, the head of Iran's Quds Force, has generated a robust conversation in the media on whether the air strike should be characterized as an "assassination." Explaining its decision not to use the term in referring to the killing, the Associated Press wrote that doing so "would require that the news service decide that the act was a murder, and because the term is politically freighted." NPR's public editor, meanwhile, said that the radio service "feel[s] it is an appropriate use of the word, which is defined as the killing of a political leader by surprise." This debate over whether the action was an assassination is unhelpful in determining whether there was a legal basis under international law for the air strike. While the United States prohibits assassination as a matter of national policy through Executive Order (EO) 12333, not every killing violates this ban. Furthermore, even if the killing did not have an international legal basis, it may not necessarily constitute an assassination under the U.S. government's definition of the term.

EO 12333 grew out of President Ford's 1976 EO 11905, which "prohibited any member of the U.S. government from engaging or conspiring to engage in any political assassination." This executive order was promulgated to address concerns that emerged from the Church Committee, a Senate committee charged with investigating potential illegal activities by the intelligence community. In the recommendation section of its interim report, the committee condemned the "use of assassination as a tool of foreign policy."

EO 11905 was superseded by President Carter's EO 12036, which, in turn, was followed by President Reagan's 1981 EO 12333. This final order expressly states in paragraph 2.11 that "no person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in assassination." Despite a number of subsequent amendments to the executive order, this paragraph has remained unchanged through the various presidential administrations. However, the term "assassination" was left undefined in the order.

The most helpful government document explaining how the U.S. approaches assassination in regard to a military operation is a 1989 memorandum coordinated with and concurred in by the Department of State's legal adviser, the Central Intelligence Agency's general counsel, the National Security Council's legal adviser, the Department of Justice Office of Legal Policy, and the civilian and military legal advisers in the Department of Defense. The memorandum was drafted by Hays Parks, thenchief of the International Law Branch, International Affairs Division in the Army's Office of the Judge Advocate General. The memorandum was drafted to "explore assassination in the context of national and international law to provide guidance in revision" on the U.S. Army's Field Manual on the Law of Land Warfare to ensure the document was consistent with EO 12333. Accordingly, the Parks memorandum is concerned primarily with the applicability of international law to these situations. While we recommend reading the entire eight-page document, three points are worth highlighting.

First, the Parks memorandum defines an assassination as an act of murder for political purposes. As an example, Parks cites to a 1978 killing of a Bulgarian defector by Bulgarian State Security agents on the streets of London with a poison-tipped umbrella. (For a more recent example along similar lines, consider the Feb. 13, 2017, killing of Kim Jong-nam, the half-brother of Kim Jong-un, with the nerve agent VX in Kuala Lumpur's international airport terminal.) The Parks memorandum definition was further accepted in a January 2002 Congressional Research Service (CRS) report, which stated that "an assassination may be viewed as an intentional killing of a targeted individual committed for political purposes."

Second, the memo and the CRS report both recognize that the term "assassination" may have different connotations depending on whether the act takes place in wartime or peacetime. While a "political" murder is illegal in either situation, in armed conflict there is greater allowance for violence. In such circumstances, the use of violence based on an individual's status or conduct could be lawful as a matter of first resort. Therefore, if an individual is a combatant, a member of an organized armed group, or a direct participant in hostilities, targeting that individual is obviously not an assassination.

Conversely, absent an armed conflict, there is a different set of rules and lethal force is expected to be used only as a last resort, the memorandum states. Article 2(4) of the U.N. Charter requires states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This prohibition has two exceptions—the most relevant being Article 51's recognition of a state's inherent right of self-defense. Also, according to the Parks memorandum, if the right of self-defense is triggered, then there is international legal justification for counteracting an ongoing or imminent threat.

Third, the Parks memorandum concludes that an "overt use of military force against legitimate targets in time of war, or against similar targets in time of peace where such individuals or groups pose an immediate threat to the United States citizens or the national security of the United States, as determined by competent authority, does not constitute assassination" and therefore "would not be prohibited by the proscription in EO 12333 or by international law."

What EO 12333 and the Parks memorandum suggest is that there is no point to continuing to debate whether the drone strike on Soleimani was an assassination without first determining the legality under international law of the United States's action. Only after determining whether the strike was unlawful in the context of an armed conflict or was not a legitimate act of self-defense does the possibility of assassination arise.

Under international law, if the strike took place during an international armed conflict and Soleimani was targeted in his role as the head of the Quds Force, then it was lawful. If the strike occurred during a non-international armed conflict, and he was the operational leader of the militia group (or perhaps a military adviser to that group), then it would also be lawful. If the strike was done outside of armed conflict, and the United States properly acted in self-defense to prevent imminent attacks organized and/or controlled by Soleimani, then again it would be lawful.

If none of the above circumstances occurred, the United States did not have a legal basis for the air strike and committed an unlawful act under international law. But this would not necessarily make the air strike an assassination as prohibited by EO 12333. Under the Parks memorandum and CRS report, to be defined as such, the killing must have a political purpose. Whether there is a political purpose or not for the Soleimani air strike may be a relevant follow-on question. However, it is a subjective analysis that has no bearing on the lawfulness of the air strike under international law—and, consequently, has limited initial legal value.

For this reason, arguing whether the Soleimani air strike was an assassination is premature without first addressing the underlying question: Was the strike legal or not?

Topics: Iran

Tags: Iran, International Law, Law of Armed Conflict, Qassem Soleimani

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Protecting Critical Infrastructure in Cyber Warfare: Is It Time for States to Reassert Themselves?

David A. Wallace[†*] *and Shane R. Reeves*[**]

When Russia uses a "combination of instruments, some military and some non-military, choreographed to surprise, confuse, and wear down" Ukraine, it is termed hybrid warfare.[1] *The term also refers to conflicts, which are both international and non-international in character, such as the ongoing conflict in Syria.*[2] *Overlapping conventional and asymmetric tactics in an armed conflict — as when Russia simultaneously conducted cyber-attacks during a conventional invasion of Georgia in 2008 — also gets the hybrid warfare label.*[3] *Or, as Professor Bobby Chesney wrote regarding U.S. operations in Somalia, hybrid warfare can include "a sophisticated approach that layers together a panoply of low-visibility (to*

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1 *See What Russia Wants: From Cold War to Hot War*, ECONOMIST (Feb. 12, 2015), https://www.economist.com/briefing/2015/02/12/from-cold-war-to-hot-war [https://perma.cc/Y89X-49U3].

2 *See generally* David Wallace, Amy McCarthy & Shane R. Reeves, *Trying to Make Sense of the Senseless: Classifying the Syrian War Under the Law of Armed Conflict*, 25 MICH. ST. INT'L L. REV. 555 (2017) (discussing the various elements of conflict in Syria, to include state and non-state factions).

3 *See* Shane R. Reeves & Robert E. Barnsby, *The New Griffin of War: Hybrid International Armed Conflicts*, HARV. INT'L REV., Winter 2013, at 16-17 (discussing the international legal challenges presented by hybrid warfare).

the public both here and there) tools" to conduct counter-terrorism operations in failing states.[4]

In other words, "hybrid warfare" has become a shorthand way to describe the various complexities of the modern battlefield. Hybrid warfare — regardless how the term is used — clearly raises several challenging and important legal issues. Some of these issues include finding a workable approach to enforcing the principle of distinction, properly classifying conflicts, and understanding the roles of the military and law enforcement in contemporary warfare. Yet, perhaps no aspect of hybrid warfare generates more legal questions than operations in cyberspace.

Cyberspace, defined as "a global domain within the information environment that encompasses the interdependent networks of information technology infrastructures, including the internet and telecommunication networks,"[5] *is quickly becoming the decisive battleground in warfare.*[6] *National armed forces, and more specifically technologically advanced militaries, rely upon their information networks for command and control, intelligence, logistics, and weapon technology, making protecting these assets a priority.*[7] *Arguably, however, the greatest vulnerability for an advanced State engaged in an armed conflict is its reliance on the cyber domain to operate the critical infrastructure essential for societal functions.*

The catastrophic results of losing the essential services provided by critical infrastructure are immense and, potentially, could result in a State being incapable of conducting military operations. Recognizing this vulnerability, this Essay therefore critically examines how the law of armed conflict protects such objects and activities. In doing so, the Essay concludes that heightened protections for critical infrastructure from cyber-attacks are necessary and suggests looking to the existing framework of special precautionary protections as a model for greater legal safeguards.

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[4] Robert Chesney, *American Hybrid Warfare: Somalia as a Case Study in the Real American Way of War in 2016*, LAWFARE (Oct. 17, 2016, 7:06 AM), https://www.lawfareblog.com/american-hybrid-warfare-somalia-case-study-real-american-way-war-2016 [https://perma.cc/YNZ6-496H].

[5] U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 37 (2010) [hereinafter QUADRENNIAL REPORT].

[6] *See, e.g.*, RICHARD A. CLARKE & ROBERT K. KNAKE, CYBER WAR 69 (2010); Stephen W. Korns & Joshua E. Kastenberg, *Georgia's Cyber Left Hook*, PARAMETERS, Winter 2008-2009, at 60 (discussing the desperate actions of the Georgian government after it found itself unable to communicate through the internet during the 2008 Georgian-Russian conflict).

[7] *See* QUADRENNIAL REPORT, *supra* note 5, at 37.

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> "The single biggest existential threat that's out there, I think, is cyber."[8]
>
> —Admiral (ret.) Michael Mullen

INTRODUCTION

As the Chairman of the Joint Chiefs of Staff, Admiral Michael Mullen served as the principal military adviser to Presidents George W. Bush and Barack Obama, and was the senior ranking member of the Armed Forces of the United States.[9] As such, his views on existential threats

[8] Micah Zenko, *The Existential Angst of America's Top Generals*, FOREIGN POL'Y (Aug. 4, 2015, 9:00 AM), https://foreignpolicy.com/2015/08/04/the-existential-angst-of-americas-top-generals-threat-inflation-islamic-state [https://perma.cc/3WC4-B85K].

[9] *See Chairman of the Joint Chiefs of Staff*, JOINT CHIEFS OF STAFF, http://www.jcs.mil/About/The-Joint-Staff/Chairman (last visited Dec. 26, 2019) [https://perma.cc/JR7R-9YD6]. Admiral Mullen became the seventeenth Chairman of the Joint Chiefs of Staff on October 1, 2007. *17th Chairman of the Joint Chiefs of Staff: Admiral Michael Glenn Muller*, JOINT CHIEFS OF STAFF, https://www.jcs.mil/About/The-Joint-Staff/Chairman/Admiral-Michael-Glenn-Mullen/ (last visited Dec. 26, 2019) [https://perma.cc/SUQ7-SE2J].

facing the country are not only relevant and weighty, but also alarming. It is not difficult to understand Admiral Mullen's fears as cyberspace increasingly allows an adversary to exploit, disrupt, deny, and degrade almost all of a State's important military and civilian computer networks and related systems.[10] Most concerning, these cyber vulnerabilities include those that run a State's critical infrastructure — whether it be the electronic grid, commercial or market activities, transportation networks, water and distribution systems, or emergency services. Incapacitating or destroying any of these systems or assets would "have a debilitating impact on security, national economic security, national public health or safety"[11] and adversely affect thousands (perhaps millions) of civilians. Consequently, social unrest and chaos would follow.[12]

The threat of a paralyzing cyber-attack on critical infrastructure is neither theoretical nor academic. It is real. President Obama made this clear in 2013 when he stated:

> Repeated cyber intrusions into critical infrastructure demonstrate the need for improved cybersecurity. The cyber threat to critical infrastructure continues to grow and represents one of the most serious national security challenges we must confront. The national and economic security of the United

[10] *See* U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE STRATEGY FOR OPERATING IN CYBERSPACE 3-4 (2011).

[11] Exec. Order No. 13,636, 78 Fed. Reg. 11,739, 11,739 (Feb. 12, 2013).

[12] *See* Bret Brasso, *Cyber Attacks Against Critical Infrastructure Are No Longer Just Theories*, FIREEYE (Apr. 29, 2016), https://www.fireeye.com/blog/executive-perspective/2016/04/cyber_attacks_agains.html [https://perma.cc/54HM-CHEN]. Recognizing the consequences associated with cyber-attacks on critical infrastructure, the United Nations Group of Governmental Experts ("UNGGE") on Information Security specifically noted in their 2015 report that "[a] State should not conduct or knowingly support [information and communications technology] activity contrary to its obligations under international law that intentionally damages critical infrastructure or otherwise impairs the use and operation of critical infrastructure to provide services to the public." U.N. Grp. of Governmental Experts, *Developments in the Field of Information and Telecommunications in the Context of International Security*, ¶ 13(f), U.N. Doc. A/70/174 (July 24, 2015), http://www.un.org/ga/search/view_doc.asp?symbol=A/70/174 [https://perma.cc/U5A8-JEWR]. The 2015 UNGGE report contains recommendations developed by governmental experts from twenty States addressing threats from uses of information and communications technologies by States and non-State actors alike and, in doing so, builds upon reports issued in 2010 and 2013. *Id.* at 4. These reports have become a significant focal point for international discussions on the applicability of international law to States with respect to cyberspace and operations. Elaine Korzak, *The 2015 GGE Report: What Next for Norms in Cyberspace?*, LAWFARE (Sept. 23, 2015, 8:32 AM), https://www.lawfareblog.com/2015-gge-report-what-next-norms-cyberspace [https://perma.cc/9RNH-QS2L].

> States depends on the reliable functioning of the Nation's critical infrastructure in the face of such threats.[13]

More recently, in describing his concerns about a cyber-attack against critical infrastructure, former National Security Agency Director Admiral Michael Rogers predicted, "[i]t is only a matter of the when, not the if, that we are going to see something traumatic."[14] Unfortunately, State activities in cyberspace have proven these statements true. For example, on December 23, 2015, a cyber-attack shut down Ukraine's relatively secure power grid.[15] More specifically, the Ukrainian Kyivoblenergo, a regional electricity distribution company, suffered severe power outages affecting 225,000 customers due to a malicious malware.[16] Not long after the incident occurred, the Ukrainian government publicly attributed the highly sophisticated cyber intrusion[17] to Russian security services.[18]

While similar events are transpiring regularly,[19] the attack on the Ukrainian critical infrastructure is particularly important as it took place during a period of armed conflict.[20] Undoubtedly, it is relevant

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[13] Exec. Order No. 13,636, 78 Fed. Reg. at 11,739.

[14] Amelia Smith, *China Could Shut Down U.S. Power Grid with Cyber Attack, Says NSA Chief*, NEWSWEEK (Nov. 21, 2014, 11:07 AM), http://www.newsweek.com/china-could-shut-down-us-power-grid-cyber-attack-says-nsa-chief-286119 [https://perma.cc/Y3XR-N4LV].

[15] *See* Kim Zetter, *Inside the Cunning, Unprecedented Hack of Ukraine's Power Grid*, WIRED (Mar. 3, 2016, 7:00 AM), https://www.wired.com/2016/03/inside-cunning-unprecedented-hack-ukraines-power-grid [https://perma.cc/54ZC-J35V].

[16] *See* ROBERT M. LEE ET AL., ELEC. INFO. SHARING & ANALYSIS CTR., ANALYSIS OF THE CYBER ATTACK ON THE UKRAINIAN POWER GRID, at iv (2016), https://ics.sans.org/media/E-ISAC_SANS_Ukraine_DUC_5.pdf [https://perma.cc/Z3FR-LAZU].

[17] *See* Zetter, *supra* note 15.

[18] *See* LEE ET AL., *supra* note 16, at iv.

[19] For example, Russia recently used malicious computer code known as Triton to gain control over a safety shut-off system — considered critical to defending against catastrophic events — at a petrochemical plant in Saudi Arabia. *See* Dustin Volz, *Researchers Link Cyberattack on Saudi Petrochemical Plant to Russia*, WALL ST. J. (Oct. 23, 2018, 3:20 PM), https://www.wsj.com/articles/u-s-researchers-link-cyberattack-on-saudi-petrochemical-plant-to-russia-1540322439 [https://perma.cc/56SV-VQB9]. This intrusion is the first reported breach of a safety system at an industrial plant. *See id.*

[20] Although the precise contours of the armed conflict in the Ukraine are difficult to determine, it appears to be international and non-international armed conflicts occurring in parallel. *See* Shane R. Reeves & David Wallace, *The Combatant Status of the "Little Green Men" and Other Participants in the Ukraine Conflict*, 91 INT'L L. STUD. 361, 372-83 (2015); *see also International Armed Conflict in Ukraine*, RULAC, http://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine [https://perma.cc/E3UU-2HMB] (last updated Sept. 12, 2017). As an international armed conflict was occurring at the time of the cyber-attack on the power grid, the law of armed conflict applied. *See id.*

and important to understand how international law regulates interactions between States when one intrudes upon the other's critical infrastructure outside of armed conflict.[21] However, this Essay focuses on the equally important topic of cyber targeting of critical infrastructure during a period of armed conflict — such as the Russian hack of the Ukrainian power grid — and whether the current normative framework of the law of armed conflict provides sufficient protections from such attacks.[22]

Through this analysis, it becomes apparent that existing protections for critical infrastructure in armed conflict are inadequate and heightened legal safeguards are necessary. To support this proposition, the Essay begins with a brief description of critical infrastructure and explains why these systems are vulnerable in cyberspace. A general overview of the law of armed conflict's provisions on targeting follows. The Essay then applies these principles and rules to critical infrastructure in cyberspace to illustrate that the existing law — *lex lata*[23] — does not go far enough in protecting these essential assets. The Essay thus concludes with a *lex ferenda* argument[24] in favor of a new treaty that provides additional protections against cyber-attacks for critical infrastructure during armed conflict.

I. WHAT IS CRITICAL INFRASTRUCTURE? WHY SHOULD WE WORRY?

There is no universal definition of "critical infrastructure." Instead, States subjectively determine the assets, systems, or capabilities that are critical to their national security. In the United States, for example,

[21] For a comprehensive general overview of international law in cyberspace, see generally INT'L GRP. OF EXPERTS, TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt et al. eds., 2017) [hereinafter TALLINN MANUAL 2.0].

[22] The law of armed conflict, which is often also called international humanitarian law, is a "set of rules which seek, for humanitarian reasons, *to limit the effects of armed conflict*. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare." ADVISORY SERV. ON INT'L HUMANITARIAN LAW, INT'L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf; *see also* U.S. DEP'T OF DEF., DIRECTIVE 2311.01E, ¶ 3.1 (2006), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101e.pdf [https://perma.cc/8S47-QPA8] (defining the law of war as the part of international law that regulates the "conduct of armed hostilities" and is often called "the law of armed conflict").

[23] *Lex lata* is defined as "what the law is." J. Jeremy Marsh, Lex Lata *or* Lex Ferenda*? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116, 117 (2008).

[24] *Lex ferenda* is defined as "what the law should be." *Id.*

critical infrastructure is defined as those "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[25] Characterized in a slightly different manner, critical infrastructure are assets or systems vital for the maintenance of essential societal functions[26] and serve as the backbone of a State's economy, security, and health.[27]

Importantly, most of the assets or services essential to a society are interconnected. Damage, destruction, or disruption in one system, therefore, would naturally have significant negative consequences in other important systems necessary for the operation of an advanced State.[28] Recognizing this interconnectedness risk, States increasingly characterize large groupings of assets, systems, or capabilities as "critical infrastructure." By doing so, States are attempting to protect not just a particular asset or service, but rather the entire ecosystem that underlies its national security.[29] For example, the United States Department of Homeland Security — aside from the generic definition provided above — now identifies sixteen critical infrastructure sectors including: chemical, commercial facilities, communications, critical manufacturing, dams, defense industrial base, emergency services,

[25] Critical Infrastructures Protection Act of 2001, 42 U.S.C. § 5195c (2019). The statute provides, among other things, "that any physical or virtual disruption of the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States . . . ." *Id.*

[26] *Migration and Home Affairs: Critical Infrastructure*, EUR. COMM'N, https://ec.europa.eu/home-affairs/what-we-do/policies/crisis-and-terrorism/critical-infrastructure_en (last visited Dec. 26, 2019) [https://perma.cc/LF9P-DUEZ].

[27] *See CISA Infrastructure Security: Supporting Policy and Doctrine*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/what-critical-infrastructure (last visited Dec. 26, 2019) [https://perma.cc/K9SQ-8QYU].

[28] *See generally Critical Infrastructure Sectors*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/critical-infrastructure-sectors (last visited Nov. 21, 2018) [https://perma.cc/V55P-KP4T] [hereinafter *Critical Infrastructure Sectors*] (listing sixteen United States critical infrastructure sectors).

[29] In other words, a State is communicating to potential adversaries the importance of these particular assets and, consequently, the severe ramifications if attacked. While what exactly those ramifications may be is outside the scope of this Essay, it is important to note, "[t]he use of force threshold, wherever it may presently lie, will almost certainly drop in lock step with the increasing dependency of states on cyberspace." Michael N. Schmitt, The Law of Cyber Warfare: Quo Vadis?, 25 STAN. L. & POL'Y REV. 269, 281 (2014) [hereinafter *Law of Cyber Warfare*] ("In particular, operations that non-destructively target critical infrastructure may come to be viewed by states as presumptive uses of force.").

energy, financial services, food and agriculture, government facilities, healthcare and public health, information technology, nuclear, transportation systems, and water and wastewater systems.[30]

The failure of critical infrastructure, regardless of the reason, is potentially catastrophic. Although an August 2003 blackout was neither cyber-related nor did it occur during an armed conflict, the event's widespread disruption of power over parts of eight U.S. states illustrates the point.[31] On one afternoon in the middle of August, a power line in northern Ohio, softened by the heat of summer, brushed against some trees and triggered an automatic shutdown of the power line. Over the next few hours, as technicians tried to understand the nature and scope of the problem, three other power lines sagged into trees causing additional shutdowns.[32] Eventually, the entire electrical system was overtaxed.[33] Approximately 50 million people lost power, eleven individuals died, and economic damages escalated into the billions.[34] Additionally, the power outage stranded thousands of commuters, disrupted air traffic across the United States, flooded hospitals with patients complaining of heat injuries, and required mandatory evacuations of buildings, tunnels, and other public areas.[35]

As the 2003 blackout shows, critical infrastructure is interconnected and interdependent — an outwardly insignificant incident in northern Ohio triggered not only the massive loss of electrical power in one town, but severely disrupted power systems throughout the United States. Yet, vulnerabilities in systems as important as the electric "grid" continue to exist and are numerous and obvious. The entire system consists of miles of high-voltage and low-voltage power lines, distribution transformers,

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[30] *See* U.S. DEP'T OF HOMELAND SEC., *Critical Infrastructure Sectors*, *supra* note 28.

[31] *See* James Barron, *The Blackout of 2003: The Overview; Power Surge Blacks Out Northeast, Hitting Cities in 8 States and Canada; Midday Shutdowns Disrupt Millions*, N.Y. TIMES (Aug. 15, 2003), https://www.nytimes.com/2003/08/15/nyregion/blackout-2003-overview-power-surge-blacks-northeast-hitting-cities-8-states.html [https://perma.cc/ZHX4-KJNC]. The blackout affected the U.S. states of Ohio, Michigan, Pennsylvania, New York, Vermont, Massachusetts, Connecticut, and New Jersey, and the Canadian province of Ontario. *See id.*

[32] *See* JR Minkel, *The 2003 Northeast Blackout — Five Years Later*, SCI. AM. (Aug. 13, 2008), https://www.scientificamerican.com/article/2003-blackout-five-years-later [https://perma.cc/M72K-SSTN].

[33] *See id.* An April 2004 report on the incident found that systemic problems with the grid, and the cascading nature of the event, caused the blackout. *See generally* U.S.-CAN. POWER SYS. OUTAGE TASK FORCE, FINAL REPORT ON THE AUGUST 14, 2003 BLACKOUT IN THE UNITED STATES AND CANADA: CAUSES AND RECOMMENDATIONS (2004).

[34] *See* Minkel, *supra* note 32. Estimates of the damage from the blackout were estimated at $6 billion. *See id.*

[35] *See* Barron, *supra* note 31.

and connections between thousands of power plants to hundreds of millions of electricity customers.[36] What becomes apparent is that any damage, disruption, or even delay along the electricity grid continuum is potentially devastating and could have a cascading negative effect on the economic and security well-being of an affected State.

The United States became acutely aware of such risks to critical infrastructure following the terrorist attacks of September 11, 2001. In February 2003, the United States government released *The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets* in an effort to reduce America's vulnerabilities to acts of terrorism.[37] The report observed that the facilities, systems, and functions that comprise an advanced society's critical infrastructure are highly sophisticated and complex.[38] Additionally, the report found that "our most critical infrastructures typically interconnect and, therefore, depend on the continued availability and operation of other dynamic systems and functions."[39] E-commerce, for example, depends on electricity (as well as information and technology), and protecting and maintaining these ancillary systems is a necessity for internet trade.[40] The report thus concludes: "[g]iven the dynamic nature of these interdependent infrastructures and the extent to which our daily lives rely on them, a successful terrorist attack to disrupt or destroy them could have tremendous impact beyond the immediate target and continue to reverberate long after the immediate damage is done."[41]

The report's logic applies equally to a cyber-attack against critical infrastructure, and its warning about the potential for such an incident is ever more prescient. For example, in 2013, an Iranian hacker named Hamid Firoozi — most likely working on behalf of the Iranian government[42] — gained remote access to the Bowman Avenue Dam in

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[36] *See Electricity Explained: How Electricity Is Delivered to Consumers*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/Energyexplained/index.cfm?page=electricity_delivery (last updated Oct. 11, 2019) [https://perma.cc/T6JS-K9KE].

[37] *See* U.S. DEP'T OF HOMELAND SEC., THE NATIONAL STRATEGY FOR THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURES AND KEY ASSETS (2003), https://www.dhs.gov/xlibrary/assets/Physical_Strategy.pdf [https://perma.cc/G62A-MY6W].

[38] *See id.* at 6.

[39] *Id.*

[40] *See id.* (noting that, similarly, transportation and distribution systems are necessary to assure the delivery of fuel to generate power).

[41] *Id.* at 7.

[42] *See* Sealed Indictment at 1-2, United States of America v. Ahmad Fathi et al., No. 16CR00048, 2016 WL 1291521 (S.D.N.Y. Jan. 21, 2016) [hereinafter Sealed Indictment].

Rye Brook, New York (fifteen miles north of New York City).[43] Access to the dam gave Firoozi the ability to remotely operate and manipulate the sluice gate, which is responsible for controlling water levels and flow rates.[44] Fortunately, the dam operators had manually disconnected the sluice gate for maintenance prior to the hack.[45] While Firoozi seemingly failed, he may have in fact been extremely successful, as he was likely conducting "a dry run for a more disruptive invasion of, say, a major hydroelectric generator or some other grand and indispensable element of the nation's power grid."[46]

The strategic importance of critical infrastructure coupled with the numerous vulnerabilities found within these assets and systems make cyber-attacks increasingly attractive to potential adversaries of any advanced State. This is especially true during a period of armed conflict. The United States, in its Department of Defense 2015 Cyber Strategy, recognizes this fact by noting "[d]uring a conflict, the Defense Department assumes that a potential adversary will seek to target U.S. or allied critical infrastructure and military networks to gain a strategic advantage."[47] The report goes on to assume that all critical

[43] *See* Tom Ball, *Top 5 Critical Infrastructure Cyber Attacks*, COMPUTER BUS. REV. (July 18, 2017), https://www.cbronline.com/cybersecurity/top-5-infrastructure-hacks [https://perma.cc/HT9N-ZMAQ].

[44] *See* Sealed Indictment, *supra* note 42, at 14-15.

[45] *See id.* at 15.

[46] Joseph Berger, *A Dam, Small and Unsung, Is Caught Up in an Iranian Hacking Case*, N.Y. TIMES (Mar. 25, 2016), https://www.nytimes.com/2016/03/26/nyregion/rye-brook-dam-caught-in-computer-hacking-case.html [https://perma.cc/9EAC-AXGD]. Since the incident at the Bowman Avenue Dam, cyber intrusions attempting to affect the American water supply have continued with increasing effectiveness. *See, e.g.*, Ari Mahairas & Peter J. Beshar, Opinion, *A Perfect Target for Cybercriminals*, N.Y. TIMES (Nov. 19, 2018), https://www.nytimes.com/2018/11/19/opinion/water-security-vulnerability-hacking.html [https://perma.cc/L7WW-8GZ2] (discussing recent examples of cyber-attacks on water and sewer utilities). The authors assert, "[t]he concept of damaging a society by attacking its water supply is as old as warfare itself. . . . These days, the threat is more pernicious than ever: Destruction and disruption that once required explosives can be achieved with keystrokes." *Id.*

[47] U.S. DEP'T OF DEF., THE DEPARTMENT OF DEFENSE CYBER STRATEGY 2 (2015), https://archive.defense.gov/home/features/2015/0415_cyber-strategy/final_2015_dod_cyber_strategy_for_web.pdf [hereinafter DOD CYBER STRATEGY]. The Department of Defense released an updated version of the Cyber Strategy document in September of 2018. *See* Mark Pomerleau, *DoD Releases First New Cyber Strategy in Three Years*, FIFTH DOMAIN (Sept. 18, 2018), https://www.fifthdomain.com/dod/2018/09/19/department-of-defense-unveils-new-cyber-strategy [https://perma.cc/4QUV-6ED7]. While the updated strategy supersedes the 2015 document, it re-emphasizes the importance of protecting critical infrastructure. *See* U.S. DEP'T OF DEF., SUMMARY: DEPARTMENT OF DEFENSE CYBER STRATEGY 2 (2018), https://media.defense.gov/2018/sep/18/2002041658/-1/-1/1/cyber_strategy_summary_final.pdf [https://perma.cc/NZZ5-UL8C]

infrastructure is targetable and gives examples of an adversary attacking "an industrial control system (ICS) on a public utility to affect public safety" or entering "a network to manipulate health records to affect an individual's well-being."[48] The Cyber Strategy concludes that the purpose of any such attack is to undercut the United States' economic and national security — despite the inevitable death and destruction that will ensue — and therefore protecting critical infrastructure is of paramount interest.[49] The following Part discusses how the law currently protects such assets during a period of armed conflict.

II. AN OVERVIEW OF TARGETING UNDER THE LAW OF ARMED CONFLICT

The law of armed conflict regulates the targeting of both persons and objects, regardless of the means or methods used by the parties, in both international and non-international armed conflicts.[50] However, of importance to understanding the extant legal protections for critical infrastructure in armed conflict is the law of targeting[51] as it specifically relates to objects. While there are several law of armed conflict principles and rules applicable to the targeting of objects,[52] underlying each of these individual norms is a compromise between two diametrically opposed impulses: military necessity and humanitarian considerations.[53] Therefore, before delving into the specifics of the law

("[T]he Department seeks to preempt, defeat, or deter malicious cyber activity targeting U.S. critical infrastructure that could cause a significant cyber incident . . . .").

48 DOD CYBER STRATEGY, *supra* note 47, at 2.

49 *See id.*

50 TALLINN MANUAL 2.0, *supra* note 21, at 414.

51 The term "targeting" is broadly understood as using violence against people or objects in the context of an armed conflict. *See* Gary P. Corn et al., *Targeting and the Law of Armed Conflict*, *in* U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 167, 172, 173 (Geoffrey S. Corn et al. eds., 2016). The law of targeting is therefore that subset of the law of armed conflict that regulates how that violence is conducted. *See id.* at 172-73 ("[I]t is universally recognized that during *any* armed conflict, the warring parties' discretion to employ violence is not legally unfettered."); *see also* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 126 (1st ed. 2004) (stating that targeting is "the selection of appropriate targets from a list of military objectives — as well as the choice of weapons and ordnance").

52 *See* WILLIAM H. BOOTHBY, THE LAW OF TARGETING 60-64 (2012) [hereinafter LAW OF TARGETING].

53 *See* Kjetil Mujezinovi Larsen et al., *Introduction by the Editors: Is There a 'Principle of Humanity' in International Humanitarian Law?*, *in* SEARCHING FOR A 'PRINCIPLE OF HUMANITY' IN INTERNATIONAL HUMANITARIAN LAW 1, 9 (Kjetil Mujezinovi Larsen et al. eds., 2013).

of targeting, a brief discussion on the military necessity-humanity balance is necessary.[54]

A. The Foundation for the Law of Targeting: Military Necessity Versus Humanity

Military necessity[55] is best understood as a broad "attempt to realize the purpose of armed conflict, gaining military advantage," whereas humanitarian considerations are intent on "minimizing human suffering and physical destruction" in warfare.[56] These two broad, often times called "meta," principles[57] are weighed against each other throughout the entirety of the law of armed conflict with every rule or norm — whether treaty- or custom-based — considering both military necessity and the dictates of humanitarian aims.[58] In other words, "it

[54] *See id.*

[55] Francis Lieber stated, "[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war." FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD: GENERAL ORDERS NO. 100, at art. 14 (1863), *reprinted in* THE LAWS OF ARMED CONFLICTS 3, 6 (Dietrich Schindler & Ji í Toman eds., 3d ed. 1988) [hereinafter LIEBER CODE]. This definition of military necessity has remained mostly intact in current U.S. doctrine. *See, e.g.*, U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE at ¶ 3.a (1956), https://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf [https://perma.cc/74KQ-ELS6] (defining military necessity as "those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible"). The definition has also survived in academic writing. *See, e.g.*, WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 72 (2009) (citing LIEBER CODE, *supra* note 55, at art. 14).

[56] GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 278 (2d ed. 2016).

[57] *See* Brian J. Bill, *The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare*, *in* 12 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 119, 131 (2009) ("Military necessity is a meta-principle of the law of war . . . in the sense that it justifies destruction in war. It permeates all subsidiary rules."); *see also* DINSTEIN, *supra* note 51, at 16 (comparing the principles at their extremes).

[58] *See* Christopher Greenwood, *Humanitarian Requirements and Military Necessity*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 35, 37-38 (Dieter Fleck ed., 2d ed. 2008) (discussing generally how the principles of military necessity and humanity check and balance each other throughout the law of armed conflict); Shane R. Reeves & Jeffrey S. Thurnher, *Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance*, HARV. NAT'L SECURITY J. FEATURES ONLINE (2013), http://harvardnsj.org/2013/06/are-we-reaching-a-tipping-point-how-contemporary-challenges-are-affecting-the-military-necessity-humanity-balance [https://perma.cc/CG27-CSJM] (explaining that humanity and military necessity must be simultaneously considered in the law of armed conflict).

can be stated categorically that no part" of the law of armed conflict "overlooks military requirements, just as no part . . . loses sight of humanitarian considerations."[59]

This equilibrium is not new to the law of armed conflict. The 1868 St. Petersburg Declaration, which is considered the first major international agreement prohibiting the use of a particular weapon,[60] outlined the relationship, and inherent tension, between military necessity and humanity in renouncing the use of explosive projectiles.[61] A similar check and balance which exists in all subsequent law of armed conflict provisions ensures that "force is applied on the battlefield in a manner allowing for the accomplishment of the mission while simultaneously taking appropriate humanitarian considerations into account."[62] Otherwise, "[i]f military necessity were to prevail completely, no limitation of any kind would [be] imposed on the freedom of action of belligerent States. . . . Conversely, if benevolent humanitarianism were the only beacon to guide the path of the armed forces, war would . . . entail[] no bloodshed, no destruction and no human suffering; in short, war would not [be] war."[63]

The law of armed conflict therefore is a series of "prohibitions, restrictions, and obligations designed to balance a State's interest in effectively prosecuting the war (military necessity) with its interest in minimizing harm to those involved in a conflict."[64] With the law of targeting conceptually best thought of as a subset of the law of armed conflict, the underlying objective of both is the same. Accordingly, the

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[59] DINSTEIN, *supra* note 51, at 17. Professor Dinstein notes that the law of armed conflict is "predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations." *Id.* at 16.

[60] *See* ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 53 (3d ed. 2000). This treaty renounced the employment of any projectile of a weight below 400 grams, which was either explosive or charged with fulminating or inflammable substances. *See* Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 C.T.S. 297 [hereinafter 1868 St. Petersburg Declaration], https://ihl-databases.icrc.org/ihl/full/declaration1868 [https://perma.cc/PP3T-ZSFH].

[61] *See* 1868 St. Petersburg Declaration, *supra* note 60; *see also* ROBERTS & GUELFF, *supra* note 60, at 53.

[62] Reeves & Thurnher, *supra* note 58, at 1.

[63] DINSTEIN, *supra* note 51, at 16. The balance between military necessity and humanitarian consideration is the very essence of the law of armed conflict. You see this balance not only at the macro-level, but it permeates down to particular rules and provisions. It is what makes the body of law workable considering what is being regulated — i.e., the worst of human conditions. *See id.*

[64] Michael N. Schmitt & Jeffrey S. Thurnher, "*Out of the Loop": Autonomous Weapon Systems and the Law of Armed Conflict*, 4 HARV. NAT'L SEC. J. 231, 232 (2013).

particular provisions or rules, discussed below, that regulate the targeting of objects will always carefully weigh the violence necessary to accomplish a mission with the need to minimize human suffering and physical destruction during warfare.[65]

B. Targeting and the Law: Distinction, Proportionality, and Precautions in the Attack

The military necessity-humanity balance establishes the foundation for the general principles that regulate hostilities and, more specifically, those relevant to the targeting of an object.[66] Undoubtedly, the most important of these principles is distinction — at times characterized as fundamental or "intransgressible."[67] Since the sole legitimate aim of belligerent hostilities is to weaken and defeat an adversary's military forces,[68] protecting both the civilian population and objects during an armed conflict is important.[69] Referenced in early law of armed conflict provisions, such as the Lieber Code[70] and the St. Petersburg

[65] *See* DINSTEIN, *supra* note 51, at 17; *see also* Shane R. Reeves & David Lai, *A Broad Overview of the Law of Armed Conflict in the Age of Terror*, *in* THE FUNDAMENTALS OF COUNTERTERRORISM LAW 139, 147-49 (Lynne Zusman ed., 2014) ("[M]ilitary necessity is 'discounted in the rules' that comprise the Law of Armed Conflict, with the particular provisions of the law either allowing for violence and destruction or forbidding such conduct out of deference to humanitarian considerations."); Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 799 (2010) [hereinafter *Military Necessity*].

[66] *See* Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, HARV. NAT'L SEC. J. FEATURES ONLINE 9-10 (2013) [hereinafter *Autonomous Weapon Systems*], https://harvardnsj.org/wp-content/uploads/sites/13/2013/02/Schmitt-Autonomous-Weapon-Systems-and-IHL-Final.pdf [https://perma.cc/DK85-537J] (discussing how the rules act as a safeguard).

[67] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257. The opinion also stated that distinction is one of two "cardinal" principles in the law of armed conflict. *See id.*

[68] *See* Nils Melzer, *The Principle of Distinction Between Civilians and Combatants*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 296, 297 (Andrew Clapham & Paola Gaeta eds., 2014). The 1868 St. Petersburg Declaration makes a similar statement. *See* 1868 St. Petersburg Declaration, *supra* note 60.

[69] *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at ¶ 1863 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY] (footnotes omitted) ("It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected . . . . The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule . . . .").

[70] *See* LIEBER CODE, *supra* note 55, at art. 22 ("Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country

Declaration,[71] distinction is a norm of customary international law.[72] Additional Protocol I provides a contemporary definition of the principle of distinction by stating:

> [I]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[73]

Additional Protocol I further clarifies this legal obligation in regards to objects by requiring any attack — defined as any act of "violence against the adversary, whether in the offence or defence"[74] — to be "limited strictly to military objectives."[75] Military objectives are those "which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[76] This broad definitional framework allows for command discretion in interpretation. Ultimately, combatants must make judgments, often in very difficult and time-sensitive circumstances, in applying this definition. For example, when an object's "total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage"

and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.").

[71] 1868 St. Petersburg Declaration, *supra* note 60 ("[T]he only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy . . . .").

[72] *E.g.*, Schmitt, *Autonomous Weapon Systems*, *supra* note 66, at 10; *see also* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 25, 40 (2005).

[73] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. It is important to note that the United States has not ratified Protocol I or Protocol II but finds many portions of the protocols to be customary international law. *See generally* Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987).

[74] AP I, *supra* note 73, at art. 49(1). An "attack" includes both large and small-scale combat actions by either party to the hostilities. *See* COMMENTARY, *supra* note 69, at ¶ 1880; DINSTEIN, *supra* note 51, at 84.

[75] AP I, *supra* note 73, at art. 52(2). This definition is widely recognized as reflecting customary international law. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 72, at 25.

[76] AP I, *supra* note 73, at art. 52(2).

depends upon the facts of a specific situation.[77] An otherwise civilian building may thus become targetable because it is being used by a party to the conflict. However, the protocol also provides clarity on what constitutes a "military objective" by requiring such objects to be only those that "by their nature, location, purpose, or use make an effective contribution to military action."[78]

Objects that by their nature make an effective contribution to military action include, but are not limited to, all those items directly used by armed forces such as: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, and communications facilities.[79] Other objects that may not have a military function may still directly contribute to military action simply due to their geography and location.[80] Natural land areas like beaches, mountain passes, and ridges or constructed items such as bridges or roads may therefore qualify as a military objective.[81] The future intended purpose of an object also determines whether it has an effective contribution to military action — for example, a civilian luxury liner that can easily transform into a method of troop transport.[82] Finally, the current use of a traditionally civilian object — like a hotel or church acting as headquarters for a military's staff — also determines if it is a military objective.[83]

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[77] *Id.*; *see* LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 399 (2013) (noting that a civilian object would not offer a definite military advantage at one moment but could if converted into a command post, a weapon storage facility, or a location to launch attacks). The reference to "military advantage" in the definition of military objective is positive expression of the broader concept of "military necessity." *See generally* Schmitt, *Autonomous Weapon Systems*, *supra* note 66, at 22.

[78] AP I, *supra* note 73, at art. 52(2); *see also* BLANK & NOONE, *supra* note 77, at 397 (discussing how "nature, location, use [and] purpose" are separate and definable criteria for determining a military objective).

[79] *See* COMMENTARY, *supra* note 69, at ¶ 2020.

[80] *See* BLANK & NOONE, *supra* note 77, at 398-99.

[81] *See* COMMENTARY, *supra* note 69, at ¶ 2021 ("[A] site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it.").

[82] SOLIS, *supra* note 56, at 511-12. Professor Solis notes that converting luxury liners into troop transports was a regular practice during World War II and the Korean Conflict. *Id.* at 511. In fact, as late as 1982, during the United Kingdom-Argentina Falklands conflict, "the P&O Cruise Line's forty-five-thousand-ton *Canberra* was requisitioned by the British Ministry of Defense, hastily converted to troop use, and used to transport two thousand combatants to the Falklands." *Id.* at 511-12.

[83] *See* COMMENTARY, *supra* note 69, at ¶ 2022.

Many objects have dual military and civilian functions. Additionally, even in those circumstances where an object is exclusively a military objective, surrounding civilian objects may be at risk during targeting. Pursuant to the principle of proportionality,[84] parties to the conflict are obligated to minimize "collateral damage" or, in other words, the effects of the attack on the civilian population.[85] However, damage to civilian property does not necessarily indicate a violation of the principle of distinction.[86] Rather, launching an attack that may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects is prohibited if the death, injury, or damage to civilian life and property is excessive in relation to the direct and concrete military advantaged gained.[87] For example, the presence of a soldier on leave cannot justify the destruction of an entire village. By contrast, if the destruction of a bridge is vitally important to the success of a military operation, it is understood that some nearby civilians' buildings may be hit in the attack of the bridge.[88] Similar to the definition of military objective, commanders have discretion in the proportionality analysis as the military advantage gained is circumstance-specific and the incidental loss to civilian life and property is typically only an estimate.[89] While this analysis is therefore always contextual, at a minimum the principle of proportionality acts as a protective threshold by ensuring the unintended civilian harm is not on a scale such that it is tantamount to being indiscriminate.[90]

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[84] The principle of proportionality is a norm of customary international law. *See generally* HENCKAERTS & DOSWALD-BECK, *supra* note 72, at 46.

[85] *See* DINSTEIN, *supra* note 51, at 155.

[86] *See* SOLIS, *supra* note 56, at 292 (quoting Yoram Dinstein, *Discussion: Reasonable Military Commanders and Reasonable Civilians*, 78 INT'L L. STUD. 173, 219 (2002)) ("Nevertheless, the realistic goal is to minimize civilian casualties, not to eliminate them altogether. There is no way to eliminate civilian deaths and injuries due to collateral damage, mistake, accident and just sheer bad luck."). In fact, extensive civilian casualties or destruction of property is acceptable if it is not excessive in relation to the direct and concrete military advantage gained. *Id.* at 292-93 (discussing proportionality).

[87] *See* AP I, *supra* note 73, at arts. 51(5)(b), 57(2)(a)(iii). Other treaties express the principle of proportionality as well. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) art. 14, June 8, 1977, 1125 U.N.T.S. 313 [hereinafter AP II]; Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90.

[88] *See* COMMENTARY, *supra* note 69, at ¶¶ 2213-14.

[89] *See* Schmitt, *Autonomous Weapon Systems*, *supra* note 66, at 24 (stating that the proportionality analysis is contextual).

[90] *See* Corn et al., *supra* note 51, at 182.

Further supplementing the principle of distinction is the well-understood customary international norm that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."[91] This mandate imposes, on both the attacking and defending parties in the hostilities, a number of precautionary legal obligations. For the attacking party, these obligations include: doing everything feasible[92] to identify military objectives and direct attacks only at those targets;[93] taking all feasible precautions in the choice of the means and methods of warfare;[94] refraining or canceling any attack that violates the principle of proportionality;[95] providing advanced warning to civilians if circumstances permit;[96] and targeting the military objective, when possible, that is "expected to cause the least danger to civilian lives and to civilian objects."[97] The defending party, for their part, must take feasible measures to protect the civilian population, individual civilians, and civilian objects from the dangers resulting from military operations.[98]

C. Specially Protected Objects — Works and Installations Containing Dangerous Forces

Certain types and classes of objects receive protections in addition to those provided by the general legal framework described above. A non-

[91] AP I, *supra* note 73, at art. 57(1); *see also* BOOTHBY, LAW OF TARGETING, *supra* note 52, at 119 (discussing how the general rules of precautions in the attack can reasonably be regarded as supplementing the principle of distinction). Precautions in the attack were first codified in Article 2 of the 1907 Hague IX Regulations. *See* Convention Between the United States and Other Powers Concerning Bombardment by Naval Forces in Time of War, art. 2, Oct. 18, 1907, 36 Stat. 2351. The obligation to take precautions in the attack is customary international law. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 72, at 51.

[92] "Feasible" is that which is "practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations." Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), art. 3(10), as amended May 3, 1996, 2048 U.N.T.S. 93.

[93] *See* AP I, *supra* note 73, at art. 57(2)(a)(i).

[94] *See id.* at art. 57(2)(a)(ii); *see also* A. P. V. ROGERS, LAW ON THE BATTLEFIELD 96 (2d ed. 2004) (noting that the means and methods of warfare chosen must be likely to hit the target).

[95] *See* AP I, *supra* note 73, at arts. 57(2)(a)(iii), (b).

[96] *See id.* at art. 57(2)(c).

[97] *Id.* at art. 57(3).

[98] *See id.* at art. 58.

exhaustive list of examples includes medically-related objects,[99] the natural environment,[100] cultural property,[101] and objects indispensable to the survival of the civilian population.[102] However, of particular relevance to the potential targeting of critical infrastructure is the special protections provided for works and installations containing dangerous forces.

Additional Protocol I, Article 56 prohibits "dams, dykes and nuclear electrical generating stations" from being the "object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population."[103] Further, the rule provides that other military objectives located at, or near, these works or installations "shall not be made the object of attack if such attack may cause the release of dangerous forces . . . and consequent severe losses among the civilian population."[104] The rule also requires attackers to take all practical precautions to avoid the release of the dangerous forces if the structure loses special status[105] and prohibits making dams, dykes, and nuclear electrical generating stations the object of reprisals.[106] Finally, although the rule appears largely focused on attacking forces, it also applies to military operations in the defense stating "[t]he Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations . . . ."[107]

As justification for these special protections, the Commentary to the rule offers several historical incidents where catastrophic collateral damage resulted from attacks on works or installations containing dangerous forces. For example, in 1938 Chinese Nationalists destroyed

[99] *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, arts. 33-37, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

[100] *See, e.g.*, AP I, *supra* note 73, at arts. 35(3), 55.

[101] *See, e.g.*, Convention for the Protection of Cultural Property in the Event of Armed Conflict, arts. 2-4, May 14, 1954, 249 U.N.T.S. 240.

[102] *See, e.g.*, AP I, *supra* note 73, at art. 54.

[103] *Id.* at art. 56(1). Similar protections also apply in a non-international armed conflict. *See* AP II, *supra* note 87, at art. 15.

[104] AP I, *supra* note 73, at art. 56(1).

[105] The terminology "special status" refers to heightened protections under the law of international armed conflict. As noted in the commentary to Article 56, "[i]t seemed appropriate to specify that in any attack directed against a dam, dyke or nuclear electrical generating station which had ceased to enjoy special protection, all other rules protecting the civilian population must be respected." COMMENTARY, *supra* note 69, at ¶ 2168.

[106] *See* AP I, *supra* note 73, at art. 56(4).

[107] *Id.* at art. 56(5).

the dykes of the Yellow River near Chang-Chow to stop advancing Japanese troops, resulting in extraordinary civilian death and property damage.[108] However, the protections described in the article are not absolute and are limited in two circumstances. First, these special protections only applies to dams, dykes, and nuclear electrical generating stations, which, if attacked, would release dangerous forces causing severe civilian losses.[109] Accordingly, if the structure is away from areas of civilian habitation, and is a military objective, there is no prohibition on such an attack.[110] Second, the special protections under the rule cease if the structure "is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support."[111]

Article 56 is not without controversy. The United States categorically denied the applicability of the rule to its military operations.[112] Similarly, on ratification of Additional Protocol I, the United Kingdom stated it could not "undertake to grant absolute protection to installations which may contribute to the opposing party's war effort, or to the defenders of such installations" but would "take all due precautions in military operations" based on known facts.[113] France also agreed absolute protections for works or installations was not possible.[114] As a result, a more limited set of prohibitions on targeting works and installations containing dangerous forces is arguably also customary international law.[115]

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[108] *See* COMMENTARY, *supra* note 69, at ¶ 2142. Other historic examples discussed in the Commentary include German troops flooding thousands of hectares of farmland in the Netherlands with seawater in 1944 and numerous deliberate attacks in 1943 against hydroelectric dams in Germany. *See id.* at ¶¶ 2142-43.

[109] *See* AP I, *supra* note 73, at art. 56(1).

[110] *See* DINSTEIN, *supra* note 51, at 174.

[111] AP I, *supra* note 73, at art. 56(2); *see also* DINSTEIN, *supra* note 51, at 174.

[112] *See* Matheson, *supra* note 73, at 427 ("[W]e do not support the provisions of [A]rticle 56, concerning dams, dykes, and nuclear power stations . . . ."). The United States stressed that the proportionality analysis was appropriate for assessing the legality of an attack against such works or installations. *See* BOOTHBY, LAW OF TARGETING, *supra* note 52, at 247 n.81. Whether this is still the position of the United States is unclear.

[113] BOOTHBY, LAW OF TARGETING, *supra* note 52, at 248; *see also* HENCKAERTS & DOSWALD-BECK, *supra* note 72, at 140.

[114] HENCKAERTS & DOSWALD-BECK, *supra* note 72, at 140.

[115] *See id.* at 139; *see also* TALLINN MANUAL 2.0, *supra* note 21, at 529. The International Group of Experts that drafted the Tallinn Manual generally agreed that neither Article 56 nor Additional Protocol II, Article 15, were customary international law. *See id.* The Tallinn authors therefore drafted a more limited rule to reflect customary international law than that found in the Additional Protocols by drawing from Rule 42 of the International Committee of the Red Cross's Customary

Regardless of the outcome of this debate, Article 56 provides a legal framework for considering how best to protect important objects.[116] Determining whether critical infrastructure requires heightened protections from cyber-attacks during an armed conflict depends on whether the existing law of targeting provides adequate legal safeguards. Application of the law of armed conflict's general principles and rules to critical infrastructure in cyberspace is therefore necessary to make this determination.

III. APPLYING THE EXISTING RULES TO CRITICAL INFRASTRUCTURE IN CYBERSPACE

Understanding how the existing law of targeting regulates cyber-attacks against critical infrastructure during an armed conflict is not merely an abstract academic pursuit. This exercise is of utmost importance as advanced States rely heavily on critical infrastructure to perform essential societal functions. Consequently, as the threat posed by cyber means and methods increases, so does the relevance of this analysis.[117]

A. Law of Armed Conflict Applies to Cyberspace

As a preliminary matter, it is important to establish that the law of armed conflict applies in cyberspace. In 2009, the NATO Cooperative Cyber Defence Centre of Excellence ("NATO CCD COE"), a cyber think tank in Tallinn, Estonia, convened a group of international law experts to develop a practical manual on cyber conflict.[118] This group of legal scholars and practitioners, referred to as the International Group of Experts, analyzed and then articulated how extant legal norms

International Humanitarian Law Study, which states "[p]articular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population." *Id.* (citing HENCKAERTS & DOSWALD-BECK, *supra* note 72, at 139).

116 In fact, Article 56 appears to recognize the need for protecting future, unanticipated works or installations by including a provision urging the High Contracting Parties and the Parties to the conflict "to conclude further agreements among themselves to provide additional protections for objects containing dangerous forces." AP I, *supra* note 73, at art. 56(6).

117 For a comprehensive approach to emerging technology and the law of armed conflict, see generally THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT (Eric Talbot Jensen & Ronald T.P. Alcala eds., 2019).

118 *See* TALLINN MANUAL 2.0, *supra* note 21, at 1.

apply to cyber warfare.[119] Their efforts resulted in the *Tallinn Manual on International Law Applicable to Cyber Warfare* in 2013.[120] In its nearly 600 pages, the manual addresses vital issues spanning public international law and in particular the law governing cyber warfare. In light of the success of the first manual, the NATO CCD COE initiated a subsequent effort to enlarge the scope of coverage with an updated Tallinn Manual to include the international law governing cyber activities during peacetime. As part of the follow-on effort, the NATO CCD COE again assembled a group of international law experts, which led to the creation and publication of *Tallinn Manual 2.0* in February 2017. *Tallinn Manual 2.0* not only incorporated and updated the materials from the first *Tallinn Manual*, but also included coverage of peacetime international legal regimes and frameworks.[121] Importantly, the *Tallinn Manual 2.0* experts limited the manual to an objective restatement of the *lex lata* and avoided including statements reflecting the *lex ferenda*.[122]

Tallinn Manual 2.0 expressly states that the current law of armed conflict applies to cyberspace and cyber-attacks during armed conflict.[123] While, to date, there are no cyber-specific law of armed conflict treaties, the Martens Clause, found in the preamble to the 1899

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[119] *See id.*; *see also* Jeremy Kirk, *Manual Examines How International Law Applies to Cyberwarfare*, CIO (Sept. 3, 2012, 7:00 AM), https://www.cio.com/article/2392610/manual-examines-how-international-law-applies-to-cyberwarfare.html [https://perma.cc/YEK5-SHUL] (noting that the Cooperative Cyber Defense Center of Excellence, which "assists NATO with technical and legal issues associated with cyberwarfare-related issues," created the Tallinn Manual to examine "existing international law that allows countries to legally use force against other nations, as well as laws governing the conduct of armed conflict").

[120] *See* TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 1 (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL 1.0].

[121] *See* TALLINN MANUAL 2.0, *supra* note 21, at 1.

[122] *See id.* at 3.

[123] *See id.* An "armed conflict" triggers the law of armed conflict. *See* ADVISORY SERV. ON INT'L HUMANITARIAN LAW, *supra* note 22 ("International humanitarian law applies only to [international or non-international] armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting."). While there is not a conclusive definition of the term "armed conflict," it is generally understood to "exist[] whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Prosecutor v. Tadi , Case No. IT-94-1-l, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

Hague Convention (II),[124] reflects customary international law and remains applicable even in novel cyber situations.[125] Therefore, the lack of cyber-specific treaties does not equate to a legal lacuna regarding the application of the law of armed conflict to cyberspace and cyber-attacks[126] as the Martens Clause extends existing principles and rules to fill any gaps in legal regulations caused by emerging technologies and, specifically, cyber capabilities.

While the *Tallinn Manual 2.0* experts were unanimous in their conclusion that the law of armed conflict applies to both international and non-international armed conflicts,[127] this determination has recently come into question. In 2015, the United Nations General Assembly requested a body of experts to form a group officially titled the UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, or more simply, the UN Group of Government Experts ("UN GGE"). The task of the UN GGE was to build upon the conclusions of four previous experts' reports in order to promote common understandings on various technology related matters including "how international law applies to the use of information and communications technologies by States."[128] Despite adopting an uncontroversial

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[124] *See* Preamble, Convention Between the United States and Certain Powers, with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 [hereinafter Hague Convention II]. Specifically, the Martens Clause states:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

Id.

[125] The Martens Clause is often invoked in the interpretation of law of armed conflict treaties "both to rule out that what is not expressly prohibited is permitted and as a presumption that favours humanitarian considerations whenever doubts exist on the meaning of certain provisions." MARCO ROSCINI, CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW 22 (2014).

[126] The Martens Clause is the subject of a great deal of controversy with some arguing that it represents an enforceable legal principle and others arguing the clause is more general guidance. For a more detailed discussion, see Dave Wallace & Shane R. Reeves, *Modern Weapons and the Law of Armed Conflict*, *in* U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 41, 62-63 (Geoffrey S. Corn et al. eds., 2016).

[127] TALLINN MANUAL 2.0, *supra* note 21, at 375.

[128] G.A. Res. 70/237, Developments in the Field of Information and Telecommunications in the Context of International Security (Dec. 23, 2015).

approach to the applicability of international law to cyberspace, a number of States rejected the final report in 2017.[129]

By rejecting the report, some legal questions remain unsettled.[130] However, the States' non-concurrence with the report was seemingly more of a political decision than a rejection of the understanding that international law applies in cyberspace.[131] In fact, whether the law of armed conflict applies in the cyber context is seemingly a resolved issue "[s]ince no international lawyer can . . . deny their applicability to cyber activities, [so] the failure of the GGE can only be interpreted as the intentional politicization in the cyber context of well-accepted international law norms."[132]

B. What Is a "Cyber Armed Attack?"

Since the law of armed conflict applies fully to cyberspace, the meaning of "cyber-attack" is critical it serves as the basis for numerous limitations and prohibitions under the international law.[133] Rule 92 of *Tallinn Manual 2.0* provides that a cyber-attack is "a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects," whereas

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[129] *See* Michael Schmitt & Liis Vihul, *International Cyber Law Politicized: The UN GGE's Failure to Advance Cyber Norms*, JUST SECURITY (June 30, 2017), https://www.justsecurity.org/42768/international-cyber-law-politicized-gges-failure-advance-cyber-norms [https://perma.cc/337F-DD8V]. While only Cuba issued a formal declaration of non-concurrence with the report, Russia and China also reportedly rejected the group's final product. *See id.*

[130] *See id.* ("The real legal challenge lies in determining when and how the aforementioned rights and legal regimes apply in the unique cyber context, questions Russia, China and the other recalcitrant States have deftly sidestepped.").

[131] *See id.* (noting that "[r]educed to basics, the States concerned have put forward what are essentially political arguments that make little legal sense"). The United States has expressly stated that international law applies in cyberspace. *See* THE WHITE HOUSE, INTERNATIONAL STRATEGY FOR CYBERSPACE: PROSPERITY, SECURITY, AND OPENNESS IN A NETWORKED WORLD 9 (2011) ("The development of norms for state conduct in cyberspace does not require a reinvention of customary international law, nor does it render existing norms obsolete. Long-standing international norms guiding state behavior — in times of peace and conflict — also apply in cyberspace."); *see also* Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, ¶ 19, U.N. Doc. A/68/98 (June 24, 2013) (noting that the United States, as well as other important States such as China and Russia, agreed that "[i]nternational law, and in particular the Charter of the United Nations, is applicable" to cyberspace).

[132] Schmitt & Vihul, *supra* note 129.

[133] *See* Schmitt, *Law of Cyber Warfare*, *supra* note 29, at 294. Again, an "attack" is defined as an act of "violence against the adversary, whether in the offence or in defence." AP I, *supra* note 73, at art. 49(1).

non-violent operations do not qualify as an attack.[134] However, "[c]yber operations have complicated matters in that they can be highly useful militarily without generating destructive or injurious effects."[135] Therefore,"[t]he violence must be understood in terms of the consequences of the act rather than the act itself; hence, violent acts may include cyber (computer network) attacks leading to mayhem and destruction."[136]

For example, a cyber operation against an electrical grid or a hydro-electrical plant that results in violent consequences is a cyber-attack,[137] and, as such, is subject to the law of targeting. In contrast, an act of cyber espionage having no violent effects is not a cyber-attack and, therefore, the principle of distinction and its supplementing provisions do not regulate that behavior. Yet, there is difficulty in determining whether the concept of "attack" extends to certain nondestructive or non-injurious cyber operations such as altering or destroying data.[138] The majority of the experts behind *Tallinn Manual 2.0* took the position that, under the current state of the law, the concept of "object" is not interpreted to include something as intangible as "data."[139] Noting that "data" does not fall under the ordinary meaning of the word "object" nor comports with how the Commentary to Additional Protocol I defines the term,[140] the majority of the experts were not willing to extend the concept of "attack" to damaging or destroying data. However, this position seems untenable going forward as Professor Michael N. Schmitt notes:

> Given the pervasive importance of cyber activities, an interpretation that limits the notion of attacks to acts generating physical effects cannot possibly survive. Suggestions that civilian activities may lawfully be seriously disrupted or that important data can be altered or destroyed because there is no resulting physical damage or injury will surely collide with

134 TALLINN MANUAL 2.0, *supra* note 21, at 415.

135 Schmitt, *Law of Cyber Warfare*, *supra* note 29, at 294.

136 DINSTEIN, *supra* note 51, at 84; *see also* TALLINN MANUAL 2.0, *supra* note 21, at 415.

137 *See* TALLINN MANUAL 2.0, *supra* note 21, at 416.

138 *See id.* at 437.

139 *Id.*

140 *See* COMMENTARY, *supra* note 69, at ¶¶ 2007-08 (noting that the term "object" means something "visible and tangible" that can be "placed before the eyes, or presented to the sight or other sense, an individual thing seen, or perceived, or that may be seen or perceived; a material thing").

> future assessments of the military necessity/humanitarian considerations balance.[141]

At a minimum, it appears that a cyber operation that interferes "with the functionality of an object" necessitating "repair of the target cyber infrastructure" qualifies as a cyber-attack.[142] Yet, while the existing law may limit a cyber-attack to those events causing physical harm,[143] it is worth again noting that any cyber-attack on critical infrastructure could potentially result in extreme, unanticipated consequences.[144] Deleting, corrupting, altering, or otherwise disrupting the computer network supporting critical infrastructure may result in the destruction or incapacitation of the structure or facility.[145] The effects of such an operation are not limited to simply causing damage to the computer networks of a given facility but may extend to large numbers of people through the loss of, for example, electrical power or water.[146] While physical damage to property, loss of life, and injury to persons may not be the intended purpose of the cyber-attack that targets critical infrastructure, this could be the result.[147] Therefore, while *de minimis* damage to critical infrastructure may not meet the cyber-attack definitional threshold, considering the expected secondary and tertiary effects of any such operation is necessary in applying the law of armed conflict.

C. The Law of Targeting Applied to Cyber-Attacks Against Critical Infrastructure During Armed Conflict

A cyber-attack occurring against critical infrastructure during an armed conflict triggers the law of targeting as it specifically relates to objects and, consequently, any concomitant protections.[148] The principle of distinction clearly prohibits a cyber-attack on critical

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141 Schmitt, *Law of Cyber Warfare*, *supra* note 29, at 295-96.

142 *Id.* at 295 (citing TALLINN MANUAL 1.0, *supra* note 120, at 93).

143 The likelihood that the concept of "cyber-attack" remains limited to causing physical harm to person and/or tangible objects is unlikely to remain static. Most likely, the notion of cyber-attack will expand to "include interference with essential civilian functions." *Id.* at 296. For a discussion on the difficulty in expanding the definition of "cyber-attack," see *id.*

144 *See supra* Part II (highlighting the potential devastating consequences of an attack on critical infrastructure).

145 *See* ROSCINI, *supra* note 125, at 52.

146 *See id.* at 52-53.

147 *See id.* at 53.

148 *See supra* Part III (highlighting what triggers the law of targeting).

infrastructure exclusively used for a civilian purpose.[149] However, critical infrastructure is generally dual use in nature — meaning it has both a military and civilian function — and therefore qualifies as military objective.[150] For example,

> military communications occur in part across cables and other media that are also used for civilian traffic. Weapons often rely on data generated by the Global Positioning Satellite (GPS) system, which serves civilian purposes such as navigation. Social media like Facebook and Twitter have been widely used during recent conflicts to transmit militarily important information. Militaries are also increasingly turning to 'off the shelf' equipment like commercial computer systems for their forces, thereby qualifying the factories which produce the products as military objectives.[151]

Certainly, if the military and civilian functions are distinguishable in dual-use critical infrastructure, any cyber-attack may only target the military function.[152] Still, most critical infrastructure is interconnected and interdependent, making such fine discernments extremely difficult. As a result, protections for critical infrastructure from a cyber-attack occurring during an armed conflict are primarily through the principle of proportionality and the requirement to take precautions in the attack.[153]

"[T]he principle of proportionality allows, in effect, an attacker to conduct an attack in the knowledge"[154] that civilian objects will be damaged or destroyed assuming such loss is incidental and not "excessive in relation to the concrete and direct military advantage

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[149] *See* AP I, *supra* note 73, at art. 48; *see also* TALLINN MANUAL 2.0, *supra* note 21, at 420-21.

[150] *See* AP I, *supra* note 73, at art. 52(2); *see also* Schmitt, *Law of Cyber Warfare*, *supra* note 29, at 298 ("The extent of military use is irrelevant; so long as the object is being employed militarily, it qualifies as a military object subject to attack." (citing TALLINN MANUAL 1.0, *supra* note 120, at 112)).

[151] Schmitt, *Law of Cyber Warfare*, *supra* note 29, at 298.

[152] *See* AP I, *supra* note 73, at art. 51(5)(a) (defining an indiscriminate attack as "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects"). The Tallinn Manual 2.0 updates and operationalizes this provision for cyber-attacks in Rule 112. *See* TALLINN MANUAL 2.0, *supra* note 21, at 469-70.

[153] *See supra* Part III.B. (discussing proportionality).

[154] Ian Henderson & Kate Reece, *Proportionality Under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects,* 51 VAND. J. TRANSNAT'L L. 835, 854 (2018).

anticipated."[155] While calculating the expected collateral damage from a cyber-attack on critical infrastructure is difficult,[156] the importance of these assets to ongoing military operations[157] makes the anticipated "concrete and direct military advantage" gained from such an attack significant.[158] Further, those planning or approving a cyber-attack against critical infrastructure have discretion as terms like "expected," "excessive," and "anticipated" that are embedded within the proportionality principle allow for a "fairly broad margin of judgment."[159] Future applications of the principle of proportionality may become more difficult for those conducting cyber-attacks as "[t]he notion of damage in the proportionality context will probably expand beyond a strict limitation to physical effects" and the term "object" may include a broader understanding.[160] However, as currently applied, the proportionality principle legally allows for, if necessary, extensive collateral damage from a cyber-attack against critical infrastructure during armed conflict.[161] In other words, as long as such damage remains below the "excessive" threshold there is no prohibition against

[155] TALLINN MANUAL 2.0, *supra* note 21, at 470.

[156] A cyber-attack may cause "what have been termed 'reverberating,' 'knock-on,' or 'indirect' effects." Henderson & Reece, *supra* note 154, at 847; *see also* TALLINN MANUAL 2.0, *supra* note 21, at 472 ("Collateral damage can consist of both direct and indirect effects."). However, the proportionality analysis considers only expected indirect effects in contrast to those that are remote possibilities. *See id.* at 475 ("The attacker either reasonably expects it or the possibility of collateral damage is merely speculative, in which case it would not be considered in assessing proportionality."). For a more detailed discussion on the difference between "expected" and "remote" indirect effects, see Henderson & Reece, *supra* note 154, at 846-54.

[157] *See supra* Part II (discussing the general importance of critical infrastructure).

[158] *See* AP I, *supra* note 73, at art. 51(5)(b).

[159] *See* COMMENTARY, *supra* note 69, at ¶ 2210. Of course, a commander must be "reasonable" when making a targeting decision. *See* TALLINN MANUAL 2.0, *supra* note 21, at 475 (citing Prosecutor v. Gali , Case No. IT-98-29-T, Judgement and Opinion, ¶ 58, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) ("In determining whether an attack was proportionate, it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.")). *See generally* Bill, *supra* note 57 (discussing the Rendulic Rule); Henderson & Reece, *supra* note 154, at 855 (arguing that the "appropriate standard for assessing a decision on the proportionality of attack is that of a 'reasonable military commander'").

[160] *See* Schmitt, *Law of Cyber Warfare*, *supra* note 29, at 297.

[161] *See* TALLINN MANUAL 2.0, *supra* note 21, at 473 ("[T]he majority of the International Group of Experts took the position that extensive collateral damage may be legal if the anticipated concrete and direct military advantage is sufficiently great.").

a cyber-attack against critical infrastructure functioning as a military objective.

Those executing a cyber-attack against critical infrastructure are also required to "be continuously sensitive to the effects of their activities on the civilian population and civilian objects, and to seek to avoid any unnecessary effects thereon."[162] Yet, similar to the principle of proportionality, in application the constant care obligation will most likely not prohibit a cyber-attack against critical infrastructure. The precautionary legal obligations — whether requiring a cyber-attacker to do everything feasible to verify the critical infrastructure is a military objective[163] or to take all feasible precautions in the choice of the cyber means and methods intended for the attack[164] — provide the decision-maker ample discretion to go forward with a cyber-attack. In fact, the term "feasible" is widely accepted as that which is "practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations."[165] The other express precautionary provisions also contain sufficiently ambiguous language to allow for a cyber-attack.[166] Consequently, the requirement to take precautions in the attack may shape how the cyber-attack occurs, but will not legally prohibit such action.[167]

Given the nature of critical infrastructure and the possible catastrophic consequences associated with cyber-attacks against such objects, the general protections provided by the law of targeting are insufficient.[168] Logically, this would seem to trigger the special

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[162] *Id.* at 477 (citing U.K. MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.32.1 (2004)).

[163] *See* AP I, *supra* note 73, at art. 57(2)(a)(i).

[164] *Id.* at art. 57(2)(a)(ii).

[165] *E.g.*, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), art. 1(5), Oct. 10, 1980, 1342 U.N.T.S. 171.

[166] For example, the attacker must provide advance warning to civilians if "circumstances permit," AP I, *supra* note 73, at art. 57(2)(c), and, when possible, only target the military objective that is "expected to cause the least danger to civilian lives and to civilian objects." *Id.* at art. 57(3).

[167] *See* Henderson & Reece, *supra* note 154, at 854 (noting that even if "all the appropriate precautions are taken, there will be some circumstances in which . . . civilian objects remain in danger of incidental harm from an attack").

[168] *See, e.g.*, Rob Taylor & Mayumi Negishi, *U.S. Allies Raise New Security Worries About China's Huawei*, WALL ST. J. (Dec. 7, 2018, 12:54 PM), https://www.wsj.com/articles/water-electricity-would-be-at-risk-in-attacks-on-5g-networks-australian-intelligence-chief-says-1544182836 [https://perma.cc/V6BQ-A6NJ]. "The head of Australia's top military cyber defense agency, Mike Burgess, said Chinese companies were blocked from the rollout of 5G mobile-phone capabilities in August because the new technology" would threaten critical infrastructure. *Id.* Mr. Burgess clarified the

protections extended for particular objects found within the law of armed conflict.[169] More specifically, the extra-legal safeguards provided for works and installations containing dangerous forces found in Additional Protocol I, Article 56[170] are relevant to regulating cyber-attacks during armed conflicts. Unfortunately, these provisions are limited to a narrow class of objects and do not comprehensively guard a State's entire critical infrastructure.[171] These provisions are therefore most helpful if viewed as a blueprint for how the law can evolve to provide heightened protections against cyber-attacks for critical infrastructure during armed conflicts.

IV. PROTECTING CRITICAL INFRASTRUCTURE IN AN ERA OF CYBER WARFARE

It is increasingly "inconceivable that the extant law of cyber warfare, which responds to cyber operations that are still in their relative technological infancy, will survive intact" in today's technological age.[172] This is especially true as "cyber activities become ever more central to the functioning of modern societies, the law is likely to adapt by affording them greater protection."[173] The trend therefore, is towards greater protections for those assets, including critical infrastructure, that are essential to civilian activities.[174] However, how these protections evolve, especially during an armed conflict, is currently unknown.[175]

reasoning by stating, "[i]f the 5G network of the future isn't there, there's a good chance electricity supply might be interrupted, water supply might be interrupted, the financial sector or elements of it might impacted." *Id.* Similarly, Japan is taking steps to lower the cyber-infiltration risk of its government agencies and critical infrastructure. *See id.*

169 *See supra* notes 103–111 and accompanying text (discussing the law of targeting's special protection provisions).

170 *See* AP I, *supra* note 73, at art. 56. Additional Protocol II, Article 15 offers a counterpart for these provisions for a non-international armed conflict. *See* AP II, *supra* note 87, at art. 15. The special protections of objects indispensable to the survival of the civilian population may also be salient when exploring the idea of how best to provide additional legal safeguards for critical infrastructure. *See* AP I, *supra* note 73, at art. 54.

171 For example, the special protections for dams, dykes, and nuclear electrical generating stations would only insulate a minor portion of the United States' critical infrastructure. *See supra* notes 28, 30 and accompanying text (listing the sixteen critical infrastructure sectors designated by the United States).

172 Schmitt, *Law of Cyber Warfare*, *supra* note 29, at 271.

173 *Id.* at 299.

174 *See id.* at 296-99.

175 *See id.* at 296.

The legal framework contained in Additional Protocol I, Article 56 for protecting particularly important objects offers a possible solution to this problem. The special protections outlined in Article 56 expressly cover dams, dykes, and nuclear electrical generating stations.[176] These objects, a subset of any State's critical infrastructure, receive special protections because of the potentially catastrophic consequences of an attack. In contemporary warfare, a cyber-attack on critical infrastructure, whether it be a health care system, power grid, or transportation network, has the same possible devastating effects. Therefore, developing a legal provision similar to Article 56, albeit with broader understanding of what is a protected object seems to be a necessary expansion in this era of cyber warfare.

Perhaps more importantly, Additional Protocol I, Articles 56 provides a workable template for addressing cyber-attacks against critical infrastructure during armed conflict because of its pragmatic approach to targeting. While the extent of the protections described in Article 56 are debatable,[177] it is unquestioned that the article strives to strike the delicate balance between military necessity and humanitarian considerations required for a workable law of armed conflict legal provision.[178] For example, the article does not absolutely ban an attack on dams, dykes, and nuclear electrical generating stations but rather links a prohibition to attacks that "may cause the release of dangerous forces and consequent severe losses among the civilian population."[179] Moreover, the special protections afforded under Article 56 cease under specified conditions while also placing duties and obligations on both the attacker and the defender of the critical infrastructure.[180]

Given the operational reasons for targeting critical infrastructure, any future legal provision must address the military necessity-humanity balance. Otherwise, if viewed as less about fixing "the technical limits at which the necessities of war ought to yield to the requirements of humanity,"[181] and more about restricting all cyber-attacks on critical infrastructure,[182] the provision risks being ineffectual and ignored.

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[176] *See* AP I, *supra* note 73, at art. 56(2).

[177] *See supra* notes 112–115 and accompanying text (noting the debate over Article 56 customary status and applicability).

[178] *See supra* Part III.A–B (discussing the military necessity-humanity balance).

[179] AP I, *supra* note 73, at art. 56(1).

[180] *See id.* at art. 56(2).

[181] 1868 St. Petersburg Declaration, *supra* note 61.

[182] *See* Reeves & Thurnher, *supra* note 57, at 12 ("It is incumbent upon states to maintain the balance between military necessity and humanity, as the primacy of the Law of Armed Conflict is dependent upon this equilibrium.").

Therefore, any new norm must look to Article 56 as a model for how to weigh military necessity with the dictates of humanitarian aims in order to be an effective regulatory provision. While States may resist joining a cyber-specific treaty protecting critical infrastructure during armed conflict, there may be incentives for States to sign and ratify such a treaty, tempered by a realistic skepticism that pervades compliance with and enforcement of the law of armed conflict generally.

First, States have an enlightened self-interest in protecting their own critical infrastructure. Given the increased capability of States to use digital combat power offensively, the vulnerabilities of and threats to advanced States' critical infrastructure are outpacing their ability to defend their networked computer systems.[183] A cyber-specific treaty establishing norms of behavior for protecting critical infrastructure during armed conflict is not and will never be a panacea. But, such an international agreement would be underpinned by notions of reciprocity. Once States bind themselves to such a treaty, the continued force of that treaty could be contingent on reciprocal observation by other States.[184] Notwithstanding the challenges associated with attribution in the cyber domain, if a State is found to be abusing the treaty, the attacking State would risk losing the protections associated with entering into the treaty.

A second, and related reason is that, at a minimum, such a cyber-specific treaty provides a special emphasis on the protection of critical infrastructure. As a general matter, civilian objects are protected under the law of armed conflict. There are some objects that receive special or heightened protections under the law of armed conflict "because of their particular importance for the protection of victims of armed conflicts, the civilian population or mankind in general or because of their particular vulnerability to destruction and damage in times of armed conflict."[185] In that regard, critical infrastructure is like other types of objects that the law of armed conflict identifies for heightened protections such as cultural property, medical facilitates, the natural environment and, most specifically, works or installations containing dangerous forces as represented by Additional Protocol I, Article 56.

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[183] *See, e.g.*, DAVID E. SANGER, THE PERFECT WEAPON: WAR, SABOTAGE, AND FEAR IN THE CYBER AGE 300-01 (2018) (discussing the actions of the United States and other nations to defend their networked computer systems from a potential Chinese threat).

[184] Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L. REV. 365, 375 (2009).

[185] *What Objects Are Specially Protected Under IHL?*, INT'L COMM. RED CROSS BLOG (Aug. 14, 2017), https://blogs.icrc.org/ilot/2017/08/14/objects-specially-protected-ihl/ [https://perma.cc/8YJW-EDF3].

Finally, adopting narrowly scoped international agreements to avoid potentially catastrophic consequences of armed conflict is not without precedent. For example, the 1976 *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* ("ENMOD Convention") prohibits the use of "environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."[186] The ENMOD Convention defines "environmental modification techniques" as "any technique for changing — through the deliberate manipulation of natural processes — the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."[187] The ENMOD Convention was negotiated during a period of heightened international concern about the protection of the environment during armed conflict.[188] Namely, by the 1970s, the international community became increasingly aware that the toll of modern armed conflicts went far beyond human suffering and damage to physical property. It also led to extensive destruction and degradation to the natural environment.[189] Most notably, the widespread use of the defoliant Agent Orange during the Vietnam War resulted in environmental contamination and related human suffering and led to significant international criticism and concern.[190] The roots of the ENMOD Convention represent a reaction to State parties using environmental modification techniques as weapons of war. Some commentators have referred to these means and methods as "geophysical warfare."[191] Such environmental modification techniques include, but are not limited to, provoking earthquakes, tsunamis or changing weather patterns.[192]

Like the 1976 ENMOD Convention, a cyber-specific treaty protecting critical infrastructure would represent a meaningful and realistic effort

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[186] *See* Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, art. I, Dec. 10, 1976, 1108 U.N.T.S. 151 [hereinafter ENMOD Convention]. The treaty is commonly referred to as the "ENMOD Convention." *See, e.g.*, *1976 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques*, INT'L COMM. RED CROSS (Jan. 2003), https://www.icrc.org/en/download/file/1055/1976-enmod-icrc-factsheet.pdf.

[187] ENMOD Convention, *supra* note 186, at art. II.

[188] *See* ROBERTS & GUELFF, *supra* note 60, at 407.

[189] *See* U.N. ENV'T PROGRAMME, PROTECTING THE ENVIRONMENT DURING ARMED CONFLICT: AN INVENTORY AND ANALYSIS OF INTERNATIONAL LAW 8 (2009).

[190] *See* KAREN HULME, WAR TORN ENVIRONMENT: INTERPRETING THE LEGAL THRESHOLD 5-6 (2004).

[191] *See* U.N. ENV'T PROGRAMME, *supra* note 189, at 12.

[192] *Id.*

by States to reassert themselves in shaping the normative infrastructure of the law of armed conflict in response to an emerging technology that could cripple the backbone of modern societies — critical infrastructure. Similar to the effects of a disaster like starting earthquakes or creating hurricanes, cyber-attacks against a State's critical infrastructure will precipitate reverberating negative consequences that will permeate throughout that society. Intuitively, the more advanced and interconnected a State, the more devastating the effects will be. To complete the analogy between the ENMOD Convention and a cyber-specific treaty protecting critical infrastructure, it is reasonable to conclude that for both types of attacks — that is, those involving environmental modification techniques and those involving cyber capabilities — the outcomes simply cannot be predicted and controlled. For example, if a belligerent party creates a hurricane that hits Florida, the consequences may vary considerably depending on its strength and where it precisely lands. Likewise, a cyber-attack against a power grid or nuclear power plant could create many unforeseeable and catastrophic effects.

CONCLUSION

In October 2012, in a speech at the Intrepid Sea, Air & Space Museum in New York, United States Secretary of Defense Leon E. Panetta sounded an alarm that the United States was increasingly vulnerable to a "cyber-Pearl Harbor" that could dismantle the nation's critical infrastructure, including power grids, transportation systems, and financial networks.[193] According to Secretary Panetta, the most destructive possibilities involve hostile parties launching cyber operations against multiple critical infrastructure targets simultaneously in concert with a conventional attack.[194] Secretary Panetta's warning is not exclusive to the United States, but applies to any advanced State.

Therefore, the urgent need to protect critical infrastructure from cyber-attacks during armed conflict appears to provide an opportunity for the creation of the first cyber-specific law of armed conflict treaty. This treaty, built upon the legal blueprint found in Additional Protocol I, Article 56, would offer special protections to critical infrastructure from cyber-attacks during an armed conflict. Of course, promulgating a

[193] *See* Elisabeth Bumiller & Thom Shanker, *Panetta Warns of Dire Threat of Cyberattack on U.S.*, N.Y. TIMES (Oct. 11, 2012), https://www.nytimes.com/2012/10/12/world/panetta-warns-of-dire-threat-of-cyberattack.html [https://perma.cc/32UD-5N3U].

[194] *See id.*

new treaty is difficult. For example, even the definition of "critical infrastructure" would likely be a controversial topic requiring significant deliberation.[195] Yet, the very real threat to these assets during an armed conflict, coupled with the common cause shared by advanced States to protect critical infrastructure may provide the incentive necessary to develop a new conventional norm. Otherwise, States are left with the law of targeting's basic protections which, increasingly, are inadequate for protecting assets of such significant importance.

[195] Creation of a new conventional norm is the exclusive responsibility of States. *See* Schmitt, *Military Necessity*, *supra* note 65, at 799 (highlighting that only States can "reject, revise, or supplement" the Law of Armed Conflict or "craft new norms").

Tethering the Law of Armed Conflict to Operational Practice: "Organized Armed Group" Membership in the Age of ISIS

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INTRODUCTION

It is mid-June 2017 and the United States continues its long campaign in Syria and Iraq against the powerful non-State actor known as ISIS.[1] The war is going badly for ISIS as their greatest prize in Iraq, the large city of Mosul, is on the verge of being re-taken by the Iraqi military.[2] In an attempt to escape being trapped in Mosul, ISIS members are fleeing west towards Raqqah, Syria—the *de facto* capital of their so-called "caliphate."[3]

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[1] The fact that the United States is currently involved in combat in Syria against ISIS is indisputable. *See* Christopher M. Blanchard and Carla E. Humud, *The Islamic State and U.S. Policy*, CRS REPORT 7-5700, R43612, 2 (Feb. 2017), https://fas.org/sgp/crs/mideast/R43612.pdf. Noting:

> the Islamic State (IS, aka the Islamic State of Iraq and the Levant, ISIL/ISIS, or the Arabic acronym Da'esh) is a transnational Sunni Islamist insurgent and terrorist group that controls large areas of Iraq and Syria, has affiliates in several other countries, has attracted a network of global supporters, and disrupts international security with its campaigns of violence and terrorism.

Id.

[2] Mosul was re-taken by Iraqi forces on 10 July 2017. *See* John Bacon, *Iraqi forces have fully retaken Mosul, U.S. backed coalition confirms*, USA TODAY (July 10, 2017), https://www.usatoday.com/story/news/world/2017/07/10/iraqi-forces-have-retaken-mosul-u-s-backed-coalition-confirms/465022001/.

[3] *See, e.g.*, Owen Holdaway, *On the Ground in Raqqa, Capital of Islamic State's Caliphate*, THE

The following hypothetical is illustrative of a likely scenario faced by the United States and coalition forces. As the ISIS exodus towards Raqqah is ongoing, the United States receives intelligence that a senior ISIS Military Commander, one they have been pursuing for the last two years, will be traveling the next day in a white car from Mosul to Raqqah. This ISIS Commander is known to be actively directing combat actions against the U.S. and Coalition Forces, Iraqi and Syrian government officials, and most troubling, at civilians who show resistance to ISIS. The source of the intelligence, who has proven to be extremely reliable in the past, has also shared that the ISIS Commander severely limits his travel in vehicles to minimize his risk of being targeted by U.S. aircraft. Additionally, tracking the ISIS Commander has become difficult as he has taken to giving orders to his subordinates in clandestine ways, primarily through encrypted phone messages which the U.S. has not yet unlocked. Thus, the ISIS Commander's decision to travel presents an extraordinary opportunity for the U.S. and Coalition Forces.[4]

But there is a complication. During the planning process, the U.S. receives additional intelligence that there will be a second white car traveling with the ISIS Commander driven by his brother. While the U.S. does not have extensive information on the brother, they do know that he identifies himself on social media as an ISIS member who has pledged an oath of loyalty to the group and its leader, Abu Bakr al Baghdadi. Further, he is known as one of the "public faces" of ISIS as he regularly makes videos advertising the group's violent efforts to establish the caliphate and highlighting their most recent military exploits. However, aside from this information, there are no indications that the brother actually carries out hostile activities in support of ISIS. With the window for a strike approaching, and with no way of knowing who is in each car, the planning cell must quickly decide whether to call off the strike or target both vehicles.

Although the above scenario is fictional,[5] the targeting dilemma presented is real. While most agree that status-based targeting of organized armed groups (OAG) in a non-international armed conflict (NIAC) is permissible,[6] what

JERUSALEM POST (Oct. 9, 2017), http://www.jpost.com/Middle-East/ISIS-Threat/On-the-ground-in-Raqqa-capital-of-Islamic-States-caliphate-507014.

[4] On September 10th, 2014, President Obama announced that combat efforts in Iraq and Syria would be joined by a Coalition of over 60 nations, providing various means of support to the combat effort. *See* Kathleen McInnis, *Coalition Contributions to Countering the Islamic State*, CRS REPORT R44135, 24 (Aug. 2016), https://fas.org/sgp/crs/natsec/R44135.pdf.

[5] If there are any similarities between this scenario and actual operations in Syria, they are coincidental.

[6] *See, e.g.*, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL ¶ 5.8.3 (2016) [hereinafter DOD LAW OF WAR MANUAL] ("Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent" (*citing* Al-Adahi v. Obama, 613 F. 3d 1102, 1108 (D.C. Cir. 2010)); INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 7, at 27–28 (Nils Melzer ed., 2009), http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf [hereinafter ICRC INTERPRETIVE GUIDANCE] (discussing how members of organized armed groups in a non-international armed conflict lose protections against

remains unsettled is when an individual is a targetable member of such a group. Thus, in the hypothetical vignette, the difficulty is not in deciding whether the U.S. can target the ISIS Commander, but rather whether the brother is also a targetable member of ISIS. Answering this question is important for ensuring State actors, engaged in hostilities with non-State armed groups during a NIAC, are capable of complying with the principle of distinction[7] as well as with their general obligation to protect civilians in the area of hostilities.[8]

There are various legally defensible views on how best to answer this question. Yet, in determining which approach is most reasonable, it is worth noting that the "challenging and complex circumstances of contemporary warfare"[9] require targeting guidance that is easily communicated to the State's armed forces. An approach that is impractical in application will not foster compliance and will create greater risk for the civilian population in these conflicts.

Therefore, in order to strengthen "the implementation of the principle of distinction"[10] in an era of increasingly powerful non-State actors and concomitant violent NIACs,[11] this article seeks to find a targeting approach that is both legal and practical to implement.

The article begins with a background section discussing OAGs, such as ISIS, and the consequences of membership in such a group. A survey of the various methods of determining OAG membership, and the practical applicability of each approach to ISIS, follows. Based upon this comparison, the article concludes that more restrictive membership criteria create an unworkable paradigm that does not match the realities of the modern battlefield. Instead, an expansive understanding

direct attack); *see also* Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, 88 INT'L L. STUD. 119, 137 (2012) ("there is no LOAC prohibition on attacking members of organized armed groups at any time. . . .").

[7] *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (stating that parties to the conflict must "distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.").

[8] *See id*. art. 51(2) ("The civilian population as such, as well as individual civilians, shall not be the object of attack."); Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II] ("Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.").

While the United States has not ratified AP I or AP II, many portions of the protocol are considered customary international law, including the protection of civilians during conflict and the principle of distinction. *See generally* Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions,* 2 AM. U.J. INT'L L. & POL'Y 419 (1987).

[9] ICRC INTERPRETIVE GUIDANCE, *supra* note 6.

[10] *Id*. at 6.

[11] *See, e.g.*, Shane Reeves, *What Happens When States No Longer Govern*?, LAWFARE (Feb. 13, 2017), https://www.lawfareblog.com/what-happens-when-states-no-longer-govern.

of who qualifies as a member of an OAG is not only practical, but necessary for providing underlying support for the principle of distinction in non-international armed conflicts.

I.
STATUS-BASED TARGETING OF "OTHER" ORGANIZED ARMED GROUPS IN A NON-INTERNATIONAL ARMED CONFLICT

A. What is an "Organized Armed Group" (OAG)?

During a NIAC, Common Article 3 to the 1949 Geneva Conventions[12] is applicable to "each Party to the conflict."[13] Common Article 3 provides no further guidance on party status, only distinguishing between individuals who are taking an "active part in hostilities" and those who are not.[14] Clarification on who qualifies as a "Party to the conflict" in a NIAC is provided by Article 1(1) of the 1977 Additional Protocol II,[15] which states:

[12] There are roughly twelve "common" articles found in the Geneva Conventions. *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR, 84–85 (2010). Common Article 3, which is repeated verbatim in all four Geneva Conventions, establishes the "law trigger for application of all treaty and customary international law related to" non-international armed conflicts. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC I]; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* GEOFFREY S. CORN, *Legal Classification of Military Operations*, *in* U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 74 (Geoffrey S. Corn, et al. eds. 2016).

[13] *See* GC III, *supra* note 12, art. 3 ("In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . . .").

[14] *See id*. ("Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. . . .").

[15] Again, while the U.S. has not ratified Additional Protocol II many of its provisions are considered customary international law. *See, e.g*., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 79, 82 (July 8); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 54, ¶ 218 (June 27); Schmitt, *supra* note 6, at 119 (noting that certain individual provisions of Additional Protocol II are customary); ICRC, *Non-international armed conflict, in* How Does Law Protect in War?, https:// casebook.icrc.org/law/non-international-armed-conflict (last visited Oct. 30, 2017)("The ICRC Study on customary international humanitarian law has confirmed the customary nature of most of the treaty rules applicable in non-international armed conflicts (Art. 3 common to the Conventions and Protocol II in particular).").

> [t]his Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[16]

Thus, Additional Protocol II clearly anticipates non-State groups acting as a party to a NIAC.[17] In particular, the text specifies that, in addition to a State party, other parties to the conflict could include "dissident armed forces" or "other organized armed groups."[18] While it is outside the scope of this article to analyze the "dissident armed forces" language of this provision, it is enough to note this is "the most straightforward category of opposition forces" in a NIAC.[19]

In contrast, "other organized armed groups" only qualify as a "Party to the conflict" if they are "under responsible command" and exercising territorial control such that they can "carry out sustained and concerted military operations."[20] Providing further granularity on what characterizes "sustained and concerted military operations," Article 1(2) makes Additional Protocol II inapplicable to "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."[21] Relying on this language, the International Criminal Tribunal for the former Yugoslavia (ICTY) defined a NIAC as "protracted armed violence between governmental authorities and organized armed groups."[22] Assuming the conflict meets the requisite

[16] AP II, *supra* note 8, at art. 1(1).

[17] Additional Protocol II is not as widely applicable as Common Article 3 since it is only triggered if there is involvement of a State armed group (versus a non-international armed conflict exclusively between non-State actors) and the group opposed to the government controls territory. *Compare* GC III, *supra* note 12, art. 3 *with* AP II, *supra* note 8, art 1(1). *See also* YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JULY 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4447 (1987) [hereinafter COMMENTARY] ("In fact, the Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict."). While these differences "bear on the law that applies to a conflict" it does not alter the status of the participants. Schmitt, *supra* note 6, at 120.

[18] AP II, *supra* note 8, at art. 1(1).

[19] Schmitt, *supra* note 6, at 124. *See id*. 124-26 for an explanation on why "dissident armed forces" are easy to identify. It is also important to note that a civilian that directly participates in the hostilities will forego the protections typically afforded them in in a NIAC. *See* AP II, *supra* note 8, at art. 13.3 (noting that civilians are protected "unless and for such time as they take a direct part in hostilities."). *See also* ICRC INTERPRETIVE GUIDANCE, *supra* note 6 at 25 (describing this category as those "who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis").

[20] AP II, *supra* note 8, at art. 1(1).

[21] *Id*. at art. 1(2).

[22] Prosecutor v. Tadic, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on

intensity,[23] the question then becomes under what conditions a collection of fighters can be labeled an "organized armed group" (OAG)?

There appears to be great flexibility in this determination, as the law of armed conflict (LOAC) accepts a broad definition of an OAG.[24] As noted above, Additional Protocol II, Article 1(1) requires the group to be "under responsible command,"[25] a phrase "explicatory of the notion of organization."[26] An OAG, according to the Commentary to the Article, should be an "organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority." [27] Yet, this does not mean "that there is a hierarchical system of military organization similar to that of regular armed forces."[28] In fact, the International Committee of the Red Cross (ICRC) notes that only minimal organization is necessary.[29]

While there may not be a "rigid, itemized checklist" of criteria that qualifies a group as an OAG,[30] the ICTY does offer helpful factors for making this determination. In the 2005 case of *Limaj*,[31] the ICTY specifically identified the following factors of the Kosovo Liberation Army as persuasive in determining its status as an OAG: the existence of a general staff and headquarters, designated military zones, adoption of internal regulations, the appointment of a spokesperson, coordinated military actions, recruitment activities, the wearing of

Jurisdiction ¶ 70 (Int'I Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Professor Schmitt notes that the ICTY definition of a NIAC thus "created a test combining intensity and organization which has been adopted in the Rome Statute of the International Criminal Court." Schmitt, *supra* note 6, at 127 (citing Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90) (defining a NIAC as taking "place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."). The Tadic definition of a NIAC is generally considered customary international law. *See, e.g.*, International Committee of the Red Cross (ICRC) Opinion Paper, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* 5 Mar. 2008.

[23] *See* Peter Margulies, *Networks in Non-International Armed Conflicts: Crossing Borders and Defining "Organized Armed Groups*," 89 INT'L L. STUD. 54, 65 (2013) (offering an excellent discussion on how to best interpret the ICTY's use of the term "protracted armed violence.").

[24] *Id*. at 62.

[25] AP II, *supra* note 8, art 1(1).

[26] Schmitt, *supra* note 6, at 128.

[27] COMMENTARY, *supra* note 17, at 1352, ¶ 4463.

[28] *Id*.

[29] *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 5 Mar. 2008, http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf (stating "as to the insurgents, the hostilities are meant to be of a collective character, [i.e.,] they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation.").

[30] Margulies, *supra* note 233, at 62.

[31] Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, 1 90 (Int'I Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) [hereinafter *Limaj*] at 37, ¶ 90.

uniforms and negotiations with the other side.[32] Similarly, in the case of *Haradinaj*,[33] the ICTY again looked at various factors to determine the existence of an organized armed group. These factors included:

> the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.[34]

An analysis of these two ICTY cases indicate that an OAG, at minimum, should exhibit a degree of structure and be able to act in a coordinated fashion.[35] More specifically, "a group that is transitory or ad hoc in nature does not qualify; in other words, an organized armed group can never simply consist of those who are engaged in hostilities against the State, *sans plus*. It must be a distinct entity that the other side can label the 'enemy'. . . ."[36] However, it is worth highlighting again that the ICTY did not consider any "single factor [as] necessarily determinative" of a group being organized.[37]

A group that is sufficiently "organized" must also be "armed" to qualify as an OAG. "Logically, a group is armed when it has the capacity to carry out 'attacks'"[38] which are defined as "acts of violence against the adversary, whether in offence or in defence."[39] Professor Schmitt notes that "[s]uch acts must be based on the *group's* intentions, not those of individual members. This conclusion derives from the fact that while many members of the armed forces have no violent function, the armed forces as a whole are nevertheless 'armed' as a matter of LOAC."[40] In situations where a group is not directly conducting an attack, but takes action that would be construed as directly participating in hostilities, "it is a reasonable extrapolation to conclude" that the group meets the criteria for being

[32] Schmitt, *supra* note 6, at 129 (citing *Limaj*).

[33] Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), surveying Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment (Int'I Crim. Trib. for the Former Yugoslavia May 7, 1997); *see also* Schmitt, *supra* note 6, at 129.

[34] Prosecutor v. Haradinaj, *supra* note 33, at ¶ 60.

[35] *See* Schmitt, *supra* note 6, at 129–30.

[36] *Id*. at 129.

[37] *Id*. at 129 (citing *Haradinaj*).

[38] *Id*. at 131.

[39] AP I, *supra* note 7, at art. 49(1).

[40] *See* Schmitt, *supra* note 6, at 131. To support this proposition Professor Schmitt draws an analogy to Additional Protocol I Article 43.2 which categorizes "member of the armed forces" as "combatants . . . [who] have the right to participate directly in hostilities," AP I, *supra* note 7, at art. 43.2, "not as individuals who do so participate." Schmitt, *supra* note 6, at n.72. Therefore, it is the group's activities that matter, "not those of select members." *Id*.

"armed."[41] Examples may include those who collect tactical intelligence to be used by another group in carrying out an attack[42] or those who provide weapons for use in an immediate attack.[43] Thus, similar to the term "organized," the definition of "armed" does not appear to be narrowly construed.

Applying the "organized" and "armed" criteria to a contemporary organization is helpful for illustrating the parameters of an OAG. Perhaps no current non-State actor is more relevant to this exercise than ISIS. Therefore, an application of the OAG criteria to ISIS follows.

B. Contemporary Example of an OAG: ISIS

ISIS's ideological and organizational roots are traced to disenfranchised Sunnis who, led by Abu Musab al Zarqawi, grouped together to fight the U.S. and the newly established Iraqi government from 2002-2006.[44] Though Zarqawi was killed by U.S. forces in 2006, the group continued their violent activities, eventually evolving into ISIS.[45] "By early 2013, the group was conducting dozens of deadly attacks a month inside Iraq and had begun operations in neighboring Syria."[46] In June 2014, ISIS declared their intent to re-form a caliphate across large swaths of land in the Middle East, claimed Raqqah, Syria as their capital, and named Abu Bakr al Baghdadi (a former U.S. detainee) as caliph and imam.[47] Heavily armed—as evidenced by their ability to conduct sustained military operations against the U.S. and Coalition partners[48]—ISIS has gone about establishing their caliphate through force, abductions, sexual slavery, beheadings, and public executions.[49] While recent battlefield losses have significantly shrunk

[41] Schmitt, *supra* note 6, at 131 (explaining that "to the extent that acts constituting direct participation render individual civilians subject to attack" it can be concluded that "a group with a purpose of directly participating in hostilities" is also armed).

[42] *See id*.

[43] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 55–56 (stating that "[t]he delivery by a civilian truck driver of ammunition to an active firing position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and, therefore, as direct participation in hostilities" (citation omitted)).

[44] Blanchard & Humud, *supra* note 1, at 18.

[45] *Id*. *See also* Howard Shatz and Erin-Elizabeth Johnson, *The Islamic State We Knew: Insights Before the Resurgence and Their Implications*, RAND CORPORATION, 5–6 (2015), https://www.rand.org/pubs/research_reports/RR1267.html.

[46] Blanchard & Humud, *supra* note 1, at 18.

[47] *See id*.

[48] *See, e.g*., Tom O'Connor, *War in Iraq: Islamic State Collapses as Military Kills ISIS Commander in West Mosul,* NEWSWEEK (May 10, 2017), http://www.newsweek.com/war-iraq-islamic-state-military-kill-isis-commander-mosul-607055 (discussing a recent combat operation where ISIS used suicide bombers and sniper fire against the U.S. and its coalition partners); Jeremy Wilson, Jeremy Bender & Armin Rosen, *These are the weapons Islamic State fighters are using to terrify the Middle East,* BUSINESS INSIDER (Jan. 17, 2016), http://www.businessinsider.com/isis-military-equipment-arsenal-2016 (discussing heavy weaponry possessed by ISIS including tanks, armored vehicle, self-propelled artillery, rocket launchers, as well as other equipment).

[49] Office of the UN High Comm'r for Human Rights (OHCHR) and UN Assistance Mission for Iraq

the area under ISIS dominance,[50] the group continues to control territory and govern a small group of civilians under a strict version of Sharia law.[51]

The ISIS organizational structure is built around five main pillars: security, sharia, military, administration, and media.[52] Emphasis on each of these pillars allows ISIS to gain, and then maintain, control of territory.[53] In describing the sophisticated organization of ISIS, a RAND study notes that "[t]he group was (and is) bureaucratic and hierarchical. Lower-level units reported to upper-level units, and units shared a basic structure in which upper-level emirs were responsible for security, sharia, military, and administration in a particular geographic area."[54] Further, "[t]hese emirs worked with departments or committees and managed a layer of sector emirs and specialized emirs at lower levels. This structure created a bench of personnel knowledgeable about managing a terrorist group that intended to become a State."[55]

As part of this organizational structure, individuals pledge an oath to ISIS and specifically to its leader, Abu Bakr al Baghdadi.[56] The oath of allegiance,

(UNAMI), Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015, at 8-20 (Jan. 19, 2016), http://reliefweb.int/report/iraq/report-protection-civilians-armed-conflict-iraq-1-may-31-october-2015-enar [hereinafter Report on the Protection of Civilians in the Armed Conflict in Iraq]. See also Shatz & Johnson, *supra* note 455, at 3.

[50] For a map of the areas within Iraq and Syria controlled by ISIS at the time of writing, see Blanchard & Humud, *supra* note 1, at Fig. 1.

[51] *See, e.g.*, *id*. at 26 ("The ideology of the Islamic State organization can be described as a uniquely hardline version of violent jihadist-Salafism—the group and its supporters are willing to use violence in an armed struggle to establish what they view as an ideal society based on their understanding of Sunni Islam."); Shatz & Johnson, *supra* note 45, at 2 ("Clandestine campaigns of assassination and intimidation have been part of the group's playbook for more than a decade.").

[52] *See* Blanchard & Humud, *supra* note 1, at 10.

[53] For example, the RAND report describes the methodical process ISIS follows to gain control of territory:

> establish an intelligence and security apparatus, target key opponents, and establish extortion and other criminal revenue-raising practices; establish administrative and finance functions and lay the foundation for command and control, recruiting, and logistics; establish a sharia network, building relations with local religious leaders; establish a media and information function; [and] establish military cells to conduct attacks.

Shatz & Johnson, *supra* note 45, at 10 (citing Pat Ryan, *AQI in Mosul: Don't Count Them Out*, AL SAHWA (Dec. 15, 2009)).

[54] Shatz & Johnson, *supra* note 45, at 2.

[55] *Id*.

[56] *See* Reem Makhoul & Mark Scheffler, *Pledging Allegiance to ISIS: Real Oath or Empty Symbolism?,* WALL ST. J. (Nov. 13, 2014), http://www.wsj.com/video/pledging-allegiance-to-isis-real-oath-or-empty-symbolism/7B2650B8-A534-4E97-B59F-0BF57BBB7AE9.html; *see also* Blanchard & Humud, *supra* note 1, at 21 ("Since 2014, some armed groups have recognized the Islamic State caliphate and pledged loyalty to Abu Bakr al Baghdadi."), and Priyanka Boghani, *What a Pledge of Allegiance to ISIS Means*, FRONTLINE (Nov. 12, 2014), https://www.pbs.org/wgbh/frontline/article/what-a-pledge-of-allegiance-to-isis-means/ (discussing

called *bay'ah*, is common to the Islamic world. This "[o]ath of allegiance to a leader," is an "[u]nwritten pact given on behalf of the subjects by leading members of the tribe with the understanding that, as long as the leader abides by certain responsibilities towards his subjects, they are to maintain their allegiance to him."[57] In the case of ISIS, when individuals and groups pledge *bay'ah* to the terrorist group, they are pledging an allegiance to the claim by ISIS that it can use any means necessary to reestablish the caliphate and that Abu Bakr al Baghdadi is "the caliph and imam (leader of the world's Muslims)."[58] To dishonor the oath to ISIS and al Baghdadi will result in punishment.[59]

ISIS membership also requires vetting and mentoring from an established member.[60] During this vetting and indoctrination process, aspiring members are required to study selected books, publications, and fatwas provided by ISIS.[61] Upon completion of this initial phase, all potential members must attend Sharia Camp, followed later by military camp.[62] ISIS then assigns its members to various roles, all contributing to the overall mission of the group to establish their caliphate by whatever means necessary. If accepted into ISIS, members are expected to plan, coordinate, and carry out military actions against all those outside of the group including State military forces, State government officials and civilians.[63] As the excerpts from the RAND article evidence, even if an ISIS

various terrorists groups from outside of Iraq and Syria pledging allegiance to ISIS and al-Baghdadi).

[57] Oxford Islamic Studies Online, Oxford University Press, at http://www.oxfordislamicstudies.com/article/ opr/t125/e316.

[58] Blanchard & Humud, *supra* note 1, at 18 ("In June 2014, Islamic State leaders declared their reestablishment of the caliphate . . . demanded the support of believing Muslims, and named Abu Bakr al Baghdadi as caliph and imam . . . ."). *See also* Thomas Joscelyn & Caleb Weiss, *Islamic State recognizes oath of allegiance from jihadists in Mali*, FDD'S LONG WAR JOURNAL (Oct. 31, 2016), https://www.longwarjournal.org/archives/2016/10/islamic-state-recognizes-oath-of-allegiance-from-jihadists-in-west-africa.php.

[59] Makhoul & Scheffler, *supra* note 566 ("Breaking a pledge is a considered a great sin and even if ISIS doesn't punish you, God will.").

[60] *See generally* Wissam Abdallah, *What it takes to join the Islamic State*, AL-MONITOR (Aug. 6, 2015), http://www.al-monitor.com/pulse/politics/2015/08/syria-fighters-join-isis-apply-training-requirements.html (articulating the intense, detailed and long process for joining ISIS including military training for *all* members of ISIS, even those who do not ultimately conduct direct attacks); John Graham, *Who Joins ISIS and Why?*, HUFFINGTON POST BLOG, http://www.huffingtonpost.com/john-graham/who-joins-isis-and-why_b_8881810.html (addressing the "great lengths" that ISIS has gone to "to demonstrate to its members and recruits that the world of radical Islam is not just death and destruction but a 24/7 total support structure" as part of the continuing indoctrination of ISIS members); Alessandria Masi, *ISIS Recruiting Westerners: How the "Islamic State" Goes After Non-Muslims and Recent Converts in the West*, IB TIMES (Sept. 8, 2014), http://www.ibtimes.com/isis-recruiting-westerners-how-islamic-state-goes-after-non-muslims-recent-converts-west-1680076 (describing how ISIS requires the establishment of an in-depth mentor-recruit relationship as part of the vetting process for Westerners who want to join ISIS).

[61] *See* Abdallah, *supra* note 600.

[62] *Id*.

[63] *See generally* Blanchard & Humud, *supra* note 1, at 21–25 (describing the various ISIS attacks around the world). *See also* Report on the Protection of Civilians in the Armed Conflict in Iraq, *supra* note 49.

member operates in a seemingly non-military role, their actions contribute to the overall violent and combative nature of the organization which, again, has the ultimate goal to take over territory through any means.

Based on the above information, ISIS is a hierarchical organization that is well-armed and qualifies as an OAG. Further, the group is currently participating in a number of NIACs[64] and is thus a "Party to the conflict." Accordingly, membership in ISIS, if established, results in the adverse consequences described below.

C. Consequence of Being a Member of an OAG

In a NIAC an individual may be a civilian, part of the government's armed forces,[65] or a member of an OAG.[66] These are mutually exclusive categories, meaning members of an OAG are obviously not civilians.[67] This distinction is not unimportant as the protections extended to civilians by the LOAC will not apply to OAG members.[68] In particular, whereas civilians are only targetable "for such time as they take a direct part in hostilities,"[69] OAG members are "analogous to members of the armed forces, and thereby remain targetable even when not participating" in the hostilities.[70] In other words, a civilian's *conduct* determines

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[64] *See generally* David Wallace, Amy McCarthy & Shane R. Reeves, *Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict,* 25 MICH. ST. INT'L L. REV. 555 (2017).

[65] *See generally* Sean Watts, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict*, 88 INT'L L. STUD. 145 (2012) (discussing this particular battlefield status).

[66] *See* DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.9.2.1 (citing Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 INT'L L. STUD. 188, 193 n.22 (2012)).

> The U.S. approach has generally been to refrain from classifying those belonging to non-State armed groups as "civilians" to whom this rule would apply. The U.S. approach has been to treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities.

Id. For a detailed discussion on whether "organized armed groups other than the dissident armed forces comprise groups who are directly participating in hostilities or constitute a separate category of 'non-civilians,'" see also ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 28; Schmitt, *supra* note 6, at 127.

[67] *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.9.2.1.

[68] *See* Schmitt, *supra* note 6, at 128 ("for if members of an organized armed group are not civilians, the LOAC extending protection to civilians is inapplicable to them.").

[69] AP II, *supra* note 8, at art. 13(3).

[70] Schmitt, *supra* note 6, at 127. *See* DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3 ("Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent."); REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 20

whether they are targetable, whereas a member of an OAG is targetable "at any time during the period of their membership,"[71] and thus is vulnerable to attack due to their status as a member of the group.[72]

Additionally, as there is no prisoner of war regime or concept of "combatant immunity" in a NIAC,[73] an OAG member upon capture "may be put on trial for treason or other crimes, and heavily punished."[74] These prosecutions are not restricted to only violations of the LOAC or war crimes, but also "for any acts that violate domestic law" including "attacking members of the armed forces."[75] Of course basic rights, such as due process and protection from summary execution, apply to these proceedings,[76] as an OAG member is treated as any other domestic criminal for their participation in the NIAC.

(Dec. 2016) [hereinafter REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE] (discussing the U.S. approach to targeting individuals in a NIAC).

[71] Schmitt, *supra* note 6, at 132.

[72] *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.7.1 stating:

> Membership in the armed forces or belonging to an armed group makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities . . . . This is because the *organization's hostile intent may be imputed to an individual through his or her association with the organization*. Moreover, the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group. Thus, combatants may be made the object of attack at all times, regardless of the activities in which they are engaged at the time of attack. For example, combatants who are standing in a mess line, engaging in recreational activities, or sleeping remain the lawful object of attack, provided they are not placed *hors de combat*.

See also Rachel E. VanLandingham, *Meaningful Membership: Making War a Bit More Criminal*, 35 CARDOZO L. REV. 79, 105 (2013) ("[B]ecause the belligerent is presumptively hostile at all times, this allows the direct attack of fighters, *once properly identified as such*, at any time during an armed conflict, whether or not they are doing anything related to hostilities at the time. . . .").

[73] *See, e.g.*, UNITED KINGDOM MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 15.6.1 (2004) [hereinafter UK MANUAL] ("The law relating to internal armed conflict does not deal specifically with combatant status. . . ."); DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1 (discussing how members of a non-State armed group are not afforded combatant immunity).

[74] Michael N. Schmitt, Charles H.B. Garraway, & Yoram Dinstein, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 41 (International Institute of Humanitarian Law, 2006) [hereinafter NIAC MANUAL] (noting "[i]t should be understood, however, that trial and punishment must be based on due process of law").

[75] *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1 (discussing a State's power to prosecute non-State actors in a NIAC for their actions under domestic law); UK MANUAL, *supra* note 73, at ¶ 15.6.3 (stating "[a] captured member of dissident fighting forces is not legally entitled to prisoner of war status"); *see also* Schmitt, *supra* note 6, at 121("[T]here is no prisoner of war regime in the context of a non-international armed conflict.").

[76] *See* UK MANUAL, *supra* note 733, at ¶ 15.6.4 ("Nevertheless, the law of non-international armed conflict clearly requires that any person . . . detained by either dissident or government forces must be treated humanely"); NIAC MANUAL, *supra* note 744, at 41; *see also* GC III, *supra* note 122, at art. 3.

The consequences of being a member of ISIS, particularly exposure to status-based targeting and prosecution for engaging in combat operations, are significant. But what makes an individual a targetable member of ISIS? For example, is swearing an oath of loyalty to al Baghdadi, being listed on an authenticated ISIS membership roster, or enforcing the group's strict form of sharia law in captured territory evidence enough for status-based targeting?[77] More broadly, what qualifies an individual as a member of an OAG versus simply being affiliated with such a group? There are a number of proposed answers to this question which are discussed in the following section.

II.
SURVEYING THE FIELD: APPROACHES TO DETERMINING MEMBERSHIP IN AN OAG

Again, membership in an OAG makes an individual vulnerable to the consequences associated with such a status.[78] The LOAC provides minimal guidance on who qualifies as a member of an OAG,[79] leaving much discretion to States' armed forces when making these decisions.[80] In an effort to address this ambiguity, and to clarify the line separating civilian and conflict participant, various approaches to determining OAG membership have emerged.

A. Continuous Combat Function (CCF)

The ICRC's *Interpretive Guidance* offers a narrow interpretation of who qualifies as a member of an OAG. The *Guidance* provides that a non-State party involved in a NIAC, similar to the State party, may have a component that is separate and distinct from the armed faction "such as political and humanitarian wings."[81] Only those acting as the fighting forces or armed wing of the non-State party are potentially considered members of the OAG and therefore non-civilians.[82] Furthermore, there "may be various degrees of affiliation with [the non-State] group that do not necessarily amount to 'membership' within the

[77] *See generally* Report on the Protection of Civilians in the Armed Conflict in Iraq, *supra* note 49, at 5-20.

[78] *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1; ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 22 (explaining why individual members of an OAG should not be considered civilians); Schmitt, *supra* note 6, at 127-28 (supporting the Interpretive Guidance's distinction between civilians and members of an OAG).

[79] *See* COMMENTARY, *supra* note 177, at 512 ¶ 1672 ("The term 'organized' . . . should be interpreted in the sense that the fighting should have a collective character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training.").

[80] *See* VanLandingham, *supra* note 72, at 117.

[81] ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 32.

[82] *Id.*

meaning of [International Humanitarian Law] IHL."[83] Affiliation may turn on "individual choice . . . involuntary recruitment . . . [or] on more traditional notions of clan or family."[84] Thus, according to the *Guidance,* there are a number of individuals affiliated in some capacity with the non-State party that are not members of the OAG.[85]

To help make this nuanced distinction, the *Guidance* notes that the "decisive criteria . . . is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities."[86] More specifically, an individual must demonstrate a "continuous combat function" (CCF) to qualify as a member of an OAG.[87] In outlining the parameters of the concept the *Guidance* states: "[c]ontinuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict."[88]

"Lasting integration" through a CCF does not include those "persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and re-integrate into civilian life."[89] Additionally, those who "continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities" are

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[83] *Id*. at 33.

[84] *Id*.

[85] *Id*. at 34 (stating "[i]ndividuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL").

[86] *Id*. What qualifies as "direct participation in hostilities" is debatable and outside the scope of this article. *Compare* ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 5-6 ("The Interpretive Guidance provides a legal reading of the notion of 'direct participation in hostilities' with a view to strengthening the implementation of the principle distinction.") *with* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 646 (No. 3, 2010) *and* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT. SEC. J. 1, 5 (May 2010) (criticizing the Interpretive Guidance legal reading of the term).

[87] *See* Schmitt, *supra* note 6, at 132 ("[B]y the *Guidance* standard only those with a continuous combat function may be treated as members of an organized armed group and therefore attackable at any time during the period of their membership.").

[88] ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 34. Further clarifying what qualifies as a CCF, the *Guidance* states:

> Individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.

Id.

[89] *Id*.

also not in a CCF.[90] These individuals, while clearly contributing to the OAG's efforts, are considered civilians.[91] "As civilians, they benefit from protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities or location may increase their exposure to incidental death or injury."[92]

B. Conduct-Link-Intent Test

Finding the ICRC's *Interpretive Guidance* test too restrictive, but recognizing that "today's enemy groups lack obvious indicia of targetable membership, and the LOAC provides no methodology for its ascertainment,"[93] Professor VanLandingham offers an alternative analysis. Making an analogy to criminal law statutes, Professor VanLandingham develops three criteria that an individual must satisfy to qualify for OAG membership.[94] First, the conduct exhibited by the individual must fall within an express listing of categories of eligible conduct.[95] This categorization would "help standardize and clarify the identification process, using behavior that has been shown to indicate membership as an analytical start point."[96] The list of conduct, akin to that provided in a U.S. criminal statute, would "force decision-makers to use a defendable, objective template."[97]

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[90] *Id*.

[91] *Id*. More specifically, according to the *Guidance,* these individuals:

> remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces. Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities. The same applies to individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature. Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group.

Id.

[92] ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 35.

[93] VanLandingham, *supra* note 72, at 137.

[94] *Id*. at 125–28.

[95] *See id*. at 136 ("For example, staying in a known Al-Qaeda guesthouse has been viewed as conduct that indicates Al-Qaeda membership").

[96] *Id*. at 137.

[97] *Id*.

Second, an express associative link between the individual's conduct and the OAG is required.[98] While requiring identification of the conduct-associate link may seem inherent in the eligible conduct list, "carving it out as an express element ensures that purely independent action is not mistakenly included."[99] Further, an associative link "challenges assumptions that may be present in the type of conduct being analyzed"[100] by requiring decision-makers to explain why the activity has been so labeled. Third, the individual must have the specific intent to further the group's violent ends via group orders, which can be inferred from particular types of conduct.[101] Therefore, it is not enough to passively support the OAG, but rather, there must be a willingness to carry out the group's commands.[102]

Application of this conduct-link-intent test would most likely increase the number of individuals considered members of an OAG and, consequently, broaden the population exposed to the consequences of such membership. However, an elements-based analysis of OAG membership that resembles a criminal statute reduces flexibility in making these determinations, particularly for commanders making real-time targeting decisions. Another approach for determining OAG membership, discussed next, is to "treat all armed forces the same."[103]

C. Structural Membership

As both States and non-State actors execute warfare through "the exercise of command, planning, intelligence, and even logistics functions," a structural membership approach argues that there is no reason to distinguish between a State's regular armed forces and "irregular" armed forces.[104] In fact, OAGs

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[98] *See id*. ("For example, the associative link in staying in an Al-Qaeda guesthouse is the assessment that it is indeed such a guesthouse").

[99] *Id*. at 137.

[100] *Id*.

[101] *See id*. at 137-38. This criteria therefore

> requires an inquiry into why the individual acted the way he did; for example, why the individual planted an IED, provided transportation, or provided lodging. Was he paid to do so, and therefore the answer is for financial gain to feed his family? Or did he do so out of the desire to see the group achieves its objectives via violent means and because he was asked or told to do so by others in the group.

Id. at 138.

[102] *Id*. (noting that those unwilling to carry out the OAG's command do "not symbolically represent the group.").

[103] *See generally* Watkin, *supra* note 866, at 690. Brigadier General Watkin retired as the Judge Advocate General of the Canadian Forces in 2010 and wrote his article in response to the ICRC's Interpretive Guidance.

[104] *Id*.

typically "have a membership structure based on more than mere function"[105] as "it is [the] organization which fights as a group."[106] Therefore, "individuals are simply members of armed forces regardless of which party to a conflict they fight for, the domestic law basis of their enrollment, or whether they wear a uniform."[107] All that is necessary for the consequences of OAG membership to attach to an individual is whether they are "a member of an organization under a command structure."[108]

Of course, not all individuals sympathetic or affiliated with the group are subject to status-based targeting.[109] One who generically creates propaganda or broadly finances the OAG, without more, is not under command or filling a traditional military role.[110] The assumption is, therefore, they are not part of the OAG and are civilians. Again, the key factor "in determining if a person can be attacked is whether the individual is a member of the armed forces . . . under a command responsible for the conduct of its subordinates."[111] It is also important to note, from an operational perspective, the Rules of Engagement (ROE) establish left and right parameters on who is within the OAG.[112]

There may also be individuals, in the command structure, not subject to the adverse consequences of their membership. For example, those who are exclusively in the role of a spiritual leader or doctor would be comparable to

[105] Schmitt, *supra* note 6, at 132.

[106] Watkin, *supra* note 866, at 691.

[107] *Id*. at 690–691.

[108] *Id*. at 691.

[109] For example, the Israeli Defense Force (IDF) agrees that members of an OAG are subject to status-based targeting and also recognizes that there may be military and non-military wings of a non-State actor. *See* Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT'L L. 55, 113 (2017). Those who are part of the non-military branch are subject to targeting if they directly participate in hostilities. *See id*. at 113–14. To help clarify what "direct participation in hostilities" includes the IDF maintains a list of activities that meet this definition. *See id*. Of course it is "impossible for the list to contain all possible forms of direct participation. . . . Therefore, if a commander of an Attack Cell believes an individual is directly participating but the activity concerned does not appear on the list, the commander may elevate the matter to higher authorities for authorization to strike." *Id*.

[110] *See id*. at 107 (discussing why the IDF has taken the position that having a role in generating propaganda or promoting morale does not deprive an individual of civilian status).

[111] *See* Watkin, *supra* note 866, at 691.

[112]Rules of engagement are defined as "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered." JOINT CHIEFS OF STAFF, JOINT PUB'N 1-02, DEP'T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 472 (2001). In particular, the ROE "establish fundamental policies and procedures governing the actions to be taken by US commanders" during a military operation. JOINT CHIEFS OF STAFF, INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES app. A, at 95 (2005). Combining operational requirements, policy, and international law therefore make the ROE more restrictive than the law of armed conflict. Supplemental measures, which "enable commanders to tailor ROE for specific missions," are the recognized tool to implement restrictions on the use of force for particular "political and military goals that are often unique to the situation." *Id*. app. A, at 99.

chaplains or medical personnel in a State's armed forces and therefore not targetable.[113] Finally, protections extend to those civilians who "provide services such as selling food under contract or otherwise much like civilian contractors working with regular State armed forces" unless "and for such time as they participate directly in hostilities."[114]

Focusing on the membership structure is therefore like other targeting principles in that it provides a definitional framework allowing for command discretion. For example, Additional Protocol I, Article 52(2), in regards to targeting military objectives, States "[a]ttacks shall be limited strictly to military objectives."[115] The protocol goes on to give broad contours of what is considered a military objective without attempting to provide specific examples.[116] Similarly, under this approach, OAG membership, like an individual's status in a regular State armed force, is possible to confirm in a number of ways. Indicia of membership would include "carrying out a combat function" such as being involved in "combat, combat support, and combat service support functions, carrying arms openly, exercising command over the armed group, [or] carrying out planning related to the conduct of hostilities."[117] However, "the combat function is not a definitive determinant of whether a person is a member of an armed group, but rather one of a number of factors that can be taken into consideration."[118]

The *Department of Defense Law of War Manual* provides guidance for U.S. forces to determine membership by offering non-exhaustive lists of both "formal" and "informal" indicators. Formal indicators, also called "direct information" include: "rank, title, style of communication; taking an oath of loyalty to the group or the group's leader; wearing a uniform or other clothing, adornments, or body markings that identify members of the group; or documents

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[113] *See* GC I, *supra* note 12, at art. 24.

> Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded and sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

Id. While Article 24 is only applicable in an IAC it is valuable for this discussion as it helps establish the status parameters of OAG members.

[114] Watkin, *supra* note 86, at 692.

[115] AP I, *supra* note 7, at art. 52(2).

[116] *See id*. ("In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.").

[117] Watkin, *supra* note 86, at 691.

[118] *Id*.

issued or belonging to the group that identify the person as a member… ."[119] Informal factors that help determine OAG membership include:

> acting at the direction of the group or within its command structure; performing a function for the group that is analogous to a function normally performed by a member of a State's armed forces; taking a direct part in hostilities, including consideration of the frequency, intensity, and duration of such participation; accessing facilities, such as safehouses, training camps, or bases used by the group that outsiders would not be permitted to access; traveling along specific clandestine routes used by those groups; or traveling with members of the group in remote locations or while the group conducts operations.[120]

Membership, therefore, includes more than just those engaging in an attack or carrying out a combat function.[121] Rather, what is important is whether the individual is "carrying out substantial and continual integrated support functions."[122] Or, to put it more simply, an individual who is under command, acting in a traditional military role, is subject to the adverse consequences of being an OAG member—in particular, status-based targeting.[123] Recognizing a member of an OAG is often not difficult as these groups consistently distinguish

[119] DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.7.3.1. The first set of factors focus on documents illustrating membership, while the second set focuses on direct observation of certain activities that may indicate membership. The Manual makes clear that these lists provide illustrative examples and are not exhaustive.

[120] *Id*.

[121] *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.7.3 ("individuals who are formally or functionally part of a non-State armed group" are subject to attack); REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE, *supra* note 700, at 20. *See also* Watkin, *supra* note 86, at 691–92 ("Someone who provides logistics support as a member of an organized armed group, including cooks and administrative personnel, can be targeted in the same manner as if that person was a member of regular State armed forces.")

[122] *Id*. at 644.

[123] *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3; REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE, *supra* note 700, at 29.

> To determine whether an individual is "part of" an enemy force, the United States may rely on either a formal or function analysis of the individual's role in that enemy force (citation omitted). . . . [S]uch a functional analysis may include looking to, among other things, the extent to which that person performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country's armed forces; whether that person is carrying out or giving orders to others within the group; and whether that person has undertaken certain acts that reliably connote meaningful integration into the group.

Id. ISIS members, for example, who recruit or are involved in logistics are comparable to military recruiters and logisticians and would therefore be considered targetable by the United States. *See* DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3 ("Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent (citation omitted).")

themselves from the civilian population.[124] However, in more difficult situations, intelligence may confirm membership.[125] Confirmation methods may include human sources, communications intercepts, captured documents, interrogations, as well as a myriad of other available tools.[126] If it is not possible to make such a determination than that person "shall be considered to be a civilian" and afforded the appropriate protections.[127]

III.
WHAT OAG MEMBERSHIP DETERMINATION APPROACH BEST WORKS ON THE CONTEMPORARY NIAC BATTLEFIELD

This section is not intended to re-hash the debates that immediately followed the 2009 release of the ICRC's *Interpretive Guidance*.[128] Instead, the following analysis is offered to illustrate which of the above described approaches best addresses the realities of a contemporary NIAC. In doing so, the hope is to provide clarity as to where the line lies between a civilian and a member of an OAG, therefore decreasing mistakes as to an individual's battlefield status. Again, applying facts from the current conflicts involving ISIS is illustrative.

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[124] *See generally* Simon Tomlinson, *From the 'Afghani robe' to the suicide bomber's all-black uniform, how ISIS differentiates between ranks and various outfits*, DAILYMAIL.COM (Sept. 29, 2015, 10:14 AM), http://www.dailymail.co.uk/news/article-3253113/From-Afghani-robe-suicide-bomber-s-black-uniform-ISIS-differentiates-ranks-various-outfits.html (explaining how ISIS has corresponding uniforms for each of its units and describing the various outfits). These groups are often in a command structure, have a "fixed distinctive sign recognizable at a distance," and carry their arms openly. In an international armed conflict these are all indications of a militia which, if belonging to a Party to the conflict, have met three of the four criteria to be considered combatants. *See* GC III, *supra* note 12, at art. 4(A)(2). However, rarely, if ever, do these groups comply with the four criteria which is to "conduct their operations in accordance with the laws and customs of war." *Id*. Regardless, these groups show many characteristics of a State's regular armed forces. *See* Schmitt, *supra* note 6, at 132 ("For example, the Red Army, Hamas, Hezbollah, FARC, Tamil Tigers and Kosovo Liberation Army were often distinguishable from the civilian population and operated in a manner not unlike the regular armed forces.")

[125] *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3–4; REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE, *supra* note 70, at 20; Watkin, *supra* note 86, at 692.

[126] *See, e.g.*, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE, *supra* note 700, at 20 ("the United States considers all available information about a potential target's current and historical activities to inform an assessment of whether the individual is a lawful target"); Schmitt, *supra* note 6, at 132.

[127] AP I, *supra* note 7, at art. 50(1). The rule is generally considered customary in both an IAC and NIAC. *See* Schmitt, *supra* note 6, at 133 (*citing* 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 23-24 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005.)) However, the United States rejects the Additional Protocol definition of "combatant" as it is viewed as relaxing "the requirements for obtaining the privilege of combatant status" thus undercutting the principle of distinction. DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 4.6.1.2, 4.8.1.4.

[128] *See generally* Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum,* 42 N.Y.U. J. INT'L L. & POL. 637, 637–640 (2010) (introducing a number of articles written by prominent LOAC and military experts that are critical of the *Interpretive Guidance*).

A. The CCF and the Danger of Good Intentions

The CCF criteria, which sets "a high bar for membership," appears "to afford the civilian population enhanced protection from mistaken attacks" by narrowly interpreting who is an OAG member.[129] This restrictive interpretation would thus seem to result in additional protections for civilians by severely limiting those who have met membership criteria. However, in fact, the CCF approach potentially puts civilians at greater risk. By contrasting those who serve in combat functions against others closely aligned with the OAG, the CCF criteria creates a category of "members of an organized armed group who do not directly participate in hostilities."[130] These individuals, in effect, "allow the entire civilian population to become conflated with the enemy, and exposes all civilians to greater risk."[131]

A short discussion on the evolution of the definition of "protracted armed violence" illustrates the danger of a narrow view on who qualifies as an OAG member. In the *Haradinaj* case the ICTY found that "protracted armed violence," as used in *Tadić*, was "interpreted in practice… as referring more to the intensity of the armed violence than to its duration."[132] This interpretation supported an earlier finding that the brief duration of an attack did not preclude a conflict from being characterized as non-international.[133] Professor Peter Margulies notes that the ICTY referring "generally to the intensity of the violence, not its timing per se" was a pragmatic decision to avoid creating perverse incentives.[134] Otherwise, if "violent non-State actors could strike first and then claim that the conflict was not yet a protracted one" States would be precluded "from utilizing the full range of responses permissible under LOAC" limited instead "to the far narrower repertoire of force permissible under a law enforcement paradigm."[135] Thus, to avoid encouraging this bad behavior, the ICTY adopted a broad interpretation of "protracted armed violence."

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[129] *See* Schmitt, *supra* note 6, at 132.

[130] VanLandingham, *supra* note 722, at 126.

> In other words, the ICRC's position is that instead of analogizing to the entire composition of a state's military, which includes members who rarely, if ever, fire weapons (such as legal advisors and public affairs officers), its 'continuous combat function' test for belligerent membership in a non-state armed group focuses exclusively on those who engage in either actual combat or in sufficiently hostile activity.

Id.

[131] *Id*. at 131–32.

[132] *See* Prosecutor v. Haradinaj, *supra* note 33, at ¶ 49.

[133] *See* Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R.,Report No. 55/97, ¶ 152 (1997).

[134] Margulies, *supra* note 23, at 65.

[135] *Id*.

Similarly, a narrow notion of what makes an individual a targetable member of an OAG creates perverse incentives. By granting "protected civilian status to persons who are an integral part of the combat effectiveness of an OAG,"[136] individuals are encouraged to straddle the line between civilian and non-civilian. What is the status of an ISIS fighter who transitions for a period of time into a cook?[137] It is unclear when this individual ceases their combat function and assumes their non-combat function. Of course, if only members of an OAG who perform a CCF are targeted, much of this confusion may disappear. However, this restrictive approach ignores the organizational aspect of an OAG and the inherent agency relationship of these groups with their members.[138]

For example, the nature of ISIS is that the entire organization is a non-State "organized" and "armed" group.[139] While individuals may join ISIS for any number of reasons,[140] when joining a group whose objectives are to use any level of violence to effectuate their vision, those individuals demonstrate intent to use violent means to assist the group in meeting its objectives.[141] ISIS membership thus evidences what VanLandingham defines as an "inherent agency relationship of command [that] demonstrates a submission of self to the central, overarching, violent purpose of the group."[142] In other words, even those ISIS members not directly involved in combat remain part of the OAG.[143] Requiring an application of the CCF criteria to every individual ISIS member thus ignores the reality that these individuals are fighting under the command structure of a cohesive group.

Finally, the CCF approach creates an inequity between ISIS members and the State's armed forces by providing protections for the former that are not available to the latter.[144] Professor Schmitt notes that, in application, a direct attack

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[136] Watkin, *supra* note 86, at 675.

[137] For a similar example, see generally *id*. at 676.

[138] *See, e.g*., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.1 ("the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group."); Gherbi v. Obama, 609 F. Supp. 2d 43, 69 (D.D.C.) (stating "many members of the armed forces who, under different circumstances, would be 'fighters' may be assigned to non-combat roles at the time of their apprehension" and that "[t]hese individuals are no less a part of the military command structure of the enemy, and may assume (or resume) a combat role at any time because of their integration into that structure."). *See also* VanLandingham, *supra* note 72, at 126. Again, ISIS is a helpful example as that group ensures all members receive military training as they are all expected to be fighters. *See supra* text accompanying notes 60–64.

[139] *See supra* text accompanying notes 44–64.

[140] *See* Patrick Tucker, *Why Join ISIS? How Fighters Respond When You Ask Them: A Study Finds that Motivations Vary Widely*, THE ATLANTIC (Dec. 9, 2015), https://www.theatlantic.com/international /archive/2015/12/why-people-join-isis/419685/ (discussing a study conducted on a non-random sample of ISIS fighters that found that some members join ISIS for status, some for identity or revenge, and some for the thrill of it, among other motivations).

[141] VanLandingham, *supra* note 72, at 108.

[142] *Id*.

[143] *See, e.g*., *supra* text accompanying notes 44–64.

[144] *See* Watkin, *supra* note 866, at 693 ("The Interpretive Guidance also adopts a position which clearly disadvantages States in relation to organized armed groups against which they are engaged in armed

on a member "of an organized armed group without a continuous combat function is prohibited (indeed, such an attack would be a war crime since the individual qualifies as a civilian), but a member of the State's armed forces who performs no combat-related duties may be attacked at any time."[145] The ICRC comments on a similar inequity in an international armed conflict (IAC) are analogous:

it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war. Therefore, even under the terms of the Hague Regulations and the Geneva Conventions, all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.[146]

Likewise, it makes little sense for an ISIS member to receive protections that are not afforded to the military members of, say the Iraqi or U.S. military, who are not serving in a combat function during a NIAC.

Admittedly, this imbalance is not unique. In a NIAC, a State's armed forces will have a form of combatant immunity while the members of an OAG will not.[147] The United States expressly notes that "the non-State status of the armed group would not render inapplicable the privileges and immunities afforded lawful combatants and other State officials."[148] This difference is a result of the State being a sovereign while a non-State armed group, obviously, is not. [149] The inequity created by the CCF approach, though unfair to a State's armed forces, is therefore not without precedent. However, in contrast to the combatant immunity imbalance, which only adversely affects conflict participants, the CCF approach dangerously blurs the already murky line between civilians and fighters in a NIAC.[150] ,Both civilians and State armed forces are therefore disadvantaged by the narrow interpretation of OAG membership promoted by the CCF approach.

conflict.").

[145] Schmitt, *supra* note 6, at 132 (discussing how this approach skews the balance between military necessity and humanitarian considerations that undergirds all of LOAC.).

[146] ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 22. Although this interpretation represents the prevailing opinion of ICRC experts some concerns were expressed that this approach could be misunderstood as creating a category of persons protected neither by GC III nor by GC IV *Id*. at 22 fn 17.

[147] *See, e.g*., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1 ("persons belonging to non-State armed groups lack any legal privilege or immunity from prosecution by a State that is engaged in hostilities against that group"); UK MANUAL, *supra* note 73, at ¶ 15.6.3 (discussing consequences for a captured member of a dissident fighting force versus a member of the State's armed forces).

[148] DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1.

[149] *Id*. at ¶ 17.4.1 ("the principle of the sovereign equality of States is not applicable in armed conflicts between a State and a non-State armed group."). *See also* Schmitt, *supra* note 6, at 133 (noting "the organized armed group lacks any domestic or international legal basis for participation in the conflict.").

[150] *See, e.g*., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.5.1.1. (highlighting the difficulty in

Applying the CCF approach to ISIS thus has a number of dangerous consequences. In particular, it diminishes the protections for civilians and promotes inequality between ISIS's members and State armed forces. While the CCF concept was clearly developed with good intentions to avoid interpretations of OAG membership by "abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse,"[151] in practice it fails to safeguard civilians.[152] As a result, it becomes apparent that a broader approach to determining OAG membership is necessary.

B. The Need for Targeting Flexibility

The conduct-link-intent test recognizes, and attempts to address, the problems resulting from the CCF approach to determining OAG membership. Unlike the CCF methodology, when applied to ISIS, this test would easily find that membership alone demonstrates intent to support the group's violent objectives. Both the first and second factors—tests of eligible conduct and associative links to the OAG—are theoretically possible to analyze by those conducting targeting activities against ISIS and could be described in appropriate ROE. Further, satisfying the third criteria—requiring an express finding of an individual's specific intent—is arguably already part of ISIS's strategy. The group often claims or endorses attacks by its "soldiers" "whether or not the individuals in question have been publicly shown to have a demonstrable operational link to, or history with, the organization."[153]

However, this novel approach presents two irreconcilable problems when applied on the modern battlefield. First, creating a criminal law statute-like list of qualifying conduct for OAG membership is inflexible and legalistic. Professor

identifying OAG members during a NIAC); Watkin, *supra* note 86, at 667 (noting that "it is difficult to see how allowing those providing direct support within an organized armed group to be protected by civilian status will actually operate to limit the conflict.").

[151] *See e.g.*, ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 33 (reasoning that establishing a continuous combat function is necessary due to the difficulty of distinguishing civilians in a NIAC); Schmitt, *supra* note 6, at 132 (noting that the CCF approach is theoretically justified).

[152] *See e.g.*, Watkin, *supra* note 86, at 675 ("A significant danger is presented to uninvolved civilians by an interpretation that would grant protected civilian status to persons who are an integral part of the combat effectiveness of an organized armed group when their regular force counterparts performing exactly the same function can be targeted."); VanLandingham, *supra* note 72, at 131–32. *See generally* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 1 (2004).

> Some people, no doubt animated by the noblest humanitarian impulses, would like to see zero-casualty warfare. However, this is an impossible dream. War is not a chess game. Almost by definition, it entails human losses, suffering and pain. As long as it is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities.

Id.

[153] Blanchard & Humud, *supra* note 1, at 7.

VanLandingham pre-emptively addresses this critique and argues that such "perceived loss of flexibility is …a needed phenomenon to ensure appropriate breadth of membership."[154] Further, she notes that "surely no decision-maker today, when approving the addition of a new name to a targeting list based on the person's actions in relation to a particular group," would refute that the "individual in question does not possess a specific intent to further his terrorist group's violent means and ends by carrying out or giving group orders regarding the same."[155]

Yet, in the effort to expand OAG membership by arguing for an express list, targeting decisions are delayed. For example, ISIS consistently changes their routine behavior or conduct specifically to avoid being targeted by an opposing State actor, and issues guidance to its members on how to do so.[156] This behavior would undoubtedly require continual editing of both the categories of eligible conduct as well as any resultant individual targeting lists. These lists are a policy construct, not required by the LOAC, and would act as a limiting factor in the best of circumstances. Further, with ISIS at its peak in 2015 having tens of thousands of fighters,[157] and thousands more coming every month,[158] an element-based approach to targeting, in practical application, is unwieldy. While much of the territory ISIS held is now liberated, and its membership drastically decreased,[159] using an element-based approach to determining OAG membership remains impractical in both the contemporary[160] and future security environment.

The second problem with the conduct-link-intent test is found in the third criteria. Though not nearly as inequitable as the results from the CCF methodology, requiring a finding that an individual has the specific intent to further a group's violent ends provides additional protections for OAG members in comparison to a State's armed forces. Again, a member of a State armed force is targetable by virtue of their status. In comparison, the conduct-link-intent test requires an additional analytical step before targeting of an OAG member. As a

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[154] VanLandingham, *supra* note 72, at 138.

[155] *Id*.

[156] *See* Keligh Baker, *Shave your beard, encrypt your phones and wear western clothes: ISIS issues booklet advising would-be terrorists how to avoid being spotted by Western security agencies*, DAILYMAIL.COM (Jan. 13, 2016, 6:24 PM), *http://www.dailymail.co.uk/news/article-3398424/ISIS-issues-booklet-advising-terrorists-avoid-spotted.html*.

[157] *See* Daveed Gartenstein-Ross, *How Many Fighters Does the Islamic State Really Have?*, WAR ON THE ROCKS (Feb. 9, 2015), https://warontherocks.com/2015/02/how-many-fighters-does-the-islamic-state-really-have/ (estimating the number of ISIS fighters as being closer to 100,000 than 30,000).

[158] *See Flow of foreign ISIS recruits much slower now, U.S. says*, CBS NEWS (Apr. 26, 2016, 1:02 PM), https://www.cbsnews.com/news/less-foreign-isis-recruits/ (reporting that approximately 1,500 foreign fighters came to Iraq and Syria a month in 2015 with the number decreasing to 200 a month in 2016).

[159] *See* Saphora Smith & Michele Neubert, *ISIS Will Remain A Threat in 2018, Experts Warn*, NBC News (Dec. 27, 2017, 3:17 AM), https://www.nbcnews.com/storyline/isis-terror/isis-will-remain-threat-2018-experts-warn-n828146.

[160] *Id*. (noting that ISIS is "far from defeated.").

result, an OAG member is treated more favorably than a member of a State's armed forces through the requirement for establishing specific intent.

C. If You Play the Game . . . Live With the Consequences

In comparison to the CCF approach, in our opinion the conduct-link-intent test better comports with the realities of the modern battlefield. Yet, as noted above, we consider this approach unnecessarily bureaucratic. What becomes apparent is that the broad approach to OAG membership allowed for by the conduct-link-intent test is appropriate as it is "unrealistic to expect government troops not to take measures against rebels simply because they are not involved in an attack."[161] However, what is also obvious is that this formalistic test is burdensome for commanders to implement. The best approach to determining OAG membership is therefore one that has the broad applicability of the conduct-link-intent test, but is also more operationally practical.

Simply treating organized armed groups and a State's armed forces the same accomplishes these goals.[162] First, this approach resolves the inequity and under-inclusivity issues presented by the CCF methodology and, in doing so, "not only reinforces the distinction principle but also recognizes that true civilian participation has to be limited in time and frequency so as not to undermine the protection associated with civilian status."[163] Second, it avoids mechanical, and consequently, restrictive tests for OAG membership. With the rise of powerful non-State actors, like ISIS, this straightforward and clear approach addresses the challenges of fighting in a contemporary NIAC by empowering commanders while also protecting civilians.

ISIS—organized, well-financed, and heavily armed—clearly acts and fights like a traditional military organization.[164] Again, not all that are affiliated with ISIS, or sympathetic to their cause, are part of the OAG. But those who are filling traditional military roles in ISIS should be subject to "attack so long as they remain active members of the group, regardless of their function."[165] Attaching the consequences of OAG membership to some of those in ISIS, and not others, ignores the realities of the modern battlefield.

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[161] LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 59 (2002).

[162] Schmitt, *supra* note 6, at 133.

[163] Watkin, *supra* note 866, at 693.

[164] *See supra* text accompanying notes 44–64.

[165] Schmitt, *supra* note 6, at 133. *See also* VanLandingham, *supra* note 72, at 109 ("armed group membership, typically in a state military, produces a presumption of hostility, thereby making one a lawful target for elimination by opposing forces, even if one is not actually fighting. But this LOAC targeting axiom is not limited to state militaries. It extends to non-state armed groups as well . . . .")

CONCLUSION

So, again, is the brother of the ISIS Commander described in the opening hypothetical vignette targetable? Yes. He has affirmatively proclaimed his loyalty to the group, and his actions as the "public face" of ISIS are arguably no different than those of a Public Affairs Officer serving in a State's armed forces.[166] Clearly, he is under command serving in a traditional military role making him a member of the group. Consequently, he is subject to the adverse consequences of his status, including being a lawful target.

One of the greatest attributes of the LOAC is its "emphasis on being applied equally to all participants."[167] Focusing on the membership structure of an OAG reinforces this aspect of the law. Doing otherwise "creates a bias against State armed forces, making its members much easier to target while imposing on them more exacting criteria when targeting opponents."[168] Additionally, protection of civilians is "one of the main goals of international humanitarian law."[169] Emphasizing function over membership also dangerously blurs the line between civilians and fighters, undercutting this principle. Both of these are untenable results. Of course, any approach to determining membership must also be practical. An expansive understanding of who qualifies as a member of an OAG resolves these outstanding concerns and is necessary in the current conflict environment.

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[166] *See* U.S. Army, *Careers & Jobs Public Affairs Officer (46A)*, GoArmy.com, https://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/arts-and-media/public-affairs-officer.html (last visited Mar. 13, 2018) (describing some of the responsibilities of a Public Affairs Officer as "gain[ing] the support of the American public," "respond to media queries," "develop and execute communication plans," as well as other internal and external communication activities.)

[167] Watkin, *supra* note 86, at 695.

[168] *Id*. at 688, 694 ("In many circumstances, waiting for an act to be carried out may leave security forces with insufficient time to react, thereby actually increasing the risk to civilians . . . .")

[169] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 4 ("The protection of civilians is one of the main goals of international humanitarian law.")

REVISITING BELLIGERENT REPRISALS IN THE AGE OF CYBER?

DAVID WALLACE, SHANE REEVES & TRENT POWELL*

I. INTRODUCTION

With respect to current and future warfare, it is virtually impossible to exaggerate the significance of information technology. Today's armed forces use a host of weapons, munitions, and systems that function through the operation of highly sophisticated information systems.[1] For instance, the command and control of operational forces are increasingly coordinated and directed through computer-based networks that allow for real-time sharing of information and common pictures of the battlespace.[2] Moreover, logistics, at all levels of warfare, are entirely at the mercy of information systems. And, of

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1. COMM. ON OFFENSIVE INFO. WARFARE, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., TECHNOLOGY, POLICY, LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBERATTACK CAPABILITIES 9 (William A. Owens et al. eds., 2009).

2. *Id.*

course, in recent years the development of cutting edge, high-tech cyber weapons allow for an attack against an adversary in both virtual and real domains.[3] While this "New Age of Cyber" may seem to raise questions about the legal framework applicable to the conduct of such operations, the traditional normative legal structure for warfare, the *jus ad bellum*[4] and the *jus in bello*,[5] still regulate the actions of belligerents engaged in cyber hostilities.

This article deals with legal issues in the cyber warfare context related to the *jus in bello*, which is also referred to as international humanitarian law (IHL). The international legal community acknowledges and widely accepts that IHL applies to cyber operations undertaken in the context of an armed conflict.[6] The challenge, of course, is not that IHL applies, but rather how it specifically applies to cyber operations. Unquestionably, digital means and methods of warfare executed in both the virtual and real world pose novel issues.[7] In this regard, it is necessary to consider and examine how pre-cyber IHL laws, as well as the values that formed the foundation for those laws,[8] translate into regulation of armed conflicts in the New Age of Cyber. Although there are many issues and topics that are worthy of such a re-examination, few are as controversial as the notion of belligerent reprisals under IHL.

As will be discussed in detail below, a belligerent reprisal under IHL is a method of warfare that is otherwise unlawful but, in exceptional cases, is lawful when used as an enforcement mechanism in response to unlawful enemy acts.[9] As noted by Professor William Schabas, "[r]eprisal amounts to an argument that crimes are justifiable as a proportionate response to criminal acts committed by the other party. In a sense, it is the most ancient means of

3. *Id.* at 10.

4. *Jus ad bellum* addresses when a State may use force under international law. *What are* Jus ad bellum *and* Jus in bello*?* INT'L COMM. RED CROSS, https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0 [https://perma.cc/7AP3-7D8M] (last visited Nov. 7, 2017). Some legal commentators have observed that the United Nations Charter creates a legal regime more accurately characterized as *jus contra bellum* because it is fundamentally devised to prevent the use of force. *See* ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 13 (2008).

5. The *jus in bello* regulates the conduct of parties engaged in an armed conflict. *See What are Jus ad bellum and Jus in bello?*, *supra* note 4.

6. *See* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 3 (Michael N. Schmitt ed., 2017) [hereinafter TALLINN MANUAL 2.0].

7. *See, e.g.*, David Wallace & Shane R. Reeves, *The Law of Armed Conflict's "Wicked" Problem:* Levée en Masse *in Cyber Warfare*, 89 INT'L L. STUD. 646, 666–67 (2013) (discussing the difficulty of applying the traditional IHL interpretation of a *levée en masse* in the cyber domain).

8. HEATHER HARRISON DINNISS, CYBER WARFARE AND THE LAWS OF WAR 239–40 (James Crawford & John S. Bell eds., 2012).

9. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 513 (2005).

enforcement of the law."[10] Under this assertion, then, a "proportionate response" by an aggrieved party serves as a *jus in bello* enforcement of the law. And, because the enforcement of international law and IHL specifically, is the obvious shortcoming with international law, belligerent reprisals may provide a timely mechanism to redress enemy violations of IHL *during* the armed conflict itself.[11]

The use of belligerent reprisal has evolved over time "from a fundamental and nearly universally recognized aspect of the international law" regulating warfare "into a complex and [highly] contentious sanction."[12] Arguably, in modern IHL, reprisals have been largely—but not entirely—prohibited by customary and codified law. The 1977 Additional Protocols (AP) I[13] is unquestionably the international community's strongest and most comprehensive condemnation of belligerent reprisals as a method of warfare. Commenting on the efforts that led to AP I, Konstantin Obradovic, who took part in the Diplomatic Conference of 1974–1977 as a member of the Yugoslav delegation, made the following observations about belligerent reprisals:

> With its well-nigh absolute prohibition of reprisals against all categories of protected persons who fall into enemy hands, Protocol I goes further down the trail blazed in 1949. The underlying considerations are both humanitarian and rational. The history of war—and the Second World War in particular—clearly shows that, apart from being barbarous, unfair and inequitable as they invariably victimize the innocent, reprisals achieve nothing. Even if they are 'justified' as a response to enemy violation of the law, they never result in the triumph of the rule of law. Moreover, all the mass executions of the last world war, all the Oradour-sur-Glane of this world have not been enough to dampen people's determination to resist. Reprisals therefore appear pointless.[14]

10. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 693 (2d ed. 2016) (quoting WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 496 (2010)).

11. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 14 (2d ed. 2004). Importantly, reprisals are separate and distinct from acts of retaliation and revenge, which remain unlawful under IHL. GEOFFREY BEST, HUMANITY IN WARFARE 19 (1980).

12. Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 382 (2009).

13. Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

14. Konstantin Obradovic, *The Prohibition of Reprisals in Protocol I: Greater Protection for War Victims*, INT'L REV. RED CROSS, Oct. 31, 1997, at 524, https://www.icrc.org/eng/resources/documents/article/other/57jnv7.htm [https://perma.cc/FY6J-PF9P].

While Obradovic expressed this view at the earliest period in the development of cyber capabilities, the current and future state of reprisals in the cyber realm require a review of more recent legal analysis. In that regard, a useful starting point for legal practitioners, policymakers, non-governmental organizations,[15] cyber security professionals, military commanders, and scholars is the 2017 *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (*Tallinn Manual 2.0*).[16] This resource, which is best understood as the collective opinions of a group of international experts, helpfully addresses the question of belligerent reprisals under IHL in armed conflict as well as many other vital issues spanning public international law in its nearly 600 pages of highly informative text.[17] Impressively, *Tallinn Manual 2.0* has 154 rules including two rules on reprisals: Rule 108, *Belligerent Reprisals*, and Rule 109, *Reprisals under Additional Protocol I*.[18] In addition to the actual rules contained in *Tallinn Manual 2.0*, the manual provides detailed commentary, offering some tremendously valuable insights into the normative context of the rules as well as practical implications for their application.[19] Finally, and most importantly, it is important to note that the experts who wrote *Tallinn Manual 2.0* were limiting themselves to an objective restatement of the *lex lata* and scrupulously avoided including statements reflecting the *lex ferenda*.[20]

This article critically explores the legal landscape of belligerent reprisals and considers whether the use of these measures is a viable enforcement mechanism under IHL in the context of cyber operations. Because of the layered approach to this inquiry, the article has seven parts that build upon each other. Part II of the article provides an overview of the history of belligerent reprisals under IHL. Part III discusses belligerent reprisals in the context of today's understanding of IHL. Part IV further explores cyber operations and belligerent reprisals: the *lex lata*. Countermeasures (at one time known as peacetime reprisals) under the law of state responsibility forms the basis of Part V. Part VI provides an analytical framework for considering how cyber means

15. An example of one such non-governmental organization is the ICRC. *The ICRC's Mandate and Mission*, INT'L COMM. RED CROSS, https://www.icrc.org/en/mandate-and-mission [https://perma.cc/XQM3-32BJ] (last visited Dec. 6, 2017). The ICRC is an "independent, neutral organization ensuring humanitarian protection and assistance for victims of armed conflict and other situations of violence. It takes action in response to emergencies and at the same time promotes respect for international humanitarian law and its implementation in national law." *Id.*

16. TALLINN MANUAL 2.0, *supra* note 6.

17. *See id.*

18. *Id.* at 460–63.

19. *Id.* at 3–5.

20. *Id.* at 3.

and methods could effectively facilitate an expanded use of belligerent reprisals for some States under some conditions. Additionally, this section serves as the lens for re-examining the propriety and practicality of breathing life back into this controversial enforcement mechanism under IHL. Lastly, Part VII summarizes and concludes the article.

II. THE HISTORY OF BELLIGERENT REPRISALS IN IHL

Reprisals have been the traditional method of enforcement of IHL since at least the late nineteenth and early twentieth centuries.[21] This time period saw a number of advances in IHL including the adoption of the first Geneva Convention; the St. Petersburg's Declaration, which renounced the use of exploding bullets projectiles under 400 grams; and the drafting and implementation of the so-called Lieber Code[22] during the American Civil War.[23] The 1863 Lieber Code addressed the concept of reprisals throughout its 157 articles.[24] Notably, Francis Lieber, the Code's main architect and drafter, described "retaliation"—which was used synonymously with the term "reprisals"—as the sternest feature of war.[25] Article 28 of the Code states:

> Art. 28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution. Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.[26]

During the American Civil War reprisals were a lawful method of enforcing the laws and customs of war with both sides making abundant use of the method.[27] The Lieber Code even permitted retaliation against prisoners of war

21. HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 514.

22. SOLIS, *supra* note 10, at 44–45. In 1862, the War Department appointed a board of officers, including Francis Lieber, to propose a "Code of Regulations for the government of armies in the field." *Id*. The military officers on the board worked primarily on a revision to the Articles of War. *Id*. Francis Lieber, a professor at Columbia, wrote the Code that bears his name. *Id*. In 1863, President Lincoln directed that Lieber's 157-article Code be incorporated into the Union Army's General Orders as "General Order 100." *Id*.

23. *Id*. at 43.

24. *See* General Orders No. 100: Instructions for the Government Armies of the United States in the Field (Apr. 24, 1863) [hereinafter *Lieber Code*].

25. *Id*. art.27.

26. *Id*. art.28.

27. Patryk I. Labuda, *The Lieber Code, Retaliation and the Origins of International Criminal*

("[a]ll prisoners of war are liable to the infliction of retaliatory measures.").[28] In only the instance of later capture and execution of deserters joining an enemy army did the Lieber Code forbid retaliation.[29]

Despite the Lieber Code's statement on the lawfulness of reprisals, other legal bodies sought to limit the use of reprisals. The Brussels Conference of 1874 and the Institute of International Law meeting at Oxford in 1880 were two such instances.[30] The Institute's Manual of the Laws of War on Land stated that reprisals "must conform in all cases to the laws of humanity and morality."[31] However, the Hague Conventions at the turn of the twentieth century did not prohibit the use of belligerent reprisals apart from providing some rudimentary protections for prisoners of war.[32] In fact, during early armed conflicts of the twentieth century, air attacks were a legitimate means and method of reprisal against a defaulting enemy to bring it back to its senses.[33] Commenting on this phenomenon, Air Commodore William Boothby stated:

> The civilian population and the popular press would demand retaliatory or reprisal action against the enemy in response to air raids that occasioned civilian loss. Air raids carried out as reprisal action could be portrayed by the adverse party as simple illegal acts ignoring, of course, the alleged prior illegality cited as justifying the reprisal in the first place.[34]

Reprisals in World War I caused much hardship for the victims of the conflict and, in particular, prisoners of war. As a result, the idea of prohibiting all reprisals against prisoners of war gained traction, eventually finding official endorsement in special agreements concluded between parties to the conflict

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Law, *in* 3 HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 299, 304, 306 (Morten Bergsmo et al. eds., 2015).

28. *Lieber Code*, *supra* note 24, art.59.

29. *Id.* art.48. This provision specifically states:

> Deserters from the American Army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture, or being delivered up to the American Army; and if a deserter from the enemy, having taken service in the Army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

Id.

30. *See* Project of an International Declaration Concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, https://ihl-databases.icrc.org/ihl/INTRO/135 [https://perma.cc/Q5VC-QGC8]; The Laws of War on Land, Oxford, Sept. 9, 1880, https://ihl-databases.icrc.org/ihl/INTRO/140?OpenDocument [https://perma.cc/M2FJ-AG3G].

31. The Laws of War on Land, *supra* note 30, art.86.

32. INGRID DETTER, THE LAW OF WAR 301 (2d ed. 2000).

33. WILLIAM H. BOOTHBY, THE LAW OF TARGETING 512 (2012).

34. *Id.* at 512–13.

towards the end of the war.[35] Following World War I, the 1929 Geneva Convention on Prisoners of War began the process of gradually excluding groups of persons and civilians' property from the scope of reprisals,[36] including prisoners of war.[37] Commenting on this particular category, Michael Walzer, in his classic book *Just and Unjust Wars*, stated, "prisoners were singled out because of the implied contract by surrender, in which they are promised life and benevolent quarantine. Killing them would be a breach of faith as well as a violation of the positive laws of war."[38]

Despite these efforts, World War II saw the regular use of reprisals by the parties to the conflict.[39] There were a number of well-known incidents involving reprisals including one involving the Germans and the French resistance fighters in 1944.[40] After the Normandy invasion, French resistance fighters organized into the French Forces on the Interior (FFI) and began operating openly and on a larger scale.[41] They wore insignia visible at a distance, carried their arms openly, and abided by the laws and customs of war, thereby qualifying them as lawful combatants.[42] However, the Germans did not recognize the FFI as lawful combatants.[43] Rather, the Germans viewed them as criminals and summarily executed a number of FFI fighters upon capture.[44]

By the late summer of 1944, "many German soldiers had surrendered to the FFI."[45] When the FFI learned the Germans executed eighty FFI fighters and planned to execute more, "the FFI announced that it would carry out eighty reprisal executions."[46] The International Committee of the Red Cross (ICRC)

35. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=8F88DE5EE5DEA183C12563CD0042207D [https://perma.cc/P7T2-57TR].

36. THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 234 (Dieter Fleck ed., 3d ed. 2013).

37. Convention Relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, Art. 2, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/305-430003?OpenDocument [https://perma.cc/244B-DFX9].

38. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 209 (4th ed. 2006).

39. DETTER, *supra* note 32, at 301.

40. Kenneth Anderson, *Reprisal Killings*, *in* CRIMES OF WAR 2.0: WHAT THE PUBLIC SHOULD KNOW 358, 358–59 (Roy Gutman, David Rieff & Anthony Dworkin eds., 2007).

41. *Id*. at 358.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

intervened and sought to postpone the executions pending an agreement whereby the Germans would recognize the FFI as lawful combatants.[47] But, after six days in which the Germans did not respond, the FFI executed eighty German prisoners.[48] Subsequently, the historical accounts indicate the Germans abandoned any plans to execute additional FFI prisoners.[49]

In addition to the actual use of reprisals by parties in World War II, there was also the threatened use of belligerent reprisals. For example, President Franklin Roosevelt threatened the use of retaliatory attacks upon becoming aware that Axis forces sought to use poison gas.[50] The regular use, or threat of use, of belligerent reprisals in World War II thus became an important topic in the post-war tribunals. Commenting about the scope of belligerent reprisals, the International Military Tribunal found that:

> The right of reprisals against civilians was restricted by rules laid down in the judgments of the Military Tribunal at Nuremberg. The Tribunal emphasised that reprisals must at least be limited geographically to one area, mainly as action against persons in one area could have little deterrent effect on people in other areas. If there was not such geographical connection a 'functional' link might be acceptable as limiting the right of reprisals: there had thus to be some connection between the reprisals and the civilians against whom action was taken. The Tribunal furthermore ruled out reprisals for which certain ethnic, religious or political groups had been selected.[51]

On August 12, 1949, a diplomatic conference in Geneva approved the text of four conventions to which more States have ratified than any other international agreements in the laws regulating armed conflict: the 1949

47. *Id.*

48. *Id.*

49. *Id.*

50. Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155, 171 (2001). President Roosevelt specifically stated:

> [T]here have been reports that one or more of the Axis powers were seriously contemplating use of poisonous or noxious gases or other inhumane devices of warfare. . . . We promise to any perpetrators of such crimes full and swift retaliation in kind. . . . Any use of gas by any Axis power, therefore, will immediately be followed by the fullest possible retaliation upon munition centers, seaports, and other military objectives throughout the whole extent of the territory of such Axis country.

Id. (alteration in original).

51. DETTER, *supra* note 32, at 301.

Geneva Conventions.[52] The Conventions were, in part, born out of the unprecedented brutality and violence of World War II.[53] As Ambassador George H. Aldrich commented:

> The history of development of this branch of international law is largely one of reaction to bad experience. After each major war, the survivors negotiate rules for the next war that they would, in retrospect, like to have seen in force during the last war. The 1929 and 1949 Geneva Conventions attest to that pattern.[54]

The four Conventions prohibited belligerent reprisals with respect to the specific classes of individuals covered by each agreement: wounded, sick, and shipwrecked; medical and religious personnel; prisoners of war; civilians in occupied territories; as well as certain objects such as medical facilities and supplies and private property of civilians in occupied territory.[55] Adding to

52. ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 195 (3d ed. 2000). To provide some background and context, the Geneva Conventions may be traced back to a well-to-do Swiss businessman, Henri Dunant, and the Battle of Solferino in 1859. *Solferino and the International Committee of the Red Cross*, INT'L COMM. RED CROSS, https://www.icrc.org/eng/resources/documents/feature/2010/solferino-feature-240609.htm [https://perma.cc/KC3E-SDEH] (last visited Jan. 3, 2018). The Battle of Solferino in Lombardy, not far from Milan and Verona, was fought between the forces of Austria and a French-Piedmontese alliance. *Id*. The battle was one of the bloodiest of the nineteenth century with thousands of dead and wounded on both sides. *Id*. The military practice of the time was to leave the wounded where they had fallen on the battlefield. *Id*. Dunant was there and witnessed the carnage and participated in the aftermath attempting to provide aid and comfort to survivors. *Id*. Dunant could not forget what he saw and experienced. *Id*. He published in 1862 a small book, *A Memory of Solferino*. *Id*. In the book, Dunant vividly and graphically described the battle and the suffering of the wounded and injured soldiers. *Id*. Additionally, in the book, Dunant called for the creation of relief societies in each country that would act as auxiliaries to the army medical services to facilitate the care for all wounded and sick, whichever side they were on. *Id*. This effort led eventually to the formation of the International Committee of the Red Cross. *Id*. Also, as part of Dunant's vision in *A Memory of Solferino*, he proposed that an international principle be created to serve as the basis for these societies. *Id*. Dunant's idea ultimately led to the Swiss government hosting an official diplomatic conference in August 1864, which resulted in the adoption of the first Geneva Convention. *Id*. In 1901, Dunant was awarded the first-ever Nobel Peace Prize for what was accurately described as the "supreme humanitarian achievement of the 19th century." *Id*.

53. *See* Phillip Spoerri, Dir. of Int'l Law, Int'l Comm. of the Red Cross, Address at Ceremony to Celebrate 60th Anniversary of the Geneva Conventions: The Geneva Conventions of 1949: Origins and Current Significance (Dec. 8, 2009), https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm [https://perma.cc/2QXP-FPQ8].

54. SOLIS, *supra* note 10, at 88.

55. THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 36, at 234, 334.

these prohibitions, the 1954 Hague Convention on the Protection of Cultural Property prohibited reprisals against objects protected under the convention.[56]

The 1977 AP I significantly enlarged the traditional prohibitions of reprisals under IHL adding several other categories of prohibited reprisal targets.[57] In addition to a general prohibition, AP I also specifically prohibits reprisals against the civilian population and objects; cultural property and places of worship; objects indispensable to the survival of the civilian populations; the natural environment; and works or installations containing dangerous forces.[58] However, the United States, as well as several other States, objected to these additional restrictions on reprisals as being counterproductive.[59]

Specifically, the United States argued AP I's greater prohibition on reprisals removed a significant tool for protecting civilians and war victims on all sides of a conflict.[60] For example, article 51 of the Protocol "prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy's own violations of the law and are intended to deter future violations."[61] Yet, historically, reprisals were the major sanction underlying the laws of war and ensured reciprocal compliance.[62] "If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind."[63] As a result, "[t]o formally renounce even the option of such attacks" would "remove a significant deterrent" for those intent on targeting unfriendly

56. *Id*. at 434; *see also* Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, 244–48.

57. TALLINN MANUAL 2.0, *supra* note 6, at 463.

58. *Id.*

59. GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 227 (2012). In fact, the United States's objections concerning reprisals was one of the reasons it did not ratify AP I. *See* SOLIS, *supra* note 10, at 128–38; *see also* Michael J. Matheson, Deputy Legal Adviser, U.S. Dep't of State, Remarks at American Red Cross-Washington College of Law Conference on International Humanitarian Law (Jan. 22, 1987), *in* 2 AM. U. J. INT'L L. & POL'Y 419, 426 (1987).

60. OFFICE OF THE GEN. COUNSEL, U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 18.18.3.4, at 1088–89 (2016) [hereinafter LAW OF WAR MANUAL].

61. *Id*. § 18.18.3.4, at 1089 n.221 (quoting Judge Abraham D. Sofaer, Legal Adviser, U.S. Dep't of State, Remarks at American Red Cross-Washington College of Law Conference on International Humanitarian Law (Jan. 22, 1987), *in* 2 AM. U. J. INT'L L. & POL'Y 460, 469 (1987)).

62. *See* Watts, *supra* note 12, at 382.

63. LAW OF WAR MANUAL, *supra* note 60, § 18.18.3.4, at 1089 n.221 (quoting Sofaer, *supra* note 61, at 469).

civilian populations.[64] Today, the United States continues to hold, as an option, the use of reprisals in limited circumstances.[65]

III. BELLIGERENT REPRISALS TODAY IN IHL

As is evident from the above, the historical development of reprisals under IHL established a gradual trend to outlaw the practice.[66] There are, however, several important considerations with respect to reprisals under the present IHL framework. First, as a threshold matter, to the degree that a reprisal would be lawful today, they are subject to stringent controls.[67] Second, the concept of belligerent reprisals exists in the context of international armed conflicts and not in non-international armed conflicts.[68] And third, under customary IHL, there are six general conditions precedent to lawfully employing belligerent reprisals.[69]

The first condition relates to the purpose of reprisals.[70] As mentioned previously, the use of reprisals is only in reaction to a prior serious violation of IHL and done for the purpose of inducing the enemy to comply with IHL.[71] In many respects, this is the *sine qua non* of reprisals, i.e., to induce a law-breaking State to abide by IHL in the future.[72] Of course, in practice, determining motive for particular actions may be problematic. That is, it may be very difficult to discern whether there is a legitimate purpose for an action, i.e., inducing an adversary to comply with the law, or whether an act is actually retaliation, retribution, or revenge.[73] Additionally, because of the underlying purpose of belligerent reprisals, anticipatory or counter reprisals are impermissible.[74]

The second condition is that the employment of belligerent reprisals is a matter of last resort, and there must be no other lawful measures available to induce the enemy to respect and comply with IHL.[75] Before using reprisals,

64. *Id.* (quoting Sofaer, *supra* note 61, at 469).

65. *See* CORN ET AL., *supra* note 59, at 227.

66. HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 513–14.

67. *Id.* at 513.

68. TALLINN MANUAL 2.0, *supra* note 6, at 464. The ICRC, in Rule 148 of its Customary International Law Study takes the position that parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 526.

69. HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 515–18; *see also* LAW OF WAR MANUAL, *supra* note 60, § 18.18.2.5, at 1086.

70. HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 515.

71. *Id.*

72. *Id.* at 515–16.

73. BEST, *supra* note 11, at 167.

74. HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 515.

75. *Id.* at 516.

States must first attempt to secure the enemy's compliance with IHL through certain means.[76] For example, actions such as "protests and demands, retorsion, or reasonable notice of the threat to use reprisals" are necessary before resorting to belligerent reprisals.[77] Notably, both international and domestic courts require meeting this condition prior to utilizing reprisals.[78]

The third condition is proportionality.[79] Proportionality has multiple meanings in international law. Generally, within the context of customary IHL, proportionality is understood to mean that an attack is prohibited if the incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, is "excessive in relation to the concrete and direct military advantage anticipated."[80] By contrast, in the context of belligerent reprisals, most State practices illustrate that the acts taken in reprisal be proportionate to the original violation, free from the balancing approach under the prevalent proportionality notion.[81]

In practice, proportionality may be hard to gauge in nature and scope, although it does not mean equivalence. Rather, it should be construed to mean the response should not be excessive.[82] Additionally, it is important to note that the proportionality requirement does not mean that the belligerent reprisal needs to be in kind.[83] For example, if State A bombs civilian objects in State B, State B is not limited to only bombing civilian objects in State A. In fact, there are many scenarios where there is not a direct counterpart to the original violation or the victim State may simply lack the technical expertise to respond in the same fashion.[84]

The fourth condition is somewhat straightforward and self-explanatory. Because reprisals are significant military and political acts that require careful and complex judgments, the law withholds authority to exact reprisals to the highest levels of government within a State.[85] As noted by one legal commentator about this unusual, but important condition:

> Because of the extremely complex legal and political assessment which must precede any reprisal, it is necessary

76. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 221 (2004).

77. LAW OF WAR MANUAL, *supra* note 60, § 18.18.2.2, at 1085.

78. HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 516.

79. *Id.* at 517.

80. LAW OF WAR MANUAL, *supra* note 60, § 2.4.1.2, at 61.

81. HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 518.

82. DINSTEIN, *supra* note 76, at 221.

83. *Id.*

84. *Id.*

85. HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 518.

> that the political leadership of a belligerent state decide on any possible use of reprisals. The exact legal nature of the adverse belligerent's actions may be extremely difficult to determine; even more importantly, a decision to use reprisals requires a genuine assessment of the political risks as well as the immediate dangers connected with the use of a reprisal.[86]

The fifth condition is intuitive and consistent with the overarching purpose of reprisals. Under this requirement, reprisal actions must immediately cease as soon as the enemy complies with IHL.[87] This condition is consistent with and highlights the nature of reprisals as a deterrent measure. Finally, the sixth condition prior to using reprisals is that in order to fulfil their purpose, dissuade an adversary from further unlawful conduct, and to promote adherence to IHL, States must announce the action and make it public.[88]

Beyond these six, strictly legal considerations, there are also several practical consequences before resorting to the use of belligerent reprisals. First, resorting to belligerent reprisals may ultimately divert valuable and scarce military resources.[89] Second, since belligerent reprisals are, by definition, violations of international norms, other States may not only disagree with the decision to use them, but also view their use as a violations of IHL and subject to sanction.[90] Third, it is very possible the use of reprisals may strengthen an adversary's morale and will to resist.[91] Fourth, many observers view reprisals as a "race to the bottom," leading to a vicious cycle of counter-reprisals.[92] Finally, like other serious violations of IHL, the use of belligerent reprisals may exacerbate tensions between the parties to the conflict making it more difficult for them to end the armed conflict and return to a peaceful state.[93] Given the legal framework as outlined above, coupled with a number of compelling practical considerations, belligerent reprisals are seemingly a waning IHL enforcement mechanism. Yet, the New Age of Cyber is challenging many seemingly settled areas of international law and therefore it is worth discussing the validity of belligerent reprisals during cyber operations.

86. THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 36, at 228.

87. HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 518.

88. LAW OF WAR MANUAL, *supra* note 60, § 18.18.2.5, at 1086.

89. *Id.* § 18.18.4, at 1090.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

IV. CYBER OPERATIONS AND BELLIGERENT REPRISALS: THE *LEX LATA*

As a starting point, when thinking about the *lex lata*, it is important to reiterate that the applicable IHL treaties were drafted before cyberspace and operations were a reality.[94] Likewise, there are many challenges associated with the emergence of customary IHL cyber-related norms with the most notable being the highly classified nature of cyber activities by States.[95] However, it is also important to note, as discussed above, it is widely accepted that IHL applies to cyber operations in the context of an armed conflict.[96] With that said, the *Tallinn Manual 2.0* Rules and Commentary provide a valuable resource and assist in identifying issues, gaps, and ambiguities in the law. But, when thinking about the *lex lata*, it is always important to be mindful of whether application of traditional rules of IHL make sense when applied in the cyber context.

This acknowledgment includes the possible use of belligerent reprisals with Rule 108 of *Tallinn Manual 2.0*, which provides basic parameters for use during cyber operations in an international armed conflict. The Rule notes that belligerent reprisals are expressly prohibited against "prisoners of war; interned civilians, civilians in occupied territory or otherwise in the hands of an adverse party to the conflict, and their property; those *hors de combat*; and medical and religious personnel, facilities, vehicles, and equipment."[97] In other circumstances, where international law does not prohibit use "belligerent reprisals are subject to stringent conditions."[98]

The Commentary to Rule 108 provides granularity into the experts' conclusions concerning belligerent reprisals. The experts state, unequivocally, that cyber reprisals are prohibited against the wounded, sick, or shipwrecked; medical personnel, units, establishments, or transports; chaplains; prisoners of war, or interned civilians and civilians in the hands of an adverse party who are protected by the Fourth Geneva Convention, or their property.[99] In effect, these prohibitions are customary international law that binds all States. However, the

94. DINNISS, *supra* note 8, at 239, 241.

95. TALLINN MANUAL 2.0, *supra* note 6, at 377.

96. *Id.* at 3. When one thinks of the use of cyber in the context of an armed conflict, it involves not only the employment of cyber capabilities to objectives in and through cyberspace, but also involves requirements such as weapons reviews to ensure that cyber means of warfare that are acquired or used complies with the law of armed conflict. *Id.* at 375; Michael N. Schmitt & Liis Vihul, *The Emergence of International Legal Norms for Cyberconflict*, *in* BINARY BULLETS: THE ETHICS OF CYBERWARFARE 34, 49 (Fritz Allhoff, Adam Henschke & Bradley Jay Strauser eds., 2016).

97. TALLINN MANUAL 2.0, *supra* note 6, at 460.

98. *Id.*

99. *Id*. at 461.

experts disagreed as to whether customary international law protected cultural property.[100]

Further outlining the proper use of belligerent reprisals in the cyber context, and particularly how AP I's greater prohibitions apply, is Rule 109 of *Tallinn 2.0.* The Rule, rooted in seven different provisions found in AP I, states:

> Additional Protocol I prohibits States Parties from making the civilian population, individual civilians, civilian objects, cultural property and places of worship, objects indispensable to the survival of the civilian population, the natural environment, and dams, dykes, and nuclear electrical generating stations the object of a cyber-attack by the way of reprisal.[101]

The commentary to Rule 109 expands on the general prohibition of cyber reprisals against the aforementioned categories by those States that are parties to AP I and engaged in an international armed conflict.[102] But, the commentary suggests the prohibition is conditional for certain States that adopted understandings during the ratification of AP I.[103] And, despite certain international tribunals holding reprisals against civilians a violation of customary international law, this practice has yet to "crystallise" into a customary rule due to contrary practice.[104] Nevertheless, in substance, the *Tallinn Manual 2.0* experts found that AP I dramatically reduces the use of reprisals in cyber operations by limiting use to only against enemy armed forces, their facilities, and equipment.[105]

Tallinn Manual 2.0's Rule 108, Rule 109, and associated commentary provide an excellent summary of the current law concerning belligerent reprisals in the cyber context. Clearly, the *Tallinn Manual 2.0* agrees that belligerent reprisals have limited use in the contemporary environment as an IHL enforcement mechanism. However, a comparison between belligerent reprisals and the concept of countermeasures under international law may indicate it is time to revisit this determination in the New Age of Cyber. It is important to note that such an intellectual and academic thought experiment, i.e., comparing countermeasures and belligerent reprisals, should not be taken to conflate or confuse these two distinct enforcement mechanisms under international law. They are very different. The common ground between the

100. *Id.* at 463.

101. *Id.*

102. *Id.* at 463–64.

103. *Id.*

104. *Id.* at 464.

105. CORN ET AL., *supra* note 59, at 227. *See generally* KOLB & HYDE, *supra* note 4, at 195.

two is in their underlying purpose and that alone warrants the comparison below.

V. COUNTERMEASURES UNDER INTERNATIONAL LAW

In the first half of the twentieth century, so-called countermeasures were referred to as "peacetime reprisals."[106] Although belligerent reprisals and countermeasures apply under different circumstances, their purpose is fundamentally the same: to force a State that violates international law to discontinue illegal activity.[107] In this respect, countermeasures provide a good point of comparison with belligerent reprisals.

As a threshold matter, it is important to note that States are responsible for their internationally wrongful acts under the law of State responsibility.[108] Article 2 of the International Law Commission's *Articles of State Responsibility for Internationally Wrongful Acts*[109] provides as follows:

> Article 2
> Elements of an internationally wrongful act of a State
>
> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
> (b) constitutes a breach of an international obligation of the State.[110]

106. Michael N. Schmitt, *Cyber Activities and the Law of Countermeasures*, *in* PEACETIME REGIME FOR STATE ACTIVITIES IN CYBERSPACE: INTERNATIONAL LAW, INTERNATIONAL RELATIONS AND DIPLOMACY 659, 662 (Katharina Ziolkowski ed., 2013). The term peacetime is no longer used.

107. *Id.* at 661–62.

108. *Id.* at 661.

109. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, (2001), http://www.un.org/law/ilc/ [https://perma.cc/9838-MCGV] [hereinafter Articles on State Responsibility]. Beginning in 1956, the Articles of State Responsibility for Internationally Wrongful Acts were drafted over decades by the International Law Commission. The 59 Articles are divided into four parts: Part One (The Internationally Wrongful Act of the State, articles 1–27); Part Two (Content of the International Responsibility of a State, articles 28–41); Part Three (The Implementation of the International Responsibility of a State, articles 42–54); and Part Four (articles 55–59) contains the final five General Provisions of the text. Although the Articles are not binding, they are authoritative because the International Law Commission developed them over decades under the leadership of multiple special rapporteurs. Schmitt, *supra* note 106, at 661.

110. James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 81 (2002). As noted in the commentary to Article 2, the element of attribution is sometimes described as "subjective" while the element of a breach is referred to as "objective"; *see* Articles on State Responsibility, *supra* note 109, at 34.

The breach of an international obligation may consist of a violation of a treaty, customary international law, or of general principles of law.[111] For example, internationally wrongful acts may include a cyber operation that violates the sovereignty of another State or the principle of non-intervention among other things. [112] A well-known recent example of an international wrongful act involved the Russian interference in the 2016 U.S. presidential election.[113] According to Professor Michael Schmitt, "Russia's apparent attempt to influence the outcome of the election by its release of emails through WikiLeaks probably violates the international law barring intervention in a state's internal affairs."[114] Another example may be a State that conducts cyber operations against a coastal State from a ship located in the territorial waters of the injured State. These actions would breach international law proscribing innocent passage found in the *United Nations Convention on* the *Law of the Sea*.[115]

One possible consequence for a state that chooses to commit an international wrongful act is entitling a targeted state to resort to countermeasures.[116] "Countermeasures are actions by an injured State that breach obligations owed to the 'responsible' State (the one initially violating its legal obligations) in order to persuade the latter to return to a state of lawfulness."[117] Countermeasures are therefore different than either a retorsion or a plea of necessity. Retorsions are actions taken by a State that are best

111. Articles on State Responsibility, *supra* note 109, at 35.

112. TALLINN MANUAL 2.0, *supra* note 6, at 312–13.

113. *See Russian Hacking and Influence in the U.S. Election*, N.Y. TIMES, https://www.nytimes.com/news-event/russian-election-hacking [https://perma.cc/3FFS-PADV] (last visited Apr. 3, 2018).

114. Ellen Nakashima, *Russia's Apparent Meddling in U.S. Election is Not an Act of War, Cyber Expert Says*, WASH. POST (Feb. 7, 2017), www.washingtonpost.com/news/checkpoint/wp/2017/02/07/russias-apparent-meddling-in-u-s-election-is-not-an-act-of-war-cyber-expert-says/?utm_term=.0e23dfb985de [https://perma.cc/SU9Q-MYGM].

115. Schmitt, *supra* note 106, at 664–65.

116. *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Fifth Session, U.N. Doc. A/58/10, at 75 (2003), http://www.un.org/law/ilc/ [https://perma.cc/57YV-NKTX] [hereinafter Articles on State Responsibility II] ("The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.").

117. Michael Schmitt, *International Law and Cyber Attacks: Sony v. North Korea*, JUST SECURITY (Dec. 17, 2014), http://justsecurity.org/18460/international-humanitarian-law-cyber-attacks-sony-v-north-korea/ [https://perma.cc/CN2H-5JRZ]; *see also* TALLINN MANUAL 2.0, *supra* note 6, at 111 (describing countermeasures as "actions or omissions by an injured State [in response to internationally wrongful acts] directed against a responsible State that would violate an obligation owed by the former to the latter.").

described as unfriendly, but not inconsistent with an international obligation of a State.[118] An example includes limitations upon normal diplomatic relations or other contacts, embargos of various kinds, or withdrawal of voluntary aid programs.[119] A plea of necessity, on the other hand, denotes exceptional cases where a State, faced with grave and imminent peril to an essential interest, takes measures counter to its international obligations to safeguard those particular interests.[120] In the cyber context, an example of the circumstances leading to a plea of necessity may involve a cyber operation against a State's critical infrastructure.[121] In contrast to either a retorsion or a plea of necessity, a countermeasure allows "a state victimized by another . . . to use acts traditionally prohibited under international law to force the offending state to comply with their legal obligations."[122]

In describing countermeasures in a cyber context, Professor William Banks commented that "[c]ountermeasures are responses, whether cyber in nature or not, below the use of force threshold designed to prevent or mitigate a perpetrator State from continuing its unlawful cyber intervention."[123] In this regard, countermeasures are similar to belligerent reprisals in that they allow a State to act unlawfully in order to force international legal compliance.[124] Of course there are differences between the two—countermeasures only apply below the use of force threshold, are limited in severity,[125] and must not involve the threat or use of force[126]—whereas belligerent reprisals only apply during an international armed conflict and would otherwise violate IHL but for a prior illegal act.[127] Nevertheless, despite these differences, countermeasures provide

118. Schmitt, *supra* note 117.

119. *Id.*

120. DINNISS, *supra* note 8, at 102.

121. Schmitt, *supra* note 106, at 663.

122. Daniel Garrie & Shane R. Reeves, *So You're Telling Me There's a Chance: How the* Articles on State Responsibility *Could Empower Corporate Responses to State-Sponsored Cyber Attacks*, HARV. NAT'L SECURITY J. ONLINE FEATURES 5 (2015), http://harvardnsj.org/wp-content/uploads/2016/01/Garrie-and-Reeves-Non-State-Actor-and-Self-Defense.pdf [https://perma.cc/SY6X-W7PR].

123. William Banks, *State Responsibility and Attribution of Cyber Intrusions After* Tallinn 2.0, 95 TEX. L. REV. 1487, 1501 (2017).

124. Schmitt, *supra* note 106, at 662. As noted by Professor Schmitt, the idea of a reprisal was also thought of in a *jus ad bellum* context. That is, "[t]he historical notion of reprisals was broader than that of countermeasures in that it included both non-forceful and forceful actions. Today, forceful reprisals have been subsumed into the U.N. Charter's use of force paradigm, which allows States to resort to force in response to armed attacks." *Id.*

125. Articles on State Responsibility II, *supra* note 116, at 129.

126. *Id.* at 131. *See generally* TALLINN MANUAL 2.0, *supra* note 6, at 38.

127. Schmitt, *supra* note 106, at 662.

a valuable lens by which to view belligerent reprisals in the context of cyber operations. Accordingly, there are four features of countermeasures worth highlighting: (1) the purpose of countermeasures; (2) restrictions or limitations on their use; (3) proportionality; and (4) attribution standards.

The purpose of a countermeasure is to return a situation to a condition of lawfulness[128] by inducing a State, who is responsible for internationally wrongful acts, to comply with its obligations and where appropriate make assurances or guarantees and reparations. Rule 21 of *Tallinn Manual 2.0* further speaks to the purpose of countermeasures in the context of cyber. It provides that "[c]ountermeasures, whether cyber in nature or not, may only be taken to induce a responsible State to comply with the legal obligations it owes an injured State."[129] Furthermore, by definition, countermeasures are a reactive, remedial, self-help measure necessitated by a lack of a compulsory dispute resolution mechanism, and are a product of a decentralized system by which an aggrieved State may seek to vindicate its rights and restore a proper legal relationship with the responsible State.[130]

It is important to note, however, that countermeasures are not intended as punishment.[131] Yet, like other forms of self-help, countermeasures are subject to abuse, especially between States of unequal power.[132] And, similar to belligerent reprisals, it may be difficult to distinguish the precise motive for pursuing the countermeasure. In other words, a pertinent question is whether countermeasures exacted against a State are being done to induce the State, who is responsible for internationally wrongful acts, to comply, or is it being done in retaliation, retribution, or revenge? In answering this question, if the countermeasure will only exacerbate a situation, it is likely a fair indication the motive may be rooted more in retaliation.[133]

The second inquiry involves restrictions on the use of countermeasures. The most significant restriction stems from the use of force as proscribed by

128. *Id.* at 674.

129. TALLINN MANUAL 2.0, *supra* note 6, at 116. Speaking to the underlying mind set of countermeasures "should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute." *Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France*, 18 U.N. REP. INT'L ARBITRAL AWARDS 417, 445. One particular risk in the context of cyber is the speed at which cyber operations may unfold, both intentionally wrongful acts and countermeasures, may detract from careful consideration of intent and consequences.

130. Schmitt, *supra* note 106, at 662; DINNISS, *supra* note 8, at 281.

131. Schmitt, *supra* note 106, at 674.

132. *Id.*

133. TALLINN MANUAL 2.0, *supra* note 6, at 117.

Article 2(4) of the United Nations Charter.[134] Articles 49 and 50 of the *Articles of State Responsibility for Internationally Wrongful Acts* further define the limits of the legal boundaries on the use of countermeasures.[135] Under Article 49, constraints exist on a countermeasure's object and purpose and are limited to the responsible State's period of non-performance of its international obligations.[136] Additionally, as far as possible, countermeasures must be taken in such a way to permit the resumption of performance of the obligation in question.[137] Article 50 expands on the foregoing by specifying a number of international obligations the performance of which may not be impaired by countermeasures.[138] Drawing from Article 50, *Tallinn Manual 2.0*, Rule 22 provides that "[c]ountermeasures, whether cyber in nature or not, may not include actions that affect fundamental human rights, amount to prohibited belligerent reprisals, or violate peremptory norm. A State taking countermeasures must fulfil its obligations with respect to diplomatic and consular inviolability."[139]

The third inquiry when considering the use of countermeasures involves the notion of proportionality.[140] Article 51 of the *Articles of State Responsibility* provides that "[c]ountermeasures must be commensurate with the injury[141] suffered, taking into account the gravity of the internationally wrongful act and the rights in question."[142] Much like the "purpose" of countermeasures,

134. U.N. Charter art. 2, ¶ 4. This provision also reflects customary international law. As noted by Professor Schmitt, the dilemma lies in determining when a cyber operation qualifies as a use of force thereby making it impermissible as a countermeasure. *See* Schmitt, *supra* note 106, at 678.

135. Articles on State Responsibility II, *supra* note 116, at 129–34.

136. *Id.* at 129.

137. *Id.*

138. *Id.* at 131.

139. TALLINN MANUAL 2.0, *supra* note 6, at 122–23.

140. It is important to note that proportionality with respect to countermeasures is separate and distinct from the concept of proportionality in *jus ad bellum* or IHL. With respect to *jus ad bellum*, the concept of proportionality considers the degree of force necessary for a State to defend itself against an armed attack. In that context, proportionality serves to identify the circumstances in which the unilateral use of force is permissible under international law. Additionally, it also serves to determine the intensity and the magnitude of military operations. In the context of IHL, proportionality means essentially whether an attack shall be cancelled or suspended if the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof. *See* Protocol I, *supra* note 13, art. 51, at 37, art. 57, at 41–42.

141. Articles of State Responsibility II, *supra* note 116, at 134. "Injury" means a breach of an international legal obligation. It should not be understood to require damage. *See* TALLINN MANUAL 2.0, *supra* note 6, at 127.

142. Articles of State Responsibility II, *supra* note 116, at 134; DINNISS, *supra* note 8, at 103–04. The principle of proportionality is a deeply rooted requirement for countermeasures and is widely recognized in State practice, doctrine and international jurisprudence. For example, in the *Naulilaa* case, using the word "reprisal," the court stated, "Even if one admitted that international law does not

proportionality is also an essential limitation on the injured State in terms of the employment of specific countermeasures and the level of their intensity.[143] A countermeasure that is disproportionate amounts to an impermissible punishment or retaliation, and is contrary to the object and purpose of countermeasures.[144] A proportionality analysis provides a check on the potentially escalating effect of countermeasures and is a control on the exercise of "decentralized power conferred on States to react individually to international wrongful acts."[145] However, it is important to note that proportionality does not mean or imply reciprocity.[146] In fact, it is entirely lawful to use non-cyber countermeasures in responses to an internationally wrongful act involving cyber operations.[147]

In the context of cyber, it is feasible to narrowly tailor the intensity, duration, and effects of the operation. For example, a cyber operation aimed at incapacitating infrastructure without destroying it may be particularly useful in meeting the limitations on countermeasures, including proportionality.[148] Noting the challenges of assessing proportionality in the context of countermeasures, *Tallinn Manual 2.0* states, in part:

> The interconnected and interdependent nature of cyber systems can render it difficult to determine accurately the consequences likely to result from cyber countermeasures. States must therefore exercise considerable care when assessing whether their countermeasures will be proportionate. Conducting a full assessment may require, for instance, mapping the targeted system or reviewing relevant intelligence. Whether the assessment is adequate depends on the foreseeability of potential consequences and the feasibility of means that can be used to conduct it.[149]

The final issue with respect to countermeasures concerns attribution. The issue of attribution includes more than technically determining the source of the

require that the reprisal be approximately measured by the offense, one should certainly consider as excessive, and thus illegal, reprisals out of all proportion with the act which motivated them." Naulilaa Incident Arbitration, Portuguese-German Arbitral Tribunal, 1928, *reprinted and translated in* WILLIAM W. BISHOP, JR., INTERNATIONAL LAW: CASES AND MATERIALS 903, 904 (3d ed. 1971).

143. DINNISS, *supra* note 8, at 104.

144. TALLINN MANUAL 2.0, *supra* note 6, at 127.

145. JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 698 (James Crawford & John S. Bell eds., 2013).

146. *See* DINNISS, *supra* note 8, at 104.

147. TALLINN MANUAL 2.0, *supra* note 6, at 128.

148. MARCO ROSCINI, CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW 106 (2014).

149. TALLINN MANUAL 2.0, *supra* note 6, at 128.

attack. It also includes policy and legal issues. The difficulties in attributing cyber-attacks and determining the identity of the perpetrators causes a perception that States can operate with virtual impunity in the cyber realm.[150] The various tools, tactics, and techniques available to conceal cyber activities compounds the challenges to attribute attacks to States, non-State actors, or individuals.[151] For example, a responsible State may gain "control of another State's cyber infrastructure and use it to mount harmful" attacks against a third State.[152] This situation illustrates the technical complexities that exist in the cyber domain. While future technological innovations may mitigate the attribution obstacle, "as with any forensic investigation, information gathering" in cyberspace is likely to remain technically challenging, time consuming, and resource intensive.[153]

While ascertaining the source of a cyber-attack remains problematic, some influential thought leaders have challenged the paradigmatic thinking that discovering the point of attack and those individuals responsible is necessary for the purpose of attribution.[154] Proponents of this concept disagree that once the technical forensics of the attack is established only then can attribution hope to determine the person or organization responsible for it.[155] Instead, they conceptualize the problem of attribution as one to consider in the light of this question: What do national policy leaders actually need to know about the cyber operation?[156] In answering this question, national leaders should simply know who is ultimately responsible for the attack rather than who actually committed the acts.

An example of this distinction between determining responsibility versus identifying the actual perpetrators occurred in 1999 when NATO inadvertently bombed the Chinese embassy in Belgrade during the armed conflict in Kosovo.[157] In the aftermath of the tragedy, scores of people gathered in Beijing near the U.S. Embassy, including many students bused in for the protests.[158]

150. Michael N. Schmitt & Liis Vihul, *Proxy Wars in Cyberspace: The Evolving International Law of Attribution*, FLETCHER SECURITY REV., Spring 2014, at 53, 54 (2014).

151. Schmitt, *supra* note 106, at 685.

152. *Id.*

153. Louise Arimatsu, *Classifying Cyber Warfare*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 326, 333 (Nicholas Tsagourias & Russell Buchan eds., 2015).

154. Jason Healy, *The Spectrum of National Responsibility for Cyberattacks*, BROWN J. WORLD AFF., Fall/Winter 2011, at 57, 57 (2011).

155. *Id.*

156. *Id.*

157. *Id.* at 58.

158. *Id.*

Despite protesters pummeling the U.S. Embassy with bricks and rocks,[159] U.S. authorities did not seek to identify the individual stone throwers "because the exact attribution was not an important input for decision makers."[160] The United States knew that the Chinese were responsible for attacks regardless of who threw the individual rocks.[161] Even though knowing who actually threw the rocks would provide many data points, that information would not be particularly helpful to deciding how to respond to the incident.[162] Similarly, with cyber-attacks, it is often not necessarily probative who actually initiated the attack at the lowest technical level.[163] Instead, the most important determination is who is overall responsible. In sum, reconceptualizing the concept of attribution may serve to provide decision-makers with flexibility to respond in the complex domain of cyber.[164]

Countermeasures have become an important tool, even if not used, for States to force compliance with international law in cyber space below the use of force threshold.[165] Taking the foregoing background into consideration, countermeasures are, in many respects, the other side of the belligerent reprisal coin. It is therefore worth asking whether belligerent reprisals may serve an equally useful purpose as countermeasures when addressing cyber operations in the international armed conflict context.

159. *Chinese in Belgrade, Beijing Protest NATO Embassy Bombing*, CNN (May 9, 1999, 9:44 PM), http://edition.cnn.com/WORLD/asiapcf/9905/09/china.protest.03/ [https://perma.cc/E6EG-QQZF].

160. Healy, *supra* note 154, at 58.

161. *Id.*

162. *Id.*

163. *Id.* at 57.

164. Attribution also presents challenging legal and factual issues. For example, what are the evidentiary considerations when using countermeasures? The Commentary to the *Articles on State Responsibility* suggest the standard for factual attribution is identification with responsible certainty, *see* Schmitt, *supra* note 106, at 685, and, importantly, only States may use countermeasures. TALLINN MANUAL 2.0, *supra* note 6, at 130. This restriction thus precludes private firms, like Sony for instance, from engaging in "hack-back" countermeasures against North Korea after a cyber-attack in 2014. *See generally* David E. Sanger, David D. Kirkpatrick & Nicole Perlroth, *The World Once Laughed at North Korean Cyberpower. No More.*, N.Y. TIMES (Oct. 15, 2017), https://www.nytimes.com/2017/10/15/world/asia/north-korea-hacking-cyber-sony.html [https://perma.cc/985U-TXV8]. *But see generally* Garrie & Reeves, *supra* note 122, at 13 (discussing a possible way for a corporation to use countermeasures).

165. *See, e.g.*, Nakashima, *supra* note 114 (noting that the United States most likely has grounds to use countermeasures against Russia for the 2016 election hacking actions) (quoting Professor Michael Schmitt).

VI. BELLIGERENT REPRISALS AND CYBER: A THEORETICAL FRAMEWORK

Sir Hersch Lauterpacht, one of the leading international lawyers of the twentieth century, observed that "[i]f international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law."[166] At some level, Lauterpacht's insightful remarks are not surprising in that IHL is attempting to regulate the worst of human conditions—war. International Humanitarian Law seeks to introduce moderation and restraint into a pursuit defined by violence and death, unbridled passion and hatred, as well as confusion and unpredictability. At its best, IHL is never more than imperfectly observed, and at its worst, very poorly observed.[167] Commenting on the effectiveness of the *jus in bello*, distinguished British historian Geoffrey Best stated, "[w]e should perhaps not so much complain that the law of war does not work well, as marvel that it works at all."[168] Unquestionably, Best is absolutely correct in his assessment. Yet, beyond the substance and circumstances of what IHL attempts to regulate, there is another factor that places international law generally, and IHL specifically, at the "vanishing point of law"—anemic enforcement mechanisms.

The challenges in enforcing and implementing norms are a significant reason why international law faces enduring criticism. Arguably, meaningful enforcement is the Achilles heel of this area of law, especially if "law" is the commands of a sovereign backed by sanctions as articulated by legal positivists from Hobbes to Austin.[169] Furthermore, critics have long contended the intractable problem of meaningful enforcement and sanctions in international law not only undermines the effectiveness and credibility of the international normative system, but also suggests whether international law is "law" at all if it cannot be imposed.[170] Even then, one has to be careful not to overstate the problem and place international law in the proper context:

> The international situation cannot be equated to the situation within states. There is not a powerful international body that has authority over the subjects of the law; the international community does not have an international police force and a

166. BEST, *supra* note 11, at 12.

167. *Id.* at 11.

168. *Id.* at 12.

169. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1822 (2009).

170. Elena Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community*, INT'L L. OBSERVER (May 18, 2010, 11:23 AM), http://www.internationallawobserver.eu/2010/05/18/the-problem-of-enforcement-in-international-law-countermeasures-the-non-injured-state-and-the-idea-of-international-community [https://perma.cc/S9UZ-6EW6].

> judiciary with compulsory jurisdiction; thus, coercive power exercised by the international community cannot be relied upon to enforce international obligations. The sovereignty and equality of states precludes the operation of such mechanisms, and ensures that the execution of the law is precarious and, sometimes, irregular.[171]

Although difficulties exist in enforcing IHL, there are some mechanisms for enforcement including protecting powers,[172] fact finding commissions,[173] penal sanctions,[174] and reparations.[175] But, challenges still remain. The absence of a hierarchical system or institution capable of enforcement, implementation, and accountability fundamentally precludes IHL's decentralized character from undergoing meaningful change in the foreseeable future. So, how should the international community respond when confronted with the realities of international law? Do advances in technology provide an opportunity to better promote lawfulness on the modern battlefield? In the context of cyber and the emergence of new capabilities, revisiting belligerent reprisals provides a means to overcome the obvious challenges underlying the enforcement of IHL.

One way to conceptualize or consider the issue of belligerent reprisals is to think of them as three points on a left-to-right continuum. At the far left end of the continuum, the first category, are belligerent reprisals that should never

171. KOLB & HYDE, *supra* note 4, at 283.

172. Under IHL, a "protecting power" is a neutral, third-party State designated as a party to the conflict and accepted by the enemy party. This State has agreed to carry out the functions assigned to a protecting Power under IHL. These functions include monitoring and ensure compliance with the law. In the absence of an agreement, the ICRC or any other impartial humanitarian organization may designate a protecting power substitute. Notably, the use of this system is rare in recent years. *See Protecting Powers: How Does the Law Protect in War?*, INT'L COMM. RED CROSS, https://casebook.icrc.org/glossary/protecting-powers [https://perma.cc/CZ47-2G5G] (last visited Jan. 26, 2018).

173. Article 90 of the 1977 Additional Protocol I provides for the establishment of an International Fact-Finding Commission. Established in 1991, it is a permanent body of 15 independent experts acting in their personal capacity. The Commission's purpose is to contribute to implementation of and ensure respect for IHL in armed conflicts. Thilo Marauhn, *The International Humanitarian Fact Finding Commission—Dedicated to Facilitating Respect for International Humanitarian Law*, INT'L HUMANITARIAN FACT-FINDING COMM'N, www.ihffc.org/index.asp?Language=EN&page=home [https://perma.cc/8YXN-9DHV] (last visited Jan. 26, 2018).

174. International Humanitarian Law is enforceable in both domestic courts and international tribunals. Over the last three decades there has been significant efforts internationally to prosecute war crimes in ad hoc tribunals like the International Criminal Tribunals for the former Yugoslavia and Rwanda as well as the International Criminal Court.

175. HUMA HAIDER, GSDRC, INTERNATIONAL LEGAL FRAMEWORKS FOR HUMANITARIAN ACTION: TOPIC GUIDE 49 (2013), http://www.gsdrc.org/topic-guides/international-legal-frameworks-for-humanitarian-action/challenges/compliance-with-and-enforcement-of-ihl/ [https://perma.cc/FF3Z-XKFX].

occur regardless of the motive, means, or method. For example, belligerent reprisals against persons under the control of a party to the conflict should never be the target of a reprisal. As a representative list, this would include the following category of individuals: "prisoners of war; interned civilians, civilians in occupied territory or otherwise in the hands of an adverse party to the conflict, and their property; those *hors de combat*; and medical and religious personnel, facilities, vehicles, and equipment."[176]

This first category also contains certain objects immune as targets of reprisals, including medical buildings, vessels, or equipment; works or installations containing dangerous forces; objects indispensable to the survival of the civilian population; and cultural property and places of worship.[177] Furthermore, the belligerent reprisals continuum precludes the use of chemical or biological weapons.[178] Certain cyber operations that would fit into the above category include opening the flood gates of a dam causing the release of a body of water capable of widespread destruction; or, using a cyber-attack to target a hospital by turning off its electricity or taking some action to remotely taint the food or water supply for the civilian population.

There are a number of reasons to categorically exclude the foregoing belligerent reprisals. First, attacking these persons and objects are simply too inhumane and barbaric. If IHL seeks to balance between the meta-principles of military necessity and humanity, the above egregious and irreversible acts may never been offset by necessity. The second reason goes to the underlying purpose of belligerent reprisals, i.e., to induce an adversary to comply with IHL. The above examples will likely cause an escalation in violence by inflaming passions and resentments, leading additional violations of IHL and continued hostilities. Third, using countermeasures as an analogy, these actions are neither reversible nor likely to induce a return to lawfulness. Instead, the harshness of the acts make them more analogues to punishments and retaliation, and whether exacted in the cyber realm or not, these belligerent reprisals should be categorically banned.

At the far right end of the continuum are belligerent reprisals that do not shock the conscience and, in the gritty world of pragmatism, are reasonable and rational responses to induce an adversary's compliance with IHL.[179] To some that take an absolutist approach to reprisals, the suggestion that there is any place on the continuum for belligerent reprisals is cause for great concern. But,

176. TALLINN MANUAL 2.0, *supra* note 6, at 460.

177. Mitchell, *supra* note 50, at 162–64.

178. LAW OF WAR MANUAL, *supra* note 60, § 18.18.3.4, at 1088.

179. Michael A. Newton, *Reconsidering Reprisals*, 20 DUKE J. COMP. & INT'L L. 361, 361 (2010).

even the ICRC in their 2005 *Study on Customary International Humanitarian Law* did not take the position that there is a complete ban on belligerent reprisals.[180] Rule 145 of the *Study* stated, "Where not prohibited by international law, belligerent reprisals are subject to stringent conditions."[181]

An example at this end of the spectrum may involve the use of a prohibited weapon against combatants or military objectives.[182] For example, suppose a State is a party to the Convention on Cluster Munitions[183] or Ottawa Convention[184] and uses cluster munitions or antipersonnel mines as a belligerent reprisal against another State party. Assuming, *arguendo*, that the other criteria for a belligerent reprisal are met, such an action is permissible.[185] For somewhat obvious reasons, the parallel to countermeasures would be the strongest in this type of case.

Tallinn Manual 2.0 provides a hypothetical to illustrate a lawful cyber operation for those States not a party to 1977 AP I.[186] In the scenario, the armed forces of one State bomb the medical facilities of another State in the context of an armed conflict and the victim State is not a party to AP I.[187] In response, and after repeated demands to cease the bombings, the Prime Minister of the victim State approves a cyber-attack against a power generation facility used exclusively to provide power to the civilian population.[188] The purpose of this cyber reprisal operation is to compel the State which was attacking the medical facilities to stop.[189] So long as the Prime Minister orders the cessation of cyber-attacks as soon as the aggressive state stops attacking its medical facilities, the reprisal is legal according to the *Tallinn Manual 2.0* experts.[190]

The middle of the continuum is the most important to this analysis and one where the employment of cyber means and methods are legitimate so long as their purpose is to induce an adversary to be in compliance with IHL and so long as they are tailored to mitigate some of negative and collateral effects. It

180. HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 513.

181. *Id.*

182. WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 54 (2009).

183. THE CONVENTION ON CLUSTER MUNITIONS, www.clusterconvention.org/ [https://perma.cc/FM5T-XBZ4] (last visited Oct. 21, 2018).

184. *Anti-Personnel Landmines Convention*, UNITED NATIONS OFF. GENEVA, www.un.org/disarmament/geneva/aplc/ [https://perma.cc/G3M3-AWNE] (last visited Oct. 21, 2018).

185. BOOTHBY, *supra* note 182, at 54.

186. TALLINN MANUAL 2.0, *supra* note 6, at 462.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* The Experts did note that if the belligerent reprisal involved attacking the other State's medical facilities that would be considered unlawful under *Tallinn Manual 2.0*, Rule 108.

is important to reiterate that the ability to develop and execute belligerent reprisals in the middle of the continuum depends, in part, on whether the State is a party to AP I as seen in the example above. The United States, again, is not a party to AP I with one of the primary reasons being the wide-ranging prohibitions against reprisals.[191] The United States' position in this case stemmed from its concern about what could lawfully be done immediately to stop an enemy State from violating IHL.[192]

So, what are the likely objects a State may attack as a belligerent reprisal that would be considered in the middle of the continuum? So long as a State meets all the criteria as outlined above in Part III,[193] reprisals may include a cyber operation against a portion of a State's economic infrastructure such as communication and transportation networks, financial markets, or energy sectors.[194] These reprisals would need to be narrowly tailored such that they cause disruption, inconvenience or, in some cases, perhaps reversible non-permanent damage to a target.[195] Additionally, using a reprisal to target the civilian leadership of a State in order to exploit damaging personal and professional information may induce a State adversary to comply with IHL. This is a non-exhaustive list of potential targets for a cyber reprisal and are best viewed as illustrating the middle of the continuum. However, what becomes apparent is that through the use of cyber belligerent reprisals a State can meaningfully enforce IHL compliance without causing repugnant and irreparable harm. Of course, further discussion on the reconceptualization of cyber belligerent reprisals is necessary to provide greater clarity on the middle of the continuum.

Viewing cyber reprisals along this continuum provides decision-makers the flexibility of options to respond in a lawful manner against a belligerent State while also remedying the shortcoming of enforcing IHL. While belligerent reprisals have been generally discarded by the international community, and justifiably so, cyber operations warrant a re-examination of this tool for IHL enforcement. A dialogue between States on this possibility would be a worthy endeavor.

VII. CONCLUSION

In sum, the employment of belligerent reprisals is a course of action with wide-ranging implications and should never be undertaken lightly.

191. Matheson, *supra* note 59, at 420.

192. SOLIS, *supra* note 10, at 132.

193. *See supra* notes 66–93 and accompanying text.

194. ROSCINI, *supra* note 148, at 104.

195. *Id.* at 106.

Nevertheless, they are lawful acts if approved at the highest levels of government with the purpose to compel an adversary to comply with IHL. Using this ancient enforcement mechanism provides a means to overcome the anemic deficiency of enforcing IHL. Although there have been efforts to impose meaningful international penal sanctions in the past few decades, much more needs to be done *during* the armed conflict itself to ensure compliance. As illustrated in this article, cyber means and methods create opportunities to compel an adversary to comply with IHL while, at the same time, mitigating the effects of cyber operations.

Some well-intentioned individuals and groups may summarily dismiss belligerent reprisals because of the horrific abuses and risks associated with their use. But, viewing countermeasures as a conceptual backdrop in terms of purpose and limitations, the time has come to at least consider the possibilities at the intersection of IHL and emerging technologies. As uncivilized, repugnant, and archaic as it may seem, strictly controlled reprisals may be justifiable as a proportionate response to the criminal acts committed by an adversary to prompt compliance with the law. Emerging cyber means and methods may be the right tool at the right time to do just that.