PANEL 1
Thresholds & Theaters

RealClear Defense

What Happens When the Prosecutor Is the War Criminal?

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

AP Photo/Peter Dejong

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.

***Rachel E. VanLandingham**, a professor of law at Southwestern Law School, is a retired Air Force lieutenant colonel and former military attorney. **Geoffrey S. Corn**, a retired Army lieutenant colonel and former military attorney and intelligence officer, is the Vinson & Elkins Professor of Law at South Texas College of Law Houston and a Distinguished Fellow at the Jewish Institute for National Security of America's (JINSA) Gemunder Center for Defense and Strategy. Both are members of JINSA's Hybrid Warfare Policy Project.*

12-31-2008

Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror

Geoffery S. Corn
South Texas College of Law, gcorn@stcl.edu

Eric Talbot Jensen
BYU Law, jensene@law.byu.edu

Recommended Citation
Geoffery S. Corn & Eric Talbot Jensen, ???????? ??? ???????? ????: ? ????????? ??? ??????????? ????????????? ?? ??? ???? ?? ??? ?? ??? ??? ?? ??????, 81 Temp. L. Rev. 787 (2008).

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

Geoffrey S. Corn[*]

Eric Talbot Jensen[**]

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

* Associate Professor of Law, South Texas College of Law. Prior to joining the faculty at South Texas, Professor Corn served as the U.S. Army Special Assistant for Law of War Matters. Professor Corn also served as an officer in the U.S. Army from 1984 to 2004, including assignments as a supervisory defense counsel for the Western United States, Chief of International Law for U.S. Army Europe, Professor of International and National Security Law at the U.S. Army Judge Advocate General's School, Chief Prosecutor for the 101st Airborne Division, and as a Tactical Intelligence Officer in Panama. Professor Corn has been an expert consultant and witness for defendants before the Military Commission and for other Guantanamo detainees challenging the legality of their detention. He has published numerous articles in the field of national security law and is a co-author of a forthcoming book titled *The Law of War and the War on Terror*. He is a graduate of Hartwick College and the U.S. Army Command and General Staff College, and earned his J.D., *highest honors*, at George Washington University and his LL.M., *distinguished graduate*, at the Judge Advocate General's School. He frequently lectures on law of war and national security law topics.

** Lieutenant Colonel, Chief, International Law Branch, Office of the Judge Advocate General, U.S. Army. B.A., Brigham Young University, 1989; J.D., University of Notre Dame, 1994; LL.M., The Judge Advocate General's Legal Center and School, 2001; LL.M., Yale Law School, 2006. Operational Law Attorney, Task Force Eagle, Bosnia, 1996. Command Judge Advocate, Task Force Able Sentry, Macedonia, 1997. Chief Military Law, Task Force Eagle, Bosnia, 1998. Professor, International and Operational Law Department, the Judge Advocate General's Legal Center and School, 2001 to 2004. Deputy Staff Judge Advocate, 1st Cavalry Division, Baghdad, Iraq, 2004 to 2005. Member of the Bars of Indiana and the United States Supreme Court. The views expressed in this Article are those of the Authors and not the Judge Advocate General's Corps, the United States Army, or the Department of Defense.

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,

---

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

---

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

---

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.
>
> 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

---

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]

---

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

---

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

---

> 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]

---

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]

---

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.

---

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]

---

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:

---

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.

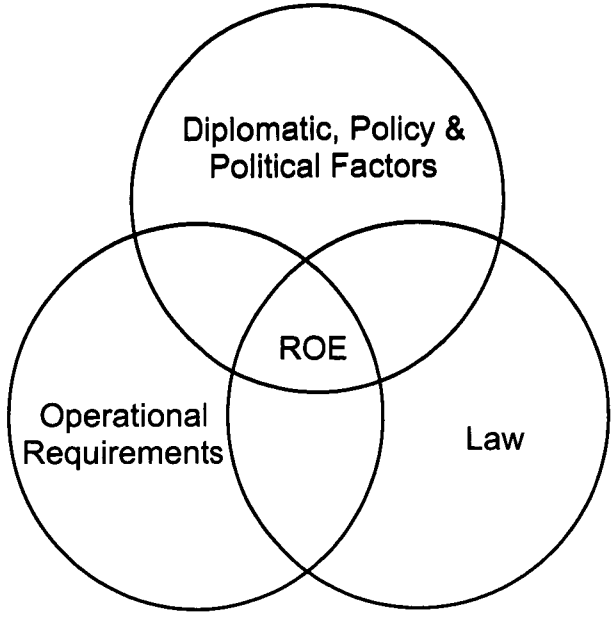
97. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES (2005) [hereinafter CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B]; OPERATIONAL LAW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

---

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

---

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

---

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]

---

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

---

. . . .

(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.

---

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"

---

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

---

> 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:

---

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

---

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

---

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

---

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

* Professor of Law, South Texas College of Law. Formerly Special Assistant for Law of War Matters and Chief of the Law of War Branch, Office of the Judge Advocate General, United States Army; Chief of International Law for US Army Europe; Professor of International and National Security Law at the US Army Judge Advocate General's School.

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

---

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

---

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

---

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

* 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.

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.

4. *See* John J. Lumpkin, *Military Buys Exclusive Rights to Space Imaging's Pictures of Afghanistan War Zone*, ASSOCIATED PRESS, Oct. 15, 2001, *available at* http://www.fas.org/sgp/news/2001/10/ap101501.html.

5. David B. Rivkin, Jr. & Lee A. Casey, *Lawfare*, WALL STREET JOURNAL, Feb. 23, 2007, at A11, *available at* http://online.wsj.com/article/SB117220137149816987.html (emphasis added).

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

7. Scott Horton, *State of exception: Bush's war on the rule of law*, HARPER'S MAGAZINE, July 2007, at 74, *available at* http://www.harpers.org/archive/2007/07/0081595.

8. Lawrence J. Siskind, *Lawfare*, THE AMERICAN THINKER (Feb. 7, 2010), http://www.americanthinker.com/2010/02/lawfare_1.html.

9. George Will, Editorial, *Futility in Afghanistan; An NCO fires off a round of illumination*, WASHINGTON POST, June 20, 2010, at A19.

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.

20. Pamela Constable, *NATO Hopes to Undercut Taliban with Surge of Projects*, WASHINGTON POST, Sept. 27, 2008, at A12 (quoting Brigadier General Richard Blanchette, chief spokesman for NATO forces), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603452_pf.html.

21. *See, e.g., Inside US Hub for Air Strikes*, BBC AMERICA, Nov. 29, 2008 (quoting Colonel Eric Holdaway as saying, "[S]ome of our enemies have clearly located themselves amongst civilians"), *available at* http://news.bbc.co.uk/2/hi/south_asia/7755969.stm.

22. "Pro-government forces reduced civilian killings by 28 percent." *See* Ben Arnoldy, *History sides with Taliban, for now*, CHRISTIAN SCIENCE MONITOR, May 10, 2010, at 9.

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.

26. *See* Lara M. Dadkhah, Op-Ed, *Empty Skies Over Afghanistan*, NEW YORK TIMES, Feb. 18, 2010, at A27, *available at* http://www.nytimes.com/2010/02/18/opinion/18dadkhah.html.

27. *Afghanistan: The Results of the Strategic Review, Part II: Hearing Before the House Armed Services Committee*, 111th Cong. 61 (2009) (statement of General Stanley R. McChrystal), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg57832/pdf/CHRG-111hhrg57832.pdf.

28. Arnoldy, *supra* note 22.

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

Maj. Gen. Charles Dunlap Jr., U.S. Air Force, retired, served thirty-four years on active duty before retiring in 2010 as the Air Force's deputy judge advocate general. His assignments included tours in Europe and Korea, and he deployed for operations in Africa and the Middle East. He is a graduate of St. Joseph's University and Villanova University School of Law and is a distinguished graduate of the National War College. He is the executive director of the Center on Law, Ethics and National Security at Duke University School of Law. He blogs on *LAWFIRE*, https://sites.duke.edu/lawfire/.

> 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.

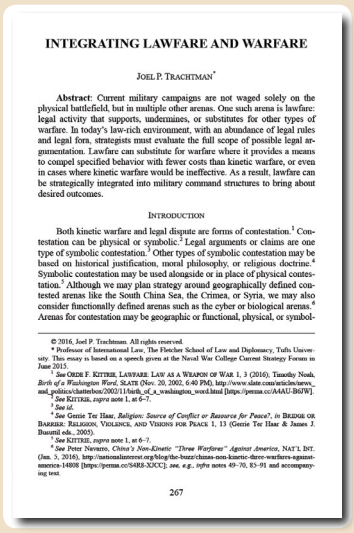
Key to this effort would be utilization of the supporting judge advocate generals (JAGs). Like other services, the Army JAG Corps has established an explicit practice area to "provide legal advice to commanders and their staffers on domestic, foreign, and international laws that influence military operations."[44]

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-

© 2016, Joel P. Trachtman. All rights reserved.

* Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University. This essay is based on a speech given at the Naval War College Current Strategy Forum in June 2015.

[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.

267

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.

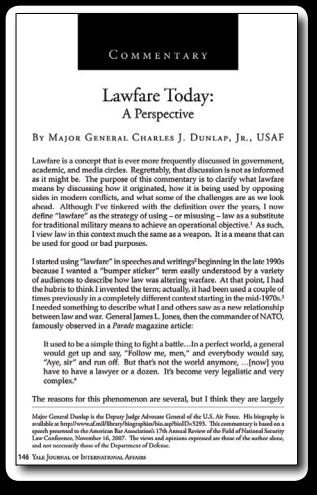
8. Ibid., xii.

9. See Charles J. Dunlap Jr., "Lawfare," in *National Security Law*, 3rd ed. (Durham, NC: Carolina Academic Press, 2015), accessed 7 March 2017, http://scholarship.law.duke.edu/faculty_scholarship/3408/. The author has discussed lawfare in previous writings, and some of the discussion here is drawn from them.

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]

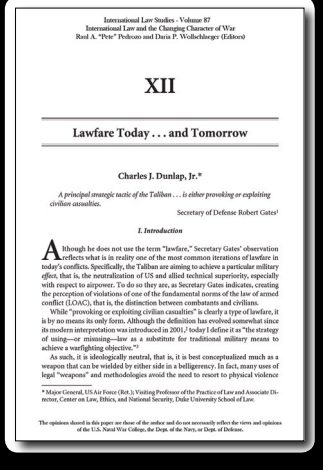
The reasons for this phenomenon are several, but I think they are largely

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.

146 YALE JOURNAL OF INTERNATIONAL AFFAIRS

"Lawfare Today: A Perspective"
(2008)
Published in the *Yale Journal of International Affairs*

To view this article, visit: http://yalejournal.org/wp-content/uploads/2011/01/083111dunlap.pdf.



International Law Studies - Volume 87
International Law and the Changing Character of War
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.

"Lawfare Today . . . and Tomorrow"
(2011)
Published by the U.S. Naval War College

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

10. Dunlap, "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts" (paper presentation, Humanitarian Challenges in Military Intervention Conference, Washington, DC, 29 November 2001), accessed 7 March 2017, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6193&context=faculty_scholarship; "About Lawfare: A Brief History of the Term and the Site," Lawfare (blog), accessed 7 March 2017, https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site. According to the Lawfare blog, the term "lawfare" came into its modern usage with the presentation of Dunlap's essay, "Law and Military Interventions."

11. *DOD [Department of Defense] Dictionary of Military and Associated Terms*, s.v. "asymmetric," last modified February 2017, 21, accessed 15 March 2017, http://www.dtic.mil/doctrine/new_pubs/dictionary.pdf. "In military operations the application of dissimilar strategies, tactics, capabilities, and methods to circumvent or negate an opponent's strengths while exploiting his weaknesses."

12. Sun Tzu, *The Art of War*, trans. Lionel Giles (Norwalk, CT: Puppet Press, 1910), 46.

13. Trachtman, "Integrating Lawfare and Warfare," 267.

14. Bijal P. Trivedi, "U.S. Buys up Afghanistan Images from Top Satellite," National Geographic website, 25 October 2001, http://news.nationalgeographic.com/news/2001/10/1025_TVikonos.html.

15. Field Manual 3-24, *Insurgencies and Countering Insurgencies* (Washington, DC: U.S. Government Publishing Office [GPO], May 2014), http://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/fm3_24.pdf.

16. Ibid., 13-13.

17. David H. Petraeus, interview by Sam Bailey, *Frontline*, PBS, 14 June 2011, http://www.pbs.org/wgbh/frontline/article/interview-general-david-petraeu/. Petraeus said, "You don't kill or capture your way out of an industrial-strength insurgency, which is what faces Afghanistan. … It takes a comprehensive approach, and not just military but civil-military."

18. "Iraqi Air Force 2003 and Rebuilt 2006," Weapons and Warfare website, 11 January 2017, accessed 7 March 2017, https://weaponsandwarfare.com/2017/01/11/iraqi-air-force-2003-and-rebuilt-2006/.

19. Kyle Mizokami, "Russia's Military: Don't Believe the Hype," *The Week* website, 4 January 2016, accessed 7 March 2017, http://theweek.com/articles/596822/russias-military-dont-believe-hype.

20. Juan C. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (New York: PublicAffairs, 2013); see also Tom C. W. Lin, "Financial Weapons of War," *Minnesota Law Review* 100 (2016): 1377, http://www.minnesotalawreview.org/wp-content/uploads/2016/04/Lin_ONLINEPDF.pdf.

21. See Jody Westbrook Flowers, "Litigation Areas: Anti-Terrorism," Motley Rice LLC website, accessed 7 March 2017, https://www.motleyrice.com/anti-terrorism.

22. Michael R. Gordon and Bernard E. Trainor, *The General's War: The Inside Story of the Conflict in the Gulf* (New York: Back Bay Books, 1994), 326.

23. Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 2nd ed. (Cambridge, UK: Cambridge University Press, 2016), 275–76.

24. W. Michael Reisman and Chris T. Antoniou, eds., *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict* (New York: Vintage, 1994), xxiv.

25. Sarbaz Yousef, "ISIS Uses Iraqi Civilians as Human Shields, Dozens Killed in U.S.-led Strike near Kirkuk," ARA News website, 4 June 2015, accessed 15 March 2017, http://aranews.net/2015/06/isis-uses-iraqi-civilians-as-human-shields-dozZns-killed-in-u-s-led-strike-near-kirkuk/.

26. William George Eckhardt, "Lawyering for Uncle Sam When He Draws His Sword," *Chicago Journal of International Law* 4, no. 2 (2003): 441, accessed 7 March 2017, http://chicagounbound.uchicago.edu/cjil/vol4/iss2/12/.

27. "Iraq Prison Abuse Scandal Fast Facts," CNN, last modified 5 March 2017, accessed 15 March 2017, http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/.

28. Ricardo Sanchez, interview by Tom Brokaw, NBC Nightly News, 30 June 2004, http://www.msnbc.msn.com/id/5333895/.

29. Petraeus, "Meet the Press" interview, cited in Joseph Berger, "U.S. Commander Describes Marja Battle as First Salvo in Campaign," *New York Times*, 21 February 2010, accessed 8 March 2017, http://www.nytimes.com/2010/02/22/world/asia/22petraeus.html?_r=0.

30. Daniel Bates and Lee Moran, "'Disgusting' Video is 'Recruitment Tool for the Taliban': Outrage Across the World after Footage Emerges Showing U.S. Troops 'Urinating on Dead Afghan Bodies,'" Daily Mail website, 12 January 2012, accessed 7 March 2017, http://www.dailymail.co.uk/news/article-2085378/US-troops-urinating-dead-Afghan-bodies-video-used-Taliban-recruitment-tool.html.

31. Charles C. Krulak, "The Strategic Corporal: Leadership in the Three Block War," *Marines Magazine*, January 1999, http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm.

32. Dean Cheng, "Winning without Fighting: Chinese Legal Warfare," *Backgrounder*, no. 2692 (Washington, DC: The Heritage Foundation, 18 May 2012), http://www.heritage.org/asia/report/winning-without-fighting-chinese-legal-warfare.

33. Ibid.

34. Ibid.

35. John Garnaut, "China's New Weapon for Expansion: Lawfare," *Sydney Morning Herald* website, 11 April 2014, accessed 7 March 2017, http://www.smh.com.au/world/chinas-new-weapon-for-expansion-lawfare-20140411-zqtir.html.

36. Army Doctrine Reference Publication 3-0, *Operations* (Washington, DC: U.S. GPO, November 2016), para. 1-15, accessed 3 April 2017, http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/ADRP%203-0%20FINAL%20WEB.pdf.

37. Ibid.

38. Joseph F. Dunford Jr., "Remarks and Q&A" (speech, Center for Strategic and International Studies, Washington, DC, 5 October 2016), http://www.jcs.mil/Media/Speeches/Article/707418/gen-dunfords-remarks-and-qa-at-the-center-for-strategic-and-international-studi/.

39. See Aurel Sari, "Legal Aspects of Hybrid Warfare," Lawfare (blog), 2 October 2015, accessed 7 March 2017, https://www.lawfareblog.com/legal-aspects-hybrid-warfare; Sari, "Hybrid Warfare, Law and the Fulda Gap," in *Complex Battle Spaces* (Oxford, UK: Oxford University Press, forthcoming), accessed 20 March 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2927773.

40. Sascha Dov Bachmann and Andres B. Munos Mosquera, "Hybrid Warfare and Lawfare," *The Operational Law Quarterly–Center for Law and Military Operations* 16, no. 1 (2015): 4, accessed 20 March 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698228.

41. Christi Scott Bartman, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2010).

42. The Judge Advocate General's (JAG's) Legal Center and School, U.S. Army, Misc. Pub. 27-8, *2015 Commander's Legal Handbook* (Charlottesville, VA: JAG's Legal Center and School, 2015), 1, accessed 3 April 2017, https://www.jagcnet.army.mil/cdrsLegalHandbook.

43. James W. Welch and M. David Riley, "Intelligence Preparation of the Battlefield: Company Commanders Must Do Their Part," *Armor* 127, no. 2 (April-June 2016): 40, accessed 8 March 2017, http://www.benning.army.mil/armor/eARMOR/content/issues/2016/APR_JUN/2Welch-Riley16.pdf.

44. U.S. Army JAG Corps, "Areas of Practice—Operational Law," last modified 5 May 2015, accessed 15 March 2017, http://www.goarmy.com/jag/jag-areas-of-practice.html.

45. Dan Maurer, "The Staff Officer's Paintbrush: The Art of Advising Commanders," Modern War Institute at West Point, 2 March 2017, accessed 8 March 2017, http://mwi.usma.edu/staff-officers-paintbrush-art-advising-commanders/.

46. See Ilana Kowarski, "5 Traits for Would-Be Military Lawyers," *U.S. News and World Report*, 11 November 2016, accessed 15 March 2017, https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2016-11-11/5-traits-law-students-can-develop-to-be-a-military-attorney.

47. Maurer, "The Staff Officer's Paintbrush."

48. Ibid.

49. Trachtman, "Integrating Lawfare and Warfare," 281.

50. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983), https://supreme.justia.com/cases/federal/us/462/296/case.html.

51. Deloitte Touche Tohmatsu Limited, *2016 Deloitte Millennial Survey* (2016), 12, accessed 15 March 2017, https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-millenial-survey-2016-exec-summary.pdf.

52. Ibid.

53. Richard Schragger, "Cooler Heads: The Difference between the President's Lawyers and the Military's," *Slate* website, 20 September 2006, accessed 8 March 2017, http://www.slate.com/articles/news_and_politics/jurisprudence/2006/09/cooler_heads.html.

54. Ibid.

55. Stephen E. Ambrose, *Americans at War* (New York: Berkley, 1998), 152.

56. William Langewiesche, "How One U.S. Soldier Blew the Whistle on a Cold-Blooded War Crime," *Vanity Fair*, 16 June 2015, accessed 15 March 2017, http://www.vanityfair.com/news/2015/06/iraq-war-crime-army-cunningham-hatley-trial.

57. See Charles Dunlap, "Civilian Casualties, Drones, Airstrikes and the Perils of Policy," War on the Rocks website, 11 May 2015, accessed 8 March 2017, https://warontherocks.com/2015/05/civilian-casualties-drones-airstrikes-and-the-perils-of-policy/.

58. See Dunlap, "The Moral Hazard of Inaction in War," War on the Rocks website, 19 August 2016, accessed 8 March 2017, https://warontherocks.com/2016/08/the-moral-hazard-of-inaction-in-war/.

59. Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 3.

60. Ibid.

61. Stefan Halper, *China: The Three Warfares* (Cambridge, UK, University of Cambridge, May 2013), https://cryptome.org/2014/06/prc-three-wars.pdf.

62. Kowarski, "5 Traits for Would-Be Military Lawyers."

63. John Moore, "Lawfare," *Three Swords Magazine*, January 2017, 39, accessed 3 April 2017, http://www.jwc.nato.int/images/stories/_news_items_/2017/Lawfare_Moore.pdf.

64. Ibid., 42–43.

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.

Table of Contents

---

* Associate Professor, Brigham Young University Law School. Previously Chief, International Law Branch, Office of The Judge Advocate General, US Army; Military Legal Advisor to US forces in Baghdad, Iraq and in Tuzla, Bosnia; Legal Advisor to the US contingent of UN Forces in Macedonia. The author wishes to thank W. Michael Reisman, Lea Brilmayer, and Bill Banks for early guidance on the issues in this article; Geoff Corn, Ashley Deeks, Dick Jackson, Joe Landau, and Sean Watts for comments on drafts; and Sue Ann Johnson for her exceptional research and editing assistance.

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]

---

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

---

> 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.

---

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

---

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

---

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]

---

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

---

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

---

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.

---

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]

---

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

---

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]

---

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]

---

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

---

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.

---

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

---

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

---

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

---

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]

---

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.

---

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

---

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

---

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

---

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

---

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

---

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

---

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

---

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.

---

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

---

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

---

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

---

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

---

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

---

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

---

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

---

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]

---

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.

---

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

---

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

---

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

---

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.

CJIL

UNIVERSITY OF EXETER | LAW SCHOOL

ECIL
EXETER CENTRE FOR INTERNATIONAL LAW

Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats

Aurel Sari

Exeter Centre for International Law

Working Paper Series
2019/1

UNIVERSITY OF EXETER | LAW SCHOOL

ECIL
EXETER CENTRE FOR INTERNATIONAL LAW

Exeter Centre for International Law

The Exeter Centre for International Law builds on a long and distinguished tradition of international legal scholarship at Exeter Law School. The Centre's mission is to provide an intellectual environment for the study and development of international law and to stimulate discussion and collaboration in response to the most pressing challenges facing the international community. As part of this mission, the Centre publishes the present Working Paper Series.

Exeter Centre for International Law
Exeter Law School, Amory Building
Rennes Drive, Exeter, EX4 4RJ, United Kingdom

http://www.exeter.ac.uk/ecil
@ExeterCIL

Cite as Aurel Sari, "Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats", ECIL Working Paper 2019/1.

Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats

Aurel Sari*

University of Exeter

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

* Associate Professor of Public International Law, University of Exeter; Director, Exeter Centre for International Law; Fellow, Supreme Headquarters Allied Powers Europe; Fellow, Allied Rapid Reaction Corps. The present paper is written in a personal capacity, but has benefitted from discussions with colleagues in a range of fora, including the European Centre of Excellence for Countering Hybrid Threats, the International Institute for Strategic Studies, the Geneva Centre for Security Policy, the Judge Advocate General's Legal Center and School and the Center for Ethics and the Rule of Law at Pennsylvania Law School.

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.

References

Adamsky, Dmitry "Dima" (2018) 'Strategic Stability and Cross-Domain Coercion: The Russian Approach to Information (Cyber) Warfare', in Rubin, Lawrence and Adam N. Stulberg (eds), *The End of Strategic Stability?* (Washington, DC: Georgetown University Press), 149–173

Alter, Karen J, James T Gathii and Laurence R Helfer (2016) 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', *European Journal of International Law*, 27:2, 293–328

Ambrosio, Thomas (2016) 'The Rhetoric of Irredentism: The Russian Federation's Perception Management Campaign and the Annexation of Crimea', *Small Wars and Insurgencies*, 27:3, 467–490

Beichler, Simone A, Sanin Hasibovic, Bart Jan Davidse and Sonja Deppisch (2014) 'The Role played by Social-Ecological Resilience as a Method of Integration in Interdisciplinary Research', *Ecology and Society*, 19:3 (4)

Benson, Melinda Harm (2015) 'Reconceptualizing Environmental Challenges: Is Resilience the New Narrative?', *Journal of Environmental and Sustainability Law*, 21, 99–128

Bering, Juergen (2017) 'The Prohibition of Annexation: Lessons from Crimea', *New York University Journal of International Law and Politics*, 49:3, 747–832

Biller, Jeffrey and Michael Schmitt (2018) 'Un-caging the Bear? A Case Study in Cyber *Opinio Juris* and Unintended Consequences', EJIL:Talk, <https://www.ejiltalk.org/un-caging-the-bear-a-case-study-in-cyber-opinio-juris-and-unintended-consequences/>

Blank, Laurie R. (2017) 'Media Warfare, Propaganda, and the Law of War', in Gross, Michael L. and Tamar Meisels (eds), *Soft War: The Ethics of Unarmed Conflict* (Cambridge: Cambridge University Press), 88–103

Borgen, Christopher J. (2015) 'Law, Rhetoric, Strategy: Russia and Self-Determination before and after Crimea', *International Law Studies*, 91, 216–280

Brinkel, Theo (2017) 'The Resilient Mind-Set and Deterrence', in Ducheine, Paul A.L. and Frans P.B. Osinga (eds), *Netherlands Annual Review of Military Studies (Winning Without Killing: The Strategic and Operational Utility of Non-Kinetic Capabilities in Crises)* (The Hague: TMC Asser), 19–38

Brooks, Rosa (2018) 'Rule of Law in the Gray Zone', Modern War Institute, <https://mwi.usma.edu/rule-law-gray-zone/>

Brownlie, Ian (1982) 'The Reality and Efficacy of International Law', *British Yearbook of International Law*, 52:1, 1–8

Cabinet Office (2018) *National Security Capability Review* (London:

Cantwell, Douglas (2017) 'Hybrid Warfare: Aggression and Coercion in the Gray Zone', ASIL Insights, <https://www.asil.org/insights/volume/21/issue/14/hybrid-warfare-aggression-and-coercion-gray-zone>

Carr, Edward Hallett (1939) *The Twenty Years' Crisis 1919–1939* (London: Macmillan and Co Ltd)

Charap, Samuel (2015) 'The Ghost of Hybrid War', *Survival*, 57:6, 51–58

Clausewitz, Carl von (1834) *Hinterlassene Werke des Generals Carl von Clausewitz über Krieg und Kriegführung*, Vol III (Berlin: Dümmler)

Cohen, Harlan Grant (2018) 'Multilateralism's Life Cycle', *American Journal of International Law*, 112:1, 47–66

Crawford, James (2018) 'The Current Political Discourse Concerning International Law', *Modern Law Review*, 81:1, 1–22

Curtis, Willie (1994) 'Maneuvering in the Gray Zone: The Gap Between Traditional Peacekeeping and War Fighting, Peacemaking, Peace-Enforcement, and Post-Conflict Peace-Building', in Mokhtari, Fariborz L. (ed) *Peacemaking, Peacekeeping, and Coalition Warfare: The Future Role of the United Nations* (Washington, DC: National Defense University), 175–185

Demange, Lia Helena de Lima (2012) 'The Principle of Resilience', *Pace Environmental Law Review*, 30, 695–810

Department of the Army (1991) *FM 27-100: Legal Operations* (Washington, DC: Headquarters Department of the Army)

Dill, Janina (2017) 'Abuse of Law on the Twenty-First-Century Battlefield: A Typology of Lawfare', in Gross, Michael L. and Tamar Meisels (eds), *Soft War: The Ethics of Unarmed Conflict* (Cambridge: Cambridge University Press), 119–133

Dunlap, Charles (2001) *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* Carr Center for Human Rights)

Dunlap, Charles J, Jr (2008) 'Lawfare Today: A Perspective', *Yale Journal of International Affairs*, 3, 146–154

Dunlap, Charles J, Jr (2010) 'Does Lawfare Need an Apologia?', *Case Western Reserve Journal of International Law*, 43:1-2, 121–144

Dunlap, Charles J, Jr (2011) 'Lawfare Today... and Tomorrow', *International Law Studies*, 87, 315–326

Dunlap, Charlie (2018) 'Yes, There Are Plausible Legal Rationales for the Syria Strikes', Lawfare, <https://www.lawfareblog.com/yes-there-are-plausible-legal-rationales-syria-strikes>

Dupuy, Florian and Pierre-Marie Dupuy (2013) 'A Legal Analysis of China's Historic Rights Claim in the South China Sea', *American Journal of International Law*, 107:1, 124–141

Eagleton, Clyde (1932) 'The Attempt to Define War', *International Conciliation*, 15:291, 237–292

Eide, Asbjorn, Allan Rosas and Theodor Meron (1995) 'Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards', *American Journal of International Law*, 89:1, 215–223

Fitzgerald, Oonagh E, Valerie Hughes, Mark Jewett and L Yves Fortier (2018) 'Conclusion', in Fitzgerald, Oonagh E, Valerie Hughes and Mark Jewett (eds), *Reflections on Canada's Past, Present and Future in International Law* (Montreal: McGill-Queen's University Press), 481–484

Franck, Thomas M. (1970) 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States', *American Journal of International Law*, 64:4, 809–837

Franck, Thomas M. (1983) 'Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War', *American Journal of International Law*, 77:1, 109–124

Franck, Thomas M. (2002) *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: Cambridge University Press)

Fridman, Ofer (2018) *Russian "Hybrid Warfare": Resurgence and Politicization* (Hurst)

Gao, Zhiguo and Bing Bing Jia (2013) 'The Nine-Dash Line in the South China Sea: History,

Status, and Implications', *American Journal of International Law*, 107:1, 98–124

Garmestani, Ahjond S and Craig R Allen (eds) (2014) *Social-Ecological Resilience and Law* (New York: Columbia University Press)

Geiß, Robin (2015) 'Russia's Annexation of Crimea: The Mills of International Law Grind Slowly But They Do Grind', *International Law Studies*, 91, 425–449

Gemunder Center for Defense and Strategy (2018) *Israel's Next Northern War: Operational and Legal Challenges* (Washington, DC:

Goldsmith, Jack and Oona Hathaway (2018) 'Bad Legal Arguments for the Syria Airstrikes', Lawfare, <https://lawfareblog.com/bad-legal-arguments-syria-airstrikes>

Gorenburg, Dmitry (2019) *The Kerch Strait Skirmish: A Law of the Sea Perspective* (Helsinki:

Grant, Thomas D. (2015) *Aggression against Ukraine: Territory, Responsibility, and International Law* (Basingstoke: Palgrave Macmillan)

Greenwood, Christopher (1987) 'The Concept of War in Modern International Law', *International and Comparative Law Quarterly*, 36:2, 283–306

Grob, Fritz (1949) *The Relativity of War and Peace: A Study in Law, History and Politics* ([S.l.]: Yale University Press)

Grotius, Hugo (1625) *De Jure Belli ac Pacis Libri Tres* (translated by Francis W. Kelsey; Oxford: Clarendon Press, 1925)

Habibi, Roojin and Steven J Hoffman (2018) 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries Like Canada Have Options', *Ottawa Law Review*, 49:2, 427–460

Hakimi, Monica (2017) 'The Work of International Law', *Harvard International Law Journal*, 58:1, 1–46

Hakimi, Monica (2018) 'The Jus ad Bellum's Regulatory Form', *American Journal of International Law*, 112:2, 151–190

Henckaerts, Jean-Marie and Louise Doswald-Beck (eds) (2005) *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press)

Henkin, Louis (1979) *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 2nd)

Higgins, Rosalyn (1994) *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press)

Hill, Steven (2016) 'The Role of NATO's Legal Adviser', in Zidar, Andraž and Jean-Pierre Gauci (eds), *The Role of Legal Advisers in International Law* (Leiden: Martinus Nijhoff), 213–236

Hoffman, Frank G (2007) *Conflict in the 21st Century: The Rise of Hybrid Warfare* (Arlington: Potomac Institute for Policy Studies)

Hoffman, Frank G (2009) 'Hybrid Warfare and Challenges', *Joint Force Quarterly*, 52:1, 34–39

Holling, C S (1973) 'Resilience and Stability of Ecological Systems', *Annual Review of Ecology and Systematics*, 4, 1–23

Horton, Scott (2010) 'The Dangers of Lawfare', *Case Western Reserve Journal of International Law*, 43, 163–179

Hughes, David (2016) 'What Does Lawfare Mean?', *Fordham International Law Journal*, 40:1, 1–40

Humby, Tracy-Lynn (2014) 'Law and Resilience: Mapping the Literature', *Seattle Journal of Environmental Law*, 4:1, 85–130

Hurd, Ian (2017) *How to Do Things with International Law* (Princeton: Princeton University Press)

International Security Advisory Board (2017) *Report on Gray Zone Conflict* (Washington DC: United States State Department)

Irani, Freya (2017) "Lawfare', US Military Discourse, and the Colonial Constitution of Law and War', *European Journal of International Security*, 3:1, 113–133

Jackson, Van (2017) 'Tactics of Strategic Competition: Gray Zones, Redlines, and Conflicts before War', *Naval War College Review*, 70:3, 39–62

Joint Chief of Staff (2019) *Joint Doctrine Note 1-19: Competition Continuum* (Washington, DC:

Kennedy, David (2006) *Of War and Law* (Princeton: Princeton University Press)

Kerr, Rachel (2004) *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford: Oxford University Press)

Kittrie, Orde F (2016) *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press)

Korman, Sharon (1996) *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon)

Koskenniemi, Martti (1990) 'The Politics of International Law', *European Journal of International Law*, 1:1, 4–32

Koskenniemi, Martti (2005) *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2nd)

Koskenniemi, Martti (2009) 'The Politics of International Law–20 Years Later', *European Journal of International Law*, 20:1, 7–19

Kraska, James (2018) 'The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?', EJIL:Talk, <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/>

Kunz, Josef L. (1945) 'The Problem of the Progressive Development of International Law', *Iowa Law Review*, 31:4, 544–560

Lauterpacht, Hersch (1933) *The Function of Law in the International Community* (Oxford: Clarendon)

Leed, Maren (2015) 'Square Pegs, Round Holes, and Gray Zone Conflicts', *Georgetown Journal of International Affairs*, 16:2, 133–143

Luban, David (2010) 'Carl Schmitt and the Critique of Lawfare', *Case Western Reserve Journal of International Law*, 43, 457–471

Luhmann, Niklas (2004) *Law as a Social System* (Oxford: Oxford University Press)

Mälksoo, Maria (2018) 'Countering Hybrid Warfare as Ontological Security Management: The Emerging Practices of the EU and NATO', *European Security*, 27:3, 374–392

Mattis, James N and Frank G Hoffman (2005) 'Future Warfare: The Rise of Hybrid Wars', *Proceedings Magazine*, Issue 131, 18–19

Maurice, John Frederick (1883) *Hostilities without Declaration of War* (London: HMSO)

Mazarr, Michael J (2015) *Mastering the Gray Zone: Understanding a Changing Era of Conflict* (Carlisle: Strategic Studies Institute and US Army War College)

Mazarr, Michael J., Jonathan Blake, Abigail Casey, Tim McDonald, Stephanie Pezard and Michael

Spirtas (2018) *Understanding the Emerging Era of International Competition: Theoretical and Historical Perspectives* (Santa Monica: RAND)

Mearsheimer, John J (1994) 'The False Promise of International Institutions', *International Security*, 19:3, 5–49

Ministry of Defence (2019) *Joint Doctrine Publication 3-46: Legal Support to Joint Operations* (London: Ministry of Defence)

Ministry of Foreign Affairs of China (2016) 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines', *Chinese Journal of International Law*, 15:4, 905–907

Monaghan, Andrew (2015) 'The "War" in Russia's "Hybrid Warfare"', *Parameters*, 45:4, 65–74

Morgenthau, Hans Joachim (1929) *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (Leipzig: Noske)

Morgenthau, Hans Joachim (1948) *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf)

Morton, Jeffrey S. (2002) 'The Legality of NATO's Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law', *ILSA Journal of International and Comparative Law*, 9:1, 75–102

Multinational Capability Development Campaign (2019) *MCDC Countering Hybrid Warfare Project: Countering Hybrid Warfare* (London: Ministry of Defence)

Muñoz Mosquera, Andres B and Sascha Dov Bachmann (2016) 'Lawfare in Hybrid Wars: The 21st Century Warfare', *Journal of International Humanitarian Legal Studies*, 7:1, 63–87

Nasu, Hitoshi (2016) 'Japan's 2015 Security Legislation: Challenges to Its Implementation under International Law', *International Law Studies*, 92, 248–280

Neff, Stephen C. (2005) *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press)

Noone, Gregory P. (2010) 'Lawfare or Strategic Communications?', *Case Western Reserve Journal of International Law*, 43:1-2, 73–86

O'Connell, Mary Ellen (2015) 'Myths of Hybrid Warfare', *Ethics and Armed Forces*, 2:2, 27–30

Olson, Peter M. (2014) 'The Lawfulness of Russian Use of Force in Crimea', *Military Law and the Law of War Review*, 53:1, 17–44

Patrikarakos, David (2017) *War in 140 Characters: How Social Media is Reshaping Conflict in the Twenty-first Century* (New York: Basic Books)

Peters, Anne (2018) 'How Not to Do Things with International Law', *Ethics and International Affairs*, 32:4, 483–491

Plokhy, Serhii (2011) 'The Call of Blood: Government Propaganda and Public Response to the Soviet Entry into World War II', *Cahiers du Monde russe*, 52:2/3, 293–319

Porter, Patrick (2016) 'Sorry, Folks. There Is No Rules-Based World Order', National Interest, <http://nationalinterest.org/blog/the-skeptics/sorry-folks-there-no-rules-based-world-order-17497>

Porter, Patrick (2018) *A World Imagined: Nostalgia and Liberal Order*, Policy Analysis No 843 (Washington, DC: CATO Institute), <https://www.cato.org/publications/policy-analysis/world-imagined-nostalgia-liberal-order>

Porter, Patrick (2019) 'Advice for a Dark Age: Managing Great Power Competition', *The Washington Quarterly*, 42:1, 7–25

Reisman, W Michael (1998) 'Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics', *Tulane Journal of International and Comparative Law*, 6:1, 5–56

Reisman, W Michael (2013) *The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment* (The Hague: Hague Academy of International Law)

Renz, Bettina (2016) 'Russia and "Hybrid Warfare"', *Contemporary Politics*, 22:3, 283–300

Rich, Roland (1993) 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', *European Journal of International Law*, 4:1, 36–65

Roberts, Anthea (2017) *Is International Law International?* (Oxford: Oxford University Press)

Rowe, Peter (2016) *Legal Accountability and Britain's Wars 2000–2015* (Abingdon: Routledge)

Ruggie, John Gerard (1993) 'Wandering in the Void: Charting the UN's New Strategic Role', *Foreign Affairs*, 72:5, 26–31

Ruhl, J B (2010) 'General Design Principles for Resilience and Adaptive Capacity in Legal Systems—With Applications to Climate Change Adaptation Adaptation and Resiliency in Legal Systems', *North Carolina Law Review*, 89:5, 1373–1404

Sari, Aurel (2019) 'Hybrid Warfare, Law and the Fulda Gap', in Christopher M. Ford and Winston S. Williams (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford: Oxford University Press), 161–190

Schachter, Oscar (1982) 'International Law in Theory and Practice: General Course in Public International Law', *Recueil des Cours*, 178-V, 1–395

Schelling, Thomas C. (2008) *Arms and Influence* (New Haven: Yale University Press)

Schmitt, Michael N and Andru E Wall (2014) 'The International Law of Unconventional Statecraft', *Harvard National Security Journal*, 5:2, 349–376

Schwarzenberger, Georg (1943) 'Jus Pacis Ac Belli?: Prolegomena to a Sociology of International Law', *American Journal of International Law*, 37:3, 460–479

Shany, Yuval (2014) 'Does International Law Grant the People of Crimea and Donetsk a Right to Secede: Revisiting Self-Determination in Light of the 2014 Events in Ukraine', *Brown Journal of World Affairs*, 21:1, 233–244

Shea, Jamie (2016) 'Resilience: A Core Element of Collective Defence', NATO Review, <https://www.nato.int/docu/review/2016/also-in-2016/nato-defence-cyber-resilience/en/index.htm>

Simpson, Gerry (2001) 'Two Liberalisms', *European Journal of International Law*, 12:3, 537–572

Ssenyonjo, Manisuli (2018) 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia', *Criminal Law Forum*, 29:1, 63–119

Stephens, Dale (2011) 'The Age of Lawfare', *International Law Studies*, 87, 327–357

Talmon, Stefan (2019) 'The United States under President Trump: Gravedigger of International Law', *Chinese Journal of International Law*, 18:3, 645–668

Tamanaha, Brian Z. (2006) *Law as a Means to an End: Threat to The Rule of Law* (Cambridge:

Cambridge University Press)

Tenenbaum, Élie (2015) 'Hybrid Warfare in the Strategic Spectrum: An Historical Assessment', in Guillaume Lasconjarias and Jeffrey A Larsen (eds), *NATO's Response to Hybird Threats* (Rome: NATO Defense College), 95–112

Thucydides (2009) *The Peloponnesian War* (translated by Hammond, Martin; Oxford: Oxford University Press)

Trachtman, Joel P. (2016) 'Integrating Lawfare and Warfare', *Boston College International and Comparative Law Review*, 39:2, 267–282

Tugendhat, Tom and Laura Croft (2013) *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power* (London: Policy Exchange)

United States Department of State (1956) *Foreign Relations of the United States: Diplomatic Papers, 1939*, Vol I (Washington, D.C.: U.S. Government Printing Office)

United States Special Forces Command (2015) *The Gray Zone* (Tampa, Florida: United States Special Forces Command)

Voetelink, Joop (2017) 'Reframing Lawfare', in Ducheine, Paul A.L. and Frans P.B. Osinga (eds), *Netherlands Annual Review of Military Studies (Winning Without Killing: The Strategic and Operational Utility of Non-Kinetic Capabilities in Crises)* (The Hague: TMC Asser), 237–254

Wassermann, Felix Martin (1947) 'The Melian Dialogue', *Transactions and Proceedings of the American Philological Association*, 78, 18–36

Wirtz, James J. (2017) 'Life in the "Gray Zone": Observations for Contemporary Strategists', *Defense and Security Analysis*, 33:2, 106–114

Wittes, Benjamin (2015) 'What Is Hybrid Conflict?', Lawfare, <https://lawfareblog.com/what-hybrid-conflict>

Wright, Jeremy (2018) 'Cyber and International Law in the 21st Century', <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century>

Hybrid Warfare, Law and the Fulda Gap

Aurel Sari

UNIVERSITY OF EXETER | LAW SCHOOL

Hybrid Warfare, Law and the Fulda Gap

Aurel Sari*

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

* Senior Lecturer in Law, University of Exeter; Fellow, Allied Rapid Reaction Corps (A.Sari@exeter.ac.uk). All views are expressed in a personal capacity.

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

---

(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

---

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

---

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

---

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

---

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

---

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]

---

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

---

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

---

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.