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The University of Texas School of Law

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In the rapidly expanding discipline of international law, the *Texas International Law Journal* helps readers stay abreast of recent developments and new scholarship by providing access to leading international legal, theoretical, and policy analysis. The *Journal* publishes academic articles, essays, and student notes in the areas of public and private international law, international legal theory, the law of international organizations, comparative and foreign law, and domestic laws with significant international implications. The editors and staff aim to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

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Over the years, the *Journal* staff has made the most of its established heritage. We have developed international repute by forging close ties with numerous scholars and authors worldwide. As a result, we receive more than six hundred unsolicited manuscripts each year and are extremely selective in our publication choices. This position has helped us develop one of the largest student-published subscription circulations of any international law journal in the United States. The *Journal*'s subscription base includes law schools, government entities, law firms, corporations, embassies, international organizations, and individuals from virtually every state in the United States and dozens of countries.

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1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

United States, and former coeditor in chief of the *American Journal of International Law*; **the Honorable Richard J. Goldstone**, former member of the Constitutional Court of South Africa and former chief prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda; **the Honorable Dalia Dorner**, former Associate Justice of the Supreme Court of Israel; **Robert Reich**, professor of public policy at the University of California, Berkeley, former U.S. Secretary of Labor, and former director of public policy for the Federal Trade Commission; **Joseph Jova**, former U.S. ambassador to Mexico; **Andreas Lowenfeld**, professor at New York University School of Law and leading international law scholar; **Dean Rusk**, U.S. Secretary of State under Presidents Kennedy and Johnson; **Ewell "Pat" Murphy**, former chairman of the American Bar Association's Section of International Law and respected attorney in the field of international business transactions; **Walter S. Surrey**, former chairman of the National Council for U.S.-China Trade and former president of the American Society of International Law; and **W. Michael Reisman**, professor at Yale Law School and honorary editor of the *American Journal of International Law*.

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Introduction

CLAUDE BRUDERLEIN*

It is a great privilege to introduce this issue of the Texas International Law Journal focusing on the Manual on International Law Applicable to Air and Missile Warfare[1] (AMW Manual) produced by the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR). As Director of the Program and cochair of the AMW Group of Experts with Professor Yoram Dinstein, I had the pleasure of supervising the elaboration of the AMW Manual and its Commentary[2] from the inception of the project in January 2004 at the Harvard Law School to the adoption by consensus of the Black-letter Rules by the Group of Experts in May 2009 in Bern, Switzerland. The 2011 Symposium organized in Austin by the editorial team of the Texas International Law Journal represents a first opportunity to reflect on the nature and goals of the AMW Manual and to formulate a critical appraisal of its content.

The completion of the AMW Manual in 2009 and its Commentary a year later marked the conclusion of a major endeavor for the HPCR. This project was designed to respond to a growing tension in the early 2000s regarding the adequacy and relevance of international humanitarian law (IHL) in the emerging post-9/11 security environment. On the one hand, some governments argued that international humanitarian treaties were no longer adequate to regulate certain aspects of the so-called "war on terror" pitting democratic states against transnational terrorist organizations. In the context of this new asymmetric and global conflict, it was argued, affected states had to update or, at minimum, reinterpret the relevant treaty rules to acknowledge evolutions in the means and methods of warfare. On the other hand, humanitarian actors such as the International Committee of the Red Cross (ICRC) defended the integrity and adequacy of treaty law provisions, calling for their full application in these purportedly exceptional times. The opening of the Guantanamo detention camp and the adoption of new security and investigation protocols for individuals captured in the context of the "war on terror" further

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1. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009) [hereinafter AMW MANUAL], *available at* http://ihlresearch.org/amw/HPCR%20Manual.pdf.

2. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2010) [hereinafter AMW COMMENTARY], *available at* http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf.

complicated the dialogue on protection standards among security and humanitarian professionals.

With the view of fostering informal professional exchanges among government experts on these challenges, HPCR, in partnership with the Swiss Federal Department of Foreign Affairs, organized a series of Informal High-Level Government Expert Meetings on International Humanitarian Law—also known as the Alabama Process—to identify and discuss research and policy agendas for the development and clarification of IHL. More than forty government representatives from all continents, as well as experts from the ICRC and the United Nations attended the first meeting of the Alabama Process in January 2003 in Ashland, Massachusetts, to discuss current challenges in the implementation of IHL. While diverging views remained on the adequacy of IHL in current conflicts, participants identified the specific challenge of protecting civilians in high-tech warfare, particularly air warfare, as a common issue of concern in terms of the lack of clarity of applicable international norms. Recommendations were made calling for further investigation and consultations on this issue.

Building on this informal consensus among states, HPCR convened a group of international experts in 2004 in order to review practical challenges of regulating air and missile warfare in contemporary armed conflicts and to draft the first set of rules representing, in their common view, the existing rules of international law applicable to air and missile warfare. Following the elaboration of a first draft of the Manual by the Group of Experts in 2006, HPCR conducted extensive consultations with more than fifty governments seeking comments on the draft Manual and the observations of the experts. Balancing the academic authority of the Group of Experts with the practical experience of military lawyers and air operators across the world, HPCR aimed to produce a set of operational norms that would assist practitioners in determining the applicable rules of international law in such situations, informed by the comments of leading experts and practitioners in the elaboration of each norm.

The AMW Manual represents a true achievement in terms of gathering the contributions of leading international experts and the comments of more than one hundred practitioners from around the world in the development of a cogent and practical military manual. In doing so, HPCR hopes that the AMW Manual will facilitate the dissemination of an authoritative set of rules reflecting international law as perceived and discussed among these experts. It is hoped that the rules of the AMW Manual will not only find their way into national legislation and formal military codes, but also inform legal debates on the application of IHL to contemporary armed conflicts. Evidently, such an ambitious exercise is also subject to critique. The development of technical manuals restating existing norms of international law sits uneasily with the traditional sources of public international law. Neither doctrinal work, nor a proper technical assessment of general practice and *opinion juris* of states, the rules of the AMW Manual do not amount to a recognized source of international law as listed under the Statute of the International Court of Justice.[3] They represent the best opinion of a group of leading experts about the existing rules of international law applicable to air and missile warfare, as gathered and reviewed by its members from a vast array of national and international sources. The goal of the AMW Manual, in this context, is not to serve as a definite source of

3. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031, 3 U.N.T.S. 993, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

international law, but to facilitate the process of identification of these rules and to support professional exchanges on their interpretation.

This distinction between formal sources of international law vetted by states or international courts and technical manuals produced by experts is of particular importance, as we will see in several articles included in this issue of the Texas International Law Journal. In his article, Professor Amos Guiora asserts that international law in its current articulation is inadequate to regulate armed conflicts between state and non-state entities.[4] In his view, international law fails to provide an operational framework that would level the field between the obligations of states, on the one hand, and non-state armed groups on the other, arguing that international rules are largely respected by the former and largely ignored by the latter. Professor Guiora's reflections focus in particular on targeting rules and procedures, drawing on his experience as legal advisor to the operations of the Israeli Defense Forces in Gaza. Professor Michael Lewis explores the impact of drone technology on the traditional legal and operational boundaries of the battlefield.[5] While all agree that Unmanned Combat Aerial Vehicles (UCAVs) represent a new type of military capabilities to be properly regulated in terms of *jus in bello*, the AMW Manual has not addressed the legal implications of the use of such technology for counter-terrorism purpose outside traditional conflict zones. Current developments show the extent to which the use of drones will require tighter regulations under national and international human rights law, as far as these operations remain outside the traditional boundaries of armed conflicts. The blurring of counterterrorism measures and military operations demonstrates the difficulty of keeping these legal frameworks separate.

Professor Charles Dunlap, formerly Deputy Judge-Advocate General of the U.S. Air Force, underscores the timeliness and practical character of the AMW Manual as a professional tool.[6] While recognizing the informal character of the AMW Manual, Professor Dunlap believes that the AMW Manual can help both disseminate reliable information on the applicable rules of international law, particularly in coalition warfare, and maintain the legitimacy of these operations. Drawing from the United States' and NATO's experience in Afghanistan, Professor Dunlap suggests that the knowledge of the proper legal balance between security and humanitarian imperatives reflected in the AMW Manual may assist military strategists in reaching their common security goals. In his view, overstating the protective scope of the law in these circumstances prompts the creation of de facto sanctuaries that opponents are likely to use and abuse. He praises the AMW Manual as an attempt to fill a lacuna in available interpretative instruments specializing in air and missile warfare.

For his part, Professor Jordan Paust presents a critical appraisal of the AMW Manual, focusing in particular on the exceptions under which the general protection of civilian assets and aircraft may be lifted and connecting this to the broader debate

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4. Amos N. Guiora, *Determining a Legitimate Target: The Dilemma of the Decision-Maker*, 47 TEX. INT'L L.J. 315 (2012).

5. Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT'L L.J. 293 (2012).

6. Charles J. Dunlap, Jr., *Law of War Manuals and Warfighting: A Perspective*, 47 TEX. INT'L L.J. 265 (2012).

on the direct participation of civilians in hostilities, on which much has been written recently.[7] Professor Paust also proposes a critical review of the applicability of the AMW Manual's rules to U.N. operations and the prohibition of terror attacks. Finally, Professor Geoffrey Corn & Lieutenant Colonel Gary Corn examine the process of targeting in military operations and the challenges of operationalizing the law of armed conflict (LOAC) rules in such environments.[8] Their article draws from the ICTY *Gotovina* jurisprudence to discuss the relevance of the rules applicable to indirect targeting and how such rules should inform the decision-making process of military commanders in practice. In their view, the regulation of air and missile warfare must be driven by a synchronized assessment of both legal norms and operational realities.

While the AMW Manual is far from perfect in its outcome, the HPCR hopes that the AMW project contributed substantially to exploring new pathways for the development and clarification of IHL. Several areas of IHL are in need of such clarification, from occupation law to the rules regulating security detention in internal conflicts to the use of force through cyberspace. The true authority of this and future manuals resides in their use by military lawyers and humanitarian practitioners and the legal debates they will generate. As far as the regulation of the conduct of air and missile warfare is concerned, the 2011 Symposium at The University of Texas Law School in Austin and the contributions published in this issue of the Texas International Law Journal are strong evidence of the start of a promising process in this direction.

7. Jordan J. Paust, *A Critical Appraisal of the Air and Missile Warfare Manual*, 47 TEX. INT'L L.J. 277 (2012).

8. Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT'L L.J. 337 (2012).

Law of War Manuals and Warfighting: A Perspective

CHARLES J. DUNLAP, JR. *

SUMMARY

INTRODUCTION

The development and publication of any law of war manual is not easy. This is particularly so when the focus is on an area such as air and missile warfare that involves relatively new technology that is the subject of few international treaties and does not always easily fit within the legal traditions that emerge from many centuries of conflicts on the land and sea domains.[1] Moreover, when it involves a means and method of warfare that largely is dominated by a few countries, the challenge is even more daunting to reconcile the legitimate concerns of the leading aviation powers with those of the rest of the family of nations.

All of this makes the development of the Manual on International Law Applicable to Air and Missile Warfare (AMW Manual)[2] such a towering achievement. Fortunately, it was shepherded to success by an individual of

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1. *See generally* Javier Guisández Gómez, *The Law of Air Warfare*, 323 INT'L REV. OF THE RED CROSS (1998), http://www.icrc.org/eng/resources/documents/misc/57jpcl.htm.

2. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009), *available at* http://ihlresearch.org/amw/HPCR%20Manual.pdf [hereinafter AMW MANUAL].

Brobdingnagian intellect, energy, patience, and determination: Professor Claude Bruderlein, the director of Harvard's Program on Humanitarian Policy and Conflict Research, who was central to the success of the effort. Undoubtedly, he would be the first to insist on crediting Professor Yoram Dinstein, whose significance to this project cannot be overstated. Still, the fact that this project overcame so many obstacles is much due to Professor Bruderlein's tireless efforts.

The publication of the AMW Manual is extremely timely, coming as it does at a time in history when air warfare is increasingly becoming the weaponry of choice to battle transnational terrorists, especially in remote locations. That said, any assessment of the role of law of war manuals, to include the AMW Manual, must acknowledge the heritage of the Lieber Code,[3] which was produced long before powered aircraft or missiles became commonplace instruments of war. Many authorities consider this Civil War-era document the "seminal step" in the "detailed codification and exposition of the laws of war."[4] It was, historians say, "the first instance in western history in which the government of a sovereign nation established formal guidelines for its army's conduct toward its enemies."[5] Since the Lieber Code, a number of manuals of various styles have been produced.

Hays Parks, speaking in November 2010 about the drafting of the as yet unreleased U.S. Department of Defense Law of War Manual (DoD Manual), detailed the role of law of war manuals in the development of the modern law of armed conflict (LOAC).[6] He, too, noted the importance of the Lieber Code, but also listed the 1914 edition of the U.S. War Department's *Rules of Land Warfare* as well as other American and foreign manuals as examples of the genre.[7] From his study, Parks, who is the principal drafter of the forthcoming DoD Manual, concludes that the best manuals "*explain* the law with State practice examples," and that is the style he chose for the DoD Manual.[8]

Because of this different approach, the DoD Manual is expected to weigh in at over 1,000 pages and be documented with more than 3,000 footnotes.[9] According to Parks, this more detailed explication is intended to add perspective to the rules, complete with illustrations, so that practitioners in particular will understand the intended context of the law and policy pronouncements the DoD Manual is expected to contain.[10] Again, Parks' view is that "providing a treaty text without explanation,

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3. U.S. War Dep't, Instructions for the Government of Armies of the United states in the Field, Gen. Orders No. 100 (1863), *available at* http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument.

4. STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 186 (2005).

5. Curtis A. Bradley, *The Story of* Ex parte Milligan*: Military Trials, Enemy Combatants, and Congressional Authorization*, *in* PRESIDENTIAL POWER STORIES 93, 99 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (quoting RICHARD SHELLY HARTIGAN, LIEBER'S CODE & THE LAW OF WAR 1–2 (1983)).

6. W. Hays Parks, Former Senior Assoc. Deputy Counsel, Int'l Affairs, Dep't of Def., National Security Law in Practice: The Department of Defense Law of War Manual, Speech at the ABA Standing Committee on Law and National Security Breakfast Series 1–7 (Nov. 18, 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/natsecurity/hays_parks_speech11082010.authcheckdam.pdf.

7. *Id.* at 1.

8. *Id.* at 5.

9. *Id.* at 8.

10. W. Hays Parks, Former Senior Assoc. Deputy Counsel, Int'l Affairs, Dep't of Def., U.S. and The Laws of War, Summary of the International Law Discussion Group Meeting Held at Chatham House 16 (Feb. 21, 2011), *available at* http://www.chathamhouse.org/sites/default/files/public/Research/International

clarification, elaboration, or evidence of State practice (other than similar manuals), has resulted in lawyers, military and civilian, incorrectly viewing law of war treaties as the sole source for the law."[11]

The Commentary to the AMW Manual serves something of a similar purpose.[12] For U.S. government practitioners, this is, however, somewhat problematic—as any such document built upon the unofficial contributions of experts from a variety of nations is likely to be. U.S. government military operations are often dominated by American policy considerations, to include interpretations of international law that may not be shared by other nations. As will be discussed in more detail below, this is especially so with respect to customary international law that is reflected in both the AMW Manual and its Commentary.

This short essay is intended to provide some perspectives on the role the AMW Manual can play in the future. It aims to provide special emphasis on the practical issues associated with air and missile operations. It assesses the potential of the manual to turn the norms it promotes into accepted practice among nations, if not into customary international law.

I. THE AMW MANUAL'S EDUCATIVE FUNCTION

Beyond its potential as a norm-setter in international law, the AMW Manual could provide an enormous service by helping to teach not just military audiences but also the public at large the fundamentals of the law applicable to air and missile warfare. Education about the law applicable to these technologies is critical. In the larger context, Protocol I to the 1949 Geneva Conventions already recognizes the importance of efforts like the AMW Manual by calling upon the parties to "encourage the study [of the Conventions] by the civilian population."[13]

Though the United States is not a party to the Protocol,[14] and it is doubtful that this section would be considered customary international law, it nevertheless makes practical sense. Why? Consider what Professors Michael Riesman and Chris T. Antoniou contend in their 1994 book, *The Laws of War*: "In modern popular democracies, even a limited armed conflict requires a substantial base of popular 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."[15]

%20Law/il210211summary.pdf.

11. *Id.* at 9.

12. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2010), *available at* http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf; *see also* AMW MANUAL, *supra* note 2, at iii ("[T]he Commentary clarifies the prominent legal interpretations and indicates differing perspectives.").

13. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 83, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

14. *See* States Parties, Int'l Comm. of Red Cross, 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), http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P#ratif (last visited Jan. 14, 2012) (U.S. not included as a party).

15. W. MICHAEL RIESMAN & CHRIS T. ANTONIOU, THE LAWS OF WAR xxiv (1994).

In order for "people" to make the appropriate judgment about the war's conduct, they need to understand exactly what the rules require. In this country, however, there is considerable evidence that such an understanding is wanting. For example, in a survey released in April 2011, the American Red Cross found that "only 1 in 5 American youth is familiar with the Geneva Conventions"[16] and just 44% "believe that rules and laws governing actions in war are a good way to reduce human suffering."[17] The only encouraging bit of news from this survey is that nearly 80% of youth recognize the need for better instruction on the law of war.[18]

Of course, the first priority has to be ensuring that those in the armed forces and in the civilian defense establishment have a keen understanding of the law of war. In this respect, the AMW Manual is especially well-suited because it clearly displays the central concepts in a cogent and direct format; even the physical shape of the manual is such that it easily slips into a cargo pocket of the military uniform. Attention to such details is an important attribute of a document intended for real-world use.

Having the law readily accessible to those who must use it is necessary not just to conform to moral and legal requirements, but also for practical, warfighting reasons—particularly for modern democracies that honor the rule of law. Professor William Eckhart points out that today's adversaries aim to turn adherence to and respect for the rule of law into vulnerabilities. He says:

> 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."[19]

This is especially true in the kind of "irregular" conflicts that predominate today.[20] There is no question that many belligerents in such conflicts seek to gain an advantage by portraying U.S. and other forces as violating the law of war, and thus erode the popular support that Professors Riesman and Antoniou say democracies need to sustain a warfighting effort.[21] In particular, they try to show that the United States and other nations with air war capabilities are violating the principle of distinction—which Professor Gary Solis characterizes as "the most significant battlefield concept a combatant must observe"[22]—by causing civilian casualties in airstrikes.

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16. Press Release, American Red Cross, Red Cross Survey Finds Young Americans Unaware of Rules of War (Apr. 12, 2011), http://www.redcross.org/portal/site/en/menuitem.94aae335470e233f6cf911df43181aa0/?vgnextoid=801dbe9f0e64f210VgnVCM10000089f0870aRCRD.

17. SURVEY ON INTERNATIONAL HUMANITARIAN LAW, AMERICAN RED CROSS 7 (March 2011), *available at* http://www.redcross.org/www-files/Documents/pdf/international/IHL/IHLSurvey.pdf.

18. *Id.* at 14.

19. William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. INT'L L. 431, 441 (2003).

20. The U.S. 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 capabilities, in order to erode an adversary's power, influence, and will." *Irregular Warfare*, DICTIONARY OF MILITARY TERMS (Nov. 15, 2011), http://www.dtic.mil/doctrine/dod_dictionary/data/i/19843.html.

21. RIESMAN & ANTONIOU, *supra* note 15, at xxiv.

22. GARY D. SOLIS, THE LAW OF ARMED CONFLICT 251 (2010). This legal principle requires combatants to at all times distinguish between civilians and combatants, and direct attacks only against the

Candidly, they have enjoyed some success in Afghanistan, where "Afghan anger over civilian casualties has been a long-standing issue . . . [and civilian casualties] dominate Afghan critiques of international forces."[23] Unsurprisingly, Afghan militants have made orchestrating such events a centerpiece of their strategy. Former Secretary of Defense Robert Gates noted in 2009 that in Afghanistan, "provoking or exploiting civilian casualties is a 'princip[al] strategic tactic' of the Taliban."[24] This is particularly true with respect to airpower because it is a military capability that they do not have and that they cannot defend against with the weaponry they typically possess.[25] Accordingly, they try to use the civilian casualty issue as a way of limiting the use of airpower by creating political pressure, often by exploiting popular misconceptions about the law.[26]

Defeating this tactic requires knowledge of the law of armed conflict as applicable especially to air operations, and the AMW Manual can help provide that. An absence of such knowledge and, indeed, understanding, can have profoundly unproductive unintended consequences.[27] A classic example is the North Atlantic Treaty Organization's (NATO) clumsy efforts to offset Taliban manipulation of the civilian casualty issue. NATO virtually invited problems when it announced in June 2007 that its forces "would not fire on positions if it knew there were civilians nearby."[28] Just a year later, a spokesman reiterated that "[i]f there is the likelihood of even one civilian casualty, [NATO] will not strike, not even if we think Osama bin Laden is down there."[29]

The law of armed conflict—as is clear in the AMW Manual—certainly does not demand such deference.[30] "By creating restrictions beyond what [LOAC] would

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latter. *Id.*

23. Erica Gaston, *Karzai's Civilian Casualty Ultimatum*, FOREIGN POLICY (Jun. 2, 2011), http://afpak.foreignpolicy.com/posts/2011/06/02/karzais_civilian_casualties_ultimatum.

24. John J. Kruzel, *U.S. Denies Using White Phosphorous in Afghanistan, Gates Pledges More Investigation*, AMERICAN FORCES PRESS SERVICE (May 11, 2009), http://www.defense.gov/news/newsarticle.aspx?id=54294.

25. *Cf.* Erin Cunningham, *Taliban Attack Highlights Its Growing Power*, GLOBALPOST (Aug. 7, 2011), http://www.globalpost.com/dispatch/news/regions/asia-pacific/afghanistan/110807/taliban-attack-highlights-its-growing-power (explaining that the Taliban does not currently "maintain serious anti-aircraft capabilities").

26. *See* Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT'L L. 121, 130 (2011) [hereinafter Dunlap, *Does Lawfare Need an Apologia?*] ("Exploiting civilian casualties, or more academically, exploiting the adherence—or lack thereof—to the law of armed conflict axiom of distinction has become the 'principle strategic tactic' of the Taliban much out of sheer necessity." (quoting then-U.S. Secretary of Defense Robert Gates, quoted in John J. Kruzel, *U.S. Denies Using White Phosphorous in Afghanistan, Gates Pledges More Investigation*, AM. FORCES PRESS SERVICE (May 11, 2009), http://www.defense.gov/news/newsarticle.aspx?id=54294)).

27. *See id.* at 133–35 (discussing the "unintended consequences" of restrictions the North Atlantic Treaty Organization placed on airstrikes in response to concerns about civilian casualties).

28. Noor Kahn, *Afghan Civilians Said Killed in Clash*, WASH. POST (June 30, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/30/AR2007063000028.html (quoting Maj. John Thomas, spokesman for NATO's International Security Assistance Force).

29. Pamela Constable, *NATO Hopes to Undercut Taliban with 'Surge' of Projects*, WASH. POST (Sept. 27, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603452_pf.html (quoting Brig. Gen. Richard Blanchette, chief spokesman for NATO forces).

30. *See, e.g.*, Charles J. Dunlap, *Lawfare Amid Warfare*, WASH. TIMES (Aug. 3, 2007), http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/?page=1 (explaining that international law recognizes "legitimate attacks on combatants" that may put civilians at risk).

require, NATO's pronouncements encourage the Taliban to shield themselves from air attack by violating the law of armed conflict [by] embedding themselves among civilians."[31] And this is exactly what has happened.[32] Nevertheless, when he took command of NATO operations in Afghanistan in June 2009, General Stanley A. McChrystal put in place new restrictions on airstrikes in an effort to limit civilian casualties, even though only a small percentage of the civilian losses were attributable to airstrikes.[33] Tragically, a year after the restrictive policy was put in place, the United Nations (U.N.) reported that civilian casualties skyrocketed by 31%[34] and Coalition military casualties reached an all-time high.[35] The policy was a stunning failure from every perspective as it had precisely the opposite effect than that intended.

General David Petraeus replaced General McChrystal in June 2010 and put in place rules that were more permissive[36] and resulted in a 65% increase in the number of airstrikes in his first year.[37] Importantly, not only did the security situation in Afghanistan improve, but civilian and military casualties also decreased remarkably. Civilian casualties dropped from about 230 per month in 2010 to about 115 per month in the first five months of 2011,[38] 85% of which were caused by the Taliban

31. Dunlap, *Does Lawfare Need an Apologia?*, *supra* note 26, at 134.

32. *Id.* at 134 n.67.

33. *See* Gen. Stanley A. McChrystal, Tactical Directive (2009), *available in part at* http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf ("The use of air-to-ground munitions and indirect fires against residential compounds is only authorized under very limited and prescribed conditions ...."); U.N. Assistance Mission to Afg., Afghanistan: Mid Year Bulletin on Protection of Civilians in Armed Conflict, 2009, 10–11, (Jul. 31, 2009), http://unama.unmissions.org/Portals/UNAMA/human%20rights/09july31-UNAMA-HUMAN-RIGHTS-CIVILIAN-CASUALTIES-Mid-Year-2009-Bulletin.pdf (reporting that 20% of the total number of civilian casualties were caused by airstrikes, which is lower than the previous year, in which airstrikes caused 26% of the total civilian casualties).

34. *Afghan Civilian Casualties Rise 31 Per Cent in First Six Months of 2010*, U.N. ASSISTANCE MISSION IN AFG. (Aug. 10, 2010), http://unama.unmissions.org/Default.aspx?tabid=1741&ctl=Details&mid=1882&ItemID=9955.

35. Elena Becatoros, *700 NATO Troops Killed in Afghanistan in 2011*, WASH. TIMES (Dec. 28, 2010), http://www.washingtontimes.com/news/2010/dec/28/700-nato-troops-killed-afghanistan-2010 ("This year is by far the deadliest for the coalition ....").

36. *See* Julian E. Barnes, *Petraeus Resets Afghan Airstrike Rules*, WSJ.COM (Aug. 1, 2010), http://online.wsj.com/article/SB10001424052748703314904575399770077260834.html ("describing General Petraeus' easing of a specific use of force rule and his "broader effort ... to review [General McChrystal's] tactical directive limiting airstrikes").

37. Noah Shachtman & Spencer Ackerman, *5,800 Attacks Are Just the Beginning After Petraeus' Year-Long Air War*, WIRED (Jul. 5, 2011), http://www.wired.com/dangerroom/2011/07/5800-attacks-are-just-the-beginning-after-petraeus-year-long-air-war/#more-50792.

38. SUSAN G. CHESSER, CONG. RESEARCH SERV., R4108, AFGHANISTAN CASUALTIES: MILITARY FORCES AND CIVILIANS 2–3 (June 9, 2011), http://www.hsdl.org/?view&did=8855 (showing in a table the civilian casualties in 2010 and January-May 2011 in Afghanistan). Regrettably, in February 2012 the United Nations Assistance Mission in Afghanistan reported that by the end of 2011, civilian casualties had risen 8% over 2010. U.N. Assistance Mission to Afg., Afghanistan: Annual Report 2011, Protection of Civilians in Armed Conflict 1, (Feb. 2012), http://unama.unmissions.org/Portals/UNAMA/Documents/UNAMA%20POC%202011%20Report_Final_Feb%202012.pdf. The report attributes 77% of "conflict-related" civilian deaths in 2011 to "Anti-Government Elements." *Id.* The report also indicates that the increased pace of air attacks that paralleled a reduction in the number of civilian deaths did not persist, as it states that in 2011 there was a "reduced number of aerial operations." *Id.* at 24. Aerial attacks were responsible for just 187 of the 3,021 civilian deaths in 2011. *Id.* at 1, 24.

and al-Qaeda, not the Coalition.[39] Moreover, Coalition fatalities, which averaged nearly sixty per month in 2010, fell in 2011.[40]

The logic of the Petraeus approach seems clear: by seizing the opportunity to use airpower more liberally (but fully consonant with LOAC), fewer enemies escaped. Since the enemy kills the overwhelming number of civilians, removing more adversaries from the equation naturally reduces the peril to noncombatants. It certainly serves no military or humanitarian purpose to create a de facto sanctuary for Taliban and al-Qaeda fighters by a policy pronouncement that erodes the underlying rationale for the law of war's rule. In short, the numbers indicate that increasing airstrikes actually *decreases* the number of civilian and military deaths. In fact, a U.N. report released in March 2011 declared that "[a]lthough the number of air strikes increased exponentially, the number of civilian casualties from air strikes decreased in 2010."[41]

To be sure, criticism of U.S. airstrikes continues, but the rationale may not be as much about violating the law or even the deaths, per se. After all, a 2010 study found that airstrikes were responsible for less than a sixth of all civilian deaths attributable to Coalition actions.[42] Indeed, traffic accidents with NATO vehicles killed more Afghan women and children than did airstrikes.[43] Rather, the criticism may be something of a veiled protest against the presence of foreign ground troops. Reporter Alissa Rubin remarked in the *New York Times* that even though the Taliban and al-Qaeda cause the vast majority of civilian casualties in Afghanistan, "those that are caused by NATO troops appear to reverberate more deeply because of underlying animosity about foreigners in the country."[44]

When the law is well understood, and is informed by relevant cultural factors, it is easier to parse the subtleties. In this instance, for example, if NATO's desire was to limit Afghan protests due to civilian deaths, then the better approach might have been to limit the number of troops on the ground, not the airstrikes that kill those doing most of the killing of civilians. Ironically, troops on the ground are related to the civilian casualties that do occur from airstrikes. A study released by Human Rights Watch in 2008 reported that the "vast majority of known civilian deaths" caused by airstrikes came from those called in by ground forces under insurgent attack.[45] Following the law as outlined in the AMW Manual, as opposed to trying to

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39. Jim Michaels, *Taliban Behind Most Afghan Civilian Casualties*, USA TODAY (June 22, 2011), http://www.usatoday.com/news/world/afghanistan/2011-06-22-afghan-civilian-casualties_n.htm.

40. *Coalition Military Fatalities By Year and Month*, ICASUALTIES.ORG, http://icasualties.org/OEF/Index.aspx (last visited Jan. 29, 2012) (showing that Coalition casualties fell to 566 in 2011 from 711 in 2010).

41. U.N. Assistance Mission in Afg. & Afg. Indep. Human Rights Comm'n, Afghanistan: Annual Report 2010, Protection of Civilians in Armed Conflict, 24 (Mar. 2011), http://unama.unmissions.org/Portals/UNAMA/human%20rights/March%20PoC%20Annual%20Report%20Final.pdf.

42. Luke N. Condra et al., *The Effect of Civilian Causalities in Afghanistan and Iraq* 39, (Nat'l Bureau of Econ. Research, Working Paper No. 16152, 2010, revised 2011), *available at* http://www.nber.org/papers/w16152 (last visited Jan. 29, 2012).

43. *Id.*

44. Alissa J. Rubin, *Afghan Leader Calls Apology in Boys' Deaths Insufficient*, N.Y. TIMES (Mar. 6, 2011), http://www.nytimes.com/2011/03/07/world/asia/07afghanistan.html.

45. HUMAN RIGHTS WATCH, "TROOPS IN CONTACT" AIRSTRIKES AND CIVILIAN DEATHS IN AFGHANISTAN 29–30, (2008), *available at* http://hrw.org/reports/2008/afghanistan0908/afghanistan0908web.pdf.

"improve" upon it, is much more likely to produce the desired military and strategic outcome.

II. THE AMW MANUAL AND THE DOD MANUAL

The AMW Manual aims to apply to all nations, but in reality, accomplishing that end is a profoundly challenging proposition. Afghanistan is a good example of why this is true. Given that international law is comprised principally of treaties and customary international law,[46] the fact that not all Coalition partners may be parties to the same international agreements can—and does—create complication in Afghanistan.

Still, manuals such as the AMW Manual, along with its Commentary, are very helpful in identifying relevant provisions of both sources; however, it is the determination of *customary* international law that is, by far, the most problematic. At the end of the day, it is principally state practice—at least with respect to the law of armed conflict—that will define customary international law.[47] It may be that manuals can play a role in developing or even initiating state practice (and some could understandably argue that the Lieber Code did just that), but they are not themselves an independent source of customary international law.

Defining customary international law in the context of the law of war has proven to be especially difficult. Indeed, I think that this will always be the rub with law of armed conflict manuals: to what degree can nations agree with what is, in fact, customary international law in that context? The United States, for example, has sharply differed in the past with interpretations that the International Committee of the Red Cross (ICRC) and others have claimed for customary international law in armed conflicts.[48] In the case of the dispute with the ICRC, the United States took most issue with the sources relied upon to determine customary international law, and it seems clear that recitation of a particular principle in a law of war manual would not be deemed sufficient.[49]

Obviously, the AMW Manual has to come to conclusions as to customary international law, and in some instances those conclusions may prove to be at odds with the U.S. interpretation. Exactly how much of a difference there may be is hard to say, because the official U.S. government views are not as definitively elucidated as one might hope. That, however, could change with the much-anticipated issuance of the aforementioned U.S. DoD Law of War Manual, the drafting of which Hays Parks oversaw for more than a decade prior to his retirement in 2010.[50] I suspect that much of it will be in agreement with the AMW Manual, but there could well be important differences.

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46. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

47. *See, e.g.*, Statute of the International Court of Justice, art. 38. para. 1b, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (stating that the International Court of Justice shall apply, inter alia, "international custom, as evidence of a general practice accepted as law").

48. *See, e.g.*, Jim Garamone, *DoD, State Department Criticize Red Cross Law of War Study*, AMERICAN FORCES PRESS SERVICE (Mar. 8, 2007), http://www.defense.gov/news/newsarticle.aspx?id=3308 (discussing criticism by lawyers in the DoD and the State Department of the methodology used in an ICRC study purporting to be the "definitive explanation of the laws of war").

49. *Id.*

50. *See* Parks, *supra* note 6, at 7–8 (describing the process of drafting the new manual).

Unfortunately, it now appears that the issuance of the DoD Manual will be delayed as the coordination with agencies outside the DoD apparently is taking longer than expected.[51] As the recent controversy over the legal status of air operations against Libya illustrates, there are evidently serious divides within the U.S. government legal community about some rather basic questions.[52]

The precise nature of the dispute may be unknown, but it is indeed worrisome that a manual that was drafted principally by current and former military lawyers (and peer-reviewed by world-renowned experts)[53] might nevertheless be caught up in policy quarrels. In a way, it is reminiscent of previous disputes between military and civilian lawyers as to other law of war issues arising since 9/11.[54] Regardless, this will make the AMW Manual especially valuable, as it will fill, if not a lacuna in the law, a lacuna in available manuals specializing in this aspect of warfare.

In any event, whenever the DoD Manual is finally published, its analysis of customary international law will likely not be accepted by all, but it will reflect state practice at least with respect to the United States. There are those who will say, understandably, that U.S. practice does not, ipso facto, define state practice for the purpose of defining customary international law. Yet in the area of air and missile warfare especially, the U.S. view will doubtless be authoritative if not controlling. The United States is, and will likely continue to be for the foreseeable future, the foremost practitioner of air and missile warfare. In terms of actual warfighting experience, there are a few nations with some current experience, but none with the dimension of that of the United States. Moreover, the United States is—for now anyway—the leader in air and missile technology.

III. TECHNOLOGY, ROE, AND THE AMW MANUAL PRACTITIONER

Along this line, allow me to observe that it has been my experience that with respect to air and missile weapons, the erudition in the law of some commentators and legal scholars is not always matched by a sophisticated understanding of the weapons and delivery systems, not to mention the doctrine and strategies for their use. This hobbles their analysis and, frankly, undermines the weight their views are given by warfighters, who may consider their legal views too uninformed by the facts to be useful.

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51. This observation is based on the author's conversations and correspondence with U.S. Department of Defense attorneys and others with relevant knowledge.

52. Administration lawyers apparently could not agree as to whether or not U.S. involvement in NATO's combat operations over Libya constituted "hostilities" within the meaning of the War Powers Resolution. Charlie Savage, *2 Top Lawyers Lose to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), http://www.nytimes.com/2011/06/18/world/africa/18powers.html.

53. *See* Parks, *supra* note 6, at 7–8 ("The peer review consisted of senior military legal officers from Australia, Canada, New Zealand, and the United Kingdom; four U.S. law professors from top U.S. law schools with extensive knowledge of the law of war; and Sir Adam Roberts, a distinguished British professor of history with long-time interest in the law of war.").

54. *See, e.g.*, Charles J. Dunlap, Jr., *A Tale of Two Judges: A Judge Advocate's Reflections on Judge Gonzales' Apologia*, 42 TEX. TECH L. REV. 893, 894, 906–908 (2010) (describing the ideological conflicts between then-Attorney General Alberto Gonzales's civilian "War Council" and JAG attorneys post-9/11).

Without a great deal of technical acumen beyond the law, it is simply impossible to be an effective legal advisor for U.S. air and missile operations, regardless of legal, qua legal, expertise. Consider that such operations are typically controlled by Combined Air and Space Operations Centers (CAOCs) that are "comprised of a vast array of people, programs and processes" and filled with "thousands of computers, dozens of servers, racks of video equipment and display screens."[55] Much of this technology is directly relevant to efforts to comply with LOAC. For example, *U.S. News & World Report* noted that in the CAOC:

> Analysts calculate the size of bomb fragments and the distance they travel from the strike site, using detailed maps and video footage to gauge potential for human casualties and property damage. In another area, analysts don 3D glasses to read maps that show precise heights of palm trees and the walls of any given compound to help determine "collateral concerns."[56]

The *New York Times* also noted that:

> The bombs themselves are chosen carefully and sometimes modified. Some designed for air burst are instead programmed with a delayed fuse to bury themselves before exploding, thus reducing the blast range. One sort of bomb has even been loaded with less explosive, filled instead with concrete, to cause great damage where it hits but no farther.[57]

As the *Times* further reported, Air Force lawyers "vet" the targets to ensure the proposed bombing conforms to "a complex body of military law, including the Geneva Conventions, acts of Congress and court decisions."[58] In order to perform this duty, each of these lawyers had to be specially trained not just on the law of air and missile warfare, but also on the systems utilized in the CAOC, as well as a vast body of information concerning weapons, munitions, and the strategies for their use.

Absent such training, legal expertise from a manual or otherwise will be for naught. It just cannot be emphasized enough how important it is for practitioners in this area to thoroughly educate themselves on what may be viewed in traditional terms as the clients' "business." This is vitally important, because absent such a demonstrated understanding of the realities military commanders and their forces face, effective legal advice that is accepted is difficult to attain. Mastery of the AMW Manual (and even its Commentary) is not sufficient to minimally qualify an attorney to serve as an air and missile operation legal advisor.

It is also important to understand that as valuable as the AMW Manual or any other manual may be in ensuring that the basics of LOAC are observed, in U.S. air operations today, the core document is what is called the special instructions (SPINS), which include the rules of engagement (ROE).[59] ROE are defined by the

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55. Combined Air and Space Operations Center (CAOC), *U.S. Air Force Fact Sheet*, U.S. AIR FORCES CENTRAL (Feb. 6, 2011), http://www.afcent.af.mil/library/factsheets/factsheet.asp?id=12152.

56. Anna Mulrine, *A Look Inside the Air Force's Control Center for Iraq and Afghanistan*, U.S. NEWS & WORLD REP. (May 29, 2008), http://www.usnews.com/news/world/articles/2008/05/29/a-look-inside-the-air-forces-control-center-for-iraq-and-afghanistan.

57. Thom Shanker, *Civilian Risks Curb Strikes in Afghan War*, N.Y. TIMES (July 23, 2008), http://www.nytimes.com/2008/07/23/world/asia/23military.html.

58. *Id.*

59. *See* U.S. Air Force Judge Advocate Gen. Corps, *Rules of Engagement*, *in* AIR FORCE

DoD as "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."[60] Those "circumstances and limitations" usually involve many more constraints than the law would itself require. ROE incorporate myriad policy considerations that may, for example, impose limitations on attacks in certain circumstances that are not mandated by LOAC, or require out-of-theater approvals by high-ranking government officials.

Put another way, in modern air and missile operations conducted by experienced air powers, compliance with the minimum LOAC standards set forth in the AMW Manual is not often a challenge; however, compliance with the ROE can be. ROE can be complex because not all of the requirements are intuitive, and policy decisions not implicating the law of war can change frequently. The United States is not, of course, alone in having ROE so defined; most nations do, and the policy directions they contain can be quite controversial.[61] Although most coalition operations seek to draft universally accepted ROE, in most circumstances nations will retain one or more variances as a matter of national prerogative, or even because of differing legal obligations based on those international agreements to which they are—or are not—parties.

CONCLUSION

As noted in the beginning, the AMW Manual is a tremendous accomplishment, one that will serve the relevant communities of interest—practitioners, operators, policymakers, journalists, the general public, and more—for years to come. In fact, it may not be possible to improve upon it very much because of the vagaries of the acceptance of what is or is not customary international law, as well as emerging theories that suggest the hitherto largely unheard of proposition that nations may be able to withdraw from customary international law.[62] International law, to include the law of war, is in a very dynamic age.

It is important to understand that while the AMW Manual can provide a baseline and its users can be assured that following it will not be "wrong" or create criminal liability of some sort, it is not without controversy. Indeed, if there is a criticism to be made, it may be that the AMW Manual is too conservative. The controversy, such as it may be, could well focus more on the Commentary than on the AMW Manual itself. Still, there are aspects of the AMW Manual not otherwise incorporated into treaty law that may nevertheless rapidly become accepted

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OPERATIONS & THE LAW 237 (2009) ("Most SPINS have an ROE subsection, which contains a copy of relevant provisions of the applicable ROE . . . .").

60. *Rules of Engagement*, DICTIONARY OF MILITARY TERMS (Nov. 15, 2011), http://www.dtic.mil/doctrine/dod_dictionary/data/r/6783.html.

61. *See, e.g.*, Andy Bloxham, *Soldiers Told Not to Shoot Taliban Bomb Layers*, THE TELEGRAPH (UK) (July 8, 2011), http://www.telegraph.co.uk/news/newstopics/onthefrontline/8626344/Soldiers-told-not-to-shoot-Taliban-bomb-layers.html (discussing a controversial ROE policy barring British soldiers from shooting insurgents planting roadside improvised explosive devices).

62. *See, e.g.*, Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L. J. 202, 204 (2010) (challenging the historical and functional underpinnings of the "Mandatory View" that "nations never have the right to withdraw unilaterally" from a customary international law rule "once the rule becomes established").

customary international law, with the Section S (Surrender) and Section U (Contraband, Interception, Inspection and Capture)[63] being excellent candidates for early recognition.

This essay has tried to emphasize that to be an effective practitioner in this area of the law requires much more knowledge than the AMW Manual can provide. The effective counselor must bring to bear a broad range of knowledge—technical, cultural, psychological, and more—all with a cognizance that it must resonate with the clientele as a practical and pragmatic enabler of effective warfighting. With respect to considerations beyond the law, per se, an American practitioner may wish to note that the American Bar Association's Model Rules of Professional Conduct provide: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."[64]

Though perhaps not conceived with the role of the lawyer in armed conflict in mind, this provision promoting a holistic approach to client issues is nevertheless especially relevant in modern air and missile warfare, where each operation is subjected to relentless scrutiny by friend and foe alike. Much of that scrutiny has as much to do with the wisdom of a particular act as its technical legality. The lawyer must be prepared to advise on both, and that preparation can require a very significant intellectual investment.

To be clear, the business of war can be quite demanding on those providing legal advice; such advice has to be given the right way, and its wider effects must be carefully considered. Recognizing the special nature of this kind of practice does not come naturally to some lawyers. Professor Richard Schragger observed in discussing the difference between military and civilian lawyers in the Bush Administration that:

> [M]ilitary lawyers understand that when you ask human beings to kill other human beings, rules of decency are required. . . . Instead of seeing law as a barrier to the exercise of their clients' power, [military lawyers] understand the law as a prerequisite to the meaningful exercise of power. Law allows our troops to engage in forceful, violent acts with relatively little hesitation or moral qualms. Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.[65]

Thus, efforts like the drafting of the AMW Manual are but one part of the overall preparation for lawful, ethical combat. The AMW Manual can be instrumental not just to protecting the lives of innocent civilians, or even to defending the perquisites of states, per se. It can also help to provide a degree of confidence, if not comfort, to those who are asked by their nation to perform the most difficult of tasks under the most demanding of circumstances. For this, if nothing else, the enormous effort that produced the AMW Manual finds its justification.

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63. AMW MANUAL, *supra* note 2, paras. 125–31, 134–36.

64. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2010).

65. Richard C. Schragger, *Cooler Heads: The Difference Between the President's Lawyers and the Military's*, SLATE (Sept. 20, 2006), http://www.slate.com/id/2150050/?nav/navoa.

A Critical Appraisal of the Air and Missile Warfare Manual

JORDAN J. PAUST*

SUMMARY

My task during this symposial discourse is to offer a critical appraisal of the Manual on International Law Applicable to Air and Missile Warfare (AMW Manual).[1] Although the AMW Manual was adopted by consensus after "extensive consultations" among a notable group of experts over a six-year period[2] and allegedly "restates current applicable law,"[3] there are a number of provisions that do not reflect current international law (especially the laws of war), are highly problematic and, if actually implemented, could result in war crime responsibility. Additionally, there are a number of provisions that are too limiting in their reach or focus or too inattentive to developments in the laws of war.

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1. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009) [hereinafter AMW MANUAL], *available at* http://ihlresearch.org/amw/HPCR%20Manual.pdf.

2. *Id.* at ii–iii.

3. *Id.* r. 2(a). Applicable law is allegedly set forth in "Black-letter Rules," including a definitional section labeled "Rule 1." *Id.* at iii, v.

I. DELIMITING AND DYSFUNCTIONAL DEFINITIONS

A. Attack

The first set of troubling provisions is in the section on definitions. Instead of analyzing each definition offered, the focus here will be on those that are patently problematic. The first troublesome definition is the definition of "attack," an important conditioning or contextually limiting word that is used throughout the AMW Manual. An attack is defined in the AMW Manual as "an act of violence, whether in offence or in defence."[4] It is problematic because limiting the word "attack" to an act of violence is too restrictive, archaic, and insufficiently related to other provisions of the AMW Manual. For example, use of the limiting word "violence" in the general definition of attack is facially inconsistent with the AMW Manual's definition of "computer network attack," which is otherwise sensible and addresses "operations to manipulate, disrupt, deny, degrade or destroy information . . . or the computer network itself, or to gain control over the computer or computer network."[5] Presumably, computer jamming and disarmament would be covered by the definition of "computer network attack," but would not constitute an attack under the general definition and, therefore, wherever the word "attack" appears without the conditioning phrase "computer network." Similarly, the redirection or destruction of foreign aircraft and missiles through computer hacking and control (which are not acts of violence) would not constitute an "attack" even if there were violent consequences. For the same reason, the definition of "attack" is inconsistent with the AMW Manual's definition of "electronic warfare," which is defined as "any military action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or to attack the enemy,"[6] although the phrase "or to attack" found in this definition is presumably limited by the general definition of "attack" noted above.

Also inconsistent is the AMW Manual's rule 6. It rightly recognizes the absolute prohibition of the use of certain weapons during air or missile combat operations, including any use of "[b]iological, including bacteriological, weapons," "[c]hemical weapons," and "[p]oison, poisoned substances and poisoned weapons."[7] The fact that use of such weaponry might not involve acts of violence should have been recognized by those contemplating what forms of conduct might constitute an attack. The AMW Manual's definition of attack would not include the use of such prohibited weaponry by aircraft or missiles during what most would undoubtedly recognize as the use of weaponry to engage in an attack even though the attack did not use or result in acts of "violence." In another area of international law—that attempting to define terroristic attacks or terrorism—scholars have recognized that an objective definition of terrorism must include an intent to produce terror and a terror outcome and that methods or means should not be limited to violence and thereby exclude use of bacteriological or biological, chemical, or poisonous weapons

4. *Id.* r. 1(e).
5. *Id.* r. 1(m).
6. *Id.* r. 1(p).
7. *Id.* r. 6(a), (b), (d).

for terroristic purposes or methods of cyber-terror that do not involve the use or outcome of violence.[8]

The word "attack" appears in highly relevant portions of Protocol I to the Geneva Conventions[9] and is defined in Article 49(1) as "acts of violence,"[10] which, as noted above, can create problems. Use of the word "attack" in rules 10 through 14 of the AMW Manual, which are facially similar to portions of Articles 48 to 51 of Additional Protocol I,[11] necessarily limits the reach of rules 10 through 14 of the AMW Manual[12] because the AMW Manual limits its definition of "attack" to "an act of violence."[13] The same problem pertains with respect to use of the word "attacks" in rules 17, 19, 20, and 21 of the AMW Manual,[14] and in many other places where the word "attack" is used.[15] This defect could have been rectified if the word attack had been redefined to include use of violence or a weapon.

B. International Armed Conflict

Also needlessly limiting are the AMW Manual's rigid state-oriented definitions of belligerent party and international armed conflict. "Belligerent Party" is limited to "a State Party to an international armed conflict,"[16] and "[i]nternational armed conflict" is limited to "an armed conflict between two or more States."[17] These definitions are not only far too limiting, but they are also ahistorical and leave out various other actors that have directly participated in international armed conflicts governed by the customary laws of war. For example, it is widely known that the customary laws of war have been applicable to wars between a state and nation,[18]

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8. *See, e.g.*, JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 841, 860 (3d ed. 2007) [hereinafter PAUST ET AL.] (discussing the limiting implications of the words "violence" and "weapon"); Jordan J. Paust, *Terrorism's Proscription and Core Elements of an Objective Definition*, 8 SANTA CLARA J. INT'L L. 51, 58, 65 (2010), *available at* http://ssrn.com/abstract=1583437 [hereinafter Paust, *Terrorism's Proscription*] (noting that terrorism must involve the creation of terror and may even include cyber-attacks). Relevant examples of terroristic attacks can involve the release of sarin gas, anthrax, or other bio agents for terroristic purposes. *See, e.g.*, Nicholas D. Kristof, *Terror in Tokyo: The Overview*, N.Y. TIMES, Mar. 21, 1985, at A1 (reporting on the sarin gas attack on the Tokyo subway that killed eight people).

9. *E.g.*, Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 12, 41, 44, 51, 52 June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

10. *Id.* art. 49(1).

11. *See id.* arts. 48–51 (stating definition and scope of "attack" similar to the definition and scope used in the AMW Manual).

12. *See* AMW MANUAL, *supra* note 1, r. 10–14 (confining "attacks" to lawful targets and prohibiting attacks that are indiscriminate, directed at civilians, or would cause excessive collateral damage).

13. *Id.* r. 1(e).

14. *See id.* r. 17(a), 19(c), 20, 21 (applying restrictions to the exercise of air and missile attacks).

15. *See, e.g.*, *id.* §§ G (Precautions in Attack), H (Precautions by the Belligerent Party Subject to Attack).

16. *Id.* r. 1(f).

17. *Id.* r. 1(r). *See also id.* r. 1(s) (limiting "[l]aw of international armed conflict" in the AMW Manual to relevant international law "binding on a State and governing armed conflict between States").

18. *See infra* note 19. Concerning the role of a "nation" in international law, see J.L. BRIERLY, THE LAW OF NATIONS 118–19 (5th ed. 1955); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 26 (George Grafton Wilson ed., Clarendon Press 1936) (1866); Jordan J. Paust, *Non-State Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977, 978–79 (2011) [hereinafter Paust, *Non-State Actors*].

such as wars between the United States and several Indian nations.[19] Another famous war to which all of the customary laws of war applied was the U.S. Civil War between the state of the United States and the Confederate States of America, which had formal "belligerent" status[20] and did not have statehood status. In fact, the famous 1863 Lieber Code was created to reflect the customary laws of war that were applicable to the Civil War and to other international armed conflicts.[21] Ever since, it has been widely recognized that "[t]he customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents"[22] and that, upon recognition of the rebels as belligerents, "the legal effect as far as international law is concerned, is the same as that of an international war."[23] Other actors that can participate

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19. *See, e.g.*, PAUST ET AL., *supra* note 8, at 301 (discussing the conviction of Arbuthnot and Ambrister in 1818 for conduct as "accomplices of the savages" in "exciting" Creek Indians to war and levying war against the United States); *id.* at 303–04 (describing an 1873 conviction of Modoc Indians for war crimes); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 778 (2d ed. 1920) (noting that laws of war apply to "Indian hostilities" and that Chief Plenty Horses was acquitted of alleged murder because the killing of a U.S. officer was a legitimate act of war); *id.* at 786 (addressing the trial of certain Modoc Indians for war crimes in 1873 who were found guilty for "murder that was as much a violation of the laws of savage as of civilized warfare"); Paust, *Non-State Actors*, *supra* note 18, at 982 n.8 (citing U.S. statutes and opinions involving the treatment of Native American tribes in the United States to illustrate the relationship of non-state actors to customary international law); Modoc Indian Prisoners, 14 Op. Att'y Gen. 249, 252–54 (1873) ("[A]s [the Modoc Indians] frequently carry on organized and protracted wars, they may properly . . . be held subject to those rules of warfare which make a negotiation for peace after hostilities possible . . . .").

20. *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL LAW 126 (2d ed. 2005) (describing the recognition of the belligerent status of the Confederate States of America); HENRY W. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR 151–53 (1866) (classifying the U.S. Civil War as an "insurrection" and explaining that as such it fell under the category of "civil wars, [which] are governed by the same rules so far as regards international law and the laws of war"); Quincy Wright, *The American Civil War (1861–65)*, *in* THE INTERNATIONAL LAW OF CIVIL WAR 30 (Richard Falk ed., 1971) ("From the point of view of the South the war was an international war . . . ."); The Prize Cases, 67 U.S. (2 Black) 635, 666–67, (1862) ("When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have committed hostilities against their former sovereign, the world acknowledges them as belligerents"); *id.* at 669 ("Foreign nations acknowledge it as a war by a declaration of neutrality. . . . 'recognizing hostilities as existing between the Government of the United States of American and *certain States* styling themselves the Confederate States of America'" (quoting the Queen of England's 1861 proclamation of neutrality)); UK MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 27 (2004) [hereinafter UK MANUAL] (addressing "large-scale civil wars in which the participants were internationally recognized as having belligerent status" and providing that "classic examples are the American Civil War and the Spanish Civil War").

21. *See generally* U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100 (1863) [hereinafter Lieber Code]. For discussion of the Lieber Code and its influence, see generally Richard R. Baxter, *The First Modern Codification of the Law of War*, 3 INT'L REV. RED CROSS 171 (1963); Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC'Y INT'L L. PROC. 112 (2001).

22. DEP'T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE para. 11(a) (1956) [hereinafter FM 27-10].

23. 2 DEP'T. OF THE ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW 27 (1962) (citing 1 CHARLES C. HYDE, INTERNATIONAL LAW 198 (2d ed. 1947)); Hersch Lauterpacht, *The Limits of the Operation of the Laws of War*, 30 BRIT. Y.B. INT'L L. 237, 249 (1953). For additional discussion regarding recognition, see, e.g., BRIERLY, *supra* note 18, at 133–35; CASSESE, *supra* note 20, at 125–26; WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 36 (Pearce Higgins ed., 1924); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 248–49 (2008); 2 OPPENHEIM'S INTERNATIONAL LAW 370–72 & n.1 (Hersch Lauterpacht ed., 7th ed. 1948); PAUST ET AL., *supra* note 8, at 645, 648–49, 651, 657, 661, 673–74, and numerous references cited; Richard R. Baxter, *Ius in Bello Interno: The Present and Future Law*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 518, 518 (John Norton Moore ed., 1974); Thomas M.

directly in an international armed conflict include a recognizable "people."[24] Common Article 2 of the 1949 Geneva Conventions also recognizes that an international armed conflict can take place between a state party and a "Power" engaged in the conflict.[25]

Moreover, a modern trend in decision making allows one to focus on various factors or features of context that can internationalize an armed conflict. This can occur, for example, when members of the regular armed forces of a state engage in armed conflict within a foreign state against an insurgent.[26] This is an important development and should be more widely adopted to facilitate realistic recognition of the expanded nature of international armed conflicts and the progressive reach of laws of war. Important consequences can exist for members of the regular armed forces of a state in such a context, since they will have "combatant status"[27] and "combatant immunity"[28] for lawful acts of warfare engaged in during

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Franck & Nigel S. Rodley, *Legitimacy and Legal Rights of Revolutionary Movements with Special Reference to the Peoples' Revolutionary Government of South Viet Nam*, 45 N.Y.U. L. REV. 679, 679 (1970); UK MANUAL, *supra* note 20, at 27. *See also* EMERICH DE VATTEL, THE LAW OF NATIONS §§ 290, 293, 296 (1758) (arguing during the 1700s for application of laws of war to civil wars).

24. *See, e.g.*, Additional Protocol I, *supra* note 9, art. 1(4) ("The situations referred to . . . include armed conflicts in which peoples are fighting . . . in exercise of their right of self-determination . . . ."); UK MANUAL, *supra* note 20, at 30 (addressing the application to "peoples" of Additional Protocol I). Concerning the role of a "people" in international law, see U.N. Charter art. 1, para. 2; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625 (Oct. 24, 1970); Paust, *Non-State Actors*, *supra* note 18, at 982.

25. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, August 2, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

26. *See* PAUST ET AL., *supra* note 8, at 662 (discussing "various internationalizing elements" of armed conflicts). Previous "traditional" international law had treated such transnational conduct as an insurgency when the armed forces of one state aided another state (with consent) in fighting insurgents located within the territory of the latter state. *Id.* at 661.

27. *See id.* at 651–52 ("The normal test for 'combatant' status during an international armed conflict is membership in the armed forces of a party to the conflict."); 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 11–12 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005) (defining "combatant" and explaining that "[c]ombatant status . . . exists only in international armed conflicts"); UK MANUAL, *supra* note 20, at 37 ("Each class [combatant and non-combatant] has distinct rights and duties.").

28. *See* MELZER, *supra* note 23, at 309, 329 ("Thus, in international armed conflict, combatants are those members of the armed forces who have a 'right' to directly participate in hostilities on behalf of a party to the conflict—they are 'privileged combatants.'"); PAUST ET AL., *supra* note 8, at 651 (noting that combatant immunity is not afforded to insurgents); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 261, 277–78 (2010), *available at* http://ssrn.com/abstract=1520717 [hereinafter Paust, *Self-Defense*] (discussing the rights afforded the armed forces of states engaged in armed conflict with recognized belligerents and addressing concerns that non-members of the armed forces operating drones may not have such protections); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 330–32 (2003) ("Enemy combatants during an armed conflict of international character are privileged to engage in lawful acts of war . . . ."); NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, 90 INT'L REV. RED CROSS 991, 1007 n.52, 1045–46 (2009), *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-

internationalized armed conflicts. Important consequences for the civilian population can also occur when all of the customary laws of war become applicable as opposed to merely those that would limit death, injury, and suffering during a local insurgency.[29]

II. RESTRICTIVE, REGRESSIVE, AND REPREHENSIBLE RULES

A. Loss of Protection for Civilians and Civilian Aircraft

Full use of some of the AMW Manual's rules with respect to civilian aircraft, including those used by civilian airlines, would be shocking and involve an unlawful loss of protection for civilians who are not taking a direct part in hostilities. Rule 10(b)(iii) rightly affirms the customary and treaty-based standard that civilians are lawful military targets if they are directly participating in hostilities,[30] and rule 13(b) rightly affirms that unlawful indiscriminate attacks include those "that cannot be or are not directed against lawful targets . . . or the effects of which cannot be limited as

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reports-documents.pdf [hereinafter INTERPRETIVE GUIDANCE] (outlining the protections of combat immunity). Therefore, whenever U.S. military personnel engage in armed hostilities in a foreign country, the United States should recognize that the conflict is international in character.

29. Common Article 3 of the 1949 Conventions was the only part of the laws of war that applied to an insurgency prior to the creation of Additional Protocol II. *See generally* PAUST ET AL., *supra* note 8, at 645–48, 656. Additional Protocol II contains articles that protect civilians from certain consequences even if they are not in the custody of a detaining power, including prohibitions of attacks on civilians in language that mirrors Article 51(1)–(3) of 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) arts. 4, 13–14, 17, June 8, 1977, 1125 U.N.T.S. 609. Decisions of the ICTY have found that customary laws of war provide extensive protections for civilians during an insurgency beyond the language in common Article 3. PAUST ET AL., *supra* note 8, at 674. The Rome Statute of the International Criminal Court (ICC) also adopts an expanded list of prohibitions with respect to civilians, including intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities. Rome Statute of the ICC art. 8(2)(e)(i)–(viii), July 17, 1998, 2187 U.N.T.S. 90.

30. AMW MANUAL, *supra* note 1, r. 10(b)(iii). Concerning this limitation of the general protection of civilians from attack and the permissibility of targeting civilians who are direct participants in hostilities (DPH), see, e.g., Additional Protocol I, *supra* note 9, art. 51(3) ("Civilians shall enjoy the protection afforded . . . unless and for such time as they take a direct part in hostilities."); MELZER, *supra* note 23, at 319–20, 332–46; Paust, *Self-Defense*, *supra* note 28, at 262, 271–72 & n.90; INTERPRETIVE GUIDANCE, *supra* note 28. Rule 29 of the AMW Manual contains an interesting list of twelve activities that might constitute direct participation in hostilities in certain circumstances. AMW MANUAL, *supra* note 1, r. 29(i)–(xii). The twelve examples may spark some controversy, but they appear to be rationally related to general expectations about what is *direct* participation and what is participation *in hostilities*. *See also* MELZER, *supra* note 23, at 345 ("[T]he threshold would almost certainly be reached where a civilian supplies ammunition to an operational firing position, arms an airplane with bombs for a concrete attack, or transports combatants to an operational combat area"). It must be kept in mind that mere assistance or conduct in support of hostilities, even if material or substantial, is not necessarily direct participation in hostilities. For example, one who merely sells arms and ammunition to an army at war or who merely finances the commercial venture is not directly participating in hostilities for purposes of targeting. Additionally, the specific singular limitation of protection in Article 51(3) of the Additional Protocol I controls the reach of claims that are otherwise based on alleged necessity during war. For example, the DPH standard trumps claims based on alleged strategic necessity to target a civilian population. Nonetheless, general principles of reasonable necessity and proportionality continue to operate as limitations on the use of force. If an individual is DPH, it is reasonably necessary to target such a person, although actual targeting is still subject to the principle of proportionality and any relevant international law precluding the use of particular tactics or weapons.

required by the law of international armed conflict, and which therefore are of a nature to strike lawful targets and civilians or civilian objects without distinction."[31] However, the AMW Manual's rules with respect to certain civilians and civilian aircraft that allegedly can be attacked as military objectives seriously abandon such law of war restraints.

For example, rule 74(a) prefers that "[t]he protection [e.g., from attack[32]] to which medical and religious personnel . . . are entitled does not cease unless they commit or are used to commit, outside their humanitarian function, acts harmful to the enemy."[33] The same type of test for loss of protection of "civilian civil defence organizations . . . [and] their personnel" is preferred in rule 92.[34] Clearly, under the customary laws of war and Additional Protocol I, at least when such personnel are civilians, they must not be attacked unless they take a direct part in hostilities.[35] In contrast, rules 74(a) and 92 use the phrase "acts harmful to the enemy,"[36] which would create an "acts harmful" test that is far too broad, remarkably fugitive, and not in compliance with the customary and treaty-based direct participation test. Medical personnel in particular often treat wounded and sick military fighters with the result that the military fighters can thereafter proceed to engage in combat and it would not be difficult to argue that such conduct by medical personnel is "harmful" to an enemy,[37] although the phrase "outside their humanitarian function" would

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31. AMW MANUAL, *supra* note 1, r. 13(b). Concerning this general prohibition under the laws of war, see, e.g., Additional Protocol I, *supra* note 9, art. 51(4)-(5).

32. *See* AMW MANUAL, *supra* note 1, r. 71 (stating that medical and religious personnel "must not be the object of attack").

33. *Id.* r. 74(a).

34. *Id.* r. 92 ("The protection . . . does not cease unless they commit or are used to commit, outside their proper tasks, acts harmful to the enemy. Protection may . . . cease only after a warning . . . .").

35. *See supra* note 30 and accompanying text; *infra* note 37 and accompanying text.

36. AMW MANUAL, *supra* note 1, r. 74(a), 92.

37. *Cf.* AMW MANUAL, *supra* note 1, r. 74(c)(iv) ("[T]he following must not be considered as acts harmful to the enemy: . . . that members of the armed forces or other combatants are in the medical unit for medical or other authorized reasons, consistent with the mission of the medical unit."). However, this provision focuses on the medical "unit" as such and not medical personnel or transports and it does not expressly state that treatment by medical personnel to bring back fighters to their fighting capacity is not an act harmful to the enemy. Moreover, there is no limitation mentioned for religious personnel who, for example, might be helping fighters who have psychological problems get back to their fighting capacity. Rule 74(c)(iv) is consistent with Article 13(2)(d) of Additional Protocol I regarding "civilian medical units" as such, but not with Article 15(1) concerning medical personnel. *See* Additional Protocol I, *supra* note 9, art. 13(2)(d) (stating "that members of the armed forces or other combatants are in the unit for medical reasons" shall not be considered to be harmful); *id.* art.15(1) (quoted *infra*). Also, the limit in the AMW Manual's rule 74(c)(iv) does not mirror language in Article 22(5) of the Geneva Wounded and Sick Convention with respect to medical units. *See* GC I, *supra* note 25, art. 22(5) ("The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19: . . . [t]hat the *humanitarian activities* of medical units and establishments or of their personnel extend to the care of civilian wounded or sick." (emphasis added)). Article 24 of the Convention states that "[m]edical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded and sick or in the prevention of disease," among others, "shall be respected and protected in all circumstances." *Id.* art. 24. The limit in Article 24 is contained in the phrase "exclusively engaged in." *See, e.g.*, 1 INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 218, 221 (Jean S. Pictet ed., 1952) (noting that "[t]o be entitled to immunity, [medical personnel] must be employed exclusively on specific medical . . . duties" and that "to enjoy immunity, they must naturally abstain from any form of participation—even indirect—in hostile acts"). Yet, Article 15 of Additional Protocol I has an unlimited protection for civilian medical personnel. *See* Additional Protocol I, *supra*

protect them at least while they are engaged in humanitarian treatment.[38] Moreover, the "acts harmful" test does not comply with principles of reasonable necessity and proportionality that are also applicable as restraints under the laws of war,[39] since it cannot be reasonably necessary to attack civilians who merely engage in acts that are somehow "harmful." In fact, the "acts harmful" test preferred in rules 74(a) and 92 might function like the military benefit or *Kriegsraison* (war reason) theory that was expressly repudiated after World War II because its use can result in unnecessary death, injury, and suffering.[40]

Rules 27(e), 63(f), and 174(f) of the AMW Manual apparently would permit the targeting of any enemy civilian aircraft or airliner (under rule 27),[41] any other civilian

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note 9, art. 15(1) ("Civilian medical personnel shall be respected and protected."). It seems, however, that Article 51(3) of Additional Protocol I (quoted *supra* note 30), which on its face applies to all civilians, will provide a limit if medical personnel take a direct part in hostilities. *See, e.g.*, MELZER, *supra* note 23, at 329–30 (describing the protections offered to medical personnel and specially protected members of the armed forces by Art. 51(3) of Additional Protocol I). Moreover, this DPH limit should be the only limit of protection with respect to any civilian who is not otherwise engaged in a continuous combat function, since the Protocol amends the 1949 Geneva Conventions and the Protocol's provisions substantially reflect customary international law. *See, e.g.*, PAUST ET AL., *supra* note 8, at 660 (noting that most states have ratified Protocols I and II and that the United States "considers most of the provisions to reflect customary law or to be relevant to interpretation of the general conventions"); Paust, *Self-Defense*, *supra* note 28, at 271–72 n.90 (discussing continuous combat function). Clearly, the AMW Manual does not comply with Article 15(1) of Additional Protocol I or the customary and treaty-based direct participation in hostilities test.

38. The same phrase is used in Additional Protocol I with respect to medical units. Additional Protocol I, *supra* note 9, art. 13(1). The Commentary of the International Committee of the Red Cross (ICRC) with respect to Article 19 of the 1949 Geneva Civilian Convention notes that "the Diplomatic Conference emphasized explicitly that the accomplishment of a humanitarian duty can never under any circumstances be described as an act harmful to the enemy," although it was recognized that it is otherwise "possible for a humane act to be harmful to the enemy or for it to be wrongly interpreted as such by an enemy lacking in generosity." 4 INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 155 (Jean S. Pictet ed., 1958).

39. *See, e.g.*, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 ("[T]he only legitimate object which States should endeavor to accomplish during War is to weaken the military forces of the enemy[.]"); Jordan J. Paust, *Weapons Regulation, Military Necessity and Legal Standards: Are Contemporary Department of Defense "Practices" Inconsistent with Legal Norms?*, 4 DEN. J. INT'L L. & POL'Y 229, 231–32 [hereinafter Paust, *Weapons Regulation*] (discussing the distinction between the "military necessity" test and "military benefit" test and rejecting the latter); PAUST ET AL., *supra* note 8, at 639 (noting the customary prohibition of unnecessary death, injury, or suffering); FM 27-10, *supra* note 22, at Appendix A-1, paras. 3–4 ("The law of war . . . requires that belligerents refrain from employing any kind or degree of violence which is *not actually necessary* for military purposes. . . . [Military necessity] justifies those measures not forbidden by international law which are *indispensable* for securing the complete submission of the enemy as soon as possible." (emphasis added)); UK MANUAL, *supra* note 20, at 22–23 (adding that the principle of "[h]umanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes"), 316 ("[I]t is forbidden to employ methods or means of warfare which . . . are of a nature to cause superfluous injury or unnecessary suffering, . . . or are indiscriminate . . . ."), 320 ("Any decision to attack [enemy civil aircraft] must be based on military necessity.").

40. Paust, *Weapons Regulation*, *supra* note 39, at 231–32; DEPT. OF THE ARMY, PAMPHLET 27-161-2, *supra* note 23, at 248 (rejecting as "universally condemned" the *Kriegsraison* theory or the "right to do anything that contributes to the winning of a war") (quoting United States v. Von Leeb et al. (The High Command Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 541 (1950)).

41. AMW MANUAL, *supra* note 1, r. 27(e) ("[T]he following activities may render any other enemy aircraft a military objective: . . . [o]therwise making an effective contribution to military action."); *id.* r. 50

airliner (under rule 63),[42] and any neutral civilian aircraft (under rule 174)[43] as a "military objective" if it is "making an effective contribution to military action."[44] This "effective contribution" test might be more restrictive than an "acts harmful" test,[45] but both are unavoidably inconsistent with the "direct participation in hostilities" test (which clearly must apply with respect to civilians on board such aircraft just as it would regarding civilians on board a civilian bus) as well as the more general requirements contained in the principles of reasonable necessity and proportionality. Merely because a civilian airliner is making an "effective contribution" does not mean that it is directly participating in hostilities or that it is reasonably necessary to target the airliner and kill all of the civilians who are on board.[46] Part of the problem also involves the focus of these rules solely on a civilian airliner as a target or "military objective" without considering the fact that civilians are on board, that they cannot be targeted unless they are taking a direct part in hostilities, and that a focus merely on a civilian airliner as a military objective has the effect of treating a targeted airliner and the civilians as one object. This results in the targeting contemplated by the rules being of a nature to strike an allegedly lawful target and civilians indiscriminately or without distinction. Therefore, the limited focus of the rules can result in indiscriminate targeting, which is a war crime.[47]

Rules 27(d), 63(e), and 174(e) of the AMW Manual would apparently permit the targeting of civilian aircraft and airliners that merely refuse "to comply with the orders of military authorities, including instructions for landing . . . or [that are]

("Subject to the specific protection of Sections K and L [regarding medical personnel and aircraft] . . . enemy civilian aircraft are liable to attack if engaged in any of the activities set forth in Rule 27.").

42. *Id.* r. 63(f) ("[T]he following may render a civilian airliner a military objective: . . . [o]therwise making an effective contribution to military action.").

43. *Id.* r. 174(f) ("[T]he following activities may render a neutral civilian aircraft a military objective: . . . [o]therwise making an effective contribution to military action.").

44. This "effective contribution to military action" standard is used in part by Additional Protocol I with respect to "civilian objects" as such if they are "military objectives," but only if their destruction, "in the circumstances ruling at the time, offers a definite military advantage." Additional Protocol I, *supra* note 9, art. 52(2). The AMW Manual's rules 27(e), 63(f), and 174(f) are not expressly limited by a "definite military advantage" test, and although the definitions portion of the AMW Manual states that "[m]ilitary objectives, as far as objects are concerned," are so limited, there is no reference to the general definition. *See* AMW MANUAL, *supra* note 1, r. 1(y). The UK Manual is partly similar in this respect. *See* UK MANUAL, *supra* note 20, at 54–57 (providing a more extensive commentary on definitional criteria used and adopting Additional Protocol I's "'an effective contribution'" criterion, but also adopting its limiting criterion of "'definite military advantage.'"). However, with respect to enemy civilian aircraft, the UK Manual, unlike the AMW Manual, states that "[a]ny decision to attack must be based on military necessity." *Id.* at 320. As noted herein, a military necessity test is not the same as a mere "effective contribution" test. *See also supra* notes 37–39 and accompanying text. Fortunately, there is no general practice of blowing civilian airliners out of the sky to support the AMW Manual's proffered rule or use of Article 52(2) of Additional Protocol I with respect to the targeting of civilian airliners.

45. It is more restrictive because it is limited by the phrase "contribution to military action" as opposed to the broader context covered by the phrase "harmful to the enemy."

46. The UK Manual warns that "[c]ivilian aircraft are entitled to the general protection afforded civilians and civilian objects and may only be attacked if they meet the definition of a military objective" and "[a]ny decision to attack must be based on military necessity." UK MANUAL, *supra* note 20, at 320. Of course, civilians are targetable if they are direct participants in hostilities. *See supra* note 30 and accompanying text. However, indiscriminate targetings would include those that are of a nature to strike lawful targets (or "military objectives") and civilians or civilian objects without distinction. *See supra* note 31 and accompanying text.

47. *See* Additional Protocol I, *supra* note 9, art. 51(4) ("Indiscriminate attacks are prohibited.").

clearly resisting interception."[48] Quite obviously, a mere refusal to comply with orders (even assuming that they are lawful) or resistance to interception would not create a circumstance of direct participation in hostilities or reasonable necessity for targeting a civilian aircraft or airliner. If a civilian airliner of U.S. registry ventures too close to the theater of a war between countries X and Y[49] and military personnel of country X order the airliner to land, but the airliner turns and is heading away,[50] would anyone argue that it is reasonably necessary to blow the civilian airliner out of the air? Would members of the general public expect that by boarding an international flight they could be lawfully killed if such a circumstance occurred?

Rules 27(b), 63(c), and 174(c) would apparently permit the targeting of civilian aircraft and airliners that are "[f]acilitating the military actions of the enemy's armed forces, e.g., transporting troops . . . ."[51] Facilitating military actions is closer to direct participation in hostilities, but it is not the same test. Moreover, merely because a civilian aircraft or airliner is facilitating military actions does not mean that it is reasonably necessary to target the aircraft. Consider the circumstance where five enemy soldiers (including a colonel) are known to be on board a third-party civilian airliner along with two-hundred-and-eighty civilians (including two diplomats and a third-party head of state) and all of them are being transported to an enemy's capital.[52] Who would argue that it is reasonably necessary and proportionate to destroy the civilian airliner in flight? Who would claim that the two-hundred-and-eighty civilians were necessarily being used as "human shields," which might allow engagement of the five enemy soldiers with proportionate fire on a battlefield?[53] And who would argue that under the circumstances such a targeting was not

48. AMW MANUAL, *supra* note 1, r. 27(d), 63(e), 174(e).

49. The AMW Manual notes that civilian airliners "do not lose their protection merely because they enter" a "no-fly zone or an 'exclusion zone', or the immediate vicinity of hostilities." *Id.* r. 60.

50. The International Civil Aviation Organization (ICAO) condemned Russia for destroying the civilian airliner KAL 007 in 1983 after it was either proceeding out of or had left Russian airspace. ICAO, *Council Resolution Adopted on 6 Mar. 1984* preambular paras. 4, 5, *reprinted in* 23 I.L.M. 924, 937 (1984); UK MANUAL, *supra* note 20, at 315 ("[T]he Assembly of the International Civil Aviation Organization . . . approved an amendment to the Chicago Convention recognizing the principle that 'states must refrain from resorting to the use of weapons against civil aircraft in flight and . . . in the case of interception the lives of persons on board and the safety of aircraft must not be endangered.'"); *see* ICAO, *Amendment of Convention on International Civil Aviation With Regard to Interception of Civil Aircraft*, Assemb. Res. A25 ("[E]very State must refrain from resorting to the use of weapons against civil aircraft in flight and . . . , in case of interception, the lives of persons on board and the safety of aircraft must not be endangered."), *reprinted in* 23 I.L.M. 705 (1984); Convention on Int'l Civil Aviation art. 3 bis, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (noting that states "will have due regard for the safety of navigation of civil aircraft"). Similarly, ICAO condemned the Israeli downing of a Libyan airliner in 1973 that had strayed over occupied territory and, when confronted by Israeli personnel, had turned to fly out. ICAO, *Council Resolution Concerning Israeli Attack on Libyan Civil Aircraft* ("[S]uch attitude is a flagrant violation of the principles enshrined in the Chicago Convention."), *reprinted in* 12 I.L.M. 1180 (1973); Terence Smith, *Israelis Shoot Down a Libyan Airliner*, N.Y. TIMES, Feb. 22, 1973, at A1. These were not lawful acts of self-defense, because once an aircraft turns and runs or is leaving a state's airspace or occupied territorial airspace it would not be reasonably expected that it is engaged in an armed attack and/or that it is necessary to destroy the aircraft and thereby kill all who are on board.

51. AMW MANUAL, *supra* note 1, r. 27(b), 63(c), 174(c).

52. Anyone who has traveled on a commercial airliner in or out of Hartsfield-Jackson Atlanta International Airport should realize that it is not unusual to have uniformed military personnel on board a civilian airliner.

53. *See, e.g.*, Additional Protocol I, *supra* note 9, art. 51(7) ("The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operation, in particular in attempts to shield military objectives from attacks.").

indiscriminate when, for example, the targeting in such an instance is "of a nature to strike lawful targets [e.g., the five enemy soldiers] and civilians or civilian objects without distinction"?[54]

A substantially different rule applicable merely in a special circumstance is addressed in the AMW Manual's rule 68. When a civilian aircraft or airliner has been "granted safe conduct," rule 68 states that it can only be attacked if it has lost protection under rules 63 and 65 and if the following cumulative conditions are fulfilled:

> (a) Diversion for landing . . . is not feasible;
>
> (b) No other method is available for exercising military control;
>
> (c) The circumstances leading to the loss of protection are sufficiently grave to justify an attack; and
>
> (d) The expected collateral damage will not be excessive in relation to the military advantage anticipated and all feasible precautions have been taken. . . .[55]

This special rule for civilian aircraft granted safe conduct is closer to one using a reasonable necessity test, but it falls short. A circumstance that is "sufficiently grave" (whatever that means) so as "to justify" an attack (which begs the question at stake) might not reach the threshold needed under customary international law involving a circumstance of reasonable necessity. The same point pertains when something is not "feasible," that is, it may still be unnecessary to destroy an aircraft even if diversion and precautions are not feasible. Moreover, paragraph (d) uses a "military advantage" test that smacks of the disparaged military benefit or *Kriegsraison* theory.[56] It does not use limiting phrases such as "effective contribution . . . and . . . definite" or "concrete and direct."[57] Clearly, the targeting of any civilian aircraft or airliner should only occur when such a targeting is reasonably necessary[58] and the method or means used are proportionate under the circumstances.

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54. *See supra* note 31 and accompanying text.

55. AMW MANUAL, *supra* note 1, r. 68.

56. *See supra* note 40 and accompanying text.

57. *Compare* AMW MANUAL, *supra* note 1, r. 68(d), *with* Additional Protocol I, *supra* note 9, arts. 52(2), 57(2)(a)(iii), 57(2)(b) (limiting the use of military force against civilian objects "[that] make an effective contribution to military action and whose total or partial destruction . . . offers a definite military advantage" and proscribing actors from planning or launching an attack where the loss of civilian lives, injury to civilians or damage to civilian objects "would be excessive in relation to the concrete and direct military advantage anticipated"). The AMW Manual rule assumes that the person or object attacked is a proper military target, so the rule does not limit determinations of whether or not a person or object is a proper military target, whereas the customary principle of necessity is used in connection with such decisions.

58. *See, e.g.*, UK MANUAL, *supra* note 20, at 319–20 (listing "activities [that] may render enemy civil aircraft military objectives").

B. United Nations Forces Are Bound by the Laws of War

Rule 3(a) of the AMW Manual declares that the rules reflected "also apply to all air or missile operations conducted by United Nations forces when in situations of armed conflict they are engaged therein as combatants."[59] To the extent that the AMW Manual's rules reflect customary international law, this statement is most appropriate, especially since nationals of a party to a relevant law of war treaty remain bound by the treaty whether or not they are members of a U.N. mission and all individuals of any status are bound by the customary laws of war. As noted above, however, some of the AMW Manual's definitions are too limited and dysfunctional and some of the AMW Manual's rules do not adequately reflect treaty-based and customary international law. It is obvious, therefore, that some of the AMW Manual's rules should not be applied during U.N. missions or otherwise.

Rule 3(a) also states that application of the rules is "[s]ubject to binding decisions adopted by the Security Council under Chapter VII of the Charter of the United Nations."[60] Of course, this statement concerning a supposed limitation of the application of treaty-based and customary laws of war begs the question whether the Security Council has authority to make binding decisions that the customary laws of war do not apply when under a treaty or customary international law they would be applicable. Clearly, the Security Council does not possess authority to violate the purposes and principles of the U.N. Charter,[61] which expressly include the duty to respect and to universally observe human rights in all social contexts.[62] Since the Security Council is bound—especially under Article 55 of the U.N. Charter—to observe human rights,[63] it would not serve policy in general or the overall purposes and principles of the Charter to conclude that the Security Council has been granted authority to decide that the laws of war that reflect human rights and humanitarian principles will not be observed during a relevant U.N. mission. More generally, refusal to follow applicable laws of war would not serve Charter-based purposes and principles of peace, security, and human rights,[64] "the dignity and worth of the human person,"[65] "respect for the obligations arising from treaties and other sources of international law,"[66] or the admonition that "armed force shall not be used, save in the common interest."[67] For these reasons, it should be recognized that the Security

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59. AMW MANUAL, *supra* note 1, r. 3(a).

60. *Id.*

61. *See generally* Jordan J. Paust, *The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity*, 51 HARV. INT'L L.J. ONLINE (Apr. 12, 2010), www.harvardilj.org/wp-content/uploads/2010/09/HILJ-Online_51_Paust.pdf. That human rights law is applicable on the battlefield during times of armed conflict as well as during relative peace and that it does not inhibit lawful conduct on the battlefield or during lawful self-defense targetings, see, e.g., Paust, *Self-Defense*, *supra* note 28, at 265–66, 269, 272–73. Claims to the contrary based on alleged *lex specialis* are in manifest error. *Id.* at 273–74 n.94.

62. *E.g.*, U.N. Charter, arts. 1(3), 24(2), 25, 55(c).

63. U.N. Charter, art. 55(c) ("[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.").

64. *See id.* arts. 1(1)–(3), 55 (describing the purposes of the United Nations).

65. *Id.* pmbl.

66. *Id.* The Security Council often "[d]emands that all parties concerned comply strictly with their obligations applicable to them under international law . . . ." *See, e.g.*, S.C. Res. 1674, para. 6, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

67. U.N. Charter, pmbl.

Council has not been granted authority to authorize violations or noncompliance with the laws of war.

Furthermore, as recognized by the International Military Tribunal at Nuremberg, "[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law," for example, by authorizing "acts which are condemned as criminal by international law."[68] Importantly, states simply could not have delegated to any U.N. entity an authority that they did not possess under international law, such as an authority to violate treaty-based or customary laws of war. There is no evidence of an attempt to delegate such an authority and if there had been such an attempt, it would have been ultra vires.

C. The Absolute Prohibition of Terroristic Targetings of the Civilian Population

Rule 18 of the AMW Manual generally mirrors an out-of-date proscription of certain terroristic targetings that is found in Article 51(2) of Additional Protocol I.[69] As rule 18 states, "[a]cts or threats of violence in the course of air or missile operations cannot be pursued for the sole or primary purpose of spreading terror among the civilian population."[70] The limiting phrase "sole or primary" is immensely ominous, leaving the reader to contemplate whether the drafters would prefer the types of intentional attacks on the civilian population that might have a mixed or secondary purpose of spreading terror among civilians.

Fortunately, not long after the formation of the Additional Protocol in 1977 and for at least the last twenty-five years, the U.N. Security Council and General Assembly have routinely condemned "all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomsoever committed, regardless of their motivation, as criminal and unjustifiable."[71] It is now undoubtedly the case that whether or not a "sole or primary" purpose exists to spread terror, any conduct engaged in by anyone with a purpose of spreading terror among the civilian population is criminally proscribed under all circumstances. Even before the formation of Additional Protocol I, Article 33 of the Geneva Civilian Convention

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68. Judgment of the International Military Tribunal at Nuremberg, 6 F.R.D. 69, 110 (Oct. 1, 1946); *see also* The High Command Case, *supra* note 40, at 489, 508 (holding that "[i]nternational law operates as a restriction and limitation on the sovereignty of nations" and a "directive to violate international criminal common law is therefore void and can afford no protection to one who violates such law").

69. *Compare* AMW MANUAL, *supra* note 1, r. 18 ("Acts or threats of violence in the course of air or missile operations cannot be pursued for the sole or primary purpose of spreading terror among the civilian population."), *with* Additional Protocol I, *supra* note 9, art. 51(2) ("Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.").

70. AMW MANUAL, *supra* note 1, r. 18.

71. Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 61/171, pmbl., U.N. Doc. A/RES/61/171 (Dec. 19, 2006). For additional condemnation of terrorism, see, e.g., S.C. Res. 1822, pmbl., U.N. Doc. S/RES/1822 (30 June 2008); S.C. Res. 1617, pmbl., U.N. Doc. S/RES/1617 (July 29, 2005); S.C. Res. 1566, para. 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004); Human Rights and Terrorism, G.A. Res. 59/195, para. 1, U.N. Doc. A/RES/59/195 (20 Dec. 2004); Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, annex, paras. 1–3, U.N. Doc. A/RES/49/60 (Dec. 9, 1994); G.A. Res. 46/51, para. 1, U.N. Doc. A/RES/46/51 (Dec. 9, 1991); G.A. Res. 40/61, para. 1, U.N. Doc. A/RES/40/61 (Dec. 9, 1985). *See also* PAUST ET AL., *supra* note 8, at 827, 829 (discussing various resolutions passed by the U.N. General Assembly and the Security Council condemning terrorism); Paust, *Terrorism's Proscription*, *supra* note 8, at 53 & nn.6–7 (same).

had expressly prohibited "all measures of . . . terrorism" with respect to protected persons.[72] It had also been recognized by 1919 that customary laws of war prohibit "systematic terrorism" in any form,[73] and the International Criminal Tribunal for the Former Yugoslavia has recognized that terrorizing the civilian population is a war crime.[74]

D. Legitimate Self-Defense Prevails Over Neutrality

Under the U.N. Charter, states have "the inherent right of individual or collective self-defence if an armed attack occurs."[75] This inherent right must prevail over general principles of neutrality and the relative sovereignty of states.[76] Moreover, under Article 103 of the U.N. Charter, the inherent right of self-defense must prevail over inconsistent international agreements.[77] However, these fundamental recognitions are not evident in Section X of the AMW Manual, which addresses certain aspects of neutrality as if they are absolute.

For example, rule 166 states that "[h]ostilities . . . must not be conducted within neutral territory."[78] Similarly, rule 167(a) declares that parties "are prohibited in neutral territory to conduct any hostile actions," including use "for the movement of troops or supplies, including overflights by military aircraft or missiles."[79] Rule 170(a) prefers that "[a]ny incursion or transit . . . into or through neutral airspace is prohibited,"[80] and rule 171(a) would prohibit "[a]ttack on or capture of persons or objects located in neutral airspace."[81] As noted above, these types of prohibitions cannot be absolute and obviate the permissibility of legitimate acts of self-defense under the U.N. Charter. Principles of reasonable necessity and proportionality will have to be applied in given contexts to condition permissible acts of self-defense,[82] but they can be reasonably necessary and proportionate even if they must occur partly in neutral territory. Furthermore, the AMW Manual's rules noted above do not adequately address the circumstances where the misuse of neutral territory has already occurred by an enemy and lawful measures of self-defense, acts of war, or both are reasonably necessary.[83] One of the AMW Manual's rules comes close, but it

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72. GC IV, *supra* note 25, art. 33. The reach of this particular prohibition is limited by Article 4 to persons "in the hands of a Party to the conflict or Occupying Power." *Id.* art. 4. Such persons might include those directly under a low-hovering helicopter, but would not include persons targeted by most aircraft or missiles.

73. Paust, *Terrorism's Proscription*, *supra* note 8, at 54.

74. Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT'L L. 11, 18–19 (2010).

75. U.N. Charter art. 51.

76. *See, e.g.*, Paust, *Self-Defense*, *supra* note 28, at 250–53, 255–57 & nn.47–48 (discussing a nation's right to defend itself outside its own territory when attacked by non-state actors).

77. U.N. Charter art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.").

78. AMW MANUAL, *supra* note 1, r. 166.

79. *Id.* r. 167(a).

80. *Id.* r. 170(a).

81. *Id.* r. 171(a).

82. Paust, *Self-Defense*, *supra* note 28, at 270–73. Concerning the permissibility of self-defense captures, see *id.* at 261–63.

83. Consider, for example, the misuse of portions of Pakistan's territory by the Taliban. *See, e.g.*, Jordan J. Paust, *Permissible Self-Defense Targeting*, 39 DENV. J. INT'L L. & POL'Y 569, 571 nn.12–15

is partly ambiguous and too restrictive. Rule 168(b) states: "If the use of the neutral territory or airspace by a Belligerent Party constitutes a serious violation, the opposing Belligerent Party may, in the absence of any feasible and timely alternative, use such force as is necessary to terminate the violation of neutrality."[84]

Ambiguity exists with use of the word "serious," unless it is realized that any enemy misuse of neutral territory during war is "serious." Moreover, reasonably necessary acts of legitimate self-defense would be restricted if the limitation contained in the phrase "in the absence of any feasible and timely alternative" was adopted as a matter of law. For example, the word "any" would change the test from reasonable necessity to absolute necessity. Rule 169 adds that "[t]he fact that a Neutral resists, even by force, attempts to violate its neutrality cannot be regarded as a hostile act."[85] Clearly, this does not make sense if the neutral state engages in acts of force that constitute an armed attack within the meaning of Article 51 of the U.N. Charter. If such acts occur, the state attacked would have an inherent and Charter-based right to engage in responsive measures of self-defense against the neutral state. Legitimate acts of self-defense must necessarily override principles of neutrality.

CONCLUSION

In conclusion, the AMW Manual appears to offer useful guidance in a number of respects,[86] although this guidance has not been the focus of this critical appraisal of some of the AMW Manual's definitions and rules. As noted, there are a number of provisions that are too limiting in their reach or focus, are problematic, or do not reflect current international law, including the law of self-defense and relevant laws of war. In fact, use of some of the provisions could lead to war crime responsibility if they are followed in contradistinction to the general immunity of civilians and civilian objects from attack, the prohibition of unnecessary and indiscriminate targetings, the binding reach of the laws of war to U.N. forces, and the prohibition of all terroristic targetings. It is hoped that the AMW Manual will be substantially revised to avoid such problems.

(2011) ("[The] misuse of neutral territory [by members of al-Qaeda and the Taliban] supplements the permissibility of self-defense targetings of members of al Qaeda and the Taliban inside of Pakistan.").

84. AMW MANUAL, *supra* note 1, r. 168(b).

85. *Id.* r. 169.

86. *See supra* note 30 with respect to the AMW Manual's list of possible forms of direct participation in hostilities.

Drones and the Boundaries of the Battlefield

MICHAEL W. LEWIS*

SUMMARY

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* Associate Professor of Law at Ohio Northern University Pettit College of Law. I would like to thank the members of the Texas International Law Journal for creating an excellent Symposium to discuss the Air and Missile Warfare Manual and all of the participants at the symposium for their comments and suggestions concerning this essay. In discussing the capabilities, limitations, and near-term uses of drones, I draw upon my experience flying F-14s for the U.S. Navy from 1989 to 1993.

INTRODUCTION

The military use of drones or Unmanned Aerial Vehicles (UAVs) and Unmanned Combat Aerial Vehicles (UCAVs)[1] in combat operations is one of the more legally controversial issues confronting international humanitarian law (IHL)[2] as we move into the second decade of the twenty-first century. The legality of drones has been questioned for a variety of reasons, some more grounded in fact than others, but in spite of these criticisms there is little question that the use of drones in surveillance and combat roles is on the rise. The next decade will undoubtedly see their continued use by an increasingly large number of nations, particularly in counterinsurgency operations. The panel of experts that created the Manual on International Law Applicable to Air and Missile Warfare (AMW Manual) recognized this emerging technology and ensured that the Manual addressed the laws applicable to such aircraft. Unfortunately, the most prominent legal issues confronting the use of drones are somewhat beyond the Manual's scope.

The AMW Manual generally treats drones in the same way as manned aircraft. It equates UCAVs with other military aircraft for the purposes of conducting attacks[3] and requires that the same level of precautions be taken before initiating an attack with UCAVs as would be required when employing manned aircraft.[4] It also states that civilians controlling drones are directly participating in hostilities, giving them the same status that civilians would have if they were to fly a military aircraft.[5] This legal equivalence between manned and unmanned aircraft is broadly accepted by commentators.[6] In spite of the Terminator-like creepiness associated with machines

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1. PROGRAM ON HUMANITARIAN POLICY & CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR & MISSILE WARFARE r. 1(dd)-(ee), 6 (2009) [hereinafter AMW MANUAL] (differentiating between UAVs and UCAVs on the basis of whether the vehicle can carry or control a weapon).

2. International Humanitarian Law is the term given to the body of law that governs armed conflicts. It is also referred to as the Law of Armed Conflict (LOAC) and encompasses the Geneva and Hague Conventions, the Additional Protocols to the Geneva Conventions, and the customary law that has developed around these treaties.

3. AMW MANUAL, *supra* note 1, r. 17(a).

4. *Id.* r. 39.

5. *Id.* r. 29(vi).

6. *See, e.g.*, *Rise of the Drones II: Examining the Legality of Unmanned Targeting*: *Hearing Before the Subcomm. on Nat'l Sec. & Foreign Affairs of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 32 (2010) [hereinafter *Drones II*] (prepared statement of David W. Glazier, Professor of Law, Loyola Law School L.A.), *available at* http://www.fas.org/irp/congress/2010_hr/drones2.pdf (warning that "CIA personnel are civilians, not combatants, and do not enjoy any legal right to participate in hostilities"); *Rise of the Drones II*, *supra* at 20 (prepared statement of Mary Ellen O'Connell, Robert and Marion Short Chair in Law, Univ. of Notre Dame) (arguing that unmanned drones are "battlefield weapons," and as such should not be used outside of "combat zones"); *Rise of the Drones II*, *supra* at 44–46 (prepared statement of William C. Banks) (describing how legal authority for use of drones in targeting can be found in existing law governing armed conflict but urging modernization of policy and law); *Rise of the Drones II*, *supra* (statement of Michael W. Lewis, Professor of Law Ohio N. Univ. Pettit College of Law), *available at* http://oversight.house.gov/images/stories/Hearings/pdfs/LewisDrones.doc ("In circumstances where a strike by a helicopter or an F-16 would be legal, the use of a drone would be equally legitimate."); *Rise of the Drones: Unmanned Systems and the Future of War: Hearing Before the Subcomm. on Nat'l Sec. & Foreign Affairs of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 3 (2010) [hereinafter *Drones*] (written testimony of Kenneth Anderson, Professor of Law, Washington College of Law Am. Univ. and Member, Hoover Task Force on Nat'l Sec. & Law), *available at* http://oversight.house.gov/images/stories/Hearings/pdfs/20100323Anderson.pdf (noting that "use of drones . . . on traditional battlefields . . . . is functionally identical to the use of missile fired from a standoff fighter plane").

seemingly[7] making war on human beings, there is nothing legally unique about using unmanned drones as a weapons delivery platform that requires the creation of new or different laws to regulate their use. As with any other attack launched against enemy forces during an armed conflict, attacks launched from UCAVs are governed by IHL and must meet its requirements of military necessity and proportionality if those attacks are to be considered legal. But it is not this view that manned and unmanned aircraft are legally equivalent that is being challenged.

While drones have been criticized for causing a disproportionate number of civilian casualties[8] or for merely sending the wrong message about American power,[9] the most serious legal challenges to the use of drones in the modern combat environment involve questions of where such unmanned aircraft may be legally employed.[10] It is contended that drone strikes in places like Yemen and Pakistan violate international law because there is currently no armed conflict occurring in these nations.[11] Although theoretically the limitations imposed by this view of the boundaries of the battlefield are not specifically directed at the use of drones and

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7. In actuality, of course, UCAVs are under human, albeit remote, control. During his presentation at the Symposium, Professor Anderson discussed the more disturbing idea that someday UCAVs may be disconnected from their human remote controllers, allowing them to make independent targeting determinations based upon pre-programmed decision trees for launch/no launch decisions. Kenneth Anderson, Remarks at the Texas International Law Journal Symposium: The 2009 Air and Missile Warfare Manual: A Critical Analysis (Feb. 11, 2011). Should such technology become a reality, the legal equivalence between manned and unmanned aircraft would be at an end and a new group of provisions specifically applicable to unmanned aircraft would become necessary.

8. *See, e.g.*, Murray Wardrop, *Unmanned Drones Could Be Banned, Says Senior Judge*, THE TELEGRAPH (July 6, 2009), http://www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html (quoting Lord Bingham, a former Law Lord, who cited civilian casualties as a possible justification for banning the use of armed drones); Kenneth Anderson, *Am I Arguing a Strawman About Drones and Civilian Casualties?*, VOLOKH CONSPIRACY (Apr. 27, 2011, 9:51 AM), http://volokh.com/2011/04/27/am-i-arguing-a-strawman-about-drones-and-civilian-casualties (arguing that the recent acknowledgement by many human rights advocates of the superior target discrimination of drones does not alter the fact that many of the early criticisms of drones were related to excessive civilian casualties). The author's experiences at a variety of events in which the legality of drones was discussed were similar to that of Professor Anderson in that, until recently, many—if not most—of the criticisms of drones were based upon civilian casualties.

9. David Ignatius, *Drone Attacks in Libya: A Mistake*, WASH. POST: POST PARTISAN (Apr. 21, 2011, 4:52 PM), http://www.washingtonpost.com/blogs/post-partisan/post/drone-attacks-in-libya-a-mistake/2011/03/04/AFtZrRKE_blog.html.

10. *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) (describing the plaintiff's contention that because Anwar al-Aulaqi was located in Yemen he was "outside the context of armed conflict"); *see also* Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 860–64 (2009) (describing a geographically limited zone of combat in which IHL applies); *Civil Liberties and National Security: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 103–04 (2010) (testimony of Mary Ellen O'Connell, Professor of Law, Univ. of Notre Dame), *available at* http://judiciary.house.gov/hearings/hear_101209.html (stating that drone strikes in Pakistan are illegal under international law because they are occurring outside the zone of combat); Human Rights Watch, Letter from Kenneth Roth, Exec. Dir., Human Rights Watch, to President Barack Obama (Dec. 7, 2010), *available at* http://www.hrw.org/en/news/2010/12/07/letter-obama-targeted-killings [hereinafter HRW letter] (urging the Obama Administration to reject the concept of a "global battlefield"); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum, Study on Targeted Killings*, para. 86, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston Report] (stating that there "are very few situations" where the legal standards for use of drones could be met when a state deployed them "[o]utside its own territory (or in territory over which it lacked control) and where the situation on the ground did not rise to the level of armed conflict").

11. *Id.*

apply with equal force to any use of the tools of armed conflict, from a practical standpoint the view that the boundaries of the battlefield are strictly defined by geopolitical lines has a particularly significant impact on the use of drones.

This Article briefly discusses drone use in the combat environment and explains why the debate about the boundaries of the battlefield is of particular importance to the employment and development of drones. It will then describe the geographically limited scope of IHL proposed by commentators critical of drone use in areas like Pakistan and Yemen. This view of the boundaries of the battlefield will be compared with the historical understanding of where the laws of armed conflict apply in international armed conflicts and the role that geography has traditionally played in restricting IHL's scope. It concludes by arguing that the more traditional view of IHL's scope of application should apply with even more force to transnational armed conflicts because any other interpretation threatens to undermine the basic theoretical underpinnings upon which IHL is constructed.

I. DRONE USE IN A COMBAT ENVIRONMENT[12]

A. *Capabilities*

The driving force behind the western militaries' development of drone technology was to minimize the number of human lives placed at risk to collect intelligence and to deliver small amounts of ordnance with some degree of precision. However, it is the relatively low cost of drones compared to that of modern combat aircraft that will drive the proliferation of drones over the next decade. More basic drones cost less than 1/20th as much as the latest combat aircraft and even the more advanced drones that feature jet propulsion and employ some stealth technology are less than 1/10th the cost.[13] With defense budgets around the world under increasing pressure, drones will be seen as an attractive alternative to manned aircraft for certain types of missions.

However, the value of drones cannot be measured solely in lives and dollars saved. Operationally, drones provide a couple of significant advantages over manned aircraft that make them particularly valuable in certain types of modern armed conflicts. Their biggest advantage is their very long endurance: over thirty

12. Some of the following analysis is based upon the author's experience in naval aviation from 1989 to 1993.

13. Predator drones cost approximately $5 million per aircraft. *Factsheets: MQ-1B Predator*, U.S. AIR FORCE (Jan. 5, 2012), http://www.af.mil/information/factsheets/factsheet.asp?fsID=122. Reaper drones, the armed version of the Predator, cost approximately $10–15 million per aircraft. *Factsheets: MQ-9 Reaper*, U.S. AIR FORCE (Jan. 5, 2012), http://www.af.mil/information/factsheets/factsheet.asp?id=6405. The Avenger, a more advanced drone with jet propulsion and some limited stealth technology, is projected to cost $13–17 million per aircraft. *See* W.J. Hennigan, *Air Force Buys an Avenger, Its Biggest and Fastest Armed Drone*, L.A. TIMES (Dec. 31, 2011), http://articles.latimes.com/2011/dec/31/business/la-fi-stealth-drone-20111231 (discussing the advantages of the Avenger compared to earlier drones and noting the $15 million purchase price). In contrast, the cost of an F-22 has risen to nearly $412 million per aircraft and the continually rising cost estimates for the proposed F-35 now approach $150 million per aircraft. W.J. Hennigan, *Sky-High Overruns, Safety Ills Plague Jet*, L.A. TIMES, (Aug. 7, 2011), http://articles.latimes.com/2011/aug/07/business/la-fi-fighter-jets-grounded-20110807; Bob Cox, *Defense Department Says F-35 Fighter Program's Costs to Significantly Rise*, FORT WORTH STAR-TELEGRAM, Apr. 7, 2010, at C1. The B-2 stealth bomber costs over $1.2 billion per aircraft. *Factsheets: B-2 Spirit*, U.S. AIR FORCE (Apr. 23, 2010), http://www.af.mil/information/factsheets/factsheet.asp?id=82.

hours for the Predator B and twenty hours for the Predator C (Avenger).[14] This gives drones more than ten times the endurance of unrefueled manned aircraft,[15] enabling them to observe and track a target for many hours at a time before deciding whether to employ ordnance. For manned aircraft to achieve the same loiter time extensive airborne refueling support would be required. To achieve the same unbroken surveillance of a potential target offered by a single drone, multiple manned aircraft would be needed to avoid losing track of the target when the aircraft left its station to refuel. This makes drones an ideal surveillance and striking weapon in counterinsurgency or counterterrorism operations, where the targets are usually individuals rather than objects.[16]

Another operational advantage that drones provide is greater legal compliance with IHL's requirements of military necessity and proportionality. Although many of the early criticisms of drones were directed at their allegedly indiscriminate nature, which purportedly resulted in disproportionate civilian casualties,[17] the reality of drone strikes is that they provide many more opportunities for disproportionate attacks to be halted prior to weapons employment. For manned aircraft both the target identification and the final proportionality decision are left in the hands of one or two crewmembers whose attention is divided between flying the aircraft, looking for (and possibly evading) surface-to-air missiles and ground fire, identifying the target, assessing the proportionality of the attack, and accurately delivering the weapon.[18] In contrast, the longer loiter time of drones allows for a much higher level of confidence that the target has been properly identified, thereby meeting the

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14. *Predator B UAS*, GENERAL ATOMICS AERONAUTICAL SYSTEMS INC., http://www.ga-asi.com/products/aircraft/predator_b.php (last visited Jan. 31, 2012); *Predator C Avenger UAS*, GENERAL ATOMICS AERONAUTICAL SYSTEMS INC., http://www.ga-asi.com/products/aircraft/predator_c.php (last visited Jan. 31, 2012).

15. *See, e.g.*, *The F-16 Fighting Falcon*, FED'N OF AM. SCIENTISTS, http://www.fas.org/programs/ssp/man/uswpns/air/fighter/f16.html (last visited Jan. 31, 2012) (observing that the F-16's average combat endurance is only two hours and ten minutes); *see also F/A-18 Hornet*, FED'N OF AM. SCIENTISTS, http://www.fas.org/programs/ssp/man/uswpns/air/fighter/f18.html (last visited Jan. 31, 2012) (observing that even the most modern variant of the F-18 can only stay airborne for two hours and fifteen minutes before requiring refueling).

16. In more traditional inter-state wars many airstrikes are directed at fixed targets such as communications links (headquarters buildings, microwave relays, radio transmitters), transportation infrastructure (bridges, road or rail networks), combat support facilities (ammunition dumps, fuel depots, munitions factories), or air defense systems (radars, surface-to-air missile sites, airfields). Other attacks may be directed at mobile targets (concentrations of troops, aircraft, artillery, or armor) but they seldom involve the individualized targeting that underlies most of the strikes being conducted in the current conflict with al-Qaeda.

17. *See* Anderson, *supra* note 8 (noting that many of the early reports of high civilian casualties were a result of the uncritical assessment of casualty figures provided by the Taliban or local Pakistani media); *see also* Farhat Taj, *Drone Attacks: Challenging Some Fabrications*, DAILY TIMES (Jan. 2, 2010), http://www.dailytimes.com.pk/default.asp?page=2010%5C01%5C02%5Cstory_2-1-2010_pg3_5 (proposing that the U.S. and Pakistani media do not accurately report civilian casualties caused by drone strikes); C. Christine Fair, *Drones Over Pakistan—Menace or Best Viable Option?*, HUFFINGTON POST (Aug. 2, 2010, 9:56 AM), http://www.huffingtonpost.com/c-christine-fair/drones-over-pakistan----m_b_666721.html (arguing that reports by U.S. and Pakistani media exaggerate civilian casualties caused by drones).

18. The multitasking that goes on in the cockpit at the moment of weapons delivery can perhaps best be understood by analogizing the divided attention of the aircrew to that of a driver who is texting while driving. The human instinct for self-preservation being what it is, this divided attention problem becomes all the more pronounced when the aircrew is flying in an environment where ground fire and surface-to-air missile fire are occurring or anticipated.

military necessity requirement. Even more critically, the drone's sensors allow many sets of eyes, including those of JAG lawyers trained to assess proportionality, to make a proportionality determination at the time of weapons release. Even if the drone is evading fire at the time of weapons release, those making the final decision to carry out the attack are not dealing with the decision-impairing effects of mortal fear. Although the sanitary environment of the drone control room has been criticized for making war too much like a video game,[19] it undoubtedly leads to much sounder proportionality determinations.

B. Limitations

Like any weapons system drones have significant limitations in what they can achieve. Drones are extremely vulnerable to any type of sophisticated air defense system. They are slow. Even the jet-powered Avenger recently purchased by the Air Force only has a top speed of around 460 miles per hour,[20] meaning that it cannot escape from any manned fighter aircraft, not even the outmoded 1970s-era fighters that are still used by a number of nations.[21] Not only are drones unable to escape manned fighter aircraft, they also cannot hope to successfully fight them. Their air-to-air weapons systems are not as sophisticated as those of manned fighter aircraft,[22] and in the dynamic environment of an air-to-air engagement, the drone operator could not hope to match the situational awareness[23] of the pilot of manned fighter aircraft. As a result, the outcome of any air-to-air engagement between drones and manned fighters is a foregone conclusion. Further, drones are not only vulnerable to manned fighter aircraft, they are also vulnerable to jamming. Remotely piloted aircraft are dependent upon a continuous signal from their operators to keep them flying, and this signal is vulnerable to disruption and jamming.[24] If drones were

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19. *See* Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 133 (noting the ethical concerns arising out of the comparison between operating a drone and playing a video game).

20. Hennigan, *supra* note 13.

21. *See Unmanned Military Aircraft: Attack of the Drones*, THE ECONOMIST: TECH. Q. (Sept. 3, 2009), http://www.economist.com/node/14299496 ("Small and comparatively slow UAVs are no match for fighter jets . . . ."). In December 2002 a Predator drone was shot down by a 1970s era MiG-25 fighter over Iraq. *See Pilotless Warriors Soar to Success*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/stories/2003/04/25/tech/main551126.shtml (describing drones' success against ground targets as well as the MiG-25 shoot-down). I am unaware of any situation in which a drone has shot down a manned fighter aircraft.

22. *Compare Factsheets: MQ-9 Reaper*, *supra* note 13 (listing no air-to-air weapons systems among the armament of one of the Air Force's most advanced armed drones), *with Factsheets: F-22 Raptor*, U.S. AIR FORCE (Nov. 25, 2009), http://www.af.mil/information/factsheets/factsheet.asp?id=199 (describing the Air Force's most advanced manned aircraft's armament as consisting of at least two air-to-air missiles and a 20-millimeter cannon for use in air-to-air combat).

23. "Situational awareness" is the term used to describe a pilot's understanding of the tactical positioning of all the aircraft in an engagement. Knowing where all the aircraft are relative to one another and projecting which aircraft will be vulnerable and which will pose an imminent threat several seconds in the future is critical to surviving an air-to-air engagement. Drone operators' ability to assess and react to the changing situation would be seriously impaired by their remote location and sensor limitations. *Cf.* Jason S. McCarley & Christopher D. Wickens, *Human Factors Concerns in UAV Flight*, FEDERAL AVIATION ADMINISTRATION 1, *available at* www.hf.faa.gov/docs/508/docs/uavFY04Planrpt.pdf (last visited Jan. 31, 2012) (noting that accident rates are higher in UAVs than manned aircraft in part because, in addition to the normal problems of flight, UAV operators and the aircraft are not in the same place). Their delayed reactions would be decisive in an engagement against any trained military pilot.

24. *See* Brendan Gogarty & Meredith Hagger, *The Laws of Man over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land and Air*, 19 J.L. INF. & SCI. 73, 138 ("This link [between the

perceived to be a serious threat to an advanced military, a serious investment in signal jamming or disruption technology could severely degrade drone operations if it did not defeat them entirely.[25]

These twin vulnerabilities to manned aircraft and signal disruption could be mitigated with massive expenditures on drone development and signal delivery and encryption technology,[26] but these vulnerabilities could never be completely eliminated. Meanwhile, one of the principal advantages that drones provide—their low cost compared with manned aircraft[27]—would be swallowed up by any attempt to make these aircraft survivable against a sophisticated air defense system. As a result, drones will be limited, for the foreseeable future,[28] to use in "permissive" environments in which air defense systems are primitive[29] or non-existent. While it is possible to find (or create) such a permissive environment in an inter-state conflict,[30] permissive environments that will allow for drone use will most often be found in counterinsurgency or counterterrorism operations.

C. Drones and the Boundaries of the Battlefield

The legal determination of what constitutes "the battlefield" has particular significance for the use of drones, particularly armed drones. This is because "the battlefield" is used to effectively define the scope of IHL's application.[31] In situations outside the scope of IHL, international human rights law (IHRL)[32] applies. For the

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UAV and the controller] is a prime target for interception, jamming, and 'digital warfare.'").

25. An "arms race" between drone controllers and signal disrupters would be similar to the contests across the radar frequency spectrum. One side finds a way to disrupt certain radar frequencies; the other side develops radar that uses a different frequency band, or multiple frequencies, until those are compromised, etc. Such a contest would also share similarities with the cyberwar contest between data encryption and data interception and hacking.

26. *See* Declan McCullagh, *U.S. Warned of Predator Drone Hacking*, CBS NEWS (Dec. 17, 2009), http://www.cbsnews.com/8301-504383_162-5988978-504383.html (reporting on Predator vulnerability to hacking and the high costs of encryption).

27. *See supra* note 13 and accompanying text.

28. Advances in artificial intelligence (AI) could one day allow for the use of "untethered" drones that would execute their missions based upon preprogrammed parameters. Because this would mean that the proportionality assessment done at weapons release would be performed by the AI chip in the drone, such developments would require the creation of new IHL provisions specifically addressing such weapons systems and their performance. *See supra* note 7.

29. Limited to ground fire or shoulder launched surface-to-air missiles.

30. The United States was able to eliminate the Iraqi air defense systems fairly rapidly at the beginning of the 2003 war, which allowed for some drone use prior to the time that the conflict became a counterinsurgency operation. *See* Michael R. Gordon, *After the War: Preliminaries; U.S. Air Raids in '02 Prepared for War in Iraq*, N.Y. TIMES, Jul. 20, 2003, http://www.nytimes.com/2003/07/20/world/after-the-war-preliminaries-us-air-raids-in-02-prepared-for-war-in-iraq.html (discussing use of air raids to weaken Iraqi air defenses and the early use of drones in the war).

31. *See infra* Part II.

32. *See* JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 207 (Gregory S. Musselman ed., 2011) http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2011.pdf [hereinafter LAW OF WAR DESKBOOK] ("Traditionally, human rights law [IHRL] and the [law of war (IHL)] have been viewed as separate systems of protection. This classic view applies human rights law and the [law of war] to different situations and different relationships respectively."). IHRL includes international treaties such as the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, at 52 (Mar. 23, 1976), subject-specific international treaties such as the Convention Against Torture and Other Cruel, Inhuman or Degrading

purposes of this Article, the salient difference between these two bodies of law lies in their disparate provisions regarding the use of lethal force. IHL allows for lethal force to be employed based upon the status of the target.[33] A member of the enemy's forces may be targeted with lethal force based purely on his status as a member of those forces.[34] That individual does not have to pose a current threat to friendly forces or civilians at the time of targeting.[35] In contrast, IHRL permits lethal force only after a showing of dangerousness.[36] Under IHRL (the law enforcement model), lethal force may only be employed if the individual poses an imminent threat to law enforcement officers attempting arrest or to other individuals.[37] Further, IHRL requires that an opportunity to surrender be offered before lethal force is employed.[38]

Because drones are incapable of offering surrender before utilizing lethal force, armed drones may not be legally employed in situations governed by IHRL.[39] This absolute prohibition does not apply to other forces commonly used in counterinsurgency or counterterrorism operations, such as special forces units, because it is possible for them to operate within the parameters of IHRL. Although the use of special forces in law enforcement operations has the potential to be legally problematic,[40] appropriately clear and restrictive rules of engagement that include the requirement of a surrender offer can allow special forces to operate under an IHRL regime.[41] Similarly, almost any other part of the armed forces, from regular army units to military police to Coast Guard and naval forces, can adapt their operating procedures to comply with IHRL's requirements. Armed drones cannot.

Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, regional human rights treaties such as the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143, 9 I.L.M. 99, as well as the customary international law that has developed around such treaties.

33. *See infra* notes 92–99 and accompanying text.

34. *See infra* notes 92–99 and accompanying text.

35. *See infra* notes 92–99 and accompanying text.

36. Alston Report, *supra* note 10, para. 32.

37. *See* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 101 (2008) (explaining that a deprivation of life violates IHRL "when the use of potentially lethal force as such is not 'strictly unavoidable' or 'strictly necessary' to protect any person, including the law enforcement officials themselves, from imminent death or serious injury, to effect an arrest or prevent the escape of a person suspected of a serious crime, or to otherwise maintain law and order or to protect the security of all") (footnotes and emphasis omitted). Lethal force could be employed against a violent criminal suspect even if he drops his weapon and attempts to flee because his escape poses a foreseeable threat of harm to future victims.

38. Alston Report, *supra* note 10, para. 75.

39. *See id.* para. 85 ("A targeted drone killing in a State's own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.").

40. *See* McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 39 (1995) (finding that the United Kingdom's use of Special Air Service special forces to attempt the arrest of three Irish Republican Army (IRA) terrorists in Gibraltar foreseeably led to the IRA members' deaths, thus violating the European Convention on Human Rights).

41. Some have even gone so far as to argue that the killing of Osama bin Laden by special forces was a law enforcement operation outside the scope of IHL, although this view is not widely shared. *See* Mary Ellen O'Connell, *The Death of bin Laden as a Turning Point*, OPINIO JURIS (May 3, 2011, 3:10 PM), http://opiniojuris.org/2011/05/03/the-death-of-bin-laden-as-a-turning-point (O'Connell argued that the killing was a law enforcement operation, but comments following the post indicated that this characterization of the operation was not widely shared. That disagreement, however, was based upon the facts of the operation, not on the ability of special forces units to conduct operations in accordance with IHRL).

As a result, the debate about what constitutes the legal boundaries of the battlefield has a particularly significant impact on the use and development of drones. Because their operational limitations prevent drones from being employed outside of the permissive environments found in counterterrorism or counterinsurgency operations, their usefulness as a weapons system is strongly tied to the scope of IHL's application. If the strict geographic approach to defining IHL's scope (described in more detail below) is accepted, then drone use would be considered illegal everywhere outside Afghanistan.

II. COMPETING VIEWS OF THE SCOPE OF IHL

A. Strict Geographical Limitations: Internal Non-International Armed Conflicts

Advocates of strict geographical limitations on the scope of IHL often summarize their position by stating that the concept of a "global battlefield" is "contrary to international law."[42] The laws of armed conflict cannot apply in a place where there is no armed conflict, and the determination of whether an armed conflict exists is based upon the intensity of the violence occurring there and the organization of the forces involved, as laid out in the *Tadic* opinion.[43] If the minimum threshold of violence that defines an armed conflict is met, then IHL applies within that geographical area. If the *Tadic* threshold is not met, the laws of armed conflict do not apply there. In IHL's absence IHRL would apply, as would the law enforcement restrictions on lethal force, including the requirement of a surrender offer. This would preclude any use of armed drones within the geographical area governed by IHRL, regardless of whether the state whose territory was involved consented to their use.

This argument—that the conditions on the ground at the place where the strike occurs is the determining factor in whether IHL applies to that strike, or whether it is instead governed by IHRL—has a number of supporters.[44] Because the *Tadic* factors are broadly accepted, their absence at the location of the strike is viewed as dispositive as to the question of which body of law controls. If the *Tadic* factors are not met, then IHRL controls. If IHRL does not control, it is argued, then nothing would prevent the United States from conducting drone strikes in London, nor

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42. HRW letter, *supra* note 10, at 2; *see also Drones*, *supra* note 6, at 5 (describing the legal view held by some that the "legal rights of armed conflict are limited to a particular theatre of hostilities"; outside of this geographic area, ordinary human rights law would apply, including the prohibition against extrajudicial execution).

43. The idea that an armed conflict may only exist when a minimum threshold of violence has been met is widely accepted. The International Criminal Tribunal for the Former Yugoslavia enunciated factors for determining the existence of an armed conflict, including its intensity and the organization of the forces involved. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, paras. 561–62 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) ("[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.").

44. *See supra* note 10; *see also* Kevin Jon Heller, *Rebuttal: Judge Bates' Infernal Machine*, 159 U. PA. L. REV. PENNUMBRA 183, 183 (2011), http://www.pennumbra.com/debates/pdfs/Targeted_Killing.pdf (arguing that in the absence of combat that is "sufficiently protracted or intense" IHL cannot apply to authorize targeted killings and that, instead, IHRL governs).

would anything prevent other nations from employing drones in this country, resulting in an "escalating spiral of unconstrained violence."[45]

This view that the *Tadic* factors determine whether an armed conflict is occurring within a particular geographical area makes sense in the context of an internal non-international armed conflict. Internal armed conflicts usually occur in portions of a state where control is disputed or where the opposition's actions and forces are concentrated. Applying IHL throughout the entire country and thus relaxing the IHRL restrictions on lethal force outside the areas in which the *Tadic* factors are met would likely lead to unnecessary loss of life and improper deprivation of liberty. However, the fact that this view is appropriately applied to internal armed conflicts does not mean that it can be universally applied. As demonstrated below, the coherence of this view begins to break down when it is applied to more traditional international armed conflicts.

B. Traditional Boundaries of the Battlefield: International Armed Conflicts

If the strict geographical view can be summarized with the phrase "the whole world cannot be a battlefield," the more traditional view of the boundaries of the battlefield might be encapsulated by the statement "the law of armed conflict goes where the participants in the armed conflict go." I term this the "traditional" view because it is the how the boundaries of the battlefield have long been understood in international armed conflicts which, until very recently, have been considered the paradigmatic way that armed conflicts are thought about. The 1949 Geneva Conventions applied almost exclusively to international armed conflicts, addressing conflicts "not of an international character" in a single article.[46] By 1977, non-international armed conflicts were prevalent enough to warrant a separate protocol, although it was still much shorter and less detailed than its companion, which addressed international armed conflicts.[47]

Commentators have suggested that the scope of IHL in international armed conflicts is also subject to increasingly strict geographical restrictions. Although these proposed restrictions are not specifically related to the *Tadic* factors, those advocating such restrictions describe them in terms of proximity to the current "area

45. 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, 724 (2004); *see also* HRW letter, *supra* note 10, at 2 (arguing that the Obama Administration's use of drones for targeted killings "sets a dangerous precedent for abusive regimes around the globe").

46. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, August 2, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

47. *Compare* 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 [hereinafter Additional Protocol I] (addressing international armed conflicts), *with* 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 (1987) [hereinafter Additional Protocol II] (addressing non-international armed conflicts).

of operations" where active fighting is occurring.[48] Christopher Greenwood opined that "it cannot be assumed—as in the past—that a state engaged in an armed conflict is free to attack its adversary anywhere in the area of war."[49] As an example, he claimed that it would have been legally problematic for a British warship to attack an Argentine warship during the Falklands War if they encountered one another in the Pacific Ocean, far from the disputed islands.[50] Similarly, Mary Ellen O'Connell has claimed that the shooting down of Admiral Yamamoto's plane over Bougainville by U.S. fighter aircraft during World War II would today be considered illegal because it occurred "far from [the] battlefield."[51]

The claim that there are legal restrictions on the employment of combat force during an international armed conflict based solely upon the distance from the "front lines" finds no support in practice. This is because no nation in the world would ever accept such blanket limitations upon its military's ability to act. Success in warfare at any level, from single combat to global military strategy, is based upon the ability to strike your opponent in places where he is vulnerable and in ways he does not expect. The history of warfare since the adoption of the Geneva Conventions is replete with examples of combat force being employed far from the "front lines."

Early in the Korean War General McArthur directed an amphibious assault by U.N. forces on Inchon, more than 150 miles from the fighting that was going on near Pusan, and thereby changed the course of that conflict.[52] The 1991 Persian Gulf War opened with a thirty-eight-day air campaign by Coalition forces against targets throughout Iraq and Kuwait.[53] Strikes on targets in northern Iraq occurred more than 550 miles from Kuwait City, and the command and control targets in Baghdad were well over 300 miles from the "front lines" of the Saudi-Kuwaiti border.[54] When the ground campaign began, the jumping off point for the French 6th Light Division on the left flank of the advance into Iraq was almost 300 miles from Kuwait City and more than 200 miles from the nearest Kuwaiti territory.[55] Most recently, after the U.N. Security Council authorized the use of force against Libya, many airstrikes and cruise missile strikes conducted on the first day of the military intervention targeted

48. Christopher Greenwood, *Scope of Application of Humanitarian Law*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 39, 53 (Dieter Fleck ed., 1st ed. 1995).

49. *Id.*

50. Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 273, 277 (Yoram Dinstein & Mala Tabory eds., 1989) [hereinafter Greenwood, *Self-Defence*]. While the Royal Navy voluntarily created a naval exclusionary zone outside of which Argentine warships would not be subject to attack, IHL did not require them to do so.

51. Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y 343, 361 (2010).

52. Hanson W. Baldwin, *M'Arthur Success in Korea Analyzed*, N.Y. TIMES, Oct. 30, 1950, at L3; Michael Hickey, *The Korean War: An Overview*, BBC NEWS, http://www.bbc.co.uk/history/worldwars/coldwar/korea_hickey_01.shtml (last updated Mar. 21, 2011).

53. *See* Michael W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AM. J. INT'L L. 481, 481–96 (2003) (discussing the Coalition air campaign against Iraq).

54. *See* DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 133–34 (Apr. 1992) (describing attacks in northern Iraq during the Persian Gulf War, including airstrikes in Mosul against nuclear facilities); *Map of Troop Movements from Desert Storm*, U.S. ARMY CENTER OF MILITARY HISTORY, http://www.history.army.mil/reference/DS.jpg (depicting the location of forces and geography of the region).

55. *See Map of Troop Movements from Desert Storm*, *supra* note 54 (depicting location of attacks).

facilities near Tripoli, more than 400 miles from the fighting that was occurring between the Libyan Army and rebel forces near Benghazi.[56]

These examples of state practice during U.N.-authorized military operations make it clear that the use of combat force far from the location of the fighting is not only considered to be legal, but is also regarded as a routine part of any international armed conflict. Any claim that shooting down a military aircraft flown by military pilots carrying a senior military officer would be considered illegal under international law today because the fighter aircraft involved in the mission had to fly approximately 450 miles from its base to complete the mission is wholly without support.[57]

C. *Neutrality Law: The* Graf Spee *Incident*

This is not to say that there are no geographic limitations on the scope of international armed conflicts. The law of neutrality clearly prohibits the use of armed force by participants in an armed conflict on the territory of neutral states.[58] Neutrality law applies to both land and naval warfare,[59] and the AMW Manual includes several articles applying neutrality law to aircraft.[60]

Neutrality law imposes restrictions on both belligerents and neutrals. Belligerents are enjoined from sending their armed forces across neutral territory, from recruiting combatants on the territory of a neutral, or from setting up communications stations or military installations on neutral territory.[61] Belligerent warships are not permitted to stay in neutral ports for more than twenty-four hours and may only prolong their stay because of damage or bad weather.[62] Belligerents are also "prohibited in neutral territory . . . [from using] such territory as a sanctuary."[63] Conversely, a neutral power is prohibited from allowing any of these acts by a belligerent on its territory and is required to intern any members of a belligerent armed force found on its territory.[64]

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56. *See* Devin Dwyer & Luis Martinez, *U.S. Tomahawk Cruise Missiles Hit Targets in Libya*, ABC NEWS (Mar. 19, 2011), http://abcnews.go.com/International/libya-international-military-coalition-launch-assault-gadhafi-forces/story?id=13174246#.TzYKsbHeAz5 (describing the initial coalition attacks on the Qaddafi regime, which focused primarily on Tripoli and other targets in the west of the country, far from the "rebel stronghold of Benghazi").

57. *See supra* note 51 and accompanying text. Bougainville was approximately 450 miles from the U.S. base at Henderson Field, where the fighters that shot down Yamamoto's plane were launched. Daniel Lagan, *Operation Vengeance*, MILITARYHISTORY.ORG (July 2, 2009), http://www.militaryhistory.org/2009/07/operation-vengeance.

58. *See* Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land arts. 1–5, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague V] (establishing the inviolate nature of neutral territory for belligerents).

59. *See generally id.* (detailing neutrality rights and duties in land war); Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415 [hereinafter Hague XIII] (detailing neutrality rights and duties in naval war).

60. AMW MANUAL, *supra* note 1, § X (Neutrality).

61. Hague V, *supra* note 58, arts. 2–4.

62. Hague XIII, *supra* note 59, arts. 12, 14.

63. AMW MANUAL, *supra* note 1, r. 167(a).

64. Hague V, *supra* note 58, arts. 5, 11; Hague XIII, *supra* note 59, art. 24; AMW MANUAL, *supra* note 1, r. 168(a), 170(c).

An illustration of both the use of armed force far from the "front lines" of an armed conflict and the application of neutrality law in an international armed conflict can be found in the *Graf Spee* incident that occurred at the beginning of the Second World War. The *Admiral Graf Spee* was a German *Panzerschiff*[65] that engaged in commerce raiding throughout the South Atlantic during the autumn of 1939, more than 6,000 miles from the British and German coasts.[66] On the morning of December 13, the *Graf Spee* encountered three British cruisers, *Exeter*, *Ajax*, and *Achilles*.[67] After an exchange of gunfire that lasted a little more than an hour, the *Graf Spee* turned and headed for the neutral port of Montevideo in Uruguay.[68] She reached Montevideo on the evening of December 13 and a diplomatic battle over the duties of Uruguayan neutrality ensued.[69] The British and French ministers demanded that the German warship be required to leave port quickly or be interned for the balance of the war in accordance with articles 12, 14, and 24 of the Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War.[70] The German captain, Langsdorff, requested that the *Graf Spee* be allowed to stay for fourteen days in order to complete the necessary repairs to make the ship seaworthy.[71] During these intense and high-stakes negotiations the Uruguayan Minister of Foreign Affairs, Dr. Guani, insisted that Uruguay would uphold its responsibilities as a neutral nation and bridled at what he perceived to be threats from the French and British diplomats if Uruguay did not do so.[72]

Uruguayan technicians examined the warship and determined that it would require seventy-two hours for her to be made seaworthy and Langsdorff was informed that he would be required to depart Montevideo on December 17.[73] He then received instructions from Berlin ordering him to either attempt a breakout or to scuttle the ship and stressing that internment in Uruguay be avoided at all costs.[74] Langsdorff chose to scuttle the ship on the 17th and he shot himself shortly thereafter.[75] His crew was interned for the balance of the war.[76]

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65. *See* RICHARD WOODMAN, THE BATTLE OF THE RIVER PLATE: A GRAND DELUSION 4–7 (Christopher Summerville ed., 2008) (describing the construction of the Panzerschiffs, or "Armored Ships," which were derisively referred to as "pocket battleships" by the Royal Navy. Constructed by the German Navy during the interwar years in order to remain in compliance with the provisions of the Treaty of Versailles, they were smaller and carried lighter armaments than the battleships of the time.).

66. *Id.* at 12–54.

67. *Id.* at 88–90.

68. *Id.* at 92–114.

69. *Id.* at 109–14.

70. *See* SIR EUGEN MILLINGTON-DRAKE, THE DRAMA OF THE *GRAF SPEE* AND THE BATTLE OF THE PLATE: A DOCUMENTARY ANTHOLOGY 1914–1964, at 288–95 (1964) (explaining that the initial British insistence that the *Graf Spee* be forced to leave immediately changed when the British cruiser commander urged a delay to allow the cruiser *Cumberland* to join his force awaiting the *Graf Spee*'s departure).

71. *See id.* (noting that this would have allowed German submarines enough time to get to the River Plate and help the *Graf Spee* break out through the group of British warships gathering at the mouth of the river).

72. *Id.* at 288–90.

73. *Id.* at 305–07, 325.

74. *Id.* at 321–23.

75. WOODMAN, *supra* note 65, at 135–40.

76. *Id.* at 140–41.

This is the manner in which geography limits the scope of IHL during international armed conflicts. As long as Uruguay maintained its neutrality, IHRL governed the conduct of all parties within Uruguay unless or until Uruguay ended its neutrality and chose to support one side or the other. The British Navy was not permitted to fire upon the damaged *Graf Spee* in Uruguayan waters, but the German warship was not permitted to use the Uruguayan port as a sanctuary. As a sovereign nation Uruguay could have chosen to permit the British Navy to sink the *Graf Spee* within Uruguayan waters, but that would have been considered a belligerent act against Germany, and Uruguay would have forfeited her status as a neutral. IHL would have applied on Uruguay's territory from the time she changed her status to that of British ally and the *Graf Spee* could have opened fire on Uruguayan naval vessels or port facilities once Uruguay declared herself to be a British ally. Likewise, Uruguay could have chosen to offer the *Graf Spee* sanctuary in the port of Montevideo, but this would have been considered a belligerent act against the British, making Uruguay a German ally. Had Uruguay made this choice IHL would have applied on Uruguayan territory and the British Navy could have fired upon the *Graf Spee* or upon Uruguayan forces from the moment Uruguay declared herself to be a German ally. Instead, Uruguay chose to uphold her responsibilities as a neutral nation by neither forcing the *Graf Spee* to depart before she could be made seaworthy, nor allowing her to improperly use the neutral port of Montevideo as a sanctuary until help could arrive. It is through neutrality law that geography limits the scope of IHL during international armed conflicts.

If the absence or existence of *Tadic* factors within a given geography determines the scope of IHL during internal armed conflicts and neutrality law determines IHL's scope during international armed conflicts, how should the boundaries of the battlefield be determined in transnational armed conflicts?

D. Transnational Armed Conflicts

For over half a century the choice for classifying armed conflicts has been binary. Armed conflicts were categorized either as international armed conflicts or non-international armed conflicts. International armed conflicts triggered the application of IHL through Common Article 2 of the Geneva Conventions, which applied the entire Conventions to such conflicts.[77] Such conflicts were those occurring between "two or more of the High Contracting Parties."[78] Non-international armed conflicts triggered the application of IHL through Common Article 3 of the Geneva Conventions, which itself set minimum standards of conduct for conflicts taking place on "the territory of *one* of the High Contracting Parties" (emphasis added).[79]

As these two choices were defined, however, they were not collectively exhaustive, potentially leaving room for a third choice that IHL left unaddressed. The scope of international armed conflicts was fairly straightforward, being any

77. Geneva I-IV, *supra* note 46, art. 2.

78. *Id.* Every nation on earth is now a party to the Geneva Conventions. INT'L COMM. RED CROSS [ICRC], ANNUAL REPORT 2010: STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS 547 (2010), http://www.icrc.org/eng/assets/files/annual-report/current/icrc-annual-report-2010-states-party.pdf. Hence, the term "High Contracting Party" is now synonymous with "state" or "nation."

79. Geneva I-IV, *supra* note 46, art. 3.

conflict between two or more states. The meaning of non-international armed conflicts was also well established. The drafting history of the Geneva Conventions supported the widely held belief that the provisions governing non-international armed conflicts were directed at internal armed conflicts and civil wars taking place inside a single state.[80] More than forty-five years later, that understanding retained its place as black-letter IHL. The Handbook of International Humanitarian Law in Armed Conflicts stated that "[a] non-international armed conflict is a confrontation between the existing governmental authority and groups of persons subordinate to this authority, which is carried out by force of arms within national territory and reaches the magnitude of an armed riot or a civil war."[81]

The problem with these definitions of international and non-international armed conflict is that collectively they did not describe all the types of armed conflicts that might exist. It was possible for an armed conflict to satisfy neither of these definitions. The United States' conflict with al-Qaeda could not be an international armed conflict because al-Qaeda was not a "High Contracting Party" to the Geneva Conventions.[82] Yet it was also clearly not a non-international armed conflict as defined above because it was not internal to the United States. The existence of this purported "gap" in IHL's coverage was felt most immediately by detainees in the conflict between al-Qaeda and the United States.[83] Justice Stevens foreclosed the Bush Administration's argument that such a gap existed by redefining the term "non-international armed conflict" to include all conflicts not deemed to be "international armed conflicts," thus reaffirming the binary approach to classifying armed conflicts.[84]

While this reinforcement of the binary approach may have been necessary to prevent compliance avoidance by the United States, its expansion of the definition of non-international armed conflicts erased important distinctions between purely internal conflicts, such as civil wars, and more complex transnational armed conflicts, like the conflict with al-Qaeda or the 2006 conflict between Israel and Hezbollah in Lebanon.[85] In order for IHL to continue to act as a coherent body of law, these

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80. *See* 3 ICRC, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 28–29 (Jean S. Pictet ed., 1960) ("[T]he Red Cross has long been trying to aid the victims of civil wars and internal conflicts, . . . [b]ut in this connection particularly difficult problems [of extending Red Cross assistance] arose."); 2-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 40–43 (William S. Hein & Co., Inc. 2004) (1949) (discussing application of the Geneva Conventions to civil wars). There are two significant sources for the drafting history of the Geneva Conventions. These are the four volume FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 and the COMMENTARIES that were produced by a number of attendees and edited by Jean Pictet, who was appointed Director of the ICRC in 1946 and took charge of the preparatory work that led to the adoption of the 1949 Conventions.

81. Greenwood, *Scope of Application*, *supra* note 48, at 47.

82. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628–29 (2006) (discussing al-Qaeda's status as a non-High Contracting Party).

83. *See id.* at 628–33 (ruling that an al-Qaeda detainee in Guantanamo Bay could not be properly tried by a military commission because the proposed commission failed to provide the procedural safeguards required by the Geneva Conventions).

84. *See id.* at 630 ("The term 'conflict not of an international character' is used here in contradistinction to a conflict between nations.").

85. *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, 310 (2007) (discussing *Hamdan* and the "regulatory gap" "spawned" by Common Articles 2 and 3).

distinctions that were understood to exist for more than fifty years should not be replaced with a monolithic understanding of "non-international armed conflicts" that applies the same rules to all conflicts within this greatly expanded category of conflict. Whether through the creation of a hybrid category of IHL[86] or merely a more compartmentalized understanding of the law applicable to "non-international armed conflicts," the legal distinction between internal civil wars and transnational armed conflicts (defined as conflicts between states and non-state actors that cross international boundaries) must be maintained.

III. HOW THE LEGALITY OF DRONE STRIKES IN TRANSNATIONAL ARMED CONFLICTS RELATES TO THE CORE PRINCIPLES OF IHL

A. Legal Challenges to Drone Strikes in Transnational Armed Conflicts

An illustration of why this distinction between internal civil wars and transnational armed conflicts must be maintained can be found in a recent lawsuit brought by the ACLU against the Obama Administration. The ACLU attempted to enjoin drone strikes directed against Anwar al-Aulaqi, a prominent member of al-Qaeda in the Arabian Peninsula (AQAP).[87] Although the ACLU conceded that strikes targeting al-Aulaqi would be governed by IHL if they were conducted in Afghanistan,[88] they maintained that such strikes would be occurring "outside the context of armed conflict" if they were directed against al-Aulaqi in Yemen.[89] Using the reasoning that underlies the strict geographical limitations on the scope of IHL described above, the ACLU argued that the absence of an armed conflict in Yemen foreclosed the application of IHL to anyone in Yemeni territory. Instead, the use of lethal force was governed by IHRL and might only be employed when al-Aulaqi presented a "concrete, specific, and imminent threat of death or serious physical injury" to others.[90] Because the ACLU conceded that al-Aulaqi was targetable under IHL in Afghanistan, the legal basis for their claim was based upon *where* al-Aulaqi was rather than upon *who* he was.

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86. *See id.* at 311 (discussing the need for a "hybrid category" of armed conflict); *see also* Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISR. L. REV. 46, 50 (2009) (setting out the need for the law of armed conflict to evolve to address the "emerging category" of "transnational armed conflict").

87. Complaint for Declaratory and Injunctive Relief of Plaintiff at 2–3, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-01469) [hereinafter Complaint]. This suit was subsequently dismissed. *See infra* note 91 and accompanying text. After the submission of this Article, al-Aulaqi was killed by a U.S. drone strike in Yemen in September 2011. Erika Solomon & Mohammed Ghobari, *CIA Drone Kills U.S.-born Al Qaeda Cleric in Yemen*, REUTERS, Sept. 30, 2011, *available at* http://www.reuters.com/article/2011/09/30/us-yemen-awlaki-idUSTRE78T0W320110930.

88. Both Ben Wizner and Arthur Spitzer—two of the ACLU lawyers who filed the lawsuit, whom I debated separately in New York and Washington, D.C. last year—both stated that if al-Aulaqi were in Afghanistan, he could be targeted. *See* Michael W. Lewis and Ben Wizner, *Predator Drones and Targeted Killings*, FEDERALIST SOCIETY (Jan. 27, 2011), http://www.fed-soc.org/publications/detail/predator-drones-and-targeted-killings-podcast (Wizner stating that if al-Aulaqi was fighting with the Taliban in Afghanistan, he would not be due any process prior to being targeted for killing).

89. *See* Complaint, *supra* note 87, at 2–11 (containing, in its eleven pages, seventeen instances of the phrase "outside of armed conflict" or a similar phrase).

90. *Id.* at 2.

Although this lawsuit was dismissed on standing and political question grounds,[91] if the court had accepted the ACLU's position that strict geographical limitations apply to transnational armed conflicts such as the conflict between the United States and al-Qaeda, it would have seriously undermined the core principles that IHL is founded upon. To understand why that is, it is necessary to understand what IHL seeks to protect and how it classifies individuals in order to further that goal.

B. Core Principles of IHL

IHL considers all people to be civilians unless or until they take affirmative steps to change that status.[92] Civilians are immune from attack and may not be targeted unless they take actions to change their status and forfeit that immunity.[93] From a legal standpoint, the most advantageous way for a civilian to change his or her status is to become a combatant. This cannot be done by merely picking up a weapon, however. To become a combatant, an individual must become a member of the "armed forces of a Party to a conflict."[94] To qualify as an "armed force" an organization must be "subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."[95]

The status of combatant is legally advantageous because combatants are entitled to the "combatants' privilege," which allows combatants to participate in an armed conflict without becoming subject to prosecution for violating domestic laws prohibiting the destruction of property, assault, murder, etc.[96] The combatant's conduct is therefore regulated by IHL rather than domestic law and a combatant may only be criminally charged with conduct that violates the laws of war.[97] There is, however, a disadvantage to achieving combatant status as well. While becoming a combatant bestows the combatant's privilege on the individual, it also subjects that individual to attack at any time by other parties to the conflict. Because targeting of combatants is based upon their status as combatants and not upon their "dangerousness," combatants may be lawfully targeted regardless of whether they pose a current threat to their opponents, whether or not they are armed, or even

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91. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 35, 52 (D.D.C. 2010).

92. Additional Protocol I, *supra* note 47, art. 50(1) (defining "civilian" as persons who are not members of the armed forces of a party to the conflict under Article 43 or otherwise eligible for prisoner-of-war status under Article 4(A)(1), (2),(3), and (6) of Geneva III, *supra* note 46, and providing that "in case of doubt" a person is presumed to be a civilian). Although the United States has not ratified Additional Protocol I, it recognizes much of Additional Protocol I as descriptive of customary international law. LAW OF WAR DESKBOOK, *supra* note 32, at 21–22.

93. Additional Protocol I, *supra* note 47, arts. 51(2)–(3).

94. *Id.* art. 43(2).

95. *Id.* art. 43(1).

96. *See* ROBERT K. GOLDMAN & BRIAN D. TITTEMORE, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, 1–4 (2002) (describing the history of recognition of the "combatant's privilege").

97. *Id.* at 2.

awake.[98] The only situations in which IHL limits the right to attack a combatant are when that combatant has surrendered or been rendered *hors de combat*.[99]

While there is some disagreement about whether "combatant status" should be recognized in non-international armed conflicts,[100] that dispute is irrelevant when it comes to questions concerning the status of members of al-Qaeda or other terrorist organizations. Because combatant status is based upon membership in a group that organizationally enforces "compliance with the rules of international law applicable in armed conflict,"[101] groups such as al-Qaeda, whose means and methods of warfare include deliberately targeting civilians, cannot claim combatant status for their members. It should be emphasized that the behavior of an individual al-Qaeda member cannot confer combatant status. No matter how strictly an individual member of a non-privileged group adheres to IHL or how scrupulously they distinguish between civilian and military targets, they are never entitled to the combatant's privilege and may therefore be criminally liable for attacks on members of an opposing armed force.[102] Al-Qaeda does not, as some have suggested, have a "basic right to engage in combat against us" in response to our attacks.[103]

If al-Qaeda members are not combatants, then what are they? Like all people, IHL treats them as being presumptively civilians who, as a general rule are immune from targeting[104] unless they take affirmative steps to forfeit that immunity.[105] There are two ways that civilians may forfeit their immunity—one temporary and one more permanent. The temporary forfeiture occurs when a civilian directly participates in hostilities (DPH).[106] While the exact contours of what constitutes DPH are not clearly established, it is generally associated with a discrete act.[107] Picking up a gun or

98. *See supra* note 36 and accompanying text.

99. Geneva I, *supra* note 46, art. 12; Geneva III, *supra* note 46, art. 13.

100. Additional Protocol I only applies to international armed conflicts and there are no provisions in Additional Protocol II (which supplements Common Article 3 of the Geneva Conventions and is applicable to "all armed conflicts which are not covered by [Additional Protocol I]") for combatant status. However, much of Additional Protocol I has been recognized as customary international law and may apply to Additional Protocol II conflicts. *See, e.g.*, *Hamdan*, 548 U.S. at 632–35 (applying Additional Protocol I Article 75 to a "conflict not of an international character"); Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL. REV. 253 (2011) (arguing that combatant status should be afforded to non-state actors meeting Additional Protocol I's Article 43 criteria).

101. Additional Protocol I, *supra* note 47, art. 43(1).

102. There is debate about whether the source of criminal liability for such an attack is the law of armed conflict or domestic criminal law. Because military commissions deal with IHL violations, the U.S. position has been that violations committed by unprivileged belligerents are war crimes. *See, e.g.*, *United States v. Khadr (Mil. Com. Oct. 25, 2010) (Plea Agreement)*, ROBERT CHESNEY'S NATIONAL SECURITY LAW LISTSERVE ARCHIVE (Oct. 25, 2010, 6:01 PM), http://jnslp.wordpress.com/2010/10/25/nationalsecuritylaw-united-states-v-khadr-mil-com-oct-25-2010-plea-agreement (describing Omar Khadr's agreement to plead guilty to, inter alia, "murder in violation of the law of war [and] attempted murder in violation of the law of war"). Alternatively Khadr could have been tried for murder under the domestic laws and procedures of either the United States or Afghanistan.

103. *Drones II* (prepared statement of David W. Glazier), *supra* note 6, at 32.

104. Additional Protocol I, *supra* note 47, arts. 50(1), 51(2).

105. *Id.* art. 51(3).

106. *Id.*

107. *See generally* NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, 90 INT'L REV. RED CROSS 991, 1031–33 (2009), *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf [hereinafter INTERPRETIVE GUIDANCE]. It should be noted that the ICRC document does

planting a bomb as part of an attack are examples of direct participation that result in a temporary forfeiture of immunity for such time as the civilian continues the participation. After putting the gun down and disengaging from the attack, the civilian regains immunity.

The more permanent forfeiture of civilian immunity occurs when a civilian takes on a "continuous combat function" within an organized armed group of a non-state actor. The International Committee of the Red Cross's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law states that "individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities assume a continuous combat function."[108] This classification is designed to deal with the "farmer by day, fighter by night" tactic that a number of organized armed terrorist groups have employed to retain their civilian immunity from attack for as long as possible.[109] The Israeli Supreme Court confronted this tactic in its 2006 opinion on targeted killings.[110] While the Court reaffirmed the "for such time as" language related to DPH, recognizing that forfeiture of immunity was not generally intended to be continuous, it did indicate that those who organize, plan, and direct operations were legitimately targetable on a continuous basis because of the continuous nature of their participation.[111] Continuous combat functionaries can only reacquire their civilian immunity by disavowing membership in the organized armed group and ceasing any operations with that group.[112]

IHL classifies individuals in this way in order to better achieve its goals. One of its principal goals is to spare the civilian population and members of the military that have surrendered or are *hors de combat* from the ravages of warfare.[113] To this end it insists on proportionality and military necessity for all attacks, it requires the

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not have the force of law and can only become customary international law if its parameters are accepted by a number of states. Because military reaction to the Interpretive Guidance has contended that the definitions offered are too narrow (i.e., that the ICRC considers that fewer people and fewer actions constitute direct participation in hostilities than the military might), the Interpretive Guidance should be viewed as a baseline description of behavior that inarguably constitutes direct participation in hostilities while the actual state of the law remains less clear. *See, e.g.*, W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. INT'L L. & POL. 769 (2010) (criticizing the ICRC's approach to direct participation in hostilities in Part IX of the Interpretive Guidance).

108. INTERPRETATIVE GUIDANCE, *supra* note 107, at 1007. It should be noted that the level of involvement with an organized armed group necessary to trigger continuous combat function (CCF) status is much greater than that required to trigger domestic criminal liability for the material support of terrorism. Hence the use of military force against those who have forfeited their immunity by acquiring CCF status would not significantly diminish the extensive role that law enforcement continues to play in the conflict with terrorist organizations like al-Qaeda.

109. *Id.* at 993.

110. HCJ 769/02 The Public Committee Against Torture in Israel v. Israel 53(4) PD 459 [2006], *available at* http://www.icj.org/IMG/Israel-Targetedkilling.pdf.

111. *Id.* paras. 34–40.

112. *Id.* paras. 39–40; INTERPRETATIVE GUIDANCE, *supra* note 107, at 996.

113. *See* Philip Spoerri, Dir. of Int'l Law, ICRC, *The Geneva Conventions of 1949: Origins and Current Significance*, Address at Ceremony to Celebrate the 60th Anniversary of the Geneva Conventions (Dec. 8, 2009), http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm (asserting that the Geneva Conventions contain "the essential rules protecting persons who are not or no longer taking a direct part in hostilities").

acceptance of surrender, it ties the availability of the combatant's privilege to organizational respect for IHL, and it removes civilian immunity from those participating in an armed conflict either temporarily for such time as they directly participate in hostilities or more permanently for those who perform a continuous combat function. IHL rewards organizations that enforce the laws of war by conferring the combatants' privilege on members of those organizations. At the same time it discourages organizations like al-Qaeda that target civilians and blend in with the civilian population, thereby placing the civilian population at greater risk, by denying them the combatants' privilege and removing civilian immunity from its members.

C. *Applying Strict Geographical Limits on the Scope of IHL to Transnational Armed Conflicts Rewards Groups like Al-Qaeda*

The legal support for applying strict geographical limitations on the scope of IHL to *all* non-international armed conflicts, rather than just internal civil wars, is based upon a misapplication of the *Tadic* test. As explained earlier, consideration of the *Tadic* factors makes sense in internal conflicts and civil wars where the violence is often episodic and geographically concentrated in one area of the country.[114] Broadly applying the laws of war throughout a nation during a time of rebellion is often unnecessary and likely to lead to improper deprivations of life and liberty, which has led courts to resist such sweeping applications of the laws of war.[115] However, applying the *Tadic* factors to determine whether IHL applies to a transnational armed conflict within a given geographical area is nonsensical.

The existence of an armed conflict between, for example, al-Qaeda and the United States, or between Hezbollah and Israel, should be based upon the degree of violence exchanged between those two parties, not on the level of violence that exists between al-Qaeda and the nation of Afghanistan where it resides, or between Hezbollah and Lebanon where it is based. Yet it is this latter test that is being proposed by the ACLU and commentators supporting strict geographical limitations on the scope of IHL.[116]

Such an application of the *Tadic* factors to determine whether IHL applies in a given geographical area to transnational armed conflicts confers a tremendous strategic advantage upon the very same organizations that IHL otherwise strongly disfavors. By limiting IHL to territory on which the threshold of violence for an armed conflict is currently occurring, IHL would effectively create sanctuaries for terrorist organizations in any state not currently involved in a domestic insurgency in which law enforcement is known to be ineffective. Nations such as Yemen,[117]

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114. *See* discussion *supra* Part II.A.

115. *See, e.g.*, *Ex parte* Milligan, 71 U.S. 2, 4 (1866) (requiring that even during time of rebellion civilian courts be utilized instead of military commissions in geographical areas where the courts were functioning).

116. *See supra* notes 87–91 and accompanying text.

117. The recent instability in Yemen has probably now reached the threshold necessary to be considered an internal armed conflict, but it had not done so at the time the United States began targeting al-Aulaqi on Yemeni territory. SUSAN BREAU, MARIE ARONSSON & RACHEL JOYCE, DISCUSSION PAPER 2: DRONE ATTACKS, INTERNATIONAL LAW, AND THE RECORDING OF CIVILIAN CASUALTIES OF ARMED CONFLICT 9 (2011), *available at* http://www.oxfordresearchgroup.org.uk/sites/default/files/ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf.

Somalia, Sudan, and the FATA-area of Pakistan, in which law enforcement actions against organizations like al-Qaeda are either ineffective or intentionally not pursued, would become safe havens if IHL were not applied there.[118] Al-Qaeda members fulfilling a continuous combat function could effectively reacquire their civilian immunity by crossing an international boundary rather than being required to disavow al-Qaeda, IHL's preferred result.

This limitation on IHL's scope in transnational armed conflicts would effectively cede the initiative[119] in a conflict between a state actor that abides by IHL and a non-state terrorist organization, which IHL disfavors in every other way because of its conduct during an armed conflict, to the terrorist organization. Members of the disfavored terrorist organization would be able to remain in these safe areas beyond the reach of law enforcement and immune from any attack that employed the tools of armed conflict, while they continued training, recruiting, and planning their next attack. They alone would be allowed to decide the next battlefield's location, whether it is New York, London, Madrid, Washington, D.C., Mumbai, Detroit, or Bali, and when the next confrontation would take place. IHL should not be read to privilege such a group that it actively disfavors in so many other ways. Employing neutrality law to determine IHL's scope and the boundaries of the battlefield in transnational armed conflicts is the best way of avoiding such an anomalous interpretation of IHL.[120]

Significantly, neutrality law (or something very much like it) has already been employed in the conflict between the United States and al-Qaeda. After the attacks of September 11, Afghanistan was put to much the same choice as Uruguay was in 1939:[121] Become an ally of the United States in the conflict with al-Qaeda and allow the use of force against al-Qaeda on Afghan territory. Maintain neutrality in the conflict between the United States and al-Qaeda by prohibiting U.S. action against al-Qaeda in Afghanistan while ensuring that al-Qaeda leaves Afghanistan and does

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118. *See* Eric Schmitt & David E. Sanger, *Some in Qaeda Leave Pakistan for Somalia and Yemen*, N.Y. TIMES (June 11, 2009), http://www.nytimes.com/2009/06/12/world/12terror.htm (describing al-Qaeda presence in Somalia and Yemen); Nicholas D. Kristof, *Al Qaeda in Darfur*, N.Y. TIMES: ON THE GROUND (July 10, 2006, 9:32 PM), http://kristof.blogs.nytimes.com/2006/07/10/al-qaeda-in-darfur (describing al-Qaeda presence in Sudan).

119. The "initiative" in an armed conflict is the ability to decide when, where and how that conflict is conducted. Every officer and senior non-commissioned officer is taught the value of gaining and maintaining the initiative at both the tactical and the strategic level, because determining when, where, and how a conflict is conducted confers a tremendous advantage on the side that holds the initiative. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS, at 3-11 (2008) ("All Army operations aim to seize, retain, and exploit the initiative and achieve decisive results. *Operational initiative* is setting or dictating the terms of action throughout an operation.").

120. Resolving the question of where IHL applies in transnational armed conflicts should not be interpreted as definitively determining that drone strikes are legal in Pakistan and Yemen. The issues of whether an armed conflict does indeed exist between the United States and al-Qaeda, whether AQAP is sufficiently related to al-Qaeda to be considered part of that armed conflict, whether those nations have properly assented to the use of force on their territory, or whether the predicate requirements for the employment of preemptive self-defense are met might all be the basis for questioning the use of drones outside Afghanistan. However, the mere fact that drones are being employed outside Afghanistan should not be viewed as a violation of international law.

121. *See* discussion *supra* Part II.C; *see also* Patrick Wintour et al., *It's Time for War, Bush and Blair Tell Taliban*, THE OBSERVER (Oct. 7, 2001), http://www.guardian.co.uk/world/2001/oct/07/politics.september11 (describing the diplomatic situation between Afghanistan and the United States just after the attacks of September 11, 2001).

not use Afghan territory as a sanctuary. Or, become an enemy of the United States by refusing to uphold its duties as a neutral nation by allowing al-Qaeda to use Afghan territory as a sanctuary.[122] Afghanistan chose the third option and the United States and its NATO allies used force against both Afghan and al-Qaeda forces in Afghanistan with broad international support.[123]

CONCLUSION

The AMW Manual makes it clear that drones are legitimate weapons platforms whose use is effectively governed by current IHL applicable to aerial bombardment. Like other forms of aircraft they may be lawfully used to target enemy forces, whether specifically identifiable individuals or armed formations, if they comply with IHL's requirements of proportionality, necessity, and distinction.

Because drones are only able to operate effectively in permissive environments, the most significant legal challenges facing their development and employment have been based upon where they may be employed. Attempts to apply the strict geographical restrictions that govern the scope of IHL in internal non-international armed conflicts to all non-international armed conflicts, including transnational armed conflicts, threaten to significantly limit the usefulness of drones.

When IHL's core principles are considered, it becomes clear that the application of strict geographical limitations on IHL's scope in the context of transnational armed conflicts cannot be defended. The determination of whether the *Tadic* threshold for an armed conflict is met on the territory of a non-party to the conflict should have no bearing on whether IHL may be applied to the parties to the conflict. In other words, the fact that there is no local violence occurring in Yemen or Somalia should not be used to provide a sanctuary for non-state actors who are involved in an armed conflict with another state.

The answer for how the boundaries of the battlefield and the scope of IHL's application can be properly determined is found in neutrality law. This is historically how geographical limitations have been imposed upon IHL's scope in international armed conflicts. It was applied in the aftermath of the 9/11 attacks, with at least tacit international approval, to the situation involving the United States, al-Qaeda, and Afghanistan. Its application is checked by the consent of the sovereign states involved, making an escalating spiral of violence less, rather than more, likely. And perhaps most importantly, neutrality law's application to transnational armed conflicts does not lead to the anomalous results that are produced when strict geographical limitations are applied to transnational armed conflicts in which IHL is read to favor its otherwise most disfavored groups.

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122. *See* David Hughes, *Blair: It's War on the Taliban: British Forces Will Target Afghanistan's Brutal Leaders*, THE DAILY MAIL, Sept. 26, 2001, at 1–4 (quoting Prime Minister Tony Blair's remarks, echoing language used by President George W. Bush, that the Taliban's failure to comply and to expel al-Qaeda meant that they "were choosing to be enemies of ours").

123. *See* Patrick E. Tyler, *A Nation Challenged: The Attack; U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps; Bush Warns 'Taliban Will Pay a Price'*, N.Y. TIMES (Oct. 8, 2001), http://www.nytimes.com/2001/10/08/world/nation-challenged-attack-us-britain-strike-afghanistan-aiming-bases-terrorist.html (describing the U.S. and UK strike against Afghanistan).

Determining a Legitimate Target: The Dilemma of the Decision-Maker

AMOS N. GUIORA*

SUMMARY

INTRODUCTION

Nation-states are under attack by non-state actors; whether non-state actors present an existential threat to nation-states is debatable, probably unlikely. Nevertheless, the threat to innocent human life that terrorism poses must not be underestimated. Because terrorist organizations have defined the innocent civilian population as legitimate targets, the state must develop and implement aggressive counterterrorism measures. That, in a nutshell, is the state of the world post-9/11. While reasonable minds may disagree as to the degree of threat that terrorism poses, there is little (never say never) disagreement that terrorism poses *a* (not necessarily *the*) threat to the nation-state.

This reality has forced decision-makers to address terrorism and terrorists literally "on the fly." In retrospect, Tuesday morning September 11, 2001, not only caught world leaders by surprise, but most were also unprepared and untrained to

respond in a sophisticated and strategic manner. In the United States, as thoroughly documented elsewhere, the lack of preparation directly contributed to significant violations of human rights including torture, rendition, indefinite detention, and unauthorized wiretapping.[1] The Executive Branch in the United States[2] chose the path of granting itself unprecedented powers, with Congress and the Supreme Court largely acquiescing. While historians will judge whether this combination made America safer, the wise words of Benjamin Franklin—"Those who would give up essential Liberty, to purchase a little temporary Safety deserve neither Liberty nor Safety"[3]—were largely ignored in the aftermath of 9/11.

The ten-year anniversary of 9/11 serves as a useful benchmark for looking back to gauge what measures have been implemented, to what degrees of effectiveness, and at what cost. The anniversary additionally serves as a useful benchmark for looking forward and addressing how to develop, articulate, and implement changes to existing counterterrorism strategy. This Article does not offer a broad retrospective of post-9/11 decisions; rather, this Article focuses on the definition of "legitimate target."

Discussion regarding the Manual on International Law Applicable to Air and Missile Warfare (AMW Manual)[4] is particularly relevant to the legitimate target discussion. After all, air and missile warfare is related directly to the legitimate target dilemma. Any analysis of air and missile warfare must include discussion regarding defining a legitimate target and then, subsequently, determining when the individual defined as a legitimate target is, indeed, a legitimate target. In that context, the link between the definition of a legitimate target and the AMW Manual is inexorable.

Two central questions with respect to operational counterterrorism are *who* can be targeted and *when* can the identified legitimate target be legitimately targeted. Those two questions go to the heart of both self-defense and the use of power. In a counterterrorism regime subject to the rule of law, use of power is neither unlimited nor unrestrained. When regimes subject neither to external nor internal restraints may engage in maximum use of force, needless to say, operational results will be uncertain.

A comparative survey of operational counterterrorism is telling, for it highlights how distinct approaches color the legitimate target discussion. The Russian experience in Chechnya presents a particularly stark example of maximum force with questionable results.[5] Conversely, Spain's experience in the aftermath of the Madrid

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1. *See generally* Benedikt Goderis & Mila Versteeg, *Human Rights Violations After 9/11 and the Role of Constitutional Constraints*, J. LEGAL STUD. (forthcoming 2012), *available at* http://ssrn.com/abstract=1374376.

2. The reference is to both the Bush and Obama administrations.

3. RICHARD JACKSON & BENJAMIN FRANKLIN, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA 289 (1759).

4. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009), *available at* http://ihlresearch.org/amw/HPCR%20Manual.pdf.

5. AMOS N. GUIORA, GLOBAL PERSPECTIVES ON COUNTERTERRORISM 37–43 (2d ed. 2011)

train bombing reflects a different paradigm, one implementing minimum force and maximum restraint.[6] Seven years after 191 people found their deaths at the hands of Islamic extremists, Spain—as these lines are written—has not experienced a second attack by Islamic extremists.[7] China's policy regarding Uyghurs in Xinxiang Province is best captured in its name: the "Strike Hard" campaign.[8] India, largely in the face of Pakistani-supported and -facilitated terrorism, has adopted a policy of restraint predicated, largely, on mutually assured deterrence.[9] Colombia's policy, in the face of twin threats posed by drug cartels and terrorists, is aggressive, not unlike China's.[10] Israel and the United States have largely, but certainly not consistently, sought to implement person-specific counterterrorism policies.[11] Policies implemented by the United States and Israel include targeted killing/drone attacks, Operation Cast Lead,[12] and detainment of thousands of individuals in Afghanistan and Iraq, often for what can best be described as little, if any, cause.[13]

[hereinafter GUIORA, GLOBAL PERSPECTIVES].

6. *Id.* at 47–50; *see also* HUMAN RIGHTS WATCH, SETTING AN EXAMPLE? COUNTER-TERRORISM MEASURES IN SPAIN 1 (Jan. 2005) (describing how Spain adhered to its Code of Criminal Procedure in the detention of those arrested for the Madrid bombings).

7. Al Goodman, *After 7 Years, Memory of Madrid Train Bombings Remains Powerful*, CNN (March 10, 2011), http://articles.cnn.com/2011-03-10/world/spain.bombings.anniversary; *see also Spain-Timeline*, BBC (Oct. 18, 2011), http://news.bbc.co.uk/2/hi/europe/country_profiles/992004.stm (providing a timeline of key events in Spain from 1936 through 2011). Spain did, however, experience attacks from ETA, a Basque separatist group, in December 2006 and May 2008. *Madrid Bomb Shatters ETA Cease-Fire*, CNN (Dec. 31, 2006), http://edition.cnn.com/2006/WORLD/europe/12/30/madrid.blast; Al Goodman, *Nine ETA Bombing Suspects Arrested*, CNN (July 22, 2008), http://articles.cnn.com/2008-07-22/world/spain.arrests_1_eta-minister-alfredo-perez-rubalcaba-madrid?_s=PM:WORLD.

8. *See* GUIORA, GLOBAL PERSPECTIVES, *supra* note 5, at 91 (explaining the goals of the Strike Hard campaign as to "reduce crime dramatically, negate potential terrorist attacks, and restore social order"); *see also* Dana Carver Boehm, *China's Failed War on Terror: Fanning the Flames of Uighur Separatist Violence*, 2 BERKELEY J. OF MIDDLE E. & ISLAMIC L. 61, 64 (2009) (describing the Strike Hard campaign and its effect on Uyghur resistance).

9. GUIORA, GLOBAL PERSPECTIVES, *supra* note 5, at 44–47; Sunil Dasgupta & Stephen P. Cohen, *Is India Ending Its Strategic Restraint Doctrine?*, 34 WASH. Q. 163, 169, 171–73 (2011).

10. GUIORA, GLOBAL PERSPECTIVES, *supra* note 5, at 52–53; *see also* Luz Estella Nagle, *Global Terrorism in Our Own Backyard: Colombia's Legal War Against Illegal Armed Groups*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 5, 20–24, 31–36 (2005) (discussing Colombia's history of terrorist and drug-related violence and detailing Colombia's aggressive legal attempts to curtail such activities).

11. *See* GUIORA, GLOBAL PERSPECTIVES, *supra* note 5, at 170–71 ("[T]he Bush administration actively engaged in drone attacks and the Obama administration has implemented a similar policy in Afghanistan, Pakistan, and Yemen against identified targets, primarily members of the Taliban and al Qaeda."); *id.* at 177–80 (detailing Israel's legal arguments and policy for targeted killings); *see also* Kenneth Anderson, *Predators over Pakistan*, WKLY. STANDARD (Mar. 8, 2010) (discussing the Bush and Obama administrations' drone policy in Afghanistan, Pakistan, and Yemen).

12. *See* GUIORA, GLOBAL PERSPECTIVES, *supra* note 5, at 276–79 (discussing the reported treatment of detained Palestinian residents of the Gaza Strip) (quoting Human Rights in Palestine and Other Occupied Arab Territories: Rep. of the U.N. Fact Finding Mission on the Gaza Conflict, paras. 1109–22, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009)).

13. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law*, 98 AM. J. INT'L. L. 820, 820 (2004) (explaining that, after September 11, 2001, the United States detained hundreds of persons in Afghanistan or on U.S. naval vessels in the region); Jeffrey Azarva, *Is U.S. Detention Policy in Iraq Working?*, 16 MIDDLE E. Q. 5 (2009), *available at* http://www.meforum.org/2040/is-us-detention-policy-in-iraq-working (detailing the U.S. policy of large, "dragnet-type security sweeps"); *see also* Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L. L. & POL'Y 33, 44 (2006) (noting that "[u]nknown numbers of terror suspects have been detained and mistreated in dozens of U.S.

With the primary focus on who is a legitimate target and when the target is legitimate, this Article is organized as follows: Section I offers a "word of caution" in an age of uncertainty; Section II discusses operational counterterrorism; Section III offers a survey of how the term legitimate target has been defined historically and applied in the battlefield; Section IV focuses on the non-state actor and international law; Section V discusses defining the legitimate target; Section VI focuses on the practical application of the legitimate target definition from the commander's perspective; and the conclusion proposes a road map for both the definition of legitimate target and its application.

I. A WORD OF CAUTION: DECISION MAKING IN THE AGE OF UNCERTAINTY

It is important to note that the killing of Osama Bin Laden is, arguably, a "once in a lifetime" event representing a perfect confluence of intelligence gathering, intelligence analysis, and extraordinary operational capability. When the Navy SEALS stood opposite Bin Laden there was, according to reports, no doubt that this was, indeed, Bin Laden.[14] The legitimate target dilemmas that are the focus of this Article are, largely, not relevant either to the planning or implementation of the Bin Laden operation because the "operation" was dilemma-free. That is distinct from the norm in operational counterterrorism decision making, which is largely characterized by extraordinary uncertainty. The Bin Laden operation was clear-cut; most counterterrorism operations are far more gray than black and white. This reality is essential to the legitimate target discussion.

Once President Obama (and before him President Bush) authorized the operation, there was an extraordinary (actually, unprecedented) focus on one individual with practically unlimited resources available.[15] The efforts of all involved in the Bin Laden killing are, undoubtedly, exemplary and represent professionalism at the highest levels; however, the overwhelming majority of special operations present operational dilemmas not confronted by those involved in this very unique, specific act of counterterrorism. The legitimate target questions addressed in this Article were, largely, not relevant to the Bin Laden operation; to extrapolate from the latter to create a legitimate target model would be disingenuous. It would also create a false paradigm, as the overwhelming majority of counterterrorism operations lack the intelligence and absolute operational clarity that characterized the Bin Laden "hit."

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detention centers around the world, including Abu Ghraib and Bagram" and that, in 2005, Abu Ghraib held "approximately 10,000 long-term detainees").

14. Nicholas Schmidle, *Getting bin Laden*, NEW YORKER (Aug. 8, 2011), http://www.newyorker.com/reporting/2011/08/08/110808fa_fact_schmidle; Scott Wilson, Craig Whitlock & William Branigin, *Osama bin Laden Killed in U.S. Raid, Buried at Sea*, WASH. POST (May 2, 2011), http://www.washingtonpost.com/national/osama-bin-laden-killed-in-us-raid-buried-at-sea/2011/05/02/AFx0yAZF_story.html.

15. *See* George W. Bush, President of the United States, Address to a Joint Session of Congress and the American People (Sep. 20, 2001), http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html ("We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network."); Romesh Ratnesar, *Obama's Mission: Talk to Some Enemies, Don't Kill Them*, TIME (May 16, 2011), http://www.time.com/time/nation/article/0,8599,2071658,00.html ("After taking office, Obama returned the United States' counterterrorism focus to killing bin Laden.").

Rather, as I have suggested elsewhere,[16] operational counterterrorism can be defined as "mission impossible"; tasks imposed on 19-year-old soldiers[17] and junior commanders "senior" to their soldiers by but a few years are extraordinarily complicated. Without a doubt, the mission of a corporal or junior officer engaged in traditional war was substantially less complex than dilemmas facing their counterparts of today.[18] That is not to diminish the horrors of war faced by soldiers in wars previously fought; Tennyson's timeless poem, *Charge of the Light Brigade*, is as extraordinarily poignant now as when first penned:

> "Forward, the Light Brigade!"
> Was there a man dismay'd?
> Not tho' the soldier knew
> Someone had blunder'd:
> Theirs not to make reply,
> Theirs not to reason why,
> Theirs but to do and die:
> Into the valley of Death
> Rode the six hundred."[19]

While Tennyson suggests a lamb-to-the-slaughter type cruelty awaiting the grunt who knows both his enemy and his fate, operational counterterrorism represents significantly different complexities. The uncertainty at the heart of these complexities is a direct result of the legitimate target question. In traditional combat, soldiers could easily identify their foe; in operational counterterrorism, the foe is extraordinarily difficult to identify, for his attire resembles that of the general population with whom he easily mingles and to whom he quickly retreats after committing an act of terrorism.[20] The certainty of enemy identification that was the essence of traditional combat has been replaced by extraordinary uncertainty in state/non-state conflicts.

II. OPERATIONAL COUNTERTERRORISM

Failure to create a framework for the operational decision-maker[21] is arguably convenient for politicians and the public. However, in a rule of law paradigm this

16. *See generally* Amos N. Guiora, Command Influence: The Confluence Between Law and Command (unpublished manuscript) (on file with author).

17. In that vein, when my son was inducted into the IDF I wished for him four things: 1) commanders who understand command; 2) fellow soldiers who will have "each other's back" (akin to "Band of Brothers"); 3) that he will know how to take care of himself; and 4) that he will never lose his moral compass. On the day he was inducted, as my wife and children parted from him he held up four fingers. Never have I, as a parent, been prouder.

18. In a remarkably candid observation, an IDF one-star general commented to me in 1996 that were he then a company commander he would resign his position given the inherent uncertainty in articulating to soldiers under his command both who presents a clear and present danger and what are clear rules of engagement.

19. ALFRED, LORD TENNYSON, THE POETICAL WORKS OF ALFRED, LORD TENNYSON, POET LAUREATE 170 (1908).

20. GUIORA, GLOBAL PERSPECTIVES, *supra* note 5, at 22.

21. For purposes of this Article, the phrase 'operational decision-maker' refers to an "on the ground" commander.

disturbing failure places the commander at a significant disadvantage; he is expected to act in accordance with international law and the laws of war, while the non-state actor is beholden neither to law nor morality. However, even though the framework has not been sufficiently constructed, the nation-state remains distinct from the non-state actor. Simply stated, the nation-state's operational counterterrorism measures should be subject to three limits: 1) domestic law, 2) international law, and 3) morality. The first and third are largely self-imposed and self-regulated; the second is a reflection of international treaties, agreements, rules, and principles. Ostensibly, domestic law must comply with international law, but what if the current state of international law is insufficient to meet the needs of operational decision-makers distinct from the traditional warfare Tennyson so compellingly addressed?

International law, in its current articulation, is inadequate regarding the state/non-state conflict; after all, the laws of armed conflict were codified in an era where warfare was conducted between nation-states with rules clearly articulated and understood, though tragically not always respected.[22] Needless to say, today's conflict is fundamentally different. Therefore, to address the two-fold question of who a legitimate target is and when the target is legitimate requires defining the conflict; that task is far easier said than done.

What Israel has defined as "armed conflict short of war,"[23] others have termed in a similarly vague, uncertain manner reflecting the inherent linguistic and structural ambiguity of a conflict between a state and a non-state actor.[24] A non-state actor is, undoubtedly, distinct from the nation-state; the latter, after all, is a definable and distinguishable entity in accordance with the terms of the Peace of Westphalia.[25] The post-9/11 geo-strategic map, however, is rife with non-state actors that both defy definition and lack firm borders, both of which are the essence of the nation-state.

In the face of this troubling and complicated uncertainty, democratic regimes must develop effective counterterrorism measures that are both legal and moral. While the history of warfare is replete with violations of the laws of war, those laws were known to combatants and commanders alike who willfully violated them. In the present state/non-state actor paradigm the rules are known and largely respected by one side and largely ignored by the other side who consistently claims that nation-state created rules of war do not apply to them.[26] In essence, non-state actors claim unilateral immunity from international law obligations while crying "foul" when the nation-state engages in aggressive operational counterterrorism.

That, however, does not release the state from honoring its international law commitments; after all, international law clearly articulates that violations by one

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22. See Section III for further discussion.

23. Permanent Rep. of Israel to the U.N., Letter dated Nov. 4, 2002 from the Permanent Rep. of Israel to the United Nations addressed to the Secretary-General, para. 5, U.N. Doc A/C.4/57/4 (Nov. 6, 2002).

24. *See, e.g.*, Julian Borger, *Leaked Memo Exposes Rumsfeld's Doubts About War on Terror*, GUARDIAN, Oct. 22, 2003, http://www.guardian.co.uk/world/2003/oct/23/usa.julianborger (discussing then U.S. Secretary of Defense Donald Rumsfeld's concerns about the "war on terror").

25. *See* Nico Schrijver, *The Changing Nature of State Sovereignty*, 70 BRIT. Y.B. INT'L L. 65, 67 (2000) (explaining that, unlike previous treaties, the peace was negotiated based on a balance of power between "sovereign States").

26. Walter Laqueur, *The Terrorism to Come*, POL'Y REV., no. 126, Aug. & Sept. 2004, http://www.hoover.org/publications/policy-review/article/7371 ("Terrorism does not accept laws and rules, whereas governments are bound by them. . . .").

party do not justify violations by another party.[27] The state, then, is limited to how it may prevent or react to terrorism. While the public may clamor—arguably encouraged by the media—for aggressive measures, the reality of operational counterterrorism is that limits, more often than not, guide decision-makers. While those limits are largely self-imposed, they are a reality; how limits are determined and applied in a time-sensitive environment is at the core of lawful counterterrorism. While recommending forceful action is second nature to pundits and politicians alike, counterterrorism decision-makers confront a largely unseen enemy who benefits from dark shadows and back alleys.

The concept of proportionality is often raised to condemn state actors for engaging in conduct presumed to violate international law.[28] While state actions often result in significant damage, the proportionality concept is largely misapplied in state/non-state actor conflicts. The state has resources and military material far exceeding those of the non-state actor; therefore, proportionality is an intellectual and semantic misnomer. There is no—and there cannot be—proportionality between the conduct of the two sides. The two are inherently dissimilar; to equate them in terms of proportionality is disingenuous.

The more appropriate inquiry is to determine whether operational counterterrorism measures applied by the state are proportionate to the threat posed by the non-state actor.[29] In conducting this inquiry, the inherent disproportionality regarding means available is a given; the question—at the heart of lawful counterterrorism—is whether the means used reflect an appropriately measured response to the threat posed. Targeted killing[30] and drone attacks[31] are, in many

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27. Int'l Committee of the Red Cross, *Customary International Humanitarian Law, Rule 140: Principle of Reciprocity*, http://www.icrc.org/customary-ihl/eng/docs/v1_rule_rule140 (citing the Vienna Convention on the Law of Treaties and several nations' military manuals).

28. *See, e.g.*, David Luban, *Was the Gaza Campaign Legal?*, 31 A.B.A. NAT'L SEC. L. REP. 2, 6–7 (Jan./Feb. 2009) (arguing that Israeli Defense Forces violated proportionality principles in Operation Cast Lead).

29. For a fuller discussion of this issue, see generally *id.* and its response piece, Amos N. Guiora, *Proportionality "Re-Configured"*, 31 A.B.A. NAT'L SEC. L. REP. 9 (Jan./Feb. 2009) [hereinafter Guiora, *Proportionality "Re-Configured"*].

30. For more information on targeted killings, *see generally* Amos N. Guiora, *The Importance of Criteria-Based Reasoning in Targeted Killing Decisions*, *in* TARGETED KILLING: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (Claire Finkelstein et al. eds., forthcoming 2012) [hereinafter Guiora, *Criteria-Based Reasoning*]; David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L. L. 171 (2005); STEVEN R. DAVID, FATAL CHOICES: ISRAEL'S POLICY OF TARGETED KILLINGS, MIDEAST SEC. & POL'Y STUD. No. 51 (Begin-Sadat Ctr. for Strategic Studies 2002); Orna Ben-Naftali & Keren R. Michaeli, *Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings*, 1 J. INT'L CRIM. JUST. 368 (2003); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008); Daniel Jacobson & Edward H. Kaplan, *Suicide Bombings and Targeted Killings in (Counter-) Terror Games*, 51 J. CONFLICT RESOL. 772 (2007).

31. For more information on drone attacks, see generally Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan 2004–2009*, *in* SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming 2012); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346 (Benjamin Wittes ed., 2009); Anderson, *supra* note 11; Jane Mayer, *The Predator War*, NEW YORKER, Oct. 26, 2009; Geoffrey 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).

ways, at the heart of this question; in both cases, the state's quantitative advantage—elaborate and expensive intelligence-gathering infrastructure, sophisticated weapons systems,[32] and significant resources—distinguish the state from the non-state actor. That is not to suggest that non-state actors do not have resources and weapons capable of inflicting significant harm on innocent civilians whom they target. It is important to recall that the most famous terror attack of the past decade was successfully completed with the use of inexpensive box cutters. That is not, however, intended to minimize the threats posed by terrorist organizations whose weapons of choice include suicide and roadside bombings,[33] firing thousands of missiles at innocent civilians,[34] and reported efforts to develop nonconventional weapons.[35]

Protecting the civilian population does not justify random counterterrorism measures devoid of legal criteria and operational guidelines. The threat posed by terrorism—ranging from minor to major—does not create a paradigm whereby the state can ignore principles such as proportionality and limits on self-defense. The "black flag" standard articulated by Judge Halevy[36] has direct implications on how the state implements both targeted killing and drone attacks.[37] That is, while both Israel and the United States have determined that aggressive self-defense is necessary and justified in protecting innocent civilians, lawful counterterrorism must be conducted morally and in accordance with existing international and domestic law obligations. Otherwise, ensuring implementation of restrained measures emphasizing identification of specific targets is all but a tragic non-starter.

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32. The United States largely utilizes unmanned weapons (unmanned aerial vehicles, or UAVs), while Israel relies mainly on firing missiles from manned helicopters.

33. *See* Marshall Billingslea, *Combating Terrorism Through Technology*, NATO REV. (Autumn 2004), *available at* http://www.nato.int/docu/review/2004/issue3/english/military.html ("Improvised explosive devices, or homemade bombs, are the current weapon of choice for terrorists and greatest cause of casualties among Allied forces and civilian populations in terrorist attacks. These weapons are deployed and employed using a wide range of means and techniques, including car and truck-bombs, roadside bombs and suicide bomber belts and jackets."). For further discussion regarding terror bombings, see generally Amos N. Guiora, *Pre-empting Terror Bombing: A Comparative Approach to Anticipatory Self Defense*, 41 TOLEDO L. REV. 801 (2010).

34. *Defiant Hamas Hits Israel with Rockets*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/stories/2008/12/29/world/main4689076.shtml (noting that "[s]ince 2005, Hamas militants and their allies have launched more than 6,000 rockets at Israeli targets"); *see also* Amos N. Guiora, *Legal Aspects of 'Operation Cast Lead' in Gaza*, JURIST (Jan. 11, 2009), http://jurist.law.pitt.edu/forumy/2009/01/legal-aspects-of-operation-cast-lead-in.php (discussing Israel's justification of Operation Cast Lead in response to the Hamas rocket attacks on Israel).

35. *See* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2009 ch. 4 (2010), *available at* http://www.state.gov/j/ct/rls/crt/2009/index.htm (discussing terrorist organizations' attempts to acquire or develop weapons of mass destruction).

36. On the eve of the 1956 Sinai Campaign, curfew was imposed on villages whose residents were Israeli Arabs. When Border Police soldiers assigned to enforce the curfew asked for instructions regarding the fate of the field hands who, when they were to return to the village (Kfar Kassem), did not know of the curfew, their commander responded "God have mercy on them." That response led to the killing of forty-seven Israeli Arabs. In a subsequent trial, Judge Benjamin Halevy held that manifestly illegal orders—that fly like a "black flag"—must be disobeyed. Leslie C. Green, *Fifteenth Waldemar A. Solf Lecture in International Law: Superior Orders and Command Responsibility*, 175 MIL. L. REV. 309, 333 (2003).

37. *See* Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT'L L.J. 113, 173 (2010) (arguing that a "discussion of individual criminal responsibility [for following manifestly unlawful orders] . . . demonstrates that the criminal nature of a superior order temporarily severs what is ordinarily a firm chain of command").

The complexity of identifying the legitimate target in the present conflict—which I agree should be deemed an "armed conflict short of war"—poses extraordinary challenges. This need is particularly acute as international law does not provide clear criteria or criteria extending beyond the four "holy grails" of international law: the principles of military necessity, collateral damage, proportionality, and alternatives.[38] In the legitimate target discussion, it is increasingly questionable whether those four principles provide sufficient direction to commanders making "real time" decisions.

Protecting a civilian population does not justify non-target-specific counterterrorism; the measure must be based on legal, moral, and operational criteria and guidelines. This is predicated on aggressive self-defense with legitimate operational requirements; however, the road map international law provides is unclear, particularly because the conflict itself is inherently nebulous. The "on the ground" commander is placed in the difficult position of operating in a "gray" zone largely marked by amorphousness and vagueness.[39] Simply put, when an "open fire" order may be given is, in many circumstances, unclear; this is particularly the case when ambiguity surrounds the question of whether an identified target individual poses a sufficient enough threat regarding either the future or present.

III. TARGETING CRITERIA FROM JUST WAR THEORY TO ASYMMETRIC WARFARE

The codified laws of armed conflict, as they exist today, are insufficient to deal with the threats posed by modern terrorist organizations. International law is behind the curve regarding the national security dilemmas nation-states currently confront. This deficiency is particularly apparent when it comes to defining who is a legitimate target and when. In order to appreciate the inadequacies of current operational paradigms, examining the evolution of targeting criteria throughout history is enlightening.[40]

In the fifth century, St. Augustine helped articulate a theory that granted moral legitimacy to warfare and became the foundation for modern military philosophy.[41] The Just War Doctrine, expanded and refined by subsequent scholars, including St. Thomas Aquinas, acknowledged that resorting to war may sometimes be necessary

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38. These principles are often articulated as the principles of military necessity, distinction, proportionality, and humanity. *See, e.g.*, U.S. DEP'T OF ARMY, JUDGE ADVOCATE GENERAL'S SCH., INT'L & OPERATIONAL LAW DEP'T, LAW OF WAR HANDBOOK 164 (2005), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf [hereinafter LAW OF WAR HANDBOOK] (listing the "four key principles of the law of war").

39. For further discussion on this issue from the commander's perspective, see generally Matthew V. Ezzo & Amos N. Guiora, *A Critical Decision Point on the Battlefield—Friend, Foe, or Innocent Bystander*, *in* SECURITY: A MULTIDISCIPLINARY NORMATIVE APPROACH 91, 91–95 (Cecilia M. Bailliet ed., 2009) and Amos N. Guiora & Martha Minow, *National Objectives in the Hands of Junior Leaders*, *in* COUNTERING TERRORISM AND INSURGENCY IN THE 21ST CENTURY 179 (James J.F. Forest ed., 2007).

40. This section is, admittedly, a western-centric version of the evolution of warfare.

41. Colin B. Donovan, *What Is Just War?*, GLOBAL CATHOLIC NETWORK, http://www.ewtn.com/expert/answers/just_war.htm. For an excellent survey of the moral issues surrounding military history, see generally MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (4th ed. 2006).

to obtain justice and to protect peace.[42] Inherent in this theory are criteria and conditions regarding the legitimate use of force. These conditions include the exercise of discrimination and proportionality and the prohibition against targeting non-combatants.[43]

The medieval code of chivalry, which revolved around the concept of knighthood, added another branch to the evolutionary tree of western warfare.[44] Chivalry existed as a code of conduct for knights and placed an emphasis on honor, which became a dominant theme regarding how knights could behave on and off the battlefield.[45] It was honorable and appropriate to target opposing knights on the battlefield, but it was against the code of chivalry to either attack another knight's horse or the weak and defenseless.[46] According to Professor Michael Walzer, "some sense of military honor is still the creed of the professional soldier, the sociological if not the lineal descendent of the feudal knight."[47] The U.S. Army specifically instructs its soldiers that the law of war requires them to "conduct hostilities with regard for the principles of humanity and chivalry."[48]

The Treaty of Westphalia (1648) established the modern framework for warfare—a framework inextricably linked to the concept of the modern nation-state.[49] Perhaps the most important development that came from this time period, as it relates to current targeting issues, was the evolution of war into a public, state-sponsored enterprise.[50] Uniforms became standardized and soldiers became increasingly professionally trained;[51] the transition of war into a public enterprise increased transparency regarding norms and expectations of behavior and conduct.[52]

The centuries that followed saw the codification of the modern rules of warfare. In 1863, in the midst of the American Civil War, Francis Lieber drafted the Instructions for the Government of Armies of the United States in the Field, subsequently known as the Lieber Code.[53] According to Article 20 of the Lieber Code:

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42. Donovan, *supra* note 41.

43. *Id.*

44. SOLIS, *supra* note 24, at 5.

45. *Id.*

46. RICHARD W. KAEUPER, CHIVALRY AND VIOLENCE IN MEDIEVAL EUROPE 170 (1999).

47. WALZER, *supra* note 41, at 34.

48. LAW OF WAR HANDBOOK, *supra* note 38, at 2 (quoting U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, 3 (1956)).

49. *See* Christopher Harding & C.L Lim, *The Significance of Westphalia: An Archaeology of the International Legal Order*, *in* RENEGOTIATING WESTPHALIA 1, 5–6 (Christopher Harding & C.L. Lim eds., 1999) ("[T]he Treaty of Westphalia symbolically indicated a sea-change in international organization—the transition to a system of sovereign states . . . .").

50. *See* Alejandro Lorite Ascorihuela, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19 MICH. ST. J. INT'L L. 299, 325–27 (2011) (discussing "privileged" and "unprivileged" agents of war and the idea that fighting on behalf of a state is a public, rather than private, enterprise).

51. *See* Christopher Kurtz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFF. 148, 160 (2005) ("The systematic uniforming of armies in fact tracks the post-Westphalian establishment of a system of internally ordered, sovereign states. . . . A norm that war should be between uniformed combatants simply mirrors the claim that war is a relation between states, not citizens.").

52. Ascorihuela, *supra* note 50, at 328–29.

53. War Dep't, Instructions for the Gov't of Armies of the United States in the Field, Gen. Orders No. 100 (1863), *available at* http://avalon.law.yale.edu/19th_century/lieber.asp.

> Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.[54]

The Lieber Code specifically draws a distinction among enemies between combatants and non-combatants[55] and articulates a class of protected persons and property.[56] Though never used expressly as a code of conduct by other states, the Lieber Code informs many international treaties and conventions of the nineteenth and twentieth centuries.[57]

The Hague Conventions of 1899 and 1907 established important restrictions regarding battlefield conduct that are still in effect today.[58] The Hague Conventions are generally referred to as the "means and methods" of warfare.[59] To be defined as a combatant—or "belligerent," in Hague parlance—a soldier, militia member, or volunteer must meet four conditions: (1) operate under the command of a superior officer, (2) wear a fixed, distinctive emblem that is recognizable at a distance, (3) carry arms openly, and (4) behave in accordance with the laws and customs of war.[60] The Hague rules prohibit attacking undefended towns, villages, habitations, or buildings and also prohibit killing or wounding "treacherously individuals belonging to the hostile nation or army."[61]

In the wake of World War II, the Geneva Conventions further codified and solidified the rules of modern warfare.[62] The Geneva Conventions divided armed

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54. *Id.* art. 20.

55. *Id.* art. 155. Interestingly, the Lieber Code also differentiates between citizens who sympathize and citizens who aid the rebel movement. The code goes on to say that the disloyal citizens should be expelled, imprisoned, or fined if they refuse to declare loyalty to the legitimate government. *Id.* arts. 155–56.

56. *Id.* arts. 35, 44.

57. *See, e.g.*, LAW OF WAR HANDBOOK, *supra* note 38, at 78 ("Despite its national character and Civil War setting, the Lieber Code went a long way in influencing European efforts to create international rules dealing with the conduct of war.").

58. *See generally* Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

59. LAW OF WAR HANDBOOK, *supra* note 38, at 3.

60. Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, art. 1, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 643, *available at* http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument [hereinafter Annex to Hague Convention IV].

61. *Id.* arts. 23, 25.

62. *See generally* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; 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 GC II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; 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 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Conflicts (Protocol II), June 8, 1977, 1125

conflict into two categories: armed conflict between two or more states (also known as an international armed conflict or IAC)[63] and armed conflict not of an international nature occurring within the territory of a state (also known as a non-international armed conflict or NIAC.)[64] According to the Geneva Conventions, "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 . . . ."[65] Thus, a soldier who has put down his or her weapon, has stepped out of uniform, and has returned to civilian life can no longer be considered a legitimate target;[66] conversely, a soldier during wartime—who is in uniform and carrying arms—may be considered a legitimate target.[67]

In 1956, the U.S. Department of the Army published its Field Manual 27-10 (FM 27-10).[68] The Army subsequently updated the manual as the Law of War Handbook in 2005.[69] FM 27-10 does not preclude attacks on individual soldiers of the enemy—whether in the "zone of hostilities . . . or elsewhere"[70]—but it does prohibit specific targeting of civilians.[71] According to FM 27-10, both combatants and those objects that make an effective contribution to military action are targetable.[72]

Finally, the Additional Protocols to the Geneva Conventions (1977) introduced the concept of direct participation in hostilities—a new class of combatants (occasionally referred to as those who DPH or are DPH-ing).[73] Article 13(3) of Additional Protocol II asserts that "[c]ivilians shall enjoy the protection afforded by [this portion of the protocol], unless and for such time as they take direct part in hostilities."[74] Civilians who take direct part in hostilities are not lawful belligerents under the Geneva Conventions, nor are they afforded immunity from attack or the prisoner of war protections laid out in the various international treaties governing armed conflict.

The nature of armed conflict has changed dramatically in the past century, most notably in two ways: (1) weaponry has evolved significantly and (2) the actors are different. The rise of non-state actors, acting outside the purview of the nation-state, has led to what scholars term "asymmetric warfare."[75] Those who do not abide by international conventions and treaties, or the general laws of warfare, place the nation-state in an extraordinary quandary regarding the appropriate targeting paradigm. It is to that issue that we now turn our attention.

U.N.T.S. 609 [hereinafter AP II].

63. GC I–IV, *supra* note 62, art. 2.

64. *Id.* art. 3.

65. *Id.*

66. LAW OF WAR HANDBOOK, *supra* note 38, at 169.

67. *Id.*

68. FIELD MANUAL 27-10, *supra* note 48.

69. LAW OF WAR HANDBOOK, *supra* note 38.

70. FIELD MANUAL 27-10, *supra* note 48, art. 31.

71. *Id.* art. 25.

72. *Id.* art. 40(c) (as amended July 15, 1976).

73. AP II, *supra* note 62, art. 13(3).

74. *Id.*

75. *See* Charles J. Dunlap, Jr., *Preliminary Observations: Asymmetrical Warfare and the Western Mindset*, *in* CHALLENGING THE UNITED STATES SYMMETRICALLY AND ASYMMETRICALLY: CAN AMERICA BE DEFEATED? 1, 1 (Lloyd J. Matthews ed., 1998) (defining asymmetric warfare).

IV. THE NON-STATE ACTOR AND INTERNATIONAL LAW

When a state is engaged in conflict with a non-state actor, the state is—ironically and counterintuitively—at a profound disadvantage. Asymmetric warfare—where the state possesses strength and means disproportionate to that of the non-state actor—is an unquestionably apt description of many current conflicts. However, because most states seek to conduct themselves in accordance with international law, the advantage they possess cannot be utilized. Conversely, non-state actors have chosen to operate free from such limits; they are, therefore, able to maximize the means available to them. The self-imposed limits paradigm, then, is an essential aspect of the legitimate target discussion.

While terrorists target innocent civilians in an effort to advance their respective causes, international law demands that the state distinguish between innocent civilians and combatants; the former are not legitimate targets whereas the latter are. However, from an operational perspective, implementing the distinction between civilian and combatant is enormously complicated, largely because the contemporary "zone of combat" is far different from the battlefield of traditional warfare. In the zone of combat, innocent civilians and combatants are often indistinguishable, whereas on the traditional battlefield, combatants were readily identifiable.

According to the traditional law of armed conflict, in order to be defined as a lawful combatant—and thus a person who may rightfully be identified as a legitimate target on the battlefield—a participant in a conflict must carry his weapon openly, belong to a chain of command, have readily identifiable insignia, and follow the laws of war.[76] Because terrorist organizations deliberately fail to distinguish themselves, identifying the legitimate target is exponentially more complicated. In other words, non-state actors consciously place their *own civilian population* "at risk" by blending in. Additionally, human shielding, a clear violation of international law,[77] is practiced by non-state actors in an effort to minimize the state's ability to operationally engage legitimate targets.[78] That is, terrorists seek to protect themselves by surrounding themselves with innocent civilians. Colonel Richard Kemp, CBE,[79] describes this practice:

> In Gaza, according to residents there, Hamas fighters who previously wore black or khaki uniforms, discarded them when Operation Cast Lead began, to blend in with the crowds and use them as human shields.
>
> We have of course seen all this before, in Lebanon, in Iraq and in Afghanistan.
>
> Today, British soldiers patrolling in Helmand Province will come under sustained rocket, machine-gun and small-arms fire from

76. GC III, *supra* note 62, art. 4(2).

77. GC IV, *supra* note 62, art. 28.

78. Daniel P. Schoenekase, *Targeting Decisions Regarding Human Shields*, MIL. REV. 26, 26 (Sept.–Oct. 2004), *available at* http://www.au.af.mil/au/awc/awcgate/milreview/schoenekase.pdf.

79. Kemp is a "former commander of the British forces in Afghanistan . . . [who] served with NATO and the United Nations; commanded troops in Northern Ireland, Bosnia and Macedonia; and participated in the Gulf War . . . and worked on international terrorism for the UK Government's Joint Intelligence Committee." *U.K. Commander Challenges Goldstone Report*, U.N. WATCH (Oct. 16, 2009), http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1313923&ct=7536409.

> within a populated village or a network of farming complexes containing local men, women and children.
>
> The British will return fire, with as much caution as possible.
>
> Rather than drop a 500 pound bomb onto the enemy from the air, to avoid civilian casualties, they will assault through the village, placing their own lives at greater risk. They might face booby traps or mines as they clear through.
>
> When they get into the village there is no sign of the enemy. Instead, the same people that were shooting at them twenty minutes ago, now unrecognised by them, will be tilling the land, waving, smiling and talking cheerfully to the soldiers.[80]

There is, then, a significant burden imposed on the state: in determining when to operationally engage an identified legitimate target, the state's working assumption must be that the individual has deliberately surrounded himself with innocent individuals. In the context of operational counterterrorism, then, the state has to determine what costs it is willing to incur with respect to collateral damage. Effective and lawful counterterrorism is predicated on successful targeting of a specific, identified individual; killing innocent individuals—in addition to raising significant questions with respect to collateral damage—also has significant "blowback" potential that enlarges the circle of potential terrorists.

However, the state has both the right to engage in preemptive self-defense and the obligation to protect its own innocent civilian population. The operative question is whether the willful endangerment of innocent individuals by non-state actors must, necessarily, deter the state from engaging in operational counterterrorism. That is, identifying the legitimate target and determining when that individual is a legitimate target (in the context of what activities the individual must be involved in to determine his legitimacy) are but two of the three steps in the decision whether to engage. The third step—on the assumption that the first two have been correctly assessed—is no less complicated, as it raises profound moral and legal dilemmas.[81]

In turning asymmetric warfare theory on its head, non-state actors, in essence, seek to take advantage of the state's commitment to international law. The introduction of innocent civilians as human shields in the legitimate target decision-making process illustrates the difference between traditional warfare and modern conflicts. In the former, soldiers fought soldiers, tanks with soldiers attacked tanks with soldiers, fighter planes flown by highly trained pilots engaged planes flown by highly trained pilots, and fully manned battle ships engaged fully manned battle ships. The legitimate target dilemma was less convoluted—until surrender, capture,

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80. Richard Kemp, International Law and Military Operations in Practice, Address to Jerusalem Center for Public Affairs (June 18, 2009), *available at* http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=378&PID=0&IID=3026.

81. For an analysis of ethical dilemmas in operational counterterrorism, see generally Amos N. Guiora, *Teaching Morality in Armed Conflict: The Israel Defense Forces Model*, 18 JEWISH POL. STUD. REV. 3 (Spring 2006) (discussing military culture in the modern context); WALZER, *supra* note 41; Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS 3 (2005) (discussing the principles of military ethics when fighting terror).

injury, or death, a soldier was rightfully considered a legitimate target.[82] This type of clarity no longer exists.

Arguably the most complicated dilemma in modern conflict is what degree of involvement is required for an individual to become a legitimate target. However, as Colonel Kemp made clear, targeting an individual as a legitimate target is fundamentally more complicated than mere identification of the individual as a legitimate target.[83] The decision by non-state actors to use human shields is, then, an extraordinarily significant "x factor" in the legitimate target discussion. It manifests a fundamental change in how combat is conducted on two distinct levels: it is a major violation of international law, and it represents a willingness to expose an otherwise innocent individual to extraordinary danger.

It is, frankly, counterintuitive to what soldiers are taught. While soldiers are, obviously, trained to kill the identified enemy, the emphasis is on the identified threat and the goal is to minimize potential harm to the innocent population of the other side. Human shielding reflects a policy and philosophy whereby innocent individuals (whom the soldier is taught to avoid) are willfully endangered by their "own side" in the name of the cause. Ironically, then, from the perspective of non-state actors, individuals defined as innocent civilians by international law are treated as permissible targets.

However, the state must exercise extreme caution in any unilateral broadening of how the term "legitimate target" is defined. The question, as will be discussed below, is whether an individual poses a threat and what the level or degree of that threat is. There is great danger in applying too liberal a definition to the term "legitimate target." The ramifications would be inevitable: unwarranted targeting of individuals whose actions do not endanger state security. The results from a legal, moral, and effectiveness analysis would be deeply troubling.

Defining an individual as a legitimate target in accordance with international law requires adopting a strict definition of threat; otherwise, individuals only tangentially involved in counterterrorism might be targeted. That said, herein lies the rub: as was made clear in the course of Operation Cast Lead (OCL), Israel unilaterally expanded the definition of legitimate target to include individuals who, prior to OCL, would not have been defined as legitimate targets.[84] The adoption of this expanded model of legitimate target was based on the theory—adopted from the suicide bomber paradigm—that the firing of 6,000 missiles into Israel from 2005 to

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82. LAW OF WAR HANDBOOK, *supra* note 38, at 169–70. In that spirit, when visiting the parents of a soldier under my command who had been injured in a suicide bombing, I sought (unsuccessfully) to explain that from the perspective of terrorists, a soldier—whether armed or not—is a legitimate target. I also sought (again, unsuccessfully) to explain to the parents that a terrorist attack can only be directed against innocent civilians (and not soldiers). As I have repeatedly mentioned to colleagues, this effort on my part (which thoroughly failed) also represents a classic example of the rule that "silence is golden."

83. For examples of human shielding, see Dorettos23, *Hamas Using Children as Human Shield*, YOUTUBE (Jan. 2, 2009), http://www.youtube.com/watch?v=J08GqXMr3YE (showing Hamas using children as shields); Noah Davis, *Pro-Qaddafi Forces Use CNN Video Crew, Reuters Journalists as Human Shields*, BUS. INSIDER (Mar. 21, 2011), http://www.businessinsider.com/pro-qaddafi-forces-use-cnn-video-crew-reuters-journalists-as-human-shields-2011-3 (showing pro-Qaddafi forces using journalists and news crews as shields to impede an attack); Jerusalemnews, *Hamas—Human Shield Confession*, YOUTUBE (Mar. 18, 2008), http://www.youtube.com/watch?v=g0wJXf2nt4Y&feature=related (stating that Hamas has used women, children, and the elderly as human shields).

84. Guiora, *Proportionality "Re-Configured"*, *supra* note 29, at 13.

2008 required a sophisticated infrastructure and that individuals involved in its *various* components were deemed legitimate targets.[85] That is, both the severity of their actions and the continuous nature of their involvement justified—from Israel's perspective—defining those involved in distinct aspects of the missile firing infrastructure as legitimate targets.

As discussed below, this unilateral expansiveness implementing a broadened definition of legitimate target implies a significant burden and responsibility for both decision-makers and boots-on-the-ground commanders. While, from an operational perspective, the conclusion that those involved in an infrastructure are legitimate targets is understandable, the discussion cannot end there. The legal and moral implications in applying a broadened definition significantly increase the likelihood of harm to otherwise innocent individuals who cannot be classified as legitimate targets, whether the term is broadly or narrowly defined. There is, however, an important caveat to this "word of caution": the increasing sophistication of terrorist networks arguably justifies adopting—with great care—a broadened definition of legitimate target.

V. DEFINING THE LEGITIMATE TARGET

The scenario below is intended both to make the discussion more concrete and to place the reader in the decision-maker's shoes. Furthermore, it is intended to highlight the extraordinary complexity of the decision-making process in determining whether an individual is a legitimate target. To that end, I suggest the following definition for a legitimate target in the state/non-state actor conflict: *An individual who, according to intelligence information received and analyzed from at least two distinct sources (therefore corroborated), intends in the future to either commit or facilitate an act of terrorism that endangers national security.*

In addition to asking whether the individual is or will be involved in an act of significant terrorism, the decision to categorize the target as legitimate requires determining what act the individual must be engaged in when "hit." This is the "when" question. For pre-emptive self-defense to be lawful, involvement—however defined—must be sufficient to define the target as legitimate. The second part of the analysis is no less important than the first. In analyzing the additional but equally important question, decision-makers and commanders must determine whether the target is actively and presently involved in some level of conduct, including "mere" planning. Re-articulated: is the theory of "continuum"[86] sufficient without narrowly defining what the individual's actions must be when authorizing his killing?

There is, obviously, a danger in adopting the continuum theory; if applied to its logical end, it suggests that once the intelligence community defines an individual as a legitimate target his actions thereafter are, largely, irrelevant. This, naturally, raises concerns as to whether, once defined as legitimate, an individual's status is subject to review and if the operational opportunity presents itself to engage him as a legitimate target regardless of what he is doing at *that* specific moment. Conversely, to demand that the state target an individual *only* when specifically engaged in the act for which he was initially deemed legitimate imposes an unrealistic burden. The

85. *Id.* at 11–13.

86. The theory of "continuum" consists of viewing legitimacy on a timeline from initial planning to fruition without need for a particular act to occur to justify killing the target defined as legitimate.

test, then, in determining whether an individual is a legitimate target demands assessing the level of his involvement ranging from planning to executing a specific act of terrorism.

In order to ensure that operational counterterrorism be both legal and moral, I propose the following:

(1) A target must have made *significant steps directly contributing* to a planned act of terrorism.

(2) An individual cannot be a legitimate target unless intelligence indicates involvement in *future* acts of terrorism.[87]

(3) Before a hit is authorized, it must be determined that the individual is *still involved* and has not proactively disassociated from the original plan.

(4) The individual's contribution to the planned attack must *extend beyond mere passive support.*[88]

(5) Every effort must be made to *minimize collateral damage.* However, the willful endangerment by the non-state actor of its own civilian population need not be a deterrent from implementing an authorized act of preventive self-defense.

(6) *Verbal threats alone are insufficient* to categorize an individual as a legitimate target.[89]

The following scenario will help illustrate the need for these criteria:

Captain James Smith reported to the Battalion Command Post outside of Kabul, Afghanistan. He was anxious to receive the next mission for India Company. Captain Smith and his men had been actively engaging al Qaeda supported militants over the past 2 weeks. They had successively conducted raid operations against militant compounds near the Afghanistan and Pakistan border. On each occasion, the militants were caught off-guard and therefore had little opportunity to offer resistance.

Captain Smith sat in the Command Post listening to the latest intelligence reports from the Battalion Intelligence Officer. The intelligence reports indicated an unusually large amount of activity from the local civilian population in and around suspected militant strongholds. Captain Smith noted this as the Battalion Commander stepped into the tent to issue the operations order for the next day. India Company was to conduct an early morning raid on a suspected militant compound near the southeastern Afghanistan and Pakistani border. Unmanned aerial vehicles provided imagery that indicated that the militants were consolidating and re-grouping in a large clay and brick enclosed compound at the base of Hill 402.

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87. Retribution and revenge for past acts would be violations of international law.

88. Though, as acts of terrorism require distinct contributions by numerous actors, the legitimate target categories extend beyond the planners and executors.

89. However, arrest and interrogation may be justified on the grounds of verbal threats—in accordance with relevant criminal law statutes—depending on operational circumstances.

India Company was to seize the objective by force and consolidate on the compound so that follow-on forces could conduct a thorough search of the compound for weapons caches and any other valuable intelligence. Captain Smith left the Command Post confident about his mission and anxious to brief his subordinates. Captain Smith and his men infiltrated to the objective under the cover of darkness and reached the compound about an hour before their pre-dawn, coordinated attack. As Captain Smith and some of his subordinate leaders were conducting a visible reconnaissance of the compound using their night vision devices, they begin to notice a group of women and elderly men starting to walk the perimeter of the compound about an hour before dawn . . . just when the attack was supposed to launch.

The women and elderly men appeared to be unarmed, but seemed to be walking the perimeter of the compound in a fashion normally associated with sentries walking their post. Captain Smith received a call on the radio from the Battalion Commander asking him to launch the attack as planned, as the follow-on forces were on their way. Captain Smith knew he was at a critical decision point . . . were these people walking the perimeter of the compound innocent civilians or were they working with the militants and therefore legitimate targets?[90]

VI. LEGITIMATE TARGETS: A PRACTICAL DISCUSSION OF CURRENT APPLICATION

From 1994 to 1997, I served as the Legal Advisor to the Gaza Strip; in that capacity I was involved in targeted killing decisions. As I have argued elsewhere, effective and legal targeted killing must be predicated on a rationally based decision-making process that emphasizes criteria and standards.[91] The motivation for such a recommendation is to minimize collateral damage and to enhance operational success by emphasizing person-specific counterterrorism. The process, without doubt, is important for the commander for it minimizes the ability of decision-makers to introduce subjective "distractions" into the equation. While it does not ensure that only legitimate targets will be killed—and that there will be no collateral damage—it enhances the maximization of the former and minimization of the latter.

Essential to the legitimate-target discussion is defining threats; after all, counterterrorism reflects a concerted effort by the state to mitigate, if not nullify, a presumed threat. To that end, there are four distinct degrees of threats; operational decision-making requires assessing each threat in determining what, if any, counterterrorism measure should be applied. The four degrees of threats are:

(1) Imminent threats: threats that will be acted upon shortly and about which a lot of detail is known

(2) Foreseeable threats: threats that will be carried out in the *near future* (with no specificity). These threats are slightly more remote than those that

90. This scenario appears in Ezzo & Guiora, *supra* note 39, at 91–92.

91. *See* Guiora, *Criteria-Based Reasoning*, *supra* note 30 (noting that "[c]riteria-based decision-making is intended to foster objective decisions").

are imminent.[92]

(3) Long-range threats: threats that *may* reach fruition at an unknown time[93]

(4) Uncertain threats: threats that invoke general fears of insecurity

Nevertheless, for the criteria model to be truly effective, it must answer the two questions that are at the heart of this Article. By example, the Israeli model is threat based; that is, if an individual has been identified by a source as posing a present or future threat, and this individual's actions will endanger state security, then he is a legitimate target for a targeted killing.[94] One of the most important questions in putting together an operational "jigsaw puzzle" is whether the received information is actionable; that is, does the information received from the source warrant an operational response?

That question is central to criteria-based decision making or at least to decision making that seeks—in real time—to create objective standards for making decisions based on imperfect information. This effort is essential to counterterrorism measures reflecting enhanced objectivity and minimal subjectivity in the decision-making process. To that end, the intelligence and the source who provided the information both must be subject to rigorous analysis. The charts below articulate guidelines for determining whether the intelligence is sufficiently actionable.[95]

Test Prong	Definition/Use
Reliable	Past experiences show the source to be a dependable provider of correct information. The test requires discerning whether the information is useful and accurate, and demands analysis by the case officer regarding whether the source has a personal agenda/grudge with respect to the person identified/targeted.
Viable	Is it possible that an attack could occur in accordance with the source's information? That is, the information provided by the source indicates that it is in the realm of the possible and feasible that a terrorist attack could take place.
Relevant	The information has bearing on upcoming events. Consider both the timeliness of the information and whether it is time sensitive, imposing the need for an immediate counterterrorism measure.
Corroborated	Another source (who meets the reliability test above) confirms the information in whole or part.

92. For example, a foreseeable threat would be premised on "valid intelligence that indicates that terrorists will shortly begin bringing explosives onto airplanes in liquid substances." AMOS N. GUIORA, FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY 97 (2009).

93. For example, terrorists training with no operational measure specifically planned would be an example of a long-range threat. *Id.*

94. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 53(4) PD 459 [2005] (President Beinisch, concurring); *see also* GUIORA, GLOBAL PERSPECTIVES, *supra* note 5, at 177 (detailing the two elements necessary for the Israeli government to order targeted killings: (1) that the target present a serious threat, and (2) that reliable information clearly implicates him).

95. Amos N. Guiora, *Part I: Ten Questions: Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. 5034, 5043–5047 (2011).

Source

- What is the source's **background** and how does that affect the information provided?
- Does the source have a **grudge/personal "score"** to settle based either on a past personal or family relationship with the person the information targets or identifies?
- What are the **risks** to the source if the targeted individual is targeted?
  - Source protection is essential to continued and effective intelligence gathering.
  - Protecting the source is essential both with respect to that source and additional—present or future—sources.
- What are the **risks** to the source if the intelligence is made public?
  - Key to determining the proper forum for trying suspected terrorists.

Target

- Who is the "**target**" of the source's information?
  - What is the person's role in the terrorist organization?
  - How will detention affect that organization, short-term and long-term alike?
  - What insight can the source provide regarding "impact"?
- By example: in the suicide bombing infrastructure there are four distinct actors: the bomber, the logistician, the planner, and the financier. Determining the legitimacy of the target (for a targeted killing) requires ascertaining the potential target's specific role in the infrastructure. *Subject to the two four-part tests above*, the four actors are legitimate targets as follows:

  a. Planner—legitimate target at all times

  b. Bomber—legitimate target solely when "operationally engaged"

  c. Logistician—legitimate target when involved in all aspects of implementing a suicide bombing but—unlike the planner—not a legitimate target when not involved in a specific, future attack

  d. Financier—a largely unexplored subject in the context of targeted killings. The financier is a legitimate target when involved in, for example, wiring money or laundering money (both essential for terrorist attacks), but subject to debate and discussion regarding when "not in the act." To that extent, the question is whether the financier is more akin to the bomber or to the logistician. Arguably, given the centrality of the financier's role, the correct placing is between the logistician and planner.
- What are the **risks/cost-benefits** if the targeted killing is delayed?
  - How time-relevant is the source's information?
  - Does it justify immediate action?
  - *Or* is the information insufficient to justify a targeted killing but significant

enough to justify other measures, including detention (subject to operational considerations)?

- What is the nature of the suspicious activity?
  - Does the information suggest involvement in significant acts of terrorism justifying immediate counterterrorism measures?
  - *Or* is the information more suggestive than concrete?
  - In addition, if the information is indicative of minor/not harmful possible action, effective counterterrorism might suggest additional information gathering—from the same or additional source—before authorization of targeted killing.
- What information can the individual provide (premised on the operational feasibility of detention rather than authorizing a targeted killing)?
- Does the individual possess information—to varying degrees of specificity—relevant to future acts of terrorism/individuals?

These charts are subject to two important caveats: independent corroboration that the information provided by the source is reliable and verification that alternatives to mitigating the threat are either unavailable or irrelevant. The Israel Supreme Court (sitting as the High Court of Justice) addressed this issue in *The Public Committee Against Torture in Israel vs. The Government of Israel.*[96] In his seminal decision, President (akin to Chief Justice) Barak wrote the following regarding identification of the legitimate target:

> On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his "home," and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.[97]

With respect to the protection of innocent civilians, President Barak wrote:

> The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities" (§51(3) of *The First Protocol*). Harming such civilians, even if the result is death, is permitted,

96. *See* HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 53(4) PD 459, paras. 39–40, 60–61 [2005] (finding that first "[i]nformation which has been most thoroughly verified is needed regarding the identity" of the civilian and that "no other less harmful means" are available).

97. *Id.* para. 39.

> on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not.[98]

CONCLUSION: MOVING FORWARD

In order to simultaneously broaden and narrow the definition of a legitimate target, the six-point proposed checklist facilitates enhanced operational counterterrorism while seeking to minimize the loss of innocent life. From an operational perspective, the human shielding of otherwise innocent individuals introduces a highly problematic "x factor" in the decision-making process. Under no circumstances are individuals used as human shields legitimate targets. However, if an individual has been correctly identified as a legitimate target and is presently engaged in an act of terrorism, then the two-part test required to define an individual as a legitimate target is met. While the commander is obligated to minimize collateral damage and seek alternatives, the presence of a human shield—in and of itself—does not mitigate the commander's right to engage the identified legitimate target.

Unlike traditional warfare, the state/non-state conflict requires a rearticulation of international law in order to facilitate lawful operational counterterrorism. The legitimate target discussion is, in many ways, at the core of this debate. As demonstrated in the vignette above, the decision making—in identifying the legitimate target—is extraordinarily complex. However, precisely because these are decisions that must be made, implementation of a rationally based approach predicated on checklists and relying on real-life scenarios (such as the vignette) will significantly contribute to more effective, lawful operational counterterrorism.

While targeting criteria were, unequivocally, more clear-cut a century ago, nation-states do not have the luxury of waiting for international law to catch up with the conflict of today. As the discussion above has highlighted, the legitimate target discussion raises profound questions from operational, legal, and moral perspectives. Operation Cast Lead is the operational manifestation of a broadened legitimate target definition; arguably, it represents the future of operational counterterrorism. If that is the case—unlike the extraordinary, resource-heavy, target-specific killing of Bin Laden—then the proposed six-point checklist suggests a way forward facilitating operational decision making of contemporary commanders engaged in an extraordinarily complex armed conflict with non-state actors beholden to neither international law nor morality.

98. *Id.* para. 60.

The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens

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SUMMARY

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INTRODUCTION

Air and missile warfare is and will almost certainly continue to be a ubiquitous aspect of contemporary armed conflicts. Yet, the law related to the regulation of this aspect of warfare has failed to develop at the same pace as the methods and means of employing such combat assets. The Manual on International Law Applicable to Air and Missile Warfare (AMW Manual)[1] is therefore without question an important development in the law of armed conflict. Although not hard law, it reflects the consensus of some of the most respected *jus in bello* scholars in the world on how existing law of armed conflict (LOAC) rules and norms apply to this type of warfare.

Understanding how air and missile warfare is planned, executed, and regulated requires more than just an understanding of relevant LOAC provisions. In U.S. practice (and that of many other countries), air and missile warfare is one piece of a broader operational mosaic of law and military doctrine related to the joint targeting process. According to U.S. doctrine, joint targeting involves:

> **creating specific effects to achieve the joint force commander's (JFC's) objectives or the subordinate component commander's supporting**

1. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE foreword (May 15, 2009), *available at* http://ihlresearch.org/amw/HPCR%20Manual.pdf [hereinafter AMW MANUAL].

> **objectives.** Targeting proceeds from the definition of the problem to an assessment of the results achieved by the executed courses of action. The process allows for the testing of multiple solution paths, a thorough understanding of the problem, and the refinement of proposed solutions. **The joint targeting process is flexible and adaptable to a wide range of circumstances.**[2]

Air and missile warfare is embedded within this broader targeting process. Accordingly, a genuine understanding of the law of air and missile warfare necessitates understanding how the LOAC influences and is integrated within this targeting process.

How operational commanders select, attack, and assess potential targets and how the LOAC reflects the logic of military doctrine related to this process is therefore the objective of this Article. To achieve this objective, the authors focus on a recent decision by the International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Gotovina*. Although the military operation at the center of this case involved only limited use of air and missile warfare, the ICTY's extensive focus on the use of artillery and rocket attacks provides a useful and highly relevant illustration of why understanding the interrelationship between law and military doctrine is essential for the logical and credible development of the law. The authors therefore seek to "exploit" this case as an opportunity to expose the reader to this interrelationship, an interrelationship equally essential to the effective evolution of the law of air and missile warfare.

I. BACKGROUND

On May 21, 2001, the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia filed an indictment against Ante Gotovina, a former lieutenant general of the Croatian Army, alleging a series of war crimes related to the execution of "Operation Storm"[3] in 1995.[4] On its face, the indictment is not particularly remarkable. As amended, it charged General Gotovina and two other former Croatian generals with both individual and "joint criminal enterprise"[5] (JCE)

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2. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT DOCTRINE FOR TARGETING v (2002) (emphasis in original) [hereinafter JP 3-60 (2002)]; *see also* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT TARGETING vii–ix (2007) [hereinafter JP 3-60 (2007)] (discussing the "Fundamentals of Targeting").

3. Operation Storm is the code name given to a large-scale military operation carried out by Croatian Armed Forces, in conjunction with the Army of the Republic of Bosnia and Herzegovina, to gain control of parts of Croatia that had been claimed by separatist ethnic Serbs since early 1991. For a description of Operation Storm, see Mark Danner, *Operation Storm*, N.Y. REV. OF BOOKS, Oct. 22, 1998, *available at* http://www.markdanner.com/articles/show/50.

4. Prosecutor v. Gotovina, ICTY Case No. IT-01-45-I, Indictment (May 21, 2001), http://www.icty.org/x/cases/gotovina/ind/en/got-ii010608e.htm. The Prosecutor subsequently amended the original indictment to name two additional Croatian former generals—Mladen Markac and Ivan Cermak. Prosecutor v. Gotovina, ICTY Case No. IT-06-90, Amended Joinder Indictment (May 17, 2007), http://www.icty.org/x/cases/gotovina/ind/en/got-amdjoind070517e.pdf.

5. Joint criminal enterprise is a theory of criminal liability first recognized by the Appeals Chamber of the ICTY in *Prosecutor v. Milutinovic*, ICTY Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise, para. 18 (May 21, 2003). Like conspiracy, JCE liability is a crime commission, characterized by the existence of a common criminal plan

responsibility for, inter alia, the wanton destruction of cities, towns, or villages.[6] The Prosecutor's central theory of criminal liability was an allegation that General Gotovina's employment of indirect fires (such as artillery, rockets, and mortars)[7] against population centers such as the city of Knin violated the LOAC.[8] While such an allegation is not itself remarkable, the complex nature of the targeting situations that existed during the attack on Knin and the reliance on these targeting decisions as the focal point for criminal responsibility make this case profoundly significant in the development of targeting law. Indeed, no other decision by the ICTY has addressed such a complex targeting situation. For this reason, the attack on Knin and the subsequent trial and conviction of General Gotovina offer a unique insight into the law of targeting and its application in contemporary armed conflicts.

The ICTY convicted General Gotovina on April 15, 2011, sentencing him to twenty-four years confinement.[9] This Article is not, however, focused on critiquing that judgment.[10] Instead, the issues raised in the trial of General Gotovina, particularly with respect to the prosecution's novel theory that the mere use of indirect fires against population centers violates the LOAC, provide an excellent lens through which to examine the LOAC principles that regulate the application of combat power and the processes by which military commanders synchronize doctrine, law, and policy to employ force for mission accomplishment. The view through this lens provides an important insight into a legal framework that is central to the application of combat power in any context, including the use of unmanned aerial vehicles armed with precision-guided missiles. In short, the complexities of the legal issues related to the use of such weapons, like any weapons, must start with a solid foundation of understanding the core principles of targeting, which are illustrated by considering the complex case of the attack on Knin. The same LOAC principles related to this attack are woven into the AMW Manual, and by viewing them through the lens of an actual operation the authors hope to provide the reader with an enhanced understanding of how the law is applied in actual operational practice.

In the execution of military operations, commanders and their staffs conduct detailed planning sessions in order to identify both the military end state that is to be

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or purpose pursued by a plurality of persons. However, unlike conspiracy, JCE liability requires actual commission by at least some of the members of the plurality of the underlying crimes agreed to; all individuals who contribute to the carrying out of crimes in execution of a common purpose may be subjected to criminal liability. Although not specifically recognized in the ICTY Statute, the Appeals Chamber held that it is fairly encompassed within article 7(1) of the Statute. *Id.* para. 28.

6. Prosecutor v. Gotovina, Amended Joinder Indictment, *supra* note 4, para. 51.

7. Indirect fire is "[f]ire delivered on a target that is not itself used as a point of aim for the weapons or the director." *Indirect Fire Definition*, JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02: DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 169 (Nov. 8, 2010, as amended through Aug. 15, 2011) [hereinafter JP 1-02].

8. *See* Prosecutor v. Gotovina, ICTY Case No. IT-06-90, Prosecution's Public Redacted Final Trial Brief, para. 524–66 (Aug. 2, 2010), http://www.icty.org/x/cases/gotovina/custom5/en/100802.pdf (describing the "shelling" of Knin); Prosecutor v. Gotovina, ICTY Case No. IT-06-90, Gotovina Defence Final Trial Brief, para. 180 (July 27, 2010), http://www.icty.org/x/cases/gotovina/custom5/en/100727.pdf (describing the prosecution's theory of criminal liability).

9. Prosecutor v. Gotovina, ICTY Case No. IT-06-90, Judgement Volume II of II, para. 2620 (Apr. 15, 2011), http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf.

10. The coauthors acknowledge Professor Geoffrey Corn's role as an expert witness for the defense in the Gotovina trial. Professor Corn is also currently assisting with the filing of an amicus brief challenging the trial court's findings.

achieved and a construct for how to reach that end state. The commander is the focal point of decision making throughout this process and during mission execution. Every application of combat power, whether at the tactical, operational, or strategic level,[11] is designed to achieve the specific effects that support the commander's identified end state and objectives. These are the basic premises that drive the target selection and execution process within a process characterized as operational art. According to U.S. Army Field Manual 3-0:

> Commanders use operational art to envision how to establish conditions that define the desired end state. Actions and interactions across the levels of war influence these conditions. These conditions are fundamentally dynamic and linked together by the human dimension, the most unpredictable and uncertain element of conflict. The operational environment is complex, adaptive, and interactive. Through operational art, commanders apply a comprehensive understanding of it to determine

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11. According to U.S. Army Field Manual 3-0, Operations:

> 7-9. The *strategic level of war* is the level of war at which a nation, often as a member of a group of nations, determines national or multinational (alliance or coalition) strategic security objectives and guidance, and develops and uses national resources to achieve these objectives. Activities at this level establish national and multinational military objectives; sequence initiatives; define limits and assess risks for the use of military and other instruments of national power; develop global plans or theater war plans to achieve those objectives; and provide military forces and other capabilities in accordance with strategic plans (JP 3-0).
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> . . .
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> 7-12. The operational level links employing tactical forces to achieving the strategic end state. At the operational level, commanders conduct campaigns and major operations to establish conditions that define that end state. A *campaign* is a series of related major operations aimed at achieving strategic and operational objectives within a given time and space (JP 5-0). A *major operation* is a series of tactical actions (battles, engagements, strikes) conducted by combat forces of a single or several Services, coordinated in time and place, to achieve strategic or operational objectives in an operational area. These actions are conducted simultaneously or sequentially in accordance with a common plan and are controlled by a single commander. For noncombat operations, a reference to the relative size and scope of a military operation (JP 3-0). Major operations are not solely the purview of combat forces. They are typically conducted with the other instruments of national power. Major operations often bring together the capabilities of other agencies, nations, and organizations.
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> . . .
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> 7-16. *Tactics* uses and orders the arrangement of forces in relation to each other. Through tactics, commanders use combat power to accomplish missions. The tactical-level commander uses combat power in battles, engagements, and small-unit and crew actions. **A *battle* consists of a set of related engagements that lasts longer and involves larger forces than an engagement.** Battles can affect the course of a campaign or major operation. An *engagement* is a tactical conflict, usually between opposing lower echelons maneuver forces (JP 1-02). Engagements are typically conducted at brigade level and below. They are usually short, executed in terms of minutes, hours, or days.
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> 7-17. Operational-level headquarters determine objectives and provide resources for tactical operations. For any tactical-level operation, the surest measure of success is its contribution to achieving end state conditions. Commanders avoid battles and engagements that do not contribute to achieving the operational end state conditions.

U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (2008) (amended Feb. 22, 2011) (emphasis in original) [hereinafter FM 3-0].

the most effective and efficient methods to influence conditions in various locations across multiple echelons.[12]

Targeting is the term used within the military to describe the process of applying combat power to achieve desired objectives within the overall operational plan by destroying, disabling, degrading, or harassing enemy capabilities.[13] It involves a cycle of identifying individuals and objects for potential attack, selecting which of those objects will be attacked, selecting the means (weapons) and methods (tactics) to conduct the attack, executing the attack, and assessing the effects of the attack.[14] All experts on the commander's staff (the "battle staff") participate in this targeting process, whether deliberate or time-sensitive. At the most basic level, operational experts identify the effects necessary to achieve the commander's purpose, intelligence experts identify enemy capabilities and vulnerabilities, weapon systems experts identify the available assets capable of achieving the desired effects, and the commander chooses the capability that he or she determines is best suited to accomplish the mission. This process can be extremely complex and time consuming at very high levels of command, or very brief and ad hoc at low levels of command. Even an infantry fireteam—a group of four to eight soldiers—engages in this process. The team leader identifies the objectives and employs the team's combat power in a manner best designed to achieve those objectives. However, the process becomes more complex in proportion to the level of command and the range of combat capabilities available to the commander.

The commander's discretion in selecting targets for attack is not, however, unfettered. In addition to being constrained by the mission and policy imperatives dictated by his or her superiors, it is an axiom of military operations that the commander may only direct attacks against lawful military objectives. What is or is not lawful is defined by the LOAC, which provides the test for not only assessing what people, places, and things may be attacked, but also for determining the legality of the means and methods used for the attack. Therefore, a legal analysis is a fundamental component of the target selection and engagement process. Stated simply, the LOAC imposes on commanders (or any other operational decision-maker) an obligation to ensure that persons, things, or places selected for deliberate attack qualify as lawful military objectives, and that the means used to attack those targets comply with limitations established by the LOAC.[15] What qualifies as a lawful military objective is determined by applying the controlling LOAC provisions and definitions. Such definitions are found not only in binding LOAC treaties, but also customary international law. In fact, in the context of contemporary armed conflicts between states and non-state groups (such as terrorist organizations), it is

12. *Id.* para. 7-18.

13. *See* JP 1-02, *supra* note 7, at 354 (defining targeting as "[t]he process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities").

14. *Id.*

15. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (defining military objectives and limiting attacks strictly to military objectives); Prosecutor v. Tadic, ICTY Case No. IT-94-1, Opinion and Judgment, para. 607 (May 7, 1997), http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf (explaining that the rule of "military objective" applies to all armed conflicts as a matter of customary international law).

this latter source of authority that establishes obligations applicable to all belligerents, irrespective of the formal applicability of treaty obligations.

Because of the incredible complexity and pressure of combat, ensuring compliance with the LOAC has proven to be one of the most challenging aspects of conducting military operations. This complexity is invariably exacerbated in direct relation to the unconventional nature of the opponent. However, the strategic imperative of compliance with LOAC obligations is, if anything, increased in the context of operations against such opponents, a reality emphasized by U.S. Army doctrine:

> Military leaders cannot dissociate objective from the related joint principles of restraint and legitimacy, particularly in stability operations. The amount of force used to obtain the objective must be prudent and appropriate to strategic aims. Means used to accomplish the military objective must not undermine the local population's willing acceptance of a lawfully constituted government. Without restraint or legitimacy, support for military action deteriorates, and the objective becomes unobtainable.[16]

This doctrine is a direct reflection of the many lessons learned by military commanders charged with achieving strategic objectives in the counter-insurgency environment. As recent history demonstrates, the legitimacy of military operations rests squarely, if not at times entirely, on the perception of adherence to the rule of law, especially the LOAC.[17]

Thus, in many militaries around the world, military lawyers have assumed an increasingly central role in the operational planning and target selection processes. These lawyers are trained in the LOAC and embedded within the targeting process to advise commanders on whether target selection and engagement will comport with LOAC obligations.[18] However, it would be a major error to assume that lawyers will always be involved in this process, and an even greater error to assume that lawyers "own" this process. After all, even when the participants to a conflict are forces with a commitment to providing widespread legal advice, the reality is quite different in multiple ways. This is a reminder that while it is certainly beneficial that commanders have access to such advice, it is only advice, and it is the commander who is ultimately responsible for making the "shoot/don't shoot" judgment.

Lawyers never have been, and never should be, viewed as a substitute for this decision-making obligation, even when highly skilled in both the LOAC and operational art. The law, in short, must evolve and be articulated in a manner that

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16. FM 3-0, *supra* note 11, para. A-3.

17. *See, e.g.*, Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 15–16 (Winter, 1994) ("Soldiers who spray fire when they should not do so sabotage any operation in which the United States seeks to bolster the legitimacy of a government or faction."); Susan L. Turley, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139, 143 (1994) ("Enforcing humane methods of combat establishes that a country is waging a justly fought war, thus providing the best evidence to rebut propaganda claims of law-of-war violations.").

18. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 130, 571 (2010) [hereinafter OPERATIONAL LAW HANDBOOK]; *see also* Additional Protocol 1, *supra* note 15, art. 82 ("The High Contracting Parties at all times . . . shall ensure that legal advisors are available, when necessary . . . .").

facilitates its understanding by lay commanders, for it is their judgment that the law must inform. While the AMW Manual is an important contribution to this evolution, the regulation of air and missile warfare operations must be driven by a synchronized assessment of both legal norms and operational realities. Allowing the law to develop without consideration of operational reality will undermine its ultimate efficacy because the constituents who must embrace the law will view it as inconsistent with their operational instincts.

Why is this so in an era of increasing legal primacy in LOAC development? First, there will always be levels of command without immediate access to legal advisors. The bulk of combat occurs at the tactical, small-unit level, where military lawyers are rarely—if ever—available. Second, while an ideal targeting decision would be the product of a deliberate planning process, armed conflict is actually laden with dynamic and emergent targeting decisions that are made without the benefit of prior planning and analysis. Belligerents make these decisions in situations offering extremely limited time to contemplate the action, much less seek the advice of a military lawyer. Indeed, U.S. Marine Corps doctrine indicates that:

> Marines must determine if a situation warrants applying deadly force. Sometimes Marines must decide in a matter of seconds because their lives or the lives of others depend on their actions. To make the right decision, Marines must understand both the lethal and nonlethal close combat techniques needed to handle the situation responsibly without escalating the violence unnecessarily.[19]

In reality, even seconds will often be a luxury for the war fighter.

Even an infantry private deciding to engage an enemy belligerent is implementing LOAC principles in a real-time targeting process. And all soldiers learn as soon as they enter a combat environment what the Federal Bureau of Investigation emphasizes when training its agents on the use of deadly force: action nearly always beats reaction.[20] Hesitation during the assessment phase of the immediate engagement decision cycle can mean the difference between life or death and mission success or failure. Even during deliberate planning, the compressed time lines of combat often do not afford the luxury of time that is needed to thoroughly analyze the legal nuances of each contemplated action. As such, commanders and their staffs (including military legal advisors), as well as the soldiers, sailors, airmen, and marines that execute military missions, depend on simplified systems that make the integration of law into operational planning and execution routine. These systems—all of which must effectuate the synchronization of law and operations (sometimes referred to as "operationalizing" the law[21])—transform the complex rules and principles of the LOAC into digestible, understandable, trainable, and easily applicable concepts.

Of course, "operationalizing" the law necessitates an understanding of the relationship between the law and the principles of military operations that the law

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19. DEP'T OF THE NAVY, UNITED STATES MARINE CORPS, MCRP 3-02B, CLOSE COMBAT foreword (1999).

20. Anthony J. Pinizzotto et al., *Law Enforcement Perspective on the Use of Force: Hands-on, Experimental Training for Prosecuting Attorneys*, FBI LAW ENFORCEMENT BULL. 16, 18 (Apr. 2009), http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2009-pdfs/april09leb.pdf.

21. *See infra* notes 54–56 and accompanying text.

regulates. With respect to targeting specifically, it requires an appreciation of the targeting process, the capabilities of the assets to be employed, and the anticipated effects of employment. It also requires an appreciation of how LOAC targeting principles impact all of these considerations. This is rarely more significant than when analyzing the legality of employing indirect fires during combat operations. Indirect fires—which include weapons such as cannon and rocket artillery, mortars, naval gunfire, and missiles—display two characteristics that make its employment particularly challenging from a LOAC perspective: enhanced destructive power and non-line-of-sight engagement.

In many ways, indirect fire support—the use of indirect fires to directly support land, maritime, amphibious, and special operations forces to engage enemy forces, combat formations, and facilities[22]—is the quintessential example of how the LOAC influences the employment of combat power. This is especially the case because it has become almost inevitable that civilians or civilian property will be in close proximity to targets that are identified for attack with indirect fires. This reality—combined with the enhanced destructive effects of most indirect fire weapons, the limits on information available to commanders who use such fires, and the risk that such fires will produce effects that extend beyond the intended object of attack—indicates that integrating LOAC targeting principles into the planning and execution of fire support missions is essential to the legitimate use of such fires.

The purpose of this Article is therefore to illustrate this synchronization process through the example of Operation Storm. As background, Part II will describe Operation Storm, focusing specifically on the Croat use of indirect fires in and around the city of Knin.[23] The Article then turns in Part III to a broader discussion of the role that LOAC targeting principles play in this process of synchronization, starting with an explanation of the target planning and execution process itself.[24] From there, the Article considers a series of questions in order to explore the relationship between the LOAC and the logic of military operations. It then explains the relationship between the LOAC, rules of engagement, and the targeting processes. Next, it specifically addresses the application of these principles to the use of indirect fires in areas of civilian population, including a discussion of the risks of conducting ground maneuvers in such populated areas and how this risk impacts a commander's choice to employ indirect fires. The Article concludes with several general considerations related to the obligations and expectations of commanders engaged in the target decision-making process.

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22. JP 1-02, *supra* note 7, at 133.

23. While this Article does not address the specific target set and engagement missions approved by General Gotovina, using the questions solicited by his defense will hopefully offer readers a more complete understanding of LOAC targeting principles in action.

24. These tenets are based on an opinion originally written by Professor Corn in his capacity as an expert witness for the defense in *Prosecutor v. Gotovina*. Central to the prosecution's theory of criminal responsibility in this case was the allegation that General Gotovina employed indirect fire assets—to include rocket artillery—against the city of Knin in the Serb-controlled area of Croatia (the Krajina) in order to terrorize the civilian population. In response to this allegation, General Gotovina's defense sought to establish why the use of these assets during Operation Storm—the offensive commanded by General Gotovina to liberate the Krajina from the control of dissident Croatian Serb forces—was legitimate within the parameters of the LOAC.

II. OPERATION STORM AND THE USE OF INDIRECT FIRES

By the mid-summer of 1995, armed hostilities triggered by the fragmentation of the former Socialist Federal Republic of Yugoslavia (SFRY) were raging in Bosnia and Croatia.[25] In Croatia, this violence began in 1991 when the Croat-Serb majority in and around Knin established the Serbian Autonomous Oblast (SAO) of Krajina.[26] The SAO declared itself independent of Croatia on March 16, 1991.[27] In 1992, following Croatia's declaration of independence from the SFRY, the SAO united with other self-declared SAOs to form the Republic of Serbian Krajina.[28]

As the conflict widened into Bosnia and Herzegovina, Croatia and the breakaway Krajina Serbs remained in a state of armed conflict. In 1995, responding to failed negotiations between the warring parties, and building on recent battlefield successes, Croatia's President Franjo Tudjman met with his top military and political leaders to begin planning a decisive operation against the Krajina Serb forces.[29] The name chosen for the offensive was Operation Storm.[30]

On August 4, 1995, Croatian military forces launched Operation Storm—the largest ground offensive in Europe since World War II—with the objective of retaking the Krajina region.[31] The four-day offensive opened with 150,000 Croatian forces attacking along a 300-kilometer front.[32] Not surprisingly, long-range artillery fires were integrated into all phases of the operation.[33] In many instances, Croatian forces employed these indirect fires against predetermined enemy objectives located in the city of Knin and other population centers, a fact which figured prominently in *Prosecutor v. Gotovina*.[34]

In terms of achieving the objective of reestablishing Croatian control over the Krajina, Operation Storm was a complete success. The Serb forces were quickly defeated in depth and the operation reversed the military balance of power in the region.[35] This shift in power eventually led to the resumption of peace talks and the

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25. JUDITH ARMATTA, TWILIGHT OF IMPUNITY 124, 468 (2010) (time line of events surrounding the hostilities in the former SFRY).

26. Chuck Sudetic, *Serbian Enclave Reluctant to Allow Visit by Outsiders*, N.Y. TIMES, July 31, 1991, at A4.

27. David Binder, *Serbian Official Declares Part of Croatia Separate*, N.Y. TIMES, Mar. 18, 1991, at A3.

28. ARMATTA, *supra* note 25, at 484–85.

29. *See Croatian Serbs Won't Even Look at Plan for Limited Autonomy*, N.Y. TIMES, Jan. 31, 1995, at A3 ("A proposal described as the last best effort to avoid a much wider Balkan war was spurned late today by leaders of the Serbian nationalists who control a third of Croatia."); *Croatian President Franjo Tudjman Says Force Was the Only Option to Shift the Balance of Power in the Balkans Away from the Serbs*, CNN WORLD (Aug. 29, 1995), http://articles.cnn.com/1995-08-29/world/Bosnia_updates_august95_8-19_tudjman_1_operation-storm-krajina-serbs-forces (stating that the Croatian Army's "successful military offensive" allowed Croatia to reclaim lands held by Krajina Serbs for four years).

30. Danner, *supra* note 3.

31. *Id.*; Anes Alic, *Serb NGOs Sue US Private Security Outfit for 'Genocide' in Croatia*, ISA INTEL (Sept. 21, 2011), http://www.isaintel.com/2011/09/21.

32. Alic, *supra* note 31.

33. *Croatia—Operation Storm 1995*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/intell/ops/croatia.htm (last visited Feb. 22, 2012) (describing the attack as including "integrated air, artillery, and infantry movements").

34. Prosecutor v. Gotovina, ICTY Case No. IT-06-90, Judgment Volume I of II, paras. 1163–281 (Apr. 15, 2011), http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol1.pdf.

35. *See* Danner, *supra* note 3 ("[L]ess than three months after Tudjman launched his 'Operation

Dayton Accords a few months later.[36] However, another immediate consequence of the offensive was the near complete displacement of the Krajina-Serb population—some 150,000 people or more.[37] The question of whether this mass exodus was the result of deliberate ethnic cleansing or an unintended consequence of legitimate military operations was at the heart of the Prosecutor's case and General Gotovina's conviction.[38]

At the macro level, *Prosecutor v. Gotovina* rests on the allegation of a "joint criminal enterprise [JCE]; the common purpose being the permanent removal of the Serb population from the Krajina region by force, fear or threat of force, persecution, forced displacement, transfer and deportation, appropriation and destruction of property or other means . . . ."[39] As set forth in the prosecution's Public Redacted Final Trial Brief, its theory of JCE liability was premised in large part on a number of alleged LOAC violations—a "[f]orcible [d]isplacement through the [c]omission of [c]rimes,"[40] to include the unlawful use of artillery against Knin and other population centers.[41]

According to the prosecution, the defendants furthered their JCE through the use of artillery to either directly or indiscriminately target civilians and civilian property, thus violating the LOAC principles regulating the employment of combat power.[42] The defense countered that the defendants' employment of indirect fires during Operation Storm was based on accepted military doctrine and that such indirect fires were directed only at lawful military objectives.[43] Accordingly, the defense position was that the prosecution could not prove beyond a reasonable doubt that General Gotovina violated relevant LOAC principles; indeed, the defense asserted that the prosecution's own facts established General Gotovina's compliance with those principles, particularly when considered within the broader context of the

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Storm'—the Serbs had lost enough territory to bring their holdings from 70 percent to not more than half . . . .").

36. JAMES GOW, TRIUMPH OF THE LACK OF WILL: INTERNATIONAL DIPLOMACY AND THE YUGOSLAV WAR 276–77 (1997).

37. ROBERTA COHEN & FRANCIS MADING DENG, THE FORSAKEN PEOPLE: CASE STUDIES OF THE INTERNALLY DISPLACED 185 (1998) (describing the incident as leading to the "mass migration of nearly 150,000 civilian[s] and 50,000 soldiers from the Krajina region").

38. *See* Prosecutor v. Gotovina, Judgement Volume II of II, *supra* note 9, paras. 2600–01 (describing the manner in which the attack had been planned as deliberate).

39. Prosecutor v. Gotovina, Amended Joinder Indictment, *supra* note 4, para. 12.

40. Prosecutor v. Gotovina, Prosecution's Public Redacted Final Trial Brief, *supra* note 8, para. I(C)(1); *see also id.* para. I(A)(1) ("The Accused and other Joint Criminal Enterprise ('JCE') members shared the common criminal purpose of the JCE to permanently remove the Serb population from the Krajina region by force or threat of force, including through the commission of the following crimes charged in Counts 1–5 of the Indictment: persecution (through deportation and forcible transfer, wanton destruction, plunder, shelling of civilians, unlawful attacks on civilians and civilian objects, the imposition of restrictive and discriminatory measures including the imposition of discriminatory laws and discriminatory expropriation of property, and unlawful detentions); deportation and forcible transfer; plunder; and wanton destruction." (footnote omitted)).

41. *Id.* paras. 615–31. According to the prosecution, the "shelling" of Knin and other areas was the manifestation of an agreement between then President Franjo Tudjman and senior Croat leaders, including Gotovina and the other defendants, at a meeting on the island of Brijuni on July 31, 1995. *Id.* para. 127.

42. *Id.* para. 491.

43. Prosecutor v. Gotovina, Gotovina Defence Final Trial Brief, *supra* note 8, paras. 180–88.

overall offensive.[44] At trial, the defense sought to establish that General Gotovina employed indirect fires only against targets that qualified as lawful objects of attack in accordance with the LOAC principle of distinction.[45] These attacks on Serb forces were designed to (and in fact did) disrupt enemy command, control, and communication capabilities, as well as its logistical support, while also degrading the enemy's willingness to fight.[46]

The applicability of fundamental LOAC targeting principles—distinction, proportionality, and precautions in the attack—was never disputed between the parties. Nor do the authors take issue with their applicability to Operation Storm. The principle of distinction prohibits deliberate attacks on civilians or civilian objects.[47] Indiscriminate attacks—attacks on a lawful object that are anticipated to produce collateral damage or incidental injury that is excessive in relation to the legitimate anticipated value of the attacks—are also prohibited by the LOAC.[48] Precautions in the attack require that commanders utilize feasible measures for the purpose of mitigating the risk to the civilian population (such as issuing warnings or timing the attack to minimize civilian exposure).[49] However, the assessment of whether the use of indirect fires during a particular military operation violates these LOAC principles must always turn on an assessment of the specific facts available to the commander at the time he orders the attack, not on a retrospective view considering facts and circumstances that were not available to the commander. This analytical perspective is central to the credibility of any post-attack criminal or administrative review of a commander's judgments and is at the core of the controversy over the execution of Operation Storm.

Perspective, however, was not the only area of dispute between the prosecution and defense. As indicated by the opposing trial briefs in the *Gotovina* case, the issue of the lawful employment of indirect fires during Operation Storm is subject to a number of disputed material facts.[50] However, irrespective of the relative merits of each position, there is a clear dispute as to the correct interpretation of the controlling LOAC principles. The prosecution strongly implied a per se prohibition on the use of indirect fires in population centers. The defense countered this position by arguing that no such prohibition exists and that targeting military objectives in a populated area must be analyzed no differently than any other targeting decision—by applying LOAC principles within the context of the operational situation.[51] The Trial Chamber appears to have rejected the per se prohibition theory.[52] Nonetheless, the Chamber's judgment of conviction in many ways endorsed a near strict liability standard of care for the employment of indirect fires in populated areas, condemning

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44. *Id.* paras. 180–319.

45. *Id.* para. 258 (listing specific military objectives that were identified during the targeting process and the justification for their selection).

46. *Id.*

47. *See* Additional Protocol I, *supra* note 15, arts. 51–52 (stating that civilians and civilian objects "shall not be the object of attack").

48. *Id.* arts. 51(2), (4), (5).

49. *Id.* art. 57(2).

50. *See supra* notes 42–46 and accompanying text.

51. Prosecutor v. Gotovina, Gotovina Defence Final Trial Brief, *supra* note 8, paras. 260–88.

52. *See* Prosecutor v. Gotovina, Judgement Volume II of II, *supra* note 9, paras. 1893–913 (finding liability through rigorous factual analysis of artillery attack).

General Gotovina based on a very small percentage of artillery effects that could not (at least according to the Chamber) be attributed to lawful objects of attack.[53]

How the LOAC influenced the planning, execution, and criminal critique of Operation Storm offers a particularly relevant opportunity to understand the relationship of law and targeting doctrine. This Article will hopefully provide greater insight into this relationship, the importance of which transcends Operation Storm and applies to any effort to genuinely understand how the LOAC impacts the employment of deadly combat power.

III. OPERATIONALIZING THE LAW: INTEGRATING AND APPLYING THE LOAC IN TARGETING

Although a relatively novel term, "operationalize" is generally defined as: to make operational; put into operation.[54] As noted above, in the context of military operations, putting the LOAC "into operation" involves transforming the myriad complex rules and principles of the LOAC into understandable and actionable orders and guidance for commanders and soldiers[55] at every echelon. It is to this process of LOAC integration and application that the Article now turns, starting with a brief description of the targeting process itself.[56]

A. The Targeting Process

In common parlance, a target is "something or someone fired at or marked for attack."[57] In military terms, the United States defines target as:

> [A]n entity or object considered for possible engagement or action. It may be an area, complex, installation, force, equipment, capability, function, individual, group, system, entity, or behavior identified for possible action . . . .[58]

Targets relate to objectives at all levels of war. Whether a target is selected through a deliberate planning process or identified as an emergent opportunity, it should be selected and engaged in support of the commander's objectives, guidance, and intent.

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53. *See id.* para. 1909 ("The Trial Chamber considers that the number of civilian objects or areas in Knin deliberately fired at . . . may appear limited in view of the total of at least 900 projectiles fired at the town on 4 and 5 August 1995.").

54. *Operationalize Definition*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/operationalize?q=operationalize (last visited Feb. 22, 2012).

55. We use the term "soldier" throughout this Article to refer to a member of the armed forces. We are fully cognizant of the fact that "soldier" normally indicates a member of the Army, and not a member of the Navy (Sailor), Air Force (Airman), or Marine Corps (Marine). However, we use this term for purposes of simplicity and not in an effort to diminish the differences between each branch of the armed forces.

56. Although the description that follows is based primarily on U.S. doctrine, the basic structure is shared by most militaries. *See generally* NATO STANDARDIZATION AGENCY, ALLIED JOINT PUBLICATION 3.9: ALLIED JOINT DOCTRINE FOR TARGETING (2008) (describing NATO targeting doctrine).

57. *Target Definition*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1206 (10th ed. 1993).

58. JP 3-60 (2007), *supra* note 2, at I-1.

Of course, it is axiomatic that only those targets determined to be valid military objectives, as defined in the LOAC, are to be made the subject of attack.[59]

Targeting is "the process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities."[60] The targeting process

> defines what targets are to be engaged, by which assets, using which method and in which priority order. It also specifies targets that are restricted or may not be engaged at all. Above all, the process aims to ensure all involved are entirely clear about their targeting and coordination responsibilities and constraints, in time and space.[61]

Before turning to the governing LOAC principles that are applicable to this process, it is necessary to first describe the process itself, focusing on those steps in the process where the injection of proper legal analysis is most critical.

Although doctrine and terminology may differ among militaries, certain core concepts are common to all. Whether at the strategic, operational, or tactical level of warfare, the ultimate objective of any military commander is to employ his or her available capabilities in a synchronized manner to successfully achieve a defined end state as efficiently and effectively as possible. In warfare, this involves leveraging available assets to generate combat power to achieve a desired effect at the selected time and place. By virtue of their extended range and amplified destructive power, indirect fires have long been considered and utilized as a critical component of combat power.

To assist commanders with integrating, synchronizing, and directing operations, doctrine organizes all available capabilities into six basic operational functions: command and control, intelligence, fires, movement and maneuver, protection, and sustainment.[62] Commanders generate and apply combat power through the correct application of each of these six functions. While the relative weight of each function may vary according to each mission, the fires function is often critical to executing the commander's overall concept of operations, whether the nature of the operation is offensive or defensive. This is true regardless of whether indirect fires are employed to enhance the overall effect of the other functions (such as maneuver and movement) or to create and preserve conditions for the success of the operation itself.

Fires are defined as "[t]he use of weapon systems to create specific lethal or nonlethal effects on a target."[63] As a war-fighting function, fires consist of the related tasks and systems that provide the coordinated use of surface-to-surface indirect fires, air-to-surface fires (which would include drone operations), naval surface fires, and command and control of these assets through the targeting process.[64] Fires

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59. Additional Protocol I, *supra* note 15, art. 52.

60. JP 3-60 (2007), *supra* note 2, at I-1.

61. NATO STANDARDIZATION AGENCY, ALLIED JOINT PUBLICATION 3(B): ALLIED JOINT DOCTRINE FOR THE CONDUCT OF OPERATIONS para. 0448 (2011).

62. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0: JOINT OPERATIONS III-1 (2011) [hereinafter JP 3-0].

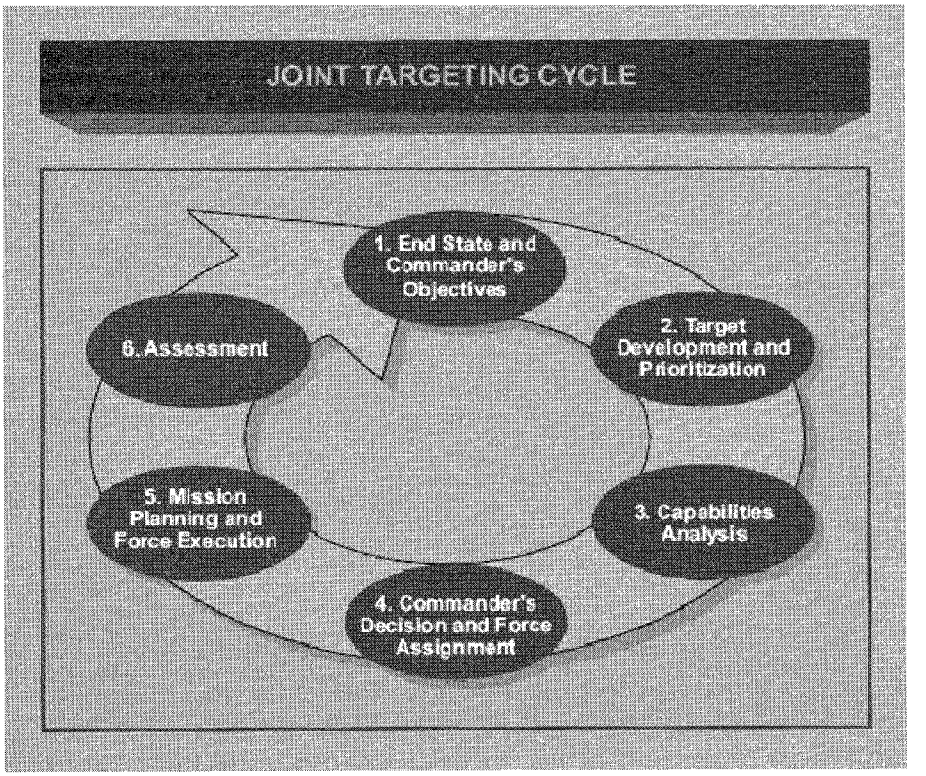
63. JP 1-02, *supra* note 7, at 133.

64. U.S. DEP'T OF ARMY, FIELD MANUAL 3-60: THE TARGETING PROCESS 1-1 to -2 (2010) [hereinafter FM 3-60].

include all tasks associated with integrating and synchronizing the effects of these types of fires with each other and with the effects of the other war fighting functions.[65]

As part of the commander's integrated plan, fires can be employed for a variety of purposes. Among the more common purposes, fires are employed to: provide fire support to assist air, land, maritime, and special operations forces to move, maneuver, and control territory, populations, airspace, and key waters; interdict enemy capabilities to divert, disrupt, delay, or destroy the enemy's military potential before it can be used effectively against friendly forces; attack strategic objectives and centers of gravity; and counter air and missile threats, to name a few. Commanders ensure the effective integration and synchronization of fires into their plans through the use of standard target selection and execution processes that seek to link intelligence, plans, and operations across all levels of command.

Targeting is a cyclical and iterative process requiring constant flexibility and adaptability in order to respond to the dynamic nature of operations. At the most basic level, it involves planning, execution, and assessment of the efficacy of each engagement or attack. The targeting cycle can be further broken down into six phases, represented in the figure below.[66]



65. *See* JP 3-0, *supra* note 62, at III-1 ("The joint functions reinforce and complement one another, and integration across the functions is essential to mission accomplishment.").

66. JP 3-60 (2007), *supra* note 2, at II-3.

The intersection of mission imperatives, policy considerations, and the law is constantly at play during all six phases of the targeting cycle. Commanders, planners, and, when available, legal advisors must be cognizant of these factors at all times. The legal analysis begins with the identification of the commander's end state and objectives and carries through the entire process to the assessment and related recommendations for reengagement.[67] There are certain points in the process, however, where legal analysis is most critical to the commander's decision making.

During the deliberate (as opposed to time-sensitive) target development and prioritization phase, legal advisors normally review every proposed target. This target vetting or validation process is intended to ensure compliance with applicable rules of engagement (ROE), the LOAC, or any other specific restrictions such as No-Strike or Restricted Target lists.[68] As discussed more fully below, the LOAC sets the legal limits for defining and engaging lawful targets, while ROE serve as an additional source of authority defining guidelines for permissible combat actions.[69] Accordingly, ROE limitations must be consistent with the LOAC, but they are technically not law. Instead, they are constraints based on mission imperatives and policy considerations, under which forces may initiate or continue combat engagement.[70]

Once targets are vetted and validated, they are nominated for approval.[71] It is at the next stage that the commander and staff engage in the detailed analysis of available capabilities in relation to desired effects.[72] This process of "weaponeering" is heavily impacted by the LOAC principle of proportionality.[73] The commander and planners seek to mitigate the risk of collateral damage by selecting weapons and tactics that will, to the greatest feasible extent, produce the desired effect while limiting such collateral damage.[74] This selection process is thoroughly consistent with the LOAC, and, of equal importance, it is also consistent with operational logic. Commanders gain no benefit from wasting effects, and they therefore logically seek to maximize effects on the intended objects of attack.[75]

However, it is important to note that this does not mean commanders will always select the weapon that produces the minimum collateral damage. The mitigation of such damage, while an important consideration in the weaponeering process, is not the exclusive consideration. Factors such as weapon availability, resupply rates, potential future requirements, and risk to friendly forces all play into

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67. *Id.* at II-3 to -19.

68. *Id.* at II-4, II-8, III-10.

69. JP 1-02, *supra* note 7, at 309; *see also* CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (2005) ("The [Standing Rules of Engagement] establish fundamental policies and procedures governing the actions to be taken by U.S. commanders during all military operations and contingencies . . . ."), *reprinted in* OPERATIONAL LAW HANDBOOK, *supra* note 18, at 87.

70. *See generally* OPERATIONAL LAW HANDBOOK, *supra* note 18, at 73–81 (providing an "overview of basic ROE concepts").

71. JP 3-60 (2007), *supra* note 2, at II-9.

72. *Id.* at II-10-11.

73. *See, e.g.*, UNITED STATES JOINT FORCES COMMAND, JOINT FIRES AND TARGETING HANDBOOK III-69 to -79 (2007) [hereinafter JOINT FIRES AND TARGETING HANDBOOK] (discussing weaponeering and the Collateral Damage Estimation process).

74. JP 3-60 (2007), *supra* note 2, at II-10 to -11.

75. JOINT FIRES AND TARGETING HANDBOOK, *supra* note 73, at I-3.

this process.[76] Thus, it is not uncommon for commanders to forego a means or method of attack that might create the least amount of collateral damage risk in favor of an alternative that creates greater risk. But such a decision will be driven by the prioritization of one of these other considerations. For example, while use of a drone attack might offer the most precise method of target engagement and therefore create the lowest level of collateral damage risk, that option might not be feasible in certain situations, such as those involving robust enemy air defense systems or limited supply of drone assets. In such situations, even if the commander could use the drone, he might select an alternate means of attack in order to "husband" the drone resource.

However, there does come a point where the LOAC dictates the weaponeering decision. The LOAC principle of proportionality prohibits the selection of any means or method of attack anticipated to produce collateral damage or incidental injury that is excessive in relation to the concrete and direct military advantage anticipated.[77] Accordingly, even if a proposed attack option will achieve the desired effect against a presumptively lawful military objective, it may not be utilized if the commander believes it will produce such an excessive effect. This is reflected in U.S. Joint Targeting doctrine, which indicates that "[c]ollateral damage estimation (CDE) is a critical component of the . . . targeting process."[78]

It should be apparent from the foregoing discussion that the effective integration and synchronization of the LOAC into and throughout the targeting process requires far more than a basic familiarity with the applicable treaty and customary norms. The LOAC is an elaborate set of rules developed from a desire among civilized nations to prevent unnecessary suffering and destruction in warfare. At the same time, the LOAC recognizes that under certain circumstances states have the need and the right to wage war. The law therefore seeks to strike a balance between humanitarian protections and the legitimate imperatives of warfare. Understanding this balance and the complex interaction among law, policy, and military doctrine is critical to the effective integration of legal advice into the targeting process. Before discussing the LOAC provisions relevant to the targeting process, a brief description of the concept of rules of engagement and their relationship to the LOAC is warranted.

B. The Relationship Between the LOAC and Rules of Engagement

It is axiomatic that thorough understanding of the military end state and the commander's intent, objectives, desired effects, and required tasks drives the entire targeting process. However, if the end state and objectives are tainted in any way with an improper or illegal purpose, or if they are premised on a misinterpretation of the legal authorities at the foundation of the overall operation, then the engagement of every target is at risk of legal infirmity. Accordingly, it is at this critical stage that

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76. *Id.* at III-72 to -73.

77. JP 3-60 (2007), *supra* note 2, at E-1; *see also* Additional Protocol I, *supra* note 15, art. 57(2)(a)(iii) (requiring parties to a conflict to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated").

78. JP 3-60 (2007), *supra* note 2, at II-10.

legal considerations inform the development of combat force initiation procedures as well as employment restraints or constraints. In U.S. practice (and the practice of many other states), these procedures and constraints normally take the form of rules of engagement.[79] Whether during the ROE development process or during the planning and execution of operations within an established ROE framework, legal advisors play a crucial role in ensuring the legality, and hence the legitimacy, of the application of combat power.

The ROE and the LOAC are two distinct sources of operational regulation. While ROE will often incorporate LOAC obligations and authorities, they are not synonymous. 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."[80] 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 is replete with examples of what have essentially been ROE. The Battle of Bunker Hill provides what is perhaps a 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 shoot until you see the whites of their eyes" in order to accomplish a tactical objective.[81] 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 a rule of engagement 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 the fall of 1914. The actual battle was between two Mexican factions, but it occurred on the border with the United States.[82] 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 U.S. neutrality was strictly maintained.[83] As part of the cavalry mission, "[t]he men were under orders not to return fire,"[84] despite the fact that the U.S. forces were routinely fired upon and "[t]he provocation to return the fire was very great."[85] 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. 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.[86]

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79. JP 1-02, *supra* note 7, at 309. In the context of joint operations planning, rule of engagement is a requirement placed on the command by a higher command that dictates (restraint) or prohibits (constraint) an action, thus restricting freedom of action.

80. *Id.*

81. JOHN BARTLETT, FAMILIAR QUOTATIONS 353 (13th ed. 1955).

82. James P. Finley, *Buffalo Soldiers at Huachuca: The Battle of Naco*, 1 HUACHUCA ILLUSTRATED, 1993, *available at* http://net.lib.byu.edu/estu/wwi/comment/huachuca/HI1-10.htm.

83. *Id.*

84. *Id.*

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

86. *Id.* (A military chronicler noted that the Chief of Staff's Annual Report stated: "These troops were constantly under fire and one was killed and 18 were wounded without a single case of return fire of

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 by the military's Joint Chiefs of Staff (JCS).[87] 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 to ensure that any force used complied with national strategic policies.[88] 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 might begin as a minor insult or probe from resulting 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 was subsequently expanded in 1986 into the JCS Peacetime ROE for all U.S. Forces.[89] 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.[90] In 1994, they promulgated the Chairman of the Joint Chiefs of Staff Standing ROE that was subsequently updated in 2000 and again in 2005.[91] As 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[92] and a key component of mission planning for U.S. and many other armed forces.[93] In preparation for military operations, the President and/or Secretary of Defense personally review and approve the ROE, ensuring they meet the military and political objectives.[94] Ideally, ROE represent the confluence of three important factors: operational requirements, national policy, and the law of armed conflict.[95] This is illustrated by the diagram below.[96]

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retaliation. This is the hardest kind of service and only troops in the highest state of discipline would stand such a test.").

87. TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS 14 n.26 (2002).

88. *See generally* Robert K. Fricke, *Dereliction of Duty*, 160 MIL. L. REV. 248 (1990) (book review).

89. Martins, *supra* note 17, at 42.

90. International Law Note, *"Land Forces" Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement*, 27-50-253 ARMY LAW. 48, 49 (Dec. 1993).

91. *See* OPERATIONAL LAW HANDBOOK, *supra* note 18, at 74 (noting the effective date of June 13, 2005, and how the Joint Chiefs of Staff replaced the 2000 and 1994 orders).

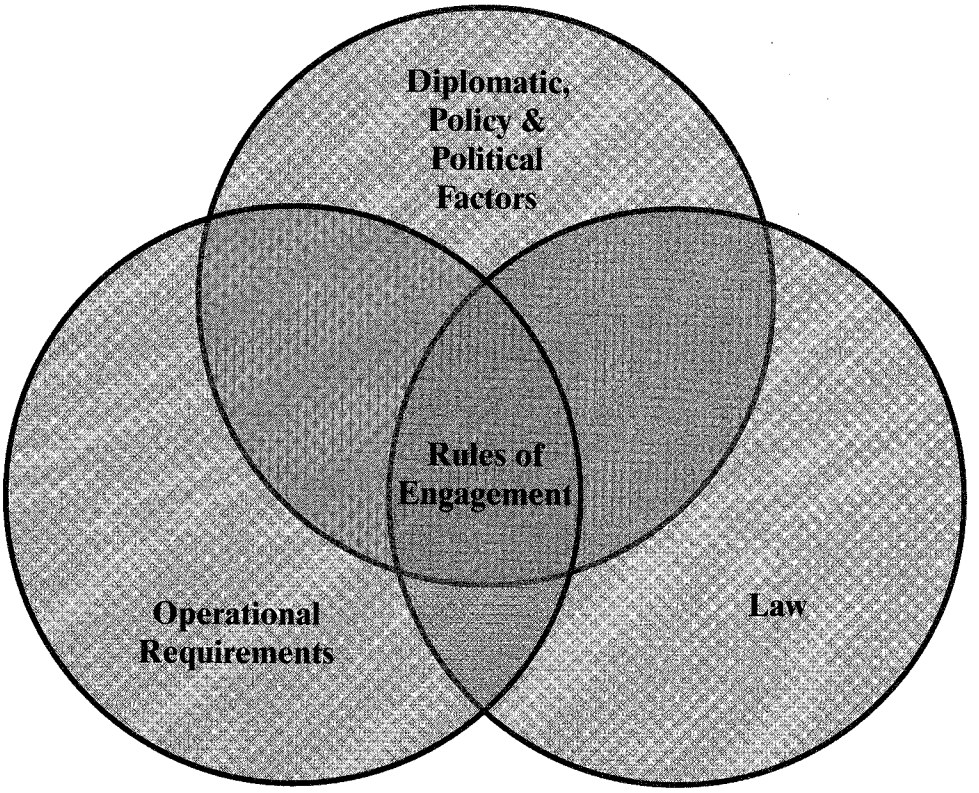
92. *See, e.g.*, Sean McCormack, Spokesman, U.S. Dep't of State, Daily Press Briefing (Oct. 3, 2007), http://2001-2009.state.gov/r/pa/prs/dpb/2007/oct/93190.htm (discussing ROE in relation to the Blackwater private security defense contractor).

93. *See* OPERATIONAL LAW HANDBOOK, *supra* note 18, at 83 (discussing ROE's importance in mission accomplishment); CTR. FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES 1-1 to -32 (2000) (discussing ROE development).

94. *See* Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126 (1998) (discussing how the "national command authority [reviews ROE] in accordance with exacting politico-legal imperatives").

95. Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. REV. 245, 247 (1997).

96. Martins, *supra* note 17, at 26.



It is particularly important to note that while ROE are not coterminous with the law of armed conflict, they must be completely consistent with this law. In other words, while there are provisions of the LOAC that do not affect a mission's ROE, all ROE must comply with the LOAC. 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 law of armed conflict. 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 be 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 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."[97] Note that this directive applies to "armed conflict," not international armed conflict.

To illustrate this interaction between ROE and the LOAC, 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 LOAC.[98] Similarly, if the ROE allow a pilot to destroy a bridge with a bomb, that does not relieve the pilot of the

97. OPERATIONAL LAW HANDBOOK, *supra* note 18, at A-1.

98. AMW MANUAL, *supra* note 1, r. 15(b); *see also* Turley, *supra* note 17, at 145 (describing the humanitarian and strategic motivations underlying the protection of surrendering soldiers).

responsibility to do a proportionality analysis and be certain that any incidental civilian deaths or damage to civilian property is not "excessive in relation to the concrete and direct military advantage" to be gained by the destruction of the bridge.[99] ROE will often contain provisions that remind soldiers that they can only engage the enemy or other individuals who engage in defined conduct endangering soldiers or others.[100] In this way, ROE ensures compliance with the laws of war by reinforcing the requirement to abide by the LOAC.

Recognizing this interrelationship is therefore essential to understanding why violation of a constraint imposed by a specific ROE, or even customarily imposed by ROE, does not *ipso facto* establish violation of the LOAC. To assess that question, it is necessary to determine whether the ROE constraint was coterminous with the LOAC or more restrictive than the scope of permissible authority established by the LOAC. In contemporary military operations, it is common for ROE to be more restrictive than the LOAC in order to satisfy policy considerations related to the application of combat power. This is particularly true with regard to the employment of indirect fires.[101]

IV. UNDERSTANDING THE SYMMETRY BETWEEN THE LOAC AND OPERATIONAL ART

As noted in the foregoing discussion, LOAC regulation and operational art are inextricably intertwined. Even the most thorough understanding of one of these disciplines is insufficient to appreciate genuinely how the law influences the planning and execution of military operations. Instead, such an appreciation is derived from an understanding of the relationship between these two disciplines or, perhaps more importantly, the symmetry between LOAC regulation and operational considerations.

During the trial of General Gotovina, both the prosecution and defense sought to provide evidence on this interrelationship. Experts on the impact of LOAC regulation on the targeting process testified for both the prosecution and defense, offering their assessments of how the LOAC impacted General Gotovina's obligations within the context of the operational situation he confronted.[102] Both experts agreed that for General Gotovina, like any other operational commander, compliance with LOAC obligations was central to the legitimate use of fires, and ultimately to mission success.[103] However, there was substantial disagreement on how the operational situation impacted application of LOAC targeting principles.[104]

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99. Additional Protocol I, *supra* note 15, art. 57.2(b).

100. *See, e.g.*, CTR. FOR LAW AND MILITARY OPERATION, *supra* note 93, at B-15-25 (providing an example ROE card).

101. For example, a typical rule of engagement might restrict the use of indirect fires in populated areas when direct observation of the target is not available, such as from a Forward Observer. While no such rule exists in the LOAC, requiring direct observation provides an added degree of confidence that the target is in fact a legitimate military objective, that any collateral effects will be within legal and acceptable standards, and that the rounds will impact the intended target.

102. Prosecutor v. Gotovina, Judgement Volume I of II, *supra* note 34, paras. 1163–75 (summarizing expert testimony).

103. *Id.*

104. *Id.*

In order to facilitate a general understanding of this aspect of the case, the Gotovina defense proffered a series of questions focused on how an operational situation influences implementation of these LOAC targeting principles.[105] The answers to these questions (provided by coauthor Geoffrey Corn in his capacity as a defense expert) were discussed at length during the presentation of evidence in the trial and heavily relied on by the Gotovina defense in its summation.[106] Because they offer valuable insight into the targeting process writ large, they are reproduced below in edited form in an effort to explore how the LOAC applies to the selection and execution of targets, so as to simultaneously advance the commander's operational objectives while fulfilling the LOAC's humanitarian objective of minimizing civilian suffering produced by the use of fires in populated areas.

A. Eight Questions on the LOAC and Military Operations

1. Explain the symmetry between the law of armed conflict and the operational art.

The LOAC—the body of customary and positive international law that regulates both the authority to engage in armed conflict and the manner in which parties conduct armed hostilities—arises from a desire among civilized nations to prevent unnecessary suffering and confine the destruction of combat to the participating armed belligerents, while at the same time not impeding the parties' ability to effectively wage war. At its heart, the LOAC evolved from codes of conduct imposed on belligerents by their commanders and has always reflected the core logic of military operations.[107] While it is clear that the law serves important humanitarian objectives, it is equally true that the law does so while facilitating the ability of belligerents to accomplish their strategic, operational, and tactical objectives. As a result, the contemporary LOAC reflects a carefully evolved balance between these two interests, a balance informed by the realities of armed conflict.

This balance is manifest in numerous provisions of the customary and conventional LOAC. Examples include the principle of military necessity,[108] military objective,[109] proportionality,[110] and the authority to preventively detain enemy belligerents.[111] Even humanitarian obligations serve an underlying military utilitarian purpose. These protections are derived from the reasoned judgment of the

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105. Transcript of Prosecutor v. Gotovina at 21156–90, ICTY Case No. IT-06-90-T (Sept. 7, 2009), http://www.icty.org/x/cases/gotovina/trans/en/090907ED.htm.

106. *Id.*

107. *See* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 26–37 (3d ed. 2008) (describing "the history and sources of the law of armed conflict").

108. *See* OPERATIONAL LAW HANDBOOK, *supra* note 18, at 10 ("The principle of military necessity authorizes that use of force required to accomplish the mission.").

109. *See* Additional Protocol I, *supra* note 15, art. 52(2) ("Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.").

110. *See supra* note 77 and accompanying text.

111. *See generally* 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 GPW].

profession-of-arms that unnecessary violence, destruction, and suffering will not only waste limited and valuable resources, but will also ultimately undermine the strategic purpose of armed conflict: restoration of peace.

The fact that the law serves the interests of not only civilians and non-combatants but also of belligerents is often overlooked in contemporary scholarship and commentary. However, this purpose is clearly central to the law. The following extract from one of the most important precursors to the twentieth-century evolution of the conventional laws of war—the *Oxford Manual of the Laws of War on Land*—emphasizes this aspect of the law:

> By [codifying the rules of war derived from State practice], [it is] a service to military men themselves .... A positive set of rules ... serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts—which battle always awakens, as much as it awakens courage and manly virtues—it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.[112]

The compelling logic reflected in this extract finds contemporary manifestation in the policy mandates that the United States' and other nations' armed forces have implemented to extend application of these principles to all military operations.[113] These mandates indicate that the application of combat power must always be subject to a logical and effective regulatory framework. That framework is provided by the LOAC.

The LOAC is replete with examples of the symmetry between regulation and operational logic. A quintessential example is the prohibition against the infliction of superfluous or unnecessary suffering.[114] This prohibition is a foundational principle of the law, tracing its roots back to the St. Petersburg Declaration of 1868.[115] By prohibiting the calculated infliction of superfluous suffering or injury, the principle advances not only a humanitarian purpose, but also the military logic reflected in the concept of economy of force. There is no military value in wasting resources for the purpose of exacerbating the suffering of an opponent already rendered combat ineffective; the principle of law is consistent with this logic.

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112. OXFORD MANUAL OF THE LAWS OF WAR ON LAND preface (1880), *available at* http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument.

113. It is the policy of the United States that all "[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." U.S. DEP'T OF DEF., DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (2006).

114. Int'l Committee of the Red Cross, Customary International Humanitarian Law, Mar. 2005, rule 70, *available at* http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70 [hereinafter Rule 70] ("The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited."); OXFORD MANUAL OF THE LAWS OF WAR ON LAND, *supra* note 112, art. 9(a) ("It is forbidden [t]o employ arms, projectiles, or materials of any kind calculated to cause superfluous suffering, or to aggravate wounds ....").

115. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 (stating as its object the barring of the "employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable").

Another example is the law of military objective. While there may be definitional uncertainty on the fringes of the rule when it is operationally applied, the underlying premise is militarily sound: the application of combat power should be limited only to those persons, places, or things that contribute to the achievement of operational objectives. This rule is consistent with the logic that a resource-conscience commander should instinctively avoid wasting resources on targets of no operational or tactical significance.

This general symmetry is unsurprising considering that the contemporary LOAC has been historically informed by the reasoned judgments of battlefield veterans and not in a vacuum. This symmetry is also a critical component in enhancing compliance with the law. Because armed forces will be primarily responsible for effective implementation of the law, implementation will invariably be facilitated where the dictates of the law comport with the logic of the profession-of-arms.

2. What is the relationship between targets and "effects," and between targets and the LOAC definition of military objective?

In general terms, targets are those persons, places, or things made the object of attack by a military force.[116] Targets can include virtually any person, object, or place in the battle space. While pursuant to the LOAC many persons, places, or things are presumed not to be targetable,[117] virtually no presumption of immunity is conclusive. Even civilians can become lawful objects of attack by virtue of their direct participation in hostilities.[118] Likewise, the LOAC permits the targeting of presumptively immune places, such as hospitals, when the enemy is using those places for hostile (unlawful) purposes.[119]

The principle of distinction, which requires belligerents to distinguish between lawful objects of attack and civilians and civilian property, is a basic principle of the LOAC.[120] This principle is derived from the concept of military necessity, which permits the infliction of death and destruction only to the extent necessary to bring about the prompt submission of enemy forces.[121] Because the law presumes that the deliberate infliction of death or destruction to civilians or civilian property does not contribute to this objective, belligerents are obligated to refrain from making civilians or civilian property the object of attack.

The LOAC defines those targets that may be lawfully attacked through the rule of military objective and the prohibition on indiscriminate attacks.[122] Commanders

116. For a full definition and discussion of targets and the targeting process, see *supra* Part III.A.

117. *See, e.g.*, Additional Protocol I, *supra* note 15, arts. 50(1), 51(1) (stating that the civilian population "shall enjoy general protection against dangers arising from military operations" and that "[i]n case of doubt whether a person is a civilian, that person shall be considered a civilian").

118. *Id.* art. 51(3).

119. *Id.* art. 52(2)–(3).

120. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 11–12.

121. *Id.* at 10–11.

122. Additional Protocol I, *supra* note 15, arts. 51(4), 52(2). *See generally* OPERATIONAL LAW HANDBOOK, *supra* note 18, at 10–12, 19–20 (discussing the law of war limitations on military objectives and military necessity); INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DESKBOOK 131–43 (2011) [hereinafter LAW OF WAR DESKBOOK] (explaining and analyzing Additional Protocol I articles 51 and 52).

are obligated to select only lawful targets and to engage those targets in a manner that comports with the prohibition against indiscriminate attacks. This does not, however, mean that the knowing infliction of harm on civilians or civilian property renders an attack on a target unlawful. Instead, it is the rule of military objective that provides the prima facie standard for determining when a target is lawful. The knowing but unavoidable harm to civilians or civilian property is considered as a second level of analysis in order to determine whether the attack will be indiscriminate and therefore unlawful.[123] This assessment process occurs within the targeting process.[124]

In order to facilitate compliance with this basic principle of distinction, the 1977 Additional Protocol I to the Geneva Conventions of 1949 (Additional Protocol I) explicitly defines what qualifies as a military objective (those people, places, and things that may be made the lawful objects of attack).[125] The first component of this definition is derived from Article 51, which provides that the "civilian population as such, as well as individual civilians, shall not be the object of attack."[126] Because individuals entitled to status as prisoners of war upon capture are excluded from the definition of "civilian" (with the exception of civilians who accompany the armed forces in the field), these "combatants" are by implication always lawful objects of attack.[127] In contrast, Additional Protocol I does not provide a comprehensive definition of places and/or things that qualify as lawful objects of attack. This was responsive to the inevitable variables of any military action, which make it impossible to establish an exhaustive list of places and things that so qualify.[128] Instead, Additional Protocol I provides a framework for assessing each proposed target to determine if it so qualifies. That rule is Article 52, which provides "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[129]

Accordingly, determining whether places or things qualify as lawful objects of attack requires a case-by-case analysis based on the mission, enemy, troops available, terrain, time, and presence of civilians. A central component of this analysis is the complementary rule established in Article 51, which provides that "[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede

123. *See* OPERATIONAL LAW HANDBOOK, *supra* note 18, at 12 (discussing the principle of proportionality); LAW OF WAR DESKBOOK, *supra* note 122, at 140–41 ("The question is whether such death, injury, and destruction are excessive in relation to the military advantage; not whether any death, injury or destruction will occur.").

124. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 12.

125. Additional Protocol I, *supra* note 15, arts. 51–52.

126. *Id.* art. 51(2).

127. *See* GPW, *supra* note 111, art. 4 (defining prisoners of war); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC] (defining persons protected by the convention).

128. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 52 (1987) [hereinafter Additional Protocol I Commentary].

129. Additional Protocol I, *supra* note 15, art. 52.

military operations."[130] Pursuant to this rule, the presence of civilians in or around what qualifies as a military objective does not "immunize" the thing or area from attack. Instead, the operational decision-maker is obligated to conduct a secondary analysis of the legality of the attack based on the prohibition against engaging in indiscriminate attacks. This requires assessment of whether the anticipated harm to civilians or civilian property will be excessive in relation to the concrete and direct military advantage anticipated (commonly referred to as proportionality analysis and discussed in greater detail below).

Perhaps the three most important aspects of the military objective "test" are contained in the prong of the rule limiting attacks to objects "whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[131] First, it is clear that the law recognizes that the desired effect of an attack need not be total destruction. This is consistent with principles of military operations. Commanders employ combat power to achieve desired effects, and these effects often do not require total destruction or capture of an enemy capability. For example, a doctrinal mission employing indirect fire assets serves the purpose of not only target destruction, but also disruption, harassment, and degradation. Another example would involve the use of a minefield to deny access or egress to an enemy. If the use of the mines never results in the destruction of an enemy asset, the effect may be achieved nonetheless by depriving the enemy of a certain area.

Second, operational judgments must be made (and ultimately critiqued) based on the situation prevailing at the time of the decision. The purpose of this qualification is to prevent the "slippery slope" that would exist if commanders could speculate on the potential future value of proposed targets. This does not, of course, mean that anticipated value is not permissible. However, a commander must have some basis in fact to support the conclusion that a possible future use of a place or thing renders it as a present military objective.

Third, the advantage gained by targeting a place or thing must be "definite." Again, the purpose of this qualifier is to prevent unfounded speculation or conjecture of the value that targeting a place or thing would produce.[132] However, no commander can know with absolute certainty the value to be gained from attacking a target. What the "definite" qualifier is intended to prevent is general speculation on some attenuated value of target engagement.[133] So long as the commander acts with a good-faith belief that the target engagement will produce a tangible operational or tactical advantage for his force, the qualifier is satisfied.

The second and third components of the military objective test are further examples of the symmetry between the LOAC and military logic. No commander should waste resources on targets with purely speculative value. Accordingly, sound operational judgments should be consistent with these aspects of the military objective test.

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130. *Id.* art. 51(7).

131. *Id.* art. 52(2).

132. *See* Additional Protocol I Commentary, *supra* note 128, art. 52, para. 2024 ("[I]t is not legitimate to launch an attack which only offers potential or indeterminate advantages. Those ordering or executing the attack must have sufficient information . . . .").

133. *Id.*

3. What is the relationship between the LOAC principle of distinction, the definition of military objective, and the effect of an opponent locating military objectives among or in proximity to civilians or civilian objects?

It is clear that military objectives may be lawfully targeted and that civilians may not. The principle of distinction establishes this axiom. This principle, which is at the core of the regulation of methods and means of warfare, requires that belligerents must at all times distinguish between the lawful objects of attack and all other persons, places, and things that do not qualify as such.[134] As discussed above, the rule of military objective implements this principle.

Compliance with the principle of distinction becomes most difficult when lawful military objectives are comingled with civilians or civilian property. While the LOAC imposes an obligation on belligerents to take "constant care . . . to spare the civilian population, civilians and civilian objects,"[135] it is clear from both historical practice and the structure of Additional Protocol I that such comingling is virtually inevitable. Extending the obligation to mitigate risk to civilians by a prohibition against attacks on military objectives whenever civilians or civilian objects are in close proximity to these objectives would be unworkable for a number of reasons. First, the rule would invite violation due to the reality that belligerents have historically refused to consider military objectives immune from attack due to the proximity of civilians or civilian property. Second, belligerents would be provided an incentive to exacerbate the risk to civilians or civilian objects by deliberately comingling them with military objectives in an effort to immunize those objectives.

In response to the reality of a comingled battle space, the drafters of Additional Protocol I adopted a compromise approach. Belligerents bear a constant obligation to mitigate the risk of harm to civilians and civilian property.[136] However, Article 51 explicitly provides that the presence of civilians or civilian objects in the proximity of military objectives does not immunize those objectives from attack.[137] Of course, this does not permit the deliberate targeting of civilians or civilian objects, but it does permit attacks on lawful military objectives with knowledge that the attacks will likely cause harm to civilians or civilian property. Thus, the commander does not violate the LOAC when he orders an attack with knowledge that civilians will likely become casualties of the attack, so long as he does not act with the purpose (conscious objective) to cause such casualties.

An equally critical aspect of this balance is that the obligation to "take constant care" to spare civilians and civilian objects from the harmful effects of hostilities requires belligerents to make prima facie good-faith efforts *not* to comingle military objectives with civilians or civilian property.[138] This obligation is obviously an "endeavor" obligation, and is therefore not absolute. However, a belligerent who deliberately locates military objectives in proximity to civilians or civilian objects

134. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 11.
135. Additional Protocol I, *supra* note 15, art. 57(1).
136. *Id.*
137. *Id.* art. 51(7).
138. *Id.* art. 57.

shares responsibility for the harm caused to civilians resulting from an attack on those military objectives.[139]

The final aspect of this equation is the relationship between comingled civilians and the proportionality rule. All belligerents are prohibited from attempting to immunize a military objective by deliberately locating the objective in the vicinity of civilians or civilian property. However, even deliberate comingling (in violation of the law) does not release the attacking commander from the obligation to consider whether the harm to the civilians or civilian property would violate the proportionality prong of the prohibition against indiscriminate attacks.[140] As a result, when improper, comingling of civilians with military objectives provides a potential residual immunizing effect. This is because it will result in a prohibition against attacking the military objective if the harm to civilians is expected to be excessive in relation to the concrete and direct military advantage anticipated. However, excluding such situations from the scope of the proportionality rule would be both unworkable (due to an attacking commander's inability to determine whether the comingling was deliberate, reckless, negligent, or innocent) and would subject civilians to the manipulation of commanders acting in bad faith.

In summary, when a commander identifies a lawful military objective that is comingled with civilians or civilian property, the commander is permitted to attack that objective even with knowledge that the attack will cause collateral damage or incidental injury to civilians or civilian property. The only limitation on this permission is that the commander must refrain from the attack if he determines that the collateral damage or incidental injury will be excessive in relation to the concrete and direct advantage anticipated from the attack.

4. How does the LOAC principle of proportionality seek to protect civilians from the effects of attacks during the execution of combat operations?

As noted above, the presence of civilians and civilian property in areas of armed hostilities has produced an ever-increasing risk that the effects of combat operations will extend beyond lawful military objectives and impact these civilians and their property. Because of this reality, it is universally recognized that the principle of military objective is insufficient to provide adequate protection for civilians from the harmful effects of hostilities. During the twentieth century, hundreds of thousands of civilians became victims of war not as the result of a decision to deliberately target them, but as the result of the collateral effects of attacks on lawful military objectives.[141]

Responding to this reality, the drafters of Additional Protocol I provided the first express prohibition against launching indiscriminate attacks. Article 51 provides a three-part definition of indiscriminate attacks: those that employ methods or means of warfare that cannot be controlled; those that treat a number of military objectives in an area of civilian population as one general objective; and those in which the collateral damage or incidental injury will be *excessive* in relation to the

139. *Id.* arts. 57(7), 58; Additional Protocol I Commentary, *supra* note 128, art. 58, paras. 2240, 2244.

140. Additional Protocol I, *supra* note 15, arts. 51(5)(b), 51(8).

141. *See* Additional Protocol I Commentary, *supra* note 128, art. 51, para. 1968 (describing World War II carpet bombing).

concrete and direct military advantage anticipated from attacking a lawful military objective.[142]

This last prong of the indiscriminate attack definition is routinely referred to as the "proportionality" rule, or the "principle of proportionality." It is universally accepted as a customary norm of the *jus in bello*, applicable to all armed conflicts. However, the term "proportionality" is somewhat misleading, for an attack does not become indiscriminate when the collateral damage or incidental injury is slightly greater than the military advantage anticipated (what is suggested by the term "disproportionate") but only when those effects are *excessive*.[143]

Understanding of this rule is facilitated by analogy to the common law concept of malice in relation to the crime of murder. The crime of murder is contingent on proof that a defendant killed with malice.[144] Malice was originally understood as a willful or deliberate act.[145] However, the common law evolved to define malice as either express or implied.[146] Express malice is established when a defendant acts deliberately (with the conscious objective to kill) or with knowledge of substantial certainty that his act will cause a death.[147] Implied malice, however, is established when the defendant acts without intent to kill but creates a risk to human life that is so unjustified that it manifests a wanton disregard for the value of human life.[148] This wanton disregard is sufficient to impute malice to the defendant.[149]

While this equation is not totally apposite to targeting decisions, there is a useful analogy. Violation of the principle of military objective is analogous to acting with express malice, for the commander is deliberately (intentionally) causing harm to civilians or civilian property. A commander is not prohibited from attacking a lawful military objective with knowledge of substantial certainty that the attack will cause civilian casualties so long as there is no conscious objective to do so, so in this regard the analogy fails. However, just as the common law allows for the imputation of malice to a defendant who acts with no intent to kill when the defendant's actions manifest a wanton disregard for others as the result of the risk created, the proportionality rule imputes an improper purpose to an otherwise lawful attack based not on the commander's intent, but instead on the commander's disregard for the consequences of the risk created by the attack. When a commander launches such an attack with awareness that the unintended harm to civilians will be excessive in relation to the benefit of creating the risk (achieving the military objective), the law essentially imputes to the commander the intent to engage in an indiscriminate attack.

Because this rule is primarily regulatory and not punitive, it necessarily requires commanders to balance anticipated effects of an attack. The two critical components of this balance are the anticipated military advantage to be gained by attacking a lawful target, and the anticipated collateral damage and incidental injury to civilians

142. Additional Protocol I, *supra* note 15, art. 51(4)–(5).

143. *Id.* art. 51(5)(b).

144. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 543 (4th ed. 2006).

145. *Id.* at 547.

146. *Id.* at 544.

147. *Id.* at 548–49. *See generally id.* at 130 (discussing the meaning of intent in criminal law).

148. *Id.* at 552–54.

149. *Id.* at 554.

and civilian property. There are no established numerical equations or ratios for applying this rule, which is by its very nature METT-TC dependent on a case-by-case basis. METT-TC refers to considerations of Mission, Enemy, Terrain and weather, Troops and support available, Time available, and Civil considerations.[150] Any critique of application of this rule must be based on this reality and must therefore be made through the subjective perspective of the commander at the time the targeting decision was made. All facts and circumstances available to the commander, including the pressures of time and the proverbial "fog of war," must be considered when rendering an objective assessment of the validity of a targeting decision.

Ultimately, like virtually all other regulatory provisions of the LOAC, these rules are intended to reinforce the obligation of commanders to make decisions in good faith. No commander should endanger civilians when the military advantage gained by doing so is so insignificant as to render the harm to civilians excessive. Doing so is both an act of bad faith and operationally illogical (for it presupposes a conclusion that the advantage anticipated by the attack is negligible). What a violation of this rule reveals, and accordingly requires, is the conclusion that although a commander did not act with the purpose to harm civilians, his disregard for the effects of his attack in relation to the advantage he anticipates justifies an imputation of invalidity in his decision-making process. Thus, while commanders need not always be correct in their judgments, they must always act reasonably under all the circumstances.

5. Does the LOAC impose a per se prohibition against indirect fires in populated areas?

There are very few per se LOAC prohibitions related to the use of weapons and weapon systems during armed conflict. Some of these have taken the form of treaties that establish an outright prohibition against the use of certain weapons, such as the prohibition against the use of chemical, biological, and bacteriological weapons.[151] Other prohibitions impose contextual limitations on the use of weapons or methods of warfare, such as the prohibition of bombarding undefended population areas or the use of booby traps in certain contexts.[152]

There is no per se prohibition against the use of artillery to attack lawful military objectives in populated areas. Instead, the legality of the use of this means of warfare, like the use of almost all means of warfare, is determined by application of the broad principles that regulate targeting (those discussed previously). Accordingly, the legality of use of artillery in such areas is dependent on consideration of a variety of factors related to the operational necessity for the use, the availability of alternate methods and means of warfare to achieve the military purpose, the enemy situation, and the risk to civilians. METT-TC is used in U.S. practice to indicate the relevance of these variables in all operational decision

150. FM 3-0, *supra* note 11, para. 6-52.

151. Chemical Weapons Convention art. 1, Jan. 13, 1993, 1974 U.N.T.S. 45; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction art. 1, 1975, 1015 U.N.T.S. 163.

152. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) arts. 3–4, 1996, 1342 U.N.T.S. 168.

making, and is a key component in assessing the propriety of use of artillery in populated areas.[153]

Consideration of the METT-TC factors provides the contextual background for operational decisions. While "law" is not an explicit element of this analysis, the requirement to consider the civilian population and the enemy situation implicitly invokes the LOAC in assessing the propriety of targeting decisions. An example of the multiple factors a commander must assess in deciding whether to use artillery to achieve an operational effect can be found in the U.S. Army Field Manual 6-20:

> Any variable that could affect the mission is a factor. Before the estimate is started, all relevant information must be collected from all available sources. Once this information has been assembled and the factors that could affect the plan have been identified, they should be listed and arranged in priority.
>
> Examples of the factors that may be considered are as follows:
>
> - The task organization of subordinate forces and their missions.
> - The availability of field artillery resources, including cannons, multiple launch rocket systems (MLRSs), missiles, ammunition (conventional, nuclear, and chemical), and target acquisition assets.
> - The availability of other fire support resources, including mortars, NGF [naval gunfire], tactical air support, and Army aviation support. Also included are EW [electronic warfare] and other intelligence-controlled surveillance assets.
> - In the attack, the enemy dispositions (including frontage and depth), the degree of protection afforded the enemy, objectives for subordinate forces or units, the number of phases, and the likely frontage and depth of the assault. These will affect the allocation of fire support resources to subordinate units.
> - In the defense, the mission of the security force, the frontage and depth of the MBA [main battle area], the contingencies for counterattack, and considerations for deep and rear [operations].
> - The mobility of the supporting artillery and its speed of movement to contact and withdrawal.
> - In light forces, the force antiarmor plan.
> - Courses open to the enemy artillery commander, especially his most probable course of action. These are derived from the intelligence estimate and knowledge of enemy artillery doctrine. Consideration of this factor results in—
>   - The probable enemy artillery plan.
>   - Enemy artillery vulnerabilities.
>   - Enemy nuclear and chemical capability and posture.

153. *See* FM 3-0, *supra* note 11, para. 1-45 (explaining how leaders use METT-TC to analyze each mission they receive).

- Any information requirements on enemy that have significant influence on the tasking of weapons-locating sensors.

- The allocation of resources, weapons, and munitions for counter fire.

- Measures to reduce the vulnerability of our force.

- The recommended counter fire priorities for each phase of the battle (by the designation of critical friendly zones and enemy weapon systems).

- The enemy EW situation.

- The identification of high-payoff targets (derived from target value analysis [TVA] and IPB [intelligence preparation of the battlefield]).

- The commander's information requirements (derived from the intelligence estimate).

- The availability and condition of roads, trails, and likely position areas. This leads to the coordination of movement and position areas with the operations staff.

- Ammunition consumption factors (type and quantity), pre-positioning requirements, and priority of combat service support.

- The effects of survey and met requirements on the ability to guarantee timely and accurate fire support (to include weapon and target acquisition assets).

- The reliability and range of communications.

- The time required for positioning and technical preparation to engage targets.

- The time to be ready to support the operation.[154]

Use of artillery in populated areas should be dictated by assessment of these factors, and even when the acronym is not explicitly used by a commander (for example, in an army that does not tend to follow U.S. or NATO doctrine), these considerations should inevitably be part of the targeting analysis. The commander first must determine how the mission should be tactically executed, which will drive selection of targets and dictate the effects that must be achieved for each target. The commander then must assess the enemy situation to guide analysis of which component of his power will be most effective in achieving the desired effects. The commander will then assess the assets available that are capable of achieving the effects, the effectiveness of each asset for this purpose, other demands on each asset, etc. This is often called "weaponeering" and involves the process of selecting the

154. U.S. DEP'T OF ARMY, FIELD MANUAL 6-20, FIRE SUPPORT IN THE AIRLAND BATTLE 3-10 to -12 (1988) [hereinafter FM 6-20].

best asset for each proposed target.[155] The commander must then consider the element of time, for time might make some assets that are potentially effective in an attack non-responsive to the operational need.

Finally, the commander must assess the impact of the targeting decision on the civilian population and civilian property. First, the commander must ensure the desired effect can be achieved without violating the prohibition against indiscriminate attacks. If the commander determines that artillery can be employed in a manner that is not indiscriminate, then, so long as the object of attack is lawful, the commander must then consider whether the potential harm to civilians creates an unacceptable policy risk even if lawful. It is not uncommon in contemporary operations for commanders to refrain from launching lawful attacks based on policy-driven concerns (it simply might not be worth the cost of having to defend the legality of the attack in the public realm, or a commander may not want to alienate the civilian population by causing casualties that, while lawful, would still be perceived as unjustified). However, this consideration is directly linked to the first element of the analysis—the mission—because the mission will dictate the degree of risk of public condemnation of civilian alienation a commander is willing to assume.

While the contemporary practice of U.S. and NATO forces is to place ROE controls on the use of artillery in populated areas, it is simply improper to characterize these controls as indications of per se prohibitions against such use. Indeed, if this were the case, no ROE constraint would be necessary, for the restraint would be redundant with existing legal prohibition. Furthermore, almost all such ROE controls permit the use of artillery fires under certain circumstances or when authorized by a certain level of command, which is only permissible because (and when) such use is consistent with existing legal standards. For example, a prohibition against the use of unobserved indirect fires in populated areas will often provide an exception for "forces in contact" or permit such fires when authorized by "division command or higher."[156] The variety of control measures is not relevant. What is relevant is that by providing exceptions to these policy-based constraints, ROE indicate that such fires are not prohibited per se by the LOAC, but are instead dictated by METT-TC considerations.

If a commander decides to employ artillery against military objectives in civilian-populated areas, the commander must act consistently with the obligation to endeavor to minimize the risk to civilians. This will often involve considering the use of artillery observers or "spotters" to better control the effects of the attack. This is referred to as "observed" indirect fires, which obviously mitigates the risk of collateral damage or incidental injury to civilians.[157] Unobserved indirect fires use intelligence indicating the location of proposed targets and indirect fire direction calculations to maximize the probability of achieving the desired effect.[158] Observed

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155. JP 1-02, *supra* note 7, at 387.

156. *See* CTR. FOR LAW AND MILITARY OPERATIONS, *supra* note 93, at B-15-18 (providing a sample ROE with language regarding exceptions for the use of unobserved indirect fires in populated areas).

157. FM 6-20, *supra* note 154, at 2-8.

158. *Id.* at 2-8 to -9 (There are two categories of fires: observed and unobserved. Adjusting and correcting artillery fires by direct observation increases the effectiveness of artillery. Fires may be delivered on unobserved targets when the relative location of such targets with respect to the unit firing can be determined.). See FM 6-40 for a detailed description of firing methods. U.S. DEP'T OF ARMY, FIELD MANUAL 6-40, TACTICS, TECHNIQUES, AND PROCEDURES FOR FIELD ARTILLERY MANUAL

fires are therefore also operationally preferable because they enhance the effectiveness of the artillery attack.

However, it is not always possible to use observed indirect fires. Observation requires getting personnel into a position where they can have "eyes on" the target. Because one of the key advantages of artillery is the capability to engage in long range targeting, commanders might not be willing or even able to place friendly spotters in close proximity to long range targets, especially those in areas under significant enemy control. Ultimately, commanders will have to engage in a cost-benefit analysis to decide whether placing artillery spotters in a position enabling observed fires is the best operational decision.

A per se prohibition on unobserved fires would be wholly unworkable for two reasons. First, it would encourage belligerents to put their most important targets in populated areas, thereby increasing the danger to the civilian population. Second, it would require attacking commanders to either ignore such targets (giving an enemy a reward for comingling them), or resorting to ground assaults to attack such targets. Because ground assaults in populated areas are considered the most complex and dangerous type of ground operations, this will place commanders in an untenable position of having to assume maximum risk to friendly forces whenever an enemy chose to abuse the law by comingling important targets in civilian-populated areas.

Accordingly, there is no prohibition against using artillery, either observed or unobserved, against lawful military objectives in civilian-populated areas. The legality of such use must be assessed on a case-by-case basis that focuses on METT-TC.

6. Does a commander have an obligation to select a method or means of warfare that poses the least risk to the civilian population? If so, what is the impact of risk to his own forces when in the selection process?

Additional Protocol I's effort to mitigate the risk to civilians in areas of hostilities includes a rule that imposes on commanders planning an attack the obligation to place a high priority on this mitigation when selecting how they will conduct attacks.[159] This rule, contained in Article 57, applies whenever a commander has the option to select from more than one military objective or more than one method or means of attack to achieve a tactical objective.[160] When this is the case, the law requires a commander to select the objective or the method or means of warfare that poses the least risk to the civilian population.[161] However, this rule includes an important and pragmatic qualifier: the alternate options must be equally effective for achieving the commander's purpose.[162] In essence, the rule is that "when all options are equal in anticipated effect, select the option that creates the least risk to the civilian population."

It is critical, however, to understand what the concept of "equality" means in assessing multiple options. It is not merely an effects-based analysis. Instead, a commander may legitimately consider both resource availability and risk to friendly

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CANNON GUNNERY (1996).

159. Additional Protocol I, *supra* note 15, art. 57.

160. *Id.*

161. *Id.*

162. *Id.*

forces when assessing equality.[163] For example, a commander is not automatically obligated to use precision guided munitions (PGM) in lieu of a "dumb" round when attacking an area in which civilians are located. While the PGM will almost certainly be the option that reduces the risk to the civilian population, the commander is entitled to consider the supply of PGMs compared to dumb munitions, other military objectives that might require the use of the limited number of PGMs, and resupply rates. If the commander determines that it is operationally necessary to "husband" the PGMs, then the option to use PGMs is not "equal" to the option to use the dumb rounds.

One area of controversy in application of this rule is the effect of risk to friendly forces when conducting equality analysis. Most experts seem to agree that a commander is entitled (some would argue obligated) to consider the comparative risk to friendly forces as a component of this analysis.[164] Accordingly, the commander is not obligated to select the method or means of warfare that poses the least risk of harmful effects to civilians when that choice increases the risk to his own forces. For example, a commander might have a need to destroy or disable an enemy command post located in a populated area. When assessing the possible options to achieve this objective, the commander may have a choice between indirect artillery fires or a special operations assault on the objective. Because the special operations assault will reduce the risk to civilians as the result of the more precise engagement probability, from an effects standpoint it would appear to be the option the commander is obligated to adopt. However, because use of that option will pose a substantially greater risk of casualties to his forces, that option is not equal to the use of indirect fires within the meaning of the rule.

Of course, commanders may always choose to assume greater risk in the interest of minimizing harm to civilians as a matter of policy because the benefit is perceived as outweighing the risk to friendly forces (which is often a motivating factor in the imposition of constraints within rules of engagement that are more restrictive than required by the LOAC). However, such choices are not legally mandated.

a. Should commanders seek to avoid ground combat operations in civilian population centers?

It is a maxim of operational art that urban warfare[165] should be avoided whenever feasible. This is because engaging an enemy in built-up or urban terrain is considered among the most difficult combat situations a commander may encounter. Such operations cede to the defender the natural advantage provided by the use of the urban terrain for cover, concealment, and overall tactical advantage. The built-up environment degrades the effectiveness of fires and maneuver. It also creates an

163. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 140–43 (2d ed. 2010).

164. *Id.* at 141–43.

165. FIBUA (fighting in built-up areas) is the current doctrinal term for conducting ground combat operations in built-up or urban areas. This type of operation is also often referred to as MOUT (military operations in urban terrain). U.S. DEP'T OF ARMY, FIELD MANUAL 3-21.10, THE INFANTRY RIFLE COMPANY Glossary-2 (2006) (defining FIBUA); FM 6-20, *supra* note 154, Glossary-7 (defining MOUT).

extremely high risk to civilians in area of hostilities that adds an undesired element of uncertainty into the target engagement process.

History is replete with examples from which this maxim is derived. From Stalingrad to Hue to Fallujah, urban areas have historically been considered the most undesired terrain on which to engage an enemy with ground combat power.[166] Because of this, military doctrine indicates that whenever feasible, commanders should seek to isolate and bypass enemy defensive positions in built-up areas.[167]

Unfortunately, there is an inverse relationship between built-up areas and defensive operations. Because of the difficulty of dislodging forces from such areas, a defending commander obtains a force multiplication benefit from emplacing positions in them.

Bypassing built-up areas is not always feasible and, when absolutely necessary, assault into such areas may have to occur. However, if alternatives to ground assault are viable, a commander would be derelict in not considering and ultimately employing them. For example, a commander may choose to use indirect fire assets to disrupt enemy forces in a built-up area during bypass operations, or to fix them in the area so that they cannot endanger friendly forces during the bypass.

The danger associated with ground assaults into built-up areas would also be an important METT-TC consideration in deciding how to address the presence of enemy forces in such an area.

b. Does the LOAC prohibit the use of certain weapons against targets in areas of civilian population?

Other than weapon systems that are the subject of express treaty prohibitions (such as chemical weapons, bacteriological weapons, air-delivered incendiary weapons, etc.), all weapons are potentially lawfully used in populated areas, and all weapons are potentially unlawful for such use. Whether use of a weapon in such an area is lawful is contingent on two primary rules. First, the weapons must be used against a lawful military objective; using even the most precise engagement capability against a non-military objective is unlawful. Second, the weapon itself, or its employment, must not be indiscriminate.

The prohibition against indiscriminate attacks codified in Article 51 of Additional Protocol I includes both weapon types (means) and weapon employment (methods).[168] Use of a weapon that cannot be controlled once fired is treated as indiscriminate because the weapon is not subject to sufficient control to comply with the distinction obligation. Weapons that fall into this category would include gas or chemical weapons or long-range missiles that can be directed against a populated area but not against any target contained therein (such as the Iraqi SCUD missile attacks against Israel and Saudi Arabia in the 1991 Persian Gulf War). Most modern weapons however, including most tube and rocket artillery, are subject to enough fire direction control as to not be considered to fall within this category.

166. *See* FM 3-0, *supra* note 11, para. 1-18 (recognizing that adversaries will seek urban environments to offset U.S. advantages).

167. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-06, JOINT URBAN OPERATIONS I-10 (2009).

168. Additional Protocol I, *supra* note 15, art. 51.

Any weapon can also be employed in a manner that is inherently indiscriminate. This is reflected in the two additional definitions of indiscriminate attack in Article 51. The first involves treating a number of distinct military objectives in a populated area as one large objective for purposes of targeting.[169] When a commander employs a weapon system to attack a "lumped together" series of distinct targets (such as carpet bombing a city in order to destroy dispersed military objectives within the city), that employment is indiscriminate and is prohibited. The second is the proportionality rule discussed above. When a commander employs even a precise weapon system against a lawful military objective with the anticipation that the collateral damage and incidental injury to civilians or civilian property will be excessive in relation to the concrete and direct military advantage the commander expects to gain from the attack, the attack is treated as indiscriminate and therefore unlawful.[170]

Because there is no per se prohibition against tube or rocket artillery, direct or indirect artillery fires, observed or unobserved indirect artillery fires, or conventional (non-chemical or bacteriological) artillery or rocket munitions, use of these capabilities in populated areas is subject to a case-by-case legality assessment based on the foregoing rules.

c. Does the LOAC contain a per se prohibition against using rocket systems to engage military objectives within urban areas during offensive military operations?

Consistent with the foregoing discussion, the LOAC imposes no per se prohibition against using rocket artillery (indirect fire systems that employ rockets, such as the U.S. Multiple Launch Rocket System (MLRS) or the Soviet-era 122 Multiple Barrel Rocket Launcher used by Croatian forces against Knin) to engage lawful military objectives in a civilian-populated area. As with almost all other weapon systems, the legality of such use would be contingent on METT-TC analysis in relation to the LOAC prohibition against engaging in indiscriminate attacks.

Once a commander determines that a military objective within a populated area needs to be attacked, the commander must then determine the effects that must be achieved. This "effects-based analysis" should drive the choice between available assets to engage the objective. If the commander determines that long-range strike capability is the best or only viable option, then artillery will become a prime candidate for target engagement.

Artillery assets are generally divided between cannon and rocket. Cannon artillery uses single-round munitions (such as howitzer or mortar rounds). Rocket artillery fires rocket-propelled munitions, often in salvos of multiple rockets (although it should be noted that tube artillery can be delivered in salvos from multiple individual artillery assets). According to U.S. Army Field Manual 6-20, *Fire Support in the Airland Battle*:

> *Indirect Fire.* The projectile, rocket, missile, and bomb are the weapons of indirect-fire systems. Indirect fire can cause casualties to troops, inhibit

169. *Id.* art. 51(5)(a).
170. *Id.* art. 51(5)(b).

> mobility, suppress or neutralize weapon systems, damage equipment and installations, and demoralize the enemy. Most casualties to troops in an indirect-fire attack are caused by the initial rounds. Best results are achieved by a short engagement at a high rate from as many weapons as possible.
>
> *Effects of Fire.* A commander will decide what effect fire support must have on a particular target. There are three types of fire: destruction, neutralization, and suppression.[171]

Rocket artillery is generally preferred for area targets. However, it is also an ideal asset for use in disruption missions. For example, rocket artillery is often a preferred means to disrupt enemy air defense assets or command and control capabilities. Furthermore, the value of rocket artillery in relation to cannon artillery will often turn on multiple factors in addition to the desired effect, to include the vulnerability of enemy assets to both types of attack, degree of certainty as to location of enemy assets, the collateral effects of both types of attack, and other operational demands on these assets.[172]

Any commander considering use of rocket artillery in a civilian-populated area would be required to assess the impact of anticipated collateral damage and incidental injury. However, it is impermissibly overbroad to assert that use of this asset would always be the most indiscriminate option of attack in comparison to cannon artillery. Factors such as the location of the civilian population (indoors or outdoors), the timing of the attack, the protection afforded to civilians by hardened structures, and the potential comparative impact of cannon versus rocket rounds would all be relevant in making this determination. It is certainly conceivable that based on all these (and other METT-TC) considerations a commander could make a good-faith determination that rocket artillery is better suited to achieve a desired effect within the framework of the LOAC than cannon artillery.

7. What importance does evidence of good faith play in attempting to impute improper motives to a commander when critiquing a given decision-making process?

The LOAC rests ultimately on a foundation of good faith. Virtually any LOAC rule can be circumvented by a commander who is not committed to good-faith compliance with the law. When assessing criminal responsibility for LOAC violations, it should be axiomatic that an overall record of good-faith application is probative circumstantial evidence in relation to determining whether the decision under judicial scrutiny violates the law.

Transforming the obligations related to the application of combat power to criminal sanction is a complex process. The law regulating such application provides operational leaders (the term "commander" denotes such leaders, although the proscriptions of the law could also reach decision-makers in a non-command position) a framework to guide their decision-making process. Reliance on these

171. FM 6-20, *supra* note 154, at 2-8.

172. JOHN J. MCGRATH, FIRE FOR EFFECT: FIELD ARTILLERY AND CLOSE AIR SUPPORT IN THE U.S. ARMY 133–35 (2010), *available at* http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/mcgrath_fire.pdf (describing the modernization of U.S. artillery and the improved capabilities of the MLRS).

rules as the source of criminal sanction requires a retrospective critique of this decision-making process. This involves the classic "subjective/objective" test: an objective standard of assessment is applied by analyzing decisions through the subjective perspective of the defendant. This is essential to ensure that commanders are not held liable based on a retrospective assessment of facts and circumstances. It is also an established principle of war crimes liability, often referred to as the "Rendulic Rule" in reference to the war crimes prosecution of a German commander for engaging in a "scorched earth" campaign in Norway during a tactical retreat at the end of World War II.[173]

Lothar Rendulic was ultimately acquitted by the Nuremberg war crimes tribunal of the charge of wanton devastation for his "scorched earth" campaign.[174] This precedent stands for the proposition that when subjecting a commander's judgment to criminal critique it is necessary to consider the situation through the perspective of that commander at the time the judgment was made.[175]

Assessing criminal responsibility for operational decisions also invariably involves assessing the state of mind of the defendant. Because direct evidence of state of mind is rarely available, it becomes essential to rely on circumstantial evidence to infer a defendant's state of mind related to a given decision. For decisions to employ combat power, this evidence often takes the form of effects from such employment. These effects are relied on to infer the defendant acted with a criminal state of mind. However, because operational effects can often support the alternate inference that a commander acted in good faith even if the assessment of potential consequences was erroneous, prior decisions by the commander should also be considered in the assessment process. In this regard, while not dispositive, a pattern of good-faith decision making by a commander could undermine the inference that an illicit effect was the result of a criminal state of mind.

This evidence is particularly useful in determining if a targeting decision violates the proportionality rule. That rule, which is a component of the prohibition against indiscriminate attack, prohibits any attack in which the anticipated incidental injury or collateral damage is excessive in relation to the concrete and direct military advantage anticipated. Using this rule as a basis for criminal responsibility requires the finder of fact to critique a command judgment based on effects of an attack and assessment of information available to the commander at the time of the attack. As will be discussed in more detail below, the essence of this inquiry is determining whether bad faith can be imputed to the commander as the result of what is in essence a reckless judgment producing harm to civilians and civilian property. In this regard, the criminal application of the proportionality rule almost inevitably will require the finder of fact to rely on actual effects of an attack as circumstantial evidence from which to infer the defendant's state of mind at the time of the decision. Accordingly, evidence of improper motive for creation of the risk should

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173. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 11 ("The circumstances justifying destruction of objects are those of military necessity, based upon information reasonably available to the commander at the time of his decision.").

174. *Id.*

175. United States v. List (The Hostage Case), 11 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, at 1230, 1297 (1948) ("The conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made.").

be highly probative in the imputation analysis, and therefore evidence of overall good-faith application of the law becomes probative to this motive analysis.

8. Does the LOAC permit a commander to assume subordinates will implement orders lawfully?

The responsibility of military commanders for the LOAC violations of subordinates is a complex and ever-evolving area of the law. The concept of "command responsibility" is a doctrine of criminal liability that emerged in the aftermath of World War II and continues to play a central role in contemporary war crimes prosecutions.[176]

Pursuant to this doctrine, as a general proposition a commander can be held criminally responsible for the LOAC violations of subordinates.[177] However, this liability is not "strict," but requires that the commander acted with some culpable state of mind.[178] Much of the debate related to application of this doctrine has focused on what level of proof is necessary to satisfy this mens rea element, particularly when liability is based not on what the commander knew, but what he "should have known."[179]

However, as the doctrine has evolved, some aspects have emerged that provide a degree of protection for military commanders. The most important of these is the principle that commanders are generally justified in relying on a presumption that subordinates will execute lawful orders in a lawful manner. This is an important qualifier to the scope of command liability, for it recognizes that it is impossible for commanders to monitor every action of every subordinate. Of course, such reliance would be invalid if the commander was on notice of some reason why subordinates would be inclined to disregard the law.[180] However, as the U.S. military tribunal noted in the High Command case after World War II:

> Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility.... A high commander cannot keep completely informed of the details of military operations of subordinates.... He has the right to assume that details entrusted to responsible subordinates will be legally executed.... There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of International Law would go far beyond the basic principles of criminal law as known to civilized nations.[181]

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176. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 35; GREEN, *supra* note 107, at 309–10; GARY D. SOLIS, THE LAW OF ARMED CONFLICT 382–91 (2010) (summarizing the development of command responsibility and the criminal liability it entails).

177. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 35.

178. *Id.*

179. *Id.*

180. *Id.* at 36.

181. 12 THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR

Accordingly, when a commander gives orders to subordinate units, it is neither necessary nor required that the orders explicitly direct subordinates to execute their missions in accordance with the LOAC. Such a direction is an implicit component of all orders. When a commander issues an order, therefore, he may justifiably presume that the subordinate leaders who receive the order will resolve any uncertainty as to the legality of the method of execution in favor of lawful conduct.

B. Use of Indirect Fires in Operation Storm

Operation Storm and General Gotovina's trial highlight the significance of developing an operationally sound understanding of how the LOAC regulates the application of combat power. As part of his offensive to capture the Krajina Serb capital of Knin, General Gotovina ordered the employment of cannon (howitzer) and rocket artillery against numerous targets in Knin.[182] These targets had been pre-selected based on intelligence analysis and ranged from barracks to headquarters buildings to the residence of the President of the Krajina.[183] General Gotovina obviously knew civilians and civilian property were at risk as a result of his use of fires against these targets. Nonetheless, he ordered execution of the attack plan as part of the broader mission to penetrate Serb defensive positions surrounding the city, exploit these penetrations, defeat Serb resistance, and force Serb forces to abandon their hold on the Krajina.

Unsurprisingly, the prosecution's position on why General Gotovina ordered the use of fires against targets in Knin was substantially different from that of the defense. For the prosecution, use of indirect fires in a city populated with Serbs provided critical evidence of General Gotovina's illicit intent to ethnically cleanse the region of the Serb civilian population;[184] for the defense, the use was a legitimate employment of combat power carefully conceived to set the conditions for success of the main effort: penetration and exploitation of improved defensive positions.[185]

Why is this a significant example of the complexity created by the intersection of LOAC regulation and operational art? Because like virtually any use of fires in a densely populated area—an almost inevitable aspect of future armed conflicts—the effects of Croat attacks provided evidence that *both* the prosecution and defense argued proved their respective cases. For the prosecution, the fact that the fires produced damage to civilian property and that Serb civilians fled the city demonstrated an illicit purpose.[186] For the defense, the fact that the fires produced exactly the type of command and control paralysis General Gotovina had intended, coupled with the fact that the vast majority of damage was inflicted on or in close proximity to lawful military objectives, undermined any reasonable allegation that

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CRIMINALS 76 (1949).

182. Prosecutor v. Gotovina, Judgement Volume I of II, *supra* note 34, paras. 1183–86.

183. *Id.* para. 1403.

184. *See* Prosecutor v. Gotovina, Prosecution's Public Redacted Final Trial Brief, *supra* note 8, para. 123 ("Gotovina planned, ordered and implemented . . . a shelling attack against the Krajina Serb population designed to drive out Krajina Serbs.").

185. Prosecutor v. Gotovina, Gotovina Defence Final Trial Brief, *supra* note 8, para. 9.

186. Prosecutor v. Gotovina, Prosecution's Public Redacted Final Trial Brief, *supra* note 8, paras. 9–14.

General Gotovina's intent was to terrorize the civilian population.[187] In fact, the defense asserted that, even though it had no burden to do so, it had proved by overwhelming evidence General Gotovina's good-faith compliance with the LOAC.[188]

Ultimately, the Trial Chamber's judgment adopted almost all of the defense's arguments. It found that there were numerous lawful enemy objectives located within the Knin;[189] it rejected the prosecution's theory that the LOAC imposes a per se prohibition against the use of indirect fires in populated areas—even unobserved indirect fires;[190] it rejected the prosecution's theory that the use of rocket artillery in a populated area is automatically indiscriminate;[191] it found that approximately 1,000 out of 1,057 artillery round impacted either a lawful military objective or an area within a reasonable range of a lawful military objective.[192] However, based on the approximate 57 impacts that it did not attribute to lawful objects of attack and its conclusion that attacking President Milan Martic's residence with knowledge that civilians *might* be harmed by the attack violated the LOAC proportionality principle, the Trial Chamber found that General Gotovina's overall intent was to place the entire city under artillery attack, and therefore the attack violated the LOAC.[193]

The finding of an illegal attack on Knin is a major aspect of General Gotovina's currently pending appeal.[194] The ultimate resolution of this appeal will have a potentially profound impact on the law of targeting precisely because the case involved the type of factual and operational situation so common in modern warfare (as opposed to an extreme case of blatant deliberate targeting of civilian populations). Both NATO's air campaign against Libya and the U.S. practice of using armed drones to attack terrorist targets of opportunity in the border regions of Pakistan involve many of the same complex legal and operational issues reflected in the *Gotovina* judgment.

Several aspects of the attack on Knin illustrate why it is so important to consider operational art and the situation confronted by a commander to understand how the LOAC influences decision-making. First, is it legitimate to use fires against targets in populated areas with full knowledge that destroying the target is virtually impossible? In Operation Storm, this was the situation with various targets attacked with indirect fires—many of which were hardened structures in Knin.[195] In the abstract, risking civilian injuries without the ability to destroy a target may seem inherently invalid, a position asserted by the Prosecutor. However, unless the intended effect is considered, and that effect is viewed in the context of the overall operation, such a conclusion would be flawed. In Operation Storm, General Gotovina never sought to destroy these buildings.[196] Instead, he used his limited indirect fire capability to disrupt enemy command, control, and communications by

187. Prosecutor v. Gotovina, Gotovina Defence Final Trial Brief, *supra* note 8, paras. 181–82.

188. *Id.* paras. 183–88.

189. Prosecutor v. Gotovina, Judgement Volume II of II, *supra* note 9, para. 1899.

190. *Id.* para. 1898.

191. *Id.* para. 1900.

192. *Id.* paras. 1898–906.

193. *Id.* paras. 1890–913.

194. Prosecutor v. Gotovina, ICTY Case No. IT-06-90-A, Notice of Appeal of Ante Gotovina, paras. C–H (May 16, 2011), http://www.icty.org/x/cases/gotovina/custom6/en/110516.pdf.

195. Prosecutor v. Gotovina, Judgement Volume II of II, *supra* note 9, paras. 1890–913.

196. Prosecutor v. Gotovina, Gotovina Defence Final Trial Brief, *supra* note 8, para. 262.

targeting the buildings at critical times of the attack that he had launched on the outskirts of the city.[197] Because it was never operationally necessary to destroy those targets, indirect fires provided an ideal means of achieving this effect; an effect that was absolutely critical to isolate forces in fixed defensive positions in order to facilitate exploitation of any penetrations of those defenses.[198] Thus, when considered in this light, the reasonableness of the fires seems fundamentally different, a conclusion that was not lost on the Trial Chamber.

A more complex illustration was the use of fires to attack the apartment building where Milan Martic, the President of the Krajina Serbs, resided. How could such an attack be legitimate? Martic was the civilian leader of the Krajina Serb military forces and as such was a lawful object of attack.[199] As with his attacks on other buildings in Knin, General Gotovina almost certainly did not expect to destroy the apartment with intermittent shelling. Nor was it likely he expected to kill Martic, although such an effect was possible. Instead, by using fires to harass Martic, General Gotovina could have intended to "fix" him in the apartment location and thereby isolate the military headquarters in Knin from its political leadership.[200] When considered in a broader operational context, such an effect seems particularly significant. This is because the Krajina Serbs relied on Serbia proper for almost all their support, and Martic would have been the conduit between the Krajina and President Slobodan Milosevic of Serbia.[201] Disrupting his ability to assess the operational situation and communicate with Milosevic would therefore mitigate the risk of Serbian intervention to reinforce their Krajina allies.

Ultimately, the Trial Chamber accepted the defense position that the apartment qualified as a lawful object of attack because General Gotovina expected Martic to be located there.[202] However, the Chamber then concluded that because General Gotovina knew civilians resided in that area, the attack was inherently indiscriminate.[203] This aspect of the judgment is a focal point of the pending appeal,[204] and for good reason. Because the Trial Chamber failed to articulate its view of the military value General Gotovina anticipated when he chose to attack the building and failed to consider how disrupting Martic's ability to influence the battle would impact overall operational execution, the judgment is difficult to understand. Such considerations are essential to any proportionality judgment, whether made by a commander prior to an attack or a tribunal after the attack. If this aspect of the judgment is rejected on appeal, it will almost certainly be the result of this failure to lay an operationally based foundation.

CONCLUSION

Targeting is a complex operational process that involves life and death decisions. The LOAC plays a critical role in regulating that process. Whether a

197. *Id.* para. 269.
198. *Id.* para. 286.
199. Prosecutor v. Gotovina, Judgement Volume II of II, *supra* note 9, paras. 1907–11.
200. *Id.* para. 1910.
201. *Id.* para. 1693.
202. *Id.* para. 1910.
203. *Id.* paras. 1910–11.
204. Prosecutor v. Gotovina, Notice of Appeal of Ante Gotovina, *supra* note 194, paras. 1.2 to 1.2.3.

private with a rifle or a Predator drone firing a Hellfire missile, the legal framework is the same. However, how that framework applies in any given situation will inevitably be influenced by the nature of the military operation. It should therefore be apparent that an understanding of operational art and the many variables that influence a commander's targeting judgments is required to truly understand how the LOAC regulates the application of combat power.

The recent case of *Prosecutor v. Gotovina* provides a unique insight into the significance of the relationship between operational art and legal regulation. The complexity of the targeting environment General Gotovina confronted during Operation Storm is indicative of the complexities that will almost certainly permeate future military operations. Building off of this case, this Article seeks to illustrate why an understanding of that relationship is critical to a genuine understanding of how the LOAC regulates combat operations, and aspects of operational art central to this understanding. While the case against General Gotovina is yet to be finally resolved, students of this law should pay close attention, for the issues *Gotovina* raises are and will remain central to the legal regulation of all armed conflicts.

Rejoinder

Enemy Status and Military Detention: Neutrality Law and Non-International Armed Conflict, Municipal Neutrality Statutes, the U.N. Charter, and Hostile Intent

KARL S. CHANG*

SUMMARY

* I am a graduate of Yale College and Harvard Law School originally from Houston, Texas. I am currently employed as an Associate General Counsel (International Affairs) in the U.S. Department of Defense, Office of General Counsel. However, these are my personal views and do not necessarily reflect the views of the U.S. government, Department of Defense, or its components. I thank the many good friends who materially supported me in writing this Article. All mistakes are mine.

INTRODUCTION

In "Enemy Status and Military Detention in the War Against Al-Qaeda," I proposed that the concept of "enemy" and the standards for construing "enemy" that have been developed in the law of neutrality provide the appropriate legal framework for construing the limits of detention authority in U.S. military operations against al-Qaeda.[1]

I sought to solve a problem of legal theory. The U.S. government has advanced common-sense, practical legal standards governing who may be detained in its military operations against al-Qaeda, but aspects of the legal theories underlying those standards have been sharply criticized. From the perspective of international law, critics have argued that the concept of "enemy combatant" advanced by the Bush Administration fails to justify the detention standard that the U.S. government has applied, while in the same breath noting that such authority is justified under other theories of international law.[2] From the perspective of domestic law, certain judges on the D.C. Circuit have also accepted the legal standards offered by the government, while criticizing the use of customary international law to construe and apply those standards.[3]

I proposed the concept of "enemy" as a legal theory that would bridge domestic and international law, answering both sets of critics. This theory could provide principles to address the hard cases and define the edges of the authority that the U.S. government may exercise to prosecute its war against al-Qaeda. And, unlike attempts to craft law anew, this theory draws from the rich principles and practice that states have developed in the law of neutrality. Of course, I did not hope to answer definitively every question, but rather to present an approach that has not yet been considered in the current context and to inspire new discussion and debate over a well-worn topic. In this vein, Rebecca Ingber and Kevin Jon Heller have written responses to "Enemy Status and Military Detention," which accompanied it in the first issue of the forty-seventh volume of the Texas International Law Journal.[4] I thank Ms. Ingber and Professor Heller for taking the considerable time and effort to write thoughtful responses to "Enemy Status and Military Detention" and for furthering the conversation I hoped to begin.

Ingber and Heller have raised some important issues to which I would like to reply. Below, I discuss: (1) the law of neutrality and non-international armed conflict; (2) using municipal neutrality statutes to interpret international law; (3) the effect of the U.N. Charter on the law of neutrality; and (4) using hostile intent to distinguish between violations of neutral duties and conversion of a neutral to an enemy.

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1. Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L.J. 1 (2011).

2. *See, e.g.*, Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 48–49 (2009) (arguing that Congress and the Bush Administration acted to detain the security threats "by eschewing legal authority that clearly supports such detentions and by resorting, instead, to excessively broad definitions of combatancy").

3. *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 871–73 (D.C. Cir. 2010) (accepting the government's detention standard while criticizing its reliance on "the international laws of war").

4. Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEX. INT'L L.J. 75 (2011); Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang*, 47 TEX. INT'L L.J. 115 (2011).

I. THE LAW OF NEUTRALITY AND NON-INTERNATIONAL ARMED CONFLICT

From the title of Heller's Response, "The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang," one might receive the impression that he disagrees with "Enemy Status and Military Detention" on the application of neutrality law to non-international armed conflict. However, after a careful reading of his Response and after having received similar reactions in discussing "Enemy Status and Military Detention" with others, I suspect we may actually disagree very little on substance. Here's why.

"Enemy Status and Military Detention" argues that neutrality law applies partially to armed conflict between a state and an insurgent group (that is, a non-state actor that is not recognized as a belligerent):

> However, in cases where insurgents are not recognized as belligerents, (for example, because the insurgents do not control enough territory), neutrality law is partially applicable. Other states have neutral duties with respect to the state, but not with respect to the insurgents. Helping the state against the insurgents is permissible; helping the insurgents against the state violates international law.[5]

Heller argues that neutrality law cannot apply partially, or "asymmetrically" as he calls it, and that neutrality law does not apply to non-international armed conflict.[6]

As a matter of substance, Heller's position and my position regarding the application of neutrality law are not necessarily inconsistent. I say that half of neutrality law applies. Heller says that neutrality law is indivisible and does not apply. Between us, there are potentially two substantive areas of tension regarding: (1) whether, when a state is fighting a non-state group, international law provides certain duties for other states and their nationals in relation to that conflict, and (2) whether standards from neutrality law may be applied to describe those duties.

First, does Heller believe that international law provides some duties for other states and their nationals to refrain from supporting violence by non-state groups against a state? Heller suggests that, when a state is engaged in armed conflict against a non-state group, international law does create certain duties for other states and their nationals towards that conflict. Heller acknowledges these duties not to support insurgents against a state when he argues that the degree to which international law permits support on behalf of the state against the insurgents is probably not as great as generally believed.[7] Moreover, the sources on which Heller relies support this proposition. For example, Heller quotes Robert Tucker for the proposition that neutrality law does not apply before recognition of belligerency.[8]

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5. Chang, *supra* note 1, at 37 (footnote omitted).

6. Heller, *supra* note 4, at 118 ("[T]he law of neutrality applies only to conflicts in which both parties are recognized as legitimate belligerents and always applies symmetrically.").

7. *Id.* at 119 ("It is commonly assumed that, prior to the recognition of insurgents as belligerents, international law prohibits a third state from assisting insurgents but permits it to help the government neutralize the insurgent threat.").

8. *Id.* at 120 ("[O]peration of the international law of neutrality presupposes, and is dependent upon, the recognition of insurgents in a civil war as belligerents. Prior to such recognition—whether by the

But immediately after the portion quoted by Heller, Tucker says "Although third states may grant any kind of material assistance to the parent government fighting insurrectionists, aid to the latter amounts to intervention in the internal affairs of the parent state and is forbidden."[9] Similarly, Heller quotes Secretary of State Stimson: "Until belligerency is recognized . . . and the duty of neutrality arises, *all the humane predispositions* towards stability of government, the preservation of international amity, and the protection of established intercourse between nations *are in favor of the existing government.*"[10]

For the difference between Heller's views and my own to be merely one of labels and not substance, he would also have to agree that these duties of other states and their nationals towards a state engaged in armed conflict against a non-state group can be described using standards from neutrality law. In "Enemy Status and Military Detention," I explain why the standards drawn from neutrality law can be used to describe these obligations: the duties that neutrals owe a belligerent and the respect that a belligerent must accord a neutral emanate from their peaceful relationship.[11] A person who offends a state by joining a terrorist group fighting against that state is in no better position than a person who enlists in a lawful belligerent group fighting against that state. The only point that I would add here is to decline the suggestion that this is my insight. Heller gives me too much credit when he says, "No scholar or state has ever taken the position that the law of neutrality *applies* to a transnational NIAC involving a terrorist group like al-Qaeda, much less that it provides the 'overarching international law framework' for that type of conflict."[12] For hundreds of years, states and scholars have used parts of the law of neutrality to describe the duties that other states and their nationals have towards an armed conflict between a state and an armed group. For example, consider Daniel Webster's canonical discussion of self-defense in the case of the *Caroline*—a case in which the United Kingdom took action against armed groups plotting violence in Canada but hiding in the United States. Webster's discussion is best known for these sentences regarding self-defense:

> Under these circumstances, and under those immediately connected with the transaction itself, it will be for her majesty's government to show upon what state of facts and what rules of national law, the destruction of the "Caroline" is to be defended. It will be for that government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.[13]

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parent state or by third states—there can be no condition of belligerency, hence no neutrality in the sense of international law." (quoting ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 200 n.8 (1955))).

9. TUCKER, *supra* note 8, at 200 n.8.

10. Heller, *supra* note 4, at 120 (emphasis added) (quoting Henry L. Stimson, U.S. Sec'y of State, The United States and the Other American Republics, Address Before the Council on Foreign Relations (Feb. 6, 1931), *in* 9 FOREIGN AFF., no. 3, Apr. 1931 at i, xiii).

11. Chang, *supra* note 1, at 40.

12. Heller, *supra* note 4, at 117 (footnotes omitted).

13. Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, Inviolability of National Territory, Case of the "Caroline", *in* THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 104, 110 (1848).

Lesser known are the predicate "circumstances" to which Webster refers. Webster argued that the United Kingdom's actions should be evaluated against this very rigorous standard for self-defense because the United States had fulfilled its duties of neutrality and non-interference; that is, the United States was willing and able to prevent hostile expeditions from proceeding from its territory to attack the United Kingdom:

> The government of the United States has not from the first fallen into the doubts, elsewhere entertained, of the true extent of the duties of neutrality.... The government of the United States has not considered it as sufficient to confine the duties of neutrality and non-interference to the case of governments whose territories lie adjacent to each other.... And the United States have been the first among civilized nations to enforce the observance of this just rule of neutrality and peace, by special and adequate legal enactments.... This government, therefore ... holds itself above reproach in every thing respecting the preservation of neutrality, the observance of the principle of non-intervention, and the strictest conformity, in these respects, to the rules of international law ....[14]

Similarly, Hersch Lauterpacht noted in 1928:

> The nearest approach to what is believed to be the true juridical construction of the state's duty to prevent organized hostile expeditions from proceeding in times of peace against a friendly state will be found in the law of neutrality.... In these two features of the law of neutrality—the distinction between the duties of states and those of their subjects, and the exclusion of neutral territory as a base for military or naval operations against a friendly state—lies also the main characteristic of the duty of states with regard to hostile expeditions in time of peace.... The two situations being closely analogous, it is only natural that they are regulated in Great Britain and in the United States in the same legal enactments. The law of hostile expeditions is nothing else than the law of neutrality in relation to an actual or impending civil war.[15]

Further, in 1958, an article in the Columbia Law Review titled "International Law and Military Operations Against Insurgents in Neutral Territory" noted:

> At this point it is appropriate to question whether the laws of neutrality can logically be said to apply in the context of a civil war. Strictly speaking, neutrality is a concept which applies only to international warfare, and its status in a civil war in which the rebels have not been recognized as belligerents is highly doubtful.... Nevertheless, this does not affect the analysis of the problem significantly because the duties which a neutral state would be called upon to observe in an international war, in terms of permitting rebel troops asylum on their territory or a base of operations,

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14. *Id.* at 108–09.

15. H. Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM. J. INT'L L. 105, 127 (1928).

> are hardly different from the duties of non-intervention in domestic affairs.[16]

More recently, Thomas Franck and Deborah Niedermeyer, in a rigorous survey of international law regarding terrorism, described the duty of states not to support armed groups against other states as "manifest most frequently in connection with the duty of *neutrality*."[17] They explain: "States must prevent the hostile activities of individuals [within their jurisdictions] because they have a duty not to harm other States; the countenancing of individual hostile activities is therefore a derogation of this duty. This obligation is an aspect of neutrality."[18]

Lastly, I cannot claim to be original in drawing a connection between neutrality law and the United States' military operations against al-Qaeda. In 2002, Christopher Greenwood explained that:

> By allowing Al-Qa'ida to operate from the territory which it controlled, the Taliban—and thus Afghanistan—violated the general duty of a state under international law not to allow its territory to be used as a base for attacks on other states. . . . At the very least, its position was analogous to that of a neutral state which allows a belligerent to mount military operations from its territory: even though it is not responsible for those operations, it exposes itself to the risk of lawful military action to put a stop to them. Similarly, where a state allows terrorist organizations to mount concerted operation against other states from its territory and refuses to take the action required by international law to put a stop to such operations, the victims of those operations are entitled to take action against those terrorists.[19]

Presuming Heller agrees that international law imposes some obligation on other states and their nationals not to support violence by private persons against foreign states with which they are at peace and that these obligations can be fairly described using standards drawn from neutrality law, I think the difference between our views is largely one of labels.[20] Heller would not say that other states and their nationals have "neutral duties" in relation to a state fighting a private armed group. However, I suspect he might agree that these states and their nationals may have duties of non-intervention, or may commit certain offenses against that state's sovereignty if they support or participate in a terrorist or insurgent campaign against that state.

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16. Note, *International Law and Military Operations Against Insurgents in Neutral Territory*, 68 COLUM. L. REV. 1127, 1128 n.4 (1968) (citations omitted).

17. Thomas M. Franck & Deborah Niedermeyer, *Accommodating Terrorism: An Offence Against the Law of Nations*, 19 ISR. Y.B. HUM. RTS. 75, 100 (1989).

18. *Id.* at 107.

19. Christopher Greenwood, *International Law and the "War Against Terrorism"*, 78 INT'L AFF. 301, 313 (2002).

20. Another possible difference is that Heller believes that duties not to support private armed groups waging war against other states are a function of domestic—not international—law. *Cf.* Heller, *supra* note 4, at 121 ("Differently put, although international law does not require all states to remain neutral with regard to insurgencies, individual states remain free to impose neutral-like duties on themselves as a matter of *municipal* law."). States and individuals are "free" to support violence against other states in the sense that they can go to war against those states or expose themselves to penalties. However, if they wish to avail themselves of the protections of international law and to remain at peace with that state, then the "neutral-like duties" apply.

II. USING MUNICIPAL NEUTRALITY STATUTES TO INTERPRET INTERNATIONAL LAW

Both Ingber and Heller questioned the use of municipal neutrality statutes in "Enemy Status and Military Detention" as evidence of what types of conduct are viewed as violating neutral duties.

Ingber claims that U.S. neutrality statutes are irrelevant to construing what is unneutral conduct under international law because the same conduct outside the United States would be consistent with the municipal neutrality statutes and international law:

> Municipal laws a state might enact to keep its own population from drawing it into war have little if any relevance to the kinds of activity that would render a—typically alien—individual militarily detainable under international law. A state's domestic laws enacted to restrain the actions of its citizens—whether or not in fulfillment of a neutral obligation—are not an affirmative means to characterize individuals as detainable "enemies" in the armed conflict alongside direct participants. In fact, the very sources Chang cites note that the same conduct, if conducted by individuals outside U.S. soil, would not be seen as a violation of domestic law or international neutrality law, let alone render an individual militarily detainable.[21]

In support of this view, Ingber says:

> [Roy] Curtis notes that there is "no obligation" on the part of the state to punish individuals either for assistance rendered directly to military expeditions departing from other countries and that "contributions made directly to armed forces in a foreign country" are not prohibited, despite the fact that they "may further the hostilities."[22]

Ingber confuses the state's and the individual's obligations under international law. For example, if a person outside the United States starts a hostile expedition against a state with which the United States is at peace, that person has not violated 18 U.S.C. § 960.[23] However, that statute is intended to implement the *United States*' obligation under international law. Thus, the fact that the person did not violate 18 U.S.C. § 960 is evidence that the person has not implicated the *United States*' secondary responsibility for others within its jurisdiction; it does not mean that the person has not violated neutral duties.

Curtis refers to the obligation of the *United States* and other *states* under international law not to aid and abet private hostile expeditions against friendly

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21. Ingber, *supra* note 4, at 101 (footnote omitted).

22. *Id.* at 101 n.130 (quoting Roy Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT'L L. 1, 23 (1914)).

23. *See* 18 U.S.C. § 960 (2011) ("Whoever, *within the United States*, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.") (emphasis added).

states.[24] In the sections to which Ingber refers, Curtis is not addressing the issue of whether the individual can be punished by the state against which he is fighting. On that question, Curtis says:

> On coming within the jurisdiction of the state against which they intend to wage war, the members of an expedition are at once subject to the municipal law of that state. If they come to be recognized as belligerents, they are, of course, subject to the special laws of war, and they may receive the special privileges accorded to belligerent parties. But aside from this limitation, the state they attack is free to apply the penalties of its own law to them. They are regarded, personally, as offenders against it.[25]

Such persons, by engaging in unneutral conduct, forfeit certain protections that international law might otherwise afford them.[26]

Heller makes a critique similar to Ingber's. Heller argues that since a state can go beyond what is required under international law in writing its municipal neutrality statute, one cannot assume that, because an individual violates a municipal neutrality statute, that person necessarily violates neutral duties under international law:

> Even worse, Chang repeats the mistake he made concerning the applicability of the law of neutrality to insurgencies by citing municipal law in the United States as if it reflected international law. Chang cites two sources in defense of his claim that providing money to belligerents is unneutral service: 18 U.S.C. § 960 and *Jacobsen v. United States*. The federal statute codifies the Neutrality Act of 1794, and *Jacobsen* addresses a conspiracy to violate that Neutrality Act, as Chang's parenthetical notes. The limitations on private commercial intercourse contained in the Neutrality Acts, however, went well beyond what international law requires—a fact that the United States has itself recognized. As Oppenheim points out with regard to the provisions in the Neutrality Act

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24. *See* Curtis, *supra* note 22, at 19 ("It is only from the standpoint of the particular states affected that expeditions are considered unlawful. They are not of the nature of piracy, to be repressed by all states wherever found. But for every attempted hostile undertaking of this sort some state is charged in a measure with responsibility. Its responsibility is dependent on the fact of the connection of the expedition in some way with its territory, or the commission of some act within its jurisdiction over which it may be presumed to have had control. Therefore, in the view of that state, only those expeditions are unlawful which are carried on from its territory, or which have been prepared through the use of its resources and under the protection of its jurisdiction.").

25. *Id.* at 32.

26. *See, e.g.*, CHARLES G. FENWICK, NEUTRALITY LAWS OF THE UNITED STATES 10–11 (1913) ("Beyond the jurisdiction of the state its citizens may commit hostile acts against a belligerent without consequent responsibility in international law devolving upon the neutral state. The remedy of the belligerent in this case is upon the individuals personally who, by their own act, have forfeited the protection of their state."); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 783 (1915) ("Aid has frequently been furnished to foreign belligerent governments or revolutionary parties abroad. Such aid when furnished by a neutral citizen is considered as in violation of neutrality and operates to forfeit neutral protection."); Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795) ("[T]his offence being committed out of the territories and waters of the United States, the government does not seem bound to do more than has already been done by the President, who . . . warned all citizens of the United States . . . that all those who should render themselves liable to punishment under the laws of nations, by committing, aiding, or abetting hostilities against any of the said parties, would not receive the protection of the United States against such punishment . . . .").

> of 1939 that "prohibited loans and commercial credits to belligerent Governments," the United States never claimed "that these prohibitions, intended as a safeguard against the United States becoming involved in the war, were in any way dictated by International Law."[27]

Heller stands on firm ground in reflecting the general point that municipal laws enacted pursuant to international obligations are not always trustworthy evidence of international law.[28] However, just as Ingber errs in interpreting Curtis, Heller errs in interpreting Lauterpacht. When Lauterpacht states that prohibitions in U.S. municipal neutrality law were not "in any way dictated by International Law," he is contending that the *United States* would not be engaged in unneutral conduct if it permitted persons in its jurisdiction to extend loans and commercial credits to belligerents.[29] Whether a *person's* conduct is unneutral is a different question from "whether a neutral [state] is obliged by [its] duty of impartiality to prevent [its] *subjects* from granting subsidies and loans to belligerents to enable them to continue the war."[30] Lauterpacht takes the view that money is contraband of war.[31] Thus, he

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27. Heller, *supra* note 4, at 127–28 (footnotes omitted) (quoting 2 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 352, at 605 (Hersch Lauterpacht ed., 6th ed. 1940)). Here, Heller says that I take the position that providing money to belligerents is "unneutral service." "Unneutral service" is a term of art in neutrality law, which entails a neutral being converted into an enemy. In the section Heller cites, "Enemy Status and Military Detention" does not express the view that giving money is "unneutral service," rather, it takes the position that giving money is a violation of neutral duties or unneutral conduct, which only converts one into an enemy under certain circumstances. *See* Chang, *supra* note 1, at 33 ("However, the United States may take measures of self-help to cure these persons' violations of their neutral duties, *including, in certain cases*, holding these persons as enemies under international law.") (emphasis added). Part III of "Enemy Status and Military Detention" re-emphasizes that violations of neutral duties are not the same as when a person becomes an enemy, and discusses when violations of neutral duties convert a person into an enemy. *See id.* at 51 ("[I]n order to determine who is subject to military detention, we must determine when a neutral has passed from simply violating duties of neutrality and acquired an enemy status. When may the United States not only redress the neutral's violations of neutral duties, but also treat the neutral as an enemy?").

28. *See, e.g.*, Letter from Thomas Bayard, U.S. Sec'y of State, to Mr. Connery, chargé to Mexico (Nov. 1, 1887), *reprinted in* JOHN BASSETT MOORE, II A DIGEST OF INTERNATIONAL LAW 235 (1906) ("[A] government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the nation's liability and not its own municipal rules."); *cf.* Lauterpacht, *supra* note 15, at 108 ("The international lawyer looks, as he is bound to do, to municipal legislation as showing what is the legal conviction of states on this matter. But the laws of different countries obviously start from the consideration that acts should be prohibited which might bring about a declaration of war, or expose the country or its citizens to reprisals, or embroil it with other Powers, and, generally speaking, all such acts as are contrary to international law. He is thus brought back to the beginning of his search, seeing that it is for international law to decide which acts may legitimately cause a declaration of war or give just offence to other states.").

29. 2 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY § 352, at 744 (Hersch Lauterpacht ed., 7th ed. 1952) [hereinafter OPPENHEIM 7th] ("It was not asserted that these prohibitions, *intended as a safeguard against the United States becoming involved in the war*, were in any way dictated by International Law.") (emphasis added). *Cf.* BORCHARD, *supra* note 26, at 761 ("While the neutrality acts of Great Britain and the United States already impose *upon these countries* greater obligations than international law requires, the President of the United States has on several occasions by special order still further increased the duties *of the United States* by forbidding the exportation of arms to disturbed areas, considering such an act as a breach of neutrality.") (emphasis added).

30. OPPENHEIM 7th, *supra* note 29, § 352, at 743.

31. *Id.* § 394, at 807 ("As regards *money*, unwrought precious metals which may be coined into money, bonds, and the like, the mere fact that a neutral is prohibited by his duty of impartiality from

views a person giving money to a belligerent as, at a minimum, engaged in unneutral conduct that the other belligerent could take measures to prevent, such as seeking to stop the transfer of funds.[32]

When a state enacts a municipal neutrality statute, it proscribes individuals from engaging in X conduct within its jurisdiction. The state's purpose is to avoid aiding and abetting X conduct by individuals in its jurisdiction against other states. Why would the state seek to prevent individuals from doing X to another state if it viewed X as entirely benign? Logically, the municipal neutrality statute can only reflect the enacting state's view that X conduct committed by individuals is offensive to other states.[33] Consequently, municipal neutrality statutes are probative as to whether an *individual* doing X commits an unneutral act under international law.

The relevance of domestic neutrality acts to the issue of whether conduct is unneutral is also indicated by severability of the issue of whether the acts are unneutral from the issue of whether they are attributed to a state. Conduct by a neutral individual could later be adopted and defended by the individual's state. Moreover, whether a state suffers harm from an act does not depend on whether that harm may be attributed to another state. Thus, judges, in assessing whether an individual's conduct is unneutral, have often considered whether the conduct would be neutral or unneutral if done by a state.[34] And thus, when collecting sources for the study of the international law of neutrality, Francis Deak and Philip C. Jessup included "obviously pertinent materials such as neutrality laws of the United States, the British Foreign Enlistment Act or laws and regulations of other countries labelled as pertaining to neutrality."[35]

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granting a loan to a belligerent ought to bring conviction that these articles are certainly contraband if destined for the enemy State or its forces.").

32. *See also* Kennett v. Chambers, 55 U.S. (14 How.) 38, 50 (1852) ("[A citizen] can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation."); De Wutz v. Hendricks, (1824) 130 Eng. Rep. 326 (C.P.) 326; 2 Bingham 314, 315–16 (Best, C.J.) ("It occurred to me at the trial that it was contrary to the law of nations (which in all cases of international law is adopted into the municipal code of every civilized country), for persons in England to enter into engagements to raise money to support the subjects of a government in amity with our own, in hostilities against their government, and that no right of action could arise out of such a transaction.").

33. *Cf.* Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, art. 16, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter Int'l Law Comm'n] ("A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: . . . (b) The act would be internationally wrongful if committed by that State."); United States v. Burr, 25 F. Cas. 55, 177 (C.C.D. Va. 1807) (No. 14,693) ("It is a settled principle in the law that the accessory cannot be guilty of a greater offense than his principal. The maxim is 'Accessorius sequitur naturam sui principalis'—'The accessory follows the nature of his principal.'").

34. *See, e.g.*, Young v. United States, 97 U.S. 39, 64–65 (1877) ("Had these things been done by a citizen of the United States, he would have been guilty of treason; and, had they been done by the government of which Collie was a subject, it could justly be charged with having been an ally of the enemy."); The Commercen, 14 U.S. (1 Wheat.) 382, 401–02 (1816) (Marshall, C.J., dissenting) ("[T]hose acts which will justify the condemnation of a neutral as an enemy, would also justify the treating his nation as an enemy, if they were performed or defended by the nation. . . . [I]f the government adopts the act of the individual, and supports it by force, the government itself may be rightfully treated as hostile. . . . The inquiry, then, whether the act in which this individual Swede was employed, would, if performed by his government, have been considered an act of hostility to the United States, and might rightfully be so considered, is material to the decision of the question, whether the act of the individual is to be treated as hostile.").

35. FRANCIS DEAK & PHILIP C. JESSUP, 1 A COLLECTION OF NEUTRALITY LAWS, REGULATIONS

III. THE EFFECT OF THE U.N. CHARTER ON THE LAW OF NEUTRALITY

Heller raises the issue of the legal effect of the U.N. Charter on the law of neutrality. He does so in discussing the conditions under which U.S. armed forces may invade the territory of states without the consent of those states in cases where only "support" to al-Qaeda occurs.[36] Although this is a fascinating legal issue, "Enemy Status and Military Detention," as the title indicates, is focused on military detention.[37] Nonetheless, Heller makes assertions regarding the U.N. Charter and neutrality law, in particular arguing that "the adoption of the U.N. Charter has rendered the law of neutrality's rules governing the use of force essentially obsolete"[38] and "the use of force against a non-state actor like al-Qaeda is now regulated by the U.N. Charter, not by the law of neutrality."[39] Some might interpret these assertions to apply to military detention operations against al-Qaeda, which has been described as a subset or incident to the authority to use force.[40]

At the outset, I would point out that the U.N. Charter does not entirely sweep aside the law of neutrality. To be fair to Heller, I would not interpret his Response as taking this extreme view, but I think it helpful to try to dispel this common misconception. In fact, states view the law of neutrality as still having relevance after the U.N. Charter. For example, the 1949 Geneva Conventions and the 1977 Additional Protocols contemplate the continued existence of neutral status.[41] Similarly, states' military manuals issued after 1945 discuss the position of neutral states and persons.[42] Thus, scholars who have addressed this issue view the law of neutrality as still having relevance after the enactment of the U.N. Charter.[43]

AND TREATIES OF VARIOUS COUNTRIES xiii (1939).

36. Heller, *supra* note 4, at 135–41.

37. To be sure, my Article touches on broader legal principles that could be applicable to the issue of forcible reprisal raised by Heller. However, such a topic would require a lengthy exploration, which I did not purport to undertake.

38. Heller, *supra* note 4, at 136.

39. *Id.* at 141.

40. Chang, *supra* note 1, at 15 nn.65–66 and accompanying text.

41. *E.g.*, Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 5, 8, 10, 11, 27, 37, 43, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention (GC II)]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 4, 9, 11, 12, 15, 24, 25, 36, 61, 132, 140, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 9, 19, 31, 37, 39, 64, June 8, 1977, 1125 U.N.T.S. 3.

42. *See, e.g.*, DEP'T OF THE ARMY, THE LAW OF LAND WARFARE ch. 9 (1956, amended 1976) (describing neutrality rules); DEP'T OF THE NAVY, Naval War Pub. No. 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ch. 7 (2007) (same); JOINT DOCTRINE & CONCEPTS CTR., U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT para. 1.43 (2004) ("Certain fundamental principles of neutrality law remain applicable . . . ."); OFFICE OF THE JUDGE ADVOCATE GEN., LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS (2004) (Can.) (describing the rights and duties of neutral powers); MINISTRY OF DEF. OF THE FED. REPUBLIC OF GER., HUMANITARIAN LAW IN ARMED CONFLICTS: MANUAL paras. 1108–55 (Aug. 1992) (describing the rights and duties of neutrals).

43. *See, e.g.*, Myres S. McDougal & Florentino P. Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771, 824 (1958) ("The emergence of a community prohibition upon recourse to violence, supported by commitments as in the United Nations Charter to a common responsibility for the maintenance of public order, have destroyed the more

If anything, the U.N. Charter makes the neutral duties discussed in "Enemy Status and Military Detention" more important. The U.N. Charter is regarded as having changed or codified a change in *jus ad bellum* rules in two important ways. First, the U.N. Charter generally requires that member states "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[44] Second, the U.N. Charter created the U.N. Security Council, which has "primary responsibility for the maintenance of international peace and security,"[45] can "determine the existence of any threat to the peace, breach of the peace, or act of aggression," and can decide what measures shall be taken under the Charter "to maintain or restore international peace and security."[46] Although these are important provisions of international law, they only strengthen the framework of neutral duties and immunities discussed in "Enemy Status and Military Detention."

First, the U.N. Charter's prohibition on the use of force does not weaken the framework of neutral duties and immunities. If anything, it strengthens that framework because state actions that are inconsistent with that framework (for example, a neutral state that participates or materially supports one side in an armed conflict or a belligerent state that violates neutral rights) may also violate the U.N. Charter's prohibition on the use of force against another state. The U.N. Charter's prohibition on the use of force also helps close a loophole in neutrality law. Before the U.N. Charter, under traditional interpretations of customary international law, belligerents and neutrals could avoid duties under neutrality law by a decision to bring a neutral state into the conflict.[47] A belligerent state that did not wish to respect a neutral state's immunities could simply declare war on the neutral and bring the law of war into effect.[48] Similarly, a neutral that wanted to avoid duties of

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important policy premises of traditional doctrines of neutrality and raised grave questions of the degree to which shared responsibility can endure claims of impartiality.... Nonetheless, to suppose that either claims to nonparticipation or the doctrines of neutrality have entirely departed would be extremely rash."); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 531 (1959) ("The traditional rules of neutrality continue to apply in international conflicts which are not subject to collective action under the United Nations Charter.... In a United Nations enforcement action, the rules of neutrality apply to nonbelligerent members of the United Nations, except so far as they are excluded by the obligations of such members under the Charter."); Walter L. Williams, Jr., *Neutrality in Modern Armed Conflicts: A Survey of the Developing Law*, 90 MIL. L. REV. 9, 47 (1980) (concluding, inter alia, that "although the development of rules limiting the use of armed force in international relations and the establishment of the United Nations Charter system have had major impact upon the traditional laws of neutrality, substantial scope exists for the developing law of neutrality to continue to operate"); Michael Bothe, *The Law of Neutrality*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 571, 574 (Dieter Fleck ed., 2d ed. 2008) ("The general law of neutrality, however, has not been revoked by the Charter of the United Nations.").

44. U.N. Charter art. 2, para. 4. Some might view customary international law as prohibiting states from waging wars of aggression against other states prior to the adoption of the U.N. Charter. *See e.g.*, *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, *reprinted in* 41 AM. J. INT'L L. 172, 217–220 (1947) [hereinafter *Nuremberg*].

45. U.N. Charter art. 24, para. 1.

46. *Id.* art. 39.

47. *See* TUCKER, *supra* note 8, at 202 ("It is one of the seeming paradoxes of the traditional law that it may be violated only by acts of neutral or belligerent which fall short of war, though not by the act of resorting to war itself."); OPPENHEIM 7th, *supra* note 29, § 312, at 671–72 ("[D]uties of neutrality exist only so long as a State remains neutral. They come to an end *ipso facto* by a neutral State throwing up its neutrality, or by a belligerent beginning war against a hitherto neutral State.").

48. John Delatre Falconbridge, *The Right of a Belligerent to Make War upon a Neutral*, *in* 4

non-participation in a conflict could simply decide to enter a conflict.[49] However, after the adoption of the U.N. Charter, a member state who is neutral must take care not to join an armed conflict against another state without a legal basis, lest it violate the U.N. Charter's prohibition on the use of force. Similarly, a belligerent state cannot simply decide to expand its armed conflict by waging war against a neutral state without legal basis, lest it do the same.

Second, where the U.N. Security Council has acted under Chapter VII of the U.N. Charter to favor one side, the scope of neutral rights to be impartial (that is, to remain apart from the armed conflict and not take sides) is diminished.[50] Member states have agreed to abide by decisions of the Security Council,[51] an obligation prevailing over other treaty obligations.[52] Member states have also agreed that they "shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."[53] However, this aspect of the U.N. Charter cannot be regarded as weakening other states' and their nationals' neutral duties towards the United States with regard to its conflict with al-Qaeda because the U.N. Security Council has in no way acted to favor al-Qaeda. In fact, the U.N. Security Council has recognized the United States' right of self-defense in response to the terrorist attacks of September 11, 2001.[54] Moreover, the U.N. Security Council has also taken action against al-Qaeda.[55]

Perhaps the most basic reason that the U.N. Charter's prohibition on the use of force does not render obsolete the rules that neutrality law would provide regarding the use of force—including military detention—against non-state groups, is that those provisions of the U.N. Charter relate to the use of force against *states*, not non-state groups.[56] Although the U.N. Charter would certainly regulate the relationship between the United States and those states within whose territories al-Qaeda personnel seek refuge, the U.N. Charter does not directly regulate the relationship

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TRANSACTIONS OF THE GROTIUS SOCIETY 204, 208 (1918) ("[A] belligerent may by an unequivocal act, such as a declaration of war, convert a neutral into an enemy . . . .").

49. *Id.*; *see also* Chang, *supra* note 1, at 56 ("International law historically allowed neutral states and persons to join in wars.").

50. *See* OPPENHEIM 7th, *supra* note 29, § 292*d*, at 647 ("In principle no Member of the United Nations is entitled, at its discretion, to remain neutral in a war in which the Security Council has found a particular State guilty of a breach of the peace or of an act of aggression and in which it has been called upon the Member of the United Nations concerned either to declare war upon that State or to take military action indistinguishable from war.").

51. U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

52. *Id.* art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

53. *Id.* art. 2, para. 5.

54. *See, e.g.*, S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) ("*The Security Council . . . [r]ecogniz[es]* the inherent right of individual or collective self-defence in accordance with the Charter [in connection with the September 11, 2001 terrorist attacks against the United States].").

55. *See, e.g.*, S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

56. U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any *state* . . . .") (emphasis added).

between al-Qaeda and the United States. Suppose the United States pursues al-Qaeda outside the territory of any other state, or pursues al-Qaeda in a state's territory with that state's consent. In those instances, the U.N. Charter's prohibition on the use of force against the territorial integrity or political independence of any state has no effect.

Moreover, even if the United States were to infringe upon the sovereignty of a state in seeking to defend itself against al-Qaeda, it is not clear why al-Qaeda or al-Qaeda personnel would receive legal rights from such a violation. To the extent that the United States injured another state, it would owe appropriate recompense to that state. But a hypothetical violation by the United States of the U.N. Charter's rules regarding the resort to force would not give al-Qaeda rights under the U.N. Charter.[57] Similarly, under the law of neutrality, when a belligerent captured an enemy's vessel in neutral territory in violation of that neutral state's rights, the neutral state would have a claim against that belligerent.[58] However, between belligerents, such a capture would be regarded as valid.[59] The enemy owner of the captured ship "has in no case any *locus standi* to reclaim his vessel merely because the capture violated the neutral State's rights."[60]

IV. USING HOSTILE INTENT TO DISTINGUISH BETWEEN VIOLATIONS OF NEUTRAL DUTIES AND CONVERSION OF A NEUTRAL TO AN ENEMY

Ingber criticizes me for failing to address the distinction between a neutral merely violating neutral duties and a neutral violating neutral duties so as to convert it into an enemy.[61] In "Enemy Status and Military Detention," I argued that hostile

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57. *Cf.* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 374 (7th Cir. 1985) ("Articles 55 and 56 [of the U.N. Charter] create obligations on the member nations (and the United Nations itself); they do not confer rights on individual citizens."); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) ("Articles 1 and 2 of the United Nations Charter . . . do not speak in terms of individual rights but impose obligations on nations and on the United Nations itself.").

58. *See* La Amistad De Rues, 18 U.S. (5 Wheat.) 385, 390 (1820) ("[A] neutral nation ought no otherwise to interfere, than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction. Neutral nations may, indeed, inflict pecuniary, or other penalties, on the parties for any such violation; but it then does it professedly in vindication of its own rights, and not by way of compensation to the captured.").

59. *See* The Anne, 16 U.S. (3 Wheat.) 435, 447 (1818) ("A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void. The enemy has no rights whatsoever; and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well established principles of public law.").

60. JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 400 (1954).

61. Ingber, *supra* note 4, at 97 ("Yet he offers no illumination on this critical question: when does such a violation rise to such a level that the offender crosses over the line from neutral to belligerent?"). Ingber's use of the term "belligerent" is unclear. In the law of war, "belligerent" is used in three different senses. First, "belligerent" is sometimes contrasted with "insurgent." A rebel group that is recognized as a belligerent is no longer an insurgent group and is afforded belligerent rights. Second, "belligerent" is sometimes contrasted with "neutral." Third, "belligerent" is sometimes used as a synonym for "combatant" and contrasted with "civilian." Ingber uses "belligerent" in the latter two senses, but in some cases, I am uncertain as to which situation she means, or whether she views the second and third senses as interchangeable. I use "enemy" here because it avoids the potential confusion of suggesting that al-Qaeda personnel would be afforded belligerent rights. A neutral who joins an enemy insurgency becomes an

intent is the distinguishing principle[62] and sought to describe the principles by which hostile intent could be attributed or imputed to an individual.[63] I would like to elaborate on this issue because it is so different from the *jus in bello* inquiries to which today's international lawyers are accustomed. *Jus in bello* emphasizes objective conduct more than intent because it deals with "war as a state of fact which [international law] has hitherto been powerless to prevent."[64] Thus, states have developed material tests for considering when *jus in bello* restrictions apply.[65] Similarly, intent often matters little in *jus in bello* rules. For example, enemy soldiers may be detained regardless of their individual intentions, because they are ordered to take active part in the fighting.[66] Although the reason why a party resorts to force does not affect its obligations to use force in accordance with *jus in bello*, the reason why a party resorts to force is central to questions of *jus ad bellum*.

I would like to address Heller's treatment of this issue as well. Although Heller is correct that hostile intent can be a legal conclusion (that is, in certain circumstances hostile intent is imputed where the person does not subjectively have the intent to wage war), the tests for hostile intent do not refer "solely to the objective nature of the neutral subject's act."[67] In many cases, hostile intent is actually about *intent*, and differences in mental state distinguish between the remedies available to an aggrieved belligerent under the law of neutrality.

As I explained in "Enemy Status in Military Detention," neutrality law establishes a framework of duties and immunities for neutrals and belligerents.[68] Neutral individuals and states have certain duties in relation to belligerents.[69] When they violate those duties, they forfeit corresponding immunities under international law.[70] There are two distinct but overlapping legal questions here. First, when does a neutral, in failing to satisfy some neutral duty, expose himself to remedial action by an aggrieved belligerent? Second, when does a neutral become an enemy of a belligerent?

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enemy insurgent, not a lawful belligerent.

62. Chang, *supra* note 1, at 52.

63. *Id.* at 52–72.

64. Richard Baxter, *So-called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, 28 BRIT Y.B. INT'L L. 323, 324 (1951).

65. *See, e.g.*, Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (stating that the Convention applies "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*") (emphasis added); III THE GENEVA CONVENTIONS OF 12 AUGUST 1949 COMMENTARY 23 (Jean Pictet ed. 1960) ("Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.").

66. *See In re* Territo, 156 F.2d 142, 146 (9th Cir. 1946) ("Petitioner argues that he was impressed against his will into the Italian Army, but the status of a volunteer or that of a draftee, as a prisoner of war who is captured upon the field of battle, is not different.").

67. Heller, *supra* note 4, at 128.

68. Chang, *supra* note 1, at 25–33.

69. *Id.* at 28–35.

70. *Id.* at 32.

The second question alludes to two different legal frameworks for construing the aggrieved belligerent's remedy for the neutral's violation of neutral duties. If the neutral does not become an enemy, then the aggrieved belligerent's remedy corresponds to the neutral's violations of his duties and what is necessary and appropriate to cure such violations. Uses of force in this category might be called "reprisals" or "countermeasures." However, if the neutral becomes an enemy, the aggrieved belligerent's remedy is measured according to *jus in bello* rules,[71] not with reference to why the neutral has achieved that status.[72] In this case, the belligerent and previously neutral entity are considered to be in a state of war. Thus, neutral status and enemy status signify different legal frameworks for assessing an aggrieved belligerent's remedy.

Traditionally, whether the first or second framework applied depended on the intent of the parties, not on the nature or extent of the use of force. "War" was viewed as a condition in which states were intending to wage war.[73] The essential element of war was hostile intent—"*animus belligerendi*"—on the part of one of the states.[74] This sentiment was not simply ill-feeling or favoritism to the other party, but the actual intent to wage war. Thus, states' intentions ended neutral status, not the violations themselves.[75]

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71. *See, e.g.*, Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523, 528 (1827) ("War is a suit prosecuted by the sword . . . ."); Gerhart Husserl, *The Conception of War as a Legal Remedy*, 12 U. CHI. L. REV. 115, 116 (1945) ("Since the formative era of International Law the idea of war as some kind of legal action has never wholly lost its hold on the mind of international lawyers. . . . [T]he notion that war is in the nature of an extraordinary legal remedy of last resort has been kept alive down to our days.").

72. The application of *jus in bello* rules generally does not depend on whether a belligerent has justly resorted to force against its enemy. *See, e.g.*, United States v. List (*Hostage Case*), Case No. 7 (Feb. 19. 1948), *reprinted in* XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1247 (1950) ("At the outset, we desire to point out that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. . . . Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject."); II THE GENEVA CONVENTIONS OF 12 AUGUST 1949 COMMENTARY 26 (Jean Pictet ed. 1960) ("[T]he application of the Convention does not depend on the character of the conflict. Whether a war is 'just' or 'unjust,' whether it is a war of aggression or of resistance to aggression, in no way affects the treatment which the wounded, sick and shipwrecked should receive.").

73. *See, e.g.*, THOMAS HOBBES, LEVIATHAN 83–84 (A.R. Waller ed., Cambridge University Press 1904) (1651) ("For Warre consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known: and therefore the notion of Time, is to be considered in the nature of Warre; as it is in the nature of Weather. For as the nature of Foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many dayes together: So the nature of Warre, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary.").

74. *See* Arnold D. McNair, *The Legal Meaning of War, and the Relation of War to Reprisals*, 11 TRANSACTIONS OF THE GROTIUS SOCIETY 29, 45 (1925) ("A state of war arises in International Law (a) at the moment, if any, specified in a declaration of war; or (b) if none is specified, then immediately upon the communication of a declaration of war; or (c) upon the commission of an act of force, under the authority of a State, which is done *animo belligerendi*, or which, being done *sine animo belligerendi* but by way of reprisals or intervention, the other State elects to regard as creating a state of war, either by repelling force by force or in some other way: retroactive effect being given to this election, so that the state of war arises on the commission of the first act of force.").

75. *See* OPPENHEIM 7th, *supra* note 29, § 358, at 752 ("Even in an extreme case, in which the violation of neutrality is so great that the offended party considers war the only adequate measure in answer to it, it is not the violation which brings neutrality to an end, but the determination of the offended party."); Clyde Eagleton, *Acts of War*, 35 AM. J. INT'L L. 321, 325 (1941) ("There is no evidence that [an 'act of war' (i.e., the employment of force)] creates or by any legal process produces a state of war. If the attacked party

Two sets of examples show how the legal status of "war" depended on intent and not on any "acts of war." First, states could use force against one another, but not be in a state of "war." Second, states could be in a state of war with one another without any actual employment of force.

Under traditional views of war in the first half of the twentieth century, states could use a great deal of force against one another without triggering a state of "war" between them.[76] For example, a neutral state could use force to repel belligerents unlawfully present on its territory.[77] In this case, the neutral state, even though it might be using force, did not trigger a state of war because the neutral did not intend to create a condition of war; rather, it only intended to vindicate its rights.[78] Similarly, a belligerent could choose to overlook violations by a neutral if the belligerent did not want the neutral as an enemy in the armed conflict. For example, the United States was formally at peace with Vichy France during World War II, even though Vichy France was fighting alongside the Axis powers.[79] Similarly, as Ingber notes, Germany overlooked the United States' "'massive support' . . . [in] violation of neutrality" to the United Kingdom prior to the United States' entry into World War II because Germany preferred those violations to the United States being fully engaged in the war.[80]

Just as states that intended not to be at war with one another would not be at war with one another, even if they committed acts of violence or other violations of neutral duties against one another, merely one state's intention to initiate a state of war was sufficient to trigger a state of war, even without any accompanying acts of

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declares war in opposition, war appears as the result of the declaration, and not as the result of the act of war. . . . To those who hold that war may exist without declaration, it would appear that an act of war does not automatically produce war, since there must be some evidence of intent to make war, or some objective determination.").

76. *See, e.g.*, Quincy Wright, *When Does War Exist?*, 26 AM. J. INT'L L. 362, 365 (1932) ("[A]n act of war starts a state of war only if there is a real intent to create a state of war. There have been numerous acts of war, such as the battle of Navarino in 1827, the American bombardment of Graytown, Nicaragua, in 1852, the Boxer expedition of 1900, and the American occupation of Vera Cruz in 1914, which did not start legal war.").

77. *See* Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 10, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654 ("The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act.").

78. *See* OPPENHEIM 7th, *supra* note 29, § 320, at 684 ("Hostilities by a neutral are acts of force performed for the purpose of attacking a belligerent. They are acts of war, and they create a condition of war between such neutral and the belligerent concerned. If, however, a neutral does not attack a belligerent, but only repulses him by force when he violates, or attempts to violate, the neutrality of the neutral, this does not constitute hostilities.").

79. Chang, *supra* note 1, at 45–46 & nn.245–46.

80. Ingber, *supra* note 4, at 97. The International Military Tribunal at Nuremberg dances delicately around this issue in its judgment against German leaders for the crime of aggression. Although the Tribunal describes various German actions during World War II as "aggressive war" or "acts of aggression" and discusses Germany's encouragement of Japan's aggressive war against the United States, the Tribunal does not characterize Germany as waging aggressive war against the United States. *See Nuremberg*, *supra* note 44, at 213–14. Germany's war against the United States was illegal insofar as it was part of Germany's general illegal enterprise, but Germany's decision to declare war against the United States was among the least illegal parts of Germany's aggressive war under traditional interpretations of neutrality law, because of the United States' support for the United Kingdom prior to the United States entering the war. The United States justified its actions based on a doctrine of "qualified neutrality." *See, e.g.*, Robert H. Jackson, U.S. Att'y Gen., Address Before the Inter-American Bar Association (Mar. 27, 1941), *in* 35 AM. J. INT'L L. 348, 351 (1941).

violence. Declarations of war, which provided formal evidence of the hostile intention to go to war, were sufficient to bring a state of war into effect.[81] Law of war treaties still recognize declared war.[82]

International law distinguishes between situations in which a state intends to go to war against another state and those in which states use force against one another but do not intend to be in a state of war. As with other situations in international law, this distinction in rules applicable to states corresponds to similar distinctions in rules applicable to individuals. Neutrality law distinguishes between violations of neutrality by individuals and the conversion of a neutral individual into an enemy. When a neutral individual carries contraband to a belligerent, but acts for commercial purposes, he retains his neutral character but becomes subject to certain penalties, such as the forfeiture of cargo and, in some cases, the confiscation of his ship.[83] On the other hand, when a neutral individual engages in unneutral service, he turns into an enemy and can be held as a prisoner of war.[84] Similarly, the neutral individual who intends to carry contraband to a belligerent does not violate the neutrality statute, whereas the neutral individual who intends to set forth on a hostile expedition does.[85] In some instances, unneutral service or the joining of a hostile expedition and the carriage of contraband might involve essentially identical conduct. The difference between these situations is whether the neutral individual had a hostile intent or the enemy's hostile intent could otherwise be attributed to the neutral.

The role of intent, apart from the objective character of the conduct, is best seen in the way neutrality law treats unwitting actions by neutrals.[86] Neutrality law does

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81. *See, e.g.*, The "Eliza Ann" and Others, (1813) 165 Eng. Rep. 1298, 1300; 1 Dods. 244, 247 (Adm.) (Mar. 9, 1813) ("[A declaration of war] proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may, perhaps, think proper to act on the defensive only.").

82. *See, e.g.*, GC II, *supra* note 41, art. 2 ("[The Convention applies] to all cases of declared war . . . between two or more of the High Contracting Parties . . . ."); 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 art. 1, Oct. 10, 1980; 1342 U.N.T.S. 137 ("This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims . . . ."); Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 18, May 14, 1954, S. TREATY DOC. NO. 106-1 (1999), 249 U.N.T.S. 358 ("[T]he present Convention shall apply in the event of declared war . . . between two or more of the High Contracting Parties . . . .").

83. Chang, *supra* note 1, at 58–59.

84. *Id.* at 59.

85. *See, e.g.*, Curtis, *supra* note 22, at 11 ("In distinguishing now the conditions under which the same acts may be considered innocent, on the one hand, or guilty through connection with a military enterprise, on the other, we are compelled to resort to the same test. Obviously, it is the purpose toward which the conduct in question is directed that stamps it with an unlawful character. It is the design to invade another country and to attack its government that attaints these otherwise harmless acts. It is through the intent, the evidence of the probability of unlawful consequences, that the prohibited conduct is to be defined. The presence of all the elements of an expedition, or the inadvertent association of individuals capable of such hostilities, is not objectionable so long as there is no purpose to do an unlawful act. For the intent is requisite to a violation of the law.").

86. Ingber criticizes "Enemy Status and Military Detention" for capturing unwitting supporters. Ingber, *supra* note 4, at 102 ("[U]nder Chang's theory, individuals providing material support—including in certain contexts individuals providing *unknowing* support—may properly be deemed 'enemies' of the state."). *But see* Chang, *supra* note 1, at 58 ("Neutrality law also has provided rules and principles for legally imputing an enemy's hostile purpose to a neutral person, organization, or nation that knowingly supported that enemy."); *id.* at 72 ("[A] neutral person who commits certain acts in favor of one side of a

not attribute a hostile purpose in cases where neutral individuals are ignorant of such hostile purpose. If someone violates a neutral duty unwittingly, the enemy's hostile purpose cannot be fairly imputed to the neutral.[87] For example, a neutral might carry goods to a belligerent without knowing that a war had started or that a blockade was in place. Similarly, if persons support a hostile expedition without knowledge of the hostile purpose, they are not guilty of violating the neutrality statute.[88] Indeed, one of the reasons behind declarations of war or proclamations of neutrality was to give notice to neutrals.[89] By providing notice of what rules and duties were applicable, the neutral's intent could be discerned from whether he comported with those rules.[90]

Here, Heller argues that the insurgent's declaration of war has no legal effect and takes me to task for my use of sources.[91] Certainly, I agree that an insurgent's declaration of war does not have the same legal effects that a state's declaration of war would have.[92] The insurgent group, because it is not a state or recognized belligerent, could not create legal effects with a declaration of war the way a state would have been able to under traditional rules of international law in the first half of the twentieth century. For example, the insurgent group's declaration of war could not trigger obligations towards it on the part of other states. Similarly, the insurgent group's declaration of war does not create neutral duties towards the state because, as I explained in "Enemy Status and Military Detention" and Part I of this Rejoinder, *those duties already exist* as a facet of the peaceful relations between the

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war becomes an enemy of the other side, even if he lacks a hostile motive. His witting actions in support of an enemy can attribute the enemy's hostile purpose to him.").

87. *See* The Orozembo, (1807) 165 Eng. Rep. 988, 990; 6 C. Rob. 430, 435 ("[I]n cases of *bona fide* ignorance, there may be no actual delinquency, but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation.").

88. *See, e.g.*, Wiborg v. United States, 163 U.S. 632, 659 (1896) ("But we think the case as to Petersen and Johansen stands on different ground .... These men were the mates of the vessel, and they proceeded on the voyage under the captain's orders. This would not excuse them if there were proof of guilty knowledge or participation on their part in assisting a military expedition or enterprise when they left Philadelphia. We are of opinion that adequate proof to that effect is not shown by the record, and that, as the case stood, the jury should have been instructed to acquit them.").

89. *See, e.g.*, Hague Convention (III) Relative to the Opening of Hostilities art. 2, Oct. 18, 1907, 36 Stat. 2259, 1 Bevans 619 ("The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification .... Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.").

90. *See, e.g.*, The Admiral, 70 U.S. (3 Wall.) 603, 615 (1866) ("[I]t is illegal for a ship having knowledge of the existence of a blockade to attempt to enter a blockaded port in violation of the blockade, and this court decided at the last term that after notification of a blockade the act of sailing for a blockaded port with the intention of violating the blockade is in itself illegal.").

91. Heller, *supra* note 4, at 129.

92. *See, e.g.*, Wright, *supra* note 76, at 363 ("[T]he moment legal war begins diplomatic relations are broken, statutes of limitation cease to operate, commercial transactions cease to be valid between persons separated by the line of war, warships of each belligerent become entitled to visit and search vessels of any flag met upon the high seas, to capture them on suspicion of enemy character, breach of blockade, carriage of contraband or unneutral service, and to submit them to national prize courts for condemnation on proof of such suspicion. War in the legal sense means a period of time during which the extraordinary laws of war and neutrality have superseded the normal law of peace in the relations of states."); *see also id.* at 365–66 ("In the case of efforts of a state to suppress an insurrection in its own territory, or to enforce a policy within territory not within the jurisdiction of any recognized state, the insurgents or native communities, not being recognized states, have no power to convert a state of peace into a state of war, so their declaration or recognition of war would have no legal effect.").

state and other states. These were not the points I was making in "Enemy Status and Military Detention." My point is that a declaration of war or avowed formal intention to participate in hostilities is useful evidence of the specific intent to wage war that is the heart of the legal inquiry into who is an "enemy." "Enemy Status and Military Detention" takes the view that the United States may take action against those who actually intend to wage war against it. And, although I might quibble with the way Heller characterizes my sources in support of this legal proposition, I think this might be one that "needs no pedant's footnotes to bestow upon it a sense of reality."[93]

CONCLUSION

I appreciate this opportunity to clarify my views and to elaborate upon several important issues that Ingber and Heller have raised in their responses. Again, I thank Ms. Ingber and Professor Heller for taking the considerable time and effort to write thoughtful responses to "Enemy Status and Military Detention." I hope they and others have enjoyed our exchange of views. Although I have focused in this Rejoinder on areas of disagreement, I end by emphasizing important areas of agreement.

Heller and I agree that the scope of a state's detention authority under *jus in bello* is very broad:

> Although a complete examination of the issue is beyond the scope of this Response, it is clear that a state has the authority to detain not only any civilian who directly participates in hostilities, but also any civilian whose indirect participation in hostilities threatens the state's security. The latter category is extremely broad: it "does not imply a direct causal relationship or geographic proximity between the individual's activity and damage inflicted on the enemy"; it "need not occur on a battlefield"; it encompasses "actions which are of direct assistance to an enemy Power," such as providing logistical support; and it includes "members of organizations whose object is to cause disturbances." . . . Indirect participation that threatens state security justifies detention, and it is difficult to imagine that international law would prohibit the United States from considering giving money to al-Qaeda such a threat.[94]

Heller is hardly an apologist for U.S. counter-terrorism operations, although he seems to put himself in that role when says that "Enemy Status and Military Detention" makes sense only if the concept of "enemy" provides more authority than using the approach afforded under *jus in bello*.[95]

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93. McDougal & Feliciano, *supra* note 43, at 771.

94. Heller, *supra* note 4, at 129–30 (footnotes omitted). To be fair to Heller, he might not agree that the law of war applies to many situations between al-Qaeda and the United States. *See id.* at 118 n.12 ("The idea that there is a global NIAC between the United States and al-Qaeda is legally questionable and has been consistently rejected by states other than the United States, including those that have been attacked by al-Qaeda.").

95. *Id.* at 129 ("Why should the United States rely on the detention authority granted by the law of neutrality instead of on the detention authority granted by [international humanitarian law]? Chang's thesis makes sense only if the former is greater than the latter, but that does not seem to be the case.").

This is where, although I disagree with Heller, I find common ground with Ingber.[96] The United States must apply both *jus ad bellum* and *jus in bello* to its war against al-Qaeda. As Ingber helpfully enumerates, there are two steps:

> In its simplest terms, the Step One question is: does an armed conflict exist between the relevant parties (or "enemies" under Chang's rubric)? Once that question is answered in the affirmative, the Step Two question is: within the confines of that armed conflict, whom among the "enemy" party may the state detain?[97]

It makes sense for the United States to perform both steps and to construe international law in its military operations against al-Qaeda accurately, even if that results in less authority than performing only one step. Getting the law right is important for its own sake. However, it also makes sense because other states have an interest in the protection of their nationals abroad.[98] The United States must fairly treat aliens because otherwise their states will seek redress against the United States.[99] Moreover, the United States also has an interest in these rules because they apply to U.S. citizens in relation to other states' fights against terrorist or insurgent groups.[100] On these principles, Ingber and I agree.[101]

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96. However, we may have to agree to disagree on whether we have agreed. *See, e.g.*, Ingber, *supra* note 4, at 78 ("Chang's approach disregards the very principles embodied in the laws of war that states have developed to regulate—and cabin—the scope of the state's authority in armed conflict."). *But see, e.g.*, Chang, *supra* note 1, at 51 ("[D]etermining that a person has acquired enemy status is necessary for military detention, but it is not sufficient. For a person's detention to be justified under the law of war, like all exercises of the war power, detention must be militarily necessary.... However, although judges may be precluded from inquiring into the military necessity of continued detention, this would still be a requirement that the President and subordinate commanders must observe."); *id.* at 72–73 ("Once a neutral person has acquired enemy status (that is, crossed the *jus ad bellum* threshold into the war), his detention must be militarily necessary in order to be justified under *jus in bello*.").

97. Ingber, *supra* note 4, at 80.

98. *See, e.g.*, 1 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: PEACE § 319, at 686 (Hersch Lauterpacht ed., 8th ed. 1955) ("By a universally recognised customary rule of International Law every State holds a right of protection over its citizens abroad, to which there corresponds the duty of every State to treat foreigners on its territory in accordance with certain legal rules and principles.").

99. *See, e.g.*, Young v. United States, 97 U.S. 39, 60 (1877) ("If he oversteps the bounds which limit the power of belligerents in legitimate warfare, as understood by civilized nations, other nations may join his enemy, and enter the conflict against him. If, in the course of his operations, he improperly interferes with the person or property of a non-combatant subject of a neutral power, that power may redress the wrongs of its subject.").

100. *Cf.* United States v. Arjona, 120 U.S. 479, 487 (1887) ("But if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other.").

101. *See, e.g.*, Ingber, *supra* note 4, at 80 ("The United States' respect for and compliance with the laws of war are essential for the well-being of our troops, for the continued cooperation and good will of our allies, and for our legitimacy in seeking to enforce compliance by others.").

Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya

ZOË HOWE*

SUMMARY

INTRODUCTION

In early 2011, violent uprisings swept through Northern Africa.[1] In Libya, the uprisings turned into an extended armed conflict between the Libyan government

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1. Fredrick Kunkle, *Demonstrations Sweep Middle East, Sparking Violence in Syria and Yemen*, WASH. POST, Apr. 8, 2011, http://www.washingtonpost.com/world/demonstrations-sweep-middle-east-sparking-violence-in-syria-and-yemen/2011/04/08/AFd5dz3C_story.html.

and U.N.-backed rebel forces, finally resulting in the overthrow of the Libyan government led by Muammar el-Qaddafi.[2] The increasing violence led the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Committee of the Blue Shield[3] to issue statements in March urging both the Libyan government and the coalition forces to protect Libya's cultural property.[4] The Blue Shield asked both sides to respect the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), to which Libya is a signatory party.[5] The Blue Shield statement is notable because it exhorts "all parties involved" in the conflict (which presumably includes the Libyan rebel group, a non-state actor) to respect an international treaty even though only state parties are traditionally bound by treaties. UNESCO later issued another statement calling on "the parties involved in the armed conflict in Libya to ensure the protection" of specific cultural sites.[6] Since the number of conflicts involving non-state actors is growing,[7] the groups' statements raise the question of whether international treaties like the Hague Convention can be used to bind not only state actors, but non-state actors as well.

For the Hague Convention to effectively protect cultural property, it must apply to non-state actors in non-international armed conflicts. To achieve this goal, the Hague Convention's application to non-state actors must be strengthened and clarified. In this Note, I examine the 1954 Hague Convention, focusing particularly on the application of the Convention to non-state actors. Part I outlines the development of laws protecting cultural property. Part II examines the important provisions of the 1954 Hague Convention and its Protocols, while Part III discusses the weaknesses of the Convention. The second half of the Note addresses the application of the Hague Convention to non-state actors, looking particularly at the looting of the Iraqi National Museum and the armed conflict in Libya. Part IV(A) examines whether the United States had a duty to prevent the looting of the National Museum of Iraq. Part IV(B) discusses the legal framework for applying the Hague Convention to non-state actors, and Part IV(C) uses an analysis of the armed conflict in Libya to further explore the implications of extending duties under the Hague Convention to non-state actors.

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2. Kareem Fahim & David D. Kirkpatrick, *Jubilant Rebels Control Much of Tripoli*, N.Y. TIMES, Aug. 21, 2011, http://www.nytimes.com/2011/08/22/world/africa/22libya.html.

3. The International Committee of the Blue Shield is an organization that coordinates and strengthens international efforts to protect cultural property at risk of destruction in armed conflicts. Blue Shield, *Blue Shield's Network Website*, http://www.blueshield-international.org (last visited Jan. 25, 2012).

4. Press Release, The Int'l Comm. of the Blue Shield, Blue Shield Statement on Libya (Mar. 14, 2011), http://icom.museum/press-releases/press-release/article/blue-shield-statement-on-libya-14-march-2011.html; *Director-General Urges Military Forces Engaged in Libya to Refrain from Endangering Cultural Heritage*, UNESCO WORLD HERITAGE CONVENTION (Mar. 23, 2011), http://whc.unesco.org/en/news/730 [hereinafter Director-General Statement to Forces Engaged in Libya].

5. Director-General Statement to Forces Engaged in Libya, *supra* note 4; *see States Parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Regulations for the Execution of the Convention*, UNESCO, http://erc.unesco.org/cp/convention.asp?KO=13637&language=E (last visited Jan. 13, 2012) [hereinafter *States Parties to the 1954 Hague Convention*] (documenting Libya's ratification of the 1954 Hague Convention on Nov. 19, 1957).

6. *The Director-General Calls for the Protection of the Old Town of Ghademes*, UNESCOPRESS (June 14, 2011), http://www.unesco.org/new/en/media-services/single-view/news/the_director_general_calls_for_the_protection_of_the_old_town.

7. Andreas Wenger & Simon Mason, *The Growing Importance of Civilians in Armed Conflict*, CSS ANALYSES IN SECURITY POL'Y, Dec. 2008, at 1, 1.

I. HISTORY OF PROTECTION FOR CULTURAL PROPERTY

For centuries, war has been conducted with the view that "to the victor goes the spoils."[8] Pillage and destruction were generally seen as unavoidable consequences of war.[9] Throughout the centuries, however, there have been some who have viewed art and cultural property as deserving of special protection, including the Greek historian Polybius, who observed that "[n]o one can deny that to abandon oneself to the pointless destruction of temples, statues and other sacred objects is the action of a madman."[10] Additionally, Cicero, the Roman philosopher, established a distinction between ordinary spoils of war and artistic decoration, asserting that the former could be legally looted while the latter could not.[11]

While some early thinkers believed cultural property merited heightened protection, looting and destruction of art and architecture during war persisted for centuries.[12] Hugo Grotius wrote in 1625 that armed violence, including destruction of enemy property, was permissible as long as the end pursued in war was just.[13] Grotius believed, however, that reason compelled sparing "those things which, if destroyed, do not weaken the enemy, nor bring gain to the one who destroys them," including art and religious property.[14]

Emer de Vattel, writing in the eighteenth century, was one of the first to recommend unique protection for cultural property.[15] While Vattel recognized that the law of war allowed states to appropriate an enemy nation's property,[16] he urged that cultural property be spared:

> For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to the

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8. Andrea Cunning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT'L L. 211, 212 (2003).

9. *See id.* (noting the historic sentiment that the victorious party to a conflict "was entitled to pillage and loot the treasures of the defeated party").

10. JIŘÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 4 (1996).

11. Margaret M. Miles, *Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art*, 11 INT'L J. CULTURAL PROP. 28, 31 (2002).

12. *See* Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT'L L. 185, 203–04 (2005) (stating that by the mid-1700s, some thinkers "took the position that, though international law permitted plunder, cultural monuments enjoyed a unique and protected status"); TOMAN, *supra* note 10, at 3–7 (explaining that in antiquity the "destruction of cultural property was then considered an inevitable consequence of war," the "situation in the Middle Ages was not very different," and "[d]uring the wars at the time of the French Revolution, the booty of war included *objets d'art* and scientific objects").

13. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 599–600 (Francis W. Kelsey trans., Clarendon Press 1925) (1625).

14. *Id.* at 751.

15. Cunning, *supra* note 8, at 214 (citing Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws*, *in* THE SPOILS OF WAR 100, 100–05 (Elizabeth Simpson ed., 1997)).

16. EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY 567 (Knud Haakonssen et al. eds., Thomas Nugent, trans., Liberty Fund, Inc. 2008) (1758) ("We have a right to deprive our enemy of his possessions, of every thing which may augment his strength and enable him to make war.").

> enemy's strength,—such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste . . . .[17]

Vattel acknowledged, however, that these cultural edifices could be destroyed if so dictated by the "necessity and maxims of war."[18]

The first codification of laws concerning cultural property was prepared by Francis Lieber in the *Instructions for the Government of Armies of the United States in the Field* (Lieber Code).[19] In 1863, President Lincoln commissioned Lieber, a law professor at Columbia University, to draft a code of military conduct for the Union Army during the Civil War.[20] While Article 31 of the Lieber Code acknowledges that victorious armies have the right to seize all public movable property,[21] Article 34 explicitly provides for protection of "property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge . . . museums of the fine arts, or of a scientific character . . . ."[22] As the first wartime code of conduct to explicitly provide for protection of cultural property, the Lieber Code was very influential in Europe and "provided the foundation for subsequent agreements on the protection of cultural property," including the 1899 and 1907 Hague Conventions.[23]

The 1899 Hague Convention with Respect to the Laws and Customs of War on Land was "[t]he first formal international treaty providing some protection for cultural property."[24] Articles 28 and 47 prohibit pillaging, and Article 56 provides that all property of the arts and sciences will be treated as private property and that the seizure or destruction of such property is prohibited.[25] The 1907 Hague Convention soon followed and provided for the protection of "buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected . . . ."[26] While the 1899 and 1907

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17. *Id.* at 571.

18. *Id.*

19. U.S. War Dep't, Instructions for the Gov't of Armies of the United States in the Field, Gen. Orders No. 100 (1863) [hereinafter Lieber Code]; *see also* ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 18 (2006) (noting that Lieber's instructions were "the first codification of the laws of war," and that Lieber states in art. 22 "[t]he principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit") (internal quotation marks omitted); Cunning, *supra* note 8, at 214 ("One of the first legal documents to reference protection of cultural property during armed conflict appears in the Instruction for Government of Armies of the United States in the Field, also known as the 'Lieber Code.'").

20. Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 253 (2006).

21. Lieber Code, *supra* note 19, art. 31.

22. *Id.* art. 34.

23. Cunning, *supra* note 8, at 215.

24. KEVIN CHAMBERLAIN, WAR AND CULTURAL HERITAGE 9 (2004).

25. Hague 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 arts. 28, 47, 56, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, *available at* http://www.icrc.org/ihl.nsf/FULL/150.

26. Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 27, Oct. 18, 1907, 36 Stat. 2277, 1

Hague Conventions were significant because they were the first international treaties addressing cultural property protection, the catastrophic destruction in World War I and World War II exposed the weaknesses of the Conventions and illuminated the need for stricter prohibitions against the destruction of cultural property.

World War I brought widespread damage to cultural property and historical sites.[27] The extent of the damage was due in part to claims of military necessity by both sides, as well as to new aerial bombardment technology.[28] Belgium and France took the brunt of the destruction, which included the shelling of Rheims Cathedral and the burning of the University of Louvain library.[29] The 1899 and 1907 Hague Conventions were largely ignored during the war, but they were referenced in negotiations surrounding the Treaty of Versailles to help return artworks plundered during the conflict.[30]

Allied forces made greater attempts to protect cultural property in World War II than they did in World War I. General Eisenhower issued two sets of orders instructing U.S. forces to protect cultural heritage as much as possible, except when it "would result in the loss of human life."[31] The Allied forces created special officer units to help locate, protect, and later return cultural objects and monuments to their original owners.[32] Despite these efforts, World War II still saw the "[l]argest destruction and displacement of cultural sites and objects" ever known.[33] The Nazis ignored the 1899 and 1907 Hague Conventions and established a system for looting art throughout the occupied countries.[34] In Eastern Europe, the Nazis looted monuments, religious buildings, museums, and libraries, while in Western Europe they focused particularly on seizing art from private collections owned by Jews.[35] Art deemed unworthy of transportation back to Germany (particularly art from Eastern Europe) was destroyed.[36]

History has highlighted the need for stronger protection of cultural property during war. The looting and destruction of art and cultural objects in World War I

Bevans 631, [hereinafter 1907 Hague Convention], *available at* http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument.

27. Sandholtz, *supra* note 12, at 209.

28. CHAMBERLAIN, *supra* note 24, at 9–10.

29. Sandholtz, *supra* note 12, at 209–10.

30. *See* Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws*, *in* THE SPOILS OF WAR 100, 102 (Elizabeth Simpson ed., 1997) ("Enforcement of the provisions of the Hague Convention was rigorously implemented in the Treaty of Versailles of 1919."); Cunning, *supra* note 8, at 216 ("[A]lthough the first two Hague Conventions did not prevent the looting that took place in WWI and WWII, they did provide a framework for the restitution and repatriation of the stolen property afterwards.").

31. Gerstenblith, *supra* note 20, at 258; *see also* TOMAN, *supra* note 10, at 20 (discussing the orders issued by General Eisenhower).

32. Gerstenblith, *supra* note 20, at 258; TOMAN, *supra* note 10, at 20.

33. Gerstenblith, *supra* note 20, at 258.

34. *Id.*

35. O'KEEFE, *supra* note 19, at 80–83.

36. *See id.* at 82 ("German occupation of the Soviet Union brought with it the vicious premeditated devastation of historic, artistic and religious buildings and sites. In an order of 10 October 1941 . . . Field Marshal von Reichenau declared that '[n]o treasures of history and art in the East are of the slightest consequence'. German forces systematically destroyed, usually after stripping them, churches, cathedrals, monasteries, synagogues, palaces, museums, libraries, archives, cityscapes, townscapes and villages across the Ukraine, Byelorussia and western Russia.").

and World War II in particular inspired an international effort to implement greater protection for cultural property.[37] This effort culminated in the drafting of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in 1954.[38]

II. THE 1954 HAGUE CONVENTION AND ITS PROTOCOLS[39]

In 1950, UNESCO's Director-General held a meeting of experts "to prepare a draft convention on the protection of cultural property in the event of armed conflict."[40] The draft attempted to strike a balance between "maximising participation in the convention and maximising the protection it afforded."[41] The draft resulted in the formulation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Regulations for the Execution of the Convention.[42] The Convention and a separate optional protocol called the First Protocol were adopted in The Hague on May 14, 1954.[43] The Hague Convention currently has 123 high contracting parties, and the First Protocol has 100.[44]

The Hague Convention rests on the principle that cultural property is valuable to all of mankind, not just to the citizens of the country where the property resides.[45] The preamble to the Convention states that "damage to [any] cultural property . . . means damage to the cultural heritage of all mankind, since each [group of] people makes its [own] contribution to the culture of the world."[46]

Chapter I of the Convention contains general provisions that apply to all cultural property.[47] Article 1 of Chapter I defines cultural property as "movable or immovable property of great importance to the cultural heritage of every people."[48] Cultural property also includes "buildings whose main and effective purpose is to preserve or exhibit . . . cultural property" and "centres containing a large amount of cultural property."[49] The drafters of the Convention believed that part of the failure

37. TOMAN, *supra* note 10, at 21–22.

38. *Id.* at 23.

39. The following discussion of the 1954 Hague Convention and the First and Second Protocols is intended to cover only the main substantive provisions included therein. For a complete discussion of the Convention, see generally TOMAN, *supra* note 10, and CHAMBERLAIN, *supra* note 24.

40. O'KEEFE, *supra* note 19, at 92–93.

41. *Id.* at 93.

42. *Id.*; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOC. NO. 106-1 (1999), 249 U.N.T.S. 215 (entered into force Aug. 7, 1956) [hereinafter 1954 Hague Convention], *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf.

43. O'KEEFE, *supra* note 19, at 93–94; 1954 Hague Convention, *supra* note 42; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOC. NO. 106-1 (1999), 249 U.N.T.S. 358, [hereinafter First Protocol], *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf.

44. *States Parties to the 1954 Hague Convention*, *supra* note 5; *States Parties to the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, http://erc.unesco.org/cp/convention.asp?KO=15391&language=E (last visited Jan. 13, 2011), [hereinafter *States Parties to the First Protocol to the 1954 Hague Convention*].

45. CHAMBERLAIN, *supra* note 24, at 24.

46. 1954 Hague Convention, *supra* note 42, pmbl.

47. *Id.* arts. 1–7.

48. *Id.* art. 1.

49. *Id.*

of the 1899 and 1907 Hague Conventions was the overly ambitious definition of objects that should be afforded protection.[50] They sought a narrower definition of protected objects so that those objects could receive a "higher standard of protection."[51] Article 1, therefore, defines cultural property as property of "great importance" to humanity,[52] though it is up to each state to decide which property is of "great importance."

Article 3 imposes an affirmative duty on the high contracting parties to implement peacetime measures to protect their own cultural property, requiring the parties to "prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate."[53] Article 3 does not specify the measures to be taken by the parties, and therefore gives each party a large amount of discretion in protecting cultural property within its borders. The country that holds the cultural property, however, "*remains accountable* to . . . [the international] community for the safeguarding of such property."[54]

Article 4 contains two of the more controversial provisions in the Hague Convention. While paragraph 1 imposes a duty on high contracting parties to respect cultural property by refraining from using historic sites or areas surrounding cultural objects for military purposes, paragraph 2 provides that this duty may be waived in cases of "military necessity."[55] The Convention does not contain a definition of military necessity, meaning that it is up to each state to decide whether military circumstances warrant the destruction of cultural property. The inclusion of Article 4 was the subject of serious debate at the 1954 conference with many countries concerned about the potential for abuse.[56] Other countries argued that the addition of the military necessity exception was the only way to make the Hague Convention militarily "applicable" and that its inclusion would encourage more countries to ratify the Convention.[57] The final provision regarding military necessity represents a compromise between these two camps, and it allows parties to destroy cultural property only in times of *imperative* military necessity.[58]

The second controversial provision of Article 4 is contained in paragraph 3, which states that the parties "undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property."[59] This provision did not receive much attention before the Iraq War but has now become one of the key provisions for evaluating whether international law has been violated during armed conflict.[60] It has attained greater importance in recent years because looting of archaeological sites and

50. O'KEEFE, *supra* note 19, at 101.

51. *Id.*

52. 1954 Hague Convention, *supra* note 42, art. 1.

53. *Id.* art. 3.

54. TOMAN, *supra* note 10, at 61.

55. 1954 Hague Convention, *supra* note 42, art. 4.

56. CHAMBERLAIN, *supra* note 24, at 38 (noting the claim that "'military necessity' does not amount to much more than 'military convenience'"); O'KEEFE, *supra* note 19, at 122–23.

57. TOMAN, *supra* note 10, at 75–76.

58. 1954 Hague Convention, *supra* note 42, art. 4(2).

59. *Id.* art. 4(3).

60. Gerstenblith, *supra* note 20, at 263.

museums has become one of the main threats to cultural property.[61] Paragraph 3 applies to looting by local citizens, and it imposes an obligation on parties to protect cultural property by preventing such looting.[62]

While Chapter I of the Convention applies to all cultural property, Chapter II applies to cultural property that is placed under "special protection."[63] The system of special protection is designed to provide greater protection for a limited number of refuges that shelter moveable cultural property as well as centers containing monuments and other immovable cultural property.[64] Article 8 provides that special protection must only be awarded to property that is regarded as being "of very great importance."[65] Two conditions must be fulfilled for property to be placed under special protection: (1) the protected property must be "situated at an adequate distance from any large industrial centre or from any important military objective;" and (2) the property must not be "used for military purposes."[66] Special protection is granted once the cultural property is entered into the International Register of Cultural Property under Special Protection.[67] Article 9 gives immunity to property under special protection.[68]

The success of the special protection provision has been limited.[69] Many countries are reluctant to register their property because of the practical difficulties they experience from the application of Article 8, and only a small number of countries have actually registered property for special protection.[70] The eligibility criteria for special protection are extremely difficult to satisfy, the procedure to obtain special protection is arduous, and the extra protection that is given to listed objects is minimal in practice.[71] In the end, listing objects for special protection is simply not worth the effort for many countries.

Article 28 provides the sanctions for violating the Convention, stating that contracting parties will take "all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."[72] This provision is problematic because: (1) it does not explain exactly which violations of the Convention can be prosecuted; (2) it does not provide the mental intent required to punish a violation; and (3) it does not establish minimum or maximum penalties for violations.[73] The vagueness of Article 28 hinders uniform application of the Article because its interpretation is up to the individual state.[74]

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61. O'KEEFE, *supra* note 19, at 132.
62. 1954 Hague Convention, *supra* note 42, art. 4(3).
63. *Id.* arts. 8–11.
64. *Id.* art. 8(1).
65. *Id.*
66. *Id.*
67. *Id.* art. 8(6).
68. 1954 Hague Convention, *supra* note 42, art. 9.
69. TOMAN, *supra* note 10, at 108.
70. *Id.* at 109.
71. O'KEEFE, *supra* note 19, at 141.
72. 1954 Hague Convention, *supra* note 42, art. 28.
73. Roger O'Keefe, *Protection of Cultural Property Under International Criminal Law*, 11 MELB. J. INT'L L. 339, 363 (2010).
74. CHAMBERLAIN, *supra* note 24, at 89.

A. First Protocol

The First Protocol to the 1954 Hague Convention was executed at the same time as the main convention and concerns the status of movable cultural property.[75] The First Protocol was meant to address the systemic pillaging of art from occupied territories during World War II.[76] Section I provides that an occupying power has a duty to prevent the exportation of cultural property from the occupied territory.[77] Additionally, parties must return any cultural property that has been exported from the occupied country.[78] Section II requires that any cultural property transported from one party to another party for safekeeping during armed conflict must be returned to the country of origin at the end of the conflict.[79]

The First Protocol has been almost universally disregarded by contracting parties.[80] There are practically no examples of parties restricting the movement of cultural property from areas affected by armed conflict because, in part, nations dislike the interference such obligations impose on their art markets.[81] Nevertheless, the First Protocol has become increasingly significant in recent years as illicit removal has emerged as one of the main threats to cultural property.[82]

B. Second Protocol

The effectiveness of the 1954 Hague Convention was called into question in the early 1990s during the Gulf War, when Iraq took Kuwaiti cultural objects back to Iraq for "safekeeping,"[83] and during the war in the former Yugoslavia, when the Old City of Dubrovnik suffered extensive destruction from shelling.[84] In 1991, UNESCO and the Netherlands commissioned a study to assess the effectiveness of the 1954 Hague Convention and to see whether it needed to be amended.[85] The study, conducted by Professor Patrick Boylan, found that the problems surrounding the 1954 Hague Convention resulted from "failure in the application of the *Convention* and *Protocol* rather than of inherent defects in the international instruments themselves."[86] While Boylan anticipated that amendments to the Convention might

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75. *See* First Protocol, *supra* note 43, para. 1 ("Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property . . . .").

76. TOMAN, *supra* note 10, at 337.

77. First Protocol, *supra* note 43, para. 1.

78. *Id.* para. 3.

79. *Id.* para. 5.

80. *See* Gerstenblith, *supra* note 20, at 266 ("[T]here seems to be no example of a nation that is a party to the Protocol taking action under the Protocol to prohibit trade in cultural objects removed from occupied territory.").

81. TOMAN, *supra* note 10, at 349; Gerstenblith, *supra* note 20, at 266.

82. O'KEEFE, *supra* note 19, at 196.

83. *See* TOMAN, *supra* note 10, at 349 (explaining that although most of the objects Iraq took from Kuwait were eventually returned, Iraq's intentions in taking the objects were suspicious to many in the international community).

84. Sandholtz, *supra* note 12, at 218–19.

85. PATRICK J. BOYLAN, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (1993), http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf.

86. *Id.* para. A.2.

be necessary in the long term, he asserted that the "over-riding priority" should be achieving greater recognition of and participation in the Convention.[87] Boylan then recommended a number of practical steps to increase awareness of the Convention and improve its effectiveness.[88]

In 1999, the Diplomatic Conference on the Second Protocol to the Hague Convention met in The Hague.[89] The Second Protocol, incorporating many of the recommendations of the Boylan Report, was adopted without a vote and was signed immediately by twenty-seven states.[90] Currently, there are sixty signatory parties to the Second Protocol.[91] The Second Protocol functions as a supplement to, rather than an amendment of, the provisions of the Convention.[92] The Hague Convention remains the basic text, and a state can remain a party to the Hague Convention without becoming a party to the Second Protocol.[93] The only provision of the Protocol that supplants the Hague Convention is the section providing for enhanced protection of certain cultural objects and sites.[94] This provision replaces the system of special protection implemented under the Hague Convention.[95]

The Second Protocol provides "enhanced protection" for cultural property under three conditions: (1) the property "is cultural heritage of the greatest importance for humanity;" (2) the property "is protected by adequate domestic legal and administrative measures . . . ensuring the highest level of protection;" and (3) the property is "not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used."[96] Cultural property that meets these criteria must then be referred to the Committee for the Protection of Cultural Property in the Event of Armed Conflict, and, if approved, it will be included in the List of

87. *Id.* para. A.4.

88. *Id.* paras. B–F.

89. Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Mar. 15–26, 1999, *Summary Report* (June 1999), http://unesdoc.unesco.org/images/0013/001332/133243eo.pdf [hereinafter UNESCO Conference on the Second Protocol].

90. Jean-Marie Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, INT'L REV. OF THE RED CROSS, No. 835 (Sept. 30 1999), *available at* http://www.icrc.org/eng/resources/documents/misc/57jq37.htm; *see also States Parties to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, http://portal.unesco.org/la/convention.asp?KO=15207&language=E&order=alpha [hereinafter *States Parties to the Second Protocol to the 1954 Hague Convention*].

91. *States Parties to the Second Protocol to the 1954 Hague Convention*, *supra* note 90.

92. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 2, Mar. 26, 1999, 38 I.L.M. 769, 2253 U.N.T.S. 172 [hereinafter Second Protocol], *available at* http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html.

93. *See* UNESCO Comm. for the Protection of Cultural Property in the Event of Armed Conflict, Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, paras. 10–11, CLT-09/CONF/219/3 REV.3 (Nov. 24, 2009) [hereinafter Guidelines for the Second Protocol], *available at* http://unesdoc.unesco.org/images/0018/001867/186742E.pdf ("The Second Protocol does not affect the rights and obligations of the High Contracting Parties to the Convention.").

94. *Id.*; Second Protocol, *supra* note 92, art. 4(b).

95. Guidelines for the Second Protocol, *supra* note 93, I.C para. 10.

96. Second Protocol, *supra* note 92, art. 10.

Cultural Property under Enhanced Protection.[97] Once it is designated as warranting enhanced protection, cultural property receives total immunity[98] unless it is later used as a military objective.[99] While the Hague Convention's program of special protection was limited because it only applied to refuges sheltering cultural property and centers containing monuments and other immovable property, the Second Protocol's system of enhanced protection expands the scope of protection and can be applied to all cultural property.[100]

Article 6 of the Second Protocol also increases protection for cultural property in times of war because it more clearly defines the term "military necessity."[101] A waiver on the basis of military necessity can only be made when (1) "that cultural property has, by its function, been made into a military objective;" and (2) "there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective."[102] Additionally, the decision to invoke military necessity may only be made by a commanding officer.[103]

The Second Protocol also clarifies the instances in which individuals can be prosecuted for harming cultural property.[104] Article 15 defines five acts against cultural property that require criminal sanctions, and Article 16 requires parties to establish them as criminal offenses under their domestic law.[105] Finally, Article 22 applies the Second Protocol to non-international armed conflicts.[106]

While the Second Protocol served as an important clarification of many of the principles of the Hague Convention, it was not the panacea that many hoped it would become. Many of the weaknesses of the Hague Convention remain even after the implementation of the Second Protocol.

III. WEAKNESSES OF THE HAGUE CONVENTION AND ITS PROTOCOLS

The development of the 1954 Hague Convention has been extremely significant in the ongoing attempt to protect cultural property; however, it has considerable shortcomings. The primary weakness of the Convention and its protocols, as with most international law, is the lack of effective enforcement mechanisms. The 1954 Convention included practically no sanctions for non-compliance, and the Second Protocol, though instituted partly to improve enforcement, did not do much better. There is no central enforcement body provided for in the Convention, leaving compliance and enforcement up to each individual state.[107] The Convention relies

97. *Id.* art. 11.

98. *Id.* art. 12.

99. *Id.* art. 13(1)(b). Cultural property may also lose its enhanced protection under specifications listed in Article 14. *Id.* art. 13(1)(a).

100. *Id.* art. 10.

101. *Id.* art. 6.

102. Second Protocol, *supra* note 92, art. 6(a).

103. *Id.* art. 6(c).

104. *Id.* art. 15.

105. *Id.* arts. 15–16.

106. *Id.* art. 22.

107. Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict—Is it Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49, 56 (1999).

"on national laws and ad hoc criminal tribunals to prosecute individuals" for destroying cultural property, but these authorities generally do not deter "improper use or destruction of cultural property."[108] Without sanctions from other parties for non-compliance, state parties can violate the Convention "whenever they deem it expedient to do so."[109] An additional weakness is the lack of sanctions for states that fail to protect their own cultural property in times of peace. Article 3 requires state parties to safeguard their own cultural property during peacetime, but does not include any specific requirements.[110] The lack of requirements effectively allows states to do nothing to protect their cultural property, and very few states have undertaken any significant measures during peacetime to ensure protection for cultural property.[111]

Another weakness of the Hague Convention is its vagueness. The Convention requires states to "respect cultural property," but it does not describe what that entails.[112] The Convention's broad language means that states can manipulate the meanings of the words to suit their own ends and can "avoid the spirit of the instruments by asserting their compliance with the literal meaning of the words."[113]

A third weakness, which is the subject of the second part of this Note, is the uncertainty over whether the Hague Convention applies to non-state actors. It is clear that the Convention binds the states that become parties to the Convention.[114] It can be argued, however, that the Convention enjoys a broader application, creating obligations for non-state parties and actors. As I discuss in more detail below, Article 19 of the Convention and Article 22 of the Second Protocol provide that the Convention will be applicable in non-international armed conflicts.[115] Article 19 in particular indicates that the Convention could be interpreted as applying to non-state actors.[116] With the increasing frequency of conflicts involving non-state actors, it is important that the potential application to non-state actors provided for in Article 19 be broadened and strengthened so that the Hague Convention remains a relevant tool by which to protect cultural property.

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108. Matthew Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE H.R. & DEV. L.J. 153, 161 (2005).

109. Oyer, *supra* note 107, at 56.

110. 1954 Hague Convention, *supra* note 42, art. 3.

111. *See* Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT'L L. 213, 216–17 (2007–2008) ("[E]ven the [Convention's] relatively light peacetime obligations . . . seem to enjoy only limited compliance among secure and peaceful states.").

112. 1954 Hague Convention, *supra* note 42, art. 4; Second Protocol, *supra* note 92, art. 6.

113. Posner, *supra* note 111, at 218.

114. 1954 Hague Convention, *supra* note 42, art. 4; Second Protocol, *supra* note 92, art. 3.

115. 1954 Hague Convention, *supra* note 42, art. 19; Second Protocol, *supra* note 92, art. 22.

116. 1954 Hague Convention, *supra* note 42, art. 19.

IV. APPLICATION OF THE HAGUE CONVENTION TO NON-STATE ACTORS: A STUDY OF IRAQ AND LIBYA

A. The Looting of the Iraq Museum

In March 2003, U.S. troops entered Iraq;[117] by early April, they reached Baghdad.[118] As U.S. forces fought to subdue the Iraqi resistance, mobs of Iraqi citizens looted the National Museum of Iraq.[119] The looting continued from April 9 to April 12.[120] Although original reports put the number of stolen artifacts at 170,000,[121] the final estimates indicated that closer to 13,500 artifacts, including forty major pieces, had been looted.[122]

Shortly after the looting began, Raid Abdul Ridhar Muhammad, the curator of the museum, approached a group of U.S. troops and asked them to protect the museum from looters.[123] A tank and five soldiers returned with Muhammad to the museum and fired above the heads of the looters, driving them away.[124] The U.S. troops left after half an hour, however, and the looters returned, threatening Muhammad and taking away anything they could carry.[125]

The looting of the National Museum was a cultural tragedy for Iraq and for the international community. Iraq has been referred to as the "cradle of civilization," having witnessed both the innovation of agriculture and the development of writing.[126] The National Museum housed "one of the finest collections of antiquities

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117. David E. Sanger & John F. Burns, *Threats and Responses: The White House; Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, N.Y. TIMES, Mar. 20, 2003, at A1, *available at* http://www.nytimes.com/2003/03/20/world/threats-responses-white-house-bush-orders-start-war-iraq-missiles-apparently.html.

118. Dexter Filkins, *A Nation at War: In the Field, First Marine Division; Little Resistance Encountered as Troops Reach Baghdad*, N.Y. TIMES, Apr. 5, 2003, http://www.nytimes.com/2003/04/05/world/nation-war-field-first-marine-division-little-resistance-encountered-troops.html.

119. Colonel Matthew Bogdanos, Dep't of Def., Briefing on the Investigation of Antiquity Loss from the Baghdad Museum, (Sept. 10, 2003), (transcript available at www.defense.gov/transcripts/transcript.aspx?transcriptid=3149); Michael Slackman, *Ancient Wonders Are History as Mob Plunders Iraq Museum*, L.A. TIMES, Apr. 13, 2003, http://articles.latimes.com/2003/apr/13/news/war-museum13.

120. Bogdanos, *supra* note 119.

121. John F. Burns, *Pillagers Strip Iraqi Museum of Its Treasures*, N.Y. TIMES Apr. 13, 2003, http://www.nytimes.com/2003/04/12/international/worldspecial/12CND-BAGH.html.

122. *See* Bogdanos, *supra* note 119 (estimating that nearly 3,500 artifacts had been recovered and slightly over 10,000 were still missing).

123. Burns, *supra* note 121.

124. *Id.*

125. *Id.*

126. *See* Harriet Crawford, *The Dawn of Civilization*, *in* THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA 50, 53–57 (Milbry Polk & Angela M.H. Schuster eds., 2005) (detailing the introduction of farming in Iraq); Robert D. Biggs, *The Birth of Writing, The Dawn of Literature*, *in* THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA 105, 106–07 (Milbry Polk & Angela M.H. Schuster eds., 2005) ("It has long been held that the world's first writing was invented in Mesopotamia sometime around 3300 or 3200 B.C.—although recent carbon-14 dates have placed its origins between 3400 and 3300 B.C."); Frank Rich, *And Now: 'Operation Iraqi Looting'*, N.Y. TIMES, Apr. 27, 2003, http://www.nytimes.com/2003/04/27/arts/and-now-operation-iraqi-looting.html (calling Iraq the "cradle of our civilization").

in the world."[127] The devastation of Iraq's cultural property outraged the international community, and it led many to question whether the United States had violated a duty to protect the National Museum.[128] The United States justified its failure to protect the National Museum on grounds of military necessity, citing a need to protect the infrastructure of Iraq.[129] The United States prioritized dismantling the remnants of Saddam Hussein's regime and protecting the Ministry of Oil over guarding the National Museum.[130] In the days following the looting, the Bush Administration was particularly nonchalant about the devastation inflicted on Iraq's cultural heritage. At a press conference on April 11, Defense Secretary Donald Rumsfeld made light of the looting, saying:

> The images you are seeing on television you are seeing over, and over, and over, and it's the same picture of some person walking out of some building with a vase, and you see it 20 times, and you think, "My goodness, were there that many vases?" (Laughter) "Is it possible that there were that many vases in the whole country?"[131]

As anger over the looting of the National Museum grew, the Bush Administration took a more conciliatory stance, acknowledging that the looting caused irretrievable losses to Iraq's cultural heritage and emphasizing that the United States would cooperate with international efforts to return the stolen property to Iraq.[132]

The U.S. failure to protect the National Museum led to an international debate about whether the United States had a duty to protect the museum under the 1954 Hague Convention.[133] While the United States had signed the Convention at its inception, Congress did not ratify it until 2009.[134] The main reason for non-ratification by the United States was that, during the Cold War, the United States

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127. Slackman, *supra* note 119.

128. Constance Lowenthal & Stephen Urice, *An Army for Art*, N.Y. TIMES, Apr. 17, 2003, http://www.nytimes.com/2003/04/17/opinion/an-army-for-art.html ("The American and British forces are clearly to blame for the destruction and displacement of [Iraq's] cultural treasures."); *see also* Frank Rich, *supra* note 126 ("America stood idly by while much of the heritage of [Iraqi] civilization—its artifacts, its artistic treasures, its literary riches and written records—was being destroyed . . . ."); Kenneth Baker, *At a Loss Over Theft of Artifacts; Calamity Should Have Been Foreseen*, S.F. CHRON., Apr. 17, 2003, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/04/17/DD263009.DTL (indicting U.S. forces for neglecting a letter from the Archaeological Institute of America imploring the United States to take precautions against raids on Iraqi museums).

129. Douglas Jehl & Elizabeth Becker, *Experts' Pleas to Pentagon Didn't Save Museum*, N.Y. TIMES, Apr. 16, 2003, http://www.nytimes.com/2003/04/16/world/a-nation-at-war-the-looting-experts-pleas-to-pentagon-didn-t-save-museum.html.

130. *See* Thurlow, *supra* note 108, at 176 ("The United States ultimately deemed protecting the cultural heritage of the Iraqi people of lesser importance than dismantling the remnants of the Ba'athist regime, securing Saddam Hussein's palaces and the Oil Ministry, and making the city safe for American soldiers.").

131. Donald H. Rumsfeld, Sec'y of Def., and Gen. Richard B. Myers, Chairman of the Joint Chiefs of Staff, U.S. Dep't of Defense, Department of Defense News Briefing (Apr. 11, 2003) (transcript available at www.defense.gov/transcripts/transcript.aspx?transcriptid=2367).

132. Sandholtz, *supra* note 12, at 200.

133. *See generally id.* at 190–95 (outlining the reaction to the U.S. failure to safeguard the National Museum by commentators, press, national governments, and nongovernmental organizations).

134. *Id.* at 230 (stating that the United States signed the 1954 Hague Convention at the conclusion of the conference on May 14, 1954); *States Parties to the 1954 Hague Convention*, *supra* note 5 (documenting the United States' ratification of the Convention in 2009).

was concerned that ratifying the Convention would limit its options in the event of a nuclear war.[135] The United States was concerned that the Kremlin would be "designated for special protection," constraining the ability of the United States to conduct nuclear war against the Soviet Union.[136]

In any event, the United States was not a party to the Hague Convention at the time of the looting of the Iraqi National Museum. One would assume, therefore, that the United States was under no obligation to protect Iraq's cultural property. In determining the United States' duties in Iraq, however, one must also consider whether the 1954 Hague Convention has become part of customary international law.

Customary international law is "'a general practice accepted as law'" that requires "the existence of . . . two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed . . . as a matter of law (*opinio juris sive necessitatis*)."[137] The actions of the United States indicate that the 1954 Hague Convention has entered into customary international law. For the United States, the most compelling evidence that it accepts the duties imposed by the Hague Convention is that it signed the Convention in the first place. While the United States did not ratify the Convention for fifty-five years, being a signatory party illustrates acceptance of the general principles of the Convention. The United States also followed the provisions of the Convention in practice during the years before ratification. For example, in the first Gulf War, the United States refrained from firing on two MiG aircraft that Iraq had placed next to the Sumerian temple of Ur.[138] Additionally, the United States has trained its military personnel in the provisions of the Hague Convention, and those provisions are incorporated into U.S. military war manuals.[139] The Army Field Manual states that the customary law of war "will be strictly observed by United States forces" and that the "customary law of war is part of the law of the United States and, insofar as it is not inconsistent with any treaty to which this country is a party . . . is binding upon the United States, citizens of the United States, and other persons serving this country."[140] The practice of the United States has been to follow the provisions of the Hague Convention, even though the United States did not formally ratify the treaty until 2009.[141]

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135. Sandholtz, *supra* note 12, at 230.

136. *Id.* at 231.

137. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175, 178 (2005) (quoting Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031).

138. Sandholtz, *supra* note 12, at 234.

139. *See* UNESCO, *National Implementation of the Penal Provisions of Chapter 4 of the Second Protocol of 26 March 1999 to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, 43–50, CLT/CIH/MCO/2002/PI/H/1 (Mar. 29, 2002), *available at* http://unesdoc.unesco.org/images/0015/001586/158681e.pdf (explaining that while the United States is not a party to the Hague Convention, it has incorporated Chapter 4 of the Second Hague Protocol into the Uniform Code of Military Justice); David Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L. J. 349, 372 (1993) ("The United States armed forces have received training in the provisions of the 1954 Convention for many years.").

140. U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE para. 7(c) (1956), *available at* http://www.afsc.army.mil/gc/files/fm27-10.pdf.

141. Marion Forsyth, *Casualties of War: The Destruction of Iraq's Cultural Heritage as a Result of U.S. Action During and After the 1991 Gulf War*, 14 DEPAUL-LCA J. ART. & ENT. L. & POL'Y 73, 88

The main question surrounding the conduct of the United States toward the National Museum of Iraq has been whether the United States was under any obligation to prevent the looting. As previously discussed, the United States had not ratified the 1954 Hague Convention by 2003, which would make it appear that the United States was not bound by its provisions. However, key provisions of the Hague Convention are regarded as part of customary international law.[142] If this is the case, the United States would be under an obligation to refrain from destroying Iraq's cultural property, and, under Article 4(3) of the Convention, to "undertake to prohibit, prevent, and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property."[143]

This question of whether the United States was obligated to prevent the looting of the National Museum has received much attention in the last eight years, with most scholars agreeing that the United States had a duty to prevent the looting, even though it was carried out by non-state actors.[144] What has received less attention, however, is the question of whether the 1954 Hague Convention also imposes a duty on non-state actors to protect cultural property.

B. The Legal Framework for Applying the Hague Convention to Non-state Actors

The question of the applicability of the 1954 Hague Convention to conflicts involving non-state actors has grown in importance in recent years as the frequency of non-international armed conflicts involving non-state actors has increased. This indicates the need for the Hague Convention to clearly bind non-state actors and to apply to non-international armed conflicts.

One of the reasons for development of the Second Protocol to the 1954 Hague Convention was to clarify the provisions protecting cultural property in these non-international armed conflicts.[145] Article 19(1) of the Convention applies the provisions relating to respect for cultural property to the parties involved in non-international armed conflicts.[146] Article 22(1) of the Second Protocol expands the scope of application in non-international armed conflicts by stating that all of the

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(2004).

142. Roger O'Keefe, *Protection of Cultural Property*, *in* The HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 443–53 (Dieter Fleck ed., 2008) (explaining that Article 4 paragraphs 1 and 2 are customary international law applicable in international and non-international armed conflicts and that Article 4 paragraph 3 is customary international law in international armed conflict and is "more likely than not . . . consonant with custom in non-international armed conflict").

143. 1954 Hague Convention, *supra* note 42, art. 4(3).

144. *See, e.g.*, Courtney Campbell, *Arts and Arms: An Examination of the Looting of the National Museum of Iraq*, 32 B.C. INT'L & COMP. L. REV. 423, 437 (2009) ("If the United States had accepted its obligation under either international treaty or customary law, it could have exercised more care in protecting Iraq's cultural property."); Thurlow, *supra* note 108, at 179 ("[T]he initial decision to refrain from intervening in the looting at the National Museum, and at numerous cultural sites across Iraq, comported with American policy standards. In Iraq, however, the United States learned that intentionally destroying cultural sites is often conflated with negligently failing to prevent their destruction."); Sandholtz, *supra* note 12, at 239–40 (concluding that "[i]f American practice amounts to an acceptance of the obligations contained in the key portions of the 1954 Hague Convention . . . then it follows that at least those rules have attained the status of customary international law").

145. *See* UNESCO Conference on the Second Protocol, *supra* note 89, para. 33 (stating that a "large number of states welcomed the provisions" aimed at protecting cultural heritage in non-international conflict).

146. 1954 Hague Convention, *supra* note 42, art. 19(1).

provisions of the Second Protocol will apply "in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties."[147] As a result, the Second Protocol applies equally to both international and non-international armed conflicts.[148]

While the purpose of the Second Protocol was to clarify the Hague Convention, both agreements retain a lack of clarity in that neither the Convention nor the Second Protocol defines "non-international armed conflict."[149] However, Article 22(2) limits the application of the Second Protocol, stating that it "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."[150] In effect, "[n]on-international armed conflicts are distinct from international armed conflicts on the one hand . . . and internal disturbances and tensions on the other."[151] In his commentary on Article 3 to the Geneva Conventions, Jean Pictet provides a useful rubric for distinguishing "armed conflicts" from internal disturbances.[152] Characteristics of an armed conflict include:

> (1)That the Party in revolt . . . possesses an organized military force [and] an authority responsible for its acts . . . . (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory. (3)(*a*) That the [legal] Government has recognized the insurgents as belligerents; or . . . claimed for itself the rights of a belligerent; or . . . that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.[153]

While these criteria are useful in determining the character of a conflict, Pictet is quick to point out that this list is not exhaustive, and does not preclude the application of international law to conflicts that do not fulfill any of the listed conditions.[154]

Through Article 22, the Second Protocol expands the application of cultural property protections to non-international conflicts.[155] However, there is still a question of whether the Hague Convention can bind non-state actors at all.[156] While

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147. Second Protocol, *supra* note 92, art. 22(1); *see also* Dieter Fleck, *The Law of Non-International Armed Conflicts*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 142, at 605, 623 (The Second Protocol "extended all provisions of the [1954 Hague Convention] to non-international armed conflicts, thus further amplifying its scope of application.").

148. Fleck, *supra* note 147, at 623.

149. 1954 Hague Convention, *supra* note 42; Second Protocol, *supra* note 92.

150. Second Protocol, *supra* note 92, art. 22(2).

151. Fleck, *supra* note 147, at 616.

152. I THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY, art. 3, at 49–50 (Jean Pictet ed., 1952) [hereinafter PICTET COMMENTARY].

153. *Id.*

154. *Id.*

155. Second Protocol, *supra* note 92, art. 22.

156. *See* Thomas Desch, *Problems in the Implementation of the Convention from the Perspective of International Law*, *in* PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT—A CHALLENGE IN PEACE SUPPORT OPERATIONS 1, 1 (Edwin R. Micewski & Gerhard Sladek eds., 2002) (The provisions of the Hague Convention applicable to non-international conflicts "give rise to the question of the binding effect of treaty provisions on non-State actors and the practical and legal problems

Article 22 would seem to directly bind non-state armed groups, treaties are generally only binding on signatory parties, and the 1954 Hague Convention was not open to signature by non-state groups.[157] The question then becomes whether the Convention can legally bind third parties.[158] The Vienna Convention on the Law of Treaties addresses the application of treaties to third parties.[159] Articles 34 through 36 provide that a treaty can create obligations for a third party if two conditions are met: (1) "the contracting parties must have intended the treaty to grant such rights or impose such obligations on third parties"; and (2) "a third party must accept the rights or obligations."[160]

The first condition requires a determination of whether the high contracting parties to the Hague Convention and the Second Protocol intended the provisions to apply to non-state actors. Looking solely at the text, it would seem that the contracting parties did not intend to extend obligations to third parties. Article 19(1) of the Hague Convention states that "each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention."[161] By using a lowercase *p* when referring to the "parties to the conflict," Article 19(1) seems to include both state parties and third parties.[162] While Article 22 of the Second Protocol expands the scope of application regarding non-international armed conflicts, it only uses Parties (with a capital *P*) when referring to the obligations created under the Protocol.[163] Additionally, Article 1 of the Second Protocol defines "Party" as "a State Party to this Protocol."[164] This seems to limit the application of the Second Protocol by excluding the possibility of application to third parties.

Such an interpretation of the application of the Second Protocol is logical; however, this interpretation has been contradicted by Jean-Marie Henckaerts, who observed the drafting of the Second Protocol.[165] Henckaerts explained:

> Although Article 22 of the Second Protocol does not spell it out as clearly as it could have, the Protocol applies to all parties to a non-international armed conflict, whether governmental or insurgent forces. This was clearly acknowledged at the final plenary session. A certain confusion arose

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involved in the attempt to communicate with irregular forces.").

157. *See* Andrew Clapham, The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement 3 (Feb. 1, 2010) (draft for comment), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636 ("It is clear that the exclusion of armed groups from the normal treaty-making process and their subsequent inability to become parties to the relevant treaties means that alternative regimes have had to be adopted.").

158. *See* Antonio Cassesse, *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflict*, 30 INT'L & COMP. L.Q. 416, 423 (1981) (analyzing this question as regards application to rebels of Additional Protocol II to the Geneva Conventions).

159. Vienna Convention on the Law of Treaties arts. 34–36, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

160. Cassesse, *supra* note 158, at 423.

161. 1954 Hague Convention, *supra* note 42, art. 19(1).

162. *Id.*

163. Second Protocol, *supra* note 92, arts. 2–4.

164. *Id.* art. 1.

165. Henckaerts, *supra* note 90; *see also* Clapham, *supra* note 157, at 9 (stating that "[t]his state-centric reading is . . . contradicted by Henckaerts, who participated in the drafting, and who writes that such a 'literal interpretation would lead to a manifestly absurd result of declaring a treaty applicable to non-international armed conflicts and at the same time eliminating most of its practical relevance in such conflicts.'").

> because Article 1 of the Protocol defines the word "Party" as a State Party to the Second Protocol. However, the understanding was that throughout the text the word "Party" in the phrase "Party to the conflict" includes rebel groups of States party to the Second Protocol but not third States which have not ratified the Second Protocol. The reasoning was that non-governmental forces involved in a non-international armed conflict within a State party to the Protocol are bound by the Protocol through the ratification of the State concerned.[166]

Additionally, the summary report from the Second Protocol convention indicates that the contracting parties intended the Protocol to apply to all parties in a non-international conflict, whether state parties or non-state parties.[167]

The second condition required for a treaty to apply to third parties—that the third party must accept the obligations created by the treaty—necessitates a case-by-case inquiry to determine if a particular non-state group has accepted the provisions of the Hague Convention.[168] This condition is extremely problematic when applied to non-state actors because the decentralized and often disorganized nature of armed non-state groups makes it difficult to ascertain if an armed non-state group has adopted treaty obligations.[169]

Without confirmation from a non-state group that it has accepted the obligations created by the Hague Convention, it would be difficult to say that the Convention can be applied to non-state actors through the Vienna Convention. There is, however, another method by which the Hague Convention can be applied to non-state actors: through customary international law. As discussed above, customary international law is comprised of general rules accepted into international law, based on the opinion and practice of states. In contrast to treaty law, customary international law will bind non-state actor groups even if the non-state group has not formally accepted the obligations created by the international law.[170] The provisions of an international treaty, if commonly accepted among both signatory and non-signatory states, can become part of customary international law, and will therefore bind not just states but non-state actors such as rebel factions or secessionist groups.[171]

Key provisions of the 1954 Hague Convention are regarded as having achieved customary international law status.[172] Most importantly, Article 4 (which obliges

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166. Henckaerts, *supra* note 90 (citations omitted).

167. UNESCO Conference on the Second Protocol, *supra* note 89, para. 36.

168. *See* Cassesse, *supra* note 158, at 428 ("As for the second test, *i.e.* the assent by a third party to the rights or duties deriving from the treaty, it will of course be necessary to determine in each civil war whether rebels are ready and willing to accept the Protocol.").

169. *See* Mali Bamako, *Armed Groups, Weapons Availability and Misuse: An Overview of the Issues and Options for Action*, *in* BRIEFING KIT FOR ARMED GROUPS PROJECT 38, 46 (David Capie ed., 2004) (addressing the decentralization and disorganization of non-state actors).

170. *See* Clapham, *supra* note 157, at 11 (noting that customary international law will "usually be binding on the non-state actor").

171. Christopher Greenwood, *Relevance of Other Fields of International Law*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 142, at 72, 76.

172. *See supra* note 142 and accompanying text; *see also* O'KEEFE, *supra* note 19, at 316 ("At its twenty-seventh session, the General Conference of UNESCO declared that 'the fundamental principles of protecting and preserving cultural property in the event of armed conflict'—by which it appeared to mean

parties to refrain from attacking cultural property unless required by military necessity and to prevent all theft, pillage, or vandalism of cultural property) and Article 19 (which applies the Convention to non-international armed conflicts) are now considered to be part of customary international law.[173] As a result, these provisions will be binding on both state and non-state actors in international and non-international armed conflicts, even though the non-state actors have not formally accepted the obligations imposed by the Hague Convention.

While certain provisions of the Convention have become part of customary international law, the Hague Convention would be more effective if it provided stronger protections for cultural property in non-international armed conflicts. While the Second Protocol clarified that the Convention applies in non-international armed conflicts, it did not provide a definition of that term.[174] In order for the Convention to be an effective tool in the protection of cultural property, it must be clear when and where the Convention is applicable.

C. The Conflict in Libya

The need to protect cultural property in non-international armed conflicts has been brought into focus by the recent events in Libya. On February 16, 2011, demonstrations erupted in Libya protesting the forty-two year reign of Colonel Muammar el-Qaddafi.[175] Between several hundred and several thousand protestors gathered in Benghazi, Libya's second-largest city, to demand Qaddafi's removal from power.[176] Asserting that he would never step down, Qaddafi attempted to suppress the uprisings by force, employing military forces, mercenaries, helicopters, and warplanes in attacks upon demonstrators.[177]

Despite Qaddafi's violence, the rebels quickly took control of eastern Libya.[178] By February 27, the rebels were increasing their military coordination and firepower, as Libyan military officers defected and joined the rebels in eastern Libya.[179] The rebels controlled vast Libyan oil reserves and displayed impressive firepower, including machine guns, tanks, and antiaircraft weapons.[180] Fighting between the rebels and Qaddafi's forces continued to escalate over the next three weeks, resulting

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the obligations of respect embodied in article 4 of the 1954 Hague Convention, the only ones applicable under the Convention to both international and non-international armed conflict—'could be considered part of international customary law'.").

173. 1954 Hague Convention, *supra* note 42, arts. 4, 19; *see also supra* note 142 and accompanying text; O'KEEFE, *supra* note 19, at 324–25 ("In *Tadic*, the Appeals Chamber . . . cit[ed] as one of the 'treaty rules [which] have gradually become part of customary law' article 19 of the 1954 Hague Convention . . . .").

174. *See* Second Protocol, *supra* note 92, art. 22 (stating that the "Protocol shall apply in the event of an armed conflict not of an international character").

175. Alan Cowell, *Protests Take Aim at Leader of Libya*, N.Y. TIMES, Feb. 16, 2011, http://www.nytimes.com/2011/02/17/world/middleeast/17libya.html?_r=1&pagewanted=all.

176. *Id.*

177. David D. Kirkpatrick & Mona El-Naggar, *Qaddafi's Grip Falters as His Forces Take On Protestors*, N.Y. TIMES Feb. 21, 2011, http://www.nytimes.com/2011/02/22/world/africa/22libya.html?pagewanted=all.

178. *Id.*

179. David D. Kirkpatrick and Kareem Fahim, *Rebels in Libya Gain Power and Defectors*, N.Y. TIMES, Feb. 27, 2011, http://www.nytimes.com/2011/02/28/world/africa/28unrest.html?pagewanted=all.

180. *Id.*

in the imposition by the United Nations of a no-fly zone over Libya.[181] The next day, coalition forces, including forces from Britain, France, and the United States, began airstrikes against Qaddafi's troops.[182] Qaddafi's supporters and the coalition-backed rebel forces continued to fight back and forth through the summer, but in August 2011 the rebels gained control of Tripoli and forced Qaddafi into hiding.[183] On September 16, the rebel group organized as the National Transitional Council (NTC) achieved formal recognition as the representative for Libya in the United Nations.[184] Finally, on October 20, 2011, Qaddafi was killed by NTC fighters as he attempted to flee Sirte.[185]

The conflict in Libya raises the question of whether the Libyan rebel forces were under any duty to protect cultural property during the fighting.[186] Libya is home to five UNESCO World Heritage sites: the Old Town of Ghadamès, an oasis that is one of the oldest pre-Saharan cities; the ancient Greek archaeological sites of Cyrene; the Roman ruins of Leptis Magna; the Phoenician trading-post of Sabratha; and the rock-art sites of Tadrart Acacus in the Sahara Desert.[187] Libya has been a melting pot of cultures throughout history and is home to Roman, Greek, Punic, Egyptian, and Berber archaeological sites.[188] Libya also contains some of the world's earliest rock and cave art, among other important prehistoric sites.[189] On March 23, 2011, Irina Bokova, head of UNESCO, urged that the cultural heritage of Libya be protected during the fighting.[190] Bokova stated that "[f]rom a cultural heritage point of view, [Libya] is of great importance to humanity as a whole .... Several major sites bear witness to the great technical and artistic achievements of the ancestors of the people [of Libya], and constitute a precious legacy."[191] She called on both Libyan

181. Press Release, Security Council, Security Council Approves 'No-Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, By Vote of 10 in Favor with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011), *available at* http://www.un.org/News/Press/docs/2011/sc10200.doc.htm.

182. Liz Sly, Greg Jaffe, and Craig Whitlock, *U.S. and European Officials Say Initial Assault on Gaddafi's Forces 'Very Effective'; Libyan Leader Pledges 'Long, Drawn-out War'*, WASH. POST, Mar. 19, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/03/19/AR2011031903274.html.

183. *Libya Unrest: Rebels Overrun Gaddafi Tripoli Compound*, BBC NEWS (Aug. 23, 2011), http://www.bbc.co.uk/news/world-africa-14630702.

184. Neil MacFarquhar, *U.N. Takes Steps to Assist Libya's Transitional Leaders*, N.Y. TIMES, Sept. 16, 2011, http://www.nytimes.com/2011/09/17/world/africa/un-takes-steps-to-assist-libyas-transitional-leaders.html.

185. Kareem Fahim, Anthony Shadid, & Rick Gladstone, *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES, Oct. 20, 2011, http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html?pagewanted=all.

186. The governments of the United States, the United Kingdom, and France recognized the Libyan rebel council as the "sole governmental authority" in Libya. *See UK Expels Gaddafi Diplomats and Recognises Libyan Rebels*, BBC NEWS (July 27, 2011), http://www.bbc.co.uk/news/uk-politics-14306544; *see also* Sebnem Arsu & Steven Erlanger, *Libya Rebels Get Formal Backing, and $30 Billion*, N.Y. TIMES, July 15, 2011, http://www.nytimes.com/2011/07/16/world/africa/16libya.html?_r=1&ref=libya. Nevertheless, my analysis addresses the rebels as a non-state actor group and focuses on the events occurring when the dispute in Libya was primarily one between a state actor and a non-state actor group.

187. Properties inscribed on the World Heritage List: Libya, UNESCO World Heritage Centre, *available at* http://whc.unesco.org/en/statesparties/ly (last visited Sept. 16, 2011).

188. Declan Butler, *Libya's 'Extraordinary' Archaeology Under Threat*, NATURE (Mar. 2, 2011), http://www.nature.com/news/2011/110302/full/news.2011.132.html.

189. *Id.*

190. Director-General Statement to Forces Engaged in Libya, *supra* note 4.

191. *Id.*

forces and coalition forces to respect the Hague Convention, saying UNESCO is "alarmed by reports of destruction, damage and theft at museums, archaeological sites and libraries and deeply concerned that this period of social upheaval will leave cultural heritage vulnerable to those unscrupulous few who would profit from the situation."[192] Sabratha and Leptis Magna were especially vulnerable because of their proximity to Tripoli: both sites are within eighty miles of the Libyan capital.[193]

On March 14, 2011, the United States Committee of the Blue Shield, a nonprofit organization committed to the protection of cultural property worldwide during armed conflict, issued a statement on Libya expressing concern for Libya's cultural heritage.[194] The statement asserted:

> The ongoing armed conflict in Libya gives reason for concern, not only amongst academics but for everybody concerned with the preservation of cultural heritage, about the vulnerability of cultural institutions, sites and monuments. Especially aerial bombardments and artillery pose a grave danger to fragile cultural sites. Any loss of Libyan cultural property would seriously impoverish the collective memory of mankind.[195]

Libya is a party to the 1954 Hague Convention, as well as to the Second Protocol.[196] The Blue Shield statement appealed "to *all parties involved* to respect the stipulations of the Convention and to protect our world cultural heritage."[197]

To date, there are no official reports indicating significant damage to Libya's cultural heritage, although there are rumors that Qaddafi stored rocket launchers at the World Heritage site of Leptis Magna.[198] Nevertheless, the ongoing concern about the possibility of damage to Libya's cultural property highlights the need for strong protective measures. Article 19 of the Hague Convention and Article 22 of the Second Protocol provide for the protection of cultural property in the event of a non-international armed conflict.[199] Using Pictet's criteria, the conflict in Libya would easily be characterized as a non-international armed conflict,[200] rather than a mere uprising or riot because: (1) the rebels possessed an organized military force; (2) it was necessary for the Libyan government to resort to use of "regular military forces against the insurgents organized as [a] military and in possession of a part of the national territory;"[201] and (3) "the dispute [was] admitted to the agenda of the United Nations Security Council . . . as being a threat to international peace, a breach of the

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192. *UN Official Calls for Concerted Effort to Safeguard Cultural Heritage in North Africa*, UN NEWS CENTRE (Mar. 16, 2011), http://www.un.org/apps/news/story.asp?Crl=&NewsID=37781&Cr=UNESCO.

193. *UNESCO Urges All Sides to Preserve Libyan Treasures*, REUTERS (Mar. 23, 2011), http://af.reuters.com/article/libyaNews/idAFLDE72M17V20110323.

194. Blue Shield Statement on Libya, *supra* note 4.

195. *Id.*

196. *States Parties to the 1954 Hague Convention*, *supra* note 5; *States Parties to the First Protocol to the 1954 Hague Convention*, *supra* note 44.

197. Blue Shield Statement on Libya, *supra* note 4 (emphasis added).

198. Ishaan Tharoor, *South African President Blasts NATO Actions in Libya*, CNN (June 14, 2011), www.cnn.com/2011/WORLD/africa/06/14/libya.war/index.html; Ishaan Tharoor, *With Roman Ruins Under Threat, Libya's Ancient Past Presses Against Its Present*, TIME (June 14, 2011), http://globalspin.blogs.time.com/2011/06/14//with-roman-ruins-under-threat-libyas-ancient-past-presses-against-its-present.

199. 1954 Hague Convention, *supra* note 42, art. 19; Second Protocol, *supra* note 92, art. 22.

200. PICTET COMMENTARY, *supra* note 152, at 49–51.

201. *Id.*

peace, or an act of aggression."[202] The Libyan government, therefore, had a duty to abide by the obligations set out under the Hague Convention in its dealings with the insurgent forces.

The more interesting question is whether the insurgent forces had a similar duty to protect cultural property under the Hague Convention. If the Hague Convention binds only state parties, it would have provided no protection for Libya's cultural property against destruction by the rebel forces. Because the rebel group was not a party to the Hague Convention, it would have had no obligations to protect cultural property during the conflict.

As previously discussed, however, many provisions of the Hague Convention have become established as customary international law, and have been made applicable to both state and non-state actors. These provisions include the obligation to avoid attacking cultural property unless required by military necessity and to avoid the theft, pillage, or vandalism of cultural property. As a result, the rebel forces in Libya were obliged to avoid destroying Libya's cultural property, even though the rebel group is not a formal party to the Hague Convention. The extension of obligations under the Hague Convention to non-state actors is necessary to achieve effective protection of cultural property. With the increasing frequency of conflicts involving non-state actors, limiting the scope of the Hague Convention so that it binds only state parties would hamstring the Convention's effectiveness. In Libya, it would have allowed the rebel group to destroy cultural property at will. To provide the most effective cultural property protection, the Hague Convention should be refined so that it clearly obliges both state and non-state actors to respect cultural property during times of conflict.

CONCLUSION

As the events in Iraq and Libya demonstrate, armed conflicts involving non-state actors will almost surely increase in frequency in the coming years. Protecting cultural property during these conflicts, therefore, is becoming increasingly important. Using the 1954 Hague Convention to help address this problem seems the most logical and effective solution. In order for the Hague Convention to remain relevant in these non-international armed conflicts, however, the Convention must forcefully and clearly apply to non-state actors. Otherwise, the future efficacy of international cultural property protection will be in doubt.

202. *Id.* at 50.

President-Prime Minister Relations, Party Systems, and Democratic Stability in Semipresidential Regimes: Comparing the French and Russian Models

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SUMMARY

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INTRODUCTION

Countries around the world are demanding change: new leaders, new realities, and new systems of government. Most of these nations intend to shift toward more democratic forms of government, having lived in the shadows of authoritarian leaders. However, the sustainability of new democratic fervor directly depends on which system is chosen to replace a now defunct authoritarian model and how a chosen system allocates power between major players. This Note argues that new democracies should develop and maintain a premier-presidential system of government for three interrelated reasons. First, premier-presidentialism creates a flexible, but powerful, political check against the president's strong and numerous executive and legislative powers. Second, this check against the president's power requires the president to resort to democratic processes to resolve political conflict, rather than rule as an autocrat. Third, and finally, the balance of power between the president, prime minister, and parliament is strengthened by and also encourages strong party coalitions, which are necessary to safeguard democratic preferences. This conclusion follows from an exploration of both the Russian and French models of semipresidentialism and an analysis of how the distribution of executive power, coupled with the strength or weakness of the nation's party system, affects each nation's democratic stability.

Part I of this Note briefly discusses the most common government systems chosen by new democracies. It then explores the dimensions and two variations of semipresidentialism, explaining both premier-parliamentarism and premier-presidentialism. Part I also briefly explores why scholars are wary of semipresidentialism and why they tend to favor presidentialism or parliamentarism. Part II of this Note first examines constitutional formation in post-Fourth Republic France. It then analyzes the powers granted by the French constitution to the president and prime minister. Finally, to evaluate the effectiveness of the French model of semipresidentialism, the regime is analyzed in light of the country's practical experience in issue resolution. Part III of this Article examines Russian constitutional formation and its model of semipresidentialism in the same manner. In Parts II and III, each country's respective model is analyzed by exploring a president-prime minister relationship experienced in the infancy of the semipresidential regime, rather than more recent president-prime minister relationships. These examples were chosen because the tension arose during each country's period of democratic consolidation, a process having a large, if not dispositive, impact on sustainable democratic stability. More recent examples simply do not illustrate the effect the choice of system has on extremely fragile new systems. Indeed, the chosen examples are those best suited to illustrate this Note's conclusion: the chosen system has a direct impact on developing democratic stability in *new* regimes. Part IV concludes by determining which of these models is best suited to support democratic consolidation and stability in a new democracy and why, along with recommendations of how new nations can ensure greater democratic stability.

I. DEMOCRATIC SYSTEMS

A. *Introductions, Strengths, and Weaknesses*

Three distinct democratic systems exist: presidentialism, parliamentarism, and semipresidentialism. Whether a fledgling democratic nation chooses presidentialism, parliamentarism, or semipresidentialism impacts democratic consolidation[1] and subsequent democratic stability.[2] Each regime type differs from the other structurally, dictating the way each branch functions and interacts with the rest of the system, which directly affects the efficiency and stability of the system as a whole. In a parliamentary system, "elements of the legislature form the government, the prime minister exercises considerable executive power and answers to the legislature, and there is either no president at all or a largely ceremonial one."[3] Presidentialism, on the other hand, is a system in which a directly elected president appoints the government,[4] which remains answerable to the president.[5] Semipresidentialism, as a general matter, refers to a regime in which there is "both a directly elected president and a prime minister who is responsible to the legislature."[6] Thus, what system should a nation choose to adopt?

The debate continues as to which regime type is most capable of sustaining a stable democratic nation. Some scholars argue "the vast majority of the stable democracies in the world today are parliamentary regimes" and "on balance, [parliamentarism] is more conducive to stable democracy than [presidentialism]."[7] In contrast, others maintain presidentialism ensures a more stable democracy because "the presence of two entities (the presidency and the legislature), each with its own

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1. As developed by Juan J. Linz and Alfred Stepan, the concept of democratic consolidation refers to the democratic development process a nation begins once it has undergone a democratic transition. Christopher J. Walker, *Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law*, 18 FLA. J. INT'L L. 745, 754 (2006); *see also* JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 5–6 (1996) (describing the tripartite developmental process constituting "democratic consolidation"). Under the Linz and Stepan model of democratic consolidation, "this process involves three separate but interrelated developments—behavioral, attitudinal, and constitutional consolidation." Walker, *supra*, at 754–55. These development phases look for the presence, or lack thereof, of anti-democratic movements, public support for a democratic system, and a system of laws, procedures, and institutions necessary for a democratic nation. *Id.* at 755.

2. Steven D. Roper, *Are All Semipresidential Regimes the Same? A Comparison of Premier-Presidential Regimes*, 34 COMP. POL. 253, 253 (2002).

3. Michael Steven Fish, *Stronger Legislatures, Stronger Democracies*, 17 J. DEMOCRACY 5, 5 (2006). *See also* Eoin O'Malley, *The Power of Prime Ministers: Results of an Expert Survey*, 28 INT'L POL. SCI. REV. 7, 10 (2007) (defining a parliamentary government as "a system in which the executive, consisting of a prime minister . . . and a cabinet, is dependent on the parliament for its continuing survival").

4. In this Note, the terms "government" and "cabinet" will be used interchangeably to refer to the same institution, namely the institution accompanying the executive branch.

5. Fish, *supra* note 3, at 6.

6. Robert Elgie & Iain McMenamin, Variations Within Semi-Presidentialism: Cohabitation, Cabinet Stability and Non-Partisan Prime Ministers (Aug. 30, 2007) (unpublished manuscript) (on file with Texas International Law Journal).

7. Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51, 51–52 (1999). *See also* Fish, *supra* note 3, at 5 (arguing a powerful legislature is critical to the success of new democracies, as indicated by the Fish-Kroenig legislative powers survey).

source of electoral legitimacy, reduces the danger of radical missteps."[8] Little academic support may be found for semipresidentialism, however. Indeed, semipresidentialism is subject to more criticism than praise.[9] Critics most often question the propriety of a dual executive, regardless of whether the president and the prime minister are of the same party, because it strains government stability and efficiency, which directly compromises democratic consolidation and future stability.[10] In spite of this, however, many countries swept within a recent wave of democratization have chosen semipresidentialism.[11]

B. Semipresidentialism and Its Variations

Semipresidentialism refers to a system combining aspects of presidential and parliamentary institutions.[12] The classification was introduced by Maurice Duverger, who defined the system by three general characteristics: "popular election of the president, presidential constitutional powers, and the separate office of a prime minister."[13] Within this system, the institutional stability of the prime minister and its cabinet is dependent, at minimum, upon parliamentary approval.[14] Matthew Shugart and John Carey expanded the concept of semipresidentialism into more specific classifications to account for variations among different countries.[15] According to Shugart and Carey, a semipresidential regime may be classified as either "premier-presidential" or "president-parliamentary."[16]

Premier-presidentialism describes the French model of semipresidentialism. In premier-presidentialism, the "prime minister . . . is head of government and subject to the vote of no-confidence of the parliament."[17] The president, on the other hand, is head of state and generally has constitutionally conferred powers of appointment and veto.[18] Most importantly, however, the prime minister and government are exclusively accountable to the parliamentary majority as the president has no

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8. Fish, *supra* note 3, at 6.

9. *See* Elgie & McMenamin, *supra* note 6 ("There is a general and long-standing academic consensus against the adoption of semi-presidentialism.").

10. *See, e.g., id.* (describing the problems that a dual executive poses to efficient and effective policy making).

11. *See* Thomas Weishing Huang, *The President Refuses to Cohabit: Semi-Presidentialism in Taiwan*, 15 PAC. RIM L. & POL'Y J. 375, 378–79 (2006) ("[B]y 1999, around fifty countries, particularly those considered part of the new wave of democratization, had adopted some form of semi-presidentialism."). For example, semipresidentialism has been adopted by former French colonies, former Portuguese colonies, former communist countries, and in parts of Asia. Elgie & McMenamin, *supra* note 6. *See also* Robert Elgie, *Duverger, Semi-Presidentialism, and the Supposed French Archetype*, 32 W. EUR. POL. 248, 250 (2009) (discussing the evolution and adoption of semipresidentialism after its creation in the French Fifth Republic).

12. Roper, *supra* note 2, at 253.

13. *Id.* at 254.

14. *See* Maurice Duverger, *A New Political System Model: Semipresidential Government*, 8 EUR. J. POL. RES. 165, 166 (1980) (explaining that "a prime minister and ministers . . . can stay in office only if the parliament does not show its opposition to them").

15. Roper, *supra* note 2, at 253–54.

16. *Id.*

17. Terry D. Clark & Jennifer M. Larson, *The Head of State in Premier-Presidentialism: Weak President or Strong President?*, ALLACADEMIC.COM 2 (Mar. 4, 2005), http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/7/1/9/7/pages71970/p71970-1.php.

18. *Id.*

constitutional power to dismiss the prime minister.[19] Distinguishing premier-presidentialism from president-parliamentarism is the fact of to whom the prime minister and government are accountable. Where in "premier-presidentialism, the prime minister and government are *exclusively* accountable to the parliamentary majority . . . under president-parliamentarism, the prime minister and government are *dually* accountable to the president and parliamentary majority," both of whom may dismiss the prime minister.[20] This difference, as well as the strength of the country's party system, directly affects successful consolidation and future democratic stability.

Because of the dual nature of the executive, the difference in powers held by the president and prime minister are critical to the overall division of power in and the stable functioning of the system. The specific powers held by the president and prime minister in a semipresidential regime depend upon the country's constitutional design. Presidential powers may be described as legislative or non-legislative in nature.[21] Legislative powers may include veto power, decree power, and the power to propose referenda to the legislature.[22] Non-legislative powers may include cabinet appointment, formation, and dismissal, as well as the ability to dissolve parliament.[23] While the strength of each of these presidential powers varies among regimes according to constitutional design, the strength of the presidency ultimately seems dependent upon and a function of non-legislative appointment and dismissal powers[24] as well as the strength of the party system, as discussed below. Prime ministerial powers, on the other hand, tend to be less well defined, as prime ministers are broadly tasked with administration of the government, rather than conferred distinct and strong powers.[25]

The strength of the party system in semipresidential countries also affects democratic stability. In premier-presidential systems, because the prime minister and government are accountable solely to the parliamentary majority, the parliamentary majority tends to dictate who is nominated as prime minister.[26] Thus, the parliamentary majority determines whether "the prime minister is subordinate to the president," as happens when each are of the same party, "or whether the president cohabits with an opposing prime minister."[27] In instances of cohabitation[28]—a circumstance rife with political tension and conflict—the strength of the party system and its ability to sustain party coalitions dictates whether conflict

19. Elgie & McMenamin, *supra* note 6.

20. *Id.*

21. Roper, *supra* note 2, at 256.

22. *Id.* at 257.

23. *Id.* at 258.

24. *Id.* at 259. *But see* Clark & Larson, *supra* note 17, at 3 (arguing the veto-player theory indicates a president may have powerful influence in premier-presidential systems due to powers of legislative initiative and veto).

25. *See* O'Malley, *supra* note 3, at 8 (discussing the challenges of evaluating and comparing prime ministerial power in areas such as policy making).

26. *See* Elgie & McMenamin, *supra* note 6 (explaining that because of the accountability of the prime minister to the legislative majority, "if the legislature selects as prime minister someone who is opposed to the president then the president has to accept the appointment").

27. *Id.*

28. More specifically, cohabitation occurs when the president and prime minister are members of opposing political parties. Elgie & McMenamin, *supra* note 6.

will be resolved democratically or through less legitimate means.[29] In president-parliamentary systems, the strength of the party system is even more relevant given the president's power to dismiss the prime minister.[30] A strong party system increases the transaction costs of dismissing a cohabitating prime minister; a weak party system allows the president to take advantage of the lack of opposition coalitions and rule almost exclusively from the executive branch.[31]

Critics of semipresidentialism, whether focused on premier-presidentialism or president-parliamentarism, advance two arguments, both of which are directed against the dual executive. First, critics argue the dual executive imposes an unnecessary competitive element on the government, which tends to result in "politicking," "delay[ed] decision making," and "contradictory policies."[32] This competitive element also foreshadows dangerous constitutional ambiguities as to the proper subordination of powerful actors, such as the military, to others within the regime.[33] If different actors are able to compete in an attempt to achieve ends beneficial only to each individually, the resulting lack of clarity as to who is subordinate to whom makes for an unstable balance of power threatening democratic stability. Notably, the concern regarding the competitive nature of the executive exists regardless of whether the president and prime minister are of the same party affiliation.[34] Second, critics argue cohabitation leads to conflict within the executive with unpredictable consequences.[35] For example, the military or the president could assume power improperly and without the authority to do so.[36] Underlying both of these criticisms is a concern about the inherent fragility and instability of semipresidential systems,[37] due in large part to the dual nature of the executive and the balance of power between the president and prime minister.

Regardless of these criticisms, and of the dearth of scholarly support for semipresidentialism in either of its forms, this regime type has been adopted by former French and Portuguese colonies, by former communist countries, as well as in parts of Asia.[38] Thus, it is all the more imperative to determine how these systems function and to what extent they support stable democracies. Because France is the well-known model for semipresidentialism[39] or, more specifically, premier-

29. *See* Robert G. Moser, *Executive-Legislative Relations in Russia, 1991–1999*, *in* RUSSIAN POLITICS: CHALLENGES OF DEMOCRATIZATION 64, 69–70 (Zoltan Barany & Robert G. Moser eds., 2001) (describing the potential conflicts in cohabitation and how they are expressed within the types of semipresidential systems).

30. *See* Elgie & McMenamin, *supra* note 6 ("Under presidential-parliamentarism . . . the president retains the possibility of dismissing the prime minister and cabinet.").

31. *See* Moser, *supra* note 29, at 70 (noting that "[p]residential-parliamentary systems raise the likelihood of interbranch conflict" and describing the ways in which such conflicts may arise).

32. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, *in* THE FAILURE OF PRESIDENTIAL DEMOCRACY 3, 55 (Juan J. Linz & Arturo Valenzuela eds., 1994); *see also* Elgie & McMenamin, *supra* note 6 (summarizing scholars' criticisms related to the dual executive aspect of semipresidential systems).

33. Linz, *supra* note 32, at 59.

34. Elgie & McMenamin, *supra* note 6.

35. *Id.*

36. *Id.*

37. *See id.* (noting that even ardent semipresidentialism supporter Giovanni Sartori admitted that "semi-presidentialism is a somewhat fragile system").

38. Elgie & McMenamin, *supra* note 6. *See also* Elgie, *supra* note 11, at 250 (discussing the evolution and adoption of semipresidentialism after its creation in the French Fifth Republic).

39. Elgie, *supra* note 11, at 248.

presidentialism, it will serve as the point of comparison against Russia, which has adopted a president-parliamentary system.

II. FRANCE: AN ANALYSIS OF A PREMIER-PRESIDENTIAL SYSTEM

A. Constitutional Formation in Post-French Fourth Republic

The current French government, the French Fifth Republic, is a direct result of the political instability of the French Fourth Republic and of the Algerian hostilities of the 1950s.[40] Intending to facilitate more consistent political stability and a more authoritative government, General Charles de Gaulle was invited by President René Coty, upon the resignation of Prime Minister Pierre Pfimlin, to form a new French government.[41] According to public opinion, "[i]f weak governments were responsible for the decay of the Fourth Republic, then special constitutional provisions were required to prevent that incapacity in the Fifth Republic."[42] Thus, upon his ascension to power in France, General de Gaulle intended to create a regime with institutions designed "to restore national unity, to reestablish order in the State, and to give Governments the authority necessary for them to fulfil their functions."[43] In doing so, a constitution was created establishing neither an authoritarian regime nor an extreme democracy.[44] Rather, General de Gaulle championed a hybrid regime in which a strong executive was combined with a government accountable solely to parliament.[45] As a result, the Fifth Republic avoided the persistent vacillations France had experienced under previous republics, which had risen and fallen with the aid of extreme regimes of the left and of the right.[46] These constitutional and regime changes resulted in failed governments caused by "a residue of hostility which would

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40. Robert J. Jackson et al., *Constitutional Conflict in France: Deputies' Attitudes Toward Executive-Legislative Relations*, 9 COMP. POL. 399, 401 (1977). According to most scholars, the demise of the French Fourth Republic began well in advance of the Algerian hostilities. In General Charles de Gaulle's view, the Fourth Republic "fell because the French were . . . 'a profoundly divided people living in a terribly dangerous universe.'" D. M. P., *After the Fourth Republic? Problems Facing General de Gaulle*, 14 WORLD TODAY 286, 287 (1958). Other, more concrete problems perceived to have plagued the Fourth Republic and to have contributed to its demise include failed financial reforms, reform of parliamentary procedures, local government reforms, and constitutional revisions. *Id.* Furthermore, the party system of the parliament had proven inefficient and incapable of agreement, "even when there was no conservative opposition to speak of." *Id.* at 288.

41. Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 63 (1997) [hereinafter Rogoff, *A Comparison of Constitutionalism*].

42. Jackson, et al., *supra* note 40, at 401.

43. D. M. P., *supra* note 40, at 290.

44. Martin A. Rogoff, *The French (R)evolution of 1958–1998*, 3 COLUM. J. EUR. L. 453, 455 (1998) [hereinafter Rogoff, *The French (R)evolution*].

45. *Id.*

46. *See* Jackson, et al., *supra* note 40, at 400 (stating that prior French constitutions may be easily categorized as "those which enshrine the principles of representation and a powerful assembly and those which belong to a plebiscitarian and powerful executive tradition"); *see also* Rogoff, *A Comparison of Constitutionalism*, *supra* note 41, at 60 (describing France's eight different constitutions between 1791 and 1815 as ranging from absolute monarchy, to constitutional monarchy, to radical republic, to moderate reaction, and finally, to dictatorship).

erupt in the next crisis and cause a further constitutional battle."[47] Through a blending of the previous Republican and Bonapartist traditions, however, the constitution of the French Fifth Republic has thus far succeeded in creating a more stable system capable of continued governance.[48]

In stark comparison to the issues faced by the Russian Constitutional Commission and Yeltsin's Constitutional Assembly, as well as the time lag in drafting the Russian constitution,[49] the Constitution of the French Fifth Republic was drafted and approved with little difficulty or delay. The National Assembly enacted a law authorizing the drafting of a new constitution on June 3, 1958; the new constitution was approved by the French people through a referendum vote on September 28, 1958; and the constitution was promulgated on October 4, 1958.[50] Indeed, where Russian politicians failed to take advantage of exigent crises to create a legitimate constitution built on compromise, the French seem to have capitalized on the nature of the political process and the powerful crises to create a constitution that continues to meet the needs of France half a century later.

B. Constitutional Analysis

1. Presidential Powers and Parliamentary "Checks"

Despite the different background within which the Constitution of the French Fifth Republic was drafted, as compared to the Russian constitution, both create a strong office of the presidency.[51] The French president has the power to: (1) "appoint the Prime Minister . . . [and] terminate[] his functions *when the latter tenders the resignation of the Government*;"[52] (2) "declare the dissolution of the National Assembly" upon consultation with the prime minister;[53] (3) "appoint[] and dismiss[] the other members of the Government" upon proposal of the prime minister;[54] (4) "sign[] ordinances and decrees decided upon in the Council of Ministers;"[55] and (5) "put into a referendum any Government bill dealing with" enumerated topics.[56]

Cabinet formation power is an exceptional executive power.[57] Under the French constitution, the president has "supreme" power in this regard, as the appointment power is not subject to parliamentary confirmation.[58] Without being

47. Jackson, et al., *supra* note 40, at 400.

48. Jose Antonio Cheibub, *Presidentialism, Parliamentarism, and the Role of Opposition Parties: Making Presidential and Semi-presidential Constitutions Work*, 87 TEX. L. REV. 1375, 1405 (2009).

49. *See infra* Part III.A (discussing the development of the current Russian constitution).

50. Rogoff, *A Comparison of Constitutionalism*, *supra* note 41, at 63.

51. Jackson, et al., *supra* note 40, at 401; Cheibub, *supra* note 48, at 1405; Rett R. Ludwikowski, *"Mixed" Constitutions: Product of an East-Central European Constitutional Melting Pot*, 16 B.U. INT'L L.J. 1, 34 (1998); Rogoff, *A Comparison of Constitutionalism*, *supra* note 41, at 63.

52. 1958 CONST. 8 (Fr.) (emphasis added).

53. *Id.* art. 12.

54. *Id.* art. 8.

55. *Id.* art. 13.

56. *Id.* art. 11.

57. *See* Roper, *supra* note 2, at 256, 258 (rating the power of cabinet formation as a "3 if the president names the entire cabinet subject to parliament's confirmation," which is one unit less than a so-called "supreme" presidential power).

58. *Id.*; 1958 CONST. 8 (Fr.).

subject to parliamentary confirmation, the French president has no direct incentive to appoint a prime minister of any particular party to satisfy parliamentary majority preferences, save perhaps the incentive to appoint a prime minister of the president's own party. Indirectly, however, the French president must be cognizant of the possibility of forced resignation of the prime minister by parliament. Should parliament pass a motion of censure or otherwise reject the prime minister's program or policies, "the Prime Minister must tender to the President of the Republic the resignation of the Government."[59] Thus, the French president tends to appoint prime ministers of the same party as the parliamentary majority, which may or may not coincide with his own.[60]

Despite the "supreme" nature of the president's appointment power, such power is mildly tempered by the remaining powers regarding government formation, similar to the approach taken by the Russian constitution.[61] Without approval by the parliament, but only on proposal of the prime minister, the French president has the power to appoint and dismiss members of the government.[62] As with the indirect limitation placed on the president's prime minister appointment power, the president's cabinet formation power is only slightly and indirectly limited by parliament's ability to force the resignation of the government.[63] However, and as in the case of the Russian constitution, parliament has little incentive to force the resignation of the government without good reason in light of the president's power to dissolve the National Assembly.[64] Thus, even with the parliamentary check of the threat of the forced resignation of the government, the president's appointment and cabinet formation powers render it capable of shaping the tenor of government policy and reform.

Finally, the French constitution grants the president important legislative powers, shifting substantial control of policy and reform to the executive. Articles 11 and 13 allow the president to initiate legislation and to declare law unilaterally.[65] Besides the topics enumerated in Article 11, the president's referendum and decree powers are seemingly unlimited by the French constitution.[66] Such powers enable the president to be less encumbered by parliament, allowing for the pursuit of policy goals perhaps not embraced or prioritized by parliament.[67] By shifting some

59. 1958 CONST. 50 (Fr.).

60. *See* Martin A. Rogoff, *One, Two, Three, Four, Five, and Counting: A Sixth French Republic?*, 10 COLUM. J. EUR. L. 157, 170 (2003) (reviewing PAUL ALLIES, POURQUOI ET COMMENT UNE VI RÉPUBLIQUE (2002) and OLIVIER DUHAMEL, VIVE LA VI RÉPUBLIQUE! (2002)) (noting the repeated practice of cohabitation). If the parliamentary majority is of a different party than the president, then the president and prime minister will "cohabit." Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2488 (2006). The tension created through cohabitation, this Note argues, is what renders the French model of semipresidentialism better able to safeguard and facilitate democratic consolidation and stability.

61. *See* KONSTITUTSIIA ROSSISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 83, cl. e (listing the powers and duties of the president of the Russian Federation).

62. 1958 CONST. 8 (Fr.).

63. *Id.* art. 49.

64. *Id.* art. 12.

65. *See id.* art. 11 (allowing the president to "put to a referendum any Government bill dealing with" a variety of enumerated topics); *see also id.* art. 13 (allowing the president to sign "ordinances and decrees decided upon in the Council of Ministers").

66. *See* 1958 CONST. tit. II (Fr.) (enumerating the powers and duties of the president).

67. *See* Ludwikowski, *supra* note 51, at 34 (noting the ways that the French model strengthened the

legislative power from parliament to the executive, the French constitution continues to support and facilitate a strong executive.

As regards executive power, the French and Russian constitutions are similar in scope and the amount of power afforded the executive branch.[68] The French president may appoint the prime minister and members of the government, subject only to the indirect threat of a vote of no-confidence or forced resignation of the government.[69] Further, the president has the power to dismiss members of the government, tempered only by the requirement of the prime minister's proposal of the same action.[70] Regardless of the threat of forced resignations, the president also possesses the power to dissolve the National Assembly, seemingly without limitation.[71] Finally, the president is also given significant legislative powers in the form of referendum and decrees, which are only slightly restricted, if at all.[72] Thus, the true difference between the French and Russian concepts of semipresidentialism is to be found in the powers of the prime minister and to whom the prime minister is responsible.

2. Prime Ministerial Powers

Under the French constitution, the prime minister holds a subordinate position, albeit not to the extent of the Russian prime minister. The scope of the prime minister's power is cast in ambiguous and vague language.[73] For example, Article 20 states that the government, of which the prime minister is the head, "shall decide on and conduct national policy."[74] What "national policy" consists of is left undefined. As to the conducting of such "national policy," the prime minister is given responsibility for "direct[ing] the activities of the Government," which is equally undefined.[75]

While the affirmative responsibilities and lawful activities of the government are left vague and open-ended, the prime minister and members of its cabinet are specifically prohibited from participating in "the exercise of any parliamentary mandate, . . . the holding of any office at national level in business, commercial or professional organizations, and with any public office or professional activity."[76]

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executive, thereby decreasing its dependence on parliament).

68. *See* discussion *infra* Parts III.A–III.B.1 (discussing the extent of executive power under Russian constitution).

69. 1958 CONST. 8 (Fr.).

70. *Id.*

71. *Id.* art. 12.

72. *Id.* art. 11.

73. *See id.* arts. 20–23 (articulating the scope of the prime minister's power).

74. *Id.* art. 20.

75. 1958 CONST. 21 (Fr.). It is interesting, although perhaps not dispositive or particularly persuasive in any meaningful way, to note the number of articles dedicated to the office of the President as compared with the number of articles dedicated to the Government. The President is governed directly by fifteen articles in the constitution, *id.* tit. II, while the Government is governed directly by four, *id.* tit. III. As another point of comparison, Parliament is governed directly by ten articles. *Id.* tit. IV. However, eighteen articles are devoted to the relationship between Parliament and the Government. *Id.* tit. V. This last observation is indicative of the nature of the French semipresidential system in which the Prime Minister and Government are accountable solely to Parliament, rather than to both Parliament and the President.

76. *Id.*

Perhaps the reasoning behind this prohibition is the interest of neutrality, as the government must work with parliament to "conduct national policy."[77] Indeed, the prime minister is given few legislative powers, save for the "power to make regulations."[78] The legislative powers accorded to the prime minister consist solely of "the right to introduce legislation," in tandem with parliament, to further national policy.[79] Such legislative power is not unilateral, however, as "government bills shall be discussed in the Council of Ministers after consultation with the Council of State."[80]

Importantly, the French constitution explicitly provides that the prime minister "shall be responsible to Parliament" pursuant to Articles 49 and 50.[81] Thus, should parliament disagree with the policies of the government, parliament is capable of forcing its resignation.[82] Moreover, and in contrast to the Russian model, the French constitution does not require the prime minister to be accountable to the president.[83] Indeed, the president holds no formal dismissal power over the prime minister, nor does the president control retention or relinquishment of prime ministerial power,[84] as does the Russian president.[85] Put succinctly, the French prime minister is accountable exclusively to the parliamentary majority.[86] Thus, the prime minister is

77. *Id.* art. 20.

78. *Id.* art. 21. Article 13 describes the president's appointment power for civil and military posts. *Id.* art. 13. Under Article 13, the Council of Ministers appoints "Councillors of State, the Grand Chancellor of the Legion of Honour, ambassadors and envoys-extraordinary, Master Councillors of the Court of Auditors, prefects, representatives of the Government in Overseas Territories, general officers, rectors of academies, and heads of central government departments." *Id.* art. 13. Thus, the prime minister's appointment power in this regard is limited to those civil and military posts not specifically enumerated in Article 13.

79. *Id.* art. 39.

80. 1958 CONST. 39 (Fr). Notably, this requirement is tempered by the influence and power of the president, who is the chair of the Council of Ministers, constituting an important check on the prime minister's legislative powers. *Id.* art. 9.

81. *Id.* art. 20.

82. *Id.* arts. 49–50.

83. *See id.* art. 8 ("The President of the Republic appoints the Prime Minister. He terminates his functions when the latter tenders the resignation of the Government.").

84. *See* Dorothy Pickles, *The Constitution of the Fifth French Republic*, 22 MOD. L. REV. 1, 8 (1959) ("Henceforth, a Government can be compelled to resign in only three ways: first, if defeated by a simple majority on a request for the Assembly's approval of its programme or its general policy; second, on a Bill or part of a Bill which the Government has made an issue of confidence; and third, on a motion of censure on the Government's general policy, signed by at least a tenth of the Deputies of the Assembly."); *see generally* 1958 CONST. 20 (Fr.) (stating the government "shall be responsible to Parliament"); *id.* arts. 5–19 (enumerating the French president's powers and indicating the French president is not conferred the power to dismiss the prime minister, as opposed to members of the cabinet, under any circumstances). However, it is important to distinguish between constitutionally compelled resignation and politically compelled resignation. While the French president formally cannot require the prime minister to resign, the president can politically pressure the prime minister to resign. *See* Pickles, *supra*, at 9 ("The constitution deals only with issues on which the Government is *obliged* to resign. But experience has shown that most French Governments resign, not because their position is constitutionally untenable, but because it is politically untenable.").

85. *See* KONST. RF arts. 116–17 (Russ.) (explaining the procedure by which the government may offer a resignation of its powers and the instances in which it must resign its powers).

86. According to Shugart and Carey, this distinction renders the French Fifth Republic model a premier-presidential system, as "the prime minister and cabinet are *exclusively* accountable to the parliamentary majority, while under president-parliamentarism, the prime minister and cabinet are *dually* accountable to the president and the parliamentary majority." Elgie & McMenamin, *supra* note 6

independent from the president in the exercise of its responsibilities under the constitution, allowing it to navigate political hurdles by compromising with party coalitions, lest it be subject to a motion to censure or forced resignation.

3. Parliamentary-Prime Ministerial Relations

Because the prime minister is accountable solely to parliament under the French constitution, it is important to explore the contours of the two bodies' working relationship as governed by Title V of the constitution.[87] In order for the prime minister to "conduct national policy" pursuant to Article 20,[88] it "may ask Parliament to authorize it, for a limited period, to take by means of ordinance measures which fall normally within the domain of legislation."[89] However, the continued enforceability of such ordinances requires a ratification bill, the absence of which causes the ordinance to lapse.[90] Additionally, the prime minister and government have the power to determine the agenda of parliament, giving the government direct power to control the output of parliament.[91]

Severely restricting unfettered use of these powers by the prime minister is the parliament's capacity to force the resignation of the government.[92] Article 49 outlines the method by which the National Assembly questions the confidence in the government and may force its resignation.[93] The National Assembly may pass a motion of censure or simply reject the government's program or policy statement.[94] A censure motion must be adopted "by a majority of all members comprising the Assembly."[95] Finally, upon passage of a censure motion, the prime minister must tender its resignation to the president.[96]

Because a censure motion requires a majority vote of the National Assembly, such motions are most successful when the parliamentary majority is a party distinct from that of the prime minister, save in exceptional circumstances.[97] Where the prime minister and parliamentary majority are of the same party, it is unlikely the parliamentary majority will be so opposed to the prime minister as to require the

(quoting Matthew S. Shugart, *Comparing Executive-Legislative Relations*, *in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 344, 357 (Sarah A. Binder & Bert A. Rockman eds., Oxford University Press 2006)).

87. 1958 CONST. 34–51 (Fr.).

88. *Id.* art. 20.

89. *Id.* art. 38.

90. *Id.*

91. *See id.* art. 48 (granting the government the power to control the content and order of the parliament's agenda).

92. *See id.* arts. 49–50 (dictating a procedural mechanism for obtaining resignation of the government).

93. 1958 CONST. 49 (Fr.).

94. *Id.* (Fr.).

95. *Id.* art. 49.

96. *Id.* art. 50.

97. *See* John D. Huber, *The Vote of Confidence in Parliamentary Democracies*, 90 AM. POL. SCI. REV. 269, 275 (1996) ("[A] parliamentary majority can remove a prime minister from office at any time by submitting and voting a motion of censure. Thus, the existence of any government in power suggests that, other things equal, a majority places a nonnegative value on keeping that government in place. The costs of bringing down the government are equally straightforward. Throwing the prime minister out of office may lead to a government that implements undesirable policies in the future, may entail a loss of access to governmental sources of patronage, and may lead to loss of one's seat if an election ensues.").

government's resignation and risk appointment of a new government of a different, and perhaps adversary, party.

C. *Practical Application of Premier-Presidentialism in France*

Because the French prime minister is accountable solely to parliament, the strength of the party system and party affiliation directly affects the balance of power between the prime minister and the president. If the prime minister and president are cohabitating, which occurs when the president is of a different party than the parliamentary majority, the prime minister's power tends to increase.[98] During periods of cohabitation, prime ministers tend to wield more power given the support of the parliamentary majority, a relationship which fosters tense conflict between the president, on one side, and the prime minister and parliament on the other.[99] Conversely, when the prime minister and president are not cohabitating, the president has little need to subordinate to the prerogatives of the prime minister and parliament as the prerogatives of the three tend to align.[100] Despite the inherent capacity for destabilizing tension during these periods, cohabitation, paired with the president's formal inability to dismiss the prime minister, actually fosters greater democratic stability within the system, as conflict necessarily is resolved according to majoritarian rule.

President François Mitterrand's nomination of Jacques Chirac on March 20, 1986, marked the beginning of the first period of cohabitation in the French Fifth Republic.[101] Chirac was appointed as prime minister to satisfy the parliamentary majority, rather than as a complement to Mitterrand's own party.[102] Conventional thought in France tended to interpret the 1958 constitution as "requir[ing] the president to resign or appeal to the electorate if he were confronted by a contrary majority. If the prime minister disagreed with the president who still had the support of the parliamentary majority, logic again required the premier to resign."[103] However, beginning in the mid-1970s, the appeal of cohabitation had become more popular among top French politicians and thus, the Mitterrand-Chirac cohabitation arrangement was not challenged.[104] From the beginning of their relationship,

98. *See* Martinez, *supra* note 60, at 2488 (noting that the prime minister's powers have increased during periods of cohabitation).

99. *See* Petra Schleiter & Edward Morgan-Jones, *Citizens, Presidents and Assemblies: The Study of Semi-Presidentialism Beyond Duverger and Linz*, 39 BRIT. J. POL. SCI. 871, 876–77 (2009) (indicating fusion of prime minister and parliamentary legislative control facilitates more efficient negotiation of legislation in premier-presidential regimes, while cohabitation in president-parliamentary systems requires more intense and protracted negotiation); *see also* Elgie & McMenamin, *supra* note 6 (quoting Matthew Søberg Shugart, *Semi-presidential Systems: Dual Executive and Mixed Authority Patterns*, 3 FRENCH POLITICS 323, 328) (explaining that when the president and prime minister "have independent sources of authority," such as during cohabitation, they must "cooperate to accomplish some task").

100. Schleiter & Morgan-Jones, *supra* note 99, at 876–77.

101. Jean T. Poulard, *The French Double Executive and the Experience of Cohabitation*, 105 POL. SCI. Q. 243, 255–56 (1990).

102. *Id.* Because presidential and legislative elections are held at different times in France, it is not entirely unlikely for the electorate to elect a president of one party, only for electoral sentiments to change prior to the legislative election. *Id.* at 255.

103. *Id.* at 252.

104. *Id.* at 255–56.

however, Mitterrand "made it clear that he would not cooperate on certain issues. Specifically he said that he would not sign *ordonnances* (decrees) dealing with social policies that did not present progress in relation to what was already in place."[105] By stonewalling Chirac on issues particularly subject to inter-party conflict, Mitterrand was requiring these issues be sent to parliament for resolution, as Chirac was without any other recourse to advance his policies.[106] Indeed, without the aid of a parliamentary majority and without powerful recourse to dismiss Chirac,[107] Mitterrand had no other option but to submit to the risk of losing on these issues by relying on the democratic process.

Although Mitterrand's stubbornness may seem simply contrarian and an attempt to plant a seed of doubt in the legitimacy of Chirac's power, such political maneuvering by the French president did not negatively affect democratic stability. Faced with the formal incapacity to dismiss the prime minister, Mitterrand was forced to submit to compromise and the democratic process to resolve conflict, thereby safeguarding democracy.[108] Thus, issues at the core of disagreements between the political parties were sent to parliament for resolution,[109] which was more likely to ensure that the interests of the electorate controlled the outcome. Interestingly, according to polls taken in 1986, "the French tended toward an acceptance of cohabitation" despite prior conventional wisdom regarding cohabitation, perhaps indicating appreciation of the vindication of democracy.[110]

The Mitterrand-Chirac period of cohabitation demonstrates the need for a strong party system in semipresidential regimes to ensure democratic stability. The strong party system allows for majority coalitions, which may stand in opposition to or in solidarity with the president. In either circumstance, conflict is resolved between the legislative and executive branches, rather than through a single branch coup. However, the efficacy of cohabitation in ensuring democratic stability depends on insulation of the prime minister from dismissal by the president.[111] If the president

105. *Id.* at 257.

106. *Id.* at 259 (illustrating that when faced with the reprivatization of the French banking system, Mitterand followed through on his promise to not sign any ordinances that did not progress those already in place, forcing Chirac to send the ordinances to parliament.).

107. Poulard, *supra* note 101, at 257.

108. *Id.* at 259.

109. *Id.* at 260.

110. *Id.* at 262.

111. While the French president formally does not have the power to dismiss the prime minister, the constitution does not prevent the president from pressuring the prime minister to tender resignation of the government. *See* ANNE STEVENS, THE GOVERNMENT AND POLITICS OF FRANCE 96 (1st ed. 1992) (explaining "in practice prime ministers have been dismissed" despite the French president having no formal right to dismiss the prime minister); Elaine Sciolino, *French Leader Fires Premier in Response to E.U. Rejection*, N.Y. TIMES (May 31, 2005), http://www.nytimes.com/2005/05/31/international/europe/31cnd-france.html (reporting that Jean-Pierre Raffarin "resigned in the wake of [a] no[-confidence] vote"); Ben Hall, *Sarkozy Reappoints Fillon in French Reshuffle*, FIN. TIMES (Nov. 14, 2010), http://www.ft.com/cms/s/0/6d89aa24-efd2-11df-88db-00144feab49a.html (reporting that Jean-Louis Borloo "resigned from the government," to be replaced by François Fillon). The president's capacity to do this, however, is tempered by prevailing assembly opinion: the president is unlikely to pressure the prime minister to resign if the prime minister enjoys parliamentary approval. *See* John C. Reitz, *Political Economy and Separation of Powers*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 579, 606 (2006) ("During periods of cohabitation, the increase in the power of the person who comes into the office of Prime Minister by virtue of his strong popular and legislative support clearly limits the authority of the President, as a matter of political fact."). If the president were to do so, the president would risk loss of electoral support and of support within his own party. *See id.* (explaining that the French president's dismissal of a

had the formal power to dismiss the prime minister during periods of cohabitation, as distinct from the political power to pressure the prime minister to resign, the president could pool power in the executive and rule accordingly, resolving conflict outside of the democratic process. However, the French model does not allow for such presidential fiat; any conflict arising within a cohabitation relationship must be resolved through compromise and submission to democratic institutions.[112] Because the French system is supported by a strong party system with defined coalitions and because the French president, (1) cannot formally dismiss the prime minister and (2) is disincentivized from pressuring resignation during periods of cohabitation, democratic legitimacy and stability are less likely to become victims of political conflict.[113]

III. RUSSIA: AN ANALYSIS OF A PRESIDENT-PARLIAMENTARY SYSTEM

A. Constitutional Formation in Post-U.S.S.R.

Prior to the 1990s, the Russian government did not have a president.[114] In an effort to realize economic programs more successfully through a stronger executive, however, the government underwent a series of political reforms under Mikhail Gorbachev.[115] To this end, Gorbachev elected to supplement the parliamentary system with a directly elected presidency.[116] In choosing a presidential model, Gorbachev evaluated the American model of presidential government, as well as the French Fifth Republic's model of semipresidentialism.[117] Central to the discussion

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cohabitating prime minister may "provok[e] such a crisis of government that he might have to resign"). Thus, when the president and prime minister are cohabitating, the president is disincentivized from pressuring resignation, as the president likely does not enjoy the support of a parliamentary majority and would have a difficult time reconstituting a government with which he is in agreement on political issues. *Id.* Conversely, when the president and prime minister are not cohabitating, the president is more likely to successfully pressure the prime minister to resign without losing much political capital. *See id.* at 604 (noting the usual ability of French presidents to dominate the government, including a power of dismissal). Because the president is in alignment with popular political sentiment and enjoys cooperation with the parliamentary majority in this case, the president would have little difficulty in reconstituting a more agreeable government.

112. *See* Pickles, *supra* note 84, at 8 (describing the political mechanisms necessary for dismissal of the prime minister).

113. *See* Poulard, *supra* note 101, at 267 ("Cohabitation has shown that it was a workable political arrangement under the 1958 Constitution and that it led neither to deadlock and immobility nor to a dire constitutional crisis.").

114. Eugene D. Mazo, *Constitutional Roulette: The Russian Parliament's Battles with the President over Appointing a Prime Minister*, 41 STAN. J. INT'L L. 123, 138 (2005). Historically, however, the Russian political system has tended to favor "[a] strong executive, with power concentrated in a small governing elite . . . ." John P. Willerton & Aleksei A. Shulus, *Constructing a New Political Process: The Hegemonic Presidency and the Legislature*, 28 J. MARSHALL L. REV. 787, 790 (1995). From the Tsarist regime through the Soviet system, the Russian government was marked by a strong central executive, which would ignore, dissolve, or otherwise control any state bureaucratic entities. *Id.* at 791.

115. MICHAEL MCFAUL, RUSSIA'S UNFINISHED REVOLUTION: POLITICAL CHANGE FROM GORBACHEV TO PUTIN 53 (2001).

116. Mazo, *supra* note 114, at 138.

117. *Id.* at 133, 139.

were the issues of the requisite amount of executive power necessary to execute reforms and the responsibilities attendant of a president as opposed to a prime minister.[118] Initially, Gorbachev preferred a presidential model similar to the United States' system, as he thought the "government needed the authority of a president at its head in order to implement difficult reforms."[119] In contrast, Georgy Shakhnazarov, a Gorbachev advisor, argued that a system based on the French model would remove Gorbachev from more detailed and mundane decision making more appropriate for a prime minister, allowing him to focus on broader policy initiatives and reforms.[120] Shakhnazarov also argued that Russia's political and economic instability demonstrated the impracticality of a presidential system based on the American model.[121] Gorbachev ultimately chose "a hybrid, somewhat closer to the French than to the American model" for the Russian presidency.[122]

Prior to the collapse of the Soviet Union in December of 1991, Russia was governed by the Constitution of 1978, itself modeled on the 1977 Soviet Constitution.[123] After the collapse, Russia had a unique and fleeting opportunity to write and ratify a new constitution quickly.[124] However, because of the national exigencies facing Yeltsin and persistent irreconcilable differences between him and the Duma, a new constitution was not agreed upon and ratified for quite some time.[125] In the interim and during the proceedings of the Constitutional Commission, Russia remained beholden to the 1978 constitution, amendments to which formed the basis of the semipresidentialism adopted in the 1993 constitution.[126]

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118. *Id.* at 139.

119. *Id.*

120. *Id.*

121. *Id.*

122. ARCHIE BROWN, THE GORBACHEV FACTOR 198, 199 (1996). Because Russia was still a member of the Soviet Union during this period of executive reform and despite Russia being the center of Soviet power, the transition from party control to a presidential executive did not directly affect the political systems utilized by other Soviet states, as the presidency was distinct from the Soviet head of state. However, Russia's executive reform was part of a broader trend in which many Soviet states had created presidencies. Indeed, "by the end of 1991, all of the other Soviet republics had presidencies as well" and thus, it is hardly surprising that the Russian electorate "overwhelmingly gave their affirmation" of support for the concept of a directly elected president. Mazo, *supra* note 114, at 140. Although the newly adopted system called for a directly elected president, for the sake of economic and social stability in the country, the Congress of People's Deputies, rather than the Soviet people, elected Gorbachev as the first president of the Soviet Union. *Id.* at 139. In June 1991, Yeltsin won the first direct presidential election, replacing Gorbachev. MCFAUL, *supra* note 115, at 168. However, because of the collapse of the Soviet Union in December 1991, the executive branch of the government required even further reform to function effectively. Mazo, *supra* note 114, at 140–41. Given the nature of the relationship between the Russian executive and parliament prior to the collapse, the powers and responsibilities of the new presidential office had yet to be clearly defined. Thus, the First Russian Republic was required to quickly create a new constitution outlining the contours of the new government. *Id.*

123. Mazo, *supra* note 114, at 140.

124. *See* BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 46 (1992) ("The window of opportunity for constitutionalizing liberal revolution is open for a shorter time than is generally recognized.").

125. Mazo, *supra* note 114, at 141–42.

126. *Id.* at 141. For example, after creating the presidency, the Duma also gave the president "the power to nominate the chairman of the Council of Ministers—although his choice was subject to approval by parliament. . . . [The president] could disband neither the Congress nor the Supreme Soviet. However, he could nominate his remaining government ministers without the Supreme Soviet's approval." *Id.*

In drafting the new constitution, two dominant approaches emerged within the Constitutional Commission.[127] Valery Zorkin proposed a system in which a strong president would be the head of the government and head of state.[128] Zorkin's model did not include a prime minister and thus, the president had the power to nominate the government, the approval of which was subject only to parliamentary approval.[129] The second approach, proposed by Viktor Sheinis, Leonid Volkov, and Revolt Pimenov, more closely resembled a semipresidential system.[130] Under the proposed system, the president would present a prime minister candidate for confirmation by the Duma.[131] The lower house of the Duma would also be able to render a vote of no-confidence, forcing dissolution of the government.[132] Despite their distinct differences, each approach constituted a variation of semipresidentialism because each required parliamentary approval of the prime minister or government.[133]

Yeltsin, however, favored a system with a stronger presidency than those proposed by the Commission and therefore drafted the Presidential Draft Constitution of Russia.[134] The Presidential Draft provided for a "presidential prerogative to control the executive branch, the right of the president to veto parliamentary laws, and the right to be elected in nationwide elections for a six-year term."[135] To prevent Yeltsin from submitting his draft to a referendum, the Commission prepared a draft "that fell somewhere between the Commission's original draft and the new presidential draft."[136] The Commission's draft, however, proved insufficient as Yeltsin desired a constitution granting the president two distinct powers.[137] First, Yeltsin wanted the president to be the head of government with an absolute right to nominate the government.[138] Second, Yeltsin wanted the president to have the power to dissolve parliament.[139] Disappointed with the work of the Commission, Yeltsin created and vested constitutional drafting authority with the Constitutional Conference.[140] The Constitutional Conference worked from both the

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127. *Id.* at 143.

128. *Id.*

129. *Id.* Although Zorkin "was a stalwart proponent of presidentialism who disliked parliamentary and semipresidential models of government," the requirement of parliamentary approval of the cabinet in his constitutional draft indicates the proposed system to be of a more semipresidential nature, rather than presidential. *Id.* at 143–44.

130. Mazo, *supra* note 114, at 143–44.

131. *Id.* at 144.

132. *Id.*

133. *Id.* at 144. In fact, "most of the drafts that were being considered during these constitutional debates were semipresidential in form.... The real question concerned what kind of semipresidential regime would be set in place." *Id.* at 148. *See also* MCFAUL, *supra* note 115, at 168–69 (stating the first and second drafts of the Commission recommended the creation of weak and strong semipresidential systems, respectively); Duverger, *supra* note 14, at 166 (stating that a regime is semipresidential if, among other things, "a prime minister and ministers ... possess executive and governmental power and can stay in office only if the parliament does not show its opposition to them").

134. Mazo, *supra* note 114, at 144.

135. *Id. See also* MCFAUL, *supra* note 115, at 168 (stating Yeltsin and his allies supported the creation of a presidency in order to increase executive autonomy from parliament).

136. Mazo, *supra* note 114, at 144.

137. *Id.* at 145.

138. *Id.*

139. *Id.*

140. MCFAUL, *supra* note 115, at 192.

Presidential Draft and the Constitutional Commission's draft, culminating in its own draft by September 1, 1993.[141]

In an attempt to subvert Yeltsin's dubiously appointed Constitutional Conference, the Duma began drafting amendments to the then-applicable constitution with the intent of eliminating the presidency.[142] Before succeeding, however, Yeltsin issued Presidential Decree No. 1400 on September 21, 1993, dissolving the Duma and calling for popular ratification of a new constitution and elections for a new parliament.[143] After forcefully removing opposition parties, Yeltsin reconvened a portion of the Constitutional Conference and "wrote the constitution to his specifications."[144] By November 10, Yeltsin had a final draft of the new Russian constitution, which was presented for a nationwide vote and approved by 54.8% of the electorate on December 12.[145] Despite the conflicts between Yeltsin and the Duma over the appropriate amount of power to be shared within the executive, the 1993 constitution created a semipresidential form of government with both a president and a prime minister.[146]

B. Constitutional Analysis

1. Presidential Powers and Parliamentary "Checks"

As penned by Yeltsin, the new Russian constitution calls for an exceedingly strong presidential office. Most importantly, the president has the power to: (1) appoint and dismiss the prime minister;[147] (2) "dissolve[] the State Duma;"[148] (3) "appoint[] and remove[] from office the deputy chairs of the Government;"[149] and (4) "issue[] edicts and decrees."[150] The strength and scope of these powers directly affects the strength of the Russian presidency, as well as the president's capacity to affect policy change.

The powers to appoint and dismiss the prime minister constitute an exceptional amount of presidential power.[151] Furthermore, such "super-presidential" powers are

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141. Mazo, *supra* note 114, at 146–47.

142. MCFAUL, *supra* note 115, at 194.

143. Mazo, *supra* note 114, at 147.

144. *Id.* In fact, merely two days before the final draft of the 1993 constitution was complete, Yeltsin "sat down at 3:15 p.m. . . . and, without consulting his advisors, made changes to it in his own hand. These changes were simply adopted and written into the text without any further discussion." *Id.* at 149.

145. *Id.* at 147.

146. Generally speaking, the 1993 constitution (1) retains popular election of the president; (2) grants the president a great deal of executive power; and (3) grants confirmation power of the prime minister to the Duma. *See* KONST. RF art. 81, § 1 (stating the president "shall be elected . . . by citizens of the Russian Federation . . . in a secret ballot"); *id.* art. 103, cl. a (stating the Duma shall give "consent to the President . . . for the appointment of the" prime minister); *see also* Duverger, *supra* note 14, at 166 (stating the elements of a semipresidential system are: "(1) the president of the republic is elected by universal suffrage; (2) he possesses quite considerable powers; [and] (3) he has opposite him . . . the prime minister and ministers who possess executive and governmental power and can stay in office only if the parliament does not show its opposition to them").

147. KONST. RF art. 83, cls. a, c.

148. *Id.* art. 84, cl. b.

149. *Id.* art. 83, cl. e.

150. *Id.* art. 90, § 1.

151. *See* Roper, *supra* note 2, at 256, 258 (rating the power of cabinet formation subject only to

only moderately limited by the Russian constitution. The foremost of these limitations is the required consent of the Duma, without which the president must appoint an alternate candidate for prime minister.[152] Through its consent power, the Duma seemingly has the capacity to force the president to appoint a politically agreeable prime minister, which, theoretically, tempers the appointment power of the president.[153] However, should the Duma fail to consent to the president's appointed prime minister three consecutive times, "the President of the Russian Federation shall appoint a [prime minister], dissolve the State Duma and call new elections."[154] Although the Duma may exercise a modicum of control over government formation, it must exercise those powers strategically to avoid dissolution or to prevent the president from resorting to more authoritarian rule.[155] The president also has the power to dismiss the prime minister, regardless of parliamentary approval.[156] This power has proven to become a powerful tool for the president in controlling the Duma and prime minister, although at the cost of some democratic legitimacy.[157]

In tandem with the power to appoint and dismiss the prime minister is the president's power to appoint and dismiss members of the government.[158] In fact, the president's power to appoint and dismiss cabinet members, upon proposal by the prime minister, is unilateral and does not require Duma consent.[159] Again, this presidential power is only marginally limited by the Duma's capacity to vote no-confidence in the formed government.[160] By the text of the constitution, therefore, the Duma seems to possess an important power to influence the political character of the government. However, two votes of no-confidence require either the dismissal of the government or the dissolution of the Duma.[161] Paired with dissolution power, the Duma's rejection of the appointed prime minister three times over grants the Russian president an extraordinary amount of power over the creation and stability of the government.[162]

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parliamentary confirmation as a "3," which is one unit less than a so-called "supreme" presidential power); *see also* Mazo, *supra* note 114, at 151 (stating that most scholars have described the Russian president's cabinet formation powers as "super-presidential"). Bolstering the strength of this appointment power, consent requires a mere simple majority of the Duma. *Id.* at 150.

152. KONST. RF art. 111, §§ 1, 3.

153. As discussed in further detail below, however, the weak party system in Russia renders this capacity of the Duma largely a theoretical one.

154. KONST. RF art. 111, § 4.

155. Moser, *supra* note 29, at 84.

156. KONST. RF art. 83, cl. c.

157. Moser, *supra* note 29, at 84–85.

158. KONST. RF art. 83, cl. e.

159. *See* Moser, *supra* note 29, at 85 ("The members of the cabinet are appointed jointly by the president and prime minister without legislative approval.").

160. KONST. RF art. 117, § 3.

161. *Id.* art. 117, § 3.

162. Importantly, however, the president may not dissolve the Duma (1) for a no-confidence vote for one year after a parliamentary election, *id.* art. 109, § 3; (2) once a charge for impeachment has been laid against him, *id.* art. 109, § 4; and (3) within six months of the end of the president's term in office, *id.* art. 109, § 5. However, the conditions precedent for these provisions have yet to manifest and thus, the practical application of the tension-ridden provisions as regards president-parliament relations has yet to be determined. Mazo, *supra* note 114, at 151.

Finally, the president has a number of legislative powers, such as the power to "issue[] edicts and decrees,"[163] which merely "must not contravene the constitution of the Russian Federation and federal laws."[164] Article 90 proposes no other restrictions, temporal, topical, or otherwise, on the president's decree power, conferring upon the president an unencumbered capacity to enforce executive policies in lieu of legislative action or approval.[165] Reinforcing the president's decree power is the presidential veto and the votes required to overcome it:[166] "[I]f a war of laws versus presidential decrees were to break out, the president would have the upper hand, for he could veto contrarian legislation, and force the legislature to come up with super-majorities to override."[167]

Thus, under the Russian constitution, the president is given an exceptional amount of control over both the parliament and the prime minister. The capacity, and sometimes the constitutional requirement, of the president to dissolve parliament tempers the Duma's use of its own constitutionally conferred control mechanisms, namely the consent-rejection power and no-confidence votes.[168] Additionally, the president retains supreme control over the appointment and dismissal of the government.[169] Finally, the president's power to issue decrees and edicts, paired with the veto power, renders the president a legislative force in the executive office.[170]

2. Prime Ministerial Powers

In stark contrast to the affirmative powers conferred upon the president, the prime ministerial powers are subordinate, deferential, and more constricted. For example, the prime minister plays a mere advisory role in the formation of the government, of which it is the head:[171] "The chair of the government of the Russian Federation shall propose to the President of the Russian Federation candidacies for the posts of deputy chairs . . . ."[172] As discussed above, however, the president has the unilateral discretion to approve of and dismiss any candidate proposed by the prime minister.[173]

Second, where the president's decree power is limited only by the constitution and federal laws,[174] the prime minister's decree power is severely limited: prime ministerial decrees and edicts must be issued "[o]n the basis of and in implementation of the constitution . . . , federal laws *and* normative edicts of the President . . . ."[175] Article 115, clause 3 further restricts the prime minister's decree

163. KONST. RF art. 90, § 1.

164. *Id.* art. 90, § 3.

165. *See id.* art. 90 (imposing no restrictions on the president's legislative powers).

166. *Id.* art. 107, § 3.

167. Moser, *supra* note 29, at 86.

168. KONST. RF art. 117, § 3; *id.* art. 111, § 4.; *see also* Moser, *supra* note 29, at 85 (describing the reduced power of the Duma as a result of the president's dissolution powers).

169. KONST. RF art. 83, cl. e.; Moser, *supra* note 29, at 85–86.

170. KONST. RF art. 90, §§ 1, 3, art. 107; Moser, *supra* note 29, at 85–86.

171. KONST. RF art. 110, § 2, art. 112.

172. *Id.* art. 112.

173. *Id.* art. 83, cl. e.

174. *Id.* art. 90, § 3.

175. *Id.* art. 115, § 1 (emphasis added).

power: "In the event of conflict with the constitution . . . , with federal laws, or with edicts of the President . . . , decrees and directives of the [Prime Minister] may be abrogated by the President."[176] Thus, the prime minister's independent legislative powers are not independent at all, as they are constitutionally required to submit to presidential preference should conflict arise.

Finally, the president also directly controls retention or surrender of prime ministerial power. Article 116 requires relinquishment of authority to newly elected presidents.[177] Even if the prime minister and government voluntarily resign or surrender their power, "on the instructions of the President" the government "shall continue to act until the formation of the new government . . . ."[178] Further, and as discussed above, the president has the power to dismiss the prime minister.[179]

Also important to note is a parliamentary constraint on the prime minister: although the president has the power to dismiss the prime minister,[180] the authority to consent to a prime minister rests solely with the Duma.[181] Furthermore, the Duma may also enter a vote of no-confidence in the government, which requires "a majority of votes of the total number of deputies of the State Duma."[182] Thus, to avoid conflict, the prime minister must be agreeable both to the parliament and the president; indeed, the prime minister is dually accountable to each.[183]

C. *Practical Application of President-Parliamentarism in Russia*

As discussed above, the choice of regime and constitutional framework directly affects a country's process of democratic consolidation and subsequent democratic stability. In Russia, the particular balance of power between the president and prime minister, as well as the politicking of the Duma, seem to have "hinder[ed] Russia's democratic consolidation and derail[ed] its economic transition."[184] Equally relevant to the democratic stability of Russia is the party system, or lack thereof. Without a strong party system, the lack of party opposition in the Duma, coupled with the president's dismissal power over the prime minister, allows power to concentrate with the president.[185] When the Duma is incapable of producing a strong majority agreeable to the president to pass legislation, the president may be forced to rule by decree.[186] Similarly, a lack of stable opposition allows the president to rule unilaterally.[187] Thus, even if the prime minister and the president were to cohabit, resulting party tension would be a hollow check against the president's capacity for authoritarian ruling because, without party opposition in the Duma and with the

176. *Id.* art. 115, § 3.
177. KONST. RF art. 116.
178. *Id.* art. 117, § 5.
179. *Id.* art. 83, cl. c.
180. *Id.*
181. *Id.* art. 103, § 1, cl. a.
182. *Id.* art. 117, § 3.
183. Because the Russian prime minister is dually accountable to both the president and the Duma, Russia's model is termed a president-parliamentary system. Elgie & McMenamin, *supra* note 6.
184. Mazo, *supra* note 114, at 124.
185. Moser, *supra* 29, at 72–73.
186. *Id.* at 73.
187. *Id.* at 72–73.

power to dismiss the prime minister, any conflict within the system invariably would be resolved in the president's favor.[188] When the president rules on the basis of such concentrated and unchecked power, the system becomes unstable and suffers in democratic legitimacy.[189] Particularly demonstrative of this resultant democratic instability is Yeltsin's presidency, which was characterized by a fractionalized Duma and a continually changing prime minister.[190]

Due to a weak party system, Yeltsin was forced to rule exclusively through his decree power in the early years of his presidency, as the democratic process in the Duma was ineffective without a stable majority coalition.[191] During this period, Yeltsin used his "sweeping decree-making authority to undertake radical economic reform."[192] Although attempting to reassert its authority in response to the hyperinflation produced by Yeltsin's economic reform, the then-Congress of People's Deputies, plagued by fractionalization, succeeded only in creating "a constitutional crisis over distribution of power in the system."[193] The resulting ideological divide between the legislature and the president rendered it impossible for the two branches to create a working relationship, without which Yeltsin was forced to circumvent the legislature entirely and rule on the basis of his own legislative powers.[194]

Exacerbating this concentration of power in the presidency was Yeltsin's zealous use of his dismissal power over the prime minister, which ultimately resulted in his downfall. Yeltsin had five different prime ministers during his presidency.[195]

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188. *See* Moser, *supra* note 29, at 86 (explaining the fractionalized party system paired with the president's legislative and executive powers would tend to render the president the victor in "a war of laws").

189. *See supra* Part III.B.

190. *See* Moser, *supra* note 29, at 72–73 (noting that the weak and fractionalized party system resulted in Yeltsin being pushed to rule by decree); *infra* note 195 (describing the frequent turnover of prime ministers).

191. Moser, *supra* note 29, at 72–73. Ironically, the necessity for Yeltsin to concentrate legislative power in the presidency because of the weak legislature simply exacerbated the problem of the weak party system in Russia, resulting in a cyclic pattern of presidentially decreed legislation, which undermined the necessity of strengthened parties. *Id.* at 73. "When the legislature plays a marginal role in the composition or maintenance of the government and can easily be circumvented by the executive in the policy-making process, parties have fewer reasons to institutionalize." *Id.*

192. *Id.* at 78.

193. *Id.*

194. *Id.* at 81. As Moser explains, "Not needing a majority to sustain executive power, it was natural to neglect the difficult, time-consuming, and compromise-ridden process of coalition building that would have been necessary to promote a working relationship with the legislature in favor of ruling by decree, especially when the issues were viewed in such dichotomous, black-and-white terms." *Id.* This coalition building, however, is at the root of every stable and reliable democracy; without it, the Russian system has lost democratic legitimacy.

195. Mazo, *supra* note 114, at 159. Yeltsin's first prime minister, Viktor Chernomyrdin, was dismissed after his popularity began to strengthen and rumors he would run for the Russian presidency began circulating. *Id.* at 159–60. Sergei Kiriyenko replaced Chernomyrdin, but was dismissed within five months of his appointment. *Id.* at 164–65. Kiriyenko's dismissal was directly related to rising wage debts, an increasing budget deficit, dropping oil prices, and a significant devaluation of the Russian ruble, as Yeltsin attempted to localize responsibility for the crises away from the presidency and with the prime minister and government to save his own legitimacy. *Id.* at 164. Strangely, Yeltsin attempted to replace Kiriyenko with his predecessor, Chernomyrdin; however, the Duma twice voted against his re-appointment. *Id.* at 165–69. Again attempting to retain legitimacy, and rather than being compelled to dissolve the Duma after a third failed vote, Yeltsin appointed Yevgeny Primakov, who was confirmed. *Id.* at 168. Primakov was dismissed after he "made it publicly known that he harbored ambitions to ascend to

Once Yeltsin perceived a prime minister to be vying for too much power, or even for a future presidential term, he would dismiss the prime minister and replace him with a seemingly more innocuous candidate.[196] Additionally, and more systemically relevant, Yeltsin would also use prime ministers as scapegoats, dismissing them in order to shift blame for failing policies and reforms away from the presidency.[197]

One reshuffling of the government during the economic crisis was particularly traumatic for the legitimacy of the Russian presidency and for the stability of the democratic system. Shortly after Viktor Chernomyrdin was replaced as prime minister, Sergei Kiriyenko's government was faced with an economic crisis and collapse caused by a combination of factors.[198] With the economic crisis worsening, Yeltsin dismissed Kiriyenko.[199] It was Yeltsin's choice for a replacement, however, that precipitated the dramatic instability and loss of legitimacy in the Russian system: Yeltsin attempted to replace Kiriyenko with his predecessor, Chernomyrdin.[200] The "zig-zag from Chernomyrdin to Kirienko was taken as further evidence of erratic, bankrupt leadership," especially as Yeltsin attempted to pander to the Duma, offering myriad concessions in exchange for the Duma's consent for Chernomyrdin.[201] When the Duma declined the arrangement, Yeltsin had lost his advantage and was forced to concede to a compromise candidate, Yevgeny Primakov, in order to sustain a semblance of authority and legitimacy.[202]

Emboldened by his unilateral dismissal power and pooled legislative power, which resulted from an ineffective and fractionalized Duma, Yeltsin had embarked on aggressive reforms and initiatives outside the legitimizing democratic process.[203] Compounding this power, the lack of a majority party in the Duma to check the president through control of the prime minister allowed Yeltsin to rule as he saw fit.[204] Yeltsin was not obligated or incentivized to nominate a prime minister on the basis of the parliamentary majority because such a majority did not exist.[205] Without such obligation or incentive, Yeltsin was able to replace his prime ministers relatively without fear of diminished executive power.[206] The abuse of this advantage, however, crippled the efficiency of the government and dealt a heavy blow to democratic

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the presidency himself." *Id.* at 170. Primakov was replaced by Sergei Stepashin, who also was dismissed after making it known he intended to run for president. *Id.* Vladimir Putin replaced Stepashin. *Id.* Ironically, Putin was the only one of Yeltsin's prime ministers who later became president.

196. *See* discussion *supra* note 195; Moser, *supra* note 29, at 92 (discussing the political motivations for Yeltsin's dismissal of Chernomyrdin).

197. *See* discussion *supra* note 195.

198. Moser, *supra* note 29, at 93; Mazo, *supra* note 114, at 164–65.

199. Moser, *supra* note 29, at 93.

200. *Id.*

201. *Id.*

202. *Id.* at 93–94.

203. *See supra* notes 192–195 and accompanying text.

204. *See supra* notes 192–195 and accompanying text.

205. *See* Moser, *supra* note 29, at 89 ("It cannot be denied that President Yeltsin appointed and stuck with prime ministers and governments that did not enjoy widespread support in the Duma—the return of the most demonized reformer, Anatolii Chubais, in 1997 in a 'young reformers' government that included Nizhny Novgorod Governor Boris Nemtsov being one of the more egregious examples.").

206. *See, e.g.*, *id.* at 90 ("Power within the government and other executive positions remained highly contingent upon cultivating favor with Yeltsin; it was not any accurate reflection of public support as conveyed in parliamentary elections.").

stability by highlighting an inherent illegitimacy in the system: concentrated executive power with no parliamentary constraint.[207]

As Yeltsin's presidency demonstrates, any conflict arising between the Duma and the executive is resolved in favor of the president due to the extent of the president's powers and the lack of a majority coalition in the Duma. If a majority coalition in the Duma did exist, however, the president may be incentivized to nominate a prime minister of the coalition's party in order to gain Duma consent. Further, majority coalitions in the Duma could facilitate two circumstances with the capacity to safeguard and stabilize democracy in the Russian system: (1) the president and prime minister might be forced to cohabit and (2) conflicts between the legislature and executive would not necessarily be resolved in favor of the president. If the president and the prime minister were forced to cohabit, the president would be less able to dismiss the prime minister fearlessly, as he would be required to face the majority coalition in the Duma upon appointing a replacement prime minister. Indeed, the transaction costs of such a shuffle might be too high to justify the change. Without being able to dismiss the prime minister as easily, the president would be forced to resort to compromises and similar tactics to resolve conflict. Conflict resolution, therefore, would be more legitimate, as resolution would follow in a more democratic manner. However, the lack of a majority opposition coalition in the Duma or a strong party system, paired with the president's dismissal power renders this nearly impossible. Unless and until a stronger party system emerges in Russia, democratic legitimacy and stability are at the mercy of the president.[208]

IV. ANALYSIS AND RECOMMENDATIONS

As the above models and analyses suggest, the Russian model of semipresidentialism, president-parliamentarism, is the least capable of fostering and sustaining a democratic nation. The balance of executive power strongly favors the president, allowing the Russian president to operate as an autocrat, with little to no

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207. This inherent illegitimacy showed itself recently as tensions between President Dmitri Medvedev and Prime Minister Vladimir Putin grew in the time leading up to the 2012 presidential election. Ellen Barry, *Bulldogs Under the Rug? Signs of a Putin-Medvedev Rift*, N.Y. TIMES (May 8, 2011), http://www.nytimes.com/2011/05/09/world/europe/09kremlin.html. Interestingly, however, it seems factors other than those political in nature have allowed Putin to subvert the constitutionally created "balance" of power between the president and prime minister. *See* Seth Mydans, *Russians See Shift in Power as Business as Usual*, N.Y. TIMES (Sept. 24, 2011), http://www.nytimes.com/2011/09/25/world/europe/russians-see-shift-in-power-as-business-as-usual.html ("Mr. Putin has clearly been the paramount member of the tandem, remaining the country's prime mover even in a job with nominally less power than the presidency."). To speculate on the nature of these non-political factors would be to delve into topics outside the scope of this Note. Seemingly due to these undefined factors, Medvedev has refrained from utilizing his constitutionally conferred power to dismiss Putin as prime minister, despite any polarization arising from anticipated shifts in the tandem. Ellen Barry, *In Russian Leadership Battle, Medvedev Hints He Lacks Fire*, N.Y. TIMES (Sept. 11, 2011), http://www.nytimes.com/2011/09/12/world/europe/12 medvedev.html. *But see* Michael Schwirtz, *Russian President Fires Finance Minister for Insubordination* (Sept. 26, 2011), http://www.nytimes.com/2011/09/27/world/europe/dmitri-medvedev-fires-aleksei-kudrin-russian-finance-minister.html (indicating political factors may have more influence than cynicism may indicate, with Aleksei Makarkin, political analyst in Moscow, explaining that any resultant tension "is not a split, but . . . is a test of the system's strength" as any ensuing fighting will result in "a crisis situation of a political nature").

208. *See supra* notes 203–207 and accompanying text (discussing crux of systemic problem in executive allowing for lost democratic stability and legitimacy).

input or opposition from the prime minister or the Duma. In contrast, the French model of semipresidentialism, premier-presidentialism, is a flexible system capable of balancing strong presidential powers against a force of opposition in the office of the prime minister and in parliament. Because the French president constitutionally is incapable of dismissing the prime minister,[209] the president is often politically pressured to resort to more democratic means of conflict resolution, instead of running the country solely from the office of the president. The French system has ensured a stable democratic nation with much greater resilience than previous French Republics.[210] Furthermore, France enjoys much greater democratic stability than its semipresidential counterpart of Russia.[211] Such is the case for three reasons. First, premier-presidentialism has inherent within the system a powerful check against the president's power through an accountability mechanism unavailable in president-parliamentarism, namely the inability of the president to dismiss the prime minister. Second, this lack of power forces the president in a premier-presidential system to avail himself or herself of democratic processes, such as compromise and coalition building, to resolve political conflict and reach a consensus on a given issue. Finally, such conflict fosters and encourages a strong party system, which is necessary for the system to continue to function with its inherent check against the president's strong powers.

From this, the following recommendations naturally flow. Assuming a new democratic nation adopts a semipresidential system of government, two conditions must be met to ensure the system flourishes and remains democratically stable. Given the cyclical nature of democratic stability, one condition need not predate the other; indeed, the two conditions tend to facilitate one another and require the other's existence for their own vitality.

A. Foster and Sustain a Strong Party System

The nation must foster the development of strong party coalitions capable of working with the prime minister in times of cohabitation in order to effectively mount opposition to the office of the president when necessary. Weak coalitions are incapable of coalescing to create the necessary opposition and are insufficient to ensure an appropriate balance of power between the legislative and executive

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209. 1958 CONST. 8 (Fr.) ("The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government.").

210. *See* Poulard, *supra* note 101, at 244 ("In comparison with the Fourth Republic, the constitution of the Fifth did indeed establish stability and more efficacy at the government level.").

211. William A. Clark, *Presidential Power and Democratic Stability Under the Russian Constitution: A Comparative Analysis*, 28 PRESIDENTIAL STUD. Q. 620, 632–33 (1998). In evaluating the French model, Clark recognizes the inherent expectation of instability in periods of French cohabitation, but points out that "French politics has survived rather well, even in this essentially confused mode." *Id.* at 632. In the case of the Russian model, however, Clark argues it is the "ability for the Russian president to bludgeon and ignore parliament that makes the hybrid presidential-parliamentarian Russian system so confused" and therefore, less stable a democracy. *Id.* at 633. In fact, Clark highlights Shugart and Carey's suggestion as to the adoption of a presidential-parliamentary system: they "suggest that it is a type best avoided." *Id.* (quoting MATTHEW SOBERG SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 161 (1992)). For discussion of recent political experiences in each regime, see discussion *supra* notes 101–110 and 190–206 (discussing recent developments in France and Russia, respectively).

branches. Strong party coalitions, whether aligned with the office of the presidency or not, are necessary to safeguard the requisite democratic processes for a stable democracy and representative government as they function as a forceful check against the super-presidential powers characteristic of semipresidential systems.

As illustrated by the Russian model, the weak and nearly nonexistent party system functioned as fuel for the fire of the president's power and capacity to govern directly and solely from the executive. First, there were zero opposition parties capable of coalescing with enough strength to oppose any of Yeltsin's supporters.[212] Second, due to the nature of the Russian system, Yeltsin was not beholden to the wishes of the Duma as he could force its dissolution and was able to cycle through prime ministers, the executive-legislative liaison, at will.

In contrast, where Mitterand and Chirac disagreed, the strength of the party system in France was found to function as a democratic force. Because Mitterand could not dismiss Chirac under the constitution,[213] Mitterand was required to take an accounting of his political capital. In the case of a political conflict, Mitterand was faced either with submitting to Chirac or with sending the issue to the parliament for resolution. By sending issues to the parliament for resolution,[214] Mitterand understood that the parliament consisted of powerful party coalitions and thereby intended to allow the parties to battle through them, perhaps resulting in a Mitterand victory.[215] In periods of cohabitation, this strong party system is a mechanism for a powerful, yet restrained, president to attempt his or her hand at a favorable resolution of a political issue without risking the democratic stability of the nation as a whole.

B. Develop a Premier-Presidential System

A nation is more likely to sustain greater democratic stability under a premier-presidential system, as opposed to a president-parliamentary system. Without a strong party system, a president in a president-parliamentary system is capable of functioning as an authoritarian leader solely from the executive branch because of the capacity to dismiss the prime minister unilaterally without expending much political capital. Therefore, to ensure democratic stability is safeguarded with a strong balance between the branches and check against a powerful president, nations should develop a premier-presidential system.

The Russian model is an apt illustration of this phenomenon. In addition to his capacity to dismiss a prime minister at will and with little or no reason whatsoever, Yeltsin also held substantial legislative powers. This enabled him to circumvent the Duma completely and run the country solely from the office of the president. Thus, when the Duma was entirely hostile to Yeltsin's stance on a given issue, such reality became irrelevant considering Yeltsin's supreme powers. Without a neutral and

212. *See* Moser, *supra* note 29, at 72–73 (explaining that the weakness of the Russian parties led Yeltsin to circumvent the legislature, thereby weakening the party system even further).

213. *See* discussion *supra* notes 83–86 (discussing the inability of the French president to dismiss the prime minister under the constitution, but suggesting alternative methods for doing so).

214. *See* Poulard, *supra* note 101, at 257–60 (explaining that in the face of presidential obstructions, the prime minister repeatedly turned to the National Assembly for resolution of the issues).

215. *Id.* at 260.

fairly independent bridge between the Duma and the executive, the Russian system fails to ensure the country will not digress to an authoritarian regime.

France's premier-presidentialism, on the other hand, evenly distributes power between the legislative and executive branches through the proxy of the prime minister, who cannot be dismissed by the president. Thus, the president is forced to compromise and resort to more democratic means of governing in order to advance policies and executive prerogatives. The functioning of the check on the president is most clearly demonstrated during periods of cohabitation, when the president and the prime minister are of different political parties. When Mitterand and Chirac disagreed on a given political issue, Mitterand had two choices: submit or play the game of politics. Being unable to dismiss his prime minister, Mitterand worked within a system designed to force political players to foster democratic processes and accountability, rather than do away with conflict through the decision of one of those players, the president.

CONCLUSION

In Russia's model of semipresidentialism, president-parliamentarism, the prime minister is accountable to both the president and the parliamentary majority. Under the Russian constitution, the president can dismiss the prime minister at will. Paired with "a weak and fractionalized party system,"[216] this super-presidential power enables the Russian president to rule essentially as an authoritarian leader, drawing on constitutionally conferred legislative powers. If the party system were stronger, however, the president may encounter higher transaction costs in dismissing prime ministers if he faced an antagonistic majority in the Duma. Without such a system, however, democratic stability remains at the mercy of the Russian president. President-parliamentary systems, by allowing for dismissal of the prime minister by the president, do not inherently require democratic resolution of conflict without a strong party system, and are thus the least capable of sustaining democratic stability in new democracies.

France's model of semipresidentialism, premier-presidentialism, requires the prime minister be accountable solely to parliament. Under this model, only the National Assembly can formally and constitutionally force resignation of the government. Paired with a strong party system and the disincentive for the president to pressure the prime minister's resignation during periods of cohabitation, this restriction of the president's power requires that conflict be solved according to democratic means. Without support of a majority coalition in parliament, the president has no other choice. Therefore, because premier-presidentialism forces democratic resolution of conflict in light of both the strong party system and the president's lack of formal dismissal power over the prime minister, it is better suited for sustainment of democratic stability in new democracies.

Although many scholars are skeptical of the wisdom of a new democracy choosing semipresidentialism because of its inherent tension and unpredictability, it is clear the French model of semipresidentialism, premier-presidentialism, has the capacity to remain flexible enough to grapple with political conflict caused by a restrained presidency and a strong party system. President-parliamentarism, on the

216. Moser, *supra* note 29, at 72.

other hand, seems to create too powerful of a president who can pool power as a result of a weak party system and the power to dismiss the prime minister. From the French example, new democracies can glean the following lessons: first, foster strong party coalitions powerful enough to function as an obstacle to authoritarian rule by the president and, second, draft a constitution creating a premier-presidential form of semipresidentialism.

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