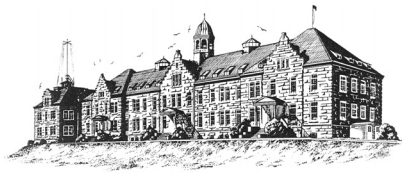


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Issues in International Law and Military Operations

Richard B. Jaques
Editor



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Foreword

The International Law Studies “Blue Book” series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. This, the eightieth volume of the series, contains edited proceedings of a colloquium entitled *Current Issues in International Law and Military Operations* hosted here at the Naval War College on June 25–27, 2003.

The colloquium’s mission was to examine the latest developments in international law, drawing on issues from then ongoing military operations. In doing so, the colloquium participants focused on the applicability and operation of the law of occupation, the perspective of military judge advocates at the strategic, operational, and tactical levels in Operation Iraqi Freedom, maritime operations issues in armed conflict and military operations other than war, including navigational freedoms in international waters and airspace, the increasingly complex considerations of combatant status and coalition operations, developments in the laws of targeting and information operations, and challenges faced in the interpretation and application of the law of armed conflict in current and future conflicts.

Renowned international scholars and practitioners, both military and civilian, representing government and academic institutions from throughout the world participated in the colloquium, which was co-sponsored by the Strategic Studies Institute of the United States Army War College at Carlisle Barracks; the Israeli Yearbook on Human Rights, Tel Aviv, Israel; the United States Coast Guard Academy; the Francis Lieber Society of the American Society of International Law; the Judge Advocate General of the Navy; the Naval War College Foundation; the Pell Center for International Relations and Public Policy of Salve Regina University, Newport, Rhode Island; and the International Law Department of the Center for Naval Warfare Studies, United States Naval War College.

On behalf of the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps, I extend to all the co-sponsors and contributing authors our thanks and gratitude for their invaluable contributions to this project and to the future understanding of the laws of war.

J. L. SHUFORD
Rear Admiral, U.S. Navy
President, Naval War College

Introduction

Operation Iraqi Freedom, in which the United States and her coalition partners conducted military operations for the express purpose of removing Saddam Hussein from power in Iraq, implicated a host of international law issues, in both theory and practice. Many of those issues are still being debated today, more than 3 years later. Was Operation Iraqi Freedom undertaken consistent with international norms on the use of force? Are targeting norms, as traditionally understood, adequate in the age of precision strategic strike capability and/or against an enemy who intentionally fails to distinguish himself from civilians? Or who purposefully uses protected places from which to launch attacks? Or who purposely attacks protected persons, places and objects? How do States reconcile competing views of what the law of war is, or requires, or forbids, in dealing with captured foes? Discussing and debating these questions, and others raised by characteristics of the conflict with “rogue” nations and international terrorists, was the purpose of the colloquium that this book, Volume 80 of the International Law Studies (“Blue Book”) series, memorializes.

In June, 2003, the Naval War College conducted a symposium entitled *Current Issues in International Law and Military Operations*. The colloquium, organized by the International Law Department’s Commander Don Rose, US Coast Guard, was made possible with the support of the Strategic Studies Institute of the United States Army War College at Carlisle Barracks; the Israel Yearbook on Human Rights, Tel Aviv, Israel; the United States Coast Guard Academy; the Francis Lieber Society of the American Society of International Law; the Judge Advocate General of the Navy; the Naval War College Foundation; and the Pell Center for International Relations and Public Policy of Salve Regina University, Newport, Rhode Island. Without the support and assistance of these organizations, the colloquium would not have been the success that it was. Their support is greatly appreciated.

Two members of the International Law Department served as primary editors of this volume. Lieutenant Colonel Jim Friend, JA, US Army, initially performed editorial work on this volume until the exigencies of war intruded and he was

transferred, prior to his normal rotation date, to Kuwait. Major Richard Jaques, US Marine Corps, eventually assumed these duties and carried them through to fruition. Their dedication and perseverance are responsible for the production and completion of this excellent addition to the “Blue Book” series.

A special thank you is necessary to Rear Admiral Rodney P. Rempt, former President of the Naval War College for his leadership and support in the planning and conduct of the colloquium.

The “Blue Book” series is published by the Naval War College and distributed throughout the world to US and foreign military commands, academic institutions, and libraries. This volume, entitled *Issues in International Law and Military Operations (2003)* to more accurately reflect the fact that the perspectives provided at the colloquium depicted events as known and perceived at the time, is a fitting and necessary addition to the series as nations continue to wrestle with developing consensus on how to best deal with groups and tyrants whose willful belligerence pose unacceptable threats to international peace and security.

DENNIS L. MANDSAGER
Professor of Law & Chairman
International Law Department

Preface

It should be no surprise that, coming as it did in June 2003, a colloquium that focused on “current” issues in international law and military operations would by necessity devote most of its time to the issues and challenges raised by Operation Iraqi Freedom, the then nascent occupation of Iraq, and the developing efforts to apply long established maritime rules and principles based on, and designed to respect, State sovereignty, against a Stateless belligerent. What may be surprising (or perhaps sadly ironic) is how current the issues, challenges, analyses, positions, and arguments for and against various interpretations and/or applications of international law to military operations voiced in 2003 remain today. This suggests that despite the passage of three years, little consensus on the nature, scope and degree of the threat faced, and the appropriate responses thereto, has yet developed.

Readers unfamiliar with the International Law Studies (“Blue Book”) series may wonder why a work that largely captures the proceedings of a colloquium held in 2003 is only now, in 2006, finding its way to print. Long-time supporters and contributors who have patiently anticipated publication for some time (especially those who participated in the colloquium) may well wonder why this volume does not serve, as previous volumes have, to fully capture all speaker and panelist comments and audience discussion or reflect the order in which those comments and discussions occurred. To both groups of readers an explanation is warranted, if for no other reason than to ensure that those deserving of credit in making this book a reality receive their due.

For reasons of detail that are unnecessary here, most of the record of this colloquium was not available to the editors of this publication. Compounding this problem was the fact that the first two assigned editors found their tenure in the International Law Department cut short or interrupted by the exigencies of war. In significant portions, this work largely reflects an effort starting some 18 months after the event to recreate the colloquium and capture key portions of it.

Typically, “Blue Books” that serve as a record of colloquium proceedings will reflect the order in which the panel discussions occurred. In this case, however, because it was impossible to recreate the “give and take” of panelists with each other and with the audience, and because not all the panels could be included in the book, the most logical arrangement was to group articles within the major subject areas addressed (the legality and legitimacy of Operation Iraqi Freedom, the tactical and operational challenges in air and land warfare, the wide variety of issues affecting operations in the maritime domain, and the question of how the law of armed conflict needs to develop to adequately address current and anticipated challenges) as reflected in the Table of Contents. Articles in which the author refers specifically to another article are grouped within the same major category.

I also decided to eschew the past practice of attempting, in this Preface, to summarize the key points of each article around a central theme or themes. The choice of articles and organization of the book itself essentially reflect my perspective on the key points and themes. Moreover, readers will find it of much more value to decide for themselves what arguments and positions set forth herein have merit. The only suggestion I offer the reader in making those assessments is to remember that whatever the law of armed conflict was in the past, is today, or will be in the future, it is not merely a subject for a panel discussion or an academic debate or an intellectual position. For those affected by it, it is a matter of life or death.

As with all works such as this, a number of individuals were involved in the publication process. Thanks must go to Lieutenant Colonel Jim Friend, JA, US Army, the first editor, who initiated this effort. A special note of thanks is due to Mr. Matthew Cotnoir in the Naval War College’s Desktop Publishing office. He served as the “point man” in converting draft after draft into publishable form, tirelessly and patiently enduring numerous rewrites, reconfigurations, and re-edits without complaint. Thanks must also go to the contributors to this volume long after the fact, for their great patience and understanding over the last three years. In particular, a debt of thanks is owed to Professor Wolff Heintschel von Heinegg and Colonel Charles H. B. Garraway, CBE, British Army (Ret.), both of whom served as the Naval War College’s Charles H. Stockton Professor of International Law during my tenure, and both of whom are contributors to this volume, for their knowledge, expertise, perspective on law (and, more importantly, on life itself), and comradeship.

Finally, two individuals, for both of whom the “Blue Books” are a labor of love, deserve the lion share of the credit for ensuring that this work has come to fruition. Simply put, without the leadership and vision of Professor Emeritus Jack Grunawalt and the painstaking detailed editing and review of Captain Ralph

Thomas, JAGC, US Navy (Ret.), both of whom devoted countless hours to this project, Volume 80 would still be barely a work in progress. Even more, they have served as mentors, teachers, advisors, confidants, leaders, and friends to the undersigned in more ways than can be expressed. By all rights, theirs should be the names printed on the binding of this volume. For everything that is good about this book, the credit is theirs. For everything that is not, the blame is mine.

RICHARD B. JAKES
Major, US Marine Corps

PART I

JUS AD BELLUM: IRAQ

I

Iraq's Transformation and International Law

Ruth Wedgwood¹

There is a great delight in returning to the US Naval War College. My time in Newport as a Stockton Professor of International Law was wonderful indeed. But few of us at the War College in the academic term of 1998–99 could foresee the momentous events of the next five years. No one foretold al Qaeda's attacks of September 11, 2001. And we could not know that the United States and the United Kingdom, alongside their allies, would commit their fortune and fate to intervene again in Iraq, this time to defeat Saddam's Baathist regime. But trouble was brewing, even in 1998. At the time, Saddam limited and then excluded United Nations weapons inspectors, and the allies conducted a limited military campaign in Operation Desert Fox. A broad debate on the use of force began to reenter the public square—when and on what authority military force could be used to compel Iraq's compliance with post-Gulf War disarmament obligations.

In the immediate moment, we are in the midst of Operation Iraqi Freedom. Faced with Saddam Hussein's continued intransigence in accounting for his weapons programs, in March 2003 the United States and its coalition forces mounted a fast-moving ground campaign against the Baathist regime, and quickly reached Baghdad. Public conversation has again focused on important issues of international law, including standards for the use of force, the role of the Security Council, the methods of enforcing disarmament obligations, and the claims of humanitarian intervention.² But I will concentrate here on the practical problems and the law governing occupation and reconstruction.

Our panel today is graced by its commentators. Professor Thomas Franck is a profound scholar on whose foundational work all of us have built. Dr. Nicholas Rostow has a twenty-five-year career of dedicated public service, including work as the legal adviser to the National Security Council and as general counsel to the US Mission to the United Nations. I should be providing comments on their views, and not the reverse.

Let me start with a speculation on the more general implications of the current conflict for Iraq and the Middle East. It is a cause for celebration to see that Saddam Hussein is gone. Not even the most vocal critics of the war have suggested that Saddam should be restored to power. No one argues that the Baathist dictatorship reflected the free will of the Iraqi people. Saddam Hussein was a callow and cruel leader, and the allied intervention toppled an authoritarian regime of unrelenting harshness. Saddam used chemical weapons to attack Iraq's Kurdish villages. He attempted to destroy the Marsh Shia. He was ruthless in suppressing political opponents. Among the supporters of Iraqi sovereignty, no one can confuse Saddam's regime with the claims of democracy.

The end of Iraq's Baathist regime may advance the Middle East peace process. The roadmap process for Palestinian-Israeli peace still has only a limited chance of success. But Iraq's threatening stance towards Israel had obvious consequences, and the end of an aggressive regime in Iraq may change how Israel regards its security space. The Baathists supported terrorist attacks against Israel, through financing and perhaps through training. In the first Gulf War, Saddam Hussein launched Scud missile attacks against civilian centers in Israel, hoping to create a wider war. The elimination of an unpredictable and looming threat to the eastern border may facilitate crucial Israeli concessions on the West Bank.

After September 11, it is unacceptable for any country to provide financing or physical sanctuary to international terrorist groups. This includes any insurgent group seeking to attack civilians as targets. The Security Council has endorsed new standards for State responsibility, forbidding any and all assistance to international terror groups in Resolution 1373.³ Iraq's financial and material support for terrorism contributed to the spoliation of Middle East politics, and removal of that threat also may produce salutary results for the region as a whole.

One hopes that the intervention in Iraq will affect other countries in the region through the example of an emerging democracy. Saudi Arabia and Egypt need to create some space for popular voice and competition in their politics. Iraq may demonstrate, if things go well, that there can be a secular, prosperous, heterogeneous State in the region under a democratic government. Support for a new and moderate democratic State should enjoy support from both sides of the aisle in American politics. The long-term goals of democracy are a realist's agenda, as well

as an idealist's hope. Harnessing the energies and ambitions of people who have been excluded from governance is one of the elements of real power. And the claim that totalitarian repression is the only way to preserve stability deserves to be disproved. Iraq is a resource-rich country, and may be in a better potential position to demonstrate that a modern democracy can work, than impoverished States such as Afghanistan or East Timor or other economically desperate places where the United Nations has intervened.

With respect to weapons of mass destruction (WMD), we should recall the immediate purpose of the Iraqi intervention. At the time of the first Gulf War, Saddam had embarked on ambitious programs to develop nuclear weapons, produce chemical weapons, and manufacture biological weapons. After he invaded Kuwait, he attempted to speed up the production of a nuclear bomb. When coalition troops drove him out of Kuwait, and had the Republican Guard on the run, Saddam agreed to stringent and unique conditions as part of the cease-fire. Under Security Council Resolution 687,⁴ as a condition of the ceasefire, Iraq was required to shut down its programs to develop weapons of mass destruction and medium-range or long-range missiles, and to do so in a transparent way. Resolution 687 placed the burden of proof on Iraq to demonstrate the dismantling of these weapons programs, as well as the destruction of components and precursors, and this burden of proof did not change during the next decade. But to the great surprise of the allies, Baghdad refused to account for the programs of WMD development, defying the demand for verifiable destruction of weapons components under the UN resolution.

The predicate for allied intervention in 2003 was "smoking documents"—not "smoking weapons." Iraq was in the midst of active nuclear, chemical, and biological weapons programs at the close of the first Gulf War, and was required to show how and when they would be abandoned. Even in the last Iraqi declaration to the United Nations filed in December 2002, Baghdad failed to give a plausible account of its weapons inventories and their disposition. It refused to allow weapons scientists to be interviewed outside the country. Ambassador Hans Blix opposed any military intervention, at least at that time, but as executive director of the UN Monitoring, Verification and Inspection Commission (UNMOVIC), he acknowledged the unsatisfactory character of Iraq's continued game of hounds and hares. In the world after September 11, accounting for WMD inventories and their required destruction is not an optional matter.

Even after the retreat of Saddam's forces, the continuing war in the streets of Baghdad and elsewhere in the Sunni triangle has presented difficult problems for the United States and coalition forces in Iraq. Saddam has gambled that the Baathists can return to power by continuing to inflict damage on the allied forces and the Iraqi people. He has counted on a version of the "Somalia syndrome"—an

exhaustion of the United States' political will to continue. He looks forward to an imagined moment, based on the example of Vietnam, when we will simply withdraw, whether or not the military and security forces of a democratic Iraq are ready to take over the fight. He predicts that we will wither, and that the field will be re-opened for Sunni and Baathist hegemony.

Overcoming the ongoing insurgency will be a great challenge. It is difficult to create a new Iraqi law enforcement capability. We have had this same struggle in far more benign environments, whether in Haiti, in Bosnia, or in Panama. It has occurred every time an existing authority is displaced, so it should not be surprising that we face the issue again. To vet and stand up a police force that is suitably independent, robust, and reliable, especially in a country with ethnic divisions, is not an easy task. It is crucial to have a local face as the intermediary with a large population. Defeating an insurgency requires information and cooperation from local citizens. Baathist retaliation against Iraqi citizens who are seen as cooperative with the new transition has been ferocious. Yet it is clear that if the Sunni resistance is to be defeated, information from Iraqis about insurgent activities will be critical.

A second practical problem is the wasting and destruction of critical infrastructure. The arrival of allied forces in Baghdad was followed by a rampage. The disorder and debellation would not surprise UN veterans who saw the razing of East Timor by paramilitaries and militias, after the UN-organized vote for independence. Part of the violence may be the reaction of a people whose political psyche was battered by three decades of suspicion and fear. The lesson for military force structure and capabilities seems clear. In peacekeeping, over the last 15 years, we have discovered that even if a mandate calls for a limited peacekeeping operation, forces must have a robust capacity for peace enforcement. Security environments change too fast, and can render under-equipped forces helpless on the ground. Now, in Iraq, we see the opposite problem. In the follow-on to a robust combat operation one needs a strong police capacity, with troops trained in security operations, arrest, and the responsible processing of prisoners. It may no longer be viable to confine the functions of military police to the reserve components of the US armed forces. This capability may be needed in the active-duty force to sustain such situations in the future.

We also need to be frank about how long peacekeeping operations will last, whether in Bosnia or in Iraq. The time horizon for an international presence in Bosnia was ignored by at least one White House. An attempt at realism about a time horizon can improve our training for the tasks at hand. For example, when allied forces are called upon to support local police operations, it would be useful to have some language capability, to avoid operating in a deaf and dumb show. In Iraq, we should seek to train allied personnel in rudimentary Arabic. In the work of

a *gendarmerie*, it is useful to know who started a quarrel, or to solicit tips without having a security breach through an unknown interpreter. Independent language capability will usefully allow each allied unit to check whether a local interpreter is providing faithful translations.

Another practical difficulty—and another lesson learned from post-conflict peacekeeping missions—is the importance of quick and visible economic progress. The slow decision and funding cycle of the World Bank and other aid agencies is a terrible obstacle to this, since the period for formulation, approval, and funding of projects may be two to three years. “Quick impact” projects are critical to showing Iraqi citizens that their material lives can change for the better. The Army Corps of Engineers and other US government components have an important role here, to facilitate the rebuilding of the national infrastructure and the jumpstart of the economy. Though freedom is a most precious commodity, a prolonged delay in starting the economic recovery of Iraq will result in the loss of goodwill, and a greater hesitation to embrace the transformation of Iraqi political society.

The ultimate puzzle is how to substitute civic nationalism for a cult of personality and ethnic division. A new set of institutions is needed as the touchstone for Iraqi allegiance and commitment. We faced similar challenges in post-war Germany and during the Cold War, though the differences to be overcome in those cases were more singularly ideological. The act of voting and organizing a government can be inspiring. But there were other important efforts in fighting fascism and communism; in particular, using effective cultural tools. Those days seem to be gone. Fifty years ago, international funding for a host of cultural and educational projects was key in restoring German political culture. We have forgotten how to use cultural power to stabilize a fractious political situation.

And then there is the legal challenge of finding a framework that allows us to accomplish these worthy purposes. Are the United States and coalition forces in Iraq to be considered under the law as an “occupying” force? In Bosnia, NATO was not characterized as an occupier. The Dayton Peace Accords acknowledged NATO’s role as a peacekeeping force.⁵ Characterizing the presence of allied forces as an international “occupation” also would have slighted the importance of Bosnia’s reestablished civilian government. NATO military commanders were concerned that the legal category of occupation presumed a degree of control that might not be realistic, and in particular, were aware that they might not be immediately able to initiate searches for top-level Serb, Croat and Bosnian war criminals, a duty that applies to occupiers under the Geneva Conventions. Rather, it was argued that NATO served in Bosnia in the tradition of a classical peacekeeping force, that is, as intermediaries tasked to keep the opposing sides apart.

In Iraq, with Saddam Hussein's removal, we are once again in an uncertain area where international law is asked to handle new situations. The Hague and Geneva Conventions may be read to suppose that an occupying power should leave intact, as much as possible, the existing institutions of a society. But Saddam's political institutions were savage and totalitarian, and to maintain their operation would prolong a gross violation of human rights. It is hard to conclude that the Hague rules of land warfare could be intended to protect the Baathists' violent monopoly of political power or to bolster Baghdad's disregard for the Shiite and Kurdish communities. Treaty law must be read as part of a legal landscape in which human rights law makes its own demands.

The United Nations also has kept eyes and ears, and a voice, on the ground in Iraq, through a special representative of the UN Secretary-General. This is Brazilian diplomat Sergio Vieira de Mello, who has served also as the United Nations High Commissioner for Human Rights in Geneva and has worked in a number of senior United Nations positions, including as Transitional Administrator in East Timor. He can be a vital link in mobilizing the UN's specialized humanitarian agencies, as well as contributing to cooperation among competing Iraqi factions.⁶ In an environment of confrontation, the United Nations could serve as a useful symbol of multilateral commitment. Though the military effort was conducted by a "coalition of the willing," the reconstruction of Iraq has been mounted under a broader aegis, in which even countries opposing the war will be invited to contribute. A visible United Nations presence in Iraq may make it easier for those countries to participate in the key tasks of reconstruction.

To be sure, we have learned that the United Nations does not enjoy automatic legitimacy in every situation. Multilateral endorsement is not a respected or comprehensible cultural artifact in some corners of the globe. This point has been made by Sir Brian Urquhart, in a wonderful memoir of his dangerous adventures during the early days of UN peacekeeping.⁷ Sir Brian served as a key aide to Dr. Ralph Bunche and UN Secretary-General Dag Hammarskjöld in the UN peacekeeping mission in the Congo in 1960.

Sir Brian was dispatched to the Congo's Atlantic port at Matadi, passing through an area where the Congolese Army had staged its mutiny. He found a train to transport a hardy contingent of Moroccan peacekeepers and had a UN flag draped across the front of the train. But the UN's emblem did not have the desired effect. The Congolese, as Sir Brian reports, "had never heard of the United Nations. 'L'ONU? C'est quelle tribu?' (The UN? What tribe is that?) a local Congolese official inquired."

So, too, we should not assume that Sunni clan members living in the Iraqi city of Tikrit will show any great deference to the United Nations. The United Nations will

be perceived as the institution that helped to enforce weapons inspections and economic sanctions in the 1990's. In other quarters of Iraq, the United Nations may be seen as the institution that failed to protect the Kurdish and Shiite communities after the first Gulf War. This will not enhance its local legitimacy. Nonetheless, in the eyes of foreign countries, the United Nations' presence may make it easier to contribute to the Iraqi reconstruction effort.

It is often said that the law of armed conflict seeks to solve the problems of the last war—catching up with worthy innovations demanded by circumstances on the ground or allowed by new technologies. But there are occasions when even post-war rules fail to reflect important problems of the most recent conflict. We should direct a few more words to the problems of adapting the law of occupation to the project of democratic transformation.

In the aftermath of World War II, the goal of the allied occupations was to transform the militaristic societies of Germany and Japan. Yet the 1907 Hague Regulations Respecting the Laws and Customs of War on Land⁸ were and are still in force, and posed some problems even for lawyers in 1945. The 1949 Geneva Convention IV,⁹ on the protection of civilians, did not remedy these problems. Article 43 of the Hague rules states that the occupier should “take all the measures in his power to restore, and ensure, as far as possible, public order and safety, *while respecting, unless absolutely prevented, the laws in force in the country.*” Article 64 of Geneva Convention IV notes that “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.” And “the tribunals of the occupied territory shall continue to function in respect of all offences covered by said laws.”

In Iraq the goal is to transform a Baathist culture of oppression. Certainly that is going to require an intrusion into and transformation of local law, mitigated in practice by the democratic participation of Iraqis and the United Nations, but nonetheless, a change of local law that might appear inconsistent with the thrust of some Hague rules and Article 64 of Geneva Convention IV.

Of course, even forces operating under the mantle of “occupiers” have powers that could aid a democratic transformation of the country. Under Articles 55 and 64 of the Geneva Convention IV, the occupier has to provide for the basic needs of the population and maintain orderly government.¹⁰ Security Council Resolution 1483 of May 22, 2003, enacted under Chapter VII of the UN Charter, refers indirectly to the Coalition Provisional Authority as a temporary governing body, pending the organization of a democratic Iraqi government. It recognizes “the specific authorities, responsibilities, and obligations under applicable international law of these states [the United States and United Kingdom] as occupying powers under

unified command,”¹¹ as well as calling on all States “to assist the people of Iraq in their efforts to reform their institutions and rebuild their country.”¹² Maintaining orderly government and assisting the reform of institutions surely could not include restoring the chaotic brutality of Baathist hegemony.

And then there is the interplay between the law of occupation and human rights law. Geneva Convention IV was completed in the same historical moment as the Universal Declaration of Human Rights.¹³ One thus has a strong reason to read the two instruments in harmony. The diktat of the Baathist party in Iraq has been a daily repudiation of the principles of the Universal Declaration of Human Rights. To be sure, in an earlier age, there was a much greater acceptance of positive power, even when exercised by undemocratic regimes. There was less willingness to openly test the legitimacy of State power before respecting it. But the two-year span of 1948-49 saw the anointment of both instruments, and it is not unreasonable to read them together.

Perhaps the simplest justification for the democratic changes that will affect Iraq lies in the sovereignty of the Iraqi people. The United States and its allies can have reference to the concurrence of the Iraqi people, expressed through the Interim Governing Authority and subsequent representative institutions. But one hard lesson of other peacekeeping operations is that mechanical political choices can also cement in place an angry nationalism. In Bosnia, elections should have been delayed until after 1996. By holding early elections there, we succeeded in electing nationalist parties who could claim democratic provenance alongside their virulent nationalism. In Iraq, we should not cement in place the sectarian angers that we—and the Iraqi people—would ultimately rather not have.

What does one do in peacekeeping when confronted with a tendentious law, with no other available? The problem of a legal vacuum during occupation is not new. A UN legal adviser has written elsewhere that it could be handy to have a temporary criminal code for post-conflict situations, so that peacekeeping forces would have a legal basis for action.¹⁴ In East Timor, the UN civilian police would arrest and release those suspected of violent crimes in ongoing cycles, because there was no criminal code under which to hold and charge them. Nonetheless, in addressing these problems, we should not forget the major justification for the adaptation and amendment of prior Iraqi law, including interim measures by the Coalition Provisional Authority. The occupation of Iraq is meant to be transformational, to allow the Iraqi people the benefits of democracy and modern human rights law, just as the occupations of Germany and Japan were transformational. The law of armed conflict will in some way have to catch up to that.

There is a long-term problem for American strategy in these kinds of conflicts. We have been using ground surrogates in many of our wars. In Bosnia we relied

upon the Croatian ground campaign. In Afghanistan we had the Northern Alliance. The US Secretary of Defense has the vision, which indeed I share, that our combat forces need to be agile and mobile, able to get places where there are not good airfields and good seaports. As a consequence, it may be necessary to form alliances of convenience in the hotspots where we need to send our forces, choosing the better of the parties on the ground.

But reliance on light and mobile forces poses a potential problem in occupation and post-conflict policing. When we have succeeded in vanquishing an adversary, we still need a force structure to carry out the policing obligations of the Hague and Geneva Conventions. The Geneva Conventions require the occupier to maintain orderly government and ensure that the normal functions of government are met. This may be hard to do, until and unless local forces are trained and stood up.

The challenge for American forces in the Iraq intervention was to move quickly on the battlefield, to keep Saddam Hussein from using any chemical weapons and to prevent him from repeating the environmental attacks that he used in the first Gulf War. We must salute the coalition forces that punched their way to Baghdad so robustly. But a large ground presence will also be needed in post-conflict peace-keeping, to assure the police authority needed to sustain order. We may look for assistance from other countries, through the United Nations or our own coordination. Yet in a difficult environment, a core American presence may be essential. Thus, in such operations, we need substantial US contingents available to follow after the light and mobile forces that vanquish the enemy on the battlefield.

Let me mention Security Council Resolution 1483, and its effect on the Iraqi economy.¹⁵ Economic sanctions have been lifted. Oil can be sold and efforts can begin to repair refineries and distribution equipment to facilitate petroleum production. The resolution renders Iraqi petroleum products immune from legal proceedings against them. Thus, Iraq can sell its oil without concern about a *replevin* action in a French port. Resolution 1483 also establishes an Iraqi development fund. Frozen Iraqi assets of the Baathist regime can be transferred to the fund, protected by required independent auditing.

Ultimately, Iraq will face the difficult question of how to form a new constitution and establish the political legitimacy of a new government. The process used in South Africa at the end of apartheid may provide a useful lesson. In that situation, consensus on foundational principles was sought, before addressing specific articles of a constitution. An unanswered question is who will participate in the development of the constitution. The process of drafting a constitution requires democratic voice as a foundation stone.

There are other crucial choices in the process of constitution-building. Should the constitution center upon civic nationalism or religious nationalism? One

American constitutional advisor has supposed that an Islamic Republic is the only sensible alternative for Iraq. But differences in the interpretation of Islam may cast this as a provocative course of action, rather than ameliorative. The alternative is a secular republic or a secular republic that helps to assist established religions. As Americans, with our history of separation of church and State, we would be uneasy with direct State support of religion. But this is not North America, and it could be an attractive alternative to the radical Islamism seen in some other Arab States.

There is a crucial choice to be made about federalism—the degree to which governing powers are spun out to the regions. Certainly one way of maintaining peace within Iraq could involve decentralization of political power, at least once order is restored. Significant authority can be vested in local government, in the north for the Kurds and in the south for the Shia. This territorial federalism may approach a form of local autonomy. The Kurds obviously would like nothing better. Or one could explore a form of so-called “consociationalism”—a community-based method of organizing political society, as seen in Belgium and some other multiethnic states. There is an economic caveat, however. Many of the petroleum reserves of Iraq are located in Kurdish areas. Iraqi oil and development revenues cannot be claimed solely by the Kurds. They must be a national asset. In addition, local autonomy cannot be used as a mask for ethnic cleansing and forced relocations.

Structuring the executive is a most delicate issue, after the abusive exercise of power by Saddam Hussein. The separate election of an Iraqi president may afford greater stability, since presidential leadership will not be immediately dependent on the waxing and waning of coalitions of minority parties in the parliament. Additionally, against a history of personality-driven politics in Iraq, a widely-recognized and democratically-elected president may provide a symbol of transition from the totalitarianism of Iraq's past to the democracy of the future.

Another difficult issue will concern the status and role of women. Women have had a more prominent role in Iraq than in some other Arab countries. Certainly, that prominence should continue.

Finally, the role of the armed forces is a critical issue for the future of Iraq. The Turkish and Indonesian model in which the armed forces have a role in the parliament is highly problematic for Iraq, particularly measured against the past and Saddam's declaration of war against his own population. Nonetheless, since Iraq is a centrifugal society, and since some actors in the region will be tempted to tear it apart, one needs to preserve a role for a democratic military in which the armed forces are honored, trusted and valued by the State—and very firmly under the command and control of a democratic republic.

The Administrator of Iraq's Coalition Provisional Authority, Ambassador Paul Bremer, has reemployed some portions of the Iraqi Army as an interim security

force. There needs to be Sunni participation in the new republic, rather than exclusion from all governmental institutions. If former government employees cannot participate, they will provide a continuing source of angry insurgents.

Constitution building will take time. One wishes for a flourishing civil society, with newspapers and civic associations and broad conversation, alongside the process of transferring power to organized political groups. In East Timor, Sergio Viera de Mello contemplated a slow and gradual transfer of political power, because there was no trained administrative class. (Under Indonesian rule, most of East Timor's managerial positions were filled by West Timorese or Jakarta-based administrators.) But very quickly, José Ramos-Horta and Bishop Carlos Belo, who had shared the 1996 Nobel Peace Prize, reminded the United Nations that Indonesian rule should not be replaced by practices that could be misapprehended as a new style of multilateral colonialism. There was great impatience for the visible participation of the East Timorese in governance. I think the same impulse will be felt in Iraq. The key is to find a way in which there is a prominent Iraqi role and yet not allow this to develop into crony capitalism or nationalist hegemony.

In conclusion, one can modestly admit that bundles of legal rules will not be the determining factor in the immediate days ahead and in the development of a viable democratic governing structure in Iraq. A successful transition depends on respect for the principles and values of Hague and Geneva law, while at the same time, re-establishing a civic culture after thirty years of tyranny. Although there are many hurdles to overcome, both by the United States and its coalition partners and by the Iraqis themselves, I am optimistic that at the end of the day we will see a democratic and prosperous Iraq.

Notes

1. Edward B. Burling Professor of International Law and Diplomacy at the School of Advanced International Studies, Johns Hopkins University, in Washington, D.C.
2. See, e.g., Ruth Wedgwood, *Legal authority exists for a strike on Iraq*, FINANCIAL TIMES (London), Mar. 14, 2003, at 19; Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 724 (1998).
3. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).
4. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).
5. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1A, Dec. 14, 1995, 35 INTERNATIONAL LEGAL MATERIALS 75, 92 (1996), available at <http://www1.umn.edu/humanrts/icty/dayton/daytonannex1A.html>.
6. Editor's note: On August 19, 2003, Sergio Vieira de Mello was killed in an insurgent bombing of the UN Headquarters in Iraq.
7. BRIAN URQUHART, A LIFE IN PEACE AND WAR 149 (1987).

8. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex: Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 2 AMERICAN JOURNAL OF INTERNATIONAL LAW (1908) SUPPLEMENT 90, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 69 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
9. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 301.
10. *Id.*, art. 55, at 319 ("To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population . . ."); *id.*, art. 64, para. 2, at 322 ("The Occupying Power may . . . subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory. . .").
11. S.C. Res. 1483, preamble, U.N. Doc. S/RES/1483 (May 22, 2003).
12. *Id.*, operative paragraph 1 ("Security Council . . . Appeals to Member States and concerned organizations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution").
13. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).
14. Hans-Jorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 46 (2001).
15. S.C. Res. 1483, *supra* note 11.

II

Iraq and the Law of Armed Conflict

Thomas M. Franck¹

The law of armed conflict is generally understood to pertain to the rules governing the conduct of war, the *jus in bello*. Superior, and antecedent to it, however, is the *jus ad bellum*, the law pertaining to the initiation of war. A war, even when fought in accordance with the letter of the *jus in bello*, will in no way be legitimate if the conflict was initiated in violation of the *jus ad bellum*. So, first things first. Was the war in Iraq undertaken in compliance with the law governing recourse to force? If, as I believe, the answer to that question is “probably not,” then the war could not have been fought in accordance with the law of armed conflict because the lawfulness of the conduct of hostilities is determined not only by the *way*, but also by *why*, a war is fought.

The United Nations Charter, a treaty consented to by the US Senate and ratified by the president and to which more than 190 States are parties, purports as its central undertaking to limit the grounds upon which States may lawfully have recourse to force. Article 2(4) stipulates that parties shall “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”² With this provision, the world, as it emerged in 1945 from history’s bloodiest war of aggression, sought forever to repudiate the principle attributed by Thucydides to the Athenians in their conduct towards the island-State of Melos during the Peloponnesian War that: “the strong do what they can and the weak suffer what they must.”³

The conflict Thucydides describes is that initiated by a highly cultivated, relatively democratic Athenian State against the much smaller Melian State, which had sought to remain neutral in Athens' larger conflict with Sparta. Athens, the historian tells us, eventually destroyed itself in a futile effort to protect against every malignant eventuality by attacking and securing the submission of every place from which danger might emanate. Whether or not one perceives a modern parallel in these events, it is amply clear that the purpose of the world's most widely ratified treaty is to repeal the vestiges of the Melian principle, replacing it with a strong rule against the initiation of war.

The sole exception envisioned by the Charter is set out in Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs. . . ." ⁴

Thus any examination of the lawfulness of US conduct in deploying force against Iraq in the spring of 2003 must begin by asking whether that action was congruent with the post-Melian requirements of the UN Charter. If the invasion of Iraq was nothing but an act of self-defense by the United States and the supporting coalition, or only an exercise of the collective police-power that had previously been approved by the UN Security Council, then the recourse to force would have been lawful. The Charter's Article 2(4) no-first-use pledge is clearly subordinate to the Article 51-based right of self-defense and also to the authority of the Security Council, set out in Chapter VII of the Charter, to initiate action against a threat to the peace. If the 2003 invasion of Iraq had previously been authorized by the Security Council, its legality would be beyond question.

It is possible to position the invasion of Iraq in either, or both, of these exculpatory contexts, but just barely. The argument that our armed forces, in occupying Iraq, have not violated the Charter is not easily or readily sustained, despite the best efforts of US and British government lawyers. Indeed, the deputy legal adviser of the British Foreign Office resigned rather than sign on to London's official legal position. As enunciated by US State Department Legal Adviser William Howard Taft IV, the argument has two prongs. The first is that the President may "of course, always use force under international law in self-defense." ⁵ The readily-apparent problem with that rationale is that, even if it were agreed (as it well might be) that the Article 51 right of self-defense has been interpreted in practice to include a right of action against an *imminent* armed attack, it is difficult to fit the facts of the situation existing in March 2003 within *any* plausible theory of imminence. This was a time, after all, when UN and International Atomic Energy inspectors were already actively conducting seemingly unimpeded searches for weapons of mass destruction with the full weight of Security Council resolutions to back them up. Nothing

in the inspectors' reports lends any credibility to the claim that Iraq, in the spring of 2003, posed any imminent threat of aggression to anyone.

The second prong of justification is more sophisticated, averring that the attack on Iraq by the United States and Britain had already been pre-authorized by the Security Council. To sustain this assertion, the United States produced a creative, but ultimately unsustainable reading of three previous Security Council Resolutions: 678, 687 and 1441.⁶ According to Taft,⁷ Resolution 678, with which the Council had authorized the use of force to oust Iraq from Kuwait in January of 1991, was kept in force by Resolution 687 of April 1991, which ended the first Gulf War and imposed stringent disarmament conditions on Iraq. Taft maintained that, as Iraq had "materially breached" these obligations, the right to use force had revived "and force may again be used under UNSCR 678 to compel Iraqi compliance. . . ." Moreover, Taft said, the Security Council, in its Resolution 1441 of November 8, 2002, which had ordered the inspectors back into Iraq, "had unanimously decided that Iraq has been and remains in material breach of its obligation." According to the Legal Adviser, Resolution 1441 gave Baghdad a final opportunity to comply, which if disregarded, would constitute a further material breach. He concluded that "Iraq has clearly committed such violations and, accordingly, the authority to use force to address Iraq's material breaches is clear."⁸ Taft's British counterpart also argued that Resolution 678 of November 29, 1991 was still effective to authorize "Member States to use all necessary means to restore international peace and security in the area" and that, while that authorization had been suspended at the end of hostilities in 1991 by Resolution 687, it was "revived by SCR 1441(2002)."⁹

Is this a fair reading of the resolution that, in 1991, first authorized the use of force by a coalition of the willing? Resolution 678 was itself the culmination of a series of earlier resolutions by which the Council had responded to Iraq's invasion of Kuwait. It called for the immediate withdrawal of the aggressor, imposed mandatory sanctions and declared the annexation of Kuwait null and void. In each instance, the Council's purpose, evidently, was to roll back the aggression committed by one member against another. Only after these measures failed to suffice did the Council, acting under Chapter VII of the Charter "authorize Member States cooperating with the Government of Kuwait . . . to use all necessary means to uphold and implement [its earlier resolutions] and to restore international peace and security in the region. . . ."¹⁰

Obviously, it was the restoration of Kuwaiti sovereignty that had motivated the Council in 1990-91. That Resolution 678 incidentally makes reference to the restoration of "international peace and security in the region" does not connote some expansive additional mandate beyond that of Kuwaiti liberation. It does not contingently license the pursuit of quite different objectives such as "regime change" at

the sole discretion of individual members of the coalition. President George Bush Sr. acknowledged as much in explaining why the American military had not pursued Saddam Hussein's forces all the way back to Baghdad. "The U.N. resolutions never called for the elimination of Saddam Hussein" he said. "It never called for taking the battle into downtown Baghdad."¹¹

What Resolution 687 did do was to establish intrusive post-conflict controls over Iraq and to make these mandatory under Chapter VII of the Charter, subject to collective enforcement in the event of non-compliance. Compliance monitoring, however, was to be the domain of the Security Council and its inspectors. Baghdad was compelled to agree to the verified elimination of its weapons of mass destruction and of the industrial capacity to produce them, as well as of its medium- and long-range delivery systems.¹² To make sure this happened, the Council and the UN Secretary-General were made responsible for creating and supervising the inspectors and for deploying them,¹³ and it was to the Council that Baghdad was required to certify "that it will not commit or support any act of terrorism or allow any organization directed toward commission of such acts to operate within its territory. . . ."¹⁴ To clinch its continuing supervisory role, Resolution 687 stipulated that the Council was to "remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region."¹⁵ *It is not individual States acting on their own information without authorization of the Council.*

This does not sound as if the Council then, or thereafter, intended to cede to the United States and Britain the right to determine when to use military force in the absence of an (imminent) armed attack. It does not appear to delegate to individual members of the Council authority to determine the existence of a material breach or to decide the appropriate response. To interpret Resolutions 687 and 1441 otherwise would be to imply, without further evidence, an intent of the Council to overturn the basic architecture of the Charter by authorizing individual members to effect an unprecedented and uncontrolled derogation from the requisites of Article 2(4). Without supporting evidence, it would be foolhardy to make such an assumption.

This difficulty for those arguing the legality of US recourse to force is not alleviated by reference to Resolution 1441 of November 2002, which effected the return of the inspectors to Iraq. While that resolution passed unanimously, it achieved that goal by resolutely refusing to delegate to individual States the authority to decide if and when its mandate was being violated, let alone what to do about it. Most members, in voting for Resolution 1441, may have hoped there would be no occasion to cross the bridge of enforcement. However, there is no evidence whatsoever

for the confident assertion that they intended to authorize individual States to decide whether the Council strictures had been violated and, if so, what to do about it.

What, if anything, is to be learned from the consequences of this US decision to use force without the requisite Security Council authorization? This was certainly not the first time a State had chosen to pursue what it perceived to be its national interest by reverting to such unilateral action. France and Britain in Suez, India in Goa and Bangladesh, Tanzania in Uganda, Vietnam in Cambodia, and even NATO in Kosovo, are but a few of a plenitude of examples. Sometimes, the unlawful action was defended by lying about the facts, which, at least, exemplifies the compliment vice sometimes pays to virtue. In most instances, however, it was argued—not without reason—that, by violating the technical letter of the law, the initiator of the use of force was preventing the occurrence of some far greater wrong. Any legal system will take such an argument into account. But these are not the justifications Washington is producing now that the weapons of mass destruction have not been discovered and the link of Saddam Hussein to Al Qaida remains unproven. In the wake of these disappointments for those who sought to justify this war in traditional terms of self-defense, we are now being invited to draw more far-reaching conclusions about a need to reshape the ostensibly broken international system because of its obstinate refusal to endorse our recourse to force. Some call for the dismantling of the United Nations as a spent force vainly resisting the reality of American predominance. France, it is said, needs to be punished and Germany ignored.

But these are the wrong conclusions to draw from the Iraq experience. Drawing the right ones may have to await further clarifying events, but a few may be ventured tentatively. One is that the collective decision-making process of the Security Council should not be regarded as just a hobble on the sole superpower's discretion, but also as an important reality check, a way to get important perspective that may even sometimes save Washington from acting too hastily in over-reliance on its own imperfect and sometimes distorted vision. Another is that the United States needs the world, and that, without its support for projects important to our national interest, the successful pursuit of that interest may prove far more elusive and expensive.

A final lesson is that the rule of law is not a smorgasbord, where the sole superpower is entitled to pick and choose among its offerings. For example, the United Nations has put in place an extensive system for preventing and monitoring the flow of money to terrorists. To implement it, however, States must subordinate some of their sovereign prerogatives to an interstate legal regime. Why should they? Very few countries feel as directly threatened by terrorism as do we: not most African and Asian States and not even the nations of Europe. If they support us in the war on terrorism, it is not necessarily in their national interest that they act in

conformity with these new legal mechanisms, for to help the United States as, for example, the Government of Pakistan appears to be doing, is to invite the terrorists to extend their retributive reach. That the legal regime underpinning the war on terrorism nevertheless enjoys such broad support of governments testifies to the adherence of States of diverse races, religions, political persuasions and social outlooks to the rule of law that the Charter supremely exemplifies.

It would be a mistake to underestimate the cost to the culture of compliance were the United States to continue over-demonstrating its entitlement to exceptionalism. The war in Iraq was undertaken in what is almost universally perceived as a serious violation of international law and, thus, a weakening of all legal regimes' capacity to secure acquiescent compliance. This deterioration of the legal ethos cannot be to the longer-term advantage of the United States, whatever the short term temptations. If it is not, steps need to be taken to mitigate, not to magnify, the damage done. In the age of globalization, and globalized anti-governmental terror, Athens needs the Melians to be willingly on its side.

Notes

1. Professor Franck is Professor Emeritus at New York University School of Law.
2. UN Charter, art. 2(4).
3. See THE LANDMARK THUCYDIDES, A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 352 (Robert B. Strassler ed., 1996).
4. UN Charter, art. 51.
5. William Howard Taft IV, An Address to the National Association of Attorneys General (Mar. 20, 2003).
6. UNSCR 678 (Nov. 29, 1990); UNSCR 687 (Apr. 3, 1991); UNSCR 1441 (Nov. 8, 2002).
7. See Taft, *supra* note 5.
8. *Id.*
9. See Written Answer of the Attorney General, Lord Goldsmith, to a Parliamentary Question on the legal basis for the use of force in Iraq, Mar. 17, 2003 (UK Foreign and Commonwealth Office, ¶¶ 2-4).
10. UNSCR 687, *supra* note 6.
11. PUBLIC PAPERS OF THE PRESIDENTS, GEORGE BUSH, 1992-93, Vol. I, at 568 (1993).
12. UNSCR 687, *supra* note 6, at ¶ 33.
13. *Id.*, ¶¶ 9, 10 and 13.
14. *Id.*, ¶ 32.
15. *Id.*

III

International Law and the 2003 Campaign against Iraq

Nicholas Rostow¹

Introduction

When, on September 12, 2002, President George W. Bush called on the UN Security Council to enforce its binding resolutions on Iraq and indicated that the United States was willing to enforce them alone if need be,² one of the questions he put before the world had periodically come up in the preceding decade: was it lawful for a State or group of States to enforce the Security Council resolutions on Iraq without specific Security Council authorization in each case? Or, to put it another way, “who decides?”³ The previous occasions when this question was raised involved the enforcement in the 1990s of the No-fly Zones by the United States, Britain, and, for part of the time, France or larger scale attacks on Iraqi military targets as in December 1998.⁴ However one frames this constitutive question, in each case the answer is that those members of the Security Council decided.

Of course, actions are taken in context, and the lawfulness of an action cannot be assessed without examining its context. The circumstances of the speech, a year after the terrorist attacks of September 11, 2001, lent special urgency to the President’s call. The effort by Iraq to mount terrorist attacks against the international coalition formed in response to the 1990 invasion of Kuwait, Iraqi support for Palestinian terrorist attacks against Israel, Saddam Hussein’s applause for the September 11 attacks themselves, and Iraq’s repeated efforts to obtain and then maintain

nuclear, chemical, and biological weapons programs and capabilities while defying obligations stemming from the 1991 Gulf War formed the political and legal environment of the 2003 military action.

On September 12, 2002, President Bush summarized the principal UN Security Council resolutions binding on Iraq and Iraq's failure to comply with them. He said "[t]he conduct of the Iraqi regime is a threat to the authority of the United Nations and a threat to peace. . . . Are Security Council resolutions to be honored and enforced or cast aside without consequence?"⁵ He added that the United States had the right and indeed the obligation to enforce the law against Iraq and called on UN Member States to join in doing so.⁶

The US view of international law applicable to the Iraq case did not and does not now enjoy unanimous support. For example, Professor Thomas Franck argues that, in 2003, the United States, Britain, Australia, and others engaged in a use of force against Iraq not sanctioned under the UN Charter.⁷ He disputes the idea that the campaign was a lawful exercise of the international use of force under existing UN Security Council resolutions and general principles of international law. In fact, the arguments Professor Franck disagrees with have merit and deserve elaboration before the invisible college of international lawyers renders its judgment.⁸

The Legal Basis for the 2003 Campaign against Saddam Hussein

The argument for the lawfulness of the 2003 campaign against Saddam Hussein's government of Iraq is rooted in the Persian Gulf situation after August 2, 1990. The argument concludes that, first, UN Security Council resolutions and statements from 1990 through 2002 provided legal authority for the 2003 campaign and demonstrated that, as a legal matter, the 1991 Gulf War had not ended, and, second, that, in any event, Iraq's material breaches of the 1991 cease-fire, which the Security Council repeatedly recognized as such, kept alive, if it were necessary to do so, the Security Council's 1990 authorization to use force to uphold and implement subsequent resolutions and restore regional peace and security. The terrorist attacks of September 11, 2001, transformed the context and analysis of Iraqi behavior and ended more than a decade's tolerance of Iraq's refusal to fulfill its obligations to the UN Security Council.⁹

UN Security Council Resolutions and Council Presidential Statements created the UN-based legal framework for the 2003 campaign.¹⁰ Resolution 1441, which the Security Council adopted unanimously on November 8, 2002, recognized "the threat Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security."¹¹ The operative section of Resolution 1441 commences with the finding

that Iraq “has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991).”¹² These words refer to the beginning of the 1990 Gulf Crisis, when Iraq invaded and purported to annex Kuwait, and acknowledge that the conflict thus begun had remained unresolved. They therefore put under the lens both the UN Security Council authorization to use force against Iraq because of the invasion of Kuwait and the resolution setting forth the terms for ending that conflict and authorization.

Material Breach of UN Security Council Resolution 687 (1991)

The Security Council was the forum through which the collective defense of Kuwait was managed in 1990.¹³ On August 2, 1990, the Council condemned Iraq’s invasion of Kuwait of the same day.¹⁴ The Security Council then affirmed the right of collective self-defense in response to the invasion,¹⁵ imposed an economic embargo,¹⁶ authorized the ongoing maritime enforcement of the embargo,¹⁷ carved out humanitarian exceptions to the embargo,¹⁸ warned Iraq about the consequences of illegal hostage-taking,¹⁹ and addressed other specific issues that arose during the first four months following the invasion.²⁰

On November 29, 1990, the Security Council adopted Resolution 678 authorizing the use of force and giving Saddam Hussein until January 15, 1991, to fulfill his government’s obligations to implement pre-existing Security Council resolutions beginning with Resolution 660, which had condemned the invasion and demanded an immediate, unconditional Iraqi withdrawal from Kuwait.²¹ In the absence of Iraqi compliance with this ultimatum, the Resolution authorized “Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement Resolution 660 (1990) *and all subsequent relevant resolutions and to restore international peace and security in the area.*”²² Operation Desert Storm—the 1991 Gulf War to eject Iraq from Kuwait—began on January 16, 1991, by decision of the US-led Coalition, not of the Security Council, and ended with a cease-fire, also by decision of the US-led Coalition, which the Security Council subsequently endorsed as a “suspension of offensive combat operations” on March 2, 1991.²³ Then, on April 3, 1991, the Council adopted Resolution 687, codifying that cease-fire and imposing additional obligations on Iraq, “bearing in mind” the goal of securing international peace and security in the area.²⁴ In order to obtain a cease-fire, Iraq formally accepted the terms of Resolution 687 by letter dated April 6, 1991.²⁵

Resolution 687 set forth the conditions for fulfilling the terms of Resolution 678 but did not rescind or provide for its termination. Since adopting Resolution 687 on April 3, 1991, the Security Council never found that Iraq has met its obligations thereunder or that Resolution 678, including its authorization to use force “to uphold and implement Resolution 660 (1990) and all subsequent relevant

resolutions,” was no longer in effect or even that the war commenced by Iraq’s invasion of Kuwait in August 1990 had ended. Indeed, UN Secretary-General Boutros Boutros-Ghali’s introduction to the UN publication of documents on the Iraq-Kuwait conflict, 1990–96, states that, notwithstanding the adoption of Resolution 687, “enforcement measures remained in effect, including the sanctions regime and the Council’s authorization to Member States to use ‘all necessary means’ to uphold Iraqi compliance.”²⁶ As shown by the series of resolutions in 1990, which tried to manage the Iraq-Kuwait crisis, the Security Council is capable of taking decisions about mandates.

From 1991 onwards, the Security Council repeatedly concluded that Iraq’s actions failed to correspond to Iraq’s obligations. Iraq’s refusal to implement Resolution 687, apparent within one month of the Resolution’s adoption, caused the Security Council to find that Iraq was in “material breach” of the Resolution—that is, of the conditions for the 1991 cease-fire.²⁷ The term “material breach” was derived from the 1961 Vienna Convention on the Law of Treaties:²⁸ a material breach is a repudiation of the agreement or a violation of a provision or term essential to the accomplishment of the object or purpose of the agreement. Material breach of an international agreement by one of the parties entitles the other to invoke the breach as a ground for terminating or suspending the agreement in whole or in part.²⁹ In the circumstances of Iraq’s failure to fulfill essential terms of the cease-fire agreement by submitting inaccurate and incomplete declarations of its holdings of prohibited weapons, weapons systems, and support structures, concealment of prohibited weapons and weapons programs, and obstruction of the inspection regime designed to monitor and verify Iraqi compliance with Resolution 687,³⁰ the United States and the United Kingdom and others, including Secretary-General Boutros-Ghali understood the finding of material breach to mean that the use of force was again permitted to compel Iraq to comply with its obligations or, as Boutros-Ghali wrote in 1996, “to uphold Iraqi compliance.”³¹ Iraq’s failure to comply with core paragraphs of Resolution 687 violated the cease-fire and justified, as a matter of law, the resumption by the United States and its coalition partners of the use of force authorized under Resolution 678.³²

Resolution 1441’s use of the words “material breach” to characterize Iraq’s repeated failures over more than a decade to implement the 1991 cease-fire agreement was the ninth such Security Council finding since the end of the Gulf War.³³ In addition, the Security Council also repeatedly found that Iraq was not complying with its obligations more generally. From 1991 to the end of 2002, the Council concluded three times that Iraq was in “flagrant violation” of its obligations,³⁴ 12 times that Iraq was not complying,³⁵ once that Iraq was in “clear-cut defiance” of its obligations,³⁶ three times that Iraq had committed a “clear violation,”³⁷ twice

that its violations were “clear and flagrant,”³⁸ and once that Iraq was in “gross violation” of Resolution 687.³⁹ In addition, from the cease-fire of 1991 through the adoption of Resolution 1441 in November 2002, the Security Council threatened Iraq with “serious consequences” 12 times as a result of its persistent non-compliance with essential terms of Resolution 687.⁴⁰ The different formulations used in the 1990s reflected the widening fissures among the Permanent Members of the Security Council with regard to Iraq.

While some, including Professor Franck, have argued that only the Security Council ought to determine when, after the cease-fire of 1991, it is permitted to invoke the authorization of Resolution 678 (1990),⁴¹ the United States and others⁴² have never shared that opinion. The United States consistently has argued that Resolution 678 remained in effect until the Security Council specifically rescinded it, that its reference to “all subsequent relevant resolutions” includes Security Council resolutions adopted subsequent to Resolution 678, and that no subsequent Security Council authorization was needed before the United States and others lawfully could use force against Iraq to compel compliance with Security Council resolutions, including Resolution 687, which codified the cease-fire.⁴³ The Security Council had neither included an expiration date for the authorization to use force in Resolution 678 nor provided for the termination of such authorization on Iraqi acceptance of Resolution 687 or for some other reason.⁴⁴ While Resolution 678 contained no time limit, succeeding resolutions, including 1441, contained no termination of the authorization to use force that was granted in previous Security Council resolutions. Whether they liked it or not, Security Council members understood that the United States, the United Kingdom, France for a time, and others would treat Resolution 678 as providing continuing authority. Indeed, although they justified the maintenance of No-fly Zones with reference to Security Council Resolution 688, the United States, the United Kingdom, and, during the period it participated in enforcing the No-fly Zones, France used their patrolling aircraft to keep pressure on Iraq to comply with Resolution 687.⁴⁵ In so doing, they arguably were acting on the continued authority of Resolution 678.

The British view, authoritatively expounded by the Attorney General, Lord Goldsmith, on March 17, 2003, stressed the significance of the finding of ongoing material breach by Iraq in Resolution 1441. Lord Goldsmith concluded that Security Council Resolution 687:

[S]uspended but did not terminate the authority to use force under resolution 678. A material breach of resolution 687 revives the authority to use force under resolution 678. In resolution 1441 the Security Council determined that Iraq has been and

remains in material breach of resolution 687, because it has not fully complied with its obligations to disarm under that resolution.⁴⁶

Russia's then-UN Permanent Representative Ambassador Sergei Lavrov made one of the most comprehensive statements against the US and British view in December 1998, during Operation Desert Fox undertaken by the United States and United Kingdom.⁴⁷ Lavrov argued that the Security Council, which was "actively seized" of the matter:

alone has the right to determine what steps should be taken in order to maintain or restore international peace and security. We reject outright the attempts made in the letters from the United States and the United Kingdom⁴⁸ to justify the use of force on the basis of a mandate that was previously issued by the Security Council. The resolutions of the Security Council provide no grounds whatsoever for such actions.⁴⁹

He came back to these arguments in 2002, using the word "automaticity" as representing the view he opposed.⁵⁰

Iraq's "Final Opportunity"

The second part of Resolution 1441 allowed Iraq a "final opportunity" to come into compliance with its obligations under Resolution 687, thus eliminating its material breach. In the words of the French Permanent Representative, Ambassador Jean-David Levitte, Resolution 1441 created a "last opportunity" "to avoid confrontation."⁵¹ To ensure compliance, the Security Council established what was called in the negotiations "an enhanced inspection regime" of the UN Monitoring, Inspection and Verification Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA). "Enhanced inspection regime" meant that the Security Council had given UNMOVIC and the IAEA clearer, broader, and stronger instructions and powers than ever before.⁵²

Resolution 1441 required that Iraq make a new declaration of all its weapons of mass destruction and associated agents and materials and support, research, development, and manufacturing facilities and structures. Iraqi material misstatements and/or omissions in this declaration *and* "failure to cooperate fully in the implementation shall constitute a further material breach and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below."⁵³ When Iraq submitted its declaration under this Resolution no Security Council Member or UNMOVIC or IAEA official defended it as complete within the meaning of the Resolution.⁵⁴ Indeed, they found material omissions.⁵⁵ The preliminary results of the post-war survey of evidence of Iraq's programs to develop weapons of mass destruction and their delivery

systems further illuminate the inadequacies of the December 2002 declaration; the final report confirmed this conclusion.⁵⁶

Omissions and false statements in the declaration were not enough in the language of Resolution 1441 to constitute the “further material breach” defined in Resolution 1441. The second of the two requirements was “failure to cooperate fully in the implementation” of the Resolution. Iraq’s derelictions in both respects were evident to the Council and reported by UNMOVIC and the IAEA.⁵⁷

The rest of Resolution 1441—the part that would determine what came next—reflected a compromise between those governments that did not want to require a second Security Council decision with respect to the use of force and those that did.⁵⁸ The result was agreement to meet “to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.”⁵⁹ Finally, Resolution 1441 ended by reminding Iraq that the Security Council had repeatedly warned that continued violations of its obligations would have “serious consequences.” In the circumstances of Iraq’s failure to fulfill essential terms of the cease-fire agreement, the finding of material breach, and the threat that serious consequences would follow non-compliance with Resolution 1441, everyone understood that the United States, Britain, and others were contemplating the use of force to compel Iraq to comply with its obligations if Iraq failed to fulfill them in response to Resolution 1441 although the Security Council was not unanimous on the legal interpretation of existing resolutions.⁶⁰ Nothing in Resolution 1441 required the Council to adopt another resolution as a prerequisite for military operations. And, between November 8, 2002, and March 19, 2003, when the United States and the United Kingdom launched their campaign against Saddam Hussein, the Security Council met some 47 times in public and in informal consultations considering the situation. The terms of Resolution 1441 therefore were met and the 2003 campaign against Iraq was lawful in accordance with UN Security Council resolutions and actions on Iraq after Operation Desert Storm in 1991.⁶¹

The Context: The Terrorist Attacks of September 11, 2001

Iraq’s attack on Kuwait in 1990 thus launched the train of events leading to the 2003 campaign. Iraq’s unwillingness to accept the outcome of Operation Desert Storm and comply with Security Council Resolution 687 meant that Iraq remained a threat to international peace and security after the 1991 Gulf War. Throughout the 1990s, the Iraq question stayed on the UN Security Council agenda, and UN Security Council sanctions against Iraq, imposed in the wake of the 1990 invasion of Kuwait, remained in place. The Security Council monitored application of the

sanctions, and the UN bureaucracy supervised Iraqi sales of oil and importation of goods, including foodstuffs and medicines.⁶² Iraq was contained militarily and prevented from attacking the Kurds in the north and the Shia in the south by the American, British, and, for part of the time, French enforcement of the Northern and Southern No-fly Zones, beginning in 1991. UN inspections of Iraq's weapons programs had depended in substantial part on intelligence and defector reports, not on Iraqi cooperation and inspectors' skills, however great, for success.⁶³ Early in 2003, the United States, the United Kingdom, Spain, and others on the Security Council—perhaps more than the nine needed to adopt a resolution absent a veto—concluded that every effort to obtain the compliance of Saddam Hussein's government with Security Council resolutions stipulating the conditions for ending the 1990 Gulf conflict had failed. Why, if Saddam's Iraq was contained and watched and the economy supervised, did the United States and Great Britain decide to launch the campaign that removed Saddam Hussein from power in 2003?

The answer, as President Bush said on March 6, 2003, lay in the impact of the terrorist attacks on September 11, 2001. The repeated failure by Saddam Hussein's Iraq throughout the 1990's to comply with Resolution 687, and the repeated failure within the Security Council to agree about what to do in response, was no longer tolerable for the United States, the United Kingdom, Spain, and others. "September 11th changed the strategic thinking, at least as far as I was concerned, for how to protect our country," President Bush said. "It used to be that we could think that you could contain a person like Saddam Hussein, that oceans would protect us from his type of terror."⁶⁴ Saddam Hussein's statements about the September 11 attacks could give no assurance about his attitude,⁶⁵ and his record of continued material breach of Security Council Resolution 687, despite economic sanctions, diplomacy, low intensity military pressure, and repeated Security Council demands, combined to support the view that there would never be voluntary Iraqi compliance with Resolution 1441 and that changing the regime by force was proportional and lawful and, after September 11, 2001, necessary.

All Security Council member governments believed that Saddam Hussein's Iraq had not complied with Resolution 687 and at least had programs to develop or obtain nuclear, biological, or chemical weapons of mass destruction, even if some of them questioned whether Iraq actually possessed such weapons at that moment.⁶⁶ In this connection, one should weigh the assessment of Rolf Ekeus, the first head of the UN inspection effort in Iraq, and, in the view of a former British Ambassador to the United Nations, "the most-clear sighted and by far the most successful" of them:⁶⁷

[Iraq's policy since 1991 was not to produce warfare agents, but rather to concentrate on design and engineering] with the purpose of activating production and shipping of

agents and munitions directly to the battlefield in the event of war. Many hundreds of chemical engineers and production and process engineers worked to develop nerve agents, especially VX, with the primary task being to stabilize the warfare agents in order to optimize facilities and activities, e.g., for agricultural purposes, where batches of nerve agents could be produced during short interruptions of the production of ordinary chemicals. This combination of researchers, engineers, know-how, precursors, batch production techniques and testing is what constituted Iraq's chemical threat—its chemical weapon. The rather bizarre political focus on the search for rusting drums and pieces of munitions containing low-quality chemicals has tended to distort the important question of WMD in Iraq and exposed the American and British administrations to unjustified criticism. The real chemical warfare threat from Iraq has had two components. One has been the capability to bring potent chemical agents to the battlefield to be used against a poorly equipped and poorly trained enemy. The other is the chance that Iraqi chemical weapons specialists would sign up with terrorist networks such as al Qaeda—with which they are likely to have far more affinity than do the unemployed Russian scientists the United States worries about. . . . While biological weapons are not easily adapted for battlefield use, they are potentially the more devastating as a means for massive terrorist onslaught on civilian targets. As with chemical weapons, Iraq's policy on biological weapons was to develop and improve the quality of the warfare agents. It is possible that Iraq, in spite of its denials, retained some anthrax in storage. But it could be more problematic and dangerous if Iraq secretly maintained a research and development capability, as well as a production capability, run by the biologists involved in its earlier programs. Again, such a complete program would in itself constitute a more important biological weapon than some stored agents of doubtful quality. It is understandable that the U.N. inspectors and even more, the military search teams, have had difficulty penetrating the sophisticated, well-rehearsed and protected WMD program in Iraq. . . . The Iraqi nuclear projects lacked access to fissile material but were advanced with regard to weapon design. . . . This is enough to justify the international military intervention undertaken by the United States and Britain. To accept the alternative—letting Hussein remain in power—would have been to tolerate a continuing destabilizing arms race in the Gulf, including future nuclearization of the region, threats to the world's energy supplies, leakage of WMD technology and expertise to terrorist networks, systematic sabotage of efforts to create and sustain a process of peace between the Israelis and the Palestinians and the continued terrorizing of the Iraqi people.⁶⁸

The Iraq Survey Group responsible for searching for prohibited Iraqi weapons and weapons programs in the wake of the 2003 Iraq campaign confirmed the existence of such programs.⁶⁹

Security Council unity about Iraq's ambitions did not extend to wanting to join a use of force to obtain compliance and bring an end to the programs—that is, to overthrow Saddam Hussein's regime. Therefore, the Council's unanimity in adopting Resolution 1441 expressed more solidarity than existed, as, for example, the French and Russian statements explaining their votes made clear and the

French-Russian-Chinese Joint Statement of November 8, 2002, reinforced.⁷⁰ Security Council members, Secretariat officials, and others agreed that the build-up of US military forces in Kuwait had persuaded Saddam Hussein to cooperate to the degree he did with UNMOVIC and the IAEA, but they did not agree that time had run-out for non-military solutions to the threat posed by Iraq.⁷¹ For example, Russia's Permanent Representative pulled back from the dire message of Resolution 1441:

Implementation of the resolution [1441] will require goodwill on the part of all those involved in the process of seeking a settlement of the Iraq question. They must have the willingness to concentrate on moving forward towards the declared common goals, not yielding to the temptation of unilateral interpretation of the resolution's provisions and preserving the consensus and unity of all members of the Security Council.⁷²

France's Ambassador Levitte said that "the Security Council would maintain control of the process."⁷³ He did not acknowledge that any one besides the heads of UNMOVIC or the IAEA might report to the Security Council on Iraqi compliance with Resolution 1441. The fact that Resolution 1441 contemplated reports from sources other than the IAEA or UNMOVIC ought not to have needed saying but did because Ambassador Levitte only referred to reports from those sources as causing the Security Council to meet. Some commentators have seen economic motives behind Russian and French Iraq policies throughout the 1990s: "By 2000, Iraq's trade was worth roughly \$17 billion, and other countries were determined to get a piece of it. Iraq carefully awarded contracts to those who echoed its propaganda and voted its way in the Security Council."⁷⁴ Perhaps more importantly, Ambassador Lavrov's and Ambassador Levitte's statements revealed again the divergence of perspectives about international threats in the wake of the terrorist attacks of September 11, 2001.⁷⁵

The importance of those attacks for the United States cannot be exaggerated. They have exerted hydraulic pressure on US officials, sending them to bed each night worried that they have again failed to understand bits and pieces of intelligence about terrorist plots, and causing them to look out on the world through a prism formed by the September 11 attacks. Thus, acceptance of Iraq's unwillingness to abide by the result of the 1991 Gulf War no longer appeared to be a sensible policy option.

Conclusion

The legal foundation for the 2003 campaign against Iraq is not the less important for being well known. The aspiration that international society operate according

to law is inseparable from the aspiration for international peace. On September 24, 2003, Security Council members joined in emphasizing this point.⁷⁶ While there have been periods of peace, enforced by a balance of power, these periods historically have ended in great wars. Whether an international system of independent States, even one that includes international institutions to which States delegate important powers, can live according to law and even whether that law can be enforced so as to strengthen peace within the international society, is a question whose answer we are still fashioning.

One of the most important and therefore one of the most controversial elements of the 2003 campaign against Iraq involved enforcement of international law by a group of States motivated by the attacks of September 11, 2001, without being able to prove a connection between Iraq and those attacks. Unlike the Afghanistan campaign, which was directed against the apparent source of those attacks, the Iraq campaign involved a response to a previously defined but ongoing threat, which acquired new seriousness as a result the terrorist attacks. Security Council actions on Iraq, including the authorization to use force and the repeated findings of Iraq's failure to carry out its cease-fire obligations, raised the stakes for all States, especially after September 11, 2001, because of the Council's primary responsibility for the maintenance of international peace and security. Those same actions created a compelling legal foundation for the 2003 campaign. Critics may choose to ignore it. They cannot rebut it.

Notes

1. Professor Nicholas Rostow is General Counsel, US Mission to the United Nations. He is a former Charles H. Stockton Professor of International Law at the Naval War College. The views expressed are those of the author and do not necessarily represent the views of the Department of State or the United States. A version of this paper appeared in the 2004 Israel Yearbook on Human Rights as "Determining the lawfulness of the 2003 Campaign against Iraq."

2. UN Doc. A/57/PV.2 6-9 (Sept. 12, 2003).

3. See the symposium on this question in 27 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY (1995), including Nicholas Rostow, "*Who Decides*" and *World Public Order*, at 577-83.

4. See text, *infra* at notes 41-45.

5. *Supra* note 2, at 8. Most of the relevant Security Council resolutions on Iraq represent "decisions" binding under Article 25 of the UN Charter ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.") The use of the word "decides" in Security Council resolutions is significant as a legal matter. British practice is to insist that a paragraph in a resolution is binding on States as a matter of law only if the preamble states that the Council is determining that the situation in question is a threat to the peace, breach of the peace, or act of aggression, and that the Council is acting under Chapter VII of the UN Charter. Other Permanent Members have gone along with the British in

this connection although their prior practice indicates tolerance of less formality than is characteristic nowadays. Whether formalists or not, all other Permanent Members agree that the word “decides” creates a binding obligation.

6. *Id.*

7. See Thomas M. Franck, *Iraq and the Law of Armed Conflict*, which is Chapter II in this volume, at 15. See also Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 607 (2003).

8. The Legal Adviser of the US Department of State published the authoritative US Government analysis. See William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 557 (2003) (the legality of the use of force against Iraq derives from UN Security Council resolutions). This article appeared with other comments on the lawfulness of the war against Iraq, some of which defend it on different grounds: John Yoo, *International Law and the War in Iraq*, *id.* at 563–76 (the lawfulness of the war derives from UN Security Council resolutions and customary law of self-defense); Richard N. Gardner, *Neither Bush Nor the “Jurisprudes,”* *id.* at 585–90 (the Bush Administration did not need the self-defense rationale because legally sufficient justification lay within UN Security Council Resolutions); and Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, *id.* at 576–85 (the UN Charter system must adapt to changing security concerns). Others reject these arguments: Richard A. Falk, *What Future for the UN Charter System of War Prevention*, *id.* at 590–98 (the UN Charter system required prior Security Council authorization, and US interests would have been well served by waiting until it was forthcoming); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, *id.* at 599–607 (the 2003 campaign against Iraq was unlawful under the international law of anticipatory self-defense); and Franck, *What Happens Now? The United Nations After Iraq*, *supra* note 7, at 607–620. Two other authors address related issues: Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 621–28 (2003) (the United States ought to accommodate to others’ preferences in order to achieve its own), and Jane Stromseth, *Law and Force After Iraq: A Transitional Moment*, *id.* at 628–42 (UN Charter system not dead). See also Carsten Stahn, *Enforcement of the Collective Will After Iraq*, *id.* at 804 (US-UK action formally breached UN Charter but Charter law intact); Andru E. Wall, *The Legal Case for Invading and Toppling Hussein*, 32 ISRAEL YEAR BOOK ON HUMAN RIGHTS 165 (2002) and Paul Schott Stevens, Andru E. Wall, and Ata Dinlenc, *The Just Demands of Peace and Security: International Law and the Case Against Iraq*, The Federalist Society for Law & Public Policy Studies (2002); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 124 (1999) (absence of, or ambiguity in connection with, question of Security Council authority). See also Prime Minister Blair, *The Threat of Global Terrorism*, Mar. 5, 2003 (“The lawyers continue to divide over it—with their legal opinions bearing a remarkable similarity to their political view of the war.”), available at www.ukun.org.

9. A separate argument concerns humanitarian intervention. Some argue that the brutality of the Hussein government, its demonstrated slaughter of thousands—perhaps as many as 300,000 or more (see, e.g., Simon de Bruxelles, *Britons Find Graves of 300,000 Victims*, TIMES (London), June 4, 2003; WILLIAMS SHAWCROSS, *ALLIES: THE US, BRITAIN, EUROPE, AND THE WAR IN IRAQ* 160–61 (2004))—of Iraqis, including with chemical weapons, itself justified the campaign as a matter of international law. Under this view, States have the right—some would say the duty—to intervene to prevent or stop widespread human rights abuses. Publications of the human rights non-governmental organizations on the widespread and systematic violations of human rights by Saddam Hussein’s government provide a basis for considering that humanitarian

intervention was not only justifiable, but also over-due. As Professor Franck does not address this point, I do not pursue it here. In this connection, see Taft & Buchwald, *supra* note 8, at 559; Stevens, Wall, & Dinlenc, *supra* note 8, at 11–12; UK Foreign & Commonwealth Office, Saddam Hussein: Crimes and Human Rights Abuses (November 2002); Thomas L. Friedman, *Presidents Remade by War*, NEW YORK TIMES, Dec. 7, 2003, available at www.nytimes.com/2003/12/07/opinion/07FRIE.html. On the arguments for and against humanitarian intervention see, e.g., Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Theodor Meron, *Commentary on Humanitarian Intervention*, *id.* at 212–14; Lori Fisler Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, *id.* at 215–23; Louis Henkin, *The Use of Force: Law and US Policy*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37–69 (Louis Henkin et al. eds., 1989); Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, in *id.* at 19–36; and Falk, *supra* note 8, at 500–98 and citations therein. See also INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Gareth Evans & Mohamed Sahnoun co-chairs, 2001). The political, legal, and moral issues raised by the idea of humanitarian intervention and the history of external interference in countries to uphold human rights or try to protect individuals or groups against oppression are complex. They involve conflicting policy and emotional impulses. Among the issues are the principle of the sovereign equality and independence of States, the prohibition on the use of force, the German murder of the European Jews in World War II, which frames responses to massive and, particularly, genocidal killings whatever the specifiable international impact, and the difficulty of defining tripwires. The last involves the questions, among others, of how many deaths justify or require intervention and who will bear the burdens and risks of intervention.

10. Security Council Presidential Statements are delivered on behalf of the entire Security Council by the President. They are adopted by consensus, not a vote.

11. UNSCR 1441 (Nov. 8, 2002).

12. *Id.* ¶ 1.

13. See generally, Nicholas Rostow, *The International Use of Force after the Cold War*, 32 HARVARD INTERNATIONAL LAW JOURNAL 411 (1991).

14. UNSCR 660 (Aug. 2, 1990).

15. UNSCR 661 (Aug. 6, 1990).

16. *Id.*

17. UNSCR 665 (Aug. 25, 1990). The US Navy's enforcement of the embargo began in the first weeks after the invasion, prior to the adoption of Resolution 665. President George H.W. Bush's letter to the Speaker of the House of Representatives and President pro tempore of the Senate, August 9, 1990, explained the US response to the invasion as "in exercise of our inherent right of individual and collective self-defense." PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, GEORGE BUSH, Vol. II at 1116 (1991). See also the letter of August 16, 1990 from the US charge d'affaires to the President of the Security Council (S/21537) (US interception of vessels at request of government of Kuwait).

18. UNSCR 666 (Sept. 13, 1990).

19. UNSCR 664 (Aug. 18, 1990).

20. E.g., UNSCR 669 (Sept. 24, 1990) (addressing "increasing number of requests for assistance" under Article 50 of the UN Charter).

21. UNSCR 678 (Nov. 29, 1990).

22. *Id.* ¶ 2 [emphasis added].

23. UNSCR 686 (Mar. 2, 1991), preambular ¶ 5. See Taft & Buchwald, *supra* note 8, at 558.

24. UNSCR 687 (Apr. 3, 1991), preambular ¶ 25.
25. Letter dated April 6, 1991 from the Permanent Representative of Iraq to the UN Secretary General and to the President of the Security Council, UN Doc. S/22456 (Apr. 6, 1991). Security Council Resolution 687, paragraph 33, required such notice for a “formal cease-fire” to take effect.
26. Boutros Boutros-Ghali, *Introduction*, in UNITED NATIONS BLUE BOOK SERIES, VOLUME IX: THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT, 1990–1996, at 29 (1996). The Secretary-General’s view in 1996 was the same as it had been in 1993. See Taft & Buchwald, *supra* note 8, at 559, quoting UN Press Release SG/SM/4902/Rev. 1 at 1 (Jan. 15, 1993). (“Q: Do you approve of yesterday’s raid against Iraq? The Secretary General: The raid was carried out in accordance with a mandate from the Security Council under resolution 678 (1991 [sic]), and the motive for the raid was Iraq’s violation of the resolution, which concerns the cease-fire. As Secretary-General of the United Nations, I can tell you that the action was in accordance with the resolutions of the Security Council and the Charter of the United Nations.”)
27. UNSCR 707 (Aug. 15, 1991), preambular ¶¶ 7 and 11 (failure to report weapons and concealment of activities “constitute a material breach of its acceptance of the relevant provisions of that resolution which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region.” *Id.* at preambular ¶ 11).
28. Convention on the Law of Treaties, Vienna, May 23, 1969, art. 60, 1155 U.N.T.S. 331. Article 60(1): “A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.” Article 60(2): “A material breach of a multilateral treaty by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties; (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.” The United States is not a party to this Convention but regards most provisions as generally accurate restatements of the binding customary international law of treaties.
29. *Id.*
30. US Department of State, Historic[al] Review of UNMOVIC’s Report of Unresolved Disarmament Issues, Mar. 10, 2003, available at www.state.gov/r/pa/prs/ps/2003/18513.htm.
31. Boutros-Ghali, *supra* note 26. In one case, the United States and Britain launched air attacks against Iraq a week after the Security Council found Iraq to be in material breach. See *id.* at 132–33 (Jan. 11 and 18, 1993).
32. See Michael J. Matheson, *Legal Authority for the Possible use of Force Against Iraq*, 98 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 136, 142 (1998). An armistice suspends military operation by mutual agreement. A party can resume hostilities if there is a “serious violation” of the armistice. Regulations Annexed to Convention (IV) Respecting the Law and Customs of War on Land, Oct. 18, 1907, art. 36, 36 Stat. 2277, 2305. See Taft & Buchwald, *supra* note 8, at 559; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 50 (3d ed. 2001) (“A labeling of Resolution 687 as a permanent cease-fire is a contradiction in terms: a cease-fire, by definition, is a transition-period arrangement.”)
33. UNSCR 707 (Aug. 15, 1991); Security Council Presidential Statements (PRST) UN Doc. S/23609 (Feb. 19, 1992); UN Doc. S/23663 (Feb. 28, 1992); UN Doc. S/23699 (Mar. 11, 1992); UN Doc. S/24240 (July 6, 1992); UN Doc. S/25081 (Jan. 8, 1993); UN Doc. S/25091 (Jan. 11, 1993);

UN Doc. S/25970 (June 18, 1993); and UNSCR 1441 (Nov. 8, 2002). After 1993 and until 2002, the Security Council would not agree to the use of the words “material breach” because Council Members understood them explicitly to justify a use of force, and France and Russia would not concur. As a result, lesser characterizations such as “clear” or “flagrant” “violations” were used. See, e.g., UNSCR 1115 (June 21, 1997).

34. UN Doc. S/22746 (June 28, 1991); UN Doc. S/PRST/1994/58 (June 14, 1996); UNSCR 1134 (Oct. 23, 1997).

35. UN Doc. S/23517 (Feb. 5, 1992); UN Doc. S/23709 (Mar. 12, 1992); UNSCR 778 (Oct. 2, 1992); UN Doc. S/PRST/1994/58 (Oct. 8, 1994); UNSCR 1051 (Mar. 27, 1996); UN Doc. S/PRST/1996/49 (Dec. 30, 1996); UN Doc. S/PRST/1994/33 (June 13, 1997); UNSCR 1137 (Nov. 12, 1997); UN Doc. S/PRST/1997/54 (Dec. 3, 1997); UN Doc. S/1998/820 (Sept. 9, 1998); UNSCR 1284 (Dec. 17, 1999).

36. UN Doc. S/25091 (Jan. 11, 1993).

37. UN Doc. S/PRST/1996/11 (Mar. 19, 1996); UNSCR 1060 (June 12, 1996); UN Doc. S/PRST/1997/56 (Dec. 22, 1997).

38. UN Doc. S/PRST/1994/58 (June 14, 1996); UNSCR 1115 (June 21, 1997).

39. UN Doc. S/PRST/1996/36 (Aug. 23, 1996).

40. UN Doc. S/22746 (June 28, 1991); UN Doc. S/23609 (Feb. 19, 1992); UN Doc. S/23663 (Feb. 28, 1992); UN Doc. S/23803 (Apr. 10, 1992); UN Doc. S/25081 (Jan. 8, 1993); UN Doc. S/25091 (Jan. 11, 1993); UN Doc. S/25970 (June 18, 1993); UN Doc. S/26006 (June 28, 1993); UNSCR 949 (Oct. 15, 1994); UN Doc. S/PRST/1997/49 (Oct. 29, 1997); UN Doc. S/PRST/1997/51 (Nov. 13, 1997); UNSCR 1441 (Nov. 8, 2002). Iraq’s record during 1991–96 is summarized in Boutros-Ghali, *supra* note 26, at 74–98. Uses of force against Iraq by US and other forces sometimes followed these Council actions.

41. See, e.g., Franck, *What Happens Now? The United Nations After Iraq*, *supra* note 7, at 613; Patrick McLain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE JOURNAL OF INTERNATIONAL LAW 233, 249 (2003) (paragraph 34 of UNSCR 6897 (1991) (“Decides to remain seized of the matter and to take such further steps as may be required for implementation of the present resolution and to secure peace and security in the region”) meant the Security Council alone could decide when the authorization in Resolution 678 (1990) could be invoked); Lobel & Ratner, *supra* note 8.

42. Including France and Boutros-Ghali. See Taft & Buchwald, *supra* note 8, at 559 n.10; Boutros-Ghali, *supra* note 26.

43. See Matheson, *supra* note 32, at 137, 139, 141–42, 146. At that time, Mr. Matheson was Principal Deputy Legal Adviser, US Department of State. Professor Franck was one of the participants in the discussion at that meeting of the American Society of International Law and disagreed with Matheson. *Id.* at 143, 144, 145 (noting, among other things, the usefulness, admitted by all, of the threat to use force to enforce the Security Council resolutions on Iraq and arguing that the threat itself was unlawful).

44. Cf. UNSCR 929 (June 22, 1994) (stating that the mission in Rwanda will be limited to a period of two months following the adopting of the present resolution); UNSCR 1031 (Dec. 15, 1995) (terminating the authority for States to take certain action in Bosnia).

45. See the exchanges on October 17, 2002, and June 8, 2000, between US and UK representatives on one side and the Russian representative on the other regarding the No-fly Zones for representative expressions of position. S/PV.4625 (Resumption 3) at 22 (Oct. 17, 2002 (Russia)), S/PV.4152, at 3–4, 5–6 (June 8, 2000 (Russia, UK, US)). In April 1991, the United States, the United Kingdom, and France established a “No-fly Zone” over northern Iraq in which Iraqi aircraft were not permitted to fly. The immediate cause of the decision to establish this No-

Fly Zone was the commencement of new attacks on Iraqi Kurds in the spring of 1991 and a resulting exodus of a large number of refugees to Turkey, which threatened to ignite a new conflict. In August 1992, a similar No-fly Zone was established for southern Iraq to protect Iraq's Shiites from attack by Saddam Hussein's forces. The US Government defended the creation and enforcement of the No-fly Zones by reference to UN Security Council Resolution 688, which for the first time in UN Security Council history condemned internal repression as a threat to international peace and security, insisted on immediate access by international humanitarian organizations to all those in need of assistance in Iraq, and appealed to all UN Members to contribute to such humanitarian relief efforts. The enforcement of the No-fly Zones required thousands of individual sorties. US and other aircraft periodically fired on Iraqi air defenses when they appeared to threaten patrolling planes. These forces, as well as other forces in the region, engaged in periodic attacks on Iraqi military or intelligence targets during the 1990s as a result of Iraqi actions, such as the attempt on the life of President George H.W. Bush in 1993. Stevens, Wall & Dilenc, *supra* note 8, at 9–11; KENNETH M. POLLACK, *THE THREATENING STORM: THE CASE FOR INVADING IRAQ* 66–67 (2002). See also The History Guy: "The No-Fly Zone War" (US/UK-Iraq Conflict) 1991–2003, www.historyguy.com/no-fly_zone_war.html.

46. The Written Answer of the Attorney General, Lord Goldsmith, to a Parliamentary Question on the legal basis for the use of force in Iraq, March 17, 2003 (UK Foreign and Commonwealth Office), ¶¶ 2–4. See also the opinion of Christopher Greenwood, CMG, QC, October 24, 2002, available at www.parliament.the-stationery-office.co.uk..

47. December 16–20, 1998, involving some 30,000 troops, 37 warships, and 348 aircraft. See Stevens, Wall, & Dilenc, *supra* note 8, at 18–19.

48. Letters from US and UK representatives, dated December 16, 1998, UN Docs. S/1998/1191, S/1998/1182.

49. UN Doc. S/PV.3955 at 4 (Dec. 16, 1998). On the legal significance of the paragraph in Security Council resolutions referring to remaining seized of the matter, see *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 287–98 (Bruno Simma et al. eds., 2d ed. 2002); LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 129–33 (3d ed. 1969); SYDNEY D. BAILEY & SAM DAWES, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 473 (3d ed. 1998) (language regarding being seized with a matter pertains to Article 12 and relations between the Security Council and General Assembly).

50. See, e.g., *infra* note 60.

51. UN Doc. S/PV.4644 (Nov. 8, 2002), at 5 (Levitte).

52. UNMOVIC had been established pursuant to UN Security Council Resolution 1284 of December 17, 1999, to undertake "the responsibilities mandated to the Special Commission" (UNSCOM). UNSCR 1284 (Dec. 17, 1999) at ¶ 2. See POLLACK, *supra* note 45, at 100 on the adoption of UNSCR 1284.

53. UNSCR 1441 (Nov. 8, 2002), at ¶ 4.

54. Hans Blix, Executive Chairman of UNMOVIC, told the Security Council in informal consultations on January 9, 2003, that Iraq's Declaration "is rich in volume but poor in new information about weapons issues and practically devoid of new evidence on such issues." Briefing the Security Council, January 9, 2003, available at www.un.orgs/Depts/unmovic/new/pages/security_council_briefings.asp. See also UNMOVIC's 12th quarterly report, Feb. 28, 2003, ¶¶ 6–11 (S/2003/232). In public Security Council meetings and in informal consultations of the Council, Blix and ElBaradei offered the same message. Blix reported increasing Iraqi cooperation with inspections as the threat of the use of force became more intense. On February 14, 2003, ElBaradei, the Director General of the IAEA, told the Security Council that "We have

to date found no evidence of ongoing prohibited nuclear or nuclear-related activities in Iraq.” S/PV.4707 at 9 (Feb. 14, 2003). The only records of informal consultations are those notes taken by delegation or UN staffs because, technically, informal consultations are just that; they are not meetings of the Security Council. One transcript of private Security Council meetings is made and preserved in the Office of the Secretary-General. Provisional Rules of Procedure of the Security Council (Dec. 1982), S/96/Rev. 7, art. 51. A communiqué is issued after each private meeting. *Id.*, art. 55.

55. For example, on January 9, 2003, Blix and ElBaradei reported examples of missing weapons-related materials for which Iraq provided no explanation or an inadequate explanation in its declaration of December 7, 2002. The text of those reports is available at www.un.org/Depts/unmovic/new/pages/security_council_briefings.asp. See also Taft & Buchwald, *supra* note 8, at 562 n.21.

56. David Kay, Statement before the House Permanent Select Committee on Intelligence, et al., On the Interim Progress Report on the Activities of the Iraq Survey Group, Oct. 2, 2003; Colin L. Powell, *What Kay Found*, WASHINGTON POST, Oct. 7, 2003, at A7. See also Richard W. Stevenson, *Iraq Illicit Arms Gone Before War*, *Inspector States*, NEW YORK TIMES, Jan. 24, 2004, at A1. See generally the “Duelfer Report,” the report of the Iraq Survey Group, Comprehensive Report of the Special Adviser to the DCI on Iraq’s WMD (Sept. 30, 2004), available at http://www.cia.gov/cia/reports/iraq_wmd_2004/ [hereinafter the Duelfer Report].

57. At no time in public or in informal consultations, did any member of the Security Council agree that Iraq had fulfilled its obligations under Resolution 1441.

58. See Stromseth, *supra* note 8, at 630–31.

59. UNSCR 1441, at ¶ 12.

60. This conclusion is drawn from the public record only, including, such statements as those of then-French Ambassador to the United Nations, Jean-David Levitte, and his Russian counterpart, Sergei Lavrov, who participated in the negotiation of Security Council Resolution 1441. UN Doc. S/PV.4644, at 5 (Levitte: “The rules of the game spelled out by the Security Council are clear and demanding and require the unfailing cooperation of Iraqi leaders. If Iraq wants to avoid confrontation it must understand that this is its last opportunity.”); *Id.* at 8–9 (Lavrov: “As a result of intensive negotiations, the resolution just adopted contains no provisions for the automatic use of force. . . . What is most important is that the resolution deflects the direct threat of war and that it opens the road towards further work in the interests of a political diplomatic settlement.”) See also Stromseth, *supra* note 8, at 629–31 (reviewing the public record of the diplomacy leading to the adoption of Resolution 1441 and quoting Levitte, by then Ambassador to the United States: “I went to the State Department and to the White House to say, don’t do it [seek a new resolution]. First, because you’ll split the Council and second, because you don’t need it. Let’s agree to disagree between gentlemen, as we did on Kosovo, before the war in Kosovo.” *Id.* at 630–31.) See also Matheson, *supra* note 32, at 139 (severe consequences refer to possible use of force).

61. See also Lord Goldsmith’s opinion, *supra* note 45, at background document paragraph 11 (requirement that Iraq be given a final opportunity and that the Security Council consider any failure meant that Resolution 1441 did not automatically authorize the 2003 campaign).

62. UNSCRs 986 (Apr. 14, 1995), 1111 (June 4, 1997), 1129 (Sept. 12, 1997), 1143 (Dec. 4, 1997), 1153 (Feb. 20, 1998), 1158 (Mar. 25, 1998), 1175 (June 19, 1998), 1242 (May 21, 1999), 1266 (Oct. 4, 1999), 1275 (Nov. 19, 1999), 1280 (Dec. 3, 1999), 1293 (Mar. 31, 2000), 1302 (June 8, 2000), 1330 (Dec. 5, 2000), 1352 (June 1, 2001), 1360 (July 3, 2001), 1382 (Nov. 29, 2001), 1409 (May 14, 2002), 1447 (Dec. 4, 2002), 1454 (Dec. 30, 2002), 1472 (Mar. 29, 2003), and 1476 (Apr. 24, 2003).

63. Boutros-Ghali, *supra* note 26, at 93; POLLACK, *supra* note 45, at 71–80, 87–94, 232–36.
64. Transcript of President George W. Bush News Conference on Iraq, March 6, 2003, *available at* <http://cnn.usnews.com>, at 5.
65. On September 12, 2001, Saddam Hussein said on Iraq Television in Arabic that “the United States reaps the thorns that its rules have planted in the world.” FBIS, Sept. 12, 2001; Open Letter to the American Peoples, Sept. 11, 2001. *See also* SHAWCROSS, *supra* note 9, at 109 (On September 11, 2002, an Iraqi government paper calls attacks of September 11, 2001, “God’s Punishment”).
66. Blair, *supra* note 8.
67. David Hannay, *Before and After*, TIMES LITERARY SUPPLEMENT, Feb. 13, 2004, at 6 (review of WILLIAM SHAWCROSS, *ALLIES: THE U.S., BRITAIN, AND EUROPE, AND THE WAR IN IRAQ* (2004) and TOBY DODGE, *INVENTING IRAQ* (2004)). Lord Hannay was British Ambassador to the United Nations, 1990–95.
68. WASHINGTON POST, June 29, 2003, at B7. The material in square brackets is Hannay’s. Hannay, *supra* note 67.
69. SHAWCROSS, *supra* note 9, at 189–93 (“The Kay report did not show that Iraq had been an immediate threat. But it did provide irrefutable evidence that Saddam’s WMD [weapons of mass destruction] ambitions were an inevitable threat.”); Blair, *supra* note 8 (“Actually, it is now apparent from the Survey Group that Iraq was indeed in breach of UN Resolution 1441. It did not disclose laboratories and facilities it should have; nor the teams of scientists kept together to retain their WMD including nuclear expertise; nor its continuing research relevant to CW [chemical weapons] and BW [biological weapons]. As Dr. Kay, the former head of the ISG [Iraq Survey Group] who is now quoted as a critic of the war has said: ‘Iraq was in clear violation of the terms of Resolution 1441’. And ‘I actually think this [Iraq] may be one of those cases where it was even more dangerous than we thought.’ . . . It’s just worth pointing out that the search is being conducted in a country twice the land mass of the UK, which David Kay’s interim report in October 2003 noted, contains 130 ammunition storage areas, some covering an area of 50 square miles, including some 600,000 tons of artillery shells, rockets and other ordnance, of which only a small proportion have as yet been searched in the difficult security environment that exists.”)
70. S/PV.4644, at 5, 8–9 (Nov. 8, 2002) (Levitte, Lavrov); UN Doc. S/2002/1236 (Nov. 8, 2002) (Joint Statement of China, France, and Russia). *See also* the Duelfer Report, *supra* note 56, vol. I, at 1 (key findings) (“[Saddam Husayn sought to balance the need to cooperate with UN inspectors—to gain support for lifting sanctions—with his intention to preserve Iraq’s intellectual capital for WMD with a minimum of foreign intrusiveness and loss of face.”); *also id.* at 68 (“Asked by a US interviewer in 2004, why he had not used WMD against the Coalition during Desert Storm [1991], Saddam replied, ‘Do you think we are mad? What would the world have thought of us? We would have completely discredited those who had supported us.’”) The Duelfer Report was not completed at the time this article originally went to press. It bears close scrutiny as it makes clear the scope of Iraq’s ambitions with respect to the development and delivery of WMD and its existing programs although the Iraq Survey Group did not find caches of WMD, which so many people expected it to do. Although not a model of clarity, the Report suggests the existence of biological weapons materials. *See id.*, vol. III at 18 *et seq.* on the findings by the Iraq Survey Group with respect to Iraq’s biological weapons research and development. *See also id.* at 58 (“An ISG [Iraq Survey Group] team obtained two vials of *C.[l]ostridium perfringens* [causative agent of gas gangrene] as well as one vial of *C.botulinum* type B [causative agent of the disease botulism], from a mid-level scientist who formerly worked in the BW [biological warfare] program.”), and 2 (ISG recovery of biological warfare-related seed stocks after Operation Iraqi Freedom).

71. *E.g.*, UN Doc. S/PV.4707, at 16 (Spain), 17 (United Kingdom), 28 (Bulgaria) (Feb. 14, 2003); Franck, *supra* note 43, at 145.
72. UN Doc. S/PV.4644, at 9 (Nov 8, 2002).
73. *Id.* at 5.
74. POLLACK, *supra* note 45, at 100–01.
75. *See, e.g.*, Robert Kagan, *A Tougher War for the US is One of Legitimacy*, NEW YORK TIMES, Jan. 24, 2004, at B7 (“Today, most Europeans believe that the United States exaggerates the dangers in the world. After Sept. 11, most Americans fear that they haven’t taken those dangers seriously enough.” *Id.* at B9). Carl Bildt, former Prime Minister of Sweden, noted that, for Europe, the most important recent historical date was 1989 when the Berlin Wall fell, whereas for the United States, the most important recent date was September 11, 2001: “While we talk of peace, they talk of security. While we talk of sharing sovereignty, they talk about exercising sovereign power. When we talk about a region, they talk about the world.” Adam Nicolson, *U.S. Thinks Europeans are Cockroaches*, LONDON DAILY TELEGRAPH, electronic edition, Nov. 4, 2003; SHAWCROSS, *supra* note 9, at 50 (Prime Minister Blair told the House of Commons in March 2003 that “September 11 changed the psychology of America. It should have changed the psychology of the world.”).
76. UN Doc. S/PV.4833 (“Justice and the Rule of Law: the United Nations Role,” Sept. 24, 2003).

PART II

AIR AND LAND WARFARE
OPERATIONAL CHALLENGES

IV

Jus in Bello Issues Arising in the Hostilities in Iraq in 2003

Yoram Dinstein¹

The hostilities in Iraq in 2003 brought to the fore a number of *jus in bello* issues deserving special consideration. This paper will deal with ten such issues.

The Status of Unlawful Combatants

The subject of unlawful combatancy has already been addressed by the present writer in the conference on Afghanistan in 2002.² It is not proposed to repeat here what was stated at some length in the earlier essay. Suffice it to state that, under customary international law, a combatant who does not fulfill the cumulative conditions of lawful (or privileged) combatancy—*inter alia*, that of having “a fixed distinctive sign recognizable at a distance”³—becomes an unlawful combatant, i.e., he is denied the privileges of a prisoner of war status and exposed to the full rigor of the domestic penal system for any act of violence perpetrated by him in civilian clothes.

The use of uniforms by members of the regular armed forces is a matter of custom, *esprit de corps* and convenience. Lawful combatancy is not determined by the wearing of a uniform per se. As indicated, it is determined (*inter alia*) by the wearing of a fixed distinctive emblem recognizable at a distance. This fixed distinctive emblem may be less than a full-fledged uniform (e.g., a special headgear or an armband). But if the fixed distinctive emblem of regular armed forces is a uniform,

then the removal of that uniform in (or in proximity to) combat does divest the person acting that way of lawful combatancy.

The issue of the removal of a uniform (as a fixed distinctive emblem) by members of the regular armed forces must be examined within the confines of space and time. A member of the armed forces who is performing his duties far from the contact zone with the enemy and removes his uniform without any possible intention (or even reasonable ability) to deceive the enemy as to his true combatant status does not thereby lose his entitlement to prisoner of war privileges. Thus, the question whether military personnel stationed in the Pentagon wear uniform or civilian clothes while at work is irrelevant to their status as lawful combatants while hostilities are raging in Iraq. However, any member of the armed forces who removes his uniform during combat—or even en route to combat or in the course of disengagement from it—becomes an unlawful combatant.

The legal position is the same whether the combatants under discussion are Americans or Iraqis. The *jus in bello* applies equally to both sides in an international armed conflict, regardless of who is in the right—and who is in the wrong—in terms of the *jus ad bellum*.⁴ One of the hallmarks of the hostilities in Iraq, in 2003, was that much of the fighting on the Iraqi side was conducted by “fedayeen” who fought Coalition forces out of uniform. These “fedayeen” were unlawful combatants. But so were any members of the US Special Forces (or other Coalition military units) who fought out of uniform.

Removal by a combatant of a fixed distinctive emblem (such as a uniform) affects his entitlement to prisoner of war status. It exposes him either to (i) trial by the domestic courts of the Detaining Power for any act amounting to an ordinary crime under the local legal system—such as murder, arson, etc.—which would be condoned if carried out by lawful combatants in the course of hostilities; or to (ii) detention without benefit of the immense panoply of protection spread over prisoners of war pursuant to Geneva Convention (III). However, removal of the fixed distinctive emblem does not amount to a breach of the *jus in bello* itself, and cannot be deemed a war crime.

Admittedly, Article 37 of Additional Protocol I of 1977 provides:

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

....

(c) the feigning of civilian, non-combatant status.⁵

Neither the United States nor Iraq is a Contracting Party to the Protocol which is, therefore, inapplicable in the hostilities between them. But, in any event, the provision of Article 37(1)(c) must be viewed as curious and in some respects misleading. On the face of it, a radical change is brought about in customary international law as regards the status of combatants who feign civilian status by removing their fixed distinctive emblem and wear plain clothing. In conformity with Article 37(1)(c), if the act leads to the killing, injury or capture of an adversary, who is invited to believe that he is facing a civilian, the act is considered perfidious, and it constitutes a direct breach of the *jus in bello* itself.

The wording of Article 37(1)(c), to say the least, is surprising, inasmuch as the Protocol in general—far from imposing more stringent constraints on combatants taking off their fixed distinctive emblem—actually relaxes in a controversial way the standards of customary international law in this context. How can one account for the singular thrust of the new stricture? The answer is that Article 37(1)(c) does not amount to much more than lip-service. Any lingering doubt is dispelled by a rider in Article 44(3) (where much of the controversial relaxation of unlawful combatancy occurs): “Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).”⁶ Even the ICRC Commentary concedes that “[t]here is a certain contradiction in terms” between the provisions of Article 37(1)(c) and Article 44(3).⁷

Since—under customary international law—the removal of a fixed distinctive emblem (such as uniform) by a combatant during military operations is a matter of loss of privileged status, and not a breach of the *jus in bello* (let alone a war crime), it follows that each belligerent party is at liberty to factor in a cost/benefit calculus as to whether or not circumstances militate in favor of retaining the fixed distinctive emblem or removing it. If members of Special Forces units are fighting behind enemy lines, and if the enemy has a demonstrably poor track record in observing the *jus in bello*’s norms concerning the protection of *hors de combat* enemy military personnel, the conclusion may be arrived at that on the whole it is well worth assuming the risks of (potential) loss of prisoner of war status upon capture while benefiting from the (actual) advantages of disguise. However, as a rule and in terms of the armed forces in general (as distinct from high-hazard commando units), the prospect of loss of prisoner of war status is a significant consequence that should, and does, weigh heavily on commanders before they give their assent to an adventurous course of action.

The preservation of traditional modes of combat by uniformed (or otherwise properly identified) soldiers is a matter of great import. The only way to ensure respect for the basic principle of distinction between civilian and combatants, protecting the latter from attack and injury, is to enable each belligerent party to know

whom it is facing. A combatant disguising himself as a civilian deserves the sanction of loss of prisoner of war status for he endangers all civilians.

Dealing with Suicide Bombers

There is currently a lacuna in the *jus in bello*, insofar as the growing phenomenon of suicide bombers disguised in civilian clothes is concerned.⁸ Clearly, suicide bombers disguised in civilian clothes are unlawful combatants. But what effective sanction is available against them? By its very nature, the sanction of detention or prosecution (under the domestic legal system) is irrelevant. A civilian (or a combatant out of uniform) who merely prepares himself to become a human bomb, but is thwarted in the attempt, can still be subject to detention or prosecution. Once the act is executed, the perpetrator is beyond the reach of the law. The question as to which measures can be taken by way of deterrence against potential suicide bombers is by no means resolved at the present time, especially in light of the generally upheld principle that nobody can be punished for an offense he has not personally committed.⁹ Accomplices and accessories to the terrorist act can evidently be prosecuted or detained, but members of the perpetrator's family—or others associated with him—cannot be held responsible for his conduct solely because of that connection.

A specific question relating to suicide bombers arises in the context of naval warfare. The issue is how to protect hospital ships from immense potential peril of being sunk by suicide bombers operating from speedboats (*à la* the well-known attack against the *USS Cole*), with a view to causing vast numbers of casualties. The problem is derived from the fact that Article 35 of Geneva Convention (II) of 1949, in listing conditions not depriving hospital ships of protection, indicates that arms held on board must be confined to those kept by the crew for the maintenance of order, for their own defense or that of the sick and wounded.¹⁰ This appears to exclude machine guns (and of course heavier armament) which may repel suicide bombers.¹¹ How can hospital ships be safeguarded against the external threat of suicide bombers in the absence of adequate armament on board? Probably, the best solution would be to allow light armed naval craft to patrol the waters around hospital ships. But the matter is not currently addressed by Geneva Convention (II) or by any other instrument.

Feigned Surrender

The above-mentioned Article 37 of Additional Protocol I, in prohibiting the act of killing, injuring or capturing an adversary by resort to perfidy, refers also to: "(a)

the feigning of . . . a surrender.”¹² No doubt, this is a reflection of customary international law. In Iraq, there were many instances in which surrender was feigned perfidiously. It must be appreciated that the killing, injuring or capture of an adversary, and the perfidious resort to feigning of an intent to surrender, need not be committed by the same person or persons. Should combatants hoisting the white flag of surrender be in collusion with their companions (who are lying in wait), perfidy is consummated once the latter open fire upon enemy soldiers stepping forward to take the former as prisoners of war. Still, collusion is the key to such manifestation of perfidy. In many combat situations, some individuals (or even units) surrender while others continue to fight. Absent collusion, the fact that John Doe persists in shooting does not mean that Richard Roe is feigning when raising the white flag. To be on the safe side, the adverse party’s troops need not expose themselves to unnecessary risks, and they may demand that Richard Roe step forward unarmed.¹³

“Human Shields”

Possibly the most characteristic feature of the hostilities in Iraq in 2003 is that the Saddam Hussein regime constantly—and flagrantly—resorted to the tactics of intermingling civilians and combatants, using civilians as “human shields” with a view to protecting combatants and military objectives. The deliberate intermingling of civilians and combatants, designed to create a situation in which any attack against combatants would necessarily entail an excessive number of civilian casualties, is a flagrant breach of the *jus in bello*. Article 51(7) of Protocol I proclaims: “The 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, favor or impede military operations.”¹⁴ The concept lying at the root of the prohibition appears already in Article 28 of Geneva Convention (IV): “The presence of a protected person may not be used to render certain points or areas immune from military operations.”¹⁵ Irrefutably, this norm mirrors customary international law.¹⁶ Utilizing the presence of civilians or other protected persons to render certain points, areas or military forces immune from military operations is recognized as a war crime by Article 8(2)(b)(xxiii) of the 1998 Rome Statute of the International Criminal Court.¹⁷ The reference to other protected persons extends beyond civilians to prisoners of war, military medical personnel, etc.¹⁸

There are three ways in which the shielding of military objectives by civilians can be attempted:

(i) One scenario relates to civilians who voluntarily choose to serve as human shields, with a view to deterring an enemy attack against combatants or military objectives. Such conduct would amount to an active participation in the hostilities on the part of the civilian volunteers, who would consequently become (unlawful) combatants.

(ii) The second scenario comes into play when combatants compel civilians (either enemy civilians or their own) to move out and join them in military operations. The civilians in question may be obliged to serve as a screen to marching combatants, sit on locomotives of military trains in transit, etc. Acting as they do under duress, these civilians do not become combatants. Those who coerce the civilians to act in such a manner assume full criminal responsibility for their conduct.

(iii) The third scenario is a variation of the second. The only difference is that, instead of the civilians being constrained to join the combatants, the combatants (or military objectives) join the civilians. That is done, e.g., by combatants emplacing tanks or artillery pieces in the courtyard of a functioning school or in the middle of a dense civilian residential area. Likewise, military units may infiltrate columns of civilian refugees (as happened during the Korean War), in order to mask a military operation.¹⁹ Once more, the civilians do not become combatants as a result of the military action taken.

All three types of attempts to protect combatants or military objectives with human shields are equally unlawful.

The crucial question is whether the brazen act of shielding a military objective with civilians (albeit a war crime) can effectively tie the hands of the enemy by barring an attack. Article 51(8) of Protocol I states that a violation of the prohibition of shielding military objectives with civilians does not release a belligerent from its legal obligations *vis-à-vis* the civilians.²⁰ What this means is that the principle of proportionality (discussed below) remains relevant. However, even if that is the case, the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that, if an attempt is made to shield military objectives with civilians, civilian casualties will be higher than usual. To quote Louise Doswald-Beck, “[t]he Israeli bombardment of Beirut in June and July of 1982 resulted in high civilian casualties, but not necessarily excessively so given the fact that the military targets were placed amongst the civilian population.”²¹

Customary international law is certainly more stringent than the Protocol on this point. It has traditionally been perceived that, should civilian casualties ensue from an illegal attempt to shield combatants or military objectives, the ultimate responsibility lies with the belligerent State placing innocent civilians at risk.²² A belligerent State is not vested by the *jus in bello* with the power to block an otherwise legitimate attack against combatants (or military objectives) by deliberately placing civilians in harm's way.²³

Abuse of Hospitals, Mosques and Schools

Throughout the hostilities of 2003, the Iraqis consistently used hospitals, mosques and schools as weapon arsenals, staging areas for military operations and launch pads for attacks against Coalition forces. It goes without saying that hospitals, mosques and schools are civilian objects which are entitled to protection—indeed, special protection because of their medical, religious and cultural nature—from attack. However, the *jus in bello* is clear about the requirement to not abuse that protection. When hospitals, mosques and schools are put to military use, their protection is terminated and they become military objectives.²⁴ Article 52 of Protocol I clarifies in Paragraph 2 that any object can turn into a military objective through use (making an effective contribution to military action); the sole qualification is proclaimed in Paragraph 3: “In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”²⁵ It must be borne in mind that the presumption is patently rebuttable, and it arises only in case of doubt. There is no room for doubt once combatants are exposed to direct fire from a supposedly civilian object.²⁶ If a steeple of a church or a minaret of a mosque is used as a sniper's nest, doubt is eliminated and the enemy is entitled to treat it as a military objective.

Even Article 53 of the Protocol, which lends special protection to certain cultural objects and places of worship constituting the cultural or spiritual heritage of peoples, prohibits their use in support of the military effort.²⁷ Article 13 adds that the protection of civilian medical units shall cease if they are used to commit, outside their humanitarian function, acts harmful to the enemy.²⁸

The pivotal issue here is proportionality. That is to say, in the words of Judge Higgins, in her Dissenting Opinion in the ICJ Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*: “even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.”²⁹ Protocol I does not employ the phrase “disproportionate,” preferring, in Article 51(5)(b), the term “excessive.”³⁰ Thus, it would be excessive to destroy a

hospital, with many dozens of civilian casualties, in order to eliminate a single enemy sniper.³¹ In contrast, if, instead of a single enemy sniper, a whole artillery battery would operate from within the hospital, such destruction may be warranted.³²

Individual Targeting of Central Figures in the Regime

Pursuant to the *jus in bello*, all combatants can be lawfully targeted.³³ This includes all members of the armed forces (other than medical or religious personnel), whether or not they are actually engaged in combat.³⁴ When a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack. The *jus in bello* does not preclude singling out an individual enemy combatant as a target, i.e., “attacks, by regular armed military forces, on specific individuals who are themselves legitimate military targets.”³⁵ Thus, leaders of the Iraqi regime—like Saddam Hussein—who wore military uniforms and prided themselves on holding high-ranking positions in the Iraqi military hierarchy could be targeted by Coalition forces, provided that the latter did not entrust the mission to unlawful combatants, as discussed earlier.

Looting by Enemy Civilians

Pursuant to customary international law, as reflected in the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention II of 1899 and IV of 1907, pillage of towns and other places is forbidden, either in assault (Article 28)³⁶ or in occupied territories (Article 47).³⁷ Pillage means looting (or plundering) of enemy, public or private, property by individuals for private ends.³⁸ Looting is a common phenomenon in warfare, but it is usually perceived as a problem affecting the belligerent forces (especially in assault or in occupation). The Iraqi situation was somewhat singular in that the collapse of the Saddam Hussein regime brought about prolonged large-scale looting of Iraqi public and private edifices (including, notoriously, the national museums) by the local population going on the rampage. Undeniably, the *jus in bello* prohibition of pillage covers all types of looting by whoever is undertaking it. The obligation of belligerent parties is evident, and it is reflected (*inter alia*) in Article 4(3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: “The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, or any acts of vandalism directed against, cultural property.”³⁹ Surely, this covers all types of looting, including that carried out by local inhabitants against their own Government, institutions and co-nationals.

The Status of Journalists

Article 79 of Protocol I enunciates that journalists engaged in dangerous professional missions in areas of armed conflict are to be considered and protected as civilians.⁴⁰ Journalists do not lose their status as civilians by accompanying armed forces⁴¹ (or being “embedded” in them). It does not matter what their specific mission as members of the media is: the expression “journalists” covers photographers, TV cameramen, sound technicians, and so on.⁴²

All the same, it must be understood that when journalists choose to go into the combat zone, with a view to covering hostilities from the front, they are engaged in a dangerous professional mission. Being civilians, journalists must not be attacked deliberately. But one should not be surprised when journalists are accidentally caught in the cross-fire between the belligerent parties (as happened on several occasions in Iraq). It is unrealistic to expect journalists to undertake a dangerous professional mission without casualties.

In any event, journalists must behave as civilians. If they go on their mission under heavily armed guard, and attempt to pull heroic feats (using, if necessary, their escorts), they are liable to lose their protection.

Treatment of Prisoners of War

Judging by media reports, a number of Coalition soldiers captured by Iraqi armed forces may have been executed. If so, this was in direct contravention to the most fundamental rule of Geneva Convention (III) Relative to the Treatment of Prisoners of War, encapsulated in Article 13 (first Paragraph).⁴³ Willful killing of prisoners of war constitutes a “grave breach” of the Convention, as per Article 130,⁴⁴ namely, a war crime.

The Iraqis also interrogated American prisoners of war on television in a manner that many people in the United States found objectionable. Such interrogation may have amounted to a violation of Article 13 (second Paragraph) of the Convention, which mandates the protection of prisoners of war against insults and public curiosity.⁴⁵ However, even assuming that that was the case, it is noteworthy that such an act (unless amounting to torture or inhuman treatment) does not constitute a grave breach of the Convention under Article 130. Moreover, interrogation on television at least attested that the prisoners of war in question were alive in captivity. The appearance on television therefore substantially reduced the chances of the subsequent execution of the prisoners of war. It is a matter of record that all American prisoners of war seen on television were in fact, eventually, found alive.

The Applicability of the Law of Belligerent Occupation

The Coalition was very eager to present its forces in Iraq as an army of liberation. But notwithstanding the fact that the overthrow of the Saddam Hussein regime brought liberation to the Iraqi people, it must be appreciated that—pursuant to international law—the legal status of the Coalition forces in Iraq is not that of liberators but that of belligerent occupants. Belligerent occupation is governed by Articles 42–56 of the Hague Regulations of 1899/1907,⁴⁶ as well as Geneva Convention (IV) of 1949.⁴⁷ It is true that, following the unconditional surrender—and total collapse—of Nazi Germany and Imperial Japan at the close of World War II (in May and August 1945, respectively), the Allied countries did not regard themselves as subject to the application of the Hague Regulations in running the two countries.⁴⁸ However, that was before the adoption of Geneva Convention (IV) in 1949. Article 2 (second Paragraph) of Geneva Convention (IV) makes it clear that the Convention applies to “all cases of partial or total occupation of the territory of a High Contracting Party.”⁴⁹ It is also noteworthy that the Security Council explicitly refers to the Coalition forces in Iraq as “Occupying Powers” in two Chapter VII resolutions adopted unanimously (initiated, in fact, by the United States and the United Kingdom): Resolution 1472 (2003) and, even more significantly, Resolution 1483 (2003). Resolution 1472 refers to the duty of the Occupying Power to ensure the food and medical supplies of the population of Iraq.⁵⁰ Resolution 1483 mentions the responsibilities and obligations under applicable international law of the United States and the United Kingdom as occupying powers; and calls upon all concerned to comply fully with their obligations under international law, including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.⁵¹

The application of the Hague Regulations and Geneva Convention (IV) to Iraq is liable to raise a number of issues, such as:

(a) The duty, under Article 43 of the Hague Regulations, to “restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁵² Article 43 has far-reaching repercussions.⁵³ It should be emphasized that the Occupying Power must ensure, as far as possible, that life in the occupied territory is not paralyzed by armed bands and saboteurs. A state of anarchy, which characterized at least parts of Iraq for a number of weeks following the end of major hostilities, could not be allowed to continue.

(b) While regime change in Iraq—i.e., the overthrow of the dictatorial regime of Saddam Hussein and the Ba’ath Party—was merely a natural

consequence of the Coalition's victory in the Gulf War, American notions of changing the structure of Iraq, for instance, transform it from a unitary State to a federal State, may run into difficulties (unless gaining the freely expressed consent of the local population). Much depends on circumstances. It is noteworthy that, during World War I, Germany was accused of a breach of Article 43 when it tried to change the regional organization of occupied Belgium into two administrative parts (Flemish and Walloon).⁵⁴ On the other hand, when the British divided occupied Libya into two administrative districts (Cyrenaica and Tripolitania) during World War II, there was no complaint.⁵⁵

(c) Pursuant to the Hague Regulations, there are many issues relating to the handling of public and private property in occupied territories. The Regulations are not necessarily draconic for the Occupying Power. Thus, the Coalition forces could have kept the billions of dollars of cash and gold bullions found in caches left behind by the leaders of the Saddam Hussein regime. Article 53 (first Paragraph) of the Regulations expressly allows an army of occupation to take possession of cash, funds etc. which are the property of the State.⁵⁶ The rule is similar to that governing the capture of the enemy's State cash and funds on the battlefield: these constitute booty of war.⁵⁷ In the event, notwithstanding the preceding provisions, the Coalition, owing to its self-perception as a liberator of Iraq, chose to take the altruistic step of preserving the troves found for the benefit of the Iraqi people.

(d) However, in other instances the Hague Regulations may tie the hands of the Coalition. There are questions spawned by the principle that the Occupying Power, under Article 55, can only be regarded as "administrator and usufructuary" of public immovable property.⁵⁸ One such problem affects the drilling of oil, especially in light of a rather controversial legal opinion of the Department of State—offered when Israel developed new oil fields in the Gulf of Suez—but now liable to haunt the Coalition in Iraq.⁵⁹

Having said all that, it should be noted that under Article 6 of Geneva Convention (IV), the application of most—albeit by no means all—of the provisions of the Convention ceases one year after the general close of military operations.⁶⁰ The general close of major combat operations has already been announced, albeit perhaps somewhat prematurely. In any event, it is generally hoped (and expected) that the full application of the Geneva Convention would prove a relatively temporary matter.

Notes

1. Professor Dinstein is Yancowicz Professor of Human Rights and Pro-President at Tel Aviv University (Israel).
2. See Yoram Dinstein, *Unlawful Combatancy*, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 247 (2002).
3. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(2)(b), 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 507, 513 (Dietrich Schindler and Jiri Toman eds., 4th ed. 2004).
4. See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 140–147 (3d ed. 2001).
5. 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, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 3, at 711, 730.
6. *Id.* at 733.
7. Jean de Preux, *Article 44*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 519, 537 (Yves Sandoz et al. eds., 1987).
8. The wearing of civilian clothes lies at the core of the problem. Some suicide attacks (epitomized by Japanese *kamikaze* pilots in World War II, flying properly marked warplanes) come within the ambit of lawful combatancy.
9. See Article 33 (first Paragraph) of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 3, at 575, 590.
10. Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 3, at 485, 496.
11. The official ICRC Commentary refers to “individual portable weapons, such as side-arms, revolvers or even rifles.” COMMENTARY, II GENEVA CONVENTION 194 (Jean Pictet et al. eds., 1960).
12. Protocol I, *supra* note 5, at 730.
13. See Law of War Workshop 7-30–7-31 (US Army, Judge Advocate General, 1999).
14. Protocol I, *supra* note 5, at 736.
15. Geneva Convention (IV), *supra* note 9, at 589.
16. See JUDITH G. GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 153 (1993).
17. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9* (1998), *reprinted in* 37 INTERNATIONAL LEGAL MATERIALS 999, 1008 (1998).
18. See William J. Fenrick, *Article 8(2)(b)(xxiii)*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 253, *id.* (O. Triffterer ed., 1999).
19. See Chistopher D. Booth, *Prosecuting the ‘Fog of War’: Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by U.S. Forces during the Opening Days of the Korean War in the Village of No Gun Ri*, 33 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 933, 972 n.301 (2000).
20. Protocol I, *supra* note 5, at 736.
21. See Louise Doswald-Beck, *The Civilian in the Crossfire*, 24 JOURNAL OF PEACE RESEARCH 251, 257 (1987).
22. See W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 162–163 (1990).

23. See Andrew D. McClintock, *The Law of War: Coalition Attacks on Iraqi Chemical and Biological Weapon Storage and Production Facilities*, 7 EMORY INTERNATIONAL LAW REVIEW 633, 663–664 (1993).
24. For a full treatment of the subject of military objectives, see Yoram Dinstein, *Legitimate Military Objectives under the Current Jus in Bello*, 31 ISRAEL YEARBOOK ON HUMAN RIGHTS 1 (2001).
25. Protocol I, *supra* note 5, at 737.
26. See Waldemar A. Solf, *Article 52, in NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 318, 327 (Michael Bothe, Karl J. Partsch and Waldemar A. Solf eds., 1982).
27. Protocol I, *supra* note 5, at 737.
28. *Id.* at 721.
29. Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, [1996] ICJ Rep. 226, 587.
30. Protocol I, *supra* note 5, at 736.
31. Cf. Parks, *supra* note 22, at 168.
32. Cf. W. Michael Reisman, *The Lessons of Qana*, 22 YALE JOURNAL OF INTERNATIONAL LAW 381, 395–396 (1997).
33. See Dinstein, *supra* note 24, at 4.
34. See Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE JOURNAL OF INTERNATIONAL LAW 609, 674 (1992).
35. Burrus M. Carnahan, *Correspondent's Report*, 2 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 423, 424 (1999).
36. Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, THE LAWS OF ARMED CONFLICTS, *supra* note 3, at 66, 74.
37. *Id.* at 78.
38. Cf. Armin A. Steinkamm, *Pillage*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1029, *id.* (Rudolf Bernhardt ed., 1997).
39. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 3, at 999, 1002.
40. Protocol I, *supra* note 5, at 752.
41. See Hans-Peter Gasser, *Article 79, in COMMENTARY ON THE ADDITIONAL PROTOCOLS*, *supra* note 7, at 473, 476.
42. See Hans-Peter Gasser, *Protection of the Civilian Population, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 209, 228 (Dieter Fleck ed., 1995).
43. Geneva Convention (III), *supra* note 3, at 517.
44. *Id.* at 557.
45. *Id.* at 517.
46. Hague Regulations, *supra* note 36, at 77–81.
47. Geneva Convention (IV), *supra* note 9, *passim*.
48. See GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 276–86 (1957).
49. Geneva Convention (IV), *supra* note 9, at 580.
50. S.C. Res. 1472, U.N. SCOR, 58th Sess., 4732d mtg., U.N. Doc. S/RES/1472 (2003), *reprinted in* 42 INTERNATIONAL LEGAL MATERIALS 767, *id.* (2003).
51. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003), *reprinted in* 42 INTERNATIONAL LEGAL MATERIALS 1016, 1017 (2003).
52. Hague Regulations, *supra* note 36, at 78.

53. See Yoram Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulations*, 25 ISRAEL YEARBOOK ON HUMAN RIGHTS 1 (1995).
54. See E. H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 89 (1942).
55. See G. T. Watts, *The British Military Occupation of Cyrenaica, 1942–1949*, 37 TRANSACTIONS OF THE GROTIUS SOCIETY 69, 72–73 (1951).
56. Hague Regulations, *supra* note 36, at 80.
57. See Yoram Dinstein, *Booty in Land Warfare*, 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 432, *id.* (Rudolf Bernhardt ed., 1992).
58. Hague Regulations, *supra* note 36, at 80–81.
59. See Monroe Leigh, *Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez*, 16 INTERNATIONAL LEGAL MATERIALS 733 (1977).
60. Geneva Convention (IV), *supra* note 9, at 582.

V

Query: Is There a Status of “Unlawful Combatant?”

Marco Sassòli¹

Introduction

The argument of the United States administration that those individuals captured during the “global war on terror”² are unlawful combatants not entitled to prisoner of war status may be summed up as follows.³ First, the United States is engaged in an international armed conflict—the “war on terrorism.” This is, second, one single worldwide international armed conflict against a non-State actor (al Qaeda) or perhaps also against a social and criminal phenomenon (terrorism). That armed conflict started—without the United States so characterizing it at that time—at some point in the 1990s and will continue until victory. Third, while the United States claims in this conflict all the prerogatives that international humanitarian law (IHL) applicable to international armed conflicts confers upon a party to such a conflict, in particular the right to detain enemy combatants without any judicial decision in Guantanamo; it denies these detainees the protections of most of that law by claiming that their detention is governed neither by the IHL rules applying to combatants nor by those applicable to civilians. Fifth, all those considered to be enemies in the “war on terrorism,” even those denied the benefit of IHL’s full protections, are not dealt with under domestic criminal legislation or under any other new or existing legislation, nor do they benefit from international

human rights law. The US administration claims that their treatment is entirely and exclusively ruled by some mysterious rules of customary IHL.⁴

In this paper I will address the approach of the US administration towards the persons held in the “war on terrorism” from the point of view of IHL. As always when IHL is applied, this implies, first, that the situation in which those persons are involved must be examined to determine whether it is an armed conflict and, if so, whether it is international or non-international in character. Second, for those persons who are covered by IHL, their status under IHL has to be determined.

The Status of the “War on Terrorism” under International Humanitarian Law

IHL is today largely codified in treaties, in particular the four 1949 Geneva Conventions⁵ and the two 1977 Additional Protocols.⁶ The United States is a party to the former, but not to the latter. It recognizes, however, Additional Protocol II as desirable or even as restating existing law, and most, but not all, provisions of Additional Protocol I as reflecting customary international law.

The four Geneva Conventions and Additional Protocol I apply to international armed conflicts. Article 2 common to the Geneva Conventions states that they “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Only States can be parties to the Geneva Conventions. Al Qaeda and terrorism are not States, therefore, the law of international armed conflict does not apply to a conflict between the United States, a State, and them. There is no indication that State practice and *opinio juris* go further and apply the law of international armed conflict to conflicts between States and some non-State actors. On the contrary, and in conformity with the basic construct of the Westphalian system, States have always distinguished between conflicts against one another, to which the whole of IHL applied, and other armed conflicts, to which they were never prepared to apply the same rules, but only more limited humanitarian rules. Even a conflict spreading over borders remained a non-international armed conflict. “[I]nternal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.”⁷

If the aforementioned principles are applied to the “war on terrorism,” the law of international armed conflicts covered the conflict in Afghanistan, because it was directed against the Taliban, representing *de facto* government of that State. As for al Qaeda, where it is acting *de facto* under the global or effective direction or control of the Taliban, the conflict against al Qaeda may also be qualified as international.⁸ Such direction and control exists, however, only in Afghanistan and not elsewhere.

Each component of the “war on terrorism”—and every situation in which persons were arrested—has to be examined and its status determined separately. Until now, it was regretted that once there was an international element to a conflict on a given territory, the whole conflict could not, under consistent State practice, be classified as wholly international, but had to be split off into its components.⁹ Even less could a worldwide conflict be determined to be international simply because some of its components were international. No one claimed during the Cold War that the IHL of international armed conflicts applied to internal conflicts such as those in Greece, Angola, El Salvador, and Nicaragua, or even to political tensions and arrests in Germany, Italy or Latin America, simply because those were part of the Cold War, the “war against communism,” or because there were international armed conflicts between proxies of the two superpowers in the Near East, Korea, or Vietnam.

Components of the “war on terrorism” that do not qualify as international armed conflicts may be non-international armed conflicts covered by Article 3 common to the four Geneva Conventions and by Additional Protocol II. To fall under those provisions they must, however, be armed conflicts. Criteria permitting such classification are the intensity; number of active participants; number of victims; duration and protracted character of the violence; organization and discipline of the parties; capability to respect IHL; collective, open and coordinated character of the hostilities; direct involvement of governmental armed forces (as opposed to law enforcement agencies); and *de facto* authority by the non-State actor over potential victims.¹⁰

Other situations are not armed conflicts at all. Additional Protocol II excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”¹¹ Terrorist actions by private groups have not customarily been viewed as creating armed conflicts.¹² The United Kingdom stated when it ratified Additional Protocol I “that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.”¹³ The British and Spanish campaigns against the IRA (Irish Republican Army) and ETA (*Euskadi ta Askatasuna*) have not been treated as armed conflicts under IHL.¹⁴

If IHL applies, each conflict has its own beginning and its own end. At the end of active hostilities in an international armed conflict, prisoners of war (not accused of or sentenced for a crime) must be repatriated. The detention, such as of Taliban fighters captured in Afghanistan, cannot be prolonged simply because in the Philippines or in Iraq the “war on terrorism” goes on.

*The Status of Persons Held in the “War on Terrorism”
under International Humanitarian Law*

Under the Law of International Armed Conflict

In international armed conflicts, there are two categories of “protected persons” that are subject to two very different legal regimes—combatants, who become prisoners of war protected by Geneva Convention III if they fall into the power of the enemy, and civilians protected by Geneva Convention IV when in enemy hands.

“Unlawful combatants?”

The US administration claims that the persons it holds in the “war on terrorism” are neither combatants nor civilians but “unlawful combatants.” President Bush himself made this argument concerning the status of Taliban fighters.¹⁵ Other administration officials extend it to members of al Qaeda and others qualified as “terrorists.”¹⁶ According to the text, context and goals of Geneva Conventions III and IV, however, no one can fall between the two conventions and therefore be protected by neither.¹⁷

The first paragraph of Article 4 of Geneva Convention IV states as follows: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” According to the fourth paragraph of that article, persons protected by Geneva Convention III “shall not be considered as protected persons within the meaning of the present Convention.” This clearly indicates that anyone fulfilling the requirement for protected person status¹⁸ that is not protected by the Third Convention falls under the Fourth Convention. The *Commentary* published by the International Committee of the Red Cross (ICRC) provides:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.¹⁹

The preparatory work for Article 4 confirms this interpretation. The ICRC had first suggested referring to “persons who take no active part in hostilities.” The XVIIth International Red Cross Conference criticized this phrasing because it did not “cover those who commit hostile acts whilst not being regular combatants,

such as *saboteurs* and *franc-tireurs*.”²⁰ This problem was reported to the Diplomatic Conference that was negotiating the four conventions, which then adopted the present wording. Moreover, Article 5 of Geneva Convention IV allows for some derogation from the protective regime of that Convention for persons engaged in hostile activities. If such persons were not covered by the Convention, such a provision would not have been necessary.

From a humanitarian perspective, it is dangerous to revive such an easy escape category for detaining powers as “unlawful combatants.” No one should fall outside the law and in particular not outside the carefully built up protective system offered by the Geneva Conventions. They are the minimum safety net in the profoundly inhumane situation that is war, in which most of the other legal safeguards tend to disappear. The US administration has declared that it treats all captured “terrorists” humanely. First, such a vague commitment is not sufficient. The law covers even those who commit the most horrible crimes; only this allows us to judge over them. Second, other, less scrupulous States may take advantage of such a new loophole by, for example, denying the protection of the conventions to US personnel.

In conclusion, all persons who are covered by the IHL of international armed conflicts and fulfill the nationality requirements must perforce be either combatants or civilians.

Combatants

Combatants are defined as members of the armed forces of a party to the international armed conflict. The United States argues that the Taliban held in Guantanamo, who are members of the armed forces of the *de facto* government of Afghanistan, are not prisoners of war, because they “have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war.”²¹ This allegation may astonish those who remember that during Operation Enduring Freedom, the United States stressed that it attacked Taliban command and control centers and did not complain that it was impossible to distinguish the Taliban from civilians.²² If the allegation were true, the legal consequence would be that the Taliban are indeed denied prisoner of war status if they are considered as “members of other militias [or] . . . volunteer corps, including . . . resistance movements,” but not if they are “members of the armed forces of a Party to the conflict.”²³ It is at least arguable that the Taliban belong to the latter category. For regular armed forces, however, it would be dangerous to require respect for the laws of war as a precondition for prisoner of war status. In all armed conflicts, the enemy is accused of not complying with IHL, and such accusations are all too often accurate. If IHL violations by regular armed forces were permitted to deprive all their members,

independently of their individual behavior, of prisoner of war status, that status could frequently not provide its protective effect. Historically, the United States never invoked such an argument concerning the German Wehrmacht, which cannot be considered to have regularly complied with the laws of war.

As for the al Qaeda members captured in Afghanistan, there may be justification to deny them prisoner of war status on two bases. First, al Qaeda was a separate entity that was distinct from the military forces of the enemy State in the international armed conflict, Afghanistan. Second, even if considered as an Afghan militia, it is highly doubtful whether al Qaeda complied with the requirements to distinguish itself from the civilian populace and conduct its operations in compliance with the law.²⁴

In case of doubt as to whether persons who have committed a belligerent act are combatants, Geneva Convention III prescribes that they must be treated as prisoners of war “until such time as their status has been determined by a competent tribunal.”²⁵ The United States established such tribunals in the Vietnam war and the 1991 Gulf War,²⁶ but it argues that in the case of those detained in Guantanamo, there is no doubt that they are not entitled to prisoner of war status.²⁷ If the applicability of the clause merely depended on whether the detaining power has doubts, the latter could always escape from its obligation, which would make the clause practically useless.²⁸

If a person fallen into the power of the enemy is determined to be a combatant, he or she is a prisoner of war. Prisoners of war may be interned, not as a punishment, but to prevent them from rejoining the fighting. Therefore no individual decision needs to be taken in order to detain them. The mere fact that they are an enemy combatant is sufficient justification for their detention until the end of active hostilities in that conflict.²⁹ Classification as a prisoner of war prevails, as *lex specialis* for combatants, over human rights law and domestic law requiring an individual judicial detention determination. While in detention, prisoners of war benefit however from the protections of Geneva Convention III, a detailed regime that ensures they are treated not only humanely, but also not as prison inmates,³⁰ since they are not serving a sentence and have committed no unlawful act.

Civilians

During an international armed conflict, civilians who fulfill certain nationality requirements³¹ are protected if they fall into the hands of a belligerent and enemy, in this case Afghan, nationals are always protected. In an occupied territory, nationals of a third country other than an ally of the occupier are equally protected. On a party's own territory, only neutral nationals are protected, and then only if they do not benefit from normal diplomatic protection.³² Protected civilians may not be

detained, except under two circumstances. First, detention may be authorized under domestic legislation (or security legislation introduced by an occupying power) for the prosecution and punishment of criminal offenses (including direct participation in hostilities). Second, civilians may be interned for imperative security reasons, upon individual decision made in a regular procedure (which must include a right of appeal) prescribed by the belligerent concerned.³³ Such civilians are civil internees whose treatment is governed by extremely detailed provisions of Geneva Convention IV and their cases must be reviewed every six months.³⁴

Under any circumstances, civilians who fell into US hands in Afghanistan may not be held in Guantanamo, but only in Afghanistan. While combatants may be held as prisoners of war in every corner of the earth, civilians protected by Geneva Convention IV may indeed never be deported out of an occupied territory.³⁵ Afghanistan was an occupied territory because it came under the control of the United States and its allies during an international armed conflict.

Surprisingly, and much to my relief, the Legal Adviser of the US State Department has admitted that “unlawful combatants” are protected by Geneva Convention IV.³⁶ Nevertheless the US administration has not yet comprehended the practical consequences of this acknowledgement, as it still detains those persons in Guantanamo and denies them individual judicial or administrative determinations of the basis for their detention.

It may appear ironic to classify heavily armed “terrorists” captured in an international armed conflict who are not entitled to benefit from combatant and prisoner of war status as “civilians.” Borderline cases never correspond to the category’s paradigm of the individual who has taken no part in the hostilities. Nevertheless these persons fall within the parameters of the law. What is important is that “civilian status” does not produce absurd results. As “civilians,” unprivileged combatants may be attacked while they unlawfully participate in hostilities. After arrest, Geneva Convention IV does not bar their punishment for unlawful participation in hostilities; it even prescribes such punishment for war crimes. In addition, it permits administrative detention for imperative security reasons and for derogations from protected substantive rights of civilians within the territory of a State and from communication rights within occupied territory.³⁷ Geneva Convention IV was not drafted by professional do-gooders or academics, but by experienced diplomats and military leaders who fully appreciated the necessity of concluding an agreement that addressed the security needs of a State confronted with dangerous people.

Some may find it shocking that unprivileged combatants classified as civilians have an advantage over captured lawful combatants in that the former are entitled to individual judicial or administrative status determinations, while the latter are

not. But combatants are normally easily identified and given prisoner of war status based on objective criteria. Additionally, members of a State’s military forces generally will acknowledge that they are in the armed forces. In contrast, the organizational membership and past behavior of an unprivileged combatant and the future threat he or she represents can only be determined individually.

Under the Law of Non-international Armed Conflicts

The international humanitarian law applicable to non-international armed conflicts does not provide for combatant or prisoner of war status, contains no other rules on the status of persons detained in connection with the conflict, nor details the circumstances under which civilians may be detained. The question as to whether “unlawful combatants” are combatants or civilians simply does not arise in non-international armed conflicts. In such conflicts, IHL cannot possibly be seen as providing a sufficient legal basis for detaining anyone. It simply provides for guarantees of humane treatment and, in prosecutions for criminal offenses, for certain judicial guarantees of independence and impartiality. Possible bases for arrest, detention or internment are entirely governed by domestic legislation and the human rights law requirement that no one be deprived of his or her liberty except on such grounds and in accordance with procedures as are established by law.³⁸ In State practice too, governments confronted by non-international armed conflicts base arrests, detentions, and internment of rebels, including rebel fighters, either on domestic criminal law or on special security legislation introduced during the conflict. They never invoke the “law of war.”

Outside Armed Conflicts

IHL applies only to armed conflicts. It offers no protection to those held in connection with those components of the “war on terrorism” that do not meet the threshold of a non-international armed conflict. Because IHL has no application to conduct falling below this threshold, it certainly cannot provide a legal basis for detaining in Guantanamo or elsewhere those that engage in such conduct.

Conclusion

Meant as the branch of international law providing protection to all those affected by or involved in armed conflicts, IHL has become for the US administration a justification for denying such individuals and others detained under the rubric of the “war on terrorism” any of the protections provided by human rights law and US domestic legislation. However, while the United States thus invokes IHL, it is not ready to provide those detained the full benefit of this law. In effect, the US

administration argues that they are covered by no law except for those never defined and mysterious rules of customary IHL.

To properly apply IHL, every component of the “war on terrorism,” the circumstances of each individual’s arrest or capture, and the basis of each detention must be examined and classified separately. Many of those held in the “war on terrorism” do not fall within the parameters of persons covered by IHL. Others benefit from the fundamental guarantees of IHL applicable to non-international armed conflicts. Again, however, that law provides no legal basis for their detention, an issue dealt with by domestic law. Those persons who were captured in Afghanistan are protected by the IHL of international armed conflicts. Under that law, only those who are prisoners of war may be held in Guantanamo. Those who are not prisoners of war are civilians. As such, they may only be detained in Afghanistan and only after individual judicial or administrative determinations. I am convinced that the “war on terrorism” can be won—and victory may even be easier—if the carefully drafted standards of IHL are respected.

Notes

1. Professor Marco Sassoli is Professor of International Law at the University of Quebec in Montreal, Canada.
2. The Bush administration uses this phrase as well as the phrase “war on terror” to describe the campaign against terrorism. In this paper, I will use the phrase “war on terrorism.” It is intended to be synonymous with the terms used by the US administration.
3. For a legal explanation of the US position, see Anthony Dworkin, Crimes of War Project, Excerpts from an Interview with Charles Allen, Deputy General Counsel for International Affairs, US Department of Defense (Dec. 16, 2002) *available at* <http://www.crimesofwar.org/onnews/news-pentagon-trans.html> (last visited Oct. 31, 2003), and, with a more moderate approach, William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE JOURNAL OF INTERNATIONAL LAW 319 (2003). That position was partly accepted by the courts in *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), and *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). For a critical assessment, see Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 241, 249 (2003); Michael J. D. Sweeney, *Detention at Guantanamo Bay—A Linguistic Challenge to Law*, 30 HUMAN RIGHTS 15 (2003); Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War*, 28 YALE JOURNAL OF INTERNATIONAL LAW 325 (2003); Luisa Vierucci, *Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled*, 1 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 284 (2003); Catherine Moore, *International Humanitarian Law and the Prisoners at Guantanamo Bay*, 7:2 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 1 (2003); Manooher Mofidi & Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: *The Law and Politics of Labels*, 36 CORNELL INTERNATIONAL LAW JOURNAL 59 (2003); Richard J. Wilson, *United States Detainees at Guantanamo Bay: The Inter-American Commission on Human Rights Responds to a “Legal Black Hole,”* 10:3 HUMAN RIGHTS BRIEF Spring 2003, at 2, *available at* <http://www.wcl.american.edu/hrbrief/10/3detainees.cfm> (last visited Oct. 31, 2003); Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: the Third Geneva Convention and the*

- ‘War on Terror,’ 44 HARVARD INTERNATIONAL LAW JOURNAL 301 (2003); and Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the War on Terror*, 27 FLETCHER FORUM OF WORLD AFFAIRS 55 (2003).
4. *See in particular* United States: Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba (Apr. 12, 2002), *reprinted in* American Society of International Law, *International Law in Brief* (June 4, 2002), <http://www.asil.org/ilib/ilib0508.htm#r2> (last visited Oct. 31, 2003).
5. Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 197 (Adam Roberts and Richard Guelff eds., 3d ed. 2000); Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra*, at 222; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra*, at 244 [hereinafter Geneva Convention III]; and Geneva Convention Relative [IV] to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra*, at 301 [hereinafter Geneva Convention IV].
6. Protocol Additional[I] to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 422; Protocol Additional[II] to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 483 [hereinafter Additional Protocol II].
7. LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 136 (2002).
8. *See* Prosecutor v. Tadic, Judgment, No. IT-94-1-A, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999, ¶¶ 116–144, *reprinted in* 38 INTERNATIONAL LEGAL MATERIALS 1518 (1999).
9. Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, in 163/II COLLECTED COURSES 117 (1979); Hans-Peter Gasser, *Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 33 AMERICAN UNIVERSITY LAW REVIEW 145 (1983); James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict* 85 (No. 850) INTERNATIONAL REVIEW OF THE RED CROSS 313 (2003); ERIC DAVID, PRINCIPES DE DROIT DES CONFLITS ARMÉS 153–160 (3d ed. 2002).
10. *See* LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 30–52 (2002).
11. Additional Protocol II, *supra* note 6, art. 1.2.
12. “[A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism . . . are outside the scope of [IHL].” LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 56 (2d ed. 2000).
13. Reservation by the United Kingdom to Article 1.4 and Article 96.3 of Additional Protocol I, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 510, *available at* <http://www.icrc.org/ihl.nsf> (last visited Oct. 31, 2003).
14. HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 318 (1992).
15. White House, Office of the Press Secretary, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> (last visited Oct. 31, 2003).

16. Allen, *supra* note 3; Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus at 7, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf>, at 22 (last visited Aug. 21, 2003).
17. Knut Doermann, *The Legal Situation of 'Unlawful/Unprivileged Combatants'*, 85 (No. 849) INTERNATIONAL REVIEW OF THE RED CROSS 45 (2003). That "unlawful combatants" are protected by Geneva Convention IV is also recognized by Richard R. Baxter, *So-called 'Unprivileged Belligerency': Spies, Guerillas and Saboteurs*, 28 BRITISH YEARBOOK OF INTERNATIONAL LAW 323, 328, 344 (1951). When the concept of "unlawful combatants" was used by the US Supreme Court in *Ex Parte Quirin et al.*, 317 U.S. 1 (1942), Geneva Convention IV did not yet exist.
18. The International Criminal Tribunal for the Former Yugoslavia (ICTY) replaces the nationality standard laid down in Article 4 by an allegiance standard. (See *Prosecutor v. Tadic*, *supra* note 8, ¶¶ 163–69 and our criticism Marco Sassoli & Laura Olson, *Case Report, Judgment, The Prosecutor v. Dusko Tadic, Case No. IT-94-A, ICTY Appeals Chamber* (July 15, 1999), 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 571, 576–77 (2000)).
19. COMMENTARY, IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet ed., 1958).
20. International Committee of the Red Cross, Revised and New Draft Conventions for the Protection of War Victims, Remarks and Proposals Submitted by the ICRC 68 (1949).
21. Statement by the Press Secretary, *supra* note 15.
22. U.S. Department of Defense News Briefing—Secretary Rumsfeld and General Myers (Feb. 8, 2002), available at http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html (last visited Nov. 22, 2003).
23. Geneva Convention III, *supra* note 5, art. 4.A, paras. (2) and (1) respectively.
24. For a detailed discussion, see Vierucci, *supra* note 3, at 392–95.
25. Geneva Convention III, *supra* note 5, art. 5, para. 2.
26. United States Military Assistance Command, Vietnam, Directives No. 381–46, Military Intelligence: Combined Screening of Detainees, 27 December 1967, *reprinted in* MARCO SASSOLI & ANTOINE BOUVIER, *HOW DOES LAW PROTECT IN WAR?* 780–783 (1999) and United States Department of Defense, Report to Congress on the Conduct of the Persian Gulf War (Apr. 1992), *reprinted in* 31 INTERNATIONAL LEGAL MATERIALS 612, 629 (1992).
27. Donald Rumsfeld, Fiscal Year 2003 Department of Defense Budget Testimony, available at <http://www.defenselink.mil/speeches/2002/s20020205-secdef2.html> (last visited Feb. 6, 2002).
28. Cf. *United States v. Percheman*, 32 U.S. 51, 69–70 (1833) ("It is one of the admitted rules of construction, that interpretations which lead to an absurdity, or render an act null, are to be avoided.").
29. Geneva Convention III, *supra* note 5, arts. 21 and 118.
30. *Id.*, art. 22, para. 1.
31. *Supra* note 18.
32. Geneva Convention IV, *supra* note 5, art. 4, para. 2.
33. *Id.*, arts. 41–43 and 78.
34. *Id.*, arts. 79–135.
35. *Id.*, arts. 49 and 76.
36. Taft, *supra* note 3, at 324, refers to Article 64 of Geneva Convention IV, which is located in the part of the convention covering protected civilians in occupied territories.
37. Geneva Convention IV, *supra* note 5, art. 5, paras. 1 and 2 respectively.
38. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 9, 999 U.N.T.S. 171.

VI

Special Forces' Wear of Non-Standard Uniforms

W. Hays Parks¹

In February 2002, newspapers in the United States and United Kingdom published complaints by some nongovernmental organizations (NGOs) about US and other Coalition Special Operations Forces operating in Afghanistan in “civilian clothing.”² The reports sparked debate within the NGO community and military judge advocate ranks about the legality of such actions. At the US Special Operations Command (USSOCOM) Annual Legal Conference May 13–17, 2002, the judge advocate debate became intense. While some attendees raised questions of “illegality” and the right or obligation of special operations forces to refuse an “illegal order” to wear “civilian clothing,” others urged caution. The discussion was unclassified, and many in the room were not privy to information regarding Operation Enduring Freedom Special Forces,³ its special mission units, or the missions assigned them.

The topic provides lessons and questions for consideration of future issues by judge advocates. The questions are:

- (a) What are the facts?
- (b) What is the nature of the armed conflict, and its armed participants?
- (c) What is the relevant law of war?
- (d) What is State practice?

What Are The Facts?

Thirty years ago it was my privilege to serve as the first Marine Corps Representative at The Judge Advocate General's School, US Army, in Charlottesville, Virginia. As the lone Marine on the faculty, I was expected to attend all major public ceremonies, including the graduation of each Judge Advocate Officers Basic Course—the accession course for new lawyers entering the Army. Course graduation warranted a speech by one of the Army JAG Corps' flag officers. Regardless of who the graduation speaker was, the speech was the same. Written by The Assistant Judge Advocate General of the Army, the late Major General Lawrence H. Williams, it was called “the facts speech.” Its message was simple and straightforward: Before charging off to tilt at windmills, be sure you have the facts.

There is much to be said for this admonition and its application in the case at hand. Condemning certain actions or declaring them a law of war violation based upon news accounts is not a sound basis for analysis. No lawyer would prepare his case based solely upon news accounts. Indeed, media reports generally are inadmissible as evidence. Regrettably, there was a rush to judgment by some based on a less-than-reliable source.

The facts surrounding the issue were two-fold. The first had to do with what was being worn, and by whom. The second concerned the motive for the NGO complaint.⁴

In response to the September 11, 2001 al Qaeda terrorist attacks against the World Trade Center and Pentagon, US and coalition Special Forces began operations in Afghanistan in late September 2001. At the request—initially insistence—of the leaders of the indigenous forces they supported, they dressed in indigenous attire. For identification purposes within the Northern Alliance, this included the Massoud pakol (a round brownish-tan or gray wool cap) and Massoud checkered scarf, each named for former Northern Alliance leader Ahmad Shah Massoud, assassinated days before the al Qaeda attacks on the World Trade Center and Pentagon. This attire was not worn to appear as civilians, or to blend in with the civilian population, but rather to lower visibility of US forces vis-à-vis the forces they supported. Al Qaeda and the Taliban had announced a \$25,000 per head bounty on uniformed US military personnel. Placing a US soldier in Battle Dress Uniform (BDU) or Desert Camouflaged Uniform (DCU) in the midst of a Northern Alliance formation would greatly facilitate al Qaeda/Taliban targeting of US Special Forces.⁵ As will be seen in review of the law, dressing in this manner more accurately may be described as wearing a “non-standard uniform” than “dressing as civilians.” Special Forces personnel who had served in Afghanistan with whom I spoke stated that al Qaeda and the Taliban had no difficulty in distinguishing Northern Alliance or Southern Alliance forces from the civilian population.⁶

The fall of Kandahar in early December 2001 was followed by the collapse of the Taliban regime and the swearing-in of Hamid Karzai as Prime Minister. Another aspect of US Special Operations Forces—Army Civil Affairs—began to enter Afghanistan. In November 2001, US Army Forces Central Command (USARCENT) had established the Coalition and Joint Civil Military Operations Task Force (CJCMOTF) using soldiers from the 377th Theater Support Command (TSC), the 122nd Rear Operations Center, and the 352nd Civil Affairs Command. By January 3, 2002, the CJCMOTF was established in Kabul. It served as liaison with local officials of the Interim Government and supervised the humanitarian assistance from US Army Civil Affairs (CA) teams from the 96th Civil Affairs Battalion, who were beginning to operate throughout Afghanistan. CJCMOTF also was the liaison with the US Embassy, and coordinated coalition humanitarian assistance contributions.

The USARCENT Commanding General made the uniform decision, favoring civilian clothing over DCU. His rationale was based on two factors: (a) ability of soldiers to perform humanitarian assistance operations; and (b) safety of Civil Affairs personnel, that is, force protection.⁷ A strong desire existed at the US Central Command (USCENTCOM) headquarters (Tampa) to present a non-confrontational face, as well as a sentiment expressed that NGO would be reluctant to be seen working with uniformed soldiers. Additionally, 96th Civil Affairs Battalion personnel, who initially operated in Islamabad, Pakistan, were ordered by the US Ambassador to Pakistan to wear civilian clothing rather than their uniforms, reflecting the sensitive and unique political environment in which US Army forces were operating. This order was not clarified or countermanded on entry into Afghanistan. Civil Affairs personnel continued to wear Western civilian attire. Eventually some adopted Afghan native attire.⁸

Other reasons existed for continued wear of civilian attire. In some areas, local governors would not talk to uniformed Civil Affairs personnel. In December 2001, the UN-sanctioned International Security Assistance Force (ISAF) began arriving in Kabul in accordance with the Bonn Agreement. United Nations representatives refused to meet with US Army Civil Affairs leaders if they were in uniform.

US Army Civil Affairs units have a long, distinguished history. They played an indispensable role in the European Theater of Operations during and after World War II, and in the postwar occupation of Japan. US Army and Marine Corps Civic Action units played an equally indispensable humanitarian assistance role during the Vietnam War. NGO involvement during those conflicts was virtually non-existent (World War II) or extremely limited (Vietnam).

Under the terms of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), NGOs operate subject to the consent of

relevant States parties to a conflict.⁹ The GC also contemplated a linear battlefield in which NGOs could operate in secure areas, a combat environment different from Afghanistan. Legally and operationally, military operations and requirements take priority over NGO activities. However, NGOs provide valuable services that the military might be expected or required to perform were NGOs not present. Military commanders must give due consideration to this, as the absence of NGOs could add other responsibilities (such as refugee care) to a military commander's burden. At the same time, NGOs cannot expect a risk-free work environment. Military commanders are entitled to make lawful mission-supporting decisions, even if those decisions might place NGOs or other civilians at greater risk.

Service NGOs have become a more significant player in areas of armed conflict over the past decade. NGO emphasis is on mission performance following the principles of humanity, impartiality, independence and neutrality. NGOs feel obliged to maintain independence from the agendas of both the donors that fund them and governments and local authorities that allow them to operate in their territory. In contrast, NGOs see CA engaged in assistance activities as driven by political and security objectives.

The US military leadership was not entirely successful in seeking a dialogue, much less a working relationship, with NGOs in Afghanistan. The relationship was particularly bad as US Army Civil Affairs arrived in Afghanistan. Civil Affairs personnel were denied access to NGO meetings, while some NGOs refused to come to CJCMTF-hosted meetings. A senior on-scene Army Civil Affairs officer concluded that the key issue was NGO image and market share. NGOs who had worked in Afghanistan since the 1980s feared being upstaged by the Army's Civil Humanitarian and Liaison Cells (CHLC). The NGOs also objected to humanitarian projects being used in support of a military campaign.

The CJCMTF served as liaison with the Interim Government and supervised the humanitarian assistance for US Army Civil Affairs teams beginning to operate throughout Afghanistan. Civil Affairs personnel deployed across Afghanistan to provide assessments and identify projects for some \$2 million in initial aid money. The money went directly to local contractors. NGOs wanted to be subcontracted. Based on limited money, a need to have an immediate impact, and concern about whether such use of these funds was permissible, US Army Civil Affairs leadership informed the NGOs that it would not subcontract to NGOs. Moreover, due to security concerns, NGOs were in the main cities but not in the villages where Civil Affairs teams conducted business. Going directly to local contractors increased the fear of some NGOs that they would be cut out of their "market share."

Friction also existed with respect to fiscal accountability. US Army Civil Affairs are expected to account for 100% of funds allocated to it. A substantial amount of money provided NGO—as much as 60%—is directed to "overhead," preventing

its allocation toward the designated project, and full accountability. NGOs resent scrutiny of their financial accountability shortcomings and amounts attributed to overhead. This increased tension between US Army Civil Affairs and the NGOs.

Social reform was another Civil Affairs/NGO point of tension. Contrary to claims of neutrality and impartiality, many NGOs in Afghanistan moved into advocacy of women's rights and human rights. This caused friction with US Army Civil Affairs, whose role is to provide humanitarian relief without interference in local customs, however objectionable they may be. Civil Affairs work stifled NGO agendas on non-humanitarian issues.

A better than average, although uneven, relationship evolved between CA and NGOs at the working, "grassroots" level. This contrasts with a poor relationship at higher levels due to the conflicts identified above. NGO resentment of US Army Civil Affairs and market share concerns apparently prompted the NGO complaint—led by *Médecins sans Frontières*—regarding Civil Affairs wear of civilian clothing.¹⁰ Philosophical differences between NGOs and the military are inevitable. The uniform/civilian clothes issue was symptomatic of a larger issue. It should be noted that not all NGOs agreed with the complaint made by *Médecins sans Frontières*.

In early March 2002, the CJCMOTF commander, desiring to broker a compromise, directed all Civil Affairs personnel in Kabul and Mazar-e-Sharif to return to full uniform. Some Civil Affairs personnel in remote locations (where NGOs would not work due to the risk) were permitted to stay in civilian attire. On March 19, following its review, USCENTCOM supported CJCMOTF's decision. Guidance and authority was provided to ground force commanders to establish uniform policies based upon local threat conditions and force protection requirements.

As a result of the NGO complaint, the issue of military wear of civilian clothing was reviewed within the Department of Defense (DOD). Following DOD-Joint Chiefs of Staff (JCS) coordination, guidance was forwarded to USCENTCOM in May 2002 that was consistent with CJCMOTF guidance issued April 7, 2002. As a result of CENTCOM/CJCMOTF guidance, the number of Civil Affairs and other SOF personnel in civilian clothing had diminished substantially prior to DOD-JCS action or the aforementioned USSOCOM Legal Conference.¹¹

What Are The Legal Issues?

Considering an issue in the public sector, including the military, is similar to private practice or a law school examination. The legal issues have to be identified and addressed. In weighing the situation at hand, the following legal issues were identified:

- Is it lawful for combatants to wear civilian clothing or non-standard uniforms in combat?
- If so, are there legal restrictions in use of either?
- Are there unique law of war considerations, such as risks, a commander should balance in making his decision?

Other questions had to be answered prior to answering these questions.

What is the nature of the armed conflict, and its armed participants? The nature of the armed conflict in Afghanistan was an issue that prompted considerable discussion within and outside the government, in large measure due to the nature of the enemy.

References to al Qaeda and the Taliban as separate entities constituted an incomplete and inaccurate picture. The enemy consisted of a loose amalgamation of at least three groups: the Taliban regime (until its December 2001 collapse, following which it reverted to its tribal origins), the al Qaeda terrorist group, used as the Praetorian Guard for the Taliban leadership (both for internal security prior to and following commencement of US/Coalition operations), and foreign Taliban. The picture was further complicated by the tendency of some to refer to the Taliban as the *de facto* Government of Afghanistan because it exercised rough control over eighty per cent of the country. This was open to debate until collapse of the Taliban, at which time it ceased to be an issue. Up to the time of the Taliban regime collapse in December 2001, a strong case could be made that this was an internal conflict between non-State actors in a failed State.¹² By the time of US Army Civil Affairs entry into Afghanistan, the case was absolute.

Another factor was that the United States and its coalition partners were engaged in military operations in a foreign nation. Hence regardless of the status of the Taliban, an argument could be made that for certain purposes this was an international armed conflict. However, by the time the uniform issue was raised by non-government organizations and considered in Washington, the conflict against the Taliban and al Qaeda looked more like a counterinsurgency campaign or counter-terrorist operation than an international armed conflict. While the US Administration chose to apply the law of war applicable in international armed conflicts as a template for US conduct,¹³ it would be incorrect to conclude that all of the law of war for international armed conflicts was applicable. For example, neither the Taliban nor al Qaeda personnel were regarded as entitled to prisoner of war status.¹⁴ Nonetheless, the Geneva Convention Relative to the Treatment of Prisoners of War¹⁵ (GPW), proved a useful template for their treatment.

This issue was not entirely new. US and other military forces engaged in the various peacekeeping and other peace operations during the 1990s frequently sought to ascertain where they were along the conflict spectrum. From the standpoint of

US military conduct, the issue made little difference. Department of Defense policy is that US military personnel will comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.¹⁶ The primary issue in US and coalition operations against al Qaeda and the Taliban was entitlement of captured al Qaeda and Taliban to prisoner of war status under the GPW. That, as indicated, had been decided.

What Is The Relevant Law?

In a speech at the United States Institute of Peace on March 1, 2001, Sir Adam Roberts declared “Lawyers stick to the safe anchor of treaties.”¹⁷ This perhaps is a more erudite way of expressing the adage, “If the only tool you have is a hammer, every problem is viewed as a nail.” So it was in the debate over SOF wear of non-standard uniforms. The argument against non-standard uniforms primarily was cast in terms of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).¹⁸ The author frequently heard critics argue that “in accordance with” the GPW, (a) SOF were required to wear uniforms; (b) failure to wear uniforms was a war crime; and (c) SOF had to wear uniforms and treat captured al Qaeda and Taliban as enemy prisoners of war in the hope of reciprocity should any SOF fall into enemy hands. A closer examination of the law reveals (a) and (b) to be legally incorrect, while (c) was highly speculative at best with respect to al Qaeda and Taliban conduct.

The GPW and its predecessors contain no language requiring military personnel to wear a uniform, nor fight in something other than full, standard uniform. Nor does it make it a war crime not to wear a uniform. Article 4, GPW, lists persons entitled to prisoner of war status and subject to the protections set forth in the GPW. It states in part:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias and volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.¹⁹

Differing views as to whether regular force combatants are *expected* or *required* to meet the four criteria contained in Article 4A(2) are beyond the scope of my presentation. While history, the negotiating history of article 4 and predecessor treaties, other provisions in the GPW, and recognized experts strongly suggest that regular force combatants are entitled to prisoner of war status once they are identified as members of the regular forces (however attired when captured),²⁰ other experts argue that the 4A(2) criteria are prerequisites for prisoner of war status for regular force personnel as well as militia members.²¹ Court cases, while limited in number, tend to support the latter point of view.²² Article 46 of the 1977 Additional Protocol I²³ denies prisoner of war protection to spies, even if they have been identified as regular members of the military.

Historical State practice, provided *infra*, suggests that denial of prisoner of war status is not automatic, while the experience of US military personnel captured even when in uniform has been one of refusal of the captor to provide prisoner of war status and/or suffer serious abuse.²⁴ Past abuses of captured US military and civilian personnel do not constitute either justification or an argument for military personnel to abandon standard uniforms. In international armed conflict, standard uniforms should be the norm; non-standard uniform, the rare exception; civilian attire, even rarer. But risk of denial of prisoner of war status, while a serious consideration, does not answer the commander's question: Is wearing something less than the standard uniform illegal? The answer in treaty law and State practice is clear: Wearing a partial uniform, or even civilian clothing, is illegal only if it involves perfidy, discussed *infra*. Military personnel wearing non-standard uniforms or civilian clothing are entitled to prisoner of war status if captured. Those captured wearing civilian clothing may be at risk of denial of prisoner of war status and trial as spies.

There is no doubt that in an international armed conflict any commander will, and should, weigh a decision to authorize the wearing of civilian clothing carefully. That being said, military personnel are in a high-risk profession, and commanders often must make life-and-death decisions. Under most circumstances, a commander ordering a frontal infantry assault on a heavily fortified position understands that in doing so, he has accepted that some soldiers are likely to lose their lives in carrying out his order. Similarly, individuals who join the military should be under no illusion as to the attendant risks. As British Special Operations

Executive historian M. R. D. Foot acknowledged, “The truth is that wars are dangerous, and people who fight them are liable to be killed.”²⁵

The decision to wear something other than a standard uniform first requires military necessity. At issue then is what constitutes a “non-standard uniform?” If a commander provides military necessity for a Special Forces team to conduct operations in an international armed conflict in something other than the standard uniform, what steps are necessary to comply with the law of war? What guidance, if any does the law of war provide as to what might constitute a “non-standard uniform?” Second, what is “treacherous” killing, prohibited by Article 23(b), Annex to the 1907 Hague IV?

At the heart of the issue is the law of war principle of *distinction*. The law of war divides the population of nations at war into the belligerent forces and civilians not taking an active or direct part in hostilities.²⁶ With a single, limited exception,²⁷ only military forces may engage directly or actively in hostilities, that is, in combatant-like activities. Hostile acts by private citizens are not lawful, and are punishable, in order to protect innocent civilians from harm.²⁸ Civilians, and the civilian population, are protected from intentional attack so long as they do not take an active or direct part in hostilities. In turn, military forces are obligated to take reasonable measures to separate themselves from the civilian population and civilian objects, to distinguish innocent civilians from civilians engaged in hostile acts, and to distinguish themselves from the civilian population so as not to place the civilian population at undue risk. This includes not only physical separation of military forces and other military objectives from civilian objects and the civilian population as such, but also other actions, such as wearing uniforms. An early 20th-century law of war scholar observed: “The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of International Law. Its effect in mitigating the evils of war has been incalculable.”²⁹

Another law of war scholar summarizes the principle of *distinction* in the following way:

It may be said that the principle . . . of distinction between belligerents and civilian population, had found acceptance as a self-evident rule of customary law in the second half of the 19th century. Indeed, it seems no more than a reflection of practice as demonstrated in many of the wars fought in Europe in that period. Soldiers were not merely distinguishable; they were conspicuous in their proud uniforms; and armies fought each other, and preferred the civilian population not to mingle in their business.³⁰

State practice and treaty development make it clear that the principle is neither absolute nor rigid. Wearing civilian clothing for intelligence collection is acknowledged in treaty law as a lawful military activity. SOF wearing civilian

clothing while serving with partisans was common State practice in World War II and codified in subsequent treaties or their negotiating records, as will be shown. The ancillary law of war prohibition on “killing treacherously”³¹ does not preclude lawful ruses or Special Forces’ wearing non-standard uniforms, or openly fighting in civilian attire with no intent to conceal their combatant status.³²

Wearing of Uniforms

Military wear of uniforms during conventional combat operations in international armed conflict reflects the general customary practice of nations, subject to limited exceptions discussed *infra*. State practice of uniform wear is extensive, dating at least to the Peloponnesian Wars (431 to 404 B.C.).³³

The customary principle of *distinction* is applicable to the regular military forces. Conventional military forces should be distinguishable from the civilian population in international armed conflict between uniformed military forces of the belligerent States. It is an expectation, with codified exceptions, and another exception acknowledged in the negotiating record of the 1977 Additional Protocol I.³⁴ The criteria set forth for militia and partisan forces not a part of the regular military had as their intention recognition of the generally accepted practice of nations with respect to the characteristics of conventional forces.³⁵

No rule exists stating that a complete, standard uniform is the only way by which regular armed forces may make themselves distinguishable from the civilian population.³⁶ Historically it has been the predominant way by which military personnel, including special operations forces, have distinguished themselves from the civilian population. But it has not been the exclusive way.

A difficulty lies in the lack of definition. There is no international standard as to what constitutes a “uniform.”³⁷ Neither the 1907 Hague Convention IV nor the GPW offers a definition or precise standard. In the International Committee of the Red Cross (ICRC) *Commentary* on Article 4, GPW, its author states:

The drafters of the 1949 Convention, like those of the Hague Conventions, considered it unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from . . . civilians.³⁸

Similarly, reporting on discussions of the same issue at the 1974-1977 Diplomatic Conference that promulgated Additional Protocol I, the ICRC *Commentary* states:

What constitutes a uniform, and how can emblems of nationality be distinguished from each other? The Conference in no way intended to define what constitutes a

uniform. . . . “[A]ny customary uniform which clearly distinguished the member wearing it from a non-member should suffice.” Thus a cap or an armlet etc. worn in a standard way is actually equivalent to a uniform.

The uniform and other emblems of nationality are visible signs. Although certain kinds of battle dress of different countries are very similar nowadays, it is nevertheless possible to distinguish allied armed forces from enemy armed forces by means of characteristics of outfitting and other signs of nationality. Furthermore, this makes it possible to distinguish members of the armed forces from the civilian population. . . .³⁹

The ICRC *Commentary* indicates that a State should ensure that its conventional military forces be distinguishable from the civilian population. It does not specify the manner in which this may be accomplished, nor state that the complete standard uniform is the only way in which this requirement may be met.

In spite of the clear treaty language in Article 4A(2)(b), GPW (“*fixed* distinctive sign”), the device need not be permanent or fixed. What “fixed distinctive sign” means remains unresolved. In commenting on this, Professor Howard S. Levie notes:

The ICRC has made several statements attempting to offer acceptable interpretations of the meaning of the term “fixed distinctive sign” [contained in Article 4A(2), GPW]. In 1960 it stated that the sign “must be worn constantly”; but in 1971 it backtracked somewhat when it said that the sign must be “fixed, in the sense that the resistant [partisan or guerrilla] should wear it throughout all the operation in which he takes part.” Moreover, at that same time the ICRC stated that the sign “might be an armband, a headdress, part of a uniform, etc.” During World War II the listed items were, on various occasions, used by resistance groups; but they were frequently removed and disposed of at critical moments in order to enable the individual to escape being identified as a member of the resistance. . . .⁴⁰

Given the generally accepted understanding of the term “distinctive devices”—a hat, a scarf, or an armband—a device recognizable in daylight with unenhanced vision at reasonable distance would meet the law of war obligation to be distinguishable from the civilian population.⁴¹

There are at least five categories of clothing: (a) a uniform as such, such as BDU; (b) a uniform worn with some civilian clothing;⁴² (c) civilian clothing only, but with a distinctive emblem to distinguish the wearer from the civilian population; (d) civilian clothing only, with arms and other accoutrements (such as load-bearing equipment, body armor) that, combined with actions and circumstances, clearly manifest military status; and (e) civilian clothing, with weapon concealed and no visual indication that the individual is a member of the military.⁴³ Based upon historical practice and treaty negotiation records, the first three constitute a

“uniform.” The fourth should protect the individual from charges of spying if captured provided he is distinguishable from the civilian population by physical separation, clearly military duties, and other characteristics.⁴⁴ The last is lawful for intelligence gathering or other clandestine activities. As will be indicated, violation of the law of war occurs only when there is treacherous use of civilian clothing that is the proximate cause of death or injury of others. The 1974-1977 Diplomatic Conference⁴⁵ did not regard it as serious enough to be classified as a Grave Breach.

The United States is not a State party to Additional Protocol I. Following extensive military, legal and policy review, the United States decided against submission of Additional Protocol I to the United States Senate for its advice and consent to ratification.⁴⁶ However, the United States acknowledged that it is bound by Additional Protocol I provisions that constitute a codification of customary international law.⁴⁷

Most paragraphs of Article 44, Additional Protocol I, amended the customary law of war with respect to entitlement to prisoner of war status for private groups (so-called “liberation movements”). For policy, humanitarian and military reasons these provisions are regarded as unacceptable by the United States, and were a major reason for the US decision against ratification.

With respect to conventional forces, Article 44, paragraph 7, states: “This Article is not intended to change the *generally accepted practice* of States with respect to wearing of the uniform by combatants assigned to regular, uniformed armed units of a Party to the conflict.” [Emphasis added.]

An authoritative commentary on Additional Protocol I—prepared by individuals directly involved in its drafting and negotiation—offers an explanation of this provision:

Within the Working Group the initial enthusiasm for a single standard applicable both to regular and independent armed forces was dampened when concern was expressed that the . . . [new rules] might encourage uniformed regular forces to dress in civilian clothing. . . . Accordingly, para. 7 was developed to overcome this concern. . . . The report of the Working Group, however, states that “regulars who are assigned to tasks where they must wear civilian clothes, as may be the case . . . with advisers assigned to certain resistance units, are not required to wear the uniform.” The implication of para. 7, construed in the light of the Working Group report is that uniforms continue to be the principal means by which members of regular uniformed units distinguish themselves from the civilian population . . . , but that members of regular armed forces assigned or attached to duty with the forces of resistance or liberation movements may conform to the manner in which irregulars conform to the requirements of para. 3. . . .⁴⁸

That being said, another Diplomatic Conference participant offered the following comment as to uniform requirement in light of Article 44, paragraph 7: “[I]t

should be noted that it is apparently not intended to exclude all regular forces from the application of the previous paragraphs of the article. What it does imply, however, is that regular forces whenever possible (notably in “conventional” types of hostilities), should continue to wear uniforms.”⁴⁹

Thus, commentaries by participants in the 1974-1977 Diplomatic Conference confirm the Additional Protocol I acknowledgement that, where warranted by military necessity, it may be permissible in international armed conflict⁵⁰ for regular military forces to wear civilian clothing. At issue is whether the action is a legitimate ruse or perfidy.

Ruses and Perfidy

Ruses of war are lawful deceptive measures employed in military operations in international armed conflict for the purpose of misleading the enemy.⁵¹ The law of war prohibits “killing or wounding treacherously individuals belonging to the hostile nation or army,”⁵² commonly known as perfidy.⁵³

Article 23 of the Annex to the 1899 Hague II Convention states:

23. Besides the prohibitions provided by special Conventions, it is especially prohibited –

(a) To kill or wound treacherously individuals belonging to the hostile nation of army.⁵⁴

This article, along with Articles 29 and 31, were re-codified with non-substantive changes in the Annex to the 1907 Hague IV Convention. They are important for several reasons. They constitute recognition of the general obligation for military forces to fight in uniform. However, it is not a war crime for military personnel to wear or fight in civilian clothing unless it is done for the purpose, and with the result of killing treacherously. What constituted “killing treacherously” was defined as “perfidy” in Article 37 of Additional Protocol I:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.⁵⁵

In order to be perfidy, the act must be the proximate cause of the killing, injury or capture of the enemy.⁵⁶ But while the Diplomatic Conference codified perfidy, it limited criminal liability. Perfidy was made a Grave Breach only if it involves “the perfidious use . . . of the distinctive emblem of the red cross, red crescent or red lion and sun.”⁵⁷ Wearing civilian attire or feigning civilian status was not designated a Grave Breach.

Each differs from US and coalition Special Forces operating in non-standard uniforms as part of heavily armed units clearly known and identifiable by the Taliban and al Qaeda in the war in Afghanistan. Special Forces wear of non-standard uniforms, whether partial BDU or indigenous apparel of their Northern Alliance partners, including their distinctive pakol hats and/or tribal scarves, did not constitute perfidy. US Army Civil Affairs wear of Western-style civilian clothing or indigenous attire in Afghanistan would not have constituted perfidy unless it had been done for the purpose, and with the result of, killing treacherously. The NGO complaint made no such allegation, and no evidence has been surfaced to suggest such conduct.

That being said, the devil always has been in the details in balancing the allowance for military personnel to operate in enemy denied areas in civilian attire, and perfidy. At the heart of the balance is the law of war principle of distinction. State practice, of which more will be said, suggests that the lines between the two are far from clear.

There is logic to this history. State tolerance of Special Forces fighting in civilian clothing in limited, special circumstances, such as support for partisans, is consistent with humanitarian tolerance for captured guerrillas. It follows efforts by many, including the International Committee of the Red Cross, to provide prisoner of war protection to all and not to prosecute except in the most egregious circumstances, such as terrorism and *treacherous* use of civilian clothing.⁵⁸ The drafters of Article 44 had a better sense of State practice than did critics of US and coalition Special Forces wear of non-standard uniforms.

Into the midst of this discussion steps the global war on terrorism. Terrorists are not entitled to law of war protection, and the law of war is not applicable as such in counter-terrorist operations.⁵⁹ Counter-terrorist units have been authorized to use hollow-point or other expanding ammunition,⁶⁰ for example, and have worn civilian clothing or non-standard uniforms on missions.⁶¹ President Bush’s radio address to the nation and the world on September 29, 2001, in response to the September 11th terror attacks on the World Trade Center and Pentagon, may have prompted some in the military to err initially and assume that law of war rules relating to uniform wear were not applicable in the military operations that followed in Afghanistan.

This leads to the proper point for review of State practice.

What Is State Practice?

State practice is important to answering legal questions because it forms a basis for determining customary international law.⁶² State practice—a synonym for military history—reveals how governments interpret, apply and/or enforce law of war treaty provisions.

State practice in international armed conflict and other military operations contains a significant record of Special Forces wear of civilian attire, non-standard uniforms, and/or enemy uniforms as a ruse or for other reasons. Beginning with Colonel T. E. Lawrence, the celebrated Lawrence of Arabia, State practice reflects an overt tolerance bordering on admiration for special forces wearing civilian clothing when working with indigenous persons in enemy denied areas, whether for intelligence gathering or combat operations.⁶³ Special forces personnel captured while wearing civilian clothing have been treated as spies rather than charged with a war crime, while Special Forces who fought in civilian clothing and returned safely have been honored as heroes.

The actions of Colonel Lawrence in all likelihood were not the first in which indigenous attire was worn, but one of the more influential. An appreciation of the list that follows necessitates a brief historical overview.

Germany's annexation of Austria in 1938 sparked interest within the British military in the potential necessity for irregular operations. Recalling the Spanish *guerrillas* in Wellington's campaign against the French in the Peninsular War (1807-1809), Boer commando success against the British in the 1899-1902 Anglo-Boer War, Colonel Lawrence's success, the British experience in facing Sinn Féin in Ireland 1919-1921,⁶⁴ Chinese guerrilla operations against Japan in the Sino-Japanese War, and other guerrilla activities in other conflicts, in 1938 the Research Branch of the British General Staff (GS(R)) began research that led to preparation of Field Service Regulations entitled *The Art of Guerrilla Warfare*, *The Partisan Leader's Handbook*, and *How to Use High Explosives*, all subsequently noted in *GS(R) Report No. 8 'Investigation of the Possibilities of Guerrilla Activities*.⁶⁵

Commencement of the Second World War with the German invasion of Poland on September 1, 1939, revealed Germany's first use of Special Forces in civilian clothing, enemy uniforms, or non-standard attire as a ruse to seize critical objectives. British focus on partisan warfare and Special Forces was renewed with Germany's invasion of Western Europe, the fall of France, and British Army evacuation from Dunkirk in May 1940. Standing alone, the British leadership identified several means for action. In addition to traditional means such as naval blockade and aerial bombing, it directed commando raids and "the undermining of enemy morale and production possibilities through close co-operation with

exile governments and through them—or without them—with Resistance Movements in enemy occupied territory.” The Charter for the British Special Operations Executive (SOE) received War Cabinet approval on July 22, 1940. At this time Prime Minister Winston S. Churchill offered his oft-quoted edict: “And now set Europe ablaze.” Working closely with exile governments, the British Government began making contact with potential resistance movements throughout Nazi-occupied Europe, ultimately providing them personnel and material support, subsequently coordinating their actions to link them directly to the British and Allied war effort.

It is important to understand what SOE was, and what it was not. SOE was an independent secret service. It was not a military service. But SOE relied heavily upon assignment of military officers to it, coordination of operations with the military chiefs of staff, and was dependent on the military services for personnel, support, supply and transportation. Although intelligence was sometimes a by-product of its activities, SOE was not an intelligence collection agency. It was intended for its operatives to engage in clandestine, subversive operations in civilian clothing. The dagger lay concealed beneath the cloak. In Prime Minister Churchill’s words, this was “‘ungentlemanly warfare’ in which the ‘Geneva Convention’ rules do not apply and the price of failure was often a slow and terrible death.”⁶⁶ Thus the British Government and SOE operatives consciously entered into this form of operations fully cognizant of its law of war implications.

The “Geneva Conventions” baby had not been tossed out with the bath water. As was the case with US Special Forces in Afghanistan in 2002, restrictions were placed on wearing civilian attire. Military personnel providing transport to SOE personnel to and from an operation were required to be in uniform, for example, while late-war operations enabled some to wear uniforms. For post-D-Day operations, SOE personnel were provided armbands for partisans and British military personnel not in uniform. Prior to and after D-Day, a clear showing of military necessity as it related to the mission was necessary for authorization to wear civilian clothing. For example, on May 30, 1943, the British War Office informed the Commander-in-Chief, India, that the Chief of Staff had decided: “No member of the armed forces . . . should be sent on military operations, however hazardous, in civilian clothes, except in the case of subversive activities for which civilian clothes are essential.”⁶⁷

Germany invaded Russia on June 22, 1941. In response, Russian Premier Josef Stalin declared that day:

The struggle against Germany must not be looked upon as an ordinary war. . . . It is not merely a fight between two armies . . . in order to engage the enemy there must be bands

of partisans and saboteurs working underground everywhere. . . . In territories occupied by the enemy, conditions must be made so impossible that he cannot hold out. . . .⁶⁸

Soviet partisan warfare differed from that of Great Britain and (subsequently) the United States, if perhaps only slightly. Whereas Great Britain and the United States exported support for underground movements in Axis-occupied nations, the Soviet Union supported partisan warfare within its own territory occupied by Germany, operating along interior lines. The partisan movement, organized, trained and directed by Soviet Army personnel, was substantial. In the month of July 1943, partisan forces carried out 10,000 separate demolitions of track to impede German re-supply efforts. During the night of July 4, 1944 alone, partisans laid 4,110 separate demolition charges on rail lines; on June 19, partisans planted over 5,000 mines on the roads and railroads behind the Second and Fourth German Armies. While it was estimated that 250,000 people were directly engaged in partisan operations by 1944, Soviet authorities boasted that every Soviet civilian in Nazi-occupied territory was at least indirectly involved in partisan activities, and on September 6, 1942, the partisan movement achieved the nominal status of a separate branch of the Soviet military—something thought about in the United Kingdom by some, but never achieved in either the United Kingdom or the United States. Like underground operations supported by the United Kingdom and United States, Soviet partisan operations—with civilians and military personnel fighting in civilian attire—were State approved and directed.

United States' movement into partisan operations closely followed Russian and British actions. Early in World War II, the Roosevelt Administration established the Office of Strategic Services (OSS). Forerunner of the Central Intelligence Agency, the OSS was a hybrid organization led by Major General William A. Donovan, a distinguished, decorated former Army officer. OSS was under the administrative cognizance of the Joint Chiefs of Staff but under operational control of the theater commander.⁶⁹ It was an organization focused on espionage, sabotage and partisan support. US Army personnel provided a major part of the OSS strength, which reached its maximum of 13,000 in December 1944. US Army Special Forces traces its lineage to OSS.⁷⁰

By the spring of 1944, SOE and OSS were operating together in a variety of missions.⁷¹ Some OSS units operated in uniform, while others did not under all circumstances. In one of its major efforts, France, OSS operational units worked in Nazi-occupied territory in direct support of the French Resistance. As a leading history notes:

The first group consisted of seventy-seven Americans *who wore civilian clothes as organizers of secret networks, as radio operators, or as instructors in the use of*

weapons and explosives. Thirty-three members of that group were active in France before 6 June 1944, D-Day. . . . [Emphasis added.]

The largest OSS group in France consisted of 356 Americans who were members of Operational Groups (OG). All recruits for the OGs were French-speaking volunteers from US Army units, primarily infantry and engineer (for demolition experts). . . . Working in uniform, these teams parachuted behind the lines after D-Day to perform a variety of missions. . . .⁷²

In addition to its Operational Groups, OSS worked with SOE in Jedburgh teams. These teams were intended to be composed of an Englishman, an American, and a continental Europe member, each military, two of whom were officers; the third was the communications specialist.⁷³ The initial core contained fifty US officers fluent in French who were to parachute in uniform to resistance groups, initially throughout France during the weeks following the Allied landings on June 6, 1944. They would provide liaison with the underground, arm and train the Maquis, boost “patriotic morale,” and coordinate resistance activity with Allied military strategy. Ninety-three Jedburgh teams parachuted into France to join the Maquis after D-Day, numbering three hundred French, British and US officers. Eventually they served in other Nazi-occupied territory.

While the Jedburghs normally operated in uniform, this was not always possible. In an operation in Nazi-occupied France, Major Horace Fuller, USMC, avoided capture as a result of accepting the advice of his French contact to wear civilian clothing, including during combat operations.⁷⁴

Similar operations occurred in other theaters. On May 4, 1942, a US Navy officer formed Naval Group China. Composed of Navy and Marine Corps personnel, its mission was to establish radio intelligence posts, weather-gathering and lookout stations, form, supply and train indigenous sabotage units, and conduct attacks on Japanese units and equipment. Also known as the Sino-America Cooperative Organization, it executed its operations successfully for the duration of the war, many of them in non-standard uniform or indigenous civilian attire, depending on the mission and situation.⁷⁵

This is not the time to recount Allied support for partisan operations in World War II, nor what then were termed “commando” operations. However, several observations are relevant to the issue at hand. First, partisan operations were universal, occurring in every Axis-occupied nation, actively supported by each of the major Allies—United Kingdom, United States and Russia—and each government in exile. Second, they were significant in their breadth and longevity. For example, the French Resistance Movement began shortly following German conquest in 1940 and continued through the war. By 1944, approximately three million men

and women were associated with the various French Resistance organizations. In Yugoslavia, 400,000 were involved in partisan operations.

Resistance activity was dependent upon volunteers—whether partisans from the civilian population of Axis-controlled nations, civilian and military personnel serving with the SOE or OSS, or members of Special Forces. All were aware of the possible consequences if they were caught, whether in uniform or other attire. At the same time, execution as a spy if captured in something other than standard uniform was not a certainty.

Partisan sabotage operations were regarded as a valuable alternative to highly inaccurate strategic bombing in Nazi-occupied territory, as the Allies sought to reduce collateral civilian casualties to friendly populations.⁷⁶ Partisan sabotage was the “smart bomb” of World War II. In its employment of very precise means, it was the epitome of the second facet of the fundamental law of war principle of distinction.⁷⁷ In some cases, the evidence was clear that partisan/Special Forces sabotage often was more effective than air operations against the same targets,⁷⁸ while in other instances OSS-lead partisans were able to destroy heavily defended targets that had resisted air attack.⁷⁹ While the rationale for partisan or Special Forces attacks may have been selected over aerial attack more for political than law of war reasons,⁸⁰ it offers evidence of why governments chose not to condemn attacks in civilian clothing as a Grave Breach in Additional Protocol I. Special Forces/partisan unconventional warfare operations tied down Axis units that could have been used more effectively engaging Allied forces but for the partisan threat,⁸¹ and significantly impaired German efforts to reinforce their defenses at Allied points of offensive ground operations.⁸² Special Forces and their partisan allies performed other life-saving actions, such as the rescue of downed Allied aircrew and assistance in running escape routes.⁸³ Special Forces served as on-the scene ambassadors where Allied combat operations killed innocent civilians.⁸⁴

Partisan operations, including sabotage and direct attacks on Axis personnel, were executed primarily in civilian attire, occasionally (after the Allied return to Europe on June 6, 1944) wearing a distinctive device, sometimes in a partial uniform, but seldom in full uniform. “Uniform” varied, often being more like modern “gang” colors than a traditional military uniform. The same was true for SOE and OSS military personnel serving with resistance movements and, in some cases, Special Forces.

Finally, partisan operations were successful. Danish historian Jørgen Hæstrup concludes “The Resistance Movements, seen in their entirety, deeply influenced the course of the war, psychologically, militarily and politically.”⁸⁵ In support thereof, he quotes Russian historian E. Boltin: “History has never known a popular fight of such huge dimensions as was apparent during the 1939-1945 war.

Furthermore the masses had never before taken so directly a part in the military combat, as was the case in the last war in Europe.”⁸⁶

The preceding comments are offered to show that the wearing of civilian attire by partisans or military personnel in Special Forces units or in the SOE or OSS was neither unique, occasional, nor limited in time and space. In the examples that follow, it is clear that the wearing of civilian attire or non-standard uniform (and, in some cases, enemy uniform) was a deliberate act based upon a decision made at the highest levels of government.

The list set forth in the Annex (*infra*) is illustrative rather than exhaustive, and is offered for historical purposes rather than necessarily with approval or condemnation of the missions listed. With the exception of US action in *Ex parte Quirin*⁸⁷ and the unsuccessful prosecution of Otto Skorzeny,⁸⁸ the list reveals that State practice in international armed conflict has tended not to treat wear of civilian attire, non-standard uniforms, and/or enemy uniforms by regular military forces as a war crime. Personnel caught *in flagrante delicto* in civilian attire or enemy uniforms have been treated as spies, sometimes (but not always) with severe consequences. However, those who returned safely were decorated rather than punished, manifesting an endorsement of their actions by their government.

The wearing of enemy uniforms is not directly within the scope of the issue under consideration. However, State practice is germane regarding the prohibition on “killing treacherously” contained in Article 23(b) of the Annex to the 1907 Hague Convention IV.⁸⁹ State practice shows that governments have been willing to deploy Special Forces in civilian attire or enemy uniforms where a major advantage is anticipated, and where the gain is greater than the risk to the deployed personnel. Such actions have not been regarded as a war crime either by the government ordering them or the government against which the forces were employed.⁹⁰

State practice provides several points for fine tuning a general principle:

(a) Colonel Lawrence wore indigenous attire while leading the Arab uprising against the Ottoman Empire in the Hejaz. Coalition Special Forces aligned with Northern Alliance and Southern Alliance forces in Afghanistan, suggesting a nuance in the law of war principle of distinction: an armed military group recognizable at a distance and readily identifiable to the enemy by its size and other characteristics, even when wearing indigenous attire with or without distinctive devices, is acting lawfully. In essence, there is no “treacherous killing” or perfidy because there has been no treacherous use of civilian clothing.

(b) Non-standard uniforms or indigenous attire may be adopted for practical reasons rather than with intent to commit perfidy. The British/Commonwealth Long Range Desert Group (LRDG), operating behind enemy lines in North Africa from 1940-1943, adopted the kaffiyeh and agal as a standard part of their uniform

for utilitarian purposes, for example. The LRDG wore native sheep or goatskin coats to ward off the nighttime desert cold, as did British and US Special Forces operating behind Iraqi lines in the 1991 coalition effort to liberate Kuwait. Wear of the latter by the LRDG served partially as a ruse against casual observation, such as by enemy aircraft. However, their identity clearly was recognizable at a distance by enemy ground forces.⁹¹

(c) Law of war compliance with something as simple as wearing a distinctive device may not be practical where the enemy is known to punish rather than reward compliance. For example, immediately prior to D-Day (June 6, 1944), British air-delivered supplies included armbands for partisan and supporting Special Forces' use once Allied conventional forces returned to the continent. However, distinctive emblem wear was viewed with skepticism in light of Hitler's *Commando Order* denying quarter to any partisans or Special Operations Forces.⁹²

(d) Perfidy requires *mens rea*, that is, the donning of civilian attire with the clear intent to deceive. A group of alert, fit young men, heavily and openly armed, surrounding an individual in military uniform, and themselves surrounded by host nation military personnel in uniform, clearly are a personal protection detail, and are not attempting to mask their status nor gain an advantage over some unsuspecting enemy soldier.

The law of war regards a uniform as the principal way in which conventional military forces distinguish themselves from the civilian population in international armed conflict. State practice (including US practice), treaty negotiation history, and the views of recognized law of war experts reveals (i) that the law of war obligation is one of distinction that otherwise has eluded precise statement in all circumstances; (ii) there is no agreed definition of uniform; (iii) the uniform "requirement" is less stringent with respect to Special Forces working with indigenous forces or executing a mission of strategic importance; and (iv) a law of war violation occurs only where an act is perfidious, that is, done with an intent to deceive, and the act is the proximate cause of the killing, wounding or capture of the enemy. My review of State practice found no enforcement by a government against its own personnel. Enemy combatants captured *in flagrante delicto* were prosecuted as spies rather than for law of war violations, with the exception of *Ex parte Quirin* and the unsuccessful post-World War II US prosecution of SS-Obersturmbannführer Otto Skorzeny.

Summary

In international armed conflict, the wearing of standard uniforms by conventional military forces, including Special Operations Forces, is the normal and expected

standard. Wearing civilian attire or a non-standard uniform is an exception that should be exercised only in extreme cases determined by competent authority.

In international armed conflict, military necessity for wearing non-standard uniforms or civilian clothing has been regarded by governments as extremely restricted. It has been limited to intelligence collection or Special Forces operations in denied areas. No valid military necessity exists for conventional military forces, whether combat (combat arms, such as infantry, armor or artillery), combat support (such as Civil Affairs), or combat service support personnel, to wear non-standard uniforms or civilian attire in international armed conflict.

The codified law of war for international armed conflict does not prohibit the wearing of a non-standard uniform. It does not prohibit the wearing of civilian clothing so long as military personnel distinguish themselves from the civilian population, and provided there is legitimate military necessity for wearing something other than the standard uniform. The generally recognized manner of distinction when wearing something other than the standard uniform is through a distinctive device, such as a hat, scarf, or armband, recognizable at a distance.

Violation of the law of war (perfidy) occurs when a soldier wears civilian clothing—not a non-standard uniform—with intent to deceive, and the act is the proximate cause of the killing, wounding or capture of the enemy. Perfidy does not exist when a soldier in civilian attire or non-standard uniform remains identifiable as a combatant, and there is no intent to deceive.

Discussion of the issue raises an appearance of a double standard in considering Taliban militia/al Qaeda (in Afghanistan) or Saddam Fedayeen (in Iraq) wear of civilian clothing while justifying SOF wear of Western civilian attire or indigenous attire. A “double standard” exists within the law of war for regular forces of a recognized government vis-à-vis unauthorized combatant acts by private individuals or non-State actors. The issue was complicated by the unique nature of operations in Afghanistan, that is, counter-terrorist operations against non-State actors in a failed State, and the increased role of NGOs in a non-linear combat environment.

The law of war principle of distinction cannot be taken lightly. The standard military field uniform should be worn absent compelling military necessity for wear of a non-standard uniform or civilian clothing. Military convenience should not be mistaken for military necessity. That military personnel may be at greater risk in wearing a uniform is not in and of itself sufficient basis to justify wearing civilian clothing. “Force protection” is not a legitimate basis for wearing a non-standard uniform or civilian attire. Risk is an inherent part of military missions, and does not constitute military necessity for the wear of civilian attire. But the law of war requirement to wear a complete, “standard” uniform is not as absolute as some have recently suggested.

To summarize:

(a) The law of war requires military units and personnel to distinguish themselves from the civilian population in international armed conflict. Article 4(A)2 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)⁹³ sets forth standards all combatants are expected to satisfy. However, military personnel may distinguish themselves from the civilian population in other ways, such as physical separation.

(b) Standard US military uniforms satisfy the requirements of GPW Article 4A. “Standard military uniform” refers to battle dress uniform (BDU), desert camouflage uniform (DCU), official flight suit, or other obvious military apparel.⁹⁴ The presumption should be that all US armed forces operate in standard uniforms during military operations in international armed conflict.

(c) When authorized, the requirements of GPW Article 4(A)2 may be satisfied by other than the complete standard military uniform. For example, a visible part of the standard military uniform, or a fixed, distinctive sign will satisfy the requirements provided that the forces are recognizable as combatants with unenhanced vision at a distance.

(d) Neither the Global War on Terrorism nor the fact that one is a member of Special Operations Forces offers *carte blanche* for military personnel to wear something other than the full, standard uniform. The wearing of a partial uniform or non-standard uniform with fixed, distinctive sign should be reserved for exceptional circumstances when required by military necessity. Force protection does not constitute military necessity. Authority should be regarded as extremely limited, mission and unit specific, and decided by a senior commander or higher, such as (in the US military) the Combatant Commander responsible for the mission.

(e) While a hat, scarf or armband would meet the fixed distinctive sign requirement, a permanently affixed distinctive sign such as an American flag sewn onto body armor or clothing is more prudent.

(f) Forces operating in other than the complete standard uniform should receive training in the law of war to ensure that they understand the requirements of distinction and are fully aware of the risks they may face if captured if they fail to comply with the law of war.

(g) Captured US military personnel (other than escaping prisoners of war) wearing civilian apparel without a fixed distinctive sign and without visible weapons may be considered spies by their captor. The captor may try them for domestic law violations (e.g., spying). Unless they otherwise commit an independent law of war violation (e.g., perfidy), history indicates that the acts will not be regarded as violative of the law of war.

ANNEX

TABLE OF HISTORICAL STATE PRACTICE⁹⁵

Who	What	When	Where	Disposition (if any)
Japan	Japanese officers in Chinese civilian attire on sabotage mission.	1904	Manchuria (Russo-Japanese War)	Captured and executed.
Russia	Russian soldiers in Chinese civilian attire attacked Japanese units.	1904	Manchuria (Russo-Japanese War)	Japanese diplomatic protest.
Col. T. E. Lawrence (Lawrence of Arabia) British Army	Wore Arab attire while leading Arab uprising against the Ottoman (WWI) Empire, fighting Turkish Army.	1916–1918	Hejaz Province Arabia (Syria)	Lawrence decorated.
Germany	SF dressed as Polish civilians fake raid on customs house as pretext for German invasion of Poland.	1939	Germany	None.
France	Free French commander wore indigenous attire in attack on Italian fort at Murzuk, Jan 11, 1941.	1941	Libya	Killed in attack.
United Kingdom	Special Operations Executive (SOE) personnel in civilian clothing supported partisan operations in Axis-controlled Nations.	1940–1945	Europe, Asia	SOE agents captured in <i>flagrante delicto</i> were incarcerated, not always executed. ⁹⁶

Who	What	When	Where	Disposition (if any)
Germany	Danish-speaking SF dressed as Danish soldiers seize key bridge to initiate invasion.	1940	Denmark	None
Germany	SF dressed as Dutch military policemen seize key bridge at start of German invasion.	1940	Netherlands	None
Germany	SF wearing Belgian Army overcoats over their uniforms seize key bridge at start of German invasion.	1940	Belgium	None
United Kingdom	Long Range Desert Group wore Arab kaffiyeh and agal, sometimes wore indigenous coats over uniforms.	1940–1943	Libya	None. Kaffiyeh/agal adopted by LRDG as official uniform.
Germany	SF wearing Russian Army overcoats, carrying Russian weapons, driving Russian vehicles, spearhead German invasion.	1941	Russia	None
Germany	SF dressed in British Army uniforms and indigenous attire, driving British vehicles, attempt reconnaissance to Suez.	1941	Libya	None

Special Forces' Wear of Non-Standard Uniforms

Who	What	When	Where	Disposition (if any)
United Kingdom	SF in German uniforms infiltrated Tobruk as part of Operation Agreement. Mission executed with infiltration by another officer in indigenous attire.	1942	Libya	None
United Kingdom	SOE-trained, equipped and transported partisans kill Obergruppenführer Reinhard Heydrich, Reichsprotektor for Nazi Governor of Czechoslovakia.	1942	Czechoslovakia	Partisan agents commit suicide rather than surrender.
Soviet Union	Russian partisans and military operative groups deployed to support them fought in civilian clothing.	1941–1945	German occupied territory in Soviet Union.	Partisans captured were executed. Survivors decorated by Russia postwar.
Soviet Union	Naval Spetsnaz conduct operations in civilian clothing, enemy uniforms.	1942–1945	German-occupied territory in Soviet Union.	Same as above.
Japan	Used English-speaking Germans (French Foreign Legion) captured in Thailand in Feb. 1941 dressed in uniforms resembling British Khaki to penetrate British lines.	1942	Malaya	None.
Germany ⁹⁷	Eight Germans on sabotage mission captured in civilian clothing.	1942	US	Tried by Military Commission for violation of the law of war.

Who	What	When	Where	Disposition (if any)
UK/Australia	Operation Jaywick, combined SOF team navigated to Singapore in Japanese fishing boat Kofuku Maru, flying Japanese flag and dressed in native sarongs. Attacked and sank seven ships (38,000 tons).	1943	Singapore	Participants commended.
Poland	SOE-trained partisans, one dressed in SS uniform, raided Pinsk prison near Brest-Litovsk, freed prisoners, killed commandant.	1943	Poland	None.
United Kingdom	SOE-trained, equipped and transported partisans sabotaged German heavy water plant at Vermok.	1943	Norway	None.
Japan ⁹⁸	Formed Indian National Army from captured Indian Army personnel, who fought in Indian Army uniforms against British and Commonwealth forces in Burma.	1943	Burma	Post-war trials of soldiers under India Army Act or Indian Penal Code rather than charged with war crimes.
United Kingdom	LT. B.J. Barton, No. 2 Commando, penetrated German defenses wearing indigenous attire, killed German commandant.	1944	Brac (Ageaen)	Awarded Military Cross.

Special Forces' Wear of Non-Standard Uniforms

Who	What	When	Where	Disposition (if any)
United Kingdom	British officers dressed as German soldiers, with partisan assistance, abduct Major General Karl Kreipe, Commander, 22nd Panzer Division on Crete.	1944	Crete	None.
United Kingdom	SAS wore mixed dress of British, German and Italian uniforms, and civilian clothing.	1944	Aegean	None. One Victoria Cross, numerous other awards.
United Kingdom, Australia	Operation Rimau, combined SF team in uniform to attack Japanese ships.	1944	Singapore	Captured died from illegal medical experimentation, or were executed.
United Kingdom	Special Boat Squadron (SBS) officer dressed as priest led successful attack on German units.	1944	Nisiros (Aegean)	None.
United Kingdom	SOE-trained/equipped partisans sabotage and sink ferry carrying German heavy water.	1944	Norway	None.
United States	Office of Strategic Service (OSS) teams enter Nazi-occupied Europe, conduct operations in civilian clothing.	1944	France, Yugoslavia, Albania, Bulgaria, Rumania	None.
United States	US Naval Group China wearing civilian clothing collected intelligence and executed direct action missions against Japanese.	1944	China	None.

Who	What	When	Where	Disposition (if any)
United States	Army Rangers dress as German soldiers to penetrate and fight in Aachen (OSS operation).	1944	Germany	None.
United States United Kingdom/ Host nation	Jedburgh teams operate post-D-Day in support of partisans, not always in uniform.	1944– 1945	France, Italy, Yugoslavia, Albania, Netherlands	None.
Germany	German Kommando unit dressed in US uniforms, driving US vehicles, penetrate US lines in Ardennes.	1944	Belgium	Members captured in US uniforms executed. Mission commander, Otto Skorzeny, and ten others acquitted in war crimes trial.
United Kingdom	Operation Tombola SAS operation with Italian partisans. Civilian attire with mixed uniform.	1945	Italy	None.
Germany	Partisan operations by German SF in civilian clothing.	1944– 1945	Germany	None.
United States	OSS team in German uniforms to conduct Operation Iron Cross to execute subversion missions and capture or kill senior Nazi officials.	1945	Germany	Mission aborted by end of war.
United States	OSS Operations Groups operate in US uniforms, indigenous attire, Chinese Puppet Army uniforms.	1945	China	None.

Special Forces' Wear of Non-Standard Uniforms

Who	What	When	Where	Disposition (if any)
Indonesia (I) ⁹⁹	Soldiers dressed in civilian attire while attacking civilian objects.	1965	Singapore	Captured and tried under domestic law.
Indonesia (II) ¹⁰⁰	Soldiers in civilian attire captured while on mission to attack civilian objects.	1965	Singapore	Captured and tried under domestic law.
United States	MACV (SOG) teams wore non-standard uniforms operating in denied areas.	1965–1971	Southeast Asia	None.
United States ¹⁰¹	SF soldier fought in civilian clothing in response to Tet Offensive assaults.	1968	South Vietnam	Awarded Medal of Honor.
United States ¹⁰²	Navy SEAL officer switched from uniform to indigenous attire to fight way in and out of encircled aircrew to rescue him.	1972	South Vietnam	Awarded Medal of Honor.
Israel	Operation Aviv Neurim, IDF SF team dressed in civilian clothing raids PLO Beirut targets.	1973	Lebanon	Team commander Ehud Barac eventually becomes IDF Chief of Staff, Israel Prime Minister.
Israel	Entebbe rescue force includes commandos dressed as Uganda soldiers.	1976	Uganda	Mission successful in rescuing hijacked aircrew and passengers held hostage.
United States	Team for rescue of US hostages in AMEMB Tehran wore non-standard uniforms approved by Joint Chiefs of Staff, President.	1980	Iran	Mission aborted due to helicopter failures.

Who	What	When	Where	Disposition (if any)
Soviet Union, East Germany (GDR)	Spetsnaz dressed in civilian clothing or NATO uniforms trained/planned to penetrate/operate in NATO rear, attack high-value targets.	Cold War	NATO nations	Never executed.
Soviet Union	Spetsnaz dressed in civilian clothing neutralized senior Afghan officers, then secured Kabul airport wearing Afghan Army uniforms.	1979	Afghanistan	None.
North Korea	Special Forces infiltrate South Korea wearing Civilian clothing or ROK uniforms.	1950–1988	Republic of Korea	Treated as spies when captured.
Israel	Sarayet Maktal wearing non-standard uniforms carry out successful direct action mission to kill Abu Jihad, PLO military commander, in Tunis.	1988	Sidi-bou-Said, Tunisia	None.
Panama	7 th Infantry Company (Macho de Monte), Panamanian Defense Forces (PDF), fought in civilian attire of shorts, t-shirts, and straw hats.	1989	Panama (Operation Just Cause)	Captured members treated as prisoners of war by US.
United States	CINC's SF personal security detail wore civilian attire.	1990–1991	Saudi Arabia	None.
United Kingdom/ United States	SF wore kufiyah/agal and indigenous coats over uniforms during operations in Iraq.	1991	Iraq	None.

Notes

1. Professor Parks holds the Law of War Chair, Office of General Counsel, Department of Defense. He is a former Charles H. Stockton Professor of International Law at the Naval War College. A version of this paper was published in 4 *Chicago Journal of International Law* 2 (Fall 2003). The views expressed herein are the personal views of the author, and may not necessarily reflect an official position of the Department of Defense or any other agency of the United States Government.

2. See, for example, Michelle Kelly & Morten Rostrup, *Coalition soldiers in Afghanistan are endangering aid workers*, THE GUARDIAN (London), Feb. 1, 2002, at 19.

3. This article offers a subtle distinction. *Special Forces* is limited to US Army Special Forces assigned to Special Forces Groups or detachments, Naval Special Warfare (SEALs and Special Boat units), and Air Force Special Tactics Units, and their coalition counterparts, while *Special Operations Forces* includes Special Forces, Psychological Operations units, and Army Civil Affairs units. There are members of Army Civil Affairs Units who are Special Forces soldiers. The distinction offered in this article is one of unit assignment and mission(s).

4. The section that follows was prepared from personal interviews with Special Forces personnel and materials provided by the Department of Military Strategy, Planning and Operations, US Army War College, US Army Peacekeeping Institute, and the Department of State. Pertinent documents are in the author's personal files. In particular, see US Army Peacekeeping Institute, *Civil Military Operations: Afghanistan* (2003).

5. Special Forces' wear of Northern Alliance attire was undertaken at the insistence of Northern Alliance General Abdul Rashid Dostum, commander of its 8,000-man Junbish-e-Millie, the largest Northern Alliance army. President William J. Clinton ordered the prompt withdrawal of US forces from Somalia following the October 3, 1993 Battle of Mogadishu in which eighteen members of Task Force Ranger died. See MARK BOWDEN, *BLACK HAWK DOWN: A STORY OF MODERN WAR* (1999). General Dostum feared US withdrawal from Afghanistan if confronted with US casualties. Multiple Northern Alliance bodyguards were assigned to each US Special Forces soldier. In the early days of fighting, General Dostum told some of his subordinates in Mazar-e-Sharif that he would kill them if they allowed their US charges to be hurt or killed. Once US and coalition forces showed that they were not casualty averse, the bodyguard standards were relaxed. SF wear of the Northern Alliance pakol, tribal scarves, and beards prevented them from being singled out for targeting by al Qaeda/Taliban personnel. Wearing indigenous attire also aided SF rapport with the Northern Alliance forces it supported. Special mission unit Special Forces, whose identities are classified, also wore beards to reduce risk of media/public identification.

The risk is not new. In 1915, serving in the Arabian Peninsula as a military adviser to Wahabi chief Abdul Aziz Ibn Saud, British Army Captain William H. I. Shakespear eschewed indigenous attire. During a battle between the forces of Ibn Saud and pro-Turkish tribal leader Ibn Rashid, Shakespear was killed by an enemy sniper when his British Army uniform singled him out and identified him as a high-value target. See JEREMY WILSON, *LAWRENCE OF ARABIA* 1043 (1990). Knowledge of the circumstances of Captain Shakespear's death prompted T.E. Lawrence to wear Arab clothing as he led the Arab Revolt against Ottoman rule that began June 5, 1916, and to incorporate the lesson into his "Twenty-Seven Articles" (Articles 18–20) published in August 1917 as lessons learned. *Id.* at 1043, n.4.

Indigenous personnel over-protection of US Special Forces personnel is not new. Office of Strategic Services (OSS) Operational Team Muskrat/Bear experienced the same phenomenon in China in 1945. FRANCIS B. MILLS, ROBERT MILLS, & JOHN W. BRUNNER, *OSS SPECIAL OPERATIONS IN CHINA* 300, 321 (2002).

In Operation Enduring Freedom, Special Forces wear of the pakol was possible because of the Pashtun (Taliban) versus Tajik/Uzbek (Northern Alliance) differences in attire. Special Forces supporting Southern Alliance forces were confronted with a more difficult situation. Southern Alliance soldiers looked and dressed exactly like the Taliban. Afghan Taliban dressed in Pashtun attire since they were from the Pashtun tribes. Other Taliban, from Pakistan predominantly, wore Pakistani attire.

In the south, Special Forces wear of indigenous attire and its distinguishing devices was encouraged by Hamid Karzai, again to lower US visibility. Accordingly, these Special Forces wore native tops over their DCU. After three days, the Special Forces abandoned the indigenous tops for the balance of their tenure, their leader having convinced Karzai that as everyone knew they were American, there was no reason to pretend otherwise. It also gave the soldiers better access to their DCU pockets and load-bearing equipment.

6. Because neither Taliban/al Qaeda nor Northern or Southern Alliance forces wore a uniform, visual friend or foe identification at a distance was a challenge. Third Battalion, Fifth Special Forces Group, *The Liberation of Mazar-e Sharif: 5th SF Group UW in Afghanistan*, 15 SPECIAL WARFARE 34, 36 (June 2002). However, this differs from dressing as civilians for the purpose of using the civilian population or civilian status as a means of avoiding detection of combatant status. From the standpoint of possible violation of the law of war, the issue is one of intent. As indicated in the main text, use of non-standard uniform (Massoud pakol and/or scarf) by some Special Forces personnel was to appear as members of the Northern Alliance rather than be conspicuous as US soldiers and, as indicated in the preceding footnote, high-value targets.

7. In *Are Soldiers in Civilian Clothes Protected Under Geneva-Hague?* (unpublished paper, 2003) at 31, Lieutenant Colonel H. Allen Irish provided the following official rationale for the decision:

The need to reduce the potential for violence that may be directed at CJCMOTF personnel engaged in humanitarian relief efforts in Afghanistan was the critical factor mandating the decision [to operate in civilian clothing]. In uniform, [CJCMOTF] personnel may be targeted since they could be confused as being engaged in offensive combat operations instead of providing humanitarian assistance. . . . The traditional wear of civilian clothes by unconventional forces for the purpose of humanitarian assistance is time-proven.

This rationale is historically inaccurate and legally flawed. Civil Affairs personnel are not unconventional forces. Civil Affairs personnel performing humanitarian assistance in operations short of international armed conflict have been authorized to wear civilian clothing. Civil Affairs personnel in international armed conflict have worn standard uniforms only. US Army and Marine Corps Civic Action (Civil Affairs) personnel operating in the Republic of Vietnam (1964–1971) wore standard field uniforms in threat circumstances similar to those faced by Civil Affairs personnel in Afghanistan. US Army Civil Affairs operating in support of Operation Just Cause (Panama, 1989–1990) and Operations Desert Shield/Desert Storm/Provide Comfort (1991) wore standard BDU. These operations were significantly different from Special Forces missions in denied territory.

From a law of war standpoint, neither “force protection” nor a desire to distinguish soldiers performing “offensive duties” from those engaged in humanitarian assistance constitutes military necessity for soldiers to wear civilian attire in international armed conflict.

With respect to the force protection argument, US Army Civil Affairs doctrine in preparation at the time of the “force protection” decision (and subsequently approved) is to the contrary. US Army Field Manual 3-05.401, Civil Affairs Tactics, Techniques and Procedures, Table 4-2, at 4-40, indicates that Civil Affairs personnel in less than full Battle Dress Uniform, complete with combat equipment, to include Kevlar load bearing vest and individual weapon, risk reduced

force protection, while noting that wearing civilian clothing “Greatly increases the possibility of fratricide.”

8. Unlike their Special Forces counterparts, Civil Affairs personnel in indigenous attire did not necessarily wear the Massoud pakol or scarf. Whether wearing western attire or indigenous attire, some concealed their weapons.

9. Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, Aug. 12, 1949, art. 10, 75 U.N.T.S. 287; *reprinted in* DOCUMENTS ON THE LAWS OF WAR 301 (Adam Roberts & Richard Guelff eds., 3d ed. 2000). Article 10 provides: “The provisions of the present convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, *subject to the consent of the Parties to the conflict concerned*, undertake for the protection of civilian persons and for their relief.” [Emphasis added.]

10. The NGO civilian clothing complaint was directed at Civil Affairs units and personnel only. Speaking at a Harvard University Carr Center Symposium, Army-Navy Club, Washington, October 18, 2002, Nicolas de Torrente, representative of the NGO *Médecins sans Frontières* (Doctors Without Borders [MSF]), made it clear that the NGO complaint was directed only at US Army Civil Affairs personnel operating in proximity to NGO. He emphasized that MSF offered no objection as to the attire of US or Coalition Special Forces engaged in counter-terrorist operations against Taliban/al Qaeda. [Personal knowledge of the author, who was present.]

During the question and answer period, this author offered the counterargument that NGO personnel working in proximity to uniformed CA personnel might be at greater risk of being targeted because of an appearance of overt support for US operations, or as collateral casualties incidental to al Qaeda attacks on uniformed Civil Affairs personnel performing humanitarian relief operations. Mr. Torrente acknowledged the counterargument before stating that MSF objected to the presence of any military personnel in proximity to MSF activities.

11. Six months later the Commanding General, US Army Special Forces Command (USASFC), issued an order re-enforcing standard uniform and grooming practices that received wide media coverage. *See, for example*, Kitty Kay, *Close shave for special forces*, TIMESONLINE, (Sept. 13, 2002), available at <http://www.timesonline.co.uk/article/0,,3463-413550,00.html>; Mike Mount, *Close shave for special ops forces in Afghanistan*, CNN.COM/WORLD, (Sept. 13, 2002), available at <http://www.cnn.com/2002/WORLD/asiapcf/central/09/12/afghanistan.clean/>; and Headquarters CJSOTF Afghanistan Memorandum (Sept. 6, 2002), Subject: Uniform and Appearance Standards Policy-Rescinding of Relaxed Grooming Standards. According to the Staff Judge Advocate for US Army Special Forces Command, the commander's intent was for field commanders to review the appropriateness of continued wear of non-standard uniforms and beards, particularly by support personnel not engaged in combat missions. This is borne out by reports the author received from special mission units judge advocates, who advised that bearded special mission unit personnel in non-standard uniforms subsequently briefed the Combatant Commander (Commander, USCENTCOM). The USASFC order was a general tightening of discipline and uniform standards where there was no military necessity for wearing either beards or non-standard uniforms.

Special Mission unit personnel operating against al Qaeda grew beards for several reasons: (1) a dearth of water for daily shaving; (2) for rapport with and to appear like the indigenous personnel with whom they were serving; and (3) to prevent their identification and thus protect them, and their families, from terrorist attacks. The latter rationale is not new. In 1918, then Lieutenant Colonel T.E. Lawrence was publicly identified as a leader in the Arab Revolt. His biographer explains:

As soon as these reports began to appear, the Censorship and Press Committee in London issued a warning to editors which read: “The Press are earnestly requested not

to publish any photograph of Lieutenant Colonel T.E. Lawrence, C.B., D.S.O. This officer is not known by sight to the Turks, who have put a price upon his head, and any photograph or personal description of him may endanger his safety.

WILSON, *supra* note 5, at 552.

In Lawrence's case and the World War II cases, identification risks were limited to the battlefield. With ease of travel and the global threat of terrorism, the identity of special mission personnel is classified to protect them and their families. This practice has existed for some time; see, for example, photographs contained in PETER RATCLIFFE, NOEL BOTHAM & BRIAN HITCHEN, *EYE OF THE STORM* (2000), where the faces of current members of 22 British Special Air Service (SAS) are obscured.

12. The section that follows (including the text of this footnote) was prepared from materials provided by the Department of Military Strategy, Planning and Operations, US Army War College, US Army Peacekeeping Institute, the Department of State, and AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM* (2001).

Arguments with respect to the Taliban militia (as they called themselves) depend only so slightly on *who* and *when*. The Taliban was a loose amalgamation of occasional and disparate tribal and other factions. It was a faction engaged in a civil war in a failed State that owed much of its strength and origin to the Pakistani Intelligence Service. It exercised none of the usual activities of a government, other than the negative one of closing down all schools. The Taliban militia never claimed to be the Afghanistan government or armed forces. The Taliban had no uniformed armed forces. The Taliban was structured around tribes rather than as a military unit, recruiting the allegiance of other tribes or personnel from other tribes and private citizens through temporary alliances, defections, bribery, and conscription, while also relying on foreign volunteers.

Since the collapse of the Soviet Union and the break-up of Yugoslavia, the international test has been whether an entity is permitted to sit behind the nameplate in the United Nations (and in other international fora) rather than the previous test of whether it controls population, territory, etc. The Taliban was never permitted to represent Afghanistan at the United Nations or in other international fora.

The UN Security Council never recognized the Taliban as the representative of Afghanistan. In a number of UN Security Council resolutions issued against the Taliban, there was discussion as to whether a binding resolution could be issued against a non-State entity. These Security Council resolutions included 1189 (1999), 1267 (1999) and 1363 (2001). Security Council resolution 1189 referred to "the continuing use of Afghan territory, especially areas controlled by the Taliban;" hence the Security Council distinguished between the Taliban and Afghanistan.

Prior to September 1, 2001, the Taliban was recognized only by Saudi Arabia, Pakistan and the United Arab Emirates. All three withdrew their recognition following the terrorist attack. Stated another way, 98.5% of governments, including the United States, did not recognize the Taliban as the government of Afghanistan prior to the September 11, 2001, al Qaeda attack. Nor was it recognized by the League of Islamic Nations, nor by Switzerland (depository of the Geneva Conventions). The Taliban was not invited to the 1999 Conference of Red Cross and Red Crescent Societies as the Afghanistan representative. Had it been invited, it is likely the US and other governments would have prevented it from occupying the Afghanistan delegation seat, as was the case with respect to the FRY in Yugoslavia. By the time coalition operations began in Afghanistan, no government recognized the Taliban as the Government of Afghanistan.

Once US and allied operations began in Afghanistan in October 2001, al Qaeda assumed command of most Taliban militia units. As the battle continued, most Taliban withdrew to their normal areas of Afghanistan, leaving the fighting to al Qaeda and foreign members of the Taliban.

Any perception of the Taliban as any sort of a national government dissolved following Taliban abandonment of Kabul (November 12, 2001) and US capture of Kandahar (December 10, 2001).

A leading authority, in discussing guerrillas, summed up the Taliban militia and al Qaeda status:

The law of nations, apart from the Hague Regulations . . . denies belligerent qualifications to guerrilla bands. Such forces wage a warfare which is irregular in point of origin and authority, of discipline, of purpose and procedure. They may be constituted at the beck of a single individual; they lack uniforms; they are given to pillage and destruction; they take few prisoners and are hence disposed to show slight quarter.

CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1797 (2d ed. 1951).

13. See, e.g., the President's Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism, § 1(a), 66 Fed. Reg. 57,833 (2001), *also available at* www.whitehouse.gov/news/releases/2001/11/20011113-27.html ("Military Order").

14. Press Briefing by Ari Fleischer, Feb. 7, 2002, *available at* <http://www.whitehouse.gov/news/releases/2002/02/20020207-6.html>; Katherine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, NEW YORK TIMES, Feb. 8, 2002, at A1. The issues are summarized in John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 207 (2003).

15. Convention Relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 9, at 244.

16. DOD Directive 5100.77 (Dec. 9, 1998), Subj: DOD Law of War Program, para. 5.3.1; CJCSI 5810.01A (Aug. 27, 1999), Subject: Implementation of the DOD Law of War Program, para. 5a. For this reason, the decision was announced that the United States would apply the law of war applicable in international armed conflict to non-State actors in Operation Enduring Freedom. See excerpts from interview with Charles Allen, Deputy General Counsel for International Affairs, US Department of Defense, Dec. 16, 2002, Crimes of War Project, *available at*: <http://www.crimesofwar.org/onnews/news-pentagon-trans.html>. This announcement was greeted with astonishment by some international law experts. See, for example, Marco Sassoli, *Query: Is There a Status of "Unlawful Combatant"?*, which is Chapter V in this volume, at 57. Comments similar to Professor Sassoli's were offered privately to the author by his foreign military counterparts. As will be indicated, the intention was to use the law of war applicable in international armed conflicts as a template for US conduct in Operation Enduring Freedom.

17. Enforcement of International Humanitarian Law: Challenges for the UN Security Council and the USA, US Institute of Peace, Mar. 1, 2001. [Personal knowledge of the author, who was present.]

18. *Supra* note 15.

19. *Id.* at 245–46.

20. Historically, regular military force entitlement to prisoner of war status was absolute and unqualified. Article 49 of US General Orders No. 100, Instructions for the Government of Armies of the United States in the Field (1863)(the Lieber Code), states: "All soldiers, of whatever species of arms . . . all disabled men or officers on the field or elsewhere, if captured . . . are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war." *Reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 1 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter THE LAWS OF ARMED CONFLICT]. Similarly, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, AUGUST 12, 1949 46–47 (Jean S. Pictet ed., 1960) states: "Once one is accorded the status of belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer. The

most important of these is the right, following capture, to be recognized as a prisoner of war, and to be treated accordingly.”

Entitlement to prisoner of war status for members of the armed forces existed without precondition in treaty law. Article 1 to the Annex to Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 631, also *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 9, at 73, and Article 4(A)1, GPW, *supra* note 15. WILLIAM E. S. FLORY, PRISONERS OF WAR 27–28 (1942) states: “Persons serving in the regular army, navy and air force of a belligerent state have rights as prisoners of war when they fall into the hands of the enemy. This rule is part of customary international law as well as treaty law.”

Similarly, G.I.A.D. Draper, *The Present Law as to Combatancy*, in REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE 197 (Michael A. Meyer & Hillairie McCoubrey eds., 1998), comments:

Article 1 of the Hague Regulations, and its four express and two implicit stringent conditions for volunteer and militia corps, represented a triumph for the “military” faction at the Hague Peace Conference. Those four express conditions: (i) a commander responsible for his subordinates; (ii) distinctive sign; (iii) open carrying of arms and (iv) compliance with the Laws of War in their operations, enable an extension of the class of the privileged belligerent by way of identification to the normal features of military armed forces. This identification is not absolute. *Members of the armed forces who persistently violate the Law of War do not lose their POW status upon capture. The effect of Articles 4, 5 and 85 of the Geneva (POW) Convention, 1949, makes this clear* [emphasis provided].

Denial to regular forces (including special operations forces) of prisoner of war status and the protections of the Convention Relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra*, at 421, predecessor to the current GPW, were held to be war crimes by post–World War II tribunals, including in cases where British and American military personnel were summarily executed. On October 18, 1942, in response to British special forces missions, Adolf Hitler issued his Führerbefehl (“Commando Order”), which declared that Allied special forces, even if uniformed members of the armed forces, were to be “slaughtered to the last man” (that is, denied quarter, in violation of Article 23(d), Annex to the 1907 Hague Convention IV) or, if captured, denied prisoner of war status and summarily executed. The “Commando Order” was declared a war crime at Nuremberg. International Military Tribunal, *Nazi Conspiracy and Aggression*, Opinion and Judgment 58 (1947). Its implementation resulted in war crimes convictions by US military tribunals (In re Dostler, 1 Law Reports of Trial of War Criminals, 22–34 (HMSO, 1945), and by British military courts (In re Falkenhorst, VI War Crimes Reports (HMSO, 1946), and Trial of Karl Buck and Ten Others, 5 Law Reports of Trials of War Criminals, 39–44 (HMSO, 1946).

In the *Dostler* case, two officers and thirteen enlisted men from Unit A, 1st Contingent (OSS Operational Group, Italy) were captured March 22, 1944, and executed under the orders from Major General Dostler, even though they had been captured in uniform. Dostler was tried, convicted and executed by firing squad following World War II; In re *Dostler*, and photographic evidence in author’s possession. Other OSS Operational Groups sewed Seventh USA Army patches on their left shoulder to conceal their OSS identity. Ian Sutherland, *The OSS Operational Groups: Origin of Army Special Forces*, 3 SPECIAL WARFARE 2, 3 (June 2002).

21. Yoo & Ho, *supra* note 14, argue that the four criteria contained in Article 4A(2), GPW, are prerequisites to prisoner of war status for regular force combatants. That view is not consistent

with Articles 5, 85 and 93, GPW or the negotiating history of the four criteria; see, for example, Draper, *supra* note 20, at 29; and Jiří Toman, *The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions*, 32 ISRAELI YEARBOOK ON HUMAN RIGHTS 271 283, 285 (2002).

22. An element of inconsistency with customary and treaty law evolved within the United States during World War II as a result of dicta in the opinion by the United States Supreme Court in *Ex parte Quirin*, 317 US 1 (1947), involving the trial of eight Nazi saboteurs captured in civilian clothing in the United States. Changes in treaty law and US practice since *Quirin* for the most part have returned US interpretation to the pre-*Quirin* position, albeit muddled by the experience and two subsequent Singapore cases that followed *Quirin*.

Quirin is lacking with respect to some of its law of war scholarship. Review of the Court's citation of paragraphs of War Department, Field Manual 27-10, Rules of Land Warfare (War Department, 1914 and 1940) suggests that the Court apparently confused provisions relating to civilians taking a direct part in hostilities, who would be unprivileged belligerents, and those related to actions by military personnel, who remain entitled to prisoner of war status. The Court correctly stated, citing paragraphs 83 and 84 of US Army General Orders No. 100 (1863), that soldiers "disguised in the dress of the country . . . if found lurking about the lines of the captor, are treated as spies, and suffer death." This provision is consistent with Article 29 of the Annex to Hague Convention IV. However, the Court failed to note paragraph 203 of Field Manual 27-10, Rules of Land Warfare (1940), which states that spies are not punished as "violators of the law of war." Rather, the Court erred in stating "the absence of uniform . . . renders the offender liable to trial for violation of the laws (*sic.*) of war." The statement has no basis in the law of war. It is contrary to Article 31 of the Annex to the 1907 Hague Convention IV (a treaty to which the United States was a party during World War II), which states that "A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage." Were absence of uniform a violation of the law of war, criminal liability would remain even after a soldier returned safely to his own lines. Similarly, a commander who orders military personnel to carry out a mission in civilian clothing would incur no criminal liability for his order. JAMES MALONEY SPAIGHT, *AIR POWER AND WAR RIGHTS* 287 (1924).

For a summary of the German operation, trial of the saboteurs, and critical analysis of *Quirin*, see LOUIS FISHER, *NAZI SABOTEURS ON TRIAL* (2003).

Two cases from Singapore follow the reasoning of *Quirin*. The facts of each are similar. In peacetime, Indonesian Marines in civilian clothing entered Singapore on sabotage missions. The courts determined that while entitled to prisoner of war status under Article 4A(1), GPW, a dubious finding in and of itself, that entitlement was forfeited when the soldiers executed their missions in civilian clothing. In both cases the defendants were charged with domestic law violations rather than violation of the law of war. Stanislaus Krofan & Another v. Public Prosecutor, Federal Court of Criminal Appeal, 1966, 1 Malayan Law Journal (1967), and Osman bin Haji Mohamed Ali and Another v. Public Prosecutor, Privy Council, 1968, 1 A.C. 430.

23. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 9, at 422..

24. See, for example, Trial of Lieutenant General Shigeru Sawada and Three Others, V LRTWC 1 (HMSO, 1948) (denial of prisoner of war status to and execution of eight US Army Air Corps personnel); and In re Dostler, *supra* note 20.

US military personnel captured in uniform during the Vietnam war were illegally denied prisoner of war status by their captors and routinely tortured. GUENTHER LEWY, *AMERICA IN VIETNAM* 332-34 (1978); Howard S. Levie, *Maltreatment of Prisoners of War in Vietnam*, in THE

VIETNAM WAR AND INTERNATIONAL LAW (Vol. 2) 361, 382, (Richard A. Falk ed., 1969); STUART ROCHESTER & FREDERICK KILEY, *HONOR BOUND: THE HISTORY OF AMERICAN PRISONERS OF WAR IN SOUTHEAST ASIA, 1961–1973*, at 188–194, 199–207 (1998); and VERNON E. DAVIS, *THE LONG ROAD HOME: US PRISONER OF WAR POLICY AND PLANNING IN SOUTHEAST ASIA* 5, 64–84 (2000). Three representative personal accounts detailing the torture and other violations of the GPW are ROBINSON RISNER, *THE PASSING OF THE NIGHT* (1973); JEREMIAH A. DENTON, *WHEN HELL WAS IN SESSION* (1976); and GEORGE E. DAY, *RETURN WITH HONOR* (1989).

US and coalition prisoners of war captured by Iraq during the 1991 war to liberate Kuwait were not provided prisoner of war treatment, and were routinely tortured. US Department of Defense, *Final Report to Congress: Conduct of the Persian Gulf War 619–620* (1992); Secretary of the Army, *Report on Iraqi War Crimes (Desert Shield/Desert Storm)*, (1993); United Nations Security Council S/25441 (Mar. 12, 1993).

25. M. R. D. FOOT, *SOE IN FRANCE* 20 (1966).

26. For example, US War Department Field Manual 27-10, *Rules of Land Warfare* (1940), at 4, states: “The enemy population is divided in war into two general classes, known as the armed forces and the peaceful population. Both classes have distinct rights, duties, and disabilities, and no person can belong to both classes at one and the same time.”

See also The War Office [United Kingdom], *Manual of Military Law*, 7 (War Office, 1929):

The division of the enemy population into two classes, the armed forces and the peaceful population, has already been mentioned. It is one of the purposes of the law of war to ensure that an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both. . . .

Similarly, see War Office, *The Law of War on Land*, being Part III of the *Manual of Military Law*, 30, paragraph 86 (War Office, 1958), which is the current British law of war manual. “Belligerent” is the classical term. More recently “belligerents” have been referred to as “combatants,” as medical personnel and chaplains are part of the belligerent forces but are non-combatants.

27. The *levée en masse* which, as defined in Article 2, Annex to Hague Convention IV (1907), *supra* note 20, is “the inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves.” Treaty recognition of the *levée en masse* constituted a first step in relaxation of the principle of *distinction*.

28. L. OPPENHEIM, *INTERNATIONAL LAW* (7th ed., Vol. II) 206 (H. Lauterpacht ed., 1952).

29. JAMES MALONEY SPAIGHT, *WAR RIGHTS ON LAND* 37 (1911).

30. FRITS KALSHOVEN, *THE LAW OF WARFARE* 31 (1973).

31. Article 23, paragraph (b) of the Annex to the 1907 Hague Convention IV, *supra* note 20, states that it is prohibited “to kill or wound treacherously individuals belonging to the hostile nation or army.”

32. Article 24, 1907 Hague Convention IV, *id.*, states: “Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.” See also Paragraph 51, US Army Field Manual 27-10, at 101–102 (1956), *The Law of War on Land*.

33. Where soldiers in international armed conflict lacked proper uniforms through no fault of their own, they were expected to wear a distinctive emblem to distinguish themselves from the civilian population. OPPENHEIM, *supra* note 28, at 429–430.

34. The negotiating record exception is discussed *infra*. Two treaty exceptions exist. Article 93, GPW, *supra* note 15, states in part:

[O]ffenses committed by prisoners of war with the sole intention of facilitating escape and which do not entail any violence against life or limb, such as offenses against public property, theft without intention of self-enrichment, the drawing up or use of false papers, *the wearing of civilian clothing*, shall occasion disciplinary punishment only. . . . [Emphasis added].

35. Richard R. Baxter, *The Juridical Basis of the Distinction between Lawful Combatant and Unprivileged Belligerent* 47–51 (1959) (unpublished thesis, The Judge Advocate General's School, US Army).

GPW, Article 4A(2) constituted acknowledgement of the legitimacy of World War II partisan warfare in its amendment of previous treaty categories to “Members of other militias and members of other volunteer corps, *including those of organized resistance movements*. . . .” [Emphasis added.] This was a further relaxation of the principle of distinction. See COMMENTARY, *supra* note 20, at 52–61.

36. US Department of War Manual, *Rules of Land Warfare* (1914, Corrected to April 15, 1917), paragraph 22, states: “*The distinctive sign*.—This requirement will be satisfied by the wearing of a uniform or even less than a complete uniform.” See also ALLAN ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT* 349 (1976).

37. ROSAS, *supra* note 36, at 349. (“[T]he concept of uniforms has never been explicitly defined in international law.”)

38. COMMENTARY, *supra* note 20, at 52. SPAIGHT, *supra* note 29, at 57, emphasizes “The ‘distinctive device’ does not mean a uniform.”

39. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 468 (Yves Sandoz et al. eds., 1987). The ICRC Commentary does not reflect the complexity of the discussions within the Working Group. As three Diplomatic Conference participants indicate in their separate commentary, the Working Group experienced considerable difficulty with the practical details of this issue. See MICHAEL BOTHE, KARL PARTSCH & WALDEMAR SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 205–206 (1982).

40. HOWARD S. LEVIE, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT* 49 (1977) (Vol. 59, US Naval War College International Law Studies). SPAIGHT, *supra* note 29, at 57, argued that the distinctive device “must be fixed—externally, so as not to be assumed or concealed at will.” This is not consistent with prior or subsequent practice. The original view regarding a distinctive device was expressed by Francis Lieber in his “Guerrilla Parties Considered with Reference to the Laws and Usages of War.” In it he noted “Nor would it be difficult to adopt something of a badge, *easily put on and off*, and to call it a uniform”. RICHARD S. HARTIGAN, *LIEBER’S CODE & THE LAW OF WAR* 40 (1983). [Emphasis added.]

41. SPAIGHT, *supra* note 29, commented at 57:

At what distance should the sign be recognizable? The German authorities demanded in 1870 that French irregulars should be distinguishable at rifle range. This, says an eminent English jurist, is “to ask not only for a complete uniform but for a conspicuous one,” [citing WILLIAM EDWARD HALL, *INTERNATIONAL LAW* 523 (5th ed. 1904)]. When rifles are sighted to 2,000 yards and over, the German requirement is clearly unreasonable. If the sign is recognizable at a distance at which the naked eye can distinguish the form and color of a person’s dress, all reasonable requirements appear to be met.

At the commencement of the Russo-Japanese War, the Russian Government addressed a note to Tokio (*sic*), stating that Russia had approved the formation of certain free corps composed of Russian subjects in the seat of war, and that these corps would wear

no uniform but only a distinctive sign on the cap or sleeve. Japan replied: “The Japanese Government cannot consider as belligerents the free corps mentioned in the Russian Note, unless they can be *distinguishable by the naked eye from ordinary people* or fulfill the conditions required for militia or volunteers by the Hague *Réglement*.” [Emphasis in SPAIGHT]. Similarly, US War Department Manual, Rules of Land Warfare, *supra* note 36, followed the Japanese Government’s test:

The distinctive sign.—This requirement will be satisfied by the wearing of a uniform, or even less than a complete uniform. The distance that the sign must be visible is left vague and undetermined and the practice is not uniform. This requirement will be satisfied certainly if the sign is “easily *distinguishable by the naked eye of ordinary people*” at a distance at which the form of the individual can be determined. [Emphasis added.]

HYDE, *supra* note 12, at 1793, cites this provision as authority.

The term “unenhanced vision” is utilized in Article 1 of the Additional Protocol on Blinding Laser Weapons (Protocol IV) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 12, 1995, Doc. CCW/CONF.I/7 (1995), 35 INTERNATIONAL LEGAL MATTERS 1218. It means normal vision without enhancements, such as binoculars, or vision corrected to 20/20. For its negotiating history, see Headquarters, Department of the Army, Office of The Judge Advocate General, DAJA-IO Memorandum of Law (Dec. 20, 1996), Subject: *Travaux Préparatoires* and Legal Analysis of Blinding Laser Weapons Protocol. The memorandum, at 8, notes the intent of its drafters:

Unenhanced vision means “the naked eye or . . . the eye with corrective eyesight devices,” such as glasses or contact lens. It does not mean binoculars, a telescopic sight, night-vision goggles or similar devices used to increase visual capability above that required by an ordinary person to perform routine tasks, such as reading or driving an automobile.

42. As noted at the text accompanying note 99, *infra*, British Special Forces in North Africa in World War II, and British and US Special Forces operating behind enemy lines in Iraq during the 1990–1991 war to liberate Kuwait, frequently wore indigenous overcoats over their BDUs to counter one of the coldest winters on record, but also as a ruse to reduce immediate, positive identification at a distance by Iraqi military units.

43. Treaty negotiation records suggest participants did not rely upon “carrying arms openly” for regular forces. This is one of the four prerequisites for militias or partisans seeking combatant and prisoner of war status. The phrase “carrying arms only” has itself been plagued with lack of agreement as to its meaning. See, for example, W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 84 (1990) (the debate with regard to Article 44(3), Additional Protocol I). It also was of limited to no value in Afghanistan, as most Afghan civilians carry military weapons. Similarly, following cessation of formal combat operations in Iraq (May 1, 2003), private Iraqi citizens were permitted to retain Kalashnikov AK-47 or AK-74 select fire weapons in their homes for personal protection. Coalition Provisional Authority Order Number 3 (May 23, 2003). [Copy in author’s personal files.]

44. As summarized in this memorandum, there is substantial State practice of Special Forces wear of civilian clothing or non-standard uniforms. As an example of the fourth category, the personal security detail for Commander in Chief, US Central Command [Combatant Commander], during Operations Desert Shield and Desert Storm (1990–91), wore civilian attire on the basis that VIP protection from terrorist attack is not a traditional military mission. (Attack by conventional Iraqi forces was not regarded as a viable threat.) The personal security detail worked in close proximity to the Combatant Commander, who wore standard BDU. The

personal security detail in turn was surrounded by an outer perimeter of uniformed Saudi soldiers. The civilian attire of the personal security detail was dictated in large measure by host nation concerns. Their immediate proximity to the commander and uniformed Saudi military, and their physical separation from the civilian population was consistent with the principle of distinction. No reasonable case could be made that their actions were tantamount to perfidy. [Personal knowledge of author and photograph in author's files.]

45. Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Convened by the Swiss Government in 1974, the Conference formally adopted Additional Protocols I and II on June 8, 1977.

46. On January 28, 1987, President Ronald Reagan informed the United States Senate that Additional Protocol I would not be submitted for Senate advice and consent to ratification. Message of the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, 100th Congress, 1st Session (1987); 26 INTERNATIONAL LEGAL MATERIALS 561 (1987).

47. US Department of State, 3 Cumulative Digest of United States Practice in International Law, 1981–1988, at 3434–3435. *See also* DOD Law of War Working Group, Memorandum for Assistant Counsel (International), OSD (May 9, 1986), Subject: 1977 Protocols Additional to the Geneva Conventions; Customary International Law Application. *See also* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419 (1987), based upon a speech Mr. Matheson made at an American University workshop. Mr. Matheson's statements with regard to the provisions of Additional Protocol I regarded by the United States as customary law are based upon the DOD Law of War Working Group memorandum, cited above. Thereafter he expresses his personal opinion that other provisions "should be observed and in due course [may be] recognized as customary law, even if they have not already achieved that status and their relationship to the provisions of Protocol I." *Id.* at 422.

48. BOTHE, PARTSCH & SOLF, *supra* note 39, at 256–257. The new rules set forth in Article 44, paragraph 3, were among those found unacceptable to the United States in taking its decision against ratification. Paragraph 3 provides:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious. . . .

49. ROSAS, *supra* note 36, at 333. Continuing, the author notes:

[T]his provision does not seem to imply that all members of regular forces have to wear uniforms in all situations in order to benefit from prisoner-of-war status. On the other hand it serves as a reminder that the uniform continues to be the *normal* way for *regular* combatants to distinguish themselves from the civilian population. [Emphasis added.]

The footnote in support thereof states:

In the 1976 report of Committee III [of the Diplomatic Conference] it is stated that “regulars who are assigned to tasks where they must wear civilian clothes, as may be the case, for example, with advisers assigned to certain resistance units, are not required to wear the uniform when on such assignments.” CDDH/236/Rev. 1, at 29.

See also, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS (Vol. 2) 475 (Howard S. Levie ed., 1980).

50. The uniform requirement has not been codified for military operations short of international armed conflict.

51. Article 24, Annex to the 1907 Hague IV Convention, *supra* note 20; SPAIGHT, *supra* note 29, at 152–156; OPPENHEIM, *supra* note 28, at 428; War Office Manual, Part III, *supra* note 26, at 101.

52. Article 23(b), Annex to the 1907 Hague IV Convention, *supra* note 20.

53. The distinction between a ruse and perfidy is offered as “whenever a belligerent has expressly or tacitly engaged, and is therefore bound by a moral obligation, to speak the truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of good faith.” OPPENHEIM, *supra* note 28, at 420; see also FM 27-10 (1956), *supra* note 32, ¶¶ 49–55.

54. Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, reprinted in THE LAWS OF ARMED CONFLICT, *supra* note 20, at 60–82.

55. *Supra* note 23.

56. BOTHE, PARTSCH & SOLF, *supra* note 39, at 203–04. As neither Afghanistan nor the United States is a State party to Additional Protocol I, the United States is bound by this article only to the extent that it codifies customary law.

57. Additional Protocol I, *supra* note 23, art. 85, ¶ 3(f).

58. This approach, taken by the United States in Vietnam, was praised by the International Committee of the Red Cross; see GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964–1973, at 66–67 (1975).

This legal approach is not new. During the American Civil War (1861–1865) and the Anglo-Boer War (1899–1902), rebel soldiers captured wearing either enemy uniforms or civilian clothing were treated as prisoners of war and not prosecuted unless their actions involved treachery. See, for example, SPAIGHT, *supra* note 29, at 105–109. Boer commandos’ wearing of portions of British uniforms produced one of the more sensational historic examples. In 1902 three Australian officers serving with the Bushveldt Carbineers were tried by British court-martial for murder of captured Boers and murder of a civilian. Their plea with regard to the murder of the captured Boers was one of superior orders on the basis that Lord Kitchener had ordered the execution of Boers wearing “British khaki.” The prosecution argued that Boer punishment was authorized only if the captured Boers had worn British khaki with intent to deceive. Convicted, two of the three—Captain Harry “Breaker” Morant and Lieutenant Peter Handcock—were executed by British firing squad, resulting in a controversy between Great Britain and Australia that remains to this day; see, for example, NICK BLESZYNSKI, SHOOT STRAIGHT, YOU BASTARDS! (2002). (This title is based upon Morant’s last words.) The incident was the basis for the 1979 Australian movie *Breaker Morant* starring Edward Woodward and Bryan Brown. Its screenplay was based upon KIT DENTON, THE BREAKER (1973). Subsequently, Denton authored the non-fiction CLOSED FILE: THE TRUE STORY BEHIND THE EXECUTION OF BREAKER MORANT AND PETER HANDCOCK (1983), less sympathetic to Morant than THE BREAKER. Comprehensive, authoritative accounts are contained in BREAKER MORANT AND THE BUSHVELDT CARBINEERS (Arthur Davey ed., 1987).

and WILLIAM WOOLMORE, *THE BUSHVELDT CARBINEERS AND THE PIETERSBURG LIGHT HORSE* (2000).

59. Toman, *supra* note 21, at 287.

60. Headquarters, Department of the Army, Office of The Judge Advocate General, DAJA-IA Memorandum 1985/7026 (23 Sept. 1985), Subject: Use of Expanding Ammunition by US Military Forces in Counterterrorist Incidents. Hollow point or expanding small arms ammunition is prohibited in international armed conflict by Declaration (IV, 3) Concerning Expanding Bullets, The Hague, July 29, 1899, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 9, at 64. The United States is not a State party to this treaty, but has taken the position that it will adhere to its terms in its military operations in international armed conflict to the extent that its application is consistent with the object and purpose of article 23(e) of the Annex to the 1907 Hague Convention IV, *supra* note 20, which prohibits employment of “arms, projectiles, or material calculated to cause unnecessary suffering.” *See, for example*, Headquarters, Department of the Army, Office of The Judge Advocate General, DAJA-IO Memorandum (May 19, 2000), Subject: 5.56mm, 77-grain Sierra MatchKing™ Bullet; Legal Review.

61. For example, German counterterrorist *Grenzschutzgruppe 9* (GSG-9) and British Special Air Service soldiers wore civilian clothing in the October 18, 1977 hostage rescue of Lufthansa Flight 181 in Mogadishu, Somalia; BARRY DAVIES, *FIRE MAGIC* (1994), photographs between 82–83; ROLF TOPHOVEN, GSG9: THE GERMAN RESPONSE TO TERRORISM 66–73 (1985). The SAS wore non-standard, fireproof uniforms during its hostage rescue operation in the Iranian Embassy at Princes Gate in London on May 6, 1980; MICHAEL PAUL KENNEDY, *SOLDIER ‘I’ SAS* (1989), which contains photographs between pages 116–117; and SIR PETER DE LA BILLIERE, *LOOKING FOR TROUBLE* 319–337 (1994) and photographs between 296–97. Other examples are provided in the State practice section of this paper, *infra*.

62. As the United States Supreme Court stated in *The Paquete Habana*, 175 U.S. 677 (1900): “International law is part of our law, and must be ascertained and administered by the courts of justice. . . [W]here there is no treaty and no controlling . . . judicial decision, resort must be had to the customs and usages of civilized nations. . . .”

63. In an experience similar to that of US Special Forces in Afghanistan eighty-five years later, Lawrence donned indigenous attire at the request of the Arab forces he joined, in part because the only soldiers many Arabs had seen wearing khaki were Turkish, the enemy. Mindful of the death of Captain William Shakespear the previous year because he wore his British uniform, Lawrence obliged his hosts. WILSON, *supra* note 5, at 334–335.

As noted by James Maloney Spaight, Colonel Lawrence was not alone in wearing civilian clothing on combat missions during World War I. SPAIGHT, *supra* note 29, at 273–74.

64. M. R. D. Foot, *The IRA and the Origins of SOE*, in *WAR AND SOCIETY, HISTORICAL ESSAYS IN HONOUR AND MEMORY OF J. R. WESTERN, 1928–1971*, at 57–69 (1973); M. R. D. FOOT, *RESISTANCE: EUROPEAN RESISTANCE TO NAZISM 1940–45*, at 7 (1977).

65. These two publications were distributed free in the hundreds of thousands throughout Europe and Southeast Asia during World War II, either in English or in translated form in Burmese, Chinese, Czech, Danish, Dutch, French, German, Greek, Italian, Malay, Norwegian, Polish, Serbo-Croat, Slovak, Slovene, and Thai. M. R. D. FOOT, *SOE: THE SPECIAL OPERATIONS EXECUTIVE 14* (1984).

The association of British thinking with Lawrence’s success, the Anglo-Boer War, the Irish War, and the Sino-Japanese War is acknowledged in JØRGEN HÆSTRUP, *EUROPE ABLAZE* 38–39 (1978); FOOT, *SOE IN FRANCE*, *supra* note 25, at 2–4; FOOT, *SOE: THE SPECIAL OPERATIONS EXECUTIVE*, *supra* this note, at 11–15; DAVID STAFFORD, *BRITAIN AND EUROPEAN RESISTANCE*,

- 1940–1945, at 19, 21 (1980); PETER WILKINSON & JOAN BRIGHT ASHLEY, GUBBINS & SOE 34, 36 (1993); W. J. M. MACKENZIE, THE SECRET HISTORY OF SOE: THE SPECIAL OPERATIONS EXECUTIVE, 1940–1945, at 10, 38–39 (2000). The Mackenzie volume, the official “in-house” history of the British Special Operations Executive, was compiled in the late 1940s. It remained classified until 1998, and reached open publication in redacted form in 2000.
66. HÆSTRUP, *supra* note 65, at 36, 76, 198. The “Geneva Conventions” were referred to as a general reference to the law of war. Churchill’s reference to the “Geneva Convention” otherwise would have been to the Convention Relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 20, at 421. Article 1 thereof incorporated by reference Article 1 of the Annex to the 1907 Hague IV, *supra* note 20, to establish criteria for prisoner of war status.
67. India Office Records L/WS/1/1296, as cited in CHARLES CRUICKSHANK, SOE OPERATIONS IN THE FAR EAST 249 (1983).
68. STAFFORD, *supra* note 65, at 68.
69. Presidential Military Order (June 13, 1942), Subject: Office of Strategic Services; and JCS 67 (June 21, 1942), Subject: Office of Strategic Services. The latter stated in part that “Under direction of the Joint US Chiefs of Staff . . . [OSS will] prepare plans for and . . . execute subversive activities.” See also R. HARRIS SMITH, OSS: THE SECRET HISTORY OF AMERICA’S FIRST CENTRAL INTELLIGENCE AGENCY (1972); EDWARD HYMOFF, THE OSS IN WORLD WAR II (1972); RICHARD DUNLOP, BEHIND JAPANESE LINES: WITH THE OSS IN BURMA (1979); WILLIAM CASEY, THE SECRET WAR AGAINST HITLER (1988); ROGER HILSMAN, AMERICAN GUERRILLA (1990); TOM MOON, THIS GRIM AND SAVAGE GAME (1991); FRANKLIN LINDSAY, BEACONS IN THE NIGHT: WITH THE OSS AND TITO’S PARTISANS IN WARTIME YUGOSLAVIA (1993); MILLS, MILLS & BRUNNER, *supra* note 5; and DAN PINCK, JOURNEY TO PEKING: A SECRET AGENT IN WARTIME CHINA (2003).
70. Colonel Aaron Bank, in a paper done at The Presidio in 1986 entitled From OSS to Green Beret [on file with author], traces the OSS to US Army Special Forces lineage, as does ALFRED H. PADDOCK, JR., US ARMY SPECIAL WARFARE: ITS ORIGINS (Rev. ed., 2002); and Ian Sutherland, *The OSS Operational Groups: Origin of Army Special Forces*, 25 SPECIAL WARFARE 2,3 (Summer 2002). As indicated in the main text, the OSS also was a forerunner of the Central Intelligence Agency. See THOMAS F. TROY, DONOVAN AND THE CIA (1981) and RICHARD DUNLOP, DONOVAN: AMERICA’S MASTER SPY (1982).
71. SOE/Special Operations (SO) became Special Forces Headquarters on May 1, 1944. British SOE and US OSS components in the United Kingdom were amalgamated into the Special Projects Operation Center (SPOC) on May 23, 1944. FOOT, SOE IN FRANCE, *supra* note 25, at 32.
72. PADDOCK, *supra* note 70, at 28.
73. This nationality mix became more the exception more than the rule. Of the 101 Jedburgh teams deployed to France, only ten were so composed. Sutherland, *supra* note 20, at 13, n.11; ARTHUR LAYTON FUNK, HIDDEN ALLY: THE FRENCH RESISTANCE, SPECIAL OPERATIONS, AND THE LANDINGS IN SOUTHERN FRANCE, 1944, at 141, 145 (1992).
74. ROBERT MATTINGLY, HERRINGBONE CLOAK-GI DAGGER: MARINES IN THE OSS 140 (1989). Another Marine, Captain Peter J. Ortiz, followed the SOE practice of parachuting in civilian clothes, but carried his Marine Corps uniform. In a touch of bravado, he frequently wore it in populated areas, thereby alerting the Germans and forcing his team to remain on the move. FOOT, SOE IN FRANCE, *supra* note 25, at 357. On one occasion Captain Ortiz entered a café dressed in a long (civilian) cape. Hearing a German soldier denigrate Americans, Ortiz drew his weapons—two .45 pistols—then threw back his cape to reveal his Marine uniform before opening fire on the Germans. MATTINGLY, *supra* at 116. For his OSS service, Captain Ortiz was awarded two Navy Crosses, a Legion of Merit, made a member of the Order of the British Empire, and received the

French Croix de Guerre. *Captain Peter J. Ortiz*, 18 FORTITUDE 14 (Marine Corps History and Museums Division Historical Bulletin), XVIII, 2 (Fall 1988); Benis Frank, "Colonel Peter Julien Ortiz, US Marine," unpublished manuscript. [On file with author.]

75. MILLS, MILLS & BRUNNER, *supra* note 5, at 9; MILTON E. MILES, A DIFFERENT KIND OF WAR 274, 371 (1967); PINCK, *supra* note 69, at 134; Dale Andrade, *Every Man a Tiger*, NAVAL HISTORY (VII, 6, Nov./Dec. 1994), at 16–21.

76. The French, Dutch, Belgian and Norwegian governments-in-exile expressed concern over collateral civilian damage and injuries resulting from Allied air attacks. HENRI MICHEL, THE SHADOW WAR: EUROPEAN RESISTANCE, 1939–1945, at 212, 216–217 (1972). As it's author notes, "The Allies undoubtedly committed a major error in disregarding such appeals and in persisting to bomb Europe—including their friends in the Resistance." *Id.*, at 217. Sabotage vis-à-vis air attacks did reduce civilian casualties. An example is the successful SOE attack on the SCNF (French national railways) locomotive works at Fives, described as one of the largest and most important in France, on June 27, 1943. The factory was in a heavily populated area, and bombing would have caused many collateral civilian casualties. Dressed as gendarmerie with the raid leader disguised as Gestapo, the factory was attacked successfully with no loss of life. FOOT, SOE IN FRANCE, *supra* note 25, at 266. Another example—the Peugeot factory at Sochaux near Montbéliard, which manufactured tank turrets—was taken out of action by an SOE-delivered satchel charge after an earlier Royal Air Force attack missed the target and resulted in heavy civilian casualties nearby. FOOT, SOE: THE SPECIAL OPERATIONS EXECUTIVE, *supra* note 65, at 219–220. For a list of key SOE industrial sabotage, see FOOT, SOE IN FRANCE, *supra* note 25, at 505–517. Benjamin F. Jones, The Moon is Down: The Jedburghs and Support for the French Resistance, 40 (1999) (unpublished MA thesis, University of Nebraska), describes the Resistance process for infiltrating and attacking these targets. [Copy in author's files.] FOOT, SOE: THE SPECIAL OPERATIONS EXECUTIVE, *supra* note 65, at 505, notes that the industrial sabotage listed was accomplished with a total of approximately 3,000 pounds of explosive. In contrast, a single Royal Air Force Lancaster bomber could carry 14,000 pounds of bombs, with some modified to carry the 22,000 pound Grand Slam bomb. SIR CHARLES WEBSTER & NOBLE FRANKLAND, THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY, 1939–1945, Vol. I, 452–53 (1961). For heavy bomber accuracy, see W. Hays Parks, "Precision" and "Area" Bombing: Who Did Which, and When?, 18 JOURNAL OF STRATEGIC STUDIES 147 (March 1995). In contrast to SOE accuracy through industrial sabotage, it took 9,070 bombs dropped by 3,024 US heavy bomber aircraft to achieve a 90% probability of a single hit on a target 60 by 100 feet in size. RICHARD HALLION, STORM OVER IRAQ 283, Table 2 (1992).

77. Distinction is the customary international law obligation of parties to a conflict to engage only in military operations the effects of which distinguish between the civilian population (or individuals not taking a direct part in hostilities), and combatant forces or military objectives, directing the application of force solely against the latter.

The principle of distinction was acknowledged in Articles 20–23 of the 1863 US Army General Orders No. 100 (the Lieber Code), *supra* note 20.

78. MACKENZIE, *supra* note 65, at 599, provides the following report from a French railway engineer who reached England in December 1943:

Aircraft attacks on Locomotives. Since the beginning of 1943 650 locomotives have been hit (an average of 70 a month) out of 10,200 in service. The damage is very slight and the average period of repair is a fortnight. There are therefore on an average 35 locomotives under repair, about 0.34% of the total. In order to achieve this derisory result 78 railwaymen have been killed and 378 wounded. . . .

Sabotage of Locomotives. 40 locomotives on an average were sabotaged each month, but the repairs required were much more serious. The average time required has not yet been established. But if we take it as six months, this means 240 locomotives under repair, 2.40% of the total, eight times as many as those damaged by aircraft.

See also MICHEL, *supra* note 76, at 215–216, describing the SOE attack on the Vermork heavy water facility in Norway.

79. MILLS, MILLS & BRUNNER, *supra* note 5, at 45, 47, 186–203 describe one such case in China. The Yellow River Bridge carrying Ping-Han railway traffic had been attacked repeatedly but unsuccessfully by the 311th (US) Air Force, with heavy friendly losses. OSS Operational Team Jackal severed the bridge on August 9, 1945.

80. As a matter of policy, Great Britain prohibited area bombing attacks in Nazi-occupied territories. WEBSTER & FRANKLAND, *supra* note 76, at Vol. I, 463; ROBIN NEILLANDS, *THE BOMBER WAR*, 288–289 (2001).

81. See, for example, MICHEL, *supra* note 76, at 289, who notes that in Russia in the summer of 1942, it was necessary for Germany to employ fifteen divisions in counter-partisan operations.

82. FOOT, SOE: THE SPECIAL OPERATIONS EXECUTIVE, *supra* note 65, at 225–227; STAFFORD, *supra* note 65, at 153–154; HÆSTRUP, *supra* note 65, at 434–435. The latter notes at 435, for example, that: “On D-Day itself, about 950 actions were carried through, out of a planned 1,050, and German Divisions which relied upon railway transport were delayed in their movements towards the [Allied] bridgehead at Normandy for up to two weeks, by which time the bridgehead had been consolidated.”

83. HÆSTRUP, *supra* note 65, at 373–374; AIREY NEAVE, *ESCAPE ROOM* (1970); M. R. D. FOOT & J. M. I. LANGLEY, *MI9: ESCAPE AND EVASION 1939–1945* (1979).

84. For example, on August 13, 1944, a US Fifteenth Air Force heavy bomber attack on a bridge across the Drôme River in southern France missed the bridge and struck the town of Crest, killing 280 civilians, wounding 200, and destroying 480 buildings in Crest. OSS Operational Group ALICE arrived on the scene, and reported:

Upon arriving they were greeted by a very downhearted and somewhat belligerent group of people. The damage consisted of destruction of about one-fourth of the town. . . . Lt. Barnard and Lt. Meeks talked with the people, visited the hospital and encouraged the people that the bombing was a mistake and would not occur again.

FUNK, *supra* note 73, at 79, 153; *THE ARMY AIR FORCES IN WORLD WAR II, COMBAT CHRONOLOGY 1941–1945*, at 424 (Kit C. Carter & Robert Mueller eds., 1973).

85. HÆSTRUP, *supra* note 65, at 9, 421–431.

86. *Id.* at 7. At 42–43, the same author attributes emphasis on partisan warfare to several factors, not the least of which were technical advances in aircraft and radios that facilitated partisan operations.

87. *Supra* note 22.

88. Trial of Otto Skorzeny and Others, IX LRTWC (HMSO, 1949), at 90–94. SS-Obersturmbannführer (Lieutenant Colonel) Otto Skorzeny commanded a commando mission during the last-ditch December 1944 German Ardennes Offensive to infiltrate US lines wearing US Army uniforms. Eighteen members of his forty-four man team were captured in US uniform; each was executed as a spy. Skorzeny was arrested in 1947. As he was not captured *in flagrante delicto*, he could not be charged as a spy. Article 31, Annex to 1907 Hague IV, *supra* note 20. Nor, however, was he charged with violation of Article 23(b) of that Annex, that is, “killing treacherously.”

The court delivered its acquittal without explanation. Popular speculation has been that the court accepted Skorzeny’s claim that his men did not fight in US uniforms. Skorzeny’s defense was less that he and his men did not fight in US uniforms nor necessarily *tu quoque* (“you also”),

but rather based upon the international law principle of *rebus sic stantibus*. A major contribution to Skorzeny's acquittal was the testimony of Royal Air Force Wing Commander Forest Yeo-Thomas, a highly decorated veteran of British Special Operations Executive service, who acknowledged that British Special Operations Executive engaged in similar conduct. Other evidence was offered of similar US, Russian and British operations. OTTO SKORZENY, MY COMMANDO OPERATIONS 450–451 (1995) and James J. Weingartner, *Otto Skorzeny and the Laws of War*, 55 JOURNAL OF MILITARY HISTORY 207, 217–18 (1991).

89. *Supra* note 20.

90. Special Forces' wear of enemy uniforms is more common than generally known. For example, summarizing the practice of the German special operations Brandenburg Regiment, one study concluded: "Throughout the period 1941–1943, the *usual* operational technique was the use of disguise in enemy uniforms." [Emphasis in original.] Edward N. Luttwak, Steven L. Canby & David L. Thomas, A Systematic Review of "Commando" (Special) Operations 1939–1980, II-188 (C&L Associates unpublished report). [On file with author.] Efforts at summarizing pre-Protocol I law as to the wearing of enemy uniforms are Valentine Jobat III, *Wearing of the Enemy's Uniform*, 35 AMERICAN JOURNAL OF INTERNATIONAL LAW 435 (July 1941) and R. C. HINGORANI, PRISONERS OF WAR 28–30 (1963).

Article 39, paragraph 2 of Additional Protocol I, *supra* note 23, states: "It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favor, protect or impede military operations." This new law has not been tested. In addition to the list, *infra*, there is considerable historical evidence to the contrary, including since 1977. See Parks, *supra* note 43, at 77 n. 259. The list that follows shows that this provision is new law rather than a codification of customary practice. Canada took a reservation to Article 39(2) upon its ratification of the Protocol. The Canadian reservation, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/172ffec04adc80f2c1256402003fb314?OpenDocument>, states: "Article 39—Emblems of nationality (Enemy uniforms). The Government of Canada does not intend to be bound by the prohibitions contained in paragraph 2 of Article 39 to make use of military emblems, insignia or uniforms of adverse parties in order to shield, favor, protect or impede military operations."

One may speculate on why the Diplomatic Conference supported this provision. Part of the reason is that State practice was neither acknowledged nor well known. Aside from personal accounts and the official works of M. R. D. Foot and Charles Cruickshank cited herein, OSS records were not declassified until 1985, and the official SOE history (MACKENZIE, SECRET HISTORY OF SOE, *supra* note 65) was not declassified until 1998. Speaking from this author's experience, a "wall" between special operations forces and the negotiating process existed that does not exist within the US government today. While US negotiation guidance was coordinated within the Department of Defense, in all likelihood it did not reach the closed-door, Cold War special operations environment that prevailed at that time. Even if it had, it is entirely probable that the decision was taken not to comment. The author's work with counterparts in other governments suggests that this wall persists to this day within many governments.

91. See also *supra* note 42.

92. FOOT, SOE: THE SPECIAL OPERATIONS EXECUTIVE, *supra* note 65, at 98; DOUGLAS DODDS-PARKER, SETTING EUROPE ABLAZE 85, 124 (1983). This pessimism was confirmed in a number of cases. Four uniformed British soldiers captured during a failed attack on the German heavy water plant at Vermork, Norway, were executed in compliance with this order on November 20, 1942. RICHARD WIGGAN, OPERATION FRESHMAN: THE RJUKAN HEAVY WATER RAID 1942, at 81–82 (1986). During the night of March 22, 1994, a uniformed US Army special operations team landed along the Italian coast about 60 miles north of La Spezia. Captured two days later,

they were executed on the orders of General Anton Dostler who, in turn, was following Hitler's Führerbefehl (Commando Order) of October 18, 1942, which ordered all SOF to be executed, even if captured in uniform. Dostler was tried and convicted by a US Military Commission 8–12 October 1945, sentenced to death, and executed. In re Dostler, *supra* note 20, (cited in n.31).

The background to Hitler's Führerbefehl is contained in FOOT, SOE IN FRANCE, *supra* note 25, at 186–187. The Führerbefehl declared:

All enemies on so-called commando missions in Europe or Africa challenged by German troops, even if they are to all appearances soldiers in uniforms or demolition troops, whether armed or unarmed, in battle or in flight, are to be slaughtered to the last man. . . . Even if these individuals when found should apparently be prepared to give themselves up, no pardon is to be granted them.

At a minimum, the Commando Order violated Article 23(d) (prohibiting denial of quarter), of the Annex to the 1907 Hague Convention IV, *supra* note 23. The Commando Order is contained in its entirety in United States v. Wilhelm von Leeb, et al. ("High Command Case"), XI TWC (GPO, 1951), at 73–75, 525–527, with additional implementing orders at 76–110. The Court's judgment that the Führerbefehl was "criminal on its face" is at 527. The Führerbefehl also is discussed in 11 International Military Tribunal (1946), at 26, and 15 International Military Tribunal (1946), at 296–306, 403–410, the trial of major German war criminals.

In Operation Cold Comfort, two members of a British SAS team captured in uniform in Italy in February 1945 were executed. ROY FARRAN, OPERATION TOMBOLA 7–8 (1960); JOHN STRAWSON, A HISTORY OF THE S.A.S. REGIMENT 275 (1984). Similarly, German Security Forces (SD) leader Josef Keiffer was tried and executed for the murder of captured uniformed British Special Air Service troops. FOOT, SOE IN FRANCE, *supra* note 25, at 305. *See also* Trial of Karl Buck, *supra* note 20, at 39–44, and Trial of Karl Adam Golkel and Thirteen Others, V LRTWC, at 45–53 (murder of captured uniformed SAS pursuant to Führerbefehl); Trial of Generaloberst Nickolaus Von Falkenhorst, XI LRTWC (HMSO, 1949), at 18–30, and VI WCT (William Hodge, 1949) (murder of captured uniformed British commandoes pursuant to Führerbefehl); and Trial of Werner Rohde and Eight Others, V LRTWC, at 54–59 (murder of captured female SOE).

The Japanese issued similar orders directing the execution of aviators and/or SOF. In 1944 members of a combined British–Australian SOF team captured in uniform were executed or died as a result of illegal medical experimentation, pursuant to such an order. As a result of postwar proceedings, Japanese General Dihihara was hanged, while other participants received lesser sentences. LYNETTE RAMSAT SILVER, THE HEROES OF RIMAU: UNRAVELLING THE MYSTERY OF ONE OF WORLD WAR II'S MOST DARING RAIDS 225 (1990). *See also* The Jaluit Atoll Case, I LRTWC (HMSO, 1947), at 71–80, and Trial of Lieutenant General Shigeru Sawada and three others, V LRTWC (HMSO, 1948), at 1–24 (execution/murder of three captured US airmen); Trial of Lieutenant General Harukei Isayama and Seven Others, V LRTWC (HMSO, 1948), at 60–65 (murder of captured US aircrew).

93. *Supra* note 15.

94. For example, a heavily-armed Navy SEAL attired in a wet suit, fins and face mask would be distinctive from the civilian population except, perhaps, in the annual zany Bay-to-Breakers foot race in San Francisco.

95. Examples contained in this Table are documented in the Chicago Journal of International Law version of this paper, *supra* note 1.

96. Where captured SOE personnel were executed without trial, those responsible were prosecuted following World War II. *See, for example*, Trial of Wolfgang Zeuss, et al. (The Natzweiler Trial), V WCT (HMSO, 1949).

97. Ex parte Quirin, *supra* note 22. The eight German saboteurs were civilians. They wore German naval uniforms when they boarded the submarine, and again at the time of their landings in the United States. After landing, they changed into civilian clothing. The uniforms were sent back to the U-boat. FISHER, *supra* note 22, at 23, 26, 35.

98. A detailed and fascinating account is contained in LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 41–434 (2d ed. 1999) based upon Professor Green's participation in the post-war trials. Later in his long and distinguished career, Professor Green was the Charles H. Stockton Professor of International Law at the Naval War College. See *INTERNATIONAL LAW ACROSS THE CONFLICT SPECTRUM: ESSAYS IN HONOUR OF PROFESSOR L. C. GREEN* (Michael N. Schmitt ed., 2001) (Vol. 75, US Naval War College International Law Studies).

99. Stanislaus Krofan & Another v. Public Prosecutor, [1967] 1 Malayan L J 133 Fed Ct Cr App 1966 (Singapore).

100. Osman bin Haji Mohammed Ali and Another Appellant v. The Public, Privy Council, 3 All. E.R. 488, 3 W.L.R. 1076, 112 S.J. 802 (1968).

101. The Medal of Honor citation of Sergeant Drew D. Dix, USA, reads as follows:

Learning that a nurse was trapped in a house near the center of the city, Staff Sergeant Dix organized a relief force, successfully rescued the nurse, and returned her to the safety of the Tactical Operations Center. Being informed of other trapped civilians within the city, Staff Sergeant Dix voluntarily led another force to rescue eight civilian employees located in a building which was under heavy mortar and small arms fire. Staff Sergeant Dix then returned to the center of the city. Upon approaching a building, he was subjected to intense automatic rifle and machine gun fire from an unknown number of Viet Cong. He personally assaulted the building, killing six Viet Cong, and rescuing two Filipinos (*sic*). The following day Staff Sergeant Dix, still on his own volition, assembled a twenty-man force and under intense enemy fire cleared the Viet Cong out of the hotel, theater, and other adjacent buildings within the city. During this portion of the attack, Army Republic of Vietnam soldiers inspired by the heroism and success of Staff Sergeant Dix, rallied and commenced firing upon the Viet Cong. Staff Sergeant Dix captured twenty prisoners, including a high-ranking Viet Cong official. He then attacked enemy troops who had entered the residence of the Deputy Province Chief and was successful in rescuing the official's wife and children. Staff Sergeant Dix's personal heroic actions resulted in fourteen Viet Cong killed in action and possibly twenty-five more, the capture of twenty prisoners, fifteen weapons, and the rescue of fourteen United States and free world civilians. The heroism of Staff Sergeant Dix was in the highest tradition and reflects great credit upon the US Army.

Citation available at <http://www.army.mil/cmh-pg/mohviet.htm> (under Drew Dennis Dix).

102. This was the famous rescue by Lieutenant Thomas R. Norris, USN, of Lieutenant Colonel Iceal E. Hambleton, USAF, commonly referred to as Bat 21, the designation of the B66 in which Lieutenant Colonel Hambleton served as navigator. (Lieutenant Colonel Hambleton actually was Bat 21B.). See DARREL D. WHITCOMB, *THE RESCUE OF BAT 21* (1998). The Vietnamese mentioned in Norris' citation was Nguyen Van Kiet, a South Vietnamese frogman. For his actions, he became the only Vietnamese in the war to be awarded the US Navy Cross. T.L. BOSILJEVAC, *SEALS: UDT/SEAL OPERATIONS IN VIETNAM* 213 (1990). The 1988 movie *Bat-21* starring Danny Glover and Gene Hackman errs in depicting this as solely an Air Force rescue. Lieutenant Norris' Medal of Honor citation clearly acknowledges his fighting in civilian clothing, and the US Government's approval of his actions:

Lieutenant Norris completed an unprecedented ground rescue of two downed pilots deep within heavily controlled enemy territory in Quang Tri Province. Lieutenant Norris,

on the night of 10 April, led a five-man patrol through 2,000 meters of heavily controlled enemy territory, located one of the downed pilots at daybreak, and returned to the Forward Operating Base (FOB). On 11 April, Lieutenant Norris led a three-man team on two unsuccessful rescue attempts for the second pilot. On the afternoon of the 12th, a forward air controller located the pilot and notified Lieutenant Norris. *Dressed in fisherman disguises and using a sampan*, Lieutenant Norris and one Vietnamese traveled through the night and found the injured pilot at dawn. Covering the pilot with bamboo and vegetation, they began the return journey, successfully evading a North Vietnamese patrol. Approaching the FOB, they came under heavy machinegun fire. Lieutenant Norris called in an air strike which provided suppression fire and a smokescreen, allowing the rescue party to reach the FOB. By his outstanding display of decisive leadership, undaunted courage, and selfless dedication in the face of extreme danger, Lieutenant Norris enhanced the finest traditions of the US Naval Service [Emphasis added.]

Citation available at <http://www.army.mil/cmh-pg/mohviet2.htm> (under Thomas R. Norris).

VII

Strategic Targeting and International Law: The Ambiguity of Law Meets the Reality of a Single-Superpower World

Jeffrey K. Walker¹

Strategic Targeting in Recent Conflicts

My charge is to address strategic targeting and the law of war. And isn't this an ironic moment in history for such a discussion? For just at the moment when the evolution of the technology of aerial bombardment allows for the fulfillment of Billy Mitchell's vision, we stand on the verge of jettisoning his underlying theory as anachronistic and redundant. For 60 years, airmen have bemoaned that if they but had pinpoint accurate, survivable, and reliable all-weather day/night weapons, the vision of the strategic bombardment gurus would inevitably and inexorably be proven correct. We now have the technology, but no longer the need.

As is surely evident in Afghanistan and Iraq, strategic bombardment just isn't the main event anymore. Kosovo was the seeming fruition of the airman's years of toil—a campaign limited from the outset to a purely air operation and therefore by necessity heavily focused on strategic targets. The problem is that air power didn't win the Kosovo campaign. The bombing showed little effect on Serbian ground forces and the will of the Serb regime showed little signs of cracking in the face of around-the-clock bombing—in fact, just the opposite. And ultimately, the precipitating event that caused Slobodan Milosevic to fold his tents was the very public

withdrawal of the support—brought about by diplomacy more than by bombs—of his long-time patron, Russia.

So in Kosovo, airmen hit the apparent high-water mark for strategic bombing theory, but at the same time many failed to notice that the plug in the bottom of the doctrinal bathtub had already been pulled. Which brings us to Afghanistan. The Afghan campaign brought unreconstructed airmen face-to-face with a horrible problem: how do you draw Colonel Jack Warden's concentric circles² when there's nothing attackable to draw them around? What do you do when strategic bombing doctrine meets an enemy that would like nothing more than to be bombed back a few centuries? To the Taliban, there wasn't much of value we could bomb in Afghanistan, since they placed little or no value on the technological, industrial, or economic trappings so dear to Western notions of modernity and progress. Al Qaeda traveled light and could easily disperse and regroup after air attacks. So the air war in Afghanistan took a decidedly different turn for air planners. What the air arm of Operation Enduring Freedom became was that much-maligned role assigned them by Heinz Guderian, father of the *blitzkrieg*. Air forces became what air doctrine purists most dreaded—"flying artillery" for the very thin, very light, and very agile special operations ground forces supporting whatever indigenous forces could be allied with us.

Iraq seemed to offer airmen a reprieve from this ignominy, but it didn't quite pan out that way. Operation Iraqi Freedom became something of a laboratory for the future non-strategic uses of air power, with five distinct and geographically defined air sub-campaigns.

First, with the quick capitulation of all but a few pockets of resistance in the southern quarter of Iraq, air forces assumed the role of airborne SWAT teams for what was essentially peacekeeping work. Second, there was the Scud hunt and border patrol of the Western desert. Like in Afghanistan, this was a special operations show, with air power acting as an airborne surgeon—precise applications of measured amounts of force against emerging or fleeting targets with tight control by ground forces with eyes on target or from low and slow tactical drones. Third, there was the Kurdish northern front. Reduced to a wait-and-see role by Turkish skittishness and the lightness of US forces in the area, the role of air power became mostly that of airborne cavalry, providing rescue as needed and exploitation of enemy missteps when possible. Fourth, there was the Big Show—the dual armored thrusts up the river valleys. This was classic close air support and what used to be called battlefield air interdiction. In this area of operations, air power was undeniably cast in the role of airborne artillery—and to very great effect.

Finally, there were bombs over Baghdad. This was the classic strategic hammer role for airpower wistfully dreamt of in its idealized form from Giulio Douhet to

Jack Warden. However, this piece of Iraqi Freedom was, in comparison to Operation Desert Storm in 1991, a very small sideshow. Why was this? Unlike Afghanistan, Iraq was a modern country with a government and population that had grown accustomed to the infrastructure of a modern economy—electrical power, effective transportation, good telecommunications, urban living—so there were certainly strategic targets available. However, Iraqi Freedom presented in clear focus the second tectonic shift that if not exactly sounding the death knell for strategic bombardment has served notice that airmen better start rethinking strategic doctrine. The primary reason why the strategic bombing campaign over Baghdad was not more vigorous was because from the beginning of planning, everyone realized that it would be foolhardy to break any more china than absolutely necessary since we would be expected to fix most everything we broke. And high on the list of the plates we wanted to remain unbroken was the good will of the Iraqi populace.

Military Objectives and Collateral Injury in a Non-Strategic World

So where does all this get us in terms of the law of war? On the one hand, the air campaign is fragmenting and over-specializing, with the result that fewer and fewer targets are now planned through the target planning cycle and air tasking order (ATO). As a result, the opportunity for systematic review and analysis for collateral damage effects and law of war compliance is rapidly fading. In the Iraq air campaign, less than 20% of all targets struck ever appeared on an ATO. This means that the business of operations lawyers is getting more complicated with less time and more uncertainty. Lawyers will need to think outside the “JAG signs the legal review line on the target folder” box—those days are mostly gone. And there is an enormous amount of work being done right now on strategy tools, collaborative software, and other air campaign planning tools that offer many opportunities for innovative new approaches to target review and law of war compliance in air campaigns. The legal community must take advantage of these opportunities to develop future procedures.

On the other hand, the legal equation is being somewhat simplified in one important respect. Since the strategic bombing campaigns of World War II, one of the messiest and most intractable questions to dog the law of war has been the issue of dual-civilian/military use targets. Unfortunately, modern industrial warfare relies upon essentially the same infrastructure as the modern industrial economy—railroads, ports, marshalling yards, highways, telecommunications, and, above all, electricity and oil. Therefore, striking strategic targets for maximum impact upon the enemy’s war-making capacity by necessity impacts greatly upon the enemy’s civilian population. In addition, much of this dual-use infrastructure tends to cluster

in and around urban areas—for completely logical reasons—and therefore striking these targets in densely populated areas heightens the risk of civilian collateral injury and damage. More accurate weaponry helps to reduce collateral injury from misdirected bombs, but the blast, heat, and fragmentation from a perfectly placed bomb cannot be completely contained, so adjoining structures and nearby persons cannot be completely spared from collateral effects. With the eclipse of the importance of “going downtown” and of the traditional infrastructure-centric strategic bombing in general, we will be granted some relief from these thorny legal problems. It is a pity that after having finally gotten some serious tools for analyzing difficult urban and infrastructure targets—I am thinking of Bug Splat,³ JMEM multi-tiered analysis,⁴ and the ready availability of sophisticated computer modeling of weapons effects—the need for them is declining.

Expanding the Notion of Lawful Targets?

However, the frustration borne from the slow realization of how ineffective or unimportant strategic bombing was in Kosovo and Afghanistan and Iraq has caused some airmen to suggest that the problem lies not with the limitations of strategic bombing itself, but rather with the artificial restrictions of international law. Why should the will of the enemy’s population *not* be a lawful target? Some have suggested that the parameters of lawful objectives should be expanded to include objectives that if struck would discomfort or distress the civilian population. (To be fair, everyone stops well short of advocating directly killing civilians.) For example, why not target symbols of cultural pride like the national soccer stadium? Why not acknowledge that making life difficult for the civilian population in the enemy capital is a lawful objective in that it will undermine political support for the enemy leadership and sap their desire to continue the war? Of course, this was one of the publicly articulated—and more regrettable—reasons why the electrical grids in Baghdad in 1991 and in Belgrade in 1999 were attacked early in those bombing campaigns. Some commanders from Desert Storm have stated at various times that one goal of the initial wave of bombing over Baghdad was to impress upon the Iraqi people that they were now at war—most obviously evidenced by the lights going out for both the Iraqi military and civilians all over the city.

There is, of course, a problem with this expansive approach. First, it is arguably illegal. Second, it should remain illegal. There are several reasons why.

First, targeting the will of the people—explicitly illegal but tacitly accepted as at least a collateral purpose of nearly every bombing campaign—doesn’t work. Never has and probably never will. Killing, wounding, or displacing civilians just makes them angry and generally more resolved to resist—it’s a tragic-comic aspect of

human nature that the more we get hurt the more we are willing to get hurt just to spite the one who's doing the hurting. Even carpet bombing and fire bombing German and Japanese cities didn't really break the resolve of the civilian populations. We saw no evidence of this in Serbia in 1999 either.

Second, even a weak declarative norm is still better than nothing in that we at least default to not attacking civilians. Eliminating or even reversing that default could easily put us on the infamous slippery slope and become a race to the bottom. If selecting targets to make the enemy population uncomfortable is lawful, the parameters of just what constitutes discomfort will inevitably expand. If the goal is to sap the population's will without directly killing them—our consciences would hardly allow that—then why not attack irrigation systems or grain elevators or hospitals or mosques? Some commentators have even suggested this is exactly what the United States did in the first Gulf War by hard killing the electrical generation systems in Iraq, resulting in prolonged famine. We have already engaged in ill-advised expansions of the definition of “military object” even under the current rules—television and radio stations and the infamous “crony targets” in Serbia are good examples. It would be disastrous were we completely to jettison the presumption that civilians—and the will of the people—are immune from direct attack.

Third, allowing direct targeting of the enemy civilian population in any way assumes some sort of collective responsibility on the part of the enemy population. This completely ignores the nature of totalitarian or authoritarian regimes. A totalitarian regime exercising a stern monopoly over the levers of power can stay in place for a very, very long time with little or no direct support from the population. In such States, the opportunities for dissent and resistance are generally very limited. In fact, the very regimes we most want to remove are generally those with the least direct popular support—the Ba'ath regime in Iraq and the communist regime in North Korea spring to mind. (Recall that even in the raucously democratic United States, the first Bush “regime” initially enjoyed the support of a bit less than half of the 52% of the population that even bothered to vote.) Deliberately targeting the will of the civilian population in these circumstances constitutes nothing more than collective punishment and random reprisal.

The final and most significant reason why we must avoid loosening the declarative norm against directly targeting the civilian population is that we surely don't want any further weakening of the admittedly less-than-effective existing legal standards protecting civilians from the effects of armed attack. It is the sad history of the documents that compromise the law of war that they were written predominantly by soldiers (or diplomatic surrogates afraid to offend soldiers) to the overwhelming benefit of soldiers.

Let us take the example of an important law of war concept, proportionality. The law of war states “indiscriminate attacks are prohibited” and that an indiscriminate attack includes one 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.”⁵ Thus says Additional Protocol I on the rule of proportionality in the attack.

The problem of course is that the rule implicitly accepts that it is the attacker who decides what is and is not excessive injury, damage, or death. And the determination of excessiveness turns on the equally ambiguous term “military advantage”—or as further obfuscated in US practice, military advantage “when viewed in the context of the campaign as a whole,”⁶ whatever on Earth that means. Except in the most obvious or ludicrous marginal cases, this studied ambiguity yields a systemic default to rendering *any* military advantage thrown into the balance by the attacker as not excessive in relation to resulting civilian injury and death.

The baby elephant in the room that most of us choose to ignore is the inherent and completely irreconcilable subjectivity built into this so-called balancing test. I vividly recall reading the Kosovo post-conflict report by Human Rights Watch⁷ while working in the Pentagon. This thorough and well-substantiated report estimated that 500 civilians had been killed during the 78-day bombing campaign. The reaction of my colleagues and me was “not bad.” The reaction of Human Rights Watch was substantially different. In the report prepared for the International Criminal Tribunal for the former Yugoslavia prosecutor in response to allegations of NATO war crimes in the Kosovo air war, the *rapporteur* stated,

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear cut It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants It is suggested that the determination of relative values must be that of the “reasonable military commander.”⁸

So we are stuck with a rule of paramount importance that rests on comparing two incomparable concepts, purports to subjectively quantify the basically unquantifiable notion of “military advantage,” and defers all decision-making to the party in interest with the least personal and most amorphous stake (soldiers) at the

enormous expense of the other party in interest with the greatest and very tangible personal stake (civilians). To quote the immortal Yul Brenner, “Is a puzzlement.”⁹

Sadly, I have come to believe this was a knowing and deliberate process all along. The agenda worked by the major powers—led by the interests of their military establishments—during the negotiation of all the major law of war conventions was to find a way to present a humane face to the world while avoiding any meaningful restrictions on the use of military force. It is poignantly ironic to note that the most historically effective niches in the law of war explicitly protect soldiers, not civilians—bans on dum-dum bullets, glass projectiles, poison gas, and provisions concerning the protection of the wounded and prisoners of war.

As a result of this studied creation of irreconcilable ambiguity into the critical concept of proportionality, it will remain little more than an aspirational norm. The very ambiguity of the rule has the perverse effect of offering significantly less protection to the innocent victims than to those who enjoy a monopoly on the use of force. Until such time as the law explicitly reapportions the greater risk of injury and death—as a normative legal concept and a moral prescription—to those who wield armed force and have voluntarily assumed the risks attendant upon its use, civilians will continue to receive scant protection from the laws of war.

Why Does It Matter Who Bears the Risk?

Why, it may well be asked, am I distressed by the notion that the law of war disproportionately benefits soldiers at the expense of civilians? Quite simply, because one has willingly assumed the risk of death, injury, or capture and the other has not. This requires a little explanation.

As the great British military historian John Keegan persuasively argues, since the advent of means and methods of warfare that allow the application of force at a distance—basically gunpowder weapons—the mark of a great and valorous military officer has ceased being the ability to inflict injury on the enemy with his strong right arm. Rather, with distant means of killing, the mark of the courageous officer has become an indifference to personal safety, a scorn for injury or death. This reached its most ludicrous extreme in World War I, when young lieutenants fresh from Oxford or Cambridge went over the top with nothing but an umbrella or riding crop or soccer ball. However, this is a very clear manifestation of the most fundamental characteristic of the profession of arms—the willingness to engage in self-sacrifice up to and including death. Military men and women often say, “It’s not about the money.” The military profession has traditionally and still does fancy itself a unique calling. It must not be all about the money, otherwise you could simply contract out for infantry to the lowest bidder.

As the United States continues to engage in conflict marked by its vast technological superiority and with its leadership's aversion to friendly casualties—almost always at the expense of higher civilian casualties—what will it mean to this culture of self-sacrifice, to the ultimate defining characteristic of the profession of arms? Michael Ignatieff, in a *New Yorker* article soon after the end of the Kosovo air campaign in 1999, asserted, “It was a virtual war, fought in video teleconference rooms, using target folders flashed on screens . . . [it] never reached deep into the psyche of a people . . . [did] not demand blood and sacrifice.”¹⁰ Even the wars of the post-9/11 era have demanded little of the American people—indeed, immediately after 9/11 the President's call for “blood and sacrifice” consisted for most people of shoe removal in airports and an enjoinder to spend more money shopping. Hardly the stuff that will render us the next “Greatest Generation.”

Assumption of the Risk

So soldiers have willingly assumed the heightened risk of death or injury as members of the profession of arms. This is not to say that I am all-over warm and fuzzy about every civilian. Just as soldiers assume risk, there has long been a tacit but universal acceptance within the law of war regime that in some circumstances civilians also assume a heightened risk. For example, although the blanket prohibition against making civilians the direct object of attack still applies, there are few who would argue that the killing of war workers busily assembling tanks inside a munitions factory is a war crime. Likewise, the torpedoing of civilian merchant vessels laden with war materiel is not a war crime. On the other hand, few would be so bold as to assert that night area bombing of the housing estate where the tank factory workers sleep is lawful—although soldiers asleep in their barracks do bear this risk. The difference is that the law of war tacitly acknowledges that civilians willingly present within a lawful military target assume the risk of being attacked. The concept seems to be that although one should not go out of your way to kill them, this category of civilian quite simply weighs quite lightly in the proportionality equation when attacking an otherwise lawful military target. Again, I can find no explicit statement of this in law—it just seems to be a generally accepted principle of application.

Voluntary human shields are another category of persons that assume the risk of death or injury by willfully placing themselves in harms way at a lawful military objective. Of course, the law is only the law, and as we saw in Kosovo, policy considerations can render immune from attack otherwise lawful targets protected by volunteer civilians.

Perhaps of more moment for US forces, contractor or civilian employees accompanying US forces in the field logically fall into the category of assumers of the risk. The law of war hints at this in 1949 Geneva Convention III¹¹ by extending some protections to these civilians if they fall into the hands of an enemy force. Both defense contractors and the government have tacitly acknowledged this by paying significantly higher wages to such civilians. As more and more functions heretofore performed by uniformed soldiers are contracted out—and lest anyone be uninformed on this subject, huge swathes of traditional military functions are being contracted—the very notion of what constitutes a combatant versus a civilian is being thoroughly muddled.

The Issue of Impunity

One final factor—and this is a big one—is rapidly undermining what we all were taught as the positivist legal regime regulating armed conflict. From the earliest conferences in St. Petersburg, there was a very rough equivalency of threat amongst the major powers who created the law of war treaty regime. Be it the Great Powers of the 19th century, Democracies versus Fascists in the inter-war years, or the US bloc versus the Soviet bloc of the Cold War, there was always a rough equivalency in the damage each could do to the other. This more or less balanced military threat produced a mutuality of self-interest amongst the major players who most influenced the development of the law of war treaties. If all your potential enemies have the wherewithal to do to you what you can do to them—be it take prisoners or strategically bomb or sink merchant shipping—then everyone faced a somewhat tarnished Golden Rule: don't do some things unto others or they just might do the same unto you. And this was until recently the positivistic enforcement mechanism—admittedly less than totally effective—that underpinned whatever success the law of war regime may have enjoyed in theory and application.

But with the emergence of the United States as the last superpower left standing, we are faced with a significant threat to this implicit enforcement mechanism—impunity. Now I don't intend to use this word with any of its negative connotations. I mean plain old impunity—the ability to act without constraint. This is after all what the Holy Grail of air campaign planners, air supremacy, means—the ability to act with impunity over the entire area of operations. And in a military sense—although not a political one—the United States and its usual allies find themselves in this position. Militarily, we can pretty much do whatever we want with little reciprocal risk of an enemy doing much back at us.

That said, any positivist notions—and you will notice that I don't count the marginally effective international criminal tribunals in this mix—of the laws of war

are basically gone. They have become what the more cynical among us have always suspected—merely an admirable collection of declaratory and aspirational normative statements, to be obeyed or not as the exigencies of the situation dictate.

Where Do We Go from Here?

So I have painted us into a corner—the law is inherently ambiguous, is more aspirational than effective, and was never really intended to protect civilians much in the first place. With one enormous military power now ruling the international roost, the self-interest and reciprocity of threat that served to shore up what compliance there was has evaporated. But the law of war regime as it exists today is all we’ve got. Can we do any better with it?

I’m not really sure, although I’m willing to give it some serious thought and hope the readers will as well. The law of proportionality is hardly unique in its inherent ambiguity—a lot of domestic law falls into the same category. If you’re a full-blown critical legal studies disciple, all law is inherently ambiguous because law is a creature of language and all language is inherently ambiguous. And in international law we get the added confounding factor of equally authentic texts in several languages. What’s a lawyer to do?

Step one may be to simply acknowledge that we need to make clear policy choices rather than tortured legal justifications as to the allocation of risks from the use of military force. As lawyers, we need to stop hiding behind pseudo-positivist “black letter” arguments—there really is very little if any truly black letter law in this area. And in modern democracies, there is already a mechanism for making these policy-driven allocations of risk—political control of the military. Much as soldiers grind their teeth at what is often perceived as niggling interference from the political masters, this is the most effective way to allocate risk in an open and coherent fashion. And as professional soldiers doing the dirty work of democracy, you might as well stop carping about it and acknowledge this is not only the way things are, it is the way things should be.

Notes

1. Lieutenant Colonel Walker is a retired US Air Force judge advocate.
2. John A. Warden, *The Enemy as a System*, AIRPOWER JOURNAL 40 (Spring 1995). Colonel Warden’s five rings are (1) the command ring—the enemy command structure, which may be a civilian at the seat of government or a military commander; (2) the enemy’s organic essentials—those facilities or processes without which the State cannot maintain itself, e.g., in many instances, electricity and petroleum products; (3) the infrastructure ring containing the enemy State’s transportation system, including rail lines, airlines, highways, bridges, airfields,

ports, and other similar systems; (4) the enemy State's population; and (5) the enemy's fielded military forces.

3. A mathematically based software program that predicts a munition's fragmentation pattern based on the angle and direction at which the munition is falling.

4. The Joint Munitions Effectiveness Manuals provide methodologies to permit standardized comparison of weapon effectiveness against a variety of targets.

5. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 57.2(b), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

6. *See* Chairman, Joint Chiefs of Staff, Standing Rules of Engagement for U.S. Forces, CJCS Inst. 3121.01A (series).

7. Human Rights Watch, Civilian Deaths in the NATO Air Campaign (Feb. 2000), *available at* www.hrw.org/reports/2000/nato/.

8. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 INTERNATIONAL LEGAL MATERIALS 1257, ¶ 48 (2000), *available at* www.un.org/icty/pressreal/nato061300.htm.

9. Yul Brenner in Oscar Hammerstein and Richard Rogers' *The King and I* (1951).

10. Michael Ignatieff, *The Virtual Commander: How NATO Invented a New Kind of War*, THE NEW YORKER, Aug. 2, 1999, at 31.

11. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 244.

VIII

Air Power, Accuracy, and the Law of Targeting: Why No Brave New World?

Adam Roberts¹

Jeffrey Walker's paper on "Strategic Targeting and International Law" is clear, punchy, and splendidly heretical. I agree with much of it. It is indeed useful to focus a discussion of targeting on one dimension of warfare. Today it is undoubtedly air power that is the driver of revolutionary changes in the conduct of war, and that presents some of the most difficult and challenging problems as regards the implementation or adaptation of existing legal norms. As Mr. Walker notes, for generations airmen have yearned for accurate, survivable and reliable all-weather day/night weapons. Now they have got them. He and I agree that this situation is strewn with hazards, and that there is no brave new world of precise and legally uncontroversial bombing. I suspect that this situation reminds both of us of that ancient and clever curse: "May your wishes be granted."

However, as will be seen from what follows, I disagree with his main conclusions. Specifically, I disagree with him about why, despite improvements in accuracy, the role of bombing in contemporary warfare remains costly in civilian lives and destruction. In addition, I do not share his extreme pessimism about the role of the laws of war in imposing some limits on bombing. As regards his proposed solution—

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more effective political control of the military—I am all in favor of it, but for reasons indicated below it does not solve the particular problems he identifies.

In responding to his paper I will focus on four main issues relating to air power. First, the significance of the technical developments that have made possible a greater degree of accuracy and discrimination in bombing than in earlier eras. Second, the provisions of the laws of war that relate to targeting, and the ways in which they have shaped and reinforced the tendency toward discrimination in bombing. Third, certain problems that remain, that help to explain why air bombardment is far from achieving perfect precision and discrimination. Fourth, the special difficulties that have arisen regarding the obligations on the defender to distinguish military activities from civilian objects. Finally I will attempt to draw some conclusions.

In each of the sections below, my discussion of the issues, like Mr. Walker's, will focus on four wars:

- The War over Kuwait (1990–1)
- The War over Kosovo (1999)
- The War in Afghanistan (2001–)
- The War in Iraq (2003–)²

These wars have certain similarities. In all of them there have been United States–led coalitions—though the coalitions have involved combat forces from progressively fewer countries.³ In all, the US–led forces had more or less complete command of the air, and used air power (including precision-guided munitions) extensively. In all, they were fighting against one essentially third-world State that was more or less isolated diplomatically and had been subject to economic sanctions. In all, there was at some stage a civil war or regional rebellion ongoing in the country concerned, as well as an international war. In short, these were all thoroughly unequal contests.

The bombing in these wars has been a mixture of strategic (intended to bring about change on its own) and tactical (in support of ground operations). Mr. Walker says of strategic bombardment: “We now have the technology but no longer the need.”⁴ If one interprets this to mean, as much of his paper suggests, that the actual uses of air power in recent wars have been very different from any of the classic visions such as those of Giulio Douhet and Billy Mitchell, I have no problem with his statement. However, if he takes this to suggest that air power today is a would-be solution in search of a non-existent problem, then while I sympathize with the spirit of his remarks I have difficulty in accepting the analysis. He is right that there is a danger of using air power as a default option in situations where, for whatever reason, it is not appropriate. However, for better or for worse, some situations arise in which the application of air power is capable of achieving significant

results—usually in combination with other armed forces, whether on the ground or at sea. Further, we live in an age in which the implementation of international norms, including resolutions of the UN Security Council, sometimes depends on a capacity for strategic coercion, i.e., the use of military and other pressures against a State to secure its compliance with specific demands: in this process, the threat and actuality of air power may have some part to play.

As in Mr. Walker's paper itself, the main focus here is on the laws of war (*jus in bello*) aspects of these wars. The focus is not on the lawfulness of the resort to force (*jus ad bellum*). This subject, while in principle entirely separate, is not always so in practice. As regards the use of air power, there is particular cause for concern about a possible overlap between *jus ad bellum* and *jus in bello*. If air power were believed (even if erroneously) to be a precision surgical instrument that can be applied at low risk to the United States and with a strong likelihood of success, that could incline the government to use it in circumstances in which, in earlier periods, it would have hesitated to use force. In actual cases, of course, other considerations have entered in to decisions to use force. In the first three wars under consideration, the resort to force by the US-led coalitions was widely viewed as justifiable in the circumstances, the most contentious of these three being Kosovo. The Iraq War in 2003 was and remains much more problematical. In this case the United States and partners relied on one principal legal justification for the action: implementation of earlier UN Security Council resolutions. This justification for the resort to force in Iraq was based on serious considerations, but its application was undermined by several difficulties: flawed assessments of Iraqi capabilities, a questionable denigration of the ongoing inspection process, failure to secure explicit Security Council support, and a failure to plan for the occupation of Iraq.⁵ However, in principle any problems that may exist under the *jus ad bellum* regarding the international legal validity of an intervention do not affect consideration of the *jus in bello* aspects.

Because air power in general, and bombing in particular, played a significant part in these four wars, it does not follow that they are necessarily keys to victory in all modern wars. For example, in the 1982 Falklands War the United Kingdom used air power in a much more restricted and limited way than in these four more recent wars. A major bombing campaign against Argentina and its armed forces would have been hard to sustain, of limited relevance to the situation, and highly questionable on moral and political grounds. Such considerations will apply to many future campaigns. The extensive use of air power is particularly questionable in pacification operations, for example in support of a friendly government or an occupation regime, because it risks antagonizing the very people whose support or neutrality is needed. In these and other cases, the reasons for avoiding

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the use of air power, or for exercising discrimination in how it is used, are not narrowly legal in character: they also involve considerations of interest, common sense and prudence. As Mr. Walker notes, everyone involved in planning the bombing of Baghdad in 2003 “realized that it would be foolhardy to break any more china than absolutely necessary.”⁶ Taking all these reasons into account, Mr. Walker’s skepticism about the use and utility of strategic bombardment, even if presented in broad-brush terms, is a healthy antidote to Douhet-like excesses in devotion to bombing.

The Impact of Technical Developments

Since the Second World War there has been a slow evolution of the means of delivery of so-called conventional weapons. The United States has been at the forefront of this process. At the same time, concern about the indiscriminate use of air power, including by the United States, has endured. The US bombing of North Vietnam from 1964 to 1972, and also the use of air power within South Vietnam, reflected certain improvements in technology but also reinforced this concern. That was one basis for the development of the law of targeting contained in 1977 Geneva Protocol I.

At first glance, the dramatic improvement in the accuracy of air-delivered weapons would appear to have improved the prospects of certain air campaigns being conducted in a manner that is compatible with long-established law-of-war principles, especially the principle of discrimination.⁷ It has even encouraged the hope that, at least in some instances, air war can comply with the more specific rules about targeting contained in Protocol I. Indeed, engineers could be seen as having contributed at least as much as international lawyers to improving the possibilities of discrimination in the use of air power.

The principle that the use of air-delivered weaponry should be discriminate was frequently repeated in all four wars, particularly by senior US government and military decision-makers. The remarkable improvement in accuracy compared to earlier eras was widely noted in the 1991 Iraq War. Subsequent US bombing campaigns, right up to the 2003 Iraq War, reflected both quantitative and qualitative developments in the use of accurate air-delivered weapons. The way in which many citizens of Baghdad went about their business in the midst of a major bombing campaign in March-April 2003 indicates that they seemed to have some understanding of the US attempt to apply the principle of discrimination.

In all four wars, civilian casualties among the population of the territory being bombed were significantly lower than many forecasts made before the commencement of military hostilities. For example, in the United Kingdom the

“Stop the War Coalition” published an advertisement in March 2003 in which it stated: “We want to stop a war which will result in an estimated 50,000 civilian deaths, 500,000 injured and 2 million refugees.”⁸ In the subsequent Iraq War—at least in its intense phase in March–April 2003—casualties and refugee movements were, by any count, far below these levels. This is not to say that they were not worryingly high, and cause for major concern.⁹ In summary, I agree with Mr. Walker that civilian casualties in these wars, and in particular casualties of bombing, have been comparatively low by historical standards; and I also agree with him that this fact does not change everything. Thus there is a need to explore why, despite developments in the law and in weaponry, civilian damage and casualties have continued. These themes are explored in the next two sections.

The Law on Targeting

Probably the law’s most important contribution in these four wars has been the part it has played in the larger overall process of improving discrimination in targeting, especially targeting of airborne weapons. Since at least 1868 the laws of war have required that only armed forces and military targets should be attacked. This apparently simple rule is in fact hugely problematical. It has now been given much greater specificity in the rules on targeting contained in 1977 Geneva Protocol I.

On this matter, my emphasis differs from Mr. Walker’s. He is a skeptic about the value of the rules on targeting. There is still, as he says, an “inherent and completely irreconcilable subjectivity”¹⁰ built in to the balancing test when decisions have to be made as between military advantage and protection of civilian life. Human Rights Watch sees certain issues one way, while the Pentagon has a different spin on them. He even implies that there may have been a deliberate and ongoing collusive process by which we have ended up with a body of combat law that seeks only ostensibly to balance the two “incomparable concepts”¹¹ of military advantage and civilian protection. As he puts it:

Sadly, I have come to believe this was a knowing and deliberate process all along. The agenda worked by the major powers—led by the interests of their military establishments—during the negotiation of all the major law of war conventions was to find a way to present a humane face to the world while avoiding any meaningful restriction on the use of military force. It is poignantly ironic to note that the most historically effective niches in the law of war explicitly protect soldiers, not civilians—bans on dum-dum bullets, glass projectiles, poison gas, and provisions concerning the protection of the wounded and prisoners of war.¹²

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This is quite an accusation, but it neglects a basic fact. It is in the very nature of things that combat is extremely hard to regulate; and therefore that some of the more effective parts of the laws of war should be those that deal, not with combat as such, but with the treatment of individuals who are *hors de combat* or have fallen into the hands of the adversary. Against this background, it is remarkable that there is any significant body of law at all that regulates combat. The most detailed rules of this type are those in 1977 Geneva Protocol I. The fact that the United States has serious disagreements with parts of this treaty, which it has not ratified, does not negate the importance of these rules.

Mr. Walker's analysis is short of concrete examples. He is not to be blamed for this. To prove beyond doubt that the law has a benevolent influence on targeting, it would be necessary to report in detail on the process by which the decision was made whether or not to attack particular targets; and, if so, with what weapon, at what time, and in what way. Most people, even specialists in strategic matters, simply do not have access to such information. Information of this kind might confirm the substantial positive contribution of law in the decision-making process. In this context, there is a particular need for evidence of plans or missions that were abandoned or modified because of undue risk to civilians and civilian objects.

What are the main rules of law that are applicable to targeting? The rules in 1977 Protocol I are contained in its Part IV, which is on "Civilian Population," and in particular in its Section I on "General Protection Against the Effects of Hostilities." Within this section, eleven articles—48 to 58—contain all the main rules. Article 52.2 is particularly important:

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.

Article 52 has to be read, and implemented, in conjunction with other provisions of Protocol I. Among the most important of these is Article 57 on precautions in attack, which establishes a strong set of procedures and criteria that must be satisfied in the conduct of all military attacks. For example, as regards so-called "dual-use" facilities—a term not used in the conventions—Article 57.2(b) sets out stringent criteria on the basis of which many planned attacks on such facilities might have to be canceled or suspended.¹³

These rules on targeting in 1977 Protocol I are well known to present problems for certain States. For example, Article 52, cited above, has been the subject of interpretative declarations by a number of parties to the Protocol.¹⁴ The UK's sixteen statements made at the time of ratification of the Protocol include no less than eight that relate to Articles 50 to 57. All eight articles, and all eight UK statements, relate in one way or another to targeting. A key theme of these eight UK statements is that the commander must necessarily act on the basis of the knowledge that was available at the time, as distinct from information that might have been available to others, or might have emerged later. In short, the commander should not be judged by an unrealistic standard. Other NATO member States have made some similar interpretative statements about Articles 51 to 57.

What is the official US line on the rules on targeting in 1977 Protocol I? Even though it is not a party to the Protocol, the United States has indicated that it accepts and applies many of its provisions. In one major official publication it has stated: "The US views the following GP I articles as either legally binding as customary international law or acceptable practice though not legally binding."¹⁵ The US list includes the following articles that relate directly to targeting:

- Article 51 except paragraph 6
- Article 52
- Article 54
- Articles 57–60

The fact of US acceptance in principle of these articles does not mean that there are no problems regarding the US understanding of them. US interpretations, while basically along similar lines to some of the statements made by NATO members when ratifying Protocol I, sometimes go further. For example, official US definitions of "military objectives" use language that is significantly broader than that of Article 52.2 as quoted above. One US version (with italics added here for emphasis) reads:

Military objectives are combatants and those objects which, by their nature, location, purpose, or use, *effectively contribute to the enemy's war-fighting or war-sustaining capability* and whose total or partial destruction, capture or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.¹⁶

In one subsequent US version of this definition, namely Military Commission Instructions issued in 2003, the word ‘definite’ has been omitted.¹⁷ This would appear to represent a further departure from the text of Article 52(2).

Some legal experts in the US armed forces have expressed serious concerns about Article 52. For example, Major Jeanne Meyer, co-editor of the *Operational Law Handbook*, stated in 2001 that this article “tries to constrict the use of air power to the specific tactical military effort at hand” and “ignores the reality that a nation’s war effort is composed of more than just military components.”¹⁸ While not suggesting total rejection of the provision, she urged the United States to “resist the pressure to accept restrictive interpretations of Article 52.2.”¹⁹ In general, the United States is anxious to retain some legal justification for attacks on certain targets that may not themselves be purely military, but which may, for example, contribute to the military effort or constitute key parts of a regime’s infrastructure.

All in all, it is not surprising that some commentators have indicated concern about US interpretations of what constitutes a military objective. They see the US interpretation as differing significantly from Article 52, and as tending towards a more permissive definition.²⁰ Are such expressions of concern well founded? One could question the extent to which the current US position really represents, as is sometimes claimed, a shift as compared to earlier US positions; and also whether the US positions generally have not been similar in their meaning to some of the interpretative declarations on Article 52 made by certain other States. However, it is clear beyond doubt that the definition of military targets in Article 52 poses certain problems for the United States despite its general acceptance of this article. Moreover, there are some differences of national approach on these matters, including between the United Kingdom and the United States; and these can cause problems during coalition military operations.

Is the law as it stands satisfactory? Mr. Walker suggests that it is not. He may be right that the provisions of 1977 Protocol I are not as strong as many would wish; and that when it comes to actual decisions on actual targets, they sometimes leave considerable scope for interpretation and even for a necessarily subjective balancing process. However, he does not suggest specific changes, and he goes too far when he states that “there really is very little if any truly black letter law in this area.”²¹ The real problem may be, not the weakness of the law itself, but the very broad official US interpretation of it. Although Mr. Walker is critical of US practice, especially the danger it poses to civilians, he does not explicitly note the above-quoted US statements that, arguably, stretch almost to breaking point that very scope for interpretation of which he is critical. There are serious arguments both for and against the US emphasis on concentrating attacks on the enemy regime’s sources of power and war-sustaining capability—and the debate about the

adequacy or otherwise of the existing law needs to take account of this critically important debate.

My main disagreement with Mr. Walker's treatment of the law on targeting relates, not to the law's content or interpretation, but to its effect. In the four wars under consideration there is evidence that, so far as the United States is concerned, the effect of all the provisions on targeting contained in Protocol I, and even of the more restricted list of those provisions accepted by the United States, has been much more than the vague and subjective requirement for proportionality mentioned in Mr. Walker's paper. This is not the place to elaborate on this point, or go into the many relevant sources.²² At this stage it may be enough simply to assert that the process of identifying and attacking targets in these four wars has been influenced by legal requirements, including those of 1977 Protocol I. The fact that the US armed forces have to defend their actions by the criteria established in the law of war has had more effect on target selection and on policy generally than Mr. Walker allows. However, it has had less effect in mitigating the horrors of war than might have been hoped. Some of the reasons for this are explored in the next section.

Continuing Problems in the Use of Air Power

The increased accuracy of air-delivered weapons, while undoubtedly a momentous development in the history of war, is no cure-all. Even when coupled with attempts to observe legal restrictions on targeting, it cannot guarantee either success or no deaths of innocents. In the course of these four wars, figures for civilian deaths have apparently not decreased in proportion to the increase in the use of precision-targeted weapons. Why is this so?

Despite the improvements in accuracy, all four bombing campaigns aroused international concern, largely on account of the danger to non-combatants. There were reports of many attacks causing significant civilian casualties and damage. Accuracy in hitting the intended target area did not itself necessarily eliminate such problems. The US bombing of the Amiriyah bunker in Baghdad on February 13, 1991 caused approximately 300 civilian casualties. In the Kosovo war in 1999, a railway bridge was bombed when a passenger train was crossing it, with heavy loss of life. In Afghanistan, the International Committee of the Red Cross warehouse in Kabul was hit twice, on October 16 and 26, 2001; and there were numerous subsequent incidents in which large numbers of villagers were killed.

The question is: what are the specific reasons why the combination of increased accuracy of air-delivered weapons and increased acceptance of certain rules relating to targeting have not produced a more dramatic change for the better? Mr. Walker suggests that the main problem is that the relevant body of law is weak,

especially as regards protection of civilians; and that the United States, as the last superpower left standing, is in a situation of impunity.²³ However, a broader range of factors is at work, many but not all of which are recognized in his paper. In the hostile relations between adversaries in the four wars, at least eleven types of operational problems can be identified:

1. No weapon is more accurate than the intelligence on which its use is based, and this may sometimes be wrong or out of date, resulting in civilian damage and deaths.

2. Many targets are selected at very short notice, for example by ground-based personnel in radio contact with aircraft overhead. This can mean that targets are sometimes attacked without being subjected to cross-checking of information, or lengthy legal and policy consideration. As Mr. Walker states, “fewer targets are now planned through the target planning cycle and air tasking order.”²⁴

3. Precision-guided weapons are generally better at hitting fixed objects, such as buildings, than moving objects that can be concealed, such as people and tanks. This could lead to a perverse prioritization in favor of targeting buildings. (However, preliminary evidence from the 2003 war suggests effective use of air power even against tanks that had been concealed under tree cover.)

4. In all countries, some military targets, whether fixed or mobile, are likely to be in close proximity to civilians and civilian objects. Thus, even when a military target is accurately hit, there may be significant “collateral” damage, including destruction of houses and deaths of civilians.

5. As a response to the increased accuracy of targeting, the “receiving State” may deliberately co-locate military objects close to civilians and civilian objects—thus making it harder to attack them without harming civilians and incurring international criticism on that account. (This problem is discussed further below.)

6. So-called “dual-use targets,” such as a power station producing electricity for both military and civilian uses, are sometimes attacked—often with serious short- and long-term effects on the infrastructure of society.

7. Weapons, even if delivered with great precision, may themselves be of such a nature as to cause serious and indiscriminate damage. For example, it is notorious that cluster bombs frequently pose a hazard to civilians, including children—and may continue to do so long after a war is over.

8. Malevolence, callousness, incompetence, and poor or inappropriate training can also lead to attacks on the wrong places or people.

9. The greater accuracy of weapons risks creating a high level of anger against those individuals and States responsible for target selection. If it is perceived (whether rightly or wrongly) that what is hit is what a targeter intended to hit, there may be a greater sense of outrage among the population of the target State and in

international opinion generally. There is ample scope for conspiracy theories as to why a particular target was attacked.

10. The greater accuracy of bombing makes possible certain forms of action, such as targeted killings of individuals, that may be exposed to a wide range of legal and other criticisms. One example is a targeted killing that risks deaths of large numbers of civilians (e.g., the Baghdad restaurant attack intended to kill Saddam Hussein at the start of the 2003 Iraq War). Another example that could incur criticism, mainly on human rights and *jus ad bellum* grounds, would be a targeted killing (e.g., of an alleged terrorist) in the territory of a foreign country when there is no state of war with, or within, that country. Absence of formal consent of its government would aggravate the problem.

11. In an era marked by frequent threats of “strategic coercion” against certain States to change their policies or even their regimes, there is sometimes tension between the perceived need to make an impressive threat (such as that of “shock and awe” against Iraq in the run-up to the 2003 war) and then, if force is actually used, the need to observe certain limitations on its use. An actual military campaign may be at risk of conforming more to the preceding threats than to the legal and other considerations that might point in the direction of using force discriminately.

The problem of “friendly fire” confirms that the reasons for disasters often relate particularly to poor intelligence and hasty decision-making. In many cases in the two wars in Iraq and in the Afghan war, US bombings led to casualties among coalition forces. It appears that in most instances the target was incorrectly identified or a weapon incorrectly “locked on” to the wrong target. “Friendly fire” is not a laws-of-war issue as such. However, it is a legal issue under the national law of the States concerned, and can lead to national legal action—as it has done in the United States as a result of an incident involving the death of Canadian soldiers in Afghanistan.²⁵ Incidents of US “friendly fire” have also caused considerable concern in the United Kingdom, especially as a result of the 2003 Iraq War.²⁶ The frequency of such incidents confirms the thesis of this commentary, that modern means of war can lead to disaster not because the law is weak, but because the fog, chaos, confusion and sheer malevolence of war have survived into a new era.

A further problem with the new type of US bombing campaign concerns perceptions of the balance of risk. In the eyes of third parties, it can easily look as if the United States puts a lower value on the lives of Iraqis, Serbs or Afghans—even if civilian—than it does on its own almost-invulnerable aircrews. Mr. Walker seems to share this view when he refers to “conflict marked by its [the United States’] vast technological superiority and its leadership’s aversion to friendly casualties—almost always at the expense of higher civilian casualties.”²⁷ I am skeptical about this proposition. It is far from proven that there is any straightforward link between the

safety of US aircrew and higher civilian casualties. It might just as easily be argued that the capacity to make decisions and to release (or refrain from releasing) weapons in relative safety may contribute to the careful and discriminate use of airpower. However, the hostile perception has some plausibility. Bombing from high altitude must sometimes increase the risk of a target being inaccurately identified; and must also increase the time a weapon takes to reach its target on the ground—by which time, for example, a previously empty bridge may have a passenger train running across it. The perception of invulnerable warriors risking the lives of civilians underneath feeds those hostile views of the United States that form a background against which terrorism can flourish.

Perhaps the most profound problem of all regarding the use of bombing is that the United States and its allies have developed a concept of war aimed at targeting the sources of an adversary's power, not all of which may be strictly and narrowly military in character. Mr. Walker appears to equate this with "targeting the will of the people."²⁸ He is rightly opposed to the idea of a policy aimed at civilians, criticizing it on both legal and practical grounds. However, the US doctrine is not necessarily one of targeting the will of the people. Rather, it aims principally at targeting the key sources and instruments of a regime's power—something that may in particular cases be very different. This is the biggest single challenge to the existing legal regime on targeting.

The debate about the bombing of the TV station in Belgrade in 1999 exemplifies the difficulty of determining what is a legal target. Mr. Walker calls this an example of "ill-advised expansions of the definition of 'military object' even under the current rules." However, it is not clear that what is involved is an expansion of the definition of military object. On the basis of the pre-1977 law, especially the 1954 Hague Cultural Property Convention, Article 8(1)(a),²⁹ a serious argument can be made that attacks on a broadcasting station are not necessarily illegal. The question is rather whether 1977 Protocol I drastically changed this situation by narrowing the definition of "military object." It may or may not be relevant that in the Yugoslav revolution of September/October 2000 the resisters to the Milosevic regime treated the same TV station as a high-priority target. One thing is certain: it will always, and quite properly, be difficult to persuade TV reporters that television stations are legitimate targets!

The Kosovo War raised many other issues indicating how easily a bombing campaign can conflict with the targeting provisions of the laws of war. For example, there were debates about what NATO should do when it started to run out of military targets: should it then abandon the bombing campaign, or move on to other targets? There is also the closely related analytical question: did attacks on dual-use targets, and/or a perceived threat of further attacks directed at civilians and

civilian objects, play a major part in the Yugoslav decision of June 3, 1999 to accept the terms that were being pressed upon it?³⁰ It is difficult to provide a definite answer to that last question. One can certainly doubt whether any “single-factor” explanation is adequate. However, while agreeing with Mr. Walker that Russia’s abandonment of Serbia was of crucial importance, I cannot agree with his strong assertion that “air power didn’t win the Kosovo campaign.”³¹ At the very least it was one important contributory factor. The more difficult question is whether the potential threat to specifically civilian objects and people was a part of the equation that contributed to Serbia’s defeat.

Defender’s Obligation to Distinguish Military Activities from Civilian Objects

There are extensive requirements that apply as much to defenders as to attackers, including the requirement not to locate military forces and equipment in civilian areas or in protected buildings such as hospitals or mosques.³² In these four wars it appears that these legal requirements were deliberately violated by adversaries in order to induce the US-led coalition to engage in an attack that caused civilian casualties and destruction. On several occasions the United States asserted that its opponents had faked civilian damage or, by illegally locating military assets in or close to civilian ones (for example putting gun emplacements next to mosques), had willfully created a situation in which US bombing, if it went ahead, would be likely to cause civilian damage and incur international criticism. Some evidence from the 2003 Iraq War in particular suggested that this may have been happening systematically.

In this reading of events, the laws of war are being cynically misused in order to make the attacker’s actions appear indiscriminate and disproportionate. Such conduct, if it were proved to have the intention imputed here, would of course constitute a tribute of sorts to the practical importance of the principles of proportionality and discrimination. Such conduct is all part of what Brigadier General Charles Dunlap has called “lawfare,” or “the strategy of using—or misusing—law as a substitute for traditional means to achieve an operational objective.”³³

Why is there such a tendency of States subjected to coalition bombing to locate military assets in or near civilian objects such as schools and mosques? Part of the answer may be that it is a logical if deplorable reaction to the situation created by effective US dominance of the air. If the United States and its partners can see and strike anywhere, or at least it is believed that they can do so, it is not surprising that its adversaries should locate their military assets in a place where any US attack would be open to condemnation in the court of world opinion. Similarly, the very

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dominance the United States exerts on the battlefield generally may induce adversaries to other illegal forms of response, including international terrorism.

Conclusions

There is no denying some obvious truths about the impact of technological developments. The increased accuracy in the delivery of weapons has had significant effects; ought to improve possibilities that bombing can bear a reasonable relation to the law of armed conflict; and may contribute to a reduction in numbers of civilian casualties in the territory being bombed. However, as this survey has suggested, none of this means that we are in a brave new world of casualty-free warfare. Indeed, the new accuracy in bombing poses a range of difficult and even threatening problems, many of which relate to the rules on targeting in the laws of war. Such problems contribute to Mr. Walker's pessimistic conclusion that "any positivist notions . . . of the laws of war are basically gone. They have become what the more cynical among us have always suspected—merely an admirable collection of declaratory and aspirational normative statements, to be obeyed or not as the exigencies of the situation dictate."³⁴

I cannot agree with this conclusion. Mr. Walker admits that he has "painted us into a corner."³⁵ Yet his account of the corner is not completely convincing. He is right to focus on the uniqueness of the situation where there is only one Great Power. However, what he says about the supposed impunity of the United States and its allies does not reflect accurately the full range of constraints on decision-makers. True, US decision-makers are protected from the attentions of the International Criminal Court (though in theory their British counterparts are not); and in some measure they are protected from military reprisals as there is no adversary of remotely equal military power. However, US decision-makers involved in such matters as targeting must always have in mind the possibility of a wide range of adverse consequences. Any actions which fly in the face of the decent opinions of humankind, or which plainly violate the laws of war, may result in adverse publicity, internal US legal procedures, local opposition in the area of operations, and a loss of support both domestically and internationally that could undermine ongoing US policies. In the twentieth century the United States acquired a unique international role thanks largely to its success in building, maintaining and leading coalitions of States. That success is now in jeopardy, as the diminishing number of member States in the coalitions between the 1991 and the 2003 Iraq wars perhaps indicates.

What, if anything, can the United States and allies do in regard to the existing (and admittedly modest) body of law as it applies to the use of air power in war? In

principle three courses of action are possible. All three have strengths, and the prudent conduct of policy must involve elements of all of them.

1. *Adhere strictly to the existing black-letter law on targeting, especially the law as outlined in 1977 Geneva Protocol I.* This course has serious merits, and Mr. Walker, despite his conclusion that there is “very little black letter law,” shows his sympathy for it, advocating strongly a default rule of not attacking civilians.³⁶

2. *Recognize some right to interpret and adapt the rules in practice.* The fact that many States have made interpretative declarations in respect of some of these rules suggests the strength of this approach. It indicates that the rules can properly be interpreted to take account of changing circumstances and the legitimate interests of States. In principle some degree of flexibility in treaty interpretation can have an important function if the law is not to be seen as rigid and irrelevant. However, there is a difference between a legitimate interpretation of the rules and an unacceptable departure from them. Any actual departure needs to be managed carefully if it is to be accepted by other States. A purely unilateral US departure from the targeting provisions of Protocol I would be problematical. A possible difficulty of this course is that different States might want to adapt or weaken the rules in different ways, until very little was left of the treaty regime.

3. *Revise the law.* In general, there is remarkably little pressure to change or amend the basic rules on targeting, including those in 1977 Geneva Protocol I. There has been a dearth of specific proposals for formal agreement on these matters—whether to strengthen the law by making it more restrictive, or alternatively to dilute it in order to bring regime-supporting activities and institutions more explicitly into the category of legitimate targets. The main impetus for new law, so far as the use of weapons is concerned, is focused on such highly specific tasks as limiting or prohibiting the use of cluster bombs.

Perhaps because he senses the difficulty of all these courses, Mr. Walker concludes with a plea for political control of the military, which he sees as “the most effective way to allocate risk in an open and coherent fashion.”³⁷ I am all in favor of political control of the military, but to imagine that it is a solution to the problems addressed in his paper is sheer escapism. The track record, including recently, suggests that on the particular issue that concerns us here—effective implementation of the law of armed conflict—political control often leads to confusion and failure. We have heard eloquent testimony at this conference suggesting that in early 2003 it was political control that contributed to the remarkable failure of the Pentagon to make plans for the occupation phase in Iraq. Similarly, in January 2002 it was largely at the political level that a number of confusing statements were made about the status and treatment of detainees at Guantanamo. Unfortunately both the US and UK governments are somewhat distrustful of their own bureaucracies

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and those in the bureaucracies with specialist skills (including the law) sometimes suffer in consequence.

My conclusions are that despite dramatic improvements in accuracy we are not in an era in which the use of air power offers an escape from the cruelties and disasters of war; that, albeit alongside a wide range of other considerations, the law as it currently exists does offer a useful practical guide to targeting; that no country, not even the United States, can afford to ignore basic legal provisions applicable to targeting; that the interpretation to be placed on the law of targeting poses problems for many countries, and not just the United States; that the law faces a major challenge in doctrines based on attacking the adversary regime's sources of power; that implementation of the laws of war, while certainly a matter for political control, must also remain central to the activities, planning and ethos of the armed forces; and, finally, that recent air campaigns show how complex and paradoxical implementation of the law can be—but not that it has ceased to be an important standard for guiding the conduct of military operations.

Notes

1. Sir Adam Roberts is Montague Burton Professor of International Relations at Oxford University and Fellow of Balliol College.
2. I have deliberately not followed the common and ethnocentric practice of referring to the events of 1990–91 as “the first Gulf War” and those of 2003 as “the second Gulf War.” If there was a “first Gulf War,” it was the Iran–Iraq War of 1980–88, which was a more catastrophic event for both societies than either of the subsequent wars. It is hard to justify the use of terminology that appears to ignore that war completely.
3. The term “coalition forces” is used here as convenient shorthand for the United States–led forces in all four wars. As regards Iraq in March–April 2003, it is questionable whether the term is appropriate to describe what was principally a “coalition” of only two armed forces, from the United States and United Kingdom, with the addition of a few Scud-hunting Australian commandos in the western desert, and Polish troops assisting US Navy Seals in the south. The use of the term was much criticized, mainly because it was seen as implying the active involvement in the conflict of a larger grouping of countries than was in fact the case.
4. See Mr. Walker's article, *Strategic Targeting and International Law*, which is Chapter VII in this volume, at 121.
5. On international legal aspects of the decision to use force in Iraq, see Adam Roberts, *Law and the Use of Force After Iraq*, 45 SURVIVAL 31 (Summer 2003).
6. Walker, *supra* note 4, at 123.
7. The principle of discrimination, which is about the selection of weaponry, methods and targets, includes the idea that non-combatants and those *hors de combat* should not be deliberately targeted.
8. Half-page advertisement for Stop the War Coalition, THE GUARDIAN (London), Mar. 3, 2003, at 17.
9. An independent US think-tank has estimated that between 3,200 and 4,300 civilian non-combatants died as a result of the military operations in Iraq between March 19 and April 20,

2003. Carl Conetta, *The Wages of War: Iraqi Combatant and Noncombatant Fatalities in the 2003 Conflict*, Project on Defense Alternatives Research Monograph no. 8, at 2–3 (Oct. 2003).
10. Walker, *supra* note 4, at 126.
11. *Id.*
12. *Id.* at 127.
13. Mr. Walker cites part of Article 57.2(b) of 1977 Protocol I in his paper, *id.* at 126.
14. Declarations made by States that have a bearing on their understanding of 1977 Geneva Protocol I, Article 52, include those by Australia, Belgium, Canada, Germany, Ireland, Italy, Netherlands, Spain and the United Kingdom. Texts in DOCUMENTS ON THE LAWS OF WAR 500–11 (Adam Roberts and Richard Guelff eds., 3d ed. 2000).
15. Judge Advocate General's School, *Operational Law Handbook*, JA 422, ch. 2, p.11 (2002).
16. US Navy/Marine Corps/Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, MCWP 5-2.1, COMDTPUB P5800.7 ¶ 8.1.1 (1995). For an annotated text, see ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 402 (A. R. Thomas and James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).
17. US Department of Defense, *Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission*, April 30, 2003, *available at* www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf.
18. Jeanne M. Meyer, *Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 AIR FORCE LAW REVIEW 143, 166, 181 (2001).
19. *Id.* at 182.
20. See, e.g., Bofaxe No. 256E of May 15, 2003, issued by the Institute for International Law of Peace and Humanitarian Law of the Ruhr-University Bochum, *available at* <http://www.ifhv.de>.
21. Walker, *supra* note 4, at 130.
22. On the relevance of legal considerations in the bombing campaign in the 1991 Gulf War, see Adam Roberts, *The Laws of War in the 1990–91 Gulf Conflict*, 18 INTERNATIONAL SECURITY 134 (Winter 1993/94).
23. Walker, *supra* note 4, at 129.
24. *Id.* at 123.
25. On September 13, 2002, two US pilots, Major Harry Schmidt and Major William Umbach, were charged by the US Air Force following an incident in which they mistakenly bombed and killed Canadian troops in Afghanistan on April 17, 2002. These were the first criminal charges against US pilots in connection with the events in Afghanistan. In the course of 2003 Major Umbach announced plans to retire from the military with a reprimand on his file. Meanwhile Major Schmidt initially declined an offer of administrative punishment, but later agreed to accept a nonjudicial hearing. At that hearing, on July 6, 2004, he was found guilty of dereliction of duty and was punished with a reprimand and a forfeiture of US \$5,672 in pay. He lost his final Air Force appeal on August 3, 2004. News report in THE TIMES (London), Sept. 14, 2002, at 16; and Associated Press reports of June 25 and October 18, 2003, and July 7 and August 3, 2004.
26. In October 2003 a UK soldier, Trooper Christopher Finney, was awarded the George Cross—the second highest honor for gallantry—for his bravery under US “friendly fire” in the 2003 Iraq War. In November 2003 the BBC's World Affairs Editor published an account of another such incident in Iraq in which at least 16 people were killed and 45 injured. See JOHN SIMPSON, *THE WARS AGAINST SADDAM: TAKING THE HARD ROAD TO BAGHDAD* (2003).
27. Walker, *supra* note 4, at 128.
28. *Id.* at 124.

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29. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 14, at 373.

30. Re the factors that led Milosevic to back down, see Adam Roberts, *The Laws of War After Kosovo*, in LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN 416–17 (Andru E. Wall ed., 2002) (Vol. 78, US Naval War College International Law Studies). As mentioned there, for a challenging argument that the NATO bombing was a key factor in leading to the decision to back down, and that one element was a belief that the bombing would become less discriminate if Milosevic did not settle, see Stephen T. Hosmer, *The Conflict Over Kosovo: Why Milosevic Decided to Settle When He Did*, RAND report MR-1351-AF, at 91–107 (2001).

31. Walker, *supra* note 4, at 121.

32. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 18, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 14, at 301; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 58, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 14, at 422. Two States against which the United States fought in recent wars—Afghanistan and Iraq—were not parties to 1977 Protocol I.

33. Brigadier General Charles Dunlap, US Air Force, *Air and Information Operations: A Perspective on the Rise of “Lawfare” in Modern Conflicts*, presentation prepared for the US Naval War College Conference on Current Issues in International Law and Military Operations, Newport, Rhode Island, June 25–7, 2003.

34. Walker, *supra* note 4, at 130.

35. *Id.*

36. *Id.*

37. *Id.*

IX

Targeting and Humanitarian Law: Current Issues

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In the 21st century, the art and science of targeting, particularly in the aerial environment, has become extraordinarily complex. So too has compliance with humanitarian law. Battlefields of centuries past were linear in character, with opposing forces facing each other across a FEBA (forward edge of the battle area). This positioning, together with the limited range and mobility of weapons systems, rendered civilian populations relatively immune to the direct effects of warfare. Civilians were either distant from the battlefield or fled as hostilities drew near.

The advent of long-range strike capability led to a revolution in military-legal affairs.² Civilian populations and objects were not only placed at greater risk due to their proximity to lucrative, and now viable, military and infrastructure targets, but civilians and civilian objects became objectives themselves in various strategic bombing doctrines.³ Humanitarian law reacted by affirming their immunity from direct attack, most notably with the 1977 codification of the distinction principle in Protocol Additional I to the Geneva Conventions.⁴

Today, technological advances in range, precision, and stealth, as well as the transparency resulting from advanced C4ISR technologies,⁵ have again transformed the nature of warfare. Entire countries now comprise the battlespace. And the technological “haves” can strike the assets of their ill-equipped adversaries with near total

impunity. For instance, during Operation Iraqi Freedom, coalition forces lost only one fixed wing aircraft to enemy fire.⁶ Such asymmetry has momentous consequences, not only for combat operations, but also for the application of humanitarian law.

This article explores several of the more pressing legal issues involving targeting during 21st-century armed conflict—targeting doctrine, targeting an opponent's leadership, targeting terrorists, the use of human and civilian object shields, treating military installations as a unitary target, and computer network attack. Each is especially relevant given the likely use of “lawfare” by opponents of the United States and its coalition partners, most recently demonstrated during Operation Iraqi Freedom.⁷ Humanitarian law has become a permanent fixture on the modern battlefield. Those who ignore this reality do so at their own risk.

Targeting Doctrine, Compellance Campaigns, and Military Objectives

Effects-based operations (EBO) have replaced attrition targeting in US doctrine. In attrition warfare, extensive pre-planned target lists are developed and targets are then destroyed serially, while engaging targets of opportunity as located. Reduced to basics, the enemy is defeated by progressively weakening its military forces. In contrast, effects-based operations represent “the maturation of . . . technologies merged with the theory of targeting for systematic effect rather than absolute destruction.”⁸ The confluence of three factors makes EBO possible: advanced technologies; effects-based planning; and parallel warfare, a new concept of operations.⁹

Technological advances enable effects-based operations by generating new options for attack. For example, the use of low-observable (stealth) technologies in the F-117 Nighthawk or B-2 Spirit aircraft permits smaller attack packages because stealth aircraft need no escorts.¹⁰ This frees systems that would otherwise be tasked for escort duties to conduct attacks themselves. It also heightens the likelihood of mission success by making attacks less detectable than would be the case with penetration by a large package.

Advances in precision also facilitate effects-based operations. The Joint Direct Attack Munition (JDAM) constitutes the great leap forward in this regard. JDAMs are guidance tail kits that use an inertial navigation system and global positioning system satellite (GPS) linkage to achieve a CEP (circular error probable—radius of a circle within which ½ of the bombs will strike) of approximately 20 feet when attached to free-fall 1,000 and 2,000-pound bombs.¹¹ A 500-pound variant entering the inventory will improve accuracy and allow aircraft to carry more weapons per sortie. Nearly all attack aircraft can carry the JDAM, and each weapon is

independently targetable. Thus, even single-seat fighters such as the F-16 can now strike multiple targets during a single sortie. JDAM's bargain price tag of approximately \$21,000 per tail kit makes it an affordable option against the vast majority of targets. Combined, these characteristics dramatically increase the number of targets that can be struck in a very short period with a high degree of accuracy.¹² The net result is the capability to conduct "shock and awe" campaigns, i.e., campaigns that stun opponents into confusion and dismay.

Advances in information technology also enable effects-based operations. Information systems now make it possible to "rapidly collect, share, access, and manipulate information," while sometimes linking the sensor directly to delivery system.¹³ By doing so more quickly and comprehensively than an opponent (and by using information technology to blind the enemy), friendly forces can operate inside his OODA (observe, orient, decide, act) loop.¹⁴ Paralysis eventually results.

The second element of EBO is effects-based planning. This method of planning seeks to achieve specific effects with the least risk, in the shortest time possible, and with minimal expenditure of resources by considering both direct and indirect effects. Direct effects are "immediate, first order consequences,"¹⁵ i.e., the damage directly caused by the weapon. Classic attrition warfare emphasizes direct effects. However, effects-based planning also factors in indirect effects—"the delayed and/or displaced second- and third-order consequences of military action."¹⁶ A typical example is loss of support for a regime that appears inept or impotent in the face of repeated enemy attacks.¹⁷

Both direct and indirect effects have three fundamental characteristics. The first is the cumulative nature of individual effects. This occurs when the overall impact of various attacks is greater than the sum of the individual attacks themselves; the attacks operate synergistically. Loss of support for the regime in the example cited above exemplifies this phenomenon.

Cascading effects are "indirect effects [that] ripple through an adversary target system, often influencing other target systems as well."¹⁸ Typically, they occur when striking targets at a higher level of conflict. For instance, damaging a national level command and control net will influence lower levels of the conflict as the ability to receive intelligence and direction from above, and to coordinate operations with other units, diminishes. Targeting leadership represents perhaps the pinnacle of a cascading effects focused mission.

Collateral effects are the unintended consequences of an attack.¹⁹ To the extent that foreseeable collateral effects affect civilians or civilian objects, the humanitarian law principle of proportionality requires balancing them against the military advantage that accrues from attacking the target.²⁰ Further, although it is sometimes

questioned whether reverberating effects must be assessed during proportionality calculations, US doctrine affirmatively requires planners to consider them.²¹

Effects-based planners deconstruct target systems to identify that element thereof the neutralization or destruction of which best achieves the desired effect. Sensitivity to the typology of effects expands the universe of possible attacks likely to yield that result. Moreover, targeting only components of the target system generating the desired effect means tasking fewer sorties, thereby increasing the availability of weapons systems for missions against other targets. EBO also creates opportunities to avoid causing collateral damage and incidental injury. In the words of one Pentagon briefer, “The best way to mitigate collateral damage is only strike the stuff you need to strike—or affect the stuff you need to affect.”²²

As to the objects or individuals against which EBO is most effective, one must understand that the effect sought determines the precise target; categories of targets cannot be assessed in the abstract. That said, because Colonel John Warden’s strategic rings concept continues to resonate in airpower circles, political leadership, economic systems, supporting infrastructure, population, and military forces remain attractive targets to planners.²³ Focusing on these key target sets does not imply that civilians or civilian objects should be attacked directly, although, as will be discussed later, some commentators are suggesting exactly that. Instead, EBO creatively identifies targets likely to affect, but not necessarily harm, these strategic centers of gravity.

In addition to a fresh planning approach, EBO leverages a new concept of operations, Parallel Warfare and Simultaneous Attack.²⁴ Traditionally, warfare was serial and sequential. In an oversimplified example, because planners usually deemed it essential to establish air superiority before conducting a concentrated bombing campaign against other targets, the enemy air defense system typically dominated air tasking orders in the early days of a conflict. Within that target set, the attack plan tended to be sequential—early warning radars, then interceptor operations centers, followed by airfields and surface-to-air missiles. To a measurable degree, this approach dominated planning during Operation Desert Storm in 1991.

Serial and sequential attack evolved into parallel and sequential attack, in which elements of a single target system are struck simultaneously, but systems are hit sequentially. For instance, Operation Allied Force, the 1999 NATO conflict against Yugoslavia, was planned as a phased air campaign: Phase 0—deploy; Phase 1—air superiority over Kosovo; Phase 2—military targets in Kosovo; Phase 3—high value military and security forces in the Federal Republic of Yugoslavia; and Phase 4—redeploy. Once operations began, however, the seemingly bright lines faded. With air superiority attacks underway, political pressure mounted to stop the ongoing slaughter of the Kosovar Albanians. When the weight of attack shifted to military

targets in Kosovo in response to such pressure, calls for attacking regime targets grew louder in the belief that Milosevic held the key to ending the conflict on acceptable terms.

Inevitably, a new concept of operations emerged, one that leverages the technological superiority of US forces and fits neatly with effects-based planning approaches—parallel and simultaneous attack. Illustrated by Operation Iraqi Freedom, this concept calls for simultaneous attack on every element of a target system, as well as on all systems, from the initiation of hostilities. The beauty of the concept is that it encourages treating the enemy as a single system, thereby taking advantage of cascading and cumulative effects occurring across what were formerly treated as separate systems. This frees up weapons systems for other attacks, which in turn increase the intensity and speed of the campaign.

The dilemma with EBO from the humanitarian law point of view is that it coincides with an era in which technological advances and dramatic asymmetries in military capabilities make possible coercive strategies that seek to compel (a compellance strategy) an opponent to engage in, or desist from, a particular course of conduct.²⁵ The archetypal example was Operation Allied Force, which was designed to compel President Milosevic to return to the bargaining table and end systematic mistreatment of the Kosovar Albanian population.

If one is trying to conquer an enemy absolutely, destroying its military through attrition warfare, albeit less efficient and effective than EBO, makes some sense; given the objective, the military is a logical center of gravity. But if the objective is compellance, force must be applied surgically, striking at centers of gravity likely to alter the opponent's cost-benefit analysis, without imposing costs so great as to render him either intransigent or irrational.²⁶ Because the objectives underlying the use of force determine centers of gravity, they may shift from the enemy's armed forces to non-military targets dear to the civilian population or leadership.²⁷ Indeed, as Allied Force demonstrated, striking military targets may actually embolden the civilian population.²⁸

Since effects-based targeting involves precisely this sort of search for effects tied to both military and political objectives, it subtly suggests an expansive view of the appropriate targets and target sets in a conflict. For instance, dual-use facilities become particularly appealing targets because the attacker not only benefits from destruction or neutralization of the target's military value, but also from cumulative effects on the civilian population.

Lieutenant General Michael Short, Air Component Commander for Operation Allied Force, made it clear that this is how commanders tasked with compellance missions think. In a controversial interview, General Short was reported as saying "I felt that on the first night the power should have gone off, and major bridges around

Belgrade should have gone into the Danube, and the water should be cut off so the next morning the leading citizens of Belgrade would have got up and asked ‘Why are we doing this?’ and asked Milosevic the same question.”²⁹ A crescendo of criticism followed, for he seemed to be suggesting that in a compellence campaign it was appropriate to attack civilian targets because this would hasten victory.

General Short backtracked somewhat at a 2001 US Naval War College conference on the Kosovo campaign. After stating that the center of gravity was “Milosevic and the men and women around him who depend upon him and who he, in turn, depends upon,” he stated,

I do not think that you are so naïve that I do not say to myself and to my planners that this will also make the Serb population unhappy with their senior leadership because they allowed this to happen. But that is a spin off—a peripheral result—of me targeting a valid military objective.³⁰

The problem is that Article 57 of Protocol Additional I, which the United States accepts as reflective of customary international law, provides that “[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”³¹ Thus, collateral damage and incidental injury are only lawful when they are unavoidable consequences of an otherwise proportionate attack selected as the most “humanitarian” option from among equally militarily advantageous alternatives.

In fact, we are seeing these sorts of fissures in the guise of both interpretive disagreement and revisionist claims of the inadequacy of the humanitarian law definition of “military objectives.” Article 52 defines military objectives as “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.”³² Protocols II and III of the Conventional Weapons Convention³³ and the Second Protocol to the Cultural Property Convention,³⁴ as well as many military manuals and training material (including those of the US),³⁵ repeat this formula.

While even the United States accepts this as the correct articulation of the legal concept of “military objective,” explanations of the standard differ. Most notably, the United States takes an expansive stance. For instance, the authoritative US Navy’s *The Commanders Handbook on the Law of Naval Warfare* includes “war sustaining” activities within the scope of the phrase.³⁶ Similarly, US joint doctrine provides that “[c]ivilian objects consist of all civilian property and activities other than those used to support or sustain the adversary’s warfighting capability.”³⁷

This interpretation has generated some negative reaction, particularly within the non-governmental organization (NGO) community and academia. For instance, one respected academic has opined that

Acts of violence against persons or objects of political, economic or psychological importance may sometimes be more efficient to overcome the enemy, but are never necessary, because every enemy can be overcome by weakening sufficiently its military forces. Once its military forces are neutralized, even the politically, psychologically or economically strongest enemy can no longer resist.³⁸

Such assertions are overly simplistic. First, they assume that both sides of a conflict are willing to commit the resources necessary to conquer the enemy. Operation Allied Force demonstrates that this is not always the case. It may well be that one side is seeking limited objectives and therefore only prepared to employ (or risk) forces necessary to achieve those specific objectives. In the campaign against the Federal Republic of Yugoslavia, NATO explicitly ruled out the use of ground forces, thereby effectively pre-announcing its unwillingness to commit all the resources at its disposal to fully neutralize the Yugoslavian military. Instead, NATO's strategy was to successively impose costs on Milosevic until his cost-benefit calculations shifted enough to force him into compliance with its demands.³⁹ Indeed, given 21st-century attitudes towards the use of force, and despite the conquest of both Afghanistan and Iraq by the United States and its partners, most States initiating a conflict are likely to seek limited objectives not involving conquest, and therefore will be unwilling to risk the forces that would be required to fully "neutralize" its opponent. Any attempt to convince States to narrowly interpret "military objective" because "every enemy" can be overcome by sufficiently weakening its military forces (albeit probably true), fails to take cognizance of the realities of modern conflict.

The explanation offered above also rather optimistically assumes that neutralization of enemy forces is sufficient to achieve one's objectives. However, United States and coalition forces have suffered more casualties in Iraq since President Bush declared hostilities at an end than during the preceding period in which they "neutralized" the Iraqi military as an organized armed force. Clearly, victory requires much more than simply defeating one's opponents on the field of battle.

Humanitarian concerns may actually auger against an overly restrictive definition of military objective. Consider, again, Operation Allied Force. Had NATO limited its attack to Yugoslavia's military forces, Milosevic might never have yielded, for he could have simply sheltered his forces while waiting for NATO resolve to dissolve. In the process, identifying and destroying military forces would have become more difficult as attacks reduced the number of unambiguous and

vulnerable targets. The likelihood of collateral damage and incidental injury would resultantly have increased. Many analysts feared exactly this would happen once the decision not to mount a ground campaign became public—that Milosevic would wait out NATO while his centers of gravity remained intact and the Yugoslav population suffered (and his support grew). Without doubt, limiting the target sets to enemy military forces can paradoxically sometimes be less humanitarian than embracing a broader interpretation of military objectives.

Although few States explicitly accept the overt US extension to “war sustaining” targets, the definition of military objectives is nevertheless generally applied contextually. The Report to the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) on the NATO bombing campaign provides, for instance, that

When the definition is applied to dual-use objects which have some civilian uses and some actual or potential military use (communications systems, transportation systems, petrochemical complexes, manufacturing plants of some types), opinions may differ. The application of the definition to particular objects may also differ depending on the scope and objectives of the conflict. Further, the scope and objectives of the conflict may change during the conflict.⁴⁰

That there is a gray area regarding the meaning of military objectives was perhaps best illustrated in the controversy generated by the NATO attack on the Belgrade’s Radio Televizija Srbije (RTS) facility. The ensuing litigation in the European Court of Human Rights focused on whether the facility was a civilian object.⁴¹ Although the Court eventually dismissed the case on jurisdictional grounds, and despite the fact that the ICTY prosecutor found that there was insufficient basis to indict,⁴² many in the humanitarian law community believe the attack was unlawful under the circumstances. This despite a prominent military law expert’s inclusion of “broadcast and television stations” in an illustrative list of military objectives in his award-winning book,⁴³ something the ICRC had done decades earlier in a proposed list of military objectives it offered in 1956.⁴⁴

Application of the concept of military objective clearly expands or contracts based on the scope and goals of the conflict. Interestingly, when one compares the academic commentary on the subject to application of the principle, the practical differences narrow. For instance, a premier legal thinker in the field has stated that the US approach “goes too far.” But, a review of air campaigns conducted by the United States, the country that coined the term “war-sustaining,” reveals that strikes in which the military nature of the target is questionable are extraordinarily rare. Instead, criticism of US attacks tends to center on their proportionality or compliance with the requisite duty of care.⁴⁵ That said, EBO has the capacity to put

greater substance into the debate. After all, if one, in a Clausewitzian manner, focuses on effects during a conflict intended to coerce and compel an opponent rather than conquer him, the war sustaining verbiage looks very attractive.

Interestingly, it is arguably not interpretive disagreement that presents the greatest threat to humanitarian law, but rather revisionism on the part of those who argue that the principle itself needs to be adjusted. Most significant in this regard are the fascinating writings of Brigadier General Charles Dunlap, a US Air Force judge advocate who serves as senior legal adviser for the Air Force's Air Combat Command. In a very thoughtful—and very provocative—2000 *Strategic Review* article, he argues that

We need a new paradigm when using force against societies with malevolent propensities. We must hold at risk the very way of life that sustains their depredations, and we must threaten to destroy the world as they know it if they persist. This means the air weapon should be unleashed against entirely new categories of property that current conceptions of LOAC put off-limits.⁴⁶

General Dunlap limits this deviation from current principles of humanitarian law to conflicts with “societies whose moral compass is wildly askew.” Moreover, he does not advocate targeting either noncombatants or objects that are “genuinely indispensable to the survival of the noncombatant,” although “almost everything else would be fair game.”⁴⁷ As an example, he suggests “reducing the middle and upper classes to a subsistence level through the destruction of all but essential goods” might pressure the very groups best positioned to effect the desired change.⁴⁸ In General Dunlap's view, doing so is just because the population bears some culpability for supporting the government, or at least failing to fulfill a duty to oppose it.⁴⁹ To an extent, he is a 21st-century adherent to the views of Giulio Douhet, the Italian air war theorist who, in his 1921 classic *Command of the Air*, suggested that the civilian population and its morale were important centers of gravity.⁵⁰

Although not addressing it directly, the Dunlap proposal takes EBO to the extreme. Indeed, General Dunlap suggests that the purpose behind the use of force is not punishment, but rather “eviscerating the disposition of the adversary to conduct objectionable activities.”⁵¹ His views resonate with many. For instance, another thoughtful active duty officer, in a 2001 *Air Force Law Review* article, has suggested that it might be more humane to attack civilian property if doing so would demoralize the population and contribute to conflict termination, than to protect property at the expense of prolonging hostilities.⁵² What General Dunlap and his supporters are calling for appears to be nothing less than a fundamental rejection of a major

element of the principle of distinction, a principle that the International Court of Justice labeled “intransgressible” in its *Nuclear Weapons Advisory Opinion*.⁵³

Effects-based operations, focused as they are on effects vice targets, enliven the debate over the distinction principle’s effectiveness in infusing humanitarian ends into armed conflict. But suggesting civilian objects can be legitimate targets of attack risks the spiral of violence against innocents that humanitarian law, such as that prohibiting certain reprisals, seeks to prevent. Moreover, suggesting that attacking civilian objects is appropriate when there is a moral imbalance between belligerents would effectively mean malevolent leaders could deprive innocents among their population of humanitarian law’s protection against the ill-effects of war. Although an “ends justify the means” philosophy may be appealing in the short term, it will ultimately prove a very slippery slope.

The appropriate balance lies between the extremes. As General Short correctly noted above, there is nothing wrong with striking legitimate military objectives in a manner intended to affect the enemy’s will to continue the fight or the civilian population’s support for the government. For instance, in order to demonstrate that they controlled the air during the Korean conflict, US forces dropped leaflets pre-announcing strikes on legitimate military targets.⁵⁴ US air forces successfully employed this tactic again during Operation Desert Storm, when warnings of impending B-52 strikes led to mass surrender by Iraqi forces. There is nothing inherently immoral or illegal about targeting the will of the people or their leader. That said, humanitarian law does, and should, dictate how that may be accomplished.

Moreover, one must be careful what one wishes for. Opponents of advanced militaries have far more to gain from a relaxation of the distinction standard than those capable of fielding state-of-the-art forces. The disadvantaged side in an asymmetrical fight has every incentive to strike at civilians and civilian objects because it cannot hope to prevail on the field of battle. Thus, its sole chance of victory (or chance of fending off defeat) lies in striking a center of gravity other than the military. This being so, a restrictive reading of military objective actually benefits the advantaged side by allowing it to leverage its superior military capabilities. It is only when mixing *ad bellum* and *in bello* principles by labeling one belligerent malevolent (as suggested by General Dunlap), that it makes any sense for the militarily advantaged side to adopt a less restrictive standard; so long as its cause is just, it need not fear attacks against its civilians or civilian objects. This is naïve. The difficulty of objectively determining that a belligerent is in the wrong (consider the case of Iraq) means that in practice any shift in the law will apply equally to both sides.

Relaxing the principle of distinction would also deprive the advantaged side of the opportunity to use what General Dunlap has labeled “lawfare.”⁵⁵ To the extent the enemy begins targeting civilians and civilian objects, it can be publicly branded criminal, thereby potentially undercutting both domestic and international support. Thus, lawfare can impose costs on an adversary’s attempt to compensate for military weakness by shifting the center of gravity he is attacking. What proponents of relaxing humanitarian law norms seem to have missed is that the question, from a purely practical point of view, is not whether relaxation of a norm benefits your side; rather, it is the relative costs and benefits of doing so vis-à-vis likely opponents. Therefore, adopting an effects-based operations doctrine should not necessarily lead to support for any relaxation of the principle of distinction, because doing so might well enhance the opponent’s ability to achieve enhanced effects with his own operations.

Targeting Leadership

Always an appealing target set, EBO doctrine and the growing emergence of compellance as a campaign objective have heightened the desire to strike directly at enemy leadership. During Operation Allied Force, for instance, government ministries were included as strategic targets, ostensibly because of the “longer term and broader impact on the Serb military machine.”⁵⁶ Of late, killing the enemy leader himself has become an open objective of military operations; failure to do so is sometimes even deemed operational failure—consider the survival of Osama bin Laden. During Operation Iraqi Freedom, the media was actually reporting attempts to kill Saddam Hussein in nearly real time.⁵⁷ Contrast this with the removal of the US Air Force Chief of Staff in 1990 for suggesting Saddam’s death was an aim of the Operation Desert Storm air campaign.⁵⁸

Targeting leadership is often mislabeled “assassination.” In fact, the lineage of the humanitarian law prohibition on assassination (e.g., Article 148 of the 1863 Lieber Code) demonstrates that the term is best interpreted as the “treacherous killing of one’s enemy,”⁵⁹ for example by perfidiously feigning protected status.⁶⁰ It is not the target’s status that determines whether a wartime assassination has been conducted, but rather the method by which he or she is attacked.

Recall that humanitarian law requires distinguishing between combatants (and illegal noncombatants) and civilians in conducting attacks. With regard to targeting enemy leadership, therefore, the determinative issue is the status of the individual in question; those who are combatants or wrongfully taking a direct part in hostilities, i.e., illegal combatants, may legally be attacked.

Article 51 of Protocol Additional I sets forth the relevant principle:

Art. 51.2. The civilian population as such, as well as individual civilians, shall not be the object of attack

Art. 51.3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

Violations are grave breaches under Article 85 of the Protocol, and, therefore, States party to the Protocol are obligated to search for individuals alleged to have targeted civilians (or ordered them to be targeted) and either try them for the offense or turn them over to another State party willing to do so.⁶¹ An analogous ban for non-international armed conflict appears in Protocol Additional II,⁶² while the Statute of the International Criminal Court contains prohibitions along these lines for both international and non-international armed conflict.⁶³

Since “civilians” enjoy immunity from attack, it is necessary to define the term. Under Article 50 of Protocol Additional I, a protected civilian is someone who does not fall into the categories enumerated in Article 4 of the Third Geneva Convention of 1949 and Article 43 of Protocol Additional I.⁶⁴ Excluded as civilians are members of the armed forces; militia, volunteer corps, or members of an organized resistance commanded by a person responsible for subordinates, who wear a distinctive sign or uniform, carry weapons openly, and are subject to a disciplinary system capable of enforcing the law of armed conflict; and members of a *levee en masse*. Article 44 reduces the requirement to carry arms openly and wear distinctive emblems or clothing, but not in situations likely to have much bearing on whether a member of the enemy leadership can be targeted.⁶⁵ Combatant organizations can include paramilitary or armed law enforcement agencies when incorporated into the armed forces if other parties to the conflict have been formally notified of the integration.⁶⁶

There is little doubt that any member (except chaplains and medical personnel) of such organizations can be targeted, although not directly applying force themselves. For instance, a public affairs officer in the military is a legitimate target despite the fact that he or she does not perform typically military functions.⁶⁷ Even heads of State or government who are active members of the armed forces may be targeted; humanitarian law provides them no specially protected status.⁶⁸

Senior leaders who are not members of the armed forces, but lie in the chain of command, are more difficult to categorize. Their legitimacy as a target must be assessed contextually and holistically. For instance, wearing military uniforms, carrying weapons, or using military rank suggest combatant status, but are not dispositive. The Queen of England wears a uniform and carries a ceremonial dagger during the “trooping of the colours,” but is hardly a combatant by virtue of doing so.

A more telling indication is the proposed target's role in the command of the armed forces. Civilians often fill *de jure* positions relative to the armed forces. As an example, by Article II of the US Constitution, the President is the "Commander-in-Chief."⁶⁹ Similarly, the Queen of England is the British Commander-in-Chief pursuant to the unwritten constitution of the United Kingdom, and each of the royals serves as a regimental "Colonel-in-Chief." In fact, British officers swear an oath of allegiance to the Queen, not the State, and it is the Queen who issues their commission.

It would be incongruous to suggest that all such individuals are legitimate targets. Obviously, if a post is purely ceremonial, or otherwise solely *de jure* in nature, i.e., if it involves no military decision-making, then the incumbent is a civilian who enjoys protected status. State practice would also suggest that decision-making at the strategic level of war does not render the participant a combatant (legal or illegal), because such decisions are in essence political. As an example, attempting to build an international coalition would not alone suffice. However, if an individual occupying a *de jure* position makes decisions affecting the operational or tactical level of war, he or she is sufficiently involved in military operations to become legitimately targetable.⁷⁰

At times, individuals without a *de jure* position in the chain of command also exercise influence over military operations. For example, Congress must approve all military funding in the United States. This makes Senators and Congressmen, particularly those on committees dealing with the military, enormously influential *vis-à-vis* defense policy. Or consider individuals tied to a dictator who exercise great influence over particular aspects of a conflict, such as certain members of Saddam Hussein's family or other highly placed members of his tribe from Tikrit.

In such cases, the critical issue is whether they are taking a direct part in hostilities as envisaged by Article 51.3 of Protocol Additional I (see text above). As to the meaning of the term "direct part," the Commentary to the Protocol states that "[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place."⁷¹ If a leader makes combat decisions at the tactical level such as target selection, then he or she would certainly be directly participating. Arguably, the same is true for those who act in a like manner at the operational level. Essentially, leaders who decide how and where to use military force are directly participating in hostilities.

As an aside, note the Article 51.3 "unless and for such time" qualifier. Some have suggested that this allows direct participants who are not formally part of the armed forces to opt in and out of "direct participant" status, and, as a result, susceptibility to attack. This position runs counter to the underlying purposes of humanitarian law because it would encourage a lack of respect for the principle of distinction on the part of the victims of those moving back and forth through

the revolving door. A much more logical and practical standard provides that once an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out. This may occur through extended non-participation or an affirmative act of withdrawal.⁷² Since the individual who directly participated did not enjoy any privilege to engage in hostilities in the first place, it is reasonable that he or she assumes the risk that the other side is unaware of such withdrawal.

Obviously, gray area situations exist in which the sufficiency of the causal relationship to the conduct of hostilities is unclear. Indeed, the issue of the scope of direct participation is the subject of an ongoing international project sponsored by the International Committee of the Red Cross. In uncertain cases, it is prudent to interpret the concept narrowly, since striking directly at an opponent's leadership can be highly destabilizing. This is especially so where the proposed target is not in the chain of command, for the absence of a position in an armed force or its civilian control structure creates a rebuttable presumption that he or she enjoys protected status as a civilian.

As should be apparent, applying the humanitarian law bearing on leadership targeting can prove difficult in practice. With the exception of situations in which the leaders are members of the armed forces, decapitation operations inevitably risk condemnation on legal, or even moral, grounds. Consider the Israeli targeted killing strategy.⁷³ Although the operations are clearly legal in many cases,⁷⁴ they are widely condemned as violations of international law.⁷⁵

Non-legal reasons also militate against mounting decapitation strikes. They may strengthen enemy resolve or morale, particularly if the target becomes a martyr in the eyes of the enemy population. Leadership attacks also risk retaliation against one's own leadership or other high value targets like the civilian population. When the target has ties to terrorist groups, this possibility is especially acute. Targeting leadership may further be perceived as escalation, an upping of the stakes which increases the level of violence and complicates conflict termination. Indeed, an individual aware of being targeted may become intransigent, even irrational, thereby rendering his military operations less predictable.

Of course, there is always the chance that targeted individuals may be replaced by less acceptable alternatives. And if they had civil responsibilities, their death may limit the ability of the State to recover from conflict, thereby presenting the victorious occupying forces with greater occupation challenges. The simple fact is that quite aside from normative barriers, targeting an enemy leader may be insensible from a practical point of view.

Targeting Terrorists

In the aftermath of the tragic attacks of September 11, the use of force against terrorists has been fervently debated, particularly as the preferred response paradigm shifted from law enforcement to military action. Unfortunately, the analysis has tended to be overcomplicated.

During armed conflict, whether international or non-international in nature, the issue of terrorism is irrelevant *vis-à-vis* targeting. All combatants and individuals taking direct part in hostilities are targetable regardless of their motive or the object or persons they attack.

The quandary surfaces in cases of terrorism occurring outside armed conflict. As a matter of law, the issue is one of self-defense. Article 51 of the UN Charter sets forth the codified law on the subject. It provides, in relevant part, that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”⁷⁶ The question is whether non-State actors such as terrorists can commit an “armed attack” that allows the victim State to respond with military force as if it had been attacked by another State.

It is incontrovertible that since 9/11 the international community has accepted just such an interpretation of the law of self-defense. Virtually no State voiced any opposition to the US and coalition attacks on al-Qaeda forces in Afghanistan that began October 7, 2001. Indeed, two pre-October 7th Security Council resolutions specifically cited the right to self-defense with reference to the 9/11 attacks,⁷⁷ NATO and other international organizations invoked the collective defense provisions of their constitutive treaties,⁷⁸ and many States either contributed forces to the effort or provided other forms of support.⁷⁹ Following commencement of hostilities in Afghanistan, international support for the coalition operations remained strong and widespread.⁸⁰ Clearly, international law is now interpreted as permitting military operations in self or collective defense against terrorist acts committed by non-State actors. However, when may those defensive operations occur?

Self-defense is obviously permissible in response to an ongoing attack; that much is clear from Article 51 on its face. When armed action follows an attack, its legality becomes murkier. Some have suggested that since the attack is over, the appropriate responses are law enforcement (*vis-à-vis* the terrorists) or diplomacy and sanctions (*vis-à-vis* State support). Negative reaction to past responses to terrorist attacks, such as the near universal criticism of Operation El Dorado Canyon that followed the 1986 bombing of the La Belle discothèque in Berlin,⁸¹ demonstrates that States have tended to be uneasy with counter-terrorist actions that smack of

retaliation or retribution. Yet, denying the possibility of post-attack military action would surrender the initiative to non-State terrorist actor's intent on continuing their campaign of violence against the target State and its citizens.

A much more effective and appropriate way to analyze terrorism and military responses thereto is to ask whether an attack was part of a continuing campaign conducted by the terrorist group against the responding State. If so, the individual actions constituting it are no more separate and distinct than tactical engagements in a military campaign. For instance, al-Qaeda has been attacking US targets for over a decade in a regular and very violent campaign. In the face of such campaigns, defensive actions may continue until it is reasonable to conclude the terrorist campaign has ended.

By this approach, the defending State may conduct strikes against those who would carry out subsequent attacks, not in retaliation or retribution and not in anticipation of future acts of terrorism, but rather because the terrorist campaign is underway. As with all defensive actions, the two requirements of self-defense apply. First, defensive action has to be necessary, i.e., non-forceful measures (such as law enforcement, diplomacy, economic sanctions, etc.) would not suffice to deter further attacks making up the terrorist campaign. Second, the use of force must be proportional.⁸² Proportionality does not refer to the relationship between the force against which one is defending and that used in self-defense. Rather, proportional force is that amount of force necessary to effectively defend against the attack, and no more. Assessed on a case-by-case basis, it may either exceed or fall short of that used by the attacker.

Characterizing individual terrorist attacks as a part of a single integrated campaign clarifies the legality of responses thereto. For instance, when a CIA-controlled Predator attacked a car carrying Qaed Senyan al-Harthi, al-Qaeda's senior operative in Yemen, in 2002, there was much discussion about targeted killings, the nature of the conflict, and so forth. Yet, al-Harthi had been tied to the October 2000 attack on the *USS Cole* and was still active in a terrorist group against which law enforcement had proven ineffective and which had vowed to carry out more terrorist strikes against the United States in the aftermath of their highly successful attacks of September 11.⁸³ Additionally, the CIA conducted the operation with the cooperation of the Yemeni intelligence service.⁸⁴ The only debatable issue from a self-defense perspective was whether al-Harthi could have been arrested instead of killed. Although ultimately a question of fact, it appears reasonable for US officials to have concluded that there was a possibility he would elude capture, thereby necessitating the lethal attack.

An analogous analysis applies to Israel Defense Force operations targeting specific Palestinians. To the extent the targets are clearly involved in an ongoing campaign of terrorism, and in the absence of other reliable means of neutralizing them, they may be attacked in self-defense when there is a "specific and imminent" threat.⁸⁵ Thus, in

such cases, the operations are legal quite aside from the separate issues of whether an armed conflict is underway and, if so, its character under humanitarian law.

A third possibility is mounting counter-terrorist strikes before the initial terrorist attack has taken place. The seminal legal issue here is neither necessity nor proportionality, but rather imminency, for the weight of authority in international law requires that an attack be imminent before acting in self-defense. In the immortal words of Secretary of State Daniel Webster in correspondence with Lord Ashburton following the 1837 *Caroline* incident, the need for defensive actions must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁸⁶ Webster’s verbiage has matured over time into a requirement that the defending party wait until the last possible moment before acting *anticipatorily*.⁸⁷

Professor Yoram Dinstein has rejected the term “anticipatory” in favor of “interceptive” on the basis that Article 51 requires an armed attack, not the possibility thereof. He propounds a standard that requires the attacker to have “committed itself to an armed attack in an ostensibly irrevocable way.” As Professor Dinstein explains, “[t]he crucial question is who embarks upon an irreversible course of action, thereby crossing the Rubicon.”⁸⁸ By this approach, no shot need be fired prior to the defensive action, but the attack operation must have been launched.

Professor Dinstein’s analysis is an insightful balancing of the practical need to deliver a defensive blow before the opponent strikes (lest it be too late to mount an effective defense) with the apparent clarity of the Article 51 requirement that an armed attack have occurred. The one difficulty with his approach is the requirement of irrevocability, a criterion that may be too difficult to judge except *ex post facto*. A more workable tack may be to appraise the attacker’s commitment to follow through, the nature of the acts already performed, and the extent to which the defensive action occurs during the last viable window of opportunity to mount an effective defense.

If a State initiates defensive action before being attacked, the evidence of the pending attack (or follow-on attacks in case of a terrorist campaign), the need to militarily defend oneself, and the perpetrator’s identity, must be very credible. This was the unambiguous lesson of the widespread criticism of the US strikes into Sudan in 1998 following terrorist bombings of its embassies in Dar-es-Salaam and Nairobi. Compare the muted criticism of related strikes against terrorist camps in Afghanistan. Since the two operations were conducted simultaneously and in response to the same terrorist attacks, the logical explanation for the dramatically different international reactions was a pervasive belief that in the case of the attacks into Khartoum, the United States got it wrong by striking a pharmaceutical plant with no ties to terrorism.

Evidentiary issues again surfaced in the aftermath of US and allied operations in Iraq in 2003. Failure to locate convincing evidence of any Iraqi weapons of mass destruction programs or Iraqi ties to al-Qaeda generated significant criticism of the decision to attack.⁸⁹ As in the Sudanese case, concern that the attack was based on insufficient and faulty intelligence was pervasive.

Given that terrorists intentionally seek to mask their activities, evidence in terrorism cases will seldom be unassailable; therefore, to demand perfect evidence of future attacks and their source would be to render victims defenseless. A better threshold is one that requires evidence on which counterterrorist operations are justified to be “clear and compelling.” The United States proffered this standard in its notification to the Security Council that it was acting in self-defense when attacking al-Qaeda and Taliban assets in Afghanistan. It articulated the same criterion when briefing the North Atlantic Council on the complicity of the two groups in the 9/11 attacks.⁹⁰ Both the Security Council and North Atlantic Council appear to have accepted the standard as sufficiently high, for neither criticized the ensuing military operations. A mere preponderance standard would certainly be too low to justify resort to military force, the most significant act in international relations, whereas a beyond a reasonable doubt standard would clearly be too high in the shadowy world of terrorism.

Finally, the issue of who can legally conduct counterterrorism operations involving armed force has drawn some attention. Specifically, must operations be mounted by combatants or can others, such as members of intelligence agencies or law enforcement personnel, conduct them?

If the operations are conducted during an international armed conflict, and the terrorists are taking part in the conflict, then combat operations may be conducted only by combatants. Article 43 of Protocol Additional I codifies this point of customary international law.⁹¹ As noted earlier, combatants are members of the armed forces and paramilitary or armed law enforcement agencies incorporated into the armed forces.⁹²

No such limitation applies in a non-international armed conflict. On the contrary, intelligence and law enforcement agencies are regularly involved in attempting to maintain law and order during an internal conflict. The latter are often the lead agencies in such conflicts, as was the case, for example, during the disturbances in Macedonia in 2001.

In cases of violence between a State and transnational terrorists unrelated to an ongoing armed conflict, humanitarian law, with the exception of general principles pervading all uses of force (such as discrimination, proportionality, unnecessary suffering), does not apply. The applicability of the humanitarian law to *international* armed conflict depends on the participation of at least one State on each side,⁹³ while

that applicable to *non-international* armed conflicts requires a situation resembling classic civil war. With respect to the latter, Common Article 3 to the Geneva Conventions envisions a “Party in revolt against the *de jure* Government [that] possess an organized force, an authority responsible for its acts, acting within a determinate territory.”⁹⁴ Protocol Additional II requires a conflict “which takes place in the Territory of a high contracting Party between its armed forces and dissident armed forces [that] . . . exercise control over part of its territory.”⁹⁵ In any case, and as noted above, the humanitarian law of non-international armed conflict imposes no limitation on the participation of other than members of the armed forces.

Therefore, except in an international armed conflict, intelligence or law enforcement agents may conduct counter-terrorist strikes such as occurred in Yemen. Thus, President Bush’s authorization to the Central Intelligence Agency to target specific al-Qaeda members outside the confines of armed conflict did not violate humanitarian law,⁹⁶ nor did the creation of a CIA Special Operations Group of several hundred officers to conduct this type of missions.⁹⁷

Finally, where may operations in other than an armed conflict be conducted? Obviously, they may take place on the territory of the State conducting them or, as in the case of the strike in Yemen, on the territory of any State that has consented. The more difficult question is when may counterterrorist operations be mounted without the consent of the State of situs.

States enjoy the right of territorial integrity under international law, a customary right enshrined within Article 2(4) of the Charter.⁹⁸ At the same time, international law recognizes a right of self-defense, itself enshrined within Article 51 of the Charter. When legal rights appear to conflict, an effort must be made to best balance them in the context in which they are to be applied.

In this situation, recall that States have a duty to “use due diligence to prevent the commission within its dominions of criminal acts against another nation or people.”⁹⁹ This duty plainly includes keeping one’s territory free from use for terrorist ends.¹⁰⁰ In light of this obligation, the only sensible balancing of the territorial integrity and self-defense rights is one that allows the State exercising self-defense to conduct counterterrorist operations in the State where the terrorists are located *if* that State is either unwilling or incapable of policing its own territory. A demand for compliance should precede the action and the State should be permitted an opportunity to comply with its duty to ensure its territory is not being used to the detriment of others.¹⁰¹ If it does not, any subsequent nonconsensual counterterrorist operations into the country should be strictly limited to the purpose of eradicating the terrorist activity (purpose and proportionality), and the intruding force must withdraw immediately upon

accomplishment of its mission since the necessity for these specific defensive operations evaporates at that point.¹⁰²

Human Shields and Shielding with Civilian Objects

The US Defense Intelligence Agency has framed this issue as “the placement of any category of non-combatant personnel, or of civilian equipment, vehicles, or material at or near a recognized or suspected military or government facility immediately before or during hostilities.”¹⁰³ It would also include placing military objects or personnel near protected individuals, objects, or locations. In technical terms, such activity falls into the category of “counter-targeting,” i.e., “preventing or degrading detection, characterization, destruction, and post-strike assessment.”¹⁰⁴ The goals of using human or civilian object shields include complicating an opponent’s military planning, reducing the effectiveness of its strikes, preserving key military forces and facilities such as command and control assets, and/or generating a strategic incident by creating the impression that the attacker is careless, incompetent, or, most significantly in the CNN age, lawless.¹⁰⁵

Sadly, there have been many instances of the use of human or civilian object shields in recent history. All have been uniformly condemned. For instance, Iraq’s use of human shields during the first Gulf War was labeled by the UN General Assembly as a “most grave and blatant violation of Iraq’s obligations under international law.”¹⁰⁶ A dozen years later, Human Rights Watch, in *Off Target*, its report on the conduct of the second Gulf War, condemned Iraqi use of civilians both to protect Iraqi forces during hostilities and to advance on US and British forces.¹⁰⁷ Similarly, the use of human shields was widespread during the 1999 NATO bombing campaign against the Federal Republic of Yugoslavia. Even UN peacekeepers have been used as human shields, most infamously with the seizure of United Nations Protection Force (UNPROFOR) personnel by the Bosnia Serbs in 1995.¹⁰⁸

As a matter of law, the use of shields presents two issues: Can shields be targeted directly (discrimination) and, if not, how do they factor into the proportionality calculation? In considering these questions, it is useful to note that US targeting doctrine closely tracks the principles set forth in Protocol Additional I. For instance, Joint Publication 3-60 (discussed above) adopts the proportionality formula contained in Articles 51.5(b) and 57.2 verbatim.¹⁰⁹ With regard to discrimination, the Joint Publication requires US forces to “engage only in military operations the effects of which distinguish between the civilian population (or individual civilians not taking a direct part in hostilities) and combatant forces, directing the application of

force solely against the latter. Similarly, military force may be directed only against military objects or objectives, and not against civilian objects.”¹¹⁰

Without question, using human or civilian object shields violates humanitarian law. Article 28 of the Fourth Geneva Convention provides that “[t]he presence of a protected person may not be used to render certain points or areas immune from military operations.”¹¹¹ The analogous Protocol Additional I provision is even more explicit.

The 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 attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.¹¹²

The International Criminal Court Statute includes these prohibitions as war crimes in Article 8.¹¹³

Uncertain, though, are the effects of such misconduct on an opponent’s military operations. To address this issue, it is necessary to distinguish between involuntary shields and those who volunteer to serve in this role. Beginning with the former, Article 51 of Protocol Additional I explicitly provides that “[a]ny violation of these prohibitions [which includes the prohibition on shielding] shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians. . . .”¹¹⁴ Therefore, an attacker continues to be bound both by the prohibition on directly attacking civilians and the proportionality principle. Taking these requirements together, the attacker must consider the deaths and injuries shields might suffer when determining whether the military advantage accruing from attack on the military objective they are shielding outweighs likely collateral damage and incidental injury.

Few have suggested that an attacker should be released from the obligation not to directly target human shields. However, there is far less satisfaction with pure application of the principle of proportionality, for some are concerned that a malevolent opponent might turn the use of human shields into a significant military advantage. Specifically, by using shields, an opponent could so alter the extent of likely civilian death and injury resulting from a strike, that the military objective is rendered immune from attack. Thus, the 1976 US Air Force law of armed conflict manual states that “[a] party to a conflict which places its own citizens in positions of danger by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise

lawful attacks upon valid military objectives in their territory.”¹¹⁵ And no less a distinguished scholar and practitioner than A.P.V. Rogers has suggested that

... a tribunal considering whether a grave breach has been committed [a disproportionate attack] would be able to take into account when considering the rule of proportionality the extent to which the defenders had flouted their obligation to separate military objectives from civilian objects and to take precautions to protect the civilian population. . . . The proportionality approach taken by the tribunals should help to redress the balance which would otherwise be tilted in favour of the unscrupulous.¹¹⁶

Despite such calls, the prevailing practice appears to be unqualified fidelity to the principle of proportionality; this is the position taken in US doctrine. In addressing use by the enemy of human shields, Joint Publication 3-60 states that: “Joint force responsibilities during such situations are driven by the principle of proportionality. . . . When an adversary employs illegal means to shield legitimate targets, the decision to attack should be reviewed by higher authority in light of military considerations, international law, and precedent.”¹¹⁷ The US Air Force, in its own doctrine, acknowledges the shields dilemma, but likewise retains the protection civilians enjoy under humanitarian law. Air Force Pamphlet 14-210 points out that

[a] state’s failure to segregate and separate its own military activities and to avoid placing military objectives in or near a populated area may greatly weaken protection of its civilian population. Such protection is also compromised when civilians take a direct part in hostilities or are used unlawfully in an attempt to shield attacks against military objectives.¹¹⁸

Note that protection is “weakened,” not canceled; in other words, 14-210 recognizes that such practices have a *de facto* effect of weakening protection of civilians and civilian objects because their proximity to military objectives increases their likelihood of being incidentally injured or collaterally damaged—but there is no *de jure* relaxation of the proportionality standard.

Perhaps the best guidance on the subject is that set forth in the Air Force’s *Operations and the Law* text:

[S]tandards of conduct should apply equally to the attacker and defender. In other words, that the responsibility to minimize collateral injury to the civilian population not directly involved in the war effort remains one shared by the attacker and the defender; and that the nation that uses its civilian population to shield its own military forces violates the law of war at the peril of the civilians behind whom it hides. . . . At the same time, however, targeteers and judge advocates should consider the necessity of

hitting the particular target, the expected results versus expected collateral damage, and ways to minimize civilian casualties, if possible.”¹¹⁹

An approach which refuses to release one side from its full obligations under humanitarian law when the other violates it is consistent with the underlying purpose of that body of law—protection of those who are not engaged in the conflict from its effects. While humanitarian law takes account of the practicalities of warfare (the principle of proportionality being perhaps the best example), it is not intended nor designed to ensure a “fair fight.” Suggestions that the wrongful behavior of one side justify a revision of the other’s obligations under humanitarian law in order to redress the balance between the two appear under girded by concerns over the inequity of the malevolent side achieving *de facto* immunity for its military objectives. Yet, even the highly controversial law of reprisals is justified solely on the basis that reprisals (otherwise unlawful acts) can compel the other side back into compliance with its humanitarian law obligations; it has never been justified on the basis that it is unfair for one side to be limited by humanitarian law when the other ignores it.¹²⁰

The issue becomes more contentious when human shields volunteer. As with the use of involuntary shields, there has been a marked increase in the readiness of civilians to willingly shield military objectives. Recent examples include Iraqis flocking to various locations when coalition forces threatened force to enforce the UN weapons inspection regimes in 1997;¹²¹ Serb civilians standing on bridges during Operation Allied Force in 1999; and international volunteer shields traveling to Iraq in anticipation of Operation Iraqi Freedom.¹²²

Although there is no explicit distinction between voluntary and involuntary shields in targeting doctrine, some States, including the United States, assert a difference. In their view, voluntary shields of military objectives lose their protected status as civilians.¹²³ Human Rights Watch, *inter alia*, takes the opposite position. In a February 2002 Briefing Paper, it opined that

[L]ike workers in munitions factories, civilians acting as human shields, whether voluntary or not, contribute indirectly to the war capability of a state. Their actions do not pose a direct risk to opposing forces. Because they are not directly engaged in hostilities against an adversary, they retain their civilian immunity from attack. They may not be targeted, although a military objective protected by human shields remains open to attack, subject to the attacking party’s obligations under IHL to weigh the potential harm to civilians against the direct and concrete military advantage of any given attack, and to refrain from attack if civilian harm would appear excessive.¹²⁴

The more defensible view is that adopted by the United States. Human Rights Watch wrongly equates voluntary human shields with munitions workers, which they

correctly characterize as only indirectly contributing to the war-making capabilities of a State. The contribution of human shields is, by contrast, very direct—they are attempting to deter an actual attack on a valid military objective. In a sense, they are no less involved in defending a potential target than air defenses.

As discussed earlier, civilians may lose their protected status by, in the terminology of Protocol Additional I, taking “a direct part in hostilities.” When they do, immunity from attack vanishes for such time as that participation continues.¹²⁵ The Statute of the International Criminal Court adopts this standard by making it a war crime to intentionally attack civilians unless they are “taking direct part in hostilities.”¹²⁶

There is much uncertainty regarding the meaning of direct participation. The Commentary to Protocol Additional I states that the term “implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity occurs.”¹²⁷ Elsewhere, the Commentary describes direct participation as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”¹²⁸ Seemingly, these comments support the Human Rights Watch position that shields must pose an immediate risk to the enemy before they can be directly attacked.

Such a narrow position does not fit well into the architecture of humanitarian law. Recall the definition of military objective. Military objectives are “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 By acting to render a military objective immune from attack (or contributing to the enemy’s hesitancy to attack it), voluntary human shields contribute to the survival of an object that *by definition* contributes to military action; thus, they themselves contribute to that action in a very direct way. Indeed, by immunizing the military objective against attack as a matter of law, in many cases shields would more effectively defend it than would traditional defenses such as anti-aircraft artillery or surface-to-air missiles, which have proven highly ineffective against air forces equipped with state of the art weaponry.

When viewed in the context of humanitarian law generally, the most reasonable characterization of voluntary shields is that they are directly participating in hostilities and, resultantly, lose their protected civilian status.¹³⁰ Consequently, voluntary human shields can be legitimate targets. Further, because they no longer enjoy protected status, death or injury to voluntary shields should not be considered in any proportionality analysis. Practically speaking, though, their military contribution only emerges at the point that they are shielding the military objective; thus, they enjoy no military significance distinct from the objective itself. This being so,

there is no military necessity for attacking them when they are not engaged in shielding. Further, even when they are shielding a target, there is no military rationale for attacking them directly instead of, or in addition to, the actual military objective. Therefore, the only practical impact of their willingness to serve as shields is that they need not be included in proportionality calculations.

An exception to this analysis involves children. For instance, Palestinian militants have used child shields to protect themselves because they know the Israel Defense Forces have been ordered not to use live ammunition against children.¹³¹ As a matter of law, children should be deemed incapable of forming the intent necessary to “directly participate” in hostilities, particularly in light of humanitarian law’s increasing recognition of their unique predicament in armed conflict.¹³² Even beyond the legal aspects of the phenomenon, as a practical matter it would usually be impossible to determine whether a child present at a prospective target is there of his or her own volition.

Finally, there is the issue of using civilian objects to shield military objectives. What is often forgotten in the debates is that civilian objects can become military objectives when their use makes an effective contribution to military action and their total or partial destruction or neutralization offers a definite military advantage in the circumstances.¹³³ When one side intentionally places military objectives near civilian objects or places civilian objects close to military objectives in order to shield them (a wrongful act as discussed above), those objects may take on a status analogous to “military objective.” Their use contributes directly to defense of the target and if their role as shields could be neutralized, a military advantage would accrue to the attacker. That said, and like voluntary shields, because their sole use is as a military shield, there is no need to attack them directly unless they physically impede attack on the intended target. Of course, they are vulnerable to damage during attack on the target, but, having taken on the character of a military objective through use, such damage should not be included within the proportionality calculation.

Note that the case of intentionally using civilian objects as shields differs from that of the civilian object unintentionally located near a military objective. To suggest otherwise would create an exception that would swallow the rule of proportionality. Obviously, objects near the intended target incur the heaviest collateral damage. Therefore, if mere proximity to a target transforms a civilian object into a military objective, there would be no need for the rule because there would be few civilian objects to protect.

Area Targets

An emerging issue in targeting involves attacking military installations on which civilian facilities exist. In the past, this issue rarely presented itself. First, civilian facilities seldom existed at military bases. However, with the demise of conscription, the average age of military personnel has increased, and a greater percentage is married. Thus, military installations increasingly contain facilities meeting the needs of military families. Further, in the era of all-volunteer forces, quality of life has become an important factor in recruiting and retaining military personnel. Today, for instance, the typical US base offers family housing, schools, child care centers, youth sports fields, stores, post offices, pools, and even the inevitable American fast food restaurant.

Second, weapons systems of the past did not have the range to strike at military bases far from the front. Today, by contrast, some systems have global capabilities. Globalization itself, with increasingly borderless travel, has made it possible to conduct special operations thousands of miles from the front. Simply put, in the 21st century most military installations lie “within range” of enemy action.

The question is whether an entire area or installation can be treated as a single unitary whole during an attack. To some extent, this defense was mounted in the trial of Major-General Stanislav Galic, former commander of the Sarajevo Romanija Corps, before the ICTY. The case involved allegations that troops under his command conducted a sniping and shelling campaign against the civilian population of Sarajevo intended to spread terror. The defense argued that the presence of some 40,000 Bosnian Muslim troops spread throughout the city rendered the entire area a target and the fact that only 3,000 civilians died out of an original population of approximately 300,000 meant the attacks were not disproportionate. After carefully reviewing the facts, the Trial Chamber determined that the attacks on the civilians were intentional and sentenced the general to 10 years imprisonment.¹³⁴ While not ruling out the possibility of treating an entire area or installation as a unitary whole, the Chamber’s meticulous focus on the facts of individual deaths demonstrates that, in its view, questions of discrimination are resolved on a case-by-case basis.¹³⁵

This approach comports well with Article 51’s characterization of “an attack by bombardment . . . which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians and civilian objects” as indiscriminate.¹³⁶ By parallel logic, the presence of a clearly distinct civilian area, such as a shopping complex or housing area, on a military installation precludes treating the entire installation as targetable.

Further, Article 57 requires belligerents to employ reasonable steps to verify that the target is military in nature and to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”¹³⁷ Therefore, whether an attack is discriminate enough depends both on the extent to which the attacker used information assets to confirm the nature of the target and selected weapons and tactics designed to avoid causing harm to civilians and civilian objects. Again, these requirements auger against treating military installations as a single entity for targeting purposes.

At any rate, military planners are now able to more accurately refine the choice of targets and aimpoints. Intelligence, surveillance, and reconnaissance (ISR) system improvements have made it far easier to distinguish between military and civilian objects, whereas advances in precision have made striking the intended target with great surety more practicable.¹³⁸ In fact, since installations are fixed, most missions against them will be preplanned. This allows a highly complex and in-depth planning process that considers such factors as maximum effective range of weaponry and their circular error probable, likely collateral damage, and aim point, fusing, and azimuth of attack alternatives. Perhaps most importantly, it is poor airmanship (or soldiering) to treat areas in which discrimination is possible as a single target because doing so, in an age of precision, would be wasteful; it violates the principle of economy of force.

That said, in those cases where it is impossible to verify that individual facilities on an installation are military objectives (e.g., does the warehouse contain munitions or school supplies?), a presumption that they are military attachés. This is because the Protocol Additional I, Article 52, presumption that a prospective target is not making an effective contribution to military action, and therefore not targetable, applies only to objects “normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling, or a school.”¹³⁹ The presence of a facility on an active military installation, combined with the fact that it does not, after reasonable steps have been taken to ascertain its status, appear to be normally dedicated to civilian purposes, makes striking it consistent with the principle of distinction. For instance, hangar facilities often line runways. In most cases, they are used for traditional military purposes such as aircraft maintenance. However, if one is the community gymnasium, as is the case at an actual US military facility, an attacker should be permitted to strike it after exhausting reasonable measures under the circumstances to determine its nature. The attack may, *ex post facto*, be shown to have been a mistake, but that mistake will have been reasonable.

Computer Network Attack

Targeting one's enemy through computer networks is a relatively new method of warfare that raises a number of complex legal issues.¹⁴⁰ Many derive from the *jus ad bellum* and have been addressed elsewhere.¹⁴¹ With regard to the *jus in bello*, and specifically the law of targeting, three merit mention.¹⁴²

The first centers on the requirement of precautions in attack. As noted above, humanitarian law imposes a duty on the attacker to select methods and means of warfare "with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."¹⁴³ This is a significant obligation because it means that even if a target is a lawful military objective that can be attacked with a particular weapon without causing disproportionate collateral damage or incidental injury, a different weapon must be employed if it could achieve a comparable military advantage with less. Of course, the requirement is subject to a rule of reason that would take into account such factors as the inventory of available weapons, particularly in light of the anticipated length of the conflict, and any increased risk to those executing the mission.

This obligation may increasingly drive armed forces possessing CNA capabilities to employ them in lieu of kinetic weapons. The precision of computer network attack (in which particular systems can be isolated and attacked), the generally low risk to the attacker, and the fact that attacks do not expend "ordnance" that might be needed later in the conflict, all lend themselves to selecting CNA in place of more traditional weaponry. For instance, typical goals in air campaigns include destroying air defense networks, blinding intelligence capabilities, and disrupting command and control. Doing so might involve hundreds of sorties by aircraft dropping or launching explosive munitions with significant risk of collateral damage and incidental injury. However, all such target systems now rely heavily on computers of some sort, thereby making them vulnerable to computer network attack.

A related humanitarian law requirement is that "[w]hen a choice is available between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and civilian objects."¹⁴⁴ Again, the fact that many prospective targets rely on computer systems in some fashion opens up opportunities to avoid striking targets in ways that might cause harm to civilians and civilian objects. As an example, one might wish to destroy an enemy air force by bombing air bases. However, in an age of computer network attack, it may be less collaterally destructive to feed the enemy false information that causes enemy aircraft to unknowingly travel into aerial ambushes. Alternatively, consider the bombing of the media station in Belgrade during Operation Allied Force that resulted in the

Bankovic litigation before the European Court of Human Rights.¹⁴⁵ Using CNA, it might have been possible to target that aspect of the electrical grid providing the station electricity, thereby simply taking it off the air during offending programming. In an increasingly networked age, the possibilities of computer network attack grow exponentially.

The second issue posed by computer network attack is that of the targets against which it may legally be directed. The requirement that parties to a conflict “direct operation only against military objectives”¹⁴⁶ would seem to imply that CNA launched against civilians or civilian objects would be unlawful. A careful reading of Protocol Additional I, most of which is characterized by even non-Party States as reflective of customary law, reveals that it is “attack” on civilians which is forbidden, not operations directed against them writ large. Thus, the “civilian population . . . shall not be the object of attack”;¹⁴⁷ “civilian objects shall not be the object of attack”;¹⁴⁸ “indiscriminate attacks are forbidden”;¹⁴⁹ “attacks shall be limited strictly to military objectives”;¹⁵⁰ and so forth.

In Article 49, the Protocol defines “attacks” as “acts of violence against the adversary, whether in offense or defense.”¹⁵¹ The Commentary on Article 48 echoes the centrality of violence by describing the term “operations” as “military operations during which violence is applied.”¹⁵² Utilizing this definition, the prohibition is actually on attacking other than military objectives through the application of violence, that is, force which injures, kills, damages, or destroys.

This interpretation does not imply that all CNA is lawful merely because kinetic force is absent. Instead, the term “attack” can best be understood as prescriptive shorthand for a particular set of consequences, specifically the type of consequences violence would cause—injury to humans and damage to objects.¹⁵³ The prohibition would also reasonably extend to intentionally creating severe mental anguish, particularly in light of humanitarian law’s prohibition on terrorizing the civilian population.¹⁵⁴ However, conducting computer network attacks that merely inconveniences the civilian population, harasses them, or causes a decline in their quality of life is permissible. This interpretation does not represent a relaxation of humanitarian law in any way; indeed, the law already countenances such results through, for example, non-violent psychological operations directed at the civilian population.

Finally, there needs to be greater sensitivity to who can conduct computer network attacks. Obviously, military personnel who possess the privilege to apply kinetic force during an armed conflict may do so. However, many countries rely on either civilian defense employees or contractors for their computer network attack capabilities. Any civilian who launches a CNA “attack,” as that term has just been described, is directly participating in hostilities and thus an unprivileged belligerent. So too are those who conduct computer network attacks that do not damage

or injure, but nevertheless affect the enemy's immediate war-fighting capabilities. Typical examples would include directing a computer network attack against enemy command and control facilities, air defense networks, and combat communications nets. Simply put, to the extent that a computer network attack neutralizes or diminishes the capabilities of a military objective, the individual launching it is directly participating in hostilities.

Concluding Thoughts

In *A Man for All Seasons*, Sir Thomas More and William Roper engage in the following now familiar exchange on the law.

Roper: So now you'd give the Devil benefit of law.

More: Yes. What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that.

More: Oh? And when the law was down—and the Devil turned round on you—where would you hide? Yes, I'd give the Devil benefit of law, for my own safety's sake.¹⁵⁵

To some degree, each of the targeting issues addressed in this article illustrate similar contradictions. Targeting doctrine that seeks particular effects subtly incentivizes attacking protected persons or objects when facing a malevolent opponent or when doing so might operate to lessen likely collateral damage and incidental injury. Similarly, many argue that it is acceptable to strike at a wicked leader, even if he or she does not meet the requirements for combatant status or direct participation. Others suggest that humanitarian law should be relaxed in meeting the new phenomenon of catastrophic transnational terrorism. Similar concerns underlie suggestions that involuntary shields should be treated differently from civilians or that military installations or other areas where the enemy has positioned military and civilian objects in close proximity may be treated as a unitary whole when targeting. Finally, computer network attack opens entirely new targeting options, some which enhance the protections of humanitarian law, others that challenge them.

What is remarkable throughout the discussions of these complex issues, however, is the extent to which humanitarian law resolves them. In the vast majority of cases, application of the law, interpreted with sensitivity to both the context in which it is to be applied and its underlying purposes, meets the concerns of the

William Ropers who assert its insufficiency in meeting the challenges of 21st-century conflict. The law hardly needs to be “cut down”; on the contrary, it still effectively shelters non-participants from the effects of hostilities, while adequately meeting the practical concerns of the warfighters. Most importantly, Sir Thomas More’s words remain prescient, for in these troubling times we must preserve the law . . . for our own sake.

Notes

1. Professor Schmitt is Professor of International Law, George C. Marshall European Center for Security Studies, Garmisch-Partenkirchen, Germany. The views expressed herein are those of the author in his personal capacity and do not necessarily represent those of any United States or German government agency.
2. For an introduction to the concept of revolutions in military affairs, see Jeffrey McKittrick, et. al., *The Revolution in Military Affairs* (Sept. 1995), www.airpower.Maxwell.af.mi/airchronicles/battle/chp3.html.
3. Most notably, Giulio Douhet, an Italian air power strategist who argued that “war is won by crushing the resistance of the enemy; and this can be done more easily, faster, and more economically, and with less bloodshed by directly attacking that resistance at its weakest point.” For Douhet, that point was the population itself. GIULIO DOUHET, *THE COMMAND OF THE AIR* 196 (Dino Ferrari trans., 1942).
4. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, arts. 48–52, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts and Richard Guelff eds., 3d ed. 2000) [hereinafter Protocol Additional I].
5. Command, control, communications, computers, intelligence, surveillance, and reconnaissance.
6. Between March 19 and April 18, 2003, during which 41,404 sorties were flown (excluding special operations and Army helicopter flights). The Iraqis also downed 6 helicopters. US Central Command Air Forces (CENTAF), Assessment and Analysis Division, Operation Iraqi Freedom—By the Numbers (Apr. 30, 2003), www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf.
7. Lawfare refers to the effort to undercut an opponent’s support by making it appear to violate international humanitarian or human rights law (or publicize actual violations). That support may be either domestic or international. For a discussion of lawfare, see Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, paper presented at Humanitarian Challenges in Military Intervention Workshop, Carr Center, Harvard University (Nov. 29–30, 2001), <http://www.ksg.harvard.edu/cchrp/UseofForcePapers.shtml>.
8. Gary L. Crowder, Department of Defense Effects-Based Operations Briefing (Mar. 19, 2003), http://www.defenselink.mil/transcripts/2003/t03202003_t0319effects.html.
9. Chairman of the Joint Chiefs of Staff, Joint Publication 3-60, Joint Doctrine for Targeting, at I-4 (2002) [hereinafter Joint Pub 3-60].
10. Escorts perform such missions as defense suppression of ground air defense systems or defense of the attacking aircraft against enemy fighters.
11. A description of these and other weapons and weapon systems can be found on the Air Force Link website, <http://www.af.mil/factsheets/>.

12. Thus, while roughly 9% of air munitions used during Operation Desert Storm were precision-guided, by Operation Iraqi Freedom that figure had grown to nearly 70%.
13. Joint Pub 3-60, *supra* note 9, at I-5.
14. The term was coined by Colonel John Boyd, United States Air Force. Operating within an opponent's OODA loop is a decision-making concept in which one party, maintaining constant situational awareness, assesses a situation and acts on it more rapidly than his opponent. When this happens, the opponent is forced into a reactive mode, thereby allowing the first party to maintain the initiative. As the process proceeds, the opponent eventually begins to react to actions that no longer bear on the immediate situation. The resulting confusion results in paralysis.
15. Joint Pub 3-60, *supra* note 9, at I-6.
16. *Id.*
17. Joint Publication 3-60 offers the following example: "For example, the plane destroyed as a direct effect of an attack on an airfield, combined with similar attacks on all the assets of an adversary's air defense system, over time may ultimately degrade the legitimacy of the regime by portraying them as incapable of protecting the populace." *Id.*
18. *Id.*
19. In humanitarian law, the proper term for unintended injury or death of civilians is "incidental injury." Technically, the term "collateral damage" refers only to unintended damage or destruction of civilian objects. However, many lay publications, such as Joint Publication 3-60, group the two under the general category of "collateral damage."
20. Protocol Additional I, *supra* note 4, arts. 51.5(b), 57.2(a)(iii), & 57.2(b).
21. Joint Pub 3-60, *supra* note 9, at I-7.
22. Crowder, *supra* note 8.
23. John A. Warden, *The Enemy as a System*, AIRPOWER JOURNAL 40 (Spring 1995). For a commentary on Warden's theory, see DAVID R. METS, THE AIR CAMPAIGN: JOHN WARDEN AND THE CLASSICAL AIRPOWER THEORISTS (1998).
24. Department of Defense Effects-Based Operations Briefing, Briefing Slides (Mar. 19, 2003), www.defenselink.mil/news/Mar2003/g030318-D-9085.html.
25. Interestingly, both Operation Enduring Freedom and Operation Iraqi Freedom were classic campaigns of conquest, rather than compellence. Nevertheless, compellence campaigns are likely to remain a prominent feature in the 21st-century strategic landscape.
26. United States Air Force, Air Force Basic Doctrine (AFDD 1) (Sept. 1997), at 79. Centers of gravity are "those characteristics, capabilities, or localities from which a military force derives its freedom of action, physical strength, or will to fight." Department of Defense, Dictionary of Military and Associated Terms, Joint Publication 1-02 (as amended through June 5, 2003), available at www.dtic.mil/doctrine/jel/doddict [hereinafter Joint Pub 1-02].
27. A dynamic entirely consistent with Clausewitz's assertion that war is "a true political instrument, a continuation of political intercourse, carried on with other means." CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard and Peter Paret trans., 1989).
28. Out of a sense of latent patriotism.
29. Craig R. Whitney, *The Commander; Air Wars Won't Stay Risk-Free, General Says*, NEW YORK TIMES, June 18, 1999, at A1.
30. Michael Short, *Operation Allied Force from the Perspective of the NATO Air Commander*, in LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN 29 (Andru E. Wall ed., 2002) (Vol. 78, US Naval War College International Law Studies).
31. Protocol Additional I, *supra* note 4, art. 57.3. Although not a Party to the Protocol I, the United States considers many its provisions to be declaratory of customary international law. For a non-official, but generally considered authoritative, delineation of those viewed as

declaratory, see Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419 (1987). See also International & Operational Law Division, Office of the Judge Advocate General, Department of the Air Force, Operations Law Deployment Deskbook, tab 12 (no date), and comments by the then State Department Legal Advisor Abraham D. Sofaer in *Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 784 (1988).

32. Protocol Additional I, *supra* note 4, art. 52.2.

33. 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, Oct. 10, 1980, 1342 U.N.T.S. 137, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 515 (1980); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), Oct. 10, 1980, as Amended, May 3, 1996, art. 2.6, *reprinted in id.* at 536; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, art. 1.3, *reprinted in id.* at 533.

34. Second Protocol to the Hague Convention of 1954 for Protection of Cultural Property in Event of Armed Conflict, Mar. 26, 1996, art. 1f, 38 INTERNATIONAL LEGAL MATERIALS 769 (1999).

35. See, e.g., Judge Advocate General's School, Operational Law Handbook 10 (2003); US Navy/Marine Corps/Coast Guard, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M, MCWP 5-2.1, COMDTPUB P5800.7 ¶ 8.1.1(1995), *reprinted in* its annotated version as volume 73 of the US Naval War College's International Law Studies series.

36. *Id.* ¶ 8.1.1. This assertion is labeled a "statement of customary international law." The Handbook cites General Counsel, Department of Defense, Letter of Sept. 22, 1972, *reprinted in* 67 AMERICAN JOURNAL OF INTERNATIONAL LAW 123 (1973), as the basis for this characterization.

37. Joint Pub 3-60, *supra* note 9, at A-2.

38. Marco Sassoli, *Legitimate Target of Attacks Under International Humanitarian Law*, International Humanitarian Law Research Initiative Brief 3 (Jan. 2003), *available at* www.ihlresearch.org/portal/ihli/Session1.pdf.

39. NATO's demands were set forth in a Statement of the Extraordinary Meeting of the North Atlantic Council on April 12, 1999, and reaffirmed by the Heads of State and Government at Washington on April 23. They included a cessation of military action, as well as ending violence and repression of the Kosovar Albanians; withdrawal from Kosovo of military, police, and paramilitary forces; an international military presence in Kosovo; safe return of refugees and displaced persons and unhindered access to them by humanitarian aid organizations; and the establishment of a political framework agreement on the basis of the Rambouillet Accords. Press Release M-NAC-1(99)51 (Apr. 12, 1999), *available at* www.nato.int/docu/pr/1999/p99-051e.htm; Press Release S-1(99)62 (Apr. 23, 1999), *available at* www.nato.int/docu/pr/1999/p99-062e.htm.

40. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 INTERNATIONAL LEGAL MATERIALS 1257, ¶ 37 (2000), *available at* www.un.org/icty/pressreal/nato061300.htm [hereinafter Report to the Prosecutor].

41. *Bankovic & Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, European Court of Human Rights Application no. 52207/99.

42. The attack was addressed in the Report to the Prosecutor, *supra* note 40, at ¶¶ 71–79. The Prosecutor announced her decision not to proceed to the Security Council on June 2, 2000. UN Doc. S/PV.4150 (2000).

43. A. P. V. ROGERS, *LAW ON THE BATTLEFIELD* 37 (1996). A second edition of this excellent book was published in 2004.

44. Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, Annex (1956). The list, which is not included with the ICRC on-line text (www.icrc.org/ihl/nsf), is reprinted in paragraph 39 of Report to the Prosecutor, *supra* note 40. The Report to the Prosecutor failed to take a firm position on the attack (and on attacks against media facilities generally).

The media as such is not a traditional target category. To the extent particular media components are part of the C3 (command, control and communications) network they are military objectives. If media components are not part of the C3 network then they may become military objectives depending upon their use. As a bottom line, civilians, civilian objects and civilian morale as such are not legitimate military objectives. The media does have an effect on civilian morale. If that effect is merely to foster support for the war effort, the media is not a legitimate military objective. If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. If the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective. As a general statement, in the particular incidents reviewed by the committee, it is the view of the committee that NATO was attempting to attack objects it perceived to be legitimate military objectives.

Id. ¶55.

45. See *supra* note 38. Coalition forces dropped over 29,000 guided and unguided munitions during Operation Iraqi Freedom. Operation Iraqi Freedom—By the Numbers, *supra* note 6. Yet, the Human Rights Watch report on the operation found only the destruction of media facilities and electrical power distribution facilities “questionable.” Instead, it criticized an “unsound targeting methodology . . . compounded by the lack of an effective assessment both prior to the attacks of the risk to civilians . . . and following the attacks of their success and utility” as the primary culprits in causing civilian casualties. Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (Dec. 2003), available at www.hrw.org/reports/2003/usa1203/ [hereinafter *Off Target*]. The Human Rights Watch, Amnesty International, and ICTY Prosecutor’s Office reports on the 1999 air campaign in Yugoslavia are consistent, with over 28,000 combat sorties and only a handful of targets questioned as legitimate military objectives. See, respectively, Human Rights Watch, *Civilian Deaths in the NATO Air Campaign* (Feb. 2000), available at www.hrw.org/reports/2000/nato/; Amnesty International, “Collateral Damage” or Unlawful Killings?: Violations of the Laws of War by NATO during Operation Allied Force (June 6, 2000), available at www.amnesty.org/library/index/ENGEUR700182000; Report to the Prosecutor, *supra* note 40.

46. Charles J. Dunlap, Jr., *The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era*, STRATEGIC REVIEW 14 (Summer 2000). He further suggests that current technology allows the United States to apply “tremendous destructive power . . . discreetly and efficiently against a wide range of objects that opportunistic, materialistic societies like Yugoslavia value.” *Id.*

47. *Id.*

48. *Id.* He continues,

[a]dditional targets under this proposal could include selected cultural, educational, and historical sites whose existence provides support—to include psychological sustenance—to the malignant ideology that stimulates the behaviors the use of force is intended to support.. Furthermore, resorts, along with other entertainment, sports, and recreational facilities could be slated for destruction. Of course, government offices and buildings of every kind would be subject to eradication, even if they do not directly support military activities (except those

whose destruction would seriously impede the delivery of services indispensable for noncombatant survival). Finally, to the extent it is feasible to do so, the personal property of the sentient, adult population ought to be held at risk so long as it is not, again, indispensable to human survival. Milosevic's bank accounts would be high on the target list under the revised model.

Id.

49. *Id.*

This proposal openly acknowledges an intent to inflict hardship upon the sentient, adult (albeit putatively noncombatant) populace who must be held responsible for the deeds of their military forces. It includes even those who may oppose their government's policies. Given the tremendous scale of atrocities that are infecting the world, not to mention the globalization of WMD technology, ethical norms should place an affirmative duty on a nation's citizenry to actively frustrate their government's actions when they become patently inhumane.

Id.

50. DOUHET, *supra* note 3.

51. Dunlap, *supra* note 46, at 15. Arguably he contorts the principles of necessity and proportionality to support this effects-based objective: "The scope and severity of the attacks must bear a reasonable relationship to the egregiousness of the conduct sought to be prevented, and the level of force necessary to purge the enemy society of its perverse beliefs." The classic articulation of military necessity is drawn from the case of *United States v. List*: "The destruction of property to be lawful must be imperatively demanded by the necessities of war There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces." *United States v. List*, 11 Trials of the Major War Criminals before the Nuremberg Tribunals 1253 (1950).

52. Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 AIR FORCE LAW REVIEW 143 (2001).

53. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 78, 79 (July 8). He partially rejects the principle of distinction by treating civilian objects as a military objective and the principle of necessity is transformed by measuring it against need to reeducate the enemy population. Doing so ignores the preambular language of the 1868 St. Petersburg Declaration, a foundation of modern humanitarian law: "The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy." St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868, 18 Martens 474–5, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 54. It also flies in the face of Article 22 of the 1863 Lieber Code, the manual for Union forces during the American Civil War, and also a foundational document of humanitarian law:

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property and honor as much as the exigencies of war will admit.

War Department, Adjutant General's Office, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 22 (Apr. 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

Numerous contemporary instruments contain the principle, most notably the Protocol Additional I requirement that Parties “shall direct their operations only against military objectives.” Protocol Additional I, *supra* note 4, art. 48. Of course, this principle assumes a legal fiction, albeit a defensible one, because if the civilian population opposes the war effort, there is little doubt that the State’s ability to wage war will be seriously degraded.

54. ROBERT F. FUTRELL, *THE UNITED STATES AIR FORCE IN KOREA 1950–1953*, at 516 (1983).

55. *See supra* note 7.

56. Lord Robertson, *Kosovo One Year On: Achievement and Challenge* 13 (Mar. 21, 2000), www.nato.int/Kosovo/repo2000/index.htm.

57. Indeed, the first attack sortie of Operation Iraqi Freedom was an attempt to kill Saddam Hussein. Mark Kinkaid, *The First Shot*, AIRMAN MAGAZINE, July 23, 2003, *available at* www.af.mil/news/airman/0703/air.html.

58. Bruce van Voorst, *Ready, Aim, Fired*, TIME, Oct. 1, 1990, at 55. Also recall the controversy surrounding Operation Phoenix, the CIA’s program to neutralize the Vietcong civilian infrastructure (resulting in nearly 20,000 deaths). Michael Ratner, *The Bob Kerry Case, Crimes of War Expert Analysis* (July 2001), www.crimesofwar.org/expert/rather.html. The *High Command Case* of 1948 was based in part on Hitler’s order to kill Soviet Commissars (political leaders). The judgment labeled the order “notorious” and the case yielded multiple convictions. *United States v. Von Leeb (High Command Case)*, 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, at 1 (1950).

59. Lieber Code, *supra* note 53, art. 148. For a fuller explanation of this analysis, see Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE JOURNAL OF INTERNATIONAL LAW 609 (1992). *See also* W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, THE ARMY LAWYER 4 (1989).

60. The British Manual of 1958 is illustrative: “assassination, the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans . . . and the killing or wounding by treachery of individuals belonging to the opposing nation or army, are not lawful acts of war.” War Office, *The Law of War on Land, Being Part III of the Manual of Military Law*, art. 115 (1958), *reprinted in* 10 DIGEST OF INTERNATIONAL LAW (1968).

61. Protocol Additional I, *supra* note 4, art. 85.3(a).

62. Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4.2, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 483 [hereinafter Protocol Additional II].

63. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9* (1998), arts. 8.2(b)(i) & (e)(i) *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 671 [hereinafter ICC Statute].

64. Protocol Additional I, *supra* note 4, art. 50.1.

65. The exception applies in “situations in armed conflict where owing to the nature of hostilities an armed combatant cannot so distinguish himself.” In such cases, he need only distinguish himself during each military engagement and while engaged in “a military deployment preceding the launching of an attack” during such time as he is visible to the adversary. *Id.*, art. 44.3.

66. *Id.*, art. 43.3.

67. The Commentary to Article 43 of Protocol Additional I makes it clear that only religious and medical personnel enjoy a special status in the armed forces:

In fact, in the army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they

actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel

COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1677, at 515 (Yves Sandoz, Christophe Swinarki & Bruno Zimmerman eds., 1987) [hereinafter PROTOCOLS COMMENTARY].

68. The Rome Statute specifically makes them subject to prosecution, another indication that humanitarian law carves out no special regime for heads of State. ICC Statute, *supra* note 63, art. 27. On targeting heads of States, see also Thomas Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MARYLAND JOURNAL OF INTERNATIONAL LAW 287 (1999); Robert F. Turner, *It's Not Really "Assassination": Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites*, 37 UNIVERSITY OF RICHMOND LAW REVIEW 787 (2003); Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 BOSTON COLLEGE INTERNATIONAL & COMPARATIVE LAW REVIEW 1 (2003); Louis Beres, *Assassinating Saddam Hussein: The View from International Law*, 13 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 847 (2003).

69. US Constitution, art. II, sect. 2, cl. 1. Casper Weinberger has suggested that a head of State or government who serves as commander of the armed forces is a combatant. As a matter of law, he overreaches. Casper Weinberger, *When Can We Target the Leaders?*, STRATEGIC REVIEW 21 (Spring 2001). See also Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, 13 HAMLINE JOURNAL OF LAW AND PUBLIC POLICY 306 (1992).

70. The Department of Defense Dictionary of Military and Associated Terms offers the following definitions for the levels of war:

Strategic Level of War: The level of war at which a nation, often as a member of a group of nations, determines, national or multinational (alliance or coalition) security objectives and guidance, and develops and uses national resources to accomplish 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 these objectives; and provide military forces and other capabilities in accordance with strategic plans.

Operational Level of War: The level of war at which campaigns and major operations are planned, conducted, and sustained to accomplish strategic objectives within theaters or other operational areas. Activities at this level link tactics and strategy by establishing operational objectives needed to accomplish the strategic objectives, sequencing events to achieve the operational objectives, initiating actions, and applying resources to bring about and sustain these events. These activities imply a broader dimension of time or space than do tactics; they ensure the logistic and administrative support of tactical forces, and provide the means by which tactical successes are exploited to achieve strategic objectives.

Tactical Level of War: The level of war at which battles and engagements are planned and executed to accomplish military objectives assigned to tactical units or task forces. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and to the enemy to achieve combat objectives.

Joint Pub 1-02, *supra* note 26.

71. PROTOCOLS COMMENTARY, *supra* note 67, ¶ 1678, at 515. In the context of non-international armed conflict, the Commentary to Protocol Additional II provides: "Direct participation in hostilities implies that there is a sufficient causal relationship between the act of participation and its immediate consequences." *Id.* ¶ 4787, at 1453.

72. For a full discussion of the issue of direct participation in hostilities, see Michael N. Schmitt, “*Direct Participation in Hostilities*” and *21st Century Armed Conflict*, in Festschrift for Dieter Fleck 505 (Horst Fischer et al. eds., 2004), available at www.michaelschmitt.org/Publications.html. Israel takes the position that Protocol Additional I, Article 51(3), which provides that civilians taking part in the hostilities can only be targeted “for such times as they take a direct part in hostilities,” should be broadly construed such that those who participate remain targetable throughout the entire period of their involvement in the conflict. Yuval Shany, *Israeli Counter-Terrorism Measures: Are They “Kosher” under International Law*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES* 96, 104 (Michael N. Schmitt & Gian Luca Beruto eds., 2003).

73. Although Israel has acknowledged killing over 30 Palestinians pursuant to the policy, non-governmental organizations estimate that nearly three times that number have been targeted. Techniques include using snipers, bombs, and airstrikes. Most of the strikes have occurred in Palestinian controlled territory and have been mounted against mid- or high-level militants involved in attacks against Israeli targets. *Id.* at 103. On the policy of targeted killings, see also Orna Ben-Naftali and Keren R. Michaeli, “*We Must not Make a Scarecrow of the Law*”: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 *CORNELL INTERNATIONAL LAW JOURNAL* 233 (2003).

74. The Israel Defense Forces Judge Advocate General has set four conditions for conducting such strikes:

- 1) well-supported information showing the terrorist will plan or carry out a terror attack in the near future; 2) after appeals to the Palestinian Authority calling for the terrorist’s arrest have been ignored; 3) attempts to arrest the suspect by use of IDF troops have failed; 4) the assassination is not to be carried out in retribution for events of the past. Instead, it can only be done to prevent attacks in the future which are liable to toll multiple casualties.

HA’ARETZ, Feb. 4, 2002.

75. See, e.g., Amnesty International, Israel, and the Occupied Territories: State Assassinations and Other Unlawful Killings (Feb. 21, 2001), at www.amnesty.org/library/index/ENGMDE150052001.

76. UN CHARTER, art. 51.

77. S.C. Res. 1368, UN SCOR, 56th Sess., 4370th mtg., UN Doc. S/RES/1368 (2001); S.C. Res. 1373, UN SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373 (2001).

78. NATO—North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; North Atlantic Treaty Organization (NATO), Press Release No. 124, Statement by the North Atlantic Council (Sept. 12, 2001), www.nato.int/docu/pr/2001/p01-124e.htm.

OAS—Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3.1, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 93; Terrorist Threat to the Americas, Res. 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sept. 21, 2001).

ANZUS—Security Treaty between Australia, New Zealand, United States, Sept. 1, 1951, art. IV, 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86; (by Australia), Prime Minister John Howard, Government Invokes ANZUS Treaty—Press Conference (Sept. 14, 2001), available at australianpolitics.com.au/foreign/anzus/01-09-14anzus-invoked.shtml.

79. Russia, China, and India agreed to share intelligence with the United States, while Japan and South Korea offered logistics support. The United Arab Emirates and Saudi Arabia broke off diplomatic relations with the Taliban, and Pakistan agreed to cooperate fully with the United States. Twenty-seven nations granted overflight and landing rights and 46 multilateral

declarations of support were obtained. White House, Fact Sheet: Operation Enduring Freedom Overview, Oct. 1, 2001, www.state.gov/s/ct/rls/fs/2001/5194.htm.

80. In addition to United Kingdom participation in the initial strikes, Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey and Uzbekistan provided airspace and facilities. China, Egypt, Russia, and the European Union publicly backed the operations, while even the Organization for the Islamic Conference limited itself to urging the United States to restrict its campaign to Afghanistan. Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered ground troops. Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARVARD INTERNATIONAL LAW JOURNAL 41, 49 (2002); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 237, 248 (2002).

81. With the exception of the United Kingdom and Israel, many of the closest US allies criticized the airstrikes against government and terrorist targets in Libya. The General Assembly passed a condemnatory resolution following the attack. GA Res. 41/38, UN GAOR, 41st Sess., 78th plen. mtg. at 34, UN Doc A/RES/41/38 (1986). See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUSTON JOURNAL OF INTERNATIONAL LAW 3, 33–34 (1999) for a detailed description of international reaction. See also Stuart G. Baker, *Comparing the 1993 US Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 99 (1994).

82. Proportionality and necessity have specifically been cited as customary international law by the International Court of Justice. Military and Paramilitary Activities (Nicar. v. US), 1986 I.C.J. ¶ 194 (June 27); Case Concerning Oil Platforms (Iran v. US), Judgment (Merits) ¶¶ 43 & 74 (Nov. 6, 2003), www.icj-cij.org.

83. Profile: Ali Qaed Senyan al-Harhi, BBC News World Report, Nov. 5, 2002, at news.bbc.co.uk/2/hi/middle_east/2404443.stm.

84. Anthony Dworkin, The Yemen Strike, Nov. 14, 2002, at www.crimesofwar/onnews/news-yemen.html.

85. Ministry of Foreign Affairs, Israel: Targeting Terrorists—Background (Aug. 1, 2001), at www.mfa.gov.il/mfa/go.asp?MFAH0k9d0.

86. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), in 29 BRITISH AND FOREIGN STATE PAPERS 1840–1, at 1129, 1138. The incident involved the *Caroline*, a vessel used to supply Canadian rebels fighting British rule during the Mackenzie Rebellion. British forces crossed into the United States (after asking the United States, without result, to put an end to rebel activities on its territory), captured the *Caroline*, set it ablaze, and sent it over Niagara Falls. Two US citizens perished. An exchange of diplomatic notes ensued in which Secretary of State Daniel Webster articulated the standard. Lord Ashburton, his British counterpart, accepted this formula as the basis of their exchange. Letter from Lord Ashburton to Daniel Webster, US Secretary of State (July 28, 1842), in 30 BRITISH AND FOREIGN STATE PAPERS 1841–1842, available at www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm.

87. In addition to acceptance of the standard by the International Court of Justice (see *supra* note 82), the Nuremberg Tribunal cited the case approvingly when rejecting the argument that Germany had attacked Poland in 1939 and Norway in 1940 in (anticipatory) self-defense. International Military Tribunal (Nuremberg), Judgment, 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 172, 205 (1947).

88. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 172 (3d ed. 2001).

89. On January 8, 2004, Secretary of State Powell, referring to “evidence of a connection between Saddam Hussein and al-Qaida and . . . a likelihood that he would transfer weapons to al-Qaida,”

stated that he has “not seen smoking-gun, concrete evidence about the connection, but I think the possibility of such connections did exist and it was prudent to consider them at the time that we did.” Colin L. Powell, Secretary Powell’s Press Conference (Jan. 8, 2004), www.state.gov/secretary/rm/28008.htm.

90. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (Oct. 7, 2001), UN Doc. S/2001/946, www.un.int/usa/s-2001-946.htm; Secretary General Lord Robertson, Statement at NATO Headquarters (Oct. 2, 2001), www.nato.int/docu/speech/2001/s011002a.htm.

91. “Members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.” Protocol Additional I, *supra* note 4, art. 43.2.

92. Law enforcement incorporation must be notified to the other side for combatant status to attach. *Id.* art. 43.3.

93. Common Article 2 to the four Geneva conventions provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” (Emphasis added). Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 197; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 222; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 244; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 301. Article 1.2 of Protocol Additional I states that it applies to “situation referred to in Article 2 common.” It then controversially expands coverage to armed conflicts in which “people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” Protocol Additional I, *supra* note 4, arts. 1.3 & 1.4.

94. COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK OF THE ARMED FORCES IN THE FIELD 49 (J. Pictet ed., 1952).

95. Protocol Additional II, *supra* note 62, art. 1.1.

96. James Risen & David Johnston, *Threats and Responses: Hunt for Al Qaeda*, NEW YORK TIMES, Dec. 15, 2002, at 1.

97. See report of the group’s activities in Douglas Waller, *The CIA’s Secret Army*, TIME, Feb. 3, 2003, www.time.com/covers/1101030203/.

98. UN CHARTER, art. 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This prohibition extends not only to seizure of territory, but also to non-consensual penetration. Albrecht Randelzhofer, *Article 2, in I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 112, 123 (Bruno Simma ed., 2d ed. 2002). See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations:

Every State has a duty to refrain in its 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. Such a threat or

- use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.
- G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., annex, UN Doc. A/Res/2625 (1970), *reprinted in* 65 AMERICAN JOURNAL OF INTERNATIONAL LAW 243 (1971) and *in* KEY RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY, 1946–1996, at 3 (Dietrich Rauschnig, Katja Wiesbrock & Martin Lailach eds., 1997) [hereinafter *Declaration on Friendly Relations*]. The resolution was adopted by acclamation.
99. Noted by John Basset Moore in his dissent in the *Lotus* case. S.S. *Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Sept. 7) (Moore, J., dissenting).
100. See, e.g., *Declaration on Friendly Relations*, *supra* note 98; *Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 49/60, UN GAOR 6th Comm., 49th Sess., 84th plen. mtg., UN Doc. A/49/743 (1994); *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 51/210, UN GAOR 6th Comm., 51st Sess., 88th plen. mtg., UN Doc. A/51/631 (1996); S.C. Res. 1363, UN SCOR, 56th Sess., 4352d mtg., UN Doc. S/RES/1363 (2001); S.C. Res. 1267, UN SCOR, 54th Sess., 4051st mtg., UN Doc. S/RES/1267 (1999).
101. In the case of Afghanistan, the United Nations had demanded that the Taliban put an end to terrorist activities on territory it controlled both before and after September 11. See, e.g., S.C. Res. 1267, *supra* note 100; S.C. Res. 1363, *supra* note 100; S.C. Res. 1378, UN SCOR, 56th Sess., 4415th mtg., UN Doc. S/RES/1378 (2001); S.C. Res. 1390, UN SCOR, 57th Sess., 4452d mtg., UN Doc. S/RES/1390 (2002). After 9/11, President Bush made the demand explicit. President George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1347 (Sept. 20, 2001). The United States also made back-channel demands through Pakistan.
102. Perhaps the most significant case of a State crossing into another to deal with attacks is the *Caroline* case itself, since the correspondence between Webster and Ashburton is universally cited as the source of the requirements of self-defense.
103. Defense Intelligence Agency, Saddam's Use of Human Shields and Deceptive Sanctuaries: Special Briefing for the Pentagon Press Corps (Feb. 26, 2003), www.defenselink.mil/news/Feb2003/g030226-D-9085M.html. On this subject, see also Central Intelligence Agency, Putting Noncombatants at Risk: Saddam's Use of Human Shields, January 2003, www.cia.gov/cia/reports/iraq_human_shields/; Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War by a Democratic State against Terrorism*, 16 EMORY INTERNATIONAL LAW REVIEW 445 (2002).
104. Defense Intelligence Briefing, *supra* note 103.
105. For a version of these points, see *id.*
106. G.A. Res. 46/134, UN GAOR, 46th Sess., ¶ 2(c), UN Doc. A/RES/46/134 (1991).
107. Off Target, *supra* note 45.
108. In May 1995, Bosnian Serbs seized UNPROFOR peacekeepers and used them as human shields against NATO airstrikes. In response, the United Nations condemned the action, demanded release, and authorized the creation of a rapid reaction force to handle such situations. S.C. Res. 998, UN SCOR, 3543d mtg., UN Doc S/RES/998 (1995).
109. Joint Pub 3-60, *supra* note 9, app. A.
110. *Id.*
111. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 93, art. 28.
112. Protocol Additional I, *supra* note 4, art 51.7.

113. ICC Statute, *supra* note 63, art 8.2(b)(xxiii): “Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.”

114. Protocol Additional I, *supra* note 4, art. 51.8.

115. Department of the Air Force, International Law—The Conduct of Armed Conflict and Air Operations (AFP 110-31), at ¶ 5-4b (Nov. 19, 1976).

116. ROGERS, *supra* note 43, at 79. See also W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 163 (1992).

117. Joint Pub 3-60, *supra* note 9, at A-2–A-3.

118. Department of the Air Force, USAF Intelligence Targeting Guide, at A4.2.1.2 (Feb. 1, 1998).

119. Department of the Air Force, Judge Advocate General’s Department, Air Force Operations and the Law 293 (2002).

120. A belligerent reprisal is an unlawful, but proportionate, act taken to compel one’s adversary to desist in its own unlawful course of conduct. On reprisals, see FRITS KALSHOVEN, *BELLIGERENT REPRISALS* (1971). Protocol Additional I went far beyond prior humanitarian law in prohibiting reprisals, a fact that led to US opposition to the treaty. See Protocol Additional I, *supra* note 4, arts. 51.6 (civilians and civilian population), 52.1 (civilian objects), 53 (cultural objects and places of worship), 54.4 (objects indispensable to the survival of the civilian population), 55.2 (the natural environment), and 56.4 (dams, dykes and nuclear electrical generating stations).

121. CNN Interactive, *Iraqis Volunteering as Human Shields* (Nov. 14, 1997), at www.cnn.com/WORLD/9711/14/iraq.al.sahhaf.presser. They used force for that purpose during Operation Desert Fox in December 1998.

122. Although most came to shield civilian objects, the Iraqi government urged them to shield military objectives.

123. Department of Defense, Background Briefing on Targeting (Mar. 5, 2003), at www.defenselink.mil/news/Mar2003/t03052003_t305targ.html.

And then, the other target category that is a challenge for us is where the human shields that we’ve talked of before might be used. And you really have two types of human shields. You have people who volunteer to go and stand on a bridge or a power plant or a water works facility, and you have people that are placed in those areas not of their own free will. In the case of some of the previous use of human shields in Iraq, Saddam placed hostages, if you will, on sensitive sites in order to show that these were human shields, but, in fact, they were not there of their own free will. Two separate problems to deal with that, and it requires that we work very carefully with the intelligence community to determine what that situation might be at a particular location.

124. Human Rights Watch, International Humanitarian Law Issues in a Potential War in Iraq (Feb. 20, 2002), <http://www.hrw.org/background/arms/iraq0202003.htm#1>.

125. Protocol Additional I, *supra* note 4, art. 51(3).

126. ICC Statute, *supra* note 63, art. 8. The notion of direct participation also appears in the humanitarian law pertaining to non-international armed conflict. Common Article 3 to the four 1949 Geneva Conventions specifically applies to “persons taking no active part in hostilities.” Geneva Conventions, *supra* note 93, art. 3(1). The very limited nature of the article’s protections were augmented in 1977 by Protocol Additional II to the Geneva Conventions, which provides far more extensive protection to civilians “unless and for such time as they take a direct part in hostilities.” Protocol Additional II, *supra* note 62, art 13.3. Although Common Article 3 and Protocol II employ different terminology (“active” and “direct” respectively), the International Criminal Tribunal for Rwanda reasonably opined in the *Akayesu* judgment that the terms are so similar they should be treated synonymously. ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case ICTR-96-4-T, Judgment, 2 Sept. 1998, ¶ 629.

127. PROTOCOLS COMMENTARY, *supra* note 67, ¶ 1679, at 516.

128. *Id.* ¶ 1942, at 618.

129. Protocol Additional I, *supra* note 4, art. 52.2.

130. This is arguably consistent with US doctrine. Joint Publication 3-60 provides,

The protection offered civilians carries a strict obligation on the part of civilians not to participate directly in armed combat, become combatants, or engage in acts of war. Civilians engaging in fighting or otherwise participating in combat operations, singularly or as a group, become unlawful combatants and lose their protected civilian status.

Joint Pub 3-60, *supra* note 9, at A-2.

131. Justus R. Weiner, *Co-existence Without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements*, 26 BROOKLYN JOURNAL OF INTERNATIONAL LAW 591, 679 n.407 (2000).

132. For instance with the entry into force on February 12, 2002 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, Annex I, 54 UN GAOR Supp. No. 49, UN Doc. A/54/49 (2000).

133. Protocol I, *supra* note 4, art. 52.2.

134. Prosecutor v. Stanislav Galic, Judgement, Dec. 5, 2003, Case No. IT-98-29-T, www.un.org/icty/galic/trialc/judgement/index.htm.

135. The Report to the Prosecutor on the NATO bombing campaign usefully addresses the *actus reus* and *mens rea* of the offense of unlawful attack under Article 3 of the ICTY Statute:

Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) and attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offence of unlawful attack under Article 3 of the ICTY Statute. The *mens rea* for the offence is intention or recklessness, not simple negligence. In determining whether or not the *mens rea* requirement has been met, it should be borne in mind that commanders deciding on an attack have duties:

- a) to do everything practicable to verify that the objectives to be attacked are military objectives,
- b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage, and
- c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.

Report to the Prosecutor, *supra* note 40, ¶ 28.

136. Protocol Additional I, *supra* note 4, art. 51.5(a).

137. *Id.*, art. 57.2. The Report to the Prosecutor on the NATO bombing campaign expanded on this obligation:

The obligation to do everything feasible is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations. Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used. Further, a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in

a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.

Report to the Prosecutor, *supra* note 40, ¶ 29.

138. Indeed, the International Criminal Tribunal for the Former Yugoslavia addressed the failure to use discriminate weapons where civilians were collocated with the military in the *Blaskic* case. The case involved shelling of the village of Ahmici and several others in Lasva River Valley with “baby-bombs,” home made mortars that are difficult to aim accurately. The Trial Chamber found this to be a deliberate attack on civilians with “blind weapons.” Prosecutor v. Blaskic, Judgment, March 3, 2000, Case No. IT-95-14.

139. Protocol Additional I, *supra* note 4, art. 52.3.

140. Information warfare consists of “information operations conducted during time of crisis or conflict to achieve or promote specific objectives over a specific adversary or adversaries.” Computer network attacks (CNA), a form of information warfare, are “operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves.” Joint Pub 1-02, *supra* note 26. The essence of CNA is that, regardless of the context in which it occurs, a data stream is relied on to execute the attack. Methods include, *inter alia*, gaining access to a computer system so as to acquire control over it, transmitting viruses to destroy or alter data, using logic bombs that sit idle in a system until triggered on the occasion of a particular occurrence or at a set time, inserting worms that reproduce themselves upon entry to a system thereby overloading the network, and employing sniffers to monitor and/or seize data.

141. On CNA and the *jus ad bellum*, see Michael N. Schmitt, *Computer Network Attack and Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 885 (1999).

142. On CNA and the *jus in bello*, see Michael N. Schmitt, *Wired Warfare: Computer Network Attack and International Law*,” 84 (No. 846) INTERNATIONAL REVIEW OF THE RED CROSS 365 (June 2002). On the subject generally, see COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW (Michael N. Schmitt & Brian T. O’Donnell eds., 2002) (Vol. 76, US Naval War College International Law Studies).

143. Protocol Additional I, *supra* note 4, art. 57.2 (a)(ii).

144. *Id.*, art. 57.3.

145. See Bankovic, *supra* note 41.

146. Protocol Additional I, *supra* note 4, art. 48.

147. *Id.*, art. 51.2.

148. *Id.*, art. 52.1.

149. *Id.*, art. 51.4.

150. *Id.*, art. 52.2.

151. *Id.*, art. 49.

152. PROTOCOLS COMMENTARY, *supra* note 67, ¶ 1875, at 600.

153. See Schmitt, *Wired Warfare: Computer Network Attack and International Law*, *supra* note 142, at 375–78.

154. See discussion at *id.* at 377.

155. Robert Bolt, *A Man for All Seasons*, act. I, scene 6 (1954).

X

Coalition Operations and the Law

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This paper addresses the practical side of the application of the law of armed conflict and domestic law requirements during coalition combat operations; highlighting areas where different legal structures or divergent national interpretation of the applicable international framework may have significant impact. I am going to do this by briefly canvassing three such areas in the context of Operation Enduring Freedom. Two of these are directly related to the topic of combatants and civilians. The third is a completely distinct topic—the conduct of coalition investigatory boards.

Coalition Boards of Inquiry

The first area I would like to discuss is coalition boards, using the Coalition Board that was convened by the United States Air Force to investigate the Tarnak Farms Range friendly fire incident and the Canadian Board of Inquiry that was ordered by the Minister of National Defence (MND) to investigate the same incident as a focus. I do not intend, however, to comment on any substantive findings of either board. Rather, my emphasis will be on the procedural issues that arose during the conduct of the concurrent boards that were investigating the incident and the resolution of those issues.

The facts are undisputed. On the evening of April 17, 2002, soldiers from Alpha Company, Third Battalion, Princess Patricia's Canadian Light Infantry were

engaged in a night live fire training exercise at Tarnak Farms Range just south of Kandahar, Afghanistan. While the Canadian soldiers were training, two US F-16 fighter aircraft were returning from an on-call mission to support coalition ground forces. As the aircraft passed south of Kandahar, the flight leader observed what he described as fireworks coming from an area a few miles south of Kandahar. Perceiving this as surface-to-air fire, the pilot asked for and received permission from the mission crew of a US Airborne Warning and Control System (AWACS) aircraft to determine the precise coordinates of the surface-to-air fire. While attempting to obtain the coordinates, the pilot of the second aircraft, the wingman, requested permission to fire on the location with his 20-millimeter cannon. The AWACS crew told him to stand by, and later requested that the wingman provide additional information on the surface-to-air fire while directing him to hold fire. The pilot immediately responded "I've got some men on a road and it looks like a piece of artillery firing at us. I am rolling in in self defense." The pilot then called "bombs away" as he released one 500-pound GBU-12 laser-guided bomb. The bomb struck a Canadian fire position at Tarnak Farms. Four Canadians were killed, eight were wounded.

As a result of this tragic incident, two boards, one exclusively Canadian and one American with a Canadian co-chairman (Coalition Board), were convened to investigate the incident.

However, although each Board was investigating the same incident, the primary purpose for the respective investigations was quite different. As will be highlighted later, this difference in purpose had significant impact on the procedural processes applicable to each board.

The primary purpose for the Coalition Board was of a disciplinary nature. This board was convened with the specific mandate to make disciplinary recommendations, if such were warranted. The Canadian Board of Inquiry was convened under Section 45 of the National Defence Act whereby the MND may convene such a board when it is appropriate for the MND to be informed on a matter connected with the Canadian Forces or that affects a member thereof. The primary purpose of the Canadian board was quite different than that of the Coalition Board. It was convened for administrative/safety purposes and was designed to meet the Canadian public expectation that this tragic incident would be investigated in a balanced and transparent manner. Recommendations as to potential disciplinary action were never contemplated and under Canadian jurisprudence, the conduct of the investigation could have, in fact, prejudiced future criminal/disciplinary action.

The conduct of simultaneous investigatory boards into the same incident, with different purposes, poses unique challenges. The first is that of sharing and disclosure of information. This issue has two facets: first, how to ensure both boards had access

to the necessary information to reach informed conclusions and recommendations; and second, what information could be publicly disclosed once the respective boards had completed their investigation and made their recommendations.

Because the co-chairman of the Coalition Board was Brigadier General Marc Dumais, a Canadian, one obvious option for the sharing of the requisite information would have been to use General Dumais as a conduit of information between the two boards. This option was not a viable one because of the significant impact such an arrangement could have on the perceived independence and impartiality of each board. The second option, and the one that was utilized, was the establishment of a protocol for the release of information to the boards. This protocol established the process for requesting documentary evidence and witnesses and set out the parameters under which the information could be released. In the case of requests by the Canadian Board of Inquiry for information from US authorities, these parameters formed part of the legal basis for the determination of what information could be released publicly. In light of the *raison d'être* (a balanced and transparent investigation) for the Canadian Board of Inquiry and the fact that it had been Canadian soldiers who had been injured or died, as much public disclosure as possible was of great importance. Equally important, however, was the desire not to release classified information, personal information protected from release under privacy legislation or information the release of which could impact on potential disciplinary proceedings. Balancing these conflicting priorities takes a great deal of coordination and cooperation between national authorities to ensure consistent and coordinated public release of information. One of the most important lessons learned in this whole process is never assume full knowledge of the legal and political constraints a coalition partner may be operating under, particularly when dealing with such an emotion charged issue as the death of coalition soldiers as a result of friendly fire. Even for Canada and the United States, who share such similar legal, political and cultural foundations, reaching a compromise that addressed both countries concerns took significant effort and coordination and, I might add, a lot of late nights, last minute panics and very senior intervention.

Returning to the initial theme of the impact of procedural processes adopted by the respective boards as a result of their differing primary purposes, I'd like to touch briefly on the issue of compellability of witnesses. As I understand it, no witness could be compelled to testify before the Coalition Board. In contrast, the Canadian board could compel anyone subject to Canadian law to testify, but their testimony could not be used as evidence in a legal proceeding (civil, disciplinary or criminal), save for perjury charges. This striking difference in procedural process is directly linked to the primary purpose for the convening of the board. In the Canadian context, because no evidence given to a Board of Inquiry can be used in future

legal proceedings, witnesses can be compelled to testify because it does not impact on their fundamental right “not to be compelled to be a witness in proceedings against oneself.” Because the purpose of the investigation is an administrative one, tied primarily to safety issues, the balance is tipped in favor of compelling the witnesses to testify in the interests of a full exploration of the facts.

Having now identified in a very cursory manner some of the legal interoperability issues related to coalition boards let me close this issue by saying that I believe that none of these challenges are insurmountable. In fact, in this instance I believe these differences in process, dictated largely by different national legal standards, actually enhanced the credibility of the findings and recommendations of the respective Boards. In the case of the Tarnak Farms tragedy, the structured process that evolved for disclosure of information to the respective boards, ensuring that there was no collusion or collaboration between the boards, led to the public perception that there had been a balanced and transparent investigation into the matter. A closer relationship between the two boards during the investigative process may not have resulted in the same perception.

Transfer of Detainees

The second area where different legal structures or divergent national interpretation of the applicable international framework may have an impact on operations is that of the transfer of detainees to another coalition partner. Let me again paint a brief background of the issue in the context of Operation Apollo, Canada’s contribution to Operation Enduring Freedom. Throughout the campaign against terrorism, the tasks and capabilities of Canadian Forces (CF) units, as well as some other coalition partners, deployed in the theater of operations did not permit the long-term detention of persons detained by the CF. Persons detained by the CF were either released or evacuated from the point of capture to a facility where proper screening, long-term treatment and security could be ensured. For Operation Enduring Freedom, the United States assumed the responsibility of establishing and maintaining the coalition’s short- and long-term detention facilities in Afghanistan and Guantanamo Bay, Cuba. The Government of Canada has noted several times that Canada, as a coalition partner, will, as a general rule, transfer persons detained by the CF, and who are suspected members of the Taliban and al-Qaida, to the United States.

I would like to highlight some of the legal issues that may impact on the decision of a coalition partner whether or not to transfer detainees to another coalition partner. As with so many other issues related to international law these are not “black letter law” issues and different coalition partners will likely have different

interpretations of the applicable law or even what is the applicable law. This, of course, is one of the significant challenges of coalition operations.

Before addressing the specifics of these legal issues, let me provide an example of how fundamental these different interpretations can be. As part of the overall campaign against terrorism, Canada and its coalition partners are engaged in an armed conflict and are exercising their inherent right of collective and individual self-defense against the al-Qaida and the Taliban. But what is the legal regime applicable to these hostilities? Generally, where a State is entitled to use force in an armed conflict, it must conduct hostilities in accordance with international law, particularly the law of armed conflict. However, al-Qaida is a non-State entity (not qualifying as a “national liberation movement”) and prior to September 11th most States rejected the Taliban as the legitimate government of Afghanistan (previous legitimate governments of Afghanistan had signed and ratified the Geneva Conventions of 1949²). This has led to a debate as to whether the coalition partners are engaged in an international or non-international armed conflict and, if one accepts that it is an international armed conflict, whether the Geneva Conventions and the 1977 Additional Protocol I³ apply as a matter of conventional law to the conflict. For example, on February 7, 2002, the United States announced that although it has never recognized the Taliban as the legitimate Afghan Government, the President determined that the Taliban members are covered by the Geneva Conventions because Afghanistan is a party to them. Other coalition partners may have taken the view that the Geneva Conventions and the 1977 Additional Protocol I may not technically apply to the conflict as a matter of strict conventional or treaty law. However, regardless of the legal position adopted by coalition partners, all coalition partners are applying the same standards, either as a matter of law or policy.

What is the legal authority for one coalition partner to transfer detainees to another coalition partner?

Turning now to the specific issue of transfer of detainees from one coalition partner to another, one issue that legal advisors may have to analyze prior to a decision being made is whether there is legal authority for such a transfer. Geneva Convention (III) Relative to the Treatment of Prisoners of War provides for the transfer of prisoners of war to other nations who are willing and able to abide by the Convention’s obligations for the handling and treatment of such persons. In particular, Article 12 states: “Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the *willingness and ability* of such transferee Power to apply the Convention.” (Emphasis added.) There are no specific provisions for those detained persons who have taken part in hostilities but are not entitled to prisoner of

war status (i.e., unlawful combatants) and therein may be the rub for some coalition partners.

In the context of Operation Enduring Freedom, a review of US treatment of detainees at Kandahar and Guantanamo Bay and statements made by President Bush, indicate the United States is willing and able to apply the appropriate international law standards. In particular, on February 7, 2002, the White House clarified the US position on the applicability of the Geneva Conventions to members of the Taliban and al-Qaida.⁴ The White House Spokesman's comments can be summarized as:

- The United States is committed to applying the principles of the Geneva Conventions;
- The United States applied the Geneva Conventions (including Article 4 of Convention III) to the Taliban and made a blanket determination that members of the Taliban are not prisoners of war;
- The United States has decided not to apply the Geneva Conventions to members of al-Qaida because they do not represent any State that is a party to the Geneva Conventions. Accordingly, they cannot have prisoner of war status under the Geneva Conventions;
- The United States will treat all detainees humanely and consistent with the principles of the Geneva Conventions; and
- The International Committee of the Red Cross (ICRC) has been allowed, and will continue to have, access to facilities and detained persons.

In circumstances such as this, it may be reasonable to argue that a coalition partner can transfer these unlawful combatants to the United States in accordance with standards analogous to the provisions of Article 12 of Geneva Convention III.

Are blanket determinations of PW status permissible under international law?

Even if a coalition partner is satisfied that the receiving State is willing and able to apply the Geneva Conventions and other appropriate international legal standards, the issue of the reasonableness of a blanket determination that members of a group are not entitled to prisoner of war status may be problematic. This was potentially an issue for coalition partners during the campaign against terrorism. On the one hand, you have the position that such blanket determinations are supportable under international law if based on appropriate evidence. (The United States decided that members of the Taliban and al-Qaida are not entitled to prisoner of war status. This was based on its determination that al-Qaida met none of the requirements for prisoner of war status—a responsible commander, a distinctive

and visible insignia, the open bearing of arms and compliance with the laws and customs of war. The Taliban failed to meet the last requirement.)

On the other hand, you have the argument that Article 5 of Geneva Convention III requires a case-by-case evaluation of the status of detained persons if prisoner of war status is not being conferred, based on the plain reading of Article 5. Article 5 addresses the issue of the legal status of a captured or detained person who has committed a belligerent act. It notes that a person who is classified as a “combatant” under Article 4 will be treated in all respects as a prisoner of war. If there is any doubt about whether a detainee is entitled to prisoner of war status, Article 5 delineates the requirement to conduct a status determination tribunal as follows:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [i.e., combatants], such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.

One could argue that a simple way for a coalition partner to solve this debate is to conduct its own status determination hearing prior to transfer, but there is no requirement at law to do so and this approach ignores the reality of the operational situation where it may be impossible to do so in a timely and effective manner.

What is the impact on the decision to transfer if it is known at the time of transfer that a detainee is likely to be charged and may be subject to the death penalty and/or judicial proceedings that may not meet minimal fair trial guarantees under international or domestic law?

This, of course, is the thorny issue of transferring detainees to a State whose penal code authorizes the death penalty or has a judicial system with less procedural guarantees than those found under the coalition partner’s law. International law, including the law of armed conflict, contemplates that detainees, including prisoners of war and unlawful combatants, may be subject to judicial proceedings and ultimately sentenced to death.⁵ International law imposes minimum legal standards on the conduct of these proceedings. Unlawful combatants may be prosecuted as criminals for having taken part in hostilities. Prisoners of war could be liable for prosecution if they committed violations of the laws of war.

The real legal issue for coalition operations, however, is likely to be how the domestic law of the respective coalition partners impacts on the transfer of detainees to a coalition partner, who could potentially subject the detainee to the death penalty. Unlike the United States, most other western nations’ domestic human rights standards have some extraterritorial application to aliens. For example, Section 7

of Canada's Charter of Rights and Freedoms guarantees individuals the right not to be deprived of their life, liberty or security of the person except in accordance with the principles of fundamental justice. The Supreme Court of Canada has held that extradition to face the death penalty⁶ or immigration removal where there is a substantial risk of torture⁷ would violate Section 7 in all but exceptional circumstances. Arguably the issue of transfer of detainees in the context of a military operation abroad is quantifiably different than the extradition or immigration removal of a person who is on Canadian territory, but the application of the Charter to such operations has yet to be addressed by Canadian courts. In a similar vein, the European Court of Human Rights ruled in *Bankovic*⁸ that while Article 1 of the European Convention on Human Rights⁹ contemplates the ordinary and essentially territorial notion of jurisdiction, extra-territorial jurisdiction by a contracting state is possible in exceptional circumstances depending on the particular circumstances of each case.

Additional Protocol I—Article 51(3)

The final issue I would like to touch on today is what Hayes Parks calls the “revolving door” for certain civilians provided by Article 51(3) of Additional Protocol I. As a trade-off for the protection they enjoy against the dangers arising from military operations, civilians should not directly participate in hostilities. According to Article 51(3) of Additional Protocol I, their direct participation in hostilities automatically entails loss of immunity from attack “*for such time as they take a direct part in hostilities.*” In principle, the trade-off does not appear to be problematic, particularly in the context of those armed conflicts where there is no difficulty in precisely defining combatant and civilian status. But in the context of Operation Enduring Freedom, the practical application of this temporal limitation could be problematic, particularly from a targeting perspective. How can the period during which a civilian who directly participates in hostilities loses immunity from attack be defined in practical terms? Does it mean that civilians only lose their protected status and become lawful targets while they carry a weapon and they revert to their protected status once they throw down their weapon or return home from a day in the trenches? Or do they continue to be lawful targets so long as they perform the functions of combatants, such as planning and command as well as the actual conduct of operations? There is no international consensus on this issue and these are not academic questions, the answer to which is of no practical import. Nor are they only relevant to those nations who are parties to Additional Protocol I. Targeting decisions will remain subject to legal review as part of the accountability process that is integral to the principle of command responsibility. There will be an effect

on the whole coalition as a result of each partner's interpretation on this issue as each nation's position on this issue may have a direct impact on the targets assigned to each partner by the coalition commander.

Notes

1. Captain M. H. (N) McDougall, Canadian Forces, is the Deputy Judge Advocate/Operations.
2. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilians Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; all *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively.
3. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereinafter Additional Protocol I), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in id.* at 422.
4. See the White House statement on the applicability of the Geneva Conventions, *available at* www.CBC.CA "US Guarantees Rights to Taliban Detainees," Feb. 8, 2002 and *at* www.CNN.Com "Bush: Geneva Treaty Applies to Taliban Detainees," Feb. 7, 2002.
5. For example, see Geneva Convention (III), Articles 99–107 of Part III (Judicial Proceedings), and Geneva Convention (IV), Articles 64–68 of Part III, Section III (Occupied Territories), DOCUMENTS ON THE LAWS OF WAR, *supra* note 2.
6. United States v. Burns [2001] 1 S.C.R. 283.
7. Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3.
8. Bankovic and Others v. Belgium and 16 Other Contracting States, 2001-XII Eur. Ct. H.R. 333 (Grand Chamber).
9. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 U.N.T.S. 222.

PART III

MARITIME OPERATIONAL CHALLENGES

XI

Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality

Wolff Heintschel von Heinegg¹

Preliminary Remarks

With the adoption of the UN Law of the Sea Convention in 1982² there was a strong belief that with that “constitution of the world’s oceans” all the disputed issues relating to coastal State rights on the one hand, and to freedom of navigation on the other hand, had been settled for good. Since 1982, however, coastal State legislation has frequently had a negative impact on the latter. The US Freedom of Navigation Program gives ample proof of excessive maritime claims ranging from restrictions of the rights of innocent passage, transit passage, and archipelagic sea lanes passage, to the establishment of illegal baselines and maritime security zones, all of which have no basis in either the LOS Convention or in customary international law.³ The problem of “creeping jurisdiction” has gradually been reinforced by national legislation on the protection of the marine environment. Many coastal States have understood that when a deviation from the established rules and principles of the law of the sea is justified on environmental grounds, it creates enormous difficulties for those States that are prepared to counter these claims. The general public will all too easily accept them as reasonable and

legitimate. Still, for countries like the United States and the member States of the European Union,⁴ in view of their dependence on the freedom of navigation for security and economic reasons, it is of tantamount importance to preserve the achievements of the LOS Convention.

At the same time, these very States are confronted with new challenges. There already exists reliable intelligence information that transnational terrorists may target ships and ports. Moreover, transnational terrorism may well seek to take advantage of navigational freedoms by transporting weapons, including weapons of mass destruction, by sea. In order to prevent them from reaching their destination it is necessary not only to establish effective control mechanisms in ports⁵ but also to interfere with international shipping on the high seas if there is no such effective control mechanism in the port of origin, or if the flag State is unwilling to comply with its obligations under treaties in force⁶ or under the respective resolutions of the UN Security Council.⁷

The dilemma the target States of transnational terrorism find themselves in seems to be obvious. On the one hand, there is a necessity to interfere with foreign shipping, thus restricting the freedom of navigation. On the other hand, these measures may be precedents for a modification of the law which would, if going too far, be contrary to the vital interests of these States whose economies depend on the free flow of goods by sea and whose security interests presuppose that their navies remain in a position to exercise power projection whenever and wherever necessary.

The first section of this paper will deal with the question of whether and to what extent the law as it stands provides a sufficient legal basis for Maritime Interception/Interdiction Operations (MIO)⁸ in the Global War on Terrorism (GWOT).⁹ If the answer to this question is affirmative, the said dilemma will prove to be less dramatic than it seems to be at first glance.

The second part of this paper will be devoted to three further current legal issues in maritime operations that, although dealing with the law of naval warfare and neutrality at sea, are not *in toto* unrelated to the issues dealt with in the first part. Firstly, the establishment of "exclusion/operational zones" during an international armed conflict will, in any event, interfere with the freedom of navigation of "neutral" and innocent shipping. Secondly, the threat posed by transnational terrorism will not vanish or even decrease during an international armed conflict. Rather, transnational terrorists may consider warships and hospital ships perfect targets, be it only for propaganda reasons.¹⁰ Hence, the question arises as to which measures belligerents may take in order to effectively protect their units. Thirdly, and finally, in view of the persisting terrorist threat during an international armed conflict, the traditional rules and principles of the law of (maritime) neutrality, if

applied in a strict manner, may prove to be a considerable obstacle for non-belligerent States in their contribution to the GWOT.

War on Terrorism

Developments following the terrorist attacks of September 11, 2001, have led to a broader understanding of the right of self-defense.¹¹ It not only applies to situations where a State, either with its armed forces or in some other way attributable to it, has attacked another State. It also comes into operation if an armed attack is launched against a State from outside its borders¹² by persons whose acts cannot, or for the time being cannot, be attributed to another State. Moreover, the target State, or the potential target State, and its allies do not have to adopt a wait-and-see policy but they may take all measures reasonably necessary to prevent future attacks as early and as effectively as possible.

MIO in the GWOT

In the maritime context such preventive measures may comprise, *inter alia*:

- Surveillance and control of sea traffic;
- Providing for freedom and safety of navigation;
- Protection of endangered vessels;
- Disruption of lines of communication;
- Visit, search (boarding) and capture;
- Diversion;
- Establishment of security zones and of restricted sea areas;
- Capture/arrest of cargos and persons.

Self-defense

However, if maritime interception/interdiction operations¹³ are solely based upon the right of self-defense there needs to be a sufficiently clear link to the threat posed by transnational terrorism. This will, for example, be the case if there are reasonable grounds for suspicion that a given vessel is involved in the carrying of terrorists and/or of weapons destined for an area known to serve as a hiding place or training ground for terrorist groups. In any event, the generally accepted legal limitations of the right of self-defense—immediacy, necessity, proportionality—have to be observed.¹⁴ Indiscriminate MIO exercised in vast sea areas would be disproportionate and, hence, not justified by the right of self-defense.

It may be added in this context that if a vessel can be connected to the persisting threat posed by transnational terrorism no further conditions have to be met. Especially, any form of consent—be it by the flag State or by the ship's master—is irrelevant. The right of self-defense has never been made dependent upon the will of third States or of individuals. The UN Security Council alone would be in a position, by taking effective measures, to terminate the exercise of that inherent right.¹⁵

Law of the Sea

While MIO could be based upon the rules of the law of naval warfare on prize measures (measures short of attack)¹⁶ and on targeting¹⁷ this would presuppose the existence of an international armed conflict. While the United States is, at present, a party to an international armed conflict (Iraq), the exercise of the right of visit and search and the targeting of vessels could be based on these rules. However, transnational terrorism poses an ongoing threat that will not disappear with the termination of the hostilities in Iraq. Hence, the question is whether there are—apart from the right of self-defense and the law of naval warfare—other rules of international law that could serve as a legal basis for MIO on the high seas.

Of course, the law of the sea, as embodied in the LOS Convention and in customary international law, recognizes the right of warships and of other State ships to take measures against a merchant vessel, including visit and search,¹⁸ if

- the vessel is flying the same flag as the intercepting warship;
- the vessel is “stateless”;
- there are reasonable grounds for suspicion that the vessel is engaged in
 - (a) piracy,¹⁹
 - (b) slave trade, or
 - (c) unauthorized broadcasting.

Accordingly, the boarding of the *So San*²⁰ was justified not merely according to the right of collective self-defense, but also according to Article 110 of the LOS Convention because, at the time of the interception, it could be considered stateless and because it did not give satisfactory information about its origin and about its destination. Hence, all measures, including visit and search (boarding, including opposed boarding), undertaken for the purpose of verifying the true character, function, and destination of the vessel were admissible.²¹ The fact that, after the boarding, the nationality of the vessel proved to be North Korean and that it was engaged in the “innocent” shipping of missiles does not justify a different legal evaluation.²²

Against allegations to the contrary it is, however, doubtful whether it would be admissible to draw an analogy between transnational terrorists and pirates. While in some cases acts of transnational terrorism may be characterized as piratical, or at least similar to piracy, it must be remembered that, according to the consensus of States, there still is a clear distinction between terrorism on the one hand and piracy on the other.²³ Therefore, according to the law as it stands, the rules on piracy can not be applied to terrorists, unless their acts qualify as piracy proper.

It may be added that, according to the LOS Convention, coastal States may take action against foreign merchant vessels to enforce their domestic laws. This right to enforce varies and decreases with the sea area in question. While it would be in accordance with international law to enforce domestic immigration and security regulations in the internal waters, in the territorial sea and in the contiguous zone,²⁴ especially if the vessel affected is believed to be involved in acts of transnational terrorism, the law of the sea does not provide for such enforcement measures in the coastal State's sea areas beyond the 12-nm territorial sea or the 24-nm contiguous zone. In the exclusive economic zone (EEZ) coastal States are only entitled to prescribe and enforce rules that are designed to regulate the exploration and exploitation of the natural resources and to protect the marine environment of that sea area.²⁵ With regard to activities of foreign vessels not affecting these "sovereign rights" nor resulting in severe damage to the marine environment, the flag State principle has precedence over the coastal State's rights. Hence, Article 110 of the LOS Convention provides a legal basis for MIO on the high seas.

Other Legal Bases for MIO?

There remains one legal aspect that seemingly has not been made use of in the current discussion on the legality of MIO in the GWOT, i.e., countermeasures and/or reprisals. In this context, it is of great importance that the UN Security Council, in Resolution 1373,²⁶ has decided—in a legally binding way (!)—that with regard to transnational terrorism States shall, *inter alia*:

Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

....

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
-
- (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.

Hence, if a State either assists transnational terrorism or has knowledge that its nationals or merchant vessels are engaged in such assistance, etc., but still remains inactive, that State is in clear violation of its obligations under the UN Charter.²⁷

Of course, if the assistance rendered amounts to direct participation in an armed terrorist attack or if the terrorist attack is in some other way attributable to the sponsoring State, the target State will be entitled to take self-defense measures. Whether the armed response qualifies as an “on-the-spot reaction” or a “defensive armed reprisal”²⁸ is merely a matter of the modalities of the exercise of the right of self-defense. In any event, the target State will have the right to respond by the use of armed force.

But what if the assistance by the sponsoring State or its inactivity does not amount to assistance in an armed attack? On the one hand, the sponsoring or inactive State would still be in violation of its obligations specified in Resolution 1373. Even more, the inactivity would be supportive of acts of transnational terrorism and could, therefore, constitute a prohibited use of force, not amounting, however, to an armed attack or an act of aggression (“smaller scale use of force”). In such a situation the target State, on the other hand, would not be under an obligation to remain inactive. Rather it would be entitled to take all necessary countermeasures or reprisals in response to the illegal acts of the sponsoring State. To some surprise this has

recently been expressly acknowledged by Judge Simma who is far from being a supporter of a broad understanding of the law governing the use of force. In his separate opinion to the Court's judgment in the *Oil Platforms* case²⁹ Judge Simma stated, *inter alia*:

In my view, the permissibility of strictly defensive military action taken against attacks of the type involving, for example, the *Sea Isle City* or the *Samuel B. Roberts* cannot be denied. What we see in such instances is an unlawful use of force "short of" an armed attack ('agression armée') within the meaning of Article 51, as indeed "the most grave form of the use of force." Against such smaller-scale use of force, defensive action—by force also "short of" Article 51—is to be regarded as lawful. In other words, I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an "armed attack" within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter.³⁰

Applied to the GWOT, the target State of acts of transnational terrorism would be entitled to take defensive countermeasures "short of Article 51" against the State that is, actively or passively, assisting or otherwise furthering transnational terrorism. Accordingly, countermeasures/reprisals involving visit and search could be taken against vessels for the mere reason that they are flying that State's flag (genuine link). However, in view of the importance of the freedom of navigation such measures must be necessary and strictly proportionate. That will only be the case if there are reasonable grounds for suspicion that the vessels affected are indeed engaged in activities of—or in assistance of—transnational terrorism, e.g., if the State in question fails to prevent the merchant vessels flying its flag from transporting terrorists or objects that are designed to further transnational terrorism.

The Use of "Zones" in the Context of Anti-Terror/Force Protection

When it comes to "zones" in a maritime context there are a number of misunderstandings due to connotations to "war zones" known from the two World Wars³¹ or to "exclusion zones" known from the Falklands/Malvinas War (1982)³² and from the Iran-Iraq War (1980–1988).³³ As a method of naval warfare such a zone—whatever its purpose or legality may be—cannot be made use of in times other than international armed conflict.

"Defense bubbles" or rather warning zones established around warships or naval units are also to be distinguished from "operational," "exclusion" or other zones. Such warning zones merely serve to protect the naval vessels from attack or

from other illegal activities and are generally recognized as in accordance with international law.³⁴ Shipping and aviation are notified of potentially hazardous conditions and are requested to clearly identify themselves if they are approaching the warning zone. The extent of these zones and the measures taken cannot be determined *in abstracto*. Rather, it will depend on the circumstances of each single case, especially on a known threat and on the location of the ships concerned, whether the extent of the warning area may be reasonable or excessive.³⁵ As the attack on the *USS Cole* clearly demonstrates, the threat posed by terrorist activities is obvious but will vary according to the region of operation and to the general security environment. If, however, the extent of the defensive/protective/warning zone is proportionate to that threat, the inconveniences imposed upon sea and air traffic will not amount to a violation of the freedom of navigation. This holds true for times of peace and during periods of international armed conflict. Still, it needs to be kept in mind that, unless the threat is overwhelming and leaves no choice of deliberations, such warning zones will have to be based upon some form of an agreement with the respective coastal State, if the warships or naval unit are deployed, or are operating, in the internal waters or territorial sea of that State.

In addition, warning zones are not to be equated with “special warnings” which are merely a tool for implementing the warning zone and for notifying it to other States and to international shipping and aviation. For example, US forces are presently operating under a heightened state of readiness. Accordingly, approaching aircraft and ships are requested to maintain radio contact and are warned that the US forces will exercise appropriate self-defense measures, without, however, impeding freedom of navigation.³⁶

The question remains whether zones may also be made use of in the GWOT for purposes other than force protection. Certainly, in view of the importance of the freedom of navigation for international trade and security, the closure of larger areas of the high seas to international navigation and aviation would be illegal. Up to the present, assertions by some States of a right to extend their sea areas for security reasons beyond the 12-nm territorial sea have regularly met protests and have, thus, never been recognized.³⁷ Older concepts, like the so-called “pacific blockade,”³⁸ or singular precedents, like the “quarantine” of Cuba,³⁹ would not justify such far reaching infringements of the freedom of navigation either. Although, in theory, the establishment of an “exclusion zone” could be based upon the right of self-defense there is but one realistic scenario this author can conceive of in which such a measure would meet the test of immediacy, necessity and proportionality: A group of transnational terrorists gains control over a submarine with launching capabilities for intermediate-range missiles and there is sufficient intelligence information that they will attack from a given sea area. Then it may be in

accordance with the right of self-defense of the threatened State to close that sea area to all underwater vehicles.

Apart from such a scenario, however, the extensive use of a given sea area in the GWOT will always be in conformity with international law, when approached from a different perspective. If the target States of terrorist attacks and their allies are allowed to conduct MIO worldwide on the high seas, clearly a decision to restrict such operations only to certain limited seas areas is lawful, particularly if the sea areas concerned are known to be used for the transport of terrorists and of weapons destined to terrorist groups. The States cooperating in the framework of Operation Enduring Freedom have been doing exactly this by restricting MIO to the sea areas surrounding the Arabian Peninsula. Up to the present, no State seems to have protested or otherwise contested the legality of these measures. Accordingly, and subject to the principles of necessity and proportionality, an operational area—that is to be distinguished from any form of “zone”—may be established in the context of the fight against transnational terrorism in order to enable the target States and their allies to identify and control international shipping and aviation or, if reasonable grounds for suspicion of an activity supportive of transnational terrorism exist, to prevent them from approaching the coastline of a State that has proved to be either unwilling or unable to comply with its obligations under the UN Security Council resolutions on transnational terrorism.

Law of Naval Warfare and Maritime Neutrality

While the San Remo Manual in most of its parts reflects customary international law, three aspects of the law of naval warfare addressed therein either remain disputed or, in view of new threats and exigencies, seemingly need to be reconsidered: maritime exclusion/operational zones, technical equipment of hospital ships, and maritime neutrality.

Maritime Exclusion/Operational Zones

There is general agreement that the “war zones” established by the belligerents of the two World Wars were, and remain, illegal.⁴⁰ No zone, whatever its denomination or alleged purpose relieves the proclaiming belligerent of the obligation under the law of naval warfare to refrain from attacking vessels and aircraft which do not constitute legitimate military objectives.⁴¹ In other words, a zone amounting to a “free-fire-zone” has no basis in the existing law. Considerations of military necessity—e.g., from a submariner’s point of view—do not justify a conclusion to the contrary.⁴²

Still, in view of State practice, the discussion on the legality of some other kind of “zone” has not ceased. On the one hand, modern weapons are far more

discriminating than any means of naval warfare used during World War II. On the other hand, modern weapons have brought about over-the-horizon targeting capabilities. At the same time, naval platforms, in view of their construction and technical equipment, are rather vulnerable and can suffer severe damage inflicted by comparatively “primitive” means. Moreover, the number of the world’s merchant vessels has increased considerably. They may be engaged in innocent trade but they may also be integrated into the enemy’s war-fighting or war-sustaining effort, thus constituting a threat to the overall effort to bring the armed conflict to a successful end without suffering unreasonable damage. Therefore, naval armed forces are forced to control large sea areas in order to remain in a position to effectively protect their units and to achieve their military goal.

Before dealing with the legality of such exclusion/operational zones under the law of naval warfare it needs to be stressed that they must be distinguished from warning zones⁴³ and from the customary belligerent right to control the immediate area or vicinity of naval operations. It is generally acknowledged that belligerents are entitled to take all measures necessary against neutral vessels and aircraft whose presence may otherwise jeopardize naval operations in that area.⁴⁴ While in many cases such measures will consist of a belligerent’s control over the communications of these vessels and aircraft, they may, depending on the circumstances, include the closure of the sea area in which naval operations are conducted.⁴⁵

State Practice

After the condemnation of unrestricted submarine warfare by the Nuremberg Tribunal, the first precedent of an exclusion zone obviously occurred during the Falklands/Malvinas conflict of 1982. On April 7, the United Kingdom proclaimed a “maritime exclusion zone” around the islands. Argentina followed on April 8 by proclaiming a “maritime zone.” On April 23, the British Government proclaimed a “defensive bubble”⁴⁶ limited to the protection of the British forces against Argentine warships and Argentine military and civilian aircraft. However, on April 28, the United Kingdom proclaimed a “total exclusion zone” (TEZ) that came into effect on April 30:

[T]he exclusion zone will apply not only to Argentine warships and naval auxiliaries but also to any other ship, whether naval or merchant vessel, which is operating in support of the illegal occupation of the Falkland Islands by Argentine Forces. The zone will also apply to any aircraft, whether military or civil, which is operating in support of the Argentine occupation. Any ship and any aircraft, whether military or civil, which is found within the zone without authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by British Forces.

In view of the wording of the proclamation that clearly indicates the British were prepared to attack any vessel or aircraft encountered within the TEZ, it is rather astonishing that one commentator has characterized the TEZ as a “reasonable temporary appropriation of a limited area of the high seas.”⁴⁷ This conclusion is mainly based on the fact that the zone had been adequately notified, that it had been established in a remote sea area without significant sea traffic, and that it had not resulted in any casualties to neutral ships or aircraft.⁴⁸ While these arguments are without doubt reflecting reality, they do not alter the wording of the proclamation. On the other hand, due to other rather obscure statements of the British government it may well be that, in reality, the British forces were not allowed to target just any contact within the TEZ—at least not without prior authorization from the highest political level. Therefore, the United Kingdom was either lucky that its naval units were not forced to really enforce the TEZ vis-à-vis neutral vessels and aircraft or, what is more likely, the proclamation of the TEZ was nothing but a most effective ruse of war because it obviously induced the Argentine forces to avoid the area. If the latter holds true, the British measure was not illegal under the law of naval warfare. At the same time, however, the British TEZ may not serve as a legal precedent for the—alleged—legality of exclusion zones as a method of naval warfare.

During the Iran-Iraq War both belligerents made use of zones. The Iranian government issued guidelines for the safety of merchant shipping in the Persian Gulf obliging vessels to transit the Strait of Hormuz south and east of a designated line, declaring a “war zone” covering all Iranian waters, and prohibiting all transportation of cargo to Iraqi ports.⁴⁹ The Iraqi government declared the area North of 29-30N a prohibited war zone and warned all vessels appearing within the zone to be liable to attack. The Iraqi government further warned that all tankers, regardless of nationality, docking at Kharg Island were targets for the Iraqi air force.⁵⁰ In contrast to the practice of the Falklands/Malvinas conflict both belligerents of the Iran-Iraq conflict, by attacking neutral tankers, did enforce their zones thus providing sufficient evidence that they regarded them as “free-fire zones.” Since the attacks were not directed solely against legitimate military objectives,⁵¹ the zones of that conflict are generally considered illegal.⁵²

Military Manuals and Expert Opinions

In view of the general condemnation of the zones established and enforced during the two World Wars and during the Iran-Iraq War, States that are prepared to characterize exclusion zones as a legitimate method of naval warfare take a rather cautious approach. The respective parts of their military manuals⁵³ all stress that

- the establishment of such a zone does not relieve the proclaiming belligerent of the obligation under the law of armed conflict to refrain from attacking vessels and aircraft which do not constitute lawful targets,
- the zone may not unreasonably interfere with neutral commerce, and that
- the geographical area covered, the duration, and the measures taken within the zone should not exceed what is strictly required by military necessity and the principle of proportionality.

Accordingly, those States agree that the same body of law applies both inside and outside the zone and, moreover, that the establishment of an exclusion zone is in conformity with the law as an exceptional measure only. If all these conditions are met, exclusion zones are accepted as in conformity with the law of naval warfare both in the San Remo Manual⁵⁴ and in the International Law Association's Helsinki Principles.⁵⁵

Still, the question remains what object and purpose an exclusion zone is to serve. To that end, the San Remo Manual is ambiguous.⁵⁶ According to the US Navy Commander's Handbook on the Law of Naval Operations an exclusion zone may either contain the geographic area of the conflict or it may keep neutral shipping at a safe distance from areas of actual or potential hostilities.⁵⁷ A similar approach underlies the German Navy Commander's Handbook that refers to "comprehensive control rights" and to the denial of access to a given sea area "in order to protect [vessels and aircraft] from the effects of armed conflicts."⁵⁸ The Helsinki Principles also contain a reference to particular risks to which neutral shipping is exposed.⁵⁹ Hence, if not designed to contain or restrict the area of naval operations⁶⁰ and if not a—legitimate—ruse of naval warfare, an exclusion zone may either serve the protection of neutral navigation and aviation or it may imply that a belligerent, in a given area, will extensively exercise the control rights already conferred on it by the law of naval warfare and of maritime neutrality. Then, however, the zone will rather resemble a geographical restriction of belligerent rights of control—the establishment of the zone would merely indicate that in sea areas not covered by the zone the belligerent may refrain from exercising these rights. Be that as it may, if serving these purposes, and if the further conditions set out above are met, there can be no doubt about the legality of exclusion zones.

Hospital Ships: New Necessities and Threats

At the time of their adoption, the rules on hospital ships laid down in Articles 22 *et seq.* of the 1949 Second Geneva Convention (GC II) were a well-balanced compromise between considerations of humanity and of military necessity and were adapted to the weapons technology of that time. However, the rapid technological

development soon gave rise to concerns. At first, the rules on the marking of hospital ships proved no longer sufficient to ensure their effective identification as specially protected platforms under the law of naval warfare.⁶¹ Then it became clear that the rules regulating the technical equipment of hospital ships for communication purposes had become outdated in view of modern forms of communication via satellite and other means. Today there is a realistic danger that a hospital ship, although exclusively employed in its humanitarian role, may be attacked by transnational terrorists who will consider it an easy and very effective target. Therefore the question arises whether and to what extent hospital ships, during an international armed conflict, may be equipped with secure communications devices and with an armament enabling them to effectively defend themselves against illegal attacks.

Secure Communications

Article 34, paragraph 2, of GC II emphasizes that “hospital ships may not possess or use a secret code for their wireless or other means of communication.” This provision appears to imply a prohibition on possession and use of secure communication equipment for both sending and receiving encrypted communications. However, the English version is not the only authoritative text of the Convention. The equally authentic French and Spanish texts prohibit only the sending of encrypted traffic (“les navires-hôpitaux ne pourront posséder ni utiliser de code secret pour leurs émissions par T.S.F. ou par tout autre moyen de communication”). According to Article 33, paragraph 3, of the Vienna Convention on the Law of Treaties, “the terms of the treaty are presumed to have the same meaning in each authentic text.”⁶² Therefore, the conclusion is justified that only the possession or use of secure communications equipment for transmitting, not for receiving, messages in secret code is prohibited.

While some States, like the United Kingdom during the Falklands/Malvinas conflict,⁶³ hesitate to share this interpretation, others, like the United States⁶⁴ and Germany,⁶⁵ obviously are prepared to provide hospital ships with equipment that would enable them to receive messages in secret code. Indeed, that would not only be in accordance with the generally accepted rules on the interpretation of multilingual treaties, it would also guarantee the effective performance of the genuinely humanitarian function of hospital ships. If hospital ships were not allowed to receive encrypted messages, the enemy would be in a position to intercept messages sent to them and to deduce from that message the location of a possible naval or military operation.⁶⁶ If a “Red Cross Box” is not a feasible alternative, the hospital ship would be prevented from performing its humanitarian function because the respective flag State would be forced to, at least, delay the message in order not to jeopardize the military operation in question.⁶⁷ In

view of the overall importance of the protection of the wounded, sick and shipwrecked, an interpretation leading to such a result would be manifestly absurd or unreasonable. Hence, it is no surprise that the San Remo Manual provides in paragraph 171: "In order to fulfill most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment. The equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage."⁶⁸

This statement implies that hospital ships should be permitted to also use cryptographic equipment for the sending of messages. Indeed, in the explanations to the San Remo Manual,⁶⁹ the commentators state:

The participants were of the opinion that as the inability to receive encrypted information jeopardises the ability of hospital ships to operate effectively, the rule ought to concentrate on the sending of military intelligence. Therefore, in order to fulfil their humanitarian mission effectively, hospital ships should be permitted to use cryptographic equipment (modern terminology for a secret code) which in modern technology is an integral part of most communications systems. This cryptographic equipment may not be used for any purpose other than the humanitarian tasks of the vessel, obviously not to transmit intelligence data, nor for any other incompatible purpose.

Seemingly, according to the San Remo Manual, hospital ships would not be prohibited from sending encrypted messages as long as they are strictly related to the humanitarian function of the hospital ship and not used for any militarily useful purposes. In view of the importance of the humanitarian function and in view of modern communications technology, it would indeed make sense if Article 34, paragraph 2, GC II could be interpreted in that way. In this context it needs to be kept in mind that the prohibition of a "secret code" is solely designed to reinforce the prohibition of committing acts harmful to the enemy in Article 34, paragraph 1, GC II. Moreover, according to Article 35 (1) GC II, a hospital may have on board an "apparatus exclusively intended to facilitate navigation or communication." Today, however, modern means of communication necessitate the use of equipment that could be considered as violating the "secret code" prohibition of Article 34, GC II. The same holds true for navigation equipment, e.g., if using the military Global Positioning System (GPS). The rules on medical aircraft in Article 28.2 of the 1977 Additional Protocol I take that development into account. While medical aircraft are prohibited to "be used to collect or transmit intelligence data" this implies that they are allowed to receive and transmit messages in a secret code as long as the data are not of a military nature.

Hence, an extensive interpretation would certainly be in accordance with the object and purpose of Article 34, paragraph 2, GC II. However, every

interpretation finds its limits in the “ordinary meaning to be given to the terms of the treaty.” These terms merely justify an interpretation allowing hospital ships the use of equipment for the receiving, not for the sending, of encrypted messages. The San Remo Manual together with the explanations does not serve as evidence for a view to the contrary. In the explanations it is made clear that paragraph 171 does not reflect the law as it stands. Rather, the majority view was that “the present law still prohibits the use of such equipment and that this law has not fallen into desuetude. [Therefore the majority was] of the opinion that the text needed to reflect this fact and that the participants were encouraging a change in the law.”⁷⁰

Since the sending of encrypted messages by hospital ships cannot be based upon the *lex lata*, States whose interests are specially affected should endeavor to contribute to a modification of the law. While a codification conference is not a realistic option, those States should focus on convincing other States to recognize a deviating practice as reasonable in order to safeguard the specially protected humanitarian function of such ships under *lex ferenda*. Numerous statements to that effect would certainly contribute to a modification of the law as it now stands.

Protective Arming of Hospital Ships

The provisions of GC II on hospital ships neither expressly prohibit the arming of hospital ships for self-defense purposes nor expressly provide for such protection or defense. Article 35(1), according to which a hospital ship is not deprived of its special protection if the “crews of ships or sick-bays are armed for the maintenance of order, for their own defense or that of the sick and wounded,” is restricted to an exclusively personal scope of protection. As such it does not seem to allow any conclusion with regard to the protection or defense of the hospital ship itself. Rather, the said provisions are based on the assumption that the special protection provided for hospital ships is sufficient to ensure that they will not be captured or attacked. That may have been true in the past but it is more than doubtful whether under present conditions that assumption is still valid.⁷¹

Still, the manuals of the US Navy and of the German Navy,⁷² as well as the San Remo Manual, reflect a strict position with regard to the protective/defensive arming of hospital ships. While they either expressly or implicitly refer to Article 35(1) GC II, they prohibit all arms other than light, portable, individual weapons such as pistols and rifles.⁷³ Only the German Manual and the San Remo Manual acknowledge the right of hospital ships to take defensive measures against erroneous or arbitrary attacks, especially by missiles, and they conclude that they “may be equipped with purely deflective means of defence, such as chaff and flares.”⁷⁴

Indeed, it is more than likely that the respective enemy belligerent will not be prepared to any longer respect the special protection of a hospital ship whose crew

is armed with other than small pistols and rifles. And as the provision of the San Remo Manual referred to above clearly shows it would be nearly impossible to reach consensus on the criteria that would make possible a distinction between the offensive or defensive character of such arming. The reference to chaff and flares was the utmost the participants felt able to agree upon.

The United Kingdom, during the Iraq-Kuwait conflict, decided that they were unable to effectively protect hospital ships and that it was preferable to abandon the special protection altogether. Hence, *RFA Argus*, which was equipped with light air defense systems, was not a hospital ship proper but a “primarily casualty receiving ship” that also served for the transportation of troops.⁷⁵

If the British practice were copied by other States the special protection of hospital ships would become obsolete. This, however, would be detrimental to the humanitarian function of such ships and certainly politically inopportune. States feeling unable to directly contribute to a multinational military operation would be deprived of the possibility of indirectly participating by deploying a hospital ship. The deployment of a hospital ship would not be a merely symbolic act. It would imply a most valuable contribution for all States and parties involved. On the one hand, the belligerents would equally profit from making use of the impartial humanitarian service. On the other hand, the deploying State would be in a position to prove its credibility and to contribute to confidence building that would facilitate a future return to normal relations.

These considerations do not, of course, rule out the basic legal problem of the admissibility of the defensive arming of hospital ships, the interest in which has recently increased considerably in view of the worldwide terrorist threat. Moreover, it is quite probable that in an asymmetric war environment at least one “party to the conflict” will disrespect the fundamental protection of such vessels under the law of naval warfare.

It is doubtful whether the drafters of GC II were at all aware of this new threat. As already stated above, they started from the assumption that all parties to an international armed conflict will respect and protect hospital ships as long as they are employed in their normal role and as long as they do not commit acts harmful to the enemy. Then, however, an attack against a hospital ship will in any event be in violation of the law. The drafters of GC II may have been under the belief that no belligerent would consider such illegal behavior and that, if it occurred after all, the parties to the conflict would find a solution *ex post facto*. If one party to the conflict, or the attacker, is not a State or other recognized subject of international law, such as transnational terrorists, any remedy provided for by the law of naval warfare will be void. Moreover, the law of naval warfare contains no rule or other provision that would justify the conclusion that a belligerent is obliged to suffer an illegal attack or

other illegal act and to remain passive. In other words, the inherent right of self-defense that is not abolished by any known legal order is also implicitly recognized by the law of naval warfare. Accordingly, if there exists reasonable grounds for suspicion that hospital ships will be the target of an illegal attack, a belligerent is entitled to take all necessary measures to effectively prevent or counter that attack. If the only means available to achieve that aim is the—defensive—arming of a hospital ship, then this would not constitute a violation of the law of naval warfare.

This, however, is a solution to the problem that is far from having passed the test of practice. As already indicated above, the enemy belligerent may well consider the arming of a hospital ship a hostile act. Hence, even if the arming of a hospital ship is, in the circumstances ruling at the time, a necessary measure of protection or of self-defense there is no guarantee for a continuing respect and protection by the opposing belligerent. In addition, it would imply a deviation from a rather settled interpretation of the existing law⁷⁶ that only provides for small and light weapons for strictly personal protection. Any State that is willing to deviate from that interpretation must be prepared to take the consequences and “to live with the precedent.” This may lead either to the total abolishment of the protection of hospital ships or to the deployment of hospital ships whose “employment in an innocent role” and, consequently, whose specially protected status, could no longer be determined with the certainty necessary.

(Maritime) Neutrality

The Law of Neutrality is laid down in two of the Hague Conventions of October 18, 1907:

- Convention V Respecting the Rights and Duties of Neutral Powers in Case of War on Land [hereinafter Hague V];⁷⁷
- Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War [hereinafter Hague XIII].⁷⁸

There is no international treaty—apart from the 1977 Additional Protocol I (AP I)⁷⁹—dealing with aerial warfare, neutrality in aerial war or with the legal status of neutral airspace. The only authoritative document dealing with these issues is the Hague Rules on Air Warfare of 1923⁸⁰—a private draft whose customary character remains an unsettled matter.

In view of the limited time and space available we do not intend to deal here with the law of neutrality in a comprehensive way. Still, it is clear that, if applied to an international armed conflict, such as the current hostilities in Iraq, that body of law would imply far-reaching obligations of abstention and of prevention on part of those States that have decided not to take part in the hostilities.⁸¹ It needs to be

emphasized, however, that allegations of an absolute duty of neutral States to intern all members of belligerent armed forces present on their territory have no basis in the traditional law of neutrality. According to Article 11, paragraph 1, of Hague V, such an obligation presupposes that the neutral State “receives on its territory troops belonging to the belligerent armies.” This does, therefore, not apply to members of the belligerent armed forces whose presence on the neutral State’s territory is due to a status of forces agreement. Additionally, escaped prisoners of war and prisoners of war “brought by troops taking refuge in the territory of a neutral Power” shall be left at liberty. Finally, according to Article 5, paragraph 1 (in conjunction with Article 2) of Hague V, a neutral State “must not allow” the movement of belligerent “troops or convoys of either munitions of war or supplies” across its territory. This means that the neutral State is under an obligation to prevent such movements but it does not necessarily imply an obligation to intern the persons engaged in such transports. Hence, the duty of internment only applies to members of the belligerent armed forces who have already actively taken part in the hostilities and who, thus, have to be prevented from reentering the war from the territory of the neutral State concerned.

Scope of Applicability of the Law of Neutrality

It is a well-known fact that the applicability of the law of neutrality has always been a highly disputed issue. While some assert that it applies only in the context of a state of war,⁸² others maintain that that determination depends upon the more or less unrestricted decision of the non-participating States.⁸³

There is, however, only one situation in which the law of neutrality clearly does not apply—the authoritative determination by the UN Security Council that one party to an international armed conflict is the aggressor.⁸⁴ If the Security Council merely refers to its powers under Chapter VII, without expressly identifying the aggressor, it will remain unclear which State has breached the law and which State is the victim of an act of aggression or of a breach of the peace. *A fortiori*, this holds true if the Security Council remains inactive.

Still, despite the unsettled scope of applicability of the law of neutrality, and apart from situations in which the Security Council has identified the aggressor, State practice since 1945 gives sufficient evidence that that body of law has not become obsolete. That very State practice also reveals, however, that there is no longer any room for an automatic application of that law to every international armed conflict in the sense of common Article 2 of the four Geneva Conventions of 1949.

Current State of the Law of Neutrality

The parties to post–World War II international armed conflicts, as well as those States not actively taking part in those conflicts have, by their actual behavior, shown that they were not prepared to accept the automatic and comprehensive applicability of the law of neutrality, even if the situation in question, either materially or formally, amounted to a “war” proper.⁸⁵ On the other hand, international armed conflicts that were not characterized as “wars”—either by the parties to the conflict or by non-participating States or by international legal scholars—have certainly had an influence on the conduct of States not being parties to those conflicts.⁸⁶ Therefore, the doctrine of the necessity of a state of war proper, as well as the doctrine of “*status mixtus*,” lack authoritative substantiation by State practice. During international armed conflicts since 1945, the conduct of non-participating States at least indirectly gives evidence of their belief that the law of peace is not *in toto* replaced but is partially modified by the law of neutrality. It is also clear from that conduct that the legally binding effects of that body of law does not depend upon an individual decision of the non-participating States but upon the mere existence of an international armed conflict. Either those States have refrained from providing arms and other war material to the belligerents altogether, have denied providing such supplies officially, or have provided them clandestinely.

Hence, modern State practice gives proof of a functional and differential approach. As far as the relationship between States (that is to be distinguished from the relations between belligerents and neutral nationals) is concerned, the law of neutrality automatically comes into operation only insofar as the applicability of its rules is strictly necessary for the achievement of the very object and purpose of that body of law. Accordingly, during an international armed conflict, non-participating States are obliged to refrain from any act that may escalate that conflict. Especially, they are prohibited from assisting one party to the conflict in a way that may lead to a temporal, territorial or other expansion of the armed hostilities.⁸⁷ The delivery of weapons and of other war material by States is prohibited. Activities of private persons who attempt such deliveries must be prevented according to domestic laws and regulations already in effect. The territory, including the territorial sea and archipelagic waters, and the superjacent national airspace, may not be made available as a base of operations to any party of the conflict.⁸⁸ Moreover, non-participating States must take all measures necessary to prevent one of the belligerents from gaining military advantages by abusing their neutral status. Any permissions or restrictions with regard to the use of neutral territory must be applied and enforced impartially. The parties to the conflict, on their part, are obliged to respect the sovereignty of the non-participating States, as well as their territorial integrity and their economic relations with other States. The economic relations with the opposing belligerent to the

conflict may be interfered with only according to, and within the limits of, the law of maritime neutrality. In other words, the law of neutrality sets an upper limit to the rights of the belligerent States.⁸⁹

As far as these *essentialia neutralitatis* are concerned, there is no room for a facultative stance on behalf of a non-participating State if, and as long as, it does not wish to become directly involved in the armed hostilities. Neither does their applicability presuppose the existence of a “war” or of a “state of war.” These fundamental obligations apply to every international armed conflict. It has to be kept in mind, however, that in case of a violation of these fundamental obligations of the law of neutrality by a non-participating State, the aggrieved belligerent remains free to assert its rights.⁹⁰

The functional and differential approach, which leaves aside the admissibility of belligerent measures under the law of neutrality, is based on the consideration that an effective prevention of unlawful activities of non-participating States, as well as of an escalation of an ongoing international armed conflict, can be achieved only if these upper legal limits are observed by all States concerned. As regards the further rights and duties of neutral States, their applicability will not depend upon a unilateral decision but rather on whether the belligerents are willing and able to enforce the law of neutrality that goes beyond the said *essentialia neutralitatis*. If the belligerents decide—for whatever reason—not to enforce the law of neutrality in a comprehensive manner, that abstention will have no impact upon the material contents of that body of law. Modern State practice has merely led to the abolishment of a comprehensive automatism regarding its applicability. Only this approach enables us to explain why States continue to maintain that the material contents of the traditional law of neutrality have not been modified.

Concluding Remarks

While there can be no doubt about the “reactive” character of any legal order, it has been one of the purposes of the present paper to show that an early call for a modification of the existing rules in view of new threats and necessities is not always the correct way of approaching the solution of—allegedly—new problems. Rather, a sober and not too formalistic scrutiny of the law as it stands will in most cases help identify the way in which a given situation should be addressed. Of course, it is not always comfortable or convenient to comply with the law. Considerations of military or political necessity and the need to rapidly react to new threats may suggest and justify a deviation from the law. It is, however, one of the most important achievements of civilized nations that they adhere to the law and, thus, show their respect for the rule of law even in situations in which this complicates things. In the

context of international law it should, moreover, not be left out of consideration that any deviation from the law will be a precedent closely observed by other States which may, in the near future, adopt a similar conduct. Although the precedent may have served a different, and legitimate, purpose, it may prove impossible to prevent those other States from referring to it and claiming their conduct to be in conformity with the modified law.

Notes

1. Professor Wolff Heintschel von Heinegg is a Professor of International Law at Europe-University in Frankfurt (Oder) Germany. He is a former Charles H. Stockton Professor of International Law at the US Naval War College.
2. United Nations Convention on the Law of the Sea, New York, Dec. 10, 1982, 21 INTERNATIONAL LEGAL MATERIALS 1261 [hereinafter LOS Convention]. 145 member States and entities are parties as of November 13, 2003. *See also* Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Aug. 7, 1994, UN Doc. A/RES/48/263, August 17, 1994, 33 INTERNATIONAL LEGAL MATERIALS 1309. 117 member States and entities are parties as of November 13, 2003.
3. For a comprehensive study of such claims, see J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996).
4. While the United States has continuously pursued the “Freedom of Navigation Program” which had been introduced to respond to excessive maritime claims, the European States have not yet decided on a similar program, although there have been private initiatives to that end. *See, e.g.,* Ger Teitler, *Enforcing UNCLOS: A Discussion of Means and Ends*, in THE ROLE OF EUROPEAN NAVAL FORCES AFTER THE COLD WAR 171–84 (Gert de Nooy ed., 1996).
5. For recent US practice, see J. Ashley Roach, *Container and Port Security: A Bilateral Perspective*, 18 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 341–362 (2003).
6. The first treaty dealing with terrorism was adopted in 1963, followed by other treaties in 1971, 1973, 1977, 1979, 1980, 1988, 1991, and 1998. Of special interest in the present context are: Convention for the Suppression of Unlawful Acts against the Safety of Navigation, Rome, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 INTERNATIONAL LEGAL MATERIALS 668; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf, Rome, Mar. 10, 1988, 1678 U.N.T.S. 304, 27 INTERNATIONAL LEGAL MATERIALS 685; International Convention for the Suppression of the Financing of Terrorism; New York, Dec. 9, 1999, UN Doc. A/RES/54/109, 27 INTERNATIONAL LEGAL MATERIALS 270.
7. UNSCR 1368 of September 12, 2001; UNSCR 1373 of September 28, 2001; UNSCR 1377 of November 12, 2001.
8. While it is common to speak of “Maritime Interdiction Operations,” it seems preferable to rather speak of Interception Operations in view of the wide spectrum of measures involved.
9. The term “GWOT” is of a purely political nature. According to the position taken here, it does not imply the existence of a “state of war” or of an “international armed conflict” unless military measures are directed against another State.
10. The attack on the *USS Cole*, although not committed during an international armed conflict, has demonstrated the propaganda effects of such attacks: some persons equipped with rather cheap and unsophisticated means are capable of inflicting harm to a warship of the sole remaining superpower.

11. While this broad understanding may have been the prevailing view in the United States, in view of UNSCRs 1368, 1373, and 1377 (*supra* note 7), it is not shared by the international community as a whole. See Wolff Heintschel von Heinegg, *The Legality of Maritime Interception Operations/Interdiction Operations Within the Framework of Operation ENDURING FREEDOM*, in INTERNATIONAL LAW AND THE WAR ON TERROR 255–73 (Fred L. Borch & Paul S. Wilson eds., 2003) (Vol. 79, US Naval War College International Law Studies). See also Wolff Heintschel von Heinegg & Tobias Gries, *Der Einsatz der Deutschen Marine im Rahmen der “Operation Enduring Freedom,”* 40 ARCHIV DES VÖLKERRECHTS 145–182 (2002).
12. Accordingly, acts of domestic or internal terrorism do not trigger the right of self-defense under public international law. Note that in its resolutions the Security Council has steadily referred to “international” terrorism.
13. Note that the above list of measures is rather comprehensive. In practice, the term “Leadership Interdiction Operations” (LIO) is also used in order to distinguish between measures taken against persons and those taken against objects. This is not useful because it implies that there are two distinct (legal) concepts. However, when it comes to interference with foreign vessels it does not make a difference whether this is aimed at persons or at objects.
14. See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 207 (3d ed. 2001).
15. See Article 51 UN Charter: “[U]ntil the Security Council has taken measures necessary to maintain international peace and security.” For an evaluation, see DINSTEIN, *supra* note 14, at 185.
16. It suffices here to refer to SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶¶ 112–117 (Louise Doswell-Beck ed., 1995) [hereinafter SAN REMO MANUAL]. For a detailed analysis, see the commentary in Explanations, *id.*, at 187–95.
17. ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, chap. 8 (A. R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies) [hereinafter ANNOTATED SUPPLEMENT]. SAN REMO MANUAL, *supra* note 16, ¶ 38–77.
18. LOS Convention, *supra* note 2, art. 110. See also UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY (Vol. III) 237 (Myron H. Nordquist ed., 1995).
19. It needs to be stressed that “piracy” is rather narrowly defined in Article 101 of the LOS Convention and does not cover any form of “armed robbery at sea.”
20. On December 11, 2002, the *So San*, was seized by a Spanish frigate—acting on information from US sources—600 miles (965 km) off the Horn of Africa in the Indian Ocean. The vessel was found to be carrying 15 Scud missiles that were being shipped from North Korea to Yemen.
21. See LOS Convention, *supra* note 2, art. 110.2.
22. Note that Article 110.3 of the LOS Convention provides: “If the suspicions prove to be unfounded, and *provided that the ship boarded has not committed any act justifying them*, it shall be compensated for any loss or damage that may have been sustained” (emphasis added).
23. As for the treaties on terrorism, see *supra* note 6. In view of those treaties, it is more than doubtful whether there exists a lacuna at all. Moreover, being consensual in character, public international law only in rare cases is open for analogies.
24. Note that in its contiguous zone the coastal State, according to LOS Convention, Article 33.1(a), may only “punish infringements of [its] laws and regulations committed within its territory or territorial sea.”
25. LOS Convention, *supra* note 2, arts. 73 and 213.
26. UNSCR 1373 of September 28, 2001, at ¶ 1(d) and ¶¶ 2 (a) and (e).
27. The Security Council has been criticized for having acted as a “quasi-legislator.” However, in view of the wide margin of discretion it undoubtedly has when it comes to its primary responsibility for international peace and security and to enforcement measures under Chapter

VII, this criticism is not justified. The legally binding effect of this resolution, under Article 25 of the UN Charter, therefore allows no conclusion to the contrary.

28. For these concepts, see DINSTEIN, *supra* note 14, at 192.

29. Oil Platforms (Iran v. US), 2003 I.C.J. (Nov. 6) (Judgment (Merits)).

30. Separate Opinion of Judge Simma, *id.* ¶ 12.

31. For an overview of the practice of “war zones” during the two World Wars, see William J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW 91 (1986); E. Schmitz, *Sperrgebiet im Seekrieg*, 8 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 641–71 (1938); L.F.E. Goldie, *Maritime War Zones & Exclusion Zones*, in THE LAW OF NAVAL OPERATIONS 156–204 (H. B. Robertson ed., 1991) (Vol. 64, US Naval War College International Law Studies); Karl Zemanek, *War Zones*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (VOL. 4) 337 (R. Bernhardt ed., 2000); JURGEN SCHMITT, *DIE ZULASSIGKEIT VON SPERRGEBIETEN IM SEEKRIEG* (1966); George P. Politakis, *Waging War at Sea: The Legality of War Zones*, 38 NETHERLANDS INTERNATIONAL LAW REVIEW 125–172 (1991/2); Wolff Heintchel von Heinegg, *Exclusion Zones, Mines, Abuse of Neutral Flags and Insignia, Booty in Naval Warfare*, in THE GLADISCH COMMITTEE ON THE LAW OF NAVAL WARFARE 39–59 (Dieter Fleck ed., 1990).

32. R. P. Barston & P. W. Birnie, *The Falkland Islands/Islands Malvinas Conflict—A Question of Zones*, 7 MARINE POLICY 14–24 (1983); T. Orford, *Exclusion Zones at Sea: Some Observations on the Conduct of the Falkland War 1982*, 2 SEA CHANGES 91–120 (1985).

33. M. Jenkins, *Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals*, 7 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 517–549 (1985); R. Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones*, 37 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 629–644 (1988).

34. See, *inter alia*, ANNOTATED SUPPLEMENT, *supra* note 17, ¶ 2.4.4; KOMMANDANTEN-HANDBUCH (Commander’s Handbook of the German Navy), no. 115 (2002).

35. The US Navy established a 5nm warning zone around its warships in the Persian Gulf during the Tanker War in the 1980s to contend with suicide craft laden with high explosives. See GEORGE K. WALKER, *THE TANKER WAR, 1980–88: LAW AND POLICY* 57–8 (2000) (Vol. 74, US Naval War College International Law Studies). Following the Iraqi air-to-surface missile attack on USS *Stark* on May 17, 1987, the fixed distance criterion (i.e., 5nm) was deleted from the warning zone published in the Notice to Mariners. *Id.* at 61–2. While a 5nm zone in those waters may be reasonable vis-à-vis a small craft suicide threat, a zone broad enough to deal effectively with an air-to-surface missile threat would likely have been excessive in that setting, which may explain why the 5nm criterion was deleted rather than expanded.

36. International shipping and aviation was informed about this condition by the following “special warning”:

1. Due to recent events in the Middle East and the American homeland, US Forces worldwide are operating at a heightened state of readiness and taking additional defensive precautions against terrorist and other potential threats. Consequently, all aircraft, surface vessels, and subsurface vessels approaching US Forces are requested to maintain radio contact with US Forces on bridge-to-bridge channel 16, international air distress (121.5 MHZ VHF) or MILAIR distress (243.0 MHZ UHF).

2. US Forces will exercise appropriate measures in self-defense if warranted by the circumstances. Aircraft, surface vessels, and subsurface vessels approaching US Forces will, by making prior contact as described above, help make their intentions clear and avoid unnecessary initiation of such defensive measures.

3. US Forces, especially when operating in confined waters, shall remain mindful of navigational considerations of aircraft, surface vessels, and subsurface vessels in their immediate vicinity.
4. Nothing in the special warning is intended to impede or otherwise interfere with the freedom of navigation or overflight of any vessel or aircraft, or to limit or expand the inherent self-defense rights of US Forces. This special warning is published solely to advise of the heightened state of readiness of US Forces and to request that radio contact be maintained as described above (162045Z NOV 2001).
37. See ROACH & SMITH, *supra* note 3, and F. C. Leiner, *Maritime Security Zones: Prohibited Yet Perpetuated*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 967–992 (1984).
38. This concept was made use of in the 19th and beginning 20th centuries and predominantly served to evade the consequences that would have arisen if a “state of war” had been recognized.
39. If at all, the Cuban Quarantine was a legitimate measure of self-defense. See, *inter alia*, C. Q. Christol & C. R. Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba*, 1962, 57 AMERICAN JOURNAL OF INTERNATIONAL LAW 525–543 (1963).
40. See the references cited at *supra* note 31.
41. SAN REMO MANUAL, *supra* note 16, ¶ 105; ANNOTATED SUPPLEMENT, *supra* note 17, ¶ 7.9; KOMMANDANTEN-HANDBUCH, *supra* note 34, no. 304; The Helsinki Principles on Maritime Neutrality, ¶ 3.3, in International Law Association (ILA), Report Of The Sixty-Eighth Conference 497 (1998) [hereinafter Helsinki Principles]; AUSTRALIAN BOOK OF REFERENCE—ABR 5179—MANUAL OF INTERNATIONAL LAW—Nov. 3, 1998.
42. Hence it is contrary to the law of naval warfare to claim: “There are two things out there: submarines and targets.” It needs to be stressed, however, that most of the doubts surrounding the employment of submarines during armed conflict have now been settled. The only merchant vessels—enemy and neutral—exempt from attack are those that are innocently employed in their normal role. If, e.g., a neutral merchant vessel is transporting enemy troops it may be attacked on sight. There is no duty to first provide for the safety of passengers, crew and the vessel’s documents.
43. See *supra* note 34 and accompanying text.
44. SAN REMO MANUAL, *supra* note 16, ¶ 108; ANNOTATED SUPPLEMENT, *supra* note 17, ¶ 7.8; KOMMANDANTEN-HANDBUCH, *supra* note 33, no. 303. See also, Helsinki Principles, *supra* note 41, ¶ 3.3, which expressly recognizes the “rights of commanders in the zone of immediate naval operations.”
45. ANNOTATED SUPPLEMENT, *supra* note 17, ¶ 7.8: “A belligerent may not, however, purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic.”
46. The language was as follows:

Her Majesty’s Govt wishes to make clear that any approach on the part of Argentine warships, including submarines, naval auxiliaries or military aircraft which could amount to a threat to interfere with the mission of British Forces in the South Atlantic will encounter appropriate responses. All Argentine aircraft, including civil aircraft engaging in surveillance of these British Forces will be regarded as hostile and are liable to be dealt with accordingly.
- THE TIMES (London), Apr. 26, 1982, at 5.
47. Fenrick, *supra* note 31, at 92.
48. See also references cited *supra* note 32.

49. Notice to Mariners Nos. 17/59 of September, 22, 1980; 18/59 of October 1, 1980; 20/59 of November 4, 1980; 22/59 of January 21, 1981; and 23/59 of January 21, 1981.
50. See the documentation in *THE IRAN-IRAQ WAR (1980–1988) AND THE LAW OF NAVAL WARFARE* 83 (Andrea de Guttry & Natalino Ronzitti eds., 1993).
51. Note, however, that if a “contribution to the war-sustaining effort” is considered sufficient to render an object a legitimate military objective, the illegality of the attacks on tankers during the Iran-Iraq War may not be that clear after all. Both belligerents were able to continue the war for eight years because the revenues of oil sales enabled them to purchase weapons abroad.
52. See R. Danziger, *The Persian Gulf Tanker War*, 111 UNITED STATES NAVAL INSTITUTE PROCEEDINGS 160–167 (May 1985); B. A. Boczek, *Law of Warfare at Sea and Neutrality: Lessons from the Gulf War*, 20 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 239–264 (1989). See also references cited at *supra* note 33.
53. Australia: OPERATIONS LAW FOR RAAF COMMANDERS—DI (AF) AAP 1003 and AUSTRALIAN BOOK OF REFERENCE, *supra* note 41; United States: THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M/MCWP 5-2.1/COMPDT PUB P5800.1) ¶ 7.9 [hereinafter COMMANDER’S HANDBOOK], in ANNOTATED SUPPLEMENT, *supra* note 17; Germany: KOMMANDANTEN-HANDBUCH, *supra* note 34, no. 304.
54. SAN REMO MANUAL, *supra* note 16, ¶¶ 105–108.
55. Helsinki Principles, *supra* note 41, ¶ 3.3:
Subject to Principle 5.2.9 and without prejudice to the rights of commanders in the zone of immediate naval operations, the establishment by a belligerent of special zones does not confer upon that belligerent rights in relation to neutral shipping which it would not otherwise possess. In particular, the establishment of a special zone cannot confer upon a belligerent the right to attack neutral shipping merely on account of its presence in the zone. However, a belligerent may, as an exceptional measure, declare zones where neutral shipping would be particularly exposed to risks caused by the hostilities. The extent, location and duration must be made public and may not go beyond what is required by military necessity, regard being paid to the principle of proportionality. Due regard shall also be given to the rights of all States to legitimate uses of the seas. Where such a zone significantly impedes free and safe access to the ports of a neutral State and the use of normal navigation routes, measures to facilitate safe passage shall be taken.
56. Paragraph 106 merely refers to an “exceptional measure” without specifying which measures a belligerent may take within the zone.
57. COMMANDER’S HANDBOOK, *supra* note 17, ¶7.9.
58. KOMMANDANTEN-HANDBUCH, *supra* note 34, no. 304.
59. Helsinki Principles, *supra* note 41, ¶ 3.3.
60. Note that the British TEZ during the Falklands/Malvinas conflict was misunderstood as being such a geographical restriction. It may be that it originally was meant to serve that purpose. However, in the course of the armed conflict the *General Belgrano* was sunk outside the TEZ. This clearly shows that a belligerent making use of the exclusion zone device ought to be as clear as possible as regards his intentions.
61. Accordingly, the States parties to Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 3, agreed on Annex I “Regulations concerning Identification.” That Annex was revised and now also allows for underwater identification. See Philippe Eberlin, *Underwater Acoustic Identification of Hospital Ships*, 229 INTERNATIONAL REVIEW OF THE RED CROSS 202–215 (July/August 1982). However, these modern means designed to facilitate the identification of hospital ships are far from being effective.

62. Convention on the Law of Treaties, Vienna, May 22, 1969, 1155 U.N.T.S. 331. For an equal consideration of the other authentic texts, see J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 64, 75 (2000); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1262–63 (Yves Sandoz et al. eds., 1987).
63. The British did not want to send messages in the clear because they did not want the Argentine forces to get advance information about the possible movements of their forces. Instead, they created so-called “Red Cross Boxes” where the hospital ships were deployed and where they waited to receive wounded soldiers.
64. COMMANDER’S HANDBOOK, *supra* note 17, ¶ 8.2.3: “Use or possession of cryptographic means of transmitting message traffic by hospital ships is prohibited under current law” (emphasis added).
65. KOMMANDANTEN-HANDBUCH, *supra* note 34, no. 357: “Devices designed for the reception of encrypted messages should also be permitted when they are employed solely for the effective performance of humanitarian tasks.”
66. As early as 1970 the late Professor D. P. O’Connell noted that dilemma. See D. P. O’Connell, *International Law and Contemporary Naval Operations*, 64 BRITISH YEAR BOOK OF INTERNATIONAL LAW 19, 59 (1970).
67. During the Falklands/Malvinas conflict the “Red Cross Box” created considerable problems because the hospital ships were not informed prior to the arrival of the wounded and were thus not well prepared to treat them efficiently. See S. S. Junod, *La protection des victimes du conflit armé des îles Falkland—Malvinas* (1982), in DROIT INTERNATIONAL HUMANITAIRE ET ACTION HUMANITAIRE 26 (2d ed. 1985).
68. SAN REMO MANUAL, *supra* note 16, ¶ 171.
69. *Id.* ¶ 171.4.
70. *Id.* ¶ 171.5. Therefore, the participants could not agree on the formulation “may” but merely on the formulation “should be allowed to.”
71. For an early analysis of this problem, see S. L. Oreck, *Hospital Ships: The Right of Limited Self-Defense*, 114 UNITED STATES NAVAL INSTITUTE PROCEEDINGS 62–66 (Nov. 1988).
72. COMMANDER’S HANDBOOK, *supra* note 53, ¶ 8.2.3: “Hospital ships may not be armed although crew members may carry light individual weapons for the maintenance of order, for their own defense and that of the wounded, sick and shipwrecked.” *Accord* KOMMANDANTEN-HANDBUCH, *supra* note 33, no. 357.
73. See also THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY, II GENEVA FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 194 (Jean S. Pictet et al. eds., 1960).
74. SAN REMO MANUAL, *supra* note 16, ¶ 170; KOMMANDANTEN-HANDBUCH, *supra* note 34, no. 357.
75. D. Foxwell & R. Jolly, *The RFA Argus—A Gas-Tight, Floating Field Hospital*, 2 INTERNATIONAL DEFENSE REVIEW 116–117 (1991); A. Bouvier, *Fighting Hospital Ships*, 3 INTERNATIONAL DEFENSE REVIEW 246 (1992).
76. See references, *supra* note 72.
77. Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, Oct. 18, 1907, 36 Stat. 2277, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 87 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
78. Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, Oct. 18, 1907, 36 Stat. 2415, *reprinted in id.* at 128.
79. Note, however, that AP I regulates aerial warfare only in part. According to Article 49, paragraph 3, Articles 48–67 apply to air warfare only if it “may affect the civilian population,

individual civilians or civilian objects on land” or if air attacks are launched against “objectives on land.” Neutral air space is dealt with in the context of medical aircraft alone in Article 31.

80. Hague Draft Rules of Aerial Warfare, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 77, at 141.

81. For an overview of the rights and duties of neutral States under the traditional rules of the law of neutrality, see, *inter alia*, ERIK CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 421 (1954); L. OPPENHEIM & H. LAUTERPACHT, INTERNATIONAL LAW (Vol. II) 673 (7th ed. 1963); C. J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 627 (6th ed. 1968).

82. Then, however, the question arises of how to define “war” or a “state of war.” For those claiming a “state of war” to be a necessary precondition for the applicability of the law of neutrality, see L. KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 141 (1956); D. Schindler, *State of War, Belligerency, Armed Conflict*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 3–20 (A. Cassese ed., 1979); CASTRÉN, *supra* note 81, at 34, 423.

83. In that context, some of those authors refer to a *status mixtus*, i.e., a situation of international armed conflict not amounting to “war” proper. See G. Schwarzenberger, *Jus Pacis ac Belli*?, 37 AMERICAN JOURNAL OF INTERNATIONAL LAW 460–479 (1943); C. Greenwood, *The Concept of War in Modern International Law*, 36 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 298, 300 (1987); P. GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC (Vol. II) 510 (1954); J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 313 (1959); Phillip C. Jessup, *Should International Law Recognize an Intermediate Status between Peace and War?*, 48 AMERICAN JOURNAL OF INTERNATIONAL LAW 98–103 (1954).

84. Helsinki Principles, *supra* note 41, Principle 1.2: . . . In particular, no State may rely upon the Principles stated herein in order to evade obligations laid upon it in pursuance of a binding decision of the Security Council. . . .” SAN REMO MANUAL, *supra* note 16, ¶ 7: “Notwithstanding any rule in this document or elsewhere on the law of neutrality, where the Security Council, acting in accordance with its powers under Chapter VII of the Charter of the United Nations, has identified one or more of the parties to an international armed conflict as responsible for resorting to force in violation of international law, neutral States : (a) are bound not to lend assistance other than humanitarian assistance to that State; and (b) may lend assistance to any State which has been the victim of a breach of the peace or an act of aggression by that State.”

85. Schindler, *supra* note 82, at 14; D. Schindler, *Transformations in the Law of Neutrality Since 1945*, in HUMANITARIAN LAW OF ARMED CONFLICT—CHALLENGES AHEAD—ESSAYS IN HONOUR OF FRITS KALSHOVEN 367–86 (A. J. M. Delissen & G. J. Tanja eds., 1991); Greenwood, *supra* note 83, at 297–300.

86. See references cited at *supra* note 85.

87. The validity of this obligation is confirmed by the statements of the United Kingdom: 57 BRITISH YEAR BOOK OF INTERNATIONAL LAW 638 (1987); United States: 88 US Department of State Bulletin 61 (1988)—during the Iraq-Iran War; and by the resolutions of the UN Security Council (UNSCR 540 of October 31, 1983; UNSCR 582 of October 8, 1986; and UNSCR 598 of July 20, 1987).

88. The United States attack against Cambodia was, *inter alia*, justified by the violations of the law of neutrality by that State. See the statement by the legal advisor of the Department of State, J. R. Stevenson of May 28, 1970, 62 US Department of State Bulletin 765 (May 1970). See also R. A. Falk, *The Cambodian Operation and International Law*, in THE VIETNAM WAR AND INTERNATIONAL LAW (Vol. 3) 35–57 (R. A. Falk ed., 1972).

89. For a similar approach, see Greenwood, *supra* note 83, at 299.

90. See P. M. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARVARD INTERNATIONAL LAW JOURNAL 249, 276 (1976).

XII

The Legal Efficacy of Freedom of Navigation Assertions

Dale Stephens¹

The 1982 Law of the Sea Convention² (1982 LOS Convention) is a quintessential product of the modernist period. The emphasis of the 1982 LOS Convention is decidedly communitarian and its content is fully influenced by an evolved institutionalization of process. It is thus typical of the co-operative pragmatism of current approaches to international law.³ The interaction of sovereign interests in exploiting and utilizing the sea and its resources are “managed” within its framework, and potential conflicts concerning such rights are intended to be resolved through emphatic utilization of dispute settlement mechanisms which will pay “due regard” to the sovereign participants.⁴ The 1982 LOS Convention continues the codification process of its antecedents, especially the 1958 Conventions,⁵ though it sets a “progressive” course with the inclusion of new concepts hitherto not recognized under the law including, in particular, the archipelagic concept as a juridical entity.

Given the holistic character of the 1982 LOS Convention, it is ironic, although not surprising, that security issues are not directly tackled. When it comes to such issues, the potential for a clash of sovereignty, or at least conceptions of the doctrinal substance of sovereignty, is likely. It is within this context that questions concerning the efficacy of freedom of navigation rights are, naturally, most pronounced. The United States, a notable absentee⁶ from the Convention, is the most significant proponent of exercising navigational freedom through use of its

naval and air forces. This has been driven from a measured agenda to ensure that it is instrumental in creating advantageous customary norms.⁷ Additionally, the US Freedom of Navigation Program is designed to influence interpretations of ambiguous provisions of the 1982 LOS Convention as a whole. In this latter respect especially, the concerns of the United States are shared by a number of other maritime powers who have either commenced their own navigational assertion programs⁸ or have otherwise relied upon US practice.⁹

It is a critical time for preserving international navigational freedom. The increasing ratification of and accession to the 1982 LOS Convention means that navigational regimes are being established that will have a permanent impact upon political and strategic realities. The “game” is not necessarily being played according to established rules by many coastal States. There are discordant voices in opposition to maritime State strategies and the stakes for all remain impossibly high, thus the need for precise and resolute action. Naval and air forces remain at the forefront of this critical campaign and are the principal instruments for ensuring effective and peaceful resolution of these threats.

The Freedom of Navigation Program which was first authorized by the United States Government in the late 1970s has been criticized in both legal and normative terms.¹⁰ Arguments have been rendered which criticize the legal efficacy of the program and question the apparent provocative nature of such assertions as unnecessary exercises of hegemonic power projection. Moreover, such criticism contends that the preservation of navigational freedom can be more effectively achieved through other, less invasive, means.¹¹ Indeed these arguments suggest that the exercise of the operational assertions may offend general principles of international law concerning “abuse of rights.”¹² It is contended that such arguments are misplaced and that the freedom of navigation assertions undertaken by the United States and others do provide the most effective means of preserving the balance of interests reflected in the legal architecture of the 1982 LOS Convention. The current cacophony of claims made by some coastal States collectively to limit navigational freedom is strident in both frequency and depth. In this dynamic world of strategic norm creation and suppression, it is contended that navigational assertions are an essential means of addressing these suspect claims. More critically, such assertions are undertaken in concert with the jurisprudence of the International Court of Justice that has repeatedly endorsed the principle of navigational freedom and recognized the legitimacy of asserting such rights. This paper argues for the continued maintenance of the Freedom of Navigation Program as an essential means of preserving the integrity of the 1982 LOS Convention and seeks to demonstrate the risks involved in failing to be vigilant to contrary strategies designed to limit the freedoms so desperately won.

Law of the Sea Legal Regime

The 1982 LOS Convention is a very well subscribed treaty. As of this writing, 145 States have ratified or acceded to the Convention,¹³ which list includes four of the permanent five members of the Security Council. Following the resolution of issues associated with Part XI of the Convention dealing with deep seabed mining,¹⁴ President Clinton submitted the 1982 LOS Convention, together with the 1994 Agreement Relating to the Implementation of Part XI, to the United States Senate on October 7, 1994 for its consent, respectively, to their accession and ratification.¹⁵ Notwithstanding its broad acceptability, the 1982 LOS Convention is not yet universally subscribed and thus is not, in its terms, binding on all. Moreover, the Third United Nations Conference on the Law of the Sea (UNCLOS III)¹⁶ debates that led to the drafting of the 1982 LOS Convention were conducted under the aegis of a consensus negotiation practice that ensured that the convention was, in many respects, a “package deal” of concessions which resulted in a number of constructive ambiguities in the text.¹⁷ Unlike the previous 1958 Conventions dealing with maritime regulation,¹⁸ the 1982 LOS Convention does not permit the making of general reservations¹⁹ and was intended to be a discrete enunciation of maritime regulation, thus further ensuring a compromised language in the text. Indeed, a recent commentary has identified over 60 terms, a dozen of which are critical, included within the 1982 LOS Convention that are either ambiguously used or not fully defined.²⁰ Significantly, the issue of the use of force in the maritime environment is barely tackled, which is not altogether surprising given the cold war environment prevailing at the time of negotiation. Accordingly, military subjects do not loom large within the text of the Instrument and assessment of State actions must be undertaken more specifically under general principles of international law.²¹

The Issue of Sovereignty

Article 2 of the 1982 LOS Convention confirms that coastal States exercise sovereignty over their territorial sea “subject to [the] Convention and other rules of international law.”²² That article provides a reliable touchstone for the conceptualization of nuanced “sovereignty” applicable in the territorial sea. Following the conclusion of the negotiating process it was evident that coastal State sovereignty over newly expanded territorial sea limits would be “subject” both to the positively stated terms of the Convention, especially the rights of innocent passage, and other, more general rules of international law. International legal discourse does not admit to a unified theory of sovereignty.²³ Since the treaties of Westphalia in 1648, both courts and publicists have wrestled with the significance

of the concept. The writings of Henry Wheaton²⁴ in the nineteenth century, and the determination of the Permanent Court of Justice of the early twentieth century in the *Lotus* case,²⁵ have recognized an absolute quality to the concept of sovereignty, upon which infringements could not be presumed.²⁶ Alternatively, the jurisprudence of the US Supreme Court of the early nineteenth century²⁷ and writers in the current period²⁸ equate “sovereignty” more with a collection or “bundle” of rights to which there are concomitant rights enjoyed by other “sovereign” States.²⁹ Within this paradigm, the enduring challenge of international law is the reconciliation of such rights. Modern theoretical conceptions seek to demystify the character of sovereignty in order to address questions of international community structure comprehensively. Hence, the theorist Hans Kelsen tackled the nature of sovereignty by positing that it was a conception premised upon an authority of order and nothing more.³⁰ However, as a manifestation of order he was able to perceive the international community equally possessing the mechanics of an order through an expression of collective will and thus was able to conclude that based upon its coercive predicate, international law exists as an equally binding legal order by which State sovereignty is necessarily limited.³¹

The monolithic and “mystical” nature of sovereignty expressed in the vocabulary of defense of measures to restrict and hamper navigational freedom, especially of warships, can be seen as representative of a particular schism of absolutist attitudes towards the legal nature of sovereignty. This essentialism seems to brook no heresy on the character of such claims. Notwithstanding this approach, it is evident that the sovereignty expressed to exist in the territorial sea of a coastal State is, in accordance with Article 2 of the 1982 LOS Convention, a disaggregated sovereignty. International law is now replete with authoritative expressions on the fractured nature of this sovereignty.³² It was this realization within the *Corfu Channel* case that prompted Judge Alvarez to acknowledge the social interdependence between States and to conclude that sovereignty carried with it both rights and obligations, stating in his individual opinion that “we can no longer regard sovereignty as an absolute and individual right of every State as used to be done under the old law founded on the individualist regime.”³³ The relationship between the coastal State and the navigating State is thus a relationship of intersecting rights and obligations. Accordingly, it is not possible to conclude that under either customary law or the 1982 LOS Convention, there is necessarily a “weighted” significance to be accorded the sovereign status of the territorial sea of a coastal State based upon appeals to mystical conceptions of what underpins the nature of sovereignty,³⁴ *a fortiori* with respect to international straits and archipelagic sea lanes.

The 1982 Law of the Sea Convention

UNCLOS III was ambitious in its goals. Addressing age old doctrinal antagonisms concerning theories of *mare clausum* and *mare liberum* naturally meant that there would be deep divisions between coastal State preferences, which sought to expand maritime jurisdiction, and those of the maritime States who sought to emphasize more liberal navigational regimes.³⁵ The 1982 LOS Convention itself is a statement *par excellence* in affirming a general theme of “balance” throughout its provisions. The Convention pits one principle against another in repeated provisions throughout its text. Thus coastal States were able to win consensus for a greatly expanded territorial sea limit (from three to twelve nautical miles) in exchange for rights of concisely defined innocent or transit passage. Similarly, the archipelagic concept was recognized in exchange for rights of archipelagic sea lane passage, as were rights of high seas navigation and freedoms within the newly established exclusive economic zone (EEZ). It is this thematic goal of “balance” that especially underpins the nature of the freedom of navigation programs.

Excessive Claims

As a result of the ambiguity in the language contained within the 1982 LOS Convention, and in conjunction with independent strategies designed to shape the development of the law, there have been a multitude of claims made by coastal States concerning their sovereign or jurisdictional rights within maritime areas, the legal basis of which is suspect. Thus, the broad language of the Convention regarding the drawing of baselines³⁶ has led a number of States to adopt an excessively generous approach to designating such co-ordinates. In this regard, for example, Vietnam draws its baselines in a manner that extend up to 50nm³⁷ around islands within the South China Sea and cannot, under any reasonable interpretation, be regarded as “generally following the direction of the coastline” as provided for in Article 7 of the 1982 LOS Convention³⁸ and supporting customary international law.³⁹ Similarly, a United Nations publication from 1994⁴⁰ identified a number of States that acted inconsistently with the terms of the 1982 LOS Convention. Such countries included Myanmar which adopted excessively long straight baselines (including one 222 nautical miles long),⁴¹ as well as the Democratic People’s Republic of Korea which had drawn straight baselines that did not follow the direction of the coast.⁴² Moreover, the report noted a number of States that purported to require prior notification or authorization pending the exercise of innocent passage by vessels, especially warships. Such countries included, *inter alia*, Bangladesh, China, India, Iran and Maldives.⁴³ Critically, the report noted that such restrictions on

navigational freedom were inconsistent with the right of innocent passage for all vessels as guaranteed under the 1982 LOS Convention.⁴⁴

States such as North Korea⁴⁵ assert that special “security zones” may be imposed in adjoining maritime areas which purportedly enable them independently and selectively to restrict navigational freedom on self-conceived terms relating to “security.” Countries such as Brazil, India, Malaysia and Pakistan all seek to restrict naval activities within their EEZ’s in terms not readily recognized under the 1982 LOS Convention.⁴⁶ The catalogue of “excessive maritime claims” is quite large. The following non-exhaustive list provides a representative outline of the types of claims made:

- Excessive and very broad claims for historic bay status,⁴⁷
- Territorial sea limits beyond the 12nm range,⁴⁸
- Imposition of a multitude of environmental or safety conditions on “innocent passage” which effectively denies the right,⁴⁹ and
- Denied transit passage rights within international straits.⁵⁰

Perhaps the most striking challenge to navigational freedom comes from the recent adoption of legislation by the Indonesian Government in December 2002⁵¹ that purported to restrict all passage through its archipelago to three north/south archipelagic sea lanes. Passage from east-west through the Indonesian archipelago is permitted, on the face of the legislation, to be with Indonesian Government permission only.⁵² The legislation also provided that archipelagic sea lanes passage was only exercisable within a limited number of north-south archipelagic sea lanes that had been partially designated with the International Maritime Organization.⁵³

Such legislation is inconsistent with a general right to engage in innocent passage through archipelagic waters as outlined in the 1982 LOS Convention.⁵⁴ Moreover, with respect to both innocent passage and the partial designation of archipelagic sea lanes, the legislation is contrary to the terms of the 1998 Resolution of the Maritime Safety Committee of the International Maritime Organization (IMO) which said, respectively, that “[e]xcept for internal waters within archipelagic waters, ships of all States enjoy the right of innocent passage through archipelagic waters and the territorial sea”⁵⁵ and “[w]here a partial archipelagic sea lanes proposal has come into effect, the right of archipelagic sea lanes passage may continue to be exercised through all normal passage routes used as routes for international navigation or overflight in other parts of archipelagic waters in accordance with UNCLOS.”⁵⁶ The Explanatory Note to the Indonesian Regulations declared that designation of routes under which innocent passage could be exercised was a right reserved to the Indonesian Government notwithstanding the provisions of the 1982 LOS Convention.⁵⁷

US Freedom of Navigation Program

The US Freedom of Navigation Program was established in 1979 and has enjoyed bipartisan political support since that time.⁵⁸ Developed against the background of the debates at UNCLOS III, the program was conceived as a means to shape the development of the law in a manner consistent with ensuring the maintenance of navigational freedoms so desperately won through the negotiations.⁵⁹ American economic and strategic policy goals are *ad idem* in relation to ensuring maximization of maritime freedom⁶⁰ and such coalescence of interests are naturally similar with other maritime State goals. Such freedom critically underpins⁶¹ existing US and coalition military strategy of deterrence, forward defense and alliance solidarity.⁶² The Freedom of Navigation Program is a composite policy of both diplomatic exchange and physical operational assertion.⁶³ Moreover, the program is to be seen as an important element in an overall process of US supported bilateral and multi-lateral military efforts to foster consistency in recognition of maritime freedoms. Such efforts are contextualized in the transparency of the international military exercise programs which are conducted in all regions of the world.⁶⁴ The agreed maritime legal framework and associated rules of engagement issued for the conduct of such exercises seek to reinforce the strategic balance of interests reflected in both the 1982 LOS Convention and equivalent customary law.⁶⁵

The thematic focus of the Freedom of Navigation Program is to consolidate US and, collaterally, coalition rights of global maritime mobility, particularly in relation to contentious “choke points” within strategic waterways (e.g., Strait of Malacca, Strait of Hormuz, etc.). The program is mandated by Presidential Directive to be “non-provocative,” “even-handed” and “politically neutral” in its application.⁶⁶ In this regard, “non-provocative” does not necessarily equate with “non-confrontational” as the very essence of the program is to contest excessive claims.⁶⁷ As will be subsequently argued, such actions do not in themselves constitute a violation of United Nations Charter prohibitions under Article 2(4)⁶⁸ nor other norms proscribing intervention within the domestic jurisdiction of a State.⁶⁹

The Freedom of Navigation Program is a critical part of an overall strategic focus of US policy with respect to maritime freedom. While not a party to the 1982 LOS Convention, President Reagan declared in 1983 that the United States would act consistently with the provisions of the Convention with respect to navigation and overflight rights, acknowledging that they were representative of customary international law.⁷⁰ Significantly, President Reagan counseled that the “United States will not . . . acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.”⁷¹ Critically, US policy perceives its Freedom of Navigation

Program as an instrumental aspect of preserving the integrity of the 1982 LOS Convention. Thus the actions of US naval forces are rationalized as representing not only US strategic interests but also those of the international community generally.⁷² As the commentator Richard Grunawalt has opined, “[t]o that end, the Freedom of Navigation Program encourages nations to modify their domestic laws and regulations so as to bring them into conformity with the Convention.”⁷³

Australian Freedom of Navigation Program

In the mid-1990s, the Royal Australian Navy (RAN) adopted an informal policy of asserting lawful navigational rights under the 1982 LOS Convention. The focus of this policy was specifically within the South Pacific/Southeast Asian region. Akin to the US program, the Australian approach is an amalgam of navigational assertion coupled with coordinated diplomatic exchange.

Australia’s geographic proximity demands that it have free regional maritime mobility capacity. A key feature of that mobility is assured access through the Indonesian Archipelago so as to access important regional ports within Southeast Asia as well as North Asia. While access through the Indonesian Archipelago is necessarily a critical aspect, it is not the sole focus of the Australian program. In April 2001, an Australian naval task force of three ships transited the Taiwan Strait in order to travel efficiently between Hong Kong and South Korea. The Taiwan Strait lies within the so-called Chinese “security zone” which led to a non-violent confrontation with Chinese naval units.⁷⁴ Australian diplomatic responses to Chinese protests relied upon conventional rights contained within the 1982 LOS Convention and the matter was not permitted by either side to escalate beyond an oral diplomatic exchange.

Legal Critique of Freedom of Navigation Program

The approach taken by the United States in undertaking freedom of navigation assertions seeks to achieve two principal legal goals. Firstly, as a non-party to the 1982 LOS Convention, the United States is bound to ensure that customary international law develops in a manner consistent with its own strategic interests. The stated security goals of the United States in ensuring free access through maritime “choke points” and unencumbered exercise of navigational freedom do accord with the goals of almost all maritime States. To that end, such navigational assertions seek to create a “practice” necessary to shape the evolution of customary norms recognizable in accordance with Article 38 (1) (b) of the Statute of the International Court of Justice.⁷⁵ Such practice is accompanied by statements concerning US convictions as

to the state of *opinio juris* concerning the establishment of a permissive regime of transit through contested areas.⁷⁶

The actions taken by those coastal States that maintain excessive maritime claims or that otherwise seek to impose restrictions on free navigation do not appear to have been taken in concert. The International Court of Justice (ICJ) has declared that freedom of navigation, in the form of a right of innocent passage through territorial seas and more generally through other foreign maritime zones, is a right possessed under customary law.⁷⁷ The Court has opined that the right is guaranteed to include “all the freedom necessary for maritime navigation”⁷⁸ which was not to be hindered by the coastal State. The 1982 LOS Convention, in the opinion of the Court, “does no more than codify customary international law on this point.”⁷⁹ Having regard to the ICJ’s pronouncements therefore, it seems an entirely vacuous process for such countries to be seeking to set a contrary “practice” which should crystallize into a rule of customary international law. Contemporary theory posits that in the face of a generally established rule of customary international law (as has been declared by the ICJ in this instance), there is a need for a “great quantity of practice to overturn existing rules of customary international law.”⁸⁰ With a strong presumption against the change in law⁸¹ there would need to be demonstrated an extremely widespread and uniform⁸² practice in opposition to the existing rule for there to be any opportunity for even beginning an assessment as to the emergence of a contrary rule. The brief survey of the multifarious claims by some coastal States indicates that there is no such uniformity, but rather a sporadic and somewhat disjointed array of challenges. It is notable that during the latter stages of the UNCLOS III debates there was an unsuccessful attempt by approximately 29 States to impose a requirement for prior notification and/or authorization for innocent passage into the Convention.⁸³ Had such countries been uniform in their continued insistence on this requirement in subsequent years, there may well have been afforded a basis to assert that such a proposition had crystallized into a rule of customary law (assuming, of course, evidence of *opinio juris* and acquiescence by other States) but this has not been the case. While some States persist with claims for either prior notification or authorization, there is no widespread uniformity in practice on either element or indeed any particular claim or principle of law that would act to undermine the guarantees of navigational freedom contained within the 1982 LOS Convention relating to warships.

Alternatively an argument might be advanced that rather than relying on the specificity of claims regarding the restriction on navigation (i.e. security zones, prior permission etc.), opposing States may be able to frame a broader enunciation of the opposing “rule”⁸⁴ to collectively bring it within a single normative framework. Thus it might be contended that the rule is simply that “navigational freedom is

constrained by a number of factors” and the multifarious actions by coastal States would all be consistent with such a broadly stated rule. Such an approach would, however, be disingenuous. The reasoning employed by the ICJ in the *North Sea Continental Shelf* case insisted that a level of exacting uniformity was required before determining the existence of a new rule, especially one that seemed to be in conflict with an existing rule.⁸⁵ In the current scenario, coastal States which seek to restrict navigational freedom do so in widely inconsistent ways. Thus, some States purport to have discretion to deny innocent passage where others simply seek to be provided with information beforehand of an impending passage so as to “ensure” that such passage is innocent while not denying outright the “right” of innocent passage. In his analysis of customary law formation, Michael Akehurst has noted “practice which is marked by major inconsistencies at all relevant times is self defeating and cannot give rise to a customary rule.”⁸⁶ On any level of analysis therefore, the development of a general customary rule contrary to the existing customary status quo concerning freedom of navigation is fraught with considerable difficulty.

Persistent Objectors

If there is little likelihood that there will develop a contrary general customary rule restricting navigational freedom, what then is the efficacy of the US Freedom of Navigation Program? Given that navigational freedom exercised in accordance with the terms of the 1982 LOS Convention is not yet a norm of peremptory status (“*jus cogens*”) the existing international legal structure does permit *individual* States the right to opt out of the application of prevailing general international customary law. While strictly defined, the so-called “persistent objector” theory permits a particular State the opportunity to resist the application of customary international law but only in relation to that State. To qualify, a State must express a protest to a developing rule during its formulative stages (i.e., protest *ab initio*) and must be vigilant in maintaining its opposition to a developing rule.⁸⁷

In view of the “persistent objector” principle, the utility of the US Freedom of Navigation Program can best be understood as testing the resolve of those States who may seek to develop opposition to the application of customary international law to them. It is notable that the 2000 International Law Association (ILA) Committee Report on the Formation of Customary (General) International Law relies upon the actual physical actions of States in the maritime environment to provide the most effective demonstration of State intent. Hence, the ILA uses the example of a State purporting to restrict navigational rights through its territorial sea as an illustration of the general need to discern the nature of the express or implied claim and response as to the applicability of a norm of international law. Thus the

authors of the report note that “if State A expressly claims the right to exclude foreign warships from passing through its territorial sea, and State B sends a warship through without seeking the permission of A . . . [and] . . . A fails to protest against this infringement, this omission can, in its turn, constitute a tacit admission of the existence of a right of passage after all.”⁸⁸

It is in this context that “actions” do indeed speak louder than “words.” Some interpreters of sources doctrine have traditionally been insistent on pointing to “deeds” over “words” as the critical “practice” of a State for determining the legitimacy of a new rule of customary international law. In support of this proposition, the publicist Anthony D’Amato notes that “acts are visible, real and significant; it crystallizes policy and demonstrates which of the many possible rules of law the acting State has decided to manifest.”⁸⁹ Such arguments have been diluted by other commentators who have opined that more general means are available to gauge State practice.⁹⁰ Akehurst, for example concludes that statements, in either abstract or concrete contexts, may also be constitutive of State practice.⁹¹ This latter view is surely the correct one, indeed it has been observed that the ICJ in the *Nicaragua* case itself appeared to conclude that *both* State practice and sufficient *opinio juris* can be gauged from public statements made by States, or even international organizations in circumstances where such entities are purporting to declare the state of the law.⁹²

While diplomatic statements may be acceptable for discerning the formulation of norms, the principal difficulty remains in identifying the specificity of the norm created. It is as much a matter of probative value than anything else in discerning the quality and content of a rule, and in the absence of a clearly directed public statement there is little value in its evidentiary effect.⁹³ Blanket verbal protests by maritime States could be met with equally blanket ripostes from coastal States contending their enduring resistance. In this flurry of statements and counter-statements it may be difficult to assess the cogency of any new rule or exception to a rule. As recognized by the ILA Committee, the matter only becomes truly tested when a transit is undertaken through contested waters and reactions gauged. Such a practical demonstration is necessary to determine the coherency of claims, especially in circumstances where a well subscribed multilateral instrument has established a rule in conflict. Indeed, as the ILA Committee report notes, the persistent objector rule is useful in an exceptional sense by allowing “the convoy of the law’s progressive development . . . [to] . . . move forward without having to wait for the slowest vessel.”⁹⁴ Such an approach can be supported upon a utilitarian basis in the maritime context, especially given the sophisticated level of the balance struck in the 1982 LOS Convention between coastal and maritime State rights and obligations.

It is in this context that the “relative normativity” theory⁹⁵ of interpretation of international legal “sources” finds useful application. The development of both “hard” and “soft” arguments within customary normative discourse concerning coastal State/maritime State interaction does require attention to the “more or less” calculus so resisted by traditional approaches. Accordingly, specific physical State action and counter-action in a very public and concrete manner plays a much more compelling role in the establishment of international legal norms. In essence, navigational assertions do carry with them greater normative significance with respect to this issue than only diplomatic exchange of notes.

The 1982 Convention and Legal Framework of Navigational Rights

As outlined in the introduction of this paper, the 1982 LOS Convention is a well-subscribed treaty. Given the widespread nature of its support, it may be wondered why the rights concerning freedom of navigation that are contained within the Convention are sought to be denied by some coastal States. The answer to this question is varied. Plainly, in the face of “constructively ambiguous” provisions, a coastal State may seek an interpretation that is advantageous to that State. Hence, arguments may be proffered in the case of innocent passage, for example, that read much into the terms of Article 19(1) that “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.” Such terminology is on its face abstract enough⁹⁶ to permit a wide array of challenges, especially to warships. Such reasoning is, however, quite disingenuous. Article 31 of the Vienna Convention on the Law of Treaties⁹⁷ prescribes that “A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁹⁸ With respect to the issue of warships and innocent passage, it is evident that the abstract propositions concerning “peace, good order or security” are necessarily informed by the detailed terms of Article 19(2) of the 1982 LOS Convention which provides a very specific contextual outline of those activities that a warship must observe to come within the definition of “innocent.”⁹⁹ As with the remainder of the treaty, this prescriptive catalogue was the necessary “price” for expanded territorial sea jurisdiction and obviously provides a reliable basis for legal interpretation. As the Indian commentator Shekhar Ghosh acknowledged at the time of the UNCLOS III debates, “[t]he scope of coastal discretion has been undeniably reduced to an unavoidable minimum”¹⁰⁰ under this provision. In essence, the rights of navigational freedom were “won” in the context of ensuring a necessary balance with coastal State interests.

Beyond a textual interpretation of the terms of the 1982 LOS Convention, it is open to a coastal State to observe the positively stated obligations while still relying

upon “gaps” in the terms of the Convention to advance a restrictive agenda. In this context so called rights to insist upon prior notification before undertaking innocent passage might be asserted consistently with primary obligations under the Convention. Thus, under this paradigm, the “right” of innocent passage has not been infringed by insisting upon prior notification, rather it is contended to be merely a procedural “condition precedent” necessary to give effect to that right. Such an approach would, however, deny, in practical terms, a substantive right.¹⁰¹ In asserting such a claim, a coastal State may seek to rely upon Article 31(3)(b) of the Vienna Convention¹⁰² that provides that interpretation of a treaty’s terms may be determined by “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” Compliance with “prior notification” demands might therefore constitute a “practice” which will cement an interpretation of the 1982 LOS Convention that necessarily undermines navigational freedom by indirectly denying a unilateral right of passage. Such actions would be akin to the process of customary norm formulation, though they do not require the demonstration of *opinio juris*, merely acquiescence with respect to “subsequent practice.” This article’s reliance upon “practice” anticipates a level of State interaction. Accordingly, the demands of a coastal State in limiting freedom of navigation through its maritime zones if met with indifference by other States parties could conceivably permit the establishment of a specific interpretation to the Convention. While diplomatic protest is obviously a means of challenging such a development, the normally bilateral and confidential nature of such action means that there is a lack of visibility by all States party to the process. The assertion of navigational rights in a contentious zone remains a publicly visible event, which tangibly constitutes a “subsequent practice” that other States parties may overtly, or tacitly support, thus shaping an interpretation consistent with the underlying balance of preserving navigational freedom.

Criticism of the US Freedom of Navigation Program

In his analysis of US navigational assertions, William Aceves¹⁰³ takes issue with the manner in which the United States undertakes these assertions. His criticism stems from a reading of the constituent elements of customary norm generation and he argues that the program is overly provocative and inconsistent with more general requirements of international law to settle disputes peacefully.¹⁰⁴ He cites the requirements of Article 279 of the 1982 LOS Convention that in turn refers to Article 2(3) of the United Nations Charter, which mandates that all international disputes are to be settled in a peaceful manner. Additionally, he contends that US naval actions undertaken in the context of a freedom of navigation assertion have the

potential to offend general principles of international law, particularly the “abuse of rights” doctrine¹⁰⁵ by adopting an unnecessarily militarily confrontational approach to the resolution of points of law.

The critique by Aceves that navigational assertions are unduly confrontational, and thus potentially violative of Article 279 of the 1982 LOS Convention, as well as Articles 2(3) and (4) the UN Charter, is curious. As Aceves himself notes,¹⁰⁶ the issue of navigational assertions and innocent passage was considered by the ICJ in the *Corfu Channel* case which determined that a British transit of a naval squadron in full battle readiness in order to assert a right of innocent passage that Albania had sought to resist was justified as a mission designed to affirm a right which had been unjustly denied.¹⁰⁷ Admittedly, the Court subsequently condemned a later British transit through the channel to sweep for mines, however the reasoning employed by the Court was not predicated upon the fact of the transit, but rather, concentrated upon the number of ships and the manner in which the transit had been undertaken. Indeed, the Court expressly noted that the British government itself admitted that the transit was not innocent and thus the Court found that the transit was an impermissible intervention.¹⁰⁸

The broader implications of the decision have been subject to significant controversy in subsequent years. While it may be fairly argued whether the *ratio* of the decision is broad enough to permit a general exception to the prohibition on the use of force, there does seem to be a consensus as to the significance of the ability to affirm rights operationally in the maritime context. Thus, the eminent publicist Ian Brownlie, who rejected any general implication of the decision, did feel constrained to acknowledge the import of the decision as to its facts, namely the right to use force to assert a right unjustly denied in the maritime context.¹⁰⁹ As such, even on its narrowest construction, the case stands as a specific precedent in support of the legality of the Freedom of Navigation Program, at least in circumstances where “innocent passage” is sought to be unlawfully denied.

The issue received indirect consideration some 40 years following the delivery of the judgment in the *Corfu Channel* case, in the 1986 decision of the ICJ in the *Nicaragua* case.¹¹⁰ The decision of the Court in the *Nicaragua* case reviewed contemporary jurisprudence concerning the prohibition against intervention under international law that has significance for assessing the confrontational nature of navigational assertions.

The majority opinion of the Court in the *Nicaragua* decision confirmed that the principle of “non-intervention” did relate to the question of the use of force. Significantly, the Court determined that the central criterion for determining whether this prohibition had been violated turned upon a determination of the existence of “coercion.”¹¹¹ The Court’s assessment of this concept was somewhat holistic in seeking an objective assessment of whether the internal choices made by a State had been

influenced as a result of “coercion” by another State.¹¹² Such a formulation may indeed have an impact upon a navigational assertion and thus come within the terms of objections raised by Aceves in circumstances where it is the intention of the transiting State to “coerce” or intimidate a State to adopt behavior that it otherwise would not freely adopt. Such an interpretation does not arise, however, in the context of a “normal” freedom of navigation assertion. The purpose of such an assertion is not to intervene in the manner contemplated by the Court where it spoke of sponsoring armed bands or financing internal disruption.¹¹³ The interplay of maritime and coastal States, particularly those that have ratified the 1982 LOS Convention, is quite the opposite, relating to an “external” settlement of rights concerning maritime areas. This is not to suggest that the maritime State should not be cognizant of internal political machinations at the time of a programmed transit, as such an assertion may have a destabilizing significance in the context of specific internal fractures. It is contended though that such circumstances are not typical. Moreover, where a State does have internal concerns regarding security issues, it may (if a party to the 1982 LOS Convention) temporarily and legitimately suspend all innocent passage through its territorial sea on a non-discriminatory basis.¹¹⁴

The criticisms raised as to the inherently threatening behavior of a navigational assertion are imprecise. This was particularly reinforced in the *Nicaragua* case where the majority opinion determined not only that innocent passage was a well established right of customary international law, but so were other navigational freedoms extending beyond the territorial sea. Indeed, the Court in that instance determined that the conduct of US naval exercises just beyond the territorial sea limits of Nicaragua was not, in itself, a violation of the prohibition of the threat to use force which Nicaragua had expressly contended, but rather was consistent with the exercise of maritime freedoms.¹¹⁵

Abuse of Rights

A further criticism of the Freedom of Navigation Program relates to the confrontational nature of such assertions as potentially constituting an “abuse of right” contrary to both Article 300 of the 1982 LOS Convention¹¹⁶ and more generally under “general principles” of international law, of a type recognized under Article 38(1)(c) of the Statute of the International Court of Justice.¹¹⁷

The general principle of “abuse of rights” may reasonably be regarded as having a settled place within the doctrine of sources comprising international law.¹¹⁸ The principle essentially seeks to restrict a State from exercising its rights in a manner which significantly impedes the enjoyment by other States of their own rights or is exercised for an end different from that which the right was created in a manner

that causes injury to another State. The doctrine is an essential one to the functioning of international legal society if the notion of sovereignty is not to be regarded as being absolute. In his separate opinion in the *Corfu Channel* case, Judge Alvarez was able to give judicial expression to his theory of disaggregated sovereignty that he had been advocating for some twenty years. Hence, if sovereignty is to be accepted as a “bundle” of rights and duties, then a method for their reconciliation among States was essential. Premised upon a foundation of “social justice,” Judge Alvarez advanced a theory of limitation on the “absolute nature” of the exercise of untrammelled sovereignty and considered that such an approach was mandated by the authority of the United Nations Charter.¹¹⁹

In the context of navigational freedom, it is unclear how the doctrine of “abuse of rights” might apply in a manner to impinge the assertion of navigational rights prescribed by the 1982 LOS Convention and reflected in customary international law. As has been outlined above, the jurisprudence of the ICJ has provided a framework for testing whether such transits could violate more general principles of international law concerning the prohibition on intervention which is determined on the basis of coercion. This element is singularly lacking in the context of the simple exercise of innocent passage or transit passage provided the criteria for such methods of passage are observed. Ironically, during the drafting of the predecessor Article 38 of the Statute of the Permanent Court of International Justice in 1920, it has been noted that the Italian commissioner to the negotiations expressly considered that the doctrine of “abuse of rights” had its place in the context of ensuring that coastal States actually recognized the principle of freedom of the seas.¹²⁰ It has been observed that the doctrine of “abuse of rights” is based upon conceptions of reasonableness in the exercise of rights.¹²¹ In that regard, it seems to be a remarkable invocation of the doctrine to assert the legality of actions designed to extend the breadth of maritime zones beyond what the 1982 LOS Convention prescribes or to otherwise impose unilateral conditions on the exercise of navigational rights contrary to the terms of the Convention. While positivist theory does not ascribe a formal hierarchy among sources of international law,¹²² principles of good faith (*pacta sunt servanda*) in accepting the balance of rights and duties under the 1982 LOS Convention surely dictate that the exercise of navigational rights in accordance with the tenor of the Convention must be accepted and cannot of themselves be a violation of the principle of “abuse of rights.”

Conclusion

It is possibly an irresistible human impulse that compels States to be extremely protective about the sanctity of their maritime areas. Most assuredly what is “one man’s

distant water is another man's maritime backyard"¹²³ and this has created what one author has termed "psycho-legal boundaries"¹²⁴ in popular perception. Such a sentiment does not accord with modern legal analysis of the nature of the "sovereignty" exercisable in offshore areas, which is of a disaggregated kind and which is necessarily limited by equally compelling rights of navigational freedom. This historical doctrinal struggle between freedom of the seas and protection of sovereign interests has found its most recent incantation within the terms of the 1982 LOS Convention and supporting, indeed largely identical, customary international law.

The 1982 LOS Convention does reflect the necessary balance of coastal and maritime interests throughout its composition. It provides for an extended sovereign range for coastal States through their adjacent maritime areas, yet preserves the necessary freedoms sought by maritime States to traverse these areas, thus achieving the economic and security priorities that were necessary for such States. The entry into force of the 1982 LOS Convention does provide a level of certainty for the realization of goals, yet notwithstanding high hopes¹²⁵ on the normative potential of the Convention, it was never going to be the last word on the reconciliation of interests.¹²⁶ As a result of both the ambiguity within the terms of the Convention and the determination of some States to press claims that are plainly contrary to its terms, it is necessary for those relying upon the integrity of lawful rights of free navigation to demonstrate an equal resolve. The operational aspect of the Freedom of Navigation Program has its place, indeed as has been argued in this paper, its critical place in the dynamic of international legal rule determination. The Program draws considerable support from ICJ jurisprudence and has been successful in ensuring conformity to legal standards.¹²⁷ It is ironic that international law is sometimes derided as being too ephemeral for realist approaches to international relations theory, yet the operational assertion aspect of the Freedom of Navigation Program reflects the very vibrancy of international legal discourse and ultimately is a testament to the power of the law.

Notes

1. Commander Dale Stephens is a Legal Officer in the Royal Australian Navy. The views expressed in this article are those of the author alone and do not necessarily represent the views of the Australian Government, the Australian Defense Force, or the Royal Australian Navy.
2. 1982 United Nations Convention on the Law of the Sea, Montego Bay, December 10, 1982, UN Doc. A/CONF.62/122 (1982), *reprinted in* 21 INTERNATIONAL LEGAL MATERIALS 1261 [hereinafter 1982 LOS Convention].
3. David Kennedy, *When Renewal Repeats: Thinking Against The Box*, 32 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 335, 389 (2000).
4. DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 204 (1987).

5. Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, Apr. 29, 1958, 559 U.N.T.S. 285; Convention on the Continental Shelf, Geneva, Apr. 29, 1958, 499 U.N.T.S. 311; Convention on the High Seas, Geneva, Apr. 29, 1958, 450 U.N.T.S. 82; Convention on the Territorial Sea and Contiguous Zone, Geneva, Apr. 29 1958, 516 U.N.T.S. 205 [hereinafter 1958 Conventions].
6. The United States did not sign the 1982 LOS Convention during the two-year period that it was open for signature (December 10, 1982 – December 9, 1984) and has yet to accede to it. See text *infra* notes 14 and 15.
7. William J. Aceves, *The Freedom of Navigation Program: A Study of the Relationship Between Law & Politics*, 9 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 259, 307 (1996).
8. Australia has an informal policy of asserting lawful rights of navigational freedom which is discussed *infra*.
9. Professor Wolff Heintschel von Heinegg notes “the member States of the European Union, even though heavily dependent upon free sea lanes, have shown but a minor interest in upholding the achievements of UNCLOS. Rather, they have relied upon the United States and the US Navy’s Freedom of Navigation program.” Paper, Current Legal Issues in Maritime Operations, *delivered at* US Naval War College, June 26, 2003 (on file with author).
10. Aceves, *supra* note 7, at 264.
11. *Id.* at 318.
12. *Id.* at 321.
13. As of November 13, 2003. For current status of State parties see a consolidated table of ratifications/accessions, *available at* http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.
14. UN General Assembly Resolution A/RES/48/263 of 17 Aug 1994 and accompanying Annex “Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982,” *reprinted in* 33 INTERNATIONAL LEGAL MATERIALS 1309 (1994).
15. Letter of Transmittal and Letter of Submittal Relating to the UN Convention on the Law of the Sea and “Agreement,” *reprinted in* ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 32–42 (A. R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).
16. UNCLOS III debates extended from 1973 to 1982.
17. Richard J. Grunawalt, *Freedom of Navigation in the Post–Cold War Era*, in NAVIGATIONAL RIGHTS AND FREEDOMS AND THE NEW LAW OF THE SEA 16 (Donald R. Rothwell & Sam Bateman eds., 2000).
18. 1958 Conventions, *supra* note 5.
19. 1982 LOS Convention, *supra* note 2, art. 309
20. See George K. Walker & John E. Noyes, “Words, Words, Words”: *Definitions for the 1982 Law of the Sea Convention*, 32 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 343 (2002) and George K. Walker & John E. Noyes, *Definitions of the 1982 Law of the Sea Convention—Part II*, 33 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 191 (2003).
21. Article 298(1)(b), 1982 LOS Convention, *supra* note 2, permits exclusion of military activities from compulsory procedures entailing binding decisions and there is very little specific concentration on these activities within the 1982 Convention.
22. *Id.*, art. 2.
23. David Kennedy, *Some Reflections on the Role of Sovereignty in the New International Order*, in STATE SOVEREIGNTY: THE CHALLENGE OF A CHANGING WORLD, PROCEEDINGS OF THE 1992 CONFERENCE OF THE CANADIAN COUNCIL OF INTERNATIONAL LAW 236 (1992).

24. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 17–23 (Richard Dana ed., 8th ed. 1866).
25. *S.S. Lotus (France v Turkey)*, 1927 P.C.I.J. (ser. A) No 10.
26. *Id.* From an inter-jurisdictional perspective, see also Judgment of Holmes J. in *American Banana Company, Plff. Err v. United Fruit Company*, 213 US 347, 353; 29 S. Ct. 511 (1909).
27. *The Antelope*, 23 US (10 Wheaton) 66 (1825). See also *Corfu Channel (Merits) (U.K. v. Alb.)*, 1949 I.C.J. 4 (April 19) (individual opinion of Judge Alvarez), at 40–44 [hereinafter *Corfu Channel case*].
28. Alejandro Alvarez, *The New International Law*, 15 *TRANSACTIONS OF THE GROTIUS SOCIETY* 35–51 (1929), whose views were given greater legal import in subsequent decades upon his election to the International Court of Justice.
29. Elisabeth Mann Borgese, *Sovereignty and the Law of the Sea*, in *OCEAN GOVERNANCE: STRATEGIES AND APPROACHES FOR THE 21ST CENTURY* 37 (Thomas A Mensah ed., 1996).
30. HANS Kelsen, *LAW AND PEACE IN INTERNATIONAL RELATIONS* 72 (1942).
31. *Id.*
32. Borgese, *supra* note 29.
33. Individual opinion of Judge Alvarez in *Corfu Channel case*, *supra* note 27, at 43.
34. See Alfred P. Rubin, *Enforcing the Rules of International Law*, 34 *HARVARD INTERNATIONAL LAW JOURNAL* 149 (1993) where the author examines appeals to “naturalist” authority and provides an effective template of analysis in addressing arguments based upon this and the other traditional source category of positivism.
35. KEN BOOTH, *LAW, FORCE AND DIPLOMACY AT SEA* 95 (1985).
36. Article 7, 1982 LOS Convention, *supra* note 2, provides general and somewhat subjective criteria for the drafting of straight baselines.
37. Grunawalt, *supra* note 17, at 17.
38. 1982 LOS Convention, *supra* note 2.
39. See generally *Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116.
40. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *The Law of the Sea: Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea*, (United Nations) (1994) [hereinafter *United Nations Practice of States*].
41. *Id.* at 65.
42. *Id.*
43. *Id.* at 66.
44. *Id.* at 34.
45. Grunawalt, *supra* note 17, at 17.
46. George Galdorisi & Alan Kaufman, *Military Activities in the Exclusive Economic Zone: Prevailing Uncertainty and Defusing Conflict*, 32 *CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL* 253, 282–283 (2002).
47. The United States has protested historic bay claims made by, *inter alia*, Argentina, Australia, Cambodia, Canada, Dominican Republic, India, Italy, Libya, Panama, Russia and Vietnam. See Table A1-4, “Claimed Historic Bays” in *ANNOTATED SUPPLEMENT*, *supra* note 15, at 96.
48. As of 1997, there were 15 States that claimed a territorial sea in excess of 12 nautical miles. See Table A1-6 “The Expansion of Territorial Sea Claims” in *id.* at 100.
49. Donald R. Rothwell, *Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice*, in *NAVIGATIONAL RIGHTS AND FREEDOMS*, *supra* note 17, at 90–91.

50. Yemen, for example, has sought to provide conditions for transit of the Bab-el-Mandeb strait including prior authorization. See United Nations Practice of States, *supra* note 40, at 103.

51. Indonesian Government Regulations Numbers 36 and 37 of 2002 which are titled respectively, “Rights and Obligations of Foreign Vessels When Exercising An Innocent Passage Via the Indonesian Waters” and “Rights and Obligations of Foreign Ships and Aircraft When Exercising Right of Archipelagic Sea Lane Passage Via The Established Archipelagic Sea Lanes” (translated copies of the Indonesian legislation in the author’s files).

52. Article 2 of Regulation 36, *id.*, provides:

(1) All foreign vessels may exercise the right to Innocent Passage via the Territorial Waters and Archipelago Waters for the purpose of passing from a part of the open sea or exclusive economic zone to the other part of the open sea or exclusive economic zone. . . . (2) The exercise of Innocent Passage Right as referred to paragraph (1) shall be carried out only by using the Sea Lanes commonly used for international sailing in compliance to Article 11.

Article 11 details a number of north-south routes only.

53. Article 3 of Regulation 37, *id.*, provides:

(1) The Right of Archipelagic Sea Lane passage . . . can be exercised via a sea lane or via the air above a sea lane which has been described as an archipelagic sea lane for the purpose of the Right of Archipelagic Sea Lane Passage as described in paragraph 11. (2) In accordance with this regulation, the Right of Archipelagic Sea Lane Passage can be exercised on other Indonesian waters after those waters have been established as archipelagic sea lanes which can be used for the purpose of Right of Archipelagic Sea Lane Passage.”

Article 11 of the Regulation designates only three main north-south sea lanes.

54. 1982 LOS Convention, *supra* note 2, art. 52,

55. Resolution MSC.71(69)(adopted on May 19, 1998)—Article 6.5

56. *Id.*, art. 6.7.

57. The second paragraph of the Explanatory Note provides “Although foreign vessels enjoy innocent passage . . . in compliance to the provisions of the United Nations Convention concerning Law of the Sea of 1982, Indonesia reserves the right to determine the sea lanes that may be used by such foreign vessels to exercise innocent passage.”

58. Grunawalt, *supra* note 17, at 15.

59. *Id.*

60. Bernard H. Oxman, Panel on the Law of Ocean Uses: United States Interests in the Law of the Sea Convention, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 167, 168 (1994).

61. Dennis Mandsager, David Grimord & Patricia Battin, *Cooperative Engagement and the Ocean: Policy and Process*, in OCEAN GOVERNANCE, *supra* note 29, at 39.

62. Grunawalt, *supra* note 17, at 11.

63. *Id.* at 17.

64. The RIMPAC biennial military exercise involves over 20,000 individual participants from the Pacific Rim region, including from Australia, Canada, Chile, Japan, South Korea and the United States.

65. For example, the Combined Exercise Agreement for the RIMPAC Exercise includes Exercise ROE that are reviewed by participating legal representatives for ongoing accuracy and are designed to be reflective of the navigational freedoms and obligations existing under the 1982 LOS Convention and at customary law.

66. Grunawalt, *supra* note 17, at 18.

67. *Id.*
68. Article 2(4) of the Charter of the United Nations, San Francisco, June 26, 1945, 1 U.N.T.S. xvi, [hereinafter UN Charter] provides “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.”
69. *Id.*, arts. 2(3) and 2(7).
70. “United States Ocean Policy,” Statement by the President, March 10, 1983:
[T]he Convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law . . . the United States will exercise and assert its navigation and overflight rights and freedoms . . . in a manner that is consistent with the balance of interests reflected in the Convention.
- Reprinted in* 22 INTERNATIONAL LEGAL MATERIALS 464 (1983).
71. *Id.*
72. Grunawalt, *supra* note 17, at 15.
73. *Id.*
74. See generally, Fia Cumming, *The Day Our Boys Stared Down China*, SYDNEY SUN HERALD, Apr. 29, 2001, at 7 and also Tom Allard, *PM Defends “Innocence” Of Ships In China Row*, SYDNEY MORNING HERALD, Apr. 30, 2001, at 5.
75. The Statute of the International Court of Justice is annexed to the UN Charter, *supra* note 68.
76. Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH YEAR BOOK OF INTERNATIONAL LAW 1, 36–37 (1974–75).
77. Military and Paramilitary Activities (Nicar. v. US), 1986 I.C.J. 14 (June 27), at 111 [hereinafter Nicaragua case].
78. *Id.*
79. *Id.*
80. Akehurst, *supra* note 76, at 19.
81. *Id.*
82. North Sea Continental Shelf (FRG v. Den., FRG v. Neth.), 1969 I.C.J. 3 (Feb. 20), at 42–43, [hereinafter North Sea Continental Shelf case].
83. E. D. BROWN, THE INTERNATIONAL LAW OF THE SEA 67–68 (1994) details that late in the UNCLOS III deliberations two amendments were proposed, one explicit on this point and the other more indirect. Both were withdrawn.
84. The 2000 Final Report of the Committee of the International Law Association’s Committee on Formation of Customary (General) International Law does accept that legal “principles” can constitute customary rules but that there needs to be evidence of a high degree of constant and uniform practice (at 8) [hereinafter ILA Report].
85. North Sea Continental Shelf case, *supra* note 82, at 42–43.
86. Akehurst, *supra* note 76, at 21.
87. *Id.* at 24; ILA Report, *supra* note 84, at 27–28.
88. ILA Report, *supra* note 84, at 10.
89. ANTHONY A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88 (1971).
90. LEO GROSS, ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION (Vol.1) 393 (1984) notes that “auto interpretation” is a fact of international discourse and as there exists “no formal, institutionalized procedure to declare or formulate the will of the family of nations” a diffuse mechanism of customary norm assertion, identification and acceptance is a necessary feature of the decentralized character of the international legal order.
91. Akehurst, *supra* note 76, at 53.

92. HCM Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 28 (1991).
93. ILA Report, *supra* note 84, at 5.
94. *Id.* at 28.
95. Prosper Weil, *Towards Relative Normativity in International Law?* 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 413 (1983).
96. Shekhar Ghosh, *The Legal Regime of Innocent Passage Through the Territorial Sea*, 20 INDIAN JOURNAL OF INTERNATIONAL LAW 216, 228 (1980).
97. Convention on the Law of Treaties, Vienna, May 23, 1969, 1155 U.N.T.S. 331, [hereinafter Vienna Convention].
98. *Id.*
99. Rothwell, *supra* note 49, at 80.
100. Ghosh, *supra* note 96, at 238.
101. Rothwell, *supra* note 49, at 75.
102. Vienna Convention, *supra* note 97.
103. Aceves, *supra* note 7.
104. *Id.* at 324.
105. *Id.* at 323.
106. *Id.* at 309.
107. Corfu Channel case, *supra* note 27, at 30.
108. *Id.* at 33–35.
109. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 287 (1963). See also the general discussion of the competing academic arguments in Dale Stephens, *The Impact of the 1982 Law of the Sea Convention on Peacetime Naval/Military Operations*, 29 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 283, 295–296 (1999).
110. Nicaragua case, *supra* note 77.
111. *Id.* at 107–8.
112. *Id.* See also Stephens, *supra* note 109, at 298–9.
113. *Id.*
114. 1983 LOS Convention, *supra* note 2, art. 25(3).
115. Nicaragua case, *supra* note 77, at 118.
116. 1982 LOS Convention, *supra* note 2. Article 300 mandates that States Parties “. . . shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”
117. Aceves, *supra* note 7, at 323.
118. Michael Byers, *Abuse of Rights: An Old Principle, New Age*, 47 MCGILL LAW JOURNAL 389, 431 (2002). See INTERNATIONAL LAW: CASES AND MATERIALS 129–30 (Lori Damrosch et al. eds., 4th ed. 2001).
119. Individual Opinion of Judge Alvarez, Corfu Channel case, *supra* note 27, at 40.
120. Byers, *supra* note 118, at 402.
121. *Id.* at 411.
122. INTERNATIONAL LAW, *supra* note 118, at 107.
123. BOOTH, *supra* note 35, at 44.
124. *Id.* at 117.
125. GEORGE V. GALDORISI & KEVIN R. VIENNA, BEYOND THE LAW OF THE SEA, NEW DIRECTIONS FOR US OCEANS POLICY 85 (1997).
126. BOOTH, *supra* note 35, at 88.
127. Susan Biniaz, *The US Freedom of Navigation Program*, in THE LAW OF THE SEA: NEW WORLDS, NEW DISCOVERIES 59 (Edward L. Miles & Tullio Treves eds., 1993).

XIII

Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict

Hyun-Soo Kim¹

Coastal States have jurisdiction over the establishment of artificial islands, installations and structures under the 1982 United Nations Convention on the Law of the Sea (hereinafter the LOS Convention).² On the other hand, foreign States enjoy freedom of navigation, freedom of overflight, and freedom to lay submarine cables and pipelines in the exclusive economic zone (EEZ) of coastal States.³ The contemporary issue in the LOS Convention is whether foreign States have the right to conduct military activities, including naval task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering, and weapons testing or firing, in coastal States' EEZs.

It is argued that the foreign States' military and missile exercises may result in violating the LOS Convention in two fundamental respects: first, it will interfere with reasonable use of the high seas by others; and, second, it will violate the prohibition against use of the high seas for non-peaceful purposes.⁴ Thus, foreign States' military activities in the EEZs of coastal States would be inconsistent with the principles and norms governing States' military actions at sea under international conventions or customary law.⁵

As a result, the legal question concerning military activities conducted at sea has become much more complicated since the establishment of the legal regime of the EEZ. This is so mainly because Article 58 of the LOS Convention provides that:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, *and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.* (Emphasis added)

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

During the negotiation of the LOS Convention, agreement on the above italicized wording was perceived as vital by the maritime powers because in their interpretation it implied the legality of naval maneuvers in a coastal State's EEZ as an activity "associated with the operation of ships." The cross-reference to Article 87 is also important to the maritime nations because it lists the major freedoms of the high seas, which include freedom of navigation, freedom of overflight, and freedom to lay submarine cables and pipelines. Accordingly, other States' freedoms in a coastal State's EEZ are the same as those in the high seas. Moreover, the phrase "and other internationally lawful uses of the sea related to these freedoms" implies that other States may enjoy other, unspecified freedoms in a coastal State's EEZ in addition to the ones listed in Article 58.1.

Furthermore, Article 58.2 makes a general cross-reference to Articles 88–115 and other pertinent rules of international law as applying to the EEZ in so far as they are not incompatible with Part V (the EEZ articles) of the LOS Convention. However, some coastal States interpreted Article 58 much more narrowly, arguing that it does not authorize other States to carry out military activities in a coastal State's EEZ, and that the consent of the coastal State is required before conducting such activities.⁶

The question of whether a foreign country has the right to conduct military activities in a coastal State's EEZ was a controversial issue in the negotiations of the text of the LOS Convention and continues to be in State practice.⁷ The maritime powers argued for a broad range of military activities consonant with traditional high seas freedoms. Consequently, they believe the right to naval maneuvers in the EEZ of a coastal State is implied in the freedom of navigation and overflight.⁸ That is, they interpret the phrase "other internationally lawful uses of the sea related to these freedoms" contained in Article 58.1 as including military activities such as

task force maneuvering, flight operations, military exercises, naval surveys, intelligence gathering, and weapons testing and firing.

During the negotiations, some States⁹ expressed strong opposition to military activities¹⁰ in the EEZ because such activities can result in threats to coastal States. However, nowhere in the LOS Convention does it clearly state whether a third State may or may not conduct military activities in the EEZ of a coastal State.¹¹ Absent clarity in the text of the Convention, resolution of this issue is very complicated and controversial. Despite the apparent ambiguity, it seems that the general understanding of the text of the LOS Convention would permit such activities to be conducted.¹²

Nevertheless, due to the ambiguity found in Article 59, and the absence of any compulsory judicial settlement of disputes concerning military activities in the EEZ, it is very difficult to render an authoritative legal interpretation whenever disputes arise. The question of whether naval maneuvers and exercises within a coastal State's EEZ are permissible under international law will remain. No authoritative legal rulings will be made unless actual international disputes arise, and the parties contest the issue before the International Court of Justice or the International Tribunal for the Law of the Sea.

The question concerning the legality of laying military-related submarine cables, pipelines, and/or devices by a State in another State's EEZ is also subject to different interpretations of, and application to, the relevant provisions of the LOS Convention. The coastal State should have the exclusive right in its EEZ to construct, and to authorize and regulate the construction, operation and use of artificial islands, installations and structures for economic purposes, and installations and structures which may interfere with the exercise of the right of the coastal State in the EEZ. Accordingly, other States should obtain consent before laying military-related submarine cables, pipelines, and/or devices in the EEZ of the coastal State. Therefore, the subsequent practices of States will become particularly important for determining the proper interpretation of the LOS Convention's provisions.

Some States argued that "the right of the coastal State to build and to authorize the construction, operation and the use of installations and structures in the EEZ and on the continental shelf is limited only to the categories of such installations and structures as listed in Article 60 of the LOS Convention." Accordingly, they argue that it is not necessary to obtain consent from a coastal State if another State intends to lay military-related submarine cables, pipelines, and/or devices in the EEZ or on the continental shelf of the coastal State. It should be remembered that under Article 58.3 "other" States, when exercising their rights in the EEZ of a coastal State, are required to "have due regard to the rights . . . of the coastal State" in accordance with the provisions of the LOS Convention. If the military activities conducted by a

foreign country in a coastal State's EEZ interfere with the lawful resource rights and interests of that coastal State, the latter's rights and interests would prevail.

In the future, no matter how international disputes concerning the issue of naval maneuvers and other military activities conducted in the EEZ of a coastal State might be generated, or how the disputes are settled, the possibility of this kind of dispute arising could be avoided entirely or at least reduced. This is possible if the State conducting military activities in the coastal State's EEZ shows "reasonable regard" for the interests of that coastal State and other States.¹³ In other words, if the coastal State's rights and interests in relation to exploration, exploitation, conservation and management of natural resources; the establishment and use of artificial islands, installations and structures; marine scientific research; the protection and preservation of the marine environment in its EEZ; and other States' rights and interests in the coastal State's EEZ, such as freedoms of navigation and overflight and freedom to lay submarine cables and pipelines,¹⁴ are not affected by the military activities of another State, these kinds of military activities are permissible under the LOS Convention.

Article 58 of the LOS Convention should be applied in order to answer the question of whether foreign States have the right, under international law, to conduct military-related activities in the coastal State's EEZ. The answer will depend on the nature and purposes of the activities. Because the operation of foreign States' intelligence gathering ships in the coastal States' EEZ involve no use of weapons and explosives, and is thus considered to be "associated with the operation of the ships" in exercising freedom of navigation in the coastal State's EEZ, it can hardly be maintained that the foreign States' activities violate international law. As a matter of law, if "due regard" indeed has been given to the coastal States' rights and interests, the foreign States do have the right to conduct military activities, including weapons testing or firing, in the coastal State's EEZ. Of course, if any live-fire military exercises are to be conducted, the establishment of a warning or exclusion zone to protect others using the affected ocean area is required because engaging in any live-fire military exercises creates dangers.¹⁵

In addition, military intelligence-gathering is different, because it is not related to the construction, operation and the use of installations in the EEZ and also would not normally be published or disseminated. Intelligence-gathering activities can also take many forms, and activities that involve "drilling into the continental shelf, the use of explosives, or the introduction of harmful substances into the marine environment"¹⁶ would certainly implicate concerns of the coastal State and should require its consent.

In light of the foregoing analysis, foreign States are allowed, under international law, to conduct military activities in the EEZ, provided that the coastal State's

resource rights and interests are not affected by the activities, and provided that the purpose for conducting the activities is not to intimidate the coastal States by threat or use of force. However, it would be considered a violation of international law if foreign States were to fire missiles into a water area in the coastal State's EEZ without giving due regard to the resource rights and interests of the coastal States and/or if it affected other States' freedoms of navigation and overflight in the coastal State's EEZ, or had an adverse impact on other States' national interests concerning maintenance of peace and stability in the coastal States' region. In these circumstances, the legality of the foreign State's military activities should be examined in accordance with the relevant provisions of the LOS Convention, in particular Articles 58 and 301, and other international legal instruments, such as the Charter of the United Nations.

In conclusion, even if all States have navigational and overflight rights in the EEZ of a coastal State under the LOS Convention, these rights should be balanced against the resource interests of the coastal State. If there is interference in the coastal State's economic utilization of its EEZ, limitations on the above mentioned freedom of navigation and overflight should be accepted. Conflicts between coastal and maritime States regarding military activities in the EEZ "should be resolved on the basis of equity and in the light of all relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."¹⁷

Notes

1. Captain Hyun-Soo Kim of the Republic of Korea Navy is Professor of International Law and Director of the Law of the Sea Research Division of the Republic of Korea Naval War College.
2. United Nations Convention on the Law of the Sea, Dec.10, 1982, art. 56.1(b), 1833 U.N.T.S.
3. 21 INTERNATIONAL LEGAL MATERIALS 1261 [hereinafter LOS Convention].
3. *Id.*, arts. 58, 87.
4. *Id.*, arts. 301.
5. *Id.*, arts. 56(1).
6. Brazil (1982 declaration), Cape Verde (1997 declaration), India (1995 declaration), Malaysia (1996 declaration), Pakistan (1997 declaration) and Uruguay (1992 declaration). Peru and Iran also prohibit foreign military activities and practices within their EEZ. See Maritime Claims Reference Manual, US Department of Defense 2005.1-M, <http://www.dtic.mil/whs/directives/corres/html/20051m.htm> (Apr. 2, 2001).
7. FRANCISCO ORREGO VICUNA, THE EXCLUSIVE ECONOMIC ZONE: REGIME AND LEGAL NATURE UNDER INTERNATIONAL LAW 309 (1989).
8. Germany (1994), Italy (1995), the Netherlands (1996) and the United Kingdom (1997) declared in general that the Convention does not authorize the coastal states to prohibit military exercises in the EEZ and the rights and jurisdiction of the coastal states in the EEZ do not include the right to require either prior notification or permission for the conducting of military exercises or maneuvers. The text of these declarations is available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

9. Peru, Albania, the Philippines, the Khmer Republic, North Korea, Costa Rica, Ecuador, Pakistan, Portugal, Senegal, Somalia, and Uruguay. UNCLOS III Official Records, Vol. II, 28 (1975).
10. For example, the use of weapons, the launching of aircraft, espionage, interference with coastal communications, and propaganda aimed at the coastal communities.
11. See VICUNA, *supra* note 7, at 108; TULLIO SCOVAZZI, THE EVOLUTION OF INTERNATIONAL LAW OF THE SEA: NEW ISSUES, NEW CHALLENGES 162 (2001).
12. See CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA 303–304 (Jon M. Van Dyke ed., 1985).
13. See LOS Convention, *supra* note 2, art. 56.1.
14. *Id.*, art. 87.
15. Jon M. Van Dyke, *Military Exclusion and Warning Zones on the High Sea*, 15 MARINE POLICY 164 (1991).
16. J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSE TO EXCESSIVE MARITIME CLAIMS 426 (1996).
17. LOS Convention, *supra* note 2, art. 59.

XIV

The Unique and Protected Status of Hospital Ships under the Law of Armed Conflict

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Hospital ships have long enjoyed a unique position under the law of armed conflict. The Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (GWS-Sea)² codifies the protection afforded hospital ships that are serving in an area of hostilities during international armed conflict. In light of the deployment of *USNS Comfort* (T-AH 20) in support of Operation Iraqi Freedom (OIF), the protected status of hospital ships and the maintenance of that status remain important topics. The import is even more pronounced in light of the sweeping changes in technology since the 1949 Geneva Conventions and the modern-day terrorist threat from non-State actors who do not adhere to the law of armed conflict.

Background

Article 22 of GWS-Sea provides that military hospital ships may in no circumstances be attacked or captured, but shall at all times be respected and protected. This provision extends to hospital ships the immunity conferred on the wounded, sick and shipwrecked.³ Article 31 of GWS-Sea provides the means by which parties

to a conflict can verify that hospital ships are abiding by the provisions of GWS-Sea, specifically that they are not committing acts outside their humanitarian duties and harmful to the enemy. It includes the right for parties to the convention to control and search the vessels, direct their movement or even detain them for a limited period of time. Parties may place a commissioner on board to ensure compliance. Additionally, the parties may also arrange for the placement on board of neutral observers who shall verify “the strict observation of the provisions contained in the present Convention.”⁴ Article 34 of GWS-Sea provides that the protection to which hospital ships are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.⁵ In short, hospital ships must refrain from all interference, direct or indirect, in military operations.⁶ In addition, the second paragraph of Article 34 provides that hospital ships may not possess or use a secret code for their wireless or other means of communication. Article 35 of GWS-Sea enumerates conditions that shall not be considered as depriving hospital ships of the protections afforded. Specifically, the arming of crews for the maintenance of order or self-defense, the presence on board of apparatus exclusively intended to facilitate navigation or communication, and the storage of arms taken from the sick and wounded are not actions that deprive a hospital ship of its protected status. Two points that must be reassessed in light of modern conditions are the use of secure communications aboard hospital ships and the arming of hospital ships beyond the traditional “small arms” paradigm.

Secure Communications

Article 34 of GWS-Sea has been viewed as prohibiting the use of secure communications equipment on hospital ships during international armed conflict. Changing technology and the practical necessity to communicate in a manner consistent with present-day technology requires that the prohibition against hospital ships using secure communication equipment be reevaluated. While the intent of the prohibition (the right of belligerents to be assured that hospital ships do not commit “acts harmful to the enemy”) must be maintained, the realities of modern communications and navigation technology should also be taken into consideration. In today’s highly technological environment where most computer and satellite communications are routinely encrypted, hospital ships should be able to utilize these state-of-the-art communications assets in order to operate safely and accomplish their humanitarian mission.⁷ In today’s highly technological operating environment, the ship’s capacity to operate safely and fulfill its humanitarian mission during armed conflict would be degraded without access to encrypted communications.

Since 1949, discussions among international legal authorities have recognized the need to reevaluate the use of secure communications equipment that may violate, or appear to violate, the “secret code” prohibition of Article 34.

As early as the close of the Diplomatic Conference of Geneva of 1949, there was concern among the Conference participants that the ability of hospital ships to communicate efficiently with warships and military aircraft was in jeopardy and needed further study.⁸

More recently, paragraph 171 of the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea⁹ recommends a different rule than Article 34. Paragraph 171 provides: “In order to fulfill most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment. The equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage.”

The Explanation to the San Remo Manual¹⁰ details the reasons for this new rule, that being, the general wording of Article 34 has caused difficulties. The British, during the Falklands War, found that transmitting to or from their hospital ships in the clear risked giving away the positions or planned movements of combat forces. The participants in the San Remo process evidently thought that, since Article 34 jeopardizes the ability of hospital ships to operate effectively, the rule ought to concentrate on the sending of military intelligence and that in order to fulfill their humanitarian mission effectively, hospital ships should be permitted to use secure communication equipment that in modern technology is an integral part of most communications systems.¹¹

Given the interpretation of Article 34 of GWS-Sea, the use of encrypted communications equipment on board hospital ships is problematic. It is clear that as technology has changed, the terms of paragraphs 2 of GWS-Sea Article 34 have been rendered obsolete. Nonetheless, States parties to the GWS-Sea arguably remain bound by its terms. One possible approach to effecting a change in the law is the premise that an accepted change in practice by parties can be utilized to further interpret and modify a treaty. This concept is reflected in Article 31 of the Vienna Convention on the Law of Treaties which states, “any subsequent practice in the application of the treaty which establishes the agreement of the parties” can be used to interpret the meaning of that treaty.¹²

The prohibition against the use of secret codes by hospital ships was born in a bygone era. In the past, use of encrypted communications was not needed for safe navigation or for affecting the humanitarian mission of hospital ships, rather, only for military operational reasons such as receiving or transmitting intelligence. Paragraph 171 of the San Remo Manual, as well as varied other international sources,¹³ illustrate the widespread recognition that, in concert with the necessities of modern technology, the use of encrypted communication equipment on hospital ships in furtherance of their

humanitarian mission and safe navigation should be permitted. Encrypted communication equipment necessary for safe operation and efficient long-range communication is now in common use at sea. The necessity for this now commonplace use of encrypted communications equipment should apply equally to hospital ships, as long as they commit no act harmful to the enemy. The modification of existing treaty obligations between parties envisioned by Article 31 of the Vienna Convention could be applied to the practice of using encrypted communications by hospital ships.

Accordingly, use of encrypted communications should be permissible when its purpose is to facilitate the navigation¹⁴ or communication¹⁵ of the hospital ship in furtherance of its humanitarian mission and is not employed in a manner that is harmful to the enemy. Under such circumstances, the presence and use of such equipment violates neither the spirit nor the intent of GWS-Sea.

Defensive Arming of Hospital Ships

The arming of a hospital ship for self-defense against terrorists and other non-State actors must also be reconsidered. The Geneva Conventions by their own terms only apply during “declared war or any other armed conflict which may arise between two or more of the High Contracting Parties.” Terrorists and their organizations (the threat against which hospital ships are now defending themselves) are not States party to the Geneva Conventions and their tactics (attacking “soft” targets normally protected under the law of armed conflict (LOAC)) fall outside the traditional definition of international armed conflict. Although it is doubtful that the Geneva Conventions apply to self-defense measures that hospital ships may take against terrorist acts, an analysis of this issue is required based on the US policy position reflected in Department of Defense (DoD) Directive 5100.77 (DoD Law of War Program) that US forces will apply the LOAC to all military operations.

GWS-Sea does not directly address weapons systems for hospital ships. As noted above, Article 34 provides that the “protection to which hospital ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.” Article 35 provides that the fact the crews of ships or sick-bays are armed for the maintenance of order, for their own defense or that of the sick and wounded, shall not be considered as depriving hospital ships or sick-bays of vessels of their protected status.

While it is clear that crews of hospital ships may be armed for their own defense, GWS-Sea does not specify what are permissible weapons. The accepted norm for arming medical personnel ashore has been “small arms” such as pistols and rifles, and that norm was equally applied to the crews of hospital ships. Traditionally, it was thought that light, portable, individual weapons such as pistols and rifles were

all that was needed for personal defense on hospital ships.¹⁶ Crew-served weapons, such as machine guns, were presumed to go beyond the need for use in self-defense, given that belligerents were bound to not attack hospital ships under the provisions of GWS-Sea.

However, current-day suicide-style terrorist tactics against so-called “soft-targets,” exemplified by the attacks on the World Trade Center, the Pentagon, US embassies in Africa, and on the *USS Cole*, demonstrate the need for enhanced defenses against individuals or groups not complying with the law of armed conflict. In this new threat environment, where large-scale, deadly, and indiscriminate attacks on civilians and civilian objects have become part of terrorists’ *modus operandi*, mounted machine guns have become by necessity standard elements of defensive force protection systems for naval vessels. Such weapons have offensive capability when installed on helicopters and small boats, but in the context of being mounted on board a large, relatively slow and not-easily-maneuverable ship, any offensive capability is greatly diminished (if not lost altogether) and the weapon becomes purely defensive in nature. To that end, hospital ships should be able to employ machine guns and similar armament solely for self-defense against terrorists and other persons who do not recognize or follow the law of armed conflict. This interpretation is consistent with the long-standing US Army interpretation of self-defense permissible under Article 22 of Geneva Convention I¹⁷ (pertaining to wounded and sick forces on land) as “personal defense and for the protection of the wounded and sick under their charge against marauders and other persons violating the law of war.”¹⁸ Such weapons would not be used in an offensive capacity nor against lawful belligerents complying with the law of armed conflict and who are exercising their rights under GWS-Sea. It is only as a result of the emergent threat to targets traditionally protected under the law of armed conflict (such as a hospital ship) that it is necessary to enhance the defensive measures available to these protected platforms. Although the Geneva Conventions would not likely apply, the use of machine guns in self-defense against non-State actors is consistent with Articles 34 and 35 of GWS-Sea, as well as the underlying principles governing the protected status of hospital ships under the law of armed conflict.

Notes

1. Captain Grimord is the Deputy Assistant Judge Advocate General, Navy International and Operational Law Division. Major Riggs is the Head of the Operational Law Branch, Navy International and Operational Law Division. The opinions expressed herein are those of the authors and do not necessarily reflect those of the Department of the Navy or Department of Defense.

2. Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, Aug. 12, 1949, 75 U.N.T.S. 85, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 222 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
3. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 157 (Jean S. Pictet et. al. eds., 1960).
4. This provision dates from the draft Additional Articles Relating to the Condition of the Wounded in War, Geneva, Oct. 21, 1868, which did not enter into force. *See* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 369 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004). The wording was only somewhat modified to take its present form as found in GWS-Sea.
5. Additionally, hospital ships must be warned of the offending action and given a reasonable amount of time to comply before their protected status can be violated. Harmful acts are, for example, transporting combatants or arms, transmitting military intelligence via radio or providing cover for a warship.
6. COMMENTARY, *supra* note 3, at 191.
7. A secondary, but important additional consideration, is the current standards relating to the privacy of medical records pursuant to the requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Standards for Privacy of Individually Identifiable Health Information (“Privacy Rule”) establishes, for the first time, a set of national standards for the protection of certain health information. The US Department of Health and Human Services issued the Privacy Rule to implement the requirement of HIPAA. The Privacy Rule standards address the use and disclosure of individuals’ health information—called “protected health information” by organizations subject to the Privacy Rule—called “covered entities,” as well as standards for individuals’ privacy rights to understand and control how their health information is used.
8. *See* Resolution 6 of the Diplomatic Conference of Geneva, 1949, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 4, at 691.
9. Sponsored by the International Committee of the Red Cross (ICRC) and completed in June 1994 by a group of legal scholars and naval practitioners, the Manual serves as a contemporary restatement of international law applicable to armed conflict at sea and comprehensively addresses the subject for the first time since the 1913 Oxford Manual. In most respects, the Manual correctly states the law and, with the exception of some portions, is consistent with US practice. The San Remo Manual is *reprinted in* Schindler & Toman, *supra* note 4, at 1153. The 1913 Oxford Manual is *reprinted in id.* at 1123.
10. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 236–37 (Louise Doswald-Beck ed., 1995).
11. It is important to note that the San Remo Manual recommendation is consistent with the rules regarding the use of secure communications equipment by medical aircraft and vehicles. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, June 8, 1977, art. 28, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 422. Unlike hospital ships, other medical transports are not restricted from using encryption equipment. They are, however, bound by the same requirement that they commit no acts harmful to the enemy. International law permits medical aircraft and vehicles to possess and use encrypted communications equipment “solely to facilitate navigation, communications, or identification.” Hospital ships have the same or similar navigation, communication, and identification requirements as medical transport aircraft.

12. Convention on the Law of Treaties, Vienna, May 22, 1969, 1155 U.N.T.S. 331.
13. In THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT, the German equivalent to the US ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (A. R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies), Professor Heintschel von Heinegg recommends that the San Remo rule be adopted. International Committee of the Red Cross (ICRC) senior legal advisor Louise Doswald-Beck notes that the San Remo Manual's recommended change in Article 34 derives from the British experience during the Falklands conflict. See Louise Doswald-Beck, *San Remo Manual on International Law*, 309 INTERNATIONAL REVIEW OF THE RED CROSS 583, 593 (1995). Phillip Eberlin, Merchant Navy and Maritime Security Officer, ICRC, in his modern Commentary to the 1923 Hague Rules for the Control of Radio in Time of War, argues that rules should be clarified to allow the use of modern communications equipment by hospital ships.
14. Military Global Positioning System (GPS) is encrypted.
15. Video teleconferencing of real time medical procedures and other patient information would by necessity have to be encrypted in order to utilize the necessary satellite communications.
16. See COMMENTARY, *supra* note 3, at 194. See also ANNOTATED SUPPLEMENT, *supra* note 13, at ¶ 8.2.3.
17. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 Aug. 1949, 75 U.N.T.S. 31, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 197.
18. US Army Field Manual 27-10 ¶ 223b (1956).

PART IV

**THE FUTURE OF LAW IN WAR:
DIFFERENT APPLICATION
OR DIFFERENT RULES?**

XV

Legal and Tactical Dilemmas Inherent in Fighting Terror: Experience of the Israeli Army in Jenin and Bethlehem (April–May 2002)

Alan Baker¹

Introduction

One of the major challenges presently facing the international community is the extent to which the laws of armed conflict, as understood today, may be applied to conflict scenarios of today's world realities, and specifically in a situation in which the international community finds itself in a concerted global campaign against terror.² In other words, is the law of armed conflict, as articulated, understood and applied in what we have grown up to understand to be today's world, capable of guiding States in the fight against today's terror?

When faced with legal issues arising in a "standard situation" of armed conflict—whether in regard to ground operations, air or naval targeting operations—the legal parameters are usually relatively clear. This is because the laws and customs of war and international humanitarian law—which constitute integral components of international law—set out the norms and standards by which

States are obligated to act and armed forces required to operate. The term “standard situation” assumes that the clearly-defined armed forces of the two sides—usually belonging to States—confront one another on a defined or clear battlefield, and engage in such actions as are necessary to conduct the armed conflict.

The term “armed conflict,” as understood up to now, thus serves as a code-word or form of algebra, indicative of a series of norms, rules, articles, principles, rights, prohibitions and requirements, obligating the forces, and the governments sending them, in guiding the military conduct of the war. The assumption is, in most cases, that armed forces—on both sides—will indeed conduct themselves in accordance with such rules and norms. More important, the assumption is also that each relies on the fact that the other will indeed observe the requisite norms and rules. That is, perhaps, the underlying assumption of any logical and viable armed conflict situation in today’s international legal system.

This is a somewhat idealistic and even simplistic description of any normal legal system—both civil and international—in which the individual components within the system are able to live and conduct themselves within the orderly parameters of the system, on the assumption that the other components of the system will comport themselves in the same way. Departure from such parameters and behavior in violation of such a normative system undermines and threatens the very existence of the system and raises the question as to the need to review the system, adjust the norms or adapt them to meet the new realities or developments.

Thus, as long as the conduct of armed conflict includes the accepted components and follows the accepted normative guidelines—whether from the point of view of the parties to the conflict or as to the modes of behavior and the theater of war—then the “standard situation” prevails. To conduct a war in Iraq against the Iraqi army, or in Afghanistan against organized armed forces fighting for the regime in Afghanistan, or even a collective NATO action against organized Serbian military forces in Yugoslavia, would generally fall within the parameters of the “standard situation,” even if, during the course of such conflict, the necessity might arise to deal with exceptional occurrences, including terror, violations of the law of armed conflict, war crimes, crimes against humanity and other irregular events.

Today’s international community is faced with a dichotomy, because what is currently known and acknowledged to be “the law of armed conflict,” by which States and their armed forces are supposed to function, developed over the years, and was set out in clear terms in the late 1800’s and early 1900’s,³ amended in the post-Second World War years (1949),⁴ and again in the 1974–7 timeframe⁵ in the background of the Vietnam War, and has since not really been touched (apart from specific instruments to reflect the need for protection of cultural property in time of war,⁶ as well as instruments reflecting technological developments in conventional⁷

and non-conventional warfare.⁸⁾ However, it is questionable whether the law of armed conflict as it exists today, incorporating as it does, international humanitarian law, is really capable of providing legal as well as operative answers to the practical issues arising out of today's struggle, directed not necessarily against a defined and identifiable armed force of a State, but rather against terror as a concept and a phenomenon. This may not necessarily be confined to the territory of a particular State, and certainly, by its very definition, is not necessarily directed against military forces of a State in the reality of today.

"Global War on Terror"

While the concept of "war" or even "global war" may be clear, while the phenomenon of "terror" is rapidly and ever-increasingly becoming understood to more and more countries, and while the challenge placed before the international community may be patently evident, the concept of a "global war on terror" in international legal terms nevertheless raises innumerable questions. Can such a war legally take place? Is the existing law of armed conflict, based as it is on well-defined criteria, capable of identifying, categorizing and recognizing the needs and components of such a war, especially when considering that the parties to the conflict are not necessarily States, and the geographical boundaries of the war are not necessarily within the confines of one State? Similarly, as the tactics and the weapons needed to deal with terror are not necessarily the same as those used *vis-a-vis* a conventional enemy in a standard war, are the law of armed conflict and international humanitarian law equipped to deal with this?

To fight against Iraqi or Afghani armed forces, or in Israel's case, a Syrian or Lebanese army, is theoretically and legally relatively simple, and can indeed be addressed in terms of the existing rules and sanctions of warfare. But as has become evident, to fight against al Qaeda, Hamas, Hezbollah, Islamic Jihad and Fedayeen Saddam, and other such nebulous and vague terrorist opponents, may be quite a different kettle of fish for a number of very significant reasons:

- They openly and demonstratively shun and violate the accepted norms and rules of armed conflict. Their very *modus operandi* and inherent functioning philosophy are built, and rely as a tactical assumption, on the fact that the organized, western armies—as well as the society that they defend—will indeed abide by the norms and rules. Thus, they utilize civilian locations, homes, churches, mosques, medical facilities and ambulances, and schools as shields for placement and concealing of weapons, bases, headquarters, laboratories and training camps, assuming that an organized army of a State obligated by the law of armed conflict and international humanitarian law, will not risk causing collateral civilian damage

to civilians and civilian facilities by responding and targeting such blatantly civilian objects, and will not wish to be accused of using disproportionate military force against groups of apparently unorganized civilians.

- They target civilians as a distinct, deliberate and concerted means to demoralize and terrorize the civil population and to pressure organized governments and society. This is their tactical *modus operandi*.

- In so doing, they knowingly violate, and operate outside the law of armed conflict and thereby place themselves outside the bounds of any accepted norms entitling them to protection or combatant status and privileges. This in itself undermines and abuses the basic assumption of an organized society, functioning pursuant to legal norms and obligations—both in its civil legal system as well part of its international conventional and customary obligations.

- Such *modus operandi* undermines and abuses the humanitarian sense of responsibility and obligation instilled into the psyche of soldiers, whether in military training and academies, or whether stemming from the basic sense of decency and morality emanating from home, childhood, family values, education, Sunday school, church, synagogue and upbringing.

- This phenomenon produces the impossible and paradoxical predicament in which, on the one hand, organized armed forces or police forces of the State are obliged to function within the limitations of the law and the accepted norms, while on the other hand, the terrorists openly, deliberately and proudly violate such law and norms. This is perhaps the essence of terror.

Israel Defense Force (IDF) Case Studies—Jenin and Bethlehem

Following are two pertinent case studies and other examples from Israel's own experiences of the blatant abuse by Palestinian terrorists of the laws and accepted norms of armed conflict, and the sometimes tragic moral and humanitarian dilemma that this creates in the psyche of the field commanders, soldiers, as well as the political leadership that holds responsibility. This is no less of a dilemma for the judiciary that is often called upon to judge the actions of the government or the armed forces during real time conflict.

These studies are also indicative of a certain element of hypocrisy and dual standards within parts of the international community, which to a certain extent would, for reasons of political interest, appear to prefer to sit on the side and rush to judgment rather than seek to unify efforts and engage in the fight against terror.

The situations covered are:

- The IDF operation, between April 3–10, 2002 to overcome an armed and fortified terrorist infrastructure in the Jenin refugee camp and to prevent its conversion into a training and exit base for suicide terrorism.
- The 37-day occupation and violation by Palestinian terrorists of one of the holiest sites to Christianity—the Church of the Nativity in Bethlehem, between April 2 and May 8, 2002.
- Other pertinent examples.

Scenario

The refugee camp in Jenin occupied a corner of the south-eastern outskirts of the town. The refugee institutions (schools, clinics and related facilities) were under the administration and responsibility of the United Nations Refugee and Works Agency (UNRWA), within the general context of the United Nations' responsibility for handling refugees.⁹

In fact, this camp (together with others in the West Bank and the Gaza Strip) had, for a considerable period of time prior to the hostilities in the area, been over-run and controlled by the Hamas and Islamic Jihad terror organizations, which had established a series of terror training centers, explosive-producing laboratories, suicide-belt sewing workshops, metal-working facilities and foundries to produce, cut and sharpen metal shavings, ball bearings, screws, bolts and related objects comprising part of the "suicide kits," and related equipment. This despite clear United Nations requirements prohibiting use of refugee camps under its administration for military purposes, including a call by the United Nations Secretary-General establishing that "[r]efugee camps should be free of any military presence or military equipment, including weapons and munitions . . . the neutrality and the humanitarian nature of the camps must be meticulously kept,"¹⁰ and despite a series of very clear obligations undertaken by the Palestinian Authority, and witnessed by the international community, to dismantle terrorist infrastructure and arrest and prosecute those involved in all forms of terror.¹¹

The schools and kindergarten facilities—ostensibly under the administration of the United Nations—were used to train terrorists, replete with posters covering the classrooms and nurseries depicting the shaheeds ("martyrs") suicide bombers, as folk heroes, and as role-models for the children. Children's playing cards depicted the faces of these "folk-heroes."¹²

The presence and control by the various terror organizations was no secret and was not done in a covert manner.¹³ Jenin was proudly dubbed in the Palestinian propaganda apparatus as "capital of the shaheeds," having produced over 20 successful suicide bombings within Israel.

During the course of the armed activities prior to the entry of IDF into the camp, the terror organizations had evacuated the majority of the refugees, sending them into the town of Jenin, and proceeded to booby-trap buildings within the camp, disperse small mines connected to piping along the narrow streets, and booby-trap doorknobs, toys, household utensils and other objects.

The Legal Situation

In strict legal terms, in the context of the law of armed conflict, the Jenin refugee camp had been turned into a military objective/location, which openly and clearly served and rendered an effective contribution to the Palestinian unique form of military action. The camp served as a purveyor and chief supply depot and training base for acts of terror—predominantly suicide bombings both during the days immediately preceding the military action, as well as having supplied an unknown number of potential future suicide bombers, the neutralization of which was clearly required in order to gain military, psychological and tactical advantage.¹⁴

Despite the obvious factors pointing to this case as being a classical “military objective” by all criteria of international humanitarian law, and despite the lack of any doubt that might place it within the “grey area” set out in paragraph 3 of Article 52 of Additional Protocol I,¹⁵ the legal and moral dilemma facing the IDF was whether indeed to treat it as such, or whether, in light of its overall denomination as a refugee camp and the protected status to which such camps are entitled, nevertheless to grant it immunity as a civilian object.

The Action

In reaching the decision to enter the camp, consideration was given to the fact that most of the civilian population had been sent out of the camp and virtually all remaining persons were presumed to be terrorists (about 200). The extent of the fortification of the camp as ascertained through intelligence and aerial photographs, subsequently became evident from a series of statements made by the Palestinian terrorists who fought in the camp:

- “The fighting forces, from all the factions in the camp, have been equipped with explosive belts and grenades.”¹⁶
- “Our fighters are blowing themselves up in front of the soldiers and planting explosive devices on the roads.”¹⁷
- “We had more than 50 houses booby-trapped around the camp. We chose old and empty buildings and the houses of men who were wanted by Israel because we knew the soldiers would search for them. . . .” “We cut off lengths of main water pipes and packed them with explosives and nails. Then we placed

them about four meters apart throughout the houses—in cupboards, under sinks, and in sofas. . . .” “They were lured there. We all stopped shooting and the women went out to tell the soldiers that we had run out of bullets and were leaving. The women alerted the fighters as the soldiers reached the booby-trapped area.”¹⁸

However, due to the cramped nature of the building, the narrow and winding streets and the possibility that some refugees remained, or were nevertheless being held as hostages or human shields within the camp, a tactical decision was made not to use artillery, tank or aerial targeting, with their concomitant potential of indiscriminate or collateral damage to civilian life and property, but rather to send ground forces into the camp and to move from house to house with a view to limiting offensive action strictly to armed terrorists and to military objectives.

During the action, IDF forces suffered heavy casualties as a result of the booby-trapped buildings and suicide bombers who exploded themselves within and close to buildings that collapsed on to the soldiers. 23 soldiers were killed (10 in one house). This required introduction of heavier equipment to enable acquisition of control by widening the narrow routes for heavier military equipment. By the end of the action, a total of 59 terrorists had been killed in the entire action—most of whom were discovered together with their weapons.

International Reaction

In the immediate aftermath of the action, Israel and its forces were widely accused of carrying out a “massacre” and of killing hundreds of innocent civilians. Senior United Nations officials came out with televised statements describing the situation in such terms as “horrific” and “morally repugnant.”¹⁹ The United Nations Human Rights Commission, Amnesty International, Human Rights Watch and others determined that Israel had committed war crimes.²⁰

Pursuant to consultations between the Israeli leadership and the US Administration, Israel agreed to the sending of a team composed of US military experts, under United Nations auspices, to ascertain the situation on the ground and to view the terrorist infrastructure prevalent in the camp and the terrorist activity that rendered the camp a military target. The Secretary-General of United Nations, through the United Nations Security Council, converted this into a fully-fledged international fact-finding commission²¹ with the substantive components of an international tribunal (headed by the ex-President of Finland who had previously served as an Under-Secretary-General of the United Nations, ex-President of the International Committee of the Red Cross, ex-United Nations High Commissioner for Refugees and a US retired general, with legal, political and technical staff and advisers) with an extended mandate to interview witnesses and officers, to attribute blame, place

responsibility, and to extend the commission to cover other areas of the West Bank territory, rather than the initial intention to analyze the Jenin situation.

The Government of Israel objected to the extended format of the Fact Finding Commission. The team was subsequently disbanded by the Secretary-General, especially after it became publicly and internationally evident that no massacre had been perpetrated; that those killed were terrorists; and that the camp had become a military object to all intents and purposes. The Secretary-General subsequently issued a report acknowledging the misuse by the Palestinian terrorists of the civilian infrastructure in the camp and affirming the fact that only 59 Palestinians had been killed, specifically rejecting the claim by Palestinian leaders and echoed by several senior United Nations and other international personalities that 300–500 had been massacred.²²

IDF Operation in Bethlehem—the Church of the Nativity (2 April–8 May 2002)

Scenario

The Church of the Nativity is one of the major holy sites for all of Christianity (Catholics, Greek Orthodox, Armenians and others). It is the site at which the nativity scene, as described in the New Testament, took place. It is the site of the annual pilgrimage by all the various Christian sects and general public to Bethlehem to conduct the Christmas Eve midnight mass. It contains a complex of chapels and altars serving the various Christian sects.²³

The Abuse

On April 2, 2002, some 220 armed Palestinian terrorists belonging to the Hamas, Palestinian Islamic Jihad, Popular Front for the Liberation of Palestine and the Al Aksa Martyrs group, entered the main church areas with weapons and ammunition, barricaded themselves inside the Church, used the roofs and balconies as shooting positions, held priests, monks, religious officials serving in the church, as well as ordinary citizens who happened to be there, as hostages and human shields, and abused holy artifacts (chalices, baptismal fonts, altars, carpets, tapestries).²⁴

The Moral, Military and Legal Dilemma

Clearly this was not merely a simple combat situation of the use of a municipal or local holy site for shielding hostile action, or the occupation by enemy forces of a neighborhood church or mosque (which in itself is no less a violation of the laws of armed conflict). This situation centered within one of the world's major holy sites revered by over one billion Christians throughout the world, from as far afield as Italy, Spain, Greece, Russia, Germany, Scandinavia, Central and South America, the Philippines, South Korea, Ireland, and Africa. The Holy See immediately issued

stern warnings to Israel to ensure the integrity and holiness of the site.²⁵ Whether any admonishment was passed on to the Palestinian authorities for encouraging and supporting the terrorist overrunning of the site, is unknown.

The moral and tactical dilemma faced by the IDF and the Israeli government was clear. Both Article 4 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict,²⁶ as well as Article 53 of Additional Protocol I to the Geneva Conventions,²⁷ regarding the protection of cultural objects and places of worship, prohibit acts of hostility against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and prohibit the use of such objects in support of the military effort and as objects of reprisals. While indeed the immunity of the site, as a place of worship, had been clearly prejudiced and abused, and technically and legally the circumstances (including the intense publicity worldwide and concomitant psychological warfare) were such that there existed an imperative element of military necessity as a criterion for active intervention against those who had occupied the Church, in order to bring the stand-off to an end, could Israel, the Jewish State, of all countries, nevertheless afford to bring upon itself the ire of all of Christendom by responding to this provocation and undertaking any military action that might prejudice the status of or damage the Church?

Action by the Israeli Army

Apart from responding to sniper fire emanating from the terrorists using the Church as cover (sometimes leading to casualties), and pressuring the terrorists through the withholding of supplies, the matter was handled by negotiation between officers comprising a special negotiating unit, and a group of priests held hostage within the Church who negotiated—principally by cell phone—on behalf of the terrorists.

Ultimately, after twenty five days, an agreement was negotiated, with assistance from such foreign actors as the Italian government and the Vatican, whereby the majority of those occupying the Church were able to leave for their homes in the vicinity of Bethlehem, while twenty six were transferred to Gaza and thirteen wanted men were deported to a number of European countries that undertook to host them in restrictive conditions.

Additional Examples of Abuse

While the case studies analyzed above clearly exemplify on a large scale the *modus operandi* of terror organizations in utilizing and abusing accepted civil and humanitarian norms and institutions, other less grandiose, but no less serious examples of such abuses abound on a daily basis, all of which involve some manner of element

shielding and perfidy in violation of, and abuse by, the terrorists of central components of international humanitarian law norms and instruments. The use of civilian ambulances for carrying arms and terrorists under recognized humanitarian emblems; the use of mosques, churches and schools as storage space for weapons and explosives; travel by wanted terrorists in vehicles accompanied by children and family; location of offices and headquarters in dense residential areas; and the use of innocent vehicles to approach and attack roadblocks are illustrative examples.

The techniques developed for rendering the weapons of terrorism more lethal cynically and blatantly utilize normal civilian objects in order to enhance the extent of the damage caused by a suicide bomber. For instance, sharpened metal shavings, rusty screws and ball bearings are added to the “concoction” of explosive materials and placed into the suicide belts in order to increase the damage to internal organs and to increase infection, germ impregnation and other such inventive and horrific means—all clearly in violation of basic humanitarian principles.

Legal Dilemma

The irony of the situation is that despite the fact that the accepted rationale of such terms as “combatant,” “legitimate target,” “defended locality” and “human shield,” as well as the situation of “military necessity,” have become blurred in the context of a war on terror, the international community is still geared to somewhat anachronistic conceptions of armed conflict between States, and presumes to judge those fighting terror by such criteria and standards. Hence, in some cases, reaction in international fora to actions by Israel and the United States (as well as others) takes a more critical view of the actions taken *against* the terrorists, while overlooking the terrorist acts that have themselves given rise to the need for response. This dilemma is compounded by a situation in the various international political fora in which automatic majority resolutions are adopted condemning those that fight terror while unwittingly (or deliberately) giving encouragement to those supporting and perpetrating the terror, instilling them with the confidence that their actions are indeed achieving their intended political ends.

Conclusion

Clearly, the international community must come to terms with the existence of modern-day terror and the need to deal with it both militarily and legally. To do so requires addressing the motivation driving terror—especially the religious, educational and social element inherent in the vast rate of incitement feeding terror from the youngest of ages. This might require some reevaluation of human rights concepts

in the context of dealing with terrorist infrastructures. It also requires addressing the capability of terrorists to act, including dealing with those States and organizations that finance, support, encourage, and glorify terror, and thereby grant the terrorists the green light to continue with their activities.

Here the international community in its most developed and organized form—the United Nations and its related organs, as well as the major human rights and international humanitarian law bodies—political, social, as well as legal—must re-evaluate the way in which they address the problem. Rather than systematically criticize those that fight terror through allowing a parliamentary majority to dictate resolutions that are viewed as encouraging terrorism, this community must tackle that aspect of the problem and not allow itself to be abused and utilized for furthering terror.

Both from the case studies and situations examined in this article, it is clear that the international community is presently experiencing a period of acute change and evolution in what has up to now been accepted morality and behavior in armed conflict and warfare. The enemy is different—in nature, definition, geography, *modus operandi*, and in terms of morality and responsibility.

In order to be capable of dealing with international terror, and overcoming it, the civilized world is going to have to adapt legal concepts and modes of behavior to the exigencies and challenges that modern-day terrorism poses.

Tragically,—so far—this is being achieved by a system of default and trial and error. Sometimes it works and lives are spared. Sometimes it does not. Practically, the trial and error is taking on the character of a new mode of international practice that is obliging the international community to adjust itself accordingly and to consider reviewing the old rules with a view to their possible rejuvenation in light of today's terrorism. The question remains if the international community is capable and prepared to take up the challenge.

Time—and terror—will tell.

Notes

1. Ambassador Alan Baker is Legal Adviser to the Israel Ministry of Foreign Affairs. The views expressed in this article are solely those of the author.
2. See the statement by President George W. Bush to the United Nations General Assembly, Nov. 10, 2001, available at <http://www.whitehouse.gov/news/releases/2001/11/print/20011110-3.html>.
3. Convention (IV) Respecting the Laws and Customs of War on Land and Annexed Regulations, The Hague, Oct. 18, 1907, reprinted in DOCUMENTS ON THE LAWS OF WAR 69 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
4. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, Aug. 12 1949, 75 U.N.T.S. 31, reprinted in *id.* at 197; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, Aug. 12, 1949, 75 U.N.T.S. 85, reprinted in *id.* at 222; Convention Relative to the

Treatment of Prisoners of War, Geneva, Aug. 12, 1949, 75 U.N.T.S. 135, *reprinted in id.* at 244; Convention Relative to the Protection of Civilians Persons in Time of War, Geneva, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in id.* at 301.

5. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereinafter Additional Protocol I), Geneva, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in id.* at 422; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter Additional Protocol II), Geneva, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in id.* at 483.

6. Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, 249 U.N.T.S. 240, *reprinted in id.* at 373; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Mar. 26, 1999, *reprinted in id.* at 700.

7. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and Protocols I–III thereto, Geneva, Oct. 10, 1980, *reprinted in id.* at 520 and Protocol IV, Oct. 13, 1995, *reprinted in id.* at 535.

8. Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, London, Moscow & Washington, Apr. 10, 1972, 1015 U.N.T.S. 164.

9. See United Nations General Assembly Resolution 302(IV), Dec. 8, 1949, on Assistance to the Palestinian Refugees, and subsequent annual resolutions adopted by the United Nations General Assembly renewing and extending the functions and mandate of UNRWA.

10. United Nations Doc. A/52/871, Apr. 1998. See also United Nations Security Council Resolutions 1208 (1988) and 1296 (2000) emphasizing the importance of safeguarding the civil and humanitarian nature of refugee camps, prohibiting the arming of refugee centers in “situations where refugees and internally displaced persons are . . . vulnerable to infiltration by armed elements and where such situations may constitute a threat to international peace and security.”

11. 1995 Israeli-Palestinian Interim Agreement and related documentation.

12. See for instance BBC report by correspondent Barbara Plett, August 7, 2002: “In vivid reds, blues and yellows, in murals and sweeping Arabic script, the graffiti celebrates suicide bombers as heroes, along with other Palestinian fighters. Their attacks are called martyrdom operations.” Available at <http://news.bbc.co.uk/2/hi/middle-east/2179609.stm>.

13. See Mohammed Dajani, *Palestinian Coverage of Jenin*, PALESTINE ISRAEL JOURNAL, Vol. 10, No. 2, June 2003.

14. Article 52(2) of Additional Protocol I, *supra* note 5, to the 1949 Geneva Conventions, requiring the distinction between civil and military objectives, and limiting attacks to military objectives, described as “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.” Neither Israel nor the United States are party to this Protocol, but several of its central articles are widely viewed as representing customary international law.

15. *Id.*

16. See AL SHARK AL AWSAT (London), Apr. 9, 2002.

17. See AL-HAYAT (London), Apr. 9, 2002.

18. See AL-AHRAM (Cairo), Apr. 19–24, 2002, statements by the main bomb-maker in the town of Jenin. See also additional statements by Palestinian terrorists, quoted in *Anatomy of Anti-*

Israel Incitement: Jenin, World Opinion and the Massacre that Wasn't, Anti-Defamation League, June, 2002.

19. UNRWA press release, Jerusalem/08/2002; *available at* <http://cnn.worldnews.printthis.clickability.com>; BBC, <http://news.bbc.co.uk/2/hi/middle-east/1937387.stm>. See also UNISPAL press release of April 12, 2002 regarding the statement by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Ms. Asma Jahangir, as well as the report of United Nations Commissioner on Human Rights, Mary Robinson to the 58th Session of the Commission on Human Rights, Apr. 15, 2002.

20. Physicians for Human Rights press release Apr. 30, 2002; Amnesty International, Israel and the Occupied Territories Shielded from Scrutiny: IDF Violations in Jenin and Nablus, *available at* <http://web.amnesty.org/library/Index/engMDE151432002>; Human Rights Watch: Jenin: IDF Military Operations, *available at* <http://hrw.org/reports/2002/israel3>.

21. United Nations Security Council Resolution 1405 (2002), dated Apr. 19, 2002.

22. See A/ES-10/186 dated July 30, 2002 at paragraph 56. This report includes a detailed description of the extent of Palestinian fortifications in the refugee camp (paragraphs 45–47) and a description of the battle within the built-up area of the camp (paragraphs 50–52).

23. For a detailed description of the history and structure of the Church of the Nativity, see Qustandi Shomali, Church of the Nativity, *available at* www.unesco.org/archi2000/pdf/shomali.pdf.

24. See ABC, CBC, and BBC reporting, May 1–10, 2002.

25. On April 8, 2002, Vatican spokesman Joaquin Navarro-Valls issued a stern warning to Israel to respect religious sites and stated that the Holy See was following the events with “extreme apprehension.”

26. *Supra* note 6.

27. *Supra* note 5.

XVI

International Humanitarian Law: Should It Be Reaffirmed, Clarified or Developed?

Jean-Philippe Lavoyer¹

Introduction

The aim of this paper is to give an overview of some concrete problems of application of international humanitarian law (IHL) and then to look towards possible future remedies. This will be done from the practice oriented, operational perspective of the International Committee of the Red Cross (ICRC).

The ICRC is mandated by States, in particular through the 1949 Geneva Conventions and their 1977 Additional Protocols, as well as the Statutes of the International Red Cross and Red Crescent Movement, to act as promoter and “guardian” of IHL. This role has many facets. It ranges from the promotion of IHL treaties, the monitoring of respect of IHL by the parties to armed conflicts, the dissemination of IHL, to preparing developments of IHL.²

For the ICRC, an institution present in almost all the “hot spots” of the world, the main challenge is without any doubt the proper application of IHL in today’s armed conflicts. Extensive research into recent armed conflicts has led the ICRC to conclude that, on the whole, the existing rules are adequate enough to deal with today’s armed conflicts. While the main problem is therefore not a lack of rules, this does not mean that the law is perfect. Like any law, IHL is the result of careful and difficult compromises, in this case between considerations of humanity, military necessity and the need

to protect the security of the State. It must be stressed that the ICRC's conclusion on the adequacy of IHL does not mean that it would in any way ignore the many challenges with regards to the application of the law, including those relating to the fight against terrorism, nor the need for IHL to evolve together with the realities of war.

Especially following the attacks of September 11, 2001, questions have been raised about whether IHL was still adequate to respond to today's challenges. The debate has taken various forms. At the beginning of 2003, the Swiss Government and the Harvard Program on Humanitarian Policy and Conflict Research organized an informal expert meeting on contemporary challenges of IHL for a group of States and independent experts, as well as the United Nations and the ICRC. The experts identified a number of topics deserving further examination and clarification. But at the same time they also strongly reaffirmed the validity of current humanitarian law and the necessity to apply it.³ A second meeting was held in June 2004.⁴

The ICRC for its part has taken a number of initiatives that will be mentioned later in this paper, with a view to reaffirm, clarify or develop IHL.

The first part of this paper will highlight some of the current challenges. It will address two aspects: first, some important general obligations under IHL will be recalled, and second, some special challenges linked to the "war on terror" will be briefly discussed.

Challenges Of A General Nature

The more general challenges facing IHL can be subdivided very roughly according to the following timeline: obligations in peacetime, obligations during armed conflict and obligations after the armed conflict. Even if these different phases will often overlap, these distinctions provide a useful analytical framework.

Before addressing some concrete obligations, a word should be said about the importance for States to widely ratify IHL treaties. Indeed, broad ratification of IHL treaties confirms the validity of the rule and, therefore, contributes to improving compliance. A look at the list of the State parties to the main IHL treaties shows that there is still a great effort to be undertaken to promote these treaties in order to obtain—ideally—universal adherence.⁵

Obligations in Peacetime

Many States have still not fully incorporated IHL treaties into their domestic law. It is not sufficient to ratify a treaty; it must also be implemented, i.e., integrated, at the national level. One particularly important area is the adoption of domestic law that makes it possible to prosecute grave breaches and other serious violations of IHL,

based on the principle of universal jurisdiction. There is also a need to adequately protect, *inter alia*, the red cross and red crescent emblems.

The ICRC's Advisory Service on International Humanitarian Law, created pursuant to a proposal by the 26th International Conference of the Red Cross and Red Crescent in 1995, promotes national implementation and gives technical advice to States through its legal advisers based in Geneva and in several field delegations.

Practice in the last few years has shown that "National Committees on IHL" are a very successful tool for the promotion of IHL generally, and for national implementation measures in particular. There are at present more than 70 such inter-ministerial committees.

In order to assist States, the ICRC has put many examples of national legislation on its website.⁶ In addition, it has recently set up an electronic forum open to national committees on IHL. Its aim is to facilitate contacts between national committees and between them and the ICRC. This forum will also allow these committees to engage in an interactive debate.

Another important obligation even in peacetime is the dissemination and teaching of IHL, especially to the armed forces. It should be acknowledged that in recent years, States have undertaken increasing efforts in this respect. At the same time, it is also obvious that much more needs to be done. It is indeed crucial that the principles and rules of IHL are fully incorporated into military courses and training.

Obligations during Armed Conflict

If we look at the different phases—obligations in peacetime, during armed conflict and after the conflict is over—it is clearly respect of IHL during armed conflicts that is the most important challenge. It is on this phase that States should concentrate their efforts, whether or not they are involved in an armed conflict.

In this regard, special attention should be drawn to the obligation not only to respect, but also to "ensure respect" for IHL, as stated in Article 1 common to the 1949 Geneva Conventions and Article 1 of 1977 Additional Protocol I.⁷ A further reference should be made to Article 89 of Additional Protocol I.⁸

However, the notion of "ensuring respect" is vague and its substantive content difficult to grasp. This notion definitely needs to be clarified. This issue will be addressed in more detail in the second part of this paper.

How to apply the law in internal armed conflicts is likely to remain a major challenge in the future, especially in situations where the conflict is exacerbated by religious and ethnic components. Furthermore, particular challenges for respect of IHL are situations where State structures have disintegrated, where chains of command are disrupted, where there is a general breakdown of law and order and where law in general has ceased to be a relevant reference.

In the recent past, a new challenge has emerged, a challenge referred to as “asymmetric warfare,” i.e., situations where due to the availability of high technology weapons in the hands of one of the parties to an armed conflict, there is a clear imbalance between the belligerents. This situation tends to force the adversary that is overwhelmed by the other party to the conflict to use means and methods of warfare that are prohibited under IHL. The implications of this challenge must still be fully examined, but it is likely that in future military operations, this imbalance of power will tend to increase.

Finally, it has to be recognized that all too often, violations of IHL are not due to a lack of knowledge of IHL, but rather to lack of political will to apply that law. The difficult challenge ahead of us will be how to generate political will among the parties to armed conflicts.

Obligations after the Armed Conflict

The prosecution of those suspected to have committed grave breaches of IHL is essential. It is regrettable that States have only rarely applied the principle of universal jurisdiction, although it was established through the Geneva Conventions in 1949.⁹ In the last ten years, important developments have taken place at the international level, with the creation of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, of the mixed tribunals for Sierra Leone and Cambodia, as well as of the International Criminal Court.

As already indicated, the prosecution of war crimes at the national level is linked to the existence of appropriate domestic legislation.

States have additional obligations once the hostilities are over: prisoners of war must be released and repatriated without delay after the cessation of active hostilities.¹⁰ Likewise, civilian internees must be released after the close of hostilities and States shall endeavor to facilitate their repatriation.¹¹

A Special Challenge: The “War on Terror”

The use of force by groups operating transnationally is certainly another key challenge. What legal qualification must be given to terrorist acts committed by transnational groups on the one hand—and to counter-terrorist activities on the other hand? Regrettably, this debate has led to some confusion and uncertainty about IHL. This body of law has been criticized for not being adequate to deal with the “war on terror.” It has to be acknowledged that violent activities by transnational groups raise many difficult challenges—including in the legal field.

It has been asserted that terrorist attacks—including the attacks of September 11, 2001—as well as counter-terrorist activities were part of a global “armed

conflict” in the legal sense, an armed conflict that started years ago and that will continue until the end of terrorist activities. Such a conclusion would have considerable consequences in practice, especially if it is used to justify that States could theoretically strike the transnational group at any time and everywhere—without having to obtain any kind of approval, e.g., from those States on whose territories the military interventions take place.

This debate has shown that there is all too often confusion between *jus in bello* and *jus ad bellum*. This confusion is extremely regrettable, as *jus in bello* (international humanitarian law) has to be separated from the question of the *jus ad bellum* (use of force). The latter is not regulated by IHL, but by the United Nations Charter. It therefore becomes problematic if the notion of armed conflict—a typical IHL notion—is employed to justify the use of force. This justification, as well as brushing aside the traditional law enforcement paradigm, is a risky undertaking that could adversely affect international relations.

The ICRC has done considerable legal research into the question of whether the “war against terror” should be considered *in toto* as an armed conflict in the sense of IHL. For the time being, and based on its long practice of IHL throughout the world, it feels uncomfortable with the notion that the different attacks and reactions thereto are part of a worldwide armed conflict. The “war on terror” does not fit well into the existing categories of armed conflict.

First, in the ICRC’s view, terrorist and counter-terrorist activities cannot be viewed as an *international* armed conflict. Such a conflict can occur only between States.¹² Second, could the “war on terror” be a *non-international* armed conflict?¹³ This would raise a number of questions—when and where does the conflict take place? Who are the parties to the conflict? What is the beginning and what is the end of such conflict? In the view of the ICRC, no satisfactory answers have so far been given to these and other questions.

One fundamental requirement of IHL should be recalled here: during an armed conflict, all the parties to the conflict have the same rights and obligations. To qualify the “war on terror” as an armed conflict would give legitimacy to the transnational groups as a party to the armed conflict, with rights and obligations, an effect that is probably not intended by States. So far in the debate on the “war on terror,” those advocating that it represents an armed conflict have indeed given the impression that this balance no longer exists.

The “war on terror” can very well take the form of an armed conflict in the traditional IHL sense. The military operations that started in Afghanistan on October 7, 2001 were clearly an international armed conflict, and generally understood to be causally related to terrorism. Likewise, no one questioned the qualification of the more recent military campaign in Iraq as an international armed conflict, although its

relationship to terrorism and counter-terrorism has been controversial. In the meantime, the armed conflicts both in Afghanistan and Iraq became non-international in character after the establishment of national authorities.

Terrorism is a complex issue that must be faced with a variety of tools, depending on the results to be achieved. Experience has shown that armed conflict—and IHL—are usually not the best tool to fight terrorism, since force as such will often not lead to the most adequate solution to the problem. Among the more effective tools are international cooperation between States, e.g., sharing of intelligence, police and judicial cooperation, domestic law enforcement, financial investigations and freezing of assets belonging to terrorist groups, and improved control of arms trade and of the proliferation of weapons of mass destruction. Finally, it has to be said that terrorism is unlikely to disappear if its root causes are not properly addressed.

Terrorist acts are foremost crimes that a series of international conventions have criminalized. The further development of international law in this field could be an important contribution to the fight against terrorism.

This question of legal qualification has, of course, implications on the legal status of those captured during the fight against terrorism. This issue will be dealt with only very briefly here.

First, there is a presumption of prisoners of war (POW) status for combatants captured on the battlefield in an international armed conflict.¹⁴ If there is a doubt about that status, competent tribunals as foreseen in the Third Geneva Convention should come into action.¹⁵ To make a blanket determination and to disqualify from the start all captured combatants from POW status raises serious concerns. Rather, a case-by-case examination must take place if there is a doubt whether a person is a POW or not. Therefore, it would be logical to have given POW status to all combatants captured by coalition forces in the war in Afghanistan,¹⁶ unless decided otherwise by competent tribunals.

Such tribunals may have had good reason to recognize POW status for members of the Taliban armed forces, but the situation may be different for members of al Qaeda, even though one would have to take into account the factual situation—what was the exact relationship between al Qaeda and the Taliban? Could acts of members of al Qaeda be attributed to the Taliban armed forces?¹⁷

The extent of legal protection to which “unlawful combatants” are entitled has become an important issue. For the ICRC, IHL provides a comprehensive protection—a person is protected either by the Third Geneva Convention or by the Fourth Geneva Convention. And in addition to IHL, international human rights law and domestic law also provide protection to all those detained. There is no legal vacuum.

If an “unlawful combatant”—or better, “unprivileged belligerent”—is not covered by the Fourth Geneva Convention (e.g., because of his or her nationality¹⁸), there exist additional safeguards, which are common Article 3 to the Geneva Conventions and Article 75 of Additional Protocol I,¹⁹ which is regarded as reflecting customary law, including by the United States.

One further challenge of the “war on terror” is the question of how long “unlawful combatants” may be detained. As already indicated above, both the Third and the Fourth Geneva Conventions contain specific rules about release and repatriation. To detain persons that are protected under IHL not just until the end of hostilities with Afghanistan or with other countries, but until the end of the “war on terror” (that could easily be many years ahead of us) would certainly raise serious difficulties.

To come back to the more general question of how to qualify the “war on terror,” it is suggested that IHL applies to terrorism and counter-terrorism when the level of force used amounts to an armed conflict. This approach limits the scope of IHL to those situations it has been intended to regulate. Acts of terrorism and the responses thereto must therefore be qualified on a case-by-case basis.

IHL is well equipped vis-à-vis terrorist activities committed in the context of an armed conflict. It prohibits all acts commonly considered as “terrorist.” As an example, both Additional Protocols of 1977 prohibit “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”²⁰ IHL also prohibits attacks against the civilian population, be they direct or indiscriminate.²¹ It protects goods that are indispensable to the survival of the civilian population (like food, agricultural areas, livestock, drinking water installations, irrigation works), cultural objects and places of worship, works and installations containing dangerous forces, as well as the natural environment.²² The taking of hostages is prohibited.²³ Furthermore, persons that find themselves in the hands of the enemy enjoy special protection.²⁴

If an attack is carried out by a civilian—who thus becomes an “unlawful combatant”—that person loses his/her protected status as a civilian during the time of the “direct participation” in the hostilities and becomes a legitimate military target. Also, civilians having participated directly in the hostilities can be punished for having done so. IHL is by no means an obstacle to justice, as some commentators have asserted. In fact, quite the opposite is the case.

These are difficult questions, and there is no doubt that more work has to be done on the different facets of the “war on terror.” The dialogue must continue. In the meantime, it is extremely important that persons suspected of having committed terrorist acts are not denied individual basic rights and due process of law.

Any development of IHL at present or in the future should build on existing standards and should not undermine a solid body of law that has taken more than a century to develop.

Having said this, it would seem that the solution to the legal questions around the “war on terror” has to be looked for not so much within IHL, but rather in the *jus ad bellum*, as it appears that the fundamental problem is about the recourse to force. To change the rules in that field would, however, necessitate an amendment of the UN Charter.

The Future of International Humanitarian Law

The second part of this paper deals with challenges in three very specific ways: which parts of IHL need to be either reaffirmed, clarified or developed? This is not supposed to be an exhaustive enumeration, but rather, a suggestion of examples that could provide a useful basis for discussion.

The Need for Reaffirmation of IHL

Generally speaking, existing IHL needs to be vigorously reaffirmed. As already indicated, IHL is not perfect, but its rules represent a careful balance between military imperatives and considerations of humanity. It is of utmost importance to reaffirm in particular the obligations referred to earlier. However, reaffirmation is also urgent in some more specific fields that will be enumerated below.

In the ICRC’s opinion, it is for example important to strongly reaffirm the prohibition of use of poisons or infectious disease in armed conflict. This concern is based on the fact that important and rapid advances are taking place in life sciences and in particular in the field of biotechnology. These advances will benefit humanity in several ways, like the production of new vaccines, of new cures for diseases or for increasing food production. But at the same time, there is a growing risk that the same advances could be used for hostile purposes, to poison or deliberately spread disease. These concerns have increased following the attacks of September 11, 2001 and also by the failure of States to strengthen the 1972 Biological Weapons Convention through the adoption of a compliance monitoring mechanism. The implication of the misuse of biotechnology could be devastating for humanity.

In response to its grave concerns about the capacity of misuse of new advances in biotechnology and the lack of effective controls at an international level, the ICRC launched an Appeal called “Biotechnology, Weapons and Humanity.” The launch took place in Montreux, Switzerland on September 23, 2002, coinciding with an informal meeting of government and independent experts.²⁵ The Appeal is

addressed to the political and military authorities, to the scientific and medical communities, and to the biotechnology and pharmaceutical industries.

The Appeal focuses on the risks, rules and responsibilities in relation to advances in biotechnology being used for poisoning or deliberate spread of disease. It describes the risks by giving concrete examples, calls for the reaffirmation, implementation and reinforcement of the 1925 Geneva Protocol and the 1972 Biological Weapons Convention, and calls on governments, the military, the scientific and medical communities as well as the pharmaceutical and biotechnological industries to ensure that advances in biotechnology are not diverted for use as weapons or for other hostile purposes.

In addition, the Appeal calls for a high-level political declaration, to be adopted at a ministerial level. In January 2004 the ICRC hosted a meeting with States about beginning a process to explore how the international community could adopt such a declaration. At the same time the ICRC has started to reach out to the key target groups, i.e., medical researchers, academic scientists, scientists working in industries, defense scientists, etc.

Another issue that in the view of the ICRC needs to be reaffirmed is the protection of cultural property in situations of armed conflict. It is important that States become party to the relevant instruments, in particular the 1954 Convention and its 1999 Protocol, which further develops the Convention. Recent conflicts have shown that the protection of cultural property is crucial in the sense that through attacking cultural property, the attacker destroys the very heart of a civilization.

Concerning the need to reaffirm the validity of IHL, the 28th International Red Cross and Red Crescent Conference that took place in Geneva from December 2–6, 2003 was an important opportunity. The International Conference is a unique forum to discuss humanitarian issues. It meets every four years. The participants are the States party to the Geneva Conventions, the National Red Cross or Red Crescent Societies, their International Federation and the ICRC.²⁶ This mixture between States and non-State entities is certainly one of the noteworthy features of the International Conference.

The International Conference adopts resolutions that are as such not legally binding. They are nevertheless important documents that are often cited. A good example are the Statutes of the International Red Cross and Red Crescent Movement that describe the tasks of the components of the Movement. They were adopted by consensus and have therefore become a very authoritative statement. IHL is always high on the agenda of the International Conference.

The overall theme of the last International Conference was “Protecting Human Dignity.” It was attended by more than 1,700 delegates from 153 States and 176 National Red Cross or Red Crescent Societies, by the International Federation and

the ICRC. There were also 64 observers. Never before had their participation been so important.

The Conference opened with a welcoming ceremony, followed by plenary meetings and meetings in commissions. In parallel, the Drafting Committee met. At the end of every day, workshops took place that were not part of the official program, but that allowed informal discussions. The participants also had the possibility to make individual or collective pledges. More than 360 such pledges were made, thus reinforcing the impact of the International Conference.

The 27th International Conference in 1999 had adopted a Plan of Action for the Years 2000 to 2003. This time, the Conference adopted two important documents: a Declaration highlighting the continued relevance of IHL and an Agenda for Humanitarian Action.²⁷

The Declaration with the title “Protecting Human Dignity” is a short text of two and a half pages. It reaffirms forcefully what “protecting human dignity” actually means. This makes this document so important. The Declaration contains a clear reaffirmation of States’ obligation to respect and ensure respect for humanitarian law. It calls upon the parties to an armed conflict to make all efforts to reduce incidental, and prevent deliberate injury, death and suffering of civilian populations. The need to protect women and children is highlighted.

The Declaration recalls that IHL is applicable to all situations of armed conflict and foreign occupation. It vigorously condemns all acts or threats of violence aimed at spreading terror among the civilian population. Furthermore, it stresses that all detainees must be treated with humanity and that all persons alleged to have committed crimes must be granted due process of law and fair trial. The Declaration also firmly states that humanitarian workers must be respected and protected in all circumstances. Their independence from political and military actors must be reaffirmed.

Finally, the Declaration commits the participants to reduce the risks and effects of disasters on vulnerable populations, as well as to reduce their vulnerability to disease due to stigma and discrimination, particularly that faced by people living with and affected by HIV/AIDS.

Whereas the Declaration is held in a rather general way, the Agenda for Humanitarian Action is very focused and deals with concrete issues. It comprises an introduction, 4 General Objectives, 15 Final Goals and 64 Proposed Actions. In this paper, only highlights of some aspects of IHL will be provided.

The first two General Objectives deal with humanitarian law: the first is about missing persons, whereas the second deals with weapons.

The title of the first General Objective is “Respect and restore the dignity of persons as a result of armed conflicts or other situations of armed violence and of their

families.” This objective is based on the observations and recommendations of an international conference that the ICRC had organized in Geneva in February 2003. The Agenda for Humanitarian Action covers a broad range of activities linked to missing persons, starting with the prevention of persons becoming missing. The Agenda then recalls that Article 32 of Additional Protocol I of 1977 refers to the right of families to know the fate of their relatives.

In addition, the following topics are covered by the Agenda: the management of information and process files on missing persons; the management of human remains and information about the dead; the support of families of missing persons; and an encouragement of organized armed groups to resolve the problem of missing persons, assist their families and prevent persons from becoming missing.

The title of the second General Objective is “Strengthen the protection of civilians in all situations from the indiscriminate use and effects of weapons and the protection of combatants from unnecessary suffering and prohibited weapons through controls on weapons development, proliferation and use.” The following issues are dealt with in this General Objective:

- *End the suffering caused by antipersonnel mines.* States, in partnership with the components of the Movement, will provide assistance for the care, rehabilitation, social and economic reintegration of war wounded, including mine victims, as well as for mine-awareness and clearance programs. States will also pursue the ultimate goal of the eventual global elimination of antipersonnel mines. They are encouraged to consider adhering to the Ottawa Convention. States party to the Convention should develop in time for the First Review Conference that will take place in Nairobi, national programs for clearance, stockpile destruction, mine awareness and victim assistance consistent with the Convention’s deadlines. The Agenda also reaffirms the ICRC’s lead role in the implementation of the Movement Strategy on Landmines. National societies, in partnership with the ICRC and States, will maintain mine action among their priorities and develop their capacity in this regard.

- *Minimize suffering from weapons that may be extremely injurious or have indiscriminate effects.* The Agenda warmly welcomes the adoption of a new Protocol on “Explosive Remnants of War” to the 1980 Convention on Certain Conventional Weapons, and encourages States to consider its ratification as soon as possible. States are encouraged to adhere to the 1980 Convention and to the extension of the Convention’s scope of application to non-international armed conflict that occurred in 2001. States are also encouraged to consider measures to minimize the risk of explosive ordnance becoming explosive remnants of war and to reduce the human costs of mines other than anti-personnel mines. In addition,

States will rigorously apply the rules on distinction, proportionality and precautions in attack, in order to minimize civilian deaths and injuries resulting from certain munitions, including sub-munitions.

- *Reduce the human suffering resulting from the uncontrolled availability and misuse of weapons.* States should take concrete steps to strengthen controls on arms and ammunition. In particular, States should urgently enhance efforts to prevent the uncontrolled availability and misuse of small arms and light weapons. They should make respect for humanitarian law one of the fundamental criteria on which arms transfer decisions are assessed. States, with the support of the ICRC and national societies, should ensure that armed, police and security forces receive systematic training in international humanitarian law and human rights law, in particular concerning the responsible use of weapons.

- *Protect humanity from poisoning and the deliberate spread of disease.* States party to the 1972 Biological Weapons Convention are encouraged to continue their efforts to reduce the threat posed by biological weapons. They are invited to work with the ICRC to develop a ministerial-level declaration that would support efforts within the framework of the 1972 Biological Weapons Convention, on preventing the hostile use of biological agents as called for in the ICRC Appeal on Biotechnology, Weapons and Humanity. States are encouraged to consider becoming party to the 1925 Gas Protocol, the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention. They are called upon to monitor closely advances in the field of the life sciences, taking practical action to effectively control biological agents that could be put to hostile use, and to improve international cooperation.

- *Ensure the legality of new weapons under international law.* States are urged to establish review procedures to determine the legality of new weapons, means and methods of warfare in accordance with Article 36 of Additional Protocol I of 1977. Reviews should involve a multidisciplinary approach, including military, legal, environmental and health-related considerations. States are encouraged to review with particular scrutiny all new weapons, means and methods of warfare that cause health effects with which medical personnel are unfamiliar.

The titles of the third and fourth General Objectives are “Minimize the impact of disasters through implementation of disaster risk reduction measures and improving preparedness and response mechanisms” and “Reduce the increased vulnerability to diseases arising from stigma and discrimination and from the lack of access to comprehensive prevention, care and treatment.”

This Agenda for Humanitarian Action is the continuation of the Plan of Action that was adopted by the 27th International Conference in 1999.

The ICRC submitted to the 28th International Conference a report “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts” containing its analysis of some major challenges in the field of international humanitarian law.²⁸ This report provides the ICRC’s analysis on the following topics: IHL applicable in international armed conflicts, IHL applicable in non-international armed conflicts, IHL and the fight against terrorism, and how to improve compliance with IHL. Many of the comments made in this paper also appear in that report.

The Need for Clarification of IHL

There are a number of domains where there exist rules of great significance, but that are formulated only in a very general way. This can make it difficult to apply the rule. There may be cases where the law should be further developed in response to such situations. However, this may often not be the most appropriate reaction (risk of difficult and lengthy negotiations, uncertainty about the outcome, possibility that the result undermines existing standards, etc.).

To try to clarify a provision can be more promising, but also raises questions, in particular concerning the concrete form a clarification should take. In some cases, clarification could also lead at a later stage to a normative development. Some examples will be given here, where attempts for clarification are being made.

The basic concepts underlying the rules concerning the conduct of hostilities—in particular the rules on targeting—are phrased in a rather general way and tend to be therefore difficult to apply. The ICRC does not see a need to change the rules, which have kept their relevance since they were incorporated into the 1977 Additional Protocols. However, to clarify the provisions about the definition of a “military objective,” the principle of “proportionality” and the “precautions” to be taken in an attack would render these rules more operational.²⁹ Such clarification would assist the belligerents in their concrete implementation. It would therefore be very useful if a consensus on the interpretation of these notions could be found. Particular attention could be given to “high-tech” warfare, as well as asymmetric warfare. The ICRC plans to conduct consultations in order to clarify if it would be useful to work on these concepts.

Another example is the notion of “direct participation in hostilities”³⁰ that was discussed at the beginning of June 2003 in The Hague, during a meeting jointly organized by the ICRC and the Asser Institute with the participation of renowned IHL experts. This seminar showed the need for clarification of this important concept—especially having in mind the debate about “unlawful combatants.” In 2004 and 2005 the ICRC organized two other expert meetings in The Hague and in

Geneva with a view to find a shared understanding of “direct participation in hostilities.” A further meeting is planned in Geneva later in 2006.

In addition, at the beginning of 2004, the Harvard Program on Humanitarian Policy and Conflict Research launched an important initiative on “Air and Missile Warfare.” Its aim is to clarify and to restate the applicable law and to draft a manual similar to the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which was adopted in June 1994. A series of expert meetings were subsequently held in Lucerne, Heidelberg, Oslo, and Brussels between 2004 and 2006.

The ICRC is also promoting and clarifying mechanisms of IHL implementation. In 2003, it organized five regional expert meetings on how to improve compliance with IHL, with the active participation of government representatives, academics, National Red Cross and Red Crescent Societies and other organizations. These meetings took place in Cairo, Pretoria, Kuala Lumpur, Mexico City and Bruges between April and September 2003.³¹

In particular, the ICRC wanted to make common Article 1 to the Geneva Conventions more operational. What does “ensure respect” mean concretely? What can be expected from States? The regional expert meetings have generated many ideas about how to improve compliance with IHL. During these meetings compliance by organized armed groups was also high on the agenda.

The participants in the regional meetings regretted that existing IHL mechanisms suffer from a lack of use. The International Fact-Finding Commission was considered to have a very promising potential.³² The participants were, however, divided on the question of whether new mechanisms should be created, although some interesting proposals were made (e.g., periodic reporting, individual complaints mechanism, IHL Commission). Participants in all the regional seminars commended the ICRC for its work, including its multi-faceted role as promoter and “guardian” of IHL. It was even proposed that the role of the ICRC should be strengthened, more particularly in non-international armed conflicts.

Concerning common Article 1, the participants in these regional meetings first acknowledged that there was an obligation not to encourage a party to a conflict to violate IHL nor to assist in such violations. It was also recognized that States not involved in an armed conflict had a positive obligation to take action—unilaterally or collectively—against parties to an armed conflict that were committing violations. This would not entail an obligation to obtain specific results, but rather an obligation to take all appropriate measures with a view to ending violations. Concrete examples of possible measures were discussed, such as diplomatic pressure, public denunciation, renouncing exports of weapons that are or could be used to commit violations of IHL, sanctions, and coercive measures, including lawful reprisals or acts of retorsion.³³ The ICRC has continued to work on compliance mechanisms, with an

emphasis on improving respect for IHL in non-international armed conflicts. It should also be noted that at the end of 2005, the European Union adopted “Guidelines on promoting compliance with international humanitarian law,” thus translating the obligation contained in common Article 1 into practice.

Furthermore, the ICRC organized in September 2003—together with the International Institute of Humanitarian Law—that year’s San Remo Round Table on the theme: “International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence.” This event has helped to clarify which legal regime applies in a given situation, in particular IHL and human rights law. This question is particularly relevant with regards to terrorist and counter-terrorist activities.³⁴

In December 2003, the ICRC convened an expert meeting to discuss issues linked to multinational forces. When does IHL apply to them? Is it the law of international armed conflict or internal armed conflicts? Does the law of occupation apply to them? *De jure* or *de facto*?

More generally, the ICRC plans to look into some aspects of the question of occupation, having in mind, in particular, the recent armed conflicts in Afghanistan and Iraq. Besides situations of occupation in the traditional sense, there may be a need to develop a more functional approach in order to ensure the comprehensive protection of persons. The existing rules on occupation are based on effective control of a territory and on the premise that the occupying power will administer the territory. However, practice has shown that there can be situations where a belligerent exercises control only to a limited extent or where persons are captured in territory that is not occupied in the traditional sense.

Future work on clarification of IHL will benefit from the ICRC study on customary IHL. The ICRC was asked to conduct this study by the 26th International Red Cross and Red Crescent Conference in 1995. Work was carried out by the ICRC’s Legal Division and almost 50 national research teams, supervised by a Steering Group. In addition, government and academic experts of great reputation have contributed to the study. The study, which has revealed the great amount of practice in the area of IHL, will be useful *inter alia* for the teaching of IHL, the drafting of military manuals, as well as for international and domestic courts.

The study—published in March 2005—will be particularly useful for non-international armed conflicts. Maybe the most important result of the study is the fact that many rules of the 1977 Additional Protocol I relating to the conduct of hostilities also apply to internal armed conflicts on a customary law basis. Furthermore States not party to certain IHL treaties will be bound by their customary rules. The ICRC intends to update the study as needed. It is hoped that the study,

through the clarification and extension of the applicability of IHL rules, will ultimately improve the protection of war victims in the field.

Another issue where some clarification is needed in the ICRC's view is related to chemical weapons. Both the 1925 Gas Protocol and the 1993 Chemical Weapons Convention prohibit the use of toxic chemicals, including incapacitating agents. However, the Chemical Weapons Convention permits the use of chemical agents for law enforcement. This could lead to the proliferation of incapacitating agents for law enforcement and could eventually undermine the existing prohibition of the use of such agents in warfare. It is therefore important that States clarify the meaning of the Convention's law enforcement exemption.

The important role of national and international tribunals in the interpretation and clarification of IHL should also be mentioned here.

The Need for Development of IHL

Finally, should IHL be further developed? Should a complete revision of the Geneva Conventions or their Additional Protocols take place, or should rules be developed only in certain domains? For its part, the ICRC believes that a complete overhaul of the basic IHL treaties is neither necessary nor realistic. To open up the Geneva Conventions could easily mean opening a Pandora's box, with very uncertain results at the end of the day. There would even be a real risk that the existing standards could be undermined. In any event, it would seem that the current international climate does not allow major normative developments.

However, the ICRC is of the opinion that there is space for developments in certain specific areas of IHL. In that respect, it is useful to review briefly some developments in the last ten years or so. The record is quite impressive when one looks at the list of adopted treaties, which are testimony of a very dynamic development:

- 1993 Chemical Weapons Convention
- 1995 Prohibition of Blinding Laser Weapons (Protocol 4 to the 1980 Convention on Certain Conventional Weapons (CCW))
- 1996 Amendment to Protocol II to the CCW
- 1997 Ottawa Convention prohibiting antipersonnel mines
- 1998 Rome Statute on the International Criminal Court
- 1999 Protocol on the protection of cultural property
- 2000 Optional Protocol strengthening the protection of children in armed conflict
- 2001 Extension of scope of the CCW to non-international armed conflicts
- 2003 New protocol to the 1980 Convention on "Explosive Remnants of War" (Protocol 5).
- 2005 Protocol on the adoption of an Additional Distinctive Emblem.

One very good example of successful work in the field of development of IHL is the question of “explosive remnants of war,” which are a serious consequence of modern armed conflict. Explosive remnants of war are the unexploded and abandoned ordnance that remain after the end of active hostilities. In September 2000, the ICRC launched an initiative to reduce the human suffering caused by these weapons at an expert meeting held in Nyon, Switzerland.³⁵ Following discussions at the 2001 Review Conference, States party to the Certain Conventional Weapons Convention agreed to establish a Group of Governmental Experts to negotiate a new instrument on explosive remnants of war.

The negotiations came to a fruitful conclusion when the State parties on November 28, 2003 adopted—by consensus—a “Protocol on Explosive Remnants of War.”³⁶ This protocol—Protocol 5 to the CCW—is an important development of IHL. It is the first multilateral agreement to address the generic problems of unexploded or abandoned ordnance. While the existing treaties have focused on specific weapons, Protocol 5 applies to all explosive ordnance not covered by earlier instruments.

The new Protocol requires each party to an armed conflict to:

- Clear the explosive remnants of war in territory it controls after the end of active hostilities.
- Provide technical, material and financial assistance to facilitate the removal of unexploded or abandoned ordnance in areas it does not control resulting from its operations. This assistance can be provided directly to the party in control of the territory or through a third party such as the United Nations, nongovernmental organizations or other institutions.
- Record information on the explosive ordnance employed by its armed forces and to share that information with organizations engaged in the clearance of explosive remnants of war or conducting programs to warn civilians of the dangers of these devices.
- Provide warnings to civilians of the dangers in specific areas.
- The protocol also creates future meetings of State parties in which States with explosive remnants of war predating the entry into force of the protocol can seek and receive assistance to help them address the problem.

The obligations to provide technical and material assistance to facilitate the clearance of explosive remnants of war in territory a party does not control and to record and share information on the explosive ordnance used during an armed conflict are of particular importance. Implemented correctly, these obligations can make an important contribution to the rapid removal of explosive remnants of

war, the establishment of risk education programs and the provision of warnings to civilians. The adoption of these rules reflects recognition by the international community that the parties to an armed conflict cannot ignore the post-conflict effects of the weapons they use and that they must take measures before, during and after a conflict to reduce the impact on the civilian population.

The new protocol has, of course, several limitations. Qualifications like “where feasible” were necessary if an agreement was to be concluded by consensus. These qualifications are in part compensated by the protocol’s vast scope of application.

In addition to concluding the new protocol, State parties agreed that the Group of Governmental Experts would continue its work on anti-vehicle mines and cluster sub-munitions in 2004. Work on these issues was indeed conducted in the following years, so far without tangible results.

Concerning cluster bombs and other sub-munitions areas of work included technical features to prevent these weapons from becoming explosive remnants of war, as well as proposals to strengthen the regulations on their use in armed conflict, such as the ICRC proposal for a prohibition on the use of sub-munitions against any military objective located in a civilian area. Such a rule would strengthen the restrictions on targeting contained in 1977 Additional Protocol I.³⁷

The Group of Governmental Experts met regularly in Geneva during 2004, 2005, and 2006. The Review Conference of the CCW will take place at the end of 2006 and will be an important point in time to assess the whole CCW process and lay the ground for future work.

One area that would certainly need further analysis with a view to possible development are the rules that apply in non-international armed conflicts. Those rules are quite rudimentary, at least in treaty form. To put it in a provocative way: has the time come to have a fresh look at the feasibility of a normative development? Such a development would at last narrow down the differences between the law of international and of non-international armed conflict. What was impossible in 1977, would it be possible today? Can the study on customary IHL give some momentum to such an idea? The ICRC for its part has not planned any initiative going into that direction. However, if the general mood were favorable to a normative development, the ICRC would be pleased to carry the idea forward, together with governmental and other experts. In the past, the ICRC has actively contributed to the development of IHL by organizing expert meetings and submitting draft proposals.

The extension of the scope of application of the CCW to non-international armed conflicts in 2001 was relatively easy. A few years before that, the Rome Statute of the International Criminal Court also contributed to narrowing the

difference in treatment between international and internal armed conflicts. These examples seem to indicate that today's atmosphere is quite different from the one that prevailed during the diplomatic conference from 1974 to 1977 that adopted the 1977 Additional Protocols.

One particular issue that the ICRC has been discussing during its regional expert meetings is whether organized armed groups could be given incentives to respect IHL.³⁸ Could this aspect be included in the discussion of a possible new instrument?

Speaking about non-international armed conflicts, the issue of missing persons should be briefly mentioned. If a new instrument was to be developed on internal conflicts, it would be important to include rules related to missing persons—or rather rules that could help prevent persons from becoming missing.³⁹ Indeed, many of the existing rules apply formally only in international armed conflicts.

Finally, how not to mention the adoption, in December 2005, of a new Third Protocol additional to the Geneva Conventions creating a new distinctive emblem, the “Red Crystal?” This emblem will be at the disposal of those States and national societies that have difficulties with the present red cross or red crescent emblems.

The adoption of the additional emblem was the culmination of a long process that started more than ten years ago. In 2000 a draft protocol was elaborated, but due to the deterioration of the situation in the Middle East, its adoption had to be postponed. The 28th International Conference of the Red Cross and Red Crescent in December 2003 adopted an important resolution on this question, following the commitment of the International Red Cross and Red Crescent Movement to achieve, with the support of States, a comprehensive and lasting solution to the question of the emblem. The resolution also requested the Standing Commission to continue to give high priority to securing, as soon as circumstances permit, a comprehensive and lasting solution. The Standing Commission set up a Working Group to continue work on the emblem issue.

Early in 2005 Switzerland, as depositary of the Geneva Conventions and of their Additional Protocols, initiated new consultations. Since they turned out to be positive, Switzerland convened an informal meeting in Geneva on September 12 and 13, 2005 and later on sent out invitations for a Diplomatic Conference, which took place in Geneva from December 5 to 8, 2005. The Diplomatic Conference adopted the text of the Third Additional Protocol that had been drafted in 2000.

The adoption of the additional emblem was facilitated by the conclusion, on November 28, 2005, of a Memorandum of Understanding signed between the Magen David Adom in Israel and the Palestine Red Crescent Society. This Memorandum was signed “in an effort to facilitate the adoption of a Third Protocol Additional to the Geneva Conventions of 1949 and to pave the way for the membership of both societies in the Red Cross and Red Crescent Movement.”

On the same day, the two societies also concluded an operational agreement. This second agreement aims at enhancing their cooperation when carrying out their humanitarian mandate. It should be noted that these two agreements were also signed by the Swiss Minister of Foreign Affairs, as well as by the ICRC, the International Federation of Red Cross and Red Crescent Societies, and the Standing Commission.

It should be made clear that the additional emblem does not in any way replace the existing emblems. Most importantly it does not have any religious, political, ethnic, cultural, or other connotations. It is also recognizable at a distance, as was shown during visibility tests conducted by Switzerland. The new Protocol stipulates that all distinctive emblems shall enjoy the same legal status.

The new emblem does so far not have an official name, but the name “Red Crystal” has been proposed and has received considerable support. This name should be made official in the course of this year. There is no doubt that the additional emblem will promote unity and universality within the International Red Cross and Red Crescent Movement.

Conclusion

Existing IHL on the whole adequately responds to the challenges of protection generated by today’s armed conflicts. It represents a careful balance between military imperatives and the protection of human dignity. It is therefore important to vigorously reaffirm the existing principles and rules of IHL, in peacetime, during armed conflict and after the armed conflict is over.

However, it is at the same time necessary to work on the clarification of certain concepts and provisions in order to make them workable in practice. There are also specific domains where it is desirable that the law be developed, as has already occurred in several respects in the past few years. When developing the law, great care should be taken not to weaken existing standards of protection.

The “war on terror” represents a particularly difficult challenge. Terrorism is a complex issue where IHL can only play a limited role. Other tools like domestic law enforcement and cooperation between States are usually much better suited to reach the desired results. It must be determined which law applies in a given situation. IHL applies when the fight against terrorism amounts to an armed conflict.

IHL itself clearly prohibits acts of terrorism when committed during an armed conflict. Those committing violations of IHL must be punished. “Unlawful combatants” enjoy the protection of IHL, even though they can be punished for the mere participation in the hostilities. Persons in the hands of the adversary must be

treated humanely, which includes due process of law, and benefit from the universally recognized judicial guarantees.

Finally, a clear distinction must be made between *jus ad bellum* and *jus in bello*. To develop the former—through an amendment of the UN Charter—could represent an important contribution to the fight against terrorism. This would help avoid invoking IHL to justify the use of force.

Notes

1. Head of the Legal Division, International Committee of the Red Cross, Geneva. This paper has been revised since its presentation at the conference to incorporate developments since June 2003. This is a slightly revised version of the paper published in 34 Israel Yearbook on Human Rights in 2004.
2. For a detailed description of the role of the ICRC, see Article 5 of the Statutes of the International Red Cross and Red Crescent Movement, that were adopted in 1986 (and amended in 1995) by the States party to the Geneva Conventions and by the ICRC, National Red Cross and Red Crescent Societies and their International Federation.
3. The meeting took place in Ashland, Massachusetts from January 27–29, 2003. Background papers and a summary report of the meeting can be found at www.ihlresearch.org.
4. The meeting took place in Cambridge, Massachusetts from June 25–27, 2004. A summary report of this meeting is available at *id*.
5. Number of State parties to the major IHL treaties (as of March 20, 2006): 1949 Geneva Conventions, 192 States; 1977 Additional Protocol I, 164 States; 1977 Additional Protocol II, 159 States; 1980 Convention on Certain Conventional Weapons, 100 States; 1954 Convention for the protection of cultural property in the event of armed conflict, 114 States; 1972 Biological Weapons Convention, 152 States; 1993 Chemical Weapons Convention, 178 States; 1997 Ottawa Convention, 150 States; 1998 Rome Statute of the International Criminal Court, 100 States.
6. Available at <http://www.icrc.org/ihl-nat>.
7. Common Article 1: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” The same language, substituting “this Protocol” for “the present Convention,” appears in paragraph 1 of Article 1 of Additional Protocol I.
8. “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.” Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 89, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts and Richard Guelff eds., 3d ed. 2000) [hereinafter Additional Protocol I].
9. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 197 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 222 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 244 [hereinafter Third Geneva Convention]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S.

287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 301 [hereinafter Fourth Geneva Convention].

10. Third Geneva Convention, *supra* note 9, art. 118.

11. Fourth Geneva Convention, *supra* note 9, arts. 133 and 134.

12. Article 2 common to the four 1949 Geneva Conventions provides that each convention “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties” as well as to “all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

13. Article 3 common to the four 1949 Geneva Conventions: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: . . .”

14. See Article 45.1 of 1977 Additional Protocol I: “A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Geneva Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power.”

15. Third Geneva Convention, *supra* note 9, art. 5.

16. When Article 4.A(1) is read in conjunction with Article 4.A(3), both of the Third Geneva Convention.

17. According to Article 4 of the Third Geneva Convention, persons entitled to prisoner of war status are “members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps *forming part of such armed forces*” (paragraph A(1)), as well as “members of *other militias* and members of other volunteer corps . . . belonging to a Party to the conflict . . . provided that such militias or volunteer corps . . . fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war” (paragraph A(2)). (Emphasis added.)

18. Fourth Geneva Convention, *supra* note 9, art. 4, para. 2.

19. Article 75 of 1977 Additional Protocol I contains a detailed list of judicial guarantees.

20. Additional Protocol I, *supra* note 8, arts. 51.2 and Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 13.2, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 483 [hereinafter Additional Protocol II].

21. Additional Protocol I, *supra* note 8, arts. 48, 51 and 52.

22. *Id.*, arts. 35.3 and 53–56.

23. See Article 3(1)(b) common to the four Geneva Conventions. See also Fourth Geneva Convention, *supra* note 9, art. 34; Additional Protocol II, *supra* note 20, art. 4.2(c).

24. Prisoners of war are protected by the Third Geneva Convention; civilians, including civilian internees, by the Fourth Geneva Convention. In non-international armed conflicts, persons captured for reasons related to the armed conflict also enjoy special protection.

25. See ICRC Summary Report of the informal meeting of government and independent experts held at Montreux, Switzerland on September 23–24, 2002, *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/STFGZZ/\\$File/Montreux_report.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/STFGZZ/$File/Montreux_report.pdf).

26. At the time of writing, there were 192 State parties to the 1949 Geneva Conventions and 183 recognized National Red Cross or Red Crescent Societies.

27. These documents can be found at <http://www.icrc.org/web/eng/siteeng0.nsf/html/conf28> !Open.

28. Available in English, French and Spanish on the ICRC's website. The English version is available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/\\$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf).
29. Additional Protocol I, *supra* note 8, arts. 52.2, 51.5 and 57.
30. *Id.*, art. 51.3; Additional Protocol II, *supra* note 20, art. 13.3.
31. An analysis of these five regional meetings can be found in Annex 3 to the report submitted by the ICRC to the 28th International Red Cross and Red Crescent Conference, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/\\$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf).
32. Additional Protocol I, *supra* note 8, art. 90. The Commission shall be competent to enquire into grave breaches or other serious violations of the Geneva Conventions or Additional Protocol I and to facilitate, through its good offices, the restoration of an attitude of respect for those treaties.
33. For a detailed description of the regional meetings, see note 31 *supra*.
34. See ICRC report of the Round Table, at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/\\$File/Interplay_other_regimes_Nov_2003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/$File/Interplay_other_regimes_Nov_2003.pdf).
35. See ICRC Report of the Expert Meeting on Explosive Remnants of War (Sept. 18–19, 2000) and the ICRC report Cluster Bombs and Landmines in Kosovo: Explosive Remnants of War (2001).
36. The text of the protocol is available on the ICRC website at <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/c110d2926d08a892c1256e280056b275?OpenDocument>.
37. Additional Protocol I, *supra* note 8, art. 48 *et seq.*
38. Under IHL armed groups have the same rights and obligations as the State. However, under domestic law members of organized armed groups can be punished for the mere fact of having participated in the hostilities, even if they have fully respected their IHL obligations. Incentives could include amnesties for the participation in hostilities (but not for violations of IHL), mitigation of punishment, or combatant immunity by analogy with international armed conflicts.
39. For concrete proposals, see International Conference of Governmental and Non-Governmental Experts, Conference Acts (Feb 19–21, 2003), available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5M9LDV/\\$FILE/TheMissing_Conf_03.2003_EN_90.pdf?OpenElement](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5M9LDV/$FILE/TheMissing_Conf_03.2003_EN_90.pdf?OpenElement). This international conference was organized by the ICRC.

XVII

Enforcing the Law

John F. Murphy¹

The focus of this panel, as well as that of most panels in this conference, is on the *jus in bello*, the law regulating the way armed force is applied. It is perhaps worth noting parenthetically, however, that participants at the Dumbarton Oaks and San Francisco conferences determined that, unlike the Covenant of the League of Nations, the United Nations Charter should outlaw war.² As the major hostilities phase of the conflict in Iraq dramatically demonstrates, we are a long way from achieving the goal of the founders of the United Nations. Indeed, it is highly unlikely that we shall ever reach the goal of outlawing armed conflict. Nonetheless, as recent events also demonstrate, there is an overriding need for people of good will to recommit themselves to the pursuit of this goal.

During this conference most of the discussion and debate has revolved around four international armed conflicts of the 1990s and the early 2000s: the Gulf War, Kosovo, Afghanistan, and Iraq. But it is important to remember that international armed conflict is not the primary kind of armed conflict today, but rather it is internal or civil wars. In the main, these wars are being fought with no concern for the *jus in bello* and are largely ignored by the great powers. This is especially the case in Africa. A major reason for the failure to deal effectively with these wars is lack of political will. But it appears clear as well that the *jus in bello* applicable to internal wars—Common Article 3 of the Geneva Conventions of 1949 and Protocol II—is inadequate; yet efforts to improve this law are strongly resisted.

Jean-Philippe Lavoyer suggests in his paper that the *jus in bello* we currently have is not the major problem but the failure to implement it in good faith. This seems clear, but as the debates at this conference have clearly shown, there are at the least major differences as to interpretation of the existing rules, even among the leading experts of Western developed States, much less on a worldwide basis. Ideally these ambiguities would be resolved by international negotiations to revise the existing law. However, as Dr. Lavoyer also notes in his paper, the risk of this route is that it might open Pandora's box and result in a much less rather than a more satisfactory *jus in bello*. This is also a problem with the *jus ad bellum*, the law of resort to the use of force, and efforts to revise the UN Charter. There are now 191 member States of the United Nations, and more and more of them, especially those from the so-called "third-world," are demanding to be heard.³

Under a rule of law paradigm,⁴ courts would play a major role in resolving ambiguities in the law of armed conflict and in prosecuting and punishing the perpetrators of war crimes.⁵ Courts have usually not played such a role, but this may be changing. As Ambassador Alan Baker reported in his presentation, Israel's application and enforcement of the law of armed conflict is supervised by its supreme court. In his presentation, Colonel Charles Garraway noted that, especially in Europe, there is an overlap between international human rights law and the law of armed conflict. This overlap was dramatically demonstrated by the claim brought before the European Court of Human Rights by several Yugoslav nationals that various North Atlantic Treaty Organization countries had violated the European Convention on Human Rights and Fundamental Freedoms (European Convention) by their 1999 intervention in Kosovo. The European Court never reached the merits of the challenge because it decided that the applicants did not come within the jurisdiction of the respondent States for purposes of Article 1 of the European Convention, which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."⁶ Nonetheless, the stage had been set for possible future challenges to the use of armed force based on international human rights law. As suggested by Colonel Garraway, at the least, there would seem to be considerable need to ensure that international human rights law and the law of armed conflict are compatible.

At this writing there are in existence three international criminal tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). Although both the ICTY and the ICTR have had their share of criticism, it is generally agreed that the two tribunals, especially the ICTY, have played a significant role in interpreting and applying the law of armed conflict. Moreover,

while the International Criminal Court has not yet started any proceedings, it may well do likewise, especially with respect to the *jus in bello* of internal wars. According to media reports, the ICC's first cases are likely to arise from situations in the Congo and other conflicts in Africa.

Also, as Professor Adam Roberts suggested during this conference, the ICC may stimulate national law enforcement authorities and courts to do a better job of enforcing the law of armed conflict. The failure to prosecute such crimes as genocide, war crimes and crimes against humanity at the national level has often been cited as a primary reason for establishing the International Criminal Court.

Belgium has recently learned how difficult it can be for a national legal system to prosecute these crimes. Belgium had legislation⁷ so wide-ranging in scope that it resulted in Belgian courts being flooded with cases based on universal jurisdiction and the Belgian government being involved in heated international controversies. One of these controversies, over a Belgian arrest warrant issued for the foreign minister of the Congo, resulted in a ruling by the International Court of Justice that Belgium had violated international law because the foreign minister enjoyed immunity from judicial process.⁸ As a result of this ruling, Belgium had to drop prosecutions of officials such as Israel's Prime Minister Ariel Sharon, who had been the object of a criminal complaint for war crimes filed by survivors of the 1982 massacres at the Sabra and Shatila refugee camps in Beirut, Lebanon. In the Sharon case, however, Belgium's highest court ruled that Sharon could be tried for war crimes after he leaves office and that his co-defendant, Amos Yaron, the former Israeli Army chief of staff, could be tried before Belgian courts.⁹ Later, as the US war in Iraq was getting under way, representatives of seven Iraqi families who claimed they had lost loved ones in the 1991 Gulf War, filed a criminal complaint naming former US President George H.W. Bush, as well as Secretary of State Colin Powell (Chairman of the Joint Chiefs of Staff in 1991), Vice-President Dick Cheney (Secretary of Defense in 1991) and Norman Schwarzkopf, the general in charge of US forces during Operation Desert Storm.¹⁰ This apparently was the last straw, and resulted in such strong protest from the United States that Belgium modified its legislation to allow cases to be brought only if the victim or suspect is a Belgian citizen or long-term resident at the time of the alleged crime. The revised law also guarantees diplomatic immunity for world leaders and other government officials visiting Belgium.¹¹

Recently, an important alternative to prosecution before an international criminal tribunal or a national court has begun to emerge, the so-called "hybrid court." In Kosovo, East Timor, and Sierra Leone, the United Nations has established hybrid courts, consisting of international and national elements, to prosecute atrocities committed in these regions. Also, on May 13, 2003, after long and tortuous

negotiations, the UN General Assembly approved an agreement with the government of Cambodia to establish a hybrid court to prosecute some of the perpetrators of the crimes committed by the Khmer Rouge during the mid-to-late 1970s.¹²

Although these hybrid courts have taken a variety of forms, perhaps the archetype is the hybrid court for Sierra Leone.¹³ Under the court's statute, there is a three judge trial chamber and a five judge appellate chamber. The government of Sierra Leone appoints one judge to the trial chamber and the UN secretary-general appoints two. The appellate chamber has two judges picked by the government of Sierra Leone and three selected by the secretary-general. Further, after consultation with the government of Sierra Leone, the secretary-general appoints the prosecutor and registrar. The court has jurisdiction over serious violations of the law of armed conflict as well as certain crimes committed since November 30, 1996 under the national law of Sierra Leone. The judges of the court as well as its prosecutor (an American national) and its registrar (a British national) have been selected, and accused persons have been brought before the court. The court has also indicted Charles Taylor, at the time the president of Liberia but now enjoying asylum in Nigeria.

The arrangements for the hybrid court for Cambodia contrast sharply with those for Sierra Leone and reflect five years of difficult negotiations between the United Nations and the Cambodian government. Under the agreement approved by the General Assembly in May 2003, Extraordinary Chambers will be established in Cambodian courts under Cambodian law but will have subject matter jurisdiction over several offenses defined under international law as well as certain offenses proscribed by Cambodian law when committed between April 16, 1975 and January 6, 1979. In the two-tier system of the Extraordinary Chambers, a majority of the judges must be Cambodian while the remaining judges are to be appointed by the Cambodian government based upon nominations by the Secretary-General. The vote of at least one UN-nominated judge is required for a judgment of guilt.¹⁴ It remains to be seen whether these arrangements will be both effective and just.

The hybrid courts in Kosovo and East Timor present still another model of adjudication. Under a UN Security Council resolution adopted at the conclusion of the 1999 conflict between the North Atlantic Treaty Organization and Yugoslavia,¹⁵ Kosovo has been governed by the United Nations Mission in Kosovo (UNMIK), and this arrangement will continue until Kosovo's final status is determined. As the interim authority, UNMIK has established local courts that prosecute both ordinary offenses and certain violations of the law of armed conflict. Foreign lawyers have been appointed as prosecutors, and a majority of the judges are foreign nationals.

Shortly after the people of East Timor voted for independence from Indonesia in August 1999, the United Nations Transitional Administration in East

Timor (UNTAET) began its administration of East Timor, which lasted until the territory became an independent State on May 20, 2002.¹⁶ During this time UNTAET established a hybrid court system in East Timor. An UNTAET regulation adopted in March 2000 created special panels of the District Court of Dili (the capital of East Timor) and granted them exclusive jurisdiction over three international crimes—genocide, war crimes and crimes against humanity—as well as crimes of torture, murder, and crimes of sexual violence when committed between January 1, 1999 and October 25, 1999. In 2001 ten defendants were convicted of crimes against humanity.

After its independence, the United Nations established a Mission of Support in East Timor (UNMISSET) to assist the new nation for two years. As UNTAET had previously, UNMISSET administered the Serious Crimes Unit of the East Timorese judicial system.

In the aftermath of the US-led forces' attack on Iraq, there has been substantial debate about how to bring to justice, to the extent possible, the 55 most-wanted, as well as other high ranking officials, of the Saddam Hussein regime. The US government has expressed its preference for prosecutions in reconstituted Iraqi courts, operating with foreign assistance.¹⁷ Many commentators, including leading human rights organizations, have called for the establishment of either an international or hybrid court established under UN auspices, arguing that, after decades of subservience to Ba'ath Party rule, Iraqi courts are not capable of dispensing impartial justice.¹⁸ Other commentators, including this writer, have supported the US position on the ground, among others, that the creation of an impartial and professionally competent judiciary in Iraq is not a mission impossible and that, in any event, the ultimate decision on the kind of tribunal or tribunals to try the leaders of the Hussein regime should be made by the new government of Iraq.¹⁹ As of this writing no final decision has been made on this issue. The US government has indicated that it plans to prosecute Iraqis in US military tribunals for war crimes committed against US forces during the 2003 Iraq war, and perhaps also for war crimes against Americans committed during the 1991 Persian Gulf War.

A primary issue arising out of the "war on terrorism" is the appropriate legal regime to apply to efforts to control terrorism after the horrific events of September 11, 2001. Prior to September 11 international terrorism had been treated primarily as a criminal law matter. Under this regime the perpetrators of terrorist crimes were prosecuted as common criminals in the civilian courts. After September 11 the situation is much less clear, as the debate over the proposed use of military commissions for prosecuting Taliban and Al Qaeda members detained at Guantanamo Bay, Cuba demonstrates. The case against Zacarias Moussaoui, a

confessed member of al Qaeda and the only person so far charged in a US court with conspiring in the terrorist attacks of September 11, is especially salient. Because the US government refused to allow Moussaoui to interview captured members of al Qaeda who might provide useful information for his defense on the ground that it would endanger national security, a federal district court judge has ruled that the government cannot seek the death penalty against him and that prosecutors would be barred at trial from trying to link him in any way to the September 11 attacks. Although the government has appealed this ruling, there is speculation at this writing that, if it loses the appeal, the government may transfer Moussaoui to a military commission, possibly at the US military base in Guantanamo Bay.²⁰

Should such a transfer occur, it would likely be met with a firestorm of protest, “given the obvious implication that civilian courts—because of the procedural rights they provide to criminal defendants—are no longer capable of dealing with defendants accused of terrorism.”²¹

Notes

1. John Murphy is a Professor of Law at Villanova University School of Law.
2. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICHIGAN LAW REVIEW 1620 (1984).
3. An example of the kind of problems that the increasing assertiveness of developing countries can cause is the collapse of the “Doha round” trade negotiations at Cancun, Mexico, due in no small part to the resistance of the developing countries to demands by the United States and the European Union that the negotiations add foreign investment, competition, and transparency to their agenda.
4. For an excellent discussion of the rule of law in the US constitutional order, see Richard H. Fallon, *The “Rule of Law” as a Concept in Constitutional Discourse*, 97 COLUMBIA LAW REVIEW 1 (1997). For a skeptical view, see Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE LAW JOURNAL 561 (1977).
5. The United States and other countries have traditionally employed military commissions during times of war to try violations of the law of armed conflict. However, President George W. Bush’s Military Order of November 13, 2001 -Detention, Treatment, and Trial of Certain Noncitizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001), asserting the authority to use military commissions to try members of al Qaeda and other persons involved in acts of international terrorism against the United States, unleashed a storm of protest. Many of the protests contended that such trials should take place in US courts rather than in military commissions, especially in light of the severely limited due process rights contained in the President’s order. See e.g., Harold Hongju Koh, *The Case Against Military Commissions*, 26 AMERICAN JOURNAL OF INTERNATIONAL LAW 337 (2002). For a general discussion and debate on this issue, see Daryl A. Mundis, *Agora: Military Commissions*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 320 (2002). Although the US Department of Defense subsequently issued regulations substantially augmenting due process rights of an accused, Military Commission Order No. 1 (Department of Defense Mar. 21, 2002), at <http://defenselink.Mil/news/mar2002/d200020321ord.Pdf>, many critics still found the protections to be inadequate. See e.g., Laura A.

- Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 SOUTHERN CALIFORNIA LAW REVIEW 1407 (2002). Foreign governments reportedly were unwilling to extradite terror suspects to the United States unless they received assurances that they would be tried before civilian courts. See Sam Dillon and Donald G. McNeil, Jr., *Spain Sets Hurdle for Extraditions*, NEW YORK TIMES, Nov. 24, 2001, at A1, col. 1.
6. See Bankovic et al. v. Belgium et al., No 52207/99 (Eur. Ct. H.R. 12, Dec. 2001) (Grand Chamber).
7. Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (Act of June 16, 1993), reproduced in 38 INTERNATIONAL LEGAL MATERIALS 918 (1999).
8. See Arrest Warrant of 11 April 2000 (Congo v. Belg.) (I.C.J. Feb. 14, 2002), reprinted in 41 INTERNATIONAL LEGAL MATERIALS 536 (2002).
9. See Marlise Simons, *Sharon Faces Belgian Trial After Term Ends*, NEW YORK TIMES, Feb. 13, 2003, at A12, col. 1.
10. See Dan Bilefsky, *Bushes on Trial in Belgium? It is Unlikely, but Brussels Still Worries*, WALL STREET JOURNAL, Mar. 28, 2003, at A11, col. 3.
11. See *Belgium Scales Back Its War Crimes Law Under US Pressure*, NEW YORK TIMES, Aug. 2, 2003, at A6, col. 1.
12. Press Release, General Assembly Approves Draft Agreement Between UN, Cambodia on Khmer Rouge Trials, UN Doc. GA/10135 (May 13, 2003).
13. For discussion and analysis of the Sierra Leone tribunal, see e.g., Celina Schocken, *The Special Court for Sierra Leone*, 20 BERKELEY JOURNAL OF INTERNATIONAL LAW 436 (2002).
14. Details of the arrangement are set forth in Report of the Secretary-General on Khmer Rouge Trials, UN Doc. A/57/769 (Mar. 31, 2003).
15. S.C. Res. 1244, UN Doc.S/RES/1244 (1999).
16. This account of the establishment of the hybrid court system in East Timor is based largely on LOUIS HENKIN ET AL., HUMAN RIGHTS: 2003 SUPPLEMENT 91.
17. See *No Nuremberg: America says Iraq should try its own thugs*, THE ECONOMIST, Apr. 12, 2003, at 28.
18. See e.g., Human Rights Watch, Letter to US Regarding the Creation of a Criminal Tribunal for Iraq (Apr. 15, 2003), available at <http://www.hrw.org/press/2003/04/iraqtribunal041503ltr.htm>.
19. For my views, see John F. Murphy, *Administering Justice in Iraq: Considerations*, THE LEGAL INTELLIGENCER, May 12, 2003, at 7. Compare Jose' E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE JOURNAL OF INTERNATIONAL LAW 365, 460 (1999) (arguing that "local criminal processes may make valuable contributions to the preservation of collective memory, victim mollification, and the national and international rule of law" and that "absent local prosecutions, mass violence may reemerge" in a country recently scourged by mass atrocity).
20. See Philip Sheldon, *Government Lawyers Fear 9/11 Ruling Threatens Al Qaeda Cases*, NEW YORK TIMES, Oct. 4, 2003, at A11, col. 3.
21. *Id.*

XVIII

Protection of Cultural Property: The Legal Aspects

Jan Hladík¹

Dr. Jean-Philippe Lavoyer's paper, *Should International Humanitarian Law be Reaffirmed, Clarified or Developed?*,² provides an excellent overview of international humanitarian law and touches briefly on the need for the protection of cultural property during armed conflict.

The principal law of war treaty provisions protecting cultural property are found in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention)³; its First Protocol,⁴ also adopted in 1954; and its Second Protocol of 1999.⁵ The following substantive areas of the Hague Convention and the Second Protocol are, in my view, those that have the primary impact on the conduct of military operations:

- Safeguarding of cultural property (Article 3 of the Hague Convention and Article 5 of the Second Protocol);
- Respect for cultural property (Article 4 of the Hague Convention and Articles 6, 7 and 8 of the Second Protocol);
- Military measures (Articles 7 and 25 of the Hague Convention);
- Protection of cultural property in occupied territory (Article 5 of the Hague Convention and Article 9 of the Second Protocol);

- Special protection under the Hague Convention and enhanced protection under the Second Protocol (essentially Chapter II of the Hague Convention and Chapter 3 of the Second Protocol); and
- Sanctions (Article 28 of the Hague Convention and Chapter 4 of the Second Protocol).

Safeguarding of Cultural Property

Under Article 3, States party to the Hague Convention are to undertake the safeguarding of cultural property through the taking of appropriate measures in peacetime against the foreseeable effect of armed conflict. Such measures only address property situated in the territory of the State concerned. The Convention does not define the nature or scope of the measures; it leaves those questions to the discretion of the State in question. This omission is remedied by Article 5 of the Second Protocol, which provides for the following preparatory peacetime measures: the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property. It should be stressed that the safeguarding measures may prove helpful not only in case of armed conflict but also in the event of natural disaster or as a highly effective weapon against theft.

Respect for Cultural Property

Article 4 of the Convention provides for respect for cultural property. Such respect consists in two mutually corresponding obligations of State parties: (1) to refrain from the use of cultural property and its immediate surroundings or of the appliances for its protection, situated both within their own territories as well as within the territory of other State parties, for purposes likely to expose it to destruction or damage in the event of armed conflict; and (2) to refrain from any act of hostility directed against such property.⁶

The next paragraph of Article 4 introduces a very important exception to this rule —the waiver of these obligations when required by military necessity.⁷ This waiver is referred to in Article 4.2, which is applicable to generally protected cultural property as defined in Article 1 of the Convention. It permits a waiver only where required by “imperative military necessity.” Withdrawal of immunity is addressed in Article 11.2 for cultural property under special protection (a subject to

which I will return). Such withdrawal is permitted only in “exceptional cases of unavoidable military necessity.”

Article 4.2 of the Convention permits the State parties to use cultural property and its immediate surroundings or of the appliances in use for its protection, situated within their own territory as well as within the territory of other States parties, for military purposes and to conduct hostilities against such property “where military necessity imperatively requires such a waiver.” The concept of “unavoidable military necessity” in Article 11.2 has stricter conditions for its application to cultural property under special protection. In particular, the immunity may be withdrawn “only for such time as that necessity continues.” Article 11.2 further provides that “Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger.” Finally, whenever circumstances permit, an advance warning is to be provided to the opposing party a reasonable time in advance of the withdrawal of immunity.

Regrettably, the lack of a universally accepted definition of military necessity leaves room for a loose interpretation of these provisions or even their abuse. Three interesting definitions illustrate this issue. The first is from the Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber. Known as the Lieber Code, they were promulgated as General Orders No. 100 by President Lincoln on April 24, 1863. They provide, in part, as follows:

Article 14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Article 15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

Article 16. Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but

disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessary difficult.”⁸

The second definition comes from Morris Greenspan who defined military necessity as “the right to apply that amount and kind of force which is necessary to compel the submission of the enemy with the least possible expenditure of time, life and money.”⁹ Finally, Black’s Law Dictionary states that military necessity is “[a] principle of warfare that permits enough coercive force to achieve a desired end, as long as the force used is not more than is called for by the situation.”¹⁰ Black’s provides a background reference to the 1907 Hague Convention on Laws and Customs of War.

It is important to point out that military commanders were aware of this ambiguity and in this connection General Eisenhower’s order of December 24, 1943 stated: “Nothing can stand against the argument of military necessity. This is an accepted principle. The phrase ‘military necessity’ is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference.”¹¹ For this reason, the Second Protocol amplifies the provisions regarding military necessity as it relates to both cultural property under general protection and that under enhanced protection.

What are the main substantive issues contained in the new definition of military necessity in the Second Protocol? In my opinion, Article 6 includes two new elements: first, a waiver of the respect obligation on the basis of imperative military necessity when cultural property has now been transformed, because of the manner in which it is being used, into a military objective (Article 6(a)(i)); and second, tightening the circumstances under which the obligation not to use cultural property for purposes likely to expose it to destruction or damage (Article 6(b)) may be waived. The first provision concerns the attacker, while the second applies to the defender. In addition, Article 6(a)(i), which is based on Article 52.2¹² of the 1977 Additional Protocol I on the Protection of Victims of International Armed Conflicts to the four 1949 Geneva Conventions, thus makes a nexus between the Second Protocol and the definition of military objective under Protocol I. Article 13, which *de facto* develops the definition of “unavoidable military necessity” under Article 11.2 of the Convention, brings in two new elements: the decision to attack must be ordered at the highest operational level of command and the obligation to provide advance warning. It is necessary to point out that to effectively implement these abstract definitions they must be further clarified in military manuals and rules of engagement and must be interpreted in good faith.

To conclude on the issue of military necessity, let me quote Burrus M. Carnahan, an acknowledged expert in the law of armed conflict:

Today, military necessity is widely regarded as something that must be overcome or ignored if international humanitarian law is to develop, and its original role as a limit on military action has been forgotten. As a result, the principle has not been applied in new situations where it could serve as a significant legal restraint until more specific treaty rules or customs are established.¹³

Article 4.3 of the Convention introduces the obligations to prohibit, prevent and put a stop to theft, pillage, misappropriation of, and acts of vandalism against cultural property. State parties are also required to refrain from requisitioning cultural property located in the territory of another party (Article 4.3) and from making cultural property the object of reprisals (Article 4.4). The prohibition of reprisals against historic monuments, works of art or places of worship constituting the cultural or spiritual heritage of peoples is reiterated in Article 53(c) of Additional Protocol I. The waiver of military necessity is not applicable to those obligations.

Articles 7 and 8 of the Second Protocol provide for precautions in attack and precautions against the effects of hostilities, respectively. Article 7 imposes a number of obligations on a military commander, such as verifying that objectives to be attacked are not cultural property, selecting means and methods of attack that avoid or minimize incidental damage, abstaining from attacks that cause excessive incidental damage, and cancelling or suspending attacks if the objective is cultural property or the attack may cause excessive incidental damage to cultural property. The first two obligations require the military commander to do everything that is feasible, in other words what is in his/her power, to fulfill those requirements. As to the Article 8 precautions against the effects of hostilities, State parties must, to the maximum extent feasible, remove movable cultural property from the vicinity of military objectives or provide for adequate *in situ* protection, and avoid locating military objectives near cultural property. Attention should be again drawn to the word “feasible.” The implementation of this obligation will depend on a number of factors such as the density of the population, the location of armament industries or economic potential of the State concerned. Finally, it should be stressed that Articles 7 and 8 mirror Article 57 (Precautions in attack) and Article 58 (Precautions against the effects of attack) of Additional Protocol I, thus ensuring cohesion in the implementation of both the Second Protocol and the Additional Protocol.

Military Measures

Military measures are mainly embodied in Articles 7 and 25 of the Convention. These, to a certain extent, complement each other. Article 7 provides for two principal categories of State party obligations: (1) introduction in peacetime into their

military regulations or instructions of provisions ensuring observance of the Convention and fostering in their military personnel respect for the culture and cultural property of all peoples; and (2) the establishment, again in peacetime, of services or specialist personnel whose purpose is to secure respect for cultural property and to cooperate with the civilian authorities who are responsible for its safeguarding. In addition, Article 30.3(a) of the Second Protocol expressly obligates States to incorporate guidelines and instructions on the protection of cultural property into their military regulations.

To facilitate the dissemination of the Second Protocol within the armed forces, the UNESCO Secretariat has prepared a series of inserts¹⁴ for training military personnel on the Protocol's obligations. The main insert contains a detailed discussion of the Protocol's provisions. Other inserts provide a list of possible instructor questions for those providing training to officers and soldiers' rules for the training of enlisted members of armed forces. It is up to each State's armed forces to adapt the inserts to its military traditions, military doctrine and training methods.

Protection of Cultural Property in Occupied Territory

The 1954 Convention requires the occupying State to take the "most necessary measures" to preserve cultural property damaged by military operations that is situated in the occupied territory if the competent national authorities of the occupied State are unable to do so (Article 5.2). This Article's obligations are complemented by Article 9 of the Second Protocol requiring the occupying Party to prohibit and prevent: (1) any illicit export or other removal or transfer of ownership of cultural property; (2) any archaeological excavation, except when strictly required to safeguard, record or preserve cultural property; and (3) any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence. Furthermore, no archaeological excavation of, alteration to, or change of use of cultural property in occupied territory may be carried out without close cooperation with the competent national authorities of the occupied territory, unless circumstances do not permit such cooperation.

Finally, it should be stressed that the 1954 Protocol, a complementary instrument to the original Hague Convention, prohibits the export of cultural property from occupied territory. If export does occur, it requires each State party to return such property that is located within its territory to the competent authorities of the territory from which it was illicitly exported. This is to occur when hostilities have ended. The 1954 Protocol also expressly forbids the appropriation of cultural property as war reparations. This provision is of fundamental importance because

of its clear recognition that the unique nature of cultural objects makes them inappropriate subjects of war reparations.

***Special Protection under the Hague Convention
and Enhanced Protection under the Second Protocol***

It should be noted that in addition to general protection¹⁵ under Chapter I of the Hague Convention, Article 8.1 provides that special protection may be granted to three categories of property: (a) refuges intended to shelter movable cultural property in the event of armed conflict; (b) centers containing monuments; and (c) other immovable cultural property of very great importance. Unlike the general protection which is attributed to all categories of cultural property, the granting of special protection is not automatic. The Convention subjects the granting of such protection essentially to two conditions: (1) the cultural property in question must be situated at an adequate distance from a *de facto* military objective; and (2) such property must not be used for military purposes.

What is “an adequate distance?” The phrase is not defined by the Convention and is, therefore, left to the discretion of each State party to the Convention. Its definition will obviously depend on a number of factors, such as the presence of military units or armament industry or requirements of national self-defense. The only exception to the requirement of the adequate distance is found in Article 8.5. Under that provision, if the cultural property is situated in the proximity of an important military objective, the special protection may be nevertheless granted if the State concerned undertakes not to use this military objective in the event of armed conflict. Finally, special protection is granted upon request by the State where the cultural property concerned is situated.

Cultural property under special protection is listed in the “International Register of Cultural Property under Special Protection,” a registry maintained by the Director-General of UNESCO. At present, cultural property in three States (Germany, the Holy See, and the Netherlands) is entered in the Register. The total property protected is four refuges for movable cultural property and the whole of the Vatican City State. Two States (Austria and the Netherlands) submitted registration requests but later withdrew them. Since only three States have placed five sites under special protection and the last entry in the Register took place in 1978, clearly the concept of special protection has never fully developed its potential.

Why have the vast majority of States abstained from placing their cultural sites under special protection? There may be several reasons. In particular, the

impossibility of complying with the condition of adequate distance from a large industrial center or military objective for densely-populated countries; technical difficulties in submitting nominations; or the fear of designating cultural property for special protection because of possible terrorist attacks; or, in fact, providing an eventual adversary with a ready made “hit-list.”

Because the special protection provisions of the Hague Convention had failed to gain widespread usage, the Second Protocol in Chapter 3 establishes a new concept of “enhanced protection” that combines aspects of special protection from the Hague Convention and the criteria for listing of cultural property in the World Heritage List under the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.¹⁶ Under the new concept of enhanced protection, three conditions are to be met: the cultural property in question must be of the greatest importance for humanity; it must be protected by adequate domestic legal and administrative measures that recognize its exceptional cultural and historic value; and it may not be used for military purposes or to shield military sites. A declaration to this latter end must be provided. Enhanced protection is granted by entering the property in the List of Cultural Property under Enhanced Protection provided for by Article 27.1(b).

The granting of enhanced protection is accorded by a twelve-member inter-governmental Committee for the Protection of Cultural Property in the Event of Armed Conflict. As in the case of special protection, objections to the granting of enhanced protection are permitted but they must be based only on the failure to meet one or more of the three criteria described above. This prevents States who are party to the Second Protocol from making objections based purely on political animosity or mutual non-recognition, thus avoiding cases such as that of Cambodia, which in 1972 requested the entry of several sites in the Register. Because of the objections filed by four States who did not recognize the Government of Cambodia at that time, the entry was not made. Finally, unlike the granting of special protection which requires no objection from any other state party to the Hague Convention, enhanced protection may be granted by a majority of four-fifths of the above Committee.¹⁷

Sanctions

Article 28 of the 1954 Convention imposes an obligation on States to prosecute and punish those persons (regardless of their nationality) who commit breaches or order the commission of breaches of the Convention. The deficiency of this provision is its general character—Article 28 does not contain a list of crimes or offenses to be sanctioned nor does it sets forth the procedural aspects of sanctions.

This deficiency is addressed in Chapter 4 of the Second Protocol. Article 15 establishes a category of serious violations (which can be of either the 1954 Convention or the Second Protocol itself). Five offenses fall within this category:

- Making cultural property under enhanced protection the object of attack;
- Using cultural property under enhanced protection or its immediate surroundings in support of military action;
- Extensive destruction or appropriation of cultural property protected under the Hague Convention and the Second Protocol;
- Making cultural property protected under the Hague Convention and the Second Protocol the object of attack; and,
- Theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention.

Article 16.1 establishes universal jurisdiction with regard to the first three types of offenses.

Chapter IV also addresses other aspects of criminal responsibility—jurisdictional issues, extradition, mutual legal assistance, and the adoption of legislative, administrative, or disciplinary measures to address other violations of the Convention or Protocol. Again, each State party to the Second Protocol must adopt those articles within its national penal legislation, either civilian or military or both.

To facilitate the domestic implementation of the provisions of Chapter IV, the UNESCO Secretariat commissioned and widely distributed a consultant's study on this issue. This study is composed of three parts: the first part introduces the relevant provisions of Chapter 4 and compares them with other international humanitarian law penal provisions by referring to the four 1949 Geneva Conventions, the 1977 Additional Protocol I, and the 1998 Rome Statute of the International Criminal Court; the second provides twelve case studies related to six countries with a common law tradition (Australia, Canada, India, Nigeria, the United Kingdom, and the United States) and six countries with a civil law tradition (Argentina, France, Japan, the Netherlands, the Russian Federation and Switzerland); the third part contains a summary of recommendations.¹⁸

Conclusion

It is important that there be close cooperation between UNESCO and national military forces in implementing and enforcing the body of cultural protection law that is set forth in the 1954 Hague Convention and its First and Second Protocol because it is those forces that must ensure its application during the execution of

combat operations. Unless military forces are properly trained and informed of the location of cultural property in the adversary's territory and unless rules of engagement address the protection of cultural property, then cultural property will not be accorded the necessary protection.

Notes

1. Jan Hladík, Program Specialist, International Standards Section, Division of Cultural Heritage, United Nations Educational, Scientific, and Cultural Organization (UNESCO). This paper is partly based on two previous presentations, the first made at the conference "Heritage under Fire: The Protection of Cultural Property in Wartime" organized by the British Red Cross in London in June 2001, and the second delivered at the conference "Conservation Law Heritage 2002" organized by the University of Georgia in Athens in April 2002. The author is responsible for the choice and the presentation of the facts contained in this paper and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.

2. See Dr. Lavoyer's paper, which is Chapter XVI in this volume, at 287.

3. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 373 (Adam Roberts and Richard Guelff eds., 3d ed. 2000) [hereinafter Hague Convention].

4. First Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 397 [hereinafter First Protocol].

5. Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 INTERNATIONAL LEGAL MATERIALS 769, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 700 [hereinafter Second Protocol].

As of March 31, 2006, 114 States are party to the Hague Convention, 92 of which are also parties to the First Protocol. As of March 31, 2006, 38 States are party to the Second Protocol. The text of the Hague Convention and its 1954 and 1999 Protocols together with the list of States party thereto, as well as other relevant information on UNESCO's standard-setting activities for the protection of cultural property, is available on the UNESCO website at <http://www.unesco.org/culture/whlp> (last visited Mar. 31, 2006).

The United States participated actively in the 1954 Hague Intergovernmental Conference which negotiated and adopted the Convention and its 1954 Protocol, and signed the Final Act of the Conference and the Convention. In January 1999, the then President William Clinton transmitted the Hague Convention and the 1954 First Protocol to the US Senate for its advice and consent, a necessary prerequisite to the United States becoming a party to both. To date, the United States has not become party to either.

6. Hague Convention, *supra* note 3, art. 4.1.

7. For the notion of military necessity with regard to the Hague Convention, see my article *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the notion of military necessity*, 81 (No. 835) INTERNATIONAL REVIEW OF THE RED CROSS 621 (Sept. 1999).

8. War Department, Adjutant General's Office, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, (Apr. 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler and Jiri Toman eds., 4th ed. 2004).

9. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 313-314 (1959).

10. BLACK'S LAW DICTIONARY 806 (7th ed. abr. 2000).
11. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 293 (A. R. Thomas and James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).
12. Article 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.

Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 422, 450.

13. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 213 (1998).

14. Available at <http://www.unesco.org/culture/whlp> (last visited Mar. 31, 2006).

15. General protection is granted to "movable or immovable cultural property of great importance to the cultural heritage of every people," including works of art; manuscripts; books; other objects of artistic, historical or archaeological interest; scientific or important collections of artifacts; monuments; and archaeological sites. All such property is generally protected under the Convention, regardless of its origin or ownership. States need not take specific measures, such as registration, for property entitled to general protection.

16. Convention concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

17. The establishment of the Committee is one of the major achievements of the 1999 Protocol because it provides a supervisory body to monitor its implementation. Such a body does not exist under the original Hague Convention. In addition to the supervision of the implementation of the Second Protocol, the Committee will be essentially responsible for the granting, suspension or cancellation of enhanced protection, assistance in the identification of cultural property under enhanced protection, consideration and distribution of international assistance, and the use of the resources of the Fund for the Protection of Cultural Property in the Event of Armed Conflict created by Article 29.

The Committee for the Protection of Cultural Property in the Event of Armed Conflict was elected for the first time by the first meeting of States party to the Second Protocol that was held in Paris at UNESCO Headquarters on October 26, 2005. The elected committee members having a four-year term (until 2009) are Austria, El Salvador, Libyan Arab Jamahiriya, Peru, Serbia and Montenegro, and Switzerland. The elected committee members having a two-year term (until 2007) are Argentina, Cyprus, Finland, Greece, the Islamic Republic of Iran, and Lithuania.

18. The study is available upon request from the UNESCO Secretariat.

XIX

The Law of Armed Conflict and the War on Terrorism

David E. Graham¹

In commenting on Mr. Lavoyer's presentation, as well as his paper,² allow me to begin with his concluding remarks and then move from there to speak to his observations regarding whether there is a need to revise, amend, or supplement the existing law of armed conflict in light of the events of September 11, 2001—and the ensuing declaration by the United States that it is now engaged in a “war on terrorism.” I would note that, contrary to Mr. Lavoyer, I will use the term “law of armed conflict” (LOAC), as opposed to “international humanitarian law” (IHL). Once again, as I have stated on a number of previous occasions, both at conferences here in Newport and elsewhere, I have yet to hear a definitive explanation as to the need for—or the body of law encompassed by—this latter term. If it is but a kinder, gentler synonym for the law of armed conflict, it is duplicative in nature—and unnecessary. If, on the other hand, it purports to embrace some undefined aspects of human rights law, I reject it as unclear, confusing, and fraught with peril for commanders in the field.

In the draft of his paper, Mr. Lavoyer notes that, “The best guarantee for respect [of the law of armed conflict] is to keep the law realistic.” With this statement, I am in complete agreement. Aspirational LOAC standards are inherently subjective in nature and bear little reality to the practice of warfare and modern weapon systems. Moreover, they harm the credibility of the LOAC as a whole. As has been

previously stated in many fora, this is a principal reason why the United States has rejected a number of the provisions of Protocol I Additional to the 1949 Geneva Conventions³—and why it has chosen not to become a party to this Protocol.

Mr. Lavoyer notes that, “[T]he main challenge today is without any doubt the proper application of IHL in today’s armed conflicts. Extensive research into recent armed conflicts has led the ICRC to conclude that, on the whole, the existing rules are adequate enough to deal with today’s armed conflicts.”⁴ Once again, I agree completely with this statement. I do not number myself among those who now criticize the law of armed conflict “for not being adequate to deal with the ‘war on terror.’”⁵ More on this particular point, later.

Now, lest you feel that I am being overly kind to Mr. Lavoyer, let me turn to a number of areas of disagreement. In his paper, he makes reference to a study conducted by the International Committee of the Red Cross (ICRC) regarding the customary LOAC. (He refers to it as “customary IHL.”) In doing so, he states that,

The study—published in 2005—will be particularly useful for non-international armed conflicts. Maybe the most important result of the study is the fact that many rules of the 1977 Additional Protocol I relating to the conduct of hostilities also apply to internal armed conflicts on a customary law basis. Furthermore, States not party to certain IHL treaties will be bound by their customary rules.⁶

This, of course, is a significant overstatement of the effect of this study. The international community, at large, has not been privy to the results of the ICRC’s work. However, I think that it is safe to say that, given the somewhat controversial nature of the study’s process—to include even the supposed mandate of the ICRC to engage in this endeavor, not all States will find themselves in full agreement with the conclusions which are drawn therein. It is always useful to remember that the essence of customary international law in general, and the customary LOAC in particular, is State practice, and—for better or worse—the principal practitioner of the LOAC is the United States.

Mr. Lavoyer refers to the ICRC as the “promoter and ‘guardian’ of IHL.”⁷ Well enough. However, in his draft paper he then goes on to declare that, “Based on its assessment of the needs of the victims of armed conflicts, it is well placed to prepare clarifications or developments of humanitarian law.” With this assertion, I disagree. Clarifying and formulating the LOAC is the domain of the international community—not that of the ICRC. The former does not respond to the demands of the latter. Such an arrangement would far exceed the ICRC’s charter and mission. While the ICRC can play a vital role in facilitating the efforts of the international community in addressing LOAC matters, it cannot unilaterally dictate the

agenda. A prime example of the ICRC's attempt to aspire to the latter is the statement in Mr. Lavoyer's draft paper that, the "[d]evelopment of humanitarian law has to continue in specific domains. The restriction or prohibition of weapons is a good example." I would submit, to you, that such decisions regarding weapon systems lies with the community of States—not the ICRC.

Let me now turn my attention to the primary point of discussion—Did 9/11 and the US Administration's subsequent pronouncement of a "war on terrorism" manifest the need for a fundamental revision of the LOAC in the belief that the current body of law is simply incapable of effectively dealing with this "new form of conflict"? Mr. Lavoyer says, "No"—I agree. He notes that

It has been asserted that terrorist attacks—including the attacks of September 11, 2001—as well as counter-terrorist activities were part of a global "armed conflict" in the legal sense, an armed conflict that started years ago and that will continue until the end of terrorist activities. Such a conclusion would have considerable consequences in practice, especially if it is used to justify that States could theoretically strike the transnational group at any time and everywhere—without having to obtain any kind of approval, e.g., from those States on whose territories the military interventions take place.⁸

I agree that if the war on terror were considered as a "global armed conflict" there would be considerable consequences. But those consequences are not reached, because, for good reasons, it's not a "global armed conflict."

From a legal perspective, the "global war on terrorism" is simply hyperbolic fiction—a good political sound bite, but nothing more. Is this "declaration of war" by the Executive branch, vice Congress, truly intended to advise the international community that the President, acting unilaterally, will now deploy US armed forces across any international boundary or boundaries, with or without the consent of the State or States concerned, to engage in combatant activity against any terrorist organization—regardless of the cause purported by such an organization? Pause for a moment to consider not only the LOAC concerns that such a pronouncement would invoke, but the broad range of *jus ad bellum* issues, as well. Indeed, the US congressional and United Nations Security Council resolutions authorizing the use of force against the Taliban government of Afghanistan pointedly tied such a use of force against only those who engaged in the 9/11 attacks on the World Trade Center and the Pentagon—and those who assisted these individuals in their efforts. In no way can these resolutions be cited as authority for the current Administration to unilaterally declare that it is engaged in a "global armed conflict" against "terrorism," which itself is an undefined phenomenon.

For this reason, we must continue to draw a sharp distinction between acts of "terrorism" to which numerous international conventions are applicable, and

what can legitimately be perceived as an unlawful “armed attack” against the United States committed by “unlawful combatants” or “unprivileged belligerents,” i.e., al Qaeda personnel, aided and abetted by the Taliban government. Well defined international conventions and State domestic laws apply to terrorist acts, while the LOAC applies to the use of force undertaken in self-defense in response to an armed attack. The United States must choose: Does it view al Qaeda members as “terrorists” to whom the law relevant to terrorism applies, or does it view these individuals as “unlawful combatants” engaged in an unlawful belligerency (armed attack) against the United States and its citizens to whom the LOAC is applicable? It cannot have it both ways. When viewed in this context, one must come to the conclusion, arrived at by Mr. Lavoyer, that, if the United States does view its ongoing use of force against al Qaeda as a response to an armed attack, the LOAC requires no significant revision; it need only be applied.

While the current Administration might assert the validity of its use of military force against al Qaeda personnel—and those who support them—wherever they might be found, even this claim must realistically be tempered by the rights of sovereign States under existing international law. How, for example, does the United States realistically apply the LOAC to a global war against al Qaeda? When the United States targeted suspected al Qaeda members in Yemen, did it comply with the applicable LOAC? With international law in general? Did the United States gain the consent of the Yemeni government prior to its use of force within the latter’s borders? Absent the consent of any State in which al Qaeda personnel might be discovered, does the relevant Security Council resolution sanction the use of armed force by the United States within such a State? Does all of the LOAC apply to such operations? If not, what provisions of the LOAC do apply? These are but a few of the questions associated with this subject that merit serious consideration—and resolution.

The last issue I shall address among those discussed by Mr. Lavoyer is the legal status of those individuals captured by coalition forces in Afghanistan, and, in particular, those currently being detained at Guantanamo Bay. I agree with his assessment that the coalition military action taken against the Taliban government and al Qaeda operatives within Afghanistan clearly constituted an international conflict to which the LOAC, in its entirety, applied—a fact belatedly and reluctantly agreed to by the current US Administration. Given this fact, he questions why none of the captured personnel have been afforded prisoner of war (POW) status—why all, in fact, have been declared to be “unlawful combatants.” Again, he asserts that this is not a matter that gives rise to a necessity for revising or amending the LOAC; the existing LOAC—the long established provisions of the Third Geneva Convention⁹—need only be applied. Once again I agree with Mr. Lavoyer. I even find myself in agreement with his contention that while he might understand how

the relevant provisions of Article 4 of the Third Convention could be interpreted in such a way that POW status could be denied to all al Qaeda personnel, how can the same be said to be true of members of the Taliban army as a whole? The question of the status of Taliban fighters deserves far more careful consideration than that apparently given it by the responsible US decision makers. While a case can be made for the decision not to accord POW status to the Taliban captives, some have argued that sound legal, as well as policy, considerations should have dictated a different course of action.

Where I do disagree with Mr. Lavoyer, however, is with his contention that, the US decision “To make a blanket determination and to disqualify from the start all captured combatants from POW status raises serious concerns.”¹⁰ He specifically contends that “If there is doubt about that status, competent tribunals as foreseen in the Third Geneva Convention should come into action.”¹¹ While this statement refers to Article 5 tribunals, he does not cite the text of this article, which reads, in part: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

Mr. Lavoyer clearly implies that the United States had a LOAC obligation under Article 5 to employ tribunals to determine the status of both al Qaeda and Taliban captives. Yet this is clearly not the case. An examination of Pictet’s Commentary reveals that this provision was intended to apply only to deserters, and to those persons who accompany the Armed Forces and who have lost their identity cards.¹² Even more telling is the clear language of Article 5, itself: “*Should any doubt arise as to whether persons...belong to any of the categories enumerated in Article 4. . .*” (Emphasis added.) While one might argue with the Administration’s legal rationale for determining that all al Qaeda and Taliban captives were to be viewed as “unlawful combatants,” one cannot posit the argument that there existed any degree of doubt on the part of the Administration as to the status of the individuals in question. I would submit to Mr. Lavoyer—and to others who have raised this issue—that the “doubt” referred to in Article 5 must arise in the “mind” of the “Capturing Party,” not that of third States, the ICRC, or the collective psyche of the international community. When the President of the United States makes a determination as to the status of personnel captured by US armed forces on the battlefield, there would appear to be no doubt on the part of the Capturing Party as to the status of the individuals concerned, and, in the absence of such “doubt,” there clearly exists no LOAC obligation to conduct Article 5 tribunals.

It is important, I think, that in the final analysis we are in agreement on Mr. Lavoyer’s essential premise: The events of 9/11 do not call for revising or

supplementing the LOAC. What is called for is a candid recognition of the true nature of the “conflict” in which the United States is engaged—and a good faith adherence to both the law of armed conflict and the other controlling principles of international law.

Notes

1. Colonel David E. Graham, JA, USA (Ret.) is the Special Assistant to the Judge Advocate General of the United States Army.
2. In advance of the conference, Mr. Lavoyer provided a draft paper for my review. Certain of my comments address the contents of that paper; others address the contents of his final paper as it appears in this volume. In this paper, I indicate to which I am referring.
3. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 422 (A. Roberts and R. Guelff eds., 3d ed. 2000).
4. Mr. Lavoyer’s paper, *Should International Humanitarian Law Be Reaffirmed, Clarified or Developed?*, which is Chapter XVI in this volume, at 287.
5. *Id.* at 290.
6. *Id.* at 301.
7. *Id.* at 300.
8. *Id.* at 290, 291.
9. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 244.
10. Lavoyer, *supra* note 4, at 292.
11. *Id.* at 292.
12. COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 77 (Jean S. Pictet ed., 1960).

XX

Interoperability and the Atlantic Divide: A Bridge over Troubled Waters

Charles H. B. Garraway¹

9/11 has now passed into folklore. As everybody, in another generation, can recall where they were when they heard of the assassination of President Kennedy, so for this, the first information of the terrible events that unfolded that bright September day are indelibly engraved on the memory. I am a member of both generations and just as I can recall standing in my school dormitory in England, frozen with horror, at the news from Dallas, so I recall the cold shiver down my spine as I stood on the second tee of the famous Berkshire Golf Club, hearing on a radio, going full volume on a local building site, the chilling account of what was happening in New York. By the time I returned to the Club House, the news from Washington and Pennsylvania was also in. The world would never be the same again.

The purpose of this article is to look at the effect of 9/11 on the field of international and operational law, in particular on interoperability between the United States and Europe. For most of the last century, the United States and Europe (the United Kingdom in particular), have worked together in the military field, to the great benefit of world peace. It has been like a marriage. We have been comfortable together and learned to work together, recognizing each others foibles. Difficulties have been overcome with good will and a willingness to appreciate one another's point of view. However, I will be suggesting in this analysis that there seems now to be less understanding and more talking across each other. I, like a good marriage guidance counselor, will

seek to go behind the rhetoric and try to look at what I see as the underlying causes of this malaise. In medical terms, I will try to look at the root of the illness rather than the symptoms. That may involve analyzing some difficult, and indeed sensitive, areas.

I spent most of my career in the UK Army working in the field of international, and what we now call operational, law. To me, the former is the academic side and the latter, in relation to the law of armed conflict, the practical application. Both go hand in glove. One of the advantages of being a military lawyer is that one can mix the academic and the practical, checking out the theory on the sounding board of fact. The battlefield is a very practical place. There is no room for ivory towers or fine theories. Delays can cost lives. Decisions have to be instant. The law of good faith is often the lodestone. Over the years, I have learned that the law of armed conflict is a vital tool in the commander's tool box. However, just as with the myriad of other tools that can be found in that box, it must prove its usefulness if it is not to be discarded. Law that is impracticable will be disregarded on the battlefield. That is a fact and those of us involved in the negotiation of international treaties and the development of international law forget that at our peril. The law of armed conflict is in some ways a Faustian pact between the interests of humanity and military reality. If the balance tilts too far in either direction the result is a breakdown in the whole system.

Much of my professional life has also been spent working with US forces. From my early days as a young officer at the US Army JAG School at Charlottesville, Virginia, through a tour at Supreme Headquarters Allied Powers Europe in Belgium, to Operation Desert Shield/Storm, I have worked alongside my US colleagues in friendship and harmony. We have shared ideas and, on the surprisingly few occasions when we have disagreed, we have worked together to find practical solutions to the practical problems that we have encountered. As a result, I have rarely found any serious interoperability problems on the ground between UK and US forces.

But things are beginning to change. Since 9/11, there seems to have been an increasing disconnect between the United States and Europe. That appeared to reach its climax in the unseemly rows over the questions raised by Operation Iraqi Freedom.² The divide between the United States and what Secretary Rumsfeld described as "Old Europe"³ opened into a chasm. The distrust, and in some cases, open dislike, that has developed will take a long time to overcome. The old "entente cordiale" appears to have broken down and even within the "special relationship," there seem to be strains appearing. The United States and the United Kingdom appear at times to be moving along diverging tracks. Tony Blair, in attempting to form a bridge between the United States and Europe has found himself like a rider trying to sit astride two horses at the same time. At times those horses have moved further apart than has been good for the health of the rider.

This divergence of political views has reached into other areas as well. Within the law of armed conflict, stresses have appeared that are beginning to impact on interoperability and hence operational efficiency. The United States is seen increasingly as looking upon European forces as a liability rather than an asset in operational terms. Traditional alliances are overlooked and there is growing emphasis on “coalitions of the willing.”⁴ This began in Kosovo where the United States gave the impression of feeling constrained by its European allies, continued in Afghanistan where offers of assistance from European States (other than the United Kingdom) appeared to be declined, and culminated in Operation Iraqi Freedom. Whilst that purported to be a coalition, it was one run very much on US terms. I have myself been involved on the ground in Operation Iraqi Freedom working as part of the Coalition Provisional Authority and I have to admit that, in terms of interoperability, it has been the hardest of all the operations in which I have participated.

Why is that? Where does this divergence spring from? I want to look at three areas where problems have arisen and examine them in detail. What is the nature of the problems? How have they arisen and can they be overcome? Finally, I will try to look to the future. Are the traditional alliances doomed to wither on the vine amidst mutual recriminations and increasing US isolationism? Or can these issues be resolved in such a way that the United States, acknowledged as the world’s only remaining superpower, will lead a willing, rather than recalcitrant, world in the pursuit of peace?

I will start by jumping in the deep end of the pool. Probably the most public disagreement between the Atlantic allies has been over the question of “unlawful combatants.” The issue of Guantanamo and its inmates has become a running sore. Yet, in my view, it need not be so. It has turned into a disagreement of substance but in its early days, I would suggest that it was more a matter of linguistics. As much as anything, it is the term “unlawful combatant” that has caused the problem. It has confused the matter of combatant status and has led to some *ex post facto* lawyering that always, in my experience, leads to trouble.

In order to understand the problem, it is necessary to go back into the history of combatant status. By tradition, States had a monopoly on violence. Only States could conduct wars and it was therefore for States to decide who could take part in them. With the limited range of weaponry up until the last century, it was not difficult to have a clear division between those who were authorised by the State to take part in warfare and those who were not so entitled. If these latter chose to involve themselves in the hostilities, they were common criminals and could be prosecuted for the acts that they carried out. Those who had official authorization had an immunity which enabled them to carry out acts that would otherwise be unlawful without sanction. This immunity led to the development of “combatant status” to represent those entitled to take part in hostilities. Those who were not so entitled

were “non-combatants” (though this distinction is somewhat confused by Article 3 of the Regulations attached to Hague Convention IV of 1907⁵).

It is important to note that this concept, that combatant status arises out of the entitlement of a State to authorize persons to take part in hostilities, is, of necessity, limited to international armed conflict. There can be no “combatant immunity” in non-international armed conflict where one side—or in some situations such as Somalia, all sides—lack that essential authority. This previously accepted tenet has come under stress in recent years with attempts to bring together the law relating to international and non-international armed conflict. There has been an increasing tendency to use the term “combatant” in relation to participants in non-international armed conflict. However, this loose use of language is, in my view, dangerous as the word is used in a separate sense from international armed conflict. Participants in non-international armed conflicts remain subject to domestic law and dissident forces have no immunity from that, even in respect of acts which would be legitimate under international law, such as attacks on military personnel or military objectives. There have, indeed, been some non-international armed conflicts where the level of intensity has been such that a form of belligerent status has been accorded to rebel fighters, but these are the exception rather than the rule and such concessions have usually been more for pragmatic than for legal reasons. The word “combatant” has always indicated a particular status and attempts to extend its use should be resisted.

In the arguments that have arisen out of Afghanistan and the Guantanamo situation, similar loose use of language occurs and this can have an effect on some fundamental tenets of international law as defined over the years. In the first instance, the “war on terror” raises the whole question of what is an international armed conflict. By custom, this has been limited to conflicts between States. Under treaty law, it is defined in Common Article 2 of the Geneva Conventions⁶ as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

The inclusion of the words “High Contracting Parties” makes it plain that this provision also involves States. Non-State entities fall outside its terms. Thus pirates, however well organised and however international their activities, cannot, by attacking State forces, create a state of international armed conflict so as to gain for themselves combatant status. They remain pirates and subject to the law relating to piracy—not the law relating to armed conflict. Similarly, criminal organizations such as the Mafia and drug cartels, despite having tentacles that reach across international boundaries and often using levels of force that would in other circumstances fall within the definition of “armed conflict,” cannot benefit by bringing themselves out of the ambit of criminal law into the law of armed conflict. “Terrorists” are in a similar position, though in their case, the situation is complicated further by two

additional factors, the lack of an agreed definition of the term and the existence of State sponsored terrorism. However, in this latter case, it is not the acts of terrorism that may create an international armed conflict but the involvement of the State behind those acts. In cases where terrorists have no State sponsor, their acts remain criminal but cannot, in themselves, amount to international armed conflict.

The campaign in Afghanistan muddled the waters. It is beyond dispute that there was indeed an international armed conflict between the Coalition and Afghanistan. That meant that combatant status was an issue *for those people involved in that conflict*. But just because there was a specific armed conflict taking place does not mean that the status of “international armed conflict” extended to all activities in the “war against terror.” Even within the United States, some alleged “terrorists” were arrested and dealt with by the ordinary criminal justice system. It follows that the first decision in relation to any attempt to obtain combatant status is to identify the international armed conflict to which the claim relates.

However, the mere identification of an international armed conflict is not sufficient. It is then necessary to examine the individual concerned to see if that person satisfies the definition of “combatant.” Not everybody to be found on the battlefield is necessarily a combatant.

Most examinations into the definition of combatant begin with Article 1 of the Hague Regulations of 1907.⁷ This reads:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer groups constitute the army or form part of it, they are included under the denomination “army.”

The Hague Regulations were accepted as reflecting customary international law at Nuremberg and their terms have been relatively unchallenged. However, within this Article lie the seeds of a controversy that has surfaced in the first part of the 21st century, one hundred years later. It will be noted that the four conditions only appear to apply to militia and volunteer corps who do not “constitute the army or form part of it.” Does this mean that the “army” itself is exempt from these conditions? The answer

is not as easy as it might seem. At the time, in 1907, the difficulties in distinguishing between combatants and non-combatants were not so severe. Battlefields were for the most part linear and armies, almost by definition, wore distinguishing features by way of uniform. It was therefore not necessary to require armies to comply with such conditions because it was assumed that they would. This view is supported by case law both within the United States and the United Kingdom which made it clear that members of armed forces could not excuse themselves from compliance.⁸

The definition contained in the Hague Regulations would stand until 1977, despite huge changes in the nature of warfare. It was reinforced by the Third Geneva Convention of 1949 which dealt with prisoner of war status. This granted prisoner of war status, *inter alia*, to:

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, *including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied*, provided that such militias or volunteer corps, *including such organized resistance movements*, fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.”⁹

Apart from the wording specifically referring to organized resistance movements which I have highlighted, this is taken directly from the Hague Regulations. However, the same assumption is made in the distinction between armed forces and “other militias and members of other volunteer corps” which do not form part of the armed forces. Anybody who had suggested in 1949 that armed forces were exempt from compliance with the four conditions would have been looked at with considerable puzzlement. Did the conditions not provide a definition of what armed forces were?

This is made plain by the Commentary to the Third Geneva Convention, published by the International Committee of the Red Cross (ICRC), which states in relation to Article 4:

The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of the armed forces should have for the purposes of recognition. It is the duty of each State to take steps so that members of its

armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians.¹⁰

In 1977, in Additional Protocol I to the Geneva Conventions,¹¹ an attempt was made to bring together the separate strands of “Hague” and “Geneva” law. Articles 43 to 47 deal with “Combatant and Prisoner-of-War Status.” Some of these provisions are controversial and undoubtedly do not represent customary law. However, others are uncontroversial and, whilst perhaps a restatement of law, reflect an international consensus. Amongst those provisions is Article 43¹² which, in part, reads:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains . . .) are combatants, that is to say, they have the right to participate directly in hostilities.

While this may seem to be a withdrawal from the Hague standards, Article 44(2)¹³ makes it clear that: “. . . all combatants are obliged to comply with the rules of international law applicable in armed conflict. . . .” Article 44(3)¹⁴ lays down a general rule that: “. . . combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. . . .” Article 44(7)¹⁵ states that: “This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.” These provisions provide a general format little removed from that contained in the Hague Regulations. As the ICRC Commentary puts it: “The provisions of Article 4 of the Third Convention are fully preserved.”¹⁶

Articles 44 to 47 of Additional Protocol I also deal with a number of unusual situations, including that of spies and mercenaries. It is here that controversy arises, particularly in Article 44(3) which deals with exceptional circumstances where the duty to distinguish can be relaxed. These provisions lay down that, in certain cases of non-compliance, the combatant may forfeit his right to prisoner-of-war status, while in others he forfeits his right even to combatant status.

Additional Protocol I is also significant because, for the first time, it attempts to define the term “civilian.” Essentially, a civilian is anyone who is not a combatant, other than those who have lost their combatant status under Articles 44 to 47.¹⁷

The principle is clear. There is no gap; a person is either a combatant or a civilian. However, just as it is possible to lose combatant status, and the immunity that goes with it, by failure to comply with the rules, so the protection given to civilians can also be lost if “and for such time as they take a direct part in hostilities.”

While the drafting of Protocol I is hardly a model of clarity with different terms being used almost interchangeably at times, one thing does appear to stand out. A combatant who loses the right to combatant status does not become a civilian. In the same way, a civilian who loses his right to protection as a civilian does not become a combatant. Each remains within their respective designation but loses the rights and privileges attached to that designation.

How does this affect the situation in Guantanamo? It would appear that the term “unlawful combatant” is being used in a generic sense to cover a multitude of different categories of people. First there are those who might be described as the armed forces of Afghanistan. Such people may well fall within the definition of “combatant” within the law of armed conflict. Some may have committed breaches of the law of armed conflict. That will not necessarily deprive them of the right to combatant status or to combatant immunity, and consequently to prisoner-of-war status.¹⁸ However, that immunity only extends to legitimate acts of warfare and so they will be liable to trial and punishment for unlawful acts. These people can perhaps be described as “combatants acting unlawfully.”

Others may also fall within the definition of “combatant” but by their actions have forfeited the right to that status or to combatant immunity.¹⁹ These people can be tried not only for war crimes but, since they have forfeited their combatant immunity, for acts that would otherwise be legitimate acts of war. It is this category of person for whom the title “unlawful combatant” is perhaps the closest fit but even then, it does not really adequately describe their position.

There are also those who do not begin to fit within the definition of combatant but who choose to take part in the hostilities. These people can never be described as “combatant” and therefore begin with the status of “civilian.” However, by their acts, they have forfeited the rights and privileges that go with the status of “civilian.”²⁰ They do not become “combatants” but can be tried for the part that they have taken in the hostilities since they have no entitlement to take such a part. It is misleading to describe such people as “unlawful combatants” as they never were combatants, whether lawful or unlawful. My preferred description, even if it seems somewhat dated to the modern ear, is that used by Richard Baxter, “unprivileged belligerents.”

It will be noticed that I have avoided such terms as “Taliban” or “al Qaeda.” I do not find such terms helpful in this analysis. The law of armed conflict deals with factual situations rather than titles. Thus, there will be Taliban members who could

not be described as “combatants” under any circumstances and, possibly, some Al Qaeda who could. That does not mean to say that such personnel necessarily are entitled to be treated as combatants but only that they fall on that side of the dividing line at the first assessment. Their subsequent conduct as combatants may well disqualify them from being entitled to be treated as combatants, or to hold prisoner-of-war status.

I said at the start that this issue began as a matter of linguistics but is now turning into an issue of substance. If the use of the term “unlawful combatant” was originally loose language, it has now begun to take on a meaning of its own with arguments being advanced that there is indeed such a category of person. This is summed up by the words of Professor Dinstein: “One cannot fight the enemy and remain a civilian.”²¹

The core of the argument here is that a civilian who takes a direct part in hostilities not only loses his civilian protection, but also his status as a civilian. Indeed, he becomes a combatant. However, because he does not come within the definition of a combatant as laid down in the law of armed conflict, he gains none of the rights and privileges of a combatant but becomes, in effect, an “outlaw.” It is this category to whom the term “unlawful combatant” is most appropriately applied.

As will be apparent, I can find no basis in law for this new category—nor do I think it is necessary. Dinstein states: “Under the *ius in bello*, combatants are persons who are either members of the armed forces (except medical and religious personnel) or—*irrespective of such membership*—take an active part in hostilities in an international armed conflict.”²² [My emphasis]. Cited as authority for this statement is the Model Manual on the Law of Armed Conflict, published by the ICRC, and entitled “Fight it Right.”²³ The same authority is cited in the Israeli response to the Mitchell Report where a similar proposition is put forward.²⁴

I regret to say that I have been unable to find anything in that ICRC Manual which would support this proposition. Certainly, the paragraphs of the Manual cited in the Israeli response²⁵ fall some way short of that and it would indeed be surprising if the ICRC, of all people, were to put forward such a view which would seem to widen considerably the definition of “combatant,” whether lawful or unlawful.

Paragraph 601 of the Manual states:

a. Only combatants may:

- (1) take a direct part in hostilities, and
- (2) be attacked.

b. Combatants are members of the armed forces of a party to the conflict except medical and religious personnel.

Paragraph 601 goes on to describe activities prohibited to civilians but nowhere does it state that civilians, by taking a direct part in hostilities, become combatants.

Similarly paragraph 1106c merely states: “Civilians are protected unless and for such time as they take a direct part in hostilities.” Despite the grammatical inconsistency, this again does not in any way imply that civilians become combatants, merely that they lose their protection.

Dinstein goes on to say: “A civilian may convert himself into a combatant. . . . In the same vein, a combatant may retire and become a civilian.”²⁶ The analogies drawn here are incomplete. Indeed, a civilian can convert himself into a combatant—by bringing himself within the definition of “combatant” by, for example, joining the armed forces. The combatant, by retiring, has ceased to come within that definition and therefore has become a civilian. The combatant does not, however, become a civilian if he goes off to occupy himself in civilian pursuits. A soldier undergoing a university course at a civilian institution remains a combatant even though he may be indistinguishable from the civilian students surrounding him.

Dinstein further states: “Combatants can withdraw from the hostilities not only by retiring and becoming civilians, but also by becoming *hors de combat*.”²⁷ I agree. But even *hors de combat*, the combatant retains his combatant status. He merely gains extra protection in return for not taking part in the hostilities. He does not change his status and become a civilian.

There is a justifiable concern about what is sometimes described as the “revolving door syndrome”—the farmer by day and the fighter by night. This is indeed a problem which needs addressing. However, I would suggest that it can be resolved better by looking again at the interpretation of Article 51(3) of Additional Protocol I.²⁸ That provision reads: “Civilians shall enjoy the protection afforded by this Section, *unless and for such time as they take a direct part in hostilities*.” [My emphasis.] It is here that the difficulty is to be found that leads to the “revolving door syndrome” and it may be necessary to take a wider view of the period during which protection is lost. It is clearly impracticable to argue that the civilian who takes part in a hostile act regains his immunity as soon as that act is completed. However, the temporal duration of the loss of protection needs to be limited in some way. International law does not allow for a permanent loss of protection so that, years after the act, the person remains vulnerable, even if he has taken no part in the hostilities since.

On the other hand, the term “combatant” has always been narrowly defined—and limited to international armed conflict. The current attempts to extend the definition, and to widen the definition of “war” or “armed conflict,” amount to a slippery slope. It is difficult to come up with clear boundaries and gives far too much freedom to interpretation. While the events of 9/11 pose a real challenge to the forces of law and order all over the world, the solution arrived at by the creation

of this new category of “unlawful combatant,” although understandable, is, in my view, unsound and, in less scrupulous hands, could be manipulated in such a way as to remove to a large extent the protections built into the law for both combatants and civilians.

The second area that I wish to look at is the question of war crimes and, in particular, methods of trial. I want to move between the Scylla of international jurisdiction as exemplified by international tribunals, and in particular the International Criminal Court, and the Charybdis of universal jurisdiction, particularly when used to bring charges against individuals in States with no links to the crime itself, the victims or the alleged participants. These are both interesting subjects in their own right but I will concentrate primarily on the controversy caused by the US proposals to hold military commissions to deal with alleged war crimes.²⁹ I will limit myself further to the nature of the commissions themselves, rather than the separate issue of their jurisdiction which is primarily a question of US domestic law.

I believe that the United States has been somewhat surprised by the strength of the reaction by their European allies against the concept of military commissions.³⁰ While some of this antipathy is undoubtedly caused by specific detail such as issues arising from the death penalty and the apparent limitations on the rights of the defense,³¹ there is a more fundamental objection which is rather a cultural divide than a legal one. Again, only by appreciating this, can the two sides reach any form of *modus vivendi*.

There is no doubt that there is a duty upon States to deal with violations of the laws of armed conflict. The ideal method of so dealing is by national jurisdiction but that may not always be possible. The Afghan courts, for example, are not yet in a fit state to deal with such cases even if the United States were prepared to release people to be so tried. Furthermore, not all States have given themselves jurisdiction to deal with the full array of international crimes arising out of armed conflict and quasi conflict situations. There is, therefore, no reason why the Coalition should not be entitled to take action themselves. Indeed, it is not so much the fact that cases will be brought but rather the forum that has caused the disquiet.

Military tribunals have a long and distinguished record. After World War II, the majority of war crimes trials were dealt with by way of national military tribunals.³² They had the advantage that they could sit anywhere in the world and not be limited by territorial considerations. In the Geneva Conventions, the use of military courts to try certain categories of offense was not only approved but mandated. Prisoners of war are made “subject to the laws, regulations and orders in force in the armed forces of the Detaining Power.” Article 84 of the Third Convention, in particular, provides that:

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.³³

Similarly, in relation to occupied territories, Article 66 of the Fourth Convention provides that, in respect of breaches of penal provisions of occupation law: “. . . the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country.”³⁴ In the light of this, why is there this visceral reaction by many Europeans to the use by the United States of military commissions?

The answer lies in two separate areas, though there is a link between them. One is historical and the other legal. In historical terms, since the end of World War II, military justice in general has earned a bad reputation. While in the United States—and the United Kingdom—we remain proud of our military and see them as a bastion of our national freedom, this is not so in many other parts of the world. The history of South America and the independent African States has been full of military dictatorships and even in Europe, the military, in the old communist States, was seen as a symbol of repression rather than a flag carrier for freedom. The jurisdiction of military courts was extended so that they became part of the State system of control over the civilian population. “Security courts,” often manned by military personnel, enabled these dictatorships to survive. “Military justice” became a contradiction in terms.

Linked to this is the rise of human rights, particularly in Europe. The European Court of Human Rights, under the auspices of the Council of Europe, has become probably the most influential human rights body in the world.³⁵ Its judgements are binding on members of the Council of Europe and the Court has adopted a progressive attitude to human rights in general. It sees the European Convention on Human Rights (ECHR) as a living document which may need to be reinterpreted as circumstances change. One of the key rights embodied in the Convention is the right to a fair and impartial trial.³⁶

In recent years, particularly since the fall of the Berlin Wall and the influx of Eastern European judges on to the bench, the Court has been called upon increasingly to rule on matters relating to the military. Many of these rulings are called for as a result of cases brought in relation to military justice. The suspicions of military justice which have inevitably arisen out of the misuse of such systems by dictatorships of different types have been apparent in rulings by the Court. Whereas in 1949, when the Geneva Conventions were drafted, military justice was accepted as fair and impartial, now it is not necessarily so accepted and increasing restrictions

have been imposed upon its use. For example, over the last ten years both the summary justice system and the court martial system used by the UK armed forces have had to be utterly overhauled as a result of rulings by the European Court of Human Rights.³⁷ The assumption that military officers will conduct their duties “without partiality, favour or affection” has been replaced almost by an assumption the other way. Any trace of possible bias or command influence has to be removed so that justice is not only seen to be done but manifestly seen to be done.

In some countries, such as Belgium, there have been moves towards abolishing the military justice system altogether and in many other continental countries, military personnel already are dealt with by civil tribunals. The trend is undoubtedly away from military justice and in particular to any exercise of military justice over civilians. It follows that what was acceptable in occupied Germany in 1945, or even in 1949, is not acknowledged as necessarily acceptable now. The United Kingdom, for example, has legislation in the form of a Royal Warrant dating from 1945,³⁸ permitting the establishment of military courts to try war crimes. However, the legislation is now effectively obsolete as it has not been updated for over fifty years and any attempt to do so would probably fail politically. The Royal Warrant therefore has been left to wither on the vine.

The question of how to deal with war crimes is a very real one and needs to be addressed. It arises again in relation to Iraq, though in that case, it is likely that most cases will be tried before Iraqi courts. The correct disposal of such cases is a matter of international concern and it is therefore important that some degree of consensus is reached on a way forward. If war crimes trials, whether carried out by domestic civil courts or by military tribunals, are not seen as fair and impartial by international standards, then they will cause another running sore in that “martyrs” will be created and allegations of “victors’ justice” will again circulate.

Like most in the US or UK military, I am convinced that my national system of military justice is as fair as it could be, and in many cases fairer than the civil system which some would like to replace it by. However, that is in itself insufficient. There is an inbuilt suspicion of military justice brought about by years of misuse by some. Failure to appreciate that suspicion—and the reasons behind it—will simply work to increase the divide between the United States and Europe. On the other hand, an appreciation may lead to dialogue which can only serve to bridge the gap before it becomes too great.

The third area with which I wish to deal is linked to this. It is the growing impact of human rights law in general on operations. For decades, human rights law and the law of armed conflict developed separately, partly because the United Nations was reluctant to involve itself in the law of armed conflict, seeing an inherent inconsistency in its role to abolish war as a means of dispute resolution. However, gradually a

more pragmatic approach was adopted and the updating of the law carried out in the 1977 Additional Protocols to the Geneva Conventions grew out of initiatives started in the human rights community.³⁹ Indeed, there are clear resonances of human rights law in some of the drafting, particularly in Additional Protocol II.⁴⁰

However, there has never been an attempt to define the relationship between the two legal systems, and as human rights law has increased both in scope and in applicability, it was inevitable that the two would eventually run up against each other. By tradition, human rights law has been seen as applicable in peacetime and the law of armed conflict in time of war, but in law that has never been so. Most human rights treaties do indeed have provisions allowing some form of derogation in time of war, but such derogation is usually limited and closely defined. For example, Article 15 of the European Convention on Human Rights provides:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention *to the extent strictly required by the exigencies of the situation*, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 [Right to Life], *except in respect of deaths resulting from lawful acts of war*, or from Articles 3 [Prohibition of Torture], 4(paragraph 1) [Prohibition of slavery] and 7 [No Punishment without Law] shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.⁴¹ [My emphasis.]

It follows from this that the Convention is indeed applicable in time of war subject to any derogation. Such derogations cannot include certain articles and furthermore, the European Court of Human Rights has taken to itself the right to decide on whether any particular derogation is indeed “strictly required by the exigencies of the situation.”⁴²

Despite this, it has only been in recent years that the Court has begun to become involved in operational matters. There have been a number of cases involving British military operations in Northern Ireland, including the *McCann* case dealing with the shootings of IRA terrorists in Gibraltar.⁴³ There have also been a series of cases arising from the Kurdish insurgency in Eastern Turkey⁴⁴ and some from the occupation of Northern Cyprus.⁴⁵ For the most part, in such cases the Court was looking at domestic law issues and comparing them with the terms of the Convention. For example, in the *McCann* case, the British Government did not seek to put forward an absolute right to shoot the three terrorists but sought to justify the killings by the fact that the soldiers believed that the terrorists might be about to

explode a remote-controlled device. Indeed, the actions of the soldiers in that case were specifically upheld by the Court though the United Kingdom was held liable (by a majority of one) on other grounds. The Court has not yet had to examine in any depth the interplay between the Convention and the law of armed conflict. However, this can only be a matter of time.

In the *Bankovic* case,⁴⁶ the Court was asked to rule on the legality of the attack on the TV station in Belgrade carried out by NATO forces during the Kosovo campaign. An action was brought by some of the survivors of that attack and relatives of the dead against all the European NATO States alleging a breach of Article 2, the right to life. The case was dismissed on the technical grounds that the applicants were not “within the jurisdiction” of any of the States concerned. However, had the case proceeded to arguments on the merits, some interesting points would have arisen. The first and most important would have involved the applicability of the Convention. The United Kingdom, for example, had not sought to derogate from the Convention in relation to the Kosovo campaign. Would that have meant that they could not have taken advantage of the exemption for “lawful acts of war” under Article 15? If not, what would be the position if the action, even if legitimate under the law of armed conflict, failed to meet the exacting standards of Article 2 of the Convention?

Sooner or later, such issues are going to arise and the Court will have to rule on the relationship between the two legal systems. Will it defer to the law of armed conflict or will it seek to impose some form of human rights supremacy? The International Court of Justice in the *Nuclear Weapons* case⁴⁷ referred to the law of armed conflict as a “*lex specialis*” and it would seem the most sensible solution for the Court to defer to that law where there appears to be a conflict. This appeared to be the line taken by the Inter-American Commission on Human Rights in the *Abella* case.⁴⁸ However, in the later *Las Palmeras* case,⁴⁹ the Commission seemed to indicate that it could not take into account the law of armed conflict as its constitution only entitled it to make decisions based on the human rights treaties under which it was established. Such a line would appear to put the human rights community on a collision course with the law of armed conflict.

However, assuming that common sense prevails and that the *lex specialis* argument is upheld, there remains the question of the detailed interrelationship between the two systems. For example, Article 5 of the Third Geneva Convention provides that:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to one of the categories enumerated in Article 4 [entitlement to prisoner-of-war status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a *competent tribunal*.⁵⁰ [My emphasis.]

The Convention does not seek to define further what a “competent tribunal” is or what procedures should be adopted by that tribunal. In the absence of any derogation, is the nature of the tribunal and its procedures governed by human rights law and if so to what extent? These are untested questions and while ten years ago, no one would have given them a second thought, they are now beginning to appear very much on the radar. European governments increasingly have to take into account the possible effects of the European Convention on military operations both at home and abroad.

This will inevitably affect interoperability between US and European forces. The United States is obviously not a party to the European Convention and while it has its own human rights obligations, it would rightly not consider itself bound by interpretations laid down by the European Court of Human Rights. However, such issues are not new. NATO has for many years operated with States being bound by different legal obligations. Most NATO States are parties to Additional Protocol I; the United States and Turkey are not. In the past, this has caused few problems as a result of close consultation leading to agreed procedures. Each side recognized the obligations of the other and agreed to work round them.

A similar problem arises, I would suggest, with the European Convention on Human Rights. It does impose certain restrictions on European partners. Furthermore, because of the uncertainty as to its scope at the present time, Europeans are likely to be cautious in areas where it could be held to be applicable.

And so what does the future hold? The United States has a number of options. It could simply say, in relation to coalition operations, “We are the most powerful and we don’t have to bother with this.” That would be understandable but would lead to an inevitable isolationism. The number of operations on which even the United Kingdom would be able to assist and support would be greatly reduced and it would leave the United States with no choice but unilateral action, with its friends and allies on the sidelines. Such a choice would be unfortunate.

The alternative is to sit down and try to work through these issues. I do not consider that any are insurmountable. What is required is a willingness to understand each others position and to be sensitive to that position. At the same time, it is necessary for the human rights and law of armed conflict communities to enter into dialogue to ensure that the two systems remain complimentary. If they become contradictory, then I would suggest that nobody wins and the world will be a more dangerous place. If the lawyers cannot agree, then the commanders will call a plague on both houses and both systems will be discredited. On the battlefield, discredited law amounts to no law at all.

I return to my theme of marriage guidance. Do I consider that the old alliances are subject to irretrievable breakdown? Not at all. However, what is needed is

greater communication between the parties and a willingness to talk *with* each other rather than *at* each other. Furthermore, each side needs to respect the others position and seek to accommodate it.

But then has any marriage guidance counselor ever said anything different?

Notes

1. Professor Garraway was the Charles H. Stockton Professor of International Law at the US Naval War College for academic year 2004–2005.
2. An interesting analysis of the “war of words” can be found in Nicole Mowbray’s report in *The Observer* of 16 February 16, 2003, under the heading “Cheese-eating monkeys and Gallic merde,” available at <http://observer.guardian.co.uk/iraq/story/0,12239,896588,00.html>.
3. See “Secretary Rumsfeld Briefs at Foreign Press Center” on January 22, 2003, available at http://www.defenselink.mil/news/Jan2003/t01232003_t0122sdfpc.html.
4. For an interesting viewpoint, see John C Hulsman, Heritage Lecture No.777, February 10, 2003, available at <http://www.heritage.org/Research/Europe/hl777.cfm>.
5. Regulations Annexed to Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, reprinted in DOCUMENTS ON THE LAWS OF WAR 73 (Adam Roberts & Richard Guelff eds., 3d. ed. 2000). Article 3 divided the armed forces into “combatants and non-combatants” (logisticians, etc.) but granted to both categories the right to be treated as prisoners of war.
6. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, Aug. 12, 1949, 75 U.N.T.S. 31–83 [Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, Aug. 12, 1949, 75 U.N.T.S. 85–133 [Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, 75 U.N.T.S. 135–285 [Geneva Convention III]; and Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, Aug. 12, 1949, 75 U.N.T.S. 287–417 [Geneva Convention IV]; all reprinted in Roberts & Guelff, *supra* note 5, at 197, 222, 244 and 301, respectively.
7. *Supra* note 5.
8. See, for example, *Mohamed Ali v. Public Prosecutor* (1968), 1 All.E.R.488, a decision by the Judicial Committee of the Privy Council arising out of the Malayan insurgency, and, in the United States, *ex Parte Quirin*, 317 US1 (1942).
9. Geneva Convention III, *supra* note 6, art. 4 (emphasis added).
10. THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 52 (Jean S. Pictet et al., eds., 1960).
11. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 422.
12. *Id.* at 444.
13. *Id.*
14. *Id.*
15. *Id.* at 445.
16. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶1686, at 522 (Y. Sandoz, C. Swinarski & B. Zimmermann eds., 1987).

17. See Additional Protocol I, *supra* note 11, art. 50.
18. *Id.*, art. 44(2).
19. A simple example of this is the position of mercenaries as defined in *id.*, Article 47.
20. *Id.*, art. 51(3).
21. Yoram Dinstein, *Unlawful Combatants*, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 247, 248 (2002).
22. *Id.* at 247
23. MODEL MANUAL ON THE LAW OF ARMED CONFLICT (A. P. V. Rogers & P. Malherbe eds., 1999).
24. Sharm El-Sheikh Fact-Finding Committee: Second Statement of the Government of Israel, March 20, 2001, at para. 46, *available at* <http://www.israel.org/mfa/go.asp?MFAH0jrb0>.
25. ¶¶ 601 and 1106(c).
26. Dinstein, *supra* note 21, at 247–248.
27. *Id.* at 248.
28. Additional Protocol I, *supra* note 11.
29. See Military Order of November 13, 2001, “Detention Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,” Federal Register: Nov. 16, 2001, Vol. 66, No. 222, *available at* <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>.
30. See Jim Lobe, “Britain, EU Set to Protest US Military Tribunals at Guantanamo,” Global Policy Forum, *available at* <http://www.globalpolicy.org/empire/un/003/0707tribunals.htm>.
31. See Human Rights Watch Briefing Paper on US Military Commissions, June 25, 2003, *available at* <http://www.hrw.org/background/usa/military-commissions.htm>.
32. In the case of the United States, these were established under Military Government Ordinance No. 7. See Germany, 1947–1949: The Story in Documents, US Govt. Print Office, Washington DC, 1950, at 112.
33. Geneva Convention III, *supra* note 6, art. 84.
34. Geneva Convention IV, *supra* note 6, art. 86.
35. Information about the Court can be obtained from the ECHR website, *available at* <http://www.echr.coe.int/Eng/General.htm>.
36. Article 6, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 9, 1950 (European Convention on Human Rights), *reprinted in* LAWS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 163–4 (D. J. Harris, M. O’Boyle & C. Warbrick eds., 1995).
37. See, e.g., Findlay v. United Kingdom, 24 European Human Rights Reports 221.
38. See Regulations for the Trial of War Criminals (Army Order 81/194), *reprinted in* Appendix XXV, The Law of War on Land being Part III of the Manual of Military Law 347 (1958).
39. The momentum for the diplomatic process that lead to the adoption of the Additional Protocols began with the 1968 International Conference on Human Rights held at Teheran.
40. See, *in particular*, Article 75, Protocol I, *supra* note 11, and Articles 4 to 6 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 483.
41. European Convention on Human Rights, *supra* note 36, art. 15.
42. See Ireland v. UK (1978), 2 EHRR 25.
43. See McCann v. UK (1995), 21 EHRR 97.
44. See, e.g., Aksoy v. Turkey (1996), 23 EHRR 553 and Ergi v. Turkey (Application 23818/94), Judgment 28 July 1998 (1998-IV, 1751).
45. See, e.g., Loizidou v. Turkey, 23 EHRR 513.

46. Bankovic and Others v. Belgium and 16 Other Contracting States, 123 ILR (2003) 94.
47. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 1996 I.C.J. 78 (July 8).
48. Juan Carlos Abella v. Argentina, Case 11.137, Report No 55/97, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc.7 rev at 271 (1997), *available at* <http://heiwwww.unige.ch/humanrts/cases/1997/argentina55-97a.html>.
49. See Las Palmeras v. Columbia, Judgement on Preliminary Objections, Inter-Am.C.H.R. (Ser.C), No.67 (2000) of 4 February 2000, *available at* http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html.
50. Geneva Convention III, *supra* note 6, art. 5.

APPENDIX

CONTRIBUTORS

Contributors

Editor's Note: In order to most accurately portray the events of the colloquium, the biographical data in this appendix reflects the position in which the authors were serving at the time of the colloquium, as reflected in the colloquium brochures and materials.

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