

5-4-2016

The Rules of Engagement: Self-Defense and the Principle of Distinction in International Humanitarian Law

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THE RULES OF ENGAGEMENT:
SELF-DEFENSE AND THE PRINCIPLE OF DISTINCTION
IN INTERNATIONAL HUMANITARIAN LAW

TRACEY LEIGH DOWDESWELL

A DISSERTATION SUBMITTED TO
THE FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN LAW
YORK UNIVERSITY
TORONTO, ONTARIO

May 2016

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ABSTRACT

This dissertation examines the problem of the mistaken killing of civilians in armed conflict. This occurs when a civilian is intentionally killed by armed forces because he or she is mistakenly believed to pose a threat of harm. The requirement that armed forces distinguish between combatants and civilians who are immune from being attacked is known as ‘the principle of distinction’ in the international humanitarian law. The problem posed by distinguishing irregular fighters from ordinary civilians has long been recognized in the law, and the modern laws of war were developed, in part, to respond to this problem. At present, two of the more influential approaches to resolving the problem of distinction are the International Committee of the Red Cross (ICRC) *Interpretive Guidance on Civilian Direct Participation in Hostilities*, which sets out the ICRC’s opinion on the circumstances under which civilian participants may be targeted, and modern Rules of Engagement, which regulate the use of force by soldiers and security forces during combat operations. This dissertation argues that both methods are inadequate to resolving the problem of distinction, because they are overbroad, in that they authorize the killing of civilians who have done nothing to forfeit their immunity, and therefore violate this key requirement of the international laws of war.

This dissertation proposes a definition of ‘civilian direct participation in hostilities’ that is based upon ordinary rules governing self-defense. In this way, a civilian will forfeit his or her life only when there is clear and convincing evidence that he or she is engaged in an act of aggression that wrongfully poses an imminent threat of death or serious bodily harm to civilians or members of armed forces, and the use of force is necessary and proportionate to prevent that harm. Force will be necessary and proportionate only after de-escalation of force procedures have been diligently applied, and the consequences of the use of force on the surrounding population would not be indiscriminate or disproportionate, or be such as to spread terror.

Merging the rules for defensive force with the laws of armed conflict possesses several advantages over the present practice of treating self-defensive killings as being separate from, and largely superseding, international law and its norms protecting civilians. First, this approach solves the problem of providing a principled definition of civilian direct participation in hostilities, which has long been the subject of controversy and contention among states and international organizations. Second, this approach provides an explanation for why pre-emptive and status-based interpretations of civilian direct participation result in unjustified killings. Hopefully, this will be a first step in quelling the growing practice of targeting persons based upon group affiliations, both real and perceived, that is gaining legitimacy. At the same time, this approach also addresses the growing problem of mistaken killings during escalation of force incidents. At present, the international laws of armed conflict do not obligate states to use minimal force when dealing with civilians and suspected civilian participants. However, if civilian direct participation were to be based upon rules for defensive force, then minimal force and escalation of force procedures would become mandatory, rather than merely recommended, as they ensure that the killing is necessary – a fundamental component of justified defensive force. Furthermore, this provides an analytical framework that can be used to analyze novel or controversial cases of civilian participation, rather than allowing states to make these decisions on an *ad hoc*, and largely discretionary, basis.

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The Rules of Engagement: Self-Defense and the Principle of Distinction in International Humanitarian Law

1.0 The Rules of Engagement and Mistaken Self-Defense

In an armed conflict, how do soldiers distinguish between ordinary civilians and irregular fighters, who might wear no uniforms, and blend into the civilian population? The requirement that armed forces distinguish between combatants and civilians who are immune from attack is known as ‘the principle of distinction’ in the international humanitarian law; *Protocol I* to the 1949 *Geneva Conventions* defines this by stating that civilians are immune from attack unless and for such time as they take a direct part in hostilities, and that belligerents must take steps to distinguish civilians from military objectives.¹ The problem posed by distinguishing irregular fighters from ordinary civilians has long been recognized in the law, and the modern laws of war were developed, in part, to respond to this problem.² At present, two of the more influential approaches to resolving the problem of distinction are the International Committee of the Red Cross (ICRC) *Interpretive Guidance on Civilian Direct Participation in Hostilities*,³ which sets out the ICRC’s opinion on the circumstances under which civilian participants may be targeted, and modern Rules of Engagement, which regulate the use of force by soldiers and security forces during combat operations. However, both methods are inadequate to resolving the problem of

¹ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 [hereinafter *Protocol I*] at Articles 51(3), which states “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”; see also Article 51(4), which states, “Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed against a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.” These are the most recent treaty rules that describe what is often called the “principle of distinction”, or the “principle of discrimination”. This is the general rule that privileges the killing of and by qualified belligerents, while prohibiting intentional attacks either by or on civilians. See e.g., Jeremy Waldron, “Civilians, Terrorism and Deadly Serious Conventions” (2009) *New York University Public Law and Legal Theory Working Papers*, Paper 122 [hereinafter *Deadly Serious Conventions*] at 1-2.

² While there is some disagreement, the phrases “the laws of war”, “the laws of armed conflict” and the “international humanitarian law” are generally taken to be interchangeable, and they shall be so used in this dissertation. See: Dale Stephens, “Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case” (2001) 4 *Yale Hum. Rts. & Dev. L.J.* 1 at 2, note 5.

³ International Committee of the Red Cross (ICRC), “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” (December 2008) 90:872 *International Review of the Red Cross* 991 [hereinafter *Interpretive Guidance*].

distinction; they are over broad, in that they authorize the killing of civilians who have done nothing to forfeit their immunity, and therefore violate this key requirement of the international laws of war. It is the purpose of this dissertation to review these current approaches to the problem of distinction, and to propose a solution which preserves legitimate recourse to self-defense, while better protecting civilians.

The present standards in place for distinguishing civilians are vague and permissive of the discretionary use of military force, and therefore they can facilitate what are termed mistaken defensive killings.⁴ Mistaken killings are those in which a person mistakenly believes a set of facts obtains which, if they were true, would give that person permission to kill another in self-defense or defense of another.⁵ In cases of mistaken self-defense, the target is believed by the defender to pose a threat of death or grievous bodily harm but is, in fact, innocent of having posed a threat.⁶ This might occur in war, for example, if a soldier suspects that an individual digging in a field near an army base is planting an explosive device that threatens the lives of nearby soldiers,⁷ or that an individual who approaches a convoy is a militant engaged in an act of sabotage.⁸ If true, then the soldier may have permission to kill the individual on defensive grounds, but in reality the person targeted is an ordinary civilian who is simply engaged in planting their crops, or driving down the highway, and poses no threat. Unlike killings that are a

⁴ Reid Griffith Fontaine, "An Attack on Self-Defense" (2010) 47 Am. Crim. L. Rev. 57 at 59.

⁵ *Ibid.* Here, no distinction will be drawn between force used in self-defense and defense of another, and both are encompassed here within the term 'defensive force'. 'Security forces' will be used to describe army, police, and/or private security forces generally, while 'army' or 'armed forces' will refer to regular army troops.

⁶ Michael Louis Corrado, "Self-Defense, Moral Acceptability, and Compensation: A Response to Professor Fontaine" (2010) 47 Am. Crim. L. Rev. 91 at 96 [hereinafter *Self-Defense and Moral Acceptability*].

⁷ See e.g., Yaroslav Trofimov, "New Battles Test U.S. Strategy in Afghanistan: Focus on Safeguarding Civilian Lives Frustrates Troops in Taliban Territory" *The Wall Street Journal* (9 February 2010), available at: <http://online.wsj.com/Articles/SB10001424052748704140104575057630668291288> (accessed 26 November 2014). In a similar case, the U.K. Service Prosecuting Authority declined to lay charges against Fusilier Duane Knott of the Territorial Army for shooting and killing an unarmed Afghan man digging near the military base. Superiors suspected that he might have been an innocent farmer, but Bruce Holder, the head of the Special Prosecuting Authority stated that, after consulting a barrister, he was satisfied that "no evidence exists to justify criminal proceedings being taken against this soldier". See: Rob Evans and Richard Norton-Taylor, "British Soldier Will Not be Charged After Killing of Afghan" *The Guardian* (16 April 2012), available at: <http://www.theguardian.com/uk/2012/apr/16/british-soldier-not-charged-afghan-murder> (accessed 26 November 2014); see: *infra* Chapter Four at note 62 and accompanying text.

⁸ United States Army, Incident Report, Reference ID IRQ20050302n1519 (2 March 2005), available at: <http://wikileaks.org/irq/report/2005/03/IRQ20050302n1519.html> (accessed 5 April 2013); see also: *infra* Chapter Four at note 62 and accompanying text.

result of collateral damage,⁹ or a proportionality calculus,¹⁰ mistaken killings take place when soldiers intentionally target individual civilians whom the soldiers subjectively believe pose some threat of harm, but who in fact do not. This also distinguishes cases of mistaken self-defense from cases in which the target poses a threat, but does so innocently, or unknowingly. It has been argued that such innocent, or non-responsible, threats may be permissibly targeted in self-defense.¹¹ In contrast, mistaken killings are unjustified, as the victim has done nothing to forfeit his or her life and does not deserve to be killed.¹² For this reason, mistaken killings of civilians by soldiers also violate the international law's prohibitions against the intentional killing of civilians who are not participating in hostilities, and may constitute a war crime.

Much of the literature that has examined the ICRC *Interpretive Guidance* and its approach to targeting civilians has criticized the ICRC for the restrictions it has placed on targeting, characterizing the problem as one of finding the correct "balance" between the competing rights of security forces versus those of civilians.¹³ In a special issue of the *NYU Journal of International Law and Politics* devoted to the *Interpretive Guidance*, the editors explicitly characterized the debate in these terms. Goodman and Jinks state that in the struggle to define civilian direct participation, humanitarian and human rights interests on the one hand are

⁹ 'Collateral' or 'incidental' damage are deaths and injuries to civilians and civilian objects that are not caused intentionally, but are incidental to a lawful attack. See: Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed. (Manchester: Manchester University Press, 2008) at 149 [hereinafter *Law of Armed Conflict*].

¹⁰ *Ibid.* To be proportionate, collateral damage caused by the attack must be proportionate to the purpose of the attack, and to the military advantage to be gained therefrom. See: *Protocol I*, *supra* note 1 at Article 51(5)(c), which defines disproportionate or indiscriminate attacks as those in which the collateral damage is expected to be "excessive in relation to the concrete and direct military advantage anticipated."

¹¹ Reid Griffith Fontaine, "Regarding Self-Defense: A Rejoinder to Professor Corrado" (2010) 47 *Am. Crim. L. Rev.* 97 at 102 [hereinafter *Regarding Self-Defense*]; Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009) at 162-6 [hereinafter *Killing in War*] (innocent threats, who are subjectively justified in posing a threat of harm), and 167-173 (nonresponsible threats, who are not morally responsible for posing a threat of harm); see also: Jeff McMahan, "Self-Defence and the Problem of the Innocent Attacker" (1994) 104 *Ethics* 252.

¹² *Ibid.* at 101.

¹³ Some of the responses to the ICRC that will be discussed in this dissertation include: Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis" (May 2010) 1 *Harv. Nat'l Sec. J.* 5; Michael Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements" (2009) 42:3 *N.Y.U. J. Int'l L. & Pol.* 697; William Hays Parks, "Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect" (2009) 42:3 *N.Y.U. J. Int'l L. & Pol.* 769; William C. Banks, ed., *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare* (New York: Columbia University Press, 2011); William C. Banks, "Towards an Adaptive Humanitarian Law: New Norms for New Battlefields" in *New Battlefields/Old Laws* 1; Eric T. Jensen, "Direct Participation in Hostilities" in *New Battlefields/Old Laws* 85; Daphne Richemond-Barak, "Nonstate Actors in Armed Conflicts: Issues of Distinction and Reciprocity" in *New Battlefields/Old Laws* 105. See: Chapter Three at s. 3.2 for discussion.

pitted against the interests of “preserving discretion or freedom of action for military planners and personnel making targeting decisions on the battlefield” and the “pragmatic and tactical realities of military operations,” on the other.¹⁴ The academic literature concerning rules of engagement, and specifically their treatment of rules concerning self-defense is small but growing, and much of this literature, too, characterizes the problem of targeting as one of balancing the rights of security forces with humanitarian concerns. Todd Huntley of the U.S. Judge Advocate General Corps, for example, states that the U.S. military has had difficulty in balancing the exercise of self-defense with the protection of civilians, stating that “[w]hile the use of force in self-defense must be proportionate, the range of response permitted under the law of armed conflict is quite wide, with many military leaders favoring the use of overwhelming force when confronted with a hostile act or hostile intent.”¹⁵ However, this balance most often falls on the side of protecting security forces over and above civilians. This dissertation rejects the “balancing approach” advocated by the above authors. While it may appear neutral on its face, the balancing approach incorporates numerous biases and prejudices, both about the efficacy and utility of using force and coercion against a target population, as well as the risks assumed to be posed by that population. Instead, this dissertation proposes that the matter be resolved not by balancing competing rights, but by incorporating objective criteria for determining when the use of defensive force is in fact legally justified. I argue that this is the best approach to minimize bias, avoid mistaken killings, and do justice to all parties involved.

The problem of mistaken killings presents a serious challenge to the regulation of counterterrorism and counterinsurgent warfare in particular, as soldiers may mistakenly perceive threats from members of the civilian population, or wrongly assume them to be members of militant or insurgent groups, and so mistakenly take their lives. In this introductory chapter, I briefly describe the approach to self-defense and civilian immunity that have been taken by modern Rules of Engagement, as well as recent interpretations of civilian direct participation by the International Committee of the Red Cross, topics that will be discussed in greater length in

¹⁴ Ryan Goodman and Derek Jinks, “The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum” (2009) 42:3 N.Y.U. J. Int’l L. & Pol. 637 at 640.

¹⁵ Todd C. Huntley, “Balancing Self-Defense and Mission Accomplishment in International Intervention: Challenges in Drafting and Implementing Rules of Engagement” (2014) 29 Md. J. Int’l L. 83 at 111.

Chapter Three. Next, I describe some of the reasons why mistaken killings present a serious problem for the protection of civilians in modern counterinsurgent warfare. Security forces are claiming a privilege to intentionally kill innocent civilians – a privilege not traditionally granted by the laws of war - and this denies civilians both their right to life, as well as justice for harms they suffer. Moreover, mistaken killings are often strategically counterproductive, as there is research that demonstrates that the killing of civilians can escalate the violence of armed conflicts, and place security forces at greater risk of reprisal attacks from insurgent forces.

Next, I sketch out some of the basic principles that ought to inform a resolution of the problem of distinction in armed conflict, proposing that rules for distinguishing civilian direct participants be based upon rules governing the use of defensive force, but not those currently in place. First, I review the current legal standards in place, rejecting both the standard of reasonableness generally used in the criminal law - that would excuse the mistaken use of defensive force in cases in which the defender subjectively, but wrongly, believed the use of force to be necessary - as well as the more objective standard of liability used in tort law, that would hold defenders accountable for mistaken killings even when the mistake was reasonable under the circumstances. The first standard is over broad, and would permit the use of force against civilians who are not participating in hostilities, whereas the second standard is not well adapted to making decisions under conditions of uncertainty, in which many of the relevant facts cannot be known. Instead, I adopt a standard based upon available evidence, one that requires clear and convincing evidence of civilian direct participation before force may be used. This shifts the inquiry away from the subjective perceptions of the soldier, and on to the conduct of the civilian. As the international humanitarian law requires,¹⁶ a clear and convincing standard that goes beyond a mere probability is necessary in order to comply with this requirement. The final section will address the elements of permissible defensive force, adapting them to the problem of determining whether a civilian is participating in hostilities, and defining this concept in terms of the threat of harm that the civilian poses.

¹⁶ *Protocol I*, *supra* note 1 at Article 50(1), which applies to international armed conflicts. Such a rule does not appear in *Protocol II*, but it has been considered that this rule is part of the customary international law, and accordingly ought to be respected in all armed conflicts. See: *Interpretive Guidance*, *supra* note 3 at 1039; Yves Sandoz *et al.*, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987) at § 4789 [hereinafter *ICRC Commentary*].

Under this definition, a civilian forfeits his or her immunity from attack only when there is clear and convincing evidence that he or she is engaged in an act of aggression that wrongfully, *i.e.* without lawful authority, justification or excuse, poses an imminent threat of death or serious bodily harm to civilians or members of armed forces, and the use of force is necessary and proportionate to prevent that harm. Force will be necessary and proportionate only after escalation of force procedures have been diligently applied, and the consequences of the use of force on the surrounding population would not be indiscriminate or disproportionate, or be such as to spread terror. The right to use defensive force in war, as well as the criteria for the justified use of defensive force, are themselves a subset of human rights law. Accordingly, the rules for defensive force also have close connections with international human rights laws, particularly those regulating the conduct of security forces. However, in this dissertation I will focus on the use of defensive force in the context of the international humanitarian law, and particularly its rules governing the distinction between military and civilian targets. It is hoped that this will highlight the centrality of these issues to the international humanitarian law, and provide a vehicle for bringing these two fields of law closer together.

Chapter Two will discuss the development of the modern laws of armed conflict concerning belligerent privilege and civilian immunity, focusing on developments that took place from the late eighteenth century to the adoption of the *Protocols Additional* in 1977. This is an area of the international law which is not only highly contentious and politicized, but which goes to the heart of the prerogatives and privileges of state power and its use of violence against the individual. It is therefore instructive to examine the basic principles and values that underlie this area of the law, and to demonstrate how wholly novel are current approaches to the principle of distinction, and how out of step they are with the international treaty and customary laws of armed conflict. Defining the loss of civilian immunity in defensive terms that focus on the potential of the civilian actor to wrongfully harm others is more in keeping with the laws of war and the “principles of humanity”¹⁷ that they embody than are current approaches.

Chapter Three will examine in greater depth the development of current Rules of Engagement and the ICRC *Interpretive Guidance*, as well as the ICRC’s critics and their own

¹⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 at para. 79 [hereinafter *Nuclear Weapons Advisory Opinion*], in which the Court states that warfare is regulated by the “fundamental principles of humanity”.

proposals for distinguishing civilians who are participating directly in hostilities. These approaches to distinguishing civilian participants are over-inclusive in that they justify the use of lethal force against civilians who are not participating in hostilities, and even against those who do not pose any threat of harm. Chapter Four will review four case studies that illustrate the problem of mistaken self-defense in armed conflict, and will discuss how a revised definition of the loss of civilian immunity based upon defensive criteria might assist in preventing these killings, and in promoting accountability on the part of the security forces involved.

The case studies demonstrate the application of Rules of Engagement to the problem of distinguishing civilian participants, and are drawn mainly from the recent military conflicts in Iraq (2003-2011) and Afghanistan (2001-present). The first case study describes an emblematic case of mistaken killings by examining escalation of force incidents at traffic checkpoints. Most of these killings took place when a vehicle approached a security checkpoint and would not stop according to instructions from Coalition forces. Standard Rules of Engagement authorize the use of lethal force in these circumstances, despite the fact that the civilians they killed were clearly not participating directly in hostilities. In these cases, it can be seen that the self-defensive criteria for the use of force found in Rules of Engagement are clearly incompatible with the rule of civilian direct participation as found in *Protocol I*. The second case study will examine the use of pre-emptive killings during the U.S.-led Coalition's 2004 siege of the Iraqi city of Fallujah. Again, standard Rules of Engagement authorized the killing of civilians who were not clearly participating in hostilities and who were not known to have been members of militant groups.

The remaining two case studies will examine the targeting of declared hostile forces as permitted by standard Rules of Engagement, *i.e.* the practice of distinguishing militants from ordinary civilians based upon their status as members of organized non-state armed groups. The first of these case studies will examine the detentions that took place at the U.S. internment facility at Guantanamo Bay, Cuba, and the judicial decisions concerning the meaning of the term 'unlawful enemy combatant' that the U.S. government developed to justify these detentions. This case study will also examine the desuetude of the long-standing principle of customary law, declared in the 1899 *Hague Regulations*¹⁸ and adopted into the *Third Geneva Convention*,¹⁹ of

¹⁸ *International Conferences (The Hague), Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 29 July 1899, Annex to the

levée en masse. A *levée en masse* is a concept that permits ordinary civilians to take up arms to repel an invasion,²⁰ and it is notable for being the only rule in international law that would permit ordinary civilians a right of self-defense against an invading army. Coalition forces in Iraq and Afghanistan expanded the circumstances under which their own security forces would be permitted to use defensive force, while simultaneously limiting those same rights for civilians. The fourth and final case study will review the U.S. government's targeted killing program and the legal justifications for this program that the U.S. government has put forth under the international laws of armed conflict, many of which were drawn from the legal doctrines it earlier developed to deal with the detainees at Guantanamo Bay. Standard Rules of Engagement are essential to the operation of the U.S.'s targeted killing program, and the manner in which its personnel choose their targets and justify these strikes. At present, there are few guarantees that civilians will not be killed by mistake, particularly in the course of 'signature strikes',²¹ and there are studies that purport to show that many civilians have in fact been killed in this manner.²² The use of signature criteria in order to justify lethal force also demonstrates that security forces are indeed using conduct-based criteria in order to distinguish targets, but the criteria being used do not meet the standard of civilian direct participation in hostilities as found in the ICRCs *Interpretive Guidance*, or the rules for the use of defensive force proposed herein.

Convention: Regulations Respecting the Laws and Customs of War on Land at Article 1; *International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land at Article 1 [hereinafter the *Hague Regulations*]; see full text of Article 1 at Appendix A at 10 and 11, p. 301.

¹⁹ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, at Article 4 available at: <http://www.refworld.org/docid/3ae6b36c8.html> (accessed 6 November 2014) [hereinafter *Third Geneva Convention*]; see Appendix A at 12, p. 302.

²⁰ *Ibid.* at Article 4(6), which states that lawful prisoners of war include "Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force, without having had time to form themselves into regular armed units, provided that they carry arms openly and respect the laws and customs of war;" see Appendix B, p. 305, for a list of definitions.

²¹ Kevin J. Heller, "One Hell of a Killing Machine: Signature Strikes and International Law" (2013) 11:1 J. Int'l Crim. Just. 89 [hereinafter *Signature Strikes*].

²² Chantal Grut, "Counting Drone Strikes" (October 2012) Columbia Law School Human Rights Clinic Report [hereinafter *Columbia Drone Study*], available at: <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf> (accessed 17 April 2013); International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, *Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan* (September 2012) [hereinafter *Stanford/NYU Drone Study*], available at: <http://www.livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf> (accessed 17 April 2013).

These case studies focus primarily on recent military activities by U.S. forces in Iraq and Afghanistan. Substantial evidence has been made available to the public concerning these incidents, and this assists the study of government activities that are frequently classified. In addition, standard Rules of Engagement were developed by the U.S. military, and they have since spread to other nations, largely through U.S. influence. However, this emphasis here on U.S. forces is not meant to imply that standard Rules of Engagement are employed only by U.S. forces, or that this problem is limited to that country alone; it will be shown that many nations, as well as NATO, are increasingly adopting similar Rules of Engagement and counterinsurgent doctrine.²³ American forces fought alongside soldiers from many countries as part of multi-national coalitions in Iraq and Afghanistan, and there was a drive for standardization and harmonization among the different forces.²⁴ These multi-national coalitions were therefore vehicles for disseminating knowledge and training regarding U.S. Rules of Engagement among Coalition forces. U.S. forces have also trained local forces in Iraq and Afghanistan to use standard U.S. Rules of Engagement and counterinsurgency doctrine.²⁵ Chapter Three will also discuss the International Institute of Humanitarian Law at Sanremo, and the *Rules of Engagement Handbook* that they have developed and disseminated.²⁶ This is also an important vehicle for disseminating knowledge of standard Rules of Engagement, and the Institute has trained high-

²³ See: Chapter Three at ss. 3.1.1.1 and 3.1.2.1.

²⁴ *Ibid.* The NATO International Security Assistance Force in Afghanistan (ISAF) is composed of troops from 40 NATO-member states, only about 52% of which are U.S. troops (as of May 2015), available at: NATO ISAF Operation Resolute Support: Troop Numbers and Contributors, <http://www.rs.nato.int/troop-numbers-and-contributions/index.php> (accessed 6 July 2015); the Multi-National Force in Iraq contained troops or advisors from 34 nations besides the United States, as part of the Coalition Forces, the NATO training mission, and the United Nations Assistance Mission in Iraq, including: Albania, Armenia, Australia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Czech Republic, Denmark, El Salvador, Estonia, Georgia, Kazakhstan, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Poland, Romania, South Korea, the United Kingdom, and later Fiji, Japan, Portugal, Singapore, and the Ukraine; Hungary, Iceland, Slovenia, and Turkey contributed NATO training personnel, available at: U.S. State Department, "August 23, 2006 Iraq Weekly Status Report" (23 August 2006), http://www.globalsecurity.org/military/ops/iraq_orbat_coalition.htm (accessed 6 July 2015). There was therefore significant numbers of non-U.S. military personnel involved in the conflicts in Iraq and Afghanistan, and a great variety of national militaries were exposed to the policies and practices put in place there.

²⁵ Afghan National Army, *Counterinsurgency*, ANA 3-24 (June 2007), available at: <http://info.publicintelligence.net/ANA-3-24.pdf> (accessed 9 January 2013); *infra* Chapter Three, note 68 and accompanying text.

²⁶ Dennis Mandsager *et al.*, *Rules of Engagement Handbook* (Sanremo: International Institute of Humanitarian Law, 2009) [hereinafter *ROE Handbook*], available at: <http://www.usnwc.edu/getattachment/7b0d0f70-bb07-48f2-af0a-7474e92d0bb0/San-Remo-ROE-Handbook> (accessed 16 January 2013).

ranking military officials from many nations in these practices.²⁷ The problems posed by Rules of Engagement can be expected to grow if these rules were to be adopted by further countries in future conflicts. The present time therefore affords an opportunity to reformulate the definition of civilian direct participation in hostilities so as to better protect human rights, and to mitigate some of the most damaging effects of standard Rules of Engagement, before these practices become more widely adopted.

1.0.1 The Protection of Civilians in the Laws of Armed Conflict

In the laws of armed conflict, the rules protecting civilians from the effects of hostilities are laid out in *Protocol I*²⁸ and *II*²⁹ *Additional to the 1949 Geneva Conventions*. *Protocol I* deals with international armed conflicts, and Article 51(1) sets out the general rule which states that the “civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.” Article 51(2) states specifically that the “civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Article 51(4) further prohibits indiscriminate attacks. Indiscriminate attacks are defined in Article 51(4)(a) as those which are “not directed at a specific military objective,” or, in Article 51(4)(b) as “those which employ a method or means of combat which cannot be directed at a specific military objective,” or, in Article 51(4)(c) as “those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.” Article 51(3) states the general rule that civilians “shall enjoy the protection of this Section, unless and for such time as they take a direct part in hostilities.” The regime of international criminal law and the *Rome Statute* depend upon the definition of civilian direct participation found in Article 51(3) of *Protocol I*; in particular, the war crime of intentionally killing civilians is defined in s. 8(2)(b)(i) as “intentionally directing attacks against the civilian

²⁷ *Infra* Chapter Three, note 180 and accompanying text.

²⁸ *Protocol I*, *supra* note 1.

²⁹ *International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: <http://www.refworld.org/docid/3ae6b37f40.html> (accessed 15 March 2015) [hereinafter *Protocol II*].

population as such or against individual civilians not taking a direct part in hostilities.”³⁰ Neither the *Rome Statute* nor *Protocol I*, however, further define what it means for a civilian to take a direct part in hostilities.

Non-international armed conflicts, defined as all those conflicts not covered by *Protocol I*,³¹ are governed by *Protocol II*, which lays out similar rules governing civilian immunity in Article 13. Article 13(1) states that “The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.” Article 13(2) states more specifically that “The civilian population as such, as well as individual civilians, shall not be the objects of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Article 13(3) reiterates the principle found in Article 51(3) of *Protocol I*, stating that “Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.” The key difference between the two *Protocols Additional* is that *Protocol II* does not include a prohibition against indiscriminate methods and means of warfare, although the protection of basic human rights, including a general prohibition against violence and murder, are stipulated in Article 4, which protects all those who do not participate, and those who have ceased to participate, in hostilities. Although it may not always be clear whether a particular conflict is an international or a non-international armed conflict, the basic rules that require civilian immunity, or the laws governing civilian direct participation in hostilities are essentially the same in all types of armed conflict.³²

³⁰ United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> (accessed 15 March 2015) [hereinafter *Rome Statute*].

³¹ *Protocol II*, *supra* note 29 at Article 1.

³² The *Third Geneva Convention*, *supra* note 19, defines an international armed conflict in Article 2 as “all cases of declared war or of any other conflict which may arise between two or more of the High Contracting Parties.” Article 2 further states that the Convention “shall apply also to cases of partial or total occupation of a High Contracting Party, even if the occupation meets with no armed resistance.” This would seem to apply to cases in which a foreign power supplies troops to assist a host government in fighting a civil war or insurgency, as was the case for the conflicts in Iraq and Afghanistan, the main focus of this dissertation. The 1960 ICRC *Commentary* on the *Geneva Conventions* states that this provision was included to prevent pretexts that states might put forward for evading the Convention, including by claiming that they were acting in self-defense, by denying that a state of armed conflict exists or - what is most relevant for counterinsurgent actions - that they were merely undertaking a police action. See: Jean Pictet, ed., *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: International Committee of the Red Cross, 1960) at 22-23 [hereinafter *1960 Commentary*]. This provision of the *Third Geneva Convention* was adopted unchanged from the draft text that was prepared by the ICRC at its 1948 Conference in Stockholm, where the preparatory work was completed on the draft Conventions for the 1949 Diplomatic Conference in Geneva; see: International Committee of the Red Cross (ICRC), *Final Record of the*

1.0.2 Rules of Engagement

Rules of Engagement are a recent and particularly modern means of regulating the use of force in armed conflict.³³ Although their antecedents date back to the end of the Second World War, they largely grew up in the post-Cold War era of the 1990s and the asymmetrical operations that then took on increasing importance.³⁴ The 1992 U.S. Operation Restore Hope in Somalia was a watershed event in generating the standard Rules of Engagement in place today.³⁵ The Rules of Engagement that emerged around this time adopted an unprecedented focus on the individual self-defense of the ordinary soldier. The standard Rules of Engagement that grew out of this came to allow for the use of force on three grounds, all of which are broadly self-defense related, and all of which give final discretion to apply force to individual soldiers themselves. Rules of Engagement allow for lethal force in self-defense first, if a soldier perceives a hostile act on the part of a civilian, and second, if the soldier perceives a hostile intent on the part of a civilian.³⁶ These criteria are clearly self-defensive in nature. Rules of Engagement also allow for the use of lethal force against any individual deemed to be a member of a ‘declared hostile force’, such as a militant or terrorist group.³⁷ The targeting of declared hostile forces is often justified in terms of self-defense and as shall be seen, this is clearly in evidence in the debate concerning targeted killings.³⁸ However, when security forces are given too much discretion, then ordinary civilians may be killed who bear no arms and pose no threat. Their killing violates the immunity

Diplomatic Conference of Geneva of 1949, Vol. 1 (Berne: Federal Political Department, 1949) at 73. *Protocol I* applies in all circumstances in which the *Third Geneva Convention* applies, at Article 1(3), and specifically applies to conflicts in which peoples are fighting against alien occupation, at Article 1(4). There is therefore good reason to conclude that both the *Third Geneva Convention* and *Protocol I* applied to the entirety of the counterinsurgent operations in Iraq and Afghanistan.

³³ Department of Defense, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 (Washington, D.C.: Department of Defense, 8 November 2010, As Amended Through 15 August 2014) at 256 [hereinafter the *Joint Chiefs Dictionary*]. The *Joint Chiefs Dictionary* defines Rules of Engagement as “[d]irectives issued by a competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with forces encountered.”

³⁴ *Infra* Chapter Three at s. 3.1.2.

³⁵ *Infra* Chapter Three note 103 and accompanying text.

³⁶ Chairman of the Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces*, Instructions 3121.01B Washington, D.C., Department of Defense (13 June 2005) at para. 6(b)(1).

³⁷ See e.g., Chairman of the Joint Chiefs of Staff, *Standing Rules of Engagement for U.S. Forces*, Instruction 3121.01, Washington, DC.: Department of Defense (1 October 1994) at Appendix A Enclosure A para. 6.

³⁸ See e.g.: Phillip Montague, “Defending Defensive Targeted Killings” in Claire Finkelstein, Jens David Ohlin & Andrew Altman, eds., *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012) 285 [hereinafter *Targeted Killings*]; Leo Katz, “Targeted Killings and the Strategic Use of Self-Defense” in *Targeted Killings* 467.

granted to them by the laws of armed conflict, as well as their right to life. In particular, Rules of Engagement, at least in their current form, are a “method or means of combat” that are inherently likely to “strike military objectives and civilians or civilian objects without distinction,”³⁹ and this can be seen in the case studies of escalation of force incidents, the indiscriminate use of force at Fallujah, and within the present targeted killing program.

1.0.3 The ICRC Interpretive Guidance on Civilian Direct Participation in Hostilities

Part of this problem lies in the lack of a clear definition in the international law of civilian direct participation in hostilities. *Protocol I* left civilian direct participation largely undefined, and there has been little case law on the subject.⁴⁰ Many of the relevant cases have been conducted under domestic codes of military justice, such as the *Uniform Code of Military Justice* in the United States,⁴¹ and military authorities have shown a great deal of deference to the discretion of soldiers operating under their Rules of Engagement, irrespective of whether the killings were reasonable, or complied with international humanitarian law.⁴² Defining civilian direct participation in hostilities has been the subject of much discussion and debate, particularly following the controversies surrounding the U.S.-led counterinsurgent actions in Iraq and Afghanistan. In 2003, the ICRC led an expert process to better define the concept of civilian direct participation in hostilities. Their findings were expressed in the ICRC’s *Interpretive Guidance*,⁴³ which has been much criticized, including by many of the experts who participated in that process.⁴⁴ The *Interpretive Guidance* takes a novel approach of separating civilian direct participants from those persons who are members of organized armed groups, thus creating a novel category of non-civilian: the non-state combatant.⁴⁵ The non-state combatant is a status-based concept, and as such it does not look to the conduct of the civilians and ask whether they

³⁹ *Protocol I*, *supra* note 1.

⁴⁰ Jens David Ohlin, “Targeting Co-belligerents” in *Targeted Killings*, *supra* note 38, 60 at 66.

⁴¹ *Uniform Code of Military Justice*, 64 Stat. 109, 10 U.S.C. §§ 801-946 [hereinafter *UCMJ*].

⁴² See e.g., *United States v. Johnson*, No. 458 27 1616 (I Marine Expeditionary Force, 16 March 1993) (Report of Article 32(b) Investigating Officer); *United States v. Mowris*, GCM No. 68 (Fort Carson 4th Infantry Division (Mech) 1 July 1993).

⁴³ *Interpretive Guidance*, *supra* note 3.

⁴⁴ William Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect” (2009) 42:3 N.Y.U. J. Int’l L. & Pol. 769 at 784 [hereinafter *No Mandate*]; see also: Michael Schmitt, “Deconstructing Direct Participation in Hostilities: The Constitutive Elements” (2009) 42:3 N.Y.U. J. Int’l L. & Pol. 697 at 699 [hereinafter *Constitutive Elements*].

⁴⁵ *Interpretive Guidance*, *supra* note 3 at 1036.

are participating directly in hostilities, but whether they exhibit some characteristics of membership in a prohibited armed group. In this way, the ICRC's definition is similar to the concepts embodied in the terms 'unlawful enemy combatant' and 'declared hostile force', in that these are all terms that attempt to encompass membership in a militant or insurgent group, and to define this in terms of the status of the group itself, rather than the conduct of its members; in particular, it does not address whether they are taking a direct part in hostilities at the time they are subject to attack.⁴⁶ The *Interpretive Guidance* permits states a much freer hand in targeting members of such groups while providing few workable criteria for how such fighters can be distinguished, and the ICRC itself has recognized the practical unworkability of these criteria.⁴⁷ Criticisms of the *Interpretive Guidance* primarily center on arguments that the ICRC's criteria lack a principled definition of civilian direct participation, as well as the fact that their criteria are under-inclusive.⁴⁸ Military experts, in particular, argued that the ICRC's standards were not as permissive as those they currently employed in their Rules of Engagement, and this would place soldiers at greater risk; accordingly, it was argued that the ICRC standards would not be accepted by military authorities.⁴⁹

On the other hand, there are reasons why the criteria found in the *Interpretive Guidance* are in fact over-inclusive. The *Interpretive Guidance* would permit attacks against civilians who engage in activities that would tend to harm or otherwise thwart a military objective.⁵⁰ States could, and in some cases have interpreted this to permit attacks against civilians engaged in unarmed protest, or civilians who commit disciplinary infractions, such as disobeying orders from occupying forces, or even humanitarian and aid workers on the ground that these actions constitute direct participation in hostilities.⁵¹ In this way, states are moving the definition of civilian direct participation away from a concept that prohibits civilians from threatening or

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at 1014.

⁴⁸ *Constitutive Elements*, *supra* note 44 at 714.

⁴⁹ *Ibid.*

⁵⁰ *Interpretive Guidance*, *supra* note 3 at 1016. The ICRC has divided this aspect of civilian direct participation into two categories. The first defines direct participation in terms of the necessity for defensive force, as when the civilian commits an act likely to "inflict death, injury or destruction on persons or objects protected against direct attack," at 995. This would permit the use of lethal force to protect property. The second defines direct participation as an act likely to "adversely affect the military operations or military capacity of a party to an armed conflict," *ibid.* In this dissertation, it is argued that the use of lethal defensive force is only permissible to protect against death or serious injury.

⁵¹ *Ibid.* at 1017. See Chapter Three at sections 3.2.2 and 3.2.3 for a fuller discussion.

committing actual *harms*, to one of prohibiting actions that merely violate national *interests*. As Jean Pictet reminds us in the ICRC's *Commentary* to the 1949 *Geneva Conventions*, "It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."⁵² At the same time, the *Interpretive Guidance* recognizes soldiers' right to attack civilians on grounds of self-defense, but does not provide criteria for what would constitute a permissible defensive killing of a civilian.⁵³ It would appear, then, that the *Interpretive Guidance* would not prohibit some of the abuses being carried out under standard Rules of Engagement, including many mistaken killings. In this, the *Interpretive Guidance* failed to address the fact that the U.S. in its standard Rules of Engagement is moving away from an international humanitarian law standard of assessing direct participation in hostilities, and replacing it with a broader standard based upon the use of defensive force.

Under the laws of armed conflict, armed forces have an obligation to distinguish civilians from qualified belligerents. This is a status-based determination: an individual's liability to attack depends upon their membership in one of these two categories. In contrast, the concept of civilian direct participation in hostilities depends upon the actions performed by a civilian in an armed conflict. As will be discussed further in Chapter Three, status-based definitions of civilian participation are problematic precisely because they are liable to capture within their scope civilians who are not participating directly in hostilities, and have therefore not lost their immunity from attack. Civilian direct participation is a concept that is based upon civilians' demonstrated actions, and so ought not to be defined in terms of status or group membership. What soldiers are being asked to do in assessing whether a civilian is participating directly in hostilities is to examine the conduct of the civilian, and to determine whether the civilian has forfeited his or her immunity from attack by virtue of engaging in that conduct.

On the other hand, Rules of Engagement ask that soldiers examine the conduct of the civilian, and assess whether the civilian poses some risk of harm based upon three criteria: either because they (1) are engaged in a hostile act, (2) are harboring a hostile intent, or (3) are members of a declared hostile force. The criteria of hostile act is closely related to, but much broader than, the traditional concept of civilian direct participation, whereas the other two criteria

⁵² 1960 *Commentary*, supra note 32 at 23.

⁵³ *Interpretive Guidance*, supra note 3 at 1035.

are wholly novel. Targeting members of a declared hostile force is a status-based definition of civilian direct participation, as is the ICRC's closely related concept of membership in an organized armed group; the defining criterion is the person's perceived affiliation with a prohibited group, and not on their conduct. This is particularly true when membership is not readily apparent but must be inferred, for example by familial or other close relationships, or by gatherings of large numbers of military-aged males. Targeting those from whom a soldier perceives a hostile intent is only loosely related to civilian direct participation, and it seems to rely on the wholly subjective determinations of the soldier as to what is in the mind of the civilian. Rules of Engagement serve to privilege the subjective determinations of front-line soldiers, and shift the focus away from civilians' demonstrated conduct and onto the soldiers' subjective beliefs. The novel criteria found in Rules of Engagement and the ICRC *Interpretive Guidance* are therefore an unsatisfactory solution to the problem of distinction in that they include impermissible targets, *i.e.* they would permit the killing of civilians who have not engaged in conduct that would forfeit his or her immunity from attack. In addition, they lend undue weight to the subjective determinations of front-line security forces, while privileging their right to life over and above that of ordinary civilians.

Determining civilian direct participation in hostilities based upon ordinary rules that justify defensive force has the potential to overcome many of these problems. First, it provides a principled definition of civilian immunity and its loss, and it does so in terms that have been well considered by the law and by legal scholars. Second, it avoids the main criticisms against some of the ICRC's standards, that they are under-inclusive and would place soldiers at greater risk. Third, and most important for the topic addressed in this dissertation, it seeks to avoid the unjustified use of force against innocent civilians, and is thus better able to avoid the problems posed by mistaken killings, which form the subject of the following section.

1.1 The Problem of Mistaken Killings in War

The problem of distinction, therefore, is one of determining when a civilian has forfeited his or her immunity from attack, and therefore may permissibly be killed by security forces.⁵⁴ Both Rules of Engagement as well as the ICRC's *Interpretive Guidance* resolve this problem by privileging the prerogatives of states and their military objectives. There are several reasons why this is an inadequate resolution to the problem of distinction. The magnitude of the power here claimed by the state – namely, the power to kill individuals who have done nothing to forfeit their lives – should not be underestimated. Such killings are unjustified according to ordinary standards of self-defense as found in the law, and are morally wrongful.⁵⁵ They also violate fundamental legal principles guaranteeing equality⁵⁶ and neutrality⁵⁷ in the operation of the law during an armed conflict. Soldiers, of course, have a belligerent privilege to kill, but not to kill

⁵⁴ This dissertation will deal mainly with the use of defensive force by soldiers, *i.e.* members of the armed forces of a country. However, private security forces and military contractors are playing an increasing role in war, and they have adopted similar Rules of Engagement as those in place for soldiers. See: ASIS International. *Management System for Quality of Private Security Company Operations – Requirements with Guidance*. 2012. ANSI/ASIS PSC.1-2012 at 24 [hereinafter *ANSI Standards for Private Military Companies*], which defines the standard for the defensive use of force on the part of private military and security contractors. Better defining the criteria for the use of defensive force in war will therefore assist in governing these private forces, as well.

⁵⁵ *Regarding Self-Defense*, *supra* note 11 at 101.

⁵⁶ United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) [hereinafter *Universal Declaration*]. The Preamble of the *Universal Declaration* states, “member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.” Article 1 states, “All human beings are born free and equal in dignity and rights. They are endowed with reasons and conscience and should act toward one another in a spirit of brotherhood.” Article 2 states, “no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” This would include civilians in occupied territories, and civilians in territories in which a foreign security force has been invited to conduct counterinsurgent operations. See also: *Nuclear Weapons Advisory Opinion*, *supra* note 17 at para. 25. See also: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 at para. 106, in which the ICJ affirmed that human rights laws apply in times of armed conflict.

⁵⁷ The laws of armed conflict do not set out (although they may recognize) universal rights in the same manner as do human rights conventions, but they are neutral as between belligerent parties. The ICRC has long been a proponent of the idea of neutrality as between belligerent parties and nations, an idea which the ICRC resurrected at the Geneva Conference of 1864, and which was embodied in Article 6 of the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, Geneva, 22 August 1864. Article 6 requires that all parties shall collect and care for the wounded and sick “to whatever nation they may belong,” and that nations were not to show any preference for collecting and caring for their own wounded and sick. This was then a novel idea, for armies generally only cared for wounded persons belonging to their own nationality. But since that provision was enacted, the *jus in bello* has come to require more generally that no legal distinctions should be drawn based on the nationality of the individual, and irrespective of which side of the conflict their nation is waging war. See: Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross* (Geneva: Henry Dunant Institute, 1985) at 72, 97 [hereinafter *From Solferino*].

civilians. Shifting the risks onto civilians and away from soldiers in this way gives soldiers a privilege to kill that is not granted by the laws of armed conflict, and that is contrary to the rules laid out in the *Protocols Additional*. The consequences of this are significant. Not only do mistaken killings contribute to an overall sense of injustice among the civilian population in the conflict zone, but they can have very negative strategic consequences as well. There is a growing body of research, some of which is discussed below, that supports the thesis that the mistaken killing of civilians escalates violence and prolongs an insurgency. The killing of civilians can increase attacks against counterinsurgent forces, therefore making soldiers less safe, while impeding mission goals of establishing an overall environment of security. In this sense, the debate over the criteria used to distinguish civilians deserving of immunity from attack is really a debate over how to distribute the harms of war, and mistaken killings can increase the harms suffered by soldiers and civilians alike.

There is much evidence, discussed below, that civilians as compared with soldiers are suffering disproportionately from the violence of war, and this was certainly true of the recent U.S.-led Coalition operations in Iraq and Afghanistan. We normally ask that those who are responsible for creating the risks of harm – in this case those who would wage war – to bear those risks,⁵⁸ as opposed to ordinary civilians in a conflict zone, who have few choices and little responsibility for geopolitical crises. In addition, it is national militaries waging wars who have the power to set the Rules of Engagement, and it is their soldiers who possess the training, equipment and protocols that can minimize their risks of harm. There will nearly always be an imbalance, therefore, between the opportunities that soldiers have to avoid harm as compared with civilians. As can be seen in Chapter Four where escalation of force incidents are discussed, soldiers staffing checkpoints are failing to take even minimal safety precautions before using lethal force against civilians, such as placing proper signage, or warning civilians of the upcoming checkpoint.⁵⁹ Michelle Hansen of the U.S. Judge Advocate General’s Office sums up the debate concerning the Rules of Engagement when she advocates for fewer protections for civilians, stating that “Warfighters will bear the costs of these increased protections as additional

⁵⁸ Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) at 169 [hereinafter *The Ends of Harm*].

⁵⁹ *Infra* Chapter Four, note 46 and accompanying text.

constraints on how they accomplish the mission and as increased risks to their lives.”⁶⁰ Although such beliefs may be common, they are not justified by the evidence, and shifting the balance towards soldiers in this way may not be the best way to protect the interests of individual *soldiers*, as well as the civilians they encounter.

Several studies support the proposition that attacks against civilians are positively correlated with an increase in insurgent violence. Shifting the risks from civilians back onto security forces, and then encouraging them to take steps to minimize those risks, would be a better means of reducing overall insurgent violence. This assists in creating not only a climate of security but also of legitimacy, as it would reassure civilians that security forces are there to protect them. States may be brought to see the benefits of this approach, if it can be shown that unjust and indiscriminate violence against civilians plays an important role in escalating and sustaining violent insurgencies.

The National Bureau of Economic Research conducted a study of civilian killings in Afghanistan and found that when Coalition forces killed civilians by mistake, the likelihood of insurgent attacks against Coalition Forces was increased.⁶¹ Condra and Shapiro then performed a similar study of civilian deaths in Iraq, using data from the Iraq Body Count data set from 2004 to 2009, and again found that “Coalition killings of civilians predict higher subsequent levels of insurgent attack directed against Coalition forces.”⁶² The authors put forth a theory that local civilians are key to both insurgent and counterinsurgent efforts; when Coalition forces killed civilians, the local population was more likely to withhold important information and intelligence from Coalition forces, and more likely to assist insurgent groups.⁶³ Condra and Shapiro tested for causality, and they concluded that the relationship between Coalition-caused civilian casualties and subsequent insurgent attacks against Coalition troops was probably causal.⁶⁴ Condra and Shapiro conclude that not only are policies that protect civilians and follow the laws of war a

⁶⁰ Michelle Hansen, “Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict” (2007) 194 *Mil. L. Rev.* 1 at 7 [hereinafter *Emasculation of Warfare*].

⁶¹ Luke N. Condra *et al.* “The Effect of Civilian Casualties in Afghanistan and Iraq” (2010) National Bureau of Economic Research, Paper w16152 [hereinafter *Civilian Casualties*].

⁶² Luke N. Condra and Jacob N. Shapiro, “Who Takes the Blame: The Strategic Effects of Collateral Damage” (2012) 56:1 *Am. J. Pol. Sci.* 167 at 168 [hereinafter *Who Takes the Blame*].

⁶³ *Ibid.*

⁶⁴ *Ibid.* at 176.

moral imperative for modern democracies, but they are strategically advantageous as well.⁶⁵ Harming civilians can increase risks for security forces while reducing the likelihood that local civilians will cooperate in counterinsurgent efforts. The Taliban in Afghanistan also appear to have adopted such a policy; therefore, it seems that encouraging state and non-state armed groups alike to adhere to the laws of war may be possible, particularly if adherence to the principle of civilian immunity is recognized as being strategically advantageous for belligerent parties.⁶⁶

This study was followed-up using data from the Iraq War Logs to perform a spatio-temporal analysis of Coalition-caused casualties and subsequent insurgent attacks against Coalition forces in Iraq, and came to the same result.⁶⁷ The results showed that “Coalition violent events strongly predicted subsequent insurgent activity,” particularly in poor Sunni areas.⁶⁸ Similar results have been demonstrated by Benmelech *et al.*, who found that preventive house demolitions in the Palestinian occupied territories were positively correlated both temporally and spatially with subsequent suicide attacks.⁶⁹ All of these studies lend support to the proposition that security forces may be placed at *greater* risk of insurgent violence when they wrongfully attack civilians. On the other hand, Downes and Lyall have found that high levels of violence directed against civilians reduced insurgent activities in the Boer War and Chechnya respectively, at least in the short term; however, it appears from their studies that in order to have this effect the violence needs to be widespread, random and indiscriminate, and therefore would almost certainly violate the laws of war.⁷⁰ Lyall does not argue that this is therefore an effective

⁶⁵ *Ibid.* at 185.

⁶⁶ *Ibid.* at 185.

⁶⁷ John O’Laughlin *et al.*, “Space-Time Granger Analysis of the War in Iraq: A Study of Coalition and Insurgent Action” (2012) 38:4 Int’l Interactions 402.

⁶⁸ *Ibid.* at 424.

⁶⁹ Efraim Benmelech *et al.*, “Counter-Suicide Terrorism: Evidence from House Demolitions” (October 2010) National Bureau of Economic Research, Working Paper No. 16493. Benmelech *et al.* showed that targeted/punitive house demolitions led to a significant decrease in suicide attacks, while preventive house demolitions did not. They conclude that targeting known terrorists is an effective means of reducing future attacks, but that indiscriminate violence backfires, and leads to an increase in suicide attacks.

⁷⁰ Alexander B. Downes, “Draining the Sea by Filling the Graves: Investigating the Effectiveness of Indiscriminate Violence as a Counterinsurgency Strategy” (2007) 9:4 Civil Wars 420; Jason Lyall, “Does Indiscriminate Violence Incite Insurgent Attacks? Evidence from Chechnya” (2009) 53:3 J. Conflict Resol. 331. Downes found that ethnic cleansing could be quite effective, and that when a population is small, homogeneous, and has good incentives to cooperate with the counterinsurgent forces, then indiscriminate violence may also be effective. Lyall found that the standard Russian counterinsurgent tactic of using random and indiscriminate violence against villages where insurgents were present was positively correlated with a decrease in insurgent violence in the 90-day window he used. The severity and lethality of the attacks was also positively correlated with a reduction in insurgent attacks,

strategy; he notes that the insurgency in Chechnya increased overall during the time period of the study, and that such tactics clearly constitute war crimes.⁷¹ He does argue that this explains why states so often resort to indiscriminate violence in putting down insurgencies: it is sometimes, even if rarely, effective, and so states and military authorities will often turn to the tactic of indiscriminate violence, always thinking that their case is one of the exceptions.⁷² This is an important lesson for those who wish to change this pattern of resort to indiscriminate violence.

Two recent studies of civilian casualties in Afghanistan also lend support to the thesis that causing civilian casualties is harmful for a counterinsurgent operation. Hultman studied civilian casualties in Afghanistan between 2004 and 2009, and found that civilian casualties were strongly predicted by losses on the part of Coalition forces.⁷³ She states that the findings “support the idea that collaterals are mainly the result of poor counterinsurgency performance. The results show that, when pro-government forces suffer large losses, they are more likely to engage in fighting that leads to higher levels of collateral deaths, implying that they are provoked into a response that will be detrimental for the operation in the long run.”⁷⁴ A further study that examined Canadian counterinsurgent strategy in Afghanistan found that when an enemy-centric approach, one dedicated towards destroying the insurgency, was replaced in 2009 by a population-centric approach, in which the main goal was to provide security to the local population, that this resulted in a more controlled and secure environment with fewer attacks against Canadian soldiers.⁷⁵ Osama Ali, a 24-year old Iraqi youth, demonstrates the connection between insurgent violence and the problem of mistaken killings when he states, “When the Americans fire back they don’t hit the people who are attacking them, only the civilians. This is why the Iraqis hate the Americans so much. This is why we love the mujahedeen.”⁷⁶ Certainly, relaxing Rules of Engagement may make it easier for soldiers to wage war by imposing fewer

perhaps because it disrupted movement and supply lines, at 344. Overall, however, the insurgency escalated during this time, and Lyall notes that these findings may not be generalizable, at 355.

⁷¹ *Ibid.* at 355, 358.

⁷² *Ibid.* at 358.

⁷³ Lisa Hultman, “COIN and Civilian Collaterals: Patterns of Violence in Afghanistan, 2004-2009” (2012) 23:2 *Small Wars & Insurgencies* 245 [hereinafter *COIN and Civilian Collaterals*].

⁷⁴ *Ibid.* at 246.

⁷⁵ Eric Jardine and Simon Palamar, “From the Medusa Past Kantolo: Testing the Effectiveness of Canada’s Enemy-Centric and Population-Centric Counterinsurgency Operational Strategies” (2013) 36:7 *Stud. Conflict & Terrorism* 588.

⁷⁶ *Who Takes the Blame*, *supra* note 62 at 167.

restrictions and demands on how they distinguish between militants and civilians, but this may not be the best manner in which to protect security forces, or to accomplish the long-term goals of reducing insurgent violence.

Similarly, when we look at the application of actuarial methods of risk assessment to more targeted counterterrorism operations, such as ethnic and behavioral profiling at airports and security checkpoints, they are also shown to be ineffective and counterproductive. The general thinking is that such methods are non-random, that they are targeted, and therefore more effective.⁷⁷ However, actuarial methods of risk assessment are almost wholly preventive, as the characteristics used to assess risk are aggregate characteristics, not associated with any individual or evidence of any actual wrongdoing on the part of the individual thus targeted.⁷⁸ Using actuarial methods based upon certain signature criteria to catch rare malfeasors, such as terrorists or insurgents, is no more mathematically justified than random sampling; rather, such an approach is often harmful, as it wastes precious resources on policing innocent individuals.⁷⁹ This is the case even if the data on which the counterterrorism operations are based is unreasonably perfect.⁸⁰ However, in most counterterrorism and counterinsurgent operations, the signature criteria used by ordinary soldiers in the field is often far from perfect, and is almost always far from being quantitative or reliable. When soldiers must decide if a group of armed men are members of a declared hostile force, or if a car approaching a checkpoint at high speed is part of an insurgent attack, their decisions are almost always immediate, subjective, and based upon an inherent lack of empirical data. Indeed, foreseeability and probability are subjective concepts, depending largely on the subjective state of mind of the assessor.⁸¹ Civilian casualties that are the

⁷⁷ This is the thinking, for example, behind the Amtrak Police Department's new "See Something, Say Something" campaign, which seeks to target suspicious behaviors, including appearing unusually calm, unusually nervous, looking around, and taking photographs. The criteria are overbroad, intended to capture any unusual or suspicious behavior, and are therefore not targeted. See: <http://police.amtrak.com> (accessed 7 November 2014).

⁷⁸ William H. Press, "Strong Profiling is Not Mathematically Optimal For Discovering Rare Malfeasors" (2009) 106:6 P.N.A.S. 1716 at 1716.

⁷⁹ *Ibid.*

⁸⁰ William H. Press, "To Catch a Terrorist: Can Ethnic Profiling Work?" (December 2010) 7:4 Significance: Statistics Making Sense 164 at 164. See also Willem Schinkel, "Prepression: The Actuarial Archive and the New Technologies of Security" (2011) 15:4 Theoretical Criminology 365. The use of signature strikes and targeted killing with unmanned aerial vehicles are some of the most developed uses of these actuarial and surveillance technologies, and these publications use statistical analyses to present a useful and critical view of their limitations.

⁸¹ Kimberley Ferzan, "Culpable Aggression: The Basis for Moral Liability to Defensive Killing" (2012) 9 Ohio St. J. Crim. Law 669 [hereinafter *Culpable Aggression*].

result of poor performance, reprisal killings, and behavioral profiling or signature criteria are also contrary to Article 51 of *Protocol I*, as they target civilians who are immune from attack, and are often indiscriminate by their nature.

There are therefore good strategic reasons to shift risks away from civilians in counterinsurgent and counterterrorism operations, as well as good reasons to question the use of behavioral profiling as a method of targeting insurgents. In addition, it can be seen that civilians suffered a disproportionate amount of harm in Iraq and Afghanistan as compared with Coalition soldiers. Data is available concerning the numbers of American soldiers killed in Iraq and Afghanistan. A report by Veterans for Common Sense, a U.S. veteran advocacy group, states that, as of 2012, 2,333,972 individual Americans had been deployed to Iraq and Afghanistan.⁸² As of 2013, a total of 6,211 U.S. soldiers were killed while on active duty there.⁸³ This gives an aggregate death rate of 266 per 100,000 U.S. military personnel deployed to Iraq and Afghanistan between 2001 and 2013. Some of these deaths were not directly related to hostile activity, such as deaths due to accident or illness. In Afghanistan, between 2001 and 2013, 1758 U.S. military personnel were killed in non-friendly hostile fire incidents, primarily due to improvised explosive devices and small arms fire.⁸⁴ In Iraq, between 2003 and 2013, 3537 U.S. military personnel were killed in non-friendly hostile fire incidents, again, primarily due to improvised explosive devices and small arms fire.⁸⁵ This gives a total of 5295 deaths directly due to hostile acts in Iraq and Afghanistan, and a death rate of 227 per 100,000 soldiers due to non-friendly hostile fire incidents.

⁸² Veterans for Common Sense, "Iraq and Afghanistan Impact Report" (January 2012), available at: <http://veteransforcommonsense.org/2012/01/20/new-veterans-for-common-sense-impact-report-is-now-available/> (accessed 18 February 2014). Veterans for Common Sense compiles this information through Freedom of Information Act requests from the Department of Defense and the Department of Veteran's Affairs. They are the only organization to publish figures on the total discrete number of individual Americans deployed to Iraq and Afghanistan. Unfortunately, an update including the years 2012 and 2013 is not yet available at the time of writing. If the total number of Americans deployed were to be higher, then this would lower the overall death rate, as the total casualty rate includes all violent deaths that occurred in Iraq and Afghanistan from 2003 to 2013.

⁸³ Iraq Coalition Casualty Count, "Coalition Military fatalities Per Year" (2013), available at: <http://icasualties.org/Iraq/index.aspx> (accessed 8 December 2013) [hereinafter *Iraq Casualty Count*]. This figure of total deaths was compiled by a manual count of the Coalition Military Fatalities data sets, excluding deaths due to non-hostile incidents, including friendly-fire, accidents, illness, and suicide.

⁸⁴ iCasualties.org, "Database for Operation Enduring Freedom" (2013) [hereinafter *Enduring Freedom Casualty Count*], available at: <http://icasualties.org/OEF/Fatalities.aspx> (accessed 8 December 2013). The above total was arrived at through a manual count of the database, excluding deaths due to non-hostile incidents.

⁸⁵ *Iraq Casualty Count*, *supra* note 83.

Data regarding the number of civilian casualties during the recent conflicts in Iraq and Afghanistan have been difficult to come by, and Coalition forces did not collect data regarding civilian casualties. One meta-study reviewed a number of published studies regarding civilian casualties caused by the conflict in Iraq up until the year 2008, and found that a 2006 household survey undertaken by Burnham *et al.* was the most methodologically rigorous.⁸⁶ Burnham *et al.* found that, between the invasion of 10 March 2003 and 15 July 2006, there had been 654,965 excess deaths among Iraqis due to the war and of these, 601,027 were attributable to violent causes.⁸⁷ Adjusted for the size of the population, this would give a rate of death due to violence of 2244 Iraqi civilians per 100,000 for those three years alone.⁸⁸ Iraqi civilians were therefore almost 10 times more likely to die from violence in just the first three years of the war than were U.S. soldiers serving in Iraq and Afghanistan from all of 2001 to 2013.

The number of civilian casualties in Afghanistan is even more difficult to establish, as no comparable household surveys have been performed there. One survey of 600 communities in Afghanistan covering the first nine months after the U.S. invasion of October 2001⁸⁹ found that there were 10,770 deaths due to landmines and unexploded ordnance, and 7,773 deaths due to aerial bombardment, shooting, and other forms of conflict violence, out of a studied population of 2 million persons.⁹⁰ If only the latter figure is taken - landmines and unexploded ordnance may have been left from previous conflicts and so cannot be definitively attributed to the U.S. invasion - then this gives a death rate of 389 persons per 100,000 Afghan civilians in those communities during this time frame. This means that the death rate for Afghan civilians in only the first nine months following the U.S. invasion was again significantly higher than the death rate for all U.S. soldiers who fought in both conflicts combined. The authors also note that such figures do not capture the indirect effects of conflict, which is also a cause of significant loss of life and morbidity.⁹¹ The World Health Organization has collected data concerning the poor state of health of Afghan civilians, who have suffered from many decades of war. For example,

⁸⁶ Christine Tapp, *et al.*, "Iraq War Mortality Estimates: A Systematic Review" (2008) 2:1 Conflict & Health 1.

⁸⁷ G. Burnham, *et al.*, "Mortality after the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey" (2006) 368 *Lancet* 1421.

⁸⁸ Based upon a UN estimated Iraqi population of 26,783,383 persons as of July 2006.

⁸⁹ Aldo A. Benini, and Lawrence H. Moulton, "Civilian Victims in an Asymmetrical Conflict: Operation Enduring Freedom, Afghanistan" (July 2004) 41:4 *J. Peace Res.* 403 at 409 [hereinafter *Civilian Victims in Afghanistan*].

⁹⁰ *Ibid.* at 411.

⁹¹ *Ibid.* at 421.

maternal mortality in Afghanistan during the years 2009-2013 was 460 per 100,000 live births.⁹² This alone is higher than the death rate of U.S. soldiers due to hostile fire for both conflicts combined.

The risks to civilians in conflict zones are therefore significant and multifaceted. Jennifer Turpin has found that civilian casualties increased from 50% of all casualties to 90% of all casualties in the years between World War II and 1998, and the majority of these victims were women and children.⁹³ Moreover, the data indicate that civilians in the conflicts in Iraq and Afghanistan were significantly more likely to die in conflict-related violence than were U.S. soldiers, by almost a factor of 10 in the case of Iraq. This should give pause to those who would argue that the risks of waging war should be further shifted away from soldiers and onto civilians, who are already bearing the brunt of war's violence.

1.2 Towards a Defensive Reformulation of the Principle of Distinction

Both the traditional definition of civilian direct participation as found in Article 51(3) of *Protocol I* and that found in modern Rules of Engagement are closely bound up with the problem of mistaken self-defense, in that they both ask how we are to *know* whether a particular individual in an armed conflict poses a threat such that they forfeit their immunity from attack. Certainly, domestic legal systems have developed rules for governing the use of defensive force in criminal and tort law, but there is a great variation in standards between and even within jurisdictions, and the rules for defensive force are the subject of much debate and contention. Legal standards governing self-defense may also differ significantly in tort cases as compared with criminal cases. Also, many legal systems, particularly in the United States, have developed rules and biases that are highly deferential to police and soldiers who raise the defense of self-defense when they kill in the course of their duties.⁹⁴ Holding security forces to account for the

⁹² World Health Organization, "Maternal Mortality Ratio (modeled estimate, per 100,000 live births)" (2013), available at: <http://data.worldbank.org/indicator/SH.STA.MMRT> (accessed 9 December 2013).

⁹³ Jennifer Turpin, "Many Faces: Women Confronting War" in Lois A. Lorentzen, and Jennifer Turpin, eds., *The Women and War Reader* (New York: New York University Press, 1998) 1 at 3.

⁹⁴ This is particularly the case in the United States. See: *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386 (1989) at 396-7, in which the court found that the reasonableness of the use of force was to be determined "from the perspective of a reasonable officer on the scene."; *Bell v. Wolfish*, 441 U.S. 520 (1979) at 559; and *Plakas v. Drinski*, 19 F. Supp. 3d 1143 (7th Cir. 1994) at 1148, in which the court held that police are not required to use "all feasible alternatives to avoid a situation where deadly force can justifiably be used." The

excessive use of force is difficult, even in Western democracies with advanced legal systems, and there are certainly dangers in transplanting into an armed conflict laws that are already inadequate, without addressing matters of fundamental justice surrounding the use of defensive force. There are several tasks, therefore, that must be accomplished before defensive rules can be adapted for use during armed conflict to distinguish civilians who have forfeited their lives through their conduct. First, the rules adopted must be those that protect civilian lives, prevent mistaken killings, and promote best practices and accountability among security forces. Second, the rules must be adapted to be consistent with the rules and values of the international laws of armed conflict, particularly rules governing civilian direct participation, as well as the rights to life and equality under the law. The third, and likely most difficult, task is to change the way the armed forces frame their decisions to use lethal force, restricting the use of prejudices and replacing subjective discretion with the constraints of institutionalized decision-making procedures.

This section will describe the basic elements of the laws regulating the use of lethal force in self-defense, and will seek to define defensive force in a way that is compatible with the laws of armed conflict and the protection of civilians, beginning with a short review of the laws of the United States military, the United Kingdom and Canada, those nations most prevalent in the Coalition forces operating in Iraq and Afghanistan. The next section will discuss the evidentiary standard to be met in determining when civilians forfeit their immunity from attack by participating directly in hostilities. The ordinary standard that is used in cases of self-defense is one of reasonableness, but the reasonableness of a defender's actions is often determined by

Washington Post recently reported, after a Grand Jury in St. Louis failed to return an indictment against Officer Darren Wilson, who is accused of fatally shooting Michael Brown, that fewer than eight percent of complaints of excessive force are upheld against police by their departments. Despite the excessive controversy caused by these cases, the latest year for which data have been analyzed is 2002. See: C.D. Leonnig, "Current Law Gives Police Wide Latitude to Use Deadly Force" *The Washington Post* (28 August 2014), available at: http://www.washingtonpost.com/politics/current-law-gives-police-wide-latitude-to-use-deadly-force/2014/08/28/768090c4-2d64-11e4-994d-202962a9150c_story.html (accessed 26 November 2014). See also: Wesley Lowery, "How Many Police Shootings a Year? No One Knows" *The Washington Post* (8 September 2014), available at: <http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/> (accessed 26 November 2014), in which he reports that the U.S. Department of Justice does not keep data on how many persons are shot by police officers each year, and does not require local police departments to report this data. See also: Geoffrey P. Alpert and William C. Smith, "How Reasonable is the Reasonable Man?: Police and Excessive Force" (1994) 85:2 J. Crim. L. & Criminology 481 at 482, in which the authors state that police use of force reporting in the United States is not mandatory, and statistics are often neither kept nor reviewed.

reference to a number of subjective factors, many of which can interfere with reliable decision-making. Decisions to use lethal force in war can come to seem intuitively reasonable based upon subjective biases and prejudices, and for this reason subjective factors ought to be minimized when making these decisions. Instead, an objective evidence-based standard is proposed, meaning that there must be clear and convincing evidence that the civilian is engaged in conduct that would forfeit their immunity from attack. The following section will define civilian direct participation in hostilities in terms of posing a wrongful threat of harm, rather than merely interfering with military objectives. In Chapter Two, I discuss the development of the concept of civilian direct participation, and argue that conceiving of civilian direct participation in terms of wrongful harm is consistent with the meaning and spirit of the international humanitarian law.

1.2.1 Soldiers and the Law of Self-Defense

The self-defensive rules in military law governing soldiers' conduct generally import the civilian laws concerning self-defense. Both the *UCMJ*,⁹⁵ and the *United Kingdom Armed Forces Act*⁹⁶ are silent as to defenses. The *Canadian Code of Service Discipline* states specifically that ordinary civil defenses apply to any justification or excuse in any proceedings.⁹⁷ The U.S. *Manual for Military Courts Martial* states that in cases of homicide or the use of deadly force, self-defense would apply when the accused apprehended on reasonable grounds that death or grievous bodily harm was about to be inflicted wrongfully, and that the accused believed that the amount of force used was necessary for protection against that harm.⁹⁸ The *Manual* explains that the first criterion, which goes to the existence of the threat, is based upon a standard of objective reasonableness, whereas the second criterion, which goes to the proportionality of the force used to repel the threat, is a subjective standard, based upon what the individual believed was necessary under their unique circumstances.⁹⁹ The defense is not available to one who was an

⁹⁵ *UCMJ*, *supra* note 41.

⁹⁶ *United Kingdom Armed Forces Act (U.K.)*, 2006, c. 52.

⁹⁷ *National Defence Act*, R.S.C., 1985, c. N-5, at s. 151.

⁹⁸ United States Department of the Army, *Manual for Military Courts Martial*, 2012 Edition (Washington, D.C.: Department of the Army, 2012) at s. 916(e), at p. II-111 [hereinafter *Manual for Military Courts Martial*].

⁹⁹ *Ibid.* Caroline Farrell states that the law used by the military is generally in line with the basic requirements of self-defense law in the majority of U.S. jurisdictions. See: Caroline Farrell, "What's Reasonable? Self-Defense and Mistake in Criminal and Tort Law" (2010) 14:4 *Lewis & Clark L. Rev.* 1401 at 1403.

aggressor, or who provoked an attack.¹⁰⁰ In Canadian law, the rules regarding self-defense are set out in section 34 of the *Criminal Code*, which states that under ordinary Canadian law, self-defense would excuse an offence if (a) the offender believes on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person; and (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and (c) the act committed is reasonable in the circumstances.¹⁰¹ Section 34(2) describes a number of factors to be considered in determining whether the act committed is reasonable in the circumstances, stating that “the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors,” including the nature of the force or threat,¹⁰² the person’s role in the incident,¹⁰³ *i.e.* whether they were the aggressor or provoked the threat, as well as a number of subjective factors, such as the nature of the relationship between the parties,¹⁰⁴ and the size, age, gender and physical capabilities of the defendant.¹⁰⁵

The law of the United Kingdom is broadly similar, requiring a standard of reasonableness in determining the existence of a threat, but permitting this reasonableness to be determined in light of the subjective views of the defendant. However, the UK law validates the subjective beliefs of the defender in cases of mistaken self-defense. The UK *Criminal Justice and Immigration Act* states that whether the degree of force used was reasonable depends upon “the circumstances as D [the defendant] believed them to be.”¹⁰⁶ However, the *Act* further states that “If D claims to have held a particular belief as regards the existence of any circumstances”¹⁰⁷ and “if it is determined that D did genuinely hold it, then D is entitled to rely on it for the purposes of subsection (3), whether or not – (i) it was mistaken, or (ii) (if it was mistaken) the mistake was a reasonable one to have made.”¹⁰⁸ Therefore, according to the ordinary laws concerning self-defense in the U.S., Canada and the United Kingdom, even an unreasonable but sincerely held

¹⁰⁰ *Ibid.*

¹⁰¹ *Criminal Code*, R.S.C. 1985, c. 46, s. 34(1), as amended 16 December 2014.

¹⁰² *Ibid.* at s. 34(2)(a).

¹⁰³ *Ibid.* at s. 34(2)(c).

¹⁰⁴ *Ibid.* at s. 34(2)(f).

¹⁰⁵ *Ibid.* at s. 34(2)(e).

¹⁰⁶ *Criminal Justice and Immigration Act (U.K.)*, 2008, c. 4, Part 5, s. 76(3).

¹⁰⁷ *Ibid.* at s. 76(4).

¹⁰⁸ *Ibid.*

belief may excuse a killing that has been performed in mistake. However, there a number of reasons why a standard of reasonableness is not an appropriate standard to use in setting rules of engagement for armed conflict, a topic that is addressed in the following section.

1.2.2 Forfeiting Civilian Immunity: Objective versus Subjective Standards

When approaching cases of mistaken self-defense, there are three broad epistemological positions that can be used to determine whether the use of force was justified. This might be determined based upon the facts as they objectively are; if, in fact, the victim is innocent, then the use of force is unjustified.¹⁰⁹ At the other end of the spectrum is the determination of liability based upon the subjective beliefs of the defender; as long as a belief is genuinely held, then the use of force will be justified, even if the belief is unreasonable in the circumstances.¹¹⁰ Between these, there exists a middle position, which seeks to adjudge the use of force based upon the evidence available to the defender at the time.¹¹¹

The problem of distinction might be approached by requiring that civilians forfeit their immunity only when it is *objectively true* on the facts that the civilian has indeed participated directly in hostilities. To do so would be to reject a reasonableness standard entirely, and instead adopt one of objective facts. This would be consistent with the wording of *Protocol I*. However, an objective standard would always find mistaken killings to be wrongful, even in cases in which the true facts are not and could not be known by the defender. A standard based only on facts as they are therefore sets a very high bar, as defenders will rarely have all of the relevant facts before them; they must necessarily respond to a risk, rather than a certainty. This makes a wholly objective standard unfeasible in practice, and provides little practical guidance on how to make such decisions under conditions of uncertainty. On the other hand, adopting a standard based on the subjective beliefs of the defender errs too far in validating even those defensive killings that are unreasonable in the circumstances. To use such a standard when apportioning punishment in criminal cases may well be justified, but to use a subjective standard to make decisions at the outset would facilitate mistaken killings, and create a climate of impunity for security forces. In the extreme, this can amount to giving state agents a virtual *carte blanche* to kill; when the target

¹⁰⁹ *The Ends of Harm*, *supra* note 58 at 218. This might also be referred to as the “omniscient” epistemic position.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

population is largely made up of a foreign or marginalized population, this can create an untenable, yet subtle, situation of systematic oppression that is difficult to diagnose and counteract. In many ways, this describes the situation created by Coalition forces operating in Iraq and Afghanistan in the case studies discussed in Chapter Four. Decisions to use force are best made by rejecting both the omniscient and subjective positions, and instead taking the middle position that these decisions are best guided by the evidence available to the soldier at the time. This shifts the inquiry away from the soldier's beliefs and perceptions, and instead seeks evidence concerning what it is the civilian has done, and whether these actions would forfeit their immunity.

When the matter is not being litigated under the criminal law, courts choose very different standards to adjudge cases of mistaken self-defense; here, the issue is not one of justifying punishment, but in identifying wrongs that are deserving of a remedy. One case that addresses these issues is the UK case of *Ashley*, which concerned a police officer who shot and killed the victim during a raid to execute a warrant on him at his home; at the time of the shooting, the victim was just getting out of bed, and was unclothed and unarmed.¹¹² The officer involved had been acquitted of criminal charges on grounds that he honestly but mistakenly believed his use of force was necessary. However, the present case was brought by the victim's heirs to request compensation for his wrongful killing, which they were granted. The Court of Appeal held that, while we do not generally *punish* people for honest mistakes, this is quite different than determining whether the defendant's actions were objectively justified.¹¹³ Tort law upholds the rights that every person possesses not to be wrongfully harmed, and others are required to respect these rights.¹¹⁴ The Court found that three different standards might be applied to the mistaken use of defensive force: a subjective standard, which is appropriate for criminal cases, a purely objective standard of liability that would not excuse even reasonable mistakes, and a standard in between these two that would excuse a mistake, but only when the false beliefs were at least

¹¹² *Ashley v. Chief Constable of Sussex Police*, [2008] 1 A.C. 962 at para. 6. See also: *Hattori v. Peairs*, 662 So. 2d 509, 514 (La. Ct. App. 1995), a case involving a tort claim for wrongful death brought by the parents of a Japanese exchange student who had been shot by Mr. Peairs, whose home he approached on a Halloween night. Peairs had been acquitted of a criminal charge of homicide, but was held responsible in this civil suit, with the court stating that "There was absolutely no need to resort to the use of a dangerous weapon to repel an attack[.]."

¹¹³ *Ibid.* at para. 17.

¹¹⁴ *Ibid.* at para. 18.

reasonably held – “and it may be,” the Court stated, “that even that would not suffice to establish the defence”¹¹⁵ in a civil suit. In fact, the Court found that a standard of liability based upon objective facts - one that would hold a defendant responsible for even reasonable mistakes - “has a good deal to be said for it,” and that “I would, for my part, regard the point as remaining open.”¹¹⁶

Therefore, in apportioning punishment, the law might utilize a more subjective standard, as the issue is the moral culpability and thus the punishment to be assigned to the offender. In determining whether the victim has been wronged, then an objective standard of liability, based on actual facts, may be the most appropriate means to apportion compensation for harms suffered. There seems to be no reason why these standards ought not to apply to soldiers and security forces in counterinsurgent operations abroad, as they apply to domestic police; indeed, U.S. forces instituted several compensation programs for civilians in Iraq and Afghanistan who had been harmed as a result of the actions of U.S. personnel, and this seems an appropriate response in cases where mistakes cannot be avoided.¹¹⁷ However, when determining the use of force at the outset, an evidence-based standard should be preferred over a standard based upon either subjective beliefs or objective facts, as it will best minimize subjective factors and ensure accurate decision-making at the outset.

1.2.3 The Standard of Reasonableness

A defensive killing will normally be permissible under the law if the person’s actions were reasonable under the circumstances.¹¹⁸ Within this, there can be a greater or a lesser reliance on subjective beliefs versus objective standards. The criteria for reasonableness are by no means clear, and can vary widely among jurisdictions. In U.S. law, ‘reasonableness’ simply means a

¹¹⁵ *Ibid.* at para. 24.

¹¹⁶ *Ibid.* at para. 20.

¹¹⁷ United States Government Accountability Office, *The Department of Defense’s Use of Solatia and Condolence Payments In Iraq and Afghanistan* (May 2007) [hereinafter *Use of Solatia Payments*]. Solatia and condolence payments were made to civilians who had been killed, injured, or suffered property damage as a result of the actions of U.S. and Coalition forces, as well as private contractors employed by the U.S. Department of State, at 1. These payments were considered to be a form of assistance, and an expression of sympathy and remorse, rather than an admission of legal liability, at 2. Payments were generally made at the discretion of local commanders on an *ad hoc* basis, at 3; however, this is a positive movement towards the institution of a formal restitution program for civilians.

¹¹⁸ *The Ends of Harm*, *supra* note 58 at 229.

“reasonable belief that he or she is in imminent or immediate danger of unlawful bodily harm and the use of force is necessary to avoid this danger.”¹¹⁹ A perpetrator who kills a victim who was not, in fact, about to cause them unlawful bodily harm, would be acquitted under normal self-defense rules if those beliefs were honest and reasonable, even if mistaken.¹²⁰ Within this, there also exists a continuum of objective versus subjective methods of assessing the reasonableness of the perpetrator’s beliefs. More objective means of characterizing the behavior examine what an objectively reasonable person would have believed and done in the circumstances, whereas more subjective methods of determining reasonableness focus on the perpetrator’s subjective state of mind at the time of the killing. Objective standards of reasonableness tend to use the law instrumentally, to enforce certain standards of community behavior, whereas a subjective approach focuses on an actor’s state of mind in order to determine his or her level of moral culpability.¹²¹ For these reasons, the usual legal standard of reasonableness is not the same as a standard based upon evidence that the victim has forfeited his or her right to life; even the more objective standards of reasonableness focus on what the defender ought to have perceived and done, and not on whether the victim’s actions justified the killing.

One case that has addressed the reasonableness of the use of lethal force by soldiers in self-defense is that of *Clegg*.¹²² This case employed a subjectively reasonable standard, and it demonstrates the difficulties that such a standard poses when prosecuting soldiers for killing civilians. This holds true even when soldiers are held to the same standard as other individuals, and the public prosecution service expends considerable time and resources to prosecute the soldiers involved. *Clegg* concerned the killing of several teenagers at a checkpoint staffed by British soldiers in Northern Ireland. On the evening of 30 September 1990, British soldiers set up

¹¹⁹ Cynthia Lee, “Race and Self-Defense: Toward a Normative Conception of Reasonableness” (1996) 81 Minn. L. Rev. 367 at 377 [hereinafter *Race and Self-Defense*].

¹²⁰ *Ibid.* at 389.

¹²¹ *Ibid.* at 382. See also: *People v. Goetz*, 68 N.Y. 2d. 96 (N.Y. 1986), in which the court employed an objective standard of reasonableness, rejecting the defendant’s claims that he honestly but mistakenly believed that several African-American youths who had approached him on the subway were about to harm him, The High Court of New York rejected a purely subjective standard of “reasonableness”, on the ground that this would allow citizens to set their own standards for engaging in defensive killings. The court stated that we cannot “allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm,” at 111.

¹²² *R. v. Clegg*, [1995] 1 AC 482 [hereinafter *Clegg*].

a checkpoint for the purpose of monitoring youths joyriding in stolen vehicles.¹²³ The purpose of the mission was therefore to enforce public order and discipline amidst ongoing sectarian tensions, and was not directed against terrorism suspects.¹²⁴ A vehicle approached the checkpoint at a high speed and did not stop when requested to do so. Private Clegg fired his weapon four times at the vehicle as it passed through the checkpoint. The fourth shot killed a teenaged girl sitting in the back seat of the vehicle.¹²⁵ This situation is thus very similar to those facing soldiers who are staffing checkpoints in counterinsurgent and stability operations abroad. In this case, the defense introduced evidence to show that the fatal bullet may have been fired before the vehicle went through the checkpoint, and not after; this was an important point, as Clegg had testified at trial that he subjectively believed that after the car had passed the checkpoint there was no longer any danger to himself or his fellow soldiers, and he therefore believed that such a shot could not be justified on grounds of self-defense.¹²⁶ Two other British soldiers in the case were convicted of perjury and obstruction of justice for fabricating exonerating evidence: one soldier had falsely claimed to have been struck by the vehicle, while another soldier had in fact stamped on his leg.¹²⁷

The House of Lords of the United Kingdom and the Appeals Court of Northern Ireland both found that ordinary laws and legal standards could and should apply to govern defensive actions by soldiers.¹²⁸ The House of Lords found that the standard to be used was one of reasonableness, and no exceptions were to be made for security forces acting in the course of their duties.¹²⁹ The House of Lords in *Clegg* was not specific about the precise scope of the reasonableness standard to be used, most likely because the Court found this to be a clear case of the excessive use of force.¹³⁰ However, Clegg was eventually acquitted at his retrial because forensic evidence cast a reasonable doubt as to whether he fired his weapon after the vehicle went through the checkpoint. This outcome was the cause of riots and further sectarian tensions, and

¹²³ *Ibid.* at 489.

¹²⁴ *Ibid.* at 491. The House of Lords found that, according to their testimony, at no time did Clegg suspect the occupants of the vehicle of being terrorists, or likely to commit terrorist acts.

¹²⁵ *Ibid.* at 490.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.* The other soldiers had stamped on the leg of Private Aindow, to create the false impression that he had been struck by the vehicle.

¹²⁸ *Ibid.* at 497.

¹²⁹ *Ibid.* at 500-501.

¹³⁰ *Ibid.* at 489.

fed perceptions among the Catholic population that British soldiers would not be held accountable for killing civilians.¹³¹

Clegg demonstrates that allowing soldiers to define their own subjective standards of reasonableness can lead to mistaken killings, and that this can create a climate of impunity that has significant negative political consequences in conflict situations. A further reason to adopt objective standards of reasonableness is the danger that subjective beliefs may be influenced by stress,¹³² as well as dehumanizing and racist stereotypes; both of these are very real dangers in conflict zones when security forces are tasked with policing foreign populations. Employing objective criteria to determine the use of lethal force can minimize the use of prejudicial and dehumanizing stereotypes as a motivation to engage in the overuse of force against a civilian population. Recall that Hultman has stated that stresses of combat and recent attacks can influence soldiers to overuse force against a target population.¹³³ Lee states that “[u]nder a subjective standard of reasonableness, if a defendant honestly but erroneously believes persons of a particular racial group are peculiarly susceptible to aggressive conduct, and acts on this belief by using deadly force against members of this racial group whenever he encounters them, the defendant may be acquitted.”¹³⁴ There is a danger that gauging the reasonableness of soldiers’ actions by a subjective standard simply comes to refer to those norms and beliefs that are typical or commonly held by soldiers, and may not describe conduct that is objectively justified or normatively desirable.¹³⁵ Soldiers may view the local population as being dangerous and hostile, and so come to believe that any suspicious behavior ought to be met with a swift and decisive use of lethal force. As seen above, this response may be out of proportion to the actual risks posed by the typical civilian in a conflict zone.

¹³¹ Nicholas Watt, “Paratrooper Lee Clegg Cleared of Last Charge Over Death of Teenagers” *The Guardian* (1 February 2000), available at: <http://www.theguardian.com/uk/2000/feb/01/northernireland.nicholaswatt3> (accessed 23 January 2014).

¹³² David A. Klinger and Rod K. Brunson, “Police Officers’ Perceptual Distortions During Lethal Force Situations: Informing the Reasonableness Standard” (2009) 8:1 *Criminology & Public Policy* 117, in which the authors found that situations of stress caused a number of perceptual distortions in police officers’ perceptions. See also: *COIN and Civilian Collaterals*, *supra* note 73, in which Hultman’s study finds that poor performance on the battlefield and suffering recent casualties could lead to reprisal violence by counterinsurgent forces in Afghanistan.

¹³³ *COIN and Civilian Collaterals*, *supra* note 73.

¹³⁴ *Race and Self-Defense*, *supra* note 119 at 386.

¹³⁵ *Ibid.* at 495.

Using objective criteria to govern the use of lethal force by security forces may help to reduce tensions by limiting the mistaken killing of civilians, and send a message to the local population that security forces will be held to account for killings that are objectively unreasonable. In fact, when the U.S. Marine Corps introduced a revolutionary new counterinsurgent doctrine in 2006, they stated that a measured use of force is crucial to the success of such missions. The 2006 *U.S. COIN Manual* states that the “cornerstone of any COIN effort is establishing security for the civilian populace.”¹³⁶ Excessive force undermines the goals of counterinsurgency, which are to build effective and legitimate governance,¹³⁷ and the rule of law.¹³⁸ The *U.S. COIN Manual* itself states that using excessive force, arbitrary detentions, and torture is self-defeating, “even against insurgents who conceal themselves amid noncombatants and flout the law.”¹³⁹ The *U.S. COIN Manual* states that public perceptions of justice are important to U.S. counterinsurgency doctrine, for “[a]ny human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world.”¹⁴⁰ Respecting human rights is therefore presented as a key component of counterinsurgent and stability operations, and Rules of Engagement that authorize force ought to be interpreted in ways that demonstrate a deep respect for human rights and that minimize the use of excessive force. Not only is this consistent with international law, but also with U.S.’s own counterinsurgency doctrine.

However, this is not how U.S. Rules of Engagement operated on the ground. There is evidence that U.S. soldiers deployed in Iraq held negative perceptions about the local population that may have contributed to abuses of civilians. A 2006 survey of soldiers and Marines deployed to Iraq undertaken by the U.S. Army Surgeon General’s Mental Health Advisory Team found that 10% of soldiers and Marines reported having mistreated Iraqi civilians.¹⁴¹ This included damaging or destroying Iraqi civilians’ property when not necessary, or hitting or kicking a non-

¹³⁶ Department of the Army, *Counterinsurgency*, FM 3-24 MCWP 3-33.5 (Washington, DC: Department of the Army, 2006) at para. 1-131 [hereinafter *COIN Manual*].

¹³⁷ *Ibid.* at para. 1-113.

¹³⁸ *Ibid.* at para. 1-119.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.* at para. 1-132.

¹⁴¹ Office of the Surgeon Multinational Force-Iraq, and Office of the Surgeon General United States Army Medical Command, *Mental Health Advisory Team (MHAT) IV Operation Iraqi Freedom 05-07 Final Report* (2006), available at: <http://armymedicine.mil/Documents/MHAT-IV-Report-17NOV06-Full-Report.pdf> (accessed 10 December 2013) at 4.

combatant when not necessary.¹⁴² The majority of military personnel sampled knew someone who had been a casualty, or had a member of their unit become a casualty,¹⁴³ and almost 50% expressed frustration over Rules of Engagement that they felt were too restrictive and placed them at greater risk.¹⁴⁴ Many soldiers expressed concern and fear over improvised explosive devices and sniper fire, risks that they could not predict or control, and which caused them severe stress.¹⁴⁵ Soldiers expressed a particular concern that they could not engage with force when Iraqis threw chunks of concrete at their vehicles, until the Rules of Engagement were altered to permit this.¹⁴⁶ However, a manual review of all deaths among Coalition soldiers in Iraq and Afghanistan indicates that no military personnel were killed in this manner.¹⁴⁷ Soldiers may therefore be systematically overestimating the risks posed by the local population, and their propensity to use force against civilians may be exacerbated by the stresses of combat.¹⁴⁸

1.3 Defining Civilian Direct Participation in Hostilities

The definition proposed herein is that a civilian participates directly in hostilities, and so forfeits immunity from attack, only when there is clear and convincing evidence that he or she is engaged in an act of aggression that wrongfully, *i.e.* without lawful authority, justification or excuse, poses an imminent threat of death or serious bodily harm to civilians or member of armed forces, and the use of force is necessary and proportionate to prevent that harm. Force will be necessary and proportionate only after de-escalation of force procedures have been diligently applied, and the consequences of the use of force on the surrounding population would not be

¹⁴² *Ibid.*

¹⁴³ *Ibid.* at 14-15.

¹⁴⁴ *Ibid.* at 13-14.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Supra* notes 83 and 84.

¹⁴⁸ While no studies to date have examined the effects of stress on soldiers' perceptions of risk, there is evidence that stress and emotions of fear are associated with risk aversion; if so, then such perceptions may make soldiers more likely to use lethal force to resolve issues, as this is viewed as the least risky option for them. See *e.g.*: Jakub Traczyk, Agata Sobkow, and Tomasz Zaleskiewicz, "Affect-Laden Imagery and Risk Taking: The Mediating Role of Stress and Risk Perception" (2015) 10:3 PLOS ONE e0122226. Dr. Shay, a Veteran's Affairs psychiatrist in the U.S., also reminds us that many soldiers are taught to see the use of overwhelming force as being the lowest risk option for themselves, and this is reinforced through what he calls "folk beliefs" about the value and efficacy of using force and coercion against an enemy. See: Joshua Phillips, *None of Us Were Like this Before: American Soldiers and Torture* (London, New York: Verso Books, 2012) at viii.

indiscriminate or disproportionate, or be such as to spread terror. Each of these elements will be discussed below in turn.

1.3.1 Clear and Convincing Evidence of Forfeiture of Immunity

As can be seen from the above discussion, even an objective standard of reasonableness is not by itself sufficient to adjudicate that a civilian has forfeited their immunity from attack. Such a standard may simply amount to asking what a reasonable soldier, holding views that are common among those same soldiers, would generally think and feel under the circumstances. If soldiers typically or commonly hold biases about the dangerousness of a civilian population, then this standard would validate those prejudices, rather than minimize them. This is the paradox of ‘reasonableness’: the more common and approved of are dehumanizing beliefs, the more they come to seem reasonable; at the same time, violence can become more widespread and egregious as a result of these beliefs, while making them easier for individuals to justify subjectively. Such positive feedback loops can increase the violence of war and ethnic conflict, and they contribute to the commission of atrocities and genocide.¹⁴⁹

Amos Guiora, a former legal advisor to the Israeli Defense Forces who was involved in decisions that authorized targeted killings, reminds us that the only permissible goal is the correct identification of a legitimate target, “otherwise, the state’s action is illegal, immoral and ultimately ineffective.”¹⁵⁰ An objective, criteria-based, decision-making process is required to isolate and identify the key pieces of information, and to minimize mistakes.¹⁵¹ Subjective and contextual factors are always present, but an objective criteria-based decision-making process can constrain these subjective factors within permissible bounds.¹⁵² An objective standard is desirable precisely because it asks not what a reasonable soldier *would* do, but what he or she *ought* to do in order to comply with the laws of armed combat, and the requirement to protect civilians in *Protocol I*. As stated above, one way of resolving this is to abandon both the omniscient and the subjective points of view, and instead inquire into the evidence available at the time, asking

¹⁴⁹ See e.g., Ervin Staub, “The Origins and Prevention of Genocide, Mass Killings, and Other Collective Violence” (1999) 5:4 *Peace & Conflict: Journal of Peace Psychology* 303 at 307.

¹⁵⁰ Amos Guiora, “The Importance of Criteria-Based Reasoning in Targeted Killing Decisions” in *Targeted Killings*, *supra* note 38, 303 at 308 [hereinafter *Criteria-Based Reasoning*].

¹⁵¹ *Ibid.* at 318-319.

¹⁵² *Ibid.* at 325.

whether the evidence indicates that the civilian is engaged in conduct that would forfeit their immunity from attack.

The weight of the evidence required in order to establish that civilians' conduct has forfeited their immunity has not been made clear in the international law. Because the laws of armed conflict require a presumption of civilian immunity,¹⁵³ the available evidence must therefore be sufficient to rebut this presumption.¹⁵⁴ There is no general rule as to the weight of the evidence required to meet a presumption; this might range from a scintilla of evidence, to a preponderance of the evidence, to a standard beyond a reasonable doubt.¹⁵⁵ No such rule appears in the laws of armed conflict to provide guidance, but it is clear that the rule is intended to protect civilians, and that is a cornerstone of the laws of war. Therefore, the presumption is a strong one. The right at stake, the right not to be arbitrarily or wrongfully killed, is also a weighty one, with grave consequences for its breach. A lower standard of evidence would not be sufficient to prevent mistaken killings and do justice. A higher standard of evidence, such as certainty, or evidence beyond a reasonable doubt, suffers from the same flaws as a standard of objective fact, and security forces would be unlikely to adopt such a rule.

Recall that *Protocol I* prohibits methods and means of warfare that are unable to distinguish between civilians and military targets.¹⁵⁶ This would certainly rule out any standard, such as a scintilla of evidence, or a mere probability, that the civilian poses a threat. Even the usual civil standard of requiring that the civilian pose a threat of harm on a balance of probabilities would be insufficient. If the tactics soldiers use were to kill civilians 49% of the time, for example, and strike military targets 51% of the time, then it is difficult to argue that such tactics are able to distinguish civilian from military targets, and are not indiscriminate. We ought to require a standard of evidence that is able to accurately distinguish between civilians and civilian participants at least a clear majority of the time. In order to strike a balance, while

¹⁵³ See: *Protocol I*, *supra* note 1 at Article 50(1), which applies to international armed conflicts. Such a rule does not appear in *Protocol II*, but it has been considered that this rule forms part of the customary international law, and accordingly ought to be respected in all armed conflicts. See: *Interpretive Guidance*, *supra* note 3 at 1039; *ICRC Commentary*, *supra* note 16 at § 4789.

¹⁵⁴ *Johnson v. Zerbst*, 304 U.S. 458 (1938) at 469, in which the Supreme Court held that in a weighty matter, such as overturning a judgment of a court that is presumed to be valid, the petitioner must rebut this presumption on a preponderance of the evidence.

¹⁵⁵ James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (London: Little Brown and Co., 1898) at 575-6.

¹⁵⁶ *Protocol I*, *supra* note 1 at Article 51(4).

providing clarity to ordinary soldiers, I argue that a ‘clear and convincing’ standard would do justice.¹⁵⁷ This standard is not so stringent as to require that soldiers assume an omniscient position, while prohibiting the use of force against threats that are not probable. It also excludes evidence that is itself unreliable. Guiora notes that we should be wary of basing these decisions upon intelligence that may be unreliable, or that comes from a dubious source.¹⁵⁸ In this way, a civilian would retain their immunity from attack only if there is clear and convincing evidence that they are engaged in conduct that would forfeit their immunity. The next section will address the individual elements of self-defense, and describe the conduct that would forfeit a civilian’s immunity, and so permit the use of defensive force against them.

1.3.2 A Wrongful Act of Aggression

The first element of a permissible claim to use defensive force is that the civilian must commit an act of aggression, which means a wrongful act that threatens to cause death or serious bodily harm to another. There are two components to this definition. First, the act must be wrongful; second, the act must meet the threshold of harm such that it is capable of causing death or serious bodily harm. In the chapters that follow, and in the case studies explored in Chapter Four, it can be seen that both the *Interpretive Guidance* and standard Rules of Engagement permit the use of lethal force against civilians where even a wrongful act of aggression is not present.

As discussed above, the *Interpretive Guidance* defines civilian direct participation in terms of activities related to an armed conflict, *i.e.* in terms of activities that would tend to adversely affect one party or side in the conflict, and not whether the act poses a risk of harm.¹⁵⁹ Both the *Interpretive Guidance* and standard Rules of Engagement also allow for the use of force against members of militant groups, even when they are not participating directly in hostilities; there are few criteria on how membership is to be adjudged but, as I will demonstrate, this may

¹⁵⁷ This standard of proof is higher than a preponderance of the evidence, *i.e.* a finding that it was likely or more probable than not that, in this case, the civilian had forfeited his or her immunity. For an example of a case in which a clear and convincing standard was required in preference to a preponderance of evidence in order to rebut a strong presumption, see: *Beckon v. Ontario* (Deputy Chief Coroner) (1992), 9 O.R. (3d) 256 at 271-2.

¹⁵⁸ *Criteria-Based Reasoning*, *supra* note 150 at 317. These elements are present on Guiora’s targeted killing checklist. He recommended that decision-makers ask whether the informant may have a grudge against the target, and whether there was a reasonable alternative explanation for the conduct.

¹⁵⁹ *Interpretive Guidance*, *supra* note 3 at 1016. See: *supra* note 50 and accompanying text.

be based upon activities that also do not pose a risk of harm: interfering with military equipment,¹⁶⁰ or logistics and communications,¹⁶¹ clearing landmines and unexploded ordnance,¹⁶² participating in demonstrations,¹⁶³ attending at certain private homes or public gatherings,¹⁶⁴ being a military-aged male in the vicinity of a strike zone,¹⁶⁵ the wearing of certain brands of apparel,¹⁶⁶ or even being associated with suspect persons through familial and social relationships,¹⁶⁷ have all been considered as acts that forfeit one's immunity to attack, as have financing, training, and supplying food to rebel groups,¹⁶⁸ as well as advertising or publishing materials.¹⁶⁹ Many of these activities not only do not pose an imminent threat of harm, but may well be lawful according to the civilians' own domestic laws, and even protected by international human rights laws. Where such activities are not lawful, domestic laws already provide a remedy. Where this is not the case, then the claim being made is that armed forces ought to be permitted to kill civilians who are engaged in lawful activities because a belligerent party considers that such acts might adversely affect their military operations. Not only is it undesirable to govern war by such rules, but there is nothing in the law concerning civilian immunity as outlined in the *Protocols Additional* that would support this interpretation. Therefore, this dissertation proposes that civilian direct participation be defined in terms of the threat of harm that the civilian

¹⁶⁰ *Ibid.* at 1017. See also: *infra* Chapter Three at note 233 and accompanying text.

¹⁶¹ *Ibid.* at 1016. See also: *infra* Chapter Three at note 232 and accompanying text.

¹⁶² *Ibid.* at 1017. See also: *infra* Chapter Three at note 231 and accompanying text.

¹⁶³ *The Constitutive Elements*, *supra* note 44 at 724. See also: *infra* Chapter Three at note 240 and accompanying text.

¹⁶⁴ *Signature Strikes*, *supra* note 21 at 7.

¹⁶⁵ Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will" *The New York Times* (29 May 2012) [hereinafter *Secret Kill List*], available at: http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=0 (accessed 26 July 2015). See also: Jim Crane, "Men Not Allowed to Leave Fallujah" *Army Times* (12 November 2004) [hereinafter *Men Not Allowed to Leave*], available at: <http://www.armytimes.com/legacy/new/1-292925-502866.php> (accessed 8 March 2013), *infra* Chapter Four at note 88 and accompanying text.

¹⁶⁶ *Al-Adahi v. Obama*, 613 F. Supp. 3d 1102 (D.C. Cir. 2010) at 14. See also: *infra* Chapter Four at note 187 and accompanying text.

¹⁶⁷ *Ibid.* at 10-11.

¹⁶⁸ Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis" (May 2010) 1 Harv. Nat'l Sec. J. 5 at 23. See: *infra* Chapter Three at note 241 and accompanying text.

¹⁶⁹ See e.g., Hannah Allam, "Is Imam a Terror Recruiter or Just an Incendiary Preacher?" *McClatchy News* (20 November 2009), available at: <http://www.mcclatchydc.com/news/nation-world/world/Article24564601.html> (accessed 30 June 2015). This Article concerns Anwar al-Awlaki, a U.S. citizen whose links to armed groups were not well established, but who was subjected to targeted killing in a Yemen. al-Awlaki's writings and sermons had been cited as a reason for his being targeted by U.S. officials, although the section of the *Targeted Killing Memorandum*, *infra* Chapter Four note 275, detailing the reasons why al-Awlaki was targeted have been redacted.

wrongfully poses to other persons. The forfeiture of civilian immunity would then be determined according to the rules that permit the use of defensive force.

One classic definition of self-defense is provided by Judith Jarvis Thomson in her 1991 article on self-defense, in which she argues that one is liable to defensive killing because they violate a right that you have not to be killed, and in so doing have forfeited their own right, stating “it is not because they will otherwise kill *you* that you may proceed; it is because of the entirely impersonal fact that they will *otherwise violate your rights that they not kill you* that you may proceed.”¹⁷⁰ Two elements of this definition are important for resolving the problem of distinction in war. First, Thomson’s definition espouses a rights based view, in which the target’s right to life is recognized, and both the target and the defender’s rights to life are placed on an equal footing; an act of aggression will forfeit one’s right to life not because the defender’s life is merely to be preferred to that of the target, but because the threat posed by the target wrongfully threatens the rights of the defender. Second, Thomson’s definition shifts the emphasis away from the defender’s beliefs and perceptions, and places it on the target’s actions by asking *what it is the target needs to do* in order to forfeit her right to life. The forfeiture of civilian immunity should not be dependent upon soldiers’ - often fallible - perceptions, but upon what conduct a civilian intentionally engages in, and for which she would bear responsibility. Conduct-based criteria guarantee to the civilian “a basic level of protection – not to be directly targeted if she does not participate in hostilities.”¹⁷¹ It ought to be clear to any civilian what she needs to do in order to maintain her immunity from attack, and refraining from participating directly in hostilities is a choice that any civilian can make. The criteria set out in the *Interpretive Guidance* and standard Rules of Engagement break this bargain, as they permit individual civilians to be attacked intentionally even when they do refrain from engaging in hostile acts. It is unclear what a civilian could do to avoid being deemed to be harboring a hostile intent, or deemed to be posing some level of risk to military operations, or deemed to be associating with a prohibited group, and thus to maintain her immunity.

¹⁷⁰ Judith Jarvis Thomson, “Self-Defense” (1991) 20:4 *Philosophy & Public Affairs* 283 at 308 [emphasis in original].

¹⁷¹ Naz Modirzadeh, “The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict” (2010) 86 *U.S. Naval War College Int’l L. Stud. (Blue Book) Series* 349 at 363.

Jeff McMahan would modify Thomson's definition of permissible defensive killing, arguing that simply posing a threat is too wide a criterion to use in justifying force. To illustrate his point, he gives the example of a murderer who is about to kill innocent people, and asserts that "the police officer who takes aim to shoot him does not thereby make herself morally liable to defensive action, and if the murderer kills her in self-defense, he adds one more murder to his list of offences."¹⁷² McMahan likens this situation to that of just and unjust combatants in an armed conflict; unjust combatants, like the murderer, have no right of self-defense against just combatants, who stand in the same position as the police officer. Any killing committed by unjust combatants is therefore a crime, whereas it is never legitimate to kill just combatants, even in self-defense.¹⁷³ McMahan claims that it is only permissible to attack in war if the target is morally responsible for posing an objectively unjustified threat of harm.¹⁷⁴ Civilians who acquire arms and begin to fight "are now doing harm, and have made themselves into dangerous men, and thus have become legitimate targets,"¹⁷⁵ provided that their use of force is not itself justified; forming part of a *levée en masse* would be one such justification that is permitted by the laws of war. In justifying self-defensive killings in war in this way, McMahan proposes one advance over Thomson's definition, which is that the civilian must be "morally responsible" for posing the threat of harm. Here, the wrongfulness of the harm is defined in terms of the moral responsibility on the part of the civilian for engaging in the act of aggression, without justification or excuse.

In order to ensure that defensive force is being accurately used against a perceived threat,¹⁷⁶ Ferzan proposes that "the question should be what the offender must do that creates such an appearance such that he is liable to defensive force."¹⁷⁷ In this formulation, defensive force may only be used against those who are morally responsible for posing a threat, but the gap between the target's responsibility and the defender's perceptions is bridged by only permitting defensive force when the target is responsible for engaging in acts of aggression that give rise to that perception of risk. Therefore, a defender would have permission to use force if the target is engaged in what Ferzan terms an act of aggression, which means to purposefully, knowingly, or

¹⁷² *Killing in War*, *supra* note 11 at 14.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.* at 34-5.

¹⁷⁵ *Ibid.* at 15.

¹⁷⁶ *Culpable Aggression*, *supra* note 81 at 689.

¹⁷⁷ *Ibid.*

recklessly and without justification engage in conduct that would lead a defender to believe that lethal force is necessary to prevent death or serious bodily harm.¹⁷⁸ Therefore, the question is whether there was clear and convincing evidence that the civilian engaged, purposefully, knowingly, or recklessly, and without justification in a wrongful act of aggression.

One United States military court martial that illustrates the principle of wrongful aggression is that of *Behenna*. First Lt. Michael Behenna was court martialled for killing an Iraqi detainee, Ali Mansour, during an interrogation.¹⁷⁹ Behenna had argued that the killing was performed in self-defense, after Mansour had thrown a chunk of concrete at him. The Court of Appeals for the Armed Forces held that Behenna was the aggressor in this case. He had taken the prisoner to a remote location, stripped him naked and interrogated him at gunpoint. The court found that his force was unauthorized and excessive, and therefore he could not claim self-defense when the prisoner fought back.¹⁸⁰ Here, the court found both that the use of force by the detainee was not wrongful, as the soldier had provoked it by his own wrongful act of aggression, and furthermore that the act of throwing a piece of concrete did not pose a risk of death or serious bodily harm to the soldier. This decision is in line with the proposed definition of civilian direct participation, as well as the usual law concerning defensive force as applied by the U.S. military.

As in *Behenna*, a threat must meet the threshold of harm in that the aggressor's behavior must pose a risk of death or serious bodily harm before the use of lethal force will be permissible. In the example above, U.S. soldiers in Iraq were concerned about local civilians throwing concrete projectiles at their vehicles and convoys as they passed by, and they believed that their Rules of Engagement ought to permit them to use force in these cases. States do not normally make the claim that throwing rocks or other projectiles constitutes direct participation in hostilities; rather, states generally argue that the use of force is justified on grounds of self-defense as found in standard Rules of Engagement, despite the fact that the aggressors do not pose a risk of death or serious harm to the soldiers.¹⁸¹ In one incident that took place during the initial invasion of Iraq on 24 March 2003, soldiers from the United Kingdom shot and killed an

¹⁷⁸ *Ibid.* at 683.

¹⁷⁹ *United States v. Behenna*, 71 M.J. 228 (2011) [hereinafter *Behenna*].

¹⁸⁰ *Ibid.*

¹⁸¹ *Supra* notes 83 and 84 and accompanying text. No soldier of any nation in Iraq or Afghanistan was killed by concrete or rock projectiles. Nearly all were killed by explosives and artillery fire.

Iraqi civilian who had thrown rocks at them.¹⁸² The Attorney General of the United Kingdom declined to prosecute the soldiers, on the grounds that they had acted in self-defense, and in accordance with their Rules of Engagement.¹⁸³ Note that the Attorney General did *not* excuse the soldiers on the grounds that the Iraqi civilian was participating directly in hostilities by throwing the rocks. On the other hand, a recent review of the use of deadly force by U.S. Customs and Border Protection agents found serious problems with the use of deadly force against civilians throwing rocks against Customs and Border Patrol Officers, and recommended that the policy be changed to state clearly that “Officers/agents are prohibited from using deadly force against subjects throwing objects not capable of causing serious physical injury or death to them.”¹⁸⁴ These are best practices that should apply equally to soldiers as to border patrol officers.

1.3.3 Imminent Harm

The proposed definition of civilian direct participation requires that the threatened harm be *imminent*. Imminence is often a requirement of laws governing self-defense; recall that the U.S. *Manual for Military Courts Martial* requires that “death or grievous bodily harm was *about to be* inflicted wrongfully.”¹⁸⁵ There is widespread disagreement as to whether imminence is a separate requirement, or whether it is simply one component of determining whether the use of force is necessary, and it is not necessary to resolve this debate here. However, when addressing the question of when armed force have permission to kill civilians during armed conflict, imminence serves a valuable function in excluding cases where there is merely an inchoate or speculative threat of future harm, and requiring imminent harm therefore serves to prevent killings that are merely pre-emptive.

Russell Christopher has argued that imminence is not a necessary component of a justified claim of self-defense, that the use of force may be valid even in cases in which the harm is not “about to be” inflicted. His argument centres on the fact that requiring imminence can lead

¹⁸² Charles Garraway, *The “War on Terror”: Do the Rules Need Changing?* (London: Chatham House, 2006) at 8, note 126.

¹⁸³ *Ibid.*

¹⁸⁴ The Police Executive Research Forum, *U.S. Customs and Border Protection Use of Force Review: Cases and Policies* (Washington, D.C.: The Police Executive Research Forum, 2013) [hereinafter *U.S. Customs Use of Force Review*] at 7.

¹⁸⁵ *Manual for Military Courts Martial*, *supra* note 98 at s. 916(e), p. II-111 [emphasis added].

to situations in which it is impossible to distinguish who is the defender and who the aggressor.¹⁸⁶ He states that it is paradoxical that if the ‘defender’ uses force at a time when the ‘aggressor’ seems to pose an imminent threat, then the ‘defender’ will become the first party to “physically manifest aggression and the first to pose a fully imminent threat.”¹⁸⁷ Similarly, if two parties threaten one another, and the threats escalate to the point where they each pose an imminent threat of death at the exact same time, then imminence can again tell us nothing about who is the aggressor and who the defender; this can only be determined by examining whose actions are *wrongful*.¹⁸⁸ This is precisely the problem often raised in war: aggressive actions that fall short of posing an imminent threat can provoke like actions in the adversary, thus escalating the conflict by creating the very conditions that make the use of defensive force seem necessary. The requirement that minimal force be used, such as that found in de-escalation of force rules discussed below, can also serve to de-escalate violence and, when applied properly, make the need to use defensive force less likely overall. This is preferable to abandoning the imminence requirement.

There are other good reasons to preserve imminence as a requirement for justified defensive force during armed conflict. Petter Asp has argued against the dangers of what he terms ‘preventionism’, which he defines as a growing social tendency that values the prevention of harm, and which is characterized by an exaggeration of the dangers we face, combined with an overly optimistic view of our abilities to “steer and control the world.”¹⁸⁹ A drive towards preventionism of this kind can certainly be seen in arguments in favor of preventive counterterrorism and counterinsurgent measures, including targeted killings.¹⁹⁰ Arguments in favor of the use of coercive preventive measures also place little weight on the very real and present harms that do result therefrom. Kimberly Ferzan has argued in favor of keeping the

¹⁸⁶ Russell Christopher, “Imminence in Justified Targeted Killing” in *Targeted Killing*, *supra* note 38, 253 at 277 [hereinafter *Imminence in Targeted Killing*]. For further arguments against requiring imminence as part of justified self-defense, see also George P. Fletcher, “Domination in the Theory of Justification and Excuse” (1984) 57 U. Pitt. L. Rev. 553; and Paul Robinson, *Criminal Law Defenses* (St. Paul, Minn.: West Publishing Co., 1984) at 77.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.* at 278.

¹⁸⁹ Peter Asp, “Preventionism and Criminalization of Nonconsummate Offences” in Andrew Asworth, Lucia Zedner, and Patrick Tomlin, eds., *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) 23 at 24.

¹⁹⁰ See *e.g.*, Richard Posner, *Countering Terrorism: Blurred Focus, Halting Steps* (Lanham, Md.: Rowman & Littlefield, 2007).

imminence requirement as an integral part of legitimate self-defense because it “separates those threats that we may properly defend against from mere inchoate and potential threats.”¹⁹¹ She argues that a “threat” is not “merely a risk, or even an evil intention, but an act of aggression.”¹⁹² Ferzan claims that the right of self-defense is *not* the right to act to preserve one’s life or safety, which is a mere self-preference rather than self-defense, but a right to respond to *wrongful aggression*.¹⁹³ For Ferzan, “the correct question is not *when does the defender need to act*, but *at what point is it fair to construe the putative aggressor as posing a threat?*”¹⁹⁴ This argument in fact seems very close to that of Christopher. While he argues that there can be sufficient evidence of wrongful aggression even in cases in which the harm is not imminent,¹⁹⁵ the real question is not whose aggression is first in time, but whose acts are wrongful.¹⁹⁶ Imminence, in his view, merely serves as evidence of aggression, but it is often very good evidence.¹⁹⁷ Imminence, in Ferzan’s view, also serves to limit the kinds of threats that constitute aggression, so that we can be more certain that we know that the use of force is necessary.¹⁹⁸ Determining whether aggressive acts are wrongful is best captured by clear and convincing evidence of aggression, while the requirement for imminence serves as a further limiting factor on the kinds of threats that can be responded to by lethal force. Keeping the requirement that the potential harm be imminent therefore serves a valuable function in regulating defensive force during armed conflict. It can eliminate the unnecessary use of force against putative and inchoate risks that may not materialize, while keeping the evidentiary standard high. Therefore, requiring imminence of harm better serves to prevent mistaken killings.

Article 51(3) of *Protocol I* permits civilian participants to be targeted “unless and for such time as” they do take a direct part in hostilities. This temporal limitation on targeting civilian participants is not the same as requiring that the threatened harm be imminent, although the two will often be closely linked. In order to comply with both the international humanitarian law, as

¹⁹¹ Kimberley Ferzan, “Defending Imminence: From Battered Women to Iraq” (2004) 46 *Ariz. L. Rev.* 213 at 217 [hereinafter *Defending Imminence*].

¹⁹² *Ibid.* at 257.

¹⁹³ *Ibid.* at 262 [emphasis added].

¹⁹⁴ *Ibid.* at 255 [emphasis in original].

¹⁹⁵ *Imminence in Targeted Killing*, *supra* note 186 at 267.

¹⁹⁶ *Ibid.* at p. 281.

¹⁹⁷ *Ibid.* at p. 267.

¹⁹⁸ *Defending Imminence*, *supra* note 191 at 262.

well as rules regarding defensive force found in domestic laws, then both temporal limitations must be respected. Therefore, civilian participants may only be targeted for such time as they do engage in a wrongful act of aggression, and only if the threatened harm is imminent.

1.3.4 Necessity, Proportionality and De-Escalation of Force Procedures

The requirements that the use of force be necessary, that only proportional force be used, and the requirement for de-escalation of force procedures are all closely related. Even in the face of a wrongful act of aggression, the use of lethal force may not be necessary in order to repel the threat, and no more force is justifiable than that which is necessary to repel the threat.¹⁹⁹ If lesser means can be used to repel the threat, then the use of lethal force will not be necessary; if the use of force is more than what is required to meet the threat, then it will be excessive and disproportionate.²⁰⁰ In addition, the force that is necessary and proportionate must be determined after de-escalation of force procedures have diligently been employed. There is some dispute over the extent to which the use of minimal force or escalation of force procedures is a requirement of international humanitarian law, and there is much evidence to support the proposition that this is at least an important principle, if not a customary rule.²⁰¹ However, when armed forces justify their use of force on grounds of self-defense, as they do under standard Rules of Engagement, then they must also establish that the use of force is necessary and proportionate, *i.e.* that means other than lethal force will not suffice to repel the threat or to protect life. When civilian direct participation is conceived of in defensive terms, then necessity and proportionality also become key components of the permissibility of force. Under current practices, the proper application of de-escalation of force procedures is a readily available means to ensure that the use of force is both necessary and proportional, and that the least amount of force necessary is routinely used.

¹⁹⁹ See: *Self-Defense and Moral Acceptability*, *supra* note 6 at 93, where Corrado states that the defender's act must be necessary to prevent death or grievous bodily harm. Corrado further point out that, in cases of mistaken self-defense, the killing is not in fact necessary to prevent death or serious bodily harm.

²⁰⁰ *Supra* note 10. See also: Judith Gail Gardam, "Proportionality and Force in International Law" (1993) 87:3 Am. J. Int'l L. 391.

²⁰¹ See: *infra* Chapter Three at s. 3.2.2.4 for a discussion of the principle of minimal harm.

As Christopher has noted above,²⁰² we may be faced with interpersonal situations in which the level of conflict is very high. Each party may be contributing to threats and acts of aggression, and in these situations the potential for violence to escalate is also very high. This may be the case, for example, in a gang war in an urban area, or in a blood feud. It is also very often the case in situations of armed conflict, not only as between soldiers and insurgent forces on the ground, but as between belligerent parties and states acting in the international arena. It is not difficult to create situations, through direct or indirect provocation, in which the use of defensive force seems justified.²⁰³ Without policies and procedures to de-escalate the use of force, it is easy to see that there may be no end to the need for ‘defensive’ force. In the same way that direct provocation renders one’s use of force unjustified, so too does a failure to take steps to minimize one’s use of force within the prescribed boundaries.

Like standard Rules of Engagement, the escalation of force continuum is a recent means of regulating the use of force, and one that began to be developed for use by domestic police forces in the 1980s.²⁰⁴ Escalation of force rules generally call for a graduated use of force when an officer is presented with resistance, first using the officer’s presence to induce compliance, and then moving towards verbal commands, the use of physical coercion to restrain the subject, followed by the use of less-than-lethal physical force and, only when the above is ineffective, is the use of lethal force permissible.²⁰⁵ The use of force continuum was put in place to attempt to clarify what may be considered as objectively reasonable force, and to guide decision-making on when to use force in police-citizen encounters.²⁰⁶ Terrill and Paoline note that this ‘step-ladder’ arrangement is the most common force continuum model currently in use, in which the use of force is escalated in a step-wise fashion if the civilian or detainee is not subdued.²⁰⁷ This is the model used by the U.S. armed forces. Escalation of force incidents were one of the most common

²⁰² *Imminence in Targeted Killing*, *supra* note 186.

²⁰³ Leo Katz, “Targeted Killings and the Strategic Use of Self-Defense” in *Targeted Killings*, *supra* note 38 at 467, in which Katz argues that it may be acceptable to provoke targets so as to justify the use of lethal force against them.

²⁰⁴ Merle Stetzer, *The Use of Force in Police Control of Violence: Incidents Resulting in Assaults on Police* (New York: LFB Scholarly Publishing, 2001) at 36-7.

²⁰⁵ H. Purdue, “Escalation of Police Use of Force” (September 1980) 5:5 *Trooper* 54 at 54-55.

²⁰⁶ William Terrill and Eugene A. Paoline III, “Examining Less Lethal Force Policy and the Force Continuum: Results from a National Use of Force Study” (2012) 16:1 *Police Quarterly* 38 at 39.

²⁰⁷ *Ibid.* They also noted that more modern models use a situational, or a matrix approach to regulating the use of force, but it appears that the armed forces have not yet adopted these models.

types of incident in which U.S. soldiers used force in Iraq²⁰⁸ and Afghanistan;²⁰⁹ therefore, better regulating escalation of force procedures can minimize the unjustified use of force, and could have a significant impact on relations between counterinsurgent forces and the local population.

While there have been no studies concerning soldiers' use of escalation of force procedures during counterinsurgent operations, studies of police escalation of force procedures have found that having effective administrative policies in place and ensuring their correct enforcement, assists in limiting police misconduct in the use of force. White, who studied the police use of force in Philadelphia, found that police shootings were not correlated with levels of crime, the number of homicides, felony arrests, or changes in demographics,²¹⁰ and were only weakly correlated with laws and court decisions restricting the use of police force.²¹¹ Instead, he found that the most significant factors at work in limiting police shootings were administrative policies and procedures being in place, their proper enforcement, and the informal norms and attitudes of peers and supervisors.²¹² He concluded that "the internal police working environment, particularly administrative policy, is an effective control of police shooting behavior if properly enforced."²¹³ He found that internal control was much more effective than external control, and that departments already had access to the kinds of measures that would limit police misuse of lethal force.²¹⁴ Other studies support this view. Lee and Vaughan found that mismanagement and a breakdown in administrative procedure were the key factors in increasing liability for police misuse of deadly force.²¹⁵ Eitle *et al.* also found that organizational and administrative factors were the most important elements: clear written policies, training, and effective enforcement

²⁰⁸ The US Significant Action ("SIGACT") Reports detail 12,678 such incidents in Iraq during the time covered by the SIGACT Reports, from 1 January 2004 to 31 December 2009. See full SIGACT Reports at: Baghdad War Diary, WikiLeaks (22 October 2010), available at: <http://wikileaks.org/irq> (accessed 8 August 2014).

²⁰⁹ US SIGACT Reports from Afghanistan, covering the time period from 2004 to 2010 indicate that US forces were involved in 2271 escalation of force incidents, as well as 37 checkpoint runs. See: Kabul War Diary, WikiLeaks (25 July 2010), available at: <http://www.wikileaks.org/afg> (accessed 8 August 2014).

²¹⁰ Michael D. White, "Examining the Impact of External Influences on Police Use of Deadly Force Over Time" (2003) 27:1 Evaluation Rev. 50 at 67.

²¹¹ *Ibid.* at 68.

²¹² *Ibid.* at 69.

²¹³ *Ibid.* at 51.

²¹⁴ *Ibid.* at 70.

²¹⁵ Hoon Lee and Michel S. Vaughan, "Organizational Factors that Contribute to Police Deadly Force Liability" (2010) 38:2 J. Crim. Just. 193. See also: J.S. Nowacki, "Organizational-Level Police Discretion: An Application for Police Use of Force" (2015) 61:5 Crime & Delinquency 643.

were the key factors in limiting police misconduct.²¹⁶

No studies have been done to date to examine how administrative failures in drafting, training, and then enforcing soldiers' Rules of Engagement and their escalation of force procedures have contributed to the unjustified use of force. However, the case studies discussed in Chapter Four tend to show that Rules of Engagement were often unclear, that administrative procedures gave great discretion to soldiers, that training was almost non-existent, and that accountability for mistakes was very poor. Poor understanding of Rules of Engagement played a role, for example, in the massacre at the Al-Muthanna chemical weapons complex in Iraq in May 2009, also known as Objective Murray. Several soldiers stated that their Rules of Engagement were unclear and confusing, particularly on the issue of whether the entire complex, including the village, and all military-aged males found therein had been declared hostile and were therefore permissible targets.²¹⁷ Five civilians were killed, and three detainees were executed, resulting in the convictions of two U.S. soldiers for murder.²¹⁸ Colonel Steele, the commanding officer, is reported to have stated in a memo, "While I never specifically stated that every military-age male should be killed on Objective Murray, the unit's understanding fell within my intent."²¹⁹ On the other hand, this indicates one ray of hope: the misuse of force by Coalition troops in Iraq and Afghanistan was not inevitable; it was largely the result of poor administrative procedures and a lack of accountability, and these are problems for which there are obvious and available remedies.

²¹⁶ David Eitle, Lisa Stolzenberg, and Stewart J. D'Alessio, "The Effect of Organizational and Environmental Factors on Police Misconduct" (2014) 17:2 Police Quarterly 103.

²¹⁷ Raffi Khatchadourian, "The Kill Company: Did a Colonel's Fiery Rhetoric Set the Conditions for a Massacre?" *The New Yorker* (6 July 2009), available at: <http://www.newyorker.com/magazine/2009/07/06/the-kill-company> (accessed 2 March 2015) [hereinafter *Kill Company*]. See also: Daniel P. Bolger, *Why We Lost: A General's Inside Account of the Iraq and Afghanistan Wars* (New York: Houghton Mifflin Harcourt, 2014) at 228.

²¹⁸ See e.g., *United States v. Girouard*, 70 M.J. 5 (2011). Several soldiers signed plea arrangements in the Al-Muthanna affair, specifically stating that their Rules of Engagement were not a factor in the murder of the detainees. Girouard had wanted to make the Rules of Engagement an issue at his appeal, but the court dismissed his conviction for negligent homicide on the grounds that it was not a lesser-included offence to the murder charges he was tried for. As a result, issues surrounding the Rules of Engagement were never raised at trial.

²¹⁹ *Kill Company*, *supra* note 217.

1.3.5 Justifications, Explanations and Excuses

In order for a civilian's act of aggression to be sufficient to forfeit their immunity, the aggressive actions must neither be justified nor excused. A full discussion of justifications and excuses lies outside the scope of this dissertation,²²⁰ but it is certainly the case that aggressors in a conflict zone may have a justification or excuse for their actions. Civilians may be responding to violence that is itself unlawful, such as war crimes or unlawful acts of aggression. This leaves open the possibility that security forces engaged in unlawful acts of aggression or provocation may thereby lose permission to use force in self-defense, and that civilians may be justified in repelling unlawful acts of aggression, as in *Behenna*.²²¹ In addition, the laws of war permit the use of force against an invading army, in the circumstances that comprise a *levée en masse*.²²²

In addition, there may be reasonable explanations for a civilian's conduct, perhaps more probable than the assumption that the civilian is engaged in a wrongful act of aggression. Such explanations are also relevant to determining whether the evidence of aggression is clear and convincing, for this will be lacking where there is a more likely explanation for the civilian's conduct. Therefore, it is important for security forces to turn their minds to possible explanations. Is the person engaged in lawful, or ordinary activities? This is especially the case when civilians are engaged in usual daily activities, such as digging in fields, or driving motor vehicles. Soldiers giving verbal instructions should ensure that civilians are capable of hearing them, and that there are no language barriers. Soldiers should be aware that civilians might easily be panicked by warning shots at a mobile checkpoint. This may at first seem like much to ask of soldiers, and they have not often been asked to engage in such considerations, but it encourages a fuller appreciation of the humanity of the local population, and serves as a reminder of the ordinariness of many of the civilian activities that have led to lethal force.

²²⁰ See generally: Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2007) [hereinafter *Excusing Crime*]. See also: *Regarding Self Defense*, *supra* note 11 at 101, in which Fontaine draws a distinction between justifications and excuses, arguing that mistaken killings are not justified, but may be excused under certain conditions.

²²¹ *Behenna*, *supra* note 179.

²²² *Third Geneva Convention*, *supra* note 19 at Article 4(6).

1.3.6 The Consequences of the Use of Force

The ways in which risks and actual harms are distributed by the rules governing defensive force can have an impact that goes far beyond the parties involved.²²³ As Jeremy Horder states, the rules that are devised ought to maintain common goods, which include a morally sound legal order.²²⁴ In counterinsurgent and counterterrorism operations, this means establishing trust with and security for the surrounding civilian population. There are always good reasons for soldiers to hold their fire. The use of lethal force is always a dangerous act, capable of harming innocent bystanders, or having unforeseen adverse consequences. Killings that are wrongful, or that are perceived to be wrongful, may weaken the authority of security forces and their ability to gain the assistance and cooperation of the local population. Killings that might seem permissible in the moment, can therefore threaten the success of the overall mission.

The definition proposed here also includes a requirement that the use of force not be such as to spread terror among the civilian population. This has been included in order to comply with the rules set out in sections 51(2) and 13(2) of *Protocols I and II* respectively, and is therefore necessary in order to comply with the international laws of armed conflict. This requirement also recognizes that the consequences of the use of lethal force have impacts that go beyond the immediate soldier-civilian encounter. In the case studies examined in Chapter Four, it can be seen that the overall effects of the overuse of force in escalation of force incidents or in targeted killings can have a widespread and negative effect on the civilian population that amounts to the indiscriminate use of force, and that is such as to spread terror. Focusing solely on the use of lethal force in micro encounters is therefore not sufficient, and the rules in place for the use of defensive force must take into account the overall effects and consequences of the use of force on the local population.

There are those who might argue that the above criteria are too onerous to be adopted by security forces in life-threatening situations that require split-second judgment. However, a recent incident involving the Secret Service shows that such criteria can be, and in fact are, effectively employed in such situations; moreover, they are of great assistance in reaching a desirable

²²³ *The Ends of Harm*, *supra* note 58 at 261.

²²⁴ *Excusing Crime*, *supra* note 220 at 17.

security outcome.²²⁵ Omar J. Gonzalez, aged 42 years, scaled the security fence at the White House, and reached the columned entrance of the residence before he was stopped by Secret Service personnel. The reasons given by Secret Service officers for holding their fire are in line with the above criteria. One Secret Service officer noted that, “This wasn’t a military-style assault. He had no bag, backpack, no visible weapons.”²²⁶ There was therefore an absence of evidence that the individual was engaged in an overt act of aggression. The officers also turned their minds to possible explanations and excuses, with one noting that, “he seemed to be mentally disturbed.”²²⁷ Officers also turned their minds to the risks and consequences of acting against the threat, noting that a stray bullet might have hit a bystander. “You’re accountable for every round,” the officer noted, “You need to think about not just the target but what’s behind the target.”²²⁸ One officer thought that it was important that members of the public have access to the grounds near the White House, and that the public’s civil liberties ought to be respected. The officer noted that, in the end, “We have to show restraint. You have to have the proper restraint.”²²⁹ The use of such criteria is therefore not difficult to employ in the rapid decision-making processes that security forces must engage in. This includes a proper appreciation of the consequences of using force, as well as the cultivation of framing-values that seek to protect the rights of the local population. In this case, such a decision-making process correctly prevented an unnecessary tragedy.

1.4 Conclusion

As Victor Tadros point out, while it is one thing to suffer harm and be killed, it may well be worse to be wrongfully killed.²³⁰ It may even be worse, particularly for the surviving community, when there is impunity for wrongful killings. However, the problem posed by mistaken killings goes beyond even impunity: here, the wrongfulness of the killing is not officially recognized, and is even approved of and validated by the values, regulations, and

²²⁵ Olivier Knox, “Why the Secret Service Didn’t Shoot the White House Fence-Jumper” *Yahoo News* (20 September 2014), available at: <http://news.yahoo.com/why-the-secret-service-didn-t-shoot-the-fence-jumper-160933257.html> (accessed 20 September 2014).

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *The Ends of Harm*, *supra* note 58 at 236.

procedures put in place by the relevant authorities. Indeed, self-defense is commonly thought to be a “morally forceful” excuse for killing,²³¹ and one that often plays well with the public in troop-providing countries. As long as this remains the case, armed forces will continue to resort to this explanation for their conduct.

Jeremy Horder also cautions us against accepting what he terms a “due diligence” excuse for wrongful killings.²³² Standard Rules of Engagement and escalation of force criteria suffer from the pitfalls of a due diligence excuse, as it is easy for military authorities to claim that precautions have been taken to avoid mistakes, and that Rules of Engagement have been followed. However, when the rules in place are over-inclusive in terms of who may be targeted, systems are not adequate to the task of avoiding mistaken killings, and training and oversight is poor, then claims to due diligence become a mere whitewash. This dissertation seeks to propose a novel way of conceiving of the forfeiture of civilian immunity in terms of the ordinary rules permitting defensive force, which can serve as a starting point for developing procedures and mechanisms of oversight that reduce mistakes in distinguishing innocent civilians from those who have forfeited their immunity. While this is a beginning, there is no guarantee that it will be sufficient, and that improved procedures will not themselves simply lead to an improved due diligence excuse for mistaken killings. Even if accurate procedures were to be meticulously followed in lawful counterinsurgent operations, there will always remain a gap between killings that are objectively wrongful, yet permissible; in these cases mistakes must be recognized, harms acknowledged, and restitution made. The framing values within which decisions are made are also important, and these include values that respect the lives and humanity of all persons in a conflict zone, values that place the responsibility for minimizing risks onto armed forces, as well as values that seek to minimize the use of unnecessary force. Many of these values are deeply rooted in the international humanitarian law as it has developed over the past few centuries, and they can inform our resolution to the problem of distinction in our own time.

²³¹ *Excusing Crime*, *supra* note 220 at 14.

²³² *Ibid.*

Chapter Two: The Development of the Laws of Civilian Immunity & Belligerent Qualification

Let every individual do his best to keep the claims of his own country within just limits... Let every individual State do its best to prevent injustice between its neighbours, either in entering on a war or in the terms of peace by which a war may be concluded, by not shrinking from expressing an opinion or from supporting that opinion by the needful pressure. If citizens have not the courage, and States have not the unselfishness for this, no machinery will help the case. If they have, machinery will not be wanted, or will be arranged easily so far as wanted.

~ John Westlake, Whewell Professor at Cambridge, on the First Hague Peace Conference, 1899.¹

2.0 Introduction

This chapter will examine the development of the modern laws of belligerent qualification and civilian immunity. These principles form the core of the modern treaty laws, as well as the customary laws of armed conflict, and as such they are applicable to all nations, and in all types of armed conflict. They specify the fundamental principles regarding who may lawfully use force during war and who may lawfully be attacked in war. This Chapter will discuss how the law developed from the end of the Middle Ages through the modern period, and up to the adoption of the *Protocols Additional* of 1977. Chapter Three will discuss the more recent developments that have arisen from the creation of modern Rules of Engagement, and the drive to better define civilian immunity by the ICRC.

Belligerent qualification entitles a combatant to belligerent privileges, and this includes, in modern times, the privilege to use force, to kill, to be afforded prisoner of war status upon capture, to take prisoners, to institute military tribunals and to convene courts martial. Belligerent liabilities include primarily the liability to be attacked by enemy forces at all times during the conflict. Belligerent duties include the responsibility to distinguish oneself from non-combatants, to present oneself as a lawful target for the enemy by wearing distinctive uniforms and/or

¹ John Westlake, (January 1899) 1:13 War Against War 1 at 2.

insignia and by carrying arms openly, and to obey the laws and customs of war. The law of belligerent qualification is necessary for the operation of the principle of distinction. Its purpose is to define who is a lawful combatant in a conflict and therefore may lawfully be attacked; civilians are defined as all those persons who are not qualified belligerents, and they retain their immunity to attack so long as they do not take a direct part in hostilities. Before these principles developed in the modern era, there were few restrictions on who could participate in armed conflict. Throughout the course of the late eighteenth and early nineteenth centuries, when the great powers were developing more professional and better equipped armies, they began to limit the granting of full belligerent qualifications only to certain classes of combatants. The problem thus created was *which* combatants would be eligible for qualification, and this in turn created the corresponding problem of how to treat those irregular combatants who did not meet these criteria.² This phenomenon can be understood as an outgrowth of changes in military administration instituted by the great powers of Europe in the post-Westphalian era, and the means by which they built their professional armed forces and consolidated their monopoly over the legitimate use of force.

To date, many scholars who have examined the history of civilians in war focus on the principle of distinction between combatants versus civilians.³ However, categories of actors now commonly termed ‘civilians’ and ‘combatants’ are themselves of relatively recent historic origin; they are normative categories that are the product of how belligerent privileges, duties and liabilities to attack came to be distributed in the course of nineteenth century warfare by the great European powers. In this modern view, a ‘civilian’ is by definition someone who takes no part in

² Here, the term ‘irregular’ is used to refer to any combatant that is not part of the regularly constituted and uniformed armed forces of a nation state. Irregular combatants may be unqualified, or they may qualify themselves by organizing in accordance with the requirements imposed by the international law, as discussed below. Many irregular fighters would include non-state actors, often termed ‘guerrilla’, ‘militant’ or ‘insurgent’ fighters. Irregular belligerents would also include certain agents of the government, such as members of militia or volunteer (para-military) forces, non-military government agents, such as police or members of intelligence agencies, and members of special-forces who engage in covert operations without wearing uniforms or carrying arms openly. Irregular forces would also include private security contractors, on land and sea. Armed conflict has long been populated with a vast array of irregular forces.

³ See for example, Richard Shelly Hartigan, *The Forgotten Victim: The History of the Civilian* (Chicago: Precedent Publishing, 1982); Igor Primoratz, “Civilian Immunity in War” (2005) 36:1 *Philosophical Forum* 41; Hugo Slim, “Why Protect Civilians? Innocence, Immunity and Enmity in War” (2003) 79:3 *Int’l Affairs* 481; and Anicee van Engeland, *Civilian or Combatant?: A Challenge for the Twenty-First Century* (Oxford, Oxford University Press, 2011).

hostilities, is possessed of no belligerent qualifications, and is not liable to be attacked. A ‘lawful combatant’ is possessed of belligerent privileges, and is liable to be attacked at all times provided that a state of armed conflict exists. In between these categories exists one of the most strategically utilized and legally controversial actors in war – those irregular fighters who do not clearly fall into either category. Therefore, the analysis that follows will focus not on civilians and combatants, but on belligerent privileges, duties, and liabilities, asking instead which actors are possessed of belligerent privileges to use force and which are not, which actors may be liable to attack and under what circumstances, and what treatment should be afforded to those who are captured.

2.1 Civilians and Combatants in the Medieval Era

One might think that in the Middle Ages the set-piece battle, the small size of the army, and the expense of outfitting a soldier for combat left little doubt as to who was a soldier and who was not. Richemond-Barak, for example, characterizes this period of warfare as one in which civilians played little part; the set-piece battles clearly separating civilians from combatants.⁴ In fact, in the Middle Ages, there was very little distinction between violence that was ‘war’, and that which was not, nor was there a strong distinction between ‘public’ and ‘private’ violence as those notions have taken shape in the modern period. As Keegan reminds us, “through its references to ‘putting in fear’, ‘making an affray’, and ‘keeping the Queen’s peace’, the medieval world was one in which the distinction between private, civil and foreign war, though recognized could only be irregularly enforced.”⁵ War was only one extreme end of this spectrum of violence. The distinction between civilians and combatants was neither recognized in practice, nor did the normative categories of ‘civilian’ and ‘combatant’ receive any recognition under the norms and customs then in force. As Green states, “[i]n ancient times, as evidenced by the Laws of Manu, the Old Testament, or the writings of Kautilya or San Szu, there was no attempt to identify those who were entitled to be treated as combatants... During feudal times, when the law of arms was

⁴ Daphne Richemond-Barak, “Nonstate Actors in Armed Conflicts: Issues of Distinction and Reciprocity,” in William C. Banks, ed., *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare* (New York: Columbia University Press, 2001) 106 at 107.

⁵ John Keegan, *The Face of Battle* (New York: Penguin Books, 1976) at 16 [hereinafter *Face of Battle*].

developing there was equally no attempt at definition.”⁶ The distinction between civilians and combatants was not yet recognized in the Middle Ages; violence was fluid, and non-combatants often played a significant role in the war effort. The facts as they existed on the ground would have meant that in practice it was difficult to distinguish between combatants and non-combatants; this situation, however, did not give rise to the distinction between ‘combatants’ and ‘civilians’ as distinct normative categories.

Just as there was a fluid relationship between ‘war’ and ‘private’ violence, there was a fluid relationship between those who were taking part in such violence, and those who were not. Civilians who aided in the war effort, such as by harboring fighters, providing supplies, or resisting a siege, were all liable to attack. The governing principle was not the distinction between combatants and civilians, but the distinction between those who were ‘innocent’, and so ‘not harming’, and those who were *nocentes*, and therefore posed some harm,⁷ but this was often interpreted very expansively. It was this view of ‘innocent’ as ‘non-harming’ that underlay the Truce of God and the Peace of God movements of the late tenth to the fourteenth centuries. Private persons, including the clergy, were much subjected to the depredations that arose out of the private violence of feudal warfare. This resulted in several peace movements beginning in the late tenth century that culminated in what historians call the Peace of God and the Truce of God movements. Such peace movements centered around Aquitaine, likely because of the high level of political instability suffered by that region after the collapse of the Carolingian Empire.⁸ At the early Synod of Poitiers in 1000 AD, the Bishops prohibited three very specific acts of war: taking ecclesiastical property by force, attacking unarmed clerics, and plundering agricultural resources from peasants.⁹ Such acts were punishable by anathema.¹⁰ Many of the attacks that motivated the early Peace of God movement were directed towards the plunder of private property to fund the expensive feuds of the secular magnates. Without any administrative structure, particularly regarding supply and logistics, individual fighters were often left to fend for themselves. This

⁶ Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed. (Manchester: Juris Publishing, Manchester University Press, 2008) at 125 [hereinafter *Law of Armed Conflict*].

⁷ Igor Primoratz, “Civilian Immunity in War: Its Grounds, Scope and Weight” in Igor Primoratz, ed., *Civilian Immunity in War* (Oxford: Oxford University Press, 2007) 21 at 30.

⁸ Thomas Head, “The Development of the Peace of God in Aquitaine (970-1005)” (1999) 74:3 *Speculum* 656 at 656 [hereinafter *Peace of God*].

⁹ *Ibid.*

¹⁰ *Ibid.*

often meant that individual fighters got their food and supplies by forced contribution from the surrounding population, including from peasants and ecclesiastical estates.¹¹ It is thus not surprising that the early prohibitions of the Peace of God focused on outlawing such depredations, which would have posed significant hardships for the peasantry. It is notable, however, that the Church was focused particularly on the protection of its own property and persons, and Held argues that “the Bishops acting at the early Peace Councils in that region were responding to attacks upon their properties and their selves caused by conflicts among secular magnates in the region.”¹² The protection of the property of peasants may have been a response to popular pressure, and a way of keeping the population under the protection of the Church. Such Peace Synods were very public and popular affairs, according to contemporary narratives,¹³ and such an addition may have been a response to popular demands. While it later came to prohibit attacks on women and children as well, the Peace of God movement, which continued to hold some influence until the fourteenth century, did not prohibit attacks on civilians as such, nor did it prohibit collective punishment or reprisals against civilians who assisted in the war effort.

It appears that there was little quarrel that civilians who aided in the war effort could lawfully be attacked, and this principle was in evidence as late as the Thirty Year's War (1618-1648) that resulted in the Treaty of Westphalia.¹⁴ Lesaffer states that all authors writing in the sixteenth and seventeenth centuries acknowledged, for example, the right to pillage a town taken by storm because the inhabitants refused to surrender.¹⁵ He writes that scholars “emphasized that the victor could always grant conditions and stated that natural law, justice or honour, or even the ‘usage of civilized peoples’ dictated the lenient treatment of the vanquished.”¹⁶

Hugo Grotius, in his 1625 *De Jure Belli Ac Pacis*, recognizes an almost unrestricted right for a just party to use force against an enemy population. He stated that the “Rights of War”

¹¹ Martin van Creveld, *Command in War* (Cambridge: Harvard University Press, 1985) at 27 [hereinafter *Command in War*].

¹² *Peace of God*, supra note 8 at 658.

¹³ Thomas Head, and Richard Landes, *The Peace of God: Social Violence and Religious Response in France Around the Year 1000* (Cornell: Cornell University Press, 1992) at 4.

¹⁴ Randall Lesaffer, “Siege Warfare in the Early Modern Age: A Study on the Customary Laws of War,” in James B. Murphy, and Amanda Perreau-Saussine, eds., *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2009) 176 at 183 [hereinafter *Siege Warfare*].

¹⁵ *Ibid.* at 183.

¹⁶ *Ibid.*

flowed solely from the sovereign authority by which such “crimes were authorized.”¹⁷ Grotius states that the “Slaughter of Infants and Women is allowed, and included by the Right of War,” as is the wasting of villages with fire and sword.¹⁸ These actions were *licit*, in the sense that they were permitted, but this did not mean that they *ought* to be done. The scholars of the late Middle Ages recognized these usages, even as they tried to advocate for more humane treatment.

2.2 The Sovereign Authorization Rule of the Early Modern Period

By the time of the Thirty Years’ War (1618-1648), the late-feudal system of “military-entrepreneurship”¹⁹ was well established, by which most fighting units were self-constituted and self-financed. In land warfare, this meant that fighters were expected to recoup their costs from the surrounding population, or from pillage or tribute from conquered territories. Nobles often raised and maintained their own armed forces on behalf of the Crown, which they partly funded from their own estates, and this was an important aspect of their privileges and power within late feudal society.²⁰ In naval warfare, the same result was accomplished by way of the sovereign issuance of letters of marque to private vessels, authorizing them to undertake specific hostile acts in foreign territory. The vessels self-financed by being able to claim prize money under international maritime law for any vessels they were able to capture.²¹ Letters of marque and reprisal were drafted to authorize very specific hostile acts, and it was this authorization only that distinguished the practice of piracy - unlawful *erga omnes* under international customary law - from what came to be known as ‘privateering’. Privateering was well established in the medieval period, with one of the earliest letters of marque being issued by King John of England in 1205 AD to Thomas of Galway.²² Privateering became more widespread throughout the sixteenth and seventeenth centuries, as European powers sought to establish trade routes and colonies abroad. This system of military entrepreneurship enabled the sovereign powers of Europe to project their

¹⁷ Hugo Grotius, *De Jure Belli Ac Pacis* (1625), A.C. Campbell, trans. (Kitchener: Batoche Books, 2001) at Book III, Chapter V, section ii [hereinafter *Grotius*]; see Appendix C at 1, p. 308.

¹⁸ *Ibid.* at Chapter IX, s. ii.

¹⁹ *Siege Warfare*, *supra* note 14 at 183-4.

²⁰ Rafe Blaufarb, “Noble Privilege and Absolutist State-Building: French Military Administration After the Seven Year’s War” (2001) 24:2 *French Historical Studies* 223 at 239 [hereinafter *French Military Administration*].

²¹ For a discussion of the history of letters of marque and reprisal, see F. Upton, *Upton’s Maritime Warfare and Prize* (New York: John Voorhies Law Booksellers and Publishers, 1863).

²² See R. G. Marsden, *Documents Relating to Law and Custom of the Sea*, Vo. I A.D. 1205-1648 (London: Navy Records Society, 1815) at 1.

power globally while keeping the cost to the Crown at a minimum, and served as a bridge between the feudal armies of the Middle Ages and the professional armies that began to develop in Europe from the mid-eighteenth century onwards.²³

The first attempt by states to abolish the private wars of the military entrepreneurs was made by European states when they concluded the Treaty of Westphalia at the close of the Thirty Year's War. Article 118 states:

[T]he Troops and Armys of all those who are making War in the Empire, shall be disbanded and discharg'd; only each Party shall send to and keep up as many Men in his own Dominion, as he shall judge necessary for his Security.²⁴

The Peace of Westphalia, however, was only the beginning of states' consolidation over the use of military force. In the century following Westphalia, "the customs of war were still determined by the same professional elite that had dominated them for ages and whose incorporation into the state was as yet incomplete... While today's international lawyers take it for granted that state authorities dictate the behaviour of their military agents and lay down the law, during the century after 1648 it was often the other way around."²⁵ Yet the military's incorporation into the nation state long remained contested and incomplete, and this has frequently been a site of the "struggle for law"²⁶ between the military authorities, civilian authorities, the courts, and the public. One of the major sites of this struggle was the incorporation of various kinds of irregular combatants into the emerging governing paradigm.

Throughout the late eighteenth and early nineteenth centuries, the great military and industrial powers of Europe began to professionalize their armies and to demarcate the lawful scope of the conflict by excluding those fighters who were not organized along these lines. Even many of those who fought as volunteers were given a rank, a uniform, and extensive drilling in the regimental military techniques of the day. Irregular militia such as these were employed by many of the great powers. Prior to the post-World War II era, irregular militias often went by the name of 'volunteers' or 'partisans', and they were generally attached to a regular professional army.

²³ *Siege Warfare*, *supra* note 14 at 183-4. See also: Janice E. Thomson, *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press, 1994).

²⁴ Peace Treaty Between the Holy Roman Emperor and the King of France and their respective Allies (Treaty of Westphalia) (24 October 1648) at XVI, §19; see Appendix A at 1, p. 297.

²⁵ *Siege Warfare*, *supra* note 14 at 195.

²⁶ David J. Bederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010) at 150.

Vattel, writing in 1758, describes the growth of professional armies during this period:

In former times, and especially in small states, immediately on a declaration of war, every man became a soldier; the whole community took up arms, and engaged in the war. Soon after, a choice was made, and armies were formed of picked men, - the remainder of the people pursuing their usual occupations. At present the use of regular troops is almost everywhere adopted, especially in powerful states. The public authority raises soldiers, distributes them into different bodies under the command of generals and other officers, and keeps them on foot as long as it thinks necessary.²⁷

This period thus saw the rise of a new type of professional soldier, one for whom the military was his occupation, and whose duties, moral, contractual, and patriotic, lay with the public authority who so employed him.

A bureaucratic administration to govern the military now became necessary, and it was introduced throughout Europe in the late eighteenth and early nineteenth centuries. This represented an exercise on the part of civilian authorities to centralize and consolidate their power over a still largely feudal military. Vattel was one of the earliest scholars at this time to describe the situation of a soldier²⁸ as a professional,²⁹ and an agent of a public authority,³⁰ one who is subsumed under the command of a higher officer, suggesting a certain degree of consolidation of central state authority over the military by the time of the mid-eighteenth century.³¹ Vattel states that subordinates may never use their own discretion, for it would be dangerous “to leave the decision to the judgment of men in subordinate stations, who are not acquainted with all the views of their general, and who do not possess an equal degree of knowledge and experience.”³² Vattel makes no distinction between those who can and those who cannot be authorized by the sovereign to conduct war, *i.e.* he espouses no rule that would qualify belligerents. Moreover, Vattel denies that all soldiers, no matter on which side of the conflict they wage war, are

²⁷ B. Kapossy & R. Whatmore, eds., *Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Indianapolis: Liberty Fund, 2008), at Book III, Chapter II, s. 9, available at: http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=2246&Itemid=27 [accessed 6 January 2013] [hereinafter *Vattel's Law of Nations*]; see Appendix A at 2, p. 297.

²⁸ *Law of Armed Conflict*, *supra* note 6 at 126.

²⁹ *Vattel's Law of Nations*, *supra* note 27, at Book III, Chapter II, s. 9.

³⁰ Vattel describes the public authority requirement by stating that the “power of levying troops, or raising an army, is of too great a consequence in a state, to be entrusted to any other than the sovereign,” *ibid.*, at Book III, Chapter II, s. 7.

³¹ *Ibid.* at Book III, Chapter II, ss. 19-21 on subordinate powers in war. The commander-in-chief should have a nearly unlimited discretion to conduct war, *ibid.*, s. 19, and military discipline is described as being of the utmost importance, *ibid.*, s. 18.

³² *Ibid.* at Book III, Chapter XV, s. 231.

possessed of the same privileges, liabilities and duties. On the contrary, the natural law principles of humanity and just war earlier espoused by Grotius still predominantly underlie his analysis of the laws of war. He opens ‘Book III On War’, by restating the just war principle earlier espoused by Grotius, that “he who is engaged in war derives all his right from the justice of his cause.”³³

Nor does Vattel distinguish between qualified and unqualified belligerents. Instead, he devoted Book III Chapter XV to “The Rights of Private Persons in War”. Here, he states, “If we confine our view to the law of nations, considered in itself, - when once two nations are engaged in war, all the subjects of the one may commit hostilities against those of the other, and do them all the mischief authorised by the state of war. But should two nations thus encounter each other with the collective weight of their whole force, the war would become much more bloody and destructive, and could hardly be terminated otherwise than by the utter extinction of one of the parties.”³⁴ Thus, “it is therefore with good reason that the contrary practice has grown into a custom with the nations of Europe, - at least those that keep up regular standing armies or bodies of militia. The troops carry on the war while the rest of the nation remain in peace.”³⁵ Even this custom was not universal among European nations - only among those who could maintain standing armies or militia - and Vattel proceeds to enumerate exceptions to the general custom. He states that, “although the operations of war are by custom generally confined to the troops” the inhabitants of a place taken by storm may take up arms to recover the liberty of the territory on behalf of the sovereign, “And where is the man that shall dare to censure it?”³⁶ Here, Vattel is articulating the concept known today as a *levée en masse*, and which remains protected by the *Third Geneva Convention*.³⁷

Vattel also expresses what later scholars would term the ‘sovereign authorization rule’, the earliest formulation of the public authority requirement that stated that only those combatants

³³ *Ibid.* at Book III, Chapter XI, s. 183.

³⁴ *Ibid.* at Book III, Chapter XV, s. 226.

³⁵ *Ibid.*

³⁶ *Ibid.* at s. 228.

³⁷ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: <http://www.refworld.org/docid/3ae6b36c8.html> (accessed 6 November 2014) at Article 4(6) [hereinafter *Third Geneva Convention*]. In Vattel’s formulation of the rule, *levées en masse* could retake territory that had been lost; Article 4(6) of the *Third Geneva Convention* restricts this only to the time of invasion; see Appendix B at 1, p. 305 and 8, p. 307. See also: *infra* Chapter Four at note 151 and accompanying text.

authorized by the sovereign are qualified belligerents.³⁸ At the same time, as Vattel has indicated, there were few restrictions on who could be so authorized by the sovereign. There is evidence, for example, of the widespread authorization of irregular forces during the French and Indian War (1754-1763) in North America. Both the French and British troops fought alongside a mixture of irregular forces, including colonial ‘rangers’, poorly trained local volunteers, and Aboriginal fighters.³⁹ The British, for example, organized a group of Aboriginals and frontiersman into what became known as ‘Roger’s Rangers’. The Aboriginal chiefs, as well as Robert Rogers, were formally commissioned into the British colonial forces and were paid by the British Crown, but were given no uniforms.⁴⁰ The frontiersmen and the Aboriginal fighters were sometimes administered an oath of service and read the *Articles of War* to induct them into the British forces and to signify that they were now subject to its laws and discipline.⁴¹ The sovereign’s authorization is made explicit through these acts. Instead of being self-financed, as with the military entrepreneurs of the late Middle Ages, these irregulars were paid directly by the Crown and made the subjects of its system of military law and discipline. Irregular forces authorized in this manner would thereby be considered as fully qualified belligerents, and irregular militia on both sides of the conflict were treated as such by the British and French authorities.⁴²

At other times, the relationship between Indigenous fighters and the European forces was less formal. In such cases, Aboriginal allies were to be remunerated as were the European military entrepreneurs of the previous century - through plunder and the ransom of prisoners. This was the case, for example, at the infamous siege of Fort William Henry in August of 1757. The French had negotiated very favorable terms of surrender with the British, permitting the British forces and their families to evacuate to Fort Edward while retaining their baggage and arms.⁴³ General Montcalm held a council of the chiefs of the Iroquois League before acceding to

³⁸ Vincent Howard, *A Treatise on the Juridical Basis of the Distinction between Lawful Combatant and Unprivileged Belligerent* (Charlottesville, VA: Judge Advocate General’s School, 1959) at 11[hereinafter *JAG Treatise*].

³⁹ Ian Steele, *Betrayals: Fort William Henry and the “Massacre”* (Oxford: Oxford University Press, 1990) at 47 [hereinafter *Betrayals*].

⁴⁰ *Ibid.* at 18.

⁴¹ *JAG Treatise*, *supra* note 38 at 18, citing “Letters from Lord Loudon to Rogers”, March 1757 and 1 January 1758, in Robert Rogers, *Journal of Major Robert Rogers* (1770), at pp. 45 & 69.

⁴² *Ibid.* at 19.

⁴³ *Betrayals*, *supra* note 39 at 110.

these terms, thus tacitly admitting, as Steele states, that “the Indians were allies and not completely under his command.”⁴⁴ The Iroquois fighters failed to respect the terms negotiated by the French as it left them without compensation; they plundered the fort, attacked and killed several of the evacuees and took several more prisoner. Each of the parties felt that it had been betrayed and dishonored by the others.⁴⁵ Steele states that this incident reinforced European views that natives were to be excluded from the protection of European laws and customs of war, as they had little regard for them.⁴⁶

This attitude continued to be evident in the American Revolutionary War (1775-1783), during which both the British and American forces allied with Aboriginals, while attempting to disrupt the alliances made by their adversaries. Particularly influential was the British-educated Mohawk leader Joseph Brant, who led fighters from the Iroquois Six Nations in the service of the loyalist cause. In his biography of Joseph Brant, William Stone states that the British government was very eager to enlist the service of the Six Nations to the cause of the British crown, despite their public denials that they would not ally with Aboriginals.⁴⁷ At the same time, the American forces considered it of the utmost importance to disrupt this alliance and prevent the Six Nations from fighting on the side of the British.⁴⁸ In July of 1778, Fort Wyoming in Connecticut was taken by British and Iroquois forces, and was plundered and burned upon its capture in much the same way as Fort William Henry had been pillaged when the British capitulated to the French.⁴⁹ Stone states that the tales of the massacre at Fort Wyoming were very likely overblown, and they unfairly cast the Aboriginals as the guilty parties.⁵⁰ In particular, he states that popular tales of Brant’s role in the affair were almost certainly fictitious.⁵¹ Later that year, in October of 1778, the American Lieutenant Colonel William Butler similarly raided and destroyed Brant’s settlement

⁴⁴ *Ibid.* at 111.

⁴⁵ *Ibid.* at 133.

⁴⁶ *Ibid.* at 147.

⁴⁷ William L. Stone, *Life of Joseph Brant - Thayendanegea: Including the Border Wars, and sketches of the Indian campaigns of generals Harmar, St. Clair and Wayne; and other matters connected with the Indian relations of the United States and Great Britain, from the Peace of 1783 to the Indian Peace of 1795* (Cooperstown: H. & E. Phinney, 1845) at 89.

⁴⁸ *Ibid.* at 92.

⁴⁹ *Ibid.* at 336.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* at 337-8. This included a very popular poem named “Gertrude of Wyoming” circulating at the time that cast him as ‘Monster Brant’.

along with several Iroquois villages in what is now upstate New York.⁵² Yet, European atrocities were excused as permissible incidents of war, whereas similar actions on the part of the Iroquois were treated as acts of savagery - the tales of which were often embellished, in order to justify treating Aboriginal fighters and civilians alike outside of the European rules of 'civilized' warfare. These incidents demonstrate the political expediency, secrecy, and hypocrisy that characterized the Europeans' use of irregular forces when they felt that matters of national security were at stake.

2.2.1 The Bureaucratic Modernization of the Military: The Example of France

Keegan states that the "replacement of crowd armies by nuclear professional armies was one of the most important, if complex, processes in European history."⁵³ State-building by the late eighteenth and nineteenth centuries required a more sophisticated bureaucracy to execute public policies and meet the demands of industrialization and colonization in an increasingly complex social environment. The rationalized and professionalized bureaucracy that arose throughout Europe in this period was most influentially characterized by Max Weber, who described its main features as a reliance on mechanization and technological progress, centralization and disciplined control, quantifiability and predictability - particularly through the collection of social knowledge through the science of statistics - the separation of workers from the means of production, and the legal doctrines of positivism and formalism.⁵⁴ The rationalization and systematization "was necessary because modernity meant change, that is, the steady introduction of new technologies, new modes of organisation etc., which individuals and organizations somehow needed to systematize in order to be able to act purposefully."⁵⁵ For Foucault, army inspections were part of the broader movement to delineate sovereign power through a continuous process of examination, extracting "from bodies the maximum time and force" through the use of "timetables, collective training, exercise, total and detailed

⁵² Francis Whiting Halsey, *The Old New York Frontier: its wars with Indians and Tories, its missionary schools, pioneers, and land titles 1614-1800* (Port Washington, N.Y.: I. J. Friedman, 1963, c. 1901) at 235-6.

⁵³ *Face of Battle*, *supra* note 5 at 176.

⁵⁴ Max Weber, "Bureaucracy" in H.H. Gerth, and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1958) 196 at 196-8.

⁵⁵ Mikkel V. Rasmussen, *The Risk Society at War: Terror, Technology and Strategy in the Twenty-First Century* (Cambridge: Cambridge University Press, 2006) at 13 [hereinafter *The Risk Society at War*].

surveillance.”⁵⁶ Within the military, “discipline was used to harness new weapons technologies because the effective use of the musket demanded well-drilled infantry and elaborate logistical arrangements.”⁵⁷ The great powers wanted to raise standing armies and professional officers, as well as the massive resources to mobilize them and to construct defenses against the professional forces of the enemy.⁵⁸ At the same time, improvements in breech-loading weapons and lighter and more mobile heavy artillery gave rise to the tight tactical formations that characterized the set-piece battles of the late eighteenth and nineteenth centuries. The development, use, and deployment of new technologies, and the desire for larger forces, required states to centralize control over the armed forces, to increase discipline and training, and for the first time to assume the full costs of the enterprise.

This rationalized system of bureaucratic administration would replace the older system of organizing the army by way of military commissions in the hands of the nobility; this system subsisted throughout much of the eighteenth century, and formed a bridge between the feudal era and the modern era in which states assumed centralized control over the armed forces. Blaufarb discusses how this process took place in France, which adopted substantial military reforms after its disastrous performance against the Prussians in the Seven Year's War (1756-1763).⁵⁹ The French began a comprehensive and revolutionary program of military modernization that centralized control over the armed forces at the War Ministry, increased systematization, documentation, inspection and discipline of troops, and that sought out commanders based upon personal merit, rather than family lineage. The French experience therefore exemplifies the kind of military reforms taking place among the great European powers in the late eighteenth and early nineteenth centuries. Britain and Prussia were instituting similar reforms, and many large non-European powers would follow suit, often asking for European assistance in training and organizing modern military forces along the same lines.⁶⁰

⁵⁶ Michel Foucault, “Panopticism,” from *Discipline and Punish*, reprinted in Paul Rabinow, ed., *The Foucault Reader* (New York: Vintage Books, 2010) 206 at 209.

⁵⁷ *The Risk Society at War*, *supra* note 55 at 16.

⁵⁸ *Ibid.* at 17.

⁵⁹ *French Military Administration*, *supra* note 20 at 226.

⁶⁰ This included the Ottoman Empire, China and Japan, who all reorganized their militaries along Western lines in the 19th century, with Western assistance, weapons and training. For example, the Ottoman Sultan Mahmud II overthrew the powerful Janissary military society in 1826, and organized the Turkish military along modern European lines with French assistance. See: A. Levy, “The Ottoman Ulama and the Military Reforms of Sultan

As a consequence of France's defeat by Prussia, the duc de Choiseul undertook a series of comprehensive military reforms to increase the centralization and systematization of the French armed forces. As Blaufarb states, "[t]housands of officers were demobilised, regulations were rewritten, a permanent regimental structure (France's first) was established, and a centralised system of personal records was instituted."⁶¹ To accomplish this, the functions of the military officers were largely taken over by the central government and its War Ministry.⁶² Prior to these reforms, the system of commissioned offices meant that members of the nobility, and not the Crown, undertook most functions of administration, discipline, logistics, as well as the financing of the military. As Blaufarb describes, "Under the traditional system of administration, captains received a royal stipend from which they had to keep their companies at full strength, provide lodging, replace worn-out horses, repair broken equipment, procure necessary supplies, and carry out training exercises."⁶³ In times of war, this meant that captains very often had to rely on family resources to supply any shortfall in funds, and this provides a key reason as to why officers were sought from the wealthier families, and not chosen based on personal merit.⁶⁴ However, this system of what Blaufarb calls "private administration" meant that commanders sought to keep costs down, and limited training exercises. Captains could be reluctant to discipline soldiers or to employ the drill, as they sought to retain personnel to avoid paying recruitment fees to new soldiers.⁶⁵ This system of private administration was crucial, however, to the social position and privileges of the Second Estate, and it primarily served their interests, rather than those of the Crown. It was the position of the nobility that "if nobles were prevented from serving or if their service was stripped of its voluntary, generous character, the very foundation of noble privilege would collapse and the entire social edifice totter."⁶⁶ Rationalization and bureaucratization were seen as inherently threatening to noble privilege. By "making military service a remunerative

Mahmud II" (1971) 7 *Asian & African Studies* 13. Both China and Japan adopted Western arms and methods beginning in the mid-nineteenth century. Barton Hacker describes Westernization in terms of the changes wrought by industrialization - the "unbreakable chain that led from firearms and ships to coal mines, iron foundries, and railroads; from military technology to industrialization; from the Weapons of the West to Westernization." See: Barton C. Hacker, "The Weapons of the West: Military Technology and Modernization in 19th-Century China and Japan" (1977) 18:1 *Technology & Culture* 43 at 52.

⁶¹ *French Military Administration*, *supra* note 20 at 226.

⁶² *Ibid.*

⁶³ *Ibid.* at 230.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* at 235.

⁶⁶ *Ibid.* at 239.

profession, establishing minutely detailed administrative routines, and enforcing them with the threat of punishment, Choiseul's reform violated the ideal of freely given service.”⁶⁷ The central authorities of France felt, however, that they needed to abolish the system of private administration in favor of centralized administration at the War Ministry in order to rebuild an effective military.⁶⁸ It was a necessary component of these reforms that the central authorities would also assume the full financing of the military, as well as administering spending and bookkeeping; as a result, the reforms resulted in a seventy percent increase in costs to the monarchy.⁶⁹

Britain also made reforms to its military at the end of the eighteenth century, but they were less comprehensive at this time than those undertaken by France and Prussia. Following the Prussian example, Britain introduced new regulations for military drills in 1764, although Hayter states, “most officers seem to have taken little interest in new ideas.”⁷⁰ Gates states that it was only after the British Army was defeated and demoralized in its struggle for the American colonies in 1783, that Britain would develop the impetus to conduct more comprehensive military reforms.⁷¹ In 1792, a more regimented system of drills was instituted, again inspired by the Prussian example.⁷² The Duke of York was instrumental in introducing a comprehensive system of reforms that transformed the British Army in the years following 1793.⁷³ He reformed the purchase system to introduce some qualifications based upon merit and service, and improved rations and barrack accommodations; he ameliorated the brutality of the penal codes then in force, while standardizing tactical drills and maneuvers, and he introduced the first permanent regiments of light infantry.⁷⁴ Unlike France and Prussia, Britain would not abolish the purchase of military commissions until 1871, and possessing the financial resources to purchase a commission remained the primary prerequisite for introduction into the officer corps until that

⁶⁷ *Ibid.* at 240.

⁶⁸ *Ibid.* at 237.

⁶⁹ *Ibid.* at 239.

⁷⁰ Tony Hayter, “The Army and the First British Empire 1714-1783” in David Chandler and Ian Beckett, eds., *The Oxford History of the British Army* (Oxford: Oxford University Press, 1996) 112 at 119.

⁷¹ David Gates, “The Transformation of the Army 1783-1815” in David Chandler and Ian Beckett, eds., *The Oxford History of the British Army* (Oxford: Oxford University Press, 1996) 132 at 132.

⁷² *Ibid.* at 141.

⁷³ *Ibid.* at 147.

⁷⁴ *Ibid.*

time.⁷⁵ However, the outbreak of war with France in 1793, and the massive mobilization that followed, served to open up the officer corps to classes outside of the landed gentry, as “men from other sectors of society, foremost among them the prosperous middle classes who had emerged in the aftermath of the agricultural and industrial revolutions, accounted for a growing proportion of the officer corps.”⁷⁶ As with France and Prussia, rigid hierarchy and strong discipline were the key principles of military governance at this time.⁷⁷

Gates describes this system as an extension of the social values and organization of the feudal period, stating that Wellington “placed his faith in uncompromising disciplinary codes and the army’s reflection of Britain’s social hierarchy; the rank and file were the tenants of a feudalistic community; the officers its squires. The latter group were, by upbringing and temperament, destined and duty bound to furnish the former with leadership”⁷⁸ This often meant discipline tempered by considerations of humanity and a respect for the welfare of the soldiers, primarily because these were important means of maintaining discipline and control. Richard Kane, Brigadier-General and Governor of Minorca, wrote an influential treatise concerning discipline, drills, and formations in 1745. He enjoins commanding officers not to treat their men with cruelty, stating that many officers had been killed by their men for this reason, whereas “those officers who, on the other hand, treat their men with justice and humanity, will be sure, on all occasions, to have them stand fast by them, and even interpose between them and death.”⁷⁹ Nor was discretion on the part of junior commanders seen as desirable at this time. Kane states that senior officers “should not depend on the care and judgment of others,” both because senior commanders had greater knowledge and experience, and also because “whatever misfortune happens, the blame will be laid at their door.”⁸⁰ The edifice of military organization that grew up at the end of the eighteenth century, and that would lay the foundations for the large, professional standing armies of the nineteenth, was inimical to the idea of individual soldiers’ agency and rights of personal self-defense.

⁷⁵ *Ibid.* at 142.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at 145.

⁷⁸ *Ibid.*

⁷⁹ Richard Kane, *A New System for Military Discipline for a Battalion of Foot on Action; With the Most Essential Exercise of the Cavalry* (London: J. Millan, 1745) at 4 [hereinafter *A New System for Military Discipline*].

⁸⁰ *Ibid.* at 12.

The European push to modernize the military, and the ideologies of governance that underlay such modernization efforts – central control, systematization, regimentation, and discipline - would have an effect on how scholars conceived of the customary international law concerning belligerent qualification. Perhaps the two most important scholars of war at this time, Jean-Jacques Rousseau (1712-1778) and Georg Friederich von Martens (1756-1821), both accepted this growing consolidation of force on the part of the state, while attempting to restrain it within just bounds. Rousseau’s *Social Contract* of 1762 was perhaps the most influential work at this time to reject the views of Grotius, and sought instead to re-conceive of international relations as the interactions between equal sovereign states; at the same time, the power that states possessed over individuals was to be limited in accordance with the rights of those individuals. Rousseau’s famous maxim, that war is not the law of the strongest, “a relation not between man and man but between state and state,”⁸¹ sought to impose new limits on the sovereign authority. Rousseau’s thoughts on war are contained within that section of the *Social Contract* that deals with slavery, and sets out a justification for the natural rights of man against the state. Rousseau’s views of war therefore privilege the natural rights of the individual, and he argues that this necessarily limits what states can do, in the conduct of war:

[T]he purpose of war is to destroy the enemy state, so we have a right to kill its defenders while they are bearing arms; but as soon as they lay down their weapons and surrender, they stop being enemies or instruments of the enemy and resume their status as simply *men*, and no one has any right to take their lives.⁸²

Rousseau is clear that he is breaking with the Grotian view of war that generally prevailed, when he states that, “These principles are not those of Grotius: they are not based upon the authority of poets, but are derived from the nature of things and are based upon reason.”⁸³ Taking up arms on behalf of the enemy and posing a threat is the guiding principle – civilians, who have never taken up arms, are also simply men and no one has the right to take their lives for this reason. It also follows that anyone who does take up arms has now made themselves an instrument of the enemy, and may be targeted. Rousseau’s comments are therefore one of the earliest expressions of norms governing civilians and civilian participants in war, and he based his determinations not

⁸¹ Jean-Jacques Rousseau, *The Social Contract* (London: Wordsworth Editions, 1998) at 5 [hereinafter *Social Contract*].

⁸² *Ibid.*; see Appendix A at 3, p. 297 and D at 1, p. 318.

⁸³ *Ibid.*

on the status of the defenders, but on their conduct.

Rousseau's ideas would exert a good deal of influence on the international laws of war, which were developing rapidly in the late eighteenth century. Georg Friedrich von Martens, writing *A Compendium of the Law of Nations* in the late eighteenth century, was closely associated with the introduction of legal positivism and doctrinal systematization into the international law, and he developed upon Rousseau's ideas concerning belligerency.⁸⁴ Treatise writers like von Martens were concerned with the practical aspects of managing international law as part of a wider system of European public law in an age with an increasingly complex and sophisticated bureaucracy; the point of this, states Koskenniemi, was to "imagine and present the interaction of European princes and states, and in particular the practices of European diplomacy, as aspects of an actually operating legal system."⁸⁵ This legal system, through the doctrinal writers, was to take on the character of "an academic science, neutral in method, religious in spirit, but committed – at least in some of its vocabulary – to the Enlightenment ideal of a rule of law to replace philosophical speculation and reason of state."⁸⁶ The ideas of Rousseau would fit very well into this new legal system, and von Martens introduces into his treatise two ideas that depart dramatically from the Grotian view of war: the idea that only a state's authorized soldiers are lawful combatants, and that it is now unlawful for unauthorized combatants to take up arms.

Von Martens states:

Soldiers, by the order of their commanders, and such other subjects as may obtain express permission for the purpose from their sovereign, may lawfully exercise hostilities, and are looked upon by the enemy as lawful enemies; but those, on the contrary who, not being so authorised, take upon them to attack the enemy, are treated by him as banditti; and even the state to which they belong ought to punish them as such.⁸⁷

Von Martens distances himself from the natural law view of war espoused by earlier scholars such as Vattel. Von Martens states that all sides in a war generally claim that they are in the

⁸⁴ Martti Koskenniemi, "Into Positivism: Georg Friedrich von Martens (1756-1821) and Modern International Law" (2008) 15:2 *Constellations* 189 at 190.

⁸⁵ *Ibid.* at 195.

⁸⁶ *Ibid.*

⁸⁷ Georg Friedrich von Martens, *A Compendium of the Law of Nations*, William Corbett, trans. (London: Corbett and Morgan, 1802), at Book VIII, Chapter III, s. 2 [hereinafter *Martens' Compendium of the Law of Nations*]. Although this version was published in 1802, it contains materials from von Martens' lectures that were written much earlier; see Appendix A at 4, p. 298.

right,⁸⁸ and that theirs is the defensive position.⁸⁹ He therefore rejects the notion that we can hold a war to be legal or illegal based upon the justice of its cause. Instead, we should defer to each sovereign's judgment, "if it be not manifestly unjust."⁹⁰ For this reason, von Martens is often considered to be the first international law scholar to reject the natural law view of war, and to characterize it instead in terms of positivism and *raison d'État*,⁹¹ while still maintaining the principle that wars that are clearly unjust are not to be permitted.

Von Martens thus shifted the law's emphasis onto the *jus in bello*, and he also introduces several key principles of the *jus in bello* now familiar to the modern laws of war. Among these are the principles that those who do not carry arms "are safe under the protection of the law of nations, unless they have exercised violence against the enemy," and that soldiers who have laid down their arms, or who have not the will nor the power to resist, may not be harmed.⁹² The principle that those who do not bear arms, or are otherwise *hors de combat*, are not liable to be attacked, harkens back to the Medieval idea of 'nocentes'; only those who pose a risk of harm are liable to be attacked.⁹³ Von Martens therefore followed Rousseau in defining civilians and civilian participants in armed conflict based upon their conduct – *i.e.* that they take up arms and pose a threat – while separating out from this all those combatants who were authorized by the sovereign, and whose privileges in war to be determined according to their status as such. This approach sought to balance the competing values of consolidating the lawful right to wage war within the state, while protecting the rights of individuals who took no part.

⁸⁸ *Ibid.* at Book VIII, Chapter II, s. 3.

⁸⁹ *Ibid.* at Book VIII, Chapter II, s. 2.

⁹⁰ *Ibid.* at Book III, Chapter II, s. 3.

⁹¹ *Law of Armed Conflict*, *supra* note 6 at 127. Green states that this is the earliest definition and use of the term 'combatants'.

⁹² *Martens' Compendium of the Law of Nations*, *supra* note 87 at Book III, Chapter III, s. 4.

⁹³ *Supra* note 7.

2.2.2 The Battle of Waterloo and the Beginnings of Strategic Command Control

The modern laws of belligerent qualification and civilian immunity developed within the system of military discipline and regimentation as it was developed in Europe in the course of the nineteenth century. By the time of the Battle of Waterloo (1815), the reforms of Choiseul had progressed further; regimentation and discipline were now important means of governing soldiers in combat, particularly as more systematic methods of command control over soldiers in battle had yet to develop. The very drills and regimentation used to fight the Napoleonic Wars were themselves means of coercion, of military discipline. The artillery square - a hollow square formation of one or more infantry battalions designed to repel a cavalry advance - had been in use since at least the end of the seventeenth century,⁹⁴ but it had been improved upon by drills and regimentation. At this time, orders were primarily transmitted from officers to rank and file by means of the drill and the drum. As Kane states, commanding officers may be killed in battle, resulting in confusion in the ranks, “whereas the drum is always the same, and much easier heard and understood.”⁹⁵ Not only was an artillery square formation easy to govern aurally via the drum, but was itself a form of discipline, for “no soldier can possibly misbehave, but there will be an eye presently upon him.”⁹⁶ Keegan describes the use of the artillery square formation at the Battle of Waterloo (1815) in the following terms:

Indeed, the very formation of the square, merely tactical as it may seem, concealed a strong coercive purpose. Infantry in line, particularly if formed four deep, offered just as much fire to cavalry as when in square. In line, however, the ratio of officers to ‘attacked length’ was altogether lower than in square, for there all the officers were grouped in the centre and could turn in an instant to consolidate whichever face of the square was attacked; moreover the weapons they and their sergeants carried, swords and halberds, though of little offensive value, were exactly what was needed to keep individual soldiers, or groups of them, from running away.⁹⁷

The artillery square could not for long fend off the growing chaos of the battlefield, the enveloping dark, and the panicked retreat of the French Guard, nor was it intended to. Discipline only held the formation in check long enough to weather the decisive part of the battle. One commander surveyed the field at Waterloo in the early hours of the evening of 18 June 1815, where perhaps as many as 40,000 men had died that day, and described the surviving soldiers as

⁹⁴ *A New System of Military Discipline*, *supra* note 79 at 10.

⁹⁵ *Ibid.* at 4.

⁹⁶ *Ibid.* at 3.

⁹⁷ *Face of Battle*, *supra* note 5 at 185.

stumbling upon one another and over the dead in the mud and the dark, while “beastly drunk... and not at all particular as to which way they fired.”⁹⁸

Choiseul's reforms may have increased the tensions between the estates, and the resulting financial pressures may have hastened the fall of the monarchy,⁹⁹ but these administrative reforms were important building blocks upon which Napoleon would be able to institute much more comprehensive administrative reforms, particularly in the area of strategic command control. Van Creveld defines military command control in the following terms:

First, command must arrange and coordinate everything an army needs to exist - its food supply, its sanitary service, its system of military justice, and so on. Second, command enables the army to carry out its proper mission, which is to inflict the maximum amount of death and destruction on the enemy within the shortest possible period of time and minimum loss to itself; to this part of command belong, for example, the gathering of intelligence and the planning and monitoring of operations.¹⁰⁰

Military command in this broad sense has always existed, and it has always been integral to the structure and organization of armed forces. However, within this expansive notion of command control there exists the ‘chain of command’, the system for delegating orders through the hierarchical structure of military offices. Napoleon was the first military commander to put together a general staff and to use delegation to engage in strategic planning.¹⁰¹ A specialized planning staff did not exist before the nineteenth century,¹⁰² from which van Creveld concludes that “the years around 1800 may be regarded as among the last in which the traditional union between ruler and commander was still possible.”¹⁰³

Napoleon’s contributions to the professionalization of modern armies lay primarily in the revolution in administration that he engendered.¹⁰⁴ This involved decentralizing the armed forces, while instituting a system of regular reporting so as to coordinate the different units, while still maintaining sufficient control over their activities. In decentralizing strategic command in battle, Napoleon established several institutions which would come to dominate military organization in

⁹⁸ *Ibid.* at 196.

⁹⁹ *French Military Administration*, *supra* note 20 at 239.

¹⁰⁰ *Command in War*, *supra* note 11 at 6.

¹⁰¹ *Ibid.* at 18. A ‘staff’ is defined by van Creveld as a “body of assistants attached to any figure in the military, government or business who wants to look at all important,” *ibid.* at 27.

¹⁰² *Ibid.*, at 33.

¹⁰³ *Ibid.* at 59.

¹⁰⁴ Andrew N. Liaropoulos, “Revolutions in Warfare: Theoretical Paradigms and Historical Evidence: The Napoleonic and First World War Revolutions in Military Affairs” (2006) 70:2 *J. Military History* 363 at 372.

the following centuries.¹⁰⁵ Napoleon proceeded:

(a) to organise the army into self-contained, mission-oriented strategic units, each with its own proper commander, staff, and balance of all arms; (b) to institute a system of regular reports from the corps to General Headquarters, and of orders from the latter to the corps; (c) to organise a headquarters staff capable of dealing with all the traffic thus tenanted; and (d) to prevent the commander in chief from becoming a prisoner of that staff.¹⁰⁶

Although Napoleon was the first to decentralize and delegate command control, his reforms did not aim at creating subordinates who would gather information and make their own decisions.¹⁰⁷ His marshals were not organized into a hierarchy, and would not have been permitted to defer to one another.¹⁰⁸ The bureaucratic administration of the General Staff was still in its infancy at Waterloo; there was no systematization, and orders were given by Napoleon on an *ad hoc* basis. As van Creveld states, “Napoleon on campaign sent out his orders with no kind of system whatsoever, writing to whomever he thought necessary at the moment, putting into his messages whatever part of his plan he thought fit, and informing those others whose names happened to occur to him.”¹⁰⁹ In this, Napoleon “stood on the threshold between the age-old tradition of oral operational command and the new system of written staff work.”¹¹⁰

The new military science of delegated command came to revolutionize command control systems throughout the nineteenth century. Inspection, examination, and documentation were all increased, so as to bring order to the increasing specialization and decentralization occurring in the large standing armies:

For example, it was the procedure of submitting daily detailed strength reports, established toward the end of the eighteenth century, that created the requirement for specialised personnel and thus gave birth to the first general staff. Once staffs existed, pen and paper, not to mention desks and filing cabinets, became much more important than they had previously been. The switch from oral to written operational command, largely accomplished within the century from 1750 to 1850, meant that far more attention could be paid to systemic analysis.¹¹¹

¹⁰⁵ See e.g.: James N. Wasson, “Innovator or Imitator: Napoleon’s Operational Concepts and the Legacies of Bourcet and Guibert” (1988) Monograph prepared for School for Advanced Military Studies United States Army Command and General Staff College, Fort Leavenworth, Kansas, for a discussion of the influence of 18th century military theorists on Napoleon’s innovations, and their legacy on Western militaries.

¹⁰⁶ *Command in War*, supra note 11 at 97.

¹⁰⁷ *Ibid.* at 98.

¹⁰⁸ *Ibid.* at 99.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* at 100.

¹¹¹ *Ibid.* at 10.

For the first time, command control began to address basic questions, such as “who ordered whom to do what, when, by what means, on the basis of what information, what for, and to what effect.”¹¹² While systematic command control gained in terms of strategic planning and in increasing the size of military formations, the larger numbers of soldiers and the decentralization of command away from the general also meant there was less control over what subordinates did during battle. As states increased the size and complexity of the armed forces among the large military powers of Europe - a key component of nation-building in the nineteenth century - there was a corresponding need to decentralize command control and place more control in the hands of subordinates. This meant that less information would be available to those higher up in the chain of command, necessitating further decentralization. This increased the problem of keeping command control over the troops in battle, and the growth of the hierarchical chain of command was an attempt to remedy this.

2.2.3 The Prussian Reforms of von Moltke: Rationalized Command Control

The development of rationalized military administration was brought to its apogee in the mid-nineteenth century in the command control systems of Helmuth von Moltke the Elder, the German Field Marshal of the Prussian Army, who further developed the methods of Napoleon and increased the complexity and decentralization of the Prussian military forces. The modernization of the Prussian military began in 1806, at which time it introduced modernization reforms based upon the French model after the Prussians’ disastrous defeat at the hands of Napoleon’s forces at the Battle of Jena (1806). Yet it was not until the time of Moltke that strategic command in battle would assume its full form. Moltke’s 1866 campaign against Austria provides the first example of a modern general staff in action in battle.¹¹³ Moltke’s reforms included the inception of a permanent General Staff, whose peace time activities included such now-common military activities as the “painstaking gathering of information on possible opponents and theatres of war”, “drafting and redrafting plans for mobilization” and deployment, and conducting war games.¹¹⁴ The activities of the General Staff also included preparing

¹¹² *Ibid.* at 12.

¹¹³ *Ibid.* at 103.

¹¹⁴ *Ibid.* at 111.

regulations and standing orders for training purposes,¹¹⁵ presaging the modern system of military doctrine and standing Rules of Engagement. The Austrian and Prussian forces at the Battle of Koniggratz (1866) together mustered about 440-460,000 troops, the largest up until that time.¹¹⁶ Armies of this size could not be mobilized permanently, but had to be kept as reserves and called up at short notice.¹¹⁷ The increasing complexity and size of military forces meant that a regular and rigid chain of command needed to be developed to assist the army in its continued growth, to manage its activities and to maintain discipline. As van Creveld states, by the time of Koniggratz, “No longer was there much of a chance that a commander would address his subordinate as ‘my cousin’ and receive an undated message in reply.”¹¹⁸

The Prussian command control system instituted in the mid-nineteenth century was rationalized and methodical:

The Prussian command system was as different from the Napoleonic one as it is possible to imagine. Whereas the one operated as a private institution (the emperor's Cabinet) addressing private individuals (“my cousin”) about private matters (“my affairs”), the other was fully and completely militarised for the first time. What one worked through a large span of control and a central reserve, the other would have nothing of either. Where one was all about brilliant improvisation and ad hoc measures without previous training to speak of, the other operated methodically on the basis of the most painstaking preparation in peacetime.¹¹⁹

Moltke decentralized command control and, unlike Napoleon, delegated responsibility for the first time to the company commanders.¹²⁰ Now, commanders were brought more fully into strategic planning, and asked to take initiative in carrying out their orders.

Moltke also introduced a systematic, detailed, and methodical form of transmitting orders in combat, called the ‘five paragraph field order’. Prior to this, field orders varied in detail, content, and length, and were issued in an *ad hoc* manner.¹²¹ The purpose of systematizing the

¹¹⁵ *Ibid.* at 111.

¹¹⁶ *Ibid.* at 105. The closest that any previous power had come to these numbers were the Qin and Han dynasties of c. 300-200 BC in China, who had introduced a similar military administration based upon standardization, discipline, centralization, and hierarchical organization, and who were able to muster hundreds of thousands of troops. See: Patricia Ebrey, Anne Walthall, and James Palais, eds., *East Asia: A Cultural, Social, and Political History* (Boston and New York: Houghton Mifflin Company, 2006) at 29-30.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.* at 114.

¹¹⁹ *Ibid.* at 141.

¹²⁰ Arthur T. Coumbe, “Operational Command in the Franco-Prussian War” (1991) Report Prepared for the U.S. Army War College, Carlisle, PA at 93.

¹²¹ Matthew Armor, “The Five Paragraph Field Order: Can a Better Format be Found to Transmit Combat Information to Small Tactical Units?” (1988-9) Monograph prepared for School for Advanced Military Studies

transmission of field orders in this way was to ensure that instructions were “clear, short, precise and complete.”¹²² As Armor states, “[t]hey avoided every form of expression that could have been misunderstood because experience showed that such orders had invariably been misunderstood.”¹²³ He also noted that orders “used positive terms so that responsibility could be placed with ease.”¹²⁴ Moltke’s five paragraph field order was first adopted by the U.S. in 1897, and most Western militaries had adopted such a format by the time of World War I.¹²⁵ While this format delegated some new powers of discretion to company commanders, the system was also designed to maintain strict control over local commanders and ordinary soldiers in the field. As Armor states, “[s]ubordinates were not left to exercise their own judgment, for it would result in too great a variation in execution which meant incoherence and weakness... small unit trench warfare in WWI demanded the most detailed and exact form of orders, a long order filled with minute instructions on every point was vital to a well-knit coordinated effort.”¹²⁶ Between the Franco-Prussian War and the massive mobilizations of World War I, European nation states aspired to mimic the structure and successes of the Prussian General Staff.¹²⁷ As van Creveld states, “[t]he belief in the scientific nature of war led to the establishment of war colleges in every leading country; to the proliferation of military journals; and to the vast numbers of officially published military histories.”¹²⁸ The administrative structure laid down by the Prussian army became the standard for Western and Westernizing militaries for the next century.

United States Army Command and General Staff College, Fort Leavenworth, Kansas at 4 [hereinafter *Five Paragraph Field Order*].

¹²² *Ibid.* at 5.

¹²³ *Ibid.*

¹²⁴ *Ibid.* This is the same point made by Kane in 1745 in his *A New System of Military Discipline*, *supra* note 79 at 12.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at 6.

¹²⁷ *Command in War*, *supra* note 11 at 149.

¹²⁸ *Ibid.* at 150.

2.3 The Modern Requirements for Belligerent Qualification

The administrative system of military governance and its hierarchical chain of command thus came to full fruition during the Franco-Prussian War (1870-1871), the first time that Moltke's full reforms were deployed in battle. The modern definition of belligerent qualification would also arise shortly after this juncture. Indeed, the definition of belligerent qualification - defined in terms of military organization and the chain of command - could not have arisen until such methods of military administration as regimentation and systematized command control had already become established. It was also during the Franco-Prussian War that serious conflict would arise among the European powers over the legality of arming and authorizing irregular belligerents to fight on their behalf. This would erupt in the debate concerning the irregular militia that fought in that war, known as the *francs-tireurs*. The first attempt on the part of the international community to clearly define belligerent qualification was undertaken just after the Franco-Prussian War, at the Brussels Conference of 1874, as part of the Project of an International Declaration Concerning the Laws and Customs of War.¹²⁹ The solution that was proposed at Brussels was that irregular fighters would be recognized only if they possessed a minimum of the qualities possessed by a regular army,¹³⁰ and by this it was meant the professional armies of the great military powers of Europe.

The Brussels Conference of 1874 was a project devoted to codifying the international laws of war for use by the militaries of the leading European powers. The Conference was called by the Tsar of Russia at the behest of the twenty-eight year old Chair of International Law at St. Petersburg University and advisor to the Russian Ministry of Foreign Affairs, the young Fyodor de Martens.¹³¹ Martens drafted the code of land warfare that would form the *Brussels Declaration*,¹³² and that would, although not ratified at that time, be adopted at The Hague Peace Conferences of 1899 and 1907 and form the basis of the *Hague Regulations*.¹³³ Although very different in substance from the *Code* drafted by Francis Lieber for use during the American Civil

¹²⁹ *Law of Armed Conflict*, *supra* note 6 at 129.

¹³⁰ *JAG Treatise*, *supra* note 38 at 46-7.

¹³¹ Peter Holquist, *The Russian Empire as a Civilized State: International Law as Principle and Practice in Imperial Russia, 1874-1878* (Washington, D.C.: National Council for Eurasian and East European Research, 2004) at 9 [hereinafter *International Law in Imperial Russia*].

¹³² Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874) [hereinafter *Brussels Declaration*].

¹³³ *International Law in Imperial Russia*, *supra* note 131 at 11.

War (1861-1865),¹³⁴ the *Lieber Code* was an important transitional document in the laws of war upon which Martens drew.¹³⁵ Perhaps the most important advance engendered by the *Lieber Code* was simply that the laws of war could be codified, and issued as instructions to armies in the field, and Martens adopted this idea and sought to draft a code that would be ratified and implemented by the international community as a whole.

2.3.1 Francis Lieber and the American Civil War

Throughout the eighteenth and nineteenth centuries, states' treatment of irregulars was inconsistent; they very often refused to recognize the irregular militia raised by opposing states, while at the same time mustering their own. For example, when Napoleon invaded Prussia in 1813, the Prussians raised a militia, known as the *Landsturm*.¹³⁶ Napoleon announced that the French considered the *Landsturm* as brigands, a common term for unqualified belligerents. *Landsturm* were authorized by the sovereign, but had little organization.¹³⁷ They used little in the way of distinctive symbols, "[t]heir only uniform was a cap and belt, which they were instructed to hide when hard pressed."¹³⁸ Yet when Napoleon's forces were themselves hard pressed, he too called up non-uniformed French peasants.¹³⁹ Throughout the nineteenth century, European powers used irregular militia as they saw fit to assist their regular forces in the conduct of hostilities, yet the sovereign authorization rule was gradually ceasing to function as the sole criteria for belligerent qualification. This can be seen, for example by the additional criteria imposed upon irregulars fighting in the American Civil War (1861-1865). Irregulars were much used in the course of the Civil War; some strongly resembled regular troops in their organization and were considered as fully qualified belligerents, whereas less organized troops were considered mere 'brigands'.

In order to clarify the applicable laws and customs of war, the Lincoln Administration commissioned Francis Lieber, a German-American who had been trained in the Prussian Army,

¹³⁴ Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, Lincoln Administration General Order No. 100 (24 April 1863) [hereinafter *Lieber Code*].

¹³⁵ *International Law in Imperial Russia*, *supra* note 131 at 12.

¹³⁶ *JAG Treatise*, *supra* note 38 at 27.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

to draft the *Lieber Code* to govern the conduct of troops during the Civil War. Lieber was primarily concerned with codifying the current customs and practices that prevailed at the time. For example, Lieber affirms the sovereign authorization rule in Article 57 of the *Lieber Code*, which states, “So soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offences.” Volunteer, or militia corps, often referred to as ‘partisans’ in the Civil War, were in use by both sides of the conflict, during which they supplemented the regular army. Article 81 of the *Lieber Code* defines partisan soldiers by stating, “Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all of the privileges of the prisoner of war.” Article 82 distinguishes partisans from unqualified belligerents as follows:

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army [and who occasionally return to their civilian avocations] are public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

Often, individual irregulars would be arrested and courts martialled on charges solely of being a ‘brigand’. Charges would be laid for such crimes as ‘Free Booting’, ‘Jayhawking’, and ‘Bushwacking’ - “all terms which were said to be so well understood as to of themselves state a punishable offence without elaboration.”¹⁴⁰ There is thus a distinction being drawn between more and less irregular troops. Sovereign authorization remains a necessary condition of belligerent qualification, but the *Lieber Code* further requires that troops be wearing uniforms, be paid by and be “part and portion of the organized army.”¹⁴¹ Thus, the *Lieber Code* reflects a transition between the earlier period in which sovereign authorization was sufficient for belligerent qualification, and the international agreements of the late nineteenth century, which also imposed the four organizational criteria.¹⁴²

While drafting the *Lieber Code*, Francis Lieber was called upon to specifically address the issue of partisans in greater depth, and he produced a treatise entitled *Guerilla Parties*

¹⁴⁰ *Ibid.* at 37.

¹⁴¹ *Lieber Code*, *supra* note 134 at Article 82; see Appendix A at 5, p. 298.

¹⁴² *JAG Treatise*, *supra* note 38 at 45.

*Considered with Reference to the Laws and Usages of War.*¹⁴³ Lieber calls this a “new topic” in the laws of war, and his purpose in writing the treatise is to sum up the applicable practices and usages of states, rather than to propose new rules.¹⁴⁴ Lieber sums up the problem posed by guerilla warfare during the Civil War, by stating that the “rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines.”¹⁴⁵ Several Confederate leaders were openly claiming the right to use such nonuniformed partisan rangers to engage in guerilla attacks against Union soldiers.¹⁴⁶ Governor John Lechter of Virginia had declared that all men who had a commission from the state were entitled to all the protections of soldiers and prisoners of war, thus claiming the right to authorize such irregular guerilla fighters.¹⁴⁷ Confederate General Thomas Hindman further asserted that the Confederacy would be bound by military necessity, rather than laws of war imposed by foreign powers, declaring that “We cannot be expected to allow our enemies to decide for us.”¹⁴⁸ Another Confederate commander claimed the right to decide “whether we shall fight them in masses or individually, in uniform, without uniform, openly or from ambush.”¹⁴⁹

In his treatise on *Guerilla Parties*, Lieber defines guerilla troops as being “self-constituted or constituted by the call of a single individual, not according to the general law of levy, conscription, or volunteering.”¹⁵⁰ Lieber distinguishes these fighters from partisans, for whom he proposes the definition of partisan troops that he would later adopt as Article 82 of the *Lieber Code*.¹⁵¹ Here, Lieber is attempting to define the difference between guerilla and partisan troops on the basis of the sovereign authorization rule: partisan troops are called up according to the general law of levy and are part and portion of the regular army, whereas guerilla troops are self-constituted or called up at the behest of one or more individuals. However, Lieber also

¹⁴³ Francis Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War* (New York: D. van Nostrand, 1862) [hereinafter *Lieber on Guerilla Parties*].

¹⁴⁴ *Ibid.* at 1.

¹⁴⁵ *Ibid.*

¹⁴⁶ John F. Witt, *Lincoln’s Code: The Laws of War in American History* (New York: Free Press, 2012) at 192 [hereinafter *Lincoln’s Code*].

¹⁴⁷ *Ibid.* at 193.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.* at 192.

¹⁵⁰ *Lieber on Guerilla Parties*, *supra* note 143 at 8.

¹⁵¹ *Ibid.* at 11.

recognized that guerilla fighters *were* in fact called up by the Confederate authorities, who *were* indeed claiming the right to authorize and to use such troops.¹⁵² The sovereign authorization rule then in use would have permitted this; if the use of such irregulars were to be prohibited, then some other rule would be required. Lieber did not propose a new rule, but he did attempt to restrain the worst abuses being committed against such troops in the interests of humanity, recognizing that “it is difficult for the captor of guerilla-men to decide at once whether they are regular partisans, distinctly authorized by their own government,” and so there should be a presumption that they are to be treated as regular partisans, and according to the law.¹⁵³

Even as he urges leniency and humanity against irregular troops, Lieber leaves the actual formulation and implementation of policies concerning guerilla fighters up to the legislative and executive powers, without seeking to circumscribe their discretion through general rules of law.¹⁵⁴ Witt argues that Lieber did more than just declare the law, however, and that his chief innovation was to focus on the characteristics that made men soldiers.¹⁵⁵ These characteristics included open and visible manifestations of the legitimacy and permanency of the fighting group, such as uniforms, insignia, and the permanence of the regiment.¹⁵⁶ This moved the law, for the first time, away from the sovereign authorization rule, finding that *something more* was required for lawful belligerency, although that something had not yet been articulated with precision.

Lieber’s approach to the problem would be influential in Europe. Johann Bluntschli, a noted scholar of international law at the University of Heidelberg would translate the *Lieber Code* into German, and it would become the Prussian Code of Land Warfare.¹⁵⁷ The failures of the sovereign authorization rule to prohibit the use of guerilla troops, to prevent the slaughter of guerillas and suspected guerrillas, and to quell international disagreements concerning the behavior of armies towards such actors would come to a head during the debate over the *francs-tireurs* called up by the French government during the Franco-Prussian War. At the time, the

¹⁵² *Ibid.* at 1.

¹⁵³ *Ibid.* at 20.

¹⁵⁴ *Ibid.* at 21-22.

¹⁵⁵ *Lincoln’s Code*, *supra* note 146 at 193.

¹⁵⁶ *Ibid.* at 193-4; *Lieber on Guerilla Parties*, *supra* note 143 at 18.

¹⁵⁷ *Ibid.* at 327-8, 343.

Prussians were using the code drafted by Lieber, and translated by Bluntschli.¹⁵⁸ Martens, who had access to Lieber's text, as well as his work on *Guerilla Parties*,¹⁵⁹ would go farther than Lieber in proposing that the problem of the *francs-tireurs* be solved by imposing the four organizational criteria on all fighters; this advance would give rise to the modern laws concerning belligerent qualification and civilian immunity.

2.3.2 The Franco-Prussian War and the Francs-Tireurs

The debate over guerilla troops was even more contentious in Europe during the Franco-Prussian War (1870-1871). After the conventional French forces were routed by the Prussians, the French government called up groups of irregular militia, including the uniformed *Garde Mobile*, as well as individuals belonging to shooting clubs, known as the *francs-tireurs*.¹⁶⁰ Some *francs-tireurs* wore uniforms, while others wore only blue blouses with a red armband or shoulder strap.¹⁶¹ The *francs-tireurs* were authorized, but were not uniformed, trained or equipped by the French government. *Francs-tireurs* were not recognized by the Prussian army, who "treated all these forces, without distinction, as unlawful belligerents, although all were authorized by the French government."¹⁶² The Prussians required not only uniforms, but also clear evidence of sovereign authorization, requiring that "each individual irregular combatant was required to have on his person a certificate of his character as a soldier, issued by a legal authority, and addressed to him personally, to the effect that he was called to colours, and was borne on the rolls of a corps organized on a military footing by the French government."¹⁶³ These requirements were nearly impossible to meet¹⁶⁴ – the French government was experiencing significant difficulties outfitting even their regular troops¹⁶⁵ - and large numbers of *francs-tireurs*

¹⁵⁸ George B. Davis, "Doctor Francis Lieber's Instructions for the Government of Armies in the Field" (1907) 1 Am. J. Int'l L. 13 at 22 [hereinafter *Davis on Lieber*].

¹⁵⁹ *Lincoln's Code*, supra note 146 at 343.

¹⁶⁰ *JAG Treatise*, supra note 38 at 32.

¹⁶¹ *Ibid.* See also James M. Speight, *War Rights on Land* (MacMillan and Co.: London, 1911) at 41-42 [hereinafter *War Rights on Land*].

¹⁶² *Ibid.*

¹⁶³ *Ibid.* at 33.

¹⁶⁴ *War Rights on Land*, supra note 161 at 45, in which Speight reports that a German jurist had doubted whether "such a demand can be insisted upon."

¹⁶⁵ Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross* (Geneva: Henry Dunant Institute, 1985) at 243 [hereinafter *From Solferino*]. Boissier states that, in an effort to save money,

were shot and executed upon capture.¹⁶⁶ At this time France, as well as many smaller European nations who were similarly unable to raise and equip professional military forces of their own, sought legal recognition for such irregular combatants.¹⁶⁷ The old authorization rule was failing to perform the functions of distinguishing combatants and protecting captives, and was leading to large numbers of casualties. The authorization rule was also causing contention between the European powers, who disagreed over the terms of the emerging customary law regarding belligerent qualification. This was the dispute that Martens hoped to resolve at the Brussels Conference of 1874.

The dispute over the *francs-tireurs* gave rise to the central issue in the laws of war in the 1870s, this being whether an insurgent population in an occupied territory were to be considered as lawful combatants,¹⁶⁸ and it is the resolution of this dispute which gave rise to the modern laws of belligerent qualification and *levée en masse*. At the time of the Franco-Prussian War, Prussia had declared that such fighters were not lawful combatants, but many other European powers disagreed. In Britain, for example, the *francs-tireurs* were considered to be lawful combatants, their status being similar to that of privateers. The Earl of Denbigh stated as much in a House of Commons debate on the war in 1871,¹⁶⁹ and this view would be echoed by Cavendish Bentick, who stated that “belligerent powers had to the full as much right to employ privateers as Francs-Tireurs, torpedoes, or Gardes Mobiles.”¹⁷⁰ The sovereign authorization rule was as yet in force.

2.3.3 The Brussels Conference of 1874 and the Martens Code

It was with the goal of clarifying the emerging customs of war that Tsar Alexander II of Russia called the Brussels Conference in 1874 as part of the Project of an International Declaration Concerning the Laws and Customs of War. The Conference took place in Brussels from 27 July to 27 August 1874.¹⁷¹ Fifteen European states were in attendance, as well as an

“[u]nscrupulous ‘clothiers’ had provided the army with a spongy uniform cloth which fell into tatters, and shoes with *papier mâché* soles.”

¹⁶⁶ *JAG Treatise*, *supra* note 38 at 34.

¹⁶⁷ *Ibid.* at 42.

¹⁶⁸ *International Law in Imperial Russia*, *supra* note 131 at 13.

¹⁶⁹ U.K., H.L., *Parliamentary Debates*, 3rd ser., vol. 207, col.197-208, at col. 202 (19 June 1871, Earl of Denbigh).

¹⁷⁰ U.K., H.C., *Parliamentary Debates*, 3rd ser., vol. 205, col. 1469-505 at col.1478 (21 April 1871).

¹⁷¹ *Law of Armed Conflict*, *supra* note 6 at 129.

Ottoman delegation.¹⁷² France, Britain, and the secondary powers were cognizant of the danger that the Prussian victory might enshrine the right of conquest in the international law. Russia supported the secondary powers of Spain, Holland, Belgium and Switzerland in recognizing the legitimacy of calling up a *levée en masse* to fight an occupying power.¹⁷³ Germany, on the other hand, strenuously argued against this practice, and instead demanded that irregular forces be outlawed, as their use would only result in military escalation, and cruel reprisals.¹⁷⁴

Martens “argued that the German claim that military necessity took precedence over all else in fact amounted to a denial of international law as a principle,”¹⁷⁵ a view that was favored among Russian scholars of international law in the late nineteenth century.¹⁷⁶ The German position was thus similar to the claim earlier made by Confederate leaders that their guiding principle was military necessity, rather than foreign laws imposed by one’s enemies.¹⁷⁷ Instead, Martens wished to found an international code of land warfare based upon principles of humanitarianism, one that would “mitigate the horrors of war, in accordance with the legal awareness and humanism that were growing among the general public.”¹⁷⁸ In fact, there were then several groups operating in Europe that had as their aim the drafting of a more complete international code for the conduct of warfare. These included the International League for Peace and Freedom, and the Association for Reform and Codification of the Law of Nations, which shared the goal of wanting the conduct of war to be subject to international law.¹⁷⁹ The Society for the Improvement of the Condition of Prisoners of War, led by the Comte de Houdetot and Henri Dunant, had originally proposed a conference be called in Paris to discuss the adoption of a Convention relating to prisoners of war, but this plan was preempted by the Russian Project. The

¹⁷² The European states in attendance were Germany, Austria-Hungary, Belgium, Denmark, Spain, France, Great Britain, Greece, Italy, The Netherlands, Sweden and Norway, Switzerland, and Russia. Delegates from Portugal and Turkey arrived later in the Conference. See: “Protocole No. 2. - Séance plénière du 29 Juillet, 1874,” in Foreign Office, *Correspondence with Major-General Sir A. Horsford Respecting the Conference at Brussels on the Rules of Military Warfare, July 25 to September 28, 1874* (London: Printed for the Use of the Foreign Office, October 1874) at 26 (hereinafter *Confidential Correspondence of the Brussels Conference*).

¹⁷³ *War Rights on Land*, *supra* note 161 at 50.

¹⁷⁴ “No. 34. Sir A. Horsford to the Earl of Derby. - (Received August 17),” in *Confidential Correspondence of the Brussels Conference*, *supra* note 172, 61 at 62.

¹⁷⁵ *International Law in Imperial Russia*, *supra* note 131 at 5.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Lincoln’s Code*, *supra* note 146 and accompanying text.

¹⁷⁸ Vladimir V. Pustogarov, “Fyodor Fyodorovich Martens (1845-1909) – A Humanist of Modern Times” (1996) 312 *International Review of the Red Cross* 300.

¹⁷⁹ *From Solferino*, *supra* note 165 at 285.

Society called off the Paris Conference in deference to the Russian Project, but when they arrived in Brussels with their delegation, they were denied entry by the state delegates, who determined that only “European Powers such as those invited, could be allowed to attend or take part in the in the proceedings of the Conference.”¹⁸⁰ None of these parties sought to adopt the Prussian Code of Land Warfare translated from Lieber, likely because it tipped the balance in favor of military discretion rather than the rule of law. The debate over the law of belligerent qualification, both in the 1870s and today, stems not so much from what Witt terms the struggle between humanitarianism versus justice as competing visions of war,¹⁸¹ but the struggle between the rule of law versus military discretion. Will security forces be guided by legal rules, or will they be permitted to act according to their own determinations as to what actions constitute military necessity?

Indeed, Baron Jomini, the principal Russian delegate and chairman of the Brussels Conference, made it clear in his opening statement to the Conference that what was at stake was the very idea of war itself in the modern age. He stated that, at the present time:

[V]ery contradictory ideas prevail concerning war. There are those that would like it made more terrible so as to make it less frequent, while others would turn it into a tournament between regular armies with civilians simply as onlookers. People must know where they stand... It is easier to do one's duty than to define it. We must, therefore, tell everyone what his duty is.¹⁸²

While the delegates at the Brussels Conference generally agreed with the above view of war, the fault lines developed along pragmatic, rather than ideological, lines. The secondary powers were simply unable to organize and equip the kind of regular military that the ‘tournament’ of war demanded, and which Germany already possessed; instead, they maintained that they needed to rely on the ‘patriotism’ expressed in the *levée en masse* in order to secure their defense against foreign invasion.

Prior to the Conference, the Germans declared their position as follows:

With regard to the question of volunteer forces - “Francs-tireurs” and “levées en masse” - Major-General Walker learns that, as the Germans have no such auxiliary forces, and as the Landsturm is to be put under legal and Parliamentary control, the policy will be to endeavour to force the French into a like course, by discouraging all immunities to volunteers and free

¹⁸⁰ “No. 19. Sir A. Horsford to the Earl of Derby. - (Received August 6),” in *Confidential Correspondence of the Brussels Conference*, *supra* note 172 at 23.

¹⁸¹ *Lincoln's Code*, *supra* note 146 at 9.

¹⁸² *From Solferino*, *supra* note 165 at 292.

corps.¹⁸³

The Germans reiterated this position at the Conference, stating that it was expedient, “in the interests of humanity that no encouragement be given to the inhabitants of an occupied district to rise against the invader,” as the French had done in the late conflict, “as such a course would lead to repressive measures, which, instead of diminishing the horrors of war, would tend to increase them.”¹⁸⁴ None of the other delegates present at the Conference took this view. The Belgian delegate, Baron Lambert, pointed out the practical difficulties of organizing and funding a regular army of the kind deployed by Germany. He pointed out that, despite the time and sacrifices they had put into the defense of their countries, the armed forces of the secondary nations would always be inferior to those of the Great Powers; therefore, it was necessary for such countries to preserve those ‘patriotic’ and ‘heroic’ sentiments that had so often led their subjects to rise and defend their nations.¹⁸⁵ Concerning the proposed punishment of irregular forces who resisted an occupying power, he stated that “if citizens were to be sacrificed for having attempted to defend their country at the peril of their lives, they need not find inscribed on the post at the foot of which they are about to be shot, the Article of a Treaty signed by their own Government, which had in advance condemned them to death.”¹⁸⁶ Privately, the Belgian Under-Secretary communicated to the British delegate, Sir Alfred Horsford, in plainer terminology that:

[A]ny inhabitants who might rise in rear of the invaders, would be liable to be treated by the enemy with the utmost rigour, whereas (to make use of the words employed by the Under-Secretary himself) the inhabitants would most probably be shot by the Belgians themselves if they did not rise in defence of their own standard; and, he continued, neither the Government nor even the King would dare to propose to them any other course.¹⁸⁷

The delegate from The Netherlands also remarked that, in practical terms, the effect of outlawing *levées en masse* would mean either that they would have to limit their powers of defense, or institute compulsory conscription as Germany had done - a course which they were not prepared

¹⁸³ “No. 40. Mr. Adams to the Earl of Derby. - (Received June 22.)” in Foreign Office, *Confidential Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare, Part I, April 11 to July 4, 1874* (London: Printed for the Use of the Foreign Office, July 30, 1874) at 23.

¹⁸⁴ “No. 34. Sir A. Horsford to the Earl of Derby. - (Received August 17),” in *Confidential Correspondence of the Brussels Conference, supra* note 172, 61 at 62.

¹⁸⁵ “No. 12. - Séance du 14 Août, 1874,” in *Confidential Correspondence of the Brussels Conference, ibid.*, 78 at 84.

¹⁸⁶ “Inclosure in No. 52. Report on the Proceedings of the Brussels Conference on the proposed Rules for Military Warfare,” in Foreign Office, *Confidential Correspondence with Major-General Sir A. Horsford Respecting the Conference at Brussels on the Rules of Military Warfare, July 25 to September 28, 1874* (London, Printed for the use of the Foreign Office, October 1874), 159 at 175.

¹⁸⁷ “No. 11. Sir A. Horsford to the Earl of Derby. - (Received August 3),” *ibid.*, 12 at 12-13.

to accept.¹⁸⁸ The new rules of belligerent qualification proposed at Brussels favored the disciplined and well-equipped regular forces of the Great Powers. The secondary powers were forced either to develop inferior armies along the same lines, or be subjected to harsh reprisals for failing to do so.

One of the great advances of the Brussels Conference, and which engendered somewhat less controversy than the definition of *levée en masse*, was the formulation of the modern rules for belligerent qualification. An early formulation of the laws of belligerent qualification as they appear in the *Brussels Declaration* was delivered in a paper read by Henry Richmond Droop, a barrister of Lincoln's Inn Fields, to the Juridical Society of London on 30 November 1870.¹⁸⁹ Droop's paper addressed the most pressing topic in international law of the day – that of the *francs-tireurs* – and he articulates many of the key concepts of the modern international humanitarian law. Like Martens, Droop was motivated by overriding concerns of humanity, and sought to limit military discretion. In particular, Droop espouses the four core organizational criteria, and links the law of belligerent qualification with the emerging principle of civilian immunity. He states that troops must be required to distinguish themselves from civilians in order that civilians might be protected from the ravages of war¹⁹⁰ – the idea that now forms the basis of the humanitarian law and the modern principles of distinction and civilian immunity.

Droop begins by asserting that sovereign authorization remains the generally accepted rule for belligerent qualification.¹⁹¹ However, he argues that this rule is no longer desirable for regulating present-day conflicts, and he proposes instead a rule for belligerent qualification based upon objective and readily observable criteria.¹⁹² Droop rejects the sovereign authorization rule that had been asserted by Vattel - “that every inhabitant of an invaded country has a natural right

¹⁸⁸ “No. 12. - Séance du 14 Août, 1874,” *ibid.*, 78 at 85.

¹⁸⁹ *JAG Treatise*, *supra* note 38 at 47. The author of the speech at Lincoln's Inn Fields was likely Henry Richmond Droop, a lawyer and mathematician, who studied proportional representation in elections, and was an early originator of game theory, as well as the single transferable vote system. See: Henry R. Droop, “On Methods of Electing Representatives” (Jun. 1881) 44:2 J. Statistical Society of London 141.

¹⁹⁰ H.R. Droop, “The Relations Between an Invading Army and the Inhabitants, and the Conditions Under Which Irregular Combatants are Entitled to the Same Treatment as Regular Troops” (30 November 1870) in *Papers Read Before the Juridical Society: 1863-1870*, Vol. III (Wildy & Sons Law Booksellers and Publishers, 1871) 705 at 716 [hereinafter *Irregular Combatants*]; see also: H.R. Droop, “The Relations Between an Invading Army and the Inhabitants, and the Conditions Under Which Irregular Combatants are Entitled to the Same Treatment as Regular Troops” (17 December 1870) 15 Solicitors' J. & Rep. 121, which reprinted an abridged version of the full paper.

¹⁹¹ *Ibid.* at 717.

¹⁹² *Ibid.*

to defend his home, and therefore ought, if he takes up arms, to have the *status* of a soldier”¹⁹³ - on the grounds that sovereign authorization alone would make it impossible to distinguish between troops and civilians, or to enforce respect for the laws of war on the part of belligerents.¹⁹⁴ Civilians ought not to be attacked in war, and preventing this is the responsibility of the armed forces who would fight the war.¹⁹⁵ At the same time, he argued that the rules regarding belligerent qualification would also be beneficial for armies. Regular troops must have some security for reciprocity from enemy troops, and “[t]his security they can hardly have, unless the combatants they are fighting against are so connected with the national army that any part of this army can be held responsible for their conduct... Therefore to entitle them to the privileges of regular troops they ought to be under the actual control of officers who are in communication with and responsible to the commanders of the national army.”¹⁹⁶ This could only be accomplished by clear standards for belligerent qualification, which Droop outlined as follows:

1. They must have an authorization from an established Government or from some *de facto* substitute for such a Government.
2. They must be under the actual control of officers who are recognized by and responsible to the chief military authorities of the state.
3. They must themselves observe the rules of war.
4. All combatants intended to act singly or in small parties must have a permanent distinctive uniform, but this is not indispensable for troops acting together in large bodies.
5. Levies *en masse* of the whole population are legitimate combatants provided they comply with the above conditions, but not otherwise.¹⁹⁷

Droop’s formulation of belligerent qualification would set out the basic outlines and rationale for the *Brussels Declaration*, including the importance of discipline maintained through a clear chain of command, yet it differs from the *Brussels Declaration* in three key respects. First, Droop would have eliminated the traditional concept of *levée en masse*, instead requiring that such combatants follow the same organizational criteria as regular troops to distinguish themselves from civilians; otherwise, it would be too difficult to identify and protect the non-combatant population. Second, Droop significantly relaxed the uniform requirements for regular troops.

¹⁹³ *Ibid.* at 713. Compare with *Vattel’s Law of Nations*, *supra* note 27 and accompanying text.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.* at 715.

¹⁹⁷ *Ibid.* at 720. Droop notes that these conditions go far beyond what Lieber and Bluntschli, “the most recent authorities who have treated that subject at any length,” would have required, *ibid.*, and he calls for an international convention to settle the rules in a more definitive manner, at 724; see also the full text at Appendix A at 6, p. 299.

Providing uniforms to a large number of troops takes considerable time and expense, and therefore uniforms are not always available, provided they have other means of distinguishing themselves.¹⁹⁸ Third, Droop recognized that a *de facto* authority could authorize the use of force, provided that it is able to discipline its troops. These last two ideas would be rejected at the Brussels Conference, but similar ideas would appear a hundred years later in *Protocol I*.¹⁹⁹

The modern definition of a ‘lawful combatant’ first appears in its essential form in Article 9 of the *Brussels Declaration*, and it is based primarily upon Droop’s organizational criteria, including wearing a distinctive insignia, carrying arms openly, and being subsumed under a nation state’s military chain of command so that the laws and customs of war can be enforced by a qualified public authority. Article 9 of the Original Project that was placed before the Conference for discussion read as follows:

The rights of belligerents shall not only be enjoyed by the army, but also by the militia and volunteers in the following cases:

1. If, having at their head a person responsible for his subordinates, they are at the same time subject to orders from headquarters;
2. If they wear some distinctive badge, recognizable at a distance;
3. If they carry arms openly; and
4. If, in their operations they conform to the laws, customs, and procedure of war.

Armed bands not complying with the above-mentioned conditions shall not possess the rights of belligerents; they shall not be considered as regular enemies, and in the case of capture shall be proceeded against judicially.²⁰⁰

This final sentence was intended to prevent the reprisal killings that were undertaken against the *francs-tireurs* by the Prussians. However, many of the delegates thought that it remained too harsh, and proposed that it be struck altogether.²⁰¹ The final *Brussels Declaration* states in Article 9:

¹⁹⁸ *Ibid.*

¹⁹⁹ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: <http://www.refworld.org/docid/3ae6b36b4.html> (accessed 6 November 2014) [hereinafter *Protocol I*] at Article 44(3), which allows combatants to distinguish themselves solely by carrying arms openly; and Article 43(1), which requires that a Party to a conflict, even if that Party is not recognized by an adverse Party, may qualify its armed forces provided that it institutes a disciplinary system which ensures compliance with the laws of war.

²⁰⁰ “Inclosure No. 52. Report on the Proceedings of the Brussels Conference on the proposed Rules for Military Warfare,” in *Confidential Correspondence of the Brussels Conference*, *supra* note 172, 159 at 164; see also Appendix A at 7, p. 299.

²⁰¹ *Ibid.* at 165.

The laws, rights and duties of war, apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognisable at a distance [so that they may be distinguished from the civilian population];
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.²⁰²

The *Brussels Declaration* thus formalized the position that sovereign authorization was insufficient; only those troops that met the four core organizational criteria could be authorized to fight.

There is a similarity between Article 9 of the *Brussels Declaration* and the criteria outlined by Droop at Lincoln's Inn.²⁰³ While there is no evidence that Martens had Droop's speech before him, as he certainly did the *Lieber Code* and Lieber's treatise on *Guerilla Parties*,²⁰⁴ Martens had studied the topic closely before drafting the *Brussels Declaration*. He states, "During the war of 1870-1871, being close to the theatre of war, I collected from the newspapers of all countries and through personal contacts all the facts which established a violation of the laws and customs of war. Already I had come to the conclusion that the establishment by the governments themselves of these laws and customs was entirely necessary in order to prevent endless occupations and merciless reprisals."²⁰⁵ Martens may have been cognizant of Droop's speech when drafting the *Brussels Declaration*, and the Judge Advocate General, in his 1956 treatise on the laws of belligerent qualification, states that Droop's speech was the origin of the *Brussels* rules regarding belligerent qualification, although this is difficult to confirm.²⁰⁶

The rules of belligerent qualification as they appeared in the *Brussels Declaration* were largely based upon European concerns concerning the use of the *francs-tireurs* in the Franco-Prussian War. American jurists were less enthusiastic about these rules, preferring instead the flexibility of their own *Lieber Code*. At the 1907 Hague Peace Conference, U.S. delegates took

²⁰² *Brussels Declaration*, supra note 132 at Article 9; see Appendix A at 8, p. 300.

²⁰³ *JAG Treatise*, supra note 38 at 47. The author notes that the *Hague Regulations* are essentially the criteria outlined in Droop's paper, *Irregular Combatants*, supra note 190, and that "we are now using rules based upon the experience in the Franco-Prussian war" at 47-8.

²⁰⁴ *Lincoln's Code*, supra note 146 at 343.

²⁰⁵ Vladimir V. Pustogarov, *Our Martens: F. F. Martens, International Lawyer and Architect of Peace* (London: Kluwer Law International, 2000) at 109 [hereinafter *Our Martens*].

²⁰⁶ *JAG Treatise*, supra note 38 at 46.

no position concerning the debate over the proposed definition of *levée en masse*, or the text of Article 1 of the *Hague Regulations* that set out the rules for belligerent qualification.²⁰⁷ Major General George Davis, an American military scholar and the Judge Advocate General at the time the U.S. ratified the *Hague Regulations*, preferred the *Lieber Code* over the *Brussels Declaration*, which he finds errs too far on the side of protecting humanitarian interests at the expense of military commanders and their discretion. He states that, unlike the *Lieber Code*, the *Brussels Declaration* has the “disadvantage of being adopted in times of peace, when the minds of men in dealing with military affairs turn rather to the ideal than the practical.”²⁰⁸ It is worth noting that the Americans had been asked by the Russian government if they would take part in the Brussels Conference, but they declined to do so.²⁰⁹ Davis saw the *Brussels Declaration*, and the *Hague Regulations* that followed upon it, as espousing quite different rules and principles than those found in the *Lieber Code*, and he was in no way eager to claim it for America’s own.

Significant also is Article 10 of the *Brussels Declaration*, which recognizes *levées en masse* as qualified belligerents:

Article 10. The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organise themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.²¹⁰

This was essentially the same concept earlier articulated by Vattel. Yet now, the population of a territory that was already under occupation lost the right to resist through force of arms, and lawful belligerents were not to include “groups of the inhabitants of an occupied territory who take up arms subsequent to the occupation to harass or engage the occupant,”²¹¹ as the *francs-tireurs* had done. Even the German delegate at the Brussels Conference admitted that, “amongst those unfortunate peasants who were shot in virtue of the laws of war, many were guilty of nothing more than having obeyed an instinctive and almost irresistible sentiment of local

²⁰⁷ J.H. Choate, and C. Hale, “Report to the Secretary of State of the Delegates of the United States to the Second Hague Conference” in J.B. Scott, ed., *Instructions to the American Delegates to the Hague Peace Conferences and their Official Reports* (New York: Oxford University Press, 1916) 86 at 102.

²⁰⁸ *Davis on Lieber*, *supra* note 158 at 25.

²⁰⁹ “No. 16. Sir E. Thornton to the Earl of Derby,” in Foreign Office, *Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare, Part II, June 30 to July 28, 1874* (London: Printed for the Use of the Foreign Office, July 28, 1874) 10 at 10.

²¹⁰ *Law of Armed Conflict*, *supra* note 6 at 129-130; see also Appendix B at 4, p. 306.

²¹¹ *Ibid.* at 130.

patriotism.”²¹² However, it was also the German position that countries must develop a strong military organization, so as to enforce the laws and usages of war, and ensure that military force would be effective.²¹³ Article 10 was therefore a compromise solution: the *Brussels Declaration* declined to require that *levées en masse* follow the organizational requirements for belligerent qualification laid down in Article 9, but also declined to abolish the concept, instead restricting it temporally to the time of invasion.

The *Brussels Declaration* is therefore the first formal articulation of the modern rules of belligerent qualification and the principle of distinction: belligerent qualification belongs equally to all those who fight on behalf of a public authority, who follow the laws of war, who are subject to the discipline of a military chain of command, and who clearly distinguish themselves from the civilian population by wearing distinctive emblems and carrying their arms openly. At the same time, the *Brussels Declaration* formally recognized that the only exceptions to this rule are the specific circumstances that give rise to a *levée en masse*. All other combatants are unqualified, and their taking up arms can be treated as a criminal offence in and of itself. Although the *Brussels Declaration* was not ratified, the definition of a combatant laid down at the Brussels Conference was essentially adopted at the 1899 Hague Peace Conference,²¹⁴ and again unchanged at the second Hague Peace Conference of 1907.²¹⁵ As Green states, “what appears in the Hague Regulations is the wording of Brussels, with but minor verbal changes,”²¹⁶ and these criteria were subsequently adopted into Article 4 of the *Third Geneva Convention* of 1949, which adopts the *Hague* law of belligerent qualification to determine which combatants are entitled to the privileges of prisoner of war treatment.

²¹² *War Rights on Land*, *supra* note 161 at 49.

²¹³ *Supra* note 184.

²¹⁴ International Conferences (The Hague), *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, states at Article 1, “The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions: To be commanded by a person responsible for his subordinates; To have a fixed distinctive emblem recognizable at a distance; To carry arms openly; and To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army’” [hereinafter *Hague Regulations of 1899*]; see also: Appendix A at 10, p. 301.

²¹⁵ International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land at Article 1 [hereinafter *Hague Regulations of 1907*]; see also Appendix A at 11, p. 301.

²¹⁶ *Law of Armed Conflict*, *supra* note 6 at 131.

Although it was not formally ratified, the *Brussels Declaration* had a significant impact at the time upon the conception of what were customarily accepted usages of war. Britain, for example, which had earlier supported the *francs-tireurs*, would largely adopt the *Brussels Declaration* principles after the Brussels Conference. Sir Henry Drummond Wolf would approve of the findings of the Conference, telling the House of Commons that “the articles submitted restricted the laws, rights, and duties of war to troops of any kind commanded by officers responsible for their subordinates conforming to the laws and customs of war, and forbade the Constitution of an Army unless it was governed by men having knowledge of those laws and customs.”²¹⁷ Sir William Harcourt would state in the House of Commons in 1875 that *francs-tireurs* were not volunteers, and that “volunteers did not go out for gain as they did.”²¹⁸ Even the Earl of Denbigh, who stated that the United Kingdom would not undertake any new obligations as a result of the Brussels Conference,²¹⁹ expressed his approval for the inclusion of *levées en masse*. The Earl of Denbigh is clear that this concept was intended to protect state sovereignty and territorial integrity from outside aggression – the position of Great Britain and the secondary powers at the Brussels Conference - when he states that without the law authorizing *levées en masse*, “if a foreign force landed in Kent, that county would cease to belong to the Queen. Hitherto the safeguard of a country had been thought to be the breast and arm of every citizen.”²²⁰ Any proposals to remove *levées en masse* from the list of qualified belligerents would “deprive the country attacked of that advantage.”²²¹

These instruments did not end the controversy over the position of irregular combatants. At the 1899 Hague Peace Conference, there was again significant disagreement between the great military powers and the weaker states over the issue of arming militia and their status as belligerents. This was resolved by the introduction of the Martens Clause as the preamble to the 1899 *Hague Convention II*, again drafted by Martens, who was now the Russian delegate to the Conference. As Ticehurst explains, “Martens introduced the declaration after delegates at the Peace Conference failed to agree on the issue of the status of civilians who took up arms against

²¹⁷ U.K., H.C., *Parliamentary Debates*, 3d ser., vol. 222, col. 667 (22 February 1875).

²¹⁸ U.K., H.C., *Parliamentary Debates*, 3rd ser., vol. 223, col. 859 (13 April 1875).

²¹⁹ U.K., H.L., *Parliamentary Debates*, 3rd ser., vol. 220, col. 986-8 (3 July 1874, Earl of Denbigh).

²²⁰ *Ibid.*

²²¹ *Ibid.*

an occupying force. Large military powers argued that they should be treated as *francs-tireurs* and subject to execution, while smaller states contended that they should be treated as lawful combatants.”²²² The positions of various delegates were so opposed on the issue of irregular combatants, that it threatened the entire conference.²²³ The Martens Clause reads:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.²²⁴

Despite this, the Martens Clause failed to resolve the issue of arming militia, which only gained momentum as a consequence of the controversial treatment of irregular forces during World War II.

2.3.4 Warfare in the Nineteenth Century and Civilian Immunity

The principle of civilian immunity grew up alongside of the modern law of belligerent qualification. Indeed, the concepts are two sides of the same coin: qualified belligerents must fight according to the criteria laid out in the *Hague Regulations*, so that they might be distinguished from civilians, who are all those persons who possess no belligerent privileges and who are immune from attack.

The Peace of God movement of the Middle Ages neither defined nor protected civilians in terms that we would recognize today. By the time Grotius wrote his treatise on international law in the seventeenth century, the ‘enemy’ was still considered to include the entire population of the hostile power, and there were no restrictions on who was liable to be attacked in the course of a lawful war. In his 1625 *De Jure Belli Ac Pacis*, Grotius states that killing in war “is no murder,” if it be a lawful war, and that this right to kill or injure included “not only those who actually bear

²²² Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict” (1997) 317 Int’l Rev. Red Cross 125 at 125.

²²³ *JAG Treatise*, *supra* note 38 at 50, note 134. This divide would be equally in evidence at the 1949 Diplomatic Conference in Geneva. Captain Mouton, the delegate of the Netherlands, remarked that, as in 1907, there were differing views on this point between “that of the Powers who had already repeatedly suffered invasion and were likely to be invaded again, and that of the Powers who were more or less likely to be Occupying Powers.” See: “Sixth Meeting, Committee II, Special Committee, Prisoners of War (18 May 1949, 10 a.m.)” in International Committee of the Red Cross (ICRC), *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. IIA (Berne: Federal Political Department, 1949) 428 at 429 [hereinafter *Geneva Final Record IIA*].

²²⁴ Preamble, *Hague Convention II* of 1899, *supra* note 214; see Appendix D at 9 and 10, p. 321.

arms, or who are immediately subjects of the belligerent power, but even all who are within the hostile territories.”²²⁵ Grotius states that the “Slaughter of Infants and Women is allowed, and included by the Right of War,” as is the wasting of villages with fire and sword.²²⁶ Von Martens, writing in the late eighteenth century, forbid the use of violence against those who were *hors de combat*, stating that those, including children, old men, and women, who do not or cannot carry arms “are safe under the protection of the law of nations, unless they have exercised violence against the enemy,” and that soldiers who have laid down their arms, or who have not the will nor the power to resist, may not be harmed.²²⁷ This is one of the earliest expressions of the modern principles of civilian immunity and civilian participation.

The *Lieber Code* of 1863, while an important transitional document in the modern laws of war, does not espouse what we now call the principle of civilian immunity. Lieber does recognize a growing usage that distinguishes combatants from non-combatants, when he states in Article 22:

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country 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.

Lieber finds this to be a growing custom among those peoples he terms ‘civilized’.²²⁸ Yet he also finds there to be a number of exceptions to this rule, including the subjection of noncombatants to sieges and bombardments,²²⁹ and the use of starvation of civilians to promote their capitulation.²³⁰ He also demonstrates a pragmatic approach that gives deference to the discretion of military authorities, allowing that civilians should be protected “as much as the exigencies of

²²⁵ *Grotius*, *supra* note 17 at Book III, Chapter IV, section vi; see Appendix C at 1, p. 308.

²²⁶ *Ibid.* at Chapter IX, s. ii.

²²⁷ *Martens’ Compendium of the Law of Nations*, *supra* note 87 at Book VIII, Chapter III, s. 4; see Appendix D at 2, p. 318.

²²⁸ *Lieber Code*, *supra* note 134 at Article 25; see also Appendix C at 4, p. 310.

²²⁹ *Ibid.* at Article 18, which states, “When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, to as to hasten on the surrender.” See also Article 19, which states, “Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.” See Appendix C at 4, p. 310.

²³⁰ *Ibid.* at Article 17, which states, “War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.”

war will admit.” Nor does he include the rule prohibiting violence against those fighters who are *hors de combat*, as Rousseau and von Martens did. Instead, he states that the enemy population is divided into combatants and unarmed citizens.²³¹ Unarmed civilians themselves are divided into those who are loyal and those who are disloyal. Disloyal citizens include those who “sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy.”²³² The “Commander will throw the burden of war, as much as lies within his power, on the disloyal citizens.”²³³

Rousseau’s principle - that no government had the right to take the life of a man who had laid down arms and was no longer defending against it – was in a state of flux at this time, with some treatise writers asserting the principle, and some circumscribing it almost entirely by military discretion. Several treatise writers directly adopted the principle that those who were *hors de combat* were not liable to be attacked. For example, the 1863 edition of *Wheaton’s Elements of International Law*, which was prepared contemporaneously with the *Lieber Code* and so addresses many legal issues arising out of the U.S. Civil War, largely adopts this principle. This follows very closely upon the reasoning of Rousseau. Wheaton states, “[t]hose who are actually in arms, and continue to resist, may be lawfully killed; but the inhabitants of the enemy’s country who are not in arms, or who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war.”²³⁴ That this formulation gave ample discretion to military authorities to determine when civilians could be attacked as a matter of military necessity is confirmed in the 1878 edition of *Wheaton’s Elements*, in which the author states that “the ravaging of Georgia and Carolina by General Sherman during the American Civil War was perhaps a necessary military operation.”²³⁵ This was echoed in the Third English Edition of *Wheaton’s Elements* in 1889.²³⁶ Notably, none of these treatises mention the Brussels Conference of 1874, or its *Declaration*.

²³¹ *Ibid.* at Article 155.

²³² *Ibid.*

²³³ *Ibid.* at Article 156.

²³⁴ Henry Wheaton, and William Beach Lawrence, *Wheaton’s Elements of International Law*, 2nd Edition (Boston: Little Brown & Company, 1863) at Part IV, Chapter 2, §2, p. 588.

²³⁵ Alexander C. Boyd, *Elements of International Law by Henry Wheaton*, English Edition (London: Stephens and Sons, 1878) at Part V, Chapter 2, §351a, pp. 421-2.

²³⁶ Alexander C. Boyd, *Elements of International Law by Henry Wheaton*, Third English Edition (London: Stephens and Sons, 1889) at Part IV, Chapter 2, §351a, p. 479.

Indeed, the deliberate targeting of civilian populations was often carried out in the nineteenth century, and was justified on the grounds of military necessity. This was true not only for large-scale military conflicts such as the American Civil War or the Franco-Prussian War, but also for smaller wars and counterinsurgent operations. During the nineteenth century, most of the activities undertaken by soldiers were what we would now term ‘unconventional’ or counterinsurgent operations. Counterinsurgent warfare during this time primarily involved the suppression of insurgent, resistance, and revolutionary movements.²³⁷ Often known as ‘pacification’, or ‘constabulary’ (policing) actions, these operations often took place in the colonies, or in areas that were undergoing conquest.²³⁸ The regular army would have spent most of their time engaged in operations of this kind, rather than in inter-state warfare. As Birtle states, “much of the Army’s combat experience prior to World War II was gained not in conventional battles against regular opponents, but in unconventional conflicts against a bewildering array of irregulars, from American Indians to Bolshevik partisans.”²³⁹ Nineteenth-century counterinsurgent warfare was thus closely linked with realpolitik, colonialism and territorial expansion.

Techniques of occupation and colonization in the nineteenth century – what we would now call ‘counterinsurgency’ – permitted the targeting of civilians who were thought to be lending support to an insurrection or rebellion. As Birtle states, “[w]hen a civilian population spurned the hand of reconciliation and supported illegal combatants, an army was free to employ more severe measures.”²⁴⁰ This was how the U.S. Army dealt, for example, with the Aboriginal populations within its expanding borders. Birtle states that the U.S. army’s experience in the antebellum period, “was in many ways the child of the frontier,”²⁴¹ as the settled boundary was pushed ever westward.²⁴² In 1835, Dennis Hart Mahan began to teach the techniques of frontier campaigning

²³⁷ Andrew J. Birtle, *U.S. Army Counterinsurgency and Contingency Doctrine 1942-1976* (Washington, D.C.: Center of Military History United States Army, 2006) at 4 [hereinafter *COIN Doctrine 1942-1976*].

²³⁸ *Ibid.* By the time of World War II, these actions were generally termed ‘Small Wars’. By the latter part of the Cold War, they fell under the heading of ‘military operations other than war’, and were often referred to in military doctrine as ‘foreign internal defense’, or ‘stabilization’ operations. Since then, the terms ‘counterinsurgency’ and ‘peacekeeping’ have come into more general usage.

²³⁹ Andrew J. Birtle, *U.S. Army Counterinsurgency and Contingency Doctrine 1860-1941* (Washington, D.C.: Center of Military History United States Army, 2006) at 3 [hereinafter *COIN Doctrine 1860-1941*].

²⁴⁰ *COIN Warfare 1942-1976*, *supra* note 237 at 8.

²⁴¹ *COIN Warfare 1860-1941*, *supra* note 239 at 7.

²⁴² *Ibid.* at 11. The U.S. based many of their techniques of frontier warfare from the earlier experiences of the British.

at West Point.²⁴³ Key tactics include the use of “science and strategy to force the Indian to fight on the white man’s terms.”²⁴⁴ Since Aborigines were better marksmen,²⁴⁵ the preferred strategy was to “send a column deep into enemy territory to destroy the Indians’ villages and food supplies. Only by striking at the foundations of Indian society could the Army compel its elusive opponents either to capitulate or to stand and fight on terms favorable to the Army.”²⁴⁶ This often included the use of sieges, starvation, and the burning of entire villages, as the U.S. had done, for example, to the Seminole tribes in Florida.²⁴⁷

Similarly, in his pacification of Mexico during the Mexican War (1846-1848), Major General Winfield Scott adopted a policy that, on the one hand, sought to win the favour of the local population, but that was accompanied by a heavy-handed strategy of collective punishment against those who resisted. General Scott distributed rations to the poor, maintained basic facilities, such as courts, schools, and hospitals, and declined to requisition supplies from the population.²⁴⁸ Nevertheless, he took a harsh stand against any irregular forces who fought back, as well as the civilians who supported them. Scott denied quarter to irregular fighters, confiscated civilian property as punishment, and even burned entire villages suspected of harboring irregulars.²⁴⁹ As Birtle states, “Scott used the torch with such liberality that the road between Vera Cruz and Mexico City was marked by a black swath of devastation several miles wide.”²⁵⁰ Not only were irregulars to be dealt with as criminals, but collective punishment was imposed upon entire communities to discourage support for resistance movements.²⁵¹

Such techniques were accepted under the international customary law of the time. Henry W. Halleck, for example, published a treatise on international law in 1861 that affirms the permissibility of such acts. While Halleck found that the law generally protected the lives of all those who refrained from acts of hostility, he also found that “If the peasantry or common people of a country use force, or commit acts in violation of the milder rules of modern warfare, they

²⁴³ *Ibid.* at 12.

²⁴⁴ *Ibid.* at 13.

²⁴⁵ *Ibid.* at 12.

²⁴⁶ *Ibid.* at 13.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.* at 16.

²⁴⁹ *Ibid.* at 17.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

subject themselves to the common fate of military men, and sometimes to a still harsher treatment... even if a portion of the non-combatant inhabitants of a particular place become active participants in the hostile operations, the entire community are sometimes subjected to the more rigid rules of war.”²⁵² Halleck would certainly have been familiar with General Scott’s actions in Mexico, as he was then serving under Scott as Secretary of State of California, and was a chief legal advisor on the conduct of the war.²⁵³ He also taught these principles at West Point, which Birtle claims “represented views that were widely held.”²⁵⁴

Martens would take a very different view of the principle of civilian immunity when drafting the *Brussels Declaration*, and one that would, if adopted, have given full effect to the legal obligations arising out of Rousseau’s ideas of war, and the inherent limitations that individual rights place on the privileges of the state. When the laws of belligerent qualification were proposed at the Brussels Conference of 1874, Martens would draft several articles that espoused the idea of civilian immunity. Article II of the Original Project laid before the Conference states, “Operations of war must be directed exclusively against the force and means of making war of the hostile State, and not against its subjects, so long as the later do not themselves take any active part in the war.”²⁵⁵ This article appeared at the beginning of the Original Project in a preambular section entitled “General Principles.” Horsford states that these general principles were not brought forward for discussion at the Conference, and so were not included in the final text of the *Brussels Declaration*; however, they were considered in the course of the Conference, and they “form the groundwork of several Articles of the Project.”²⁵⁶ These include Article 13(c), which prohibits the killing of an enemy who is *hors de combat*, and Article 15, which departs substantially from the *Lieber Code* to state that “Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor

²⁵² Henry Halleck, *International Law; or, Rules Regulating the Intercourse of States, In Peace and War* (San Francisco: H. H. Bancroft & Company, 1861) at Chapter XVIII, §4, p. 428.

²⁵³ *Ibid.* at “Preface”.

²⁵⁴ *COIN Warfare 1860-1941*, *supra* note 239 at 17.

²⁵⁵ “Inclosure in No. 52. Report on the Proceedings of the Brussels Conference on the proposed Rules for Military Warfare,” in *Confidential Correspondence of the Brussels Conference*, *supra* note 172, 159 at 161. See also: “General Principles, Project for an International Convention on the Laws and Customs of War Presented by the Russian Government,” reprinted in Carnegie Endowment for International Peace, *Documents Relating to the Program of the First Hague Peace Conference Laid Before the Conference by the Netherlands Government* (London and Oxford: Clarendon Press, 1921) at 40; see Appendix C at 6, p. 311 and Appendix D at 6, p. 320.

²⁵⁶ *Ibid.*

bombarded.”

Martens then issued his draft *Brussels Declaration* as instructions to the Russian armed forces in a *Code of Land Warfare* that Martens himself drafted, and that would quickly be put to the test with the outbreak of the Russo-Turkish War (1877-1878).²⁵⁷ The humanitarianism of Marten’s code had a counterpart in the growing Red Cross movement, and both would be tested in a bitter war between the Russian and Ottoman Empires that was characterized by ethnic and religious animosities.²⁵⁸ During Russia’s final march to Constantinople in January of 1878, the ensuing panic among the local population caused a vast flow of refugees, depopulating entire regions, and leading to widespread starvation and disease among the civilian population in what the head of the Red Crescent Society in Turkey would term “the spectacle of a calamity perhaps without precedent in the annals of modern warfare.”²⁵⁹ For the first time, the Red Cross was called upon to provide humanitarian relief to civilians and, while they thought this was outside the scope of their mandate, they felt they could not refuse in the face of the growing humanitarian catastrophe.²⁶⁰ Although the law as it then stood was not able to protect the civilian population as such from the violence of the war, the idea of civilian immunity was “in the air,”²⁶¹ as Pustogarov states, and both the protection of civilians and the organization of humanitarian relief were growing in importance.

Lieber himself saw the necessity of drafting an international code of land warfare, recognizing the need to settle the law and generate more humane rules; this ought to be accomplished through consensus among the leading powers. Shortly before his death in September 1871, he wrote to communicate this wish to Gustav Rolin-Jaequemyn, who was then president of the *Institut de Droit International* which he had founded along with Gustav Moynier, then President of the ICRC in Geneva.²⁶² This project came to fruition in 1880, when the *Institut*

²⁵⁷ *Our Martens, supra* note 205 at 109.

²⁵⁸ *From Solferino, supra* note 165 at 304-5.

²⁵⁹ *Ibid.* at 312. The Red Crescent Society in Turkey found that they were being targeted by Ottoman troops because of the cross symbol, and they requested from the ICRC in Geneva that they might be able to adopt the red crescent symbol to try to prevent this.

²⁶⁰ *Ibid.*

²⁶¹ *Our Martens, supra* note 205 at 110.

²⁶² *From Solferino, supra* note 165 at 285.

de Droit International published the *Oxford Manual of the Laws of Land Warfare*.²⁶³ Article 1 forbids the use of violence by civilians, authorizing force only as between the armed forces of belligerent states. Articles 2 and 3 set out the four organizational criteria for qualified armed forces. The *Oxford Manual* did not include Article II of the Original Project of the *Brussels Declaration* protecting the civilian population generally, stating only in Article 7 that “It is forbidden to maltreat inoffensive populations,” and in Article 4 that armed forces must refrain from acts of “undue severity”. The *Oxford Manual* also protects public and private property, in Article 32(b), as well as religious and cultural sites, in Article 34.

Although the *Hague Regulations* of 1899 did not address civilian immunity directly by adopting an article similar to Article II of the Original Project of the *Brussels Declaration*, they do contain provisions that prohibit the killing of non-combatants. Article 23(c) adopts Article 13(c) of the *Brussels Declaration* almost word for word, stating that it is especially prohibited to “kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion,”²⁶⁴ thus affirming the long-standing unwritten prohibition against killing those who were *hors de combat*. Article 50 prohibits the collective punishment of enemy populations. Article 46 most directly protects the lives of civilians, for it states that “the lives of persons” must be respected by occupying powers, as must other basic rights, including family honor, and religious convictions and practices. Although the principles of civilian immunity and civilian direct participation were not directly expressed as such in the *Hague Regulations*, it received some recognition as a generally accepted principle, albeit one whose scope was uncertain, and for which enforcement was weak. George Davis, who approved of the more pragmatic approach found in the *Lieber Code*, nonetheless recognizes the principle of civilian immunity in his post-Hague treatise on international law, published in 1900. He recognizes the principle that unarmed persons are immune from attack, and states, “this exemption from the

²⁶³*Institut de Droit International, Oxford Manual of the Laws of Land Warfare* (Oxford: Institut de Droit International, 1880) [hereinafter *Oxford Manual*]; see Appendix A at 9, p. 300, Appendix B at 5, p. 306, Appendix C at 8, p. 311 and Appendix D at 8, p. 320.

²⁶⁴*Hague Regulations of 1907, supra* note 215 at Article 23(c); *Hague Regulations of 1899, supra* note 214 at Article 23(c); see also: Appendix D at 7, 9 and 10, p. 320-1.

operations of war they enjoy so long as they take no active part in hostile operations.”²⁶⁵ This is very close to Marten’s formulation of the principle as it appeared in Article II of the Original Project of the *Brussels Declaration*, and also very close to the final phrasing that would eventually be adopted in Article 51(3) of *Protocol I*.

World War I, and Allied concerns over German atrocities, would give a further impetus to the growing adoption of more humane methods of warfare. The 1916 edition of *Wheaton’s Elements* was written to update the law following the adoption of the *Hague Regulations*, and to respond to the crises posed by the war.²⁶⁶ For the first time, a section on “Lawful Belligerents” appears.²⁶⁷ The 1916 edition is also notable for its assertion of the principle of minimal harm. The author states, “[t]he instruments of warfare should be such as do not inflict unnecessary or superfluous injury or damage. The object of a belligerent is obviously attained if he puts hors de combat the adversary; the infliction of unnecessary suffering is not indispensable to achieve this object.”²⁶⁸ This is also one of the few English-language treatises to mention the Brussels Conference of 1874,²⁶⁹ in which it is invoked to demonstrate that “[t]hese rules were in practice recognized long before the Hague Conferences. But in the France-German war, the Germans paid little heed to them.”²⁷⁰ The purpose of introducing the *Brussels Declaration* at this late date was to show that Germany was violating principles of the international laws of war that were by then “long standing.”²⁷¹

2.3.5 The Hague Law of Belligerent Qualification and World War II

Following the Hague Peace Conferences, the law of belligerent qualification came to be generally recognized among the international community. Whereas the *First Geneva Convention* in 1864 had been signed by only a handful of European powers, the 1899 *Hague Regulations* were signed by twenty-three nations, including such major non-European powers as the U.S.,

²⁶⁵ George B. Davis, *The Elements of International Law with an Account of its Origin, Sources and Historical Development* (New York & London: Harper & Brothers Publishers, 1900) at 313 [hereinafter *Davis’ Elements of International Law*]; see Appendix D at 11, p. 322.

²⁶⁶ Coleman Phillipson, *Wheaton’s Elements of International Law*, 5th Edition (London: Stevens and Sons, 1916) at vi [hereinafter *Wheaton’s 1916 Elements of International Law*]; see Appendix D at 12, p. 322.

²⁶⁷ *Ibid.* at 473.

²⁶⁸ *Ibid.* at 470.

²⁶⁹ The only other such treatise cited herein in Speights’s *War Rights on Land*, supra note 161.

²⁷⁰ *Wheaton’s 1916 Elements of International Law*, supra note 266 at 474-5.

²⁷¹ *Ibid.*

Turkey, Iran, Siam, Japan, and Mexico.²⁷² The 1907 Hague Peace Conference would be attended by most of the nations of Latin America as well, and the *Hague Regulations* would then be extended to most of Central and South America.²⁷³ China would attend the 1907 Peace Conference, and would ratify the *Hague Regulations* in 1917.²⁷⁴ Other non-European powers would ratify the *Hague Regulations* after World War II, these being India and Pakistan in 1950, and Laos in 1955.²⁷⁵ Whereas the laws of belligerent qualification were a European invention, stemming largely from European concerns, they were adopted by most major non-European powers after the 1907 Peace Conference, and by most countries in the world following World War II. The basic rules of belligerent qualification were also adopted into Article 4 of the *Third Geneva Convention* of 1949, which has now been ratified by virtually every nation state.²⁷⁶

By the time of World War II, the law of belligerent qualification and the importance of humanitarian treatment of captured combatants had advanced with the assistance of such treaties as the *Hague Regulations* of 1899 and 1907 and the *Geneva Convention Relative to the Treatment of Prisoners of War* of 1929.²⁷⁷ However, these instruments were inadequate to the task of securing humanitarian treatment for irregular belligerents and the civilians who supported them. World War II, more so than World War I, was fought using a wide variety of irregular and partisan forces. Such forces were often ill treated, and even slaughtered upon capture,²⁷⁸ and this demonstrates the ineffectiveness of the laws of belligerent qualification enacted in the *Hague Regulations* to govern the use of such troops. Many partisan forces that fought in World War II had high levels of organization yet, by and large, they failed to achieve the status of belligerent

²⁷²Dutch Government Information Services, available at:

<https://verdragenbank.overheid.nl/en/Verdrag/Details/002338> (accessed 8 April 2014).

²⁷³Including Argentina, Bolivia, Brazil, Chile, Columbia, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Panama, Paraguay, Peru, Uruguay and Venezuela, available at:

<https://verdragenbank.overheid.nl/en/Verdrag/Details/003319.html> (accessed 8 April 2014).

²⁷⁴*Ibid.* See also: Klaus Schlichtmann, “Japan, Germany, and the Idea of the Hague Peace Conferences” (2003) 40:4 J. Peace Res. 385 at 389; and Yongjin Zhang, “China’s Entry into International Society: Beyond the Standard of ‘Civilization’” (1991) Rev. Int’l Studies 3.

²⁷⁵*Ibid.*

²⁷⁶ICRC, States Parties to Conventions III relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, available at:

https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375 (accessed 17 March 2015).

²⁷⁷International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War*, Geneva (27 July 1929).

²⁷⁸Case 47, Trial of Wilhelm List and Others (Hostages Trial), *Law Reports of Trials of War Criminals*, Vol. VIII (London: His Majesty’s Stationary Office, 1949) [hereinafter *Hostages Trial*].

qualification under the *Hague Regulations*. For example, Tito's Partisans in Yugoslavia wore "captured uniforms, or parts of uniforms, with a small Red star on the cap."²⁷⁹ They closely approximated a *de facto* civilian authority for, "[a]t times, they operated what amounted to a functioning government, with postal systems, an armory... and a rough judicial system."²⁸⁰ The *JAG Treatise* states that "the Partisans had many of the characteristics of a regular army, even to a staff organized upon conventional lines."²⁸¹ Tito's Partisans were supplied by the Allied powers and, "during most of the war Tito obeyed radioed orders from the Presidium of the USSR without a question."²⁸² The Soviets used similarly organized partisans, under the direction of an executive agency separate from the Red Army, at the Partisan Headquarters in Moscow.²⁸³ Yet even this close approximation of the organizational criteria laid out in the *Hague Regulations* did not assist the allied partisans to secure prisoner of war treatment from Germany. Hitler issued a number of decrees ordering that even suspected partisans be liquidated, "which, in effect allowed any officer to execute on the spot, without a trial, any person opposing the German army, whom it was felt expedient to liquidate."²⁸⁴

In America, the Supreme Court of the United States found in 1942 that a group of Germans, duly authorized by the German government and sent to America to commit acts of sabotage on American soil, were unqualified belligerents and could be sentenced to death by a military court martial. In *Ex parte Quirin*, the Court distinguished between lawful and unlawful combatants, finding that "[u]nlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."²⁸⁵ The fact that the saboteurs did not meet the four organizational requirements, despite being trained and authorized by the German government, closely follows the *Hague* law of belligerent qualification.

While *Ex parte Quirin* affirmed that a state may court martial, and thereupon execute, an

²⁷⁹ *JAG Treatise*, *supra* note 38 at 62.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.* at 63.

²⁸² *Ibid.*

²⁸³ *Ibid.* at 63-4.

²⁸⁴ *Ibid.* at 65, which the reader is directed to for a full catalog of Hitler's liquidation orders, and the instructions they contained.

²⁸⁵ *Ex parte Quirin*, 317 U.S. 1 (1942) at 31. In determining that the defendants were unlawful combatants, the court specifically referenced the laws of belligerent qualification in the *Hague Regulations* of 1907, which the U.S. Senate had ratified in 1909, *ibid.* at 34-5.

unqualified belligerent that it had captured, the subsequent Nuremberg Tribunals found that a state could target and kill unqualified belligerents, even *after* capture when they were *hors de combat*, and without a court martial. This was affirmed in the *Hostages Trial*, in which Wilhelm List and others were tried at Nuremberg for the execution of suspected partisans. The Tribunal found that only a small number of partisans met the *Hague* requirements for belligerent qualification. Without belligerent qualification, the irregulars could lawfully be executed pursuant to Hitler's liquidation orders, and the Tribunal acquitted the defendants on these counts. The Tribunal found:

The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian and Serbian uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralized command, such as the Partisans of Marshal Tito, the Chetniks of Draja Mihailovitch, and the Edes of General Zervas... The captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being *francs-tireurs*.²⁸⁶

The Tribunal thus exonerated those defendants who had killed captured prisoners, despite the fact that they sometimes had parts of uniforms and had "units common to military organization". Thus, neither the *Hague Regulations*, nor the practice of states themselves, were sufficient to recognize irregular forces or to bring them under the protection of the laws of war. This extended even to those who had been rendered *hors de combat*, and the Tribunal seems not to have applied von Martens' long-standing principle against killing those who were *hors de combat*. If even very high levels of organization could not meet the *Hague* requirements, then there seemed to be little incentive for any irregular troops to organize more fully. Nor were there any protections for those civilians who were merely suspected of having participated in hostilities.

Therefore, the judgment in the *Hostages Trial* did not apply even the limited protections contained within the *Hague Regulations* for protecting the lives of hostile irregulars and non-combatants, or outlawing reprisal killings. Instead, the tribunal emphasized the importance to an occupying power of maintaining law and order by putting down an insurgency.²⁸⁷ The tribunal

²⁸⁶ *Hostages Trial*, *supra* note 278 at 57.

²⁸⁷ *Ibid.* at 55-6.

recognized that it could be difficult to discern whether a captured guerilla were a lawful belligerent or not, and that “[w]here room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.”²⁸⁸ This interpretation shifts the balance in favor of the discretion of military authorities, and away from the rights of civilians and detainees. The decision would also seem to leave very little scope for a more general customary rule prohibiting the killing of non-combatants. In fact, the judgment in the *Hostages Trial* was criticized precisely on these grounds. Lord Wright of Durley, the Chairman of the United Nations War Crimes Commission, took what he termed the “unusual” step of criticizing the judgment when it was published in the *Law Reports of Trials of War Criminals*.²⁸⁹ He found that the judgment in the *Hostages Trial* had not “correctly stated the general law of war crimes on this very important issue.”²⁹⁰ He notes that both Articles 50 and 46 of the *Hague Regulations*, prohibiting collective punishments and mandating that the lives of enemy populations be respected, if applied, should have led to a finding that these killings amounted to war crimes.²⁹¹ More than that, he found expressed in these provisions a more general rule prohibiting the killing of civilians, whose “essential feature is that innocent non-combatants are slaughtered”.²⁹² The *Hostages Trial* has generally not been followed, even by other Tribunals at Nuremberg,²⁹³ and Lord Durley’s opinion served as a strong precedent in favor of the general prohibition on the killing of non-combatants, and one that was more in keeping with the more widespread recognition of this principle following the war.²⁹⁴

²⁸⁸ *Ibid.* at 58.

²⁸⁹ *Ibid.* at viii.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.* at viii.

²⁹² *Ibid.* at ix.

²⁹³ *Ibid.*

²⁹⁴ Case 72, Trial of Wilhelm von Leeb and Thirteen Others (German High Command Trial), *Law Reports of Trials of War Criminals*, Vol. XII (London: His Majesty’s Stationary Office, 1949) at 83, in which the Tribunal held the Barbarossa Jurisdiction Order to be unlawful. This order authorized the killing without trial of suspected guerilla fighters. Moreover, the Tribunal found that officers who issued orders that were likely to be misapplied in such a manner as to authorize the killing of suspected guerillas were also criminally liable, *ibid.* at 84. The Tribunal, in discussing the decision of the *Hostages Trial*, queries whether the killing of innocent non-combatants “is ever permissible under any theory of international law”, *ibid.* at 85.

2.3.6 The Geneva Conventions of 1949 and Common Article 3

At the close of World War II, the laws of war were updated and further codified into the four *Geneva Conventions* of 1949, which adopted the *Hague* law of belligerent qualification essentially unchanged. The *Fourth Geneva Convention* contains a number of additional provisions protecting civilian non-combatants. Article 27, for example, contains essentially the same prohibitions as found in Article 46 of the *Hague Regulations*, and ensures respect for the lives of protected persons, who “shall be protected especially against all acts of violence or threats thereof.”²⁹⁵ The true advance, however, of the *Fourth Geneva Convention* is to be found within the Common Article 3 that it shares with the *Third Geneva Convention*. Common Article 3 applies to all armed conflicts, even those not of an international character, and it specifically protects all non-combatants, as well as those who are placed *hors de combat*, from violence to their life and person. Common Article 3 states:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture[.]

The expansive language of Common Article 3, its application to non-international conflicts as well as international ones, and its prohibitions on violence to life or person “at any time and in any place whatsoever”, combined with the near-universal ratification of this Article, argue in favor of the proposition that killing non-combatants then gained the status of a *jus cogens* norm of international law.²⁹⁶

²⁹⁵ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135 [hereinafter *Third Geneva Convention*]; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 [hereinafter *Fourth Geneva Convention*]; see Appendix D at 13 and 14, p. 322-3. Protected persons are defined in Article 4 of the *Fourth Geneva Convention* as all those persons who, in an international conflict, “find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

²⁹⁶ *Jus cogens* norms are those obligations which are peremptory norms of international law, and so may never be derogated from, or altered by the consent of the subjects of international law. See e.g.: Cherif Bassiouni,

Emily Camins has stated, in her history of civilian immunity, that Common Article 3 is not a precursor to Article 51(3) of *Protocol I*, and that it was likely not intended to reflect a general customary legal obligation upon states to refrain from killing non-combatants.²⁹⁷ She argues that the obligations contained in the *Geneva Conventions* are limited only to those who find themselves in the hands of an enemy power,²⁹⁸ and that more general obligations to protect non-combatants in civil and colonial wars were removed by states at the 1949 Diplomatic Conference at Geneva.²⁹⁹ However, evidence from the 1949 Diplomatic Conference itself indicates that the provision was intended to protect all civilians, and that it was thought to embody norms that were uncontroversial, as they were already binding on all states at all times. The debate over Common Article 3 centered around the application of the *Fourth Geneva Convention* to armed conflict generally, including cases of non-international armed conflict not covered by the *Geneva Conventions*. Many states did not wish to extend these protections to all manner of irregulars in all manner of conflicts on the grounds that “Any such proposals giving insurgents a legal status, and consequently increased authority, would hamper and handicap the Government.”³⁰⁰ Those nations whose delegates most forcefully put forward these arguments included the United States and Burma. The U.S. delegate, Leland Harrison, advocated for a more expansive role for states in putting down insurrection within their own borders than appears in Common Article 3.³⁰¹ The delegate from Burma made similar arguments, stating that putting down an insurrection in one’s own territory should not place a nation outside the laws of humanity; yet he nevertheless felt the need to assure the Committee that “we have not shot one rebel for being a rebel[.]”³⁰² The Australian delegate put forward the idea that ‘suspected’ or ‘hostile’ civilians ought to lose the protection of Common Article 3; although this motion was

“International Crimes: Jus Cogens and Obligatio Erga Omnes” (1996) 59:4 Law & Contemp. Probs. 63 at 65; Georg Schwartzenberger, “International *Jus Cogens*?” (1964-65) 43 Tex. L. Rev. 455 at 455.

²⁹⁷ Emily Camins, “The Past as Prologue: The Development of the ‘Direct Participation’ Exception to Civilian Immunity” (2008) 90:872 Int’l Rev. Red Cross 853 at 872.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.* See also: Jean Pictet, ed., *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (Geneva: International Committee of the Red Cross, 1958) at 10 [hereinafter *1958 Commentary*].

³⁰⁰ *Ibid.* at 31.

³⁰¹ “Second Meeting, Joint Committee for the Examination of the Articles Common to All Four Conventions (27 April 1949, 10 a.m.)” 12 at 12 in International Committee of the Red Cross (ICRC), *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. IIB (Berne: Federal Political Department, 1949) [hereinafter *Geneva Final Record IIB*].

³⁰² “Nineteenth Plenary Meeting (29 July 1949, 10 a.m.),” *ibid.*, 331 at 337.

adopted by several nations - including Canada, the United States, the United Kingdom, and Switzerland - it was eventually rejected from the final text as being arbitrary and prone to abuse.³⁰³ In times of war, the ICRC recognized that “the lawful government, or that which so styles itself, tends to regard its adversaries as common criminals,” and that this attitude ought to be prohibited.³⁰⁴ This attitude extended not only to those members of the civilian population who were thought, as Lieber did, to be “disloyal,”³⁰⁵ but also to the Red Cross itself, as when governmental authorities looked upon “relief given by the Red Cross to war victims on the other side as indirect aid to guilty parties.”³⁰⁶ There was much discussion and intense debate over this matter, and the deadlock was finally broken by a proposal from the French delegation, who proposed that the entire Convention need not apply to cases of non-international conflict, but only its most important and fundamental obligations, such as prohibitions on torture and unlawful killings.³⁰⁷ A working committee was then assigned the task of identifying these principles, and drafting the article.³⁰⁸ The result was Common Article 3. The prohibitions contained within Common Article 3 were considered so fundamental that they would apply at all times and places – even in times of peace - as they set a minimum standard of required behavior.³⁰⁹ This included acts of internal strife that did not amount to a full-scale armed conflict.³¹⁰ As Pictet states, how could any government refuse to observe “a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.”³¹¹ It was certainly the intention of the ICRC and the working committee that Common Article 3 would have a very wide, even universal, scope of application, and these matters were thoroughly debated by states and their representatives, who all had ample opportunity to have their say.³¹² The result is that:

Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in hostilities. In this instance, however, the Article

³⁰³ “Forty-Ninth Meeting, Committee III, Civilians Convention (18 July 1949, 3 p.m.),” in *Geneva Final Record IIA*, *supra* note 223, 796 at 796.

³⁰⁴ *1958 Commentary*, *supra* note 299 at 26.

³⁰⁵ *Lieber Code*, *supra* note 134 at Article 155.

³⁰⁶ *1958 Commentary*, *supra* note 299 at 26.

³⁰⁷ *Ibid.* at 32.

³⁰⁸ *Ibid.*; see also: “Report Drawn up by the Special Committee of the Joint Committee (16 July 1949)” in *Geneva Final Record IIB*, *supra* note 301, 120 at 122.

³⁰⁹ *Ibid.* at 38. Pictet states that such fundamental principles apply *a fortiori* in cases of international armed conflict.

³¹⁰ *Ibid.* at 36.

³¹¹ *Ibid.*

³¹² *Ibid.* at 32.

naturally applies first and foremost to civilians – that is to persons who do not bear arms.³¹³

Common Article 3 was intended to express universal and customary laws of *jus cogens*, that were *already* thought to be binding upon all states at all times. Finally, the ICRC states that the prohibitions are intentionally left quite broad, as it would never be possible to “catch up with the imagination of future torturers.”³¹⁴

The *Third Geneva Convention* also includes Common Article 3, and belligerent qualification is addressed in Article 4(2), which defines lawful combatants, *i.e.* those combatants who possess belligerent qualification, in terms of the *Hague Regulations*, as follows:

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.

Thus, the *Brussels Declaration* definition of belligerent qualification in terms of the four organizational criteria was largely kept in Article 4 of the *Third Geneva Convention*.³¹⁵ Now, ‘militia’ and ‘volunteer corps’ were also to include resistance movements operating in or outside of occupied territory, which the Committee referred to as “an important innovation which has become necessary as a result of the experience of the Second World War.”³¹⁶ It was also intended by the Plenary Committee of the 1949 Diplomatic Conference that Article 4 not be exhaustive, and that prisoners of war were not limited only to those enumerated categories.³¹⁷ Article 4 also kept the long-standing definition of *levée en masse*, as described in subsection 4(6). The Plenary Committee also stated that nothing in the Convention limited the right of a civilian population,

³¹³ *Ibid.* at 40.

³¹⁴ *Ibid.* at 39.

³¹⁵ See: “Second Meeting, Committee II, Prisoners of War (26 April 1949, 5 p.m.)” in *Geneva Final Record IIA*, *supra* note 223, 237 at 237, in which the British delegate, Mr. Gardener, stated concerning the *Hague Regulations* on belligerent qualification, that the Conference ought to “reaffirm those rules explicitly, so as to leave no doubt as to their validity.” See also: *ibid.* at 410 and 561, reaffirming that the *Hague Regulations* remained valid, and were not altered or displaced by Article 4 of the *Third Geneva Convention*.

³¹⁶ “Commentaries on the Draft Convention, Committee II, Prisoners of War” in *Geneva Final Record IIA*, *supra* note 223, 561 at 562.

³¹⁷ “Thirteenth Meeting of the Plenary Committee (26 July 1949, 10 a.m.)” in *Geneva Final Record IIB*, *supra* note 301, 266 at 268.

either individually or collectively, to defend itself against an act of aggression, or against war crimes committed by armed forces.³¹⁸ Yet this affirmation of the rights of self-defense of civilians and organized resistance movements fighting occupation, would not last long in the post-war era, as memories of past occupations faded in comparison to states' desire to put down resistance movements in their own territories and in the colonies. The international community began to recognize the undesirability of this situation, particularly as regards the atrocities committed by and against many anti-colonial liberation movements, which led to the Diplomatic Conference of 1971-1976.

2.3.7 The Protocols Additional to the Geneva Conventions of 1977

In order to address the contentious issue of irregular belligerents, particularly those waging anti-colonial wars of liberation, and the further protection of civilians during armed conflict, the International Committee of the Red Cross convened the Diplomatic Conference of 1971-1976, which produced the *Protocols Additional to the Geneva Conventions*.³¹⁹ The Diplomatic Conference was open to all State parties to the *Geneva Conventions*,³²⁰ and was attended by 155 nations, 51 inter- and non-governmental organizations, and 11 national liberation movements.³²¹ The Conference followed published Rules of Procedure modeled upon those generally in use for diplomatic conferences held pursuant to international law.³²² The topic of guerilla fighters was again the subject of much controversy among representatives.³²³ The ICRC itself remained firm in its position of granting belligerent privileges to guerilla fighters in a limited number of circumstances, in the interests of humanitarian considerations and so that “many contemporary conflicts will be governed by law.”³²⁴

The most contentious provision of the *Protocols Additional* has been Article 1(4) of *Protocol I*, which grants belligerent qualification to non-state, and therefore unauthorized, belligerents who are fighting against foreign, colonial or racist domination. Article 1(4) states

³¹⁸ *Ibid.*

³¹⁹ *Protocol I*, *supra* note 199.

³²⁰ Yves Sandoz *et al.*, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987) at xxxi [hereinafter *ICRC Commentary*].

³²¹ *Ibid.* at xxxiii.

³²² *Ibid.*

³²³ *Ibid.* at xxxv.

³²⁴ *Ibid.*

that the scope of application of *Protocol I* shall “include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” This article comes very close to echoing the position of Droop, who asserted in 1870 that *de facto* public authorities could authorize qualified belligerents to wage war.³²⁵ In the post-World War II era, anti-colonial struggles were increasingly recognized by the United Nations General Assembly as being legitimate.³²⁶ Prisoner of war status for ‘freedom fighters’ was recognized by UN General Assembly in 1970,³²⁷ and again in their resolution concerning the “Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes” of 1973.³²⁸ It was the position of the nations of the General Assembly that prisoner of war protections be extended to such unauthorized irregular belligerents.³²⁹

Protocol I also facilitates the qualification of irregular troops, such as paramilitary troops and non-state fighters. Under *Protocol I*, certain militia, police, and volunteer corps can be added as qualified belligerents by way of a formal declaration. Article 43(3) stipulates that “whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.” Therefore, states may incorporate these security forces, provided they meet the organizational criteria, including being subsumed under the military chain of command, and a formal declaration is made. Non-state actors, such as liberation movements who wish to become recognized parties to an armed conflict, and receive belligerent qualification under *Protocol I*, can make a similar declaration under Article 96(3) of the *Protocol*.

Protocol I does not recognize all non-state belligerents who have taken up arms in the course of waging a war of national liberation. In addition to meeting the requirements of Article 1 and the procedural requirement of making a formal declaration under Article 96(3), such irregular belligerents must still meet certain organizational criteria. The political authority that authorizes

³²⁵ *Irregular Combatants*, *supra* note 190 at 121.

³²⁶ See for example, *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 2105 (XX) (20 December 1965).

³²⁷ *Program of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 2621 (XXV) (12 October 1970).

³²⁸ *Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*, GA Res. 3103 (XXVIII) (12 December 1973).

³²⁹ *Ibid.* at the “Preamble”.

such irregular belligerents “must have certain characteristics of a government, at least in relation to its armed forces.”³³⁰ Moreover, such irregular forces must be organized armed groups that have a collective character.³³¹ The ICRC *Commentary* states:

All armed forces, groups and units are necessarily structured and have a hierarchy, as they are subordinate to a command which is responsible to one of the Parties to the conflict for their operations. In other words, all of them are subordinate to a command and to a Party to the conflict, without exception, for it is not permissible for any group to wage a private war.³³²

The *Commentary* thus highlighted the fact that fighters must be subsumed under a chain of command and subject to military discipline, which the *Commentary* interpreted to mean that the armed group enforces the laws of war through a system of military penal law.³³³

Article 1 has been controversial, and was particularly criticized by America,³³⁴ Britain,³³⁵ and Israel,³³⁶ which rejected Article 1 on the grounds that it might lend legitimacy to insurgents and terrorist organizations. In supporting the rejection of *Protocol I*, then U.S. President Ronald Regan advised the Senate that Article 1 “would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.”³³⁷ He stated, “we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.”³³⁸

In fact, *Protocol I* greatly circumscribed an older customary rule that granted wide discretion to states to recognize unqualified belligerents waging wars of national liberation. One early example is the military support provided by Britain, France and Russia to those seeking

³³⁰ ICRC *Commentary*, *supra* note 320 at 507.

³³¹ *Ibid.* at 512.

³³² *Ibid.*

³³³ *Ibid.* at 514.

³³⁴ George H. Aldrich, “Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions” (1991) 85 Am. Int’l L. 1 [hereinafter *U.S. Ratification of Protocol I*].

³³⁵ United Kingdom of Great Britain and Northern Ireland, *Declaration of 2 July 2002, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 at para. (d), available at: <https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757C1256402003FB6D2> (accessed 17 March 2015).

³³⁶ *U.S. Ratification of Protocol I*, *supra* note 334 at 2, 4.

³³⁷ Ronald Regan, “Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions” (29 January 1987) in G. Peters and J.T. Woolley, *The American Presidency Project: Public Papers of the Presidents Collection*, available at: <http://www.presidency.ucsb.edu/ws/?pid=34530> (accessed 15 April 2014).

³³⁸ *Ibid.*

secession from the Ottoman Empire during the Greek War of Independence at the naval Battle of Navarino (1827).³³⁹ George Canning, then British Foreign Secretary, had stated of the secessionist movement that “when a whole nation revolts against its conqueror, the nation cannot be considered as piratical but as a nation in a state of war.”³⁴⁰ Supporting secession movements was considered by Britain to be one solution to the ‘Eastern Question’ of how to deal with the declining power of the Ottoman Empire, and therefore an indispensable tool of foreign policy.³⁴¹ George Davis would state the rule in similar terms to George Canning in his 1900 treatise on international law. Rebel fighters in internal wars could receive a recognition of qualified belligerency provided that the conflict rose to the level of a public war, that there was broad public participation in the insurrection “by a considerable portion of the population”, that the rebels maintained a well-defined territory, and that that they established such governmental institutions as would enable them to enter into diplomatic intercourse with those states whose recognition was sought.³⁴² Within these bounds, states had a broad discretion to recognize rebel groups, for it might harm a state’s foreign policy interests if they did not recognize an insurgency that was eventually successful.³⁴³ Similar rules were proposed at the Diplomatic Conference of 1949, but at that time the participants decided in favor of the more expansive provisions contained in Common Article 3, which it was thought would both bind and protect insurgents and resistance movements.³⁴⁴ It therefore appears that insurgents, under customary law and practice, could become a *de facto* public authority, and gain other states’ recognition of the belligerent qualification of its fighters, on grounds that were decidedly more expansive than the conditions imposed by Article 1.

The Diplomatic Conference also addressed the contentious questions concerning the status of non-belligerent members of the regular armed forces, and of non-combatants who sometimes assist guerilla forces and other armed insurgent groups. During the preparatory work

³³⁹ David Howarth, *The Greek Adventure: Lord Byron and Other Eccentrics in the War of Independence* (London: Collier & Sons, 1976) at 231-4.

³⁴⁰ L.S. Stavrianos, *The Balkans Since 1453* (London: C. Hurst & Co., 2000) at 288.

³⁴¹ M.S. Anderson, *The Eastern Question 1774-1923: A Study in International Relations* (New York: Macmillan, 1966).

³⁴² *Davis’ Elements of International Law*, *supra* note 265 at 277.

³⁴³ *Ibid.*

³⁴⁴ “Report Drawn up by the Joint Committee and Presented to the Plenary Assembly” in *Geneva Final Record IIB*, *supra* note 301, 128 at 129.

undertaken in 1971, it was again remarked that guerilla warfare was often the only method open of self-defense for whole populations of civilians who had been denied their collective and individual rights, and therefore the principles of humanity ought to govern their treatment.³⁴⁵ The delegates at the Diplomatic Conference of 1971 introduced the word ‘directly’ in Article 51(3), and wanted also to make the temporal connection with armed combat clear.³⁴⁶ Therefore, Article 51(3) of *Protocol I* lends general protection to all civilians “unless and for such time as they take a direct part in hostilities.” The ICRC *Commentary* states, “a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target.”³⁴⁷ It was determined that the *Protocols Additional* would draw a sharp distinction between qualified belligerents and everyone else, declining to recognize a middle-status between that of ‘combatant’ and ‘civilian’. The *Commentary* explains that, “[a]ll members of the armed forces are combatants and only members of the armed forces are combatants. This should therefore dispense with the concept of ‘quasi-combatants’, which has sometimes been used on the basis of activities related more or less directly in the war effort.”³⁴⁸ Thus, civilians that aid guerrilla forces – by providing food shelter, planning, surveillance, etc. - continue to be treated as civilians. Civilians who are not qualified belligerents and who participate in hostilities may only be attacked for the duration of their participation. At times when such fighters are not directly participating in hostilities, “there is nothing to prevent the authorities, capturing him in the act, or arresting him at a later stage, from taking repressive or punitive security measures with regard to him in accordance with the provisions of Article 45.”³⁴⁹ *Protocol I*, and the *Commentary*, would therefore close the door to status-based interpretations of the belligerency of non-state armed groups, instead treating them as civilians participating in hostilities. This rejects the notion that unqualified belligerents fighting as part of armed groups can receive a ‘quasi’ status – one that imposes upon them no responsibilities or privileges, but that renders them liable to be attacked at all times. The same principle also holds for non-belligerent members of regular armed forces,

³⁴⁵ “Rules Applicable in Guerilla Warfare” in International Committee of the Red Cross (ICRC), *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May to 12 June 1971, Report of the Work of the Conference* (Geneva: ICRC, 1971) 66 at 70, para. 388.

³⁴⁶ *Ibid.* at “Report of Commission III” 73 at 75, para. 426; and 77 at para. 438.

³⁴⁷ *ICRC Commentary, supra* note 320 at 618.

³⁴⁸ *Ibid.* at 515.

³⁴⁹ *Ibid.* at 619.

such as cooks or logistical personnel; they do not thereby lose their belligerent status, and they retain the privilege of receiving prisoner of war treatment.³⁵⁰ In Chapter Three, the discussion will turn to new proposals for status-based unqualified belligerency, including the ICRC's 'continuous combat function', 'unlawful enemy combatants' as used at Guantanamo Bay, and 'declared hostile forces' as found in modern Rules of Engagement, which are all designed to consign precisely such a quasi-status on guerrilla fighters – a contentious topic that was purportedly settled at the Diplomatic Conference, but that has been resurrected once again.

With the exception of Article 1 of *Protocol I*, the status of the *Protocols Additional* as customary law is generally accepted. The U.S. considers many of the provisions of *Protocol I*, and all of *Protocol II*, to be binding customary international law.³⁵¹ This includes provisions relating to the principle of distinction and the targeting of civilians who take a direct part in hostilities. Article 4 of *Protocol II* similarly guarantees humane treatment to those who take no part in a non-international armed conflict, or who cease to take part, including the prohibitions on violence to life³⁵² and collective punishments that were first codified in the *Hague Regulations*.³⁵³ The Judge Advocate General of the United States confirms that the U.S. has no objections to these provisions.³⁵⁴ After the *Protocols Additional*, therefore, most states have agreed that the law of belligerent qualification and the principle of distinction are binding customary law in all armed conflicts, and that formerly common techniques of war – including deliberate attacks on civilians and members of rebel movements not participating directly in hostilities, the killing of suspected rebels, reprisals against civilians who support rebel movements, and collective punishments against civilians – are prohibited, even in civil wars, counterinsurgent operations, and domestic

³⁵⁰ *Ibid.* Note that medical and humanitarian workers have long received specific protections, under the *First Geneva Convention* of 1864.

³⁵¹ The United States Army Judge Advocate General's Legal Center and School, *Law of War Deskbook* (Charlottesville, VA: The United States Army Judge Advocate General's Legal Center and School, 2011) at 21-22 [hereinafter *2011 Law of War Deskbook*]. See also: The United States Army Judge Advocate General's Legal Center and School, *Law of War Deskbook* (Charlottesville, VA: The United States Army Judge Advocate General's Legal Center and School, 2000) at 32, where it states with fewer reservations that the U.S. considers *Protocol I*, outside of Article 1, to be indicative of the customary law. See also: *Law of Armed Conflict*, *supra* note 6 at xviii, where Green states that this has generally been accepted, and the U.S., under the 1991 recommendation of General Colin Powell, then Chairman of the Joint Chiefs of Staff would recognize and apply *Protocol I* as customary law during the First Gulf War (1990-1).

³⁵² *Protocol II*, *supra* Chapter One at note 26 at Article 4(2)(a).

³⁵³ *Ibid.* at Article 4(2)(b).

³⁵⁴ *2011 Law of War Deskbook*, *supra* note 351 at 129.

uprisings.

2.4 Conclusion

The present laws of belligerent qualification emerged in the late nineteenth century as modern nations states, led by the great military powers of Europe consolidated their power over the use of armed force. As war was conceived of as a contest between states and their professional armies in the international arena, civilians were no longer permitted to participate in hostilities, but armed forces would be required to refrain from subjecting them to attack, so long as they refrained from participating. While formally acknowledging these rules, state authorities have also been reluctant in practice to give up the discretion they formerly held to deal summarily with suspected irregular fighters, and civilians who “spurn the hand”, and support guerilla or insurgent movements. As a result, rules restricting the discretion of states and their military authorities to determine when civilian are directly participating in hostilities have long been controversial. Despite several attempts to finally resolve the matter in favor of protecting civilian populations – at Brussels in 1874, at the Hague Peace Conferences of 1899 and 1907, at Nuremberg in the war crimes tribunals at the close of World War II, and at the Diplomatic Conferences in Geneva in 1949 and 1971-6 - military powers have found ways to push back the rules in favor of greater discretion in putting down rebel movements and insurgencies.

This last lesson is important to keep in mind when more recent law-making endeavors are discussed in the remaining two chapters, including the ICRC’s expert process, the legal interpretations of international law from the U.S. Department of Justice Office of Legal Counsel, and the formulation of Rules of Engagement by military authorities, for they represent the latest chapter in this long struggle for law for irregular combatants. The ICRC’s expert process abandoned the transparency and inclusivity that the ICRC had fostered at the 1949 and 1977 Diplomatic Conferences, and the rules produced by the *Interpretive Guidance*’s expert process not only rolled back many protections that had been established there, but re-opened the contentious issue of status-based interpretations of organized armed groups that was supposed to have been resolved during the negotiations leading up to *Protocol I*. Rules of Engagement take a novel approach to the problem, by defining the use of force not in terms of the traditional belligerent privileges possessed by qualified belligerents, but according to a much broader, yet

“morally forceful”³⁵⁵ standard based upon defensive force.

Interpreting civilian direct participation in terms of the need for defensive force against civilians who pose a threat of harm is perhaps a novel response to this most recent challenge to the legal protection of civilians; however, it is consistent with the principle of civilian immunity as it has developed since the publication of Rousseau’s *Social Contract*, and von Marten’s early formulation of civilian immunity as belonging to all those who do not pose a threat of harm that would engage one’s right to self-defense. Since that time, the principle of civilian immunity has focused upon the conduct of individual civilians, and in particular whether they have taken up arms and posed a threat of harm to others, just as it has limited the discretion of military authorities in favor of protecting individuals and populations that are particularly at risk of being characterized by them as ‘suspicious’, ‘disloyal’, ‘hostile’, or ‘criminal’.

³⁵⁵ Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2007) at 14.

Chapter Three: Unprivileged Belligerency and Civilian Immunity in the Post-Protocol Era

We must transform not only our armed forces but also the Defense Department that serves them -- by encouraging a culture of creativity and intelligent risk-taking. We must promote a more entrepreneurial approach: one that encourages people to be proactive, not reactive, and to behave less like bureaucrats and more like venture capitalists; one that does not wait for threats to emerge and be validated, but rather anticipates them before they appear and develops new capabilities to dissuade and deter them.

~ Donald Rumsfeld, in *Foreign Affairs*, 2002¹

3.0 Belligerent Qualification and Civilian Immunity in the Post-Protocol Era

This Chapter examines developments in the laws of belligerent qualification that have taken place since the *Protocols Additional*. As in the nineteenth century, changes in military governance, doctrine, and command control have rendered some of the established rules obsolete as mechanisms of governing and bringing accountability to the use of force. This Chapter will discuss how new command control doctrines of intent-based orders and standard Rules of Engagement have changed the ways in which civilians suspected of participating in hostilities are identified and attacked during the course of hostilities. Now the power in the international arena, and the centre of gravity for the development of these new practices, has shifted to the U.S. and its NATO allies. While these practices have been developed primarily by the U.S., this Chapter seeks to show that some of these new approaches to the distinction and treatment of civilians participating in hostilities are also becoming internationalized. These new practices give great deference to military discretion in making targeting choices, and push decision-making authority down the chain of command much more than had formerly been the practice in the modern era of professional and bureaucratized armies. The ICRC has not been successful in restraining even the worst of the resulting abuses, and even after it adopted a novel status-based definition of civilian

¹ Donald Rumsfeld, "Transforming the Military" (2002) 81:3 *Foreign Affairs* 20 at 29.

participation by permitting states to engage in unrestricted targeting against fighters who perform a ‘continuous combat function’,² it has failed to find a compromise with participating states that they are willing to accept, or that adequately protects civilians. In this debate, the need for discretion by military forces is pitted against the rule of law, just as it was in the time of Fyodor de Martens.³ Allowing military authorities greater discretion to use force in asymmetric and counterinsurgent operations may make it easier for armies to make these decisions, but at the same time it may increase the violence of the war, and make it more difficult to resolve the underlying conflict and restore legitimate governance.⁴ Defining civilian immunity and the circumstances under which it can be lost in terms of the justified use of defensive force may be a more effective means of regulating and bringing justice to armed conflict, as humanitarian reformers once did in drafting codes of land warfare embodying humanitarian principles in response to the military atrocities of the late nineteenth century.

Recent attempts to define civilian direct participation give rise to rules that permit unjustified killings, both because they target actions that pose no threat of harm but that merely violate national interests, and because they attempt to define the belligerency of non-state actors in terms of their status as members of militant groups. Previously, non-state combatants were treated as civilian participants in hostilities, and therefore possessed no belligerent privileges, as affirmed by *Protocol I* and its 1987 *Commentary*.⁵ Status-based concepts of civilian direct participation have changed the ways in which armed forces distinguish and treat civilians who are suspected of participating in hostilities. One important consequence of this shift is a move away from distinguishing belligerents based upon observed and objective behavior exhibited by the fighters themselves – a key precept of Lieber, Droop and de Martens as they formulated the rules we now have in place. Instead, suspected militants are identified and targeted based upon criteria

² International Committee of the Red Cross, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” (2008) 90:872 Int’l Rev. Red Cross 991 at 1007 [hereinafter *Interpretive Guidance*].

³ Peter Holquist, *The Russian Empire as a Civilized State: International Law as Principle and Practice in Imperial Russia, 1874-1878* (Washington, D.C.: National Council for Eurasian and East European Research, 2004) at 5.

⁴ *Supra* Chapter One at s. 1.1.

⁵ Yves Sandoz *et al.*, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987) at 515 [hereinafter *ICRC Commentary*]; see also: *supra* Chapter Two at note 348 and accompanying text The *ICRC Commentary* explains that, “[a]ll members of the armed forces are combatants and only members of the armed forces are combatants. This should therefore dispense with the concept of ‘quasi-combatants’, which has sometimes been used on the basis of activities related more or less directly in the war effort.”

that are relatively common, risks that are inchoate, and social and political associations that are subjectively judged by soldiers themselves. This is illustrated by the development of the concept of a ‘declared hostile force’ contained within standard Rules of Engagement. Chapter Four will discuss cases in which hostile forces have been defined and constructed – *i.e. declared* - by U.S. forces themselves, with little reference to the actual belligerent activities of those targeted. This departs significantly from the traditional concept of unqualified belligerency as it was articulated in the *Hague Regulations*, in which it referred to civilians whose belligerency was unlawful as it was not conducted pursuant to a public authority that enforced the four organizational criteria.⁶ On numerous occasions, international legal fora have rejected states’ claims to be able to summarily execute such irregular combatants, particularly when the very fact of their belligerency is merely suspected, rather than established.⁷ The new rules overturn this basic approach, and return to a subjective and discretionary standard that is liable to abuse.

In the ICRC’s expert process, the debate again focused on the opposition between justice and humanitarianism in the conduct of warfare, continuing upon the old fault lines of whether and to what extent the discretion of military authorities can be fettered by humanitarian concerns.⁸ To a large extent, this is a misguided debate. The rule of law can facilitate justice in war - as well as perceptions among the population that justice will be done - and this is of greater assistance in bringing insurgencies to a resolution and reestablishing good governance. In the nineteenth century, new rules were adopted when a sufficient number of states saw that it was in their interests to govern armed forces through the chain of command. This gave them greater legitimacy in the international arena, as well as greater control over their own armed forces. It would also afford states some reciprocity that opposing belligerent powers would follow the

⁶ International Conferences (The Hague), *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land at Article 1; International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land at Article 1 [hereinafter the *Hague Regulations*].

⁷ Case 72, Trial of Wilhelm von Leeb and Thirteen Others (German High Command Trial), *Law Reports of Trials of War Criminals*, Vol. XII (London: His Majesty’s Stationary Office, 1949) at 83 [hereinafter *German High Command Trial*]; Jean Pictet, ed., *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (Geneva: International Committee of the Red Cross, 1958) [hereinafter *1958 Commentary*] at 10.

⁸ Ryan Goodman and Derek Jinks, “The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum” (2009) 42:3 N.Y.U. J. Int’l L. & Pol. 637 at 640 [hereinafter *An Introduction to the Forum*].

same laws, which in turn would ensure better treatment for their own troops.⁹ At present, U.S. Rules of Engagement and counterinsurgent doctrines are being adopted by numerous states with relatively little opposition or debate as to their consequences. The rules that are emerging may not be those that best serve the widest variety of interests - including those of host states, armed forces, and civilian populations - or those that will bring a speedy resolution to counterinsurgent operations.

3.1 The Restructuring of Command Control

The devolution of decision-making authority in the military chain of command proceeded gradually in the decades preceding the 1980s. At this time, the new command control doctrines of ‘intent-based orders’ and ‘standing Rules of Engagement’ were introduced into U.S. military operations. Standard Rules of Engagement grew up alongside the intent-based system of transmitting orders, and in many ways are a natural outgrowth of this system of command control, for standard Rules of Engagement are essentially standing intent-based orders that govern when force can be deployed during military operations. This first section will therefore discuss the development of intent-based orders in U.S. military doctrine, and examine its role within counterinsurgency doctrine more broadly, and the following section will discuss Rules of Engagement more specifically. Intent-based orders and Rules of Engagement only grew into standard operating procedures in about the late 1980s and 1990s, and have since been adopted by many U.S. allies. The third section will describe how many of the leading Western military powers, including NATO, have now adopted these methods of command control into their own military doctrine. This has been facilitated by the widespread assumption of new counterinsurgency field manuals, as well as the desire to harmonize joint doctrine for use in multi-national and peacekeeping operations.

Much of the discussion below will focus on changes and developments taking place within military doctrine. Military doctrine is itself a species of regulation, of governance, whose purpose is to set out “those concepts, principles, policies, tactics, techniques, practices, and procedures which are essential to efficiency in organizing, training, equipping, and employing its tactical and

⁹ H.R. Droop, “The Relations Between an Invading Army and the Inhabitants, and the Conditions Under Which Irregular Combatants are Entitled to the Same Treatment as Regular Troops” (17 December 1880) 15 Solicitor’s J. & Rep. 121.

service units.”¹⁰ After World War II, modern militaries shifted towards setting out their doctrine systematically in field manuals, drafting specific regulations for different combat units, different types of combat, or different governance functions.¹¹ As a species of regulation, military doctrine, indeed military governance in general, has been responsive to broader changes in the ideologies and mentalities concerning governance and management, and this has been reflected in the development of military doctrine. Military doctrine and Rules of Engagement are binding laws, and any person who violates or fails to obey a Rule of Engagement or a regulation found in military doctrine may be prosecuted under military codes of justice, such as the United States *Uniform Code of Military Justice*.¹²

3.1.1 Intent-Based Orders & Counterinsurgency Doctrine

Between the late nineteenth and late twentieth centuries, front-line soldiers were bound by the traditional command control structure, including a hierarchical chain of command with decision-making centralized in the uppermost levels of command, with the use of force being governed by precise written orders.¹³ This was equally true for soldiers fighting in counterinsurgent and unconventional operations, which formed the bulk of day-to-day soldiering.¹⁴ For example, the U.S. Marines *Small Wars Manual* of 1940,¹⁵ long the official doctrine governing U.S. counterinsurgent and unconventional operations until replaced by the

¹⁰ Evaluation Division, Air University, “To Analyze the USAF Publications System for Producing Manuals” Staff Study (13 July 1948), cited in Robert Frank Futrell, *Ideas, Concepts, Doctrine: Basic Thinking in the United States Air Force, 1907-1960* (Air University Press, December 1989).

¹¹ *Ibid.* The British did not publish their first capstone doctrinal publication until 1988. See: Timothy Granville-Chapman, *British Military Doctrine* (London: Department of National Defence, 1988).

¹² *Uniform Code of Military Justice*, 64 Stat. 109, 10 U.S.C. Chapter 47, at §892 at Article 92 [hereinafter *UCMJ*]. See also: Mark S. Martins, “Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering” (Winter 1994) 143 Mil. L. Rev. 1 at 61 [hereinafter *Rules of Engagement*], in which Martins describes some of the circumstances that could lead to prosecution under Article 92 for failure to obey an ROE.

¹³ Matthew Armor, “The Five Paragraph Field Order: Can a Better Format be Found to Transmit Combat Information to Small Tactical Units?” (1988-9) Monograph prepared for School for Advanced Military Studies United States Army Command and General Staff College, Fort Leavenworth, Kansas [hereinafter *Five Paragraph Field Order*].

¹⁴ Andrew J. Birtle, *U.S. Army Counterinsurgency and Contingency Doctrine 1942-1976* (Washington, D.C.: Center of Military History United States Army, 2006) at 4 [hereinafter *U.S. COIN Doctrine 1942-1976*].

¹⁵ United States Marine Corps, *Small Wars Manual*, FMFRP 12-15 (Washington, DC: Department of the Navy, 1940) [hereinafter *Small Wars Manual*]. The first such manual was the 1935 United States Marine Corp, *Small Wars Operations* (Washington, DC: Department of the Navy, 1935).

2006 *Counterinsurgency Field Manual*,¹⁶ imposed a traditional centralized chain of command on these operations. In its chapter on ‘Command Control’, the *Small Wars Manual* states that the “Major General Commandant exercises only administrative control over the marine force; its operations are controlled by the Chief of Naval Operations directly, or through the senior naval officer present, if he be superior to the marine force commander. Consequently, no operation plans or instructions with regard to the tactical employment of the marine force originate in the office of the Major General Commandant.”¹⁷ Essentially, this means that all operational orders were to originate directly from the Chief of Naval Operations. This is in line with traditional centralized and hierarchical conceptions of command control, which require that there be unity of command, that a single, clearly defined commander is responsible for each operation, that the command structure be hierarchical, clear and unequivocal.¹⁸ Command was centralized, with orders being issued only by very senior commanders.

By the late 1980s, the centralized chain of command that governed the use of force using clear and detailed written field orders was becoming obsolete. Instead, the U.S. military had begun to institutionalize intent-based orders and standing Rules of Engagement that push decision-making down to the lowest levels in the organization. Intent-based orders, also called ‘mission-type’ orders, are defined in the *Joint Chiefs Dictionary* as “an order to a unit to perform a mission without specifying how it is to be accomplished,” and ‘mission command’ is defined as “the conduct of military operations through decentralized execution based upon mission-type orders.”¹⁹ Individual soldiers are expected to use their initiative and personal judgment to determine how best to meet the overall mission goals assigned to them.

Intent-based orders were first used informally during the more mobile warfare of World War II.²⁰ The use of intent-based orders was limited, and their growth in the U.S. can be traced

¹⁶ Department of the Army, *Counterinsurgency*, FM 3-24 MCWP 3-33.5 (Washington, DC: Department of the Army, 2006) [hereinafter *COIN Manual*].

¹⁷ *Small Wars Manual*, *supra* note 15 at 36.

¹⁸ National Defence Canada, *Canadian Military Doctrine*, CFJP 01, 1st ed. (Ottawa: Joint Doctrine Branch, Canadian Forces Experimentation Centre, Department of National Defence, 2009) at 5-3 [hereinafter *Canadian Military Doctrine*], available at: http://www.cfd-cdf.forces.gc.ca/cfwc-cgfc/Index/JD/CFJP%20-%20PDF/CFJP%2001/CFJP-01_Cdn_Mil_Doctrine_EN_2011_09.pdf (accessed 9 January 2013).

¹⁹ Department of Defense, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 (Washington, D.C.: Department of Defense, 8 November 2010, As Amended Through 15 August 2014) at 194 [hereinafter *Joint Chiefs Dictionary*].

²⁰ Richard M. Perry, *Striking the Balance: Airpower Rules of Engagement in Peace Operations* (Maxwell Airforce

by examining their gradual introduction into military doctrine, particularly into the operations manuals, whose function is to set out the basic goals and principles of military governance. As late as 1976, the *Operations Manual* of that year,²¹ the U.S. military's "keystone warfighting manual,"²² makes no reference to these concepts, and is primarily concerned with warfare involving the Soviet Union and the Warsaw Pact countries in Eastern Europe.²³ Similarly, the U.S. Army's 1976 reissue of its *Law of Land Warfare Field Manual* is silent on intent-based orders and Rules of Engagement.²⁴ The Manual straightforwardly applies the *Third* and *Fourth Geneva Conventions*, and describes how they are to be made operational by U.S. military personnel. The updated 1982 version of the *Operations Manual* makes no reference to mission-type orders or to Rules of Engagement, but does state for the first time that flexibility and initiative are important components of winning war, and that "[l]arge unit commanders must encourage initiative in their subordinates."²⁵

The first establishment of intent-based orders in U.S. military doctrine occurred in the next reissue of the *Operations Manual* in 1986. The 1986 *Operations Manual* emphasizes "flexibility and speed, mission-type orders, initiative among commanders at all levels, and the spirit of the offence,"²⁶ suggesting that the development of intent-based orders as a standard doctrine of command control began to take shape in the middle years of the 1980s. A mobile infantry field manual of 1988 gives an early version of an intent-based order, stating that intent-based orders "reflect the commander's intention and will. Indecisive, vague, and ambiguous language leads to

Base, Ala.: United States Air Force, School of Advanced Airpower Studies, 1999) at 17, available at: <http://www.dtic.mil/cgibin/GetTRDocLocation=U2&doc=GetTRDoc.pdf&AD=ADA391759> (accessed 20 November 2011) [hereinafter *Striking the Balance*].

²¹ Department of the Army, *Operations*, FM 100-5 (Washington, D.C.: Department of the Army, 1976) [hereinafter *1976 Operations Manual*], available at:

<http://cgsc.contentdm.oclc.org/utis/getfile/collection/p4013coll9/id/39/filename/40.pdf> (accessed 9 January 2013).

²² Department of the Army, *Operations*, FM 100-5 (Washington, D.C.: Department of the Army, 1986) at I [hereinafter *1986 Operations Manual*], available at:

<http://cgsc.contentdm.oclc.org/utis/getfile/collection/p4013coll9/id/893/filename/894.pdf> (accessed 9 January 2013).

The 1986 version superseded FM 100-5 of 1982, *infra* note 25.

²³ *1976 Operations Manual*, *supra* note 21 at 102.

²⁴ Department of the Army, *The Law of Land Warfare*, FM 27-10 (Washington, D.C.: Headquarters Department of the Army, 1956, Updated 15 July 1976), available at: <http://www.afsc.army.mil/gc/files/fm27-10.pdf> (accessed 12 January 2013).

²⁵ Department of the Army, *Operations*, FM 100-5 (Washington, D.C.: Department of the Army, 1982), at 2-1, available at: <http://cgsc.contentdm.oclc.org/utis/getfile/collection/p4013coll9/id/44/filename/45.pdf>, (accessed 9 January 2013).

²⁶ *1986 Operations Manual*, *supra* note 22 at i, 4.

uncertainty. Subordinates are told in direct and unmistakable terms exactly what the commander wants them to do; they are not normally told how to accomplish it.”²⁷ Here, the military has come to emphasize small-unit commanders’ information, initiative and responsibility, based upon their experience in the combat zone. By 1988, intent-based orders had become an important doctrine of command control,²⁸ and were beginning to replace the century-old Prussian field orders; they have since become the standard format for delivering combat orders.²⁹

Intent-based orders devolve decision-making responsibility down the traditional chain of command by empowering subordinates in the field to make decisions to employ force. Front-line soldiers are now tasked with using their own individual judgment and initiative, developed in the combat zone, to better adapt to asymmetrical threats. This has become embodied as the core command control doctrine in counterinsurgency operations governing unconventional and asymmetrical warfare. As stated by the 2006 US *Counterinsurgency Field Manual*:

Thus, effective COIN [counter-insurgency] operations are decentralized, and higher commanders owe it to their subordinates to push as many capabilities as possible down to their level. Mission command encourages the initiative of subordinates and facilitates the learning that must occur at every level. It is a major characteristic of a COIN force that can adapt and react at least as quickly as the insurgents.³⁰

The military’s command control doctrine for counterinsurgent and asymmetrical warfare has thus shifted greatly since the *Small Wars Manual* of 1940,³¹ or even the *Operations* doctrine of 1976.³² The subjective discretion embodied in intent-based orders have now become institutionalized, not only in asymmetrical warfare, but across all divisions of the U.S. military.³³

The production of the U.S. Marine *Counterinsurgency Field Manual* of 2006 saw a significant shift in doctrine related to counterinsurgency, particularly in its institutionalization of new doctrines of command control. The U.S. *COIN Manual* is a significant re-conceptualization of military doctrine for waging complex irregular warfare, and likely one of the most significant

²⁷Department of the Army, *The Tank and Mechanized Infantry Battalion Task Force*, U.S. Army Field Manual 71-2 (Washington, D.C.: Headquarters US Department of the Army, 1988), at para. B-2(e), available at: <http://www.militarynewbie.com/pubs/FM%2071-2%20THE%20TANK%20AND%20MECHANIZED%20INFANTRY%20BATTALION%20TASK%20FORC.pdf> (accessed 24 November 2011).

²⁸ *Five Paragraph Field Order*, *supra* note 13 at 15, 22.

²⁹ *COIN Manual*, *supra* note 16 at para. 1-146.

³⁰ *Ibid.*

³¹ *Small Wars Manual*, *supra* note 15.

³² *1976 Operations Manual*, *supra* note 21.

³³ *COIN Manual*, *supra* note 16, at para. 1-146.

shifts in military doctrine concerning irregular warfare since the nineteenth century. The U.S. *COIN Manual* was a direct response to the insurgency that developed in Iraq after the U.S.-led invasion of 2003. The drafting of the 2006 U.S. *COIN Manual* was largely led by then General David Petraeus and John Nagl. John Nagl states that the U.S. had no counterinsurgency doctrine to draw upon when it invaded Iraq, which impeded U.S. forces' ability to wage that war.³⁴ The *COIN Manual* was directed toward “making the Army and Marine Corps more effective learning organizations that are better able to adapt to the rapidly changing nature of modern counterinsurgency campaigns.”³⁵ Accordingly, an interim field manual was drafted in response to the growing Iraqi insurgency, a large part of which was centred at that time on the Iraqi city of Fallujah.³⁶ Then General David Petraeus took charge of the project in 2005, and the final *COIN Manual* was produced in December 2006.³⁷ The *COIN Manual* focuses on leadership and values, such as developing local civil institutions and capacity for governance, and exercising leadership and integrity. Chief topics covered by the *COIN Manual* include, for example, chapters on integrating civilian and military activities,³⁸ leadership and ethics,³⁹ and social network analysis.⁴⁰

In the military, the new ethic of experimentation, adaptability, and fallibility is seen as better facilitating the gathering of information and the management of risks, which are both key concerns of the new counterinsurgency doctrine. This is closely linked with an ethic of non-coerciveness, as the military has relaxed its emphasis on discipline and punishment in favour of individual initiative. As stated in the Introduction to the *COIN Manual*, “In COIN, the side that learns faster and adapts more rapidly – the better learning organization – usually wins.”⁴¹ This involves fostering “open communication between senior officers and their subordinates,” “coordinating closely with governmental and nongovernmental partners at all command levels,” and establishing “rapid avenues of disseminating lessons learned.”⁴² Discipline is not mentioned

³⁴ *Ibid.* at “Forward”.

³⁵ *Ibid.*

³⁶ Department of the Army, *US Marines Field Manual (Interim) 3-07.22* (1 October 2004).

³⁷ *COIN Manual*, *supra* note 16 at “Forward”.

³⁸ *Ibid.* at para. 2-1.

³⁹ *Ibid.* at para. 7-1.

⁴⁰ *Ibid.* at Appendix B, para. B-1.

⁴¹ *Ibid.* at ix.

⁴² *Ibid.* at x.

in the *COIN Manual*, although leaders are enjoined to “check routinely on what Soldiers and Marines are doing;”⁴³ commanders are left not necessarily knowing what activities they are performing in the combat zone, “due to the decentralized nature of operations.”⁴⁴ This has consequences for the targeting of combatants in a conflict zone in which the line between lawful combatants, unlawful combatants, and civilians is increasingly shifting and unclear. Here, the ethic of non-coercion refers to the ways in which security forces deserve to be treated, and not to the ways in which they are required to act towards a target population.

The *COIN Manual*'s emphasis on leadership and ethics renders it liable to the criticism that its counterinsurgent doctrine possesses an inherent moral asymmetry. The *COIN Manual* states that COIN warfare “includes the responsibility to serve as a moral compass that extends beyond the COIN force and into the community. It is that moral compass that distinguishes Soldiers and Marines from the insurgents.”⁴⁵ This is a radical re-conception of the “characteristics that make men soldiers,”⁴⁶ and one that moves us away from the objective and readily observable criteria that once identified the “legitimacy and permanency of the fighting group.”⁴⁷ Accordingly, commanders must maintain the “moral high ground” at all times, for maintaining this is key to winning the conflict,⁴⁸ and in practice this often means that there is great pressure on commanders to justify the actions of their soldiers even when such actions appear to violate rules imposed by the international humanitarian law. Here, morality and ethics is represented by individual “initiative and adaptability”, involving “[s]elf-development, life-long learning, and reflection on experience.”⁴⁹ Here, moral engagement in combat is depicted as a matter of process – of learning and reflection – and not on outcomes. As shall be discussed in the case studies in Chapter Four, there are many ways in which COIN doctrine and Rules of Engagement incorporate strategies of martial law and pacification used by imperial powers prior to the widespread introduction of the principle of distinction in the international humanitarian law, including collective punishment, the dehumanization of the population, and facilitating a

⁴³ *Ibid.* at para. 7-3.

⁴⁴ *Ibid.* at para. 7-6.

⁴⁵ *Ibid.* at para. 7-9.

⁴⁶ John F. Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012) at 193.

⁴⁷ *Ibid.*; Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (New York: D. van Nostrand, 1862) at 18.

⁴⁸ *COIN Manual*, *supra* note 16 at para. 7-10.

⁴⁹ *Ibid.* at para. 7-47.

presumption of the hostility of the civilian population.

John Nagl, co-author of the 2006 *COIN Manual*, held the position of operations officer of Task Force 1/34 Armor of the First Infantry Division, stationed in Khaldiya, near Baghdad, during U.S. counterinsurgent operations there in 2003-2004. His doctoral thesis was published in 2002 as *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya, Vietnam, and Iraq*,⁵⁰ and he became very influential in developing present-day U.S. counterinsurgency doctrine. Counterinsurgency, Nagl explains, is intelligence-driven in that “[y]ou have to have the local nationals tell you who the bad guys are, and then you act on that information.”⁵¹ This idea is similar to the ‘informational thesis’ of counterinsurgency put forth by Condra *et al.*, in which they find that the local civilian population can affect an insurgency to the extent that they choose to share information with, or lend support to, either the insurgent or counterinsurgent forces.⁵² Counterinsurgent forces who mistakenly kill civilians are more likely to lose this support.⁵³ However, under Nagl’s command in Iraq, forcing locals to turn over militants often involved the use of coercive and dehumanizing tactics.⁵⁴ Even when information was forthcoming, it was difficult for U.S. forces to locate suspected individuals given their lack of local and cultural knowledge. Nagl states that “[t]here aren’t any addresses in this country. The streets don’t have names, there are no street signs, there aren’t numbers on the houses; all the houses look the same.”⁵⁵ Nagl found that he was not able to make effective use of local assistance, even when locals came forward with information. “These clowns don’t know how to read maps,” Nagl explained to the *New York Times*, “so how exactly do I find out which house the bad guy lives in?”⁵⁶ Nagl describes how his unit instead used mortar attacks on civilian neighborhoods as a means to encourage locals to turn in insurgents. Nagl stated, “if you live in a neighborhood and you know there are bad people and you don’t want Americans to return heavy fire into your

⁵⁰ John Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya, Vietnam, and Iraq* (Westport, CT: Praeger Publishers, 2002).

⁵¹ Peter Maas, “Professor Nagl’s War” *The New York Times Magazine* (11 January 2004) [hereinafter *Professor Nagl’s War*], available at: <http://newyorktimes/2004/01/11/magazine/professor-nagl-s-war.html?pagewanted=all&src=pm> (accessed 17 January 2013).

⁵² Luka N. Condra and Jacob N. Shapiro, “Who Takes the Blame: The Strategic Effects of Collateral Damage” (2012) 56:1 Am. J. Pol. Sci. 167 at 168; see also: *supra* Chapter One, note 62 and accompanying text.

⁵³ *Ibid.*

⁵⁴ *Professor Nagl’s War*, *supra* note 51. Nagl describes a situation in which he grabbed an Iraqi police officer by the back of his neck and escorted him in this way before his subordinates, and members of the local Iraqi community.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

neighborhood, endangering your families, you need to turn in the bad guys.”⁵⁷ An American-appointed representative of the local governing counsel, Ghazi Ajil al-Yarwar, referred to the U.S. practice of jailing relatives of suspected insurgents as one of “collective punishment.”⁵⁸

Orders that are ambiguous cause difficulties, as they can facilitate atrocities while avoiding the appearance of manifest illegality.⁵⁹ As Osiel explains, “this approach easily permits the superior officer who desires atrocity to formulate his orders in ways that ensure that soldiers obeying them are excused from criminal liability. It takes no great measure of verbal artistry to do this[.]”⁶⁰ An example of this took place in Iraq in 2006 during Objective Murray,⁶¹ where the orders were vague as to whether all military-aged males in the vicinity of the Al-Muthanna chemical weapons complex were declared as hostile, and this led to the killing of several non-combatants. As Colonel Steele stated afterwards, “While I never specifically stated that every military-aged male should be killed on Objective Murray, the unit’s understanding certainly fell within my intent.”⁶² Intent-based orders can therefore facilitate the commission of acts that are clearly unlawful under international humanitarian law, while simultaneously excusing them. The reliance of modern COIN doctrine on managing information and perceptions to gain the moral high ground further compounds this problem, by encouraging mistakes to be vindicated, rather than acknowledged and remedied. Intent-based orders are therefore very different from the old form of the five-paragraph field order, which was designed to “place responsibility with ease”, and instead have the effect of diffusing and obscuring responsibility.

⁵⁷ *Ibid.* It appears that Nagl meant by this that local Iraqis ought to physically detain and bring suspected insurgents to U.S. troops.

⁵⁸ *Ibid.*

⁵⁹ Mark Osiel, “Obeying Orders: Atrocity, Military Discipline, and the Law of War” (1998) 86:5 Cal. L. Rev. 939 at 1100 [hereinafter *Obeying Orders*].

⁶⁰ *Ibid.*

⁶¹ Raffi Khatchadourian, “The Kill Company: Did a Colonel’s Fiery Rhetoric Set the Conditions for a Massacre?” *The New Yorker* (6 July 2009), available at: <http://www.newyorker.com/magazine/2009/07/06/the-kill-company> (accessed 2 March 2015) [hereinafter *Kill Company*]; see also: *supra* Chapter One at note 217 and accompanying text.

⁶² *Ibid.*

3.1.1.1 The Internationalization of U.S. COIN Doctrine

Several nations, including many of the U.S.'s key Coalition partners in Iraq and Afghanistan, have adopted similar doctrines regarding intent-based orders and counterinsurgent doctrine. After the U.S. issued its 2006 *COIN Manual*, several U.S. allies followed suit, as many leading Western powers revised their own COIN doctrine along the same lines, instituting intent-based orders, and promoting discretion and freedom of action down the chain of command onto front-line soldiers. Intent-based orders are now enshrined in Canadian military doctrine as the foundational principle of command control. The capstone Canadian doctrinal manual, *Canadian Military Doctrine*, states:

To be effective, command should normally be decentralized to the greatest degree practicable in order to cope with the uncertainty, the disorder, the complexity, and the confusion that are usually present at the tactical level. Commanders must always make their intentions clear to subordinate commanders who, in turn, must make their decisions on their own initiative based upon their understanding of the senior commander's intentions.⁶³

Canada also updated its counterinsurgency doctrine, issuing the *Land Force Counter-Insurgency Operations Manual* in 2008.⁶⁴ The *British COIN Manual* places an emphasis on governing counterinsurgent warfare from below, on flexibility, initiative and adaptation:

In many cases, the most effective response to new threats or to developing patterns of activity come from those who face them at the tactical level. Those involved in the operation can keep the initiative by maintaining the mindset to learn and adapt, in the same way that the enemy adapts. This is particularly important at the lowest tactical level, with those who understand the operational environment the best, who are in the optimal position to judge local conditions, and can tailor their response to a new threat or new enemy TTP [tactics, techniques and procedures] accordingly.⁶⁵

Similarly, the new *German COIN Manual* states that the “overarching training objective is to qualify the soldier to act self-reliantly and in line with the higher commander's intent, and to quickly adapt to changes in the situation while keeping his focus on accomplishing the mission,

⁶³ *Canadian Military Doctrine*, *supra* note 18 at 5-1, para. 0502.

⁶⁴ Department of National Defence, *Land Force Counter-Insurgency Manual* (Ottawa: Department of National Defence, 2008) [hereinafter *Canadian COIN Manual*], available at: <http://wlstorage.net/file/canadian-coin-operations-manual.pdf> (accessed 17 February 2013).

⁶⁵ Ministry of Defence, *Countering Insurgency*, British Army Field Manual, Volume 1, Part 10, Army Code 71876 (London: Ministry of Defence, 2009) at 3-20, para. 3-43 [hereinafter *British COIN Manual*], available at: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_11_09_army_manual.pdf (accessed 9 January 2013). See also: at 3-23, and Chapter 11 on “Learning and Adaptation”.

even in complex situations.”⁶⁶ The *German COIN Manual* draws heavily upon British and U.S. counterinsurgency doctrine.⁶⁷ The US has also simplified and adapted their *COIN Manual* for use by the Afghan National Army.⁶⁸ In this way, U.S. command control doctrine can come to be imposed upon the host nation states in which counterinsurgent operations take place, and this is a further mechanism whereby these doctrines may gain more widespread acceptance among domestic security forces.

France has adopted many of these doctrines into a revised counterinsurgency manual following upon the *US COIN Manual*. The *French COIN Manual* states that COIN “operations demand a flexible implementation... based upon a strong decentralization of the tactical action down to the lowest unit echelon.”⁶⁹ The new *French COIN Manual* was therefore in operation when France undertook its own recent counterinsurgency operation in Mali. Examining the Malian conflict is therefore an opportunity to observe how the new COIN doctrine may be affecting counterinsurgent operations by countries that have adopted U.S. COIN doctrine. In this, there is some evidence that French and Malian government forces were targeting civilians according to status-based markers, such as their ethnicity and suspected group and social affiliations. Amnesty International states that “civilians were at risk by all parties to the conflict, against whom there is evidence of grave human rights abuses.”⁷⁰ Civilian deaths included a number of civilians killed by French forces in air strikes in Konna on 11 January 2013.⁷¹ However, much of the ground campaign was waged by Malian troops, and there are several reports that they were targeting civilians on the grounds that they appeared to be members of the Tuareg ethnicity. Malian forces were targeting civilians as suspected members of hostile forces on the grounds that they were wearing clothing that soldiers believed marked them as Tuaregs.⁷²

⁶⁶ German Army Office, *Preliminary Basics for the Role of Land Forces in Counterinsurgency* (Cologne: Federal Ministry of Defence, 2010) at 23 [hereinafter *German COIN Manual*], available at: <http://info.publicintelligence.net/GermanyCOIN.pdf> (accessed 9 January 2013).

⁶⁷ *Ibid.* at 52.

⁶⁸ Afghan National Army, *Counterinsurgency*, ANA 3-24 (June 2007), available at: <http://info.publicintelligence.net/ANA-3-24.pdf> (accessed 9 January 2013).

⁶⁹ Philippe Coste, *Doctrine for Counterinsurgency at the Tactical Level*, Armée de Terre (Paris: Ministère de la Défense, Centre de Doctrine d'Emploi des Forces, 2010) at 28 [hereinafter *French COIN Manual*], available at: <http://info.publicintelligence.net/FR-TacticalCOIN.pdf> (accessed 9 January 2013).

⁷⁰ Amnesty International, *Mali: First Assessment of the Human Rights Situation after Three-Week Conflict* (London: Amnesty International Publications, 2013) at 5 [hereinafter *Mali: First Assessment*].

⁷¹ *Ibid.* at 6.

⁷² *Ibid.* at 9.

One detainee told Amnesty International that he was arrested by government forces at a checkpoint on the basis of his ethnically Tuareg name, stating “the soldier in charge of the checkpoint told me that my name indicates that I was ‘jihadist’.”⁷³ Targeting suspected insurgents based on ethnic markers would be consistent with standard counterinsurgency doctrine and Rules of Engagement; when used in this way such command doctrines may constitute not only violations of international humanitarian law’s prohibitions on targeting civilians, but, to the extent that they are systematic, may constitute crimes against humanity as well.⁷⁴ Amnesty International did not find that either French or Malian forces had undertaken any prosecutions or other disciplinary actions at that time for ethnically-based killings and detentions, indicating a high degree of official tolerance for these actions.⁷⁵

In 2011, NATO issued its own *Joint Doctrine for Counterinsurgency*.⁷⁶ NATO COIN doctrine has also been influenced by new command control doctrines, particularly those of the United Kingdom, the present custodian of Allied Joint Doctrine.⁷⁷ The recent *NATO COIN Manual* reflects the consensus of NATO countries as to their common conduct of counterinsurgent warfare. The *NATO COIN Manual* adopts a number of U.S. reforms, such as its emphasis on information and intelligence exploitation, learning and adaptation,⁷⁸ devolving tasks upon host security forces and civilians whenever possible,⁷⁹ the use of coordination and partnerships,⁸⁰ the idea that COIN is primarily a battle of perception, to be waged by

⁷³ *Ibid.* at 10.

⁷⁴ United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> (accessed 24 November 2014). Article 7 of the *Rome Statute* defines a crime against humanity as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” including (a) murder, and (e) imprisonment. Rules of Engagement could be used to systematically justify the targeting of ethnic groups as hostile.

⁷⁵ *Mali: First Assessment*, *supra* note 70.

⁷⁶ North Atlantic Treaty Organization, *Allied Joint Doctrine for Counterinsurgency (COIN)*, AJP-3.4.4 (North Atlantic Treaty Organization, 2011) [hereinafter *NATO COIN Manual*], available at: <http://info.publicintelligence.net/NATO-Counterinsurgency.pdf> (accessed 16 December 2012).

⁷⁷ North Atlantic Treaty Organization, *Allied Joint Doctrine*, AJP-01(D) (Brussels: NATO Standardization Agency, December 2010) at vii [hereinafter *Allied Joint Doctrine*], available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33694/AJP01D.pdf (accessed 7 February 2013).

⁷⁸ *NATO COIN Manual*, *supra* note 76 at 3-26, 5-10.

⁷⁹ *Ibid.* at 3-27.

⁸⁰ *Ibid.* at 4-8.

information,⁸¹ and the importance of a decentralized chain of command.⁸² The *NATO COIN Manual* states, “command and control must be decentralized to allow for tactical initiative. This facilitates agility at the tactical level, allowing junior commanders to work with their civilian counterparts and seize the initiative in rapidly developing situations.”⁸³ All of these recent COIN Manuals place a strong emphasis on managing public opinion and available information to create a favourable political environment for counterinsurgency operations,⁸⁴ as well as adapting and influencing local cultural knowledge.⁸⁵ U.S. COIN doctrine as embodied in their 2006 *COIN Manual* was therefore adopted fairly rapidly into the military doctrine of the U.S.’s key allies, particularly its emphasis on learning, adaptation, perception management, and the command control doctrines of intent-based orders, decentralization, and the devolution of decision-making.

3.1.2 Standard Rules of Engagement

In addition to intent-based orders, the military has made increasing use of standard Rules of Engagement to govern the use of force in specific theatres of operation. As with intent-based orders, standard Rules of Engagement are drafted broadly so as to leave the actual decision of whether or not to employ force with the individual soldier, and they emphasize the individual’s inherent right of self-defense. ‘Rules of Engagement’ are defined by the Joint Chiefs as “[d]irectives issued by a competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with forces encountered.”⁸⁶ Rules of Engagement clearly emphasize the individual soldier’s ‘inherent right of self-defense’,⁸⁷ and permit soldiers a broad discretion in preemptively killing civilians they deem to be hostile. Prior to the late 1990s, U.S. military doctrine makes little mention of Rules of Engagement; it was only in the 1990s that they began to become significantly institutionalized into U.S. doctrine, particularly in military manuals that governed

⁸¹ *Ibid.* at 5-5.

⁸² *Ibid.* at 5-6.

⁸³ *Ibid.*

⁸⁴ See for example, *French COIN Manual*, *supra* note 69 at 25 *et seq.*

⁸⁵ *NATO COIN Manual*, *supra* note 76 at 20.

⁸⁶ *Joint Chiefs Dictionary*, *supra* note 19 at 256.

⁸⁷ *Rules of Engagement*, *supra* note 12 at 33.

‘stability’ operations and operations other than war.⁸⁸ McClung describes this as a move away from a Soviet-based enemy and towards a more complex battlefield populated with an increasing array of non-state actors.⁸⁹ Hall also notes that Rules of Engagement are a “distinctly modern method of constraining the military’s use of force,” and that Rules of Engagement were originally intended to limit the use of force in unconventional and humanitarian operations, even more than what was required by the laws of war.⁹⁰

Virtually unknown during World War II, limited use was first made of Rules of Engagement during the air campaign of the Korean War, so as to project an image of compliance with the UN mandate to restrict the conflict and to utilize restrained air power.⁹¹ Airborne Rules of Engagement were again used during the U.S. air bombing campaigns during the Vietnam War, largely as a response to its political fallout.⁹² The first seaborne Rules of Engagement, specifying the circumstances under which naval troops may open fire, were developed by the British Royal Navy in the mid-1960s for the purposes of limiting maritime hostilities with Indonesia during the Malay Emergency.⁹³ These early Rules of Engagement for air and naval forces were intended to restrict the use of force, even more than what was permitted under the international humanitarian law, and therefore they were designed to prevent the escalation of a conflict.⁹⁴ Rules of Engagement for land forces developed later, with the first recorded use of land force Rules of Engagement being made during the U.S.’s action in the Dominican Republic, known as Operation Power Pack (1965-1966), after leftist forces deposed the sitting government.⁹⁵

As with naval and air forces, early land force Rules of Engagement were intended to restrict the use of force, often beyond that which was permitted by the laws of armed conflict. For example, the Operation Power Pack Rules of Engagement did not permit soldiers to fire even

⁸⁸ Kevin J. McClung, *Law of Land Warfare and Rules of Engagement: A Review of Army Doctrine and Training Methodologies* (Carlisle Barracks, PA: U.S. Army War College, 2004) at 5, available at: <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA423617> (accessed 16 January 2013).

⁸⁹ *Ibid.*

⁹⁰ D.B. Hall, “Rules of Engagement and Non-Lethal Weapons: A Deadly Combination?” *Global Security.org* (1997), available at: <http://www.globalsecurity.org/military/library/report/1997/Hall.htm> (accessed 16 January 2013).

⁹¹ *Striking the Balance*, *supra* note 20 at 17.

⁹² *Ibid.*

⁹³ *Rules of Engagement*, *supra* note 12 at 40.

⁹⁴ *Ibid.* at 45.

⁹⁵ *Ibid.* at 47.

upon the sighting of enemy units.⁹⁶ Standing orders in Vietnam from the same time period did not permit firing in self-defense as such, as is common today, but they did permit the use of lethal force in the following circumstances:

(1) Enemy personnel observed with weapons who demonstrate hostile intent either by taking a friendly unit under fire, taking evasive action, or who occupy a firing position or bunker. (2) Targets which are observed and positively identified as enemy. (3) Point targets from which fire is being received. (This will not be construed as permission for indiscriminate firing into areas inhabited by non-combatants). (4) Suspected enemy locations when noncombatants will not be endangered.”⁹⁷

At the time, the focus of these standing orders is on the demonstrated actions of the enemy personnel themselves, and the kinds of activities which they are performing, many of which – “taking a friendly unit under fire”, “point targets from which fire is being received” – are evidence of wrongful aggression. On the other hand, these Rules of Engagement opened up new opportunities for soldiers to choose to use lethal force, particularly when confronted with “suspected enemy locations”. Martins states that there was a sense among the U.S. Army that the Rules of Engagement in Vietnam were deliberately bent by soldiers so as to kill ‘potential’ or suspected insurgents, who were actually ordinary civilians.⁹⁸ At the same time, intent-based orders and Rules of Engagement that permit the targeting of forces declared hostile avoid the appearance of manifest illegality, which was raised by critics to denounce the free-fire orders as unlawful.⁹⁹ Despite these abuses, the Rules of Engagement drafted for Vietnam contained restrictions that are absent today, as they required that the target be carrying and pointing a weapon - or at least clearly manifesting the intent to fire a weapon - and also required that the target be positively identified.

During the 1989 Operation Just Cause in Panama, an infantry company in Colon received standing orders to shoot all armed civilians, irrespective of whether or not they were participating in hostilities.¹⁰⁰ Although Martins states that there is no evidence that this was ever done, it marks a watershed departure from the time when Rules of Engagement restricted the use of deadly force in order to de-escalate conflict, and instead began to facilitate it. The U.S. Judge Advocate

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* at 50.

⁹⁸ *Ibid.* at 20.

⁹⁹ See for example, Richard A. Falk, “Law and Responsibility in Warfare: The Vietnam Experience” (1974) 4:1 *Instant Res. Peace & Violence* 1.

¹⁰⁰ *Rules of Engagement*, *supra* note 12 at 54.

General's *Law of War Deskbook* indicates that Rules of Engagement are permissive in nature, stating that "commanders are generally allowed to use any weapon or tactic available" without having to gain permission, unless this has been specifically prohibited.¹⁰¹ Rules of Engagement are intended to be quite fluid around these basic boundaries.¹⁰² The 1993 Operation Restore Hope Rules of Engagement for Somalia permitted soldiers to fire in the face of a hostile intent, stating, "you are authorized to use deadly force if: a. you are fired upon; b. armed elements, mobs, and/or rioters threaten human life; [or] c. there is a clear demonstration of hostile intent in your presence."¹⁰³ 'Hostile intent' has since become a standard criterion for the use of lethal force against civilians.

In addition to the above requirements, self-defense has become a crucial and much-used component of regulating the use of force through Rules of Engagement. This has normalized what were previously considered to be abuses, such as the preemptive killing of 'potential' or 'possible' insurgents, and the targeting of 'suspected enemy locations'.¹⁰⁴ The current boilerplate self-defense clause now prominently displayed in all Rules of Engagement was first enacted after the 1983 Barracks Bombing in Lebanon, as a response to that emergency situation, but later came to be institutionalized in all theatre Rules of Engagement as a standing order.¹⁰⁵ At first, this appears to be a surprising reaction to the barracks bombing; there were many ways of responding to the incident, including target hardening, better surveillance around bases, and better training for soldiers. Rules of Engagement also feature a "prominent notice regarding the right of self-defense."¹⁰⁶ As Martins states, "[t]his cautionary rule typically appears at the very beginning of written ROE, often in capital letters. One common version states that 'nothing in these rules limits the right of individual soldiers to defend themselves or the rights and responsibilities of

¹⁰¹ The United States Army Judge Advocate General's Legal Center and School, *Law of War Deskbook* (Charlottesville, VA: The United States Army Judge Advocate General's Legal Centre and School, 2011) at 78, s. III.E.5.(a).(2) [hereinafter *2011 Law of War Deskbook*].

¹⁰² *Ibid.* at 79, s. V.B.1.(e).

¹⁰³ *Rules of Engagement*, *supra* note 12 at 67, note 183, citing Headquarters, 10th Mountain Division, Operations Plan for Restore Hope, Annex N, at para. 3(b)(1)(1993).

¹⁰⁴ See: *infra* Chapter Four at s. 4.2 for a discussion on how U.S. forces used many of these same tactics during 2004 operations in Fallujah, including the pre-emptive bulldozing of homes.

¹⁰⁵ *Rules of Engagement*, *supra* note 12 at 51-2.

¹⁰⁶ *Ibid.* at 33.

leaders to defend their units.”¹⁰⁷ Rules of Engagement routinely not only remind soldiers of their inherent right of self-defense, but the exercise of this right often overrides other laws and important policy goals. For example, a 2009 Tactical Directive for NATO’s International Security Assistance Force (ISAF) in Kabul, Afghanistan, issued a tactical directive that expressed important ISAF policies, including the necessity to limit civilian casualties, to utilize restrained force, and to fully appreciate the consequences of the use of force.¹⁰⁸ However, the Directive then states, “This directive does not prevent commanders from protecting the lives of their men and women as a matter of self-defense.”¹⁰⁹ The over-use of defensive force has the potential to compromise these other policy goals.

Present-day standard Rules of Engagement also permit the use of lethal force on three grounds: in the face of a hostile act, when soldiers’ perceive a hostile intent, and when a particular force or individual has been declared to be hostile.¹¹⁰ In 1994, the Joint Chiefs of Staff issued their first set of draft Standing Rules of Engagement,¹¹¹ which were intended to set out definitions and best practices for Standing Rules of Engagement across all branches of the U.S.

¹⁰⁷ *Ibid.*, citing Headquarters, XVIIIth Airborne Corps, Peacetime Rules of Engagement for Operation Desert Shield (1990) (soldier card). Rules of Engagement are usually given to soldiers on small cards, which they are to keep in their pockets at all times. See also: 800th Military Police Brigade Rules of Engagement for Operations In Iraq (2003), in Department of the Army, *Taguba Report on Treatment of Abu Ghraib Prisoners in Iraq: Article 15-6 Investigation of the 800th Military Police Brigade* (19 October 2004), at Annex 93, available at: https://www.thetorturedatabase.org/document/taguba-report-annex-93-army-memo-re-rules-engagement-operations-iraq-800th-military-police?pdf_page=1 (accessed 20 May 2015). This ROE states, in a manner that is a typical expression of the right to self-defense, in bold letters at the top of the page, “Nothing in these rules limits your inherent authority and obligation to take all necessary and appropriate action to defend yourself, your unit, and other US forces.”

¹⁰⁸ NATO/International Security and Assistance Force Headquarters (ISAF), “Tactical Directive” (6 July 2009), available at: http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (accessed 9 February 2016).

¹⁰⁹ *Ibid.*

¹¹⁰ Chairman of the Joint Chiefs of Staff, “Standing Rules of Engagement for U.S. Forces (Enclosure A)” in *Standing Rules of Engagement (SROE), Chairman of the Joint Chiefs of Staff, Instruction 3121.01*, (1 October 1994) [hereinafter *1994 Joint Chiefs SROEs*], available at:

http://www.globalsecurity.org/military/library/report/call/call_96-6_roeappa2.htm (accessed 22 February 2013).

¹¹¹ *Ibid.* The Joint Chiefs of Staff consist of the head of each of the Army, Navy, Air Force, Marine Corps, and the National Guard, as well as a Chairman and a Vice Chairman. The present organizational structure was created by the *Goldwater-Nichols Department of Defense Reorganization Act* of 1986, Pub. L. 99-433, following the Packard Commission of 1985, which was instituted by President Reagan to study the management structure of the U.S. military. The Joint Chiefs are assigned the tasks of promoting inter-agency cooperation, to develop joint standards and training, and to facilitate lateral communication among all branches of the armed forces, but they are not given a role in operational command. Their SROEs are therefore expressions of how Rules of Engagement ought to be formulated at the operational level, and are used in training and standardizing operational ROEs.

armed forces, and to facilitate standardization and training.¹¹² The *Joint Chiefs SROE's* were updated and reissued in 2000, and again in 2005.¹¹³ The U.S. military defines a hostile act as “simply the actual use of armed force – attacking,”¹¹⁴ whereas a hostile intent is the “threat of imminent use of force.”¹¹⁵ ‘Hostile act’ and ‘hostile intent’ are self-defense-based criteria that authorize the use of lethal force against civilians who are not necessarily participating in hostilities. Martins states that now, as in Vietnam, proper training is the key to properly executing Rules of Engagement, and that Rules of Engagement can be better enforced by relying on individual soldiers’ experience and judgment.¹¹⁶ Perry states that Rules of Engagement are “intended to be used throughout the spectrum of conflict in the absence of any superseding guidance from the National Command Authority.”¹¹⁷ Soldiers are thus being asked to make decisions to use lethal force in the absence of central command control.

The precise scope of the criteria for determining when a civilian is manifesting a ‘hostile intent’ is not further defined by the U.S. military. The 2004 Judge Advocate General’s *Law of War Handbook* states that there is a “loss of civilian status” – and therefore the loss of their immunity from attack - “for those intending to cause harm to the personnel and/or equipment of the enemy.”¹¹⁸ Perceiving an intention to ‘cause harm to personnel and/or equipment’ is not necessarily equivalent to direct participation in hostilities, and it focuses on the subjective perceptions of the soldier, rather than the demonstrated actions of the civilian. What criteria do soldiers use to determine when civilians intend to cause harm to them or to their equipment? In Vietnam, this often included stipulations that the belligerent be aiming or pointing a rifle or other weapon, and even these actions would not be sufficient to justify the use of lethal force in all

¹¹² *Ibid.*

¹¹³ Chairman of the Joint Chiefs of Staff, “Standing Rules of Engagement for U.S. Forces (Enclosure A)” in Chairman of the Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for Use of Force for U.S. Forces*, Instruction 3121.01B, Washington, D.C., Department of Defense (13 June 2005) [hereinafter *2005 Joint Chiefs SROEs*], is the most recent version as of writing.

¹¹⁴ A. Roach, “Rules of Engagement” (1983) *Naval War College Rev.* 46 at 50. Roach also states that ROEs, at the time of his writing permitted *fewer* actions than those permitted by domestic laws or the international laws of armed conflict, at 46.

¹¹⁵ *Ibid.* See also: *Joint Chief’s Dictionary*, *supra* note 19 at 117, where “hostile act” and “hostile intent” are also defined.

¹¹⁶ *Rules of Engagement*, *supra* note 12 at 83.

¹¹⁷ *Striking the Balance*, *supra* note 20 at 1.

¹¹⁸ The United States Army Judge Advocate General’s Legal Center and School, *Law of War Handbook* (Charlottesville, VA: The United States Army Judge Advocate General’s Legal Center and School, 2004) at 143, available at: http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2004.pdf (accessed 12 January 2013).

cases.

Martins states that since the Marine Barracks Bombing of 1983, the U.S. has been concerned with soldiers who are over-tentative in using force,¹¹⁹ while dismissing the over-use of lethal force against persons who, in fact, pose no threat. Dave Grossman finds that since the 1960s, there has been a growing movement in the U.S. military to train soldiers to overcome low firing rates; this tendency for soldiers not to fire has been counteracted by improvements in training exercises and live simulations to achieve higher rates of fire.¹²⁰ Rules of Engagement accomplish the same goal, and are in line with this broader movement to avoid the over-tentative use of lethal force.

The 1993 court martial of U.S. Army Specialist James Mowris was also influential in institutionalizing this permissive attitude towards the use of lethal force. Mowris was convicted of firing a warning shot that killed an unarmed Somali who was running away from U.S. soldiers during Operation Restore Hope in Somalia.¹²¹ However, Martins states that the “investigation and court-martial conviction of Army Specialist Mowris, for instance, had a restraining influence on soldier responses to fire. The convening authority decided to set aside Specialist Mowris’ conviction for negligent homicide only after many soldiers received a strong signal.”¹²² Martins cites one Army colonel who clarified that many soldiers had interpreted this conviction in such a way as to make them reluctant to fire their weapons “even when fired upon for fear of legal action.”¹²³ There is no obvious reason why the conviction of Mowris would be interpreted in this way, but the Army was very responsive to these concerns. Despite Martins’ injunction that a soldier may not “base anticipatory force on a mere hunch that the person is hostile,”¹²⁴ the U.S. military has encouraged a liberal use of lethal fire and, since *Mowris*, has generally declined to prosecute soldiers who kill unarmed civilians in response to a perceived hostile intent.¹²⁵ The

¹¹⁹ *Rules of Engagement*, *supra* note 12 at 10.

¹²⁰ Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (New York: Little Brown and Company, 2009) at xvii-xx.

¹²¹ *United States v. Mowris*, GCM No. 68 (Fort Carson 4th Infantry Division (Mech) 1 July 1993) [hereinafter *Mowris*]. Mowris claimed that he did not intend to hit the victim, but to fire the shot on the ground as a warning.

¹²² *Rules of Engagement*, *supra* note 12 at 66. In the U.S. military justice system, a convening authority has a wide discretion to set aside a court martial conviction or sentence; see: *UCMJ*, *supra* note 12 at Article 60.

¹²³ *Ibid.*

¹²⁴ *Ibid.* at 119.

¹²⁵ This proposition is supported by a review of all cases that have come before the United States Court of Appeals for the Armed Forces from 1994-2012, which did not indicate any appellate cases concerning charges of murder or

Joint Chiefs Standing Rules of Engagement now codify the result obtained in *Mowris* into standard Rules of Engagement, stating that self-defense includes the authority to pursue or engage persons who are fleeing U.S. forces, “if they continue to demonstrate a hostile intent.”¹²⁶ Chapter Four, *infra*, will discuss several examples in which U.S. forces perceived a hostile intent from civilians who were fleeing, or who were disobeying orders, or failing to heed verbal warnings.

Standing Rules of Engagement also permit the use of lethal force when a particular group or individual has been declared hostile. The 1994 *Joint Chiefs SROEs* set out the present

manslaughter in which Rules of Engagement were in issue. Moreover, the Annual Reports for these years indicate that there was no increase in appeals generally, or in appeals involving the serious crimes of murder or manslaughter, after U.S. Forces became engaged in Afghanistan and then Iraq in 2001 and 2003. This supports a finding that there were few prosecutions involving these charges. See: Annual Reports of the United States Court of Appeals for the Armed Forces Pursuant to the Uniform Code of Military Justice, available at: http://www.loc.gov/rr/frd/Military_Law/Annual-Reports-CMA.html (accessed 25 November 2014). See also: *supra* Chapter One at note 218 and accompanying text, concerning how some of the accused involved in Objective Murray were offered plea bargains to avoid a trial involving the terms of their Rules of Engagement. Another example is the Haditha Massacre that took place in 19 November 2005 in Haditha, Iraq. On that day, a roadside bomb went off, killing one U.S. soldier and seriously injuring two others. The commanding officer, Staff Sergeant Frank Wuterich later stopped a vehicle at a nearby checkpoint, shooting five Iraqis from that vehicle, on the grounds that they were saboteurs, and therefore hostile. He then led his team to nearby houses, from which insurgent fire was suspected. They cleared these houses by machine gun fire, killing 19 Iraqi civilians, including women and young children. Seven defendants were found not guilty. See: Dan Whitcomb, “Haditha Charges Dropped Against Top Marine Officer” *Reuters* (17 June 2008), available at: http://web.archive.org/web/20080624014039/http://news.yahoo.com/s/nm/20080617/us_nm/usa_iraq_haditha_dc (accessed 25 November 2014). Only the case involving Wuterich went to a court martial, and on 4 January 2012, he pled guilty to dereliction of duty in return for having charges of assault and manslaughter dropped. See: Mary Slosson, “Marine Pleads Guilty, Ending Final Haditha Trial” *Reuters* (23 January 2012), available at: <http://www.reuters.com/article/2012/01/23/us-marine-haditha-idUSTRE80M1U620120123> (accessed 25 November 2014). The case was notable, as it raised controversial issues concerning the application of standard Rules of Engagement, an application which was deeply controversial within the U.S. military, and a trial of these issues was avoided with the plea bargain arranged with Wuterich. For interviews of U.S. military personnel discussing the issues surrounding Rules of Engagement, see also: Frontline, “Rules of Engagement” PBS (19 February 2008), available at: <http://www.pbs.org/wgbh/pages/frontline/haditha/> (accessed 25 November 2014).

¹²⁶ 2005 *Joint Chiefs SROEs*, *supra* note 113 at s. 4.(b). See also: *Tennessee v. Garner*, 471 U.S. 1 (1985), in which it was held that police may use lethal force against a fleeing suspect if they suspect him of having committed a felony, and have informed him of their intent to use force if he does not submit to custody. This law is not universal, even within U.S. jurisdictions. See: *R. v. Gosset* [1993] 3 S.C.R. 76, in which the Supreme Court of Canada overturned an acquittal for a police officer who shot and killed a fleeing suspect. See also: *Clegg*, *supra* Chapter One note 122 and accompanying text. White refers to this as the ‘fleeing felon’ rule, which he states had been in use since the Middle Ages, but which but was thought to have become “barbaric” and “outdated” by the American Law Institute in 1931; the Pennsylvania state legislature, for example, outlawed this practice in 1973 (Pennsylvania Crimes Code, 18 C.P.S.A. s. 508). See: Michael White, “Examining the Impact of External Influences on Police Use of Deadly Force Over Time” (2003) 27:1 Evaluation Rev. 50 at 54. American soldiers may therefore be applying a standard similar to that used in certain U.S. states that permits the killing of a fleeing suspect. On the other hand, these laws privilege security forces with rights to use lethal force that are not available to other persons, and have been abandoned in several jurisdictions on the grounds that they violate basic human rights.

definitions for ‘hostile act’¹²⁷ and ‘hostile intent’,¹²⁸ and also defined the concept of ‘declared hostile force’ as follows:

Once a force is declared hostile by appropriate authority, U.S. units need not observe a hostile act or a demonstration of hostile intent before engaging that force. The responsibility for exercising the right and obligation of national self-defense and declaring a force hostile is a matter of the utmost importance demanding considerable judgment of command. All available intelligence, the status of political decision, and the consequences for the United States must be carefully weighed. Exercising the right and obligation of national self-defense by competent authority is in addition to and does not supplant the right and obligation to exercise unit self-defense. The authority to declare a force hostile is limited as amplified in Appendix A to Enclosure A.¹²⁹

The Judge Advocate General’s *Operations Law Handbook* of 2011 states that paragraph 3 of Appendix A of Enclosure A of the 2005 *Joint Chiefs SROEs* now sets out the circumstances under which forces and individuals may be declared hostile,¹³⁰ but the provisions themselves are classified. This means that ordinary soldiers would not know how or why a particular force has been declared hostile, but they are tasked with attempting to identify and target them once this declaration has been made.

Declaring a force or individual to be hostile facilitates the use of anticipatory force, particularly force that is based upon status or group affiliation as opposed to demonstrated belligerent activities. As stated in the *Joint Chiefs SROEs*, persons declared hostile can be targeted irrespective of whether they are armed or engaged in hostile acts, or manifesting a hostile intent. The Judge Advocate General similarly states that, “[o]nce a force is declared to be ‘hostile’, U.S. units may engage it without observing a hostile act or a demonstration of hostile intent, *i.e.*, the basis for engagement shifts from conduct to status.”¹³¹ Martins also confirms that the rules for declared hostile forces are an exception to the general rule prohibiting anticipatory force. He states, “[d]o not base anticipatory force on a mere hunch that the person is hostile. On the other hand, if your commander informs you that a particular fighting force has been designated by higher head-quarters as ‘hostile’, or as ‘the enemy’, you may shoot that force or its

¹²⁷ 1994 *Joint Chiefs SROEs*, *supra* note 110 at para. 5(e).

¹²⁸ *Ibid.* at para. 5(f). The 1994 *Joint Chiefs SROE* definitions of ‘hostile act’ and ‘hostile intent’ are now embodied in the *Joint Chiefs Dictionary*, *supra* note 19 at 117.

¹²⁹ *Ibid.* at para. 6.

¹³⁰ The United States Army Judge Advocate General’s Legal Center and School, *Operational Law Handbook* (Charlottesville, VA: The United States Army Judge Advocate General’s Legal Center and School, 2011) at 75 [hereinafter *2011 Operations Law*].

¹³¹ *Ibid.*

equipment – on sight without identifying indicators of hostile intent.”¹³² As Colonel Max Maxwell states, discussing the concept of declared hostile force in the 2000 *Joint Chiefs’ SROEs*, “[o]nce declared hostile by a superior authority, enemy forces can be engaged and the soldier does not need to observe a hostile act or demonstration of hostile intent before engaging that force.”¹³³ Maxwell states that when targeting ‘declared hostile forces’ “the soldier is legally permitted to engage and kill the hostile force without regard to whether the lethality is reasonable from the perspective of the hostile party’s conduct.”¹³⁴ Janin clarifies the status-based nature of targeting declared hostile forces, stating that when “the ROE designate a civilian force hostile, the on-scene American servicemember will not have to perform the ‘direct part in hostilities’ analysis. Positive identification as a member of the civilian-belligerent group becomes the issue.”¹³⁵ Positive identification is difficult, he concedes, because “their status is not revealed until the point of attack.”¹³⁶ The UN High Commissioner for Human Rights has found that in Afghanistan, intelligence regarding the identity of enemy combatants was often faulty, stating, “international forces were often too uninformed of local practices, or too credulous in interpreting information, to be able to arrive at a reliable understanding of a situation.”¹³⁷ The criteria that soldiers use to identify and target hostile forces are therefore poorly defined and liable to misunderstanding and abuse.

There are several public laws in the U.S. that also define and set out the process for declaring forces as hostile, including the 2001 *Authorization to Use Military Force* (AUMF),¹³⁸ the 2009 *Military Commissions Act*,¹³⁹ and the 2012 *National Defense Authorization Act*.¹⁴⁰ The

¹³² *Rules of Engagement*, *supra* note 12 at 119.

¹³³ Mark “Max” Maxwell, “Rebutting the Civilian Presumption: Playing Whack-A-Mole Without a Mallet?” in Claire Finkelstein, Jens David Ohlin, and Andrew Altman, eds., *Targeted Killings: Law and Morality in an Asymmetric World* (London: Oxford University Press, 2012) [hereinafter *Targeted Killings*] 31 at 32 [hereinafter *Playing Whack-A-Mole*].

¹³⁴ *Ibid.*

¹³⁵ Albert S. Janin, “Engaging Civilian Belligerents Leads to Self-Defense/Protocol I Marriage” (2007) *Army Lawyer* 82 at 91 [hereinafter *Civilian Belligerents*].

¹³⁶ *Ibid.*

¹³⁷ United Nations Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Study on targeted killings*, UNHRC, 14th Sess., A/HRC/14/24/Add.6 (28 May 2010) at 25 [hereinafter *UN Special Rapporteur Report*], available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> (accessed 21 April 2013).

¹³⁸ *Authorization for Use of Military Force*, Pub. L. 107-40, 50 U.S.C. 1541 (14 September 2001) [hereinafter *2001 AUMF*]; see Appendix D at 18, p. 325.

¹³⁹ Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84, H.R. 2647, 123 Stat.

2001 *Authorization for the Use of Military Force* is an exercise by Congress in declaring members of Al-Qaeda and the Taliban to be hostile forces, and it has been used as the primary basis for targeting hostile forces by U.S. personnel in Iraq and Afghanistan. The *AUMF* authorizes “all necessary and appropriate force against those nations, organizations or persons he [the President of the United States] determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁴¹ The 2012 *NDAA* further authorizes the detention by U.S. forces of any person “who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.”¹⁴² This would authorize the killing of persons who had been members of such groups in the past, and who were not presently taking a direct part in hostilities.

The U.S. has come to use the *AUMF* to target persons affiliated with insurgent forces other than Al-Qaeda and the Taliban and who had no involvement with the September 11 attacks, indicating how amorphous and malleable such status-based concepts can be. The U.S. has used the *AUMF*, for example, to target and detain suspected members of the Somalian Al-Shabaab group on the grounds that Al-Shabaab is suspected of having ties to Al-Qaeda. The group was formed sometime around 2006-7 out of the Islamic Courts Union militia who sought to establish

2190 (28 October 2009) [hereinafter *2009 Military Commissions Act*]; see Appendix D at 21, p. 326.

¹⁴⁰ Title X, Subtitle D of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, H.R. 1540, 125 Stat. 1563 (31 December 2011) at ss. 1021, 1022 [hereinafter *2012 NDAA*]. Section 1021 (a) affirms the 2001 *AUMF*, *supra* note 140. Section (b) defines covered persons as “(1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks,” or “(2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.” This definition therefore could include civilians who do not themselves participate directly in hostilities, but who merely provide support or assistance, or who are deemed to be associated with such persons and/or groups. Covered persons may be tried under the *2009 Military Commissions Act*, *ibid.* at s. 1021 (b)(2), or may be transferred “for trial by an alternative court or competent tribunal having lawful jurisdiction,” at s. 1021 (b)(3). However, covered persons may be subjected to “Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force,” at s. 1021 (b)(1), as well as “Transfer to the custody or control of the person’s country of origin, any other foreign country, or any other foreign entity,” at s. 1021 (b)(4). These sections would authorize indefinite military detention, as well as rendition to third parties, respectively. Section 1022 (a)(1) stipulates that a person who is captured in the course of hostilities under the *2001 AUMF* “shall” be held in military custody pending disposition under the law of war. This provision does not apply to United States citizens, at s. 1022 (b)(1), or lawful resident aliens, at s. 1022 (b)(2).

¹⁴¹ *2001 AUMF*, *supra* note 138.

¹⁴² *2012 NDAA*, *supra* note 140.

a strict Wahabbi court system in Somalia.¹⁴³ This took place sometime after the Islamic Courts Union was defeated after the fall of Mogadishu on 28 December 2006, and Al-Shabaab is thought to have been formed out of loose-knits groups of nationalist Islamic militia that grew up in the slums of Mogadishu.¹⁴⁴ It is thus difficult to make the claim that the group existed as such at the time of the September 11th attacks, or that its fighters “planned, authorized, committed, or aided the terrorist attacks.”¹⁴⁵ Despite this, the U.S. has begun to detain suspected Al-Shabaab militants pursuant to the 2001 AUMF. In April of 2011, for example, Ahmed Abdulkadir Warsame was captured on a vessel in international waters in the Persian Gulf and taken to a U.S. Naval vessel, where he was interrogated for several months before being turned over to the FBI.¹⁴⁶ As U.S. Senator Carl Levin explains, “the approach taken by the administration in this case is consistent with the bipartisan detainee provisions included in the National Defense Authorization Act... These provisions would authorize military detention for enemy belligerents captured in the course of hostilities authorized by the 2001 Authorization for the Use of Military Force. That authority appropriately encompasses the detention of individuals like Warsame, who is suspected of participation in such hostilities.”¹⁴⁷ Since then, three more suspected members of Al-Shabaab have been reportedly detained under similar circumstances.¹⁴⁸ Therefore, the AUMF is being used to detain individuals outside of war zones in Iraq and Afghanistan on the grounds that they are suspected of being associated with Al-Qaeda, even when this association was not in existence until after 11 September 2001. Officials in the Obama administration and senior Department of Justice lawyers have reportedly queried whether many of the groups that the U.S. is targeting are, in fact, covered by the 2001 AUMF. Many of these groups, like Al-Shabaab, are nascent, or have

¹⁴³ Abdisaid M. Ali, “The Al-Shabaab Al-Mujahidin – a Profile of the First Somali Terrorist Organization,” paper for the Joint Kenya-Uganda Border Security and Management Workshop, Jingo, Uganda (April 28-29, 2008), available at: mercury.ethz.ch/serviceengine/Files/ISN/.../en/AlShabaab.pdf (accessed 2 March 2013).

¹⁴⁴ The Economist, “Somalia Islamists Half-Ready for Holy War” *The Economist* (12 October 2006), available at: http://www.economist.com/node/8031141/print?story_id=8031141 (accessed 2 March 2013).

¹⁴⁵ 2001 AUMF, *supra* note 138.

¹⁴⁶ Senator Carl Levin (MI), “Ahmed Warsame” Congressional Record 157:100 S4431 (daily ed. 7 July 2011). Senator Levin quotes Admiral William McRaven as stating that suspected enemy belligerents detained outside of the war zones of in Afghanistan and Iraq would likely be put on a naval vessel until “we can prosecute that individual in a U.S. court or we can return him to a third party country.”

¹⁴⁷ *Ibid.*

¹⁴⁸ Alice K. Ross, “Missing British-Somali Man Reappears in New York Court” *The Bureau of Investigative Journalism* (22 December 2012), available at: <http://www.thebureauinvestigates.com/2012/12/22/missing-british-somali-man-reappears-in-new-york-court/> (accessed 2 March 2013).

only tenuous links to Al-Qaeda – “associates of associates,” as one U.S. official described.¹⁴⁹ More recently, President Obama has used the *2001 AUMF* to justify current military actions against the Islamic State group in Iraq and Syria,¹⁵⁰ on the grounds that the group is an offshoot of Al-Qaeda, being originally formed as Al-Qaeda in Iraq, despite the fact that the central leadership of Al-Qaeda has disavowed the group.¹⁵¹ Officials are discussing whether to “turn counterterrorism policies adopted as emergency measures after the 2001 attacks into more permanent procedures that can sustain the campaign against al-Qaeda and its affiliates, as well as other current and future threats.”¹⁵² Although a new authorization for the use of military force is currently being debated, the present administration has continued to rely on the *2001 AUMF* to justify new military operations in Iraq and Syria against new and emerging groups of militants.

The U.S. *Military Commissions Act of 2009* also provides a definition of an ‘unprivileged enemy belligerent’,¹⁵³ and in doing so it provides perhaps the most complete definition in U.S. law as to the nature and scope of declaring forces to be hostile. The *Act*’s definition of the term ‘unprivileged enemy belligerent’ departs in a number of ways from the cognate concept of ‘civilian direct participation in hostilities’ that is found in the international law. The *Act* states:

- The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who –
- (A) has engaged in hostilities against the United States or its coalition partners;
 - (B) has purposefully and materially supported hostilities against the United States or its coalition partners’ or
 - (C) was a part of al Qaeda at the time of the alleged offence under this chapter.¹⁵⁴

This provision makes it clear that privileged belligerents are excluded from this definition, but it

¹⁴⁹ Greg Miller and Karen de Young, “Administration Debates Stretching 9/11 law to Go After New al-Qaeda Offshoots” *The Washington Post* (7 March 2013) [hereinafter *Stretching 911 Law*], available at: http://www.washingtonpost.com/world/national-security/administration-debates-stretching-911-law-to-go-after-new-al-qaeda-offshoots/2013/03/06/fd2574a0-85e5-11e2-9d71-f0feafdd1394_story.html (accessed 7 March 2013).

¹⁵⁰ Elias Groll, “Obama: I was against the Authorization for War before I was for it” *Foreign Policy* (10 September 2014), available at: http://thecable.foreignpolicy.com/posts/2014/09/10/obama_i_was_against_the_authorization_for_war_before_i_was_for_it (accessed 15 November 2014).

¹⁵¹ Charles Lister, “Al Qaeda Disavows ISIS” *The Brookings Institute* (3 February 2014), available at: <http://www.brookings.edu/research/opinions/2014/02/03-al-qaeda-rejects-isis-lister> (accessed 15 November 2014). The relationships between ISIS, Jabhat al-Nusra – another al-Qaeda affiliate fighting in the civil war in Syria – and the central leadership of Al-Qaeda remains fluid, and the *AUMF* has been interpreted broadly enough to encompass a wide variety of relations and associations between nascent militant groups.

¹⁵² *Stretching 911 Law*, *supra* note 149.

¹⁵³ *2009 Military Commissions Act*, *supra* note 139.

¹⁵⁴ *Ibid.* at s. 948a.(7); see Appendix D at 21, p. 326.

seeks to define non-state fighters in terms of their status as militants, rather than as civilians taking a direct part in hostilities according to Article 51(3) of *Protocol I*. Section C very closely mirrors the declaration of Al-Qaeda as a declared hostile force in the *AUMF*. Section A states that unprivileged enemy belligerents may be targeted at any time, whereas civilian direct participants are defined as such “only as long as and for such time as” they engage in hostilities.¹⁵⁵ Section A thus removes the temporal requirement found in the international law. Section B defines belligerency as encompassing activities that materially support hostilities, but that may not amount to direct participation in hostilities - such as civilians who provide information, or food and other supplies to militant groups, or civilians who have family and other social relationships with suspected members of militant groups.

The targeting of declared hostile forces as found in standard Rules of Engagement, the *2001 AUMF*, the *2009 Military Commissions Act* and the *2012 NDAA* move away from traditional conceptions of combatant as known in the law of belligerent qualification. As discussed in Chapter Two, the international laws of war only permit two status-based determinations: that of a civilian or a qualified belligerent. Those fighters who do not meet the criteria for qualified belligerency may only be targeted only “unless and for such time as they participate directly in hostilities.”¹⁵⁶ Instead, the definitions of a ‘declared hostile force’ and an ‘unprivileged enemy belligerent’ are status-based concepts, ones that do not fall either into the conduct-based concept of ‘civilian direct participation’, or the existing status-based concepts of ‘civilian’ or ‘qualified belligerent’. Targeting forces declared as hostile abandons the established approach of treating irregular belligerents as civilians taking a direct part in hostilities, and instead emphasizes their membership and association with a target group, which can include criteria not relate to participation in belligerent activities, such as social and political affiliations, or family or tribal groups.¹⁵⁷ Recall that in Mali, there is evidence that security forces have targeted persons on this

¹⁵⁵ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 [hereinafter *Protocol I*] at Article 51(3).

¹⁵⁶ *Ibid.*

¹⁵⁷ For example see: Anand Gopal, *No Good Men Among the Living: America, the Taliban, and the War Through Afghan Eyes* (New York: Metropolitan Books, 2014), particularly at 5-27, in which Gopal describes the ways in which U.S. tracked and targeted family members of the Haqqani networks leaders, even after they had pledged to support the new Afghan government. See also: supra note 58 and accompanying text, describing how U.S. forces in Iraq detained family members of suspected insurgents.

basis, including those who simply appeared, by name or dress, to be ethnically Tuareg.¹⁵⁸ This method of targeting is authorized by the above Acts, and by standard Rules of Engagement.

The self-defensive criteria embodied in standard Rules of Engagement that permit targeting civilians who engage in a hostile act, or who manifest a hostile intent may also permit the killing of many civilians who are not participating directly in hostilities. Commander Janin notes that the U.S. “interprets ‘direct part’ more broadly than the Additional Protocol signatories,” and through the “prism of self defense.”¹⁵⁹ In this way, standard Rules of Engagement are coming to replace the concept of ‘civilian direct participation’ with justifications for the use of lethal force that are based on the right of self-defense, while providing no criteria that would ensure that defensive force is used within the bounds prescribed by ordinary laws governing self-defense. The case studies in Chapter Four explore many instances in which lethal force was justified on defensive grounds, and it will be seen that these justifications are not in line with either Article 51(3) of *Protocol I* or the criteria governing defensive force as outlined in Chapter One.

3.1.2.1 *The Internationalization of Standard Rules of Engagement*

These command control doctrines have not remained confined to the U.S. military, but have been adopted by many leading Western powers, as practices that began in the U.S. have spread to its allies. Perry states that Rules of Engagement have become the primary means of regulating the use of force not only in counter-insurgency operations, but also in inter- and multinational peacekeeping and humanitarian operations.¹⁶⁰ This has been facilitated by the fact that counterinsurgent and humanitarian operations are often conducted jointly among Western nations, leading to a push to standardize command control doctrine and Rules of Engagement. A recent initiative by the International Institute of Humanitarian Law of Sanremo seeks to standardize Rules of Engagement across the international community.¹⁶¹ The Sanremo Institute, founded in 1970, provides courses and training, holds conferences, and conducts an annual

¹⁵⁸ *Mali: First Assessment*, *supra* note 70 at 9-10.

¹⁵⁹ *Civilian Belligerents*, *supra* note 135 at 89.

¹⁶⁰ *Striking the Balance*, *supra* note 20 at 4.

¹⁶¹ Dennis Mandsager, Alan Cole, Phillip Drew, and Rob McLaughlin, *Rules of Engagement Handbook* (Sanremo: International Institute of Humanitarian Law, 2009) [hereinafter *ROE Handbook*], available at: <http://www.usnwc.edu/getattachment/7b0d0f70-bb07-48f2-af0a-7474e92d0bb0/San-Remo-ROE-Handbook> (accessed 16 January 2013).

Round Table on contemporary issues in international humanitarian law. The Institute is funded through membership fees, course participant fees, and voluntary contributions from governments, organizations and individuals.¹⁶² The Sanremo *ROE Handbook* seeks to set ‘best practices’ with respect to Rules of Engagement in joint and multinational operations.¹⁶³ Although the major contributors to the *ROE Handbook* were limited to military law experts from a handful of NATO-member states - namely the U.S., Canada, Australia, and the United Kingdom¹⁶⁴ - the *ROE Handbook* “has been designed so that it can be used by any nation or group of nations without reference to security caveats or restrictions.”¹⁶⁵

Like standard U.S. Rules of Engagement, the *ROE Handbook* does not elaborate on the definition of a ‘hostile intent’, stating only that a demonstration of a hostile intent exists when “there is a reasonable belief that an attack or use of force is imminent, based on an assessment of all the facts and circumstances known at the time.”¹⁶⁶ The *ROE Handbook* states that indications of a hostile intent can include aiming or directing weapons, adopting an attack profile, closing within weapons release range, illuminating with radar or laser designations, and laying or preparing to lay naval mines, but also passing along targeting information and failing to respond to proactive measures, such as verbal queries, warnings, visual and noise signals.¹⁶⁷ Similar criteria are also found in the *2005 Joint Chiefs SROEs*, which further state that self-defense can be used to justify the pursuit and engagement of individuals who are fleeing U.S. forces, if they “continue to demonstrate a hostile intent.”¹⁶⁸ These criteria would have validated the actions of Mowris, for example, who killed an unarmed civilian because he fled and failed to heed verbal instructions from U.S. troops. They would also validate many of the checkpoint shootings in Iraq, discussed in Chapter Four, which have been justified by Coalition forces on the grounds that

¹⁶² “The Institute,” available at: <http://www.iihl.org/about-us/> (accessed 2 February 2016).

¹⁶³ *ROE Handbook*, *supra* note 161 at ii.

¹⁶⁴ *Ibid.* The lead authors of the *Sanremo ROE Handbook* are Professor Dennis Mandsager of the U.S. Naval War College, Major Phillip Drew of the Canadian Forces, Captain Rob McLaughlin of the Royal Australian Navy, and Commander Alan Cole of the United Kingdom Royal Navy.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.* at 22.

¹⁶⁷ *Ibid.* at 22-23. This is a further example of permitting security forces to use lethal force against suspected persons who flee or do not follow instructions. See: *supra* note 126 for a discussion of the ‘fleeing felon’ rule. This is a privilege afforded to security forces, and which ordinary persons do not possess. Such practices therefore represent a wielding together of the laws of war with the law enforcement paradigm in ways that increase the power of security forces beyond that which either paradigm alone would afford.

¹⁶⁸ *2005 Joint Chiefs SROEs*, *supra* note 113 at Enclosure A, s. 4.(b).

those killed failed to respond immediately to verbal instructions and in doing so manifested a hostile intent. Note also that these criteria are significantly broader in scope than the use of force rules that the U.S. employed in Vietnam. The proposition that a hostile intent can be manifest by civilians who ‘pass on information’ is also a significant widening of the circumstances under which civilians lose their immunity to attack; it opens the door to the targeting of civilians who are perceived as supporting insurgencies and is particularly liable to be abused by warring parties.¹⁶⁹

The Sanremo *ROE Handbook* also adopts the U.S. practice of declaring individuals and groups to be hostile. The *ROE Handbook* defines a declared hostile force as “any civilian, paramilitary, or military force or terrorist organization that has been declared hostile by the appropriate authority.”¹⁷⁰ The *ROE Handbook’s* draft Rules of Engagement suggest that a declared hostile force includes “a. Combatants of the armed forces of (SPECIFY nation), b. Civilians taking a direct part in hostilities, and/or c. (SPECIFY others e.g. group/vessel).”¹⁷¹ The Sanremo draft Rules of Engagement are thus framed very broadly and can potentially incorporate a very wide variety of groups and individuals quite apart from civilians taking a direct part in hostilities. Note that section b. closely mirrors the 2009 *Military Commissions Act* in its removal of the temporal limitation on targeting civilian participants only for such time as they do take part in hostilities;¹⁷² here, section b. would also permit such civilian participants to be declared as hostile, and then targeted even when not participating directly in hostilities.

The *ROE Handbook* does recognize that self-defense is an important component of standard Rules of Engagement, and that the exercise of individual self-defense in the course of combat is not intuitive but is conceived differently in different nations.¹⁷³ Exercising the inherent right of self-defense depends greatly on the rules that are chosen to govern it,¹⁷⁴ and this can materially change the character of the conflict. The 2005 *Joint Chiefs SROEs* state that reasonable efforts will be made to develop common Rules of Engagement in multinational forces, although

¹⁶⁹ See: *supra* note 7.

¹⁷⁰ *ROE Handbook*, *supra* note 161 at 82.

¹⁷¹ *Ibid.* at 37-8.

¹⁷² 2009 *Military Commissions Act*, *supra* note 139 at s. 948(a).

¹⁷³ *ROE Handbook*, *supra* note 161 at 3.

¹⁷⁴ Victor Tadros, *The Ends of Harm* (Oxford: Oxford University Press, 2011) at 261.

U.S. forces will only be bound by their own Rules of Engagement.¹⁷⁵ The *2005 Joint Chiefs SROEs* also state that Status of Forces agreements negotiated with host governments may never be interpreted in such a way that limits U.S. forces' inherent right of self-defense.¹⁷⁶ This suggests that the harmonization of Rules of Engagement with multi-national forces and host governments is likely to reproduce U.S. practices that displace the 'direct participation in hostilities' analysis.¹⁷⁷ It can also mean that killings undertaken according to the doctrine of inherent self-defense cannot be prosecuted under the domestic laws of a host nation as criminal offences, essentially giving foreign armed forces a blanket immunity for mistaken killings, as occurred with U.S. forces in Iraq.¹⁷⁸

Because individual nations, as well as NATO, have generally classified their Rules of Engagement, it cannot be known which nations have adopted the Sanremo *ROE Handbook* for use by their domestic armed forces. At present, the *Joint Chief's SROEs* and the Sanremo *ROE Handbook* are the two formulations of standard Rules of Engagement that have been made publicly available, and they are substantially similar to one another. The Sanremo *ROE Handbook* has also been translated into numerous languages, including Spanish, French, but also including the languages of many non-NATO member states, these being Bosnian, Arabic, Thai, Russian and Chinese.¹⁷⁹ The Sanremo Institute also promotes annual training seminars in these Rules of Engagement for high-ranking military officials from around the world.¹⁸⁰ An inquiry to

¹⁷⁵ *2005 Joint Chiefs SROEs*, *supra* note 113 at Enclosure A, s. 1.(f).2. This specifically includes rules regarding self defense.

¹⁷⁶ *Ibid.* at s. 1.(g).

¹⁷⁷ *Civilian Belligerents*, *supra* note 135 at 89, and *Playing Whack-A-Mole*, *supra* note 133.

¹⁷⁸ Coalition Provisional Authority, "Order No 17: Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq" CPA/ORD/20 June 2004 (20 June 2004), available at: http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (accessed 25 November 2014). CPA Order No. 17 states that Coalition forces, their employees, contractors and subcontractors, and their funds and property shall be immune from the Iraqi legal process, at s. 1.

¹⁷⁹ To date, the San Remo *ROE Handbook* has been translated into Arabic, Chinese, Thai, Spanish, French, Russian, and Bosnian. See: International Institute of Humanitarian Law, "San Remo Rules of Engagement Handbook" available at: <http://www.iihl.org/Default.aspx?pageid=page12090> (accessed 14 October 2013).

¹⁸⁰ The Sanremo Institute holds an annual workshop to teach these Rules of Engagement in September of each year. They recently held an "Asia Pacific Rules of Engagement Workshop" on 24-30 June 2013, training officials from Asia Pacific nations, during which "participants used the renowned 'San Remo Handbook on Rules of Engagement' to draft and brief ROE for a variety of missions." See: International Institute of Humanitarian Law Newsletter No. 54 (April-June 2013), available at: <http://www.iihl.org/iihl/Documents/54einglese.pdf> (accessed 14 October 2013). The Sanremo Institute regularly conducts training in the laws of armed conflict for "officers, military lawyer and other military personnel." See: Sanremo International Institute of Humanitarian Law, "Program of Activities 2012" available at: http://www.iihl.org/iihl/Documents/IIHL_cat2012_web2_2012.pdf (accessed 14 October 2013). The

Dr. Mandsagar, the now-retired lead author of the Sanremo *ROE Handbook* and the organizer of these training seminars, regarding which nations had attended these seminars garnered the response that the countries who had attended included those for whom the above translations had been done.¹⁸¹ Dr. Mandsager stated that, while he did not keep records of the nations who had attended the training seminars, the number was “quite large”, and that many countries used the *ROE Handbook* for training purposes, military exercises, and war games, particularly nations in South America.¹⁸² Therefore, many NATO and non-NATO member states alike have attended these seminars, and have been given translations of the *ROE Handbook* for domestic use, including not only many NATO Allies, but also the major non-NATO military powers of Russia and China. This indicates that knowledge concerning U.S. norms and practices has received widespread dissemination, but perhaps not yet widespread agreement. This leaves open a space for debate and engagement concerning alternative norms.

3.2 Civilians Who Take a Direct Part in Hostilities: The ICRC Expert Process

In 2003, the ICRC convened a panel of experts to address the growing uncertainty surrounding the circumstances under which states may lawfully target civilians during armed conflict. Out of a series of expert meetings held over the course of six years, the ICRC produced its *Interpretive Guidance*, one of the more significant interpretations of the law of belligerent qualification since the Diplomatic Conference that produced the *Protocols Additional*. The *Interpretive Guidance* addresses the question of when civilians can be said to be taking a direct part in hostilities and are therefore liable to be attacked, as well as the belligerent qualifications of private contractors and civilian government employees, who have been taking on greater roles during hostilities.¹⁸³ The ICRC's *Interpretive Guidance* presents its findings to be authoritative

October 2016 workshop on ROEs is designed for “commanders, legal advisors, and other staff officers, this course is must-have training for those who are involved in mission planning and the development of rules for using force during military operations.” See: “Rules of Engagement (ROE): Sanremo, 10-14 October 2016,” available at: <http://www.iihl.org/rules-of-engagement-roe/> (accessed 8 February 2016). The Sanremo ROE workshops are therefore aimed specifically at military personnel who are drafting and interpreting rules for use of force during military operations.

¹⁸¹ Dennis Mandsager, personal communication *via* e-mail (1 October 2013).

¹⁸² *Ibid.*

¹⁸³ *Interpretive Guidance*, *supra* note 2 at 995. The ICRC found that, as they are not members of the armed forces, they are to be treated as civilians. See also: *ICRC Commentary*, *supra* note 5 at 515, which closely followed the *Hague Regulations*, stating that all members of the armed forces and only members of the armed forces are to be considered as qualified belligerents.

interpretations of the customary laws of armed conflict, and hopes that its findings will be adopted by states.¹⁸⁴ It is therefore instructive to discuss the expert process by which the ICRC developed its *Interpretive Guidance*.

By 2003, distinguishing those civilians who are taking a direct part in hostilities – and are therefore liable to be attacked – had again become a significant and controversial issue in international humanitarian law, and this controversy became particularly acute with the post-9/11 War on Terror and the U.S.-led Coalition operations in Iraq and Afghanistan. The *Interpretive Guidance* lists a number of factors that have, in recent decades, contributed to increased confusion in determining whether civilians are taking a direct part in hostilities. Such factors include a number of governance reforms that have been instituted by the leading military powers:

[T]he increased outsourcing of traditionally military functions has inserted numerous private contractors, civilian intelligence personnel, and other civilian government employees into the reality of modern armed conflict. Moreover, military operations have often attained an unprecedented level of complexity, involving the coordination of a great variety of interdependent human and technical resources in different locations. All of these aspects of contemporary warfare have given rise to confusion and uncertainty as to the distinction between legitimate military targets and persons protected against direct attacks.¹⁸⁵

These new State practices had, in recent decades, sowed confusion as to the acceptable criteria for distinguishing belligerents from civilians.

One of the key legal questions asked by the ICRC's expert process was what conduct on the part of civilians amounts to direct participation in hostilities, such that the military may lawfully target those civilians.¹⁸⁶ A panel of forty to fifty experts was convened for five meetings held over the course of five years to address this and related questions. The final *Interpretive Guidance* was published in 2009. "In order to encourage open discussion on politically sensitive issues," the ICRC states, it had decided not to publish a list of the experts involved, or with what organizations they were affiliated.¹⁸⁷ The ICRC states that the resulting *Interpretive Guidance* "does not necessarily reflect a unanimous view or a majority opinion of the experts. It endeavors to propose a balanced and practical solution that takes into account the wide variety of concerns

¹⁸⁴ *Ibid.* at 992.

¹⁸⁵ International Committee of the Red Cross (ICRC), "Overview of the ICRC's Expert Process (2003-2008)" at 1 [hereinafter *Expert Process Overview*], available at: <http://www.icrc.org/eng/assets/files/other/overview-of-the-icrcs-expert-process-icrc.pdf> (accessed 14 October 2012).

¹⁸⁶ *Ibid.* at 2.

¹⁸⁷ *Ibid.* at 4.

involved[.]”¹⁸⁸ It is difficult, therefore, to know what interests and concerns were raised during the expert process, and how these were taken into account in the final *Interpretive Guidance*. This contrasts sharply with the public processes that the ICRC led at the Diplomatic Conferences of 1949 and 1977.

The ICRC published the agenda, including the names and affiliations of the presenters, in attendance at the first expert meeting and then declined to provide further information.¹⁸⁹ In some cases, expert participants disagreed so strongly with the draft produced by the ICRC that they asked that their names be removed as participants “lest inclusion be misinterpreted as support for the Interpretive Guidance’s propositions.”¹⁹⁰ Of the published presenters from the first expert meeting, there were two professors of international law,¹⁹¹ one representative each from the American and British military,¹⁹² three legal representatives from the ICRC,¹⁹³ one counsel from the T.M.C. Asser Institute,¹⁹⁴ and one representative from the International Commission of Jurists.¹⁹⁵ There were no presenters from outside of northern Europe and the United States, nor any representatives of non-governmental organizations, nor non-state organized armed groups, nor civilians in conflict zones – some of whom had been represented at the Diplomatic Conference that produced the *Protocols Additional* in 1977 - nor did they follow standard diplomatic protocols and record keeping, as had been done at the earlier conferences.¹⁹⁶ The ICRC notes that the *Interpretive Guidance* is not binding law, but hope it to be persuasive for

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.* See also: Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis” (May 2010) 1 Harv. Nat’l Sec. J. 5 at 6 [hereinafter *A Critical Analysis*]. Professor Schmitt was one of the participants in the Expert Process who asked that his name be removed for this reason, *ibid.*

¹⁹¹ Horst Fischer, Academic Director of the Institute for International Law of Peace and Armed Conflict, Ruhruniversitat, Germany, and Michael Schmitt, Professor of International Law, George C. Marshall European Centre for Security Studies, Germany. See: International Committee of the Red Cross (ICRC), “Direct Participation in Hostilities Under International Humanitarian Law,” Agenda of the Meeting (2 June 2003), available at: <http://www.icrc.org/eng/assets/files/other/2003-01-agenda-2003-icrc.pdf> (accessed 14 October 2012).

¹⁹² Charles Garraway, Colonel, ALS2, Directorate of Army Legal Services, United Kingdom, and William K. Leitzau, Special Assistant to the General Counsel, U.S. Department of Defense, *ibid.*

¹⁹³ Jean-Philippe Lavoyer, Head of the Legal Division, ICRC, Hans-Peter Gasser, former Legal Advisor ICRC, and Jelena Pejic, Legal Advisor ICRC, *ibid.*

¹⁹⁴ Avril McDonald, Head, section IHL/ICL, T.M.C. Asser Institute, *ibid.* The T.M.C. Asser Institute is a for-profit legal research and consultancy institute who co-chaired the expert process with the ICRC.

¹⁹⁵ Louise Doswald-Beck, Secretary General, International Commission of Jurists, *ibid.*

¹⁹⁶ *ICRC Commentary*, *supra* note 5 at xxxiii.

states and non-state actors;¹⁹⁷ at the same time, the process by which it chose its participants and produced its interpretations can be seen to be closed and non-transparent, and the process itself was highly contentious and politicized.

Under the international humanitarian law, civilians who take a direct part in hostilities possess no belligerent privileges: they may be targeted only for such as time as they participate directly in hostilities; outside of this, they may be detained and prosecuted criminally for their participation, but they may not be summarily killed.¹⁹⁸ Such acts had led to the contentious debate over the German armed forces' treatment of the *francs-tireurs*.¹⁹⁹ This had also been the finding at the *German High Command Trial* at Nuremberg,²⁰⁰ and the international community's rejection of such acts had led to the adoption of the expansive protections contained in Common Article 3 of the *Geneva Conventions*.²⁰¹ It should also be recalled that in the U.S. case of *Ex parte Quirin*, agents of the German navy were sentenced to execution after being prosecuted for preparing to commit acts of sabotage on U.S. territory; they were not subjected to extra-judicial or summary killing.²⁰² After World War II, the *Fourth Geneva Convention* continued to treat the issue of civilian direct participation in acts of sabotage in international armed conflict as a criminal matter that may be prosecuted by an occupying power.²⁰³ For those civilians who do make an attempt on the life and limb of members of the occupying forces, there are strict limits on when the death penalty can be applied. The death penalty is only available "provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began," and only for "espionage", "serious acts of sabotage", and "intentional offences which have caused the death of one or more persons."²⁰⁴ Article 6 of *Protocol II* affords similar guarantees to those subjected to judicial processes during non-international armed conflict, including a requirement that "[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed

¹⁹⁷ *Interpretive Guidance*, *supra* note 2 at 992.

¹⁹⁸ *Ibid.* at 1045.

¹⁹⁹ *Supra* Chapter Two at s. 2.3.2.

²⁰⁰ *German High Command Trial*, *supra* note 7 at 83; see also: *supra* Chapter Two note 294 and accompanying text.

²⁰¹ *1958 Commentary*, *supra* note 7 at 10, 38.

²⁰² *Ex parte Quirin*, 317 U.S. 1 (1942).

²⁰³ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 at Article 68.

²⁰⁴ *Ibid.*

conflict.”²⁰⁵ The *Interpretive Guidance* thus represents a shift away from affording non-state fighters judicial processes and amnesty for acts constituting their belligerency, and towards validating the discretion of military authorities to target even suspected irregular belligerents with lethal force. This, in turn, evidences a shift away from the approach taken by the ICRC in the post-World War II era, during which the ICRC attempted to incorporate irregular belligerents into the laws of armed conflict - either by qualifying them as belligerents, or by seeking similar treatment for them as that afforded to qualified belligerents, so that, in the words of Jean Pictet, “many contemporary conflicts will be governed by law.”²⁰⁶

3.2.1 Continuous Combat Function

The ICRC began its expert process by acknowledging the difficulties inherent in distinguishing between combatants and civilians, and the problems that erroneous killings generate in armed conflicts. The ICRC recognized that the expert process was in part an attempt to resolve the problem of mistaken killings, stating that, “civilians are more likely to fall victim to erroneous or arbitrary targeting, while armed forces – unable to properly identify their adversary – run an increased risk of being attacked by persons they cannot distinguish from the civilian population.”²⁰⁷ The ICRC notes that direct participation in hostilities is not defined in treaty form, and that a clear picture does not emerge from state practice or international jurisprudence.²⁰⁸ The ICRC thus tasked its experts with explaining the precise scope of the meaning of Article 51(3) of *Protocol I*, which formulates the principle of distinction by stating only that “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.” The *Interpretive Guidance* divides direct participation in hostilities into two categories: the first consists of civilians who participate sporadically in hostilities, and who may only be targeted for such time as they do so;²⁰⁹ the second consists of those fighters who belong to organized armed groups, and who perform a ‘continuous combat function’ on behalf of those

²⁰⁵ *International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 at Article 6(5).

²⁰⁶ *ICRC Commentary*, *supra* note 5 at xxxv.

²⁰⁷ *Interpretive Guidance*, *supra* note 2 at 993.

²⁰⁸ *Ibid.* at 1012.

²⁰⁹ *Ibid.* at 1008.

groups. These fighters may be targeted at any time during the hostilities.²¹⁰

The ICRC begins its analysis by stating that there are three mutually exclusive groups in a non-international armed conflict: civilians, armed forces, and organized armed groups. Performing a continuous combat function is synonymous with membership in an organized, but unqualified, armed group. The ICRC was clear that members of organized armed groups are not civilians participating directly in hostilities, and therefore do not enjoy the immunity from attack outlined in Article 51(3) of *Protocol I*. The ICRC states:

[T]he restriction of loss of protection to the duration of specific hostile acts was designed to respond to spontaneous, sporadic or unorganized hostile acts by civilians and cannot be applied to organized armed groups.²¹¹

The *Interpretive Guidance* has therefore separated organized armed groups and removed them from the definition of ‘civilian direct participants in hostilities’. This approach is in opposition to the meaning and purpose of Common Article 3 which the *1958 Commentary* states was intended to apply to all actors in situations of armed conflict, and specifically to prevent states from treating insurgents as common criminals, and outside of the law.²¹²

“The decisive criterion,” the ICRC states, “for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”²¹³ Such fighters are liable to be attacked at any time during the conflict, so long as they continue to perform a continuous combat function on behalf of an organized armed group.²¹⁴ Visible signs that an armed group is an organized one include such signifiers as wearing uniforms, carrying weapons, and repeated involvement in armed activities.²¹⁵ However, the difficulty in identifying such irregular fighters lies precisely in the fact that they frequently do not manifest the visible markers of such organization. Moreover, a fighter must exhibit repeated involvement in combat operations in order to fall into this category. It is difficult to see how a soldier would or could have evidence of what a particular non-state fighter

²¹⁰ *Ibid.* at 1009. The ICRC limited this concept to cases on non-international armed conflict, declining to state what their position would be in an international armed conflict, or whether counterinsurgent operations or foreign internal defense, of the kind NATO and Coalition forces undertook in Iraq and Afghanistan would qualify as an international or non-international armed conflict. See: *supra* Chapter One note 32.

²¹¹ *Ibid.* at 1036.

²¹² *1958 Commentary*, *supra* note 7 at 26.

²¹³ *Interpretive Guidance*, *supra* note 2 at 1007; see also Appendix D at 22, p. 326.

²¹⁴ *Ibid.* at 1034.

²¹⁵ *Ibid.* at 1008.

has done at other times and places. The ICRC is attempting to capture the essence of a ‘militant’ or an ‘insurgent’, but this definition is extremely difficult to apply in practice.

There is a danger that states will instead choose to use impermissible criteria for defining and then determining membership in organized armed groups - criteria that are much easier to apply, but that are over-inclusive. The ICRC attempted to address this problem by excluding certain activities from their definition of ‘combat function’. The ICRC stated that the planning, preparation, and execution of hostile acts constitutes a continuous combat function, but political, administrative, and non-combat roles do not.²¹⁶ Mere attendance at training camps does not, in and of itself, qualify one as performing a continuous combat function.²¹⁷ The ICRC specifically stated that recruiters, trainers, financiers and propagandists, while contributing to the war effort, were civilians, and so may not lawfully be targeted,²¹⁸ on the grounds that these were not combat functions. The *Interpretive Guidance* states that, “the concept of organized armed group refers to non-State armed forces in a strictly functional sense. For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness, or abuse.”²¹⁹

The ICRC’s separation of those who perform a continuous combat function off from civilians who perform hostile acts sporadically and not as part of an organized armed group is a novel concept. Watkin, for example, has criticized the *Interpretive Guidance* on the grounds that its ‘continuous combat function’ introduces a novel category of combatant quite apart from civilians and qualified belligerents,²²⁰ while providing few workable criteria to distinguish this category of combatant.²²¹ He states that in “effectively creating a third category of participant in armed conflict,” and one that is difficult to explain or justify, it represents a departure from the

²¹⁶ *Ibid*

²¹⁷ *Ibid*. See e.g.: *Al-Adahi v. Obama*, 613 F. Supp. 3d. 1102 (D.C. Cir. 2010), *infra* Chapter Four at note 190 and accompanying text; Al-Adahi was ordered to continued detention after a *Boumediene* hearing in which one of the findings was that he had attended an Al-Qaeda training camp at some time prior to the conflict in Afghanistan.

²¹⁸ *Ibid*.

²¹⁹ *Ibid*. at p. 1007.

²²⁰ Kenneth Watkin, “Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance” (2009) 42:3 N.Y.U. J. Int’l L. Pol. 641 at 643 [hereinafter *Opportunity Lost*]. Watkin states that these criteria for belligerency are “unique and are not found in existing treaty or customary law.”

²²¹ *Ibid*. at 643. Watkin finds that the ICRC has provided few functional criteria for making distinctions between civilians and different kinds of belligerents, that the ICRC’s reasoning generally “lacks clarity and precision” and does “not survive critical analysis.” For these reasons, he concludes that the ICRC’s contributions do not solve the longstanding and complex problem of distinction in armed conflict.

international law, and from the ICRC's previous position on the protection of irregular fighters.²²²

The ICRC appreciates the difficulties inherent in applying these standards. The *Interpretive Guidance* states:

In operational reality, it would be impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistent recurrent basis and whether they have the continued intent to do so again.²²³

Individuals' past actions, and subjective intentions as to future behavior, are neither readily observable nor objectively-determined criteria, and it is for this reason that they ought not to form part of the criteria for when an individual has lost their immunity from attack. Moreover, the ICRC's concept of 'continuous combat function' only applies in non-international armed conflicts, thus sowing further confusion; the treatment of irregular fighters has certainly caused significant controversy in international armed conflicts, and it is difficult to understand why states would not wish to apply these more permissive rules there as well, or how states could apply different rules in a mixed conflict.²²⁴

The ICRC's concept of 'continuous combat function' shares some similarities with standard Rules of Engagement that define the targeting of declared hostile forces. While both concepts are attempting to capture a definition of when an individual can be said to be part of an organized militant or insurgent group, recall that any individual or group can be declared a hostile force²²⁵ - and not merely organized armed groups - making this a much more permissive and flexible basis for targeting. For these reasons, two of the American representatives at the expert process preferred the U.S.'s own rules over the ICRC's criteria.²²⁶ The ICRC's expert process therefore represents a lost opportunity to clarify the law in this area, and achieve widespread

²²² *Ibid.* at 693.

²²³ *Interpretive Guidance*, *supra* note 2 at 1014.

²²⁴ If members of non-state armed groups participating in an international armed conflict are not 'civilians directly participating in hostilities' as the ICRC has defined them, and they are not performing a 'continuous combat function', then they would appear to have *no* status in international armed conflict, a situation that the ICRC does not address in the *Interpretive Guidance*. This is a further reason to reject the ICRC's formulation.

²²⁵ Note the definition in the Sanremo *ROE Handbook*, *supra* note 161 at 38, which provides the option to "specify other". This opens up the possibility that legal persons, such as vessels, corporations or organizations, could be declared hostile, as well as groups of persons and individual civilians.

²²⁶ *A Critical Analysis*, *supra* note 190.

acceptance on norms that best protect civilians.²²⁷

3.2.2 Interpretive Guidance Criteria for Civilian Direct Participation

For those civilians who do not perform a continuous combat function on behalf of an organized armed group but who nevertheless participate directly in hostilities, the ICRC has generated several criteria for when they have lost their immunity from attack. These standards, too, suffer from conceptual and operational flaws. Unlike those who perform a continuous combat function, the *Interpretive Guidance* states, “the notion of direct participation in hostilities does not refer to a person’s status, function, or affiliation, but to his or her engagement in specific hostile acts.”²²⁸ The ICRC has proposed certain limiting criteria to determining when civilian direct participation forfeits the immunity normally enjoyed by civilians. There must be a certain threshold of harm, there must be direct causation between the act and that harm, and there must be a belligerent nexus, each of which will be discussed in turn.

3.2.2.1 Threshold of Harm

In order to constitute a hostile act, the act must reach a threshold of harm, which the ICRC defines as follows:

In order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations of a party to an armed conflict, or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.²²⁹

The first criteria, that an act would be sufficient to forfeit the individual’s life if it would adversely affect the military operations of a party to an armed conflict, renders the ICRC’s notion of civilian direct participation over-inclusive, as does the permission to target civilian participants who merely threaten objects and property. The ICRC recognizes that this would include a number of *unarmed* activities, such as those “restricting or disturbing deployments, logistics and communication.”²³⁰ This also includes any activities that would deny the military “the use of certain objects, equipment, and territory,” including disrupting computer networks and clearing

²²⁷ *Opportunity Lost*, *supra* note 220.

²²⁸ *Interpretive Guidance*, *supra* note 2 at 1014.

²²⁹ *Ibid.* at 1016.

²³⁰ *Ibid.* at 1017.

landmines and unexploded ordnance.²³¹ Defining direct participation in terms of harm to military operations in this way captures many lawful and peaceful activities, including political expressions, protesting unlawful military activities, protesting detentions, expressing opinions through media, and protecting cultural and religious sites. Civilians might clear land and naval mines to protect their lives and secure their livelihood, and it would be wrongful and undesirable to use lethal force to prevent them from doing so.

The ICRC's criteria could therefore lead to an untenable situation in which individuals could be held to be participating directly in hostilities for engaging in unarmed and lawful activities, as well as political expressions and acts of civil disobedience. There are a number of organizations, for example, that are devoted to clearing land mines and destroying unexploded ordnance in conflict zones,²³² and the ICRC has not provided any justification as to why such acts would not constitute direct participation as they have defined it. In one case in the United Kingdom, a group of anti-war activists attempted to sabotage - and therefore deny to the military the use of - certain equipment at a military base in Fairfield, Gloucestershire, that was to be used in the course of the 2003 invasion of Iraq.²³³ They raised the defense that their actions were necessary to prevent the commission of unlawful acts, *i.e.* murder and crimes of aggression by the British government.²³⁴ Although this defense failed, the activists were given only token sentences in the form of conditional discharges. The criteria as outlined in the *Interpretive Guidance* could be used by states to justify targeting activists engaged in similar political acts, and there is little in the *Interpretive Guidance* itself that would clearly prevent this.

While the participants at the expert process generally agreed that certain conduct has traditionally been excluded from the definition of civilian direct participation in hostilities - including "war-sustaining" activities such as civilians working in a munitions factory, civilians engaged in media or propaganda activities, political activities, as well as agricultural production and food preparation - there was disagreement concerning other, closely related activities.²³⁵

²³¹ *Ibid.*

²³² See e.g., the Halo Trust, available at: <http://www.halotrust.org/>; and the Mines Advisory Group, available at: <http://www.maginternational.org/>, which was a co-laureate of the 1997 Nobel Peace Prize.

²³³ *R. v. Jones*, [2006] U.K.H.L. 16, [2007] 1 A.C. 1 136.

²³⁴ *Ibid.* at 152.

²³⁵ Michael Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements" (2009) 42:3 N.Y.U. J. Int'l L. & Pol. 697 at 718 [hereinafter *The Constitutive Elements*].

Michael Schmitt, who was present as one of the U.S.'s expert participants in the ICRC expert process, advocates for the inclusion of activities such as involvement in logistics, deployments, and communications; clearing mines; computer network attacks; collecting information; and activities that attempt to deny to a belligerent party the ability to target certain objects, equipment or territory – a category often termed 'human shields'.²³⁶ In characterizing the above activities as civilian direct participation, Schmitt relies on the ICRC's principle that it is not the nature or quantum of harm that determines participation, but the fact that the activity is intended to adversely affect the military operations of a party to the conflict.²³⁷ From this, Schmitt argues that human shields ought to constitute lawful targets of attack,²³⁸ and that the act of shielding is itself unlawful under international humanitarian law.²³⁹ Schmitt also takes issue with civilians who demand that troops be withdrawn, or that prisoners be released, stating that such activities have caused a great deal of difficulty for national militaries waging counterinsurgent campaigns in Iraq, Afghanistan, and Israel.²⁴⁰ Schmitt has also raised the issue of food production, using the example of an army cook who may lawfully be attacked at all times, whereas "his or her counterpart in an organized armed group may be attacked only if he or she directly participates and then only for such time as the participation occurs."²⁴¹ Schmitt therefore argues that to exclude these criteria would confer greater protection upon irregular fighters than that afforded to regular armed forces.²⁴² Of course, qualified belligerents receive a number of privileges in return for their liability to be attacked, including immunity from prosecution for acts constituting their belligerency as well as prisoner of war treatment if captured; therefore, they are not placed on an equal legal footing with unqualified belligerents. International humanitarian law, he states, involves a delicate balance between military necessity and humanity, and that the ICRC "must remain sensitive to the interests of states in conducting warfare efficiently."²⁴³ Here, he states that the ICRC's interpretations "skew the balance towards humanity", and "exaggerate humanitarian

²³⁶ *Ibid.* at 716.

²³⁷ *Ibid.*

²³⁸ *Ibid.* at 732.

²³⁹ *Ibid.* at 734.

²⁴⁰ *Ibid.* at 724.

²⁴¹ *A Critical Analysis*, *supra* note 190 at 23.

²⁴² *Ibid.* at 44.

²⁴³ *Ibid.* at 6.

considerations at the expense of military necessity.”²⁴⁴

There is therefore much dispute over which activities constitute direct participation in hostilities, and the ICRC’s *Interpretive Guidance* did not provide a principled approach as to why certain activities ought to be included or excluded. For example, the dangers of characterizing human shields as combatants in an armed conflict who are liable to be attacked is illustrated by one example from the initial U.S. invasion of Iraq. Not only are shielding activities often lawful,²⁴⁵ as well as non-violent, forms of political expression, but killing those who participate in these activities can have serious negative consequences for an army’s counterinsurgency efforts. Ahmed Abu Ali related to journalist Mark Kukis the story of a human shield he participated in in March 2003 during the U.S. forces’ invasion of Karbala. Rumors that U.S. forces might enter the shrine of Imam Hussein had caused a large sit-in to take place in front of the shrine, with protesters passing out food and water.²⁴⁶ Abu Ali and a local cleric spoke to a U.S. officer, asking him not to enter the shrine, as it was considered a holy place for them. The U.S. officer informed them that they suspected the shrine of being used as a base for militant groups, and they proceeded to advance a tank with a raised gun upon the shrine.²⁴⁷ This prompted a large human shield to form around the shrine, and U.S. forces eventually withdrew the tank.²⁴⁸ Abu Ali asks, “What kind of people would force a standoff with unarmed civilians? How could they insult our dignity by threatening such a holy place right in front of us? We are human beings after all. Aren’t we?”²⁴⁹ In this case, the human shields were protecting a cultural and religious

²⁴⁴ *The Constitutive Elements*, *supra* note 234 at 714.

²⁴⁵ *Protocol I*, *supra* note 155 at Article 51(7), which deals with human shields, stating that “The presence or movement 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 attack 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 attack or to shield military operations.” *Protocol I* also protects from shielding only those objectives that are already lawful military objectives; it does not prohibit the shielding of protected objects or areas that are immune from military operations. Furthermore, Article 51(8) states that “Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.” Therefore, even when civilians are being used to shield lawful military objectives, Parties remain obligated to respect their immunity. Civilians who are shielding are not dealt with in *Protocol I* as though they were participating directly in hostilities.

²⁴⁶ Mark Kukis, *Voices from Iraq: A People’s History, 2003-2009* (New York: Columbia University Press, 2011) at 8-9 [hereinafter *Voices from Iraq*].

²⁴⁷ *Ibid.* at 10.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.* at 11.

site that would normally be protected from attack under international humanitarian law.²⁵⁰ Activities such as forming human shields or calling for the release of prisoners or the withdrawal of troops are essentially political activities, and may very often be directed towards protesting military activities that are themselves unlawful. Not only would it be a significant blow to the international humanitarian law to subject persons engaged in non-violent or lawful activities to lethal force, but such actions are also likely to cause harm to a party's war effort. In this case, Abu Ali, who was initially very supportive of the U.S. invasion, joined the Al-Mahdi militia and participated in the insurgency as a result of this incident.²⁵¹

Gathering information or targeting computer networks also fall under the category of "war sustaining" activities that do not necessarily pose an imminent threat of wrongful death or serious bodily harm. In fact, many of the activities raised by Schmitt are amenable to be characterized as political in nature and, even when they stand in the way of military authorities achieving their objectives, they are often legitimate and worthy of protection under human rights laws guaranteeing freedom of expression. Clearing mines, engaging in non-violent forms of protest, and forming human shields might all fall under the category of protected acts of expression. Civilians engaged in agriculture and food production, although often crucial to a war effort, are also protected under existing international humanitarian laws.²⁵² The cook for a militant fighter may well be the fighter's female family members, who are performing the cooking inside of a civilian home as part of their daily activities. If the above views were to prevail, civilians and family members providing such supporting services would thereby render themselves liable to be attacked. Under the *Geneva Conventions*, activities that do violate the law may be prosecuted in

²⁵⁰ Article 52 of *Protocol I*, *supra* note 155, protects civilian objects from attack, defines legitimate military objectives, and provides that, in case of doubt, objects are presumed to be civilian objects. Article 53(a) protects from attack "historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples." Unlike Article 52, Article 53 provides no exception to this rule when such objects are used for a military purpose. Article 8(2)(b)(ix) of the *Rome Statute*, *supra* Chapter One at note 30, criminalizes the act of "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives." The shrine of Imam Hussein in Karbala would certainly be considered an historic monument, as well as a cultural and religious site.

²⁵¹ *Voices from Iraq*, *supra* note 246 at 11.

²⁵² *Protocol I*, *supra* note 155, at Article 54(2), states that it is "prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."

the ordinary manner under domestic laws in force, or under the laws of an occupying power, and do not justify the use of lethal force.²⁵³ On the other hand, one does not normally forfeit one's life by performing lawful activities. This is consistent with ordinary domestic laws concerning the necessity to use defensive force, as well as the international laws of war.

The situation is even more serious for humanitarian and relief organizations, who have long required special protection under the international law from states who have tended to view their activities as providing support for insurgent and rebel groups. Jean Pictet noted that this was already a long-standing issue in the *1958 Commentary*, when he states that governmental authorities had tended to “look upon relief given by the Red Cross to war victims on the other side as indirect aid to guilty parties.”²⁵⁴ This had certainly been the case during the Franco-Prussian War, one of the first armed conflicts in which the Red Cross participated. Article 5 of the *First Geneva Convention* gave immunity to those entitled to wear the distinctive Red Cross armband, but also provided that all “the inhabitants of the country who bring help to the wounded shall remain free... any wounded combatant receiving shelter and care in a house shall ensure its protection.” Boissier states that villages facing capitulation to the advancing Prussian forces distributed the armbands “with boundless prodigality.”²⁵⁵ Many ordinary civilians, “who cared for, or who wanted to appear to care for the wounded decorated themselves with an armband of their own making... Those who wore it simply to avoid active service were so numerous that they were called ‘*francs-fleurs*’.”²⁵⁶ This demonstrates a strong desire on the part of civilians to do what they feel is necessary to preserve their immunity from being attacked by advancing forces. For their part, the Prussians accused many persons who claimed neutrality under the auspices of the Red Cross as being involved in espionage, combat, and looting.²⁵⁷ As a result, German forces afforded little deference to those sporting the white flag of truce or even the Red Cross, who often suffered “the most regrettable consequences” thereby.²⁵⁸ This attitude can also be seen in present-day conflicts. For example, al-Nusra Front rebels in Syria's civil war attacked

²⁵³ *Supra* note 203 and accompanying text.

²⁵⁴ *1958 Commentary*, *supra* note 7 at 27.

²⁵⁵ Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross* (Geneva: Henry Dunant Institute, 1985) at 252 [hereinafter *From Solferino*].

²⁵⁶ *Ibid.* referencing the first-hand account of Dr. Le Fort.

²⁵⁷ *Ibid.* at 252-3.

²⁵⁸ *Ibid.* at 253.

a group of peacekeepers from the United Nations Disengagement Observer Force at a border checkpoint in the Golan Heights in August 2014 because they were thought to be colluding with the Syrian government.²⁵⁹ At about the same time, the neutrality of several facilities in Gaza run by the United Nations Relief and Works Agency (UNRWA) was violated when Hamas placed weapons in evacuated schools. This was followed by attacks by Israel on several UNRWA schools on the grounds that UNRWA was providing material support to insurgents, killing dozens of civilians and eleven UN employees, and deepening long-standing tensions between Israel and UNRWA.²⁶⁰ On 3 October 2015, U.S. forces bombed a hospital in Kunduz, Afghanistan being operated by Médecins Sans Frontières (MSF), killing 42 and injuring 37 staff and patients. The U.S. has been inconsistent in its explanations for the incident, initially stating that it had come under fire, and Representative Duncan Hunter of the House Armed Services Committee has stated that he received reports that the hospital was attacked because local Afghan forces accused it of having been overrun by Taliban militia.²⁶¹ Later that month, air strikes in Yemen carried out by the Saudi-led coalition destroyed another MSF-run hospital in the Haydan District in the Saada Province, leaving an area of 200,000 people without access to medical care.²⁶² Eva Wortel has documented a number of instances since the end of World War II when the Red Cross has been accused of aiding and abetting a belligerent party by providing shelter and relief to civilians, for example, by providing aid during the famine in Biafra during the Nigerian Civil War (1967-1970),²⁶³ providing aid to Rwandan refugees in Zaire after the 1994

²⁵⁹ Diaa Hadid and Oliver Teves, “Syria Rebels Attack UN Peacekeepers in Golan Heights” *Associated Press* (30 August 2014), available at: http://www.huffingtonpost.com/2014/08/30/syria-un-peacekeepers-attacked_n_5740840.html (accessed 7 October 2014). UNDOF Forces were stationed in the Golan Heights at the end of the 1973 Yom Kippur War to oversee the truce between Israel and Syria.

²⁶⁰ See e.g.: Harriet Sherwood, “UN Dragged into Conflict Between Israel and Hamas in Gaza” *The Guardian* (4 August 2014), available at: <http://www.theguardian.com/world/2014/aug/04/un-dragged-conflict-israel-hamas-gaza> (accessed 7 October 2014).

²⁶¹ Ken Dilanian, “MSF Hospital Bombing: US Servicemen Contradict Military Explanation for Kunduz Airstrike” *The Independent* (10 December 2015), available at: <http://www.independent.co.uk/news/world/americas/msf-hospital-bombing-us-servicemen-contradict-military-explanation-for-kunduz-air-strike-a6767921.html> (accessed 3 February 2016).

²⁶² Médecins Sans Frontières, “Yemen: MSF Hospital Destroyed by Airstrikes” Médecins Sans Frontières (27 October 2015), available at: <http://www.doctorswithoutborders.org/article/yemen-msf-hospital-destroyed-airstrikes> (accessed 3 February 2016).

²⁶³ Eva Wortel, “Humanitarians and their Moral Stance in War: The Underlying Values” (2009) 91:876 *Int’l Rev. Red Cross* 779 at 794.

genocide,²⁶⁴ as well as providing humanitarian relief to civilians in the recent conflicts in Iraq and Afghanistan.²⁶⁵ There is therefore a very real - and long-recognized - danger that individuals working for human rights and relief agencies will be considered as engaging in activities “likely to adversely affect the military operations of a party to an armed conflict,” and they may be and have been targeted on that basis. The criteria outlined by the ICRC in the *Interpretive Guidance* provide no workable criteria for preventing this, and they run counter to the earlier position of the Red Cross when they were negotiating the final text of the *Geneva Conventions* of 1949.

3.2.2.2 Direct Causation

The ICRC has also proposed that the hostile act must be such as to directly cause the harm envisioned. The ICRC defines direct causation as follows:

In order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.²⁶⁶

For the ICRC in its *Interpretive Guidance*, the directness of civilians’ participation in hostilities is an important dividing line, for it distinguishes civilians who are participating only indirectly, and therefore would not lose their immunity from attack.²⁶⁷ The ICRC also stated that ‘directness’ means that the envisioned harm should be brought about in a single causal step.²⁶⁸ Here, the ICRC is responding to risk, to actions that appear likely to cause harm, but instead of using the concepts proposed herein, of clear and convincing evidence, and imminence of harm, they have chosen instead to use the standard of a single causal step. The ICRC intended that this would exclude indirect war-supporting activities, such as the provision of supplies, funding, and

²⁶⁴ *Ibid.* at 796.

²⁶⁵ *Ibid.* at 798; see also: Stephen Lendman, “Yemen is Obama’s War: US/Saudi Blockade Prevents Vital Humanitarian Aid from Reaching Yemen” *Global Research* (29 April 2015), available at: <http://www.globalresearch.ca/yemen-is-obamas-war-ussaudi-blockade-prevents-vital-humanitarian-aid-from-reaching-yemen/5446014> (accessed 12 June 2015); Gina Holmes, “The Red Cross Round-up” Canadian Red Cross: Red Cross Talks (8 April 2015), containing a story concerning three Red Crescent workers killed in Yemen that week delivering humanitarian aid, and a statement from the Red Cross that “it is prohibited to attack the staff and volunteers of the International Red Cross and Red Crescent Movement, and all others whose sole purpose is to provide humanitarian relief in emergencies,” available at: <http://www.redcross.ca/blog/2015/4/the-red-cross-round-up-1> (accessed 30 June 2015).

²⁶⁶ *Interpretive Guidance*, *supra* note 2 at 1019.

²⁶⁷ *Ibid.* at 1020.

²⁶⁸ *Ibid.* at 1021.

financial services.²⁶⁹ The ICRC found that recruiters and financiers of militant or terrorist groups could not be targeted, nor could those who were attending at training camps, on the grounds that these activities would not cause harm directly.²⁷⁰ The design, production and transport of weapons would also be excluded, unless “carried out as an integral part of a specific military operation designed to cause the required threshold of harm.”²⁷¹ One of the more contentious examples raised was that of Improvised Explosive Devices (IEDs). The ICRC found that making and storing IEDs would not directly cause harm, unless part of a specific military operation, but that planning to use them would.²⁷² It is difficult to imagine that armed forces fighting insurgent groups would not view the production and transport of weapons as part of a “specific military operation” against them, and/or as evidence of planning to use such devices, and would therefore claim the right to target such persons. Such criteria are therefore unlikely to be adopted in practice, and would not adequately protect civilians who are merely suspected of engaging in the above activities.

The ICRC also permits the targeting of civilians who are not participating in hostilities on the basis that such killings may constitute proportional, and therefore permissible, collateral damage. For example, the ICRC noted that voluntary human shields could be targeted, stating, “the presence of voluntary human shields often has no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective.”²⁷³ Another example raised in the *Interpretive Guidance* is that of a civilian driver of an ammunition truck. The ICRC stated that, while the truck itself is a legitimate target of attack, the civilian driver is not.²⁷⁴ However, the ICRC further stated that, as with human shields, the loss of the civilian’s life could be factored into to an assessment of proportionality *vis à vis* the military advantage to be gained.²⁷⁵ The ICRC provided no guidance as to how the proportionality calculus ought to be carried out, as such decisions would be left to the discretion of military authorities. If civilians may not be killed

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.* at 1022.

²⁷¹ *Ibid.* at 1021-2.

²⁷² *Ibid.* at 1022.

²⁷³ *Ibid.* at 1024. The ICRC notes that this was the generally accepted view of the experts at the meeting, at note 138, but does not cite any legal sources, particularly *Protocol I*, *supra* note 155 at Article 57, which contradicts this assertion; see: *supra* note 245 and accompanying text.

²⁷⁴ *Ibid.* at 1023-4.

²⁷⁵ *Ibid.* at 1024.

as direct participants, but may be killed on grounds of proportionality, then there seems little in this definition that would actually protect civilians when such circumstances arise during combat operations.

3.2.2.3 *Belligerent Nexus*

Finally, the ICRC stated that there must be a belligerent nexus to the armed conflict, which the ICRC defines as follows:

In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.²⁷⁶

This is similar to the requirement, above, that the act must be such as to cause harm to the military operations of a party to the conflict. It may have been introduced to protect activities that are neutral, or humanitarian in nature, and so are not intended to support one party to the detriment of the other. As discussed above, relying on parties' subjective determinations as to the neutrality and intentions of civilians and humanitarian relief organizations is not sufficient to ensure that their activities will not be interpreted as aid to guilty parties, or that they will not be subject to attack. The ICRC further states that actual culpability is not required; even children and civilians forced to participate would lose their protection against direct attack if they engaged in such an activity.²⁷⁷ Moreover, the ICRC states that parties may always exercise their rights of self-defense, even against acts that lack a belligerent nexus. The ICRC states that the use of force in such circumstances "must comply with the standards of law enforcement or individual self-defense,"²⁷⁸ but without specifying what those standards are. The permissibility of lethal force in self-defense overrides the above prohibitions the ICRC has imposed on targeting civilians. If states may use lethal force in self-defense against civilians, would they not use this as a justification in preference to the ICRC's criteria for civilian direct participation? Indeed, standard Rules of Engagement appear to permit precisely this, and therefore any workable standard for civilian immunity should address the issue of self-defense in specifying when persons have lost their immunity from attack.

²⁷⁶ *Ibid.* at 1025.

²⁷⁷ *Ibid.* at 1027.

²⁷⁸ *Ibid.* at 1035.

3.2.2.4 The Principle of Minimal Harm

Section IX of the *Interpretive Guidance* lays out the ICRC's standards with respect to the principle of minimal harm, which states that armies must avoid superfluous injury or unnecessary suffering,²⁷⁹ and that military necessity must be balanced by considerations of humanity.²⁸⁰ If the above criteria were to be interpreted faithfully in this light, then this would go a long way towards minimizing abuses of the targeting criteria by military authorities, both in terms of deciding who should be considered as a civilian participating directly in hostilities or a militant performing a continuous combat function, as well as in deciding when civilians who are not participating in hostilities can be killed as part of a proportionality assessment. On the other hand, without the principle of minimal harm to fetter military decision-making, the ICRC's targeting criteria are capable of being applied in ways that facilitate abuses and mistaken killings of civilians who are not participating in hostilities.

Section IX describes the principle of minimal harm in the following terms:

The principle of military necessity is generally recognized to permit 'only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.'²⁸¹

William Hays Parks, a long-time Judge Advocate and senior counsel with the U.S. Department of Defense, states that the requirement for the use of minimal force originated with Jean Pictet's arguments at the 1978-1980 United Nations Conference on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects which produced the treaty of the same name.²⁸² Parks argues that there is no precedent for such a rule in the international law, and that Pictet's arguments did not receive serious consideration from government delegates at the Conference.²⁸³ Regarding their inclusion of Section IX, Parks states that the ICRC, lacking any combat experience, "gave little deference to the advice of its military experts,"²⁸⁴ who were "senior military lawyers from

²⁷⁹ *Ibid.* at 1040.

²⁸⁰ *Ibid.* at 1041.

²⁸¹ *Ibid.*

²⁸² William Hays Parks, "Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect" (2009) 42:3 N.Y.U. J. Int'l L. & Pol. 769 at 784 [hereinafter *No Mandate*].

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

Canada, Israel, United Kingdom, and the United States.”²⁸⁵

In fact, there is greater precedent in international law for the general principle of minimal harm than Parks has acknowledged. As has been discussed in Chapter Two, the principle that those who are not harming ought not to be harmed was first espoused by von Martens as a customary rule of armed conflict in his *Compendium on the Law of Nations*; significantly, the reason given for this is that excess harm is not necessary to achieve the legitimate ends of the war.²⁸⁶ This principle is more clearly defined in the *St. Petersburg Declaration* of 1868, which states:

That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.²⁸⁷

Moreover, this principle is affirmed in a number of legal treatises on the laws of armed conflict that appeared throughout the nineteenth century,²⁸⁸ including one written by a U.S Judge Advocate General.²⁸⁹ In establishing this principle, the ICRC cited its present inclusion in a number of national military manuals, including the United Kingdom,²⁹⁰ NATO,²⁹¹ France,²⁹²

²⁸⁵ *Ibid.* at 795-6.

²⁸⁶ Georg Friedrich von Martens, *A Compendium of the Law of Nations*, William Corbett, trans. (London: Corbett and Morgan, 1802) at Book III, Chapter III; see: *supra* Chapter Two note 87 and accompanying text.

²⁸⁷ Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles (Saint Petersburg, 29 November/11 December 1868).

²⁸⁸ *Ibid.*; H.R. Droop, “The Relations Between an Invading Army and the Inhabitants, and the Conditions Under Which Irregular Combatants are Entitled to the Same Treatment as Regular Troops” (30 November 1870) in *Papers Read Before the Juridical Society: 1863-1870*, Vol. III (Wildy & Sons Law Booksellers and Publishers, 1871) 705; Article II of “General Principles, Project for an International Convention on the Laws and Customs of War Presented by the Russian Government,” reprinted in Carnegie Endowment for International Peace, *Documents Relating to the Program of the First Hague Peace Conference Laid Before the Conference by the Netherlands Government* (London and Oxford: Clarendon Press, 1921) at 40; *Institut de Droit International, Oxford Manual of the Laws of Land Warfare* (Oxford: Institut de Droit International, 1880) at Articles 7 and 49; International Conferences (The Hague), *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899 [hereinafter *Hague Regulations of 1899*] at Articles 23(c), 46 and 50; International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907 [hereinafter *Hague Regulations of 1907*] at Articles 23(c), 46 and 50; Coleman Phillipson, *Wheaton’s Elements of International Law*, 5th Edition (London: Stevens and Sons, 1916) at vi.

²⁸⁹ George B. Davis, *The Elements of International Law with an Account of its Origin, Sources and Historical Development* (New York & London: Harper & Brothers Publishers, 1900) at 313; *supra* Chapter Two note 265 and accompanying text. Recall that Davis was the U.S. Judge Advocate General at the time of the Hague Peace Conferences.

²⁹⁰ Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004) at s. 2.2

Germany,²⁹³ Switzerland,²⁹⁴ and the United States itself.²⁹⁵

Although Section IX does not deal in depth with escalation of force criteria that are now commonly part of Rules of Engagement, Parks states that the use of force continuum is not required for law enforcement officers even in peacetime, and that the U.S. Supreme Court has imposed only a reasonableness standard that trusts “individual police officers to use their discretion in applying broad rules to particular circumstances.”²⁹⁶ As discussed in Chapter One, domestic courts are often deferential to the subjective discretion of police officers when they use lethal force;²⁹⁷ this does not serve to protect innocent persons from being killed mistakenly in self-defense, nor does it solve the political and security problems that result when innocent civilians are mistakenly killed.

Instead of fettering military discretion by the principle of minimal harm, Parks argues in favour of affording a large measure of discretion to military personnel to make decisions concerning direct participation in hostilities. Parks states that the laws of war belong to governments, and that they are “entrusted in large measure to their respective battlefield commanders.”²⁹⁸ He also argues that nations have “declined to impose treaty restrictions on battlefield commanders or individual soldiers with respect to the application of force against enemy combatants or civilians taking a direct part in hostilities.”²⁹⁹ He rejects a law enforcement

²⁹¹ North Atlantic Treaty Organization, *NATO Glossary of Terms and Definitions*, AAP-6 (North Atlantic Treaty Organization, 2008) at p. 2-M-8, where “minimum force” is defined as “Force, up to and including deadly force, limited to the degree, intensity and duration necessary to achieve the objective.”

²⁹² Ministry of Defence, *Manuel de Droits des Conflits Armés* (2001) at 86(f).

²⁹³ Federal Ministry of Defence, *Triservice Manual ZDv 15/2: Humanitarian Law in Armed Conflicts* (1992) at § 130.

²⁹⁴ Swiss Army, Regulations 51.007/IV, *Bases légales du comportement à l'engagement* (2005) at § 160.

²⁹⁵ Department of the Army, *Field Manual 27-10* (Washington, D.C.: Department of the Army, 1956), at § 3; Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-12-1/COMDTPUB P5800.&A (Washington, D.C.: Department of the Navy, 2007) at § 5.3.1.

²⁹⁶ *No Mandate*, *supra* note 282 at 816. Parks cites this principle from the U.S. decisions of *Graham v. Connor*, 490 U.S. 386 (1989) at 396-7, as well as *Bell v. Wolfish*, 441 U.S. 520 (1979) at 559, and *Plakas v. Drinski*, 19 F. Supp. 3d 1143 (7th Cir. 1994) at 1148. Watkin finds that even the low standards required in these cases are unlikely to be followed in cases of armed conflict, when normal criminal justice and law enforcement norms and institutions are absent: Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict” (2004) 98:1 Am. J. Int'l L. 1 at 18.

²⁹⁷ See: *supra* Chapter One at note 94 and accompanying text.

²⁹⁸ *No Mandate*, *supra* note 282 at 796.

²⁹⁹ *Ibid.* at 806. The Preamble to the *Hague Regulations of 1899 and 1907*, *supra* note 288, states that the goals of the Conventions are to revise the laws and customs of war with a view to “confining them within such limits and would mitigate their undue severity,” and that “the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.” Article 22

approach to insurgencies, and instead advocates for a military-centred approach to threats based upon standard Rules of Engagement, as when a “soldier in an armed conflict... will see what may be a threat, identify it as a threat, process that information, and respond according to his or her training and the rules of engagement.”³⁰⁰ He asserts an unrestricted right on the part of qualified belligerents to use force, stating that “the historic consequence of combat is that combatants lawfully may kill their enemies and are at risk of being killed by them.”³⁰¹ This argument, however fails to address the issue which has long been the subject of contention, namely how does a soldier in an armed conflict accurately distinguish who is the enemy, and avoid the unnecessary killing of civilians who pose no threat. He closes with the point made by Grotius that “[a]ccording to the law of nations, anyone who is an enemy may be attacked anywhere.”³⁰² These comments harken back to the pre-modern law of Grotius and Vattel that would permit an unrestricted use of force against an enemy population, but without their extensive stipulations regarding the justice of the *jus ad bellum*.

3.2.3 Further Criticisms of the Interpretive Guidance

There were a number of further criticisms raised of the targeting criteria devised by the ICRC in the *Interpretive Guidance*. Commentators have largely characterized the debate as one in which humanitarian principles are pitted against the discretion of military authorities, and in a special issue of the *NYU Journal of International Law and Politics* devoted to the *Interpretive Guidance*, the editors explicitly characterized the debate in these terms. Goodman and Jinks state that in the struggle to define civilian direct participation, humanitarian and human rights interests on the one hand must be balanced against the interests of “preserving discretion or freedom of action for military planners and personnel making targeting decisions on the battlefield” and the “pragmatic and tactical realities of military operations,” on the other.³⁰³

Michael Schmitt, a long-time judge advocate and now director of the Stockton Center for

further states, “The right of belligerents to adopt means of injuring the enemy is not unlimited.”

³⁰⁰ *Ibid.* at 820.

³⁰¹ *Ibid.* at 830.

³⁰² Hugo Grotius, *De Jure Belli Ac Pacis* (1625), A.C. Campbell, trans. (Kitchener: Batoche Books, 2001) at Book III, Chapter V, section ii; see: *supra* Chapter Two at note 17 and accompanying text. Recall that Grotius has stated that these activities were licit, in the sense that such crimes would not be prosecuted; he did not advocate for their desirability, or discuss the effects that such actions would have on the overall military conflict.

³⁰³ *An Introduction to the Forum*, *supra* note 8 at 640.

the Study of International Law at the U.S. Naval War College, was one of the U.S. representatives at the expert process, and one of the experts who disavowed his connection with the *Interpretive Guidance*. Schmitt, too, criticizes the ICRC for taking a case-by-case approach rather than a principled approach to direct participation, focusing on whether a series of specified acts would constitute direct participation.³⁰⁴ He states that, as there is no authoritative guidance in international law as to which activities would classify as direct participation in hostilities, the “analysis has tended to be case-by-case and based upon vague and somewhat insubstantial criteria.”³⁰⁵

William Hays Parks stated that “[m]ost experts’ comments, and particularly those of the military experts, were strongly critical”³⁰⁶ of the ICRC’s restrictive targeting criteria, particularly the ICRC’s declaration in Section IX that the degree of force permitted be no more than what is required to meet legitimate military objectives.³⁰⁷ Parks was also one of the military experts who participated in the expert process and asked that his name be removed from the *Interpretive Guidance*.³⁰⁸ Some of Parks’ objections to the expert process centre on the heavy-handed manner in which the ICRC introduced Section IX near the end of the expert process without informing or consulting the experts participating in the process,³⁰⁹ a procedural failure that is a further consequence of the non-transparent way in which the ICRC and the T.M.C. Asser Institute conducted the expert process.

The *Interpretive Guidance* characterization of civilian direct participation also provoked much discussion in the wider academic community, resulting in the subsequent publication of an edited volume of essays entitled *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare*.³¹⁰ Banks *et al.* argue that the nature of warfare is changing to include more non-state participants, and therefore the laws of war ought to be modernized to facilitate the targeting of

³⁰⁴ *The Constitutive Elements*, *supra* note 235 at 709.

³⁰⁵ *Ibid.* at 699. Schmitt also notes that the few courts to have addressed the matter have also taken a fact and situation specific approach to determining civilian direct participation in hostilities, without developing a unified and principled criteria. See *e.g.*: *Prosecutor v. Strugar*, International Criminal Tribunal for Former Yugoslavia, Case No. IT-01-42A (Appeal Tribunal) at paras. 176-9; *Public Committee Against Torture in Israel v. Government of Israel*, (2006) H.C.J. 769/02, 46 I.L.M. 375 at 394 (2007) [hereinafter *Public Committee Against Torture*].

³⁰⁶ *No Mandate*, *supra* note 282 at 784.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.* at 783.

³¹⁰ William C. Banks, ed., *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare* (New York: Columbia University Press, 2011) [hereinafter *New Battlefields/Old Laws*].

suspected civilian participants. As Jensen states, the “modernised view” of asymmetrical warfare “must allow for the targeting of members of organized groups engaged in hostilities with military forces, including those who may not actually be pulling the trigger or setting off the explosive but still play an intricate supporting role.”³¹¹ Jensen argues that the ICRC concept of ‘continuous combat function’ places onerous burdens on states and unduly limits their targeting decisions. He argues that requiring that persons be habitually performing a continuous combat function before they can be continuously targeted would protect civilians engaged in non-combatant supporting activities, including a number of activities the ICRC has excluded from civilian direct participation, including “recruiters, trainers, financiers, propagandists.”³¹² Jensen argues that civilians take a direct part in hostilities by engaging in these activities, including when they train, act as observers, supply information to fighters, store weapons, and act as recruiters and financiers.³¹³ Civilian participants in his view would also include those persons providing supply and logistical services.³¹⁴

Daphné Richemond-Barak, supporting Jensen’s views, also argues in favour of new laws for new battlefields. She states that “the modern battlefield is different from that contemplated by the Geneva Conventions,” as it “features an array of non-state participants playing central roles in hostilities.”³¹⁵ However, as has been discussed in Chapter Two, non-state actors have played key roles in wars throughout the modern period, including in international as well as non-international armed conflicts, and it is precisely this problem to which the modern laws of war were responding. William Banks, who advocates for a freer hand in permitting states and their military authorities to target non-state actors in war, asks “whether the laws of war should be made available in any respect, to protect an enemy that is not deserving of protection?”³¹⁶ He queries whether there might be “legitimate and illegitimate nonstate entities for humanitarian law

³¹¹ Eric T. Jensen, “Direct Participation in Hostilities” in *New Battlefields/Old Laws*, *ibid.*, 85 at 86 [hereinafter *Direct Participation*].

³¹² *Ibid.* at 98.

³¹³ *Ibid.* at 102.

³¹⁴ *Ibid.* at 103.

³¹⁵ Daphné Richemond-Barak, “Nonstate Actors in Armed Conflicts: Issues of Distinction and Reciprocity” in *New Battlefields/Old Laws*, *supra* note 310, 105 at 108.

³¹⁶ William C. Banks, “Towards an Adaptive Humanitarian Law: New Norms for New Battlefields” in *New Battlefields/Old Laws*, *supra* note 310, 1 at 9.

purposes?”³¹⁷ Accomplishing this is in essence the effect of standard Rules of Engagement: undesirable activities can be identified and then punished on grounds of ‘self-defense’, while states can declare any prohibited group or organization as hostile and then target them unrestrictedly – these are tactics that states have often used in the past, and whose legality has often been rejected by international humanitarian law instruments.³¹⁸ These are new laws for old battlefields, and ones whose effects are to enlarge the prerogatives of the state, freeing them from the constraints of existing laws, while permitting them to claim the moral high ground by reinterpreting the law to authorize these killings.

3.3 Conclusion

The counterinsurgency doctrines and Rules of Engagement recently adopted by an increasing number of military authorities restructure the traditional chain of command, and devolve targeting decisions onto front-line combat soldiers. Loosening these criteria, while also empowering individual fighters to make these determinations on an *ad hoc* basis in a dangerous, complex, and uncertain environment has significantly impacted the ways in which civilians are distinguished from qualified belligerents. It has largely replaced the long-standing norm that civilians are immune from attack so long and for such time as they refrain from direct participation in hostilities with norms that permit the killing of civilians who are suspected of posing a threat to security forces, or who are suspected of belonging to, or even merely supporting, rebel or insurgent groups. In the main, the ICRC validated many of these practices in its *Interpretive Guidance*. As a consequence, many of the reforms that the ICRC did attempt to devise to protect civilians against some of the abuses resulting from these practices are likely to be overridden by the discretionary powers inherent in intent-based command control, and the targeting procedures contained in standard Rules of Engagement.

Many of the changes to the international humanitarian law that were accomplished from the 1860’s until the adoption of the *Protocols Additional to the Geneva Conventions* in 1977, had as their goal the protection of the civilian population from the violence of war and occupation, and the encouragement of restraint on the part of military forces. Many of the most egregious

³¹⁷ *Ibid.* at 13.

³¹⁸ *Supra* notes 5, 7.

practices that armies had used against civilian populations were outlawed over the course of the century, including reprisals, collective punishments, the targeting of 'disloyal' civilians and suspected sympathizers, and civilian property and infrastructure. All of these techniques had been used during the nineteenth and early twentieth centuries to maintain order among the civilian population by spreading terror. In many ways, the new doctrines found in standing Rules of Engagement, escalation of force procedures, and the targeted killing of 'unlawful enemy combatants' accomplish many of the same goals as did these formerly outlawed practices. The ICRC in its expert process has failed to appreciate the negative consequences of this for civilian populations. At the same time, the manner in which the ICRC conducted its expert process demonstrates a shift away from the transparency and inclusivity that the ICRC had promoted during the diplomatic conferences of the twentieth century, and the rights of civilian populations and resistance movements that had been validated and protected as a result of those conferences.

Chapter Four: Case Studies

[Guerilla] operations consist chiefly in the killing of picket guards and sentinels, in the assassination of isolated individuals or detachments. If captured, they are treated with great severity, the punishment in any case being proportioned to the offence committed...¹ The task is not one of serious or particular difficulty.²

~George B. Davis on guerrilla operations at checkpoints, 1900.

4.0 Introduction

This Chapter illustrates the U.S. military's application of use of force criteria in intent-based orders and standing Rules of Engagement, and compares them to the ICRC's definition of civilian direct participation in hostilities, and finally to the definition of civilian participation based upon wrongful aggression provided in Chapter One. The examples have been drawn from recent U.S. practices, primarily involving the U.S. and Coalition forces' counterinsurgency operations in Iraq and Afghanistan. Several U.S. allies have adopted many of these practices and principles into their own military doctrine.³ This helps to internationalize the acceptance of the norms embodied in modern counterinsurgency doctrine and standard Rules of Engagement. In each of the cases studied below, the U.S. has justified its practices as being permissible incidents of war, on the grounds that they are in accordance with standard Rules of Engagement and the rules regarding self-defense reflected therein, despite the fact that soldiers deliberately killed civilians whom it is not clear were in fact participating directly in hostilities.

The first case study will examine escalation of force incidents at traffic checkpoints. Escalation of force incidents were one of the most commonly-used tactics employed by Coalition forces in Iraq and Afghanistan,⁴ and their importance for counterinsurgent operations is likely to

¹ George B. Davis, *The Elements of International Law with an Account of its Origin, Sources and Historical Development* (New York & London: Harper & Brothers Publishers, 1900) at 292.

² *Ibid.* at 293.

³ See: *supra* Chapter Three at ss. 3.1.1.1 and 3.1.2.1.

⁴ According to the incident reports in the Iraq War Logs there were 12,578 escalation of force incidents reported in Iraq from January 1st 2004 to December 31st 2009, at <https://www.wikileaks.org/irq/> (accessed 26 May 2015). In Afghanistan, there were 2271 escalation of force incidents reported between 2004 and 2010, at

grow, making them an important case for further study. Soldiers at checkpoints are often confronted with vehicles that do not respond to warnings, and soldiers must make very rapid decisions as to whether or not to employ lethal force against a vehicle and its occupants. Soldiers make these decisions in a permissive climate that seeks to minimize risks to soldiers, even if civilians are deliberately targeted without an adequate assessment of their status as belligerents, or the actual risks they pose.

The second case study examines the use of status-based criteria for civilian direct participation in hostilities during the 2004 Coalition operations against the city of Fallujah, Iraq. The 2004 Operations Vigilant Resolve and Phantom Fury comprised some of the most widespread hostilities during the Coalition campaign in Iraq and Afghanistan. This presents an opportunity to examine how these doctrines might function during a more conventional “hot” theatre of hostilities, as opposed to isolated escalation of force incidents, which consist of widespread but small-scale encounters with the local civilian population. During Operation Phantom Fury, Coalition forces cordoned virtually the entire adult male population within the city, and did not permit them to leave before launching the assault. They also engaged in other abusive practices, including enforcing curfews and other military orders through lethal force, and preemptively bulldozing homes suspected of containing insurgents. Operation Phantom Fury exemplifies the widespread dangers posed to civilian populations if inadequate concepts of civilian direct participation are used during large-scale conventional military operations.

The third and fourth case studies examine the practice of declaring forces hostile, and the legal doctrine of ‘unlawful enemy combatant’ that the U.S. has developed to justify the detention and targeting practices that follow from this. The third case study concerns the U.S. classification of detainees at the Guantanamo Bay detention facility as ‘unlawful enemy combatants.’ This status-based concept of civilian direct participation in hostilities was instrumental in the U.S. government’s successful bid to treat the detainees outside of the scope of the *Third* and *Fourth Geneva Conventions*. The treatment of the Afghan detainees also evidences the desuetude of the concept of a *levée en masse*, which permits the inhabitants of an invaded territory to take up arms in self-defense, without having to meet the organizational requirements of belligerent qualification. In order to avoid addressing the issue of whether the detainees at Guantanamo Bay

<https://www.wikileaks.org/afg/> (accessed 26 May 2015).

were entitled to prisoner of war status under Article 4(6) of the *Third Geneva Convention*, or whether they were civilians deserving of protection under the *Fourth Geneva Convention*, the U.S. avoided their obligation to hold Article 5 Tribunal hearings to determine the belligerent status of the detainees.⁵ This disuse of the procedures set down in the international law for determining the belligerent status of detainees represents a move away from the established legal framework, and towards determining belligerent status in ways that are discretionary and arbitrary. A preoccupation with intelligence-gathering has also prompted the U.S. to shift away from applying the *Geneva Conventions*, which place restrictions on interrogations and mandates rights of communication for detainees. Many of the detainee abuses that took place in connection with the U.S. government treatment of detainees at this time, and the legal doctrines they developed concerning the detainees at Guantanamo Bay, have now become normalized by the U.S. in standard operating procedures, including such practices as indefinite detentions, renditions, and the use of secret detention facilities. If these new status-based determinations of belligerency, and the practices concerning detainee treatment which accompany them, are to gain widespread acceptance, then this poses a systemic threat to the *Geneva* system of laws laid down at the end of World War II.

The fourth case study of the U.S.'s targeted killing program is an instructive example with which to conclude this dissertation, as the controversies over its legal interpretation may greatly impact the future development of the principle of distinction and the law of belligerent qualification. The targeted killing program uses a status-based concept of 'civilian direct participation in hostilities', in which status is determined by the use of behavioral or 'signature criteria', which are particularly liable to be abused. This is exacerbated by the fact that the program also reverses the presumption of civilian immunity. Many of the legal justifications that the U.S. government has proffered for the program are based upon legal doctrines developed to govern the treatment of detainees at Guantanamo Bay.

⁵ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135 at Article 5 [hereinafter *Third Geneva Convention*]. Article 5 of the *Third Geneva Convention* states 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 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." Such competent tribunals to determine belligerent status shall hereinafter be referred to as "Article 5 Tribunals."

When U.S. forces are applying their standard Rules of Engagement in combat situations, they are essentially engaged in identifying targets for the use of force, either because the target is performing a hostile act, manifesting a hostile intent, or is a member of a force declared as hostile. This identification of possible targets is defined by NATO as the “process of attaining an accurate characterization of a detected entity by any act or means so that high-confidence real-time decisions, including weapons engagement, can be made.”⁶ The following case studies will illustrate that U.S. and NATO forces did not make accurate characterizations, and this is a consequence of administrative failures in formulating and enforcing adequate defensive criteria in standard Rules of Engagement. Standard Rules of Engagement not only permit soldiers wide discretion to make these decisions – with perhaps a high degree of confidence, if not a high degree of accuracy – in a climate in which there is little oversight over the application of Rules of Engagement and escalation of force rules, and little accountability for mistaken killings.

4.1 Case Study I: Escalation of Force Incidents & Preemptive Killings

Checkpoint shootings are a class of escalation of force incidents in which U.S. soldiers staffing a checkpoint observe suspicious behavior, and must make a very rapid decision as to whether and how far to employ force to neutralize a potential threat. As discussed in Chapter Three, civilians who fail to respond to verbal warnings can be and are targeted under present-day Rules of Engagement, and this view has also been promoted by the International Humanitarian Law Institute of Sanremo in their *ROE Handbook*.⁷ The U.S. and the drafters of the *ROE Handbook* have interpreted this behavior as manifesting a hostile intent, and so have permitted lethal force against civilians on these grounds. This is exemplified by the nature of many checkpoint shootings in Iraq and Afghanistan, in which U.S. forces killed civilians who were later found to have been innocent of posing any hostile intent, but who had failed to heed verbal warnings and instructions.

Prior to the early 1990s, when the U.S. first employed standard Rules of Engagement

⁶ North Atlantic Treaty Organization, *NATO Glossary of Terms and Definitions*, AAP-6 (2008) at p. 2-I-1.

⁷ Dennis Mandsager, Alan Cole, Phillip Drew, and Rob McLaughlin, *Rules of Engagement Handbook* (San Remo: International Institute of Humanitarian Law, 2009) [hereinafter *ROE Handbook*], available at: <http://www.usnwc.edu/getattachment/7b0d0f70-bb07-48f2-af0a-7474e92d0bb0/San-Remo-ROE-Handbook> (accessed 16 January 2013) at 22-3. See: *supra* Chapter Three at note 161 and accompanying text.

during Operation Restore Hope in Somalia, there are very few examples of escalation of force incidents being adjudicated in the international arena. Most of these incidents involve escalation of force incidents at border crossings, and aerial intrusions into a nation's airspace. A review of these incidents demonstrates that the killing of civilians in escalation of force incidents was generally rejected. One arbitration case brought in 1926 by Mexico against the United States found that U.S. border guards had acted improperly in firing on a raft of Mexican civilians attempting to cross the Rio Grande from U.S. back into Mexican territory, and who had failed to heed warning shots; in this incident, U.S. border guards shot and killed a young girl.⁸ The General Claims Commission held that "Authoritative writers in the field of domestic law in different countries and authoritative awards have emphasized that human life may not be taken either for prevention or for repression, unless in case of extreme necessity."⁹ The Commission found that the act of firing is always dangerous, and that "it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available."¹⁰ The use of lethal force was rejected in this case, in circumstances remarkably similar to many of the checkpoint shootings that Coalition forces undertook in Iraq and Afghanistan. This decision is also consistent with the requirement for the use of minimal force,¹¹ and this is what escalation of force rules can accomplish, if they are used and enforced properly.

Other early escalation of force incidents in the international arena involved aerial intrusions by civilian aircraft. In these incidents, as well, the use of lethal force was generally rejected. For example, on 29 April 1952, a French airliner was shot down by Soviet fighter planes over East Berlin; the Allied High Commissioners in Germany stated that it was entirely unacceptable to fire upon a civilian aircraft, even by way of warning shots when the aircraft ignored verbal and physical commands to land.¹² Again, on 27 July 1955, when an Israeli passenger aircraft was shot down over Bulgarian airspace, briefs before the International Court of Justice submitted by Israel, the United States, and the United Kingdom all claimed that force could not be used under any

⁸ *Garcia Case (Mexico v. United States)*, 4 R. Int'l Arb. Awards 119 (1926) at 119.

⁹ *Ibid.* at 121.

¹⁰ *Ibid.*

¹¹ The Police Executive Research Forum, *U.S. Customs and Border Protection Use of Force Review: Cases and Policies* (Washington, D.C.: The Police Executive Research Forum, 2013) at 7. See also: *supra* Chapter One at note 184 and accompanying text.

¹² John T. Phelps II, "Aerial Intrusions by Civil and Military Aircraft in Time of Peace" (1985) 107 Mil. L.R. 256 at 277 [hereinafter *Aerial Intrusions*].

circumstances against a civilian aircraft that ignored warnings to land; a remedy through diplomatic channels was urged as the appropriate response to an aerial incursion.¹³

The above examples concern peacetime incidents, but on 21 February 1973 during the Yom Kippur War (1973), Israeli forces shot down a Libyan airliner over the Sinai Peninsula after using escalation of force criteria.¹⁴ Israeli forces stated that they had signaled to the plane to land by dipping their wings, but had been ignored.¹⁵ Given the hostile situation, Phelps states that it was not unreasonable to suspect that the Libyan government would use a civilian airliner for a hostile act, yet the government of Israel's claims that its use of force was justified on grounds of security was not accepted by the International Civil Aviation Organization,¹⁶ or the United States.¹⁷ Phelps states that while overflowed states have often sought to justify the use of lethal force after aircraft failed to heed instructions to land, this rationale has always been rejected by a majority of nations as unacceptable.¹⁸ Therefore, as of 1985, the standard for the use of lethal force against civilians who were suspected of posing a security threat, even after the use of escalation of force procedures, was set very high.

However, the acquittals in *Mowris*¹⁹ and *Johnson*²⁰ during the campaign in Somalia set a much lower bar in land-based counterinsurgency operations for the use of lethal force against civilians who were suspected of posing a hostile intent for failing to heed warnings, or for attempting to flee. Recall that *Mowris*' conviction for shooting a fleeing and unarmed civilian was overturned by his superiors on the grounds that it would have a "restraining influence" on soldiers' responses to fire.²¹ *Johnson* concerned an incident in which U.S. soldiers killed a 13-year old boy in Somalia during Operation Restore Hope because they suspected him of placing

¹³ *Aerial Incident of 27 July 1956, Israel v. Bulgaria; U.S. v. Bulgaria; U.K. v. Bulgaria*, I.C.J. Pleadings 168 at 210-11 (U.S. pleadings), and 368 (U.K. pleadings), which state that there can be no grounds for self-defense against a civilian aircraft, clearly identified as such. The case was dismissed due to Bulgaria's refusal to submit to the jurisdiction of the Court, and no decision was rendered.

¹⁴ *Aerial Intrusions*, *supra* note 12 at 288.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, citing 28 IACO Bull. 13 (July 1973).

¹⁷ *Ibid.*, citing 8 Dep't. St. Bull 369 (1973).

¹⁸ *Ibid.* at 293.

¹⁹ *United States v. Mowris*, GCM No. 68 (Fort Carson 4th Infantry Division (Mech) 1 July 1993) [hereinafter *Mowris*]. *Mowris* claimed that he did not intend to hit the victim, but to fire the shot on the ground as a warning.

²⁰ *United States v. Johnson*, No. 458 27 1616 (I Marine Expeditionary Force, 16 March 1993) (Report of Article 32(b) Investigating Officer) [hereinafter *Johnson*].

²¹ Mark S. Martins, "Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering," (Winter 1994) 143 Mil. L. Rev. 1 at 66.

an incendiary device in their convoy as it was moving through the streets of Mogadishu. U.S. forces routinely instructed civilians to keep away from their vehicles.²² As Martins describes, “[s]uddenly, a boy carrying what appeared to be a small box in one hand, ignored the warnings and ran up behind the vehicle... Only after the boy had continued to ignore warnings and then had placed his arm in the back of the truck – but out of Sergeant Johnson’s reach – did Sergeant Johnson fire his weapon at the boy.”²³ Soldiers had recently received reports of Somalis throwing grenades at coalition patrols, or handing grenades to children to use against coalition forces.²⁴ No object was recovered from the vehicle, but the boy was killed.²⁵ A preliminary hearing was convened to determine whether Sergeant Johnson should stand trial. The investigating officer concluded that Sergeant Johnson had acted appropriately and the convening authority dismissed all charges.²⁶ The U.S. Army exonerated Johnson, like Mowris, because he was found to have properly followed the Rules of Engagement in order to assess the hostile intent of a civilian, and to have responded appropriately with lethal force. In this case, the impugned behavior involved the boy running after the soldiers’ convoy, and touching the back of the vehicle. This does not constitute clear and convincing evidence of an act of aggression, yet the soldiers genuinely feared for their lives. They did not consider whether further investigation, such as questioning or searching the boy, or lesser means than lethal force, would have revealed the absence of a threat. Had they done so, they would have averted a tragedy, and one that may well have eroded U.S.’s forces claims to moral authority among the local population.

The application of standard Rules of Engagement during the campaign in Somalia laid the groundwork for how U.S. soldiers would later assess hostile intent at checkpoints in Iraq and Afghanistan. The U.S. Army Rules of Engagement for traffic control operations found in the *Traffic Control Operations Smartcard* permit soldiers to use lethal force in self-defense when a person is committing a hostile act or exhibiting a hostile intent, and requires a graduated escalation of force, according to the step-ladder model.²⁷ Escalation of force rules ask that

²² *Ibid.* at 65.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Johnson, supra* note 20.

²⁷ Center for Army Lessons Learned, “Traffic Control Operations Smartcard,” GTA 90-01-005 (September 2010), available at: <http://info.publicintelligence.net/CALL-TrafficControlPoints.pdf> (accessed 5 April 2013). Traffic

soldiers first shout verbal warnings to halt, then show their weapon and demonstrate the intent to use it, then block access or detain, and then to fire warning shots before lethal force is used; however, these escalation of force criteria are to be used only when “time and circumstances permit.”²⁸ The individual soldiers staffing the checkpoints make these judgments, often very quickly and under conditions of stress; accordingly, escalation of force rules are either not used, or are applied in a very cursory manner.²⁹

This is demonstrated by the Bureau of Investigative Journalism in their study of checkpoint shooting incidents detailed in the Iraq War Logs. The Iraq War Logs are a collection of almost 400,000 U.S. Army field reports, detailing a variety of incidents that U.S. soldiers documented throughout the conflict, and covering the time period from 2004 to 2009. The documents were released by WikiLeaks to a number of media outlets on 22 October 2010.³⁰ The Bureau of Investigative Journalism (BIJ) undertook a manual count of a total of 13,963 reported checkpoint incidents. They found that 832 people had been killed at checkpoints during the reporting period. Of these, 120 were described as insurgents, 681 were described as civilians, and 31 were Iraqi security forces.³¹ The Bureau also reported that U.S. forces fired on 50 families, and that at least 30 children were killed.³² Given the ubiquitous presence of checkpoints, the data also indicates that the risk of U.S. and Iraqi forces being killed in checkpoint incidents during this time period was quite low, at 0.22% of the recorded checkpoint incidents. Commander Albert Janin of the Judge Advocate General’s Corps, has described similar numbers of checkpoint killings, estimating that from May 2003 until mid-summer 2006, U.S. forces killed about 1200 Iraqi civilians in escalation of force incidents at checkpoints and during convoy operations.³³

Control Point Procedures are also addressed in Department of the Army, *Stryker Brigade Combat Team Rifle Platoon and Squad FM-3-21.9* (Washington, D.C.: Department of the Army, 2002) at 7-11.

²⁸ *Ibid.*

²⁹ Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2007) at 14.

³⁰ Der Spiegel, “The WikiLeaks Iraq War Logs: Greatest Data Leak in US Military History” *Spiegel Online* (22 October 2010), available at: <http://www.spiegel.de/international/world/the-wikileaks-iraq-war-logs-greatest-data-leak-in-us-military-history-a-724845.html> (accessed 5 April 2013).

³¹ Emma Slater and James Ball, “Hundreds of Civilians Gunned Down at Checkpoints” *The Bureau of Investigative Journalism* (22 October 2010), available at: <http://www.iraqwarlogs.com/2010/10/22/more-than-600-civilians-killed-in-error-by-coalition-forces-in-iraq/> (accessed 5 April 2013). The BIJ study did not find that any U.S. forces were indicated in the incident reports as being killed in checkpoint incidents.

³² *Ibid.*

³³ Albert Janin, “Engaging Civilian-Belligerents Leads to Self-Defence/Protocol I Marriage” (2007) *Army Lawyer* 82 at 104 [hereinafter *Civilian Belligerents*]. Commander Janin uses the data collected by the organization Iraq Body Count.

The Iraq War Logs incident reports indicate that vehicles were normally fired upon before they reached the checkpoints, often because they disregarded verbal and visual signals that were made by U.S. forces during the vehicle's approach. In one incident, U.S. forces shot and killed 7 persons out of a family of 11 persons when their vehicle approached the checkpoint at a speed of 40-45 mph, and did not slow down when instructed to do so. U.S. soldiers reported making hand and arm signals, which failed to stop the vehicle. U.S. forces then fired warning shots, which caused the vehicle to accelerate. At that point, U.S. forces engaged the driver directly. The report states that the "large number of civilians KIA [killed in action] resulted from the family having placed their children on the floor boards of the vehicle. The disabling shots aimed at the grill are believed to have traveled through the vehicle low to the floorboards causing the large number of KIA."³⁴ The warning shots were first fired when the vehicle was 150 meters away from the checkpoint, suggesting that the vehicle must have been some distance away from the checkpoint when the driver disregarded the hand and arm signals. In this case, the family was not found to have been posing a hostile intent, and it may have been the case that the driver disregarded the signals because he did not see them, or that he accelerated in response to the small arms fire due to panic.

Some of the incidents involved drivers who were elderly, and had difficulties seeing the hand signals or hearing the verbal warnings. One incident involved the shooting of an elderly male driver who had been unable to see the visual signals made by U.S. forces. His relatives also indicated that "the brakes on the old vehicle were not functional,"³⁵ and so he could not slow down. As in the above incident, this vehicle was also approaching the checkpoint, and shots were fired at the vehicle shortly after the visual and verbal signals were not heeded. The time frame within which U.S. forces are using escalation of force procedures - and making a final decision to use lethal force - may be very short, perhaps only a matter of seconds. This may not give civilians sufficient time to respond. A similar incident involved a 50-year old female driver, whose vehicle was fired upon after she did not respond to escalation of force procedures. The vehicle was as far as 200 meters away from reaching the checkpoint when 9 rounds were fired

³⁴ United States Army, Redacted Report 10-2, Iraq War Logs (14 June 2005), available at: <http://www.iraqwarlogs.com/PDF/10/2.pdf> (accessed 5 April 2013).

³⁵ United States Army, Redacted Report 10-1, Iraq War Logs (6 September 2008), available at: <http://www.iraqwarlogs.com/PDF/10/1.pdf> (accessed 5 April 2013).

into the vehicle. A three year-old boy was killed in the incident.³⁶

In one incident, a mobile, *i.e.* temporary, U.S. checkpoint was set up at the corner of what American forces referred to as Routes Irish and Vernon near Baghdad's Green Zone.³⁷ The checkpoint had been set up *ad hoc* to ensure safe passage for Ambassador Negroponte, who was making an unscheduled trip to the airport.³⁸ A vehicle approached the checkpoint, and escalation of force procedures were used; the vehicle failed to stop for flashing lights, hand and arm signals, and then warning shots.³⁹ The vehicle was then engaged with small arms fire. The fire wounded journalist Giuliana Sgrena, who had just been freed after being held captive for a month by insurgents.⁴⁰ The fire killed Italian intelligence officer, Nicola Calipari, who had negotiated her release, and who was killed while shielding Ms. Sgrena; another Italian security agent, the driver, was wounded.⁴¹ The incident was widely reported, and the U.S. military publicly defended the killing, claiming that the soldiers had acted appropriately.⁴² Ms. Sgrena has reported that the driver could not see the checkpoint because "the patrol was not on the street. The patrol was outside the street, behind a curb."⁴³ She also reported that 58 bullets were fired at the vehicle, all but one at the passengers, and was strongly critical of the U.S.'s actions and its justifications.⁴⁴

Because of the high-profile nature of this incident and the tensions it caused between the U.S. and Italian governments, the U.S. undertook an investigation.⁴⁵ The U.S. Army investigation claimed that Route Irish was a dangerous road, one that had experienced many insurgent attacks

³⁶ United States Army, Redacted Report 10-3, Iraq War Logs (11 December 2005), available at: <http://www.iraqwarlogs.com/PDF/10/3.pdf> (accessed 5 April 2013). In this incident, the grandmother, who was bleeding from glass in her eyes, refused medical treatment so that she could bury the child before sundown, according to religious custom.

³⁷ United States Army, Incident Report, Reference ID IRQ20050304n1554, Iraq War Logs (4 March 2005), available at: <http://wikileaks.org/irq/report/2005/03/IRQ20050304n1554.html> (accessed 5 April 2013).

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Jeffrey Smith and Ann Scott Tyson, "Shootings by U.S. at Iraq Checkpoints Questioned" *Washington Post* (7 March 2005), available at: <http://www.washingtonpost.com/wp-dyn/articles/A12507-2005Mar6.html> (accessed 17 January 2013).

⁴³ Amy Goodman, "Italian Journalist Giuliana Sgrena on Washington's Refusal to Take Responsibility for Fatal Shooting of Intel Agent Nicola Calipari in Iraq" *Democracy Now* (14 March 2007), available at: http://www.democracynow.org/2007/3/14/italian_journalist_giuliana_sgrena_on_washingtons (accessed 5 April 2013).

⁴⁴ *Ibid.*

⁴⁵ When an investigation is commenced, it is usually noted in the incident report. None of the above-referenced checkpoint incidents included a statement to the effect that the U.S. had commenced an investigation, and the incidents were simply closed.

and IED explosions that had killed both U.S. soldiers and Iraqi civilians.⁴⁶ The soldiers staffing the checkpoint had been trained in standard Rules of Engagement, operating procedures for traffic checkpoints, and the use of a graduated escalation of force, requiring soldiers to “shout, show, shove, then shoot.”⁴⁷ Soldiers were first to use verbal warning shouts, and then to shine a spotlight on the vehicle, then to aim a green laser light at the driver, then to fire warning shots near the vehicle, then to fire disabling shots at the vehicle; only then could they use lethal force.⁴⁸ At the time of the incident, the Italian diplomatic vehicle was traveling at a high rate of speed towards the checkpoint. U.S. personnel reported shining a light onto the vehicle, and then focusing a green laser pointer onto the windshield.⁴⁹ Specialist Mario Lozano then fired warning shots near the vehicle, which the vehicle did not heed; shots were then fired directly at the vehicle.⁵⁰ The Investigation found that the incident took approximately a mere 7 seconds from the time the vehicle crossed the Alert Line, at which time the U.S. forces began their escalation of force procedures, to the time the last shot was fired and the vehicle came to a halt; of these, the firing of the shots took four seconds, leaving only three seconds within which U.S. undertook the above escalation of force procedures.⁵¹ The driver of the vehicle, Italian intelligence expert and member of the Carabinieri, Mr. Carpani, told U.S. forces that when he heard the shots, he panicked and sped up the vehicle to exit the area quickly.⁵² He was uncertain as to where the shots were coming from, and why they were being fired.⁵³

The investigation into the Calipari checkpoint shooting incident found that the spotlight and laser pointer had been effective in stopping about 15-20 vehicles that had previously approached the checkpoint that evening.⁵⁴ It also found that the Italian vehicle was traveling at a rate of speed

⁴⁶ United States Army, *Investigation into the Calipari Checkpoint Shooting Incident* (Unredacted Version), Macchianera.net (May 2005) [hereinafter *Calipari Shooting Investigation*] at 12-13, available at: <http://www.macchianera.net/files/rapportousacalipari-noomissis.pdf> (accessed 5 April 2013).

⁴⁷ *Ibid.* at 22.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* at 30.

⁵⁰ *Ibid.* at 31.

⁵¹ *Ibid.* at 32.

⁵² *Ibid.* at 34.

⁵³ *Ibid.* at 31.

⁵⁴ *Ibid.* at 36. The Investigation does not report, however, at what time these vehicles were stopped, or whether it was still light out at that time. At the time of the shooting incident, witnesses reported that it was dark, and raining heavily.

much higher than average vehicles in the area.⁵⁵ The investigation also found that the driver was distracted, as he was talking on a cell phone, concerned with getting to the airport, listening for threats, and navigating bad weather and wet roads.⁵⁶ The investigation concluded that Specialist Lozano complied with the Rules of Engagement in firing his weapon.⁵⁷ The investigation exonerated the soldiers involved in the shooting, but did make a number of recommendations, including better signage indicating the presence of U.S. checkpoints, as well as the use of non-lethal blocking methods, such as spike strips and concertina wire, so as to limit the use of force.⁵⁸ These procedures would not only be practical and cost-effective, but would comply with the principle that only the minimum amount of force necessary be used. Indeed, according to the definition proposed herein - that civilian direct participation be defined in terms of the justified use of defensive force against a clear and convincing threat - then necessity becomes a crucial component of the use of force. Therefore, states are obliged to use escalation of force procedures to identify possible threats, as well as less than lethal means to repel actual threats - for when states avoid using these safeguards by choice, they cannot claim that their use of lethal force is *necessary*.

Checkpoint shootings take place in an environment in which civilians may be unfamiliar with the checkpoint procedures, the language used, or may not be aware that there is a checkpoint present in the road ahead. Civilians may not be given sufficient time to respond and civilians may be likely to panic when coming under fire. Checkpoints, particularly temporary checkpoints, are not always clearly marked. Annia Ciezadlo, a reporter familiar with U.S. checkpoint procedures in Iraq, states that many U.S. checkpoints follow close upon checkpoints staffed by Iraqi security forces.⁵⁹ Many drivers are routinely waved through the Iraqi checkpoint, but do not realize that there is a U.S. checkpoint following close after. She states, “[y]our driver, who slowed down for the checkpoint, will accelerate to resume his normal speed. What he doesn’t realize is that there is another, *American* checkpoint several hundred yards past the Iraqi checkpoint, and he’s speeding towards it. Sometimes, he may even think that being waved through the first checkpoint means

⁵⁵ *Ibid.* at 36. The vehicle was reported as travelling at 50 mph, as compared with an average speed of 24 mph.

⁵⁶ *Ibid.* at 37.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* at 38.

⁵⁹ Annia Ciezadlo, “What Iraq’s Checkpoints are Like” *The Christian Science Monitor* (7 March 2005), available at: <http://www.csmonitor.com/2005/0307/p01s04-woiq.html> (accessed 5 April 2013).

he's exempt from the second one (especially if he is not familiar with American checkpoint routines).”⁶⁰ This may be especially true of civilians travelling in unfamiliar territory, or when a checkpoint is new or temporary, and its procedures are not understood by the local population.

Private contractors operating in counterinsurgent environments, and who lack belligerent qualification to use force during hostilities, are employing escalation of force procedures similar to those used by military forces, and are also defending their use of force on grounds of self-defense.⁶¹ In one incident, DynCorp private security contractors were returning to the U.S. Army base at Camp Al-Asad, Iraq, when “a black sedan (opel) approached at a high rate of speed on the center line of the road. At 500 m, the lead DynCorp vehicle began flashing lights, but the sedan did not respond. At 75 m, the lead DynCorp vehicle fired (3-4) warning shots into the shoulder of the road.”⁶² The sedan then attempted to pass the convoy, hit the second DynCorp vehicle, and all three occupants of the sedan were killed.⁶³ This incident also indicates that private contractors are also using escalation of force procedures to keep civilians away from their convoys and equipment, even when they themselves are not participating directly in hostilities (and are not permitted to do so); the ICRC in its *Interpretive Guidance* has stated that private contractors are not to be considered as performing a continuous combat function on behalf of an organized armed group, and did not deal with the question of whether their use of force in the course of force protection activities would be considered as direct participation in hostilities.⁶⁴

Checkpoint shootings are not unique to the conflict in Iraq, and similar incidents occurred in Afghanistan, as well. In one incident, a white vehicle traveling toward a U.S. checkpoint failed

⁶⁰ *Ibid.*

⁶¹ USCENTCOM Message, “USCENTCOM Civilian and Contractor Arming Policy and Delegation of Authority for Iraq and Afghanistan” (24 August 2009), available at: <https://publicintelligence.net/uscentcom-civilian-and-contractor-arming-policy-and-delegation-of-authority-for-iraq-and-afghanistan/> (accessed 14 April 2015). See e.g.: para. 4A, which states that private contractors have the right to use force in self-defense against a hostile act or hostile intent, whereas para. 4D1 confirms that deadly force “is permitted only for individual self-defense when there is a reasonable belief in imminent risk of death or serious bodily harm”, and para. 4D, which imposes a requirement for the use of minimal force. The defensive rules proposed herein are therefore similar to those already in use by the Department of Defense, but contractors are being permitted to interpret “hostile act” and “hostile intent” very broadly, and with little oversight or enforcement of the rules in place.

⁶² United States Army, Incident Report, Reference ID IRQ20050302n1519 (2 March 2005), available at: <http://wikileaks.org/irq/report/2005/03/IRQ20050302n1519.html> (accessed 5 April 2013).

⁶³ *Ibid.*

⁶⁴ International Committee of the Red Cross, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” (2008) 90:872 Int’l Rev. Red Cross 991 at 995 [hereinafter *Interpretive Guidance*]. See also: UNCENTCOM Message, *supra* note 55 at para. 4B, which states that private contractors are forbidden to participate directly in hostilities.

to respond to a wave signal, and was fired upon with 24 rounds of ammunition. One civilian was killed.⁶⁵ It appears that U.S. forces did not use graduated escalation of force procedures in this incident; no investigation was noted as being commenced.⁶⁶ In another incident, an Afghan National Police [ANP] Officer shot at a vehicle that had approached an ANP checkpoint at a high rate of speed and knocked the officer down. The ANP officer shot and killed the driver. No weapons or explosives were found, and U.S. forces noted that the person killed in this incident was a “civilian”. The US incident report states, “ANP escalation of force was appropriate. Effects on the enemy demonstrate the ANP support of IO themes. Effects on populace clearly identify the importance of stopping at checkpoints.”⁶⁷ This last comment clearly evidences the disciplinary nature of these killings, and the effects they are intended to have on the behavior of the local population generally – and not merely on those traveling through checkpoints or near convoys. U.S. forces are instructing local host nation security forces in these procedures, and encouraging them to adopt similar Rules of Engagement and escalation of force procedures. In the above incident, an innocent civilian was killed as a result of a minor traffic incident, but the killing was justified by U.S. forces because of the desirable effect it would have on the civilian population generally in encouraging their compliance with security forces.

Nor were checkpoint shootings confined to U.S. forces. There are a number of documented incidents in which British forces stationed in Basra, Iraq, killed civilians at checkpoints under similar circumstances. In one incident that took place on 24 August 2003, UK forces stationed at a temporary checkpoint in Basra shot and killed 42-year old driver Walid Fayay Mazban on the grounds that they had seen his minivan swerve in a suspicious manner near the checkpoint, and he had failed to heed verbal commands to stop his vehicle.⁶⁸ The Ministry of Defence paid his family \$1405 in compensation, but without admitting wrongdoing.⁶⁹ In a similar incident that took place on 4 September 2003, British forces shot and killed As’ad Kadhem Jasem at a

⁶⁵ United States Army, Incident Report, Reference ID AFG20070227n568 (27 February 2007), available at: <http://wikileaks.org/afg/event/2007/02/AFG20070227n568.html> (accessed 5 April 2013).

⁶⁶ *Ibid.*

⁶⁷ United States Army, Incident Report, Reference ID AFG20070305n602 (5 March 2007), available at: <http://wikileaks.org/afg/event/2007/03/AFG20070305n602.html> (accessed 5 April 2013). “IO” as used here likely stands for “Inter-operational”, *i.e.* joint training and operational procedures that U.S. forces have taught to Afghan security forces.

⁶⁸ Amnesty International, *Iraq: Killings of Civilians in Basra and Al-‘Amara*, Amnesty Report MDE14/007/2004 (10 May 2004) at 10.

⁶⁹ *Ibid.*

checkpoint north of Basra.⁷⁰ He had been traveling at high speed, and it was dark.⁷¹ The Ministry of Defence did not launch an investigation into this incident.⁷² The inconsistent manner in which checkpoint shootings are investigated, and victims compensated, may reflect the fact that the Ministry of Defence is unclear about the legality of these killings, and has not been able to decide on a uniform response.

4.2 Case Study II: Preemptive Killing and Collective Punishment at Fallujah

U.S. operations in Fallujah in 2004 illustrate the dangers posed to the civilian population as a whole when inadequate criteria for determining direct participation in hostilities are employed during military operations. At Fallujah, U.S. forces treated the entire military-aged male population of the city as potential insurgents, and their actions in Fallujah can be characterized as the collective punishment of a civilian population seen to be hostile to U.S. forces and the new Iraqi government that U.S. forces were supporting.⁷³

The security situation in Fallujah deteriorated quickly during the early days of the U.S. occupation in April 2003. On 23 April 2003, a group of 200 protestors defied a U.S.-imposed curfew to protest the U.S. occupation of a local school. U.S. troops of the 82nd Airborne Division opened fire on the crowd, reportedly killing thirteen persons and wounding seventy-five.⁷⁴ There is some dispute as to whether the U.S. troops fired in response to gun shots from the crowd; locals claim that only rocks were thrown, whereas the troops claimed to have come under fire.⁷⁵ Since the casualty rate was about 44% of all those present, and is also reported to have included children and medical personnel who were treating the wounded,⁷⁶ this suggests that U.S. forces

⁷⁰ *Ibid.* at 11.

⁷¹ *Ibid.*

⁷² *Ibid.* at 12.

⁷³ For example, the U.N. envoy to Iraq, Lakhdar Brahimi accused U.S. military commanders of engaging in collective punishment of Fallujah residents; see: Rajiv Chandrasekaran, “Key General Criticizes April Attack in Fallujah” *The Washington Post* (13 September 2004) at A17.

⁷⁴ Muhamad Tareq Al-Darraji, “Testimonies of Crimes Against Humanity in Fallujah: Towards a Fair International Criminal Trial,” 15th Session of the U.N. Human Rights Council, Geneva (13 September – 1 October 2010) at 4 [hereinafter *Fallujah Testimonies*], available at: <http://www.brusselstribunal.org/pdf/MHRI-Fallujah160910.pdf> (accessed 8 March 2013).

⁷⁵ Kendall G. Gott, ed., *Eyewitness to War, Volume I: The US Army in Operation AL FAJR: An Oral History* (Fort Leavenworth, Kansas: Combat Studies Institute Press, 2006) at 2 [hereinafter *Eyewitness to War*].

⁷⁶ *Fallujah Testimonies*, *supra* note 74 at 4.

may have been firing indiscriminately, which is unlawful.⁷⁷ On 11 September 2003, a further incident occurred in which members of the local Fallujah Protection Force claimed to have witnessed Blackwater security contractors, driving a blue BMW SUV, opening fire on the Mayor's home. They pursued the BMW. U.S. forces then fired upon the Fallujah Protection Force vehicle in pursuit of the BMW, killing a reported eight police officers and wounding two others.⁷⁸ These incidents caused significant tensions between the residents of Fallujah, U.S. forces and their private contractors. Tensions escalated until 31 March 2004, when four Blackwater security guards transporting kitchen supplies were ambushed and killed in Fallujah. Their mutilated bodies were hung from a bridge over the River Euphrates, and the images were broadcast around the world.⁷⁹ In response to the murder of the Blackwater contractors, Coalition forces launched Operation Vigilant Resolve against Fallujah on 4 April 2004.⁸⁰ Due to political pressure, Ambassador Bremer was forced to halt the operation on 9 May, and talks resumed between U.S. and city officials.⁸¹ The talks produced few results, and the U.S. felt that the resistance was growing. On 7 November 2004, the U.S. launched Operation Phantom Fury, also termed Operation Al-Fajr ("The Dawn") by the Iraqi forces fighting alongside the Americans.⁸² The U.S. considered the attacks to be a success, and it ended the operation on 23 December 2004, stating that "Operation AL FAJR served as an example for cities in open defiance of the new Iraqi government."⁸³

The U.S.'s actions during Operations Vigilant Resolve and Phantom Fury demonstrate how status-based interpretations of belligerency were used to characterize virtually the entire military-aged male population of Fallujah as potential insurgents. The use of these tactics is also indicative of an overall campaign of collective punishment directed against a city that was disobeying U.S. forces and withholding support for the new Iraqi government. Kendall G. Gott of the Combat Studies Institute states that, "the Coalition continuously warned city leaders and

⁷⁷ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Article 51(4) [hereinafter *Protocol I*].

⁷⁸ *Fallujah Testimonies*, *supra* note 74 at 5-6.

⁷⁹ *Eyewitness to War*, *supra* note 75 at 4.

⁸⁰ *Ibid.* at 5.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.* at 14.

residents that they were provoking a major assault on the city, but the warning went unheeded.”⁸⁴ This reverses the presumption of civilian immunity normally required of troops under the international laws of armed conflict, and sets a dangerous precedent for future conflicts, as well.

Colonel Michael Formica, Commander of the 2nd Brigade Combat Team, 1st Cavalry Division - also known as the Black Jack Brigade - discusses the inception of Operation Phantom Fury around the 7th of November. He confirms that the “concept was that we would perform basically a cordon and prevent anybody from leaving or reinforcing the city of Fallujah.”⁸⁵ Colonel Formica and his unit were directly responsible for preventing insurgents from leaving Fallujah.⁸⁶ In order to prevent targets from leaving the city before the bombardment, “the bottom line answer was that military-aged men, deemed as 16-55, would not be permitted to leave, but children and women certainly could.”⁸⁷ On the 12th of November, the *Army Times* reported that “[h]undreds of men trying to flee the assault on Fallujah have been turned back by U.S. troops following orders to let only women, children and the elderly to leave.”⁸⁸ Officials suggested that men stay in their homes, but admitted that the city was a risky and frightening place to live.⁸⁹ The *Army Times* also reported that after the battle all military-aged males would be searched, tested for explosive residue, catalogued, and interrogated about ties with insurgent forces.⁹⁰

In Fallujah, there were reports and rumors of ‘free-fire’ orders reminiscent of those used by U.S. forces in Vietnam.⁹¹ These tactics also recall those used during Objective Murray, in which it was part of the intention of the commanding officer that all military-aged males in the area be treated as hostile.⁹² As discussed above, there are a number of ways that present-day Rules of Engagement are able to accomplish preemptive and indiscriminate targeting by giving soldiers a wide discretion to determine whether a given civilian is exhibiting a hostile intent or is affiliated with a hostile group, even basing a perception of ‘hostility’ merely on the grounds that the

⁸⁴ *Ibid.* at 6.

⁸⁵ *Ibid.* at 31.

⁸⁶ *Ibid.* at 40.

⁸⁷ *Ibid.* at 33.

⁸⁸ Jim Crane, “Men Not Allowed to Leave Fallujah” *Army Times* (12 November 2004) [hereinafter *Men Not Allowed to Leave*], available at: <http://www.armytimes.com/legacy/new/1-292925-502866.php> (accessed 8 March 2013).

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ See for example, Patrick Cockburn, “Toxic Legacy of US Assault on Fallujah ‘Worse than Hiroshima’” *The Independent* (24 July 2010), available at: <http://www.independent.co.uk/news/world/middle-east/toxic-legacy-of-us-assault-on-fallujah-worse-than-hiroshima-2034065.html> (accessed 30 April 2013).

⁹² *Supra* Chapter One note 217 and accompanying text.

civilian is a military-aged male. The *New York Times* reported that the Third Battalion, Fourth Marine Regiment received orders to shoot at anyone in Fallujah with a gun, as well as orders to shoot any male of military age on the streets after dark, armed or not.⁹³ If this is the case, then these orders permitted the killing of civilian non-belligerents in circumstances that would have been impermissible even in Vietnam, and suggests that the U.S. may have issued orders that declared as hostile all armed civilians and all civilians breaking U.S. curfew orders. Certainly, officials reported in the *Army Times* that the males who had been prohibited from leaving Fallujah were told that they should remain in their homes, away from the windows, and off of the rooftops,⁹⁴ further suggesting that any visible military-aged male was at risk of being targeted by U.S. forces, without their having to distinguish whether such civilians were or were not participating in hostilities.

The U.S. reportedly engaged in the preemptive bulldozing of houses suspected of containing insurgents. Ross Caputi, former Private of the United States Marine Corps, 1st Battalion, 8th Marine Regiment, of the Alpha Company Headquarters Platoon during Operation Phantom Fury in November 2004, testified to the Office of Special Procedures of the U.N. Human Rights Council. Private Caputi claimed that U.S. forces were using preemptive and indiscriminate means of killing, such as ‘reconnaissance by fire’, a tactic in which soldiers fire into an area or building to determine if there are persons located there, and the use of bulldozers to clear the houses of suspected insurgents.⁹⁵ Private Caputi states, “[s]ometimes we were unsure whether or not there were resistance fighters in a house, then we would bulldoze it just in case... so that they would not have to send their men inside to clear those houses.”⁹⁶ This is confirmed by U.S. military sources. The Combat Studies Institute reports that, with only “a few exceptions,” soldiers “did not hesitate to destroy buildings simply suspected of holding insurgents.”⁹⁷

It appears that the entire civilian population present in Fallujah at the time of Operation Phantom Fury was at serious risk of being targeted, even in circumstances in which they were not

⁹³ Jeffrey Gettleman, “The Struggle for Iraq: Combat; Marines in Falluja Still Face and Return Relentless Fire” *The New York Times* (14 April 2004), available at: <http://www.nytimes.com/2004/04/14/world/struggle-for-iraq-combat-marines-falluja-still-face-return-relentless-fire.html> (accessed 8 March 2013).

⁹⁴ *Men Not Allowed to Leave*, *supra* note 88.

⁹⁵ *Fallujah Testimonies*, *supra* note 74 at 27.

⁹⁶ *Ibid.* at 27-28.

⁹⁷ *Eyewitness to War*, *supra* note 75 at 14-15.

taking a direct part in the hostilities or engaging in a specific hostile act, and despite the fact that many of them had been forcibly detained in the combat zone by U.S. forces themselves. The preemptive and indiscriminate killings discussed above that took place in Fallujah appear to violate the principle of distinction contained in Article 51(3) of *Protocol I* on their face, yet they were all authorized under the standard Rules of Engagement the U.S. employed there. In addition, the U.S. military has been quite open about these practices, and there has been an absence of criticism from members of the international community. Such acquiescence may set a precedent for the use of status-based characterizations of belligerency in future conflicts.

4.3 Case Study III: Unlawful Enemy Combatants & the Detainees at Guantanamo Bay

The Guantanamo Bay detention facility is an internment camp located at the U.S. Naval Base in Guantanamo Bay, Cuba. The internment camp was established in January of 2002 to hold prisoners detained by the U.S. forces in Afghanistan, as well as suspected members of Al-Qaeda and the Taliban detained elsewhere in the global war on terror.⁹⁸ Many of the detainees were not captured on a ‘battlefield’, but were turned in by local Afghans, often for cash bounty payments.⁹⁹ The U.S. detained these suspected belligerents pursuant to the *2001 AUMF*.¹⁰⁰ The U.S. claimed that these persons were ‘unlawful enemy combatants’, and so were not entitled to the protections of the *Third Geneva Convention*, including its requirement that detainees be given a hearing under Article 5 to determine their status as belligerents. This was despite the fact that these procedures had long been a standard part of U.S. military doctrine.¹⁰¹ Many of the concepts and procedures instituted by the U.S. at Guantanamo Bay have now been written into U.S.

⁹⁸ Laurel Fletcher and Eric Stover, *The Guantanamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices* (Berkeley: University of California Press, 2009) at 4-5.

⁹⁹ Mark Denbeaux *et al.*, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* (South Orange, N.J.: Seaton Hall University School of Law, 2006) at 2-3 [hereinafter *Seaton Hall Report on Guantanamo*]. Typical bounty payments were reported to be \$5000 USD.

¹⁰⁰ *Authorization for Use of Military Force*, Pub. L. 107-40, 50 U.S.C. 1541 (14 September 2001) [hereinafter *2001 AUMF*].

¹⁰¹ Departments of the Army, the Navy, the Air Force, and the Marine Corps. *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*. Military Police, Army Regulation 190-8 (1 October 1997) [hereinafter *Prisoner of War Manual*], available at: <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf> (accessed 5 December 2012). The U.S. ratified the *Geneva Conventions* in 1956, and updated its field manuals at that time to render them compliant. These rules had been in use up until 2001.

doctrine, and have become standard operating procedures.¹⁰² As will be seen in the following case study, U.S. concepts and practices developed at Guantanamo Bay were instrumental in developing policies and legal justifications for the targeted killing program.

4.3.1 The Suspension of the Geneva Conventions and the Office of Legal Counsel

The U.S. began its invasion of Afghanistan on 7 October 2001, fighting together with the United Kingdom, Australia, Canada, France, and a loose-knit collection of militia known as the Northern Alliance,¹⁰³ to overthrow the Taliban-proclaimed Islamic Emirate of Afghanistan. The city of Kabul fell on the night of 12 November 2001, beginning the rout of the Taliban forces and the increasing consolidation of Coalition control over the territory. By December, a Conference was hosted in Bonn, Germany to establish the Afghan Interim Authority under the leadership of future President Hamid Karzai.¹⁰⁴ On 22 December 2001, the Afghan Interim Authority assumed *de jure* control over Afghanistan, although many parts of the country remained outside of its *de facto* control, as armed fighters, warlords, and various militia continued to operate throughout the country.¹⁰⁵ The U.S. captured and detained numerous persons in the course of their invasion, some of whom were brought to the U.S. Naval Base at Guantanamo Bay, Cuba.¹⁰⁶

¹⁰² Joint Chiefs of Staff, *Detainee Operations*, Joint Publication 3-63 (30 May 2008) at IV-4 and IV-5 [hereinafter *Detainee Operations Manual*], available at: http://www.dtic.mil/doctrine/new_pubs/jp3_63.pdf (accessed 10 January 2013).

¹⁰³ The Northern Alliance are an illustrative example of a 'declared friendly force'. They did not meet the organizational requirements laid down in the *Hague Regulations* for belligerent qualification, and were thus unlawful combatants, as were the Taliban and Al-Qaeda fighters. Yet the U.S. and NATO forces funded and equipped these forces, fought alongside them, and permitted them to run their own internment facilities, including the Dasht-e-Leili facility, at which Northern Alliance forces have been accused of killing hundreds of suspected Taliban fighters by execution and suffocation in metal containers. See: Physicians for Human Rights, "Preliminary Assessment of Alleged Mass graves in the Area of Mazar-I-Sharif, Afghanistan" Report (February 2002), available at: http://web.archive.org/web/20040719061418/http://www.physiciansforhumanrights.org/research/afghanistan/report_graves.html (accessed 18 May 2013).

¹⁰⁴ United Nations, "Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Relations" Bonn, Germany (5 December 2001), available at: <http://www.un.org/News/dh/latest/afghan/afghan-agree.htm> (accessed 20 July 2015).

¹⁰⁵ For a brief history of the U.S. invasion of Afghanistan, see for example Derek Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (Oxford: Blackwell, 2004).

¹⁰⁶ On the question of whether the War in Afghanistan was of an international character, the Judge Advocate General of the U.S. has taken the position that it was an international conflict prior to the defeat of the Taliban, but became a non-international conflict with the new government headed by President Karzai. See: Judge Advocate General's Legal Center and School, *Law of War Deskbook* (Charlottesville, VA: International and Operational Law Department, The United States Army Judge Advocate General's Legal Center and School, 2011) at 81 [hereinafter *2011 Law of War Deskbook*], available at: http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2011.pdf (accessed 10 January 2013). However, the establishment of the new government, and its invitation to U.S. forces to

At the outset of the war, the U.S. had attempted to suspend the *Geneva Conventions* on the grounds that Afghanistan was not a functioning state, and so had no juridical authority to continue as a party to international treaties, such as the *Geneva Conventions*. The position of the U.S. government was set out in a legal memorandum dated 30 November 2001 from the Office of Legal Counsel, stating that “the President has the constitutional authority to find that Afghanistan was a failed state during the period in which the Taliban exercised control over most of the country” and consequently “is not entitled to the protection of the *Geneva Conventions*,”¹⁰⁷ despite the fact that Afghanistan was one of the original High Contracting parties to the *Geneva Conventions*, which it signed in 1949 and ratified in 1956.¹⁰⁸ A similar Memorandum was issued on 9 January 2001, which stated, “for the period in question, Afghanistan was a ‘failed state’ whose territory had been largely overrun and held by violence by a militia or faction rather than by a government. Accordingly, Afghanistan was without the attributes of statehood necessary to continue as a party to the Geneva Conventions, and the Taliban militia, like al Qaeda, is therefore not entitled to the protections of the Geneva Conventions.”¹⁰⁹ This was followed up on 22 January 2002 by a third Memorandum from the Office of Legal Counsel, which stated that “our treaty obligations under Geneva III toward Afghanistan were suspended during the period of the conflict” on the grounds that “Under Article II of the Constitution, the President has the unilateral power to suspend whole treaties or parts of them at his discretion.”¹¹⁰

This decision to suspend the *Geneva Conventions* was much criticized by the international community, and also within the U.S. administration and the Office of Legal Counsel itself. As a consequence, on 7 February 2002, U.S. President George Bush reversed this policy and issued a

continue their occupation may not be sufficient to convert the conflict from an international to a non-international conflict. See: *supra* Chapter One at note 32 and accompanying text.

¹⁰⁷ John Yoo and Robert J. Delahunty, “Memorandum for Alberto R. Gonzales Counsel to the President,” Office of Legal Counsel, U.S. Department of Justice (30 November 2001) at 18 [hereinafter *Yoo Memorandum of 30 November 2001*].

¹⁰⁸ ICRC, “Treaties and State Parties to Such Treaties: Convention (III) relative to the treatment of prisoners of war. Geneva, 12 August 1949,” available at: http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375 (accessed 8 August 2014).

¹⁰⁹ John Yoo and Robert J. Delahunty, “Memorandum for William J. Haynes II, General Counsel, Department of Defense,” Office of Legal Counsel, U.S. Department of Justice (9 January 2002) at 14 [hereinafter *Yoo Memorandum of 9 January 2002*].

¹¹⁰ Office of the Assistant Attorney General, “Memorandum for Alberto R. Gonzales, Counsel to the President, and William Haynes II General Counsel of the Department of Defense,” Office of Legal Counsel, U.S. Department of Justice (22 January 2002) at 11 [hereinafter *OLC Memorandum of 22 January 2002*].

statement that Taliban detainees would be treated in accordance with the *Geneva Conventions*, whereas Al-Qaeda detainees would not. The press release stated that Taliban detainees were not entitled to prisoner of war status, as they did not meet the four organizational criteria set out in Article 4 of the *Third Geneva Convention*, whereas Al-Qaeda detainees were not a state party to the *Geneva Conventions* and so “are not covered by the Geneva Convention.”¹¹¹ The Judge Advocate General’s office has stated that by the time the *Geneva Conventions* were ‘re-instituted’ on 7 February, they were no longer applicable in any event, as the conflict had ceased to be of an international character once Hamid Karzai had assumed power.¹¹²

For those Taliban detainees who had been apprehended before this time, the U.S. denied that they met the criteria for belligerent qualification, and could be treated outside the scope of the *Third Geneva Convention*. The White House’s press announcement of 7 February 2002 was issued concurrently with a new Memorandum from the Office of Legal Counsel concerning the status of Taliban detainees, written by Assistant Attorney General Jay S. Bybee.¹¹³ The *Bybee Memorandum* found that the Taliban militia failed to meet the organizational requirements imposed by Article 4 of the *Third Geneva Convention*,¹¹⁴ even if they were to be considered as the official and authorized armed forces of the state of Afghanistan.¹¹⁵ The *Bybee Memorandum* concludes by clarifying the, now, position of the U.S. Administration that Taliban and Al-Qaeda detainees did not need to be afforded a status determination hearing under Article 5 of the *Third Geneva Convention*, because there was ‘no doubt’ as to their status as belligerents.¹¹⁶ Article 5 requires that there be a presumption that detainees are prisoners of war until a competent Article 5 Tribunal determines otherwise, thus placing the onus on the detaining power to demonstrate that the person is *not* entitled to prisoner of war treatment.¹¹⁷ The *Bybee Memorandum* states that “the presumption and tribunal requirement are triggered, however, only if there is ‘any doubt’ as

¹¹¹ Armed Forces Press Service, Press Release, “Geneva Convention Applies to Taliban, not Al-Qaeda” (7 February 2002), available at: <http://www.defense.gov/News/NewsArticle.aspx?ID=43960> (accessed 5 December 2012).

¹¹² *2011 Law of War Deskbook*, *supra* note 106 at 81.

¹¹³ Jay S. Bybee, “Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949” Memorandum Opinion for the Counsel to the President, Office of the Assistant Attorney General, U.S. Justice Department, Washington, D.C. (7 February 2002) [hereinafter *Bybee Memorandum*].

¹¹⁴ *Ibid.* at 2-4.

¹¹⁵ *Ibid.* at 2.

¹¹⁶ *Ibid.* at 8.

¹¹⁷ *Supra* note 5.

to a prisoner's Article 4 status,"¹¹⁸ which Bybee stated had been definitively resolved in the negative by the preceding arguments in the *Memorandum*.

This suppressed the most important questions concerning the status of the Afghan detainees. First, it failed to address the question of whether a particular detainee was, in fact, a member of Al-Qaeda or the Taliban militia – a complex factual matter that, in and of itself, should have merited Article 5 Tribunal hearings for each detainee. Second, the OLC Memoranda failed to address the question of whether the detainees, even if members of Al-Qaeda and the Taliban, had actually participated as combatants in hostilities during the initial invasion of Afghanistan – a conflict of an international character that certainly would have been governed by the *Third Geneva Convention*.¹¹⁹ If a detainee had not taken part in hostilities, then they would have been entitled to be treated as a protected person under the *Fourth Geneva Convention*.¹²⁰ Third, the OLC Memoranda do not address the question of whether any of the detainees, even if they had participated directly in hostilities, were lawful prisoners of war under Article 4(6) of the *Third Geneva Convention*. Neither the *Bybee* nor the *Yoo Memoranda* make any reference to Article 4(6) of the *Third Geneva Convention*, those provisions granting belligerent qualification to those participating in a *levée en masse*. Those persons who had taken up arms to repel the U.S. invasion may have fallen under Article 4(6) – even members of the Taliban and Al-Qaeda – and this in turn is a complex question of mixed law and fact that would have merited Article 5 Tribunal hearings in each case. In the end, the legal effect of the U.S.'s refusal to hold Article 5 Tribunal hearings ought normally to have been that the presumption of prisoner of war status contained within Article 5 remained non-rebutted, during which time the detainees remained entitled to the privileges of prisoner of war protections under the *Geneva Conventions*.¹²¹

¹¹⁸ *Bybee Memorandum, supra* note 113.

¹¹⁹ *2011 Law of War Deskbook, supra* note 106 at 79, where it is stated that the war in Afghanistan was, at that time, an international conflict between two Contracting Parties to the *Geneva Conventions*, but the Taliban was an unorganized militia, and not the armed forces of the state of Afghanistan, and therefore not entitled to be treated in accordance with the *Third Geneva Convention*.

¹²⁰ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 [hereinafter *Fourth Geneva Convention*] at Article 4, which broadly defines protected persons as, "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."

¹²¹ In addition, the *Third Geneva Convention, supra* note 5 at Article 17 provides that "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or

However, the U.S. did not proceed on this basis.

The Office of Legal Counsel has played an important role in interpreting, and even reshaping, customary international law through their legal opinions concerning the Afghan detainees being held at Guantanamo Bay. The OLC's position on the status and treatment of the Afghan detainees has been highly influential, and the OLC is now playing a similar role in legal justifications for the U.S.'s targeted killing program, discussed below. The OLC, created in 1933, plays a unique role as a source of law. Its function is "to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."¹²² The OLC provides guiding legal advice to the federal administration; this advice is likely to affect the policies and decisions of the executive branch, even as it is frequently immune to review by the courts. As stated by the Acting Assistant Attorney General, David J. Barron, the OLC "is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts – a circumstance in which OLC's advice may effectively be the final word on the controlling law."¹²³ Many of the opinions of the OLC are not published.¹²⁴ The *Barron Best Practices Memorandum* states that the "OLC will decline to publish an opinion when disclosure would reveal classified or other sensitive information relating to national security."¹²⁵ "Similarly," he states, "the OLC will decline to publish an opinion if doing so would interfere with federal law enforcement efforts or is prohibited by law. The OLC will also decline to publish opinions when doing so is necessary to preserve internal Executive Branch deliberative processes or to protect the confidentiality of information covered by the attorney-client relationship between OLC and other executive offices."¹²⁶ Therefore, the OLC's advice to their clients very often has the status of law, and certainly U.S. law. However, the OLC's opinions also cover aspects of the international customary law. Thus, the OLC's opinions can justify state

disadvantageous treatment of any kind." Article 14 further states that "Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture." Therefore, presumptive prisoner of war status would have rendered unlawful much of the U.S.'s treatment of the Afghan detainees, including their interrogation, as well as limitations on their ability to communicate, to contact counsel, and to enjoy normal civil liberties and capabilities.

¹²² David J. Barron, "Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions," Office of Legal Counsel, U.S. Department of Justice (16 July 2010) at 1 [hereinafter *Barron Best Practices Memorandum*].

¹²³ *Ibid.* at 1.

¹²⁴ *Ibid.* at 5, for a discussion of the internal OLC process whereby publication decisions are made.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at 6.

practice and give rise to persuasive *opinio juris*.¹²⁷ This is counterintuitive, but as the next case study will discuss further, the U.S. has sought simultaneously to keep the actual memoranda secret, while very openly publishing their conclusions that U.S. actions are not only lawful, but specifically that they are lawful under the international laws of armed conflict. In this way, the U.S.'s adoption of certain practices sets a precedent for other states who might wish to adopt similar policies, and this has the potential to significantly affect the interpretation of international humanitarian law. At the same time, however, the legal interpretations of the OLC are subject to attorney-client privilege, are very often immune from review by the courts, and – certainly in matters of national security - are inaccessible to the public.¹²⁸ This gives the OLC a unique position as a source of law, for the controlling nature of its opinions arises directly out of the fact that they are *not* known to the general public, and so remain unchallenged and unreviewable.

The OLC's response to the *Yoo Memoranda* has significant consequences for the law concerning Article 5 of the *Third Geneva Convention*, as it repudiated some of the assertions made in the *Yoo Memoranda*, but not those concerning Article 5. First, the OLC issued the *Barron Best Practices Memorandum* outlining the standard their attorneys should follow in providing controlling legal opinions. Barron states, “It is thus imperative that the Office’s advice be clear, accurate, thoroughly researched, and soundly reasoned... OLC must always give candid, independent, and principled advice – even when that advice is inconsistent with the aims of policymakers.”¹²⁹ For further clarity, it instructed Department of Justice lawyers at the OLC that the “OLC’s analysis should be guided by the texts of the relevant documents, and should use traditional tools of construction in interpreting those texts.”¹³⁰ Their attorneys were reminded of the importance of precedent.¹³¹ The *Barron Best Practices Memorandum* squarely addressed the issue that government policy had been dictating the legal opinions of the OLC, and not the other way around, when Barron reminds OLC attorneys that their legal analyses are “not designed

¹²⁷ Customary international law is defined as practices among States that are consistent and that endure for some period of time, as well as a belief that the practice is legally mandated, which belief is referred to as *opinio juris*. See: Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010) at 6.

¹²⁸ The *Yoo* and *Bybee Memoranda*, *supra* notes 107, 109 and 113, as well as the OLC’s *Interrogation Opinions*, *infra* page 184, came to light only after they were leaked to members of the press.

¹²⁹ *Barron Best Practices Memorandum*, *supra* note 122 at 1.

¹³⁰ *Ibid.* at 2.

¹³¹ *Ibid.*

merely to advance the policy preferences of the President or other officials.”¹³² In fact, a five-year investigation by the Department of Justice’s Office of Professional Responsibility into the *8/1/02 Interrogation Opinion* and the *3/14/03 Military Interrogation Opinion*, also written by John Yoo and Jay Bybee, and which concerned the application of the law of torture to the enhanced interrogation techniques being used by the CIA in Iraq and Afghanistan, did find that Yoo and Bybee had committed professional misconduct in failing to exercise independent legal judgment, and render thorough, objective and candid, legal advice.¹³³ Specifically, the Office of Professional Responsibility found that the memoranda were drafted with a view to providing the client, the U.S. executive, with a justification for using the enhanced interrogation techniques.¹³⁴ The investigators concluded that “there was never any doubt that waterboarding would be approved by Yoo.”¹³⁵ Precedents were not used appropriately,¹³⁶ and some of the arguments presented were found to be “illogical or convoluted.”¹³⁷ The Office of Professional Responsibility, while they did not examine the *Yoo Memoranda* in total, did address their advice concerning the suspension of the *Geneva Conventions*. Specifically, the Office of Professional Responsibility found that Yoo’s assertions in the *Yoo Memorandum of 9 January 2002* that the President has the authority to suspend the *Geneva Conventions* to be incorrect, as well as his conclusion that al-Qaeda suspects were not protected by the *Geneva Conventions*, and therefore no breaches of the *Geneva Conventions* or war crimes could be found with respect to their treatment.¹³⁸

The Office of Legal Counsel rejected the Office of Professional Responsibility Report.¹³⁹ Deputy Attorney General David Margolis rejected the findings of the investigation, and declined to refer its finding with respect to the misconduct of Yoo and Bybee to state bar authorities for

¹³² *Ibid.*

¹³³ Office of Professional Responsibility, *Investigation Into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists*, Office of Professional Responsibility Report, U.S. Department of Justice (29 July 2009) at 11 [hereinafter *OPR Report*].

¹³⁴ *Ibid.* at 226.

¹³⁵ *Ibid.* at 227.

¹³⁶ *Ibid.* at 228, 231.

¹³⁷ *Ibid.* at 230.

¹³⁸ *Ibid.* at 240.

¹³⁹ David Margolis, “Memorandum for the Attorney General” U.S. Department of Justice (5 January 2010) [hereinafter *Margolis Memorandum*].

determination.¹⁴⁰ Specifically on the issue of the extent to which OLC attorneys should take into account the wishes of the executive branch in crafting their opinions, Margolis stated that OLC attorneys must take into consideration the goals of the administration, and assist in their accomplishment within the law.¹⁴¹ Assistant Attorney General Jack Goldsmith had told the OPR investigators that there was a long tradition where “Attorney Generals [sic] gave advice which was, you know, more of, here’s an argument to cover what you’ve done, rather than my best independent view on the merits,” and he noted that the standard to be followed was not clear to OLC attorneys.¹⁴² The Department of Justice defended the OLC memoranda, and denied that they were intended to provide legal cover to the U.S. Administration for questionable human rights practices they engaged in against the detainees at Guantanamo Bay and elsewhere in Iraq and Afghanistan. This is the context in which David Barron also drafted the OLC’s *Targeted Killing Memorandum*, discussed below.

Despite Margolis’ defense of the legal reasoning contained within the OLC memoranda, the OLC did issue a further Memorandum explicitly repudiating portions of the *Yoo Memoranda*,¹⁴³ including its “broad assertion of the President’s Commander in Chief power that would deny Congress any role in regulating the detention, interrogation, prosecution, and transfer of enemy combatants captured in the global War on Terror.”¹⁴⁴ The *Bradbury Memorandum* also retracted the much-criticized *8/1/02 Interrogation Opinion* and the *3/14/03 Military Interrogation Opinion*, that had justified enhanced interrogation techniques in Iraq and Afghanistan. The *Bradbury Memorandum* also repudiated the assertion made in the *Yoo Memoranda* that the President possesses unfettered discretion to suspend treaty obligations.¹⁴⁵ Bradbury states, “we advised the Legal Advisor to the National Security Council and the Deputy Counsel to the President not to rely on the two opinions identified above to the extent they suggested that the President has unlimited authority to suspend a treaty beyond the circumstances traditionally recognized.”¹⁴⁶

¹⁴⁰ *Ibid.* at 2.

¹⁴¹ *Ibid.* at 15.

¹⁴² *Ibid.* at 18.

¹⁴³ Stephen G. Bradbury, “Memorandum for the Files Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001” Office of Legal Counsel, U.S. Department of Justice (15 January 2009) [hereinafter *Bradbury Memorandum*].

¹⁴⁴ *Ibid.* at 2.

¹⁴⁵ *Ibid.* at 8.

¹⁴⁶ *Ibid.* at 9.

The wording indicates therefore, that the other portions of the *Yoo Memoranda* continue to represent the official view of the OLC, including the position that the U.S. declined to review the belligerent status of the detainees, or to hold competent tribunals under Article 5 of the *Geneva Conventions*. Therefore, the OLC did not challenge their previous assertion that Articles 4(6) and 5 of the *Geneva Conventions* did not apply to the U.S.'s treatment of the Afghan detainees, and the U.S. government continued to act in accordance with this position, despite the cloud cast over the OLC's memoranda by the Office of Professional Responsibility.

4.2.2 The Belligerent Status of the Guantanamo Detainees

The U.S. therefore asserted through the Office of Legal Counsel that the detainees at Guantanamo Bay were unlawful combatants, and that since there was no doubt on this matter, Article 5 Tribunal hearings need not be held to determine the detainees' status as belligerents. However, if any of the detainees had not participated directly in hostilities, then they were entitled to be treated as protected persons under the *Fourth Geneva Convention*. For those who did participate directly in hostilities, then it was open for them to claim that they did so as qualified belligerents under Article 4(6) of the *Third Geneva Convention*, as part of a *levée en masse*. Recall from the discussion in Chapter Two that the concept of a *levée en masse* is a holdover from the customs of the early-modern era that would have permitted any civilian to take up arms in their defense, and this custom was preserved in Article 10 of the 1874 *Brussels Declaration*, and then codified in Article 2 of the 1899 and 1907 *Hague Regulations*. The current definition of a *levée en masse* is found in Article 4(6) of the *Third Geneva Convention*, which states that it applies to "inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war." The law only imposes two organizational requirements on members of *levées en masse*: they must carry arms openly and respect the laws and customs of war, but they need not wear a uniform or be subsumed under a chain of command.¹⁴⁷ The ICRC clarified this concept in its 1987 *ICRC Commentary*, which states that "it allows the combatants to distinguish

¹⁴⁷ *Third Geneva Convention*, *supra* note 5 at Article 4(6).

themselves solely by carrying arms openly.”¹⁴⁸ Belligerent qualification is limited temporally to those who take up arms “on the approach of the enemy”. This narrow definition “was a direct reflection of contemporary State concerns that to give too wide a definitional scope to *levee en masse* was to legitimize resistance fighters and rebellion.”¹⁴⁹ Yet, *levées en masse* may subsist not only during the initial phase of the invasion, but any time that a State moves to take new territory in an area that it is not presently occupying, or to retake a territory over which it has lost control. The *ICRC Commentary* states that it “seems to be accepted nowadays that a *levee en masse* can take place in any part of the territory which is not yet occupied, even when the rest of the country is occupied, or in an area where the occupying power has lost control over the administration of the territory and is attempting to regain it.”¹⁵⁰ The *ICRC Commentary* also affirms, “*Levee en masse* will subsist unless the occupying power can demonstrate that it has established control over the administration of the territory, and has not lost it.”¹⁵¹ The ICRC’s *Interpretive Guidance* of 2006 affirmed the existing concept of *levées en masse* but without further elaboration.¹⁵²

Was there a serious issue to be raised, then, as to whether some of those detained during the course of the U.S. invasion of Afghanistan were either ordinary civilians, or qualified belligerents entitled to prisoner of war status under Article 4(6) of the *Third Geneva Convention*? This latter category could have covered all those detained before the fall of Kabul, and most likely all those detained before the Afghan Interim Authority was instituted on 22 December 2001. However, it would also appear to cover situations in which Coalition Forces moved into new territories over which neither they nor the Afghan Interim Authority had established administrative control, as well as territory that they had lost to local militia.

Indeed, several detainees specifically raised the claim that they were members of *levées en masse*. This claim was raised in the Petition for *habeas corpus* and other relief filed by Shafik

¹⁴⁸ Yves Sandoz *et al.*, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987) at 533 [hereinafter *ICRC Commentary*].

¹⁴⁹ Emily Crawford, “*Levee En Masse – A Nineteenth Century Concept in a Twenty-First Century World*” (2011) Sydney Law School Legal Studies Research Paper No. 11/31 (May 2011) at 8 [hereinafter *Levee En Masse*], available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851947 (accessed 5 December 2012).

¹⁵⁰ *ICRC Commentary*, *supra* note 148.

¹⁵¹ *Ibid.*

¹⁵² *Interpretive Guidance*, *supra* note 64 at 1001.

Rasul¹⁵³ and Fawzi Al-Odah¹⁵⁴ and heard by the D.C. District Court on 26 June 2002.¹⁵⁵ Also joined in the suit were Australians David Hicks and Mamdouh Habib, and twelve Kuwaiti nationals. The Petitioners were being held by the United States military at the Guantanamo Bay detention facility in Cuba. In their Amended Petition, the Petitioners Rasul and Hicks explicitly claimed to be members of a *levée en masse*. They stated, in the language of Article 4(6), that if any of the Petitioners “ever took up arms in the Afghani struggle, it was only on the approach of the enemy, when they spontaneously took up arms to resist the invading forces, without having had time to form themselves into regular armed units, and carrying their arms openly and respecting the laws and customs of war.”¹⁵⁶ This was clearly an assertion on the part of the Petitioners that any use of force they engaged in against U.S. and Coalition troops was lawful under Article 4(6) of the *Third Geneva Convention*. Several of the Kuwaiti Petitioners claimed that they were civilians who had taken no part in hostilities.¹⁵⁷ The District Court did not hear the merits of the detainees’ claims, as it dismissed the suit for lack of jurisdiction.¹⁵⁸

In 2004, the case of *Rasul* was heard by the U.S. Supreme Court, which permitted jurisdiction in the matter of the Petitioners’ writs of *habeas corpus*, and held that the legality of their detention had to be addressed by the U.S. government.¹⁵⁹ As a result of the decision in *Rasul*, the Department of Defense formed the Combatant Status Review Tribunal by an order dated 7 July 2004.¹⁶⁰ The *Wolfowitz Order* was limited to those persons detained at Guantanamo Bay, and not to the much larger number of detainees being held in Iraq, Afghanistan, and in third

¹⁵³ *Rasul v. Bush*, Civil Action No. 02-299 (D.C. Cir. 19 February 2002).

¹⁵⁴ *Odah v. United States*, Civil Action No. 02-828 (D.C. Cir. 1 May 2002).

¹⁵⁵ *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.C. Cir. 2002) [hereinafter *Rasul District Court Decision*]. The case was also consolidated with that of *Boumediene v. Bush* 553 U.S. 723 (2008), which held that the Military Commissions Act of 2006 was unconstitutional, and that the writ of *habeas corpus* applied to Guantanamo detainees.

¹⁵⁶ *Ibid.* at 8.

¹⁵⁷ *Ibid.* at 9. In Odah’s *habeas corpus* petition before the D.C. District Court, the Court found that Odah was not credible, and found in favour of the government’s claim that he had been associated with members of Al-Qaeda.

¹⁵⁸ *Ibid.* at 16. The Court cites the World War II case of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which held that enemy aliens held outside of the sovereign territory of the United States could not bring a writ of *habeas corpus* in U.S. courts for want of jurisdiction.

¹⁵⁹ *Rasul v. Bush* 542 U.S. 466 (2004) [hereinafter *Rasul*].

¹⁶⁰ Paul Wolfowitz, “Memorandum for the Secretary of the Navy Subject: Order Establishing Combatant Status Review Tribunal” Deputy Secretary of Defense, Washington, D.C. (7 July 2004) [hereinafter *Wolfowitz Order*], available at: <http://www.defense.gov/news/Jul2004/d20040707review.pdf> (accessed 5 December 2012); see Appendix D at 19, p. 325.

party countries.¹⁶¹ Its jurisdiction was limited to the power to “determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government’s evidence.”¹⁶² Thus, the presumption of belligerent qualification contained within Article 5 of the *Third Geneva Convention* was reversed, and the Combatant Status Review Tribunal was not empowered to make findings that a detainee was either a qualified belligerent under the *Third Geneva Convention* or a civilian deserving of protection under the *Fourth Geneva Convention*, but could only rule whether their continuing detention was justified on the grounds that the detainees were ‘enemy combatants’.¹⁶³ Justice O’Connor, in the U.S. Supreme Court’s related 2004 decision in *Hamdi*,¹⁶⁴ recommended that the U.S. government employ a procedure similar to that already established in U.S. military doctrine for the determination of belligerent status. The Military Police *Prisoner of War Manual* in force at the time already provided for a well-established procedure to implement Article 5 Tribunal hearings to determine the status of all detainees,¹⁶⁵ including a presumption that “[a]ll persons taken into custody by U.S. forces will be provided with the protections of the GPW [*Third Geneva Convention Relative to the Treatment of Prisoners of War*] until some other legal status is determined by a competent authority.”¹⁶⁶ The *Prisoner of War Manual* also notes that inhumane treatment “is prohibited and is not justified by the stress of combat or with deeper provocation.”¹⁶⁷ This had been U.S. practice since the U.S. had ratified the *Geneva Conventions* in 1956, at which time it redrafted the *Law of Land Warfare Field Manual* to include a presumption that all detainees were entitled to a presumption of prisoner of war status, as well as Article 5 Tribunal hearings.¹⁶⁸

A companion manual to the *Prisoner of War Manual*, drafted in 1996 and in force at the time of the 2001 invasion of Afghanistan, sets out policies and procedures for Military Police to

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* at g.(12).

¹⁶³ *Ibid.* at i.

¹⁶⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) [hereinafter *Hamdi*].

¹⁶⁵ *Prisoner of War Manual*, *supra* note 101 at s. 1-6, p. 2-3.

¹⁶⁶ *Ibid.* at s. 1-5 (2), p. 2.

¹⁶⁷ *Ibid.* at s. 1-5(4), p. 2.

¹⁶⁸ Department of the Army, *The Law of Land Warfare*, FM 27-10 (Washington, D.C.: Department of the Army, 1956) at para. 71.

follow when detaining enemy prisoners of war and civilian internees.¹⁶⁹ The *EPW/CI Policy and Procedures Manual* also recognizes traditional categories of detainees under the *Third and Fourth Geneva Conventions*, and includes a subcategory called “detainees”, which includes all persons not recognized as prisoners of war or protected persons under the *Geneva Conventions*, such as innocent civilians, displaced persons, “suspect civilians, terrorists, espionage agents, and saboteurs.”¹⁷⁰ Such individuals would be held by the U.S. “until a definitive legal status can be established by competent authority and are treated as EPW [enemy prisoners of war] until that time.”¹⁷¹ This accords with the *Geneva Conventions*, as it mandates that civilians and suspected terrorists or insurgents are to be treated as prisoners of war until a competent tribunal determines otherwise. The U.S. government’s treatment of the Afghan detainees thus stood apart not only from the international law, but from the U.S. military’s own practices, doctrine, and institutionalized procedures. It also disregarded the advice of the U.S. Supreme Court that it implement its own military doctrine with respect to the detainees at Guantanamo Bay.

During the U.S.’s earlier experience with counterinsurgent warfare in Vietnam, the U.S. treated North Vietnamese as presumptive prisoners of war, and held Article 5 Tribunals to determine their status.¹⁷² Blocher argues that this should have set a precedent for Afghanistan, as Vietnam was also an unconventional and counterinsurgent war against irregular belligerents.¹⁷³ Corn, Watts and Jensen, a group of legal academics from the U.S. Judge Advocate General’s Office, disagreed with Blocher, stating that in Vietnam it was the central command, and not the Article 5 Tribunals, who decided that the North Vietnamese detainees should be treated as prisoners of war.¹⁷⁴ Corn argues that this decision was made primarily on political grounds, as

¹⁶⁹ United States Army Military Police School, “Military Police EPW/CI Policy and Procedures, Subcourse Number MP 2011 Edition D” (1996).

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.* The U.S. already had the legal authority necessary to detain, and to try for criminal acts, any prisoners that it detained in Iraq and Afghanistan. What the U.S. could not do under these rules was detain persons who were not prisoners of war, or persons against whom there was no evidence of criminal wrongdoing, nor could it interrogate prisoners of war, or hold prisoners of war indefinitely.

¹⁷² United States Army, Army Regulation 190-8 1-6 (b). Note that, since the U.S. ratified the *Geneva Conventions* in 1956, the Vietnam War was the first major conflict fought by United States forces in which the *Geneva Conventions* applied.

¹⁷³ Joseph Blocher, “Combatant Status Review Tribunals: Flawed Answers to the Wrong Questions” (2006) 116 Yale L.J. 667 at 669 [hereinafter *Combatant Status Review Tribunals*].

¹⁷⁴ Geoffrey Corn, Eric Talbot Jensen and Sean Watts, “Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher” (2007) 116 Yale L.J. Pocket Part 327 at 331 [hereinafter *Response to Blocher*].

their Vietnamese allies lacked a functioning court system to try the detainees as traitors, and not out of deference to the international law.¹⁷⁵ The authors claim this to be precedent that the status of belligerents in counterinsurgent environments can be made by central authorities as a political decision.¹⁷⁶ Moreover, they argue that the *Third Geneva Convention* does not ask whether a particular detainee fulfills the criteria for being a prisoner of war under Article 4, but only whether the detainee is a member of a predicate group covered by Article 4.¹⁷⁷ The authors determined that there was no predicate group to which the Afghan detainees belonged that could qualify them as prisoners of war under Article 4, using arguments similar to those contained in the *Bybee Memorandum*.¹⁷⁸ The authors did not address the issue of whether any of the detainees may have been civilians taking no part in hostilities. The authors also assert that the purpose of the Combatant Status Review Tribunals was not to determine the status of the detainees under the *Geneva Conventions*, “but rather to subject the detainee to continuing U.S. detention in order to prevent his return to the battlefield.”¹⁷⁹ If this is indeed the case, then the Combatant Status Review Tribunal would not qualify as a ‘competent tribunal’ as required by the Supreme Court in *Rasul*¹⁸⁰ and *Hamdi*¹⁸¹ and Article 5 of the *Third Geneva Convention*. Moreover, the authors do not address whether some of the Afghan detainees could have belonged to a *levée en masse*, a predicate group that *would* have qualified them for prisoner of war status under Article 4. Admitting that some of the detainees might have reasonable claims to belligerent qualification, or protection as civilians, or even that there was any doubt on this matter, would have undermined the U.S. government’s rationale for dispensing with the presumption of prisoner of war status and the Article 5 Tribunals.

¹⁷⁵ *Ibid.* See also: International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 [hereinafter *Protocol II*]. Note that after *Protocol II*, trying belligerents in a civil war as traitors may itself be impermissible under international law. Article 6(5) states that, “At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

¹⁷⁶ *Response to Blocher*, *supra* note 174 at 331.

¹⁷⁷ *Ibid.*, emphasis in original.

¹⁷⁸ *Ibid.* at 327. Compare with the *Bybee Memorandum*, *supra* note 113. However, the authors do not address in what manner the detaining power is to determine if a particular detainee is in fact a member of a predicate group if Article 5 Tribunals are not held in each case, as this is a matter on which there may often be doubt.

¹⁷⁹ *Ibid.* at 334.

¹⁸⁰ *Rasul*, *supra* note 159.

¹⁸¹ *Hamdi*, *supra* note 164.

The U.S. Supreme Court in *Boumediene* found the Combatant Status Review Tribunals contained inadequate procedural guarantees, but did not go so far as to stipulate that the detainees were entitled to Article 5 Tribunal hearings.¹⁸² As a result of the Supreme Court's decision in *Boumediene*, the U.S. government permitted the Afghan detainees to file petitions for *habeas corpus* directly before the D.C. District Court, and it ended the Combatant Status Review Tribunals. Yet the scope of the *Boumediene* hearings was essentially the same as that before the Combatant Status Review Tribunals, in that the government's evidence was presumed to be accurate, much of it was redacted, and the issue to be addressed was whether the detainees' continuing detention was justified; the *Boumediene* hearings did not address the detainees' status as belligerents or their treatment under the *Third Geneva Convention*.

4.3.3 The Boumediene Hearings and Status-Based Determinations of Belligerency

In its determinations of the belligerent status of the detainees at Guantanamo Bay, the U.S. government was therefore not working within the established framework of the laws of belligerent qualification, even that which was affirmed in the U.S.'s own military doctrine and regulations. Instead, it treated the detainees at Guantanamo Bay as members of 'declared hostile forces' under the 2001 AUMF. This permitted the U.S. government, and the U.S. courts, to avoid determining whether the detainees had actually been participating in hostilities, and replace this with an analysis of the detainees' membership in, or affiliation with, Al-Qaeda, the Taliban, and associated groups. This is evidenced in the manner in which the D.C. District Court of Appeals has assessed the prisoners' *habeas corpus* petitions at their *Boumediene* hearings. The D.C. District Court of Appeals ruled in *Al-Adahi* that, pursuant to the 2001 AUMF, the government must only demonstrate some evidence that a detainee was a member of the Taliban or Al-Qaeda.¹⁸³ In other words, the U.S. government does not need to show that the detainee

¹⁸²*Boumediene v. Bush*, 128 S. Ct. 2209, 553 U.S. 723 (2008) at 2260 [hereinafter *Boumediene*]. This case also held unconstitutional, at 2276, the *Military Commissions Act* of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17 2006), and which was subsequently replaced by the present 2009 *Military Commissions Act*, Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84, H.R. 2647, 123 Stat. 2190 (2009).

¹⁸³ *Al-Adahi v. Obama*, 613 F. Supp. 3d. 1102 (D.C. Cir. 2010) at 1105 [hereinafter *Al-Adahi*]. This judgment overturned *Al-Adahi v. Obama*, 692 F. Supp. 2d. 85 (D.D.C. 2010). The court rejected a higher standard of evidence, and stated that the applicable standard was likely "some evidence to support the [detention] order," at 1104. The court also noted that the standard must be reached on the evidence taken as a whole; each individual piece of evidence need not meet this standard.

participated directly in hostilities in the war in Afghanistan in order to justify his continuing detention, only that there is some evidence that he was at some time a member of or affiliated with a prohibited organization. Referencing the *AUMF*, the Court of Appeals in *Al-Adahi* overturned the finding by the D.C. District Court that it was “the nature of Al-Adahi’s own conduct, upon which this case must turn,”¹⁸⁴ and focused instead on evidence that showed that Al-Adahi had been associated with Al-Qaeda, the Taliban, or other related organizations.¹⁸⁵ The Court found that, under the *AUMF*, the government must only show that the detainee has been associated with groups which planned or aided the terrorist attacks on September 11, 2001, and not that the detainee has been a belligerent in the armed conflict in Afghanistan.¹⁸⁶ The government’s evidence against Al-Adahi included his wearing a Casio watch (known to be favored by Al-Qaeda operatives),¹⁸⁷ two meetings with Osama bin Laden, who had attended at his sister’s wedding,¹⁸⁸ his attendance at an Al-Qaeda training camp in Afghanistan, and the fact that his brother-in-law’s house “was very close to the compound of Mullah Omar, the leader of the Taliban.”¹⁸⁹ These activities were alleged to have taken place before the commencement of hostilities in October 2001.¹⁹⁰ The only evidence that Al-Adahi had taken up arms in the hostilities following the U.S. invasion of Afghanistan, was the fact that he had been found on a

¹⁸⁴ *Ibid.* at 1107.

¹⁸⁵ *Ibid.* at 1106. The Court also states that his brother-in-law was “affiliated with Al-Qaeda” in order to demonstrate the likelihood that Al-Adahi was similarly affiliated. See also: *Al Marri v. Pucciarelli*, 534 F. Supp. 3d 213 (4th Cir. 2008), which similarly focused on the affiliation of the person with a prohibited group, particularly at 322-323. The court held that Al-Marri, living in Illinois at the time of his arrest, was properly detained as an enemy combatant under the 2001 *AUMF*, at 261. The court found that, while membership in a prohibited group was an “amorphous” concept, it could be established by overt acts indicating affiliation, such as “self-identification with the organization through verbal or written statements; participation in the group’s hierarchy or command structure; or knowingly taking overt steps to aid or participate in the organization’s activities,” at 323. The court does not require that this participation amount to direct participation in *hostilities* under the laws of war, but only that it be to participate in a group’s activities.

¹⁸⁶ *Ibid.* at 1103.

¹⁸⁷ *Ibid.* at 1109. The Court stated that this particular model of watch is “linked to Al-Qaida and terrorist activity.”

¹⁸⁸ *Ibid.* at 1106-7. The court also stated, regarding Al-Adahi’s loyalty to the cause of Al-Qaeda, that “his sister was married to one of bin Laden’s most trusted associates,” *ibid.* at 1108.

¹⁸⁹ *Ibid.* at 1106. The Court also noted that Al-Adahi’s brother-in-law was “from mujahidin” – those who fought against the Russians in the Afghan civil war, *ibid.* This is surprising evidence of membership in Al-Qaeda, since the U.S. have openly admitted to funding and training these same mujahidin as part of Operation Cyclone. See: David Gibbs, “Afghanistan: The Soviet Invasion in Retrospect” (June 2000) 37 Int’l Pol. 233.

¹⁹⁰ *Ibid.* at 1108. Al-Adahi was expelled from the training camp after seven to ten days for smoking tobacco, which is not permitted by Al-Qaeda. Despite his expulsion after such a short time, the court stated that “there was no evidence that Al-Adahi ever affirmatively disassociated himself from Al-Qaeda,” *ibid.* at 1109. Compare with the *Interpretive Guidance*, *supra* note 64 at 1008, in which the ICRC stated that mere attendance at training camps is not sufficient evidence of membership in an organized armed group.

bus with several wounded Arab and Pakistani nationals traveling to Pakistan, and who were thought by the U.S. government to have been Taliban militants.¹⁹¹ Even this evidence was used by the Court as tending to show that Al-Adahi was part of Al-Qaeda and/or the Taliban, rather than as evidence showing that he took a direct part in the hostilities.¹⁹² The Court thus appears to have taken a view similar to Corn,¹⁹³ in finding that detention is justified on group membership or affiliations, including family and social relationships, geographical proximity, and perceived loyalties, which are in turn based upon such markers as family relationships, geographical location, cultural habits, and manners of attire. At no time did the court address the question of whether Al-Adahi himself took a direct part in the armed conflict in Afghanistan.

In a related case involving a former detainee at Guantanamo Bay, the D.C. District Court of Appeals overturned Salim Hamdan's conviction for material support for terrorism on the grounds that this is not a war crime recognized by the international laws of armed conflict.¹⁹⁴ Hamdan had also attended at Al-Qaeda training camps in Afghanistan, and had worked as a driver for Osama bin Laden from 1996-2001. Like Al-Adahi, he had been accused of being affiliated with Al-Qaeda through these activities, which took place prior to the outbreak of hostilities between the United States and Afghanistan. The court also distinguished unlawful belligerency, or taking up arms, from activities that constitute material support for terrorism.¹⁹⁵ This decision supports the finding that activities which evidence support for or affiliation with prohibited groups do not constitute direct participation in hostilities, and demonstrates the extent to which the court's analysis of the U.S. 2001 AUMF in *Al-Adahi* departs from generally-accepted interpretations of the international law.

The D.C. District Court's decision in *Al-Adahi* has had a significant and negative impact on the Guantanamo detainees' petitions for *habeas corpus*. A study by Seton Hall Law School has found that, prior to *Al-Adahi*, the D.C. District Court granted 59% of *habeas* petitions from Guantanamo detainees, but after *Al-Adahi*, only one petition has been granted, and this decision

¹⁹¹ *Ibid.* at 1110. For those who would argue that the hostilities between the U.S. and Al-Qaeda began on September 11th, 2001, it is worth noting that none of the government's evidence showed that Al-Adahi was involved with Al-Qaeda either near or after this time, nor that he had any knowledge of or participation in the September 11th attacks, calling into question whether his detention was properly authorized under the 2001 AUMF.

¹⁹² *Ibid.*

¹⁹³ *Response to Blocher, supra* note 174.

¹⁹⁴ *Hamdan v. U.S.*, 696 F. Supp. 3d 1238 (D.C. Cir. 2012) at 1250-1.

¹⁹⁵ *Ibid.* at 1252.

had since been reversed and the detainee's *habeas* petition denied.¹⁹⁶ Like the Combatant Status Review Tribunal, the *Boumediene* hearings canvas whether there is some evidence that the detainee was affiliated with Al-Qaeda or the Taliban or associated forces, and is therefore subject to continuing detention. The *Boumediene* hearings do not review whether the detainees took a direct part in hostilities in the War in Afghanistan or whether they are prisoners of war under the *Third Geneva Convention*. The Afghan detainees thus have not yet had a competent hearing to determine their lawful status as belligerents under Article 5 of the *Third Geneva Convention*.

4.3.4 The Future Treatment of 'Detainees' Under International Humanitarian Law

The U.S.'s controversial treatment of the detainees at Guantanamo Bay may set a precedent for the future treatment of detainees in counterinsurgent and counterterrorism actions. The Department of Defense's most recent doctrine concerning detainee treatment, the 2008 *Detainee Operations Manual*, departs quite dramatically from previous doctrine concerning prisoners of war.¹⁹⁷ Instead, it has normalized many of the most objectionable practices that the U.S. engaged in the wake of the September 11 attacks, including the regular assignment of interrogators to all detainees,¹⁹⁸ and the routine screening of all detainees "to determine those suspected of possessing information of immediate tactical value."¹⁹⁹ The *Detainee Operations Manual* makes few references to the *Third* and *Fourth Geneva Conventions*, and instead treats all captured persons – civilians and belligerents alike - under the category of 'detainee'. Detention, in turn, is primarily justified not on an individual's participation in hostilities, but on his or her potential intelligence value in ongoing security operations. The *Detainee Operations Manual* includes a requirement that a "JIDC [Joint Interrogation and Debriefing Center] commander, with the advice of the assigned interrogators, should provide recommendations to the DFC for release/transfer of detainees, to ensure that detainees are not released while still being exploited for HUMINT

¹⁹⁶ Mark Denbeaux *et al.*, "No Hearing Habeas: D.C. Circuit Restricts Meaningful Review" Report, Seton Hall University School of Law, Center for Research and Policy (1 May 2012) at 4, available at: <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/hearing-habeas.pdf> (accessed 18 December 2012).

¹⁹⁷ *Detainee Operations Manual*, *supra* note 102 at pp. IV-4 and IV-5.

¹⁹⁸ *Ibid.* at p. II-7.

¹⁹⁹ *Ibid.* at p. IV-4.

[human intelligence].”²⁰⁰ In other words, the length of the person’s detention is not related to the armed conflict, but to their ability to be exploited for information. The *Third Geneva Convention* in Article 13 prohibits any form of intimidation or coercion being applied to prisoners of war, and Article 17 prohibits their intimidation for the purposes of “securing from them information of any kind whatever.” Article 118 states that prisoners of war must be repatriated at the close of active hostilities “without delay”, and states may not detain prisoners longer than this to exploit them for intelligence. The U.S.’s categorization of the Guantanamo Bay detainees as ‘unlawful enemy combatants’ represents an attempt to move away from these standards.

The *Detainee Operations Manual* also writes into law some of the more controversial treatment of detainees in the war on terror, including their internment at black sites,²⁰¹ as well as extraordinary renditions.²⁰² The *Detainee Operations Manual* permits prisoners to be transferred to long-term “strategic internment facilities,”²⁰³ for the purposes of intelligence exploitation. It affirms the “permanent or temporary transfer of a detainee to a foreign nation,” and provides that such renditions “may be based on ad hoc arrangements.”²⁰⁴ Therefore, it no longer makes sense to speak of ‘extraordinary’ rendition, as measures that were implemented and justified as extraordinary responses to an emergency situation are now regulated as standard operating procedures. The *Detainee Operations Manual* also regularizes the controversial treatment known as ‘forced cell extractions’ that were employed by U.S. forces at Guantanamo Bay, which are now available to govern any “unruly and/or uncooperative detainee”.²⁰⁵ All of these procedures are absent from the previous version of the Military Police *Prisoner of War Manual*²⁰⁶ discussed above, which straightforwardly applied the provisions of the *Third* and *Fourth Geneva*

²⁰⁰ *Ibid.* at p. VII-2.

²⁰¹ Leila N. Sadat, “Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law” (2005) 37 Case W. Res. J. Int’l L. 309 at 315, where she defines ‘black sites’ as “covert prisons set up by the CIA in eight countries, including Thailand, Afghanistan, several unspecified countries in Eastern Europe, and Guantanamo Bay, Cuba.” Black sites may also include detentions aboard naval brigs at sea, *ibid.* at 309, as was the case with the Al-Shabaab militants referred to in Chapter Three, note 146 and accompanying text.

²⁰² *Ibid.* at 314, where extraordinary rendition is defined as the process of moving prisoners to third party countries through extra-legal channels. These transfers do not comply with the *Geneva Conventions*, or existing extradition laws, or human rights treaties. Sadat states that many of these prisoners have been tortured or killed, *ibid.* at 315.

²⁰³ *Detainee Operations Manual*, *supra* note 102 at p. IV-5.

²⁰⁴ *Ibid.* at p. VII-2.

²⁰⁵ *Ibid.* at p. A-2. See also: Leonard S. Rubenstein and George J. Annas, “Medical Ethics at Guantanamo Bay Detention Center and in the U.S. Military” (2009) 374:9686 *Lancet* 353 at 353, for a discussion on forced cell extractions and their role in the forced feeding of detainees.

²⁰⁶ *Prisoner of War Manual*, *supra* note 101 at 9-12.

Conventions. These procedures have been derived, according to the bibliography in the *Detainee Manual* itself,²⁰⁷ from the *Military Commissions Act of 2006* and the *Detainee Treatment Act of 2005*, and that had been struck down by the U.S. Supreme Court in *Hamdi*,²⁰⁸ *Rasul*,²⁰⁹ and *Boumediene*.²¹⁰ They are also drawn from the Standard Operating Procedures at the Bagram detention facility in Afghanistan, and the Guantanamo Bay Standard Operating Procedures, as well as its Medical Standard Operating Procedures, and the GTMO Tiger Team Standard Operating Procedures.²¹¹ Therefore, exceptional procedures instituted by the U.S. in the wake of its invasion of Afghanistan, such as extraordinary renditions, and indefinite detentions for the purposes of intelligence gathering - have now been codified into U.S. military regulations, and institutionalized as standard operating procedures.²¹²

The degree of legitimation and institutionalization that the U.S. military has given to status-based determinations of civilian direct participation, and the procedures which accompany them, may facilitate their adoption by other nation states who may also wish to interrogate suspected insurgents and terrorists and treat them outside the scope of the *Geneva Conventions*. This could have an impact on the other states' practices concerning the treatment of detainees in armed conflicts. UK *Allied Joint CPERS Doctrine*, which integrates the doctrine of UK and NATO forces, was updated in 2011²¹³ as a response to abuses that took place at prison facilities at Abu

²⁰⁷ *Detainee Operations Manual*, *supra* note 102 at p. C-1.

²⁰⁸ *Hamdi*, *supra* note 164.

²⁰⁹ *Rasul*, *supra* note 159.

²¹⁰ *Boumediene*, *supra* note 182.

²¹¹ *Detainee Operations Manual*, *supra* note 102 at p. C-3. The *Detainee Operations Manual* can be compared with the Military Police *Prisoner of War Manual* of 1997, *supra* note 101, and with the Standard Operating Procedures at Guantanamo Bay, and be found to be quite dissimilar textually from the previous version of the *Prisoner of War Manual*, and quite similar to the GTMO Standard Operating Procedures, which can be found at: http://wikileaks.org/wiki/Camp_Delta_Standard_Operating_Procedure, (accessed 3 March 2013) for the 2003 Standard Operating Procedures, and <http://wlstorage.net/file/gitmo-sop-2004.pdf> (accessed 3 March 2013) for the 2004 Standard Operating Procedures.

²¹² The United States took a slightly different approach to detainees in the course of the post-2003 Iraq occupation. Initially, they applied the *Third* and *Fourth Geneva Conventions*, but later they adopted a policy of transferring many detainees to Iraqi government authorities, who in turn committed many human rights abuses against the detainees. See e.g.: Robert M. Chesney, "Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010" (2011) 51:3 Va. J. Int'l L. 549 at 565 *et seq.* See also: Hina Shamsi and Deborah Pearlstein, eds., *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (New York: Human Rights First, 2006).

²¹³ Ministry of Defence, *Joint Doctrine Publication 1-10 Captured Persons (CPERS)*, 2nd Ed. (Swindon: Ministry of Defence, 2011) [hereinafter *Allied Joint CPERS Doctrine*]. See Annex 7E for procedures intended to harmonize NATO common capture reports.

Ghraib,²¹⁴ and at Camp Breadbasket²¹⁵ in Basra, Iraq. Allied Joint CPERS Doctrine does not overcome the above problems, but it does represent a better approach to detainee operations than U.S. doctrine. Allied Joint CPERS policy correctly recognizes that the abuse and mistreatment of detainees is not only unlawful, but harms military and counterinsurgent operations and the authority of national security forces.²¹⁶ It also correctly confirms that Article 5 Tribunals must be held in all cases of doubt as to whether the captured person is a prisoner of war,²¹⁷ and this includes members of non-state militia,²¹⁸ although this policy is limited to cases of international armed conflict.²¹⁹ Prisoner of war status is not to be granted in cases of non-international armed conflict, and this impedes the reforms attempted in the post-war period by the U.N. General Assembly and *Protocol II* that had attempted to bring more irregular fighters under the framework of the law, as discussed in Chapter Two.²²⁰ In addition, *Allied Joint CPERS Doctrine* permits individuals suspected of committing criminal acts, including those related to direct participation in hostilities, to be transferred to the host nation,²²¹ as well as third party nations,²²² which, like the U.S. *Detainee Operations Manual*, essentially permits the rendition of detainees. Although *Allied Joint CPERS Doctrine* states that detainees will not be transferred if there is a real risk that the detainee will be tortured or mistreated,²²³ this is an area in which human rights abuses have been particularly widespread.²²⁴ However, one positive development is the

²¹⁴ See generally: Seymour M. Hersh, *Chain of Command: The Road from 911 to Abu Ghraib* (New York: Harper Collins, 2004).

²¹⁵ See generally: BBC News, "Iraq Abuse Case Soldiers Jailed" *BBC News* (25 February 2005), available at: http://news.bbc.co.uk/2/hi/uk_news/4296511.stm (accessed 9 August 2014). Three UK soldiers were sentenced to jail time after military courts martial for abusing Iraqi prisoners at the Camp Breadbasket detention facility in Basra, in a manner very similar to that which took place at Abu Ghraib.

²¹⁶ *Allied Joint CPERS Doctrine*, *supra* note 213 at para. 102.

²¹⁷ *Ibid.* at para. 130.

²¹⁸ *Ibid.* at para. 137.

²¹⁹ *Ibid.* at para. 131. *Allied Joint CPERS Doctrine* does not state what the policy would be in non-international armed conflict or, more importantly, whether counterterrorism and foreign internal defense operations of the kind the United Kingdom undertook in Iraq would constitute an international armed conflict.

²²⁰ See: *supra* Chapter Two at note 324 and accompanying text.

²²¹ *Allied Joint CPERS Doctrine*, *supra* note 213 at para. 149, and Chapter 12.

²²² *Ibid.* at para. 1203 (b).

²²³ *Ibid.* at para. 1205.

²²⁴ For a general discussion of human rights abuses that took place as a result of extraordinary rendition, see *e.g.* the 2006 investigation by the Council of Europe: Dick Marty, *Alleged Secret Detentions in Council of Europe Member States, Information Memorandum II*, Committee on Legal Affairs and Human Rights, Council of Europe (22 January 2006). For human rights abuses resulting from the transfer of detainees by Canadian Forces in Afghanistan to the host nation security forces, see: Military Police Complaints Commission, *Concerning a complaint by Amnesty International Canada and British Columbia Civil Liberties Association in June 2008*, Final Report, MPCC-2008-042

recognition by the Ministry of Defence that international human rights laws and treaties apply to detainees captured abroad, including the *European Convention on Human Rights*.²²⁵ This is a welcome reversal of the policy earlier expressed by the Ministry of Defence that human rights laws did not apply extraterritorially to the actions of UK forces.²²⁶ This promotes the trend of applying human rights laws to international, as well as non-international conflicts and counterinsurgent operations. This ought to set an important precedent regarding the treatment of detainees in future conflicts, as human rights laws and the laws of armed conflict become better integrated on the issue of detainee treatment.

4.4 Case Study IV: Declared Hostile Forces & the Targeted Killing Program

In November of 2002, the U.S. launched its targeted killing program by conducting its first drone strike in Yemen, killing Qaed Sinan Harithi, one of the suspected planners of the 2000 terror attack on the USS Cole.²²⁷ Although much of the controversy surrounding the U.S.'s targeted killing program concerns the use of 'drones', which are unmanned aerial vehicles used to remotely target particular individuals from a high altitude, the targeted killing program is broader than drone strikes. A special-forces team, for example, was used to kill Osama bin Laden at his compound in Abbotabad, Pakistan on 2 May 2011.²²⁸ Nor is the use of drones in armed conflict new. Fully automated vehicles have been available since 1898, when Nicholas Tesla's radio-controlled watercraft was rejected by the U.S. military.²²⁹ While balloons have been used for surveillance purposes in armed conflicts since World War I, the weaponization and use of drones in targeting irregular belligerents was first employed by the U.S. in Afghanistan in October

(27 June 2012). The *Final Report* found the complaints against Canadian Forces officers to be unsubstantiated, as they acted as reasonable police officers in the circumstances, at s. XIX, despite the fact that there was much publicly available information regarding the risk of ill-treatment of detainees by Afghan security forces, at s. 12.1.

²²⁵ *Allied Joint CPERS Doctrine*, supra note 213 at para. 149.

²²⁶ See: Michelle A. Hansen, "Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict" (2007) 194 *Mil. L. Rev.* 1 at note 223 and accompanying text.

²²⁷ International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (2012) at 11 [hereinafter *Stanford/NYU Drone Study*].

²²⁸ White House, Press Release, "Osama bin Laden Dead" (2 May 2011) [hereinafter *White House Press Release*], available at: <http://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead> (accessed 9 August 2014).

²²⁹ Peter Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century* (New York: Penguin Press, 2009).

2001.²³⁰ During his term in office, President Bush is thought to have launched between 45 and 52 drone strikes.²³¹ Since President Obama took over the program he has significantly expanded both the number of drone strikes, as well as the geographical areas covered, increasing the number of drone strikes in Yemen and the Federally Administered Tribal Areas in Pakistan, and extending drone strikes into Somalia.²³² Only four countries to date have openly used - and argued in favour of the legality of - targeted killings. The United Kingdom has made use of drone strikes in Afghanistan.²³³ The United States, Israel, and Russia have all used targeted killings as part of their counterinsurgency strategy.²³⁴ Russia has passed a law similar to the *AUMF*, authorizing targeted killings against suspected terrorists outside of Russian territory.²³⁵ The use of non-weaponized drones has expanded in many countries, where they are being used for security, reconnaissance, policing, and search-and-rescue operations.²³⁶

The targeted killing of suspected militants raises a number of legal issues concerning the international laws of armed conflict. These include laws prohibiting aggression against an individual located in another state without that state's consent, jurisdictional questions regarding when an armed conflict can be said to exist that would trigger the international laws of war,

²³⁰ *Stanford/NYU Drone Study*, *supra* note 227 at 8.

²³¹ *Ibid.* at 12.

²³² *Ibid.* In Pakistan, 338 drone strikes have been authorized by President Obama as of July 2014, compared with 51 strikes authorized by President Bush. In Yemen, President Obama has authorized 65-77 strikes, compared with 1 authorized by President Bush. President Obama introduced the use of drone strikes in Somalia, authorizing between 5-8 drone strikes. See: Victoria Parsons, Jack Serle and Alice K. Ross, "July 2004 Update: US Covert Actions in Pakistan, Yemen and Somalia" *The Bureau of Investigative Journalism* (1 August 2014), available at: <http://www.thebureauinvestigates.com/2014/08/01/july-2014-update-us-covert-actions-in-pakistan-yemen-and-somalia/> (accessed 3 August 2014). The US is reported to have carried out about 1,000 drone strikes in Afghanistan, and the UK has conducted about 300. See: Alice K. Ross, "Who is Dying in Afghanistan's 1000-plus Drone Strikes?" *The Bureau of Investigative Journalism* (24 July 2014), available at: <http://www.thebureauinvestigates.com/2014/07/24/who-is-dying-in-afghanistans-1000-plus-drone-strikes/> (accessed 3 August 2014).

²³³ *Ibid.*

²³⁴ United Nations Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Study on targeted killings*, UNHRC, 14th Sess., A/HRC/14/24/Add.6 (28 May 2010) at 8 [hereinafter *U.N. Special Rapporteur 2010 Report*], available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> (accessed 21 April 2013). Russia has reportedly used targeted killings against suspected terrorists in Chechnya, but the UN states that there are credible reports that some killings have taken place outside of Chechnya as well.

²³⁵ Federal Law No. 35-FZ on Counteracting Terrorism (2006), cited *ibid.* at 9.

²³⁶ Richard L. Wilson, "Ethical Issues with Use of Drone Aircraft" (2014) *Ethics in Science, Technology and Engineering, 2014 IEEE International Symposium on IEEE*; see also: Bradley J. Strawser, ed., *Killing by Remote Control: The Ethics of an Unmanned Military* (Oxford: Oxford University Press, 2013), for a wide-ranging discussion concerning the use of unmanned technologies in armed conflict.

whether domestic laws and ordinary criminal laws would apply, the role of international humanitarian law versus international human rights law, and whether the attack is a lawful exercise of self-defense under the *U.N. Charter*.²³⁷ Although there are many legal issues raised by the targeted killing program, this section will focus on the laws of belligerent qualification, and the ways in which states are required to distinguish between ordinary civilians and irregular belligerents participating directly in hostilities. The U.S. has characterized its conflict with Al-Qaeda as a transnational and non-international armed conflict, as well as a counterterrorism operation; however, it has justified the legality of its actions specifically under the international laws of war, and this will be the main focus of the discussion below. Recall that the present state of the international law is that targets may only be killed intentionally if they are qualified belligerents, or civilians participating directly in hostilities.

For the present discussion, what is most significant about the targeted killing program is its use of signature criteria to choose individuals for targeting based upon their membership in a declared hostile force. Signature criteria are behaviors that U.S. forces use to determine whether an individual belongs to a declared hostile force for the purpose of targeting, based upon a “pattern of life analysis,” rather than targeting a named individual.²³⁸ Signature strikes result in the killings of many persons who are demonstrably not participating in hostilities. This practice has largely been justified by the *2001 AUMF*,²³⁹ and the doctrine of ‘unlawful enemy combatant’ as it grew up to govern the detainees at Guantanamo Bay. The ICRC’s *Interpretive Guidance* largely validates this concept as it authorizes the killing of those persons performing a continuous combat function on behalf of an organized armed group, even when they are not participating in hostilities, although it attempts to limit the signature criteria that can be used to make these decisions. The final section will argue that these criteria can be better identified by a definition based upon a definition of wrongful aggression, ensuring that those who are killed have justifiably forfeited their lives.

²³⁷ See e.g.: Mark V. Vlasic, “Assassination and Targeted Killing – A Historical and Post-Bin Laden Analysis” (2012) 43 *Geo. J. Int’l L.* 259; Afsheen John Radsan and Richard Murphy, “The Evolution of Law and Policy for CIA Targeted Killing” (2012) 5 *J. Nat’l Sec. L. & Pol’y* 439; Laurie R. Blank, “Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Conflict” (2010) 39 *Ga. J. Int’l & Comp. L.* 1.

²³⁸ *Stanford/NYU Drone Study*, *supra* note 227 at 12.

²³⁹ *2001 AUMF*, *supra* note 100.

4.4.1 *The White Paper & the Targeted Killing Memorandum*

Although the use of targeted killings performed pursuant to the 2001 AUMF began in Afghanistan in October 2001, the U.S.'s targeted killing program came to widespread public attention on 2 May 2011, when U.S. officials announced that the CIA and special forces from the U.S. Navy's Seal Team Six had killed Al-Qaeda leader Osama bin Laden at his compound in Abbottabad, Pakistan.²⁴⁰ Although the U.S. government publically announced and defended the killing, questions surrounding the legality of targeted killings began to emerge.²⁴¹ Following upon these criticisms, U.S. government officials made several public statements asserting the legality of the targeted killing program. First, Department of Justice General Counsel Jeh Johnson delivered the Dean's Lecture at Yale Law School on 22 February 2012, and stated that targeted killings were in compliance with the laws of armed conflict, including the customary law and its core principles of distinction and proportionality.²⁴² On 5 March 2012, then Attorney General Eric Holder gave a speech to Northwestern University School of Law students. This was the first official public acknowledgment of the targeted killing program by the U.S. government, and one of the first public discussions of its legality under international law. Holder stated that targeted killings, including that of Osama Bin Laden and other "senior operational leaders" of Al-Qaeda are not assassinations, "and the use of that loaded term is misplaced. Assassinations are unlawful killings."²⁴³ He also stated that "the U.S. government's use of lethal force in self-defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful,"²⁴⁴ thus clearly justifying the targeted killings as a legitimate use of defensive force. The Attorney General also noted that the laws of armed conflict

²⁴⁰ *White House Press Release*, *supra* note 228.

²⁴¹ See e.g.: Aidan Lewis, "Osama bin Laden: Legality of Killing Questioned" *BBC News* (12 May 2011), available at: <http://www.bbc.co.uk/news/world-south-asia-13318372> (accessed 18 May 2013); See also: Sarah Cunningham, "Zero Dark Thirty: A Critical Evaluation of the Killing of Osama Bin Laden Under International Humanitarian Law" (2013) 26:2 *J. Int'l L. Peace & Armed Conflict* 56, for an argument in favour of the illegality of the killing; David A. Wallace, "Operation Neptune Spear: The Lawful Killing of Osama Bin Laden" (2012) 45:2 *Israeli L. Rev.* 367, for an argument in favour of the legality of the killing; and Leysan K. Storie, Stephanie L. Madden, and Brooke Liu, "The Death of Bin Laden: How Russia and U.S. Media Frame Counterterrorism" (2014) 40:3 *Public Relations Rev.* 429, for a discussion of the narrative frames used to justify the killing.

²⁴² Jeh Johnson, "Dean's Lecture at Yale Law School" (22 February 2012) [hereinafter *Johnson Speech*], available at: http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/#_ftn9 (accessed 8 April 2013).

²⁴³ Eric Holder, Speech at Northwestern University School of Law, Chicago (5 March 2012) [hereinafter *Holder Speech*], available at: <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (accessed 5 March 2013).

²⁴⁴ *Ibid.*

only permit the U.S. to target “combatants, civilians participating directly in hostilities, and military objectives.”²⁴⁵ Holder did not clarify whether senior operational leaders of al-Qaeda and the Taliban were to be classified as combatants, civilians participating directly in hostilities, or as military objectives. As these fighters would not meet the criteria for belligerent qualification as found in Annex B of the *Hague Regulations*, they ought properly to be classified under the laws of armed conflict as civilians participating directly in hostilities.

Shortly after Eric Holder’s speech at Northwestern University, John Brennan, then Assistant to the President for Homeland Security and Counterterrorism, addressed the Woodrow Wilson International Center for Scholars. Brennan discussed the legality of drone strikes and targeted killings, including the high-profile killings of Osama bin Laden in Pakistan and American citizen Anwar al-Aulaki in Yemen.²⁴⁶ Brennan briefly addressed the principle of distinction, stating, “[w]ith the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qaeda terrorist and innocent civilians.”²⁴⁷ On the legality of targeted killings, he stated that the 2001 *AUMF* authorizes the use of force against al Qaeda, the Taliban, and associated forces.²⁴⁸ Brennan also acknowledged the precedential value that U.S. practice has on the development of other nations’ targeted killing programs, stating, “President Obama and those of us on his national security team are very mindful that as our nation uses this technology, we are establishing precedents that other nations may follow[.]”²⁴⁹ Brennan concluded by stating, “we’ll look to institutionalize our approach more formally so that the high standards we set for ourselves endure over time, including as an example for other nations that pursue these capabilities.”²⁵⁰ U.S. officials therefore view the targeted killing program as offering a model for other nations to follow.

²⁴⁵ *Ibid.* He also noted the due process clause under the Fifth Amendment to the U.S. Constitution, stating, “The Constitution guarantees due process, not judicial process.”

²⁴⁶ John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Speech to the Woodrow Wilson International Center for Scholars, Washington, D.C. (20 April 2012) [hereinafter *Brennan Speech*], available at: <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> (accessed 5 April 2013).

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

At the same time as these officials were making public statements regarding the legality of the drone strikes, they refused to disclose the precise legal justification for these strikes contained within a memorandum written by the Office of Legal Counsel. A case brought by the New York Times and the ACLU sought disclosure of the OLC memorandum, but was unsuccessful at trial.²⁵¹ However, on 4 February 2013, about a month after the district court decision in the *New York Times* case, NBC News received a leaked copy of excerpts of an undated Department of Justice Memorandum, known as the “*White Paper*”. The *White Paper* is a “policy document that closely mirrors the arguments” of the OLC’s classified *Targeted Killing Memorandum*.²⁵² The *White Paper* “sets forth a legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa’ida or an associated force.”²⁵³ Although the *White Paper* focuses on circumstances in which the target is a U.S. citizen, it also includes a discussion of targeted killings generally under the international laws of armed conflict. The *White Paper* states that the U.S. is in a non-international armed conflict with al-Qaeda, and therefore al-Qaeda and ‘associated forces’ comprise an “enemy force.”²⁵⁴ To the extent that a conflict is not of an international character, it is nevertheless governed by Common Article 3 of the *Geneva Conventions* as well as the customary international law, which include the basic principles regarding belligerent qualification and civilian immunity.

The *White Paper* asserts that members of enemy forces may be attacked at any time.²⁵⁵ The *White Paper* cites the 1987 *ICRC Commentary*, which states, “those belonging to armed forces or armed groups may be attacked at any time.”²⁵⁶ However, this section of the *ICRC Commentary* clarifies that armed forces and armed groups refer to qualified belligerents, and further states that other fighters may only be attacked for as long as they participate in hostilities, and that “in case

²⁵¹ *The New York Times Company and the American Civil Liberties Union v. United States Department of Justice*, 915 F. Supp. 2d 508 (2d Cir. 2013).

²⁵² Michael Isikoff, “Justice Department Memo Reveals Legal Case for Drone Strikes on Americans” *NBC News* (4 February 2013), available at: http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite (accessed 8 April 2013).

²⁵³ Office of Legal Counsel, “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force” Office of Legal Counsel, U.S. Department of Justice (undated) at 1 [hereinafter *White Paper*], available *ibid*.

²⁵⁴ *Ibid*.

²⁵⁵ *Ibid*. at 3.

²⁵⁶ *ICRC Commentary*, *supra* note 148 at ss. 4789.

of doubt regarding the status of an individual, he is presumed to be a civilian.”²⁵⁷ The *ICRC Commentary* therefore does not provide authority for the proposition that non-state actors may be targeted “at any time” in the course of an armed conflict, and instead supports a strict interpretation of when a civilian can be said to be participating directly in hostilities.

The *White Paper* does not recognize any geographical limitation on the scope of the U.S.’s armed conflict with al-Qaeda and associated forces, stating that “[a]ny U.S. operation would be part of this non-international armed conflict with al Qaeda and associated forces, even if targeted killings were to take place away from the zone of active hostilities.”²⁵⁸ The *White Paper* states that the Department of Justice “has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that armed conflict, unless the hostilities become sufficiently intense and protracted in the new location.”²⁵⁹ The sole example of such a state practice cited in the *White Paper* is the U.S. Strategic Air Command’s bombing campaign against Cambodia during the Vietnam conflict, known as Operation Menu.²⁶⁰ However, the legality of this action was questionable even at the time, and was sharply criticized by the Senate Armed Services Committee after a lengthy investigation.²⁶¹ The House Judiciary Committee considered including this issue in the articles of impeachment against President Richard Nixon, but the motion was voted down.²⁶² The U.S. bombing campaign in Cambodia is therefore doubtful precedent for the U.S.’s current practices in targeting persons outside of areas of active hostilities in neutral territory, and rather serves as a precedent *against* their legality.

The geographical scope of an armed conflict is governed by the laws of neutrality, which regulate the conduct of belligerent states towards third party states. The law of neutrality has rarely been invoked since World War II, and this may be because many of its customary provisions have been superseded by the *U.N. Charter*; however, while the *U.N. Charter* may

²⁵⁷ *Ibid.*

²⁵⁸ *White Paper*, *supra* note 253 at 3.

²⁵⁹ *Ibid.* at 4.

²⁶⁰ *Ibid.*

²⁶¹ United States Senate, *Hearings Before the Senate Armed Services Committee Bombing in Cambodia*. United States Senate, 93rd Congress, 1st Session (Washington, D.C.: US Government Printing Office, 1973).

²⁶² John Morocco, *War in the Shadows* (Boston: Boston Publishing Company, 1988) at 149.

have limited the free choice of states to declare their neutrality, it is less clear that it has affected the substantive rights and obligations of belligerents towards neutral states.²⁶³ These principles are expressed in the *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers in Case of War on Land*, which prohibits attacks on the territory of a neutral state, which is held to be inviolable.²⁶⁴ The *Hague Convention (V)* contains a number of provisions covering situations in which belligerents seek shelter or supplies within the territory of a neutral state. Individuals do not violate neutrality by furnishing loans or supplies to belligerents.²⁶⁵ When troops from a belligerent party are found on the territory of a neutral state, that state shall intern them, and shall provide them with food, shelter, and relief required by humanity, at its own expense.²⁶⁶ Although the *Hague Convention (V)* only applies to those parties who have ratified it, including the United States,²⁶⁷ its provisions may have now become customary law.²⁶⁸ It certainly lends support to the proposition that financing and supplying belligerents have not traditionally been considered as direct participation in hostilities, and therefore not belligerent acts. It also contradicts the position outlined in the *White Paper*, which asserts that states may attack

²⁶³ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html> (accessed 24 June 2015). Article 25 requires compliance with the U.N. *Charter*, and Article 2(5) requires Members to “give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or punitive action.” See also: Walter L. Williams Jr., “Neutrality in Modern Armed Conflicts: A Survey of the Developing Law” (1980) William and Mary Law School Faculty Publications Paper No. 759 at 15.

²⁶⁴ International Conferences (The Hague), *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907 at Article 1 [hereinafter *Hague Convention (V)*]. The *Hague Convention V* has been ratified by 33 countries, including the United States. See: International Committee of the Red Cross, available at: https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=200 (accessed 24 March 2015).

²⁶⁵ *Ibid.* at Article 18.

²⁶⁶ *Ibid.* at Article 11 and 12.

²⁶⁷ *Ibid.* at Article 20. The United States is a party to the *Hague Convention (V)*, although Pakistan and Yemen, where many drone strikes have taken place, are not. See: <https://www.icrc.org/ihl/INTRO/200?OpenDocument> (accessed 2 December 2014).

²⁶⁸ International Military Tribunal at Nuremberg, *Trial of the Major War Criminals*, Judgment (London: His Majesty’s Stationary Office, 1946) at 65, where the Tribunal addressed the defense’s argument that the *Hague Regulations* did not apply to Germany, stating, “[T]he rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt ‘to revise the general laws and customs of war’ which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war[.]” Although the International Military Tribunal did not specifically reference the *Hague Convention V*, similar arguments would apply in favor of the customary nature of its norms.

belligerents on the territory of neutral states.

The *Hague Convention (V)* governing neutrality does not permit the unrestricted targeting of suspected belligerents in neutral territory; however, there are scholars who have rejected the *Hague* law of neutrality in favour of a new concept of a ‘zone of hostilities’ that is not bound by the territoriality of states.²⁶⁹ Daskal argues that such operations would be permissible if they follow a framework of individualized threat assessment, a least-harmful means test, and meaningful procedural safeguards.²⁷⁰ Blank argues that status-based Rules of Engagement are preferable to the traditional framework of the law of neutrality because they permit a state to create a zone of conflict by declaring a force hostile.²⁷¹ Blank also advocates for permitting states a wide degree of choice in declaring zones of conflict, as well as the framework chosen to address the targeting of forces declared as hostile.²⁷² This line of thinking follows the same reasoning found in the *White Paper* that would sideline the *Hague Convention (V)* norms governing neutrality and instead permit states a wider latitude in targeting militants in neutral territories. However, there are no guarantees that targets will be chosen on the basis of their participation in hostilities. There is also a lack of appreciation for the effects on the sovereignty of neutral states if the law of neutrality were to be abandoned. On this point, the *White Paper* mainly references U.S. policies and practices, rather than established principles of the international laws of armed conflict, and therefore serves as doubtful authority for the legality of the targeted killing program.

In 2014, the U.S. government was ordered by the New York District Court of Appeals to release a redacted version of the OLC *Targeted Killing Memorandum*. The release of the *White Paper* and the public statements made by senior U.S. officials were crucial to the Court’s holding that there had been voluntary disclosure, which waived the *Freedom of Information Act* exemption the U.S. government had claimed.²⁷³ The Court found that waiver of secrecy and privilege in the *Targeted Killing Memorandum* had occurred “[a]fter senior government officials

²⁶⁹ See e.g.: Jennifer C. Daskal, “The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone” (2013) 161:5 U. Pa. L. Rev. 1165.

²⁷⁰ *Ibid.* at 1209 *et seq.*

²⁷¹ Laurie R. Blank, “Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat” (2010) 39:1 Ga. J. Int’l & Comp. L. 1 at 35.

²⁷² *Ibid.* at 37.

²⁷³ *The New York Times Company and the American Civil Liberties Union v. United States Department of Justice*, 756 F. Supp. 3d 100 (2d Cir. 2014) at 116 [hereinafter *New York Times*].

have assured the public that targeted killings are ‘lawful’ and that OLC advice ‘establishes the legal boundaries within which we can operate,’ and the Government makes a public and detailed analysis [redacted], waiver of secrecy and privilege as to the legal analysis in the Memorandum has occurred.”²⁷⁴ The Court released a redacted version of the *Targeted Killing Memorandum* on 23 June 2014.²⁷⁵

The *Targeted Killing Memorandum* argues that targeted killings of members of hostile forces are lawful under the international laws of armed conflict, including the principle of distinction between civilians and combatants. It includes many arguments that are substantially similar to those raised in the *White Paper*; for example, it raises the example of Operation Menu in Cambodia as precedent for targeted killings in neutral third countries.²⁷⁶ The basic argument of the *Targeted Killing Memorandum* is that targeted killings “undertaken in accord with the public authority justification were not ‘unlawful’ because they were justified.”²⁷⁷ The lawful conduct of war “is a well-established variant of the public authority justification,” and therefore it is not a crime to kill within the laws of war, but it is a crime to kill in violation of the laws of armed conflict.²⁷⁸ It is certainly a violation of the laws of armed conflict to kill civilians who are not participating directly in hostilities. However, the *Targeted Killing Memorandum* does not argue that the targets of the killing program are participating directly in hostilities as defined by the international law; instead, it argues that U.S. law and practice would permit the killing of those persons declared to belong to a hostile force. As with the *White Paper*, the *Targeted Killing Memorandum* references primarily U.S., rather than international, laws and practices in order to justify the legality of targeted killings under the international laws of armed conflict.

The *Targeted Killing Memorandum* asserts that the 2001 AUMF authorizes the Department of Defense to use force against those who planned and committed the September 11 attacks.²⁷⁹

²⁷⁴ *Ibid.* at 37.

²⁷⁵ David J. Barron, “Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi” Office of Legal Counsel, U.S. Department of Justice (16 July 2010) [hereinafter *Targeted Killing Memorandum*].

²⁷⁶ *Ibid.* at 25.

²⁷⁷ *Ibid.* at 19.

²⁷⁸ *Ibid.* at 20.

²⁷⁹ *Ibid.* at 21. See: *supra* Chapter Three at p. 147, where it is noted that many of those groups targeted in Yemen and Somalia were not involved in the 11 September attacks, and that the Al-Shabaab militant group in Somalia in particular was not in existence at that time. It is therefore questionable whether the 2001 AUMF would in fact authorize many of the targeted killings taking place.

However, it does not address whether declaring forces hostile in this manner would comply with the international laws of war. Instead, Barron uses as precedent the *Boumediene* hearings held before the D.C. district court,²⁸⁰ including specifically the decision in *Al-Adahi*, discussed above.²⁸¹ Barron reasons that, since those detentions were justified under the laws of armed conflict as lawful incidents of war, than so would be the use of lethal force in similar circumstances.²⁸² The classification of the prisoners at Guantanamo Bay as ‘unlawful enemy combatants’ is used to demonstrate that those who are associated with al-Qaeda and the Taliban are properly targeted as part of the enemy forces.²⁸³ Therefore, the U.S. government’s treatment of the Afghan detainees at Guantanamo Bay, and its establishment of the legal doctrine of ‘unlawful enemy combatant’ in U.S. courts have come to form the basis of the legal argument used to justify the targeted killing program.

The *Targeted Killing Memorandum* also addresses the question of civilian direct participation in hostilities, setting standards for when forces declared as hostile can be said to be, or no longer to be, participating in hostilities. First, Barron claims that the use of lethal force against members of armed groups is a lawful incident of war, but does not address the circumstances under which members of irregular armed groups are lawful targets by virtue of their direct participation in hostilities, or how membership in such groups is to be adjudged.²⁸⁴ Here, Barron cites the *Lieber Code*, Article 15, which states, “Military necessity admits of all direct destruction or armed enemies, and of other persons whose destruction is incidentally

²⁸⁰ *Ibid.* at 22.

²⁸¹ *Ibid.*, referencing *Al-Adahi v. Obama*, supra note 183. The other *Boumediene* Hearings cited here include: *Anam v. Obama*, 696 F. Supp. 2d 1 (D.D.C. 2010); *Bensayah v. Obama*, 610 F. Supp. 3d 718 (D.C. Cir. 2010); *Razak Ali v. Obama*, 2009 WL 4030864 (D.C. Cir. 2009); and *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008).

²⁸² *Ibid.* at 23.

²⁸³ *Ibid.* See also: *White Paper*, supra note 253 at 4-5. The sources Barron cites for this include the 2001 *AUMF*, supra note 100, as well as the U.S. case *Bensayah v. Obama*, 610 F. Supp. 3d 718 at 720 (D.C. Cir. 2010), concluding that an individual detained in Bosnia could be turned over to U.S. authorities if the government demonstrates that he was part of Al Qaeda; *Al-Adahi v. Obama*, 613 F. Supp. 3d 1102, 1003 at 1111 (D.C. Cir. 2010), concluding that an individual detained in Pakistan could be transferred to U.S. custody; and an article by Corn and Jensen, arguing in favour of the desirability of the government’s position: Geoffrey Corn and Eric Talbot Jensen, “Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror” (2008) 81 Temp. L. Rev. 787. Neither the *White Paper* nor the *Targeted Killing Memorandum* references any state practice outside of the U.S., and, as above, Operation Menu is the only U.S. practice raised as a U.S. precedent that took place before the 2001 invasion of Afghanistan.

²⁸⁴ *Ibid.* at 23.

unavoidable in the armed contests of the war.”²⁸⁵ Barron does not reference the *Hague Regulations* or the laws of belligerent qualification outlined there. Also, Barron reverses the presumption found in Article 50 of *Protocol I* that civilians are immune from attack, claiming that enemy armed forces are considered as taking no active part in hostilities “only once they have disengaged from their fighting function (‘have laid down their arms’) or are placed hors de combat; mere suspension of combat is insufficient.”²⁸⁶ This reverses the long-standing presumption in the international humanitarian law that civilians are presumed to be immune from attack, and instead shifts the burden onto civilians to prove that they are *not* participating in hostilities.²⁸⁷ This also violates the temporal limitations on targeting found in Article 51(3) of *Protocol I*, which states that those taking a direct part in hostilities may be targeted “unless and for such time as” they do so. Using status-based criteria to assess targets serves the function of removing both the presumption of protection and the temporal limitations on targeting found in the international law.

The *Targeted Killing Memorandum* advances a status-based concept of self-defense as a justification for targeted killing. The *Targeted Killing Memorandum* states that when prohibited groups pose a threat to U.S. persons and interests, then any member of those groups, or any person who is associated with those groups, also poses a similar threat by virtue of their association.²⁸⁸ Declaring prohibited groups as hostile in this manner removes the necessity to determine whether the individual to be targeted is participating directly in hostilities. When status-based determinations of belligerency are combined with justifications based upon self-defense, then this also removes the necessity to establish whether the individual to be targeted poses a threat of any kind.²⁸⁹ These decisions can then be made, not by observing acts that show that the person is participating in hostilities or posing a threat, but on the much simpler and much broader basis of observing acts that suggest membership in or association with particular groups.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.* at 37-8.

²⁸⁷ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Article 50(1) [hereinafter *Protocol I*].

²⁸⁸ *Targeted Killing Memorandum*, *supra* note 275 at 21.

²⁸⁹ Mark “Max” Maxwell, “Rebutting the Civilian Presumption: Playing Whack-A-Mole Without a Mallet?” in Claire Finkelstein, Jens David Ohlin, and Andrew Altman, eds., *Targeted Killings: Law and Morality in an Asymmetric World* (London: Oxford University Press, 2012) 31 at 32. Soldiers need not determine whether a threat is present before targeting members of prohibited groups.

This includes a number of characteristics that would not constitute participation in hostilities, such as family and tribal associations, physical proximity to suspected enemy locations, and the wearing of certain apparel. The following section will deal more specifically with these signature criteria in the context of the targeted killing program. Not only does the use of such criteria greatly facilitate mistaken killings of civilians, but these methods of targeting have particularly severe negative effects on the local population.

4.4.2 Declared Hostile Forces & Signature Criteria in Targeting

The targeting of ‘declared hostile forces’ or ‘unlawful enemy belligerents’ is based upon those individuals’ status as members of a prohibited group, and dispenses with the need to assess whether the individuals are participating in hostilities, or pose an imminent threat of serious harm. However, it does not dispense with the need for soldiers to observe the person’s actions and characteristics and use these to make a targeting decision during combat operations. U.S. forces have used a number of what are termed ‘signature criteria’ in order to make these decisions.²⁹⁰ Many of the targeted killings that are taking place are not of known or named individuals, but seek to target suspected members of insurgent or terrorist groups based upon certain signature behaviors. Signature criteria have been used throughout U.S. counterinsurgent operations in Iraq and Afghanistan, and are neither new nor unique to the targeted killing program. This manner of targeting is best understood not as the targeted killing of specific or named *individuals*, but of the targeting of suspicious or hostile *populations* and groups of persons. Accordingly, it has been shown to produce widespread terror, and serious psychological as well as social and cultural disruptions among the target groups.²⁹¹

The U.S. defines ‘militant groups’ and membership therein by using signature criteria that are over broad and poorly defined. For example, Columbia University’s Human Rights Clinic performed a study of three organizations that track drone strikes, the New America Foundation,

²⁹⁰ *Stanford/NYU Drone Study*, *supra* note 227 at 12.

²⁹¹ See: Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008) at 3-4 [hereinafter *Targeted Killing in International Law*], in which he defines targeted killing as the intentional killing by a state of an individual identified in advance and not in the state’s custody. Because targeting based upon signature criteria do not target known or named individuals, they would not meet the criteria to be a ‘targeted killing,’ as that has normally been defined. Many of the targeted killings that are taking place are therefore best understood not as targeting known individuals, but as targeting suspicious populations and groups of persons.

the *Long War Journal*, and the Bureau of Investigative Journalism, examining data from drone strikes in Pakistan in 2011.²⁹² The *Columbia Drone Study* found that the more official and oft cited sources compiled by the New America Foundation and the *Long War Journal* significantly undercounted the number of those killed as being “civilians”, and significantly over counted those killed as being “militants.”²⁹³ The undercounting was found to have resulted from a reliance on official government sources and English-language news sources.²⁹⁴ When Columbia verified a greater variety of local news reports, they found that the New America Foundation had under reported civilian casualties by 2300 percent, and the *Long War Journal* by 140 percent.²⁹⁵ The *Columbia Drone Study* used a methodology similar to that of the Bureau of Investigative Journalism, as they each verified local news reports and news reports not in English, and their civilian casualty counts were in close agreement.²⁹⁶ A special report from Reuters disclosed that “[o]f the 500 militants the agency believes have been killed since the summer of 2008, about 14 are widely considered to be top tier militants, while another 25 are considered mid-to-high-level organizers.”²⁹⁷ An estimate from Peter Bergen of the New America Foundation found that under Obama, less than 13% of all drone strikes killed a militant leader.²⁹⁸ The Bureau of Investigative Journalism has published a data set in May 2014 that shows that out of 384 drone strikes in Pakistan, all but 24 targeted a domestic home, a vehicle, or a religious site.²⁹⁹ The majority of the drone strikes were of residential homes, constituting at least 241 of the named targets.³⁰⁰ Overwhelmingly, therefore, the targets of drone strikes are of protected civilian objects and

²⁹² Chantal Grut, “Counting Drone Strikes” Columbia Law School Human Rights Clinic (October 2012) [hereinafter *Columbia Drone Study*], available at: <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf> (accessed 17 April 2013).

²⁹³ *Ibid.* at 5.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ Adam Entous, “Special Report: How the White House Learned to Love the Drone” *Reuters* (18 May 2010), available at: <http://www.reuters.com/article/2010/05/18/us-pakistan-drones-idUSTRE64H5SL20100518> (accessed 17 April 2013).

²⁹⁸ Peter Bergen and Megan Bruan, “Drone is Obama’s Weapon of Choice” *CNN* (19 September 2012), available at: <http://edition.cnn.com/2012/09/05/opinion/bergen-obama-drone> (accessed 17 April 2013).

²⁹⁹ Alice K. Ross and Jack Serle, “Get the Data: What the Drones Strike” *The Bureau of Investigative Journalism* (23 May 2014) [hereinafter *What the Drones Strike*], available at: <http://www.thebureauinvestigates.com/2014/05/23/get-the-data-what-the-drones-strike/> (accessed 30 November 2014).

³⁰⁰ *Ibid.*

infrastructure.³⁰¹

The *Columbia Drone Study* noted that the term ‘militant’ is itself a vague and undefined term, and that official sources often provided no evidence to support a claim that those killed were in fact active militants. Grut states that “identification of those killed as ‘militants’ or ‘civilians’ is likely driven by political interests, and colored by the perspective and experiences of the source.”³⁰² Grut also argues that these terms, and the ways in which they are used by official sources, denote not *legal*, but *moral* categories, stating, “they might be better understood as moral categories of who should and should not be killed. They are, to that extent, inherently limited and biased.”³⁰³ She also notes that government and official sources might be including in the category of ‘militant’ those civilians who “though not members of a militant group, are suspected of some affiliation or of providing some material support to militant groups.”³⁰⁴ The ICRC has stated that civilian sympathizers and supporters of armed groups are not lawful targets, and that this would violate the principle of distinction.³⁰⁵

Grut found that witnesses sometimes took issue with official and government sources’ characterizations of who was a militant. She states:

On the one hand, governments may justify targeting based upon an individual’s provision of supplies to a local militant group, while on the other hand, local witnesses might characterize the individual as innocent and note that supplies were food or medicine, or provided only under duress. Likewise, governments may justify targeting local groups who are meeting or mixing with individuals identified as militants; yet local witnesses and observers might characterize those meetings and talks as attempts at reconciliation or peace-building[.]³⁰⁶

In many cases, the *Columbia Drone Study* found that the U.S. employed few criteria to ensure that those targeted were, in fact, members of a militant group. Nor are there investigations after the strike to confirm the identity of casualties. A recent study by the Bureau of Investigative Journalism states that an ISAF commander stated, “We only count that which we see... You can do a tremendous amount of forensics... [but] seldom do we see the actual bodies.”³⁰⁷ The drone

³⁰¹ *Protocol I*, *supra* note 287, at Articles 52, 53, and 54.

³⁰² *Columbia Drone Study*, *supra* note 292 at 15.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.* at 16.

³⁰⁵ *ICRC Commentary*, *supra* note 148.

³⁰⁶ *Columbia Drone Study*, *supra* note 292 at 16.

³⁰⁷ Alice K. Ross, “Who is Dying in Afghanistan’s 1000-plus Drone Strikes?” *Bureau of Investigative Journalism* (24 July 2014) [hereinafter *Who is Dying in Afghanistan*], available at:

strike program is therefore liable to over-count casualties as being members of militant groups, and contains few safeguards either before or after the strikes to confirm the identities of those targeted.

Similarly, the *Stanford/NYU Drone Study* found that government sources frequently mischaracterized civilian deaths in drone strikes.³⁰⁸ The *Stanford/NYU Drone Study* examined drone strikes in the Federally Administered Tribal Areas of Pakistan. Their methodology consisted of fieldwork in Pakistan and interviews of witnesses, survivors, and experts, and a review of documentation and media reporting.³⁰⁹ Like the *Columbia Drone Study*, the *Stanford/NYU Drone Study* notes that ‘militants’ are defined by very loose criteria, and that not all those described as militants are lawful targets under international law.³¹⁰ The authors report that the “frequent use of the word ‘militant’ to describe individuals killed by drones often obscures whether those killed are in fact lawful targets under the international legal regime.”³¹¹ The word ‘militant’ is often used simply to imply that the killing was lawful.³¹² Becker and Shane report that the Obama administration has “embraced a disputed method for counting civilian casualties,” which, “in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.”³¹³ Yet the U.S. does not conduct post-strike investigations that would determine this information.³¹⁴ The *Stanford/NYU Drone Study* reports, “there is little evidence that U.S. authorities have engaged in any effort to visit drone strikes or to investigate the backgrounds of those killed.”³¹⁵ Potential targets reportedly include individuals under eighteen years of age.³¹⁶

<http://www.thebureauinvestigates.com/2014/07/24/who-is-dying-in-afghanistans-1000-plus-drone-strikes/> (accessed 3 August 2014).

³⁰⁸ *Stanford/NYU Drone Study*, *supra* note 227 at 29.

³⁰⁹ *Ibid.* at v.

³¹⁰ *Ibid.* at 30.

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will” *The New York Times* (29 May 2012) [hereinafter *Secret Kill List*], available at: http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=0 (accessed 26 July 2015).

³¹⁴ *Who is Dying in Afghanistan*, *supra* note 307.

³¹⁵ *Stanford/NYU Drone Study*, *supra* note 227 at 30.

³¹⁶ *Ibid.* The U.S. is suspected of, but has not confirmed, the killing of 16 year-old American citizen Abdulrahman Al-Awlaki, son of U.S. citizen Anwar al-Awlaki. Both were killed in Yemen, in separate strikes.

Many ‘signature strikes’ do not require a positive identification of the target, but are rather based upon a “pattern of life analysis.”³¹⁷ Both the U.S. military and the CIA make use of signature strikes. David Cloud reported that the CIA was cleared to begin using signature strikes in 2008 in the targeted killing program; previously, they were limited only to killing individuals who were known to U.S. authorities, and “whose names were on an approved list.”³¹⁸ Unnamed government sources said that signature strikes are based upon “formations of fighters and other terrorists... people whose actions over time have made it obvious that they are a threat.”³¹⁹ Officials claimed that the vast majority of targets were either individuals whose names were unknown, or “about whom the agency had only fragmentary information.”³²⁰ Daniel Klaidman describes signature strikes as the targeting of “groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren’t known.”³²¹ In this kind of targeting, individual soldiers are given a wide degree of subjective discretion in deciding whether an individual’s or a group’s pattern of conduct indicates that they are members of a declared hostile force. Targeting declared hostile forces therefore *does* often depend upon conduct-based criteria, but they are criteria that would not constitute direct participation in hostilities as required by Article 51(3) of *Protocol I*, and reverses the presumption of civilian status in cases of doubt, as required by Article 50(1).

Heller proposes that signature strikes must meet two criteria in order to be lawful. First, the behavior in question must be legally adequate to establish that the person is a lawful target, by which he means that the person is either participating directly in hostilities or, adopting the definition from the *Interpretive Guidance*, is performing a continuous combat function.³²² Both the ICRC’s ‘continuous combat function’ and the U.S.’s ‘declared hostile force’ seek to answer the question of whether the person is an active member of a militant group, but the U.S. uses a far less restrictive and more subjective collection of signature behavior than that permitted by the

³¹⁷ *Ibid.* at 12.

³¹⁸ David S. Cloud, “CIA Drones Have Broader List of Targets” *Los Angeles Times* (5 May 2010), available at: <http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506> (accessed 17 April 2013).

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (New York: Houghton Mifflin Harcourt, 2012) at 41.

³²² Kevin Heller, “One Hell of a Killing Machine: Signature Strikes and International Law” (2013) 11:1 J. Int’l Crim. Just. 89 at 3 [hereinafter *Signature Strikes*]. Heller cites the ICRC’s *Interpretive Guidance*, and accepts its definition of ‘continuous combat function’, unlike many of the commentators discussed above.

ICRC.³²³ Heller argues that legally adequate signature behavior that the U.S. has used include planning attacks, transporting weapons, handling explosives, as well as presence at an al-Qaeda compound or training camp.³²⁴ Recall that the latter was rejected by the ICRC as a targeting criteria.³²⁵ Behaviors that Heller claims *may* indicate that the individuals are active militants include groups of armed men traveling toward a conflict zone, operating a training camp, training to join al-Qaeda, presence at a safe house or rest area, and facilitating or financing terrorist activities.³²⁶ Again, the ICRC specifically excluded all but the first criteria, yet the U.S. has used all of these to determine that targeted persons were ‘militants’, and have killed them on this basis.³²⁷

Heller also points out that U.S. forces have used signature criteria that violate the principle of distinction on their face. This includes targeting military-aged-males in an area of known terrorist activity.³²⁸ Prohibited targeting criteria also include consorting with known militants, or sympathizing or collaborating with militants.³²⁹ Becker and Shane report that counterterrorism officials told them that “people in an area of known terrorist activity, or found with a top al-Qaeda operative, are probably up to no good,”³³⁰ indicating that the U.S. has targeted people simply because they are near a conflict zone, or are merely in the presence of suspected militants. Targeting armed men traveling in trucks is also, Heller claims, impermissible and he notes that even Michael Schmitt has agreed that this is so.³³¹ Also impermissible is the targeting of compounds merely on the grounds that they are suspicious, and Heller notes that the U.S. State Department has protested that this practice violates the principle of distinction.³³² Yet, on 26 November 2011, US-led NATO forces targeted and killed 24 Pakistani soldiers in the Federally Administered Tribal Areas near the Afghan border, on the grounds that their military checkpoint

³²³ *Interpretive Guidance*, *supra* note 64 at 1008. The *Interpretive Guidance* posits that planning, preparing and executing acts are evidence of performing a continuous combat function, but that political and administrative roles, as well as recruiting, financing and propagandizing on behalf of armed groups is not.

³²⁴ *Signature Strikes*, *supra* note 322 at 4.

³²⁵ *Interpretive Guidance*, *supra* note 64 at 1008.

³²⁶ *Signature Strikes*, *supra* note 322 at 7.

³²⁷ *Ibid.*

³²⁸ *Ibid.* at 4.

³²⁹ *Ibid.* at 5-6.

³³⁰ *Secret Kill List*, *supra* note 313.

³³¹ *Signature Strikes*, *supra* note 322 at 6, note 57.

³³² *Ibid.*

resembled a suspicious militant compound.³³³ Therefore, U.S. and NATO forces do use these prohibited criteria to target suspected militants as part of a broader counterinsurgent strategy.

The signature criteria employed in counterinsurgent operations has been shown by human rights researchers to have widespread and severely negative effects on the civilian population as a whole. The use of signature criteria therefore affects the wider community, and not only those individuals who are targeted. The *Stanford/NYU Drone Study* interviewed witnesses and survivors in the Federally Administered Tribal Areas in Pakistan, and heard testimony from several individuals regarding the fear and terror that living under the frequent surveillance of drones, and the constant threat of drone strikes had imposed upon them. Moreover, this significantly impacted their daily lives and lifestyles. The authors state that “those interviewed stated that the fear of strikes undermines people’s sense of safety to such an extent that it has at times affected their willingness to engage in a wide variety of activities, including social gatherings, educational and economic opportunities, funerals, and that fear has also undermined general community trust.”³³⁴ The authors also state that “the US practice of striking one area multiple times, and its record of killing first responders, makes both community members and humanitarian workers afraid to assist injured victims.”³³⁵ The *Stanford/NYU Drone Study* reports that such follow-up strikes seem to form a pattern, and they have killed numerous first responders, thus discouraging humanitarian work and hindering the provision of medical care to victims.³³⁶ The U.S. claims that its drones have excellent surveillance facilities, and this has led the Stanford/NYU team to conclude that the U.S. may be deliberately targeting those providing humanitarian assistance to casualties.³³⁷

Many civilians living in and near strike zones reported feeling high levels of anxiety, fear and psychological stress, compounded by the fact that they felt powerless to “minimize their

³³³ See e.g.: BBC News, “Pakistan Buries 24 Troops Killed in NATO Airstrike” *BBC News* (27 November 2011), available at: <http://www.bbc.com/news/world-asia-15908760> (accessed 30 June 2015); Rob Crilly, Ban Farmer and Chris Irvine, “U.S. Refuses to Apologize for Pakistan Air Strike that Killed 24 Soldiers” *The Telegraph* (29 November 2011), available at: <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/8921789/US-refuses-to-apologise-for-Pakistan-air-strike-that-killed-24-soldiers.html> (accessed 30 June 2015).

³³⁴ *Stanford/NYU Drone Study*, *supra* note 227 at 55.

³³⁵ *Ibid.*

³³⁶ *Ibid.* at 74.

³³⁷ *Ibid.* at 76.

exposure” to the strikes.³³⁸ Mental and physical symptoms of trauma were common, and one witness reported that he and others had taken to using medications and tranquilizers to deal with their symptoms.³³⁹ Many families have lost their primary breadwinner, and many children and young people have been forced to stay home from school or lose educational opportunities as a result of fear of drone strikes.³⁴⁰ Some witnesses also reported that drone strikes were significantly disrupting religious beliefs and practices; one witness stated that the U.S. had “even targeted funerals, they have targeted mosques, they have targeted people sitting together, so people are scared of everything.”³⁴¹ Many witnesses stated that their community’s political and social gatherings have also been significantly limited due to fear of drone strikes.³⁴² The authors believe that the traditional Pashtun way of life may be threatened by the drone strikes, and this includes such elementary community functions as political gatherings,³⁴³ religious practices, community trust,³⁴⁴ and humanitarian values. This is directly related to the kinds of signature behavior used by the U.S. to determine whether individuals in the Tribal Areas are associated with a declared hostile force, and these tactics would appear to violate the prohibitions against using indiscriminate force as found in Articles 51(4) and (5) of *Protocol I*, and using violence of which the primary purpose is to spread terror among the civilian population as found in Article 51(2).

4.5 The ICRC & Non-U.S. Approaches to Targeting Civilian Participants

The U.S.’s legal justifications for its targeted killing program depend primarily upon the *2001 AUMF*,³⁴⁵ and the status-based doctrine of the unlawful enemy combatant that was developed through litigation, the *Boumediene Hearings*,³⁴⁶ and the *2009 Military Commissions Act*³⁴⁷ that had been used to justify the detentions at Guantanamo Bay, rather than on the

³³⁸ *Ibid.* at 82.

³³⁹ *Ibid.* at 88.

³⁴⁰ *Ibid.* at 88 *et seq.*

³⁴¹ *Ibid.* at 93-4, citing interview with Ibrahim Qasim (anonymized name), in Islamabad, Pakistan (9 March 2012).

³⁴² *Ibid.* at 96.

³⁴³ *Ibid.* at 97-98.

³⁴⁴ *Ibid.* at 99 *et seq.*

³⁴⁵ *2001 AUMF*, *supra* note 100.

³⁴⁶ *Boumediene*, *supra* note 182 and accompanying text.

³⁴⁷ *2009 Military Commissions Act*, Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84, H.R. 2647, 123 Stat. 2190 (2009) at s. 948a.(7); see also: Appendix D at 21, p. 326.

international laws of armed conflict. Therefore, the U.S. approach to targeted killings has been rejected in several non-U.S. legal fora that have examined this issue. Although the general idea that targeted killings may be lawful under some circumstances has received approval by the Israeli High Court of Justice, the United Nations Office of Human Rights, and the ICRC's *Interpretive Guidance*, these authorities have placed strict conditions on the use of targeted killings, and have rejected a status-based approach to targeting. Despite these safeguards, they may still be insufficient to prevent the mistaken killing of civilians. The following sections will describe how these non-U.S. fora have considered the U.S. approach to targeting civilian participants.

4.5.1 Unlawful Enemy Combatants, Declared Hostile Forces & Continuous Combat Function

These three categories are closely linked, as they seek to target individuals based upon behaviors that evidence the individual's affiliation with a prohibited group, rather than on behaviors that evidence direct participation in hostilities. The recognition of a 'hybrid' category of combatant – one that is neither a civilian nor a lawful combatant - was rejected at the Brussels Conference of 1874, the Hague Peace Conferences of 1898 and 1907,³⁴⁸ the Diplomatic Conference at Geneva in 1949,³⁴⁹ and most recently at the Diplomatic Conference of 1977.³⁵⁰ However, the ICRC in its *Interpretive Guidance* has recently devised criteria for killing individuals based upon their performance of a continuous combat function as members of a militant group.³⁵¹ If accepted, this criteria, like that of a declared hostile force, would permit the targeted killings of members of prohibited groups, simply on the basis of that membership. The *White Paper* and the *Targeted Killing Memorandum* set out even more permissive criteria for determining membership in a prohibited group, asserting that when a person has been a member of a prohibited group, then continuing future membership - and a continuing future threat - can be presumed. The *White Paper* states, "where the al-Qa'ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and

³⁴⁸ See: *supra* Chapter Two at s. 2.3.3.

³⁴⁹ Jean Pictet, ed., *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (Geneva: International Committee of the Red Cross, 1958) at 32. See: *supra* Chapter Two at s. 2.3.6.

³⁵⁰ *ICRC Commentary, supra* note 148 at 515.

³⁵¹ *Interpretive Guidance, supra* note 64 at 1036.

there is no evidence suggesting that he has renounced or abandoned such activities, that member's involvement in al-Qa'ida's continuing terrorist campaign would support the conclusion that the member poses an imminent threat."³⁵² The *White Paper* does cite the *Interpretative Guidance* on this point to conclude that an "operation against a senior operational leader of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States would target a person who is taking 'an active part in hostilities' and therefore would not constitute a 'grave breach' of Common Article 3 [of the *Geneva Conventions*.]"³⁵³ However, status-based concepts of direct participation violate this rule precisely because they operate to target individuals who are not taking an active part in hostilities. Furthermore, the Department of Justice has broadened their definition of 'defensive force' in order to fit many targeted killings within the law, claiming that any person who may pose a threat of harm is thereby participating directly in hostilities. Nor does the feared harm need to be imminent; it can merely be presumed from evidence of past affiliation with a prohibited group. The *White Paper* states that mere membership in a prohibited group that has not been renounced constitutes evidence of an imminent threat of harm.³⁵⁴ Recall from Chapter One that such a standard would violate the U.S. military's own rules for the use of defensive force as laid out in the *Manual for Military Courts Martial*.³⁵⁵ On the other hand, the ICRC's definition of 'continuous combat function' is likely broad enough to encompass many of the targeted killings, and this is a further reason why this category of combatant ought to be rejected. Recall that an imminent threat is not required by the ICRC when targeting members of militant groups who perform a continuous combat function; membership allows for continuous targeting in the absence of any threat.³⁵⁶ This would violate the prohibitions on killing those not taking an active part in hostilities as found in Common Article 3, as well as Articles 51(3) and 13(3) of *Protocols I* and *II* respectively.

Outside of U.S. practice, a recent precedent of a state policy of targeted killings is that undertaken by the Israeli government during the Second Palestinian Intifada. The High Court of

³⁵² *White Paper*, *supra* note 253 at 8.

³⁵³ *Ibid.* at 16.

³⁵⁴ *Ibid.* at 8.

³⁵⁵ Department of the Army, *Manual for Military Courts Martial*, 2012 ed. (Washington, D.C.: Headquarters, Department of the Army, 2012) s. 916(e), at p. II-111, *supra* Chapter One, note 98 and accompanying text. The *Manual* permits a defense of self-defense only if the threatened harm is "about to be" wrongfully inflicted.

³⁵⁶ *Interpretative Guidance*, *supra* note 64 at 1034.

Justice examined the legality of these targeted killings in 2005.³⁵⁷ The court in *Public Committee Against Torture* upheld the long-standing categories of belligerent qualification, and required safeguards regarding the accuracy of intelligence and target identification that are absent from the U.S. program. Most importantly, the court refused to recognize the government's assertion that such targets fell into a quasi- or "third category", that of "unlawful combatant."³⁵⁸ The court found that the *Third* and *Fourth Geneva Conventions* recognize only lawful combatants and civilians, and not irregular unqualified belligerents.³⁵⁹ The court therefore determined the legality of the killings by reference to the concept of 'civilian direct participation in hostilities' as found in the *Protocols Additional*.³⁶⁰ The court is thus upholding a conduct-based definition of 'civilian direct participation in hostilities', similar to that affirmed in the 1987 ICRC *Commentary*. The court also found that targeted killings of civilians taking a direct part in hostilities would only be lawful if the information was well-based,³⁶¹ and ruled that a civilian taking a direct part in hostilities may not be targeted if a less harmful means can be employed, such as capture.³⁶² After any killings are conducted, the court found that there must be a thorough investigation into the precision of the identification and the circumstances of the attack.³⁶³ These safeguards are absent from the U.S. program.³⁶⁴ Therefore, the *Public Committee Against Torture* case rejected the adoption of the doctrine of a third, status-based, category of belligerent, and upheld a traditional interpretation of belligerent qualification and civilian immunity. This case did not address the circumstances surrounding targeted killing outside of a 'hot' theater of conflict, and therefore does not support the proposition asserted in the *Targeted Killing Memorandum* that a government may authorize targeted killings at any time and place that they perceive a potential security threat. On the other hand, *Public Committee Against Torture* does support the proposition that non-state actors may be targeted for such time as they participate directly in hostilities, and that this would not necessarily violate the principle of distinction when such operations occur during wartime;

³⁵⁷ *Public Committee Against Torture in Israel v. Government of Israel*, (2006) H.C.J. 769/02, 46 I.L.M. 375 [hereinafter *Public Committee Against Torture*].

³⁵⁸ *Ibid.* at para. 28.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.* at paras. 28 and 31. The court found that the *Protocols Additional* reflect the norms of international customary law, which obligate Israel, at paras. 4 and 20.

³⁶¹ *Ibid.* at para. 40.

³⁶² *Ibid.*

³⁶³ *Ibid.* at para. 40.

³⁶⁴ *Who is Dying in Afghanistan*, *supra* note 307.

targeted killings would remain illegal in the absence of hostilities. In addition, the court's instruction that the information used to adjudge direct participation be 'well-based' may not be sufficient to ensure accuracy in decision-making, and is a much lower standard than the requirement for 'clear and convincing' evidence that is proposed here.

Despite the High Court of Justice's stipulations that information leading to a targeted killing must be well-founded, and that a thorough investigation must be undertaken after the killing, human rights groups have criticized the Israeli government for failing to implement these criteria. In 2012, B'Tselem released a report stating that the Military Advocate General Corps, which pledged in 2011 to investigate every case in the West Bank in which a soldier killed a Palestinian, had not been doing so.³⁶⁵ B'Tselem criticized the Military Advocate General Corps on a number of grounds, stating that its "decision not to open Military Police investigations as a rule, the flaws in operational inquiries, and the negligent handling of the rare investigations that were opened, have all conveyed a message to commanders and soldiers that there is little chance that they will be held accountable even if they stray from the orders they receive and mistakenly kill innocent persons."³⁶⁶

In a report on U.S. drone strikes prepared in 2010, then Special Rapporteur on summary or arbitrary executions Philip Alston (August 2004-July 2010) rejected status-based targeting as being contrary to the international humanitarian law.³⁶⁷ Specifically regarding the ICRC *Interpretive Guidance's* definition of 'continuous combat function', the Special Rapporteur stated that, "the creation of the CCF [continuous combat function] category is, *de facto*, a status determination that is questionable given the specific treaty language that limits direct participation to 'for such time as' as opposed to 'all the time.'"³⁶⁸ The Special Rapporteur rejected the practice of targeting terrorism suspects outside of hostilities, stating that in such

³⁶⁵ B'Tselem, "Military Police Investigations Regarding the Deaths of Palestinians" B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories (16 April 2012), available at: http://www.btselem.org/accountability/investigation_of_complaints (accessed 4 December 2014).

³⁶⁶ *Ibid.* B'Tselem has also found that 56 Palestinian civilians have been killed in targeted killings in the Occupied Territories between Operation Cast Lead and Operation Protective Edge, primarily on the grounds that they were members of militant organizations. Of these, 11 had not participated in hostilities, including 4 children under the age of 10 years old. Five of those killed were attending at a training camp, and none of those killed were participating directly in hostilities at the time that they were killed. See: <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-death/wb-gaza/palestinians-killed-during-the-course-of-a-targeted-killing> (accessed 4 December 2014).

³⁶⁷ *U.N. Special Rapporteur 2010 Report*, *supra* note 234 at para. 65-66.

³⁶⁸ *Ibid.* at para. 65.

cases the international laws of conflict would not apply, and states would be required to conform to ordinary legal standards regarding self-defense and law enforcement.³⁶⁹ Similarly, in March 2013, Ben Emmerson, the U.N. Special Rapporteur on human rights and counter-terrorism, traveled to Waziristan to conduct an inquiry into the effects of the drone program. The Special Rapporteur similarly found the drone strikes in Waziristan to be unlawful, and a violation of Pakistan's sovereignty. He called on the U.S. to cease drone strikes immediately.³⁷⁰

However, in a more recent Report to the United Nations General Assembly, the new Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns (1 August 2010-present) appeared more willing to accept the legitimacy of using status-based criteria in targeted killings. The Special Rapporteur notes that the effect of accepting the ICRC's definition of 'continuous combat function' is that targeted killings of members of armed groups would then become consistent with the international laws of armed conflict.³⁷¹ The Special Rapporteur also notes in this Report that the "ICRC test may rightly be criticized because of its lack of an authoritative basis in treaty law," but has been followed in recent state practices concerning drone strikes.³⁷² However, the Special Rapporteur cites only one example of state practice, a decision by the German Federal Prosecutor concerning drone strikes in Pakistan.³⁷³ The United States is at present the only state to undertake drone strikes against terrorism suspects outside of an armed conflict, and the U.S. itself has rejected the ICRC's formulation of 'continuous combat function.' There is therefore very little evidence to date of state practice accepting the legitimacy of the ICRC's concept of continuous combat function, or of status-based concepts of civilian direct participation more generally. However, this may change in the future, due to the continued advocacy of many states and legal academics to accept these doctrines.³⁷⁴ The Special Rapporteur notes that this is a controversial and rapidly developing area of the international law, stating that,

³⁶⁹ *Ibid.* at para 64.

³⁷⁰ Ben Emmerson, "Statement of the Special Rapporteur Following Meetings in Pakistan" Office of the High Commissioner for Human Rights, United Nations (14 March 2013), available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13146&LangID=E> (accessed 21 April 2013).

³⁷¹ United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/68/382 (13 September 2013) at para. 68 [hereinafter *U.N. Special Rapporteur 2013 Report*].

³⁷² *Ibid.* at para. 70.

³⁷³ *Ibid.*, citing Decision of the German Federal Prosecutor of 20 June 2013, available at: www.generalbundesanwalt.de/docs/drohneneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf.

³⁷⁴ See e.g., Nils Melzer's work, *Targeted Killing in International Law*, *supra* note 291, in which he advocates in favor of the legality of targeted killings.

“It is too early to determine in which direction the controversy around this concept will be resolved.”³⁷⁵ Therefore, the overall trend at present is that there is a growing acceptance of the legitimacy of status-based methods of targeting prohibited groups, although this acceptance at the present time appears limited only to targeted killings committed during an ongoing armed conflict, and that, at a minimum, safeguards such as well-based information and post-killing investigations must be conducted.

However, these are minimum safeguards, and they do not adequately address what has long been a contentious issue in the international laws of war, namely how should states characterize an insurgent force that does not identify itself or carry arms openly. The ICRC concept of ‘continuous combat function’ is a novel concept, and therefore one that does not represent the state of international law as it now stands. In addition, signature strikes have been shown to cause widespread and systematic harm against the civilian population as a whole. Normalizing these practices by introducing ‘continuous combat function’ as a lawful and legitimate method of targeting would therefore represent a significant step backwards in the development of international humanitarian law. What the international community ought to do, and what would admittedly be much more difficult, is to continue the project begun with the *Protocols Additional* in the 1970s, and work to regularize the status of these forces. This could mean working to improve upon the procedures outlined in Article 96 of *Protocol I* that provide irregular belligerent forces an opportunity to bind themselves to international law. One possible solution is to enable states to specify a belligerent party with which it is engaged in an armed conflict, and then to qualify that party as a lawful belligerent. In this way, such a force could be targeted at all times, but would also be subject to the rights and responsibilities of a lawful combatant, such as following the laws of war and being entitled to prisoner of war status. This would be more in keeping with the development of international law, and would better address the humanitarian concerns that have long attended states’ treatment of such fighters and the population surrounding them. This may also give such fighters an incentive to distinguish themselves from the population that they are presently lacking. What should be avoided is a situation in which states are able to define and then target prohibited groups with few restrictions, while affording them no protections under the law. On the other hand, normalizing a new status-

³⁷⁵ U.N. *Special Rapporteur 2013 Report*, *supra* note 371 at para. 79.

based category would regularize many of the abuses inherent in signature strikes and similar targeting methods, while simultaneously closing the door to more fruitful avenues of legal development.

4.5.2 The ICRC Interpretive Guidance & Civilian Direct Participation in Hostilities

The ICRC has also laid out criteria for when individual civilians can be said to be sporadically participating directly in hostilities. The *Interpretive Guidance* appears to recognize that signature criteria are playing a large role in making targeting decisions, and it has made some attempts to classify permissible versus impermissible criteria. The ICRC has stated that the activity must constitute a hostile act,³⁷⁶ and that it must be such as to hinder the military operations of a party through a direct causal step.³⁷⁷ Many of the signature criteria in use do not meet this test, primarily because the impugned behavior does not constitute a hostile act. The clear majority of drone strikes have targeted residential homes and civilian vehicles. Religious and cultural sites have also been targeted.³⁷⁸ These sites are all protected under *Protocol I*.³⁷⁹ In addition, the U.S. has targeted suspicious compounds, and the November 2011 NATO strike of a Pakistan military base demonstrates how uncertain these criteria are, and how few checks there are concerning the accuracy of targets.³⁸⁰ The U.S. has also targeted military-aged males solely on that basis - as they did during Objective Murray and Operation Phantom Fury. The majority of these killings would not meet the ICRC test of direct participation in hostilities, primarily because the signature criteria that led to the targeting did not constitute a hostile act.

The ICRC's *Interpretive Guidance* does not discuss escalation of force incidents, and this is a significant oversight given that these incidents are not only common in war, but also led to a significant loss of civilian lives in Iraq and Afghanistan. The civilians killed in the above case studies of escalation of force incidents would not have met the ICRC's criteria for direct participation in hostilities, primarily because they were not, at the time they were killed "engaged in a specific hostile act."³⁸¹ *Protocols I and II* clearly prohibit the killing of civilians who are not

³⁷⁶ *Interpretive Guidance*, *supra* note 64 at 1014.

³⁷⁷ *Ibid.* at 1019.

³⁷⁸ *What the Drones Strike*, *supra* note 299 and accompanying text.

³⁷⁹ *Protocol I*, *supra* note 287 at Articles 52 and 53.

³⁸⁰ *Supra* note 333 and accompanying text.

³⁸¹ *Interpretive Guidance*, *supra* note 64 at 1016.

participating directly in hostilities.³⁸² The *Hague Regulations* of 1899 and 1907, declarative of customary law,³⁸³ also mandate that states protect the lives of a population under occupation,³⁸⁴ and they specifically prohibit the collective punishment of a population.³⁸⁵ These provisions would prohibit killing civilians who simply fail to obey orders, who violate curfew, or who flee security forces, as well as killings that are intended to ensure discipline among the local population.

There is therefore some justification to claim that the killings discussed above are unlawful under the international laws of armed conflict, and that they would not meet the criteria for civilian direct participation set out in the ICRC's *Interpretive Guidance*, or the existing international laws of armed conflict. However, the parties involved in the above killings claimed the right to do so not because the civilians were participating directly in hostilities, but on grounds of self-defense, and the ICRC in its *Interpretive Guidance* generally agreed that states and security personnel do have the right to use force in self-defense.³⁸⁶ The *Interpretive Guidance* has also stated that only minimal force may be used, and this goes some way towards encouraging, although not mandating, the proper use of escalation of force procedures; however, the law as it stands does not clearly require escalation of force procedures be used to favor the use of minimal force to resolve threats, and several states, including the U.S.'s own representatives at the expert process, have rejected this.³⁸⁷

Because the ICRC's criteria would give security forces a wide degree of discretion in conducting strikes that cause collateral civilian deaths, as well as the use of lethal force in self-

³⁸² *Protocol I*, *supra* note 287 at Article 51(3), and *Protocol II*, *supra* note 175 at 13(3).

³⁸³ See: International Military Tribunal at Nuremberg, *Trial of the Major War Criminals*, Judgment (London: His Majesty's Stationary Office, 1946) at 65, where the Tribunal addressed the defense's argument that the Hague Regulations did not apply, stating, "[T]he rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt 'to revise the general laws and customs of war' which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war[.]"

³⁸⁴ International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907 at Article 46, which states: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."

³⁸⁵ *Ibid.* at Article 50, which states: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

³⁸⁶ *Interpretive Guidance*, *supra* note 64 at 1035.

³⁸⁷ See: *No Mandate*, *supra* Chapter Three, note 282 and accompanying text.

defense,³⁸⁸ it is difficult to say that the *Interpretive Guidance* would clearly prohibit such killings, and this limits its utility in protecting civilians against these abuses. Nor has the *Interpretive Guidance* gained sufficient acceptance or moral authority among either states or human rights organizations such that it could convince states to abandon these abusive practices. This is at least in part due to the ICRC's failures to set out a principled approach to civilian direct participation, as well as one that addresses defensive force, and that is consistent with the laws as laid down in the *Geneva Conventions* and the *Protocols Additional*. This represents a significant reversal of the ICRC's earlier position at both the 1949 and 1977 Diplomatic Conferences, and this, too, serves to undermine the authority that the ICRC has long held on these issues.

4.6 A Defensive Approach to Civilian Direct Participation

States are increasingly choosing to regulate war through the prism of self-defense, and in both standard Rules of Engagement and the ICRC's *Interpretive Guidance*, the use of defensive force has been interpreted as superseding other laws and policy goals, and is largely displacing the 'direct participation in hostilities' analysis required by Article 51(3) of *Protocol I*. Regulating the use of force through the prism of self-defense might provide the convergence necessary to gain a foothold for the rule of law at the present time, performing the same function as the regulation of war through the professional system of military command control did at the close of the nineteenth century. Justifying the use of force against civilian participants by reference to the rules regarding defensive force is useful because it is capable of providing the foundation for a principled approach to civilian immunity and its loss. Under this definition, a civilian forfeits his or her immunity from attack only when there is clear and convincing evidence that he or she is engaged in an act of aggression that wrongfully, *i.e.* without lawful authority, justification or excuse, poses an imminent threat of death or serious bodily harm to civilians or members of armed forces, and the use of force is necessary and proportionate to prevent that harm. Force will be necessary and proportionate only after escalation of force procedures have been diligently applied, and the consequences of the use of force on the surrounding population would not be indiscriminate or disproportionate, or be such as to spread terror.

³⁸⁸ *Interpretive Guidance*, *supra* note 64 at 1024, 1035.

4.6.1 The Civilian is Engaged in an Act of Aggression

The first issue to be determined is whether the civilian is engaged in an act of aggression that wrongfully poses a threat of death or serious bodily harm. Many of the examples raised in the above case studies would fail even this initial test. Armed forces have argued in favor of the legality of targeting and killing civilians who engage in the following acts:

- Geographical proximity to an insurgency, or living in a neighborhood close to where insurgent activity is suspected to have taken place;³⁸⁹
- Familial relationships or social affiliations with persons or networks suspected of participating in insurgent or terrorist activity;³⁹⁰
- Being a sympathizer or supporter of a particular group or ideology;³⁹¹
- Wearing certain brands of apparel;³⁹²
- Ethnic markers, signified through one's appearance, name or clothing;³⁹³
- Engaging in cyber-attacks or disruptions of computer networks or communications;³⁹⁴
- Shielding objects of attack, including objects of cultural or religious significance that are protected from direct military attack;³⁹⁵
- Protesting military activities, or military detentions;³⁹⁶
- Agricultural production and food preparation;³⁹⁷
- Digging in fields;³⁹⁸
- Recruiting, advertising, furnishing money or supplies,³⁹⁹ or supplying information to

³⁸⁹ Peter Maas, "Professor Nagl's War" *The New York Times Magazine* (11 January 2004), available at: <http://newyorktimes.com/2004/01/11/magazine/professor-nagl-s-war.html?pagewanted=all&src=pm> (accessed 17 January 2013); *Al-Adahi*, *supra* note 183 at 1106.

³⁹⁰ *Ibid*; *Al-Adahi*, *supra* note 183 at 1106-7; *supra* Chapter Three note 157.

³⁹¹ *Al-Adahi*, *supra* note 183 at 1106.

³⁹² *Ibid*. at 1109.

³⁹³ Amnesty International, *Mali: First Assessment of the Human Rights Situation after Three-Week Conflict* (London: Amnesty International Publications, 2013) at 9-10.

³⁹⁴ *Interpretive Guidance*, *supra* note 64 at 1017.

³⁹⁵ *Ibid*. at 1024; Michael N. Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements" (2009) 42:3 N.Y.U. J. Int'l L. & Pol. 697 at 716.

³⁹⁶ *Ibid*. at 724.

³⁹⁷ Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis" (May 2010) 1 Harv. Nat'l Sec. J. 5 at 23.

³⁹⁸ *Supra* Chapter One at note 7 and accompanying text.

³⁹⁹ Eric T. Jensen, "Direct Participation in Hostilities" in William C. Banks, ed., *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare* (New York: Columbia University Press, 2011) 85 at 98.

- armed groups;⁴⁰⁰
- Driving delivery vehicles;⁴⁰¹
- Sabotaging military equipment;⁴⁰²
- Clearing land mines and ordnance;⁴⁰³
- Disrupting supply lines;⁴⁰⁴
- Failing to respond to the instructions of security forces;⁴⁰⁵
- Fleeing security forces;⁴⁰⁶
- Providing humanitarian aid or relief to populations or groups of persons suspected of the above activities.⁴⁰⁷

Persons performing these activities do not thereby forfeit their lives, on the grounds that – irrespective of whether they help or hinder the activities of armed forces or non-state armed groups - they do not constitute acts of aggression that pose a threat of death or serious bodily harm. Furthermore, lethal force is not justified when the impugned behavior is brought about by the actions of the security forces themselves.⁴⁰⁸

4.6.2 The Aggression is Wrongful

Aggression must be wrongful in order to justify defensive force. If a soldier provokes an act of aggression - such as by committing war crimes, illegal searches or detentions, the torture or mistreatment of detainees, or attacking sites that are protected under international law – then he or she may thereby lose the right to use lethal force in self-defense as in *Behenna*.⁴⁰⁹ In addition,

⁴⁰⁰ *Ibid.* at 102.

⁴⁰¹ *Interpretive Guidance*, *supra* note 64 at 1024.

⁴⁰² *Ibid.* at 1016.

⁴⁰³ *Ibid.* at 1017.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ See e.g.: Amnesty International, *Iraq: Killings of Civilians in Basra and Al-'Amara*, Amnesty Report MDE14/007/2004 (10 May 2004) at 10.

⁴⁰⁶ *Mowris*, *supra* note 19; see also: *supra* Chapter Three at note 126 for a discussion of the 'fleeing felon' rule.

⁴⁰⁷ *Supra* Chapter Three at p. 168 *et seq.*

⁴⁰⁸ See Leo Katz, "Targeted Killing and the Strategic Use of Self-Defense" in Claire Finkelstein, Jens David Ohlin, and Andrew Altman, eds., *Targeted Killings: Law and Morality in an Asymmetric World* (London: Oxford University Press, 2012) 467, in which he takes a different view. Allowing security forces to provoke reactions that they then use to justify acts of self-defense is not permitted for ordinary persons, and would grant very broad and discretionary power to security forces over and above other individuals. This is another example of how self-defensive justifications can be used in an attempt to expand the state prerogative to use violence, at the expense of other individuals and groups in society.

⁴⁰⁹ *United States v. Behenna*, 71 M.J. 228 (2011).

civilian activities that are lawful would not normally constitute evidence of wrongful aggression. This includes ordinary activities, such as driving vehicles, digging in fields, attending large gatherings, and riding in trucks, but also carrying weapons when this is lawful. Defending protected sites through shielding is also lawful, as are acts of expression in the media, political opinions, and the exercise of freedom of assembly. Performing humanitarian and aid work, removing land mines and unexploded ordnance, rescuing the wounded, collecting bodies, and obtaining the necessities of life are all protected by the international laws of armed conflict, and therefore civilians do not forfeit their immunity from attack by engaging in these activities. States at war have often justified using military force to target aid workers and interfere with the provision of the necessities of life to a civilian population.⁴¹⁰

As the definition of wrongful aggression follows an evidence-based standard - rather than one of objective facts, subjective fear, or a reasonableness standard - the emphasis is on what the civilian must *do* to give rise to a belief that he or she is engaged in a wrongful act of aggression that threatens to cause a loss of life or serious bodily harm. There may be cases in which the act of aggression is not in fact wrongful, because the person is acting under duress, is not morally responsible for their actions, or otherwise has a justification or excuse. Wrongfulness may be especially difficult to determine when young children or child soldiers are participating in hostilities. Adults can be coerced into carrying out attacks,⁴¹¹ and very young children,⁴¹² disabled persons, and those who are mentally ill have also been used in this way.⁴¹³

Security forces may therefore have permission to kill a person whose act of aggression is not in fact objectively wrongful. Security forces in the field are almost necessarily limited in what they can know, and must make decisions based upon what is often inadequate information. Security forces must judge based upon the actions of the civilian, and they may not have access to information that would justify or excuse the behavior. In particular, security forces may not be

⁴¹⁰ Eva Wortel, "Humanitarians and their Moral Stance in War: The Underlying Values" (2009) 91:876 *Int'l Rev. Red Cross* 779.

⁴¹¹ Henry Dodd, "A Short History of Suicide Bombings" *Action on Armed Violence* (23 August 2013), available at: <https://aoav.org.uk/2013/a-short-history-of-suicide-bombings/> (accessed 30 July 2015).

⁴¹² Agence France Press, "Seven-year-old Girl Kills Herself and Five Others in Nigeria Suicide Bombing" *The Guardian* (22 February 2015), available at: <http://www.theguardian.com/world/2015/feb/22/girl-as-young-as-seven-kills-herself-and-five-others-in-nigeria-suicide-bombing> (accessed 30 July 2015).

⁴¹³ Soraya Nelson, "Disabled Often Carry Out Afghan Suicide Missions" *NPR* (15 October 2007), available at: <http://www.npr.org/templates/story/story.php?storyId=15276485> (accessed 30 July 2015).

able to know that a person who poses a threat lacks moral capacity, or is acting under duress. Children and mentally-ill persons acting under duress would often fall under the category of what McMahan has termed ‘non-responsible threats,’ which he defines as a person who “without justification threatens to harm someone in a way to which she is not liable, but who is in no way morally responsible for doing so.”⁴¹⁴ McMahan argues that such persons are not liable to be killed, as they are not morally responsible for posing a threat of harm.⁴¹⁵ However, he notes that there may be other justifications for using lethal force against persons who pose a non-responsible threat, the most common of which is the lesser evil justification.⁴¹⁶ This may permit the use of lethal force, for example, against an innocent child forced to wear a suicide vest which will be detonated in a public place, killing a large number of persons. Several such incidents took place in Nigeria throughout 2015, during which the Boko Haram militant group abducted young children, many of them girls, and then forced them to carry out suicide attacks against marketplaces and mosques.⁴¹⁷ Such non-responsible threats may permissibly be killed to prevent a greater loss of life, but may not be killed on the grounds that their actions are wrongful.

The issue of child soldiers has been most controversial, because it raises the question of whether a child - in this case acting of their volition and not under duress - may be killed if they pose a threat to others. McMahan has argued that even child soldiers are morally responsible for their actions,⁴¹⁸ although this moral responsibility may be significantly diminished. He states that “[a]bduction and brutal mistreatment constitute duress through the implicit threat, to which explicit threats are usually added, of even greater harm in the event of disobedience; physical isolation and indoctrination produce profound ignorance; and youth, psychological manipulation, and drugs together diminish their capacity for responsible agency.”⁴¹⁹ However, these abuses are often perpetrated against adult fighters, and there may be little difference between a child soldier

⁴¹⁴ Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009) at 168 [hereinafter *Killing in War*].

⁴¹⁵ *Ibid.* at 169.

⁴¹⁶ Jeff McMahan, *Child Soldiers: The Ethical Perspective* (Pittsburgh: Ford Institute for Human Security, 2007) at 8 [hereinafter *Child Soldiers*].

⁴¹⁷ See e.g.: BBC News, “Nigerian City of Maiduguri ‘Attacked by Five Child Bombers’” *BBC News* (2 October 2015), available at: <http://www.bbc.com/news/world-africa-34423311> (Accessed 3 February 2016); NPR, “Boko Haram Enlists Young Girls as Suicide Bombers” *NPR* (19 October 2015), available at: <http://www.npr.org/2015/10/19/449862206/boko-haram-enlists-young-girls-as-suicide-bombers> (accessed 3 February 2016).

⁴¹⁸ *Child Soldiers*, *supra* note 416 at 11-12.

⁴¹⁹ *Killing in War*, *supra* note 414 at 200.

of 16 years of age and a regular soldier of 18 years.⁴²⁰ McMahan argues that security forces have a responsibility to judge whether, as in the above cases, a child combatant is acting under duress, and ought in all cases to use especial restraint.⁴²¹ As above, where it is clear that a child soldier is not morally responsible for their actions, or has a justification or excuse, then they may not be killed on defensive grounds; however, there may be other reasons that permit force to be used against them, such as the prevention of greater harm.

4.6.3 The Act of Aggression Must Meet the Threshold of Harm

It must be shown that the civilian's conduct meets the threshold of harm, such that it would lead one to believe that this conduct clearly and convincingly poses a risk of death or serious bodily harm. This would exclude many activities in which persons are carrying, storing, or trafficking in weapons generally, but have not manifested any intent to use those weapons to cause harm, including:

- Keeping or storing weapons;
- Carrying a weapon;
- Delivering or selling weapons;
- Throwing non-lethal projectiles.

Simply carrying, storing, transporting, or even trafficking in weapons alone is not sufficient to demonstrate an intent to use those weapons to kill or injure another person. Many individuals in conflict zones carry weapons for personal protection, and the U.S. government even permitted Iraqi civilians the right to bear automatic weapons for this purpose.⁴²² Coalition Provisional Authority (CPA) Order No. 3 amended their previous order when they came under heavy criticism from Iraqi civilians for only allowing pistols and small arms, and prohibiting automatic weapons.⁴²³ Andrews reports that a spokesperson for L. Paul Bremer told him, "Yes, they will be

⁴²⁰ *Ibid.* at 202.

⁴²¹ *Child Soldiers*, *supra* note 416 at 15.

⁴²² Coalition Provisional Authority, "CPA Order No. 3 (Revised) (Amended), Weapons Control" CPA/ORD/31 December 2003/03 (31 December 2003) at s. 1(3) permitted Iraqis to obtain licenses for firearms for personal defense, including automatic firearms. This amended the earlier CPA/ORD/23 May 2003/03, which only permitted Iraqis to possess pistols and other small, non-automatic weapons.

⁴²³ Edmond L. Andrews, "Iraqi Civilians Allowed to Keep Assault Rifles" *The New York Times* (1 June 2003), available at: <http://www.nytimes.com/2003/06/01/world/after-the-war-baghdad-iraqi-civilians-allowed-to-keep-assault-rifles.html> (accessed 23 March 2015).

allowed to keep their AK-47s,” as this was a weapons control program, and “not a program for the disarmament of the Iraqi people.”⁴²⁴ The CPA distributed leaflets and flyers informing Iraqis that they were permitted to keep automatic weapons in their homes and businesses.⁴²⁵ On the other hand, U.S. forces then permitted the targeting of civilians based solely on the grounds that they were so armed. This indicates the failure of CPA policies at multiple levels: first, in permitting the widespread possession of such weapons; second, in not putting in place any mechanism to enforce the laws and policies in place that served to register and control small arms; and third, in targeting civilians based upon criteria that the CPA had itself informed them were lawful.

Many individuals in Iraq make money from storing and selling small arms on the black market.⁴²⁶ This is one of the harmful consequences of war and the damage it does to local economies, but many individuals who carry, store, or traffic in small arms never use or intend to use those weapons. Ka’ab Zuhir Ahmed describes how he earned a living selling guns in the aftermath of the invasion. He states:

There was a huge number of Kalashnikovs available. Iraqi soldiers who died fighting the Americans entering Baghdad would have their guns and ammunition taken off their bodies by people who stashed the weapons in their houses. A lot of the Iraqi soldiers in the final days of the regime fled their posts in uniform. Out in the streets many of them traded their guns for civilian clothes so they would not be killed by either the Americans or the Ba’athist execution squads looking for deserters. Houses near military bases wound up with six or seven Kalashnikovs, because so many fleeing soldiers passed. People with a lot of guns in their houses started to get worried about being caught by the Americans with so many weapons, so they wanted to get rid of them quickly. Also, there was a huge arms depot in my neighborhood. Looters emptied it, and many of the weapons ended up in houses around the area. All of this made it easy to collect inventory for sale.⁴²⁷

It is perhaps unsurprising that this situation would follow the collapse of the regular armed forces, and that these weapons would assist in fuelling the insurgency. It also demonstrates how the mere possession or sale of weapons by civilians can be very common during an armed conflict, and does not demonstrate a culpable intention to use those weapons.

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.*

⁴²⁶ Mark Kukis, *Voices from Iraq: A People’s History, 2003-2009* (New York: Columbia University Press, 2011) at 20-21, where Mohammed Khalil Hamed describes how, in the aftermath of the U.S. invasion, a large number of weapons were looted from a military storehouse in Baghdad where he worked. He states, “There were hundreds of them, running like crazy everywhere to grab something. Boys of no more than five were alongside 80-year-olds... They took everything, everything they could carry.”

⁴²⁷ *Ibid.* at 59.

The threshold of harm would also exclude the use of lethal force in the controversial cases in which armed forces claim the right to kill civilians who are throwing rocks or similar projectiles against them. These activities do not pose a threat to the lives of soldiers, and states have a responsibility to provide their security personnel with adequate protective gear to ensure their safety against such common and foreseeable activities.⁴²⁸

4.6.4 The Civilian is Engaged in the Act of Aggression, and the Threatened Harm is Imminent

There are two temporal limitations to targeting civilian participants. In order to comply with the *Protocols Additional*,⁴²⁹ civilians lose their immunity from attack only as long as and for such time as they engage in the impugned conduct. In order to comply with the ordinary rules regarding defensive force, the harm must be imminent, or close in time. The purpose of the imminence requirement is to turn security forces' attention to harms that are merely potential or inchoate, and to decline to use lethal force in such cases.⁴³⁰ Ferzan's cautions regarding the very real benefits of keeping the imminence requirement are important to keep in mind, as the imminence requirement can filter out many unjustified killings in which the threat posed is merely speculative.⁴³¹ In many cases, the individual's actions may not pose an imminent threat of harm, but may be contrary to domestic laws. This includes many activities related to planning attacks, manufacturing, storing and trafficking in weapons, or financing or supplying terrorist organizations. Many activities that play a supporting role in sustaining terrorist and insurgent violence can be dealt with through the enforcement of existing laws and regulations that tackle root causes, such as restricting the movement of small arms and explosive materials.⁴³²

⁴²⁸ See: *supra* Chapter One at note 58 and accompanying text.

⁴²⁹ *Protocol I*, *supra* note 287 at Article 51(3); *Protocol II*, *supra* note 175 at Article 13(3).

⁴³⁰ See: *supra* Chapter One at s. 1.3.3.

⁴³¹ Kimberley Ferzan, "Defending Imminence: From Battered Women to Iraq" (2004) 46 *Arizona Law Review* 213 at 217.

⁴³² See e.g., Iain Overton, ed., *Material Harm: A Review of IED Components and Measures to Prevent their Spread* (London: Action on Armed Violence, 2014), a recent report by an organization that seeks to reduce armed violence, and which makes a number of recommendations on how governments can limit the production and trafficking of improvised explosive devices and their components. Many of these measures involve the international tracking and limiting of supplies that are used to manufacture IEDs, at 22, and this may ultimately save more lives than targeting individual suspects with lethal force.

4.6.5 Escalation of Force Procedures are Required to Ensure the Use of Force is Necessary

Requiring that soldiers diligently undertake escalation of force procedures is an important step in eliminating the use of unnecessary force, and to promote the use of minimal force less in deterring or detaining a genuine perpetrator. The requirement to use minimal harm has also been discussed in the context of the U.S.'s targeted killing program, in which it has been formulated as the 'kill or capture' requirement. U.S. government officials claim that they abide by such a rule,⁴³³ and have recognized that they ought to capture and detain the impugned individual if circumstances permit this,⁴³⁴ but they have not demonstrated that the U.S. government has made attempts to detain suspects that it has killed in targeted killing operations. In *Public Committee Against Torture*, the Israeli High Court of Justice stated that targets could only be killed if capture was not feasible,⁴³⁵ and the ICRC approved of this in its *Interpretive Guidance*.⁴³⁶

Escalation of force procedures, however, go beyond the requirement to 'kill or capture', for they mandate that concrete steps be undertaken to mitigate the use of force. While the use of minimal force has not hitherto been an obligation imposed by international law, it is a long-recognized principle that is consistent with international law, as well as an important goal of international humanitarian law.⁴³⁷ However, when states base their use of force not on the belligerent privileges granted to their armed forces under international law, but on the need for self-defense, then the requirement to use minimal force and to employ escalation of force procedures *does* become a requirement for the justified use of defensive force.

In many of the above cases, escalation of force criteria were not properly employed to minimize the use of force, yet they would have been effective in averting many potential and actual threats. Many of the civilians in the above incidents simply could not see the U.S. checkpoint, since it was not visible from the road or clearly marked. Others were too far from the checkpoint to be able to perceive hand or voice signals to stop. It is likely that many persons were not given sufficient time to respond to escalation of force procedures; recall that in the Calipari checkpoint shooting, the investigation found that these procedures were used at night, in

⁴³³ *Holder Speech*, *supra* note 243.

⁴³⁴ *White Paper*, *supra* note 253 at 40.

⁴³⁵ *Public Committee Against Torture*, *supra* note 357 at 40.

⁴³⁶ *Interpretive Guidance*, *supra* note 64 at section IX.

⁴³⁷ *Supra* Chapter Three at s. 3.2.2.4

conditions of rain and low visibility, for only 3 seconds before lethal shots were fired.⁴³⁸ Other civilians had malfunctioning vehicles that were not able to stop. Others, such as the driver in the Calipari checkpoint shooting, simply panicked when shots began to be fired, as they did not know where the shots were coming from or why they were being fired. Simply using adequate signage and the emplacement of concertina wire would have prevented these deaths. Security forces must find *clear and convincing* evidence that imminent and serious harm will result from a wrongful act of aggression - not merely that one is *possible* – and the diligent application of escalation of force procedures is a useful means of ensuring that decisions are made to the required degree of accuracy.

4.6.6 The Presumption of Civilian Immunity is Rebutted Only by Clear and Convincing Evidence

Each of the elements of the justified use of defensive force must be established by evidence that is clear and convincing; if one element is unclear, then security forces do not have permission to use defensive force. This is higher than other standards that have been proposed - such as a mere probability, a well-based fear, or a reasonableness standard - and this higher standard is required in the context of armed conflict in order to comply with the presumption of civilian immunity as found in Article 50 of *Protocol I*. In many of the above case studies, a mere possibility of harm was seen as being sufficient to justify the detention or killing of a suspected militant. The targeted killing program is explicitly based upon reversing the presumption of civilian immunity, and replacing it with a presumption of guilt in any case where militancy or association with militant groups is suspected, or where the possibility of a future attack is merely speculative; this is clearly prohibited by Article 50 of *Protocol I*. Several incidents of lethal force in Afghanistan involved U.S. forces shooting local Afghans who were digging in fields or near roads. In one incident, village elders from Pashmul demanded an end to overflights after a helicopter strike killed two men who were digging in a field.⁴³⁹ Lt. Col. Reik Anderson stated,

⁴³⁸ *Calipari Shooting Investigation*, *supra* note 46 at 32.

⁴³⁹ Yaroslav Trofimov, “New Battles Test U.S. Strategy in Afghanistan: Focus on Safeguarding Civilian Lives Frustrates Troops in Taliban Territory” *The Wall Street Journal* (9 February 2010), available at: <http://online.wsj.com/articles/SB10001424052748704140104575057630668291288> (accessed 26 November 2014).

“Could that guy be emplacing an IED? He could be. Is he? Unlikely.”⁴⁴⁰ He therefore recognized that there was not sufficient evidence of an act of aggression in the mere act of digging. Instead of using lethal force, he promised the elders that his soldiers would use smoke to discourage digging in certain areas,⁴⁴¹ thus applying less-than-lethal means to repel potential threats. This demonstrates how easy it can be for commanding officers to choose alternatives to the use of force that give effect to the principle of minimal harm without placing their forces at greater risk.

In the conditions of uncertainty that prevail in armed conflict, both parties are being asked to adjudge something that cannot be proven to the standard of objective fact: the defender cannot prove that the target will certainly kill them if lethal force is not deployed; on the other hand, the target cannot prove his or her innocence. The outcome of such encounters therefore depends very heavily on precisely where this burden of proof is placed. Shifting the burden onto civilians to prove that they are *not* members of militant groups, or that they pose *no* threat of harm is simply too high a burden for any individual to meet. Moreover, it can be seen that the civilians in the above encounters were in fact given no opportunity to do so. Shifting the burden onto civilians in this manner also has significant consequences for the population as a whole, and not only in micro-encounters between individual soldiers and civilians. Over many thousands, and even tens of thousands of interactions between civilians and security forces, the rules employed will have far-ranging consequences that can materially shift the nature of the conflict, destroy trust and cooperation between the local population and security forces, and even undermine nascent government authority.

4.6.7 The Use of Force is Not Indiscriminate, or Disproportionate, or Such as to Spread Terror

In order to comply with Article 51 of *Protocol I*, the use of force must not be arbitrary, indiscriminate, or such as to spread terror. The use of force must be justified not only in the micro-encounter at hand, but must be macro-justified as well, which means that armed forces must consider the overall and longer-term consequences of particular strategies and tactics, and their effects on the local civilian population. Armed forces might conduct their operations in such a way as to provoke reprisals, or escalate conflict violence, such as through illegal detentions,

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*

torture, arbitrary or indiscriminate force, or though impunity for the mistaken killing of civilians. Certain tactics are especially likely to create terror among the civilian population, such as the use of arbitrary and indiscriminate force, using force against lawful or ordinary daily activities, and using lethal force in order to coerce civilians to obey military orders. It also includes the unlawful tactic of timing strikes close together so as to prevent humanitarian aid from reaching casualties. Many of the above case studies show evidence of these tactics being used and, even when it cannot be shown that spreading terror is the “primary purpose” of the tactics,⁴⁴² they can create extreme psychological trauma and social dislocation in the target population that go far beyond the specific escalation of force incidents or drone strikes involved. Again, civilians are left not knowing how to protect themselves and maintain their immunity. In many of the cases discussed above, not only were civilians given no opportunity to do so, but it would simply not have been possible for them to do so.

4.7 Conclusion

This dissertation has discussed the problem of the mistaken killing of civilians during armed conflict that result from self-defensive and status-based interpretations of civilian direct participation in hostilities. At present, standard Rules of Engagement in use by the U.S. would not meet either the requirements for determining civilian direct participation as defined in the *Protocols Additional*,⁴⁴³ or the ordinary rules governing self-defense - including those already in use by the U.S. military.⁴⁴⁴ Self-defense is a compelling, and perhaps because of this, a growing rationale that states and security forces proffer for killing in war, and therefore it ought to be governed by well-established rules in order to ensure that the use of defensive force is justified. Furthermore, this dissertation has sought to show that the problems posed by defensive force in armed conflict can best be resolved not only by adopting ordinary rules governing defensive force, but by merging these rules with the existing international laws of armed conflict. Accordingly, it has discussed a definition of ‘civilian direct participation in hostilities’ that is based upon the rules for self-defense. In this way, a civilian will forfeit his or her life only when

⁴⁴² Article 51(2) of *Protocol I*, *supra* note 287, outlaws only those acts or threats of violence the primary purpose of which is to spread terror among the civilian population.

⁴⁴³ *Ibid.* at Article 51(3); *Protocol II*, *supra* note 175 at Article 13(3).

⁴⁴⁴ United States Department of the Army, *Manual for Military Courts Martial*, 2012 Edition (Washington, D.C.: Department of the Army, 2012) at s. 916(e), at p. II-111.

there is clear and convincing evidence that he or she is engaged in an act of aggression that wrongfully - *i.e.* without lawful authority, justification or excuse - poses an imminent threat of death or serious bodily harm to civilians or member of armed forces, and the use of force is necessary and proportionate to prevent that harm. Force will be necessary and proportionate only after escalation of force procedures have been diligently applied, and the consequences of the use of force on the surrounding population would not be indiscriminate or disproportionate, or be such as to spread terror. This definition adapts ordinary rules for defensive force to the specific requirements of international law, including the requirement in Article 50 of *Protocol I* that there be a presumption of civilian immunity, which presumption can only be sufficiently rebutted by clear and convincing evidence, as well as the requirements of Article 51(3) of *Protocol I* that civilians lose their immunity from attack only for such time as they take a direct part in hostilities. It also includes the implication that the overall, or macro effects of the military tactics currently used are such as to constitute indiscriminate force, which is prohibited by Articles 51(4) and (5), or are primarily intended to spread terror among the civilian population, as prohibited by Article 51(2). These requirements are largely mirrored in *Protocol II* governing non-international armed conflict, and they largely codify long-standing customary principles of the international laws of armed conflict.

Merging the rules for defensive force with the laws of armed conflict possesses several advantages over the present practice of treating self-defensive killings as being separate from, and largely superseding, international law and its norms protecting civilians. First, this approach solves the problem of providing a principled definition of civilian direct participation in hostilities, which has long been the subject of controversy and contention among states and international organizations. Second, this approach provides an explanation for why pre-emptive and status-based interpretations of civilian direct participation result in unjustified killings. Hopefully, this will be a first step in quelling the growing practice of targeting persons based upon group affiliations, both real and perceived, that has recently been gaining legitimacy. At the same time, this approach also addresses the growing problem of mistaken killings during escalation of force incidents. At present, the international laws of armed conflict do not obligate states to use minimal force when dealing with civilians and suspected civilian participants. However, if civilian direct participation were to be based upon rules for defensive force, then

minimal force and escalation of force procedures would become mandatory, rather than merely recommended, as this ensures that the killing is necessary – a fundamental component of justified defensive force. Furthermore, this provides an analytical framework that can be used to analyze novel or controversial cases of civilian participation, rather than allowing states to make these decisions on an *ad hoc*, and largely discretionary, basis.

Although a novel approach, justifying the forfeiture of civilian immunity based upon the need for self-defense is in fact consistent with the international law governing belligerent qualification and civilian immunity as it has grown up in the past two centuries. These rules largely grew out of Enlightenment ideals that elevated the value of individual rights over and above the prerogatives of the state; accordingly, those not bearing arms or posing a threat could not be harmed. At the time, states saw many advantages to adopting these rules, many of which remain important today. Great powers enforce their preferred means of military administration within the law, which gives them an additional advantage over lesser powers that are forced to fight on these terms, but with fewer resources. In addition, when states fight according to the rules created by the international law, they give themselves permission to claim the moral high ground. What the U.S. has attempted to do through standard Rules of Engagement and the targeted killing program is to create new norms, through their own civilian and military legal systems, that skirt the international law, while encouraging more states to adopt their own legal interpretations; this enables them to rewrite the rules, while still claiming that they are following the norms favored by a community of nations. The ICRC has largely validated this process, and the rules it has generated. Both this approach and the rules it has produced for killing civilians ought to be rejected as falling afoul of both the international laws governing civilian immunity, as well as generally accepted legal principles that set out the conditions under which defensive force is justified. If both bodies of law were in fact to be followed, then more mistaken killings would be prevented, and the well-being of civilians would be improved. This serves the broader, and more important goals, of protecting civilians during armed conflict and de-escalating armed violence and bringing it to a speedier resolution.

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Appendix A: Selected Texts Relating to the Qualification of Belligerents

1. *Treaty of Westphalia* (1648):

Article XVI, §19

Finally, the Troops and Armys of all those who are making War in the Empire, shall be disbanded and discharg'd; only each Party shall send to and keep up as many Men in his own Dominion, as he shall judge necessary for his Security.

~ Peace Treaty Between the Holy Roman Emperor and the King of France and their respective Allies (*Treaty of Westphalia*) (24 October 1648) at article XVI, §19.

2. Emmer de Vattel *The Law of Nations* (1760):

Book III, Chapter II, §9

In former times, and especially in small states, immediately on a declaration of war, every man became a soldier; the whole community took up arms, and engaged in the war. Soon after, a choice was made, and armies were formed of picked men, - the remainder of the people pursuing their usual occupations. At present the use of regular troops is almost every-where adopted, especially in powerful states. The public authority raises soldiers, distributes them into different bodies under the command of generals and other officers, and keeps them on foot as long as it thinks necessary. As every citizen or subject is bound to serve the state, the sovereign has a right, in case of necessity, to enlist whom he pleases. But he ought to choose such only as are fit for the occupation of war; and it is highly proper that he should, as far as possible, confine his choice to volunteers, who enlist without compulsion.

~ B. Kapossy & R. Whatmore, eds., *Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Indianapolis: Liberty Fund, 2008) at Book III, Chapter II, s. 9.

3. Jean-Jacques Rousseau, *The Social Contract* (1762):

Book I, Chapter IV

But it is clear that this supposed right to kill the conquered is by no means deducible from the state of war. Men, from the mere fact that, while they are living in their primitive independence, they have no mutual relations stable enough to constitute either the state of peace or the state of war, cannot be naturally enemies. War is constituted by a relation between things, and not between persons; and, as the state of war cannot arise out of simple personal relations, but only out of real relations, private war, or war of man with man, can exist neither in the state of nature, where there is no constant property, nor in the social state, where everything is under the authority of the laws...

War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. Finally, each State can have for enemies only other States, and not men; for between things disparate in nature there can be no real relation.

~ Jean-Jacques Rousseau, *The Social Contract* (London: Wordsworth Editions, 1998) at Book I, Chapter IV.

4. Georg Friedrich von Martens, *A Compendium of the Law of Nations* (1802):

Book VIII, Chapter III, s. 2

Soldiers, by the order of their commanders, and such other subjects as may obtain express permission for the purpose from their sovereign, may lawfully exercise hostilities, and are looked upon by the enemy as lawful enemies; but those, on the contrary who, not being so authorised, take upon them to attack the enemy, are treated by him as banditti; and even the state to which they belong ought to punish them as such.

~ Georg Friedrich von Martens, *A Compendium of the Law of Nations*, William Corbett, trans. (London: Corbett and Morgan, 1802) at Book VIII, Chapter III, s. 2.

5. *Lieber Code* (24 April 1863):

Article 57

So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding or other warlike acts are not individual crimes or offences. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies [and therefore entitled to be treated as prisoners of war].

Article 81

Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all of the privileges of the prisoner of war.

Article 82

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers – such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but

shall be treated summarily as highway robbers or pirates.

~ Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, Lincoln Administration General Order No. 100 (24 April 1863).

6. Henry Richmond Droop, paper read before the Juridical Society of London (30 November 1870):

The conditions which, in my opinion, combatants may reasonably be required to satisfy, in order to be entitled to the same treatment as regular soldiers, may be briefly summed up thus :-

1. They must have an authorization from an established Government or from some *de facto* substitute for such a Government.
2. They must be under the actual control of officers who are recognized by and responsible to the chief military authorities of the state.
3. They must themselves observe the rules of war.
4. All combatants intended to act singly or in small parties must have a permanent distinctive uniform, but this is not indispensable for troops acting together in large bodies.
5. Levies *en masse* of the whole population are legitimate combatants provided they comply with the above conditions, but not otherwise.

~ H.R. Droop, "The Relations Between an Invading Army and the Inhabitants, and the Conditions Under Which Irregular Combatants are Entitled to the Same Treatment as Regular Troops" (30 November 1870) in *Papers Read Before the Juridical Society: 1863-1870*, Vol. III (Wildy & Sons Law Booksellers and Publishers, 1871) 705 at 715.

7. Original Project of the *Brussels Declaration Concerning the Laws and Customs of War* (27 July 1874):

Article 9

The rights of belligerents shall not only be enjoyed by the army, but also by the militia and volunteers in the following cases:

1. If, having at their head a person responsible for his subordinates, they are at the same time subject to orders from headquarters;
2. If they wear some distinctive badge, recognizable at a distance;
3. If they carry arms openly; and
4. If, in their operations they conform to the laws, customs, and procedure of war.

Armed bands not complying with the above-mentioned conditions shall not possess the rights of belligerents; they shall not be considered as regular enemies, and in the case of capture shall be proceeded against judicially.

~ Original Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 July 1874).

8. *Brussels Declaration Concerning the Laws and Customs of War* (27 August 1874):

Article 9

The laws, rights and duties of war, apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognisable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.

~ Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874).

9. *Oxford Manual of the Laws of Land Warfare* (1880):

Article 1

The state of war does not admit of acts of violence save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts.

Article 2

The armed force of a State includes:

1. The army properly so called, including the militia;
2. The national guards, landsturm, free corps, and other bodies which fulfill the three following conditions:
 - (a) That they are under direction of a responsible chief;
 - (b) That they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps;
 - (c) That they carry arms openly;
3. The crews of men-of-war and other military boats;
4. The inhabitants of non-occupied territory, who, on the approach of the enemy, take up arms spontaneously and openly to resist the invading troops, even if they have not had time to organize themselves.

Article 3

Every belligerent armed force is bound to conform to the laws of war.

~ *Institut de Droit International, Oxford Manual of the Laws of Land Warfare* (Oxford: Institut de Droit International, 1880).

10. *The Hague Regulations* (1899), Annex B: Regulations Respecting the Laws and Customs of War on Land:

Chapter 1 On the Qualification of Belligerents

Article 1

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 and volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

~ International Conferences (The Hague), *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land.

11. *The Hague Regulations* (1907), Annex B: Regulations concerning the Laws and Customs of War on Land:

Chapter 1 On the Qualification of Belligerents

Article 1

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 and volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

~ International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land.

12. *Third Geneva Convention* (1949):

Article 4

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

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

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

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

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

Article 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. 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 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.

~ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.

13. *Protocol I (1977)*:

Article 43

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 covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44

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

(a) during each military engagement, and

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

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

...

6. 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.

Article 45

1. 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 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. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held 'in camera' in the interest of State security. In such a case, the detaining Power shall advise the Protecting Power accordingly.

~ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

Appendix B: Selected Texts Relating to the Qualification of Levées en Masse

1. Emmer de Vattel *The Law of Nations* (1760):

Book III, Chapter XV, §223

A subject may repel the violence of a fellow-citizen when the magistrate's assistance is not at hand; and with much greater reason may he defend himself against the unexpected attacks of foreigners.

Book III, Chapter XV, §228

There are occasions, however, when the subjects may reasonably suppose the sovereign's will, and act in consequence of his tacit command. Thus, although the operations of war are by custom generally confined to the troops, if the inhabitants of a strong place, taken by the enemy, have not promised or sworn submission to him, and should find a favourable opportunity of surprising the garrison and recovering the place for their sovereign, they may confidently presume that the prince will approve of this spirited enterprise. And where is the man that shall dare to censure it?

~ B. Kapossy & R. Whatmore, eds., *Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Indianapolis: Liberty Fund, 2008) at Book III, Chapter XV, ss. 223, 228.

2. Lieber Code (24 April 1863):

Article 51

If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy en masse to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

Article 52

No belligerent has the right to declare that he will treat every captured man in arms of a levy en masse as a brigand or bandit. If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

~ Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, Lincoln Administration General Order No. 100 (24 April 1863).

3. Henry Richmond Droop, paper read before the Juridical Society of London (30 November 1870):

The conditions which, in my opinion, combatants may reasonably be required to satisfy, in order to be entitled to the same treatment as regular soldiers, may be briefly summed up thus:-

...

5. Levies *en masse* of the whole population are legitimate combatants provided they comply with the above conditions, but not otherwise.

~ H.R. Droop, "The Relations Between an Invading Army and the Inhabitants, and the Conditions Under Which Irregular Combatants are Entitled to the Same Treatment as Regular Troops" (30 November 1870) in *Papers Read Before the Juridical Society: 1863-1870*, Vol. III (Wildy & Sons Law Booksellers and Publishers, 1871) 705 at 715.

4. *Brussels Declaration Concerning the Laws and Customs of War* (27 August 1874):

Article 10

The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organise themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.

~ Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874).

5. *Oxford Manual of the Laws of Land Warfare* (1880):

Article 2

The armed forces of a State includes:

...

4. The inhabitants of non-occupied territory, who, on the approach of the enemy, take up arms spontaneously and openly to resist the invading troops, even if they had not had time to organize themselves.

- *Institut de Droit International, Oxford Manual of the Laws of Land Warfare* (Oxford: Institut de Droit International, 1880).

6. *The Hague Convention (II)* (1899):

Chapter 1 On the Qualification of Belligerents

Article 2

The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having

time to organize themselves in accordance with Article 1, shall be regarded as belligerents, if they respect the laws and customs of war.

~ International Conferences (The Hague), *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899.

7. *The Hague Convention (IV) (1907)*:

Chapter 1 On the Qualification of Belligerents

Article 2

The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with Article 1, shall be regarded as belligerents, if they respect the laws and customs of war.

~ International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907.

8. *Third Geneva Convention (1949)*:

Article 4

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

...

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

~ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.

Appendix C: Selected Texts Relating to Civilian Immunity

1. Grotius, *De Jure Belli Ac Pacis* (1625):

Book III, Chapter IV, s. VI

This right of making lawful what is done in war is of great extent. For in the first place it comprises, in the number of enemies, not only those who actually bear arms, or who are immediately subjects of the belligerent power, but even all who are within the hostile territories, as appears from the form given by Livy, who says, that “war is declared against the sovereign, and all within his jurisdiction.” For which a very good reason may be assigned; because danger is to be apprehended even from THEM, which, in a continued regular war, establishes the right now under discussion.

Book III, Chapter IV, s. VIII

But the persons of natural-born subjects, who owe permanent allegiance to the hostile power may, according to the law of nations, be attacked, or seized, wherever they are found. For whenever, as it was said before, war is declared against any power, it is at the same time declared against all the subjects of that power. And the law of nations authorizes us to attack an enemy in every place: An opinion supported by most legal authorities: thus Marcian says “that deserters may be killed in the same manner as enemies, wherever they are found.” They may be lawfully killed there, or in their own country, in the enemy’s country, in a country belonging to no one, or on the sea. But as to the unlawfulness of the killing, or violently molesting them in a neutral territory, this protection does not result from any personal privileges of THEIR OWN, but from the rights of the SOVEREIGN of that country. For all civil societies had an undoubted right to establish it as a standing maxim that no violence should be offered to any person within their territories, nor any punishment inflicted but by due process of law. For where tribunals retain their authority in full vigour, to try the merits of every offence, and, after impartial inquiry to acquit the innocent, or condemn the guilty, the power of the sword must be restrained from inflicting promiscuous death.

Book III, Chapter IV, s. IX

But to return to the subject, which is, to decide how far the power of lawfully destroying an enemy, and all that belongs to him, extends. An extent of which we may form some conception from the very circumstance, that even women and children are frequently subject to the calamities and disasters of war.

~ Hugo Grotius, *De Jure Belli Ac Pacis* (1625), A.C. Campbell, trans. (Kitchener: Batoche Books, 2001).

2. Emmer de Vattel *The Law of Nations* (1760):

Book III, Chapter XV, §226

If we confine our view to the law of nations, considered in itself, - when once two nations are engaged in war, all the subjects of the one may commit hostilities against those of the other, and do them all the mischief authorised by the state of war. But should two nations thus encounter each other with the collective weight of their whole force, the war would become much more bloody and destructive, and could hardly be terminated otherwise than by the utter extinction of one of the parties. The examples of ancient wars abundantly prove the truth of this assertion to any man who will for a moment recall to mind the first wars waged by Rome against the popular republics by which she was surrounded. It is therefore with good reason that the contrary practice has grown into a custom with the nations of Europe, - at least those that keep up regular standing armies or bodies of militia. The troops carry on the war while the rest of the nation remain in peace. And the necessity of a special order to act is so thoroughly established, that, even after a declaration of war between two nations, if the peasants of themselves commit any hostilities, the enemy shows them no mercy, but hangs them up as he would so many robbers or banditti. The crews of private ships of war stand in the same predicament: a commission from the sovereign or the admiral can alone, in case they are captured, insure them such treatment as is given to prisoners taken in regular warfare.

- B. Kapossy & R. Whatmore, eds., *Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Indianapolis: Liberty Fund, 2008) at Book III, Chapter XV, s. 226.

3. Rousseau, *The Social Contract* (1762):

Book I, Chapter IV

Furthermore, this principle is in conformity with the established rules of all times and the constant practice of all civilised peoples. Declarations of war are intimations less to powers than to their subjects. The foreigner, whether king, individual, or people, who robs, kills or detains the subjects, without declaring war on the prince, is not an enemy, but a brigand. Even in real war, a just prince, while laying hands, in the enemy's country, on all that belongs to the public, respects the lives and goods of individuals: he respects rights on which his own are founded.

- ~ Jean-Jacques Rousseau, *The Social Contract* (London: Wordsworth Editions, 1998) at Book I, Chapter IV.

4. *Lieber Code* (24 April 1863):

Article 17

War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

Article 18

When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

Article 20

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

Article 21

The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

Article 22

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country 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.

Article 23

Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

Article 24

The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection, and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

Article 25

In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

~ Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, Lincoln Administration General Order No. 100 (24 April 1863).

5. Henry Richmond Droop, Paper Read at Lincoln's Inn Fields (30 November 1870):

It is impossible to carry out the principle of as far as possible protecting non-combatants from the consequences of war, unless combatants and non-combatants are to a certain degree kept distinct... In the heat of an assault it is impossible for foreign soldiers to investigate whether a man is a combatant or a non-combatant unless they can distinguish him by some distinct external mark.

~ H.R. Droop, "The Relations Between an Invading Army and the Inhabitants, and the Conditions Under Which Irregular Combatants are Entitled to the Same Treatment as Regular Troops" (30 November 1870) in *Papers Read Before the Juridical Society: 1863-1870*, Vol. III (Wildy & Sons Law Booksellers and Publishers, 1871) 705 at 715-6.

6. Original Project of the *Brussels Declaration* (27 July 1874):

Article II

Operations of war must be directed exclusively against the force and means of making war of the hostile State, and not against its subjects, so long as the later do not themselves take any active part in the war.

~ "General Principles, Project for an International Convention on the Laws and Customs of War Presented by the Russian Government," reprinted in Carnegie Endowment for International Peace, *Documents Relating to the Program of the First Hague Peace Conference Laid Before the Conference by the Netherlands Government* (London and Oxford: Clarendon Press, 1921) at 40.

7. *Brussels Declaration Concerning the Laws and Customs of War* (27 August 1874):

Article 38

Family honour and rights, the lives and property of persons, as well as their religious convictions and their practice must be respected.

~ Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874).

8. *Oxford Manual of the Laws of Land Warfare* (1880):

Article 4

The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy. They are to abstain especially from all needless severity, as well as from all perfidious, unjust, or tyrannical acts.

Article 7

It is forbidden to maltreat inoffensive populations.

Article 49

Family honour and rights, the lives of individuals, as well as their religious convictions and practice, must be respected.

~ *Institut de Droit International, Oxford Manual of the Laws of Land Warfare* (Oxford: Institut de Droit International, 1880).

9. *The Hague Convention (II)* (1899):

Preamble

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Article 46

Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property cannot be confiscated.

Article 50

No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.

~ International Conferences (The Hague), *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899.

10. *The Hague Convention (IV)* (1907):

Preamble

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Article 46

Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property cannot be confiscated.

Article 50

No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.

~ International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907.

11. *Third Geneva Convention* (1949):

Common Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

~ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.

12. *Fourth Geneva Convention* (1949):

Common Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Article 5

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

~ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

13. *Protocol I* (1977):

Article 50

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Article 51

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

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

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in 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.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

~ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

14. *Protocol II* (1977):

Article 4

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

- (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) collective punishments;
- (c) taking of hostages;
- (d) acts of terrorism;
- (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) slavery and the slave trade in all their forms;
- (g) pillage;
- (h) threats to commit any of the foregoing acts.

Article 13

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this

protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

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

~ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609.

Appendix D: Selected Texts Relating to Civilian Direct Participation in Hostilities

1. Jean-Jacques Rousseau, *The Social Contract* (1762):

Book I, Chapter IV

The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take. Sometimes it is possible to kill the State without killing a single one of its members; and war gives no right which is not necessary to the gaining of its object. These principles are not those of Grotius: they are not based on the authority of poets, but derived from the nature of reality and based on reason.

~ Jean-Jacques Rousseau, *The Social Contract* (London: Wordsworth Editions, 1998) at Book I, Chapter IV.

2. Georg Friedrich von Martens, *A Compendium of the Law of Nations* (1802):

Book VIII, Chapter III, s. 2

Soldiers, by the order of their commanders, and such other subjects as may obtain express permission for the purpose from their sovereign, may lawfully exercise hostilities, and are looked upon by the enemy as lawful enemies; but those, on the contrary who, not being so authorised, take upon them to attack the enemy, are treated by him as banditti; and even the state to which they belong ought to punish them as such.

Book VIII, Chapter III, s. 4

From the moment we are at war, all those who belong to the hostile state become our enemies, and we have a right to act against them as such; but our right to wound and kill being founded on self-defence, or on the resistance opposed to us, we can, with justice wound or take the life of none except those who take an active part in the war. So that, 1. Children, old men, women, and in general all those who cannot carry arms, or who ought not to do it, are safe under the protection of the law of nations, unless they have exercised violence against the enemy. 2. Retainers to the army, whose profession is not to kill or directly injure the enemy, such as chaplains, surgeons, and, to a certain degree, drummers, fifers, trumpeters, &c ought not to be killed or wounded deliberately. 3. Soldiers, on the contrary, being looked upon as ever ready for defence or attack, may at any time be wounded or killed; unless when it is manifest that they have not the will, or have lost the power to resist. When this is the case; when wounded, surrounded, or when they lay down their arms and ask for quarter; in short, from the moment they are reduced to a state in which it is impossible for them to exercise further violence against the conqueror, he is obliged, by the laws of war, to spare their lives; except, however, 1. when sparing their lives be inconsistent with his own safety; 2. in cases where he has a right to exercise the *talio* or to make reprisals; 3.

when the crime committed by those who fall into his hands justifies the taking of their lives.

~ Georg Friedrich von Martens, *A Compendium of the Law of Nations*, William Corbett, trans. (London: Corbett and Morgan, 1802).

3. Henry Halleck, *International Law* (1861):

Chapter XVIII, §4

If the peasantry or common people of a country use force, or commit acts in violation of the milder rules of modern warfare, they subject themselves to the common fate of military men, and sometimes to a still harsher treatment... even if a portion of the non-combatant inhabitants of a particular place become active participants in the hostile operations, the entire community are sometimes subjected to the more rigid rules of war.

~ Henry Halleck, *International Law; or, Rules Regulating the Intercourse of States, In Peace and War* (San Francisco: H.H. Bancroft & Company, 1861) at Chapter XVIII, §4, p. 428.

4. *Lieber Code* (24 April 1863):

Article 85

War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence.

~ Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, Lincoln Administration General Order No. 100 (24 April 1863).

5. *Wheaton's Elements of International Law* (1863):

Part IV, Chapter 2, §2

Those who are actually in arms, and continue to resist, may be lawfully killed; but the inhabitants of the enemy's country who are not in arms, or who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war.

~ Henry Wheaton, and William Beach Lawrence, *Wheaton's Elements of International Law*, 2nd ed. (Boston: Little Brown & Company, 1863) at Part IV, Chapter 2, §2, p. 588.

6. Original Project of the *Brussels Declaration* (27 July 1874):

Article II

Operations of war must be directed exclusively against the force and means of making war of the hostile State, and not against its subjects, so long as the latter do not themselves take any active part in the war

Article III

In order to attain the object of the war, all means and all measures in conformity with the laws and customs of war shall be permitted. The laws and customs of war forbid not only useless cruelty and acts of barbarity committed against the enemy; they furthermore require from the competent authorities the immediate punishment of those guilty of such acts, provided they have not been provoked by absolute necessity.

Article IV

The necessities of war cannot justify either treachery towards the enemy, or declaring him an outlaw, or the employment of violence and cruelty towards him.

~ “General Principles, Project for an International Convention on the Laws and Customs of War Presented by the Russian Government,” reprinted in Carnegie Endowment for International Peace, *Documents Relating to the Program of the First Hague Peace Conference Laid Before the Conference by the Netherlands Government* (London and Oxford: Clarendon Press, 1921) at 40.

7. *Brussels Declaration Concerning the Laws and Customs of War* (27 August 1874):

Article 13

According to this principle are especially forbidden:

...

(c) Murder of an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion[.]

- Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874).

8. *Oxford Manual of the Laws of Land Warfare* (1880):

Article 4

The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy.

They are to abstain especially from all needless severity, as well as from all perfidious, unjust, or tyrannical acts.

Article 9

It is forbidden:

...

(b) To injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be given, even by those who do not ask for it themselves.

Article 47

The population of the invaded district cannot be compelled to swear allegiance to the hostile Power; but inhabitants who commit acts of hostility against the occupant are punishable.

- *Institut de Droit International, Oxford Manual of the Laws of Land Warfare* (Oxford: *Institut de Droit International*, 1880).

9. *The Hague Convention (II)* (1899):

Preamble

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Article 23

In addition to the prohibitions provided by special Conventions, it is especially forbidden

(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

~ International Conferences (The Hague), *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899.

10. *The Hague Convention (IV)* (1907):

Preamble

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Article 23

In addition to the prohibitions provided by special Conventions, it is especially forbidden

(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

- International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907.

11. Davis' *Elements of International Law* (1900):

It has been seen that the subjects of two belligerent states become enemies at the outbreak or declaration of war. They continue in this hostile relation during its continuance. This status does not authorize them to commit acts of hostility, however, which can only be undertaken by persons having the express authorization of the belligerent governments. The rest of a population of a belligerent territory are not only forbidden to take an active part in military operations, but are entitled to personal immunity and protection so long as they refrain, in good faith, from taking part in the war... This exemption from the operations of war they continue to enjoy so long as they take no active part in hostile operations.

- ~ George B. Davis, *The Elements of International Law with an Account of its Origin, Sources and Historical Development* (New York & London: Harper & Brothers Publishers, 1900) at 312-3.

12. Wheaton's *Elements of International Law* (1916):

The instruments of warfare should be such as do not inflict unnecessary or superfluous injury or damage. The object of a belligerent is obviously attained if he puts hors de combat the adversary; the infliction of unnecessary suffering is not indispensable to achieve this object.

- ~ Coleman Phillipson, *Wheaton's Elements of International Law*, 5th ed. (London: Stevens and Sons, 1916) at 470.

13. *Third Geneva Convention* (1949):

Common Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

~ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.

14. *Fourth Geneva Convention (1949)*:

Common Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

~ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

15. *Protocol I* (1977):

Article 51(3)

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

~ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

16. *Protocol II* (1977):

Article 13(3)

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

Article 6(5)

At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

~ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609.

17. *Rome Statute* (1998):

Article 8(2)(b)

Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to protection given to civilians or civilian objects under the international laws of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

~ United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.

18. *Authorization for Use of Military Force* (2001):

Section 2 – Authorization For Use of United States Armed Force

(a) IN GENERAL – That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

~ *Authorization for Use of Military Force*, Pub. L. 107-40, 50 U.S.C. 1541 (2001).

19. *The Wolfowitz Order* (2004):

a. *Enemy Combatant*. For the purposes of this Order, the term “enemy combatant” shall mean an individual who was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

g. (9) The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify or change the classification of any national security information it reviews.

g. (12) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government’s evidence.

~ Paul Wolfowitz, “Memorandum for the Secretary of the Navy Subject: Order Establishing Combatant Status Review Tribunal,” Deputy Secretary of Defense, Washington, D.C. (7 July 2004), available at: <http://www.defense.gov/news/Jul2004/d20040707review.pdf> (accessed 5 December 2012).

20. *Military Commissions Act (2006)*:

Section 948b. (g)

Geneva Conventions Not Establishing Source of Rights – No alien unlawful enemy combatant subject to trial by military commission under this Chapter may invoke the Geneva Conventions as a source of rights.

Section 948a.

The term ‘unlawful enemy combatant’ means –

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces);

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or Secretary of Defense.

~ *Military Commissions Act*, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17 2006).

21. *Military Commissions Act (2009)*:

Section 948a.(7) UNPRIVILEGED ENEMY BELLIGERENT.-

The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who –

(A) has engaged in hostilities against the United States or its coalition partners;

(B) has purposefully and materially supported hostilities against the United States or its coalition partners’ or

(C) was a part of al Qaeda at the time of the alleged offence under this chapter.

Section 948b.(e) GENEVA CONVENTIONS NOT ESTABLISHING PRIVATE RIGHT OF ACTION.- No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.

~ Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84, H.R. 2647, 123 Stat. 2190 (2009) at s. 948a.(7).

22. *ICRC Interpretive Guidance (2009)*:

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose

continuous function it is to take a direct part in hostilities (“continuous combat function”).

~ International Committee of the Red Cross (ICRC), “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” (2008) 90:872 Int’l Rev. Red Cross 991 at 1002.