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

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One of the most difficult legal questions generated by the U.S. proclaimed Global War on Terror has been determining when, if at all, the laws of war apply to military operations directed against non-state actors? This question has produced a multitude of answers from scholars, government officials, military legal experts, and

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

Ironically, this state-centric law-triggering paradigm emerged as one of the most significant post World War II advances in the laws of war. From 1949 through 2001, this

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paradigm evolved into almost an article of faith among the international legal and military community. Accordingly, military operations were subject to this body of international legal regulation only when the situation satisfied certain law-triggering “criteria”. This paradigm became so pervasive that at least one major military power felt compelled to establish military policy requiring compliance with the “principles” of this law during military operations that did not satisfy this triggering paradigm, a situation which became increasingly common following the end of the Cold War.2

The utility of this paradigm was, however, truly thrown into disarray as the result of the events of September 11th, 2001. President Bush characterized the terror strike against the United States as an “armed attack”,3 and he and the Congress of the United States almost immediately invoked the war powers of the nation to respond to the threat presented by al Qaeda, a non-state entity operating throughout the world.4 This characterization was embraced not only by the United Nations Security Council,5 but by the North Atlantic Treaty Organization6 and others.7 Since that time, the

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2 See, e.g. U.S. Dep’t of Def., DoD Directive 2311.01E, DoD Law of War Program (2006), mandating that “Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” Id. at Par. 4.1. See also Chairman, Joint Chiefs of Staff, CJSCI 5810.01B, Implementation of the DoD Laws of War Program (2002).


5 UNSCR 1368, 1373

executive branch has struggled to articulate, and in many judicial challenges defend, how it could invoke the authorities of war without accepting the obligations of the law regulating war. Unfortunately, responding to such questions by application of the traditional law-triggering paradigm was like fitting a square peg into a round hole.

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7 See 96 AJIL 905, 909 (2002).


9 See Hamdan v. Rumsfeld, et. al., Case No. 04-5393, (D.C. Cir) (July 15, 2005) (Williams, Sr. Judge, concurring). Judge Williams explanation exemplifies the challenge associated with applying the laws of war to the war on terror:
Because of this, the time has come to develop a new approach to determining application of the laws of war that reconciles this disparity between authority and obligation related to the conduct of combat military operations. This will require adopting a new triggering “criteria”. This trigger must reflect both the underlying purpose of the laws of war, but also the pragmatic realities of contemporary military operations.

As nations prepare to use military force, national leaders dictate rules on how force may be applied by the military in the impending operation. These rules, broadly categorized as Rules of Engagement (ROE), fall into two general categories:

- Conduct-based ROE which allow military personnel to respond with force based on an individual’s actions,
- Status-based ROE which allow military personnel to use

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

Id.

10 See infra notes ____-____, and accompanying text.

11 See infra notes ____-____, and accompanying text.
deadly force based only on an individual’s membership in a designated organization, regardless of the individual’s actions. It is the thesis of this article that a nation’s adoption of status-based ROE for its military in a particular military operation should constitute the trigger requiring that nation and its military to apply the laws of war to that operation.

This article will initially discuss the historical underlying purpose of regulating conflict, and why that purpose supports an expansive application of the laws of war. It will then explain why the current law-triggering test is insufficient to respond to the realities of contemporary transnational conflict between states and non-state organizations. The article will then provide a comprehensive discussion of the concept of rules of engagement, to include how they evolved to compliment application of the laws of war. More importantly, the article will explain how in practice rules of engagement fall into two broad categories: status or conduct rules. The distinction between these two categories of ROE will, as this article demonstrates, offer a new analytical criterion for triggering the law which relies on a nation’s invocation of status-based ROE. The article will accordingly analyze how focus on the rules of engagement related to military operations offers perhaps the best de facto indicator of the line between conflict and non-conflict operations, and therefore is the best triggering criterion for legally mandated application of the fundamental principles of the laws of war. The article will conclude with a proposal for adoption of this new law-triggering paradigm, and a discussion of some pragmatic policy concerns that will need to be carefully considered in any such adoption.

See infra notes ___-___, and accompanying text.
I. Historical underlying purpose of regulating conflict, and why that purpose supports an expansive application of the laws of war.\textsuperscript{13}

Recorded history contains the continuous and bloody record of armed conflict. Integral to this chronicle and consistently interwoven throughout is exhibited man’s desire to limit that phenomenon and to control the impact of war on himself as the warrior, and on those who were not warriors but became victims.\textsuperscript{14} The culmination of these efforts have taken on legal legitimacy and have come to be known as the laws of war, the law of armed conflict, or, more recently, international humanitarian law. This section will briefly chart the historical underpinnings of these laws\textsuperscript{15} and demonstrate that they serve three broad purposes: 1) limiting the ferocity of war between combatants, 2) providing protections for those not in combat, including both non-combatants and civilians, and 3) facilitating the restoration of peace.\textsuperscript{16}

\textit{A. Historical account of the creation of the law of war.}

\textsuperscript{13} This section is lightly edited extract from Eric Talbot Jensen’s previous article addressing the principle of distinction and how the International Court of Justice’s recent decision in the Congo case degrades that principle. See Eric Talbot Jensen, \textit{The ICJ’s Uganda Wall: A Barrier to the Principle of Distinction} Denver J. Int’l L. (2007).

\textsuperscript{14} Gregory P. Noone, \textit{The History and Evolution of the Law of War Prior to WWII}, 47 \textit{NAVAL. L. REV.} 176, 182-85 (2000) where the author asserts that laws regulating conflict have developed in almost every culture.

\textsuperscript{15} See generally Howard S. Levie, \textit{History of the Law of War on Land}, \textit{INTERNATIONAL REVIEW OF THE RED CROSS} No. 838, 339 (2000);

\textsuperscript{16} Rupert Smith – “Utility and the Use of Force”; UK Military manual (intro or ch. 1) (I need to get this cite)
Many previous civilizations have embraced rules regulating armed conflict. Normally having restrictive effect, these regulations found their origins in the desire to limit the impact of conflict on both combatants and victims. The Chinese, Romans, Babylonians, Hittites, Persians, Greeks, and others all had rules or practices that either placed affirmative constraints on the warriors, or at least described a culture where the greatest warrior could accomplish his conquest without destroying the civilization. These rules grew generally out of a utilitarian view of warfare and were closely tied to their ability to assist the commander in accomplishing his military mission. Without this tie to practicality, rules did not survive the test of warfare.

This focus on mission accomplishment as the ultimate goal of rulemaking continued through the age of chivalry where the combatants developed rather intricate rules for plunder and siege, a customary practice against assassination, as


well as combat rules such as the distinction between ruses and perfidy. They also contained a number of rules governing relations between combatants no longer able to participate in the fight, such as ransom and parole. Although the practice of protecting victims of war was not so clearly delineated or respected, the chivalric codes of that era sowed the seeds for more comprehensive regulations to follow. As the age of chivalry melted into history, so did the use of knights. When the nation state became the predominant player in international relations, it had to have some way to monopolize force to maintain the state’s legitimacy. It did this through the establishment of professional armies.

With the rise of national armies, the scale of warfare and scope of those directly affected by war also broadened. Nathan Canestaro writes concerning


28 Allison Marston Danner, Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism, 46 VA. J. INT’L L. 83, 100 (Fall, 2005).

29 See Nathan A. Canestaro, “Small Wars” and the Law: Options for Prosecuting the Insurgents in Iraq, 43 COLUM. J. TRANSNAT’L L. 73, 83 (2004) where the author argues that “the right to wage war is limited to sovereign authority was asserted by the prominent Sixteenth Century legal scholar and father of international law, Hugo Grotius.”

the fundamental changes brought about by the advent of professional armies in the Napoleonic era that “the expanding scale of warfare, the advent of popular revolutions in some European countries, especially France, and repeated clashes between professional soldiers and armed peasantry during the Napoleonic wars, brought commoners into warfare in significant numbers for the first time.”\(^{31}\) With this increase in the scope and scale of hostilities, actions on the battlefield were the target of a renewed focus on the laws governing war. While there was still little codification of rules and much disregard from principles we now consider fundamental,\(^ {32}\) there were also elements of what now seems commonplace being put into practice by armies.\(^ {33}\) It is at this time that the major goals of the law of warfare, limiting the ferocity of the conflict between fighters, protection of those not in the fight, and facilitating the restoration of peace began to be differentiated and codified.

B. Humanitarians and Warriors on separate tracks.

In the middle of the 19th century, Europe and America\(^ {34}\) began to codify these rules that had developed over the prior centuries of warfare and expand and

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33 The Judge Advocate General’s School, A Treatise on the Juridical Basis on the Distinction Between Lawful Combatant and Unprivileged Belligerent 17-44 (1959) on file with author.

elaborate on them. The 1863 Lieber Code, the 1868 Declaration of St. Petersburg, the unratiﬁed Brussels Conference of 1874, the Hague Conventions of 1899 and 1907, and the 1909 Naval Conference of London are a few prominent examples of this codiﬁcation trend. Because most of these burgeoning principles related to the regulation of warfare were ultimately codiﬁed in the Hague Convention of 1907, the type of battlefield regulation embodied in this treaty came to be known as the “Hague tradition.”

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35 DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 3 (3rd ed. 1988). An analysis of the provisions of the Lieber Code show that it “clearly acknowledge(s) the supremacy of the warrior’s utilitarian requirements even though explicitly referring to the need to balance military necessity with humanitarian concerns.” Eric Krauss & Michael Lacey, Warriors vs. Humanitarians: The Battle Over the Law of War, Parameters, Summer 2002, at 76.


40 See Derek Jinks and David Sloss, Is the President Bound by the Geneva Conventions? 90 CORNELL L. REV. 97, 108-09 (November, 2004) where the authors state:

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

Id. (Citations omitted).
The Hague tradition is the foundation\textsuperscript{41} for much of the modern law of armed conflict, particularly those principles dealing with means and methods of warfare.\textsuperscript{42} As originally written and applied, the Hague tradition was focused on and written by warriors not only to provide limited protections for combatants while in battle, but also to maintain the warrior ethos of chivalry.\textsuperscript{43} Accordingly, the “Hague” codification was tied to the practicalities of war.\textsuperscript{44} Like the warriors before them, codifiers were ever mindful that any rules or customs established to restrain hostilities would not infringe on a nation’s ability to wage and win wars. This idea is exemplified in the statement traditionally attributed to the German Chancellor, Otto von Bismarck, “What leader would allow his country to be destroyed because of international law?”\textsuperscript{45} One consequence of this focus was that the Hague tradition was only incidentally concerned with protecting civilians from the consequences of war. As George Aldrich has written, “The 1907 Hague Regulations contain very few provisions designed to protect civilians from the effects of hostilities. Aside from the prohibition on the

\textsuperscript{41} See Christopher L. Blakesly, Ruminations on Terrorism & Anti-Terrorism Law & Literature, 57 U. MIAMI L. REV. 1061, 1064-65 (July, 2003).


\textsuperscript{44} See LOUISE DOSWALD-BECK, Implementation of International Humanitarian Law in Future Wars, in THE LAW OF ARMED CONFLICT: INTO THE NEW MILLENNIUM 42 (Naval War College International Law Studies, vol. 71) (Michael N. Schmitt & Leslie C. Green eds., 1998) (arguing that the advance in weapons technology also drove States to try and enact laws to limit warfare).

employment of poison or poisoned weapons, which was primarily intended to protect combatants, the only such rules are Articles 25-28."

As the “Hague” rules were imbedding themselves into the practice of militaries, another movement emerged to fill the void of protecting non-combatants who so often became victims of conflict. Triggered by his ghastly experience with the victims of the 1859 Battle of Solferino,47 Henri Dunant organized the International Committee of the Red Cross (ICRC) to draw attention to the plight of war victims, particularly the wounded and sick on the battlefield. By 1864, he and others had mustered enough support to facilitate the Convention for the Amelioration of the Condition of the

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   Article 25 forbids the bombardment “of towns, villages, dwellings, or buildings which are undefended.” By undefended, it was clear that the article meant that there were no defending armed forces in the town or other area in question or between it and the attacking force and consequently that it was open for capture by the attacker. It clearly did not apply to towns, villages, and so forth, that were in the hinterland and consequently were not open to immediate capture — or, in 1907, even to bombardment. Essentially, the article was a commonsense prohibition against bombarding something that could be taken without cost to the attacker.

   Articles 26 and 27 were precautionary measures, and neither suggests that its primary object was to minimize civilian casualties, although they might have provided some beneficial incidental effects for civilians in places under siege or bombardment. Article 28, which prohibits pillage, protects civilians only after the fall of the town or place and was necessary to make clear that the ancient custom permitting pillage of places that had resisted sieges was no longer acceptable.

Id. (Citations Omitted).

47 See http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNVP for a concise history of Dunant, including the Battle of Solferino.
Wounded in Armies in the Field, followed by its accompanying Additional Articles of 1868. This was followed by the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.

These humanitarian efforts became known as the “Geneva tradition” because the ICRC was headquartered in Geneva, Switzerland, where many of the early conferences were held. These innovations were welcomed by the warriors, especially since they focused mainly on greater protections for combatants who had become hors de combat and were still guided by the practical realities of warfare. Nevertheless, they were perceived as being separate from those rules governing combatants’ actions vis-à-vis each other.

C. Merging of “Hague” and “Geneva”

WWII exhibited an exponential rise in wartime costs to civilians, both in lives and in property. Increasingly lethal technology and weapons led to exponential danger for civilians. This danger was no longer limited to civilians living near the front lines of


49 See Laws of Armed Conflicts, supra note 48, at 285.

50 See Laws of Armed Conflicts, supra note 48, at 301.


52 See Hague IV, article 21, which says: “The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.”

53 Compare the estimated number of deaths in WWII (http://www.valourandhorror.com/DB/BACK/Casualties.htm) with those in WWI (http://www.vw.cc.va.us/vwhansd/HIS122/WWIcasualties.htm).
combat. Instead, weapons and tactics placed entire populations at risk of death or injury. As a result, "At the end of the nineteenth century, the overwhelming percentage of those killed or wounded in war were military personnel. Toward the end of the twentieth century, the great majority of persons killed or injured in most international armed conflicts have been civilian non-combatants."\(^{54}\) This disturbing direction of warfare heightened the concern for the victims of warfare, particularly after the devastation of WWII.

In the years immediately following the war, a shifting of focus continued to add protections for warriors but also began to intertwine them with protections for captured and wounded military personnel and civilians.\(^{55}\) Codification of this shift began with the 1949 Geneva Conventions.\(^{56}\) While the first three Geneva Conventions\(^ {57}\) built upon preexisting established principles that survived WWII and were aimed at the protection of sick or wounded warriors, a new treaty, Convention (IV) relative to the Protection of Civilian Persons in Time of War\(^ {58}\) extended certain protections to civilians considered to

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\(^{57}\) See Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, *Laws of Armed Conflicts*, supra note 13, at 373; Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *id* at 401; Convention (III) relative to the Treatment of Prisoners of War, *id* at 423.

\(^{58}\) See *Laws of Armed Conflicts*, supra note 13, at 495; Eric Krauss & Michael Lacey, *Warriors vs. Humanitarians: The Battle Over the Law of War*, *Parameters*, Summer 2002, at 77 where the authors state:
be victims of war (which resulted in a focus on protecting civilians subject to enemy subjugation). All four conventions advanced humanitarian law and proscribed much of the conduct that produced the many horrors of WWII. However, the fourth convention required military commanders to modify operations based solely on their potential effects on the civilians on the battlefield. As Krauss and Lacey write, "The Civilian Convention for the first time placed affirmative obligations upon the utilitarian warrior class to address the food, shelter, and health-care needs of civilians in an occupied area." While still mainly rooted in practically applicable battlefield notions, this was the beginning of a paradigm shift that would see the blurring of distinctions between the Hague and Geneva traditions.

These Geneva Conventions were then supplemented by two Additional Protocols, signed in 1977 in the aftermath of the Vietnam War and in many ways

Previous conventions had forced the utilitarians to deal with issues such as the treatment of the sick and wounded and prisoners of war—duties which most utilitarians saw as part of their 'warrior code' anyway. The Civilian Convention for the first time placed affirmative obligations upon the utilitarian warrior class to address the food, shelter, and health-care needs of civilians in an occupied area.

Id.


David B. Rivkin, Jr. & Lee A. Casey, Leashing the Dogs of War, THE NATIONAL INTEREST, 2003 Fall, at 6 where the authors state "The reasoning behind the practical nature of both customary law and the Geneva Conventions was obvious: a humanitarian ‘law’ that impeded the ability of states to defend their vital interests would, in practice, amount to nothing but a series of pious aspirations."

responsive to not only that conflict, but also the seemingly endemic internal conflicts raging throughout the world. While the stated purpose of these supplemental treaties was to bring up to date the provisions of the Geneva Conventions, in reality they reflect the almost complete merger of the Hague and Geneva traditions. For example, Part IV of AP I is titled “Civilian Population” but contains some of the most important contemporary regulation of target selection and engagement, subjects theretofore reserved almost exclusively to the Hague tradition. While this merger causes concern amongst some military practitioners, it represents an expansion in not only the qualitative scope of the law of war but also in the quantitative breadth of law of war coverage. In short, it resulted in more rules covering more people.

D. From Practical Restraints to Expansive Prohibitions

The trend begun by the protocols has gained momentum since their formulation. They have been followed by a number of conventions and treaties reflecting the same merging of traditions. For example, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects and its additional protocols seem to be derived from International Armed Conflicts, available at http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument (hereinafter GPII).


63 Do we want to add a footnote here doing an analysis of the various articles?


65 See DOCUMENTS ON THE LAWS OF WAR 520 (Adam Roberts & Richard Guelff eds. 3d ed. 2003).
the Hague tradition as they prohibit certain weapons. However, the impetus for these
treaties came not from warfighters, but rather the ICRC and other special interest
groups decrying certain weapons that had lasting effects on the civilian population.67
Similarly, the Convention on the Prohibition of the Use, Stockpiling, Production and
Transfer of Anti-Personnel Mines and on Their Destruction68 outlawed a method of
warfare that many military experts considered extremely useful. However, special
interest groups69 were able to raise awareness of the public and government officials to
the serious dangers to the civilian population in areas where mines remained active
after termination of conflict. As a result, these interest groups succeeded in bringing
about a general ban amongst signatories70 and even self-imposed restrictions by non-
signatories.71 These examples represent the continuing progression and impact of the
merging of the Hague and Geneva traditions, which has resulted in states embracing

67 Robin Collins, “The shadow campaign: cluster bombs and explosive remnants of war” PEACE
MAGAZINE (September, 2002).
69 See DOCUMENTS ON THE LAWS OF WAR 648, at preamble (Adam Roberts & Richard Gueff eds. 3d ed.
2003); Christopher W. Jacobs, Taking the Next Step: An Analysis of the Effects the Ottawa
Convention May Have on the Interoperability of United States Forces with the Armed Forces of
Australia, Great Britain, and Canada, 180 MIL. L. REV. 49, footnote 41 (Summer, 2004).
70 See DOCUMENTS ON THE LAWS OF WAR 648, at article 1 (Adam Roberts & Richard Gueff eds. 3d ed.
2003).
71 See Sarah Elizabeth Kreps and Anthony Clark Arend, Why States Follow the Rules: Toward a
Positional Theory of Adherence to International Legal Regimes, DUKE J. OF COMP. & INT’L L. at 19
(near footnote 153) (March 22, 2006); U.S. Dept of State Bureau of Political-Military Affairs, New
States Soldiers, (27 Feb. 2004) available at http://www.state.gov/t/pm/rs/fs/30044.htm where
comprehensive regulations of methods and means of warfare, often over the express objection of their military institutions.  

E. The expanded law of war and the restoration of peace

Expanding the regulation of warfare by accepting rules that limit the ferocity of war between combatants (the Hague tradition) and provide protections for those not in combat including both non-combatants and civilians (the Geneva tradition) escalated progress toward the third goal of the law of war: facilitating the restoration of peace. As Sun Tzu taught in 5th century B.C., "Treat the captives well, and care for them . . . Generally in war the best policy is to take a state intact; to ruin it is inferior to this." Sun Tzu not only recognized the benefit to a quick restoration of peace, but he also recognized that applying what is now modern law of war principles would facilitate that end. That wisdom is as prescient today as it was during his time. The Hague and Geneva traditions mitigate the destructive consequences of war and attempt to limit the overall long term detrimental impact. Though the statistics show that war is adversely affecting a larger percentage of civilians as advanced methods of warfare develop, it is impossible to determine how much worse those statistics might be if

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modern warfare was not constrained by the modern law of war. Thus, the restoration of peace is almost certainly facilitated by the expansion of both the content and application of the law of war.

Unfortunately, just as World War II reflected a major increase in the destructive nature of warfare, a similar change is once again on the horizon. This evolution in the nature of warfare can be understood as transnational armed conflict – the conduct of combat operations between a state’s armed forces and non-state actors outside the territory of the state. If the nations of the world are committed to continue the movement to expand regulation of armed conflict and increase both the qualitative scope of the law of war and the quantitative breadth, the triggering mechanism for the application of these rules must respond to the changed face of modern warfare. Unfortunately, the widely accepted conditions that bring this law into force ostensibly omit the regulation of transnational armed conflict.

II. Conflict Classification: The Inherent Insufficiency of the Traditional Approach to Determining Applicability of the Laws of War

Emergency in Northern Uganda, CANADIAN JOURNAL OF SURGERY 51 (Feb 2006) available in LEXIS Nexis Library, CURNWS File where the authors state “The proportion of civilian war-related deaths has increased from 19% in World War I, 48% in World War II, to more than 80% in the 1990s. Civilians are used as shields to protect the military, abducted, enslaved, tortured, raped and executed.”


76 This section is lightly edited extract from Geoffrey Corn’s previous article addressing the insufficiency of the current law-triggering paradigm to address issues related to transnational armed conflicts. See Geoffrey S. Corn, Hamdan, Lebanon, and the Need to Recognize a Hybrid Category of Armed Conflict, 40 Vand. J. Transnat’l L. 295 (2007).
A thorough appreciation of the historical underpinnings of the laws of war demonstrates the critical importance of providing a regulatory framework for the execution of combat operations. Accordingly, asserting that armed conflict must be subject to such a framework becomes almost axiomatic. However, as noted above, the rapid evolution of the nature of warfare exemplified by the post 9/11 Global War on Terror has outpaced the evolution of the legal triggers for application of this regulatory framework. As a result, nations and the armed forces called upon to execute combat operations in their name confront increasing uncertainty as to the applicability of the laws of war to their operations, an uncertainty frequently resulting in policy based application of law of war principles.\textsuperscript{77}

That such uncertainty exists seems inconsistent with the intent of the drafters of the Geneva Conventions of 1949. One of the most important aspects of these four treaties was the rejection of a legally formalistic approach to determining application of the laws of war in favor of a pragmatic trigger. This rejection is emphasized in the ICRC Commentary to common article 2 of the four Geneva Conventions, which indicates that:

\begin{quote}
(B)y its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the
\end{quote}

\textsuperscript{77} See, e.g., U.S. Dep't of Def., DoD Directive 2311.01E, DoD Law of War Program (2006); see also Chairman, Joint Chiefs of Staff, CJSCI 5810.01B, Implementation of the DoD Laws of War Program (2002).
application of the Convention. The occurrence of de facto hostilities is sufficient.\textsuperscript{78}

This effort to ensure broad application of the laws of war and prevent formalistic treaty interpretation as a justification for regulation avoidance are reflected in what is best understood as the common article 2/3 \textit{law-triggering} paradigm.\textsuperscript{79} This paradigm

\begin{quote}
The Hague Convention of 1899, in Article 2, stated that the annexed Regulations concerning the Laws and Customs of War on Land were applicable “in case of war”. This definition was not repeated either in 1907 at The Hague or in 1929 at Geneva; the very title and purpose of the Conventions made it clear that they were intended for use in war-time, and the meaning of war seemed to require no defining . . . Since 1907 experience has shown that many armed conflicts, displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the Hague Convention. Furthermore, there have been many cases where Parties to a conflict have contested the legitimacy of the enemy Government and therefore refused to recognize the existence of a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation or capitulation has been put forward as a pretext for not observing one or other of the humanitarian Conventions. It was necessary to find a remedy to this state of affairs and the change which had taken place in the whole conception of such Conventions pointed the same way. The Geneva Conventions are coming to be regarded less and less as contracts concluded on a basis of reciprocity in the national interests of the parties, and more and more as a solemn affirmation of principles respected for their own sake, a series of unconditional engagements on the part of each of the Contracting Parties ‘\textit{vis-à-vis}’ the others.
\end{quote}

\textit{Id.} at 19-20.

\textsuperscript{79} See Geoffrey S. Corn, \textit{Hamdan, Lebanon, and the Need to Recognize a Hybrid Category of Armed Conflict}, 40 Vand. J. Transnat’l L. 295, 301-302 (2007), which explains this paradigm as follows:
emerged from the “treaty avoidance” ashes of World War II. During that conflict, several states asserted the inapplicability of the predecessor Conventions of 1929 and other law of war treaties on the basis that a conflict did not satisfy the legal definition of war; or that the war had terminated as the result of annexation or cooperation with a puppet government of a former opponent.\textsuperscript{80}

In response to this compliance avoidance, the drafters of the 1949 Conventions chose to include within each treaty a “common article” defining the situations to which the treaties would apply. In so doing, they adopted language specifically intended to provide for the broadest application of the treaties based on pragmatic and not technical legal criterion. Accordingly, Common Article 2 defines the triggering event for application of the full corpus of the laws of war: international armed conflict.\textsuperscript{81}

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

\textsuperscript{80} \textit{Id.}\textsuperscript{.} (citations omitted).

\textsuperscript{81} \textit{Id.}

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, T.I.A.S. 3362, at art. 2 (hereinafter GWS); Geneva Convention for the
Common Article 3, in contrast, provides that the basic principle of humane treatment is applicable in non-international armed conflicts occurring in the territory of a signatory state.\textsuperscript{82} Although neither of these treaty provisions explicitly indicates that they serve as the exclusive triggers for application of the laws of war, they rapidly evolved into just such triggers.\textsuperscript{83} As a result, these two treaty provisions have been long understood as

Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, August 12, 1949, T.I.A.S. 3363, at art. 2 (hereinafter GWS Sea); Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3364 at art. 2 (hereinafter GPW); Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, T.I.A.S. 3365, at art. 2 (hereinafter GC). Each of these Conventions includes the following identical article:

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

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.

\textsuperscript{82} See GWS, id. at Art. 2.

establishing the definitive "law-triggering paradigm". In accordance with this paradigm, application of the laws of war has always been contingent on two fundamental factors: first, the existence of armed conflict; second, the nature of the armed conflict.84

The first of these triggering requirements is the existence of armed conflict. Although there is no definitive test for assessing when a situation amounts to armed conflict, a term undefined by the express language of either Common Article 2 or 3, the

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International Committee of the Red Cross, What is International Humanitarian Law, Advisory Service on International Humanitarian Law, (07/2004), available at http://www.icrc.org/Web/eng/siteeng0.nsf/twpList104/707D6551B17F0910C1256B66005B30B3. This fact sheet clearly reflects the international/internal evolution of the triggering paradigm:

International humanitarian law distinguishes between international and non-international armed conflict.

**International armed conflicts** are those in which at least two States are involved. They are subject to a wide range of rules, including those set out in the four Geneva Conventions and Additional Protocol I.

**Non-international armed conflicts** are those restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other. A more limited range of rules apply to internal armed conflicts and are laid down in Article 3 common to the four Geneva Conventions as well as in Additional Protocol II.

Id.


85 The relevant text of common article 2 provides "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." See GWS, supra note 81, at Art. 2; the relevant text of common article 3 provides: "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 . . ." See GWS, supra note 81, at Art. 3
International Committee of the Red Cross Commentary to these articles is generally regarded as the primary interpretive aid. This Commentary provides several factors for assessing the existence of armed conflict, today treated as the most authoritative and effective criteria for making such a determination.

Applying these criteria has resulted in relative clarity in determining when the law of war applied to a use of force by the armed forces of opposing states. The Commentary indicates that the two principle concerns that motivated the adoption of the “armed conflict” trigger vis a vis inter-state conflict were the danger of “compliance avoidance” by refusal to acknowledge a state of “war”, and the concern that brevity/lack of intensity of such hostilities could be used as a justification to deny existence of a situation triggering humanitarian protections. Both of these concerns grew out of the pre-1949 experience. With regard to the first concern, the very term “armed conflict” was adopted as a trigger for law of war application for the

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86 See Commentary, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949 (Jean S. Pictet ed., 1960), at 19-23 (hereinafter ICRC Commentary). A similar Commentary was published for each of the four Geneva Conventions. However, because Articles 2 and 3 are identical - or common - to each Convention, the Commentary for these articles is similar in each of the four Commentaries.

87 See INT’L & OPERATIONAL LAW DEPT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, THE LAW OF WAR DESKBOOK, at Chapter 3 (2000). The International Criminal Tribunal for the Former Yugoslavia, while not explicitly relying on these criteria, nonetheless followed the general logic reflected therein when it determined in the first opinion addressing the jurisdiction of the Tribunal that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” See also Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), at par. 70, reprinted in 35 I.L.M. 32 (1996). See also supra note 95-98.

88 See ICRC Commentary, supra note 10, at 32 (“It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims.”).
specific purpose of emphasizing that such application must be the result of *de facto* "warfare" and not *de jure* "war." As for the second concern, the Commentary emphasizes that the term armed conflict was intended to apply to *de facto* hostilities no matter how brief or "non-destructive" they might be. When such hostilities occurred between the regular armed forces of two states, the armed conflict prong of the triggering test for application of the laws of war would be satisfied.

The drafters of the Conventions could well have limited the *law-triggering* criteria to inter-state conflicts. Indeed, at the time the Conventions were drafted there was little or no precedent for establishing application criteria for anything other than inter-state conflicts. Even when the law of war was applied to what today would be classified as "internal" or intra-state conflicts, the doctrine of belligerency was used as somewhat of a legal fiction to elevate such conflicts into the realm of inter-state classification. However, the utility of the belligerency concept was contingent on a truly *de facto* determination of belligerent status devoid of geo-political manipulations. Unfortunately, such influences became increasingly involved in international treatment of internal conflicts, with the attendant result that the concept of belligerency became ineffective as a basis to warrant application of the laws of war to large scale civil wars.

89 *Id.*
90 *Id.*
91 See generally Lieutenant Colonel Yair M. Lootsteen, The Concept of Belligerency in International Law, 166 Mil. L. Rev. 109 (2000).
92 See generally Lieutenant Colonel Yair M. Lootsteen, The Concept of Belligerency in International Law, 166 Mil. L. Rev. 109 (2000).
Perhaps no conflict better exemplified the disutility of the concept of belligerency in relation to application of international law than the Spanish Civil War. From a \textit{de facto} perspective, that conflict undoubtedly satisfied the established criteria for designating the competing entities as belligerents and therefore treating both the Spanish Republic and the rebellious Nationalist coalition as state entities for purposes of applying international law. This was not, however, how events evolved. Instead, the principal ally to the Republic – the Soviet Union – refused to acknowledge the legitimacy of the Nationalist coalition; while the principal allies of the Nationalists – Nazi Germany and Fascist Italy – refused to treat the Republic as a legitimate government. As a result, there was no consensus regarding the international legal status of the conflict, even though the scope, duration, and intensity clearly indicated it was a “war”. Whether this contributed to the brutality inflicted on the approximately 250,000 prisoners and the civilians killed during the war is impossible to determine, but it certainly did render the status of such individuals confused.

The drafters of the 1949 Conventions chose to provide for international legal protections for victims of such intra-state conflicts irrespective of whether they were characterized as belligerencies. In what was the most profound extension of

\footnote{During this period, brutal internal conflicts in Spain, Paraguay, Russia, and China\textsuperscript{63} challenged this customary expectation that professional armed forces engaged in armed conflict would conduct themselves in accordance with principles of disciplined warfare. (According to the \textit{Historical Atlas of the Twentieth Century}, \url{http://users.erols.com/mwhite28/20centry.htm#FAQ} (last visited September 5, 2006). The estimated number of people killed in civil wars during the inter-war years are: 18,800,000- Russian Civil War (1918-21); 3,000,000- Chaco War (Paraguay and Bolivia) (1932-35); 2,500,000- Chinese Civil War (1945-49); 365,000- Spanish Civil War (1936-39)). This created a perceived failure of international law to provide effective regulation for non-international armed conflicts, ultimately providing the motivation for the development of \textit{Common Article 3}.}
international law produced by the revision of the Conventions, the drafters applied the
shield of humane treatment to any person rendered hors de combat during a non-
international armed conflict. This protection took the form of Common Article 3, an
article that has become perhaps the most well known provision of the Conventions.94

Because, however, Common Article 3 represented an intrusion into a realm of state
sovereignty previously immune from international regulation, the principal concern of
the drafters of the Conventions was limiting this intrusion to genuine situations of armed
conflict, and not merely any internal disturbance.95 Accordingly, the key concern

94 The Supreme Court decision in Hamdan v. Rumsfeld and the associated debate related to the
treatment of detainees has resulted in extensive public exposure to this provision of the
Conventions. For example, a Google search for the term “common article 3” produces
23,700,000 results (as of December 4, 2007).

95 According to the ICRC Commentary to common article 3:

There is nothing astonishing, therefore, in the fact that the Red Cross has long been
trying to aid the victims of civil wars and internal conflicts, the dangers of
which are sometimes even greater than those of international wars. But in this
connection particularly difficult problems arose. In a civil war, the lawful
Government, or that which so styles itself, tends to regard its adversaries as
common criminals . . . A considerable number of delegations were opposed, if
not to any and every provision in regard to civil war, at any rate to the
unqualified application of the Convention to such conflicts. The principal
criticisms of the Stockholm draft may be summed up as follows. It was said that it
would cover all forms of insurrections, rebellion, and the break-up of States, and
even plain brigandage. Attempts to protect individuals might well prove to be at
the expense of the equally legitimate protection of the State. To compel the
Government of a State in the throes of internal conflict to apply to such a conflict
the whole of the provisions of a Convention expressly concluded to cover the
case of war would mean giving its enemies, who might be no more than a
handful of rebels or common brigands, the status of belligerents, and possibly
even a certain degree of legal recognition . . . What is meant by “armed conflict
not of an international character”? The expression is so general, so vague, that
many of the delegations feared that it might be taken to cover any act
committed by force of arms -- any form of anarchy, rebellion, or even plain
banditry. For example, if a handful of individuals were to rise in rebellion against
addressed by the Commentary in relation to the application of Common Article 3 was determining the line between internal civil disturbances – situations subject to domestic legal regimes; and military conflict – situations triggering application of the basic principle of humanity derived from the laws of war. As the Commentary emphasizes, there is no single factor that establishes this demarcation line. Instead, a number of factors, when considered in any combination or even individually, were proposed to assess when a situation rises above the level of internal disturbance and moves into the realm of armed conflict. Of the numerous factors offered by the Commentary, perhaps the most instructive was the focus on the state response to the threat: when a state resorts to the use of regular (and by regular it is fair to presume that the Commentary refers to combat) armed forces, the situation has most likely crossed the threshold into the realm of armed conflict.

Although applying this armed conflict prong of the Common Article 2/3 conflict classification paradigm has not been without controversy, up until 9/11 the Commentary criteria proved remarkably effective in practice. For example, short duration/small scale hostilities between states have been treated as falling into the

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See ICRC Commentary, *supra* note 86 at 29-35.

96 *Id.* at 49-50.

97 *Id.*

98 *Id.*
category of armed conflict, such as when the U.S. Naval pilot Lieutenant Bobby
Goodman was shot down by Syrian forces while flying a mission in relation to the U.S.
peacekeeping presence in Lebanon in 1982. Even in the non-international realm,
resort to the use of regular armed forces for sustained operations against internal
dissident groups that cannot be suppressed with only law enforcement capabilities
makes it difficult for a state to credibly disavow the existence of armed conflict.

Because, however, the Common Article 2/3 triggers include not merely a
determination of armed conflict, but also analysis of the nature of the armed conflict,
the ostensible intent of the drafters of the Conventions to ensure maximum applicability
of the laws of war has been frustrated by the emerging reality of transnational armed
conflicts between states and non-state entities. This nature of conflict analytical
element links application of the laws of war to what is defined as the international or
non-international character of a given armed conflict. Because there is no defined
meaning of “international” or “non-international” in Common Articles 2 or 3, uncertainty
has developed in relation to application of this prong of the legal trigger. However,

99 Interview Mr. W. Hays Parks, a senior attorney for the Defense Department and recognized
expert on the law of armed conflict. Mr. Parks was personally involved in developing the United
States position on the status of Lieutenant Goodman and indicated during the interview that the
United States asserted prisoner of war status for Goodman as a matter of law due to the
existence of an “armed conflict” between the United States and Syria within the meaning of
Common Article 2.

100 See generally Adam Roberts, Counter-terrorism, Armed Force and the Laws of War, Survival
(quarterly journal of IISS, London), vol. 44, no. 1, (Spring 2002), also available at:
http://www.ssrc.org/sept11/essays/roberts.htm; see also CRS Report for Congress, Terrorism and
the Laws of war: Trying Terrorists as War Criminals before Military Commissions, Order Code
RL31191, (December 11, 2001) (analyzing whether the attacks of September 11, 2001 triggered
the law of war).
reliance on the ICRC Commentary has resulted in operative definition of these terms. With regard to international armed conflict, the Commentary makes the existence of a “dispute between states” the dispositive consideration. While this has been a generally effective de facto criterion, it has not eliminated all uncertainty related to when the use of armed force by one state in the territory of another state is the product of such a dispute, thereby triggering the law applicable to international armed conflicts. Such uncertainty emerges when the intervening state disavows the existence of a “dispute” as the predicate for the intervention.

It therefore seems apparent that despite the best efforts of the drafters of the Geneva Conventions to provide an effective de facto standard for determining the existence of international armed conflicts, and thereby avoid the type of compliance avoidance that resulted from linking application of the laws of war to the existence of a state of war, gaps in coverage have remained problematic. This aspect of determining

101 See ICRC Commentary, supra note 10, at 32

102 This “hostilities without dispute” theory was clearly manifest in the recent conflict in Lebanon, where neither Israel nor Lebanon took the position that the hostilities fell into the category of international armed conflict. However, this was not the first example of use of such a theory to avoid the acknowledgement of an international armed conflict. In fact, the United States intervention in Panama in 1989 represents perhaps the quintessential example of this theory of “applicability avoidance” due to the absence of the requisite “dispute between nations.” Executed to remove General Manuel Noriega from power in Panama and destroy the Panamanian Defense Force – the regular armed forces of Panama, Operation Just Cause involved the use of more than twenty thousand U.S. forces who engaged in intense combat with the Panamanian Defense Forces. Nonetheless, the United States asserted that the conflict did not qualify as an international armed conflict within the meaning of Common Article 2. The basis for this assertion was that General Noriega was not the legitimate leader of Panama, therefore the U.S. dispute with him did not qualify as a dispute with Panama. Although this rationale was ultimately rejected by the U.S. Federal District Court that adjudicated Noriega’s claim to prisoner of war status, it is not the only example of the emphasis of a lack of a “dispute” between states as a basis for denying the existence of a Common Article 2 conflict.
law of war applicability has, however, had virtually no impact on analysis of contemporary transnational conflicts. Based on the plain text of the Conventions, combat operations between state armed forces and non-state entities operating outside the territory of that state fail to satisfy either the Common Article 2 or Common Article 3 tests. This is because there is no plausible basis to conclude that such combat operations, although manifesting all the classic indicia of armed conflicts, are the result of disputes between states. Instead, it is the uncertainty as to whether the transnational geographic scope of such operations excludes them from the definition of “non-international” – with the accordant uncertainty as to what law such combat operations trigger – that has generated the greatest regulatory challenge.

Because Common Article 3 responded primarily to the brutal civil wars that ravaged Spain, Russia, and other states during the years between the two world wars, the trigger for this baseline humanitarian provision came to be understood as conflicts that were primarily intra-state, or “internal armed conflicts.” 103 During the five plus decades between 1949 and 2001, the term “non-international” evolved to become synonymous with internal, or intra-state. This most likely can be attributed to a combination of two factors: the original motivation leading to the development of Common Article 3 – the concern over civil wars; and the qualifying language of Common Article 3 indicating that it applies only to non-international armed conflicts occurring within the territory of a High Contracting Party. 104 Although this “within the


104 Id.
territory" qualifier became increasingly less meaningful as the Geneva Conventions progressed rapidly towards their current status of universal participation, it is difficult to ignore the logical impact of this term in the context of 1949: that it limited the scope of application of this "mini convention" to true intra-state conflicts.\footnote{This point was relied upon by the Department of Justice Office of Legal Counsel in the first law of war applicability analysis provided to the President after the attacks of September 11, 2001:}

This understanding of Common Article 3, coupled with the reality that the vast majority of non-international armed conflicts between 1949 and 2001 were predominantly intra-state, produced what one of the authors has characterized

elsewhere\textsuperscript{106} as an “either/or” paradigm in the legal determination of law of war applicability: armed conflicts falling under the definition of “international” within the meaning of Common Article 2 of the Geneva Conventions would trigger the entire corpus of the law of war. In contrast, intra-state, or “internal” armed conflicts – those between a state and internal dissident forces - would trigger the far more limited humane treatment mandate of Common Article 3.\textsuperscript{107} This paradigm is reflected in the following excerpt from a presentation by the ICRC Legal Adviser:

Humanitarian law recognizes two categories of armed conflict - international and non-international. Generally, when a State resorts to force against another State (for example, when the “war on terror” involves such use of force, as in the recent U.S. and allied invasion of Afghanistan) the international law of international armed conflict applies. When the “war on terror” amounts to the use of armed force within a State, between that State and a rebel group, or between rebel groups within the State, the situation may amount to non-international armed conflict . . . \textsuperscript{108}


According to this interpretation, there are only two possible characterizations for military activities conducted against transnational terrorist groups: international armed conflict (when the operations are conducted outside the territory of the state) or non-international armed conflict (limited to operations conducted within the territory of the state).

Unfortunately, this “either/or” analytical approach fails to acknowledge the reality of extraterritorial non-inter-state combat operations launched by a state using regular armed forces. Such an operation would fail to satisfy the requisite “dispute between states” necessary to qualify as an international armed conflict within the meaning of Common Article 2. And, based on the traditional understanding of “non-international” armed conflict – an understanding shared by virtually all scholars and practitioners prior to 9/11—the possibility that an armed conflict falling somewhere between an internal armed conflict and an inter-state state armed conflict could theoretically be subject to the regulatory effect of the laws of war was necessarily excluded. Accordingly, these “transnational” armed conflicts fell into a regulatory gap, with the law failing to account for determining what regulatory framework should or does in fact apply to such operations. Both the military component of the U.S. fight against al Qaeda and the recent conflict between Israel and Hezbollah have strained this traditionally understood paradigm for triggering application of the laws of war. This strain has

produced international and national uncertainty as to the law that applies to such
conflicts.\textsuperscript{110} Although, as one of the authors has argued elsewhere,\textsuperscript{111} this strain may
ultimately produce what may actually come to be appreciated as a beneficial
reassessment of the trigger for application of the fundamental principles of the laws of
war, it also reflects the inherent insufficiency of the current paradigm to satisfy the
broad application objectives so central to the 1949 Conventions.

As noted above, the uncertainty created by the Article 2/3 triggering paradigm
forced several states to adopt policies mandating law of war application to all military
operations. Since 9/11, this pragmatic logic has also started to influence assessments of
the scope of legally mandated law of war application. One early example of this
influence is reflected in the lower court judgment in \textit{Hamdan v. Rumsfeld, et. al.}\textsuperscript{112} In
that original challenge to the legitimacy of the military commissions created by
President Bush, Judge Williams articulated this pragmatic approach to determining law
of war application. In his concurring opinion, he responded to the majority conclusion
that Common Article 3 did not apply to armed conflict with al Qaeda because the
President has determined that this conflict is one of international scope:

\begin{quote}
\textit{Terrorists as War Criminals before Military Commissions, Order Code RL31191, (December 11,
2001) (analyzing whether the attacks of September 11, 2001 triggered the law of war).}
\end{quote}
\textsuperscript{110} See Human Rights Watch, Lebanon/Israel: U.N. Rights Body Squanders Chance to Help
Civilians, Aug. 11, 2006, \url{http://hrw.org/english/docs/2006/08/11/lebano13969_txt.htm}
(containing statements by Louise Arbour); see also Human Rights Watch, U.N.: Open
Independent Inquiry into Civilian Deaths, Aug. 8, 2006, \url{http://hrw.org/english/docs/2006/08/08/lebano139939.htm}
(containing statements by Kofi Annan).
\textsuperscript{111} See Geoffrey S. Corn, \textit{Hamdan, Lebanon, and the Need to Recognize a Hybrid Category of
\textsuperscript{112} Case No. 04-5393, (D.C. Cir) (July 15, 2005).
Non-State actors cannot sign an international treaty. Nor is such an actor even a “Power” that would be eligible under Article 2 (¶ 3) to secure protection by complying with the Convention’s requirements. Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” The gap being filled is the non-eligible party’s failure to be a nation. Thus the words “not of an international character” are sensibly understood to refer to a conflict between a signatory nation and a non-State actor. The most obvious form of such a conflict is a civil war. But given the Convention’s structure, the logical reading of “international character” is one that matches the basic derivation of the word “international,” i.e., between nations. Thus, I think the context compels the view that a conflict between a signatory and a non-State actor is a conflict “not of an international character.” In such a conflict, the signatory is bound to Common Article 3’s modest requirements of “humane” treatment and “the judicial guarantees which are recognized as indispensable by civilized peoples.”

Although the logic expressed by Judge Williams seems pragmatically compelling, the fact remains that he was unable to convince his peers to adopt this interpretation. This reflected the pervasive impact of Common Article 2 and 3 – and the legal paradigm they spawned – on conflict regulation analysis. It is simply inescapable that such a pragmatic interpretation of these law triggers is fundamentally inconsistent with the plain text of the Conventions, a reality borne out by the subsequent Supreme Court decision in Hamdan v. Rumsfeld, where the Court was essentially evenly divided on the proper interpretation of Common Articles 2 and 3.

113 Id., (Williams, Sr. Judge, concurring).

114 In an opinion written by Justice Stevens, a plurality of the Court embraced the conclusion reached by Judge Williams in the D. C. Circuit, concluding that common article 3 operated in “contradistinction” to common article 2, applying to any armed conflict not satisfying common article 2. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2757 (2006). The dissenters rejected this interpretation, asserting that the plain language of common article 3 did not extend to
But as Judge Williams and the *Hamdan* Supreme Court plurality recognized, it is fundamentally inconsistent with the logic of the law of armed conflict to detach the applicability of regulation from the necessity for regulation. What was needed was a pragmatic reconciliation of these two considerations, a reconciliation that ensured that war dictated application of law.

Such reconciliation will inevitably require a certain degree of international unanimity on the conditions that trigger application of the laws of war outside of the traditionally accepted Article 2/3 paradigm. This in turn necessitates identification of triggering conditions beyond those provided by the ICRC Commentary. Identification of such criteria is particularly essential for determining the existence of an extraterritorial non-international armed conflict. As one of the authors has proposed elsewhere, such conflicts involve the transnational characteristics of international armed conflict; but the military operational characteristics of non-international armed conflicts (because the state v. non-state nature of the operations). As a result, attempting to rely on the accepted triggering criteria for either of these categories of armed conflict is like trying to put the proverbial square peg into the round hole. It is therefore unsurprising that designating the struggle against international terrorism a “global war” and announcing that the United States was engaged in an “armed conflict” with al Qaeda transnational conflicts against non-state entities. *Id.* at 2846 (Scalia, J. dissenting) (The President’s interpretation of Common Article 3 is reasonable and should be sustained. The conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also “occurring in the territory of” more than “one of the High Contracting Parties.”).

was both controversial and ultimately confusing for the armed forces required to execute operations associated with this struggle.

But acknowledging the limits of the **law-triggering paradigm adopted in 1949** does not *ipso facto* mandate the conclusion that application of the law must or should be confined to the situations falling under that paradigm. What is more important is to look to the underlying rationale of the effort to provide an application mechanism. That rationale clearly supports a pragmatic approach to determining when the law should apply, based not on a legally formalistic interpretation of treaty provisions but instead on the historically validated necessity of providing regulation of warfare and limiting the suffering associated with military conflict. Analyzing the law from this perspective leads to the conclusion that it may have been simply an accident of history that resulted in the failure to provide for regulation of transnational non-state conflicts, caused by the simple reality that the drafters of the Conventions did not have contemporary experience with such conflicts. Accepting such a proposition, a proposition bolstered by the policies adopted by professional armed forces mandating application of the law during all military operations even when they failed to fall under the Article 2/3 paradigm, leads to the necessity of identifying an effective triggering criteria that can reconcile the reality of contemporary combat operations with the internationally ordained application trigger for the laws of war. As will be discussed below, analysis of Rules of Engagement may provide the key for achieving such a reconciliation.

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

This idea of a commander controlling the use of force has resulted not only in laws of war, but also in tactical control measures commonly referred to as rules of engagement, or ROE. As defined in U.S. military doctrine, ROE are “Directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”¹¹⁶ In other words, ROE are intended to give operational and tactical military leaders greater control over the execution of combat operations by subordinate forces. Though not historically designated in contemporary terms, the history of warfare is replete with examples of what have essentially been ROE. From the leader of the hunt by prehistoric man who organized his forces to surround the great mammoth, to the children of Israel marching around Jericho and blowing their horns.¹¹⁷


as long as man has engaged in organized combat, military leaders have used ROE as a mechanism to maximize success. The Battle of Bunker Hill provides a more modern and perhaps quintessential example of such use. Captain William Prescott imposed a limitation on the use of combat power by his forces in the form of the directive “don’t shoot until you see the whites of their eyes”¹¹⁸ in order to accomplish a tactical objective. Given his limited resources against a much larger and better equipped foe, he used this tactical control measure to maximize the effect of his firepower. This example of what was in effect ROE is remembered to this day for one primary reason – it enabled the American rebels to maximize enemy casualties.

Another modern example of tactical controls on the use of force is the Battle of Naco in the Fall of 1914. The actual battle was between two Mexican factions, but it occurred on the border with the United States. In response to the threat of cross-border incursions, the 9th and 10th Cavalry Regiments, stationed at Fort Huachuca, Arizona, were deployed to the U.S. side of the border to ensure the U.S. neutrality was strictly maintained. As part of the Cavalry mission, “The men were under orders no to return fire,”¹¹⁹ despite the fact that the US forces were routinely fired upon and “(T)he provocation to return the fire was very great.”¹²⁰ Because of the soldiers’ tactical restraint and correct application of their orders – what today would be characterized as rules of engagement - the strategic objective of maintaining US neutrality was


¹¹⁹ See http://net.lib.byu.edu/estu/wwi/comment/huachuca/Hi1-10.htm.

¹²⁰ See http://net.lib.byu.edu/estu/wwi/comment/huachuca/Hi1-10.htm.
accomplished without provoking a conflict between the Mexican factions and the United States. The level of discipline reflected by the actions of these U.S. forces elicited a special letter of commendation from the President and the Chief of Staff of the Army.

Despite these and numerous other historical examples of soldiers applying ROE, the actual term “rules of engagement” was not used in the U.S. until 1958 by the military’s Joint Chiefs of Staff (JCS). As the Cold War began to heat up and the US had military forces spread across the globe, military leaders were anxious to control the application of force and ensure it complied with national strategic policies. With US and Soviet bloc forces looking at each other across fences and walls in Europe and over small areas of air and water in the skies and oceans, it was important to prevent a local commander’s overreaction a situation that began as a minor insult or a probe to result in the outbreak of a conflict that could quickly escalate into World War III. Accordingly, in 1981 the JCS produced a document titled the JCS Peacetime ROE for Seaborne Forces, which was subsequently expanded in 1986 into the JCS Peacetime ROE for all US Forces. Then, at the end of the Cold War, the JCS reconsidered their peacetime ROE and determined that the document should be amended to apply to all situations, including war and military operations other than war. In 1994, they

\[121\]

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

\[122\]

promulgated the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement\textsuperscript{123} which was subsequently updated in 2000 and again in 2005. As will be discussed below in detail, it is this 2005 edition that governs the actions of US military members today.

ROE have become a key issue in modern warfare\textsuperscript{124} and a key component of mission planning for U.S. and many other armed forces.\textsuperscript{125} In preparation for military operations, the President and/or Secretary of Defense personally review and approve the ROE, ensuring they meet the military and political objectives.\textsuperscript{126} Ideally, ROE represent the confluence of three important factors: Operational Requirements, National Policy, and the Law of War.\textsuperscript{127} This is illustrated by the diagram below.

\textsuperscript{123} CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3121.02, STANDING RULES OF ENGAGEMENT FOR UNITED STATES FORCES, (1994).


\textsuperscript{125} See INT’L & OPERATIONAL LAW DEPT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK, at 84 (2007); CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT HANDBOOK, at 1-1 – 1-32 (1 May 2000).


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

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

To ensure that approved ROE are properly understood and applied during armed conflict, they become an integral part of the training in preparation for military


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

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133 CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT HANDBOOK, at C-29 (1 May 2000).
IV. How in practice rules of engagement fall into two broad categories: status or conduct rules.

As discussed above, for the United States the seminal ROE directive is the Chairman of the Joint Chiefs of Staff Instruction 3121.01B Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (CJCSI), as amended in 2005. The CJCSI is divided into two parts, the Standing Rules of Engagement for US Forces (SROE) and Standing Rules for the Use of Force (SRUF). The SRUF “establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all DOD civil support and routine Military Department functions (including AT/FP (anti-terrorism/force protection) duties) occurring within US territory or US territorial seas. SRUF also apply to land homeland defense missions occurring within the US territory and to DOD forces, civilians and contractors performing law enforcement and security duties at all DOD installations, within or outside US territory, unless otherwise directed by the SecDef.”

SRUF therefore are not particularly relevant to the thesis of this article because they are intended to apply in what are relatively clear peacetime/non-conflict situations. In contrast, and directly relevant to our thesis, the SROE “establish fundamental policies and procedures governing the actions to be taken by US commanders during all military operations and contingencies and routine Military

\[134\] Chairman, Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, (13 Jun 2005). The CJCSI is classified SECRET but the basic instruction and Enclosure A titled “Standing Rules of Engagement for US Forces” are UNCLASSIFIED. All references in this paper will come from the basic Instruction or the UNCLASSIFIED Enclosure and will be from the 2005 edition unless otherwise noted.

\[135\] Chairman, Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, 1-2 (13 Jun 2005)
Department functions.” This includes “Antiterrorism/Force Protection duties, but excludes law enforcement and security duties on DOD installations, and off-installation while conducting official DOD security functions, outside US territory and territorial seas.” The SROE also apply to “air and homeland defense missions conducted within the US territory or territorial seas, unless otherwise directed by the (Secretary of Defense)” and are standing instructions that are “in effect until rescinded.” Thus, the SROE are standing instructions regulating the use of destructive military power that apply to almost everything the military does outside the continental United States. Unless otherwise directed, it applies to soldiers stationed in Germany, air crews providing disaster assistance in Pakistan after an earthquake, marines on shore leave in Australia, and sailors cruising through the Mediterranean. And they certainly apply to members of the military patrolling neighborhoods on a United Nations peace enforcement mission or fighting in the streets against a counterinsurgency.

A. Organization

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139 CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES, encl. A, para. 1c (13 Jun 2005).
Understanding the organization of the U.S. ROE Instruction provides insight into the principles it espouses. The basic instruction is only 6 pages long, UNCLASSIFIED, and provides only general guidelines concerning the use of force. Most importantly, it discusses the general applicability of the document as discussed above, and then highlights the difference between the rules for self-defense and mission accomplishment which will be discussed in detail below.

Appended to the basic instruction are 17 Enclosures, the majority of which are protected by national security classification. The first enclosure, however, is unclassified and deals with the self-defense policies under the SROE. Enclosures B, C and D contain general rules tailored for Maritime, Air and Land Operations respectively. Enclosures E through H contain more specific rules targeted at types of military operations, rather than instructions based on the geographic aspects of the operations. These later enclosures include directions for space operations, information operations, noncombatant operations, and counterdrug operations. Enclosure I contains a menu of potential supplemental measures which will be discussed below in section F. This is followed by Enclosure J discussing the ROE request and authorization process and Enclosure K containing a list of references. Enclosures L through Q deal with the SRUF and will therefore not be discussed.

B. Bifurcation

The genius of the SROE is in its bifurcation between the rules governing self-defense and mission accomplishment. This foundational principle is the key to proper understanding and application of force by US forces. As the document states, "The purpose of the SROE is to provide implementation guidance on the application of force
for mission accomplishment and the exercise of self-defense.”\textsuperscript{141} Throughout the document these two situations are treated as almost mutually exclusive. By treating these two applications of force separately, the instruction provides a paradigm where each set of rules can be the subject of appropriate training to ensure they are clearly understood and readily applicable. Accordingly, they facilitate the execution of missions regardless of whether military members are employing force in self defense or employing force without the necessity of immediate imminent threat in order to accomplish a designated operational mission.

This bifurcation of force employment authority between mission accomplishment and traditional self-defense principles is indicative of both the nature of the mission as well as the nature of anticipated threats posed by different groups that might be encountered during such missions. For example, when US forces entered Iraq in March 2003, the Iraqi forces were presumably the “enemy” and could be attacked on sight irrespective of whether they were presenting U.S. forces with an imminent threat. Individuals in this category were easy to identify because they were normally wearing Iraqi uniforms. They were also, of course, correspondingly able to engage US forces on sight without waiting for any specific action or additional direction. However, there was no requirement that U.S. forces wait to allow such a threat to develop prior to engaging these individuals with destructive combat power. These engagements were governed by the mission accomplishment ROE and provided robust authority to engage any Iraqi soldier upon contact.

\textsuperscript{141} \textit{Chairman, Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces}, encl. A, para. 1c (13 Jun 2005).
In contrast, once the Iraqi military was defeated and the US forces established general control in areas throughout Iraq and began moving among the populace, there was the additional risk that they would come under attack from time to time from members of this population. Such risk did not come from Iraqi forces or other lawful combatants under the definitions in the Geneva Conventions. Instead, it came from Iraqi civilians who opposed the US presence in Iraq. In these situations, U.S. forces responded not against declared or known hostile forces, but against an otherwise protected civilian who had decided to take up arms and act hostile to US forces. In this

142 See Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, reprinted in DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 430-31 (2d ed. 1981) which outlines the requirements to be considered a prisoner of war - a status reserved for lawful combatants:

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

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

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

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

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

…

(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 of war.
situation, it is self-defense principles that are implemented by the ROE, authorizing U.S. forces to employ necessary force in response to an imminent threat directed to them or other innocent individuals. Thus, when employing force against the Iraqi armed forces, it is their status as members of that group that subjects them to attack; whereas when employing force against hostile civilians, it is their conduct that subjects them to attack.

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

C. Status vs. Conduct

Within the SROE, there are several definitions that are key to the proper application of force and that must be clear to guide an appropriate response in situations similar to the Iraq hypothetical above. As described in that hypothetical, in
March of 2003 the Iraqi army was the enemy or declared hostile forces. Declared hostile forces are defined in the SROE as "Any civilian, paramilitary or military force or terrorist(s) that has been declared hostile by appropriate US authority." Under the SROE, US forces may always engage a declared hostile force, irrespective of their manifested conduct (with the exception of conduct that clearly indicates such personnel are *hors de combat*). It is their status as members of a declared hostile force which makes them subject to attack. It does not matter whether the declared hostile force is sleeping, taking a shower, eating a meal, or attacking US forces. In all cases, they may be attacked. This is not to say that once identified as a member of a hostile group, U.S. forces must attack. Ultimately, other tactical considerations will dictate the nature of the U.S. reaction. For example, if a US soldier happens upon a sleeping Iraqi soldier, it may very well be tactically preferable to capture this enemy rather than kill him. But this merely illustrates that the authority granted by the ROE, which is in turn derived from the law of war principle of military objective, is just that – an authority, and not an obligation. Understanding the distinction between authority and obligation is therefore essential to appreciate the significance of the tactical choice to forego an otherwise lawful attack. It is, however, the authority provided by the ROE as the result of the designation of "hostile force" that permits the US soldier kill the "sleeping enemy" if such action is deemed tactically appropriate.

This is in contrast to the civilian in the Iraq hypothetical who takes up arms against US forces. His status is that of a civilian, a protected status\textsuperscript{144} that prohibits US forces making him the object of attack. However, when he attacks,\textsuperscript{145} he is divested of that protected status and military forces have the right to respond in self-defense. In other words, the protection he enjoys from being made the object of attack is not absolute, but instead may be forfeited for as long as the civilian engages in conduct that threatens U.S. forces. This is only logical, for no state would consent to a law of war principle that would deprive their personnel of the ability to act in self-defense and defense of others.

D. Self-Defense


\textsuperscript{145} Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, art. 51.3 states “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” The definition of “direct participation in hostilities” is a matter of some controversy. Academics and military leaders have searched for a workable definition since its inception. The Commentary is not much help as almost all agree that it is broader than this (J. Ricou Heaton, Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces, 57 A.F. L. Rev. 155, 177 (2005)) and the ICRC is holding a conference on that topic in November, 2007 in hopes of providing additional clarity on that issue. With such a lack of clarity, it is beyond the scope of this article to resolve that issue. However, it is important here to draw the distinction between “direct participation in hostilities” as a law of war principle and self-defense ROE principles. ROE and the Law of War are not coterminous, but ROE must comply with the Law of War. Therefore, when a civilian takes a direct part in hostilities by attacking a member of the military, he surrenders his law of war protective status and becomes targetable. The ROE then govern the tactical application of force against that targetable civilian. Add footnote about Duck walk lady versus bridge people.
When responding in self-defense, two SROE definitions are determinative: hostile act, and hostile intent.\(^{146}\) A hostile act is defined as “An attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used to preclude or impede the mission and/or duties of US force, including the recovery of US personnel or vital USG property.”\(^{147}\) This is the easier of the two principles to understand and apply. In the Iraq hypothetical, it is when the civilian shoots at US forces. By attacking US forces, he has committed a hostile act to which US forces may respond with proportionate force,\(^{148}\) including deadly force if necessary.

Hostile intent is “The threat or imminent use of force against the United States, US forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of US force, including the recovery of US personnel or vital USG property.”\(^{149}\) Determining a “threat” or “imminent use of force” necessarily injects increased subjectivity into the analysis. Application of this principle is

\(^{146}\) But see Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 Naval L. Rev. 126, 142 (1998) where the author argues that the definitions of hostile act and hostile intent are overly broad to comply with international law.

\(^{147}\) Chairman, Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, encl. A, para. 3e (13 Jun 2005).

\(^{148}\) The SROE uses the term proportionality instead of proportionate force. However, to avoid confusion with the law of war term “proportionality,” this article will use the term “proportionate force.” In describing a proportionate response, the SROE state “The use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force should not exceed what is required.”

\(^{149}\) Chairman, Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, encl. A, para. 3f (13 Jun 2005). “The determination of whether the use of force against US forces is imminent will be based on an assessment of all facts and circumstances know to US forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.” SROE page A-4, para. 3g.
dictated by the actions prior to firing at US forces, such as when the prospective attacker establishes a firing position, raises his rifle or puts the US forces in his weapon sight. Once the prospective attacker’s intent is discernible and his capability evident, US forces may respond with proportionate force, including deadly force.

The need for military members to be able to respond to hostile act and hostile intent is amply illustrated from unfortunate past experience. In 1982, the US military units deployed to Beirut as part of a multinational force comprised of British, French, and Italian forces. Their mission was to facilitate the withdrawal of non-Lebanese forces from the country. There was no “enemy” or declared hostile force. As the mission continued into 1983, relations between the local population and the multinational forces deteriorated. On October 23, 1983, a suicide bomber drove a truck loaded with explosives that were the equivalent of over 12,000 tons of TNT past several guard stations and crashed into the Marine barracks, detonating the explosives and killing 241 Marines.

As a result of the attack, the Secretary of Defense convened a commission to “examine the rules of engagement in force and the security measures in place at the time of the attack.” While the commission concluded that the “ROE used by the

150 For an excellent analysis of the events in Beirut, see Major Mark S. Martins, Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering, 143 MIL. L. REV. 1, 10-12 (Winter, 1994).


152 DEPARTMENT OF DEFENSE COMMISSION, REPORT ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, 23 October 1983, at 9.
Embassy security detail were designed to counter the terrorist threat posed by both vehicles and personnel," it also concluded that "Marines on similar duty at (Beirut International Airport), however, did not have the same ROE to provide them specific guidance and authority to respond to a vehicle or person moving through a perimeter." One of the contributing factors that the Commission based its conclusion on was that the ROE "underscored the need to fire only if fired upon to avoid harming innocent civilians, to respect civilian property, and to share security and self-defense efforts with the (Lebanese Armed Forces)." Had the Marines been functioning under the hostile intent and hostile act rules that US Servicemembers currently function under, there permissible actions in self-defense would have been clear and a tragedy potentially averted.

It is therefore clear that the engagement authorization provided by the self-defense prong of the ROE essentially extends traditional criminal self-defense and defense of others principles to the operational environment. Hostile intent and hostile act serve as triggers for proportionate actions in self-defense or defense of others. This is a true necessity based authority, permitting only that amount of responsive force necessary to terminate the threat, and extant for only so long as the threat exists. Because of the necessity basis for this authority, the SROE permits the use of force

153 DEPARTMENT OF DEFENSE COMMISSION, REPORT ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, 23 October 1983, at 50.

154 DEPARTMENT OF DEFENSE COMMISSION, REPORT ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, 23 October 1983, at 51.
pursuant to this prong of authority at all times and during all missions. This authority
never changes in relation to the nature of the operational mission and even applies
when functioning under operational ROE different than those in the SROE, such as when
U.S. forces operate under the command and control of a multinational force such as
NATO.

The indelible nature of this self-defense prong of the ROE add immensely to their
military value by making them a prime training tool. As US forces train day to day for
undetermined future missions with undetermined mission accomplishment ROE, they
can always base such training on the default expectation that these self-defense
principles will apply in whatever mission they are assigned. In current operations in

155 There has been some discussion amongst military personnel about the “inherent right of self-
defense” and allegations that the principles of self-defense are insufficient to protect individual
soldiers. (ADD FOOTNOTE) This right of self-defense is vested in the commander of the unit rather
than individual members of the unit. As the SROE states:

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

CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES

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

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Deleted: conduct based
Iraq, some have raised allegations that the military is not permitted adequate ROE to defend themselves. This is not true. While many of the same considerations apply in Iraq as applied in Beirut, there should be no doubt in the minds of military members as to their ability to respond in self-defense with proportionate force. These principles are not only taught and trained constantly through standard military training requirement, but also reinforced on a continuing basis while in Iraq. Having these self-defense principles remain constant and never change allows them to become as natural and immediate to a member of the armed forces as clearing a jammed weapon or reloading ammunition in the middle of a firefight.

E. Mission Accomplishment

While the ROE principles for self-defense are constant, each mission will likely have its own specific ROE that provide authorizations to use force to accomplish the designated operational mission. If the military mission is to destroy, defeat, or neutralize a designated enemy force or organization, such as the Iraqi Army in 2003, personnel associated with that force will be declared hostile pursuant to the ROE. The consequence of this designation is that once individuals are identified as a member of such a group or organization – a designation based on relevant criteria established through the intelligence preparation process – U.S. forces have the authority (but as noted above not necessarily the obligation) to immediately attack these “targets.”

respond appropriately on the modern battlefield and still preserve the principle of distinction between civilians and combatants.

157 Kyndra Rotunda, Denying Self-Defense to GIs in Iraq, CHRISTIAN SCIENCE MONITOR, (Mar. 2, 2007)

Thus, it is the "status" of being associated with the declared hostile organization that triggers the use of force authority: threat identification results in a group of individuals that as a result of their status, i.e., membership of a specific organization such as an army, may be attacked. As the SROE states, "Once a force is declared hostile by appropriate authority, US forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force." 159

Although specifics of potential mission accomplishment rules are protected from public disclosure as classified information, as a general rule they fall into two categories: 1) Measures that "specify certain actions that require SecDef approval," and 2) Measures that "allow commanders to place limits on the use of force during the conduct of certain actions." 160 One of the most important aspects of these two prongs of authority is that unless a specific action falls within those measures requiring SECDEF approval, the operational commander may assume he has the authority to use all lawful means and measures without having to seek additional authorization. This means that as military commanders face difficult situations in Iraq and other areas, they should plan to employ their entire arsenal of capabilities, limited only by the law of war and their judgment as to what is operationally and tactically appropriate.

159 CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES, encl. A, para. 2b (13 Jun 2005). The necessity of this rule is obvious. Determining hostile act or hostile intent is a difficult task and requires constant watchfulness. Such action is not required when facing a declared enemy who is equally free to attack US forces and is willing to demonstrate that by wearing a uniform and carrying their arms openly.

160 CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES, 3 (13 Jun 2005).
Underlying all of these measures for mission accomplishment is the assumption that the mission accomplishment may require more specific use of force authorization than that provided by the self-defense prong of the SROE. When authorizing such additional measures, the authorizing commander is able to provide additional guidance on the application of force against individuals or groups based on their status. Because these measures are not constant and change for each mission (and often change during missions) they are precisely tailored for each mission, providing clear directives for the use of force related to specific operations. This in turn assists the forces tasked to execute such missions by providing direction on whether they may employ unrestricted use of force or must instead comply with limits on that use of force designed to enhance the probability of mission accomplishment.

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

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

As the operation continues, at some point, the US destroys the effectiveness of the KLI militia and repels the Iraqi forces back into Iraq. An armistice is brokered by the US and UN and both Kuwait and Iraq agree to its terms. As part of the agreement, the United States is asked to act as an implementation force and monitor the agreement and patrol the border between the two nations. In response to the new operation, the President and Secretary of Defense modify the existing ROE. While the self defense rules remain unchanged, both the KLI and Iraqi forces would no longer be declared hostile forces and the ROE would be changed to remove US forces authority to attack them based on their status. However, if they commit hostile acts or demonstrate hostile intent, US forces could still respond in self-defense with proportionate force, including deadly force if necessary.
This example highlights the flexibility of the ROE to respond to mission requirements. It also demonstrates the value of the unchanging “*conduct-based*” ROE that allow the military to respond to hostile acts and hostile intent regardless of the current mission. At no point in the mission, did the self-defense ROE change. Military members who had been trained to respond appropriately to hostile acts and hostile intent continued to apply that training as the fluid nature of the mission changed. In contrast, the fluid nature of the mission changed the political and strategic goals of the United States. The “*status-based*” ROE were able to change accordingly, ensuring that the appropriate amount of force was applied against the appropriate targets. The ROE were also responsive to military changes on the ground, such as the militarization of the KLI, changing the response to their actions from a “*conduct-based*” ROE to a “*status-based*” ROE and then back again when “*status-based*” ROE were no longer needed or appropriate.

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

V. **Operational Rules of Engagement: The Ultimate *de facto* Indicator of Armed Conflict**
As explained above, ROE fall into two broad categories of use of force authorization: **conduct-based** and **status-based**. It is this dichotomy that provides a truly *de facto* indication of the existence of armed conflict for purposes of triggering fundamental principles of the laws of war.\(^{161}\) Because **conduct-based** ROE are inherently self-defense/responsive in nature, they indicate that the state views the nature of the military mission as insufficient to trigger the targeting authority of the laws of war. However, because **status-based** ROE require no justification for the use of force beyond threat recognition and identification, they indicate that the state views the nature of the military mission as sufficient to trigger the targeting authority of the laws of war. In such situations, it is the principle of military objective that dictates the application of combat power once the threat identification process results in the conclusion that the object of anticipated attack is a member of a designated hostile group.\(^{162}\)

Because the approval of **status-based** ROE implicitly invokes the target engagement authority of the laws of war, it seems logical that such issuance should trigger an analogous requirement to comply with fundamental regulatory obligations derived from the laws of war. And, because such ROE have and will likely continue to be issued for military operations that fall into the twilight zone between Common Articles 2 and 3, this indication that the state is invoking the laws of war in support of mission accomplishment provides the missing ingredient in determining when these principles apply outside this established **law-triggering** paradigm. Clinging to the

\(^{161}\) *Supra* notes ___ and accompanying text.

\(^{162}\) *Supra* notes ___ and accompanying text.
restrictions of this paradigm in such situations produces a dangerous _de facto_ anomaly: military forces will execute operations with the force and effect of expansive authority without being constrained, as a matter of law, by any balancing principles. Such an anomaly may be explicable in purely treaty interpretation terms, but it is inconsistent with the historical underpinnings of the laws of war noted above. To this end, it is important to understand why focus on a consideration not already identified by the Geneva Conventions or their associated commentaries is necessary.

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

Because of sovereignty concerns, the drafters of Common Article 3 walked a proverbial tightrope between mandating humanitarian protections for victims of internal armed conflicts and protecting states from unwarranted application of

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163 See, e.g. Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AJIL 1 (January, 2004) (discussing the potential role of human rights norms in the regulation of armed conflict); see also *REST 3d FOREL* § 701 (discussing the universally accepted intrusion of international human rights norms in the realm of state sovereignty).
international law to internal affairs. Although the language of Common Article 3 refers only to "conflicts not of an international character," the ICRC Commentary emphasized the necessity of distinguishing internal disturbances not rising to the level of armed conflict from those situations triggering application of the substantive protections of the article. This seems somewhat axiomatic, for all it really emphasized was that the law of war should apply only to armed conflicts. However, it was the analytical method proposed by the Commentary that provides insight into how focus on de facto criteria should dictate interpretation of the armed conflict trigger.

In order to protect the sovereignty of party states, the Commentary indicates that the key focus of the treaty drafters was determining the existence of an actual armed conflict. To this end, the Commentary offered a number of objective criteria that either individually or in combination would indicate an internal situation had crossed the threshold from non-conflict to armed conflict. These included, among others, the scope, intensity, and duration of military operations, whether the dissident group controlled territory to the exclusion of government forces, and whether the dissident group enjoyed demonstrable popular support. However, because none of these considerations would be dispositive of the existence of armed conflict, the

164 See ICRC Commentary, supra note 86 at 34-35. The Commentary emphasizes that the limited scope of applicability of common article 3 was responsive to historic concerns related to the protection of state sovereignty ("It at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for interventions by the International Committee of the Red Cross or any other impartial humanitarian organization -- interventions which in the past were all too often refused on the ground that they represented intolerable interference in the internal affairs of a State.").

165 GWS, supra note 81 at art. 3.

166 See ICRC Commentary, supra note 86 at 35-37.
Commentary proposed an additional consideration: the nature of the government response to the threat. According to the Commentary, one important indication of the existence of armed conflict is when a government is forced to resort to regular armed forces to respond to a dissident threat. Use of such forces is normally reserved for combat type operations. Accordingly, employment of such forces would indicate that the state authorities no longer considered normal law enforcement assets capable of responding to the dissident threat, which in turn would indicate that the threat had progressed beyond widespread criminal activity or civil disobedience.

In the realm of internal armed conflicts, this “nature of government response” consideration is indeed extremely indicative of the existence of armed conflict. Of course, this one factor has not been a talisman. In some situations, the co-mingling of military and law enforcement organizations make it difficult to apply this factor; in others, precipitous resort to military forces to respond to civil disturbances undermine the efficacy of this factor. However, once a state employs its armed forces to conduct combat operations against an internal dissident threat, it becomes almost impossible to disavow the existence of armed conflict.

Unfortunately, in the emerging realm of transnational military operations between state and non-state forces, this factor is far less instructive in determining the existence of armed conflict. There are two reasons for this. First, “internal” military operations were the original intended context for application of this consideration. In this context, national resort to use of regular armed forces in response to a dissident group is

167 Id. at 35.
normally an extraordinary measure, responsive to a threat that exceeds the capabilities
of law enforcement authorities. However, such contextual significance is less profound
in relation to transnational operations, for the simple reason that it would be equally
extraordinary for a state to use its own non-military (law enforcement) security forces
outside its borders.

The second reason, one which exacerbates the significance of the contextual
difference between internal armed conflict and transnational armed conflict, is that
states routinely use military forces to conduct non-conflict “peace operations”.168 Such
operations have become a major tool in the maintenance of international peace and
security. When conducted under the authority of a legal mandate that is principally
defensive in nature (normally granted by the United Nations Security Council), these
extensive extraterritorial military operations are normally not considered sufficient to

168 See generally INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL
Peace Operations as follows (drawing from other Department of Defense doctrinal sources):

**Peace Operations**

1. Peace Operations is a new and comprehensive term that covers a wide range
of activities. FM 3-07 defines peace operations as: “military operations to support
diplomatic efforts to reach a long-term political settlement and categorized as
peacekeeping operations (PKO) and peace enforcement operations (PEO).”

2. Whereas peace operations are authorized under both Chapters VI and VII of
the United Nations Charter, the doctrinal definition excludes high end
enforcement actions where the UN or UN sanctioned forces have become
engaged as combatants and a military solution has now become the measure of
success. An example of such is Operation Desert Storm. While authorized under
Chapter VII, this was international armed conflict and the traditional laws of war
applied.

Id.
trigger the laws of war. This is because they do not involve “armed conflict”, a point emphasized in the U.K. Manual:

The extent to which PSO forces are subject to the law of armed conflict depends upon whether they are party to an armed conflict with the armed forces of a state or an entity which, for these purposes, is treated as a state . . .

Where PSO forces become party to an armed conflict with such forces, then both sides are required to observe the law of armed conflict in its entirety . . .

a PSO force which does not itself take an active part in hostilities does not become subject to the law of armed conflict simply because it is operating in territory in which an armed conflict is taking place between other parties. That will be the case, for example, where a force with a mandate to observe a cease-fire finds that the cease-fire breaks down and there is a recurrence of fighting between the parties in which the PSO force takes no direct part.

It is not always easy to determine whether a PSO force has become a party to an armed conflict or to fix the precise moment at which that event has occurred. Legal advice and guidance from higher military and political levels should be sought if it appears possible that the threshold of armed conflict has been, or is about to be, crossed.169

Because the use of force authority normally associated with these transnational “peace operations” is inherently defensive in nature,170 it is essential to focus on some


170 See Headquarters, Department of the Army Field Manual No. 100-23, Peace Operations (30 December 1994), at 33 (indicating that during peacekeeping operations, military “commanders
alternate analytical factor to distinguish between non-conflict transnational military operations and those that trigger the laws of war. And, because this type of armed conflict was either unanticipated or overlooked by the drafters of the 1949 Conventions, neither the text of these treaties nor the ICRC Commentary provide such a factor. But this does not mean that none could be identified. Combining consideration of the underlying purpose of the Convention triggers with the realities of contemporary military operations leads almost inexorably to one conclusion: status-based ROE provides this elusive factor.

In order to emphasize the validity of this proposition, it is useful to consider the nature of the contemporary debate on the applicability of the laws of war to the war on terror. It is not uncommon for the question of law of war applicability to be hotly debated during contemporary symposia addressing issues related to the GWOT. Participants in such debates often argue that the war on terror is not really a “war”, and as a result it is not regulated by the laws of war. The Article 2/3 paradigm is then cited in support of such arguments. 171

should regard the use of force as a last resort”, and that “(N)othing in the ROE should negate a commander’s obligation to take all necessary and appropriate action to protect his force.).

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

It is this simple reality that illustrates the value of ROE as factor to determine when the laws of war are triggered by transnational military operations, for it is the ROE that informs the soldier of the nature of the operation. As noted elsewhere in this article, ROE provide a clear indication of how the state ordering the military operation perceives both the threat and the authority to address the threat. When ROE authorizes engagement based solely on status determinations, it represents an inherent invocation of the laws of war as a source of operational authority, for it is the rules of necessity and military objective that will provide the parameters for implementing such ROE. Accordingly, analysis of the nature of the ROE both illuminates the state’s perception of the nature of the operation, and indicates when the forces of the state will inherently

Law, Ottawa (Oct. 24-26, 2002); CRS Report, supra n.22 (analyzing whether the attacks of September 11 triggered the law of war).
invoke authorities derived from the laws of war. It is therefore appropriate to focus on the nature of ROE to determine when the balance of competing interests reflected in the laws of war must apply to a military operation.

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

VI. Proposal for adoption of this new law-triggering paradigm

The decision of the President to characterize the military response to the terror attacks of September 11th as an armed conflict was unquestionably supported by Congress. While this characterization is the source of continued scholarly criticism, one of the few areas of legislative and executive agreement in relation to the U.S. response to the terror attacks of 9/11 has been the decision to treat that response as an armed conflict.

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172 See Mil. Or., Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (finding that “[I]nternational terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.”); Id. at par. 1 (emphasis added); Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the President to use necessary military force to destroy terrorist threat posed by al Qaeda and states that sponsor the organization);
the United States is unlikely to alter its perspective any time soon, and the forces called upon to engage terrorist entities will continue to employ combat power in a manner consistent with this position.

In contrast to the relative clarity of the U.S. characterization of the struggle against global terror, there continues to be tremendous uncertainty as to the applicability of the laws of war to this fight.\textsuperscript{174} This uncertainty is detrimental to the execution of these operations because it creates a regulatory void and imposes upon the armed forces the responsibility to fill this void. In the past, reliance on military policy to deal with such uncertainty has been generally effective. However, in post 9/11 era, it

\textsuperscript{173} See Gabor Rona, \textit{When is a war not a war? - The proper role of the law of armed conflict in the “global war on terror”, “International Action to Prevent and Combat Terrorism” - Workshop on the Protection of Human Rights While Countering Terrorism, Copenhagen, 15-16 March 2004 - Presentation given by Gabor Rona, Legal Adviser at the ICRC’s Legal Division, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/lwpList575/3C2914F52152E565C1256E60005C84C0 (last accessed 23 August, 2006); Jordan J. Paust, Responding Lawfully to Al Qaeda, 56 Cath. U. L. Rev. 759 (2007) (Under international law, the United States cannot be at “war” with al Qaeda as such, much less with a tactic or strategy of “terrorism,” and the laws of war are not applicable with respect to acts of violence between members of al Qaeda and armed forces of the United States outside the context of an actual war, such as the wars in Afghanistan or Iraq.).

has not been uncommon for civilian leaders of the military to make policy decisions that are not consistent with compliance with the principles of the laws of war.\textsuperscript{175}

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

Assuming the necessity and utility of such a position does not, however, resolve what the criteria for application should be. It does seem relatively indisputable that to date there has been an almost myopic effort to fit the global war on terror into the Common Article 2/3 paradigm. As noted above, this has resulted in uncertainty for military forces and controversy among policy makers and their critics. Perhaps even more troubling is that it has shifted the focus from what rules should apply to such combat operations to whether a particularly legal trigger is satisfied. Because of this, and the simple reality that relying on the Common Article 2/3 paradigm to characterize transnational military operations directed against non-state actors is like trying to put

\textsuperscript{175} The rebuke to executive wartime authority represented by the decision in Hamdan v. Rumsfeld is perhaps the quintessential example of this reality.
the proverbial square peg into the round hole, the time has come to adopt a different approach to determining when the fundamental regulatory framework of the law of war applies to such operations.

Based on the foregoing analysis, the nature of mission specific ROE provides an effective analytical criterion for making such a determination. Quite simply, the authorization of status-based ROE for a military mission provides a critical de facto indication that the state is inherently invoking the authority of the laws of war to guide target selection and destruction decisions. As a result, linking application of fundamental law of war principles to the authorization of such ROE ensures that the essential balance between authority and obligation central to the laws of war is preserved. More importantly, this will ensure the force and effect of this essential regulatory framework regardless of the geographic nature of the operations, the non-state character of the enemy, the duration of the hostilities, the intensity of the hostilities, or most importantly whether the hostilities satisfy the Common Article 2/3 law-triggering paradigm.

Ironically, the entire emphasis of this law-triggering paradigm supports the adoption of the ROE based trigger. As noted above, the objective of the drafters of the 1949 Conventions was to prevent “law avoidance” as the result of technical legal definitions and associated arguments. For this reason, the focus of Articles 2 and 3 the creation of a truly de facto law-triggering standard, immune from the type of

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\(^{177}\) Id.
technical manipulations so common during the Second World War. Although the drafters did not anticipate extraterritorial armed conflict between states and non state entities, this does not justify ignoring the effort to ensure that the laws of war would come into force based primarily on the existence of armed conflict.

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

More importantly, consistent with the underlying objective of the Geneva Conventions, the probability that an ROE based trigger for law of war application will be manipulated to avoid application of the law is *de minimis*. This is because of one simple reality: the state is unlikely to deprive its forces of the authority to effectively accomplish a military mission in order to avoid obligations imposed by the laws of war.

Considering the hypothetical use of combat power to target an *al Qaeda* base camp in a remote area of another country illustrates this point. To effectively accomplish this mission, the military commander will need to engage the “enemy” immediately upon positive threat identification. While that process may indeed be complex because of the unconventional nature of the enemy, once identification is made, success will depend on the unhesitating application of combat power. This can only occur if the
command is operating pursuant to \textit{status-based} ROE. If the national authority attempted to avoid law of war application by issuing \textit{conduct-based} ROE, it would debilitate operational effectiveness. Accordingly, the cost for law avoidance would be so profound that it should rarely if ever be a significant influence on ROE authorization.

It is therefore time for the President to issue an executive or military order adopting an ROE trigger for application of fundamental law of war principles. This order should emphasize a number of critical points. First, the United States has been and will continue to be a leader in the development and application of the laws of war.\footnote{Prior President’s have emphasized the important role played by the United States in the positive development of the laws of war. See, e.g. Ltr. of Transmittal from Pres. Ronald Reagan to the U.S. Sen. (Jan. 29, 1987) reproduced in \textit{United States: Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions, Relating to the Protection of Victims of Noninternational Armed Conflicts}, 26 I.L.M. 561, 562 (1987); Ltr. of Transmittal from Pres. William Clinton to the U.S. Sen. (Jan. 6, 1999) reproduced at 1996 WL 54428.}

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

Perhaps the most controversial military order ever issued by a President in his capacity as Commander in Chief was the order establishing the military commissions.¹⁷⁹ Much of the controversy that order sparked resulted from the perception that it reflected a lack of respect for the most fundamental obligations imposed by the laws of war. Now is the time to issue an order that will have a radically different effect; an order that will confirm and advance those fundamental obligations, and send a powerful message to the international community that never again will the United States assert authority derived from the laws of war without acknowledging fundamental obligations. The order proposed herein will have such an effect.

VII. Discussion of some pragmatic policy concerns that will need to be carefully considered in any such adoption.

This new triggering paradigm is not without its risks. As described earlier in the diagram, one of the inputs into ROE is national policy. Policy is by definition a political input. That means that by definition, ROE are already subject to political inputs. Naturally, in a nation such as the US which strongly believes that its military must be subject to civilian control, the inputs are not only important, but necessary. However, it is equally important that ROE remain a functional tool that can be applied by the military to achieve the end state desired by the political leadership.

History has already provided at least one occasion where military leaders felt the ROE were too constrained to allow military victory. In the midst of the Vietnam War, Pres. Johnson proudly proclaimed that the military couldn’t “bomb an outhouse without my approval.”¹⁸⁰ Many military leaders chaffed under such controls and argued that this level of review and approval prevented the military from successfully carrying out its mission.¹⁸¹ Some of this may be the military leaders not recognizing that the political endstate may not always include a complete military victory and the total destruction of the enemy. However, there is certainly a valid concern that the ROE can be overpoliticized at the expense of blood and treasure.

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

¹⁸⁰ Richard Lowry, Bush’s Vietnam syndrome: the president draws a wrong lesson, NATIONAL REVIEW, (20 Nov 06).

¹⁸¹ Richard Lowry, Bush’s Vietnam syndrome: the president draws a wrong lesson, NATIONAL REVIEW, (20 Nov 06).
mounting US casualties that would result, it is still a risk that must be recognized with the adoption of the new paradigm.

Additionally, there is disagreement currently between the US and much of the rest of the world, including its allies, as the characterization of the current conflict in Iraq\textsuperscript{182} and to some degree the conflict in Afghanistan\textsuperscript{183}. If manipulating the ROE became an option by either side to bolster its argument, it may have deleterious effects on the military members from those countries and would almost certainly hamper interoperability between the nations’ militaries.

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

VIII. Conclusion

This article began with a discussion of the historical underpinnings of the contemporary law of war. This history provides a proverbial looking glass through which the logic of this law can be best understood. That logic finds at its core a simple but


\textsuperscript{183} This has been resolved to some extent by the Supreme Court’s ruling in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).
critical proposition: warfare and anarchy are not synonymous. Accordingly, the waging of war has been, and must always be subject to a regulatory framework. That framework is provided by the laws of war.

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

Asserting the logic of applying law of war principles to all combat operations does not, however, resolve perhaps the most complicated questions related to the regulation of conflict that to emerge in decades: how does a state determine what triggers this law outside the Common Article 2/3 paradigm? As illustrated above, relying on the existing law-triggering criteria is insufficient to provide an effective answer to this question, even when supplemented by consideration of analytical factors suggested in the ICRC Commentary. This insufficiency has led to confusion as to when this law applies to contemporary operations, criticism of decisions related to its application, and uncertainty for the armed forces called upon to execute missions against non-state entities.
The answer to this question therefore must be derived from a new perspective, and it is the perspective of the warrior where it is found. Warriors understand the difference between conflict and non-conflict operations. This understanding is not based on the nature of the opponent, nor the geographic location of the operation, nor the scope, duration, or intensity of the operation. Instead, it is based on the pragmatic and simple reality that authorization to engage an opponent based solely on a status determination means the line has been crossed. Thus, for the warrior, the most fundamental indication of armed conflict is the nature of the ROE issued for the mission.

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

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

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

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