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# COMPLEX LEGAL FRAMEWORKS AND COMPLEX OPERATIONAL CHALLENGES: NAVIGATING THE APPLICABLE LAW ACROSS THE CONTINUUM OF MILITARY OPERATIONS

*Laurie R. Blank\**

Modern conflicts and stability operations pose complex challenges for both military and civilian actors tasked with promoting the rule of law during conflicts and stability operations. Military operations can occur both during armed conflict and in situations that do not qualify as armed conflict, such as disaster relief or humanitarian intervention.<sup>1</sup> The now oft-used term “stability operations” encompasses U.S. military activities conducted “outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.”<sup>2</sup>

The legal classification of a particular situation, including non-conflict situations, determines which law governs the actions, rights, and obligations of those involved. The continuum of conflict ranges from domestic disorders to non-international armed conflicts to international armed conflicts, including belligerent occupation. Other situations involving the use of military force or military capabilities may include counter-piracy or counterterrorism operations, disaster relief, or humanitarian assistance. In addition, conflicts sometimes involve elements of both international and non-international armed conflict and often evolve from one form of conflict into another. The emergence of new forms of conflict, for which there may be no ready characterization, complicates matters. For example, acts of transnational terrorism could constitute an international armed conflict, a non-international armed conflict, a law enforcement operation, or, perhaps, a new category of conflict. Indeed, stability operations occur across the spectrum of military operations, within the context of international armed conflict, non-international

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<sup>1</sup> See 10 U.S.C. §§ 401–409 (2006); S. REP. NO. 109-322, at 467–550 (2006).

<sup>2</sup> DEP’T OF THE ARMY, FIELD MANUAL 3-07: STABILITY OPERATIONS, at vi (2008), [http://downloads.army.mil/docs/FM\\_3-07.pdf](http://downloads.army.mil/docs/FM_3-07.pdf) [hereinafter STABILITY OPERATIONS] (quoting JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0: DOCTRINE FOR JOINT OPERATIONS, at xxi (2001), [http://www.fs.fed.us/fire/doctrine/genesis\\_and\\_evolution/source\\_materials/dod\\_joint\\_ops\\_doctrine.pdf](http://www.fs.fed.us/fire/doctrine/genesis_and_evolution/source_materials/dod_joint_ops_doctrine.pdf)).

armed conflict, and non-conflict situations. Such operations thus involve multiple legal frameworks, including international humanitarian law, human rights law, and the domestic law of both the territorial state and the state sending troops, as well as, perhaps, a United Nations (“UN”) mandate and bilateral or multilateral treaties, or additional layers such as joint operations doctrine.

Understanding how these various legal regimes interact in practice on the ground is a challenging task and is fundamental to promoting the rule of law in conflict and post-conflict environments.<sup>3</sup> For example, uncertainty about the applicable law can impact a range of determinations including, among others, detention regimes, targeting, and the parameters of the authority and responsibility for conducting operations. Identifying the applicable law in a conflict or during a stability operation is thus an essential first step that enables both military and civilian actors to define their engagement in any international intervention.

This challenge is often compounded when states involved in a conflict or military operation do not explicitly characterize it, or when coalition partners have conflicting views as to its characterization. For example, the United States chose not to characterize its operation in Panama as an armed conflict.<sup>4</sup> Instead, the United States described its operation—one that involved the deployment of approximately 30,000 U.S. troops and extensive hostilities between U.S. and Panamanian forces—as assistance to the legitimate

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<sup>3</sup> This Article grew out of the discussions at the pilot meeting of *Mind the Gap: Assessing the Applicable Law Across the Continuum of Conflict*, a project initiated by the International Humanitarian Law Clinic at Emory University School of Law, with the support of the U.S. Institute of Peace. The project has been renamed *Rules of War and Tools of War*; the Author is the Project Director; Project Co-Chairs are Professor Michael N. Schmitt, Chair, International Law Department, Naval War College; and Professor Amos N. Guiora, S.J. Quinney College of Law, University of Utah. The project brought together leading practitioners and scholars with operational and legal experience in a range of conflicts and peace and stability operations for a two-day meeting in September 2010. In particular, the expert group focused on: (1) identifying the key legal questions that arise over the continuum of conflict scenarios; (2) assessing whether and how problems in defining the conflict situation and identifying applicable legal regimes complicate effective and legal interventions; (3) determining which relevant materials and products would be most useful for military and civilian actors on the ground; (4) addressing how to better train key actors in this regard; and (5) developing a framework for better analyzing the key questions and dilemmas identified. The Author is grateful to the participants at the initial pilot meeting for their insights on these issues and, in particular, would like to thank Benjamin R. Farley, J.D., Emory University School of Law (2011), for his excellent research assistance and contributions to the discussion and the preparation of this Article.

<sup>4</sup> *United States v. Noriega*, 808 F. Supp. 791, 794–95 (S.D. Fla. 1992); Geoffrey S. Corn & Sharon G. Finegan, *America’s Longest Held Prisoner of War: Lessons Learned from the Capture, Prosecution, and Extradition of General Manuel Noriega*, 71 LA. L. REV. 1111, 1117 (2011).

government of Panama (although it applied the law of armed conflict as a matter of policy).<sup>5</sup> Alternatively, while the United States has declared that it is in an armed conflict in Afghanistan with both the Taliban and al Qaeda, coalition partners such as Germany remained reluctant, until recently, to characterize their involvement under the aegis of the International Security Assistance Force (“ISAF”) as an armed conflict.<sup>6</sup> Thus, even within the same coalition, some nations would not apply the same legal framework to their activities, creating differing interpretations of rights and obligations.

Although international law provides a framework—albeit more or less clear depending on the situation—for the characterization of conflict and non-conflict situations, other factors will often come into play from the perspective of a particular state. For example, characterization of conflict impacts cohesion among coalition partners, the nature of contemporary operations, and the linkage between tactics and broader policy issues and choices. A range of background issues will also be relevant, such as the connection between law and policy, the process by which law is made, and the role of law in the policymaking process. For some observers, the lack of or uncertain characterization of a conflict up front may be seen as the direct cause of numerous legal and policy challenges; for others, it is an inherent aspect of the law and decision-making process, and is symptomatic of the tensions between strategic-level policymaking and tactical-level operational decision-making. Nonetheless, although the choice not to characterize a military operation does afford policymakers a great deal of flexibility—a valid and advantageous goal that allows them to tailor operations to particular needs—characterization of conflicts matters from a legal perspective—it makes a difference normatively and not just on a policy level.

This Article analyzes the impact of differing legal characterizations, or a lack of characterization altogether, in complex conflict situations. Amid the complicated set of considerations that contribute to conflict characterization, the interaction of different applicable legal frameworks poses several key issues that policymakers and military and civilian decision-makers should

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<sup>5</sup> *Noriega*, 808 F. Supp. at 795; Corn & Finegan, *supra* note 4, at 1117–18.

<sup>6</sup> See Timo Noetzel, *Germany's Small War in Afghanistan: Military Learning amid Politico-Strategic Inertia*, 31 CONTEMP. SECURITY POL'Y 486, 487 (2010) (“Foreign Minister Guido Westerwelle, speaking explicitly as a representative of the government as a whole, announced before the Bundestag that Germany now considered the conflict in all of Afghanistan, and thus including the northern part of the country, an ‘armed conflict in terms of international humanitarian law.’”) (quoting Guido Westerwelle, Foreign Minister, Address at the Bundestag (Feb. 10, 2010), *available at* <http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Reden/2010/100210-BM-BT-Afghanistan.html>).

consider and weigh seriously. Part I provides a brief background of the legal framework for conflict characterization and highlights some additional policy and strategic considerations as a framework for the primary analysis of the overlapping legal frameworks. Part II presents four main categories of operational concepts that can be particularly vulnerable to uncertain conflict characterizations and highlights the legal fault lines that may result from such ambiguity or uncertainty. The first category, detainee issues, includes detention, treatment, transfer, and trial. The second category, use of force, encompasses targeting, weapons, and host nation influence on operations. In the third category, civil–military relations, the primary issues include humanitarian assistance and relations between the military and nongovernmental organizations (“NGOs”); and the fourth category focuses on third state responsibilities during conflict and related situations. In all of these areas, operational challenges can arise in the face of uncertain or differing characterizations of conflict, underscoring the importance of the normative legal frameworks and the need to understand how they interact, and the consequences of any legal fault lines.

## I. BACKGROUND: SETTING THE LEGAL, POLICY, AND STRATEGIC SCENE

### A. *Conflict Characterization in Brief*

Distinguishing between situations of armed conflict and situations not categorized as armed conflict is essential to understanding the rights, privileges, and obligations of states, non-state entities, NGOs, and individuals in both situations. At the most basic level, the rights and duties associated with war—such as the right to attack and kill enemy operatives or the right to detain such persons without charge or trial until the end of hostilities—may only be invoked during periods of armed conflict.<sup>7</sup> As noted above, however, states will often engage in military operations (broadly defined) outside of armed conflict, whether in situations that do not rise to the level of armed conflict or in situations such as disaster relief or humanitarian assistance. In the absence of armed conflict, international human rights law and domestic law govern the conduct of states and individuals and set out their relevant rights, privileges,

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<sup>7</sup> See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings*, at 10, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston); Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 30 (2011).

and duties. It is important to note that international human rights law and domestic law continue to apply even during armed conflict; there is a continuing debate about the extent and content of that application in different types of situations.<sup>8</sup> The contours of that debate lie beyond the scope of this Article, but it is important, especially for the purposes of the instant analysis, to recognize the existence of multiple legal frameworks in a variety of conflict and non-conflict situations.

The law of armed conflict (“LOAC”)—otherwise known as the law of war or international humanitarian law—governs the conduct of both states and individuals during armed conflict, and it seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.<sup>9</sup> The 1949 Geneva Conventions endeavor to encompass all instances of armed conflict<sup>10</sup> and set forth two primary categories of armed conflict that trigger the application of LOAC: international armed conflict and non-international armed conflict. Common Article 2 of the Geneva Conventions states that the conventions “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.”<sup>11</sup> Common Article 3 of the Geneva Conventions sets forth

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<sup>8</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 7, at 9–12, 10 n.53.

<sup>9</sup> Int’l Comm. of the Red Cross [ICRC], *International Humanitarian Law: Answers to Your Questions*, at 4, Pub. Ref. No. 0703 (2002), available at [http://www.ehl.icrc.org/images/stories/resources/ihl\\_answers\\_to\\_your\\_questions.pdf](http://www.ehl.icrc.org/images/stories/resources/ihl_answers_to_your_questions.pdf). The law of armed conflict is codified primarily in the four Geneva Conventions of August 12, 1949 and their Additional Protocols. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter GC IV]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter GC III]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217 [hereinafter GC II]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114 [hereinafter GC I].

<sup>10</sup> INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 26 (Oscar M. Uhler & Henri Coursier eds., 1958) [hereinafter GC IV COMMENTARY] (“Born on the battlefield, the Red Cross called into being the First Geneva Convention to protect wounded or sick military personnel. Extending its solicitude little by little over other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle in *all* cases of armed conflict, including internal ones.”).

<sup>11</sup> GC IV, *supra* note 9, art. 2; GC III, *supra* note 9, art. 2; GC II, *supra* note 9, art. 2; GC I, *supra* note 9, art. 2 [collectively hereinafter Common Article 2].

minimum provisions applicable “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>12</sup> The term “armed conflict” was adopted specifically to avoid the technical legal and political pitfalls of the term “war” and prevent states from claiming that the law does not apply because no declaration of war has been issued.<sup>13</sup> As such, determination of the existence of an armed conflict does not turn on a formal declaration of war or even on how the participants characterize the hostilities, but rather is based on the facts of a given situation.<sup>14</sup>

The Appeals Chamber of the International Criminal Tribunal for Yugoslavia (“ICTY”) set forth the contemporary definition of armed conflict in *Prosecutor v. Tadic*.<sup>15</sup> The ICTY held 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.”<sup>16</sup> The first portion of the definition refers to international armed conflict; the second to non-international armed conflict. A thorough analysis of the definition of armed conflict and the objective triggers for the existence of either an international armed conflict or a non-international armed conflict is beyond the scope of this Article. The purpose in this brief background section is to set forth the basic framework of when LOAC is triggered and the distinction between international and non-international armed conflict. LOAC applies during all situations of armed conflict, with the full panoply of the Geneva Conventions and customary law applicable in international armed conflict and a more limited body of conventional and customary law applicable during non-international armed conflict.<sup>17</sup>

International armed conflict occurs when there is any conflict between two states. Neither the duration of the hostilities, the intensity of any fighting, nor

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<sup>12</sup> GC IV, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC I, *supra* note 9, art. 3 [collectively hereinafter Common Article 3].

<sup>13</sup> See generally GC IV COMMENTARY, *supra* note 10, at 17–25 (addressing Common Article 2).

<sup>14</sup> Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 85 (2005) (“[I]t is worth emphasizing that recognition of the existence of armed conflict is not a matter of state discretion.”); Sylvain Vite, *Typology of Armed Conflicts in International Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69, 72 (2009).

<sup>15</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>16</sup> *Id.* ¶ 70.

<sup>17</sup> *Id.* ¶¶ 67, 70.

the number of wounded or killed affects the characterization as an armed conflict. Rather, as the Commentary to the Geneva Conventions explains, “[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.”<sup>18</sup>

Non-international armed conflicts present a more complex identification paradigm than international armed conflicts. In general, non-international armed conflicts involve protracted armed violence between a government and organized armed groups or between two or more such groups.<sup>19</sup> Treaty provisions do not specify any particular test for determining the applicability of Common Article 3. Instead, as the Commentary explains, the goal is to interpret Common Article 3 as broadly as possible.<sup>20</sup> In identifying non-international armed conflict, the law seeks to “distinguish[] armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”<sup>21</sup> For example, the Inter-American Commission on Human Rights characterized a short-lived attack on a military barracks as a non-international armed conflict because of “the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence.”<sup>22</sup> Some factors or characteristics that are useful in identifying a Common Article 3 conflict include the response of the state,<sup>23</sup> such as whether it employs its regular armed forces and whether it has recognized the non-state actor as a belligerent, and the capability of the non-state actor, such as whether it has an organized military force under a responsible command and whether it

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<sup>18</sup> GC IV COMMENTARY, *supra* note 10, at 20. Note that because all states are parties to the Geneva Conventions, the requirement in Common Article 2 that an international armed conflict be a dispute between two High Contracting Parties is akin to a dispute between two states.

<sup>19</sup> *Tadic*, Case No. IT-94-1-I, ¶ 70.

<sup>20</sup> GC IV COMMENTARY, *supra* note 10, at 36 (“Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of [the suggested criteria]? We do not subscribe to this view. We think, on the contrary, that the scope of application of the article must be as wide as possible.”).

<sup>21</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). Government forces are presumed to be sufficiently organized to be a party to an armed conflict. *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

<sup>22</sup> *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95 doc. 6 rev. ¶ 155 (1997), available at [http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm#\\_ftn1](http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm#_ftn1) (“[P]articularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective—a military base.”).

<sup>23</sup> Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 1, 17 (Michael W. Lewis ed., 2009).

acts as a de facto governing entity within a determinate territory.<sup>24</sup> In particular, courts and tribunals have focused on two primary considerations: “the intensity of the conflict and the organization of the parties to the conflict.”<sup>25</sup> Intensity looks at the seriousness of the fighting to determine whether it has passed from riots and other somewhat random acts of violence to something more akin to regularized military action. Courts look to a non-state party’s level of organization as one way to distinguish armed conflict from unorganized violence and riots, and consider factors such as hierarchical structure, territorial control and administration, the ability to recruit and train combatants, the ability to launch operations making use of military tactics, and the ability to enter peace or cease-fire agreements.<sup>26</sup>

### B. Policy Considerations

Characterization of conflict has broader policy and strategic-level consequences as well, beyond the legal paradigms. Although flexibility at the policymaking level is understandably desirable from a policy standpoint, it may result in uncertainty and ambiguity for military and civilian actors executing the missions. When the legal framework—which sets forth each party’s rights and obligations—is unclear, the operational challenges multiply exponentially. Beyond the immediate challenges on the ground, these ambiguities create two additional problems. First, ad hoc answers to operational challenges may not be readily transferable to the next operation, leaving operators in the unfortunate position of having to readdress challenges and redevelop solutions already faced by their predecessors elsewhere. Second, military and civilian actors will often be left in an uncertain position with respect to their local counterparts, particularly regarding the appropriate parameters for providing advice or counsel, or performing a mentoring role.

Two other important issues arise beyond these significant tactical and operational level concerns. One common response to the question of uncertain

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<sup>24</sup> GC IV COMMENTARY, *supra* note 10, at 35–36. None of these factors is dispositive; rather, these and other factors may be used to distinguish acts of banditry, short-lived insurrection, or terrorist acts from armed conflict. Cases apply different and overlapping factors to determine whether an armed conflict existed. *See, e.g.*, Prosecutor v. Lukić, Case No. IT-98-32/1-T, Judgement, ¶¶ 879–88 (Int’l Crim. Trib. for the Former Yugoslavia July 20, 2009); *Haradinaj*, Case No. IT-04-84-T, ¶ 49; Prosecutor v. Limaj, Case No. IT-03-66-T, Judgement, ¶ 84 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); *Tadic*, Case No. IT-94-1-T, ¶¶ 562–67; Vite, *supra* note 18, at 76–78.

<sup>25</sup> *Tadic*, Case No. IT-94-1-T, ¶ 562.

<sup>26</sup> *Haradinaj*, Case No. IT-04-84-T, ¶ 60; *see also* Lukić, Case No. IT-98-32/1-T, ¶ 884; *Limaj*, Case No. IT-03-66-T, ¶¶ 95–109.

characterization is that it is U.S. policy to apply the full panoply of LOAC in all military operations—to apply the law applicable in international armed conflict to all situations. Department of Defense Directive 2311.01E thus states that “[m]embers of the [Department of Defense] Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”<sup>27</sup> This policy minimizes confusion on the ground, creates a standard set of rules, provides for training without the ambiguities of multiple legal frameworks, and generally facilitates certainty of action for troops and commanders. This approach clearly has great value. However, when considering whether the lack of or conflicting characterizations has an impact on military operations, the across-the-board policy approach also can have two primary and problematic consequences in complex stability operations and conflict—consequences that policymakers should understand, explore, and consider.

The first is an issue of limitation, the second of obligation. As stated above, it is U.S. policy that all situations be viewed as triggering the obligations of the law applicable to international armed conflict and U.S. troops are trained accordingly. While this approach does create certainty, it also means that in complex conflict and stability operations, military leaders and junior and senior commanders may forfeit opportunities to craft more specific solutions and options appropriate to the situation on the ground. In essence, when U.S. policy is to follow the law of international armed conflict unless told otherwise, identifying the “unless told otherwise” times is a critical task to tease out the different types of options available to military and civilian leaders and operators on the ground. The flip side of this first concern is that by treating all situations—from a normative legal perspective—as international armed conflict, commanders and soldiers may find themselves in situations in which, by following the law of international armed conflict, they could actually be in violation of human rights and other legal obligations applicable in the internal conflict or other emergency situation at hand.

## II. OPERATIONAL CHALLENGES AND LEGAL FAULT LINES

In many contemporary conflicts, the complicated nature of the situation on the ground leads to overlapping legal frameworks, uncertain or conflicting characterizations, and other factors that pose challenges for the analysis of

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<sup>27</sup> DEP’T OF DEF., DIRECTIVE 2311.01E: DoD LAW OF WAR PROGRAM ¶ 4.1 (2011), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>.

legal operational obligations and parameters. This Article focuses on four areas in which legal obligations and issues can prove particularly vulnerable to uncertain conflict characterization and thus highlight the legal fault lines at issue: detainee issues, use of force, civil–military relations, and third state responsibilities. In each of these areas, uncertainty regarding the applicable legal framework can create ambiguities because the legal obligations and parameters differ depending on the characterization of the conflict or situation. When these ambiguities produce uneven, delayed, or ineffective implementation of legal obligations, protections for individuals can be affected. Other concerns involve the legitimacy of particular operations and the effective accomplishment of a designated mission. Beyond the tactical and operational ambiguities, each of these areas also raises concerns about the forfeiting of opportunities to craft responses specific to the situation on the ground and the potential for violations of other legal obligations. This Part outlines the key legal frameworks in each of these areas to highlight the operational challenges that can arise, in essence, to frame the normative issues and differences that make characterization matter on the policy and strategic levels, and not just in the lawyer’s office.

#### A. *Detainee Issues*

International humanitarian law provides the legal framework for detention in both international and non-international armed conflicts.<sup>28</sup> Human rights law continues to apply across the spectrum of conflict as well, in varying ways. In non-conflict scenarios, the domestic law of the host state regulates detention, with human rights law providing minimum standards of conduct.<sup>29</sup> In any or all of the situations, UN mandates, bilateral agreements, and other legal frameworks can play an important role as well. This Subpart encompasses four particular areas: detention authority, treatment of detainees, trial, and transfer. The legal understanding of the military operation—characterization as either international armed conflict, non-international armed conflict, or not a conflict—impacts the parameters and term of the detention, the relevant international humanitarian law and human rights norms applicable upon transfer, procedures for review and prosecution, and other issues.

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<sup>28</sup> GC III, *supra* note 9, arts. 4–5; GC IV, *supra* note 9, arts. 42, 78. In non-international armed conflict, the authority to detain stems directly from the principle of military necessity and is a fundamental incident of waging war. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 552–53 (2004); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 10, at 9.

<sup>29</sup> *See* International Covenant on Civil and Political Rights art. 9, *opened for signature* Dec. 16, 1966, 99 U.N.T.S. 171 [hereinafter ICCPR] (defining minimum human rights standards for detention).

### 1. *Detention Authority*

Detention authority and obligations can differ depending on the characterization of any given scenario in five key areas: the basis for detention; procedural requirements for detention; the conditions of detainee release; outside monitoring of detention; and detainee contact with the outside world. Although fundamental notions of respect for human dignity underlie the parameters for detention in any legal regime, international or domestic, the precise content of the legal rights and obligations do differ between international armed conflict, non-international armed conflict, and non-conflict situations. As a result, uncertainty about the governing legal paradigm can lead to ambiguity or confusion regarding the appropriate approach.

#### a. *Basis for Detention*

In an international armed conflict or occupation, LOAC provides for the detention of combatants and of civilians who either participate in hostilities or pose a threat to the security of the occupying power.<sup>30</sup> Prisoners of war (“POWs”) may be detained for the duration of hostilities and must be repatriated at the close of hostilities.<sup>31</sup> Under the POW detention regime in the Third Geneva Convention and earlier customary and conventional law, preventing a return to hostilities is the underlying purpose of detention.<sup>32</sup> In particular, POWs are not liable to prosecution for their lawful wartime acts, which reinforces the fact that they are not held as a form of punishment for engaging in combat.<sup>33</sup> Historical and modern incarnations of law of war detention rest on this notion. As the Lieber Code stated, in one of the earliest codifications of the modern law of war, “So soon as a man is armed by a sovereign government, and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts, are not individual

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<sup>30</sup> GC IV, *supra* note 9, art. 5.

<sup>31</sup> GC III, *supra* note 9, art. 118.

<sup>32</sup> *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (“The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released.”).

<sup>33</sup> *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (“Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets. Belligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent’s municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict. This doctrine has a long history, which is reflected in part in various early international conventions, statutes and documents.”); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 30–31 (2004); *see also* GC III, *supra* note 9, arts. 87, 99.

crimes or offences.”<sup>34</sup> The Nuremberg Tribunal similarly upheld this purpose for POW detention.<sup>35</sup>

Persons who do not qualify for POW status can nonetheless be detained during international armed conflict as well. The Fourth Geneva Convention explicitly contemplates the detention of civilians during international armed conflict “only if the security of the Detaining Power makes it absolutely necessary,”<sup>36</sup> or during belligerent occupation for “imperative reasons of security.”<sup>37</sup> The Commentary to the Fourth Geneva Convention offers some further explanation about the nature of imperative reasons of security:

[A] belligerent may intern people . . . if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage. . . . [T]he State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.<sup>38</sup>

In particular, the mere fact that an individual is an enemy national is not sufficient to justify such internment; rather, any detention must be based on an individualized determination of the threat to security the individual poses.<sup>39</sup> For example, “[s]ubversive activity carried on inside the territory of a Party to

<sup>34</sup> FRANCIS LIEBER, WAR DEP’T, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD ¶ 57 (1863) [hereinafter Lieber Code].

<sup>35</sup> Judgment, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171 (1947), reprinted in 41 AM. J. INT’L L. 172, 229 (1947); see also TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 19 (1970) (“War consists largely of acts that would be criminal if performed in time of peace. . . . Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors.”); Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT’L. REV. RED CROSS 571, 572 (2002).

<sup>36</sup> GC IV, *supra* note 9, art. 42.

<sup>37</sup> *Id.* art. 78; see also *id.* art. 5 (referring to individuals who are “definitely suspected of or engaged in activities hostile to the security of the State”); Ashley S. Deeks, *Security Detention: The International Legal Framework: Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403, 404 (2009) (describing “situations in which states engaged in armed conflict may detain persons” without criminal charges).

<sup>38</sup> GC IV COMMENTARY, *supra* note 10, at 257–58.

<sup>39</sup> MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 9.31 (2004) [hereinafter U.K. MANUAL]; Deeks, *supra* note 37, at 407 (“Embedded in these rules is the unstated requirement that a person must be detained based on the particularities of his situation. For instance, a state may not detain a person for something his neighbor has done, or use a person as a bargaining chip to obtain the release of a detainee held by the opposing state.”); Ryan Goodman, *The Second Annual Solf–Warren Lecture in International and Operational Law*, 201 MIL. L. REV. 237, 245 (2009).

the conflict or actions which are of direct assistance to an enemy Power” fit within this framework.<sup>40</sup>

Civilian internees during international armed conflict or occupation are detainable for only as long as the reasons underlying the initial detention persist,<sup>41</sup> at which time they are to be returned to their place of residence at the time of their detention, or, if they were in transit when detained, to their point of departure.<sup>42</sup> For example, the UN Security Council Resolution governing the activities of the Multi-National Force-Iraq authorized the coalition forces to “take all necessary measures to contribute to the maintenance of security and stability in Iraq,”<sup>43</sup> including “internment where . . . necessary for imperative reasons of security.”<sup>44</sup> The primary recourse a detaining power has in such circumstances is to assigned residence or internment, and only if security reasons make such measures absolutely necessary.<sup>45</sup> The rules governing such internment bear a marked similarity to many of the rules for POW detention, including the obligation to ensure that internment camps are not exposed to the dangers of war.<sup>46</sup>

In situations of non-international armed conflict, Common Article 3 clearly contemplates detention of one or more forms, referencing individuals who are *hors de combat* because of detention, among other reasons.<sup>47</sup> However, no specific provision in LOAC delineates authority for detention in internal armed conflict, where POW status does not exist. Military necessity thus forms the foundation for detention pursuant to LOAC in such conflicts.<sup>48</sup> In essence, it is

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<sup>40</sup> GC IV COMMENTARY, *supra* note 10, at 258; Goodman, *supra* note 39, at 245–46.

<sup>41</sup> GC IV, *supra* note 9, arts. 132–33 (“Internees in the territory of Party to the conflict against whom penal proceedings are pending . . . may be detained until the close of such proceedings.”).

<sup>42</sup> *Id.* art. 135.

<sup>43</sup> S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004); *see also* Public Notice, Office of the Adm’r of the Coal. Provisional Auth., Regarding Public Incitement to Violence and Disorder (June 5, 2003), available at <http://dosfan.lib.uic.edu/ERC/cpa/english/regulations/PN1.pdf> (announcing that all individuals engaged in public incitement to violence and disorder “will be subject to immediate detention by CPA security forces and held as security internee[s] under the Fourth Geneva Convention of 1949”).

<sup>44</sup> S.C. Res. 1546, *supra* note 43, Annex I, at 11. For a comprehensive discussion of security detention in Iraq, *see* Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT’L L. 549 (2011).

<sup>45</sup> GV IV, *supra* note 9, art. 78.

<sup>46</sup> GC III, *supra* note 9, art. 43. For further discussion of the specific rules governing internment of civilians and the similarities to POW detention, *see* U.K. MANUAL, *supra* note 39, ¶¶ 9.37–86.

<sup>47</sup> Common Article 3, *supra* note 12 (“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”).

<sup>48</sup> *See* R (Al Jeddah) v. Sec’y of State for Defence, [2008] 1 A.C. 332, 368 (2006) (U.K.) (holding that the power to detain is implicit in customary LOAC); CHATHAM HOUSE & INT’L COMM. OF THE RED CROSS,

generally recognized that anyone who may be lawfully targeted in internal armed conflict may likewise be detained<sup>49</sup>: notably, members of organized armed groups and civilians directly participating in hostilities. Domestic law will often serve as the basis for detention in non-international armed conflict, for crimes such as murder and treason. Furthermore, the fact that international law provides safeguards for persons detained in such conflicts suggests that it contemplates that operations in internal armed conflict do include the authority to detain.

Beyond authority found in LOAC and domestic law, detention during armed conflict can also rest on authorization in relevant UN Security Council resolutions. In particular, UN Security Council resolutions authorized detention as part of multinational operations in Kosovo and Iraq.<sup>50</sup> For example, UN Security Council Resolution 1244 stated that the international security force's responsibilities in Kosovo would include "[e]nsuring public safety and order until the international civil presence can take responsibility for this task."<sup>51</sup> This mission to ensure public safety was understood to provide a basis for the multinational force to undertake detention. As a NATO press release at the time explained, one "necessary means" for maintaining security and law and order "may be the detention of individuals who pose a threat to the safe and secure environment in Kosovo. Such detentions are fully compliant with international law, are used sparingly and will last for only as long as is absolutely necessary."<sup>52</sup> Similarly, UN Security Council Resolution 1546 expressly authorized the multinational force in Iraq to "take all necessary measures to contribute to the maintenance of security and stability in Iraq."<sup>53</sup> In Iraq, detention authority was specifically linked to that provided in the

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PROCEDURAL SAFEGUARDS FOR SECURITY DETENTION IN NON-INTERNATIONAL ARMED CONFLICT 5–6 (2008) [hereinafter CHATHAM HOUSE]; Geoffrey S. Corn, *The Problem with Law Avoidance*, NAT'L SECURITY L. REP. (Am. Bar Ass'n Standing Comm. on Law & Nat'l Sec., Chi., Ill.), Winter 2010, at 4, 6.

<sup>49</sup> See *infra* Part II.B.

<sup>50</sup> See, e.g., S.C. Res. 1244, ¶ 9, U.N. Doc. S/RES/1244 (June 10, 1999) (providing a mission to ensure public safety and order that was interpreted to provide a basis for detention in Kosovo); S.C. Res. 1546, *supra* note 43, Annex I, at 11 (stating that, in order to counter ongoing security threats, the multinational force will intern individuals where necessary for imperative reasons of security).

<sup>51</sup> S.C. Res. 1244, *supra* note 50, ¶ 9(d).

<sup>52</sup> Press Release, Kosovo Force, DFOR Detention Under UNSCR 1244 (May 5, 2004), *available at* <http://www.nato.int/kfor/docu/pr/2004/05/28.htm>; see also *Behrami v. France*, Eur. Ct. H.R. (2007), ¶ 124, [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow "Case- Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Behrami" in the "Case Title" box and "France" in the "Respondent State" box).

<sup>53</sup> S.C. Res. 1546, *supra* note 43, ¶ 10.

Fourth Geneva Convention: “necessary for imperative reasons of security.”<sup>54</sup> In Afghanistan, ISAF detention authority is considered to stem from UN Security Council Resolution 1833, which directs ISAF “to take all necessary measures to fulfill its mandate,”<sup>55</sup> but does not specifically authorize detention.

In non-conflict situations, much like in non-international armed conflict, domestic law and international human rights law provide the framework for detention. Among other requirements, human rights norms require that detention be grounded in previously established law, that the detainee be informed of the reasons for his detention, and that all detention be subject to judicial review.<sup>56</sup>

*b. Procedural Requirements*

LOAC mandates basic procedural requirements for the detention of individuals within the context of an international armed conflict or occupation. In the case of persons potentially entitled to POW status, Article 5 of the Third Geneva Convention states that if “any doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, [merit POW status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”<sup>57</sup> For those persons where POW status is clear, such as soldiers captured in uniform, no such status hearing is required, because there is no doubt regarding status.<sup>58</sup> For others, this obligation helps ensure that persons are granted the appropriate treatment and classification under the law. It also helps fulfill one spirit and purpose behind the Geneva Conventions framework that all detainees must have some status, either as a POW or as a civilian internee:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the

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<sup>54</sup> See *id.*, Annex I, at 11.

<sup>55</sup> S.C. Res. 1833, ¶ 2, U.N. Doc. S/RES/1833 (Sept. 22, 2008).

<sup>56</sup> See ICCPR, *supra* note 29, arts. 9(1)–(4). This is also true in situations of occupation for the detention of civilians who violate ordinary penal law. See GC IV, *supra* note 9, arts. 67, 71–73.

<sup>57</sup> GC III, *supra* note 9, art. 5.

<sup>58</sup> See *id.* arts. 4–5.

armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law.<sup>59</sup>

LOAC contains no specific procedural requirements for Article 5 tribunals other than the general statement that such hearings must be held by a “competent tribunal.”<sup>60</sup> It is generally understood that Article 5 hearings “were not envisaged as judicial bodies obliged to comply with fair trial guarantees” but can be significantly less formal and organized.<sup>61</sup> Detaining powers mandate the particular procedural framework, which can and will differ depending on the location, nature of the conflict, number of detainees, and other factors.<sup>62</sup> One example of such procedures can be found in the guidance provided by U.S. Central Command to Army units during the 1991 Gulf War, which defined a tribunal as a “panel of three commissioned officers, at least one of whom must be a judge advocate, convened to make determinations of fact pursuant to GPW Article 5.”<sup>63</sup> In the United Kingdom, Article 5 tribunals are governed by the 1958 Prisoner of War Determination of Status Regulations,<sup>64</sup> according to which a competent tribunal “consists of a board of inquiry which makes a report that constitutes the effective determination of the status of the person concerned.”<sup>65</sup>

In the case of civilians detained during international armed conflict or occupation, the Fourth Geneva Convention sets forth procedural requirements and protections. Article 43 mandates that “[a]ny protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.”<sup>66</sup> Any such court or administrative board must review the case at least twice

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<sup>59</sup> GC IV COMMENTARY, *supra* note 10, at 51.

<sup>60</sup> GC III, *supra* note 9, art. 5.

<sup>61</sup> Jelena Pejic, *Unlawful/Enemy Combatants*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULT LINES 335, 336 (Michael N. Schmitt & Jelena Pejic eds., 2007).

<sup>62</sup> *Id.*

<sup>63</sup> U.S. CENT. COMMAND, REGULATION NUMBER 27-13, CAPTURED PERSONS: DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS ¶5(k) (1995), available at [http://www.aclu.org/torturefoia/legaldocuments/july\\_docs/\(G\)%20%20MISCELLANEOUS%20BATCH%201.pdf](http://www.aclu.org/torturefoia/legaldocuments/july_docs/(G)%20%20MISCELLANEOUS%20BATCH%201.pdf). The regulation set forth the powers of the tribunal, including calling witnesses, determining the mental and physical capacity of the detainee to participate, and requiring or requesting the production of documents, and the rights of the detainee during the proceeding. *Id.* app. C, ¶4.

<sup>64</sup> See U.K. MANUAL, *supra* note 39, ¶8.21.

<sup>65</sup> Naqvi, *supra* note 35, at 588 (noting that the regulations include the requirement that detainees be represented by a lawyer at the public expense).

<sup>66</sup> GC IV, *supra* note 9, art. 43.

each year to determine if the individual detained can be released.<sup>67</sup> Furthermore, protected persons detained for imperative reasons of security under Article 78 of the Fourth Geneva Convention are entitled to appeal and periodic review of their detention.<sup>68</sup> The goal of these provisions is to minimize opportunities for abuse by ensuring procedures for appeal and regular review. As the Fourth Geneva Convention's Commentary explains,

[t]he essential point is that protected persons should be absolutely free to make their appeals and that the authorities should examine them with absolute objectivity and impartiality. They must never forget that the Convention describes internment and placing in assigned residence as exceptionally severe measures which may be applied only if they are absolutely necessary for the security of the State.<sup>69</sup>

Unlike POWs, therefore, who are held until the end of hostilities without review of their detention (except in cases of penal prosecution for crimes committed pre-capture or during captivity), civilians detained in the course of international armed conflict or occupation have the right to appeal and periodic review of their detention.<sup>70</sup> Given the extraordinary power enemy or occupying forces have over such civilians, such obligations and procedures are critically important.<sup>71</sup>

Neither conventional nor customary law relating to armed conflicts includes any statement regarding the procedural requirements for detention in

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<sup>67</sup> *Id.*

<sup>68</sup> *See id.* art. 78 (“Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention.”).

<sup>69</sup> GC IV COMMENTARY, *supra* note 9, at 260–61.

<sup>70</sup> *Id.*

<sup>71</sup> *See, e.g.,* Coard v. United States, Case 10:951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 60 (1999) (stating that the rules authorizing security detention of civilians during international armed conflict as an extraordinary measure “require that it be implemented pursuant to a regular procedure which enables the detainee to be heard and to appeal the decision ‘with the least possible delay’”). In Iraq, for example, the procedures for detention by the multinational force included specific procedures for review:

Detainees in Iraq receive review of their detention every six months. These periodic reviews occur in the form of a Multi-National Force Review Committee (MNFRC), a three-officer board that assesses the threat posed by each detainee. The MNFRC reads the case summary to the detainee at the review. The detainee may make an oral statement to the Committee, may present evidence, and may ask questions of witnesses. The Committee informs the detainee of the final decision within 45 days of the review.

Deeks, *supra* note 37, at 422.

non-international armed conflict, particularly administrative detention akin to that contemplated in the Fourth Geneva Convention and Additional Protocol I. As the President of the International Committee of the Red Cross (“ICRC”) recently noted in reporting on the current state of LOAC, “[t]here are simply no procedural safeguards in treaties of humanitarian law to deal with [the widespread practice of internment without criminal charge] during non-international armed conflicts.”<sup>72</sup> Notably, Additional Protocol II, which applies only to a certain class of non-international armed conflicts and includes enhanced protections relative to Common Article 3, makes no mention of procedures to be taken at the start of or during detention.<sup>73</sup> Rather, such detention and any requisite procedures are governed by domestic law,<sup>74</sup> which may incorporate or be informed by human rights provisions and the due process requirements set forth in the International Covenant on Civil and Political Rights (“ICCPR”), for example.<sup>75</sup> Customary international law forbids arbitrary detention in non-international armed conflict.<sup>76</sup> These same standards—in domestic law and international human rights law—form the appropriate paradigm in non-conflict situations as well.

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<sup>72</sup> Jakob Kellenberger, President, Int’l Comm. of the Red Cross, Strengthening Legal Protection for Victims of Armed Conflicts (Sept. 21, 2010), available at <http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm>.

<sup>73</sup> Additional Protocol II applies to non-international armed conflicts between a state signatory to the Protocol and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and . . . implement” the Protocol. AP II, *supra* note 9, art. 1. Article 5 of Additional Protocol II provides protections for persons who have been detained, but is silent as to procedures, appeals, or reviews. *See, e.g.*, Laura M. Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulations of Internment in Non-international Armed Conflict*, 40 CASE W. RES. J. INT’L L. 437, 442 (2009) (“The Second Additional Protocol applicable in non-international armed conflict briefly mentions internment, but provides no guidance regarding procedures either to assess the decision to intern or to terminate captivity. Again, Common Article 3 does not speak to the issue.”).

<sup>74</sup> Deeks, *supra* note 37, at 405. It is unclear, however, whether a state engaged in a non-international armed conflict in the territory of another state, as is the case for the United States in Afghanistan, may draw upon its own domestic law or only the domestic law of the state in which it is operating. *See* CHATHAM HOUSE, *supra* note 48, at 7.

<sup>75</sup> *See, e.g.*, ICCPR, *supra* note 29, arts. 8–10. Note also that the law of international armed conflict can provide useful analogies and guidance for exploring the parameters of detention in non-international armed conflict. *See, e.g.*, Goodman, *supra* note 39, at 240–42.

<sup>76</sup> In the context of a non-international armed conflict, arbitrary means detention of a civilian not supported by military necessity or detention of a civilian beyond the existence of the necessity requiring the initial detention. *See* CHATHAM HOUSE, *supra* note 48, at 4.

c. *Outside Monitoring*

The law of international armed conflict establishes a framework for external monitoring and implementation of the obligations of states. The concept of a “protecting power,” which first appeared in a treaty in the 1929 Geneva Convention on the Treatment of Prisoners of War, relies on neutral third states to protect the rights and duties of parties to international armed conflicts.<sup>77</sup> Articles 8 and 9 of the Third and Fourth Geneva Conventions set forth the protecting powers system.<sup>78</sup> The ICRC also plays an essential role in monitoring the implementation of LOAC during armed conflict, particularly with regard to POWs and other detainees. In particular, given that the protecting power system has barely, if ever, been used in the years since World War II, “[t]he role of the ICRC has taken on an increasing importance in the light of the failure of states to appoint protecting powers.”<sup>79</sup>

With regard to detention in international armed conflict, Protecting Powers and the ICRC “shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war . . . [and] be able to interview the prisoners, and in particular the prisoners’ representatives.”<sup>80</sup> Article 143 of the Fourth Geneva Convention provides for the same rights for Protecting Powers and the ICRC regarding protected persons<sup>81</sup> detained during the course of international armed conflict.<sup>82</sup> In both

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<sup>77</sup> See generally George A.B. Peirce, *Humanitarian Protection for the Victims of War: The System of Protecting Powers and the Role of the ICRC*, 90 MIL. L. REV. 89 (1980) (describing the history of the protecting power system in both customary and treaty law).

<sup>78</sup> Respectively, Article 8 of the Third Geneva Convention and Article 9 of the Fourth Geneva Convention state:

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties. The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

GC IV, *supra* note 9, art. 9; GC III, *supra* note 9, art. 8.

<sup>79</sup> U.K. MANUAL, *supra* note 39, ¶ 16.13.1.

<sup>80</sup> GC III, *supra* note 9, art. 126.

<sup>81</sup> Protected Persons are a specially defined class of persons in international armed conflict, defined in Article 4 of the Fourth Geneva Convention: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” GC IV, *supra* note 9, art. 4.

situations, detaining powers cannot prohibit visits by Protecting Powers or the ICRC except for “reasons of imperative military necessity, and then only as an exceptional and temporary measure.”<sup>83</sup>

LOAC does not impose any obligations for outside monitoring of individuals detained in non-international armed conflicts, but there remains at a minimum the recognition that persons should not be held incommunicado.<sup>84</sup> Furthermore, the ICRC has a right to request access to persons detained in such conflicts and regularly visits detention centers in a range of countries involved in non-international armed conflict.<sup>85</sup> In the absence of armed conflict, international law does not include any procedures for or obligations to submit to outside monitoring of detention.

#### *d. Conditions of Release*

Consistent with the other facets of detention addressed here, LOAC provides significant guidance regarding the conditions of release for POWs and civilian internees during international armed conflict, but offers minimal guidance regarding the release of detainees in non-international armed conflict. A fundamental feature of the POW regime is that POWs must be repatriated as soon as possible after the end of active hostilities.<sup>86</sup> Once the fighting is over, the justification for holding enemy personnel—removing them from the battlefield—no longer exists. The Third Geneva Convention then sets forth detailed procedures for such repatriation, including the restoration of any articles of value to POWs and provisions for POWs to take their personal effects with them upon repatriation or have them forwarded.<sup>87</sup> For civilians interned for imperative reasons of security during occupation or international armed conflict, the regime for release includes an additional element. Like POWs, civilian internees must be released as soon as possible after the close of hostilities. In a clear demonstration of a key difference between POW detention and civilian internment, however, the Fourth Geneva Convention

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<sup>82</sup> GC IV, *supra* note 9, art. 143 (“Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work. They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter. . . . The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives.”).

<sup>83</sup> *Id.*; GC III, *supra* note 9, art. 126.

<sup>84</sup> Jelena Pejic, *Procedural Principles and Safeguards*, 87 INT’L REV. RED CROSS 375, 389–90 (2005).

<sup>85</sup> *Id.* at 391.

<sup>86</sup> GC III, *supra* note 9, art. 118.

<sup>87</sup> *Id.* art. 119.

also requires that each individual internee be released as soon as the reasons necessitating his or her internment have ended, which may be during the conflict.<sup>88</sup> This rule thus reinforces “that internment may be ordered only if the security of the Detaining Power makes it absolutely necessary.”<sup>89</sup> One final provision governing the release of detained persons appears in Additional Protocol I: Article 75(3) mandates that

[e]xcept in cases of arrest or detention for penal offences, [all persons arrested, detained or interned for actions related to the armed conflict] shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.<sup>90</sup>

Recognizing the importance placed on prompt release and repatriation of both POWs and civilian internees, the grave breaches provisions of Additional Protocol I include an “[u]njustifiable delay in the repatriation of prisoners of war or civilians” as a grave breach.<sup>91</sup>

In non-international armed conflict, much like in the other areas covered here regarding detention, the conventional law offers little, if any, guidance regarding conditions of release and repatriation. Although Additional Protocol II refers, albeit obliquely, to the release of detained persons in Articles 2(2)<sup>92</sup> and 5(4),<sup>93</sup> treaty law governing non-international armed conflict contains no specific provisions detailing the timeframe or the obligations relevant to release and repatriation. The ICRC’s Customary International Law Study includes as customary law the rule that “[p]ersons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist,” based on agreements

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<sup>88</sup> See GC IV, *supra* note 9, art. 132.

<sup>89</sup> GC IV COMMENTARY, *supra* note 10, at 510–11.

<sup>90</sup> AP I, *supra* note 9, art. 75(3).

<sup>91</sup> *Id.* art. 85(4)(b).

<sup>92</sup> Additional Protocol II dictates:

At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

AP II, *supra* note 9, art. 2(2).

<sup>93</sup> *Id.* art. 5(4) (“If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.”).

in various internal conflicts, national legislation, and official statements.<sup>94</sup> In non-conflict situations, again, domestic law—as informed by human rights obligations—governs the terms and process for release of detainees.

*e. Contact with the Outside World*

The Geneva Conventions establish a comprehensive framework for POWs and civilian internees to communicate with the outside world during international armed conflict. In both situations, elaborate rules set forth the number and type of correspondence permitted, parameters for censorship, obligations regarding postage, and other specifics.<sup>95</sup> One significant difference, however, is that civilians interned under an occupation may be restrained from communicating with the outside world if they are believed to be saboteurs, spies, or definitively engaged in hostile acts against the occupying power, and military security necessitates such restrictions.<sup>96</sup> In light of concerns about the potential widespread application of this derogation article, the Commentary to the Fourth Geneva Convention emphasizes “that Article 5 can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow . . . [and never] as a result of mere suspicion.”<sup>97</sup>

Interestingly, in a departure from the previous categories, the conventional law does include at least one statement regarding communication rights of detainees during non-international armed conflict. Article 5 of Additional Protocol II, which applies only to a certain subset of non-international armed conflict,<sup>98</sup> states that persons interned or detained for reasons relating to the armed conflict “shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary.”<sup>99</sup> With limits for the capability of the detaining power and concerns of necessity, this protection is significantly less comprehensive and less mandatory than the protections set forth in the Third and Fourth Geneva

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<sup>94</sup> See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 451–53 (2005) [hereinafter CIHL].

<sup>95</sup> See, e.g., GC IV, *supra* note 9, arts. 107–12; GC III, *supra* note 9, arts. 71–77.

<sup>96</sup> GC IV, *supra* note 9, art. 5. (“Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.”).

<sup>97</sup> GC IV COMMENTARY, *supra* note 10, at 58.

<sup>98</sup> See AP II, *supra* note 9, art. 1(1).

<sup>99</sup> *Id.* art. 5(2)(b).

Conventions, but it does represent an important recognition that persons detained during non-international armed conflict must not be held *incommunicado*.

The ICCPR does not delineate specific rights to communication for persons detained in non-conflict situations. Article 36 of the Vienna Convention on Consular Relations mandates that all foreign nationals detained before or after trial have a right to consular visits and communication.<sup>100</sup> Furthermore, in two comprehensive sets of principles regarding the rights of detained persons and the obligations regarding their treatment, the UN has set forth several rules or minimum standards with regard to communication. The UN Standard Minimum Rules for the Treatment of Prisoners states that prisoners “shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.”<sup>101</sup> This document also reinforces the right to consular visits and communication, as does the UN General Assembly’s Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>102</sup>

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Divergent characterizations of a conflict or blurred lines between situations can lead to significant ambiguities and operational complexities regarding who has authority to detain individuals and for how long. For example, varying characterizations of the situation in Afghanistan have led not only to divergent practices between U.S. forces engaged in the Operation Enduring Freedom and ISAF missions, but to multiple different practices among the ISAF contributing states.<sup>103</sup> For example, while one state authorizes its forces to detain under the ISAF aegis, another refuses to detain at all. Thus, when the latter state finds itself in a position where it must detain an individual, it will *not* detain that individual, but rather hold him or her in place until a detaining state can arrive to detain the individual. Moreover, divergent practices among even the ISAF

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<sup>100</sup> Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 27 U.S.T. 77, 596 U.N.T.S. 261.

<sup>101</sup> First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, Switz., Aug. 22–Sept. 3, 1955, *Proceedings of the Congress*, Annex I(A) art. 37, U.N. Doc. A/CONF/6/1, at 69 [hereinafter Standard Minimum Rules for the Treatment of Prisoners].

<sup>102</sup> G.A. Res. 43/173, annex princ. 16(2), U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

<sup>103</sup> See generally AFG. INDEP. HUMAN RIGHTS COMM’N, TORTURE, TRANSFERS, AND DENIAL OF DUE PROCESS: THE TREATMENT OF CONFLICT-RELATED DETAINEES IN AFGHANISTAN (2012), available at <http://www.aihrc.org.af/media/files/AIHRC%20OSF%20Detentions%20Report%20English%2017-3-2012%20%28Final%29%20.pdf>.

detaining states led NATO, after several years, to finally impose the uniform ninety-six hour detention rule on all ISAF forces.<sup>104</sup> In addition, as the past decade has highlighted, uncertainty or debate regarding the overarching legal paradigm for a conflict between a state and non-state terrorist groups—including questions regarding the characterization, duration, and geographic parameters of the conflict, among others—have left states and others “without clear, comprehensive international rules to govern . . . detention operations.”<sup>105</sup>

## 2. Treatment

In all situations—whether international or non-international armed conflict, or a non-conflict situation—international law protects all individuals, including those who have been detained, from cruel or inhuman treatment and torture. Beyond the provisions in the four Geneva Conventions that apply in all situations of international armed conflict, international law contains numerous prohibitions on the use of torture and other abusive treatment.<sup>106</sup> In internal armed conflict, “[t]he treatment of detainees is governed by the domestic law of the country concerned, any human rights treaties binding on that state in the time of armed conflict and . . . basic humanitarian principles.”<sup>107</sup> The prohibition against torture is *jus cogens* and no derogations are allowed, whether in times of national crisis or armed conflict.<sup>108</sup>

POWs and protected persons in an international armed conflict or occupation, however, are specially protected from not just cruel or inhuman treatment, but also from insult or public display.<sup>109</sup> Similarly, human rights law prohibits subjecting civilian prisoners to insult or public curiosity.<sup>110</sup> The comprehensive international law prohibitions on torture and cruel or inhuman

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<sup>104</sup> See Press Conference, James Appathurai, NATO Spokesman, Remarks on the Foreign Ministers’ Meetings (Dec. 8, 2005), available at <http://www.nato.int/docu/speech/2005/s051208g.htm> (outlining IASF detention policy).

<sup>105</sup> John B. Bellinger & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 202 (2011); see also Deeks, *supra* note 37, at 434 (arguing for the acceptance of five basic rules governing detention in all situations to avoid the challenges of conflict characterization, promote counterinsurgency goals, and, in multinational detention operations, “ensur[e] that allies start from the same procedural propositions”).

<sup>106</sup> See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) [hereinafter UN Convention Against Torture].

<sup>107</sup> U.K. MANUAL, *supra* note 39, ¶ 15.30.3.

<sup>108</sup> UN Convention Against Torture, *supra* note 106, annex art. 2.

<sup>109</sup> GC III, *supra* note 9, art. 13.

<sup>110</sup> See, e.g., Standard Minimum Rules for the Treatment of Prisoners, *supra* note 101, art. 45(1).

treatment, found in LOAC and in human rights law, lead to similar legal paradigms for treatment of detainees across the spectrum of conflict characterization. However, differing characterizations of conflict do impact one area of treatment in particular: the privileges owed to POWs in international armed conflict and civilians detained by an occupying authority. For example, Article 25 of the Third Geneva Convention mandates that POWs be “quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area,”<sup>111</sup> with allowances made for special national or religious practices, and separate sleeping quarters for women and men.<sup>112</sup> POWs and civilian internees “shall enjoy complete latitude in the exercise of their religious duties”<sup>113</sup> and have access to “intellectual, educational and recreational pursuits, sports and games.”<sup>114</sup> Such privileges do not apply to adult individuals detained in a non-international armed conflict or in a non-conflict situation. Treatment is thus one area in which fundamental norms of international law prohibiting torture and inhuman treatment across all situations create a consistent paradigm for the treatment of persons detained in a range of situations. Nonetheless, the types of seeming technicalities described above are relevant and can present stumbling blocks in the absence of clear legal frameworks on the ground.

### 3. *Trial*

The trial of detainees—and the nature and amount of process afforded to them—depends on the character of the conflict and status of the detainee. In international armed conflicts, including occupation, international law strictly regulates the trial of POWs.<sup>115</sup> POWs can be tried only in a court-martial and only for offenses for which soldiers of the detaining state would likewise be tried.<sup>116</sup> Most importantly, under the principle of combatant immunity explained above, LOAC proscribes the trial of a lawful combatant for lawful acts of war committed within the context of an armed conflict—thus, for instance, a combatant may not be prosecuted for murder for the otherwise lawful act of killing an enemy combatant.<sup>117</sup> Combatants are, however, subject to trial for war crimes, other pre-capture criminal acts unrelated to the conflict,

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<sup>111</sup> GC III, *supra* note 9, art. 25.

<sup>112</sup> U.K. MANUAL, *supra* note 39, ¶ 8.49.

<sup>113</sup> GC IV, *supra* note 9, art. 93.

<sup>114</sup> *Id.* art. 94.

<sup>115</sup> *See, e.g.*, GC III, *supra* note 9, arts. 84–88.

<sup>116</sup> *Id.* arts. 84, 87.

<sup>117</sup> *See id.* art. 99; *supra* text accompanying note 34.

and crimes committed during captivity.<sup>118</sup> Individuals who engage in hostilities but are not combatants can be tried in a variety of fora, including military commissions, domestic courts, international tribunals, and other appropriate venues. In all such cases, however, international law mandates a minimum threshold of judicial guarantees and protections.<sup>119</sup> During occupation, detained civilians are subject to the laws and courts of the occupied state that existed prior to the occupation.<sup>120</sup>

In internal armed conflict, on the other hand, LOAC offers little guidance for trials of either persons who are fighting or other individuals. All persons taking no active part in hostilities are protected from extrajudicial sentencing and execution, as informed by general principles of international law.<sup>121</sup> Customary international humanitarian law applicable in non-international armed conflict is recognized as guaranteeing a right to fair trial for all detainees.<sup>122</sup> Importantly, though, individuals engaged in a non-international armed conflict are not protected by combatant immunity, meaning they may be tried under domestic law for murder for engaging in acts which, had they been committed by a combatant during an international armed conflict, would be considered lawful.<sup>123</sup> Ultimately, persons detained during a non-international armed conflict, though protected by Common Article 3, are subject to domestic law.<sup>124</sup>

Obviously, persons detained in a non-conflict scenario are subject to the established law of the host state in the tribunals of that state. Multinational or

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<sup>118</sup> Corn & Finegan, *supra* note 4, at 1121–23; Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 9–10 (2004).

<sup>119</sup> See AP I, *supra* note 9, art. 75.

<sup>120</sup> Detained civilians are also subject to any newly enacted provisions of the occupying power subject to the provisions of Fourth Geneva Convention, including its prohibition on retroactivity. See GC IV, *supra* note 9, art. 65.

<sup>121</sup> Common Article 3, *supra* note 12.

<sup>122</sup> CIHL, *supra* note 94, at 352–54. A fair trial is one: that is conducted before an independent, impartial, and regularly constituted court; that presumes the innocence of the detainee; where the detainee has been informed of the nature and cause of the charges against him; where the detainee is provided with the means and opportunity to defend himself; and where the trial is public and occurs without undue delay.

<sup>123</sup> John P. Cerone, *Status of Detainees in Non-international Armed Conflict, and Their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld*, AM. SOC'Y INT'L L. INSIGHTS (Am. Soc'y of Int'l Law, Wash. D.C.), July 14, 2006, available at <http://www.asil.org/insights060714.cfm> (noting that “non-state combatants in a non-international armed conflict may be prosecuted for all hostile acts, including violations of ordinary domestic law, irrespective of whether they have violated any norms of international law”).

<sup>124</sup> *Id.*

foreign forces deployed to a host state as part of a stability operations mission may be subject to either the host state's domestic law or the deploying state's domestic law, depending on a governing Status of Forces Agreement ("SOFA") or, potentially, an applicable UN mandate.

Complex military operations and uncertain characterization can create a range of ambiguities and complications in this area. Without a firm legal framework in place, military and civilian actors on the ground may face significant uncertainties regarding who can be tried, in what venue, under what procedures, and for what crimes. As a consequence, individuals detained may face lengthier detention and a lack of access to individual accountability determinations because of the need to assess the appropriate parameters for trials.

#### 4. *Transfer*

The principle of *non-refoulement* and the associated human rights protections apply to the transfer of prisoners at all times. According to these protections, individuals may not be transferred to states where they will likely suffer severe human rights deprivations, particularly torture or inhuman treatment.<sup>125</sup> Most importantly, "[t]he prohibition on torture is regarded as nonderogable, not subject to any exclusions, and also binding where the rendering state is a party to the treaty but the receiving state is not."<sup>126</sup> *Non-refoulement* is a foundational principle in refugee law, which has an important role for the protection of persons caught up in armed conflict. Article 33 of the 1951 Refugee Convention prohibits the forcible return or expulsion of a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>127</sup>

Within the context of armed conflict, recent experiences in Afghanistan and Iraq demonstrate the relevance of transfer and the applicable legal frameworks in today's conflicts and military operations. In particular, the main transfer-related issues that may differ based on the characterization of a given situation include where and to whom a detainee may be transferred, and post-transfer monitoring obligations.

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<sup>125</sup> See UN Convention Against Torture, *supra* note 106, art. 3.

<sup>126</sup> Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. REV. 457, 477 (2003).

<sup>127</sup> Convention Relating to the Status of Refugees art. 33, July 28, 2951, 19 U.S.T. 6259.

a. *Transfer Where and to Whom?*

LOAC places some limitations on the ability of a detaining authority to transfer detainees in an armed conflict. In international armed conflict, POWs can only be transferred to another state that is a party to the Geneva Conventions.<sup>128</sup> Furthermore, POWs are not to be transferred to an internment facility that imposes additional hardship on their eventual repatriation.<sup>129</sup> For civilian internees held during occupation, the Fourth Geneva Convention prohibits occupying authorities from transferring civilian detainees out of the occupied state.<sup>130</sup> Protected persons, as defined in Article 4 of the Fourth Geneva Convention, also cannot be transferred to a state that is not a party to the Geneva Conventions.<sup>131</sup> Although all states are parties to the Geneva Conventions, making this obligation—and the corresponding obligation regarding transfer of POWs—seem no longer important, it does highlight the importance placed on ensuring that POWs and protected persons retain the protections of the Geneva Conventions in all situations. One notable difference between the transfer regimes for POWs and for protected persons is that the Fourth Geneva Convention specifically prohibits the transfer of a protected person “to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs,”<sup>132</sup> a direct incorporation of the full scope of *non-refoulement*. In all transfer cases, the detainee or POW is to be afforded opportunity to notify his next of kin if he is transferred.<sup>133</sup>

Although the law of non-international armed conflict offers little black letter guidance regarding the transfer of detainees in a non-international armed conflict, the overarching international legal framework of *non-refoulement* in human rights law and refugee law continues to apply at all times. Therefore, detainees in non-international armed conflict cannot be transferred to a state or another party where they will face torture or inhuman treatment.<sup>134</sup> Article 5(4) of Additional Protocol II does recognize the need for detaining powers to consider the subsequent treatment of released or transferred detainees by noting that, when releasing detainees, “necessary measures to ensure their safety shall be taken by those so deciding.”<sup>135</sup> At a minimum, this provision

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<sup>128</sup> GC III, *supra* note 9, art. 12.

<sup>129</sup> *Id.* art. 46.

<sup>130</sup> GC IV, *supra* note 9, art. 49.

<sup>131</sup> *Id.* art. 45.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* art. 106; GC III, *supra* note 9, art. 48.

<sup>134</sup> See UN Convention Against Torture, *supra* note 106, art 3.

<sup>135</sup> AP II, *supra* note 9, art. 5(4).

reinforces the principles and obligations inherent in *non-refoulement*. In addition, the protections in Article 12 of the Third Geneva Convention and Article 45 of the Fourth Geneva Convention can be seen as a useful guide even in non-international armed conflict. Thus,

the humanitarian principle underlying these provisions, namely that a detaining power should ensure that the ally to whom it transfers detainees treats them according to the standards of the Geneva Conventions, should also be taken into account in non-international armed conflict (especially in so-called internationalized non-international armed conflicts—that is, internal conflicts in which foreign troops from outside the country intervene on the side of the government). For instance, if countries contributing troops to a multinational force in a non-international armed conflict transfer detainees amongst each other, the principle underlying Articles 12(2) of the Third and 45(3) of the Fourth Geneva Convention should be taken into account.<sup>136</sup>

Similarly, domestic law and human rights law govern the transfer of any detainees during a non-conflict situation as well, even when military personnel are involved.

*b. Post-transfer Monitoring and Obligations*

A detaining party in international armed conflict or occupation may not transfer a detainee to another authority that will violate the provisions of the Geneva Conventions.<sup>137</sup> For both POWs and protected persons, the authority responsible for the original detention of an individual retains responsibility for the detainee's treatment even after transferring the detainee to another authority.<sup>138</sup> Article 12 of the Third Geneva Convention thus mandates that such transfers can only take place “after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.”<sup>139</sup> Although the transferee state then assumes responsibility for the application of all obligations in the Geneva Conventions regarding the detainees, the transferring state has obligations to step in and rectify the

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<sup>136</sup> Cordula Droege, *Transfer of Detainees: Legal Framework, Non-refoulement, and Contemporary Challenges*, 90 INT'L REV. RED CROSS 669, 675–76 (2008) (noting that the norms of humanitarian law, refugee law, and human rights law must be seen as complimentary in such situations, not exclusionary).

<sup>137</sup> See GC III, *supra* note 9, art. 12; GC IV, *supra* note 9, art. 45.

<sup>138</sup> GC III, *supra* note 9, art. 12; GC IV, *supra* note 9, art. 45.

<sup>139</sup> GC III, *supra* note 9, art. 12. The Fourth Geneva Convention contains the same requirement with regard to transfers of Protected Persons in Article 45. See GC IV, *supra* note 9, art. 45.

situation.<sup>140</sup> As the Commentary to the Third Geneva Convention explains, this system of subsidiary responsibility helps ensure appropriate treatment for any transferred persons.<sup>141</sup> Thus, the transferring power, upon learning of inadequacies in treatment, may send direct assistance in the form of food, medical equipment and personnel, or other provisions.<sup>142</sup>

If these measures nevertheless prove inadequate, if the poor treatment given to prisoners is not caused merely by temporary difficulties but by ill-will on the part of the receiving Power, or if for any other reason the situation cannot be remedied, the Power which originally transferred the prisoners must request that they be returned to it.<sup>143</sup>

These responsibilities will often have a powerful impact on detention decisions early on, such as in the Vietnam War, for example. Amidst the complexity of the characterization of the conflict and the varied categories of individuals involved in the conflict and being detained by U.S. forces, the United States also faced the practical considerations involved in seeking to transfer detainees to the South Vietnamese authorities. By characterizing a broad swath of detainees as POWs, the United States ensured that it remained in compliance with these obligations under the Third Geneva Convention.<sup>144</sup>

Transfer obligations and implementation is an area in which uncertainty regarding the characterization of a conflict or situation—or differing characterizations—and the resultant ambiguities are particularly problematic, especially in multinational operations. For example, in Afghanistan, a variety

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<sup>140</sup> See, e.g., GC III, *supra* note 9, art. 12 (“Nevertheless, if [the transferee] Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall . . . take effective measures to correct the situation or shall request the return of the prisoners of war.”). Article 45 of the Fourth Geneva Convention contains the same obligation. GC IV, *supra* note 9, art. 45.

<sup>141</sup> INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 137 (1952).

<sup>142</sup> *Id.* at 138–39.

<sup>143</sup> *Id.* at 139.

<sup>144</sup> GEORGE S. PRUGH, VIETNAM STUDIES: LAW AT WAR: VIETNAM 1964–1973, at 66 (1975) (“The classification of Viet Cong combatants and Viet Cong suspects posed an interesting legal problem. Because it believed the Viet Cong were traitors and criminals, the Vietnam government was reluctant to accord prisoner of war status to Viet Cong captives. Furthermore it was certainly arguable that many Viet Cong did not meet the criteria of guerrillas entitled to prisoner of war status under Article 4, Geneva Prisoner of War Conventions. However, civil incarceration and criminal trial of the great number of Viet Cong was too much for the civil resources at hand. In addition, Article 22 prohibited the mingling of civil defendants with prisoners of war. By broadly construing Article 4, so as to accord full prisoner of war status to Viet Cong Main Force and Local Force troops, as well as regular North Vietnamese Army troops, any Viet Cong taken in combat would be detained for a prisoner of war camp rather than a civilian jail.”).

of considerations played a role in transfer decisions: the desire to assist the host government in building capacity to ensure law and order, ISAF's ninety-six-hour rule for release or transfer of detainees, and the fact that most international organizations or states operating in Afghanistan do not have facilities for holding people in custody.<sup>145</sup> Because none of these considerations would justify the failure to fulfill international legal obligations under the principle of *non-refoulement*,<sup>146</sup> many states have simply not engaged in detention operations at all. In situations where multiple forces are engaged in detention and possibly trial, such ambiguities can create situations in which transfers are not carried out appropriately or are delayed unnecessarily simply through a lack of clear legal guidelines. In addition, a common problem is that in each new scenario, operators on the ground must reinvent effective procedures in the absence of a discernable legal framework. Questions of authority, obligation, individual rights, and procedures thus loom large along the fault lines between different types of conflict and non-conflict scenarios.

### *B. Use of Force and Conduct of Hostilities*

States use military force in a wide range of situations, including many outside of defined armed conflict scenarios. Considerations pertaining to the use of force pose some of the most complicated issues in complex military operations. The fundamental split between LOAC (applicable in times of armed conflict) and human rights law (the governing framework in non-conflict situations and applicable during conflict subject to the more specific authority of LOAC) highlights these challenges at the most basic level. LOAC authorizes states to use force as a first resort against legitimate targets. In contrast, human rights law requires that force be used only as a last resort, a traditional law enforcement paradigm. The use of force outside an armed conflict scenario also implicates the international law of self-defense.

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<sup>145</sup> Droege, *supra* note 136, at 693.

<sup>146</sup> *Id.* ("Transfers arising in multinational operations abroad are only now drawing attention to legal and practical issues. The real challenge will be to find practical solutions to accommodate the object and purpose of those operations and their inherent restrictions as operations carried out at the invitation of the host government and often under the auspices or even under the command and control of the United Nations. Solutions will have to take into account the very limited capacity and political will to detain persons who should normally be detained by the host country, while at the same time respecting the principle of *non-refoulement*. Solutions can encompass, among others, prolongation of temporary detention, transfers to third states, transfers to specific places where there is no risk, and monitoring or even joint administration of detention to monitor transferred persons.").

Within these parameters, targeting issues, types of weapons, and the role and authority of host nations in stability operations are key areas where lack of characterization or conflicting characterizations can create ambiguities and uncertainties for operators on the ground. Of particular concern are the protection of civilians and individual rights, the implementation of counterinsurgency principles within the framework of differing operations and situations, and questions regarding the legitimacy of military operations. Each of these concerns is highly relevant to the considerations raised above regarding the forfeiting of options and the risk of legal violations. Issues regarding use of force produce significant policy challenges beyond the legal issues set forth below. These policy questions—such as public support for military operations, effective coordination with allies and with host nation officials and entities, and the coordination of multiple missions—can play a major role in the effectiveness of military operations, both at home and on the ground.

### 1. Targeting

In an armed conflict, LOAC permits the use of lethal force as a first resort against legitimate military objectives, whether persons or objects.<sup>147</sup> LOAC's fundamental principles of distinction, proportionality, and precautions in attack guide the use of force and targeting considerations in all situations.<sup>148</sup> One of the most fundamental issues during conflict is identifying who or what can be targeted. The principle of distinction, one of the "cardinal principles" of LOAC, requires that any party to a conflict distinguish between those who are fighting and those who are not and direct attacks solely at the former.<sup>149</sup> Similarly, parties must distinguish between civilian objects and military objects and target only the latter.<sup>150</sup> The obligation to distinguish forms part of

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<sup>147</sup> Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUM. LEGAL STUDIES 52, 74–75 (2010).

<sup>148</sup> Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 NAVAL WAR C. INT'L L. 307, 308, 312, 323 (2009) ("Although the conflict [in Afghanistan] has become non-international, it must be understood that the IHL norms governing attacks in international armed conflicts, on one hand, and non-international armed attacks, on the other, have become nearly indistinguishable.").

<sup>149</sup> Legality of the Threat and Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) (separate opinion of Judge Higgins) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of international humanitarian law).

<sup>150</sup> AP I, *supra* note 9, art. 48 ("[T]o ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."). Article 48 is considered customary international law. See CIHL, *supra* note 94, at 1 (2005).

the customary international law of both international and non-international armed conflicts, as the ICTY held in the *Tadic* case.<sup>151</sup> The purpose of distinction—to protect civilians—is emphasized in Article 51 of Additional Protocol I, which states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.”<sup>152</sup>

Distinction thus requires identification of lawful targets as a prerequisite to the use of force in armed conflict. A lawful attack must be directed at a legitimate target: either a combatant, member of an organized armed group, a civilian directly participating in hostilities, or a military objective.<sup>153</sup> In international armed conflicts, all members of the state’s regular armed forces are combatants and can be identified by the uniform they wear, among other characteristics.<sup>154</sup> Other persons falling within the category of combatant include members of volunteer militia who meet four requirements: wearing a distinctive emblem, carrying arms openly, operating under responsible command, and abiding by LOAC.<sup>155</sup> Members of the regular armed forces of a government not recognized by the opposing party and civilians participating in a *levée en masse* also qualify as combatants in international armed conflict.<sup>156</sup> Combatants can be attacked at all times and enjoy no immunity from attack, except when they are *hors de combat* due to sickness, wounds, or capture. In non-international armed conflicts, including state versus non-state actor conflicts, there is no combatant status, but individuals who are members of an organized armed group are legitimate targets of attack at all times.<sup>157</sup> Finally,

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<sup>151</sup> Prosecutor v. *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal, ¶¶ 27, 111 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: . . . 2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.”) (alteration in original) (quoting G.A. Res. 2675 (XXV), U.N. Doc. A/RES/2675 (XXV) (Dec. 9, 1970)) (internal quotation mark omitted); see also Legality of the Threat and Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. at 257 (distinction is one of the “intransgressible principles of international customary law”); *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95 doc. 6 rev. ¶ 178 (1997), available at [http://www.cidh.oas.org/annualrep/97eng/Argentina1137.htm#\\_ftn1](http://www.cidh.oas.org/annualrep/97eng/Argentina1137.htm#_ftn1); CIHL, *supra* note 94, at 7–8.

<sup>152</sup> AP I, *supra* note 9, art. 51(2).

<sup>153</sup> See *id.* art. 48.

<sup>154</sup> GC III, *supra* note 9, art. 4(1).

<sup>155</sup> *Id.* art. 4(A)(2).

<sup>156</sup> *Id.* arts. 4(A)(3), 4(A)(6).

<sup>157</sup> See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991, 995, 999 (2008); see also JIMMY GURULÉ &

civilians who take direct participation in hostilities are also legitimate targets of attack during and for such time as they engage directly in hostilities.<sup>158</sup>

The principle of proportionality requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained.<sup>159</sup> Proportionality is not a mathematical concept, but rather a guideline to help ensure that military commanders weigh the consequences of a particular attack and refrain from launching attacks that will cause excessive civilian deaths. The principle of proportionality is well-accepted as an element of customary international law applicable in all armed conflicts.<sup>160</sup>

The third key targeting principle concerns precautions. LOAC mandates that all parties take certain precautionary measures to protect civilians.<sup>161</sup> Precautions are, understandably, a critical component of the law's efforts to protect civilians and are of particular importance in densely populated areas or areas where civilians are at risk from the consequences of military operations. For this reason, even if a target is legitimate under the laws of war, failure to take precautions can make an attack on that target unlawful. First, parties must do everything feasible to ensure that targets are military objectives.<sup>162</sup> Second, they must choose the means and methods of attack with the aim of minimizing incidental civilian losses and damage.<sup>163</sup> Third, when choosing between two possible attacks offering similar military advantage, parties must choose the objective that offers the least likely harm to civilians and civilian objects.<sup>164</sup> Fourth, parties are required to refrain from any attacks that would be disproportionate and to cancel any attacks where it becomes evident that the civilian losses would be excessive in light of the military advantage.<sup>165</sup> Finally,

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GEOFFREY S. CORN, *PRINCIPLES OF COUNTER-TERRORISM LAW* 70–76 (2011) (discussing the rules governing targeting of enemy forces in international and non-international armed conflict and noting that (1) “a member of an enemy force . . . is presumed hostile and therefore presumptively subject to attack” in international armed conflict; and (2) “subjecting members of organized belligerent groups to status based targeting pursuant to the LOAC as opposed to civilians who periodically lose their protection from attack seems both logical and consistent with the practice of states engaged in non-international armed conflicts”).

<sup>158</sup> AP I, *supra* note 9, art. 51(3).

<sup>159</sup> *Id.* art. 51(5)(b).

<sup>160</sup> Michael N. Schmitt, *Fault Lines in the Law of Attack*, in *TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW* 277, 292 (Susan C Breau & Agnieszka Jachec-Neale eds., 2006); Yoram Dinstein, *The Laws of Air, Missile and Nuclear Warfare*, 27 *ISR. Y.B. HUM. RTS.* 1, 7 (1997).

<sup>161</sup> AP I, *supra* note 9, art. 57.

<sup>162</sup> *Id.* art. 57(2)(a)(i).

<sup>163</sup> *Id.* art. 57(2)(a)(ii).

<sup>164</sup> *Id.* art. 57(3).

<sup>165</sup> *Id.* arts. 57(2)(a)(iii), 57(2)(b).

Article 57(2)(c) of Additional Protocol I requires attacking parties to issue an effective advance warning “of attacks which may affect the civilian population, unless circumstances do not permit.”<sup>166</sup> Each of these steps requires an attacking party to take affirmative action to preserve civilian immunity and minimize civilian casualties and damage.

These obligations to take precautions apply in both international and non-international armed conflict and are considered customary international law.<sup>167</sup> Article 13(1) of Additional Protocol II protects civilians and the civilian population from the dangers arising from military operations;<sup>168</sup> the principle of precautions forms a natural component of that obligation. The obligation to take precautions also appears in other treaties applicable in non-international armed conflict, such as Amended Protocol II to the Convention on Certain Conventional Weapons<sup>169</sup> and Second Protocol to the Hague Convention for the Protection of Cultural Property.<sup>170</sup>

In the absence of an armed conflict, international human rights law and the principles governing the use of force in law enforcement will govern. Article 6 of the ICCPR states that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>171</sup> In a slightly different formulation, the European Convention on the Protection of Fundamental Rights and Freedoms establishes the right to life

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<sup>166</sup> *Id.* art. 57(2)(c).

<sup>167</sup> CIHL, *supra* note 94, at 51; *see also* AP I, *supra* note 9, arts. 57–58; Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgement, ¶ 524 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

<sup>168</sup> AP II, *supra* note 9, art. 13(1).

<sup>169</sup> Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Amended Protocol II) arts. 3(4), 4, May 3, 1996, S. TREATY DOC. No. 105-1 (1997) (“All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”).

<sup>170</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 7, Mar. 26, 1999, 2253 U.N.T.S. 172 (“Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall: (a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention; (b) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention; (c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and (d) cancel or suspend an attack if it becomes apparent: (i) that the objective is cultural property protected under Article 4 of the Convention: (ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.”).

<sup>171</sup> ICCPR, *supra* note 29, art. 6.

and states that any “[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence.”<sup>172</sup> Here, the use of lethal force is—appropriately—tightly prescribed and extraordinarily restricted.<sup>173</sup> In such situations, it is the target’s conduct—some sort of hostile action or threat—that justifies the use of force, in contrast to armed conflicts, where many individuals (combatants and members of organized armed groups) are targetable based solely on their membership in a hostile organization or enemy armed force. In the case of civilians directly participating in hostilities, of course, targeting is on the basis of conduct. Ambiguities regarding whether a particular situation is a conflict or not can undoubtedly create uncertainties and confusion with regard to targeting, the use of force, and accompanying obligations.<sup>174</sup>

We can see some of these basic challenges in Afghanistan, where until recently some ISAF contributing states did not characterize the situation as a conflict.<sup>175</sup> As a result, their forces could only employ force as a means of self-defense,<sup>176</sup> which impacts not only the use of force in specific situations, but also the types of operations different coalition partners would and could

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<sup>172</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2), Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>173</sup> See Eighth United Nations Conference on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, ¶9, U.N. Doc. A/CONF.144/28/Rev.1 (stating that force can only be used “in self-defense or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives”); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defense?*, 16 EUR. J. INT’L L. 171, 176 (2005) (“Under [international human rights law,] the intentional use of lethal force by state authorities can be justified only in strictly limited conditions. The state is obliged to respect and ensure the rights of every person to life and to due process of law. Any intentional use of lethal force by state authorities that is not justified under the provisions regarding the right to life, will, by definition, be regarded as an ‘extra-judicial execution.’”).

<sup>174</sup> For a comprehensive treatment of the consequences of blurring the lines between the parameters of the use of force in armed conflict and in self-defense (i.e., outside of armed conflict), see Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Lines Between the Armed Conflict and Self-defense Justifications*, 38 WM. MITCHELL L. REV. (forthcoming 2012).

<sup>175</sup> See, e.g., *Changing the Rules in Afghanistan: German Troops Beef Up Fight Against Taliban*, SPIEGEL ONLINE INT’L (July 9, 2009), <http://www.spiegel.de/international/germany/0,1518,635192,00.html> [hereinafter *Changing the Rules in Afghanistan*] (describing the shift in the German government’s characterization of the conflict).

<sup>176</sup> See *id.* (noting that, in 2006, the German government added to the NATO operations plan a prohibition on the use of lethal force except when an attack is underway or imminent; the provision was subsequently removed in 2009).

undertake at all. Where, as is the case in Afghanistan, some members of allied forces operate under the rubric of non-international armed conflict and others operate under a non-conflict characterization,<sup>177</sup> allied forces often might engage in joint operations under different rules of engagement and parameters for the use of force. Divergent characterizations, leading to uncertain or even contrasting legal paradigms governing the use of force, can leave those forces vulnerable to miscommunication, inaction, and even danger.

Beyond the foundational issues apparent in the differing paradigms for the use of force—above all whether it can be used in first resort or only in last resort—there are additional areas where ambiguities can arise and cause operational challenges. One involves compensation for the destruction of life or property. Under U.S. law, for example, losses from combat are non-compensable, even though there may be specified authority to pay solatia,<sup>178</sup> while losses from non-combat activities or wrongful or negligent acts are compensable.<sup>179</sup> Although this may at first appear to be a technical procedural issue, it can become a complicated operational challenge in the face of ambiguities regarding the controlling legal framework. Other areas that raise potential concerns involve the use of force to defend others and the use of force to defend property. Each of these is primarily addressed in the rules of engagement (“ROE”), but can become quite complicated in complex multinational operations in which disputes arise over the formulation and implementation of ROE among different forces and in accordance with different legal frameworks and mission objectives.

## 2. *Weapons*

Along with questions of lawful use of force, the range of permissible weapons depends on the characterization of the situation. Any potential ambiguities regarding permitted weapons generally occur along the line between armed conflict and non-conflict, and, unlike the other key areas here,

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<sup>177</sup> Until late 2009, for example, Germany did not view its participation in ISAF as part of an armed conflict. *See id.*; Thomas Darnstadt, Opinion, *Germany Should Face Up to Reality of Civil War in Afghanistan*, SPIEGEL ONLINE INT’L (July 27, 2009), <http://www.spiegel.de/international/germany/0,1518,639203,00.html>.

<sup>178</sup> The Department of Defense uses its discretion to pay solatia to injured civilians or their families in Afghanistan or Iraq. *See generally* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE’S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN (2007). Solatium is compensation for grief, as opposed to traditional damages for injury. BLACK’S LAW DICTIONARY 1519 (9th ed. 2009).

<sup>179</sup> 10 U.S.C. § 2734 (2006).

do not generally arise in the distinction between international and internal armed conflict.

International law prohibits two categories of weapons in armed conflict: indiscriminate weapons and weapons that cause unnecessary suffering. The first prohibition appears in Article 51(4) of Additional Protocol I, which defines indiscriminate attacks as attacks not directed at a specific military objective; attacks “which employ a method or means of combat which cannot be directed at a military objective; or [attacks] which employ a method or means of combat the effects of which cannot be limited as required by this Protocol.”<sup>180</sup> Second, weapons that cause unnecessary suffering or superfluous injury are prohibited.<sup>181</sup> The goal is to minimize harm that is not justified by military utility, either because of a lack of any utility at all or because the utility gained is considerably outweighed by the suffering caused. These two regulations on the use of weapons are part of customary international law in all armed conflicts.<sup>182</sup>

However, some weapons prohibited under LOAC are lawful for use in law enforcement scenarios, such as expanding bullets. LOAC prohibits exploding or expanding projectiles (e.g., hollow point rounds) because they cause unnecessary suffering.<sup>183</sup> An enemy soldier is rendered *hors de combat* just as effectively with normal non-expanding bullets. However, expanding bullets have an important and legitimate use in civilian law enforcement situations. Bullets that expand on impact are less likely to go through the target and hit innocent bystanders or do collateral damage to property (for example, the skin of an aircraft).<sup>184</sup> For this reason, they are especially valuable in hostage and counterterrorist operations. In today’s complex conflicts involving both military operations against terrorists and a range of other counterterrorism measures, it is not difficult to see how ambiguities in the characterization of situations can lead to uncertainty regarding the application of this prohibition.

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<sup>180</sup> AP I, *supra* note 9, art. 51(4).

<sup>181</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 23(e), Oct. 18, 1907, 36 Stat. 2277, *reprinted in* CARNEGIE ENDOWMENT FOR INT’L PEACE, THE HAGUE CONVENTIONS OF 1899 (II) AND 1907 (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND (1915).

<sup>182</sup> Legality of the Threat and Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) (separate opinion of Judge Higgins).

<sup>183</sup> Hague Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, 36 Stat. 2277; U.K. MANUAL, *supra* note 39, ¶ 6.1. In addition, the use of such bullets is a war crime under the Rome Statute of the International Criminal Court. Rome Statute of the International Criminal Court art. 8(2)(b)(xix), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

<sup>184</sup> Use of Expanding Ammunition by U.S. Military Forces in Counterterrorist Incidents, Op. JAG, U.S. Army, DAJA-IA/No. 7026, 23 Sept. 1985, *as reprinted in* ARMY LAW., Nov. 1985, at 45, 46.

Other weapons, such as riot control agents, present similar challenges. Under the Chemical Weapons Convention (“CWC”), the use of riot control agents is prohibited as a means of warfare.<sup>185</sup> At the same time, the CWC recognizes that “purposes not prohibited” by the convention include “[l]aw enforcement including domestic riot control purposes.”<sup>186</sup> Especially in situations of occupation, where the occupying power may face difficulties in establishing order even while armed conflict continues, finding the dividing line between a “method of warfare” and a legitimate law enforcement tool can be a daunting task. “[T]he use of riot control agents as a less-than-lethal means of law enforcement in the midst of an ongoing armed conflict must [therefore] be reconciled with the prohibition on their use as ‘a method of warfare.’”<sup>187</sup> Military operations across a range of situations, including both non-conflict and certain stability operations and counterinsurgency, can encounter various scenarios in which riot control agents in particular may prove effective, both operationally and in light of the overall mission goals. Along the often difficult to discern line between conflict and non-conflict, operators on the ground need to know what their lawful options are in any given scenario and need to retain the flexibility the appropriate legal framework may offer.

### 3. *Host Nation Control and Influence*

Just as the type of military operations in a foreign country can run the gamut from disaster relief to international armed conflict, so the degree of influence and authority the host nation government can exert on those operations varies widely. Obviously, a nation engaged in an international armed conflict with an opposing nation enjoys no authority over that nation’s military operations. Beyond that clear-cut situation, however, finding clear parameters and common ground regarding the appropriate measure of host nation influence on military operations and the determinative legal framework for such analysis can be a struggle.

Moreover, conflicts are not static and the relationship between the host state and foreign deployed forces will likely change as a conflict evolves. In the case of an occupation, for example, as the occupation matures and as a new

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<sup>185</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I(5), Jan. 13, 1993, 1974 U.N.T.S. 45 (“Each State Party undertakes not to use riot control agents as a method of warfare.”).

<sup>186</sup> *Id.* art. II(9)(d).

<sup>187</sup> Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 32 (2004).

local government is established, or as the occupation transitions into a consensual deployment or, potentially, into a non-international armed conflict, the host state may enjoy greater influence over operations conducted within the host nation. In other situations, a host state will likely exert a greater degree of control over forces consensually deployed within its territory—either in a non-conflict capacity or in support of a non-international armed conflict in which the host state is engaged.

Where the host nation has a measure of influence over the operations being conducted in its territory, the degree of control it exerts may be established through or limited by a UN mandate, a SOFA, or other instrument setting forth the respective authority of the host and visiting forces.<sup>188</sup> Frequently, political considerations will dictate the influence a host nation exercises. In occupation, consent from the occupying force will usually be all that is required. Fundamentally, however, the presence of foreign forces within a state's territory is contingent upon that state's consent. Beyond that, there is little framework for understanding exactly where the parameters of host nation influence lie regarding the planning and implementation of military operations. Recent conflicts offer extensive evidence of the complex nature of these relationships.

For example, the U.S. invasion of Afghanistan in 2001 triggered an international armed conflict. Upon the initial defeat of the Taliban and the establishment of the Karzai government, it was generally recognized that the conflict became a non-international armed conflict between the Karzai government and the United States on one side and insurgent Taliban forces on the other.<sup>189</sup> Many view U.S. operations to combat al Qaeda in Afghanistan as a separate non-international armed conflict.<sup>190</sup> At the same time, some NATO allies participating in ISAF characterize their involvement as non-conflict stability operations.<sup>191</sup> Additionally, U.S. and other ISAF forces operate under a UN mandate while a SOFA governs U.S. Operation Enduring Freedom forces.<sup>192</sup> Each of these scenarios—whether concurrent or simultaneous—has

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<sup>188</sup> See Roisin Burke, *Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity*, 16 J. CONFLICT & SECURITY L. 63, 65–66 (2011).

<sup>189</sup> See Robin Geiss & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 INT'L REV. RED CROSS 11, 15 (2011) (discussing SOFAs and other mandates with regard to UN peacekeeping forces).

<sup>190</sup> *Id.* at 51 n.21.

<sup>191</sup> See *supra* notes 175–77.

<sup>192</sup> See, e.g., S.C. Res. 1833, U.N. Doc. S/RES/1833 (2008). The SOFA governing the presence of the U.S. military in Afghanistan is a diplomatic note. Agreement Regarding the Status of United States Military

ramifications for the role and influence of the Afghan government regarding operations and for its engagement with different national forces. U.S. operations in Pakistan introduce additional questions regarding both the government of Pakistan and even the Karzai government given the close links between the operations and their key goals and impact on each other. Iraq demonstrated these issues as well through a slightly different lens, folding the issue of occupation and transition from occupation into the mix.

### *C. Civil–Military Relations*

In all situations where military forces are deployed, the relationship between the military and a range of civilian actors plays a role, especially as international NGOs and multinational military forces work together more often in the same theater of operations. Here the potential ambiguities from uncertainty regarding the applicable legal framework create operational challenges for both military and civilian actors, in essence multiplying the potential issues. Three primary areas are of particular interest here: humanitarian assistance, the relationship between militaries and nongovernmental organizations, and the provision of advisory and training services to the host nation government, law enforcement, and military.

#### *1. Humanitarian Assistance*

It is axiomatic that humanitarian assistance efforts are critical to the survival and protection of civilian populations during conflict situations and natural disasters, and even in times of internal disturbances. Relief organizations often have to navigate access to conflict zones and areas under military control, which implicates both domestic and international law, depending on the scenario at hand. In armed conflict, international humanitarian law recognizes a role for humanitarian assistance organizations in alleviating the suffering of civilians, and recognizes the special role of the ICRC and its national affiliate organizations in international armed conflicts and occupations.<sup>193</sup>

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and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities, State Dep't No. 03-67, *available at* 2003 WL 21754316, \*1–4 (entered into force May 28, 2003).

<sup>193</sup> See GC IV, *supra* note 9, arts. 3, 10.

The law of international armed conflict includes numerous obligations for belligerent parties to permit humanitarian relief operations. Article 23 of the Fourth Geneva Convention requires all states to allow “free passage of all consignments of medical and hospital stores and objects for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary.”<sup>194</sup> Also included in the free passage obligation are foodstuffs, clothing, and other essentials for children, pregnant women, and new mothers.<sup>195</sup> Article 70 of Additional Protocol I then provides a more comprehensive framework for the provision of humanitarian assistance during international armed conflict, mandating relief operations for the entire civilian population if essential supplies are running low.<sup>196</sup> Although this provision does state that such relief is provided subject to the agreement of the parties concerned, the Commentary to Additional Protocol I explains that parties do not have *carte blanche* to refuse relief shipments; rather, refusals to allow relief consignments “should thus remain exceptional.”<sup>197</sup> The Fourth Geneva Convention also contains specific obligations regarding the provision of humanitarian relief during occupation, requiring an occupying power to allow and facilitate relief operations when “[all] or part of the population of occupied territory is inadequately supplied.”<sup>198</sup> All states must permit free passage for and protect such consignments of humanitarian relief.<sup>199</sup>

During non-international armed conflict, the rules regarding humanitarian assistance are significantly sparser. Common Article 3 recognizes the right of the ICRC or other independent humanitarian entities to offer assistance to the parties to the conflict.<sup>200</sup> With regard specifically to the provision of relief supplies, Article 18(2) of Additional Protocol II requires humanitarian assistance efforts when “the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies,”<sup>201</sup> subject to the consent of the relevant state where the conflict is taking place. The requirement that the government consent to relief shipments does raise concerns. However, the Commentary to Additional

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<sup>194</sup> *Id.* art. 23.

<sup>195</sup> *Id.*

<sup>196</sup> AP I, *supra* note 9, art. 70.

<sup>197</sup> INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS 820 (1977) [hereinafter ADDITIONAL PROTOCOLS COMMENTARY].

<sup>198</sup> GC IV, *supra* note 9, art. 59.

<sup>199</sup> *Id.*

<sup>200</sup> Common Article 3, *supra* note 12.

<sup>201</sup> AP II, *supra* note 9, art. 18(2).

Protocol II reinforces that states cannot withhold access for relief shipments without good grounds for doing so. Rather,

[t]he fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place.<sup>202</sup>

Refusing to allow such shipments in such situations, could be equivalent to using starvation as a means of warfare, for example. During the internal conflict in Sri Lanka, human rights organizations sharply criticized the Sri Lankan government's restrictions on international aid workers, noting that if the government cannot meet its obligations to provide humanitarian relief to the civilian population, "it must allow the humanitarian community to do so on its behalf. Parties to a conflict must ensure the freedom of movement of impartial humanitarian relief personnel—only in cases of military necessity may their activities or movements be temporarily restricted."<sup>203</sup> In practice, the parameters for the provision of humanitarian relief may prove to be quite similar in international and non-international armed conflict, but it is important to recognize the differences so that relief organizations can maximize their abilities to help those in need during armed conflicts.

In non-conflict situations, humanitarian relief is subject to the domestic law of the host state. Although human rights law mandates that host states may not restrict access to relief to the extent that such restrictions would violate the state's human rights obligations, access is ultimately subject to the state's laws governing entry visas, importation guidelines, and similar issues.

In all of these situations, the relationship between civilian relief workers and military personnel will be guided by the relevant legal framework and parameters for access to conflict zones or natural disaster areas. Any potential ambiguities regarding these legal obligations and privileges may ultimately result in diminished services and protection for the civilian population that both civilian and military actors on the ground are trying to protect and serve, a counterproductive result.

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<sup>202</sup> ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 197, at 1479.

<sup>203</sup> HUMAN RIGHTS WATCH, WAR ON THE DISPLACED, SRI LANKAN ARMY AND LTTE ABUSES AGAINST CIVILIANS IN THE VANNI 26 (2009), available at [http://www.hrw.org/sites/default/files/reports/srilanka0209web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/srilanka0209web_0.pdf).

## 2. *Militaries and NGOs*

The relationship between the military and NGOs on the ground during military operations can be fraught with interesting challenges, even when both actors are working toward the same or similar goals. There are three main types of operations in which militaries and NGOs must cooperate: natural disasters, such as floods, typhoons, tsunamis, earthquakes, epidemics, or famine; technological disasters, such as chemical spills, radiological releases, or oil spills; and complex humanitarian emergencies, defined by the United Nations as “humanitarian crises in a country, region or society where there is total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single and/or ongoing UN country programme.”<sup>204</sup> The first two situations do not constitute armed conflict and thus do not trigger LOAC and its attendant rights and duties. The third category, however, may well often rise above the threshold for triggering LOAC, depending on the nature and extent of the conflict.

In most disaster response operations, the military’s primary mission will be to establish a safe and secure environment, which enables NGOs to provide relief and other assistance as needed. “Carrying out these missions may require the military to first establish a secure environment, then to provide transportation, communication, and/or security for the NGOs as well as for the military force itself.”<sup>205</sup> The characterization of the situation—as non-conflict, non-international armed conflict, or international armed conflict—will affect the rights and obligations military forces have in the course of fulfilling these missions, as noted with regard to many of the issues discussed earlier in this Article. If the operation takes place in the context of one of the first two types of disaster response operations described above, meaning it is not during a conflict, the host nation’s domestic law will govern, along with international human rights law and any bilateral agreements regarding the provision of assistance. During conflict, LOAC will provide the dominant and overarching legal framework, but the characterization as non-international or international

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<sup>204</sup> INTER-AGENCY STANDING COMM., GUIDELINES ON THE USE OF MILITARY AND CIVIL DEFENCE ASSETS TO SUPPORT UNITED NATIONS HUMANITARIAN ACTIVITIES IN COMPLEX EMERGENCIES 3 (2003), *available at* <http://www.humanitarianinfo.org/iasc/downloaddoc.aspx?docID=4411&type=pdf>.

<sup>205</sup> LISA WITZIG DAVIDSON ET AL., HUMANITARIAN AND PEACE OPERATIONS: NGOs AND THE MILITARY IN THE INTERAGENCY PROCESS 12 (1996), *available at* [http://www.dodccrp.org/files/Davidson\\_Humanitarian.pdf](http://www.dodccrp.org/files/Davidson_Humanitarian.pdf).

armed conflict will then affect the extent of the application of host nation law and international human rights law.

One issue that has arisen in Afghanistan and Iraq in recent years is the extent of military control of areas where civilian actors, namely international NGOs, live and work in the conflict area. In the face of the dangers in both conflict zones, it has been common for NGO workers to live in the same secured areas as military units.<sup>206</sup> Such arrangements often raise questions for NGOs regarding their independence, neutrality, and ability to access a range of actors—civilian and military—on both sides in the conflict zone. As discussed in greater detail above, the military will have greater control over areas in certain conflict situations rather than others, such that different conflict characterizations can produce differing interpretations of the level of military control and NGO access and independence.

A separate but related issue that stems directly from the close engagement between the military and NGOs occurs when military personnel “go humanitarian”—e.g., when they use humanitarian cover, in civilian clothing, for intelligence gathering and similar activities. Many NGOs raise legitimate concerns about the impact on the safety of their personnel in the aftermath of such military activities. These concerns are not necessarily directly related to questions of conflict characterization or applicable legal frameworks, but certainly arise with greater frequency and concern in conflict situations rather than non-conflict situations, reinforcing the need to clarify the line between the two.

### *3. Training and Advisory Roles*

In today’s counterinsurgency and stability operations, the interface between the military and the host nation is a critical piece of the mission, not just for the purpose of coordinating operations, but to enhance capacity building across the range of the judicial, security and political infrastructure. Military advisors often face significant challenges in providing advice to their counterparts in the host nation, whether military or civilian, due to uncertainties regarding the parameters of the advisory relationship or the specific substance of particular exchanges. In missions where the role of rule of law advisor is such a critical one, the ambiguities and operational challenges set forth above loom large. When capacity building is at the heart of counterinsurgency efforts and

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<sup>206</sup> Volker Franke, *The Peacebuilding Dilemma: Civil–Military Cooperation in Stability Operations*, 11 INT’L J. PEACE STUD. 5, 6 (2006).

stability operations—across a range of conflict situations—it is essential that actors on the ground be able to communicate effectively regarding the applicable legal framework and the obligations of the various actors involved, civilian or military, host nation or multinational. And yet it is here, in the one-on-one relationships between advisor and host nation official, that ambiguities and uncertainties crop up time and again, leading to continued requests for further guidance from training and analysis centers back in the United States.

Multinational operations can manifest more complex challenges in this area. In Afghanistan, the ISAF force includes troops from many different nations, many of whom focus their operations on capacity building.<sup>207</sup> If these different contingents characterize the overall situation differently, they will thus have varying parameters for the provision of training and capacity building and for the content of such programs. The distinction between the U.S. view and the pre-2010 German view in Afghanistan offers a useful example: “U.S. forces conduct practical training for the Afghan army in real combat situations,” but such training fell “outside the German mandate.”<sup>208</sup> In contrast, German forces at first applied police training methods relevant to domestic law enforcement activities.<sup>209</sup> Although both types of training were useful and important, the clash in perspectives reduced the ability to engage in joint operations and joint decision-making on these issues.

#### *D. Third State Responsibilities*

International armed conflicts trigger the law of neutrality, which delineates the boundaries between the battlespace and neutral space, on which no fighting between belligerents may take place. The law of neutrality “defines the relationship under international law between states engaged in an armed conflict and those that are not participating in that armed conflict.”<sup>210</sup> Based on

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<sup>207</sup> See *Troop Numbers and Contribution*, AFG. INT’L SECURITY FORCE, <http://www.isaf.nato.int/troop-numbers-and-contributions/index.php> (last visited May 5, 2012). “Capacity development is the process by which individuals, organizations, institutions and societies develop abilities to perform functions, solve problems and set and achieve objectives.” Committee of Experts on Public Administration, 5th Sess., Mar. 27–31, 2006, *Definition of Basic Concepts and Terminologies in Governance and Public Administration: Note by the Secretariat*, U.N. Doc. E/C.16/2006/4 (Jan. 5, 2006).

<sup>208</sup> James D. Bindenagel, *Afghanistan: The German Factor*, PRISM, Sept. 4, 2010, at 95, 107.

<sup>209</sup> *Id.*

<sup>210</sup> U.K. MANUAL, *supra* note 39, ¶1.42; see also YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 25–26 (2001) (“The laws of neutrality are operative only as long as the neutral State retains its neutral status. Once that State becomes immersed in the hostilities, the laws of neutrality cease being applicable, and the laws of warfare take their place. However, if the neutral State does not embroil itself in war, the laws of neutrality are activated from the onset of the war until its conclusion.”).

the fundamental principle that neutral territory is inviolable,<sup>211</sup> neutrality law seeks to (1) contain the spread of hostilities, particularly by keeping down the number of participants; (2) define the legal rights of parties and nonparties to the conflict; and (3) limit the impact of war on nonparticipants, especially with regard to commerce.<sup>212</sup> Neutrality law thus leads to a geography-based framework in which belligerents can fight on belligerent territory or the commons but must refrain from any operations on neutral territory. This framework protects third states that are neutral from becoming part of the battleground of the armed conflict and prevents them from supporting any party to the armed conflict.

The Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 1907 (“Hague V”) sets forth neutrality law’s basic principles. Beyond upholding the inviolability of neutral territory, Hague V prohibits the movement of belligerent troops or materiel across neutral territory<sup>213</sup> and the use of military installations or communications facilities on neutral territory.<sup>214</sup> In addition, belligerent states may not attack targets in neutral territory, unless, as stated below, the neutral state fails to ensure its territory is not used for belligerent purposes. For its part, a neutral power must not provide, or enable the provision of, military supplies to any belligerent, nor allow its territory to be used for military operations.<sup>215</sup> Indeed, it may use force—as necessary and within its capability—to prevent belligerent powers from using its territory for war-making purposes.<sup>216</sup> To the extent a neutral state is unable or unwilling to prevent the use of its territory for such purposes, “a belligerent state may become entitled to use force in self-

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<sup>211</sup> Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague V]; see also GERHARD VON GLAHN, LAW AMONG NATIONS 844 (6th ed. 1992) (“The basic right, beyond any question, is the inviolability of neutral territory . . . and all other neutral rights really are mere corollaries to that fundamental principle.”); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 534 (1959) (“The chief and most vital right of a neutral state is that of the inviolability of its territory.”); GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 179 (5th ed. 1967) (explaining that the rights and duties of neutral powers under international customary law can be summarized in three basic rules: “(1) [a] neutral State must abstain from taking sides in the war and from assisting either belligerent[;] (2) [a] neutral State has the right and duty to prevent its territory from being used by either belligerent as a base for hostile operations[; and] (3) [a] neutral State must acquiesce in certain restrictions which belligerents are entitled to impose on peaceful intercourse between its citizens and their enemies, in particular, limitations on the freedom of the seas”).

<sup>212</sup> John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119, 139 (1997).

<sup>213</sup> Hague V, *supra* note 211, art. 2.

<sup>214</sup> *Id.* art. 3.

<sup>215</sup> DINSTEIN, *supra* note 210, at 26–27.

<sup>216</sup> Hague V, *supra* note 211, arts. 5, 10.

defence against enemy forces operating from the territory of that neutral state,” based on the ordinary rules governing the resort to force.<sup>217</sup> As a companion to Hague V, the Convention Concerning the Rights and Duties of Neutral Powers in Naval War of 1907 (“Hague XIII”) sets forth principles of neutrality law for conflicts at sea.<sup>218</sup>

In non-international armed conflicts, however, the law of neutrality does not apply.<sup>219</sup> Third states may lawfully support a state against a non-state actor, thus becoming party to the existing non-international armed conflict<sup>220</sup>—like the United States in Afghanistan, for example. In contrast, third state support for a non-state actor against a state violates the general international law principle of nonintervention.<sup>221</sup> Depending on the third state’s support or control of the non-state actor, the third state may, through its support of the non-state actor, commit an armed attack against the state or incur responsibility for the actions of the non-state actor.<sup>222</sup> Alternatively, the nature and extent of such third-state support for a non-state actor may also result in an international armed conflict, such as in the former Yugoslavia.<sup>223</sup> The principle of non-intervention also remains in effect in non-conflict situations.<sup>224</sup>

In today’s interconnected world, understanding the role of third states and external actors is a critical piece of the puzzle. Military and civilian actors on the ground in a conflict situation, peace operation, or other situation cannot operate in a vacuum but rather must take into account the actions of third states and external actors. To do so, they need a clear understanding of the applicable legal framework that guides the behavior of such actors and sets out parameters for the involvement in any conflict or non-conflict operation.

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<sup>217</sup> U.K. MANUAL, *supra* note 39, ¶ 1.43.a.

<sup>218</sup> Convention Concerning the Rights and Duties of Neutral Powers in Naval War pmbl., Oct. 18, 1907, 36 Stat. 2415.

<sup>219</sup> PROGRAM ON HUMANITARIAN POLICY & CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 307 (2010).

<sup>220</sup> *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 93 (June 27) (describing how a state can be involved in a non-international armed conflict).

<sup>221</sup> *See id.* at 98 (noting that if the right of a state to intervene and support an internal opposing force in another state were validated, it would “involve a fundamental modification of the customary law principle of non-intervention”).

<sup>222</sup> *Id.* at 109–10.

<sup>223</sup> *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶¶ 79, 569 (Int’l Crim. Trib. For the Former Yugoslavia July 14, 1997) (holding that the Federal Republic of Yugoslavia’s effective control over the military forces of the Republika Srpska created an international armed conflict).

<sup>224</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. at 106.

### III. THE WAY FORWARD

This Article focuses on two fundamental issues endemic to today's operations, as well as many past military operations: characterization of the conflict/non-conflict situation and the operational challenges on the ground that can arise in the face of uncertain or differing characterizations. Military and civilian actors on the ground in Afghanistan, Iraq, the Balkans, and a range of other hotspots have addressed these issues with grace and adept analysis over the years, but ambiguities continue to arise and pose challenges time and again. When coupled with the range of strategic and policy issues underlying conflict characterization, the above discussion demonstrates that these normative issues do indeed make a real difference. Clear and consistent characterization of conflict certainly could help alleviate some of the challenges noted throughout this Article. However, as noted in the analysis of the strategic and policy considerations in Part I, policymakers have significant incentives to maintain flexibility in most situations. It is therefore essential to understand the consequences of such flexibility at the operational level and recognize that uncertainties and ambiguities may well remain, given the complicated nature of modern peace and stability operations, conflicts, and counterinsurgency operations. Minimizing both the ambiguities and their effects through training, tailored operational planning, and other resources will then be a crucial goal for both military and civilian actors at home and in the field.