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**UNTYING THE GORDIAN KNOT:  
A PROPOSAL FOR DETERMINING APPLICABILITY OF  
THE LAWS OF WAR TO THE WAR ON TERROR**

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One of the most difficult legal questions generated by the United States' proclaimed Global War on Terror is how to determine when, if at all, the laws of war apply to military operations directed against nonstate actors. This question has produced a multitude of answers from scholars, government officials, military legal experts, and even the Supreme Court of the United States.<sup>1</sup> The

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1. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 558, 625–31 (2006) (determining when law of war applies to military operations directed against nonstate actors), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w), *as recognized in* *Boumediene v. Bush*, 476 F.3d 981, 985 (D.C. Cir. 2007); JENNIFER ELSEA, CONG. RESEARCH SERV., ORDER CODE RL31191, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS, at CRS-10 to CRS-16 (2001), *available at* <http://fpc.state.gov/documents/organization/7951.pdf> (analyzing whether September 11th attacks triggered law of war); Sean D. Murphy, *International Law, the United States, and the Non-Military War Against Terrorism*, 14 EUR. J. INT'L L. 347, 359–61 (2003) (discussing U.S. government's attempts to "avoid the application of standard US and international due process norms" when dealing with suspected terrorists); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and*

varied responses to this question are almost certainly attributable to the reality that the criterion for determining when the law of war applies to any given military operation is based on an assumption that armed conflicts will occur either between the armed forces of states or between state armed forces and internal dissident groups.<sup>2</sup> Prior to the terror attacks of September 11, 2001 and the military response they triggered, the application of this body of law to military operations directed against nonstate entities outside the territory of the responding state had not been seriously contemplated. Both proponents and opponents of application of the laws for war to this struggle relied on this law-triggering paradigm, derived from articles 2 and 3 of the four Geneva Conventions of 1949.<sup>3</sup> This merely revealed that characterizing the “war on terror” according to this state-centric paradigm was like putting a proverbial square peg into a round hole.<sup>4</sup> While from a lay perspective it may seem that resolving such a question is like dancing on the head of a pin, the resolution has profound consequences for virtually every person involved in or impacted by this “war.”

Ironically, this state-centric law-triggering paradigm emerged as one of the most significant post-World War II (“WWII”) advances in the laws of war. From 1949 through 2001, this paradigm evolved into almost an article of faith among the international legal and military community. Accordingly, military operations were subject to this body of international legal regulation only when the situation satisfied certain law-triggering “criteria.”<sup>5</sup> This paradigm became so pervasive that at least one major military power felt compelled to establish military policy requiring compliance with the “principles” of this law during military operations that did not satisfy this triggering paradigm, a situation that became increasingly common following the end of the Cold War.<sup>6</sup>

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*Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1340–43 (2004) (same). See generally Derek Jinks, *The Applicability of the Geneva Conventions to the “Global War on Terrorism,”* 46 VA. J. INT’L L. 165 (2005); Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443 (2007) (discussing how war against terrorist networks such as al Qaeda could impact nature of existing war conventions).

2. See Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U. L. REV. 53, 57–61, 63–65 (1983) (explaining norms determining armed conflict and status of combatants).

3. See Geoffrey S. Corn, Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict, 40 VAND. J. TRANSNAT’L L. 295, 323–25, 329 (2007) (noting how both President Bush and Supreme Court relied on Common Articles 2 and 3 to reach opposite conclusions about applicability of Geneva Conventions to post-9/11 conflict).

4. *Id.* at 329.

5. See *id.* at 300–10 (discussing use of Geneva Convention triggers for determining whether laws of war apply).

6. See, e.g., U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE DIRECTIVE NO. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf> (mandating that “[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations”); see also CHAIRMAN OF THE JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJSCI 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR

The utility of this paradigm was, however, truly thrown into disarray as the result of the events of September 11, 2001. President Bush characterized the terror strike against the United States as an “armed conflict,”<sup>7</sup> and he and the Congress of the United States almost immediately invoked the war powers of the nation to respond to the threat presented by al Qaeda, a nonstate entity operating throughout the world.<sup>8</sup> This characterization was embraced not only by the United Nations Security Council,<sup>9</sup> but also by the North Atlantic Treaty Organization<sup>10</sup> and others.<sup>11</sup> Since that time, the executive branch has struggled to articulate, and in many judicial challenges defend, how it could invoke the authorities of war without accepting the obligations of the law regulating war.<sup>12</sup> Unfortunately, responding to such questions by application of the traditional law-triggering paradigm was like fitting a square peg into a round hole.<sup>13</sup>

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PROGRAM para. 4(a) (2007), available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/5810\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/5810_01.pdf) (using same words as Directive to describe when armed forces are to “comply with the law of war”).

7. Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

8. See Jayshree Bajoria, *al-Qaeda (a.k.a. al-Qaida, al-Qa'ida)*, CFR.ORG, Apr. 18, 2008, available at <http://www.cfr.org/publication/9126/> (discussing origins, structure, and goals of al Qaeda).

9. See S.C. Res. 1373, pmb., U.N. Doc. S/RES/1373 (Sept. 28, 2001) (calling for international response to “terrorist attacks”); S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (condemning September 11th attacks as “threat to international peace and security”).

10. See Press Release, N. Atl. Treaty Org., Statement by the North Atlantic Council (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01-124e.htm> (stating that if 9/11 attacks were “directed from abroad against the United States,” such terrorist attacks would constitute “armed attack” requiring international response).

11. See Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT’L L. 905, 909–10 (2002) (collecting responses from other organizations).

12. See generally Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, U.S. Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf> (containing executive branch’s analysis and conclusion that al Qaeda and Taliban operatives are not subject to Geneva Convention); Memorandum from Alberto R. Gonzales, Counsel to the President, to George W. Bush, President of the United States, on Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), available at <http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html> (same); Memorandum from Donald Rumsfeld, Secretary of Def., U.S. Dep’t of Def., to Chairman of the Joint Chiefs of Staff, U.S. Dep’t of Def., Status of Taliban and Al Qaeda (Jan. 19, 2002), available at <http://news.findlaw.com/hdocs/docs/dod/11902mem.pdf> (summarizing past analysis). In a message dated January 19, 2002, the Chairman notified combatant commanders of the Secretary of Defense’s determination. Message from the Chairman of the Joint Chiefs of Staff, Status of Taliban and Al Qaida 1 (Jan. 19, 2002), available at <http://news.findlaw.com/hdocs/docs/dod/12202mem.pdf> (announcing Secretary Rumsfeld’s determination that captured Taliban forces were not entitled to prisoner of war status under Geneva Conventions). This determination endorsed the analysis provided by the Office of Legal Counsel of the Department of Justice to the General Counsel of the Department of Defense that reflected a restrictive interpretation of legal applicability of the laws of war. Memorandum from George W. Bush, President of the United States, Humane Treatment of Taliban and al Qaeda Detainees ¶ 2 (Feb. 7, 2002), available at [http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf).

13. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring) (articulating difficulties in applying Geneva Convention’s language to war on terror), *rev’d*, 548 U.S.

Because of this disarray, the time has come to develop a new approach to determining application of the laws of war that reconciles this disparity between authority and obligation related to the conduct of combat military operations. This will require adopting a new triggering “criteria.” This trigger must reflect not only the underlying purpose of the laws of war, but also the pragmatic realities of contemporary military operations.

As nations prepare to use military force, national leaders dictate rules on how the military may apply force in any impending operation. These rules, broadly categorized as rules of engagement (“ROE”),<sup>14</sup> fall into two general categories: conduct-based ROE that allow military personnel to respond with force based on an individual’s actions,<sup>15</sup> and status-based ROE that allow military personnel to use deadly force based only on an individual’s membership in a designated organization, regardless of the individual’s actions.<sup>16</sup> It is the thesis of this Article that a nation’s adoption of status-based ROE for its military in a particular military operation should constitute the trigger requiring that nation and its military to apply the laws of war to that operation.

This Article will initially discuss the historical underlying purpose of regulating conflict, and why that purpose supports an expansive application of the laws of war. It will then explain why the current law-triggering test is insufficient to respond to the realities of contemporary transnational conflict between states and nonstate organizations. The Article will then provide a comprehensive discussion of the concept of rules of engagement, including how they evolved to complement application of the laws of war. More importantly,

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557 (2006). Judge Williams’ explanation exemplifies the challenge associated with applying the laws of war to the war on terror:

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

*Id.* (alteration in original).

14. See JOINT CHIEFS OF STAFF ET AL., DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JOINT PUBLICATION 1-02, at 476 (rev. ed. 2008), available at [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf) (providing DoD standardized definition of “rules of engagement”) [hereinafter DoD DICTIONARY].

15. See *infra* notes 133–40 and accompanying text for an explanation of when conduct-based ROE are applicable in determining whether to use force.

16. See *infra* notes 130–32 and accompanying text for a discussing of when it is appropriate to invoke status-based ROE in using force.

the Article will explain how, in practice, rules of engagement fall into two broad categories: status or conduct rules. The distinction between these two categories of ROE will, as this Article demonstrates, offer a new analytical criterion for triggering the law, relying on a nation's invocation of status-based ROE. The Article will accordingly analyze how focusing on the rules of engagement related to military operations offers perhaps the best de facto indicator of the line between conflict and nonconflict operations, and therefore is the best triggering criterion for legally mandated application of the fundamental principles of the laws of war. The Article will conclude with a proposal for adoption of this new law-triggering paradigm, and a discussion of some pragmatic policy concerns that will need to be carefully considered in any such adoption.

I. HISTORICAL UNDERLYING PURPOSE OF REGULATING CONFLICT, AND WHY THAT PURPOSE SUPPORTS AN EXPANSIVE APPLICATION OF THE LAWS OF WAR<sup>17</sup>

As long as there has been conflict, there have also been attempts to limit or control that conflict.<sup>18</sup> The focus of these attempts has ranged from a desire to increase military effectiveness to concerns for the victims of conflict. Over time, this body of conflict regulation has come to be known as the laws of war, the law of armed conflict, or, more recently, international humanitarian law. This Part will briefly chart the historical underpinnings of these laws<sup>19</sup> and demonstrate that they serve three broad purposes: (1) "protecting both combatants and noncombatants from unnecessary suffering," (2) "safeguarding all persons who fall into the hands of an enemy," and (3) helping with the reestablishment of peace.<sup>20</sup>

Many ancient civilizations developed detailed rules to regulate armed conflict,<sup>21</sup> including the Chinese,<sup>22</sup> Romans,<sup>23</sup> Babylonians, Hittites, Persians,

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17. For further background on the historical bases for regulating conflict, see generally Eric Talbot Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENV. J. INT'L L. & POL'Y 241, 244-51 (2007).

18. Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 182-85 (2000) (asserting that laws regulating conflict have developed in almost every culture).

19. See generally Howard S. Levie, *History of the Law of War on Land*, 838 INT'L REV. RED CROSS 339 (2000), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQHG> (discussing modern attempts to codify conduct and limitations in law of war).

20. INT'L & OPERATIONAL LAW DEP'T, U.S. ARMY, OPERATIONAL LAW HANDBOOK 12 (John Rawcliffe ed., 2007) [hereinafter OPERATIONAL LAW HANDBOOK].

21. William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 641 n.12 (2004); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 60 n.37 (1994); Noone, *supra* note 18, at 182-85.

22. For an example of an early Chinese work about military strategy, see generally SUN TZU, THE ART OF WAR 76 (Samuel B. Griffith trans., Oxford Univ. Press 1963) (n.d.).

23. See Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. TOL. L. REV. 111, 113-14 (2001) (explaining role of Roman law in shaping law of war during Age of Chivalry).

and Greeks.<sup>24</sup> This effort continued in the Age of Chivalry, when fighters formed complex rules concerning plunder<sup>25</sup> and siege,<sup>26</sup> assassination,<sup>27</sup> the distinction between ruses and perfidy,<sup>28</sup> and ransom<sup>29</sup> and parole.<sup>30</sup> As states began to employ professional armies and hostilities grew in scale and breadth, the need for laws governing what happened on the battlefield also grew with a more focused intensity.<sup>31</sup>

This need started an age of law of war codification that generated numerous conventions and agreements that still regulate armed conflict today. The 1863 Lieber Code,<sup>32</sup> the 1868 Declaration of St. Petersburg,<sup>33</sup> the unratified Brussels Conference of 1874,<sup>34</sup> the Hague Conventions of 1899 and 1907,<sup>35</sup> and the 1909 Naval Conference of London<sup>36</sup> are a few prominent examples of this codification trend. Because most of these burgeoning principles related to the regulation of

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24. See Noone, *supra* note 18, at 182–85 (describing conflict-regulating laws in different ancient civilizations).

25. See Wingfield, *supra* note 23, at 115–16 (describing mechanics and rules of plundering).

26. See *id.* at 117–19 (describing rules of siege).

27. See Kristen Eichensehr, *On the Offensive: Assassination Policy Under International Law*, HARV. INT'L REV., Fall 2003, at 36, 36 (describing ancient roots of international agreements prohibiting assassination).

28. See Wingfield, *supra* note 23, at 131 (presenting rationales used in attempts to distinguish ruses from acts of perfidy).

29. See Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, ARMY LAW., Dec. 1997, at 4, 4 (explaining that practice of keeping battlefield captives alive for ransom was traditionally based on “fiscal” rather than “humanitarian” reasons); Wingfield, *supra* note 23, at 116–17 (describing how “law of ransom” operated during Middle Ages).

30. See Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 201–08 (1998) (discussing development of parole from days of ancient Carthaginian civilization through World War II).

31. See Nathan A. Canestaro, “Small Wars” and the Law: Options for Prosecuting the Insurgents in Iraq, 43 COLUM. J. TRANSNAT'L L. 73, 81–87 (2004) (detailing evolution of law of war).

32. Dietrich Schindler & Jiří Toman, *Introductory Note to Instructions for the Government of Armies of the United States in the Field*, in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3, 3 (Dietrich Schindler & Jiří Toman eds., 3d rev. and completed ed. 1988). An analysis of the provisions of the document, commonly called the Lieber Instructions or the Lieber Code, shows that it clearly “acknowledge[s] the supremacy of the warrior’s utilitarian requirements even though explicitly referring to the need to balance military necessity with humanitarian concerns.” Eric S. Krauss & Mike O. Lacey, *Utilitarian vs. Humanitarian: The Battle over the Law of War*, PARAMETERS, Summer 2002, at 73, 76.

33. Dietrich Schindler & Jiří Toman, *Introductory Note to Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, in THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 101, 101. This document is commonly referred to as the Declaration of St. Petersburg.

34. Dietrich Schindler & Jiří Toman, *Introductory Note to Brussels Conference of 1874*, in THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 25, 25.

35. Dietrich Schindler & Jiří Toman, *Introductory Note to Convention (II) with Respect to the Laws and Customs of War on Land and Convention (IV) Respecting the Laws and Customs of War on Land*, in THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 63, 63. These documents are typically referred to as the Hague Conventions.

36. Dietrich Schindler & Jiří Toman, *Introductory Note to Naval Conference of London*, in THE LAWS OF ARMED CONFLICTS, *supra* note 32, at 843, 843.

warfare were ultimately codified in the Hague Convention of 1907, the type of battlefield regulation embodied in this treaty came to be known as the “Hague tradition.”<sup>37</sup> The principles of the Hague Tradition were focused on the fighters and tied to the practicalities of war.<sup>38</sup> Accordingly, George Aldrich has written, “The 1907 Hague Regulations contain very few provisions designed to protect civilians from the effects of hostilities. Aside from the prohibition on the employment of poison or poisoned weapons, which was primarily intended to protect combatants, the only such rules are Articles 25–28.”<sup>39</sup>

Concurrent with the development of the Hague rules was the beginning of a growing concern for the victims of war, comprising both combatants who were out of the fight and civilians who were never part of the fight. Beginning with Henri Dunant’s experience at the 1859 Battle of Solferino,<sup>40</sup> and the subsequent

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37. Derek Jinks and David Sloss discuss the differences between the Geneva and Hague traditions:

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

Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 108–09 (2004) (footnotes omitted).

38. See Louise Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 39, 42 (Michael N. Schmitt & Leslie C. Green eds., 1998) (arguing that advance in weapons technology also drove States to try and enact laws to limit warfare).

39. George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT’L L. 42, 50 (2000) (footnote omitted). Aldrich continues:

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

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

*Id.* (footnotes omitted).

40. International Committee of the Red Cross, *From the Battle of Solferino to the Eve of the First World War*, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNVP> (last visited Apr. 30, 2009) (providing concise history of Dunant, including Battle of Solferino).

formation of the International Committee of the Red Cross (“ICRC”), the world began to consider the plight of war victims, particularly the wounded and sick on the battlefield. By 1864, the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field<sup>41</sup> was signed, followed by its accompanying Additional Articles of 1868.<sup>42</sup> This convention was followed by the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.<sup>43</sup> Much like the Hague tradition, with the ICRC headquartered in Geneva, Switzerland, this new humanitarian-centered focus became known as the “Geneva tradition.”<sup>44</sup>

When WWII ravaged much of the world, it demonstrated the need to update the laws of war to increase protections not only for combatants, but civilians, as well.<sup>45</sup> “At the end of the nineteenth century, the overwhelming percentage of those killed or wounded in war were military personnel. Toward the end of the twentieth century, the great majority of persons killed or injured in most international armed conflicts have been civilian noncombatants.”<sup>46</sup> The nations of the world responded to this great destruction with the 1949 Geneva Conventions.<sup>47</sup> While the first three Geneva Conventions<sup>48</sup> built upon preexisting established principles that survived WWII and were aimed at the protection of sick or wounded warriors, a new treaty, Convention (IV) relative to the Protection of Civilian Persons in Time of War,<sup>49</sup> granted extensive

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41. Dietrich Schindler & Jiří Toman, *Introductory Note to Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, in *THE LAWS OF ARMED CONFLICTS*, *supra* note 32, at 279, 279.

42. Dietrich Schindler & Jiří Toman, *Introductory Note to Additional Articles Relating to the Condition of the Wounded in War*, in *THE LAWS OF ARMED CONFLICTS*, *supra* note 32, at 285, 285.

43. Dietrich Schindler & Jiří Toman, *Introductory Note to Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, in *THE LAWS OF ARMED CONFLICTS*, *supra* note 32, at 301, 301.

44. Jinks & Sloss, *supra* note 37, at 108–09.

45. See U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 2006, at 344 tbl.504 (2006), available at <http://www.census.gov/prod/2005pubs/06statab/defense.pdf> (showing U.S. death toll disparity between World Wars I and II).

46. Aldrich, *supra* note 39, at 48.

47. See Bradford, *supra* note 21, at 765–71 (discussing enactment of four treaties following WWII).

48. See Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I] (updating earlier conventions on treatment of wounded and sick soldiers); 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, 75 U.N.T.S. 85 [hereinafter Geneva Convention II] (applying standards of convention on wounded and sick soldiers to fighting at sea); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] (instituting minimum standards for treatment of captured enemy troops).

49. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Eric Krauss and Mike Lacey describe the importance of this treaty:

Previous conventions had forced the utilitarians to deal with issues such as the treatment of the sick and wounded and prisoners of war—duties which most utilitarians saw as part of



protections to civilians considered to be victims of war, including those in the hands of an enemy.<sup>50</sup> The overall goal of the four conventions was the advancement of humanitarian law by enlarging the reach of the law of war.<sup>51</sup>

The trend to enlarge the coverage of the laws of armed conflict continued as a result of the deadly armed conflicts that occurred after WWII. In 1977, the ICRC sponsored the completion of two Additional Protocols<sup>52</sup> that expanded on the prior Geneva Conventions. They not only brought the Geneva Conventions up to modern expectations, but for the first time showed a merging of the Geneva and Hague traditions.<sup>53</sup> For example, Part IV of Additional Protocol I is titled “Civilian Population” but contains some of the most important contemporary regulation of target selection and engagement, subjects theretofore reserved almost exclusively to the Hague tradition.<sup>54</sup>

The laws of armed conflict have also been modified considerably to affect specific weapons, for example, by the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and its additional protocols,<sup>55</sup> and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.<sup>56</sup> Some of these regulations have been passed without much deference to the

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their “warrior code” anyway. The Civilian Convention for the first time placed affirmative obligations upon the utilitarian warrior class to address the food, shelter, and health-care needs of civilians in an occupied area.

Krauss & Lacey, *supra* note 32, at 77.

50. Jensen, *supra* note 17, at 244–51.

51. Krauss & Lacey, *supra* note 32, at 77.

52. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument> [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, S. TREATY DOC. NO. 100-2, 1125 U.N.T.S. 609, available at <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument> [hereinafter Additional Protocol II].

53. James D. Fry, *Contextualized Legal Reviews for the Methods and Means of Warfare: Cave Combat and International Humanitarian Law*, 44 COLUM. J. TRANSNAT'L L. 453, 466 (2006).

54. See generally Orna Ben-Naftali & Keren R. Michaeli, “We Must Not Make a Scarecrow of the Law”: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT'L L.J. 233, (2003) (examining targeted killings of suspected terrorists in context of Additional Protocol I); Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 82; Mark David Maxwell & Richard V. Meyer, *The Principle of Distinction: Probing the Limits of Its Customariness*, ARMY LAW., Mar. 2007, at 1 (using Additional Protocol I to analyze how soldiers should distinguish between civilians and combatants).

55. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (with Protocols), Oct. 10, 1980, 1342 U.N.T.S. 137.

56. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211.

military's desire to maintain the weapon's wartime capability.<sup>57</sup> Nevertheless, the governments of many nations have embraced continued development of the law of armed conflict in order to increase its applicability and coverage because it supports the purposes of the law of war.

The merging and expansion of the Hague and Geneva traditions not only adds to the protections for combatants, noncombatants, and civilians on the battlefield, but also those who are in the hands of an enemy. In doing so, it also supports the quicker restoration of peace. The expansive application of the laws of war is a trend based in history and supportive of the modern political climate.

## II. CONFLICT CLASSIFICATION: THE INHERENT INSUFFICIENCY OF THE TRADITIONAL APPROACH TO DETERMINING APPLICABILITY OF THE LAWS OF WAR<sup>58</sup>

A thorough appreciation of the historical underpinnings of the laws of war demonstrates the critical importance of providing a regulatory framework for the execution of combat operations. Accordingly, asserting that armed conflict must be subject to such a framework becomes almost axiomatic. However, as noted above, the rapid evolution of the nature of warfare exemplified by the post-9/11 Global War on Terror has outpaced the evolution of the legal triggers for application of this regulatory framework. As a result, nations and the armed forces called upon to execute combat operations in their name confront increasing uncertainty as to the applicability of the laws of war to their operations, an uncertainty frequently resulting in policy-based application of law of war principles.<sup>59</sup>

That such uncertainty exists seems inconsistent with the intent of the drafters of the Geneva Conventions of 1949. One of the most important aspects of these four treaties was the rejection of a legally formalistic approach to determining application of the laws of war in favor of a pragmatic trigger, an effort inspired by the perceived "law avoidance" that occurred during WWII by characterizing armed conflicts as falling outside the legal definition of "war."<sup>60</sup>

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57. See *id.* pmb. (focusing on harmful impact on civilians and not mentioning weapon's military utility); cf. INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 2008: TOWARD A MINE-FREE WORLD (2008) (describing, in purely humanitarian terms, global effort to ban landmines).

58. For further analysis of the insufficiency of the current law-triggering paradigm to address issues related to transnational armed conflicts, see Corn, *supra* note 3, at 300–11.

59. See CHAIRMAN OF THE JOINT CHIEFS OF STAFF, *supra* note 6, at para. 4(a) (providing that U.S. armed forces will comply with law of war at all times, regardless of how conflicts are characterized, unless directed otherwise); U.S. DEP'T OF DEF., *supra* note 6, at para. 4.1 (requiring all members of Department of Defense to comply with law of war at all times, regardless of how conflict is characterized).

60. 3 INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 22–23 (Jean S. Pictet ed., 1960) [hereinafter ICRC COMMENTARY]. The ICRC Commentary offers additional background for this emphasis on de facto hostilities as a trigger for the protections of the Conventions:

The Hague Convention of 1899, in Article 2, stated that the annexed Regulations concerning the Laws and Customs of War on Land were applicable "in case of war". This

The method adopted by the international community in 1949 to accomplish this objective of preventing “law avoidance” was to develop a law-triggering mechanism based on the de facto existence of hostilities. Accordingly, the Geneva Conventions provide that the full corpus of the treaties come into effect during any “armed conflict” of an international character (interstate armed conflicts);<sup>61</sup> and that the more limited regulation provided by Common Article 3 to the treaties comes into effect during any armed conflict not of an international character<sup>62</sup> (understood at that time to mean intrastate armed conflicts).<sup>63</sup> While

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

*Id.* at 19–20.

61. Geneva Convention I, *supra* note 48, art. 2; Geneva Convention II, *supra* note 48, art. 2; Geneva Convention III, *supra* note 48, art. 2; Geneva Convention IV, *supra* note 49, art. 2. Each of these Conventions includes the following identical article:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Geneva Convention I, *supra* note 48, art. 2; Geneva Convention II, *supra* note 48, art. 2; Geneva Convention III, *supra* note 48, art. 2; Geneva Convention IV, *supra* note 49, art. 2.

62. Geneva Convention I, *supra* note 48, art. 3; Geneva Convention II, *supra* note 48, art. 3; Geneva Convention III, *supra* note 48, art. 3; Geneva Convention IV, *supra* note 49, art. 3. Each of these Conventions includes the following identical article:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

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

Geneva Convention I, *supra* note 48, art. 3; Geneva Convention II, *supra* note 48, art. 3; Geneva Convention III, *supra* note 48, art. 3; Geneva Convention IV, *supra* note 49, art. 3.

63. See *supra* note 73 and accompanying text for a discussion of the evolving definition of intrastate conflicts. The following explains this paradigm:

these law triggers technically relate only to the treaty provisions to which they are connected, over time they evolved into the customary international law triggers for the law of armed conflict writ large.<sup>64</sup>

The significance of these law triggers for purposes of this Article is not that transnational counterterrorism operations fall into either the interstate or intrastate armed conflict categories. Indeed, it was the fact that these operations fell into a proverbial twilight zone between these two types of armed conflicts that formed the basis for the Bush administration's denial of Geneva protections for captured al Qaeda operatives.<sup>65</sup> The significance lies in the determined efforts of the international community to ensure that, in future conflicts, the regulatory framework of the law of armed conflict could not be disavowed once a de facto situation of armed conflict existed. Accordingly, relying on these law-triggering provisions as a basis to *deny* applicability of this regulatory framework to a situation claimed to fall into the category of armed conflict represented a perversion of the spirit and intent of this fundamental advancement of the law.<sup>66</sup>

The reality that evolved after 1949 did not, however, necessarily implement this spirit and purpose. Instead, the geographic context of armed conflicts became as decisive to law applicability as did the existence of armed conflict itself. Accordingly, unless a conflict could be pigeonholed into what one of the Authors has characterized elsewhere as the interstate/intrastate "either/or" law-triggering paradigm,<sup>67</sup> applicability of the law was rejected. This paradigm is reflected in the following excerpt from a presentation by an ICRC Legal Adviser:

Humanitarian law recognizes two categories of armed conflict - international and non-international. Generally, when a State resorts to

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

Corn, *supra* note 3, at 300–02 (footnotes omitted).

64. See INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GEN.'S SCH., THE LAW OF WAR WORKSHOP DESKBOOK 13–24 (Brian J. Bill ed., 2000) (discussing legal justifications for armed conflict).

65. See *supra* notes 7–9 and accompanying text for a discussion of the characterization of al Qaeda as an armed attacker and the stance of the U.N. Security Council.

66. See generally Corn, *supra* note 3 (discussing need to update law-triggering paradigm to reflect modern realities of war).

67. *Id.* at 308.

force against another State (for example, when the “war on terror” involves such use of force, as in the recent U.S. and allied invasion of Afghanistan) the international law of international armed conflict applies. When the “war on terror” amounts to the use of armed force within a State, between that State and a rebel group, or between rebel groups within the State, the situation *may* amount to non-international armed conflict . . . .<sup>68</sup>

This interpretation of the law not only formed the foundation of Bush administration interpretations in relation to the U.S. military response to the terror attacks of September 11,<sup>69</sup> but did then and continues to play a central role in the assertion by some experts and governments that the law of armed conflict cannot apply to transnational counterterror military operations (unless those operations are part of a broader interstate armed conflict, such as U.S. operations in Afghanistan).<sup>70</sup>

If, as suggested herein, the ultimate purpose of the drafters of the Geneva Conventions was to prevent “law avoidance” by developing *de facto* law triggers—a purpose consistent with the humanitarian foundation of the treaties—then the myopic focus on the geographic nature of an armed conflict in the context of transnational counterterror combat operations serves to frustrate that purpose. These combat operations fall in a gap between the understood meaning of international and noninternational armed conflicts, because they are not conflicts resulting from disputes between states,<sup>71</sup> nor are they confined to the territory of the responding state. Thus, when one state uses combat power against an organized terrorist group in another state, and one or both states denies that it is involved in the armed conflict with the other (such as the 2006 Israeli intervention in Lebanon to destroy Hezbollah forces), uncertainty exists as to whether the armed conflict is “international” within the meaning of the law.<sup>72</sup> And, because such operations occur outside the responding state’s territory, they certainly are not intrastate.<sup>73</sup>

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68. Gabor Rona, Legal Adviser, ICRC, Presentation at the Workshop on the Protection of Human Rights While Countering Terrorism: When Is a War Not a War? - The Proper Role of the Law of Armed Conflict in the “Global War on Terror” (Mar. 16, 2004) (transcript available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList575/3C2914F52152E565C1256E60005C84C0>).

69. See *supra* notes 7–9 and accompanying text for a discussion of the Bush administration and U.N. Security Council’s characterization of al Qaeda.

70. See, e.g., UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 3.1 (2004) (limiting application of law of armed conflict to situations in which “the armed forces of a state are in conflict with those of another state”). *But see* Rona, *supra* note 68 (rejecting idea that international humanitarian law does not apply to war on terror).

71. See ICRC COMMENTARY, *supra* note 60, at 32 (discussing difficulties in coming to consensus about applicability of Geneva Conventions to conflicts that are not traditional civil wars or interstate conflicts).

72. “This ‘hostilities without dispute’ theory was clearly manifest in the recent conflict in Lebanon, where neither Israel nor Lebanon took the position that the hostilities fell into the category of international armed conflict.” Corn, *supra* note 3, at 305; *see also* Statement by Group of Eight Leaders - G-8 Summit 2006 (July 16, 2006), *available at* [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2006/Statement%20by%20Group%20of%20Eight%20Leaders%20-%20G-8%20Summit%202006%2016-Jul-2006](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2006/Statement%20by%20Group%20of%20Eight%20Leaders%20-%20G-8%20Summit%202006%2016-Jul-2006) (describing conflict between Israel and terrorist organization

It therefore becomes apparent why this “either/or” law-triggering paradigm fails to address the reality of extraterritorial counterterror combat operations conducted outside the territory of the responding state. These operations cannot be characterized as international armed conflicts within the meaning of Common Article 2 because they fail to satisfy the interstate predicate. As for Common Article 3, although they are certainly “non-international” as the result of the fact that they are not “interstate,” because they occur outside the territory of the responding state they fail to satisfy the “within the territory of the High Contracting Party” qualifier of Common Article 3, a qualifier that based on the drafting history of the article is properly understood as limiting Common Article 3 conflicts to those that are truly intrastate. This interstate/intrastate understanding of the Geneva Convention law-triggering paradigm was pervasive prior to the initiation of the U.S. military response to the terror attacks of September 11. As a result, the characterization of this military response as an “armed conflict” between the United States and a transnational terrorist group exposed a regulatory lacuna created by the Common Article 2/3 law-triggering paradigm. It was clear that the law had failed to account for determining what regulatory framework should or does in fact apply to such operations, typified by not only the U.S. military response to these attacks but also the subsequent Israeli assault on Hezbollah. These operations reveal the existence of this regulatory gap<sup>74</sup> and the legal uncertainty it produces.<sup>75</sup> Ironically, however, the

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based in Lebanon). However, “this was not the first example of the use of such a theory to avoid the acknowledgement of an international armed conflict. In fact, the U.S. intervention in Panama in 1989 represents perhaps the quintessential example of [this] theory of ‘applicability avoidance’ due to the absence of the requisite dispute between nations.” Corn, *supra* note 3, at 305. The United States executed the intervention to remove General Manuel Noriega from power in Panama and destroy the Panamanian Defense Force—the regular armed forces of Panama. RONALD H. COLE, OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, OPERATION JUST CAUSE: THE PLANNING AND EXECUTION OF JOINT OPERATIONS IN PANAMA, FEBRUARY 1988–JANUARY 1990 1–3 (1995), available at <http://www.dtic.mil/doctrine/jel/history/justcaus.pdf>. “Operation Just Cause involved the use of more than 20,000 U.S. forces who engaged in intense combat with the Panamanian Defense Forces.” Corn, *supra* note 3, at 305. However, “the United States asserted that the conflict did not qualify as an international armed conflict within the meaning of Common Article 2. The basis for this assertion was the fact that General Noriega was not the legitimate leader of Panama,” therefore the United States dispute with him did not qualify as a dispute with Panama. *Id.* (footnote omitted). “Although this rationale was ultimately rejected by the U.S. district court that adjudicated Noriega’s claim to prisoner of war status, it is” not the only example of the emphasis “of a lack of a dispute between states as a basis for denying the existence of a Common Article 2 inter-state conflict.” *Id.* (footnote omitted); see also *United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992) (discussing argument for denying role to Common Article 2 in Noriega’s case).

73. See Corn, *supra* note 3, at 307 & n.38 (examining evolution of interpretation of Common Article 3 from origins to post-September 11 applications).

74. See ELSEA, *supra* note 1, at CRS-10 to CRS-16 (analyzing whether attacks of September 11, 2001 triggered law of war); Kirby Abbott, *Terrorists: Combatants [sic], Criminals, or . . .?—The Current State of International Law*, in THE MEASURE OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS AND VALIDITY 366, 366–70 (2004) (discussing difficulty of determining what law applies in War on Terror context); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 2–9 (2004) (discussing complex challenge of

existence of this gap does not prove that regulation in this context is not required. In fact, the policy response to the reality of this gap in legal coverage reveals that professional armed forces consider an unregulated operational environment fundamentally inconsistent with disciplined military operations.<sup>76</sup> Furthermore, the pragmatic recognition that all armed conflicts must be subject to the regulatory principles of the law of armed conflict has been central to the Supreme Court's rejection of the "regulatory gap" interpretation of the law central to the government position in war on terror cases. The most profound example of this is certainly the Court's decision in *Hamdan v. Rumsfeld*.<sup>77</sup> But even before that case reached the Court, this logic was embraced by the concurring judge in the lower court endorsement of the Bush position that brought the case to the Supreme Court. In the D.C. Circuit Court of Appeals decision,<sup>78</sup> Judge Williams responded to the majority's reasoning that, because the President determined that the conflict is of international scope but is not interstate, Common Article 3 is therefore inapplicable to armed conflict with al Qaeda:

Non-State actors cannot sign an international treaty. Nor is such an actor even a "Power" that would be eligible under Article 2 (¶ 3) to secure protection by complying with the Convention's requirements. Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The gap being filled is the non-eligible party's failure to be a nation. Thus the words "not of an international character" are sensibly understood to refer to a conflict between a signatory nation and a non-state actor. The most obvious form of such a conflict is a civil war. But given the Convention's structure, the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict "not of an international character." In such a conflict, the signatory is bound to Common Article 3's modest requirements of "humane[]" treatment and "the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>79</sup>

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conflict categorization related to military operations conducted against highly organized nonstate groups with transnational reach).

75. See *Lebanon/Israel: U.N. Rights Body Squanders Chance to Help Civilians*, HUMAN RIGHTS WATCH, Aug. 11, 2006, [http://hrw.org/english/docs/2006/08/11/lebanon13969\\_txt.htm](http://hrw.org/english/docs/2006/08/11/lebanon13969_txt.htm) (denouncing Human Rights Council's decision to investigate abuses committed by Israel but not those perpetrated by Hezbollah); *U.N.: Open Independent Inquiry into Civilian Deaths*, HUMAN RIGHTS WATCH, Aug. 7, 2006, <http://hrw.org/english/docs/2006/08/08/lebanon13939.htm> (noting that Kofi Annan, Secretary-General of the United Nations, called for investigation into effects of conflict on civilians in Israel and Lebanon).

76. See Corn, *supra* note 3, at 311–15 (discussing policy-mandated application of fundamental law of armed conflict principles to situations that do not trigger legal application of these principles).

77. 548 U.S. 557 (2006).

78. *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006).

79. *Id.* (Williams, J., concurring).

Although this argument seems to provide a compelling recognition that the critical trigger for application of the law was a government assertion of authority based on a theory of armed conflict and that no armed conflict should be unregulated, Judge Williams was unable to convince his peers to adopt this interpretation. This reflects the pervasive impact of the Common Article 2 and 3 “either/or” law-triggering paradigm on conflict regulation analysis. It is simply inescapable that such a pragmatic interpretation of these law triggers is fundamentally inconsistent with the evolved interpretation of these articles, a reality borne out by the subsequent Supreme Court decision in *Hamdan v. Rumsfeld*, where the Court was essentially evenly divided on the proper interpretation of Common Articles 2 and 3.<sup>80</sup> But as Judge Williams and the *Hamdan* Supreme Court decision recognized, “it is fundamentally inconsistent with the logic of the law of war to detach the applicability of regulation from the necessity for regulation.”<sup>81</sup> A pragmatic reconciliation of these two considerations, one that ensured that conflict dictates application of law, not that law dictates what is a conflict, was needed.

But pragmatism only reaches so far. The law of armed conflict is indisputably a *lex specialis*, and as such does not and cannot apply at all times to all situations. Nor can it simply apply to all military operations, for many such operations cannot under any legitimate definition be characterized as armed conflicts. Accordingly, to achieve this reconciliation it is necessary to identify triggering conditions beyond those focused on the interstate and intrastate conflict paradigm. Identification of such criteria is particularly essential for determining the existence of an extraterritorial noninternational armed conflict. As one of the Authors has proposed elsewhere, such conflicts involve the transnational characteristics of international armed conflict, but the military operational characteristics of noninternational armed conflicts (because of the state versus nonstate nature of the operations).<sup>82</sup> As a result, attempting to rely on the accepted triggering criteria for either of these categories of armed conflict is like trying to put the proverbial square peg into the round hole. It is therefore unsurprising that designating the struggle against international terrorism a “global war” and announcing that the United States was engaged in an “armed conflict” with al Qaeda was both controversial and ultimately confusing for the armed forces required to execute operations associated with this struggle.

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80. In an opinion written by Justice Stevens, a plurality of the Court embraced the conclusion reached by Judge Williams in the D.C. Circuit, arguing that Common Article 3 operated in “contradistinction” to Common Article 2, and applied to any armed conflict not satisfying Common Article 2. *Hamdan*, 548 U.S. at 629–31. The dissenters rejected this interpretation, asserting that the plain language of Common Article 3 did not extend to transnational conflicts against nonstate entities. *Id.* at 718–20 (Scalia, J., dissenting) (“The President’s interpretation of Common Article 3 is reasonable and should be sustained. The conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also ‘occurring in the territory of’ more than ‘one of the High Contracting Parties.’”).

81. Corn, *supra* note 3, at 310.

82. *Id.* at 300–10.



Identification of law-triggering criteria that address such transnational combat operations is not inconsistent with the underlying purpose of the “either/or” paradigm. It is the underlying purpose reflected by the articles that spawned this paradigm that should be the focus of law development. That purpose was to provide a law-triggering mechanism that is based not on a legally formalistic interpretation of treaty provisions but instead on the historically validated necessity of providing regulation of warfare and limiting the suffering associated with military conflict. Analyzing the law from this perspective leads to the conclusion that it may have been simply an accident of history that resulted in the failure to provide for regulation of transnational nonstate conflicts, caused by the simple reality that the drafters of the Conventions did not have contemporary experience with such conflicts. Accepting such a proposition—a proposition bolstered by the policies adopted by professional armed forces mandating application of the law during all military operations even when they failed to fall under the Article 2 and 3 paradigm—leads to the necessity of identifying an effective triggering criteria that can reconcile the reality of contemporary combat operations with the internationally ordained application trigger for the laws of war. As will be discussed below, analysis of rules of engagement may provide the key for achieving such a reconciliation.

### III. THE DEVELOPMENT OF RULES OF ENGAGEMENT AND HOW THEY COMPLEMENT THE LAWS OF WAR

As demonstrated above, the development of warfare has been paralleled by the formation of rules of warfare. Because those rules have responded to the changes in the nature of warfare, over time they have not only been codified in numerous treaties, but also generally accepted as authoritative by armed forces, even when they are not meticulously applied in practice.<sup>83</sup> Regardless of the increasing influence on humanitarian organizations in the development and interpretation of this law, the underlying tactical rationale for most of these rules continues to be the military commander’s desire to regulate the use of force by warriors in order to facilitate accomplishment of political, tactical, or strategic goals.

This idea of a commander controlling the use of force has resulted not only in laws of war, but also in tactical control measures commonly referred to as rules of engagement (“ROE”). As defined in U.S. military doctrine, ROE are “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”<sup>84</sup> In other words, ROE are intended to give operational and tactical military leaders greater control over the execution of combat operations by subordinate forces. Though not historically designated in contemporary terms, the history of warfare

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83. See *infra* notes 84–97 and accompanying text for a discussion of the development of the rules of engagement.

84. DOD DICTIONARY, *supra* note 14, at 476.

is replete with examples of what have essentially been ROE. From the leader of the hunt by prehistoric man, who organized his forces to surround the great mammoth, to the children of Israel marching around Jericho and blowing their horns,<sup>85</sup> as long as man has engaged in organized combat, military leaders have used ROE as a mechanism to maximize success. The Battle of Bunker Hill provides a more modern and perhaps quintessential example of such use. Captain William Prescott imposed a limitation on the use of combat power by his forces in the form of the directive “[d]on’t one of you fire until you see the whites of their eyes”<sup>86</sup> in order to accomplish a tactical objective. Given his limited resources against a much larger and better-equipped foe, he used this tactical control measure to maximize the effect of his firepower. This example of what was in effect ROE is remembered to this day for one primary reason—it enabled the American rebels to maximize enemy casualties.

Another modern example of tactical controls on the use of force is the Battle of Naco in 1914. The actual battle was between two Mexican factions, but it occurred on the border with the United States.<sup>87</sup> In response to the threat of cross-border incursions, the 9th and 10th Cavalry Regiments, stationed at Fort Huachuca, Arizona, were deployed to the U.S. side of the border to ensure that U.S. neutrality was strictly maintained.<sup>88</sup> As part of the Cavalry mission, “[t]he men were under orders not to return fire,”<sup>89</sup> despite the fact that the U.S. forces were routinely fired upon and “[t]he provocation to return the fire was very great.”<sup>90</sup> Because of the soldiers’ tactical restraint and correct application of their orders—what today would be characterized as rules of engagement—the strategic objective of maintaining U.S. neutrality was accomplished without provoking a conflict between the Mexican factions and the United States.<sup>91</sup> The level of discipline reflected by the actions of these U.S. forces elicited a special letter of commendation from the President and the Chief of Staff of the Army.<sup>92</sup>

Despite these and numerous other historical examples of soldiers applying ROE, the actual term “rules of engagement” was not used in the United States until 1958, when the military’s Joint Chiefs of Staff (“JCS”) first referred to it.<sup>93</sup>

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85. *Joshua* 6:1–20.

86. Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 34 (1994) (quoting JOHN BARTLETT, FAMILIAR QUOTATIONS 446 & n.1 (Emily Morison Beck ed., 14th ed., Little, Brown and Co. 1968) (1855)).

87. See James P. Finley, *Buffalo Soldiers at Huachuca: The Battle of Naco*, HUACHUCA ILLUSTRATED, 1993, available at <http://net.lib.byu.edu/estu/wwi/comment/huachuca/HI1-10.htm> (providing information on Fall of Naco).

88. *Id.*

89. *Id.*

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

91. *Id.*

92. The commendation letter stated, “These troops were constantly under fire and one was killed and 18 were wounded without a single case of return fire of retaliation. This is the hardest kind of service and only troops in the highest state of discipline would stand such a test.” Finley, *supra* note 87.

93. See generally Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate’s Primer*, 42 A.F. L. REV. 245, 245–47 (1997) (indicating Joint Chiefs of Staff are responsible for Rules of Engagement enactment).

As the Cold War began to heat up and the United States had military forces spread across the globe, military leaders were anxious to control the application of force and ensure it complied with national strategic policies.<sup>94</sup> With U.S. and Soviet bloc forces looking at each other across fences and walls in Europe and over small areas of air and water in the skies and oceans, it was important to prevent a local commander's overreaction to a situation that began as a minor insult or a probe to result in the outbreak of a conflict that could quickly escalate into World War III. Accordingly, in 1981 the JCS produced a document titled the JCS Peacetime ROE for Seaborne Forces, which subsequently expanded in 1988 into the JCS Peacetime ROE for all U.S. Forces.<sup>95</sup> Then, at the end of the Cold War, the JCS reconsidered their peacetime ROE and determined that the document should be amended to apply to all situations, including war and military operations other than war.<sup>96</sup> In 1994, they promulgated the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement, which was subsequently updated in 2000 and again in 2005.<sup>97</sup> As will be discussed below in detail, it is this 2005 edition that governs the actions of U.S. military members today.

ROE have become a key issue in modern warfare<sup>98</sup> and a key component of mission planning for U.S. and many other armed forces.<sup>99</sup> In preparation for military operations, the President or Secretary of Defense personally reviews and approves the ROE, ensuring they meet the military and political objectives.<sup>100</sup> Ideally, ROE represent the confluence of three important factors:

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94. See generally Robert K. Fricke, *Dereliction of Duty: Lyndon Johnson, Robert McNamara, the Joint Chiefs of Staff, and the Lies That Led to Vietnam*, 160 MIL. L. REV. 248, 252–53 (1999) (book review) (identifying Cuban missile crisis as event encouraging planning for “graduated use of force”).

95. See Martins, *supra* note 86, at 22–26 (explaining rules with which military units must comply under JCS Peacetime ROE, including United Nations Charter and international law regulations regarding force).

96. Faculty, Judge Advocate General's School, *International Law Notes: “Land Forces” Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement*, ARMY LAW., Dec. 1993, at 48, 49.

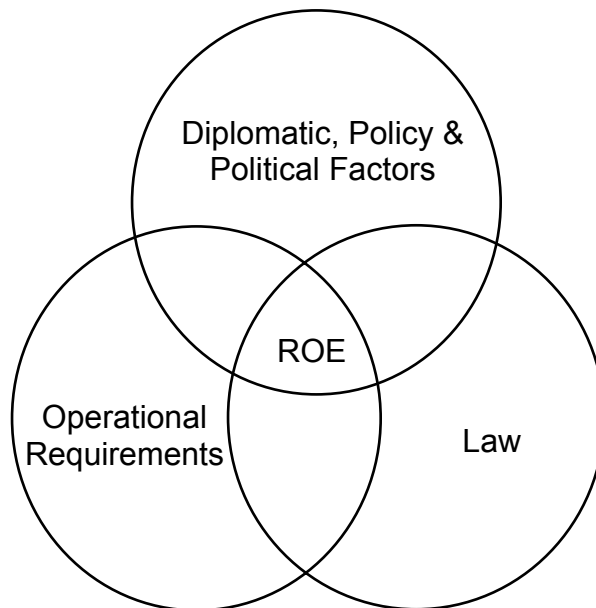
97. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES (2005) [hereinafter CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B]; OPERATIONAL LAW HANDBOOK, *supra* note 20, at 84.

98. See Sean McCormack, Spokesman, U.S. Dep't of State, United States Department of State Daily Press Briefing (Oct. 3, 2007), available at <http://2001-2009.state.gov/r/pa/prs/dpb/2007/oct/93190.htm> (explaining that civilians and contractors must abide by rules of engagement in war zones).

99. See CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT HANDBOOK FOR JUDGE ADVOCATES 1-1 to 1-32 (2000) [hereinafter RULES OF ENGAGEMENT HANDBOOK] (providing in-depth analysis on role rules of engagement play in planning process); OPERATIONAL LAW HANDBOOK, *supra* note 20, at 84 (detailing potential parameters that rules of engagement impose on mission planning).

100. See Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126 (1998) (explaining that “national command authority” ensures rules of engagement are in line with nation's military and political goals).

operational requirements, national policy, and the law of war.<sup>101</sup> This is illustrated by the diagram below.



It is particularly important to note while ROE are not coterminous with the laws of war, they must be completely consistent with the laws of war. In other words, while there are laws of war that do not affect a mission's ROE, all ROE must comply with the laws of war. This is illustrated by the diagram above, which reflects the common situation where the authority provided by the ROE is more limited than would be consistent with the laws of war. For example, in order to provide greater protection against collateral injury to civilians, the ROE may require that the engagement of a clearly defined military objective in a populated area is authorized only when the target is under direct observation. This is a fundamental principle and key to the proper formation and application of ROE. In fact, the preeminent U.S. ROE order (discussed in Part V below) explicitly directs U.S. forces that they "will comply with the Law of Armed Conflict during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with the principles and spirit of the Law of Armed Conflict during all other operations."<sup>102</sup> Note that this directive applies to "armed conflict," not international armed conflict. The significance of this language will be discussed below.

101. Grunawalt, *supra* note 93, at 247.

102. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-1 para. 1(d).

To illustrate this interaction between ROE and the laws of War, consider an ROE provision that allows a soldier to kill an enemy. While this provision is completely appropriate, it does not give the soldier the authority to kill an enemy who is surrendering because such conduct would violate the law of war.<sup>103</sup> Similarly, if the ROE allow a pilot to destroy a bridge with a bomb, that does not relieve the pilot of the responsibility to do a proportionality analysis and be certain that any incidental civilians deaths or damage to civilian property is not “excessive in relation to the concrete and direct military advantage”<sup>104</sup> to be gained by the destruction of the bridge. ROE will also often contain provisions that remind soldiers that they can only engage the enemy or other individuals that engage in defined conduct endangering soldiers or others. In this way, ROE ensures compliance with the laws of war by reinforcing the requirement to abide by the laws of war.

To ensure that approved ROE are properly understood and applied during armed conflict, they become an integral part of the training in preparation for military operations.<sup>105</sup> Military trainers are tasked with incorporating vignettes into training that reinforce the ROE and law of war. The training also highlights specific issues important to the upcoming military operation. For example, as a result of the ratification of the Chemical Weapons Convention,<sup>106</sup> the United States has agreed not to use riot control agents such as tear gas as a method of warfare.<sup>107</sup> Therefore, using riot control agents against an enemy in international armed conflict would be a violation of the law of war for U.S. soldiers. However, using riot control agents is not proscribed in other military operations such as peace support operations conducted in Haiti.<sup>108</sup> As the unit prepares for their mission, an analysis is done of what law of war constraints will apply, based on the type of conflict, and then the training centers can adapt their training to appropriately incorporate the use or nonuse of riot control agents. In this way, the ROE not only act as a guide to the use of force but also are a flexible and responsive method of ensuring compliance with international legal obligations in armed conflict, including differing obligations between international armed conflict, transnational armed conflict, and internal armed conflict.

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103. See Susan L. Turley, Note, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139, 142 (1994) (categorizing reciprocity in dealing with enemy as central to laws of war).

104. Additional Protocol I, *supra* note 52, art. 57.2(b).

105. See OPERATIONAL LAW HANDBOOK, *supra* note 20, at 90–91 (explaining how rules of engagement may affect soldiers); RULES OF ENGAGEMENT HANDBOOK, *supra* note 99, at 2-1 to 2-12 (detailing rules of engagement training principles and tactics). See generally Martins, *supra* note 86, at 24 (discussing peacetime training in rules of engagement).

106. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 45, available at [http://www.cwc.gov/cwc\\_treaty.html](http://www.cwc.gov/cwc_treaty.html).

107. See *id.* art. 1 (setting forth obligations of parties, including agreement to refrain from use of riot control agents in warfare).

108. RULES OF ENGAGEMENT HANDBOOK, *supra* note 99, at C-29.

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IV. TWO BROAD CATEGORIES OF RULES OF ENGAGEMENT: STATUS RULES AND CONDUCT RULES

As discussed above, for the United States, the seminal ROE directive is the Chairman of the Joint Chiefs of Staff Instruction 3121.01B Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (“CJCSI”),<sup>109</sup> as amended in 2005. The CJCSI is divided into two parts, the Standing Rules of Engagement for U.S. Forces (“SROE”) and Standing Rules for the Use of Force (“SRUF”). The CJCSI explains the purpose of the SRUF as follows:

The SRUF . . . establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all DOD civil support . . . and routine Military Department functions (including [antiterrorism/force protection] duties) occurring within US territory or US territorial seas. SRUF also apply to land homeland defense missions occurring within US territory and to DOD forces, civilians and contractors performing law enforcement and security duties at all DOD installations . . . within or outside US territory, unless otherwise directed by the [Secretary of Defense].”<sup>110</sup>

SRUF therefore are not particularly relevant to the thesis of this Article because they are intended to apply in what are relatively clear peacetime/nonconflict situations.

In contrast, and directly relevant to our thesis, the SROE “establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all military operations and contingencies and routine Military Department functions.”<sup>111</sup> This includes “Antiterrorism/Force Protection . . . duties, but excludes law enforcement and security duties on DoD installations, and off-installation while conducting official DoD security functions, outside US territory and territorial seas.”<sup>112</sup> The SROE also apply to “air and maritime homeland defense missions conducted within US territory or territorial seas, unless otherwise directed by the [Secretary of Defense]”<sup>113</sup> and are standing instructions that are “in effect until rescinded.”<sup>114</sup> Thus, the SROE are standing instructions regulating the use of destructive military power that apply to almost everything the military does outside the continental United States.<sup>115</sup> Unless otherwise directed, it applies to soldiers stationed in Germany, air crews providing disaster assistance in Pakistan

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109. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97. The CJCSI is classified SECRET but the basic instruction and Enclosure A titled “Standing Rules of Engagement for US Forces” are unclassified. *Id.* All references in this Article will come from the basic instruction or the unclassified enclosure and will be from the 2005 edition unless otherwise noted.

110. *Id.* at 1.

111. *Id.*

112. *Id.* at A-1 para. 1(a).

113. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-1 para. 1(a).

114. *Id.* at A-1 para. 1(d).

115. See Grunawalt, *supra* note 93, at 247–48 (describing scope of SROE’s application).

after an earthquake, Marines on shore leave in Australia, and sailors cruising through the Mediterranean. And they certainly apply to members of the military patrolling neighborhoods on a United Nations peace enforcement mission or fighting in the streets against a counterinsurgency.

#### A. *Organization*

Understanding the organization of the U.S. ROE Instruction provides insight into the principles it espouses. The basic instruction is only six pages long, unclassified, and provides only general guidelines concerning the use of force.<sup>116</sup> Most importantly, it discusses the general applicability of the document as discussed above, and then highlights the difference between the rules for self-defense and mission accomplishment which will be discussed in detail below.

Appended to the basic instruction are seventeen Enclosures, the majority of which are protected by national security classification.<sup>117</sup> The first enclosure, however, is unclassified and deals with the self-defense policies under the SROE.<sup>118</sup> Enclosures B, C, and D contain general rules tailored for maritime, air, and land operations, respectively.<sup>119</sup> Enclosures E through H contain more specific rules targeted at types of military operations, rather than instructions based on the geographic aspects of the operations.<sup>120</sup> These later enclosures include directions for space operations, information operations, noncombatant operations, and counterdrug operations.<sup>121</sup> Enclosure I contains a menu of potential supplemental measures which will be discussed below in Part IV.F.<sup>122</sup> This is followed by Enclosure J, discussing the ROE request and authorization process, and Enclosure K, containing a list of references.<sup>123</sup> Enclosures L through Q deal with the SRUF and will therefore not be discussed.<sup>124</sup>

#### B. *Bifurcation*

The genius of the SROE is in its bifurcation between the rules governing self-defense and mission accomplishment. This foundational principle is the key to proper understanding and application of force by U.S. forces. As the

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116. See CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-1 para. 1(a) (describing purpose and scope of SROE).

117. See, e.g., INSPECTOR GEN., U.S. DEP'T OF DEF., REVIEW OF MATTERS RELATED TO THE AUGUST 28, 2005 SHOOTING OF REUTERS JOURNALISTS 43 n.22 (2008), available at <http://www.dodig.osd.mil/Inspections/ipo/reports/Reuters%20Final%20Print%20Version.pdf> (discussing scope of unclassified materials).

118. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at 3, A-1.

119. *Id.* at 5.

120. *Id.*

121. *Id.*

122. *Id.*

123. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at 5.

124. *Id.*

document states, “The purpose of the SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of self-defense.”<sup>125</sup> Throughout the document these two situations are treated as almost mutually exclusive.<sup>126</sup> By treating these two applications of force separately, the instruction provides a paradigm where each set of rules can be the subject of appropriate training to ensure they are clearly understood and readily applicable. Accordingly, they facilitate the execution of missions regardless of whether military members are employing force in self-defense or employing force without the necessity of immediate imminent threat in order to accomplish a designated operational mission.

This bifurcation of force employment authority between mission accomplishment and traditional self-defense principles is indicative of both the nature of the mission as well as the nature of anticipated threats posed by different groups that might be encountered during such missions. For example, when U.S. forces entered Iraq in March 2003, the Iraqi forces were presumably the “enemy” and could be attacked on sight irrespective of whether they were presenting U.S. forces with an imminent threat. Individuals in this category were easy to identify because they were normally wearing Iraqi uniforms. The Iraqi forces were also, of course, correspondingly able to engage U.S. forces on sight without waiting for any specific action or additional direction. These engagements were governed by the mission accomplishment ROE, which provided robust authority to engage any Iraqi soldier upon contact.<sup>127</sup>

In contrast, once U.S. forces defeated the Iraqi military and established general control in areas throughout Iraq and began moving among the populace, there was the additional risk that they would come under attack from time to time by members of this population. Such risk did not come from Iraqi forces or other lawful combatants under the definitions in the Geneva Conventions.<sup>128</sup>

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125. *Id.* at A-1 para. 1(a).

126. *See id.* at A-2 to A-3 (defining force and self-defense).

127. *See* Grunawalt, *supra* note 93, at 255 (explaining mission accomplishment ROE).

128. *See* Geneva Convention I, *supra* note 48, art. 4 (outlining requirements to be considered prisoner of war). Prisoner of War status is reserved for lawful combatants:

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

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

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

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

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



Instead, it came from Iraqi civilians who opposed the U.S. presence in Iraq. In these situations, U.S. forces responded not against declared or known hostile forces, but against an otherwise protected civilian who had decided to take up arms and act hostile to US forces. In this situation, it is self-defense principles that are implemented by the ROE, authorizing U.S. forces to employ necessary force in response to an imminent threat directed to them or other innocent individuals. Thus, when employing force against the Iraqi armed forces, it is their status as members of that group that subjects them to attack, whereas when employing force against hostile civilians, it is their conduct that subjects them to attack.

Though the SROE treat mission accomplishment and self-defense as almost mutually exclusive, there are situations where such bifurcation could be misleading. For example, if U.S. forces engage an opponent who launches an attack against them during combat or high intensity conflict situations, they are ostensibly defending themselves. In such situations, should the response be governed by the self-defense rules? The answer is no. Because they are in a combat environment and declared hostile forces are engaging them, their use of force is governed by mission accomplishment rules, even though the nature of the response also implicates self-defense. This provides an operational advantage for U.S. forces because, as explained below, mission accomplishment rules are generally more permissive than self-defense rules. There are similar examples on the fringes of the differentiation between self-defense and mission accomplishment,<sup>129</sup> but for the majority of situations, this bifurcation is a great aid not only in applying force but also in the conduct of preparatory training for an assigned mission.

### C. *Status Versus Conduct*

Within the SROE, there are several definitions that are key to the proper application of force and that must be clear to guide an appropriate response in situations similar to the Iraq hypothetical above. As described in that hypothetical, in March 2003 the Iraqi army was the enemy, or “declared hostile forces.” Declared hostile forces are defined in the SROE as “[a]ny civilian, paramilitary or military force or terrorist(s) that has been declared hostile by appropriate US authority.”<sup>130</sup> Under the SROE, U.S. forces may always engage a declared hostile force, irrespective of their manifested conduct (with the

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(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

*Id.*

129. Grunawalt, *supra* note 93, at 255.

130. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-3 para. 3(d).

exception of conduct that clearly indicates such personnel are *hors de combat*).<sup>131</sup> It is their status as members of a declared hostile force that makes them subject to attack. It does not matter whether the declared hostile force is sleeping, taking a shower, eating a meal, or attacking U.S. forces. In all cases, they may be attacked.<sup>132</sup> This is not to say that once identified as a member of a hostile group, U.S. forces *must* attack. Ultimately, other tactical considerations will dictate the nature of the U.S. reaction. For example, if a U.S. soldier happens upon a sleeping Iraqi soldier, it may very well be tactically preferable to capture this enemy rather than kill him. But this merely illustrates that the authority granted by the ROE, which is in turn derived from the law of war principle of military objective, is just that—an authority, and not an obligation. Understanding the distinction between authority and obligation is therefore essential to appreciate the significance of the tactical choice to forego an otherwise lawful attack. It is, however, the authority provided by the ROE as the result of the designation of “hostile force” that permits the U.S. soldier kill the “sleeping enemy” if such action is deemed tactically appropriate.

This is in contrast to the civilian in the Iraq hypothetical who takes up arms against U.S. forces. His status is that of a civilian, a protected status<sup>133</sup> that prohibits U.S. forces making him the object of attack. However, when he attacks,<sup>134</sup> he is divested of that protected status and military forces have the right to respond in self-defense.<sup>135</sup> In other words, the protection he enjoys from being made the object of attack is not absolute, but instead may be forfeited for as long as the civilian engages in conduct that threatens U.S. forces. This is only logical, for no state would consent to a law of war principle that would deprive their personnel of the ability to act in self-defense and defense of others.

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131. *Id.* at A-2 para. 2(b).

132. *Id.*

133. See Additional Protocol I, *supra* note 52, art. 51.1 (providing that civilians are protected from military attacks).

134. See *id.* art. 51.3 (stating that civilians are protected until they “take a direct part in hostilities”). The definition of “direct participation in hostilities” is a matter of some controversy. Academics and military leaders have searched for a workable definition since its inception. See, e.g., J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 176–80 (2005) (attempting to define scope of direct participation required). The Commentary is not much help as almost all agree that it is broader than this definition. The ICRC has an on-going “group of experts” meeting to discuss this topic. With such a lack of clarity, it is beyond the scope of this Article to resolve that issue. However, it is important here to draw the distinction between “direct participation in hostilities” as a law of war principle and self-defense ROE principles. ROE and the law of war are not coterminous, but ROE must comply with the law of war. See *supra* notes 100–01 and accompanying text for a discussion of the requirements of ROE. Therefore, when a civilian takes a direct part in hostilities by attacking a member of the military, he surrenders his law of war protective status and becomes targetable. Additional Protocol I, *supra* note 52, art. 51.3. The ROE then govern the tactical application of force against that targetable civilian. See *supra* notes Part IV.D for a discussion of when the ROE permit use of force in self-defense.

135. See *supra* note 134 for a discussion of targetable civilians.

*D. Self-Defense*

When responding in self-defense, two SROE definitions are determinative: hostile act, and hostile intent.<sup>136</sup> The SROE define a hostile act as “[a]n attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.”<sup>137</sup> This is the easier of the two principles to understand and apply. In the Iraq hypothetical, it is when the civilian shoots at U.S. forces. By attacking U.S. forces, he has committed a hostile act to which U.S. forces may respond with proportionate force,<sup>138</sup> including deadly force if necessary.

Hostile intent is “[t]he threat of imminent use of force against the United States, US forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.”<sup>139</sup> Determining a “threat” or “imminent use of force” necessarily injects increased subjectivity into the analysis. Application of this principle is dictated by the actions prior to firing at U.S. forces, such as when the prospective attacker establishes a firing position, raises his rifle or puts the U.S. forces in his weapon sight. Once the prospective attacker’s intent is discernible and his capability evident, U.S. forces may respond with proportionate force, including deadly force.<sup>140</sup>

The need for military members to be able to respond to hostile act and hostile intent is amply illustrated from unfortunate past experience. In 1982, the U.S. military units deployed to Beirut as part of a multinational force comprised of British, French, and Italian forces.<sup>141</sup> Their mission was to facilitate the withdrawal of non-Lebanese forces from the country.<sup>142</sup> There was no “enemy”

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136. *But see* Stephens, *supra* note 99, at 142 (arguing that definitions of hostile act and hostile intent are overly broad to comply with international law).

137. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-3 para. 3(e).

138. The SROE uses the term “proportionality” instead of proportionate force. *Id.* at A-3 para. 4(a)(3). However, to avoid confusion with the law of war term “proportionality,” this Article uses the term “proportionate force.” In describing a proportionate response, the SROE state

[t]he use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required.

*Id.*

139. *Id.* at A-3 para. 3(f). “The determination of whether the use of force against US forces is imminent will be based on an assessment of all facts and circumstances known to US forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.” *Id.* at A-3 para. 3(g).

140. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-3 para. 4(a)(3).

141. For an excellent analysis of the events in Beirut, see Martins, *supra* note 86, at 10–12.

142. U.S. DEP’T OF DEF., REPORT OF THE DoD COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCTOBER 23, 1983, at 1–3 (1983) [hereinafter DEPARTMENT OF DEFENSE COMMISSION, BEIRUT REPORT].

or declared hostile force.<sup>143</sup> As the mission continued into 1983, relations between the local population and the multinational forces deteriorated.<sup>144</sup> On October 23, 1983, a suicide bomber drove a truck loaded with explosives that were the equivalent of over 12,000 tons of TNT past several guard stations and crashed into the Marine barracks, detonating the explosives and killing 241 Marines.<sup>145</sup>

As a result of the attack, the Secretary of Defense convened a commission to “examine the rules of engagement in force and the security measures in place at the time of the attack.”<sup>146</sup> While the commission concluded that the “ROE used by the Embassy security detail were designed to counter the terrorist threat posed by both vehicles and personnel,” it also concluded that “Marines on similar duty at [Beirut International Airport], however, did not have the same ROE to provide them specific guidance and authority to respond to a vehicle or person moving through a perimeter.”<sup>147</sup> One of the contributing factors on which the commission based its conclusion was that the ROE “underscored the need to fire only if fired upon, to avoid harming innocent civilians, to respect civilian property, and to share security and self-defense efforts with the [Lebanese Armed Forces].”<sup>148</sup> Had the Marines been functioning under the hostile intent and hostile act rules that U.S. service members currently function under, their permissible actions in self-defense would have been clear and a tragedy potentially averted.

It is therefore apparent that the engagement authorization provided by the self-defense prong of the ROE essentially extends traditional criminal self-defense and defense of others principles to the operational environment.<sup>149</sup> Hostile intent and hostile act serve as triggers for proportionate actions in self-defense or defense of others. This is a true necessity-based authority, permitting only that amount of responsive force necessary to terminate the threat, and extant for only so long as the threat exists.<sup>150</sup> Because of the necessity basis for this authority, the SROE permit the use of force pursuant to this prong of authority at all times and during all missions.<sup>151</sup> This authority never changes in

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143. *Id.*

144. *Id.* at 39–40.

145. *Id.* at 1–2; Stephens, *supra* note 99, at 128.

146. DEPARTMENT OF DEFENSE COMMISSION, BEIRUT REPORT, *supra* note 142, at 19.

147. *Id.* at 50.

148. *Id.* at 51.

149. See David Bolgiano et al., *Defining the Right of Self-Defense: Working Toward the Use of a Deadly Force Appendix to the Standing Rules of Engagement for the Department of Defense*, 31 U. BALT. L. REV. 157, 166 (2002) (describing “inherent right” to self-defense as essential element of American common law).

150. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-3.

151. There has been some discussion amongst military personnel about the “inherent right of self-defense” and allegations that the principles of self-defense are insufficient to protect individual soldiers. See, e.g., Bolgiano, *supra* note 149, at 160 (arguing that self-defense principles in SROE are “confusing, confounding, and dangerous”). This right of self-defense is vested in the commander of the unit rather than individual members of the unit. As the SROE states,

relation to the nature of the operational mission and even applies when functioning under operational ROE different than those in the SROE, such as when U.S. forces operate under the command and control of a multinational force such as NATO.<sup>152</sup>

The indelible nature of this self-defense prong of the ROE add immensely to their military value by making them a prime training tool. As U.S. forces train day-to-day for undetermined future missions with undetermined mission accomplishment ROE, they can always base such training on the default expectation that these self-defense principles will apply in whatever mission they are assigned.<sup>153</sup> In current operations in Iraq, some have raised allegations that the military is not permitted adequate ROE to defend themselves.<sup>154</sup> This is not true. While many of the same considerations apply in Iraq as applied in Beirut, there should be no doubt in the minds of military members as to their ability to respond in self-defense with proportionate force. These principles are not only taught and trained constantly through standard military training requirement, but are also reinforced on a continuing basis while in Iraq. Having these self-defense principles remain constant and unchanging allows them to become as natural and immediate to a member of the armed forces as clearing a jammed weapon or reloading ammunition in the middle of a firefight.<sup>155</sup>

#### *E. Mission Accomplishment*

While the ROE principles for self-defense are constant, each mission will likely have its own specific ROE that provide authorizations to use force to accomplish the designated operational mission. If the military mission is to

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

CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-2 para. 3(a) (emphasis added).

152. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-1 para. 1(f).

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

154. Kyndra Rotunda, *Denying Self-Defense to GIs in Iraq*, CHRISTIAN SCI. MONITOR, Mar. 2, 2007, at 9.

155. See Martins, *supra* note 86, at 6 (noting that once shots are fired, soldiers will follow rules that through repetition and experience have become second nature).

destroy, defeat, or neutralize a designated enemy force or organization, such as the Iraqi Army in 2003, personnel associated with that force will be declared hostile pursuant to the ROE. The consequence of this designation is that once individuals are identified as a member of such a group or organization—a designation based on relevant criteria established through the intelligence preparation process—U.S. forces have the authority (but as noted above not necessarily the obligation) to immediately attack these “targets.”<sup>156</sup> Thus, it is the “status” of being associated with the declared hostile organization that triggers the use-of-force authority: threat identification results in a group of individuals that as a result of their status, i.e., membership of a specific organization such as an army, may be attacked.<sup>157</sup> As the SROE state, “[o]nce a force is declared hostile by appropriate authority, US forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force.”<sup>158</sup>

Although specifics of potential mission accomplishment rules are protected from public disclosure as classified information, as a general rule they fall into two categories: (1) Measures that “specify certain actions that require [Secretary of Defense] approval,” and (2) Measures that “allow commanders to place limits on the use of force during the conduct of certain actions.”<sup>159</sup> One of the most important aspects of these two prongs of authority is that unless a specific action falls within those measures requiring approval by the Secretary of Defense, the operational commander may assume he has the authority to use all lawful means and measures without having to seek additional authorization. This means that as military commanders face difficult situations in Iraq and other areas, they should plan to employ their entire arsenal of capabilities, limited only by the law of war and their judgment as to what is operationally and tactically appropriate.

Underlying all of these measures for mission accomplishment is the assumption that mission accomplishment may require more specific use-of-force authorization than that provided by the self-defense prong of the SROE. When authorizing such additional measures, the authorizing commander is able to provide additional guidance on the application of force against individuals or groups based on their status. Because these measures are not constant and change for each mission (and often change during missions) they are precisely tailored for each mission, providing clear directives for the use of force related to specific operations.<sup>160</sup> This in turn assists the forces tasked to execute such

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156. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, NO. CJCSI 3121.01B, *supra* note 97, at A-2 to A-3.

157. *Id.*

158. *Id.* at A-2 para. 2(b). The necessity of this rule is obvious. Determining hostile act or hostile intent is a difficult task and requires constant watchfulness. Such action is not required when facing a declared enemy who is equally free to attack U.S. forces and is willing to demonstrate that by wearing a uniform and carrying their arms openly.

159. *Id.* at 2 para. 6(b)(2)(a)(1), (2).

160. *See* OPERATIONAL LAW HANDBOOK, *supra* note 20, at 84–85 (detailing purpose of mission-specific directives). *See generally* RULES OF ENGAGEMENT HANDBOOK, *supra* note 99, at 1-1 to 1-32

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missions by providing direction on whether they may employ unrestricted use of force or must instead comply with limits on that use of force designed to enhance the probability of mission accomplishment.

In an effort to highlight the utility of the ROE regime, consider the following scenario, adapted from the 1991 Gulf War. In 1990, Iraq invaded Kuwait.<sup>161</sup> As a result of the invasion, the United States engaged in a political process with the United Nations, the result of which was a political decision to expel Iraqi forces from Kuwait and reestablish the international border. As a result of this political decision, the U.S. military became involved in a military operation to invade Kuwait, expel Iraqi forces, and restore the international border. Assume for analytical purposes that a group of indigenous Kuwaitis, known as the KLI, supported Iraq during the invasion and continue to be active in Kuwait but have not taken up arms. As U.S. forces prepare to deploy, the President and Secretary of Defense issue ROE that declare Iraqi forces as hostile forces. Based on this ROE, when U.S. forces arrive in Kuwait, they can immediately attack all Iraqi forces as a “status-based” declared hostile force. They can also respond with proportionate force in self-defense to other individuals or groups that commit hostile acts or demonstrate hostile intent.

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

As the operation continues, at some point the U.S. destroys the effectiveness of the KLI militia and repels the Iraqi forces back into Iraq. The U.S. and U.N. broker an armistice and both Kuwait and Iraq agree to its terms. As part of the agreement, the United States is asked to act as an implementation force and monitor the agreement and patrol the border between the two nations. In response to the new operation, the President and Secretary of Defense modify the existing ROE. While the self-defense rules remain unchanged, both the KLI and Iraqi forces would no longer be declared hostile forces and the ROE would be changed to remove U.S. forces’ authority to attack them based on their status. However, if they commit hostile acts or demonstrate hostile intent, U.S. forces

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(describing process of ROE development and noting need for adequate planning and integration of development through all phases of mission).

161. See generally Majid Khadduri, *Perspectives on the Gulf War*, 15 MICH. J. INT’L L. 847, 848 (1994) (reviewing JOHN NORTON MOORE, *CRISIS IN THE GULF: ENFORCING THE RULE OF LAW* (1992) and LAWRENCE FREEDMAN & EFRAIM KARSH, *THE GULF CONFLICT, 1990–1991: DIPLOMACY AND WAR IN THE NEW WORLD ORDER* (1993)).

could still respond in self-defense with proportionate force, including deadly force if necessary.

This example highlights the flexibility of the ROE to respond to mission requirements. It also demonstrates the value of the unchanging “conduct-based” ROE that allow the military to respond to hostile acts and hostile intent regardless of the current mission. At no point in the mission did the self-defense ROE change. Military members who had been trained to respond appropriately to hostile acts and hostile intent continued to apply that training as the fluid nature of the mission changed. In contrast, the fluid nature of the mission changed the political and strategic goals of the United States. The “status-based” ROE were able to change accordingly, ensuring that the appropriate amount of force was applied against the appropriate targets. The ROE were also responsive to military changes on the ground, such as the militarization of the KLI, changing the response to their actions from a “conduct-based” ROE to a “status-based” ROE and then back again when “status-based” ROE were no longer needed or appropriate.

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

#### V. OPERATIONAL RULES OF ENGAGEMENT: THE ULTIMATE DE FACTO INDICATOR OF ARMED CONFLICT

As explained above, ROE fall into two broad categories of use-of-force authorization: conduct-based and status-based. It is this dichotomy that provides a truly de facto indication of the existence of armed conflict for purposes of triggering fundamental principles of the laws of war.<sup>162</sup> Because conduct-based ROE are inherently self-defensive and responsive in nature, they indicate that the state views the nature of the military mission as insufficient to trigger the targeting authority of the laws of war. However, because status-based ROE require no justification for the use of force beyond threat recognition and identification, they indicate that the state views the nature of the military mission as sufficient to trigger the targeting authority of the laws of war. In such situations, it is the principle of military objective that dictates the application of combat power once the threat identification process results in the conclusion that the object of anticipated attack is a member of a designated hostile group.<sup>163</sup>

Because the approval of status-based ROE implicitly invokes the target engagement authority of the laws of war, it seems logical that such issuance

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162. See *supra* notes 14–16 and accompanying text for a discussion of ROE categorization.

163. See *supra* Part IV.C for an analysis of the distinction between conduct- and status-based categories.



should trigger an analogous requirement to comply with fundamental regulatory obligations derived from the laws of war. And because such ROE have and will likely continue to be issued for military operations that fall into the twilight zone between Common Articles 2 and 3, this indication that the state is invoking the laws of war in support of mission accomplishment provides the missing ingredient in determining when these principles apply outside this established law-triggering paradigm. Clinging to the restrictions of this paradigm in such situations produces a dangerous de facto anomaly: military forces will execute operations with the force and effect of expansive authority without being constrained, as a matter of law, by any balancing principles. Such an anomaly may be explicable in purely treaty interpretation terms, but it is inconsistent with the historical underpinnings of the laws of war noted above. To this end, it is important to understand why the focus on a consideration not already identified by the Geneva Conventions or their associated commentaries is necessary.

As noted above, the most significant concern related to the decision to interject international legal regulation into the realm of noninternational armed conflicts was the intrusion of state sovereignty represented by Common Article 3.<sup>164</sup> Although today such intrusions are relatively unremarkable as the result of the rapid evolution of human rights law in the latter half of the twentieth century,<sup>165</sup> in 1949 subjecting a purely internal conflict to international regulation was indeed remarkable.<sup>166</sup> Considering that such conflicts often challenged the existence of the state itself, what is regarded today as a relatively modest level of regulation was profound, for it vested internal enemies of the state with a shield of international protection.

Because of sovereignty concerns, the drafters of Common Article 3 walked a proverbial tightrope between mandating humanitarian protections for victims of internal armed conflicts and protecting states from unwarranted application of international law to internal affairs.<sup>167</sup> Although the language of Common

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164. See generally Corn, *supra* note 3, at 300–10 (noting changes in nature of warfare and observing that limitations of Common Articles 2 and 3 result in uncertainty with regard to whether conflict is international or noninternational).

165. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (2008) (discussing universally accepted intrusion of international human rights norms in realm of state sovereignty). See generally Kenneth Watkin, *supra* note 75 (discussing potential role of human rights norms in regulation of armed conflict).

166. See LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 21–23 (2002) (noting stiff state resistance to “international regulation of internal armed conflict”).

167. ICRC COMMENTARY, *supra* note 60, at 32–35. The Commentary emphasizes that the limited scope of applicability of Common Article 3 was responsive to historical concerns related to the protection of state sovereignty:

It at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for interventions by the International Committee of the Red Cross or any other impartial humanitarian organization—interventions which in the past were all too often refused on the ground that they represented intolerable interference in the internal affairs of a State.

*Id.* at 35.

Article 3 refers only to “conflict[s] not of an international character,”<sup>168</sup> the ICRC Commentary emphasized the necessity of distinguishing internal disturbances not rising to the level of armed conflict from those situations triggering application of the substantive protections of the article.<sup>169</sup> This seems somewhat axiomatic, for all it really emphasized was that the law of war should apply only to armed conflicts.<sup>170</sup> However, it was the analytical method proposed by the Commentary that provided insight into how focusing on de facto criteria should dictate interpretation of the armed conflict trigger.

In order to protect the sovereignty of party states, the Commentary indicates that the key focus of the treaty drafters was determining the existence of an actual armed conflict.<sup>171</sup> To this end, the Commentary offered a number of objective criteria that either individually or in combination would indicate an internal situation had crossed the threshold from nonconflict to armed conflict.<sup>172</sup> These included, among others, the scope, intensity, and duration of military operations; whether the dissident group controlled territory to the exclusion of government forces; and whether the dissident group enjoyed demonstrable popular support.<sup>173</sup> However, because none of these considerations would be dispositive of the existence of armed conflict, the Commentary proposed an additional consideration: the nature of the government response to the threat.<sup>174</sup> According to the Commentary, one important indication of the existence of armed conflict is when a government is forced to resort to regular armed forces to respond to a dissident threat.<sup>175</sup> Use of such forces is normally reserved for combat-type operations. Accordingly, employment of such forces would indicate that the state authorities no longer considered normal law enforcement assets capable of responding to the dissident threat, which in turn would indicate that the threat had progressed beyond widespread criminal activity or civil disobedience.

In the realm of internal armed conflicts, this “nature of government response” consideration is indeed extremely indicative of the existence of armed conflict.<sup>176</sup> Of course, this one factor has not been a talisman. In some situations, the commingling of military and law enforcement organizations make it difficult to apply this factor; in others, precipitous resort to military forces to respond to civil disturbances undermines the efficacy of this factor.<sup>177</sup> However, once a state

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168. Geneva Convention I, *supra* note 48, art. 3.

169. ICRC COMMENTARY, *supra* note 60, at 35–37.

170. *Id.* at 22–23.

171. *Id.* at 35–36.

172. *Id.* at 35–37.

173. *Id.*

174. ICRC COMMENTARY, *supra* note 60, at 36.

175. *Id.*

176. *Id.* at 35–37.

177. For example, the federal police forces of some states are technically a component of the armed forces. This was the case in Panama when the United States executed Operation Just Cause to oust General Noriega. See History Office, XVIII Airborne Corps and Joint Task Force South, Panamanian Defense Force Order of Battle: Operation Just Cause, <http://www.history.army.mil/>

employs its armed forces to conduct combat operations against an internal dissident threat, it becomes almost impossible to disavow the existence of armed conflict.

Unfortunately, in the emerging realm of transnational military operations between state and nonstate forces, this factor is far less instructive in determining the existence of armed conflict. There are two reasons for this. First, in the context of responding to an internal dissident threat—the context for which this factor was originally proposed—use of the regular armed forces is generally regarded as a somewhat extraordinary escalation from the norm of police response.<sup>178</sup> However, such contextual significance is less profound in relation to transnational operations, for the simple reason that it would be equally extraordinary for a state to use its own nonmilitary (law enforcement) security forces outside its borders.

The second reason, one that exacerbates the significance of the contextual difference between internal armed conflict and transnational armed conflict, is that states routinely use military forces to conduct nonconflict “peace operations.”<sup>179</sup> Military forces conducting such operations almost always operate under a legal mandate limiting their authority to use combat power to situations of self-defense or defense of others; rarely does such authority allow the application of combat power as a measure of first resort. Because of this, such operations almost never rise to a level of hostility considered sufficient to trigger application of the law of war. This was emphasized in the recently revised U.K. Manual of the Law of Armed Conflict:

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documents/panama/pdfob.htm (last visited Apr. 30, 2009) (listing “Fuerza de Policia” as component of armed forces). Even in states where the police are not a component of the armed forces, the armed forces may be called upon to provide assistance to police forces for the purposes of law enforcement, as occurred when the U.S. Army provided assistance to federal law enforcement efforts to arrest David Koresh in Waco. See Philip Shenon, *Documents on Waco Point to a Close Commando Role*, N.Y. TIMES, Sept. 5, 1999, at A14 (indicating involvement of armed forces in assisting law enforcement agencies may have been longer and closer than previously thought).

178. See A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 216 (2d ed. 2004) (arguing that continued state control and application of domestic law can be indicative of internal security problem while lack of state control or normal application of domestic law can be indicative of armed conflict).

179. See generally OPERATIONAL LAW HANDBOOK, *supra* note 20, at 52–57 (discussing definition, key concepts, legal authority, and U.S. role in peace operations). The Handbook summarizes Peace Operations as follows (drawing from other Department of Defense doctrinal sources):

1. Peace Operations is a new and comprehensive term that covers a wide range of activities. FM 3-07 defines peace operations as: “military operations to support diplomatic efforts to reach a long-term political settlement and categorized as peacekeeping operations (PKO) and peace enforcement operations (PEO).”
2. Whereas peace operations are authorized under both Chapters VI and VII of the United Nations Charter, the doctrinal definition excludes high end enforcement actions where the UN or UN sanctioned forces have become engaged as combatants and a military solution has now become the measure of success. An example of such is Operation Desert Storm. While authorized under Chapter VII, this was international armed conflict and the traditional laws of war applied.

*Id.* at 53 (footnotes omitted).

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

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

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

It is not always easy to determine whether a PSO force has become a party to an armed conflict or to fix the precise moment at which that event has occurred. Legal advice and guidance from higher military and political levels should be sought if it appears possible that the threshold of armed conflict has been, or is about to be, crossed.<sup>180</sup>

Because the use-of-force authority normally associated with these transnational “peace operations” is inherently defensive in nature,<sup>181</sup> it is essential to focus on some alternate analytical factor to distinguish between nonconflict transnational military operations and those that trigger the laws of war. And, because this type of armed conflict was either unanticipated or overlooked by the drafters of the 1949 Geneva Conventions, neither the text of these treaties nor the ICRC Commentary provide such a factor. But this does not mean that none could be identified. Combining consideration of the underlying purpose of the Convention triggers with the realities of contemporary military operations leads almost inexorably to one conclusion: status-based ROE provide this elusive factor.

In order to emphasize the validity of this proposition, it is useful to consider the nature of the contemporary debate on the applicability of the laws of war to the war on terror. It is not uncommon for the question of law of war applicability to be hotly debated during contemporary symposia addressing issues related to the Global War on Terror.<sup>182</sup> Participants in such debates often argue that the war on terror is not really a “war,” and as a result the laws of war do not regulate

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180. UK MINISTRY OF DEFENCE, *supra* note 70, at ¶¶ 14.3–14.4, 14.6–14.7 (footnotes omitted) (emphasis added).

181. See DEP’T OF THE ARMY, FIELD MANUAL NO. 100-23, PEACE OPERATIONS 34–35 (1994) (indicating that during peacekeeping operations, use of force should be last resort but rules of engagement should not hinder commander’s duty to protect his troops).

182. See generally Daphné Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001, 1001 (2007) (analyzing rules governing warfare in light of war on terror and transnational terrorist organizations). This article appeared as part of Catholic University Law Review’s Symposium on Reexamining the Law of War.

it. The paradigm of Common Articles 2 and 3 is then cited in support of such arguments.<sup>183</sup>

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

It is this simple reality that illustrates the value of ROE as a factor to determine when the laws of war are triggered by transnational military operations, for it is the ROE that informs the soldier of the nature of the operation. As noted elsewhere in this Article, ROE provide a clear indication of how the state ordering the military operation perceives both the threat and the authority to address the threat.<sup>184</sup> When ROE authorize engagement based solely on status determinations, it represents an inherent invocation of the laws of war as a source of operational authority, for it is the rules of necessity and military objective that will provide the parameters for implementing such ROE. Accordingly, analysis of the nature of the ROE both illuminates the state's perception of the nature of the operation, and indicates when the forces of the state will inherently invoke authorities derived from the laws of war. It is therefore appropriate to focus on the nature of ROE to determine when the balance of competing interests reflected in the laws of war must apply to a military operation.

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

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183. See Watkin, *supra* note 74, at 2–9 (discussing complex challenge of conflict-categorization-related military operations conducted against highly organized nonstate groups with transnational reach); Rona, *supra* note 68 (asserting that “humanitarian law” applies to armed conflict whereas “human rights law” applies to nonarmed conflict and distinguishing between international and noninternational armed conflict). See generally ELSEA, *supra* note 1, at CRS-10 to CRS-16 (analyzing whether attacks of September 11 triggered law of war); Abbott, *supra* note 74 (analyzing whether members of al Qaeda and Taliban can be considered “combatants” per international law).

184. See *supra* notes 162–63 and accompanying text for a discussion of ROE as an indicator of state perception.

unjustified by the conflict; and prevent national policymakers from avoiding the most basic obligations of the laws of war through the assertion of technical legal arguments devoid of pragmatic military considerations.

#### VI. PROPOSAL FOR ADOPTION OF THIS NEW LAW-TRIGGERING PARADIGM

Congress unquestionably supported the decision of the President to characterize the military response to the terror attacks of September 11 as an armed conflict.<sup>185</sup> While this characterization is the source of continued scholarly criticism,<sup>186</sup> the United States is unlikely to alter its perspective any time soon, and the forces called upon to engage terrorist entities will continue to employ combat power in a manner consistent with this position.

In contrast to the relative clarity of the U.S. characterization of the struggle against global terror, there continues to be tremendous uncertainty as to the applicability of the laws of war to this fight.<sup>187</sup> This uncertainty is detrimental to the execution of these operations because it creates a regulatory void and imposes upon the armed forces the responsibility to fill this void. In the past, reliance on military policy to deal with such uncertainty has been generally effective.<sup>188</sup> However, in the post-9/11 era, it has not been uncommon for civilian

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185. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (authorizing president to use necessary military force to destroy terrorist threat posed by al Qaeda and states that sponsor it); Military Order of November 13, 2001, 66 Fed. Reg. 57,833, 57,833 (Nov. 16, 2001) (noting that scale of September 11, 2001 attacks resulted in “state of armed conflict” requiring use of military forces); *cf.* Hamdan v. Rumsfeld, 548 U.S. 557, 566, 635 (2006) (reflecting almost unanimous conclusion among Justices that struggle between United States and al Qaeda is armed conflict for purposes of international law), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w), *as recognized in* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

International terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

Military Order of Nov. 13, 2001, 66 Fed. Reg. at 57,833.

186. See Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATH. U. L. REV. 759, 760 (2007) (stating that, “[u]nder international law, the United States cannot be at ‘war’ with al Qaeda as such, much less with a tactic or strategy of ‘terrorism,’ and the laws of war are not applicable with respect to acts of violence between members of al Qaeda and armed forces of the United States outside the context of an actual war, such as the wars in Afghanistan or Iraq”).

187. See, e.g., Corn, *supra* note 3, at 300–10 (noting absence of definitive test to determine when armed conflict exists, and that such absence can result in uncertainty as to when laws of war are triggered); Paust, *supra* note 186, at 760–67 (suggesting that laws of war do not apply to al Qaeda or 9/11 attacks because al Qaeda does not hold status necessary for warfare or armed conflict, although attacks triggered United States’ right to exercise self-defense); Rona, *supra* note 68 (arguing that laws of armed conflict, including humanitarian law, are not applicable to “war on terror” except in limited situations).

188. See Geoffrey S. Corn, “Snipers in the Minaret—What is the Rule?” *The Law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAW., July 2005, at 28, 34–40 (discussing policy-based application of law of armed conflict principles in accordance with Department of Defense directives).

leaders of the military to make policy decisions that are not consistent with compliance with the principles of the laws of war.<sup>189</sup>

It is therefore imperative that the United States clearly articulate when the fundamental principles of the laws of war will apply to military operations that fail to satisfy the Common Articles 2 and 3 triggering criteria.<sup>190</sup> As explained above, the evolving nature of warfare has created a necessity for such an articulation, and the historical purposes of the laws of war support the application of the law to such situations.<sup>191</sup> Asserting application of this law based on the pragmatic realities of contemporary military operations will ensure that the armed forces executing such operations clearly understand their fundamental obligations and that these operations are guided by an indelible regulatory framework that balances the authority to employ combat power with the obligations historically associated with such action.

Assuming the necessity and utility of such a position does not, however, resolve what the criteria for application should be. It does seem relatively indisputable that to date there has been an almost myopic effort to fit the Global War on Terror into the Common Article 2/3 paradigm. As noted above, this has resulted in uncertainty for military forces and controversy among policymakers and their critics.<sup>192</sup> Perhaps even more troubling is that it has shifted the focus from what rules should apply to such combat operations to whether a particular legal trigger is satisfied. Because of this, and the simple reality that relying on the Common Article 2/3 paradigm to characterize transnational military operations directed against nonstate actors is like trying to put the proverbial square peg into the round hole,<sup>193</sup> the time has come to adopt a different approach to determining when the fundamental regulatory framework of the law of war applies to such operations.

Based on the foregoing analysis, the nature of mission-specific ROE provides an effective analytical criterion for making such a determination. Quite simply, the authorization of status-based ROE for a military mission provides a critical de facto indication that the state is inherently invoking the authority of the laws of war to guide target selection and destruction decisions. As a result, linking application of fundamental law of war principles to the authorization of such ROE ensures that the essential balance between authority and obligation

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189. The rebuke to executive wartime authority represented by the decision in *Hamdan v. Rumsfeld* is perhaps the quintessential example of this reality. 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w), *as recognized in* *Boumediene v. Bush*, 476 F.3d 981, 985 (D.C. Cir. 2007).

190. See *supra* notes 76–81 and accompanying text for a discussion of the necessity of clear delineation regarding when the fundamental principles of the laws of war will apply to military operations not falling within the Common Article 2/3 paradigm.

191. See *supra* notes 59–73 and accompanying text for a discussion of the evolving nature of warfare. See *supra* Part I for a discussion of the historical purposes of the laws of war and why they support an expansive application.

192. See *supra* notes 187–89 and accompanying text for a discussion of the confusion resulting from the attempt to fit the global war on terror into the Common Article 2/3 paradigm.

193. Corn, *supra* note 3, at 329.

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central to the laws of war is preserved. More importantly, this will ensure the force and effect of this essential regulatory framework regardless of the geographic nature of the operations, the nonstate character of the enemy, the duration of the hostilities, the intensity of the hostilities, or, most significantly, whether the hostilities satisfy the Common Article 2/3 law-triggering paradigm.

Ironically, the entire emphasis of this law-triggering paradigm supports the adoption of the ROE-based trigger. As noted above, the objective of the drafters of the 1949 Conventions was to prevent “law avoidance” as the result of technical legal definitions and associated arguments.<sup>194</sup> For this reason, the focus of Common Articles 2 and 3 was the creation of a truly de facto law-triggering standard, immune from the type of technical manipulations so common during the Second World War. Although the drafters did not anticipate extraterritorial armed conflict between states and nonstate entities, this does not justify ignoring the effort to ensure that the laws of war would come into force based primarily on the existence of armed conflict.

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

More importantly, consistent with the underlying objective of the Geneva Conventions, the probability that an ROE-based trigger for law of war application will be manipulated to avoid application of the law is de minimis. This is because of one simple reality: the state is unlikely to deprive its forces of the authority to effectively accomplish a military mission in order to avoid obligations imposed by the laws of war. Considering the hypothetical use of combat power to target an al Qaeda base camp in a remote area of another country illustrates this point. To effectively accomplish this mission, the military commander will need to engage the “enemy” immediately upon positive threat identification. While that process may indeed be complex because of the unconventional nature of the enemy, once identification is made, success will depend on the unhesitating application of combat power. This can only occur if the command is operating pursuant to status-based ROE. If the national authority attempted to avoid law of war application by issuing conduct-based ROE, it would debilitate operational effectiveness. Accordingly, the cost for law avoidance would be so profound that it should rarely if ever be a significant influence on ROE authorization.

It is therefore time for the President to issue an executive or military order adopting an ROE trigger for application of fundamental law of war principles.

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194. See *supra* notes 61–63 and accompanying text for a discussion of the “law avoidance” purpose of the 1949 Conventions.



This order should emphasize a number of critical points. First, the United States has been and will continue to be a leader in the development and application of the laws of war.<sup>195</sup> Second, there is unanimous agreement among the branches of our government that the struggle against transnational terrorist groups is an armed conflict, and that this characterization has been endorsed by a number of allies and international organizations. Third, the United States will continue to aggressively pursue and target individuals and groups it determines to be operatives of hostile groups. Fourth, when determined necessary the United States will employ the full spectrum of combat capabilities to destroy such targets. Fifth, whenever the military is tasked to conduct such operations pursuant to status-based mission ROE, the fundamental principles of the laws of war will apply as a matter of legal obligation irrespective of whether the operation brings into force other law of war treaty obligations. Sixth, these principles include military necessity, proportionality, the prohibition against unnecessary suffering, and the obligation to treat any individual who is *hors de combat* humanely. The order should conclude by calling upon all other states to adopt an analogous position on law of war application.

Perhaps the most controversial military order ever issued by a president in his capacity as Commander-in-Chief was the order establishing the military commissions.<sup>196</sup> Much of the controversy that order sparked resulted from the perception that it reflected a lack of respect for the most fundamental obligations imposed by the laws of war.<sup>197</sup> Now is the time to issue an order that will have a radically different effect; an order that will confirm and advance those fundamental obligations, and send a powerful message to the international community that never again will the United States assert authority derived from the laws of war without acknowledging fundamental obligations. The order proposed herein will have such an effect.

#### VII. DISCUSSION OF SOME PRAGMATIC POLICY CONCERNS THAT WILL NEED TO BE CAREFULLY CONSIDERED IN ANY SUCH ADOPTION

This new triggering paradigm is not without its risks. As described earlier in the diagram, one of the inputs into ROE is national policy. Policy is by definition

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195. Prior presidents have emphasized the important role played by the United States in the positive development of the laws of war. *See, e.g.*, Letter of Transmittal of Protocol II Additional to the Geneva Conventions of 12 August 1949 from Ronald Reagan, President of the United States, to the United States Senate (Jan. 29, 1987), *reprinted in* 26 I.L.M. 561, 562 (noting that United States is generally at forefront of efforts to modify rules of armed conflict); Letter of Transmittal of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Hague Protocol from William J. Clinton, President of the United States, to the United States Senate (Jan. 6, 1999) (urging ratification of Hague Convention and noting United States will play role in amendments as party to Convention).

196. Military Order of November 13, 2001, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

197. *See, e.g.*, Amicus Curiae Brief of Retired Generals and Admirals and Milt Bearden in Support of Petitioner at 9–11, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) (asserting that respondent's position, in support of President Bush's military order, undermines long-standing tradition of fidelity to law of war, which is central to U.S. profession of arms).

a political input. That means that, by definition, ROE are already subject to political inputs. Naturally, in a nation such as the United States, which strongly believes that its military must be subject to civilian control, the inputs are not only important, but necessary. However, it is equally important that ROE remain a functional tool that the military can apply to achieve the end state desired by the political leadership.

History has already provided at least one occasion where military leaders felt the ROE were too constrained to allow military victory. In the midst of the Vietnam War, President Johnson proudly proclaimed that the military could not “bomb an outhouse without my approval.”<sup>198</sup> Many military leaders chafed under such controls and argued that this level of review and approval prevented the military from successfully carrying out its mission.<sup>199</sup> Some of this may be the military leaders not recognizing that the political end state may not always include a complete military victory and the total destruction of the enemy. However, there is certainly a valid concern that the ROE can be overpoliticized at the expense of blood and treasure.

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

Additionally, there is disagreement currently between the United States and much of the rest of the world, including the United States’ allies, as to the characterization of the current conflict in Iraq<sup>200</sup> and, to some degree, the conflict in Afghanistan.<sup>201</sup> If manipulating the ROE became an option by either

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198. Richard Lowry, *Bush’s Vietnam Syndrome: The President Draws a Wrong Lesson*, NAT’L REV., Nov. 20, 2006, at 18, 20 (internal quotation marks omitted).

199. *Id.* at 20, 22.

200. Compare Corn, *supra* note 188, at 28–34 (noting that United States characterization of conflict in Iraq was first as belligerent occupation, followed by “‘armed conflict’ of some character” still requiring application of laws of war), with Knut Dörmann & Laurent Colassis, *International Humanitarian Law in the Iraq Conflict*, 47 GERMAN Y.B. INT’L L. 293, 295–301 (2004) (noting ICRC position that conflict in Iraq was first an international armed conflict followed by a military occupation).

201. This has been resolved to some extent by the Supreme Court’s ruling in *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–30 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub.

side to bolster its argument, it may have deleterious effects on the military members from those countries and would almost certainly hamper interoperability between the nations' militaries.

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

#### VIII. CONCLUSION

This Article began with a discussion of the historical underpinnings of the contemporary law of war. This history provides a proverbial looking glass through which the logic of this law can be best understood. That logic finds at its core a simple but critical proposition: warfare and anarchy are not synonymous. Accordingly, the waging of war has been, and must always be, subject to a regulatory framework. The laws of war provide that framework.

In an ironic twist of history, the post-World War II efforts to ensure that war and law operated concurrently in all circumstances has become the basis for disavowing law-of-war-based obligations in relation to the type of contemporary transnational conflicts exemplified by the global war on terror. However, as discussed above, disconnecting armed conflict from a legally based regulatory framework is both detrimental to warriors and victims of war and inconsistent with the spirit of the 1949 Geneva Conventions and the history they build upon.<sup>202</sup> Accordingly, the time is ripe to reconsider the law-triggering paradigm that evolved after 1949 in order to ensure that a *de facto* standard for application is once again the norm and not considered an aberration.

Asserting the logic of applying law of war principles to all combat operations does not, however, resolve perhaps the most complicated questions related to the regulation of conflict to emerge in decades: How does a state determine what triggers this law outside the Common Article 2/3 paradigm? As illustrated above, relying on the existing law-triggering criteria is insufficient to provide an effective answer to this question, even when supplemented by consideration of analytical factors suggested in the ICRC Commentary. This insufficiency has led to confusion as to when this law applies to contemporary operations, criticism of decisions related to its application, and uncertainty for the armed forces called upon to execute missions against nonstate entities.

The answer to this question, therefore, must be derived from a new perspective, and it is the perspective of the warrior where it is found. Warriors understand the difference between conflict and nonconflict operations. This understanding is not based on the nature of the opponent, the geographic

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L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w), *as recognized in* *Boumediene v. Bush*, 476 F.3d 981, 985 (D.C. Cir. 2007).

202. See *supra* notes 59–81 and accompanying text for a discussion of the growing disconnect between armed conflict and the regulatory framework formed by the Common Article 2/3 paradigm.

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location of the operation, or the scope, duration, or intensity of the operation. Instead, it is based on the pragmatic and simple reality that authorization to engage an opponent based solely on a status determination means the line has been crossed. Thus, for the warrior, the most fundamental indication of armed conflict is the nature of the ROE issued for the mission.

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

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

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

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