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The Age of Lawfare

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We are currently living in the age of lawfare; perhaps we always have been. The term, in its relationship to armed conflict, was most recently popularized by Major General Charles Dunlap of the US Air Force in 2001¹ and has generated an exponential and diffuse trajectory of meaning and critique since that time. The term “lawfare” has no real fixed definition, but has come to be generally understood as the “use or misuse of law as a substitute for traditional military means to achieve military objectives.”² It has been examined in the context of domestic US legal practices,³ in transnational legal incidents⁴ and, of course, within the realm of public international law, particularly in the context of the law of armed conflict (LOAC).⁵ All accounts do share a conception that recognizes that lawfare is concerned with the instrumentalization or politicization of the law to achieve a tactical, operational or strategic effect.

The reference to the “use or misuse” of law in the Dunlap definition reveals an essentially neutral perspective. The fact is that modern State military forces do legitimately use the law to achieve military outcomes. This is done as a substitute for the application of force and hence represents a form of lawfare so defined. This may be manifested with, for example, a UN Charter, Chapter VII, “all necessary

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means” Security Council resolution that displaces the law of neutrality or otherwise shapes the tactical or strategic military environment.⁶ Alternatively, it may also be manifested in a formal determination as to whether an armed conflict exists at all, whether it is international or non-international and/or whether an opposition group is to obtain prisoner of war rights or not. In this sense, the law is “weaponized” to achieve a desired military outcome that negates the need to apply force to obtain the same result. Indeed, recent scholarship on this body of law has highlighted the notion that LOAC practice itself is a process of construction, contestation and strategic instrumentalization that usually advantages State military forces.⁷ That the existing architecture of LOAC possesses this apparent bias⁸ for State military forces is not surprising. Under classical views States are the subjects, and not the objects, of international law. Moreover, from a policy perspective, this preference is both appropriate and necessary under the existing international legal structure. This is to ensure the right balance between internationally recognized military and humanitarian aims in warfare is maintained and that institutional accountability is effectively preserved.

While States engage in a type of structural lawfare to achieve military aims, the primary focus of this article is to examine the converse situation, namely, the manner in which lawfare is exercised against States. The strategic use of the law by non-State groups engaged in asymmetric warfare has been recognized as a significant tool to obtain military and political advantage. In these contexts, such groups will, *inter alia*, invite the application of force against themselves or their proxies, innocent civilians (as incidental injury), or ostensibly civilian objects (that have lost their protection) that, while strictly lawful, nonetheless generate political costs and/or moral dilemmas for the attacking force. The goal is to undermine the resolve of State military forces by generating negative reaction by relevant constituencies with political power.

Predictably, this type of lawfare prompts reactions concerning the “unfairness” of legal constraints applying to one side as compared to the wanton disregard of legal compliance by the other.⁹ Such asymmetric disadvantage is usually framed in terms of a dilemma within the literature for Western “law-abiding” military forces in meeting the threats while retaining a fidelity to the law. Lawfare is thus characterized in the register of formal legality of being a refuge of the weak,¹⁰ of being disingenuous by unfairly manipulating the law to achieve a relevant extra-legal and asymmetric effect.

It is the purpose of this article to review the phenomenon of lawfare to highlight how law is situated within the broader political, moral and social terrain of military decision making. The reactions against lawfare disclose a number of assumptions. Principally, the reactions against lawfare evidence a particular interpretive attitude

to LOAC, specifically one based squarely within a positivist orientation. Positivism remains the dominant interpretive idiom of LOAC, but it contains a number of vulnerabilities in its theoretical structure. It is a goal of this article to identify such vulnerabilities and to propose remedies that might be used to prompt a more self-aware counter-lawfare response within positivism's interpretive enterprise.

A broader goal is to tackle the issue of how the law is actually employed within military decision making. It will contend that while LOAC is often expressed in a key of validity, it should also be understood in a register of legitimacy. The factors that contribute to such an approach draw upon broader socio-legal and ethical considerations and these will be canvassed.

To this end, it is submitted that military lawyers and operators alike regularly synthesize legal propositions with broader political, social and moral considerations when dispensing advice and embarking upon a course of action. In so doing, this permits a more nuanced and surgical application of force that meets broader military and political goals. In short, it allows for effective mission accomplishment. It also allows for a firmer foundation in confronting lawfare and its intended manipulation of moral and political reaction. This assimilation of factors that occurs when developing legal advice is not always admitted, but it occurs nonetheless, and should be acknowledged and discussed for what it can add to the military appreciation process.

This is not to say that the register of formal legal validity has been dispensed with. Quite the contrary, a formal assessment of law is always the starting point in any interpretive exercise. Rules are carefully parsed and their linguistic construction assessed against standard canons of interpretation. However, the law is more indeterminate, language more malleable and open, than what we might imagine. In reality, the practice of LOAC takes place against a complex array of normative factors. Whether reconciled as acting within the "free space" of legal discretion permitted under positivism's structure or as a product of government-imposed policy overlay to ameliorate a rule's strictness, or indeed some other rationale, the result is the same. It remains true today that, at least since the Vietnam War, liberal democratic societies are compelled to wage war through a prism of self-perceived legitimacy. Modern military lawyers by necessity navigate this complex legal and political topography as a matter of course. It also means that confronting lawfare tactics head-on is not as daunting as it may at first seem.

This article is comprised of three parts. Part I will briefly examine the tenor of claims regarding lawfare so as to situate the subsequent analysis. Part II will canvass the dominant interpretive idiom of LOAC—namely, positivism—and will demonstrate the blind spots and gaps that this methodology generates. It will outline the remedies that are available to deal with lawfare (i.e., counter-lawfare) either

under positivism's method or more broadly under a complementary approach of LOAC practice within the register of legitimacy. Finally, Part III will conclude by examining the choices and orientation military lawyers might adopt in the context of counter-lawfare. To this end, assessment of means-ends rationality, constructivism and virtue ethics will be separately undertaken.

Part I. Lawfare and Its Taxonomy

The term "lawfare" has established a distinctly pejorative connotation within the prevailing literature. This seems unusual, as the term itself is value neutral. It is neither intrinsically "good" nor "bad," but rather an agnostic phenomenon. Indeed, as outlined in the introduction, established State military forces in the conduct of warfare can deploy a form of structural lawfare.

In the contemporary environment, allegations of lawfare are routinely cited as a tool used by insurgents or other non-State actors in actions against State military forces. This is the version of lawfare that has become more typically associated with the term. Hence, US Army lawyer Eric Jensen identifies that in the context of asymmetric warfare, an opponent will seek to exploit an adversary's weaknesses to seek tactical or strategic advantage. Such weaknesses are not necessarily those of military capacity, but rather are more intangible and revolve around inciting violent reaction that feeds public disquiet. Thus, "[i]n this type of conflict, the disadvantaged party must seek to use the comparatively low-tech tools at its disposal to gain the comparative advantage."¹¹ Such non-State groups will openly violate the law in order to strike at a more militarily superior though legally bound (thus restrained) force. As outlined by Jensen, such subversion takes the form of attacking from protected places and using protected places or objects as weapons storage sites, fighting without wearing a proper uniform, using human shields to protect military targets, using protected symbols to gain military advantage, murdering prisoners or others who are protected and not distinguishing oneself from the general population when taking a direct or active part in hostilities.¹²

The types of incidents detailed by Jensen almost always have an exception for the use of force by opponents. Under positive prescriptions of the law, protected places lose their immunity when used for military purposes,¹³ human shields may not be directly attacked (at least when not voluntary) but become part of the incidental injury calculation under proportionality assessments,¹⁴ and while fighting without a distinguishing uniform does threaten greater civilian loss due to misidentification, it does not prohibit State military forces from targeting those taking a direct part in hostilities (DPH).¹⁵

The point is not that legal arguments can't be relied upon in favor of surmounting these tactics, but rather that the political and social consequences of relying upon such exceptions can cause a negative effect. These exceptions highlight the moral dilemmas and political and social costs faced by soldiers when engaged in such conflict.

In this sense, it is significant that the main concern about lawfare is in fact the broader context in which law is invoked. Hence, as Casey and Rivkin state: "The term 'lawfare' describes the growing use of international law claims, usually factually or legally meritless, as a tool of war. The goal is to gain a moral advantage over your enemy in the court of world opinion, and potentially a legal advantage in national and international tribunals."¹⁶

It became clear during the counterinsurgency (COIN) operation within Iraq that insurgents invariably used unlawful means to intimidate the population and discredit the government. The whole point of using such unlawful means was specifically to invoke an overreaction by counterinsurgent forces. Provoking violation of counterinsurgent ethics and values in reacting to an insurgency is a means to an end, namely, discrediting the legitimacy of the host government and the counterinsurgent forces themselves. As David Kilcullen notes, Al Qaeda in Iraq drew the majority of its strength from the "backlash engendered by counterinsurgent overreaction rather than genuine popular support."¹⁷

When examined in these terms, the reaction against lawfare turns out to be less about the law itself than about the broader question of a political and moral reaction to the application of force that has the capacity to undermine military effectiveness. In this context, LOAC (and its sustaining interpretive model) is not particularly adept at providing a sufficiently calibrated response. The law is largely framed in a binary manner. It mainly deals with categories of persons: combatants, civilians and those *hors de combat*. It restricts attacks against military objectives¹⁸ and prohibits attacks against those objects that are civilian.¹⁹ It does not deal very well with nuance or effect. Hence within this binary code, decisions are made in an essentially "yes" or "no" manner—*viz.*, this military object over there may be attacked, that civilian one here may not; these civilians are a proportionate loss but those ones are not. Issues such as whether the object to be attacked is a church or a mosque that is being used for a military purpose have no formal relevance as a matter of law. Neither does the question whether the civilians who will incidentally die as a result of a proportionality equation are individuals who may be part of a particular broader social network. These underlying social and political factors are simply accorded no formal legal weight.

Notwithstanding this, attacking such objects, while lawful, will often have the inevitable effect of galvanizing resistance by a resident population, which, in turn,

may well undermine broader strategic goals. Similarly, whether an insurgent is a hard-core fanatic determined to die in his or her cause or an “accidental guerilla”²⁰ loosely swept into a broader movement is of no account as a matter of formal law; each may be targeted under DPH criteria. While some scholars have ventured that there may exist some level of cultural relativity in making assessments of “military advantage” or “proportionate” loss,²¹ the broad sweep of the law is predicated upon a conception of exchangeable universal value. There exists a pretense of mathematical certainty in making assessments of “military advantage units” versus “civilian loss units.” To this end, the appeal of universality sustains the law. It may be enough to respond to allegations of lawfare to say that “this is the law” and what we do is “lawful.” In certain contexts and to certain audiences, such assertions may be conclusive. In other circumstances and for other audiences, they may not be.

The reference to “the court of world opinion” identified by Rivkin and Casey has both an international and a domestic application. As discussed above, entirely lawful attacks within a theater of operations can result in popular resentment by those within that battlespace that translates into practical resistance. Equally, resistance may be manifested within domestic polities at home and can galvanize domestic reaction and decisively undermine military capacity. Hence, as Dunlap has observed when addressing this issue in the context of the Vietnam War:

The United States has already seen how an enemy can carry out a value-based asymmetrical strategy. For example, one of the things that America’s enemies have learned in the latter half of the 20th century is to manipulate democratic values. Consider the remarks of a former North Vietnamese commander: “The conscience of America was part of its war-making capability, and we were turning that power in our favor. America lost because of its democracy; through dissent and protest it lost the ability to mobilize a will to win.” By stirring up dissension in the United States, the North Vietnamese were able to advance their strategic goal of removing American power from Southeast Asia. Democracies are less-resistant to political machinations of this sort than are the totalitarian systems common to neo-absolutists.²²

These lessons have been fully absorbed by military professionals, especially by military lawyers. It has become clear that there are “good” and “bad” wars, just as there are wars of necessity and wars of choice.²³ Public conscience on issues of force in relation to both the *jus ad bellum* and *jus in bello* has real impact. As a result, the levels of discretion exercised under the law differ due to imposed government/command policy restraints. While prevailing textbooks and restatements of LOAC present a picture of almost clinical certainty, the truth of the matter has always been more nuanced. Law and legal interpretation are modulated. Legal rectitude is the starting point and of course universal prohibitions are always formally

acknowledged (i.e., not attacking civilians, respecting hospital ships, etc.), but legal interpretation invariably accommodates implicit counter-lawfare elements at least as a matter of policy overlay. Legitimate targets are not attacked and extraordinary measures are taken to spare civilian populations from any incidental injury. Is this approach consistent with positivism's method? Is this really a policy overlay or does it fall within "proper" legal interpretation? As will be outlined in Part II below, such accommodations may still be conceived as validly coming within the structure of positivism's methodology.

Part II. Positivism, Legitimacy and Lawfare

Law and Morality

Positivism remains the dominant interpretive idiom of LOAC. As an interpretive style, it is venerable and hardy and has withstood numerous challenges to its dominance throughout the twentieth century. While regarded as too illusory by some scholars,²⁴ it nonetheless heralded a momentous change to international law when embraced at the turn of the nineteenth to the twentieth century. Reading accounts of international law in the 1920s, one gets a palpable sense of positivism's great emancipatory promise.²⁵ While international law in the nineteenth century was largely bound up in sovereign prerogatives and naturalist conceptions, the onset of the twentieth century saw law harnessed for progressive causes. Positivism was the means by which such progress was to be realized. While international courts initially resisted impositions by positive law on sovereign prerogatives,²⁶ over time even these nebulous rights were quietly relegated as products of an earlier era.²⁷

The legal philosopher H.L.A. Hart in his 1962 account *The Concept of Law* probably best describes positivism's contemporary structure.²⁸ To Hart, positivism was fundamentally centered on a separation thesis, that is, legal validity was not necessarily tied to any moral inquiry.²⁹ Rather law was a combination of primary and secondary rules that was sustained by an inner social perspective of law's officials.³⁰ The rule of recognition was the most significant secondary rule,³¹ and essentially established what was law in terms of pedigree. The rule of recognition itself was based upon social fact. Significantly, words did a considerable amount of work within positivism and Hart conceived of a duality of core and penumbra for framing interpretive discourse.³² Within the core, words possessed unassailable meaning. Law was thus ascertainable and largely predictable. At the border of the core, within the narrow penumbral region, the law was less determinate and a broader level of discretion was permitted to determine legal outcomes. Indeed, Hart allowed for a policy- or legislative-type reasoning within this narrow band.³³

The separation thesis, which sustains much of Hart's approach, was famously outlined in an exchange with Harvard professor Lon Fuller in a series of articles appearing in the 1957–58 edition of the *Harvard Law Review*.³⁴ In question was the status of laws passed during the Nazi regime in Germany. Fuller invoked a form of naturalist legal methodology to argue that such edicts could not constitute law. Hart presented a differing view; while such laws were morally bankrupt, they nonetheless still constituted law properly adopted in accordance with a prevailing process.³⁵ Importantly, Hart did fully acknowledge that while they were still deserving of the name "law," one could nonetheless rely upon personal moral grounds not to obey such law.³⁶

This dichotomy reveals much about positivism that has application within LOAC reasoning and more broadly within the context of lawfare. While it is plain that "no sensible positivist . . . would claim that morality is never relevant or necessary for legal interpretation,"³⁷ positivism is essentially a non-directive form of interpretation.³⁸ When one is resolutely within the core meaning of words (and sentences)³⁹ there remains a requirement to follow the course of such wording to its necessary end to reach an inevitable legal result. This is done notwithstanding that what occurs may in fact appear to be "a wrong or unjust or unwise or inequitable or silly result."⁴⁰ This differentiation between law as it "is" and what it "ought" to be (at least within the core) has the potential to cause blind spots and contradictions in legal interpretation. Yet, it is resolutely defended by many as the appropriate measure of legal interpretation and has resisted inroads by alternative legal theories. Former US Attorney General Michael Mukasey has, for example, strenuously argued that government lawyers must ensure they only "do law."⁴¹ He outlines that a lawyer's primary duty is

to define the space in which the client may legally act. . . . [T]here will be times when you will advise clients that the law prohibits them from taking their desired course of action, or even prohibits them from doing things that are, in your view, the right thing to do. And there will be times when you will have to advise clients that the law permits them to take actions that you may find imprudent, or even wrong.⁴²

Judge Higgins in a famous defense of this methodology reaffirmed the perspective that the practice of law is best conceived of as the application of "neutral principles" to achieve predictable outcomes.⁴³

This conception is reflected in traditional approaches to interpreting LOAC. There is usually an emphatic confidence in the literature that LOAC is comprised of a broad core of validity. To be sure, even a provision such as the famous Martens clause that makes a direct appeal to the "dictates of public conscience"⁴⁴ has been

strenuously argued to be no more than an aid to interpretation of existing positive law and certainly not a source of legal authority in its own right.⁴⁵

This reliance upon pedigree of legal norms and the strong confidence placed in the core structure of words seems a little too emphatic in the literature. Indeed, such a patois might be read as reflecting a type of anxiety as to the capacity of law to actually restrain violence. The LOAC project was always placed between a promise and a fear⁴⁶ that law would intercede and ameliorate the excess of warfare's violence.

Given the strong differentiation between law, morality and policy considerations, at least resident within core meanings of words and sentences, there should be little surprise that lawfare is derided as unfair. Compliance with the law concerning the propriety of certain attacks is the formal answer to those who take issue with the moral, social and political consequences of such attacks. Lawyers are ill equipped to respond with anything more than extolling the virtue of compliance with the law as it exists. Arguments in support of structural rectitude and of linguistic construction are what sustain legal responses. Despite this, to relevant publics "out there" such exquisite compliance and faithfulness may not be persuasive, indeed may not be worth "two straws."⁴⁷ This necessarily leaves open a number of vulnerabilities to such advocacy.

It also relies upon the picture painted by Hart (and others) that the law comprises a large inner core of meaning. If, in fact, the law (especially LOAC) is less determinate than what many imagine, if language is so intrinsically malleable that we can flip between the core and the penumbra with greater ease than what we anticipate, then many of the assumptions that underpin "proper" interpretive technique become undone. However, in accepting these factors we have new challenges, but also better opportunities to align legal advice with a greater moral and political acuity and so may confront lawfare more instrumentally.

Core/Penumbra and the Malleability of Language

Many scholars have critiqued the semantic certainty implicit in the core/penumbra distinction. Winter, for example, observes that Hart fails to appreciate that the cognitive process of ascribing a purpose to words that we necessarily make means the "distinction between a policy-free core and a penumbra of 'legislative' freedom necessarily collapses."⁴⁸ According to Winter, we all operate in accordance with tacit knowledge and seek to attribute a meaning to words that will give effect to an underlying policy. Language is by nature malleable, rendering the placement of a firewall between open (penumbra) and closed (core) discretion an arbitrary exercise. Duncan Kennedy has adeptly demonstrated that the "self-evident" placement of words within the core or penumbra is a highly contentious exercise. Hart

advocated that “plain cases”⁴⁹ would always be easily discernible, but Kennedy argues that through “legal work”⁵⁰ we can find ourselves within either the constrained core or the open textured penumbra whenever we wish to exercise a more political discretion. Either way, we can construct a desired result. In essence, Kennedy concludes that determinacy is “a function of the worlds of valid norms, and of the content of other sources, *and also* of their interaction with the resources and strategies of whoever has the power to do legal interpretation.”⁵¹

The Malleability of Language and Common Article 3

The malleability of language within LOAC was amply demonstrated in the course of the internal Bush administration debates concerning the application of Common Article 3 (CA 3) to the war in Afghanistan. Writing in January 2002, Deputy Assistant Attorney General John Yoo determined that the conflict then under way in Afghanistan was an international armed conflict. However, according to Yoo, neither Taliban nor Al Qaeda detainees were accorded prisoner of war status, because Afghanistan was a “failed State” and therefore the Geneva Conventions did not apply.⁵² The question then to be decided was whether CA 3, which set a minimal humanitarian standard for detainee treatment, applied as a matter of law. Yoo determined that it did not and drew heavily upon a textual analysis of the provision. Significantly, the opinion Yoo drafted had an especially narrow determination of the application of CA 3 of the four 1949 Geneva Conventions. Yoo opined that CA 3 (which applies to “conflicts not of an international character”) was intended to apply only to a condition of civil war or “large scale armed conflicts between a State and an armed movement within its own territory.”⁵³

The opinion specifically relied upon a close textual analysis, as well as a historical account of the negotiating history and past practice of States. It concluded that if CA 3 was to have a “cover all” reach, then it would have used “broader language.”⁵⁴ The “precise language”⁵⁵ actually used restricted it to the type of conflicts identified.

In reply, William Taft, the Department of State’s Legal Advisor, responded by taking issue with the reading of the applicability of the Geneva Conventions, stressing that “[t]he President should know that a decision that the Conventions do apply is consistent with the *plain language* of the Conventions.”⁵⁶ Moreover application of the Conventions “demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations.”⁵⁷

Ultimately, President Bush determined that CA 3 did not apply *de jure* but “as a matter of policy” humane treatment to the extent “consistent with military necessity”⁵⁸ would be accorded to detainees.⁵⁹

Subsequently, the executive assertion that CA 3 did not apply to the conflict with Al Qaeda was litigated before the Supreme Court. In the 2006 *Hamdan* case,⁶⁰ the Court held that the term “conflict not of an international character” contained within CA 3 was used in contradistinction to “conflict between nations.” Hence the phrase “‘not of an international character’ bears its literal meaning”⁶¹ and, as such, applied effectively to all armed conflicts that are not between nation-States, thus constituting CA 3 and its minimal standards as a “cover all.”

The remarkable feature of this composite line of executive and judicial reasoning was the reliance upon “precise,” “plain” and “literal” meaning of the words and yet such reliance produced widely divergent conclusions. In its terms the Yoo opinion was a credible enough exposition of the law, yet it seemed profoundly wrong in its recognition of a gap vis-à-vis a legal obligation to observe even minimal humanitarian standards for detainees. Were Taft and the Supreme Court better at linguistic construction and was CA 3 terminology “self-evidently” in the core of meaning? Or perhaps was “legal work” at play? Was this rather about wise international relations (IR) policy,⁶² or perhaps checking executive excess⁶³ or perhaps retaining a moral high ground for instrumental reasons?⁶⁴

The debate about the semantic placement of CA 3 is replicated with numerous key terms throughout LOAC. Issues concerning the correct interpretation of “military advantage,”⁶⁵ of the “nature” of an objective that renders it liable to attack,⁶⁶ of whether “war-fighting or war-sustaining” capability is a legitimate military objective,⁶⁷ of how “reasonable” must be the grounds for boarding and attacking vessels under the right of visit and search or blockade in naval warfare,⁶⁸ of the issue of sufficient “effectiveness” in aerial and naval blockade,⁶⁹ of the application of the precautionary principle to weapons selection (particularly by those countries possessing high-technology weaponry)⁷⁰ and, of course, what counts as “proportionate” loss⁷¹ are all illustrative of the many interpretive issues that occupy contentious and/or ambiguous decision making under the law. Invariably many of these matters are usually decided by recourse to “judgment.”⁷² Within this indeterminacy it becomes evident that legal arguments are calibrated less in terms of lawful and unlawful, and more in terms of differing degrees of lawfulness. In so doing, a different style of legal reasoning develops that is more amenable to policy influence. Perhaps this can be reconciled with Hart’s sense of penumbral reasoning, or perhaps it indicates that the register of legitimacy (with a small dose of Holmes’s predictivism)⁷³ provides better explanatory power for how LOAC is applied in practice, an explanation that gives a sufficient basis to deal with the political and moral advantage sought to be generated through lawfare.

The Register of Legitimacy

Writing in 1952, Sir Hersch Lauterpacht famously observed that “if international law is . . . at the vanishing point of law, the law of war is perhaps even more conspicuously at the vanishing point of international law.”⁷⁴ This dire warning of LOAC’s diminished relevance has in fact been breathtakingly challenged in succeeding years and rendered meaningless. Over the past few decades there has been an “explosion” of treaties, restatements, handbooks, institutional assimilation and deep professional military and academic investment with LOAC. This has been partly driven by a strategy of pragmatic engagement by humanitarian voices.⁷⁵

Rather than law becoming assimilated at the “vanishing point” of international politics, the reverse seems to have happened. LOAC and its underlying principles have been embraced by political elites and invoked in a vernacular of legitimacy to further broader strategic claims. Certainly from the first Gulf War onward, law has been invoked and heralded as providing decisive support for broader campaign advocacy.⁷⁶ There is no doubt now that compliance with the law forms part of the political discourse as to the legitimacy of a conflict. Witness the negative consequences of the Abu Ghraib events in Iraq,⁷⁷ or even more recently, the German-initiated tanker attack in Afghanistan,⁷⁸ to identify the correlation between *jus in bello* considerations and broader political and social identification with the legitimacy of a military campaign.

This phenomenon is being tracked within the legal literature. David Kennedy has observed that the practice of international law, and especially that of LOAC, has become a variegated process of input and reaction from relevant constituencies. Traction of legal arguments has become measured more in terms of persuasion within such constituencies than technical mastery of legal construction. In short, a register of legitimacy complements that of legality. Kennedy notes that “[i]nternational law has become the metric for debating the legitimacy of military action . . . [and that] law now shapes the politics of war,”⁷⁹ and, further:

In the court of world public opinion, the laws in force are not necessarily the rules that are valid, in some technical sense, but the rules that are persuasive to relevant political constituencies. Whether a norm is or is not legal is a function not of its origin or pedigree, but of its effects. Law has an effect—is law—when it persuades an audience with political clout that something someone else did, or plans to do, is or is not legitimate. . . . The fact that the modern law in war is expressed in the keys of both validity and persuasion makes the professional use of its vocabulary both by humanitarian and military professionals a complex challenge.⁸⁰

In this context, ethical and political corroboration with legal rules becomes inevitable. We leave behind the smooth reassurance of an external judicial standard

and enter a more dynamic though unfamiliar and contentious world—one where law has its rightful place, but its purchase is of a variable nature. In describing this recent phenomenon Kennedy observes:

International lawyers became less interested in whether a rule was valid—in the sense that it could be said to be rooted in consent, in sovereignty or in the nature of an inter-sovereign community—than in whether it worked. International law was what international law did. The observations of sociologists or political scientists about what functioned as a restraint or a reason became more important than the ruminations of jurists in determining what international law was and was not. As one might imagine, it became ever less possible to say in advance or with precision what rules would, in fact, be effective as law. To do so was to make a prediction about what would, in the end, be enforced. Acting under cover of law became a wager that the action's legality would be upheld in the unfolding of state practice. Moreover, it became clear that the effectiveness of rules depended less on something intrinsic to the rule than on aspects of society—how powerful was its proponent, how insistent its enforcement, how persuasive its reasons to the broad public who would determine its legitimacy.⁸¹

The perspective presented by Kennedy concerning the variable nature of legal norms is representative of a wave of critical reassessment. Over the recent past there have been a number of theories put forward that seek to rationalize the relativity of legal norms within international law. Whether predicated upon notions of “compliance pull”⁸² or theories of transnational politico-legal iteration,⁸³ they all share recognition of a corroborative role of politics/policy as fused with conceptions of legitimacy. In assessing the themes proffered, a model of the law as a justificatory discourse⁸⁴ begins to emerge, one that belies too obvious political self-interest with appeals to a broader legitimacy. This is not to say that bad legal arguments cannot still be distinguished from good ones.⁸⁵ It does acknowledge though that the vernacular of persuasion has more resonance than appeals to pedigree or some kind of external validity. As one commentator has noted, legal discourse within the international realm is not

the search for some legal truth “out there,” waiting to be discovered. It is a practice that operates on the basis of common understandings and shared beliefs about the relationship governed by the rules in question. Thus interpretation of international law is the search for an intersubjective understanding of the norm at issue.⁸⁶

Critically, the point is not one of “all things considered” subjective policy choice, but rather choice within the indeterminacy of the law. Such choice has been likened to “politics within the law”⁸⁷ or perhaps the “legalisation of politics.”⁸⁸ In determining how choices are to be made, some commentators have pointed to the

role of “general principles” of the law as reflected in Article 38(1)(c) of the Statute of the International Court of Justice as providing a durable catalog. Such principles proliferate throughout international law and often form complementary and opposing pairs.⁸⁹ Hence within LOAC, the principle of military necessity is counterpoised against the principle of humanity, and each may be relied upon to advance a particular interpretive perspective. Kalshoven has argued that such principles themselves reflect particularized social, historical and ethical traditions and are sustained by an “inner force”⁹⁰ that is “moral in nature.”⁹¹

The move to a frame of legitimacy and to acknowledging the power of political persuasion as part of a justificatory process signals a significant departure from the positivist firmament of external standards and linguistic precision. Perhaps we are still within the positivist frame but are situated deeply within the penumbral region described by Hart where a more freewheeling exercise of policy-like discretion is permitted. If so, the penumbra is more than just a narrow band, but rather occupies a much larger space. The type of legal practice and interpretive style currently being theorized actually signals a reflection of the type of reasoning advanced by the American legal realist movement of the 1920s and ’30s. This movement sought to accommodate the indeterminacy of law and in so doing wanted to implement a more self-aware process of legal reasoning⁹²—one critically predicated upon a conception of social scientific methodology that could more productively guide relevant canons of interpretation.⁹³

Counterinsurgency, Stabilization Operations and American Legal Realism

This move to a more instrumentalized form of legal reasoning has found explicit expression in the recently published US COIN and stabilization doctrines. Legal interpretation of LOAC became contextualized in seeking to achieve specific political and military outcomes. The US COIN doctrine was developed against the exigencies of the increasing violence in Iraq in 2005–6. General Petraeus and others reviewed counterinsurgency best practices, and thinking “outside the box” developed a strategy for dealing with the increasingly pressing insurgency. It was in fact a blueprint for “a strategy waiting to be implemented as everything else failed in Iraq.”⁹⁴

The resulting COIN manual grapples with the new realities of postmodern war and recommends decisive change. Indeed, the introduction to the manual makes it very clear that it intends to set a new course. Within the first paragraph, the point is abruptly made that “[t]hose who fail to see the manual as radical probably don’t understand it, or at least understand what it’s up against.”⁹⁵

The manual deals with a number of legal propositions and directs an interpretive methodology that is decisively instrumental. These are tailor-made to attain strategic effect within the context of an insurgency. The doctrine contains a number

of paradoxes that seem counterintuitive to prevailing approaches to legal interpretation. These include:

- Sometimes, the more you protect your force, the less secure you may be,⁹⁶
- Some of the best weapons for counterinsurgents do not shoot,⁹⁷
- Sometimes, the more force is used, the less effective it is,⁹⁸ and
- The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.⁹⁹

It is evident that COIN doctrine knowingly places greater physical risk on counterinsurgent forces. It fully concedes that choices will need to be made that will result in higher counterinsurgent casualties. These truisms necessarily test resolve as well as public expectation. They also provide a meaningful counter to the political and moral advantage that is sought by insurgent forces through lawfare techniques. It turns out that political and social success in the field provides the best antidote to lawfare susceptibility at home as well as within the relevant theater of operations.¹⁰⁰ The COIN and stability operations doctrines have proven, within Iraq at least, to provide a reliable framework to reach that goal. General restraint and an allocation of particular ethical and social value to the consequences of violence have provided a more durable context for legal interpretation.

Within an insurgency, those taking a direct or active part in hostilities are ostensibly targetable under the DPH provisions of LOAC. As outlined earlier in this article, little differentiation is traditionally made between hard-core insurgents and those who are more loosely associated with an insurgency (but who nonetheless come within the DPH formula). There is, as previously highlighted, an assumption of mathematical precision that underpins this approach to legal reasoning under LOAC. In challenging this blanket legal categorization the Multi-National Force–Iraq guidelines, reflecting the COIN doctrine, introduced a more nuanced targeting strategy that was based upon the question of reconcilability and modified legal approaches. Hence the guidelines stated bluntly:

We cannot kill our way out of this endeavor. We and our Iraqi partners must identify and separate the “reconcilables” from the “irreconcilables” through engagement, population control measures, information operations and political activities. We must strive to make reconcilables a part of the solution, even as we identify, pursue and kill, capture or drive out the irreconcilables.¹⁰¹

This required a greater use of intelligence to understand deeper tribal and provincial networks and allegiances. Understanding relevant ethnography and intra-tribal group dynamics gave a better context for instrumental thinking. It also

meant that a substantive differentiation could be made between the hard-core insurgent and the “accidental guerilla” with respect to targeting. These more nuanced approaches combine with a revised legal interpretive methodology that seeks to promote a particular effect with respect to targeting choices.

In relation to the principle of proportionality, the COIN manual similarly signals a self-conscious variation on the manner in which this legal standard is usually interpreted by concentrating upon political and social alienation. The manual states:

In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained. In COIN operations, [military] advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained. . . . In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape.¹⁰²

The commentary notes that the principles of discrimination and proportionality have an additional sociopolitical significance that must be factored into any interpretive exercise under the law, stating that “[f]ires that cause unnecessary harm or death to noncombatants may create more resistance and increase the insurgency’s appeal—especially if the populace perceives a lack of discrimination in their use.”¹⁰³

Law, Legitimacy and Interpretive Space

In reconciling the recourse to legitimacy with legal interpretive theory, a broader opportunity arises to grapple with lawfare—not least of which is the ability to meaningfully address the political and moral advantage sought by non-State actors. The COIN and stability operations doctrines provide an illuminating insight into how the calibrated application of force can result in achieving identified military and political effects at the tactical, operational and strategic levels. Indeed, military journals these days disclose a fascination by military operators with the implications of force in terms of psychological, sociological and anthropological effect as a means of fulfilling mission accomplishment goals.¹⁰⁴ Military lawyers have, of necessity, been part of that experience.

When we speak in the register of legality in familiar terms of classic modern positivism, we must be aware of what this implicates and the vulnerabilities it exposes. We still rely upon this methodology because it retains sufficient explanatory “horsepower” for some audiences in some circumstances. Such circumstances would, of course, encompass formal litigation processes. They would also be more likely in a

“State-on-State” conventional warfare context, which is the background in which LOAC was principally developed, or even when dealing with an “irreconcilable” in a COIN context. The disquiet that is felt by some that lawfare techniques can undermine military efforts seems geared to this concept and context of legal exposition.

As has been outlined, however, the register of formal legality is not well equipped to deal with social, political or moral critiques. But this is only one concept or version of interpretive valence. In a broader day-to-day context, the interplay between law, legitimacy, policy and politics has become well understood by military lawyers, if not expressly, at least intuitively as a different narrative of the law. Some might reconcile these interactions as mere policy overlay of hard law at the core of legal meaning. Or they could perhaps be reconciled as occurring in the (broad) penumbral region of discretion of Hart’s conception of positivism, or by invoking and assimilating American legal realist techniques (we are, after all, “all realists now”),¹⁰⁵ or perhaps as forming a competing legal methodology of normative legal relativism and pluralism.

However these interactions are reconciled from a theoretical perspective, the fact is that military lawyers have in practice adopted a more informed attitude to interpretation that has kept pace with broader national and international strategies for military action. The recent COIN and stabilization doctrines and their supporting interpretive legal approaches are designed precisely to counter adverse political and social reaction in order to obtain military advantage. They represent strong elements of counter-lawfare in their ontological premise. As will be discussed below, departing the safe moorings of a register of legality for one of legitimacy allows for a more instrumental approach to achieving mission outcomes. Though not without risk, it also offers the means by which lawfare techniques used by non-State actors can be decisively met and defeated.

Part III. Legal Choice by Military Lawyers in a Pluralist Environment

If, as I have contended, the legal framework of LOAC generates considerable interpretive space, military lawyers necessarily have a complex responsibility in reconciling multiple factors when shaping their advice. Notwithstanding this challenge, it is a theme of this article that military lawyers are well equipped to deal with lawfare. Such skills have developed quite independently as part of the general nature of dispensing advice within LOAC practice. The purpose of this part is to explore the exogenous factors that underpin military legal decision making. First will be an analysis of means-ends rationality, looking particularly at IR theories as to how the law is used to mobilize political action. Second will be an examination of constructivism, which seeks to demonstrate how internalization of normative legal

standards can result in generating a sense of self-identity and interpretive attitude. Finally, the part will conclude with a survey of virtue ethics, which have particular resonance within the military ethos and can be understood as a basis for adopting particular legal strategies of support or resistance.

Means-Ends Rationality and Politicization of Law

Public opinion is often readily acknowledged by military lawyers as having considerable effect in driving government policy. Of course in the context of lawfare, domestic public opinion is a decisive strategic target, yet there is little understanding of how law gets metabolized by advocates to prompt the type of political mobilization that subsequently shapes opinion.

To this end international lawyers and international legal scholarship generally exhibit what Jack Goldsmith has referred to as a “methodological unsophistication.”¹⁰⁶ Lawyers generally have a predilection to favor formal over functional and are less interested in examining causality.¹⁰⁷ They tend to assume law’s role in directing policy choice as a given. Conversely, IR theory seeks to explain international behavior more “realistically” and thus takes “theoretical, methodological, and empirical issues more seriously, and . . . draw[s] more generously on economics, sociology, and history.”¹⁰⁸ Generally speaking, IR scholars review international behavior in terms of power, interests, institutions, beliefs or ideas. International law can have normative effect within these mechanisms of influence but not in the manner in which most lawyers possibly anticipate.

In describing how international legal norms can be invoked to initiate or sustain political mobilization, Simmons observes that treaty ratification can be seen as an anchor for creating domestic and international advocacy networks; hence “[t]reaties can change values and beliefs and can change the probability of successful political action to achieve the rights they promulgate.”¹⁰⁹ She notes that ratification affects elite agendas, supports litigation and has a particular capacity to mobilize political action among epistemic communities.¹¹⁰ Treaty ratification, according to Simmons, signals not only a “costly signal of intent,” but also marks a decisive step in “domestic legitimation,” thus fostering a precommitment to receptivity by a government, increases the size of the mobilizing coalition, enhances “intangible” resources and expands the range of political and legal compliance strategies.¹¹¹ Similarly, Keck and Sikkink catalog how treaty ratification creates channels of access for those motivated by shared values and structured mechanisms for information exchange. These authors present both rationalist (language of incentives and constraints, strategies, institutions, rules) and constructivist (norms, social relations and intersubjective understandings) foundations to ground their analysis of the mechanisms of social and political pressure that can be generated by

politicizing legal norms.¹¹² Interestingly, the authors refer to “frames” of meaning¹¹³ to “alter the information and value contexts within which states make policies,” which in turn involve “not just reasoning with opponents, but also bringing pressure, arm twisting, encouraging sanctions, and shaming.”¹¹⁴

The concept of framing provides a useful context for understanding LOAC politicization. The issue of banning anti-personnel landmines, for example, which ultimately resulted in the drafting of the Ottawa anti-personnel mines convention,¹¹⁵ was originally discussed in terms of military utility and saving soldiers’ lives. When the debate was subsequently “framed” by advocates in terms of indiscriminate effect upon civilians, there developed an unstoppable momentum for universal banning. It is in the context of individual vulnerability to military violence that political mobilization of LOAC norms seems to be the most effective. Keck and Sikkink note that “issues involving physical harm to vulnerable or innocent human individuals appear particularly compelling”¹¹⁶ for network organization (issue of framing personified). Consistent with this observation, it is not surprising to see that trenchant arguments of *lex specialis* vis-à-vis international human rights law are usually relaxed when it comes to issues such as detainee treatment. Even if the *de jure* extraterritorial application of human rights law is not accepted, at least its normative underpinnings are observed through humanitarian policy stipulations—partly as recognition of that public expectation that such standards will be applied.

This recognition of the use of law to press moral and political leverage from a domestic audience is not lost on military lawyers and, of course, is relied upon as part of any lawfare campaign. Means-ends rationality concerning public support is implicitly part of the military decision-making calculus that underpins approaches to the law, whether consciously acknowledged or subconsciously registered. LOAC includes tremendous license for the application of destructive power; however, its full exercise is unlikely to be pressed. Indeed, legal assessment of mainstream military action is rarely undertaken to decide whether something is legal or illegal. Rather, as previously noted, it is much more a case of deciding between various iterations of legal justification and construing the better arguments, which may range from merely colorable through to compelling. Deciding whether something is merely legal, of course, does not mean that it is good policy and this is where means-ends rationality invariably enters the equation. Questions concerning public support, institutional reputation, ethical orientation, self-image, internal discipline and numerous other inchoate factors are part of that mix. In discussing the nature of the resistance exhibited by a number of senior US military lawyers to aspects of the Bush administration’s legal framework for the war on terror, Hatfield notes: “The military lawyers deferred to the law as an accumulation of hard-won institutional

wisdom. They believed the law against torture to be a reality-based warning to keep us from being doomed to learn the same lessons (usually referred to as ‘those from Vietnam’) again and again.”¹¹⁷

The Vietnam War and its consequences loom large in the literature. There is a sense that something intangible was lost in that conflict and that the decades since have been devoted to a restoration of professional ethos within the military and a reach for renewed public trust. The specific correlation between the Vietnam conflict and LOAC is also emphasized. In a recent article, retired Colonel David Graham observes that events like the My Lai incident “caused great consternation and soul searching among Americans generally,”¹¹⁸ and was a catalyst for initiating comprehensive and profound revision and prioritization of the law of war training within the military.¹¹⁹

If lawfare is partly predicated upon a strategy of decisively influencing public opinion, then it is logical that lawyers should better understand applicable IR theories that detail the pathways in which law is politicized for this very purpose. Indeed, the incorporation of public affairs officers within most chains of command evidences the general institutional recognition by the broader military of the decisive power of public opinion in liberal democratic societies. Due to a number of reasons, not the least of which is a lack of relevant social scientific training,¹²⁰ lawyers seem reluctant to undertake an analysis of law’s effect upon political mobilization. These perspectives allow lawfare strategies a head start. The rationalist and constructivist methodologies used by advocacy groups to influence political decision making should be better understood so that alternative arguments can be meaningfully mounted in response. Similarly, the issue of “framing” LOAC issues to mobilize public opinion in order to achieve a particular political result might be usefully studied to better understand and anticipate different perspectives.

Constructivism and a Logic of Appropriateness

Constructivism is an ideational theory of IR that posits that national interests are shaped by international structures. Hence national identity is partly “constructed” by international legal norms that create and disperse beliefs. This realization is predicated upon the partial or full internalization of legal norms through a process of coercion, persuasion or acculturation,¹²¹ leading to an overall acceptance of the normative force of international law, in this case LOAC. A “logic of appropriateness” as opposed to a “logic of consequence”¹²² ensues; hence it is less instrumentalist than other competing IR theories.

Under the constructivism mantle, psychological factors can permit “shaping” of perspectives through a conscious or unconscious acknowledgment of global military isomorphism.¹²³ Moreover, constructivism seeks to provide an answer for

normative adherence to the tenets of LOAC. Examples of this process at work through the constructivist lens would include the unique universality of ratification of the 1949 Geneva Conventions (the only treaty series in the world to achieve this coveted status), the de-emphasis of reciprocity as a basis for an obligation to comply with the LOAC (famously reinforced by the International Criminal Tribunal for the former Yugoslavia in the *Kupreskic* case)¹²⁴ and the enhancement of legal “principles” (as opposed to treaties or customary international law which are predicated upon State consent) based upon “elementary consideration of humanity,”¹²⁵ morality¹²⁶ and interstitial norms¹²⁷ that have achieved greater sway in legal interpretation. Constructivism also provides an explanation for why LOAC treaty declarations and reservations are not, in practice, fully relied upon within interpretive approaches to LOAC. Additionally, as discussed above, under the means-ends rationality concept, it goes some way to explaining why, as a matter of “policy” overlay, a number of human rights norms within armed conflict find resonance, especially within the field of detention operations.

Constructivism, not surprisingly, provides the most comprehensive account of social agency among competing IR theories. Some see this as a two-step process of initial “role playing”¹²⁸ that then leads to an internalization of norms. Goodman and Jinks examine this further to differentiate between “persuasion,” a conscious acceptance of the merits of an idea, and “acculturation,” under which partial internalization occurs through the phenomena of sociological micro-processes of mimicry, orthodoxy, identification, status maximization and avoidance of cognitive dissonance.¹²⁹

Constructivism provides an explanation for why military forces can come to generate a level of self-identity from LOAC. Famously, during the Bush administration debates about the *de jure* application of the Geneva Conventions to the war in Afghanistan, the Chairman of the Joint Chiefs of Staff, General Myers, resisted their non-application, stating that “[t]he Geneva Conventions were a fundamental part of our military culture and every military member was trained on them. . . . Objectively applying the Conventions was important to our self image.”¹³⁰ This sentiment is echoed by other military members who asked who “owned” the Geneva Conventions, the civilian lawyers or the military.¹³¹ Plainly there was a level of deep cognitive dissonance that came from a perception of civilian technical legal manipulation. Such questioning suggests a strong sense of internalization of norms associated with the legal framework.

Constructivists also posit the view that their theory helps explain the non-use of nuclear and chemical weapons at times when their legality was still evolving and rationalist theories would have expected such use.¹³² While these theories may be overstated and fail to account for the types of means-end rationality arguments

outlined above, or more generally for simple military utility, they nonetheless do provide a credible basis to understand disposition. If, in fact, the military “owns” LOAC as many so perceive, then normative adherence has less to do with external legal controls than with an internal orientation of self-image. As such, arguments of legal propriety find a receptive audience in the military and permit a more nuanced view of the application of force. This does not deny the availability of fulsome legal arguments to ensure complete mission accomplishment. It does, however, allow for a “base” internal attitude toward legitimacy of action that has been accepted—one that is not oblivious to the significance of moral and social consequences concerning the application of force.

Virtue Ethics

Unlike deontology or utilitarianism, which are forms of external moral guidance “where [an] agent has to bring his will and action in line with universal moral laws . . . or to maximize the common good,”¹³³ virtue ethics deal with a deeply personal orientation toward living life. Of Aristotelian origin, virtue ethics are concerned with consistent personal examination of our own behavior. Mark Osiel notes that “virtue is a property of our character, not our relation to others, even if evidenced in such relations.”¹³⁴ Osiel points to a form of virtue ethics as the motivating factor that led a number of senior US judge advocates to resist some Bush administration policies which were thought to undermine a particular balance in the framework of LOAC.¹³⁵ The motivation was not necessarily based upon means-ends rationality, or even a conscious expression of internalized legal norms; rather they were motivated by a deeper sense of felt professional honor.

Interestingly, virtue ethics have been viewed as a more reliable basis for action than “altruistic obligations to others and braver than self-interest.”¹³⁶ Importantly, they represent something of a reversion to an aristocratic commitment of living a life based upon a sense of reflective equilibrium.¹³⁷ Critically, the motivation is not premised upon any sense of (human) rights discourse, but rather a reflection of personal integrity. Hence with respect to the Judge Advocate General’s (JAG) Corps approach to detainee operations, Osiel observes that the felt sentiment was that “the duties we owe to those we have detained as terror suspects should best be understood . . . as an inference from the duties we owe our fellow citizens to behave honorably, consistent with our identity as a people constitutively committed to the rule of law.”¹³⁸

The military is particularly susceptible to the agency of virtue ethics as codes of behavior and service values are ritually emphasized in all professional military organizations around the world. Moral courage, as much as physical courage, is highly prized, and heuristic devices that transmit and reinforce this virtue are

consistently deployed. As Osiel notes, one such shorthand expression is reflected in the oft-used statement “Marines don’t do that.”¹³⁹ Similarly, the line of a JAG Corps defender of a Guantanamo detainee, “It’s not about them, it’s about us,”¹⁴⁰ conveys the depth of this appeal to virtue ethics, as does the refrain “Lose Moral Legitimacy, Lose the War” outlined within the COIN manual.¹⁴¹ That this particular perspective should have explanatory power for choices made under the law is not all that surprising. The business of warfare is brutal and deeply intimate. Drawing upon a self-illuminated moral identity is, or should be, a necessary consequence of such decision making. It does necessarily inform decision making in a manner independent from means-ends rationality and constructivist internalization theories. Of course, targeting and other operational decision making has become highly bureaucratized¹⁴² and there is the sense of a loss of responsibility through the battery of iterated routines.¹⁴³ Yet, there is always space at the strategic, operational and tactical levels where independent judgment is exercised under LOAC and it is here, within those spaces, where virtue ethics have some explanatory power for decision making. As such, the recognition of virtue ethics as a motivating force within the military acts as a sort of default setting to counter lawfare strategies that aim to ignite overreaction and violation of moral standards.

Conclusion

The typical sentiment expressed when dealing with assertions of lawfare is that it is a pernicious tactic that exploits the vulnerabilities of “law-abiding” States. The fact is that the practice of law, including LOAC, has always taken place on a highly contested terrain of social and political norms. What the phenomenon of lawfare does is highlight the perceptions of the limitations under the positivist framework in addressing and countering its goals. All contemporary accounts of positivism today reveal a level of interpretive space where broader social and policy considerations can be infused into legal interpretation. It has been a strong theme of this article that the interpretive space is much broader than what might be imagined. Correlatively, it is also a theme that LOAC is more indeterminate than what might be hoped. Hence, whether reconciled as the interplay between law and policy, or being an interpretive act within Hart’s penumbral region, or representing a new format of legitimacy, the means exist by which the goals sought in a malevolent lawfare strategy can be decisively countered. Evidence of these opportunities already exists within the COIN and stability operations environment, but these new doctrines merely represent aspects of a broader reality about interpretive approaches.

In understanding the choices that are available to military legal officers when interpreting and applying the law, there are a number of factors that do get included in the decision-making calculus beyond mere textual excursus. Means-ends rationality and the role of public opinion have always been relevant considerations. In accepting this, legal analysis should borrow from IR theory to better understand the manner in which the law is used as part of political advocacy projects. Constructivism provides another explanatory theory for why normative features of the law are internalized and why there exists a strong sentiment that LOAC is “owned” by the military. Such an understanding assists in anticipating the margins of appreciation that may be at play when grappling with the decision-making processes under LOAC. Similarly, virtue ethics sometimes play an unconscious though vital part of the interpretive experience and permit a reliably professional assessment of law’s purpose in relation to military decision making.

The issue of equipoise between principles of military necessity and humanity remains central to the interpretive endeavor of LOAC. As a fundamental touchstone of every interpretive exercise in any register of approach is the observations of Professor Dinstein, who poignantly notes that

[e]very single norm of LOIAC [the law of international armed conflict] is moulded by a parallelogram of forces: it confronts a built-in tension between the relentless demands of military necessity and humanitarian considerations, working out a compromise formula. The outlines of the compromise vary from one LOIAC norm to another. Still, in general terms, it can be stated categorically that no part of LOIAC overlooks military requirements, just as no part of LOIAC loses sight of humanitarian considerations.¹⁴⁴

The expression of such a “categorical imperative” provides a critical foundation for directing the trajectory of any interpretive approach. While lawfare is derided as an unfair or malevolent means to an ulterior end, its recognition permits a deeper appreciation of the social and political context in which law is used to underpin military decision making. This requires that the inevitable moral and political dilemmas encountered in such decision making be consciously faced if legal advice is to be rendered meaningful. Central to this exercise is the critical need to balance military and humanitarian considerations, always and everywhere, as a matter of legal rectitude. It also prompts a necessary acknowledgment of the special role military lawyers have in dispensing advice under the law, in whose name they must always responsibly act.

Notes

1. Charles J. Dunlap Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.
2. Council on Foreign Relations, *Lawfare, the Latest in Asymmetries* (Mar. 18, 2003), summarized transcript of sixth session of FY03 National Security Roundtable, available at <http://www.cfr.org/publication.html?id=5772>.
3. Michael W. Lewis, *International Myopia: Hamdan's Shortcut to "Victory,"* 42 UNIVERSITY OF RICHMOND LAW REVIEW 687 (2008).
4. Brooke Goldstein, Opening Remarks at the Lawfare Conference (Mar. 11, 2010), available at <http://www.thelawfareproject.org/141/opening-remarks>.
5. Dunlap, *supra* note 1.
6. See, e.g., Dale Stephens, *UN Security Council and Maritime Zones*, in INTERNATIONAL LAW DEPARTMENT, US NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES 5.1, 5.12–5.16 (2006).
7. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 1 (2004).
8. Noting of course that Articles 1(4), 43 and 44 of Additional Protocol I provide arguable exceptions to this emphasis. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter GP I].
9. Eric Talbot Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 241, 269 (2007).
10. Famously outlined in the United States' 2005 National Defense Strategy: "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism." Department of Defense, *The National Defense Strategy of the United States 5* (2005), available at <http://www.defense.gov/news/Mar2005/d20050318nds1.pdf>.
11. Jensen, *supra* note 9, at 269.
12. *Id.* at 269–70.
13. With regard to "Special Protection," The Commander's Handbook on the Law of Naval Operations provides: "Under the law of land warfare, certain persons, places, and objects enjoy special protection against attack. . . . [M]isuse of protected places and objects for military purposes renders them subject to legitimate attack during the period of misuse" and "Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be bombarded, provided they are not used for military purposes." US Navy, US Marine Corps & US Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A ¶¶ 8.10.2, 8.9.1.6 (2007).
14. The issue of voluntary and involuntary shields is discussed in the commentary on the 2009 HPCR Manual where a differentiation between voluntary and involuntary human shields was made. While the status of voluntary human shields was debated in terms of whether such persons should be considered as taking a direct part in hostilities or not, and thus whether they can be excluded from any proportionality debate, there was "no dispute among the Group of

Experts that ‘involuntary human shields’ count as civilians in a proportionality analysis.” PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 144, ¶¶ 5–7 (2010) [hereinafter HPCR MANUAL COMMENTARY].

15. GP I, *supra* note 8, Article 51(3) states, “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” Identical language appears in Additional Protocol II (changing only “Section” to “Part”) applicable to non-international armed conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 483.

16. David B. Rivkin Jr. & Lee A. Casey, Opinion, *Lawfare*, WALL STREET JOURNAL, Feb. 23, 2007, at A11.

17. DAVID KILCULLEN, *THE ACCIDENTAL GUERRILLA* 30 (2009)

18. GP I, *supra* note 8, Article 52(2) provides:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

19. *Id.*, Article 52(1) provides: “Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.” (Paragraph 2 is set forth in the preceding endnote.)

20. KILCULLEN, *supra* note 17, at 38.

21. Michael Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUMAN RIGHTS AND DEVELOPMENT LAW JOURNAL 143, 170 (1998).

22. Charles Dunlap Jr., *A Virtuous Warrior in a Savage World*, 8 UNITED STATES AIR FORCE ACADEMY JOURNAL OF LEGAL STUDIES 71, 77 (1998).

23. Jim Molan, *Thoughts of a Practitioner*, AUSTRALIAN ARMY JOURNAL, Winter 2008, at 215, 217 (2008).

24. *See, e.g.*, RONALD DWORIN, *LAW’S EMPIRE* (1986).

25. *See, e.g.*, Manley O. Hudson, *The Prospect for International Law in the Twentieth Century*, 10 CORNELL LAW QUARTERLY 419 (1925); Alejandro Alvarez, *The New International Law*, 15 TRANSACTIONS OF THE GROTIUS SOCIETY 35 (1930).

26. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

27. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 78 (Feb. 14), *reprinted in* 41 INTERNATIONAL LEGAL MATERIALS 536, 585, ¶ 51.

28. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

29. *Id.* at 185.

30. *Id.* at 89–91, 137–38.

31. *Id.* at 100–110.

32. *Id.* at 124–36.

33. *Id.* at 135.

34. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD LAW REVIEW 593 (1957); Lon Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARVARD LAW REVIEW 630 (1957).

35. Hart, *supra* note 34, at 626.

36. *Id.* at 620.

37. Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 NEW YORK UNIVERSITY LAW REVIEW 1109, 1114 (2008).
38. Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICHIGAN JOURNAL OF INTERNATIONAL LAW 345, 350 (1998).
39. Schauer, *supra* note 37, at 1119.
40. *Id.* at 1128.
41. Michael Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 179, 181 (2009).
42. *Id.* at 180.
43. Rosalyn Higgins, *Diverging Anglo-American Attitudes to International Law*, 2 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 1, 2–3 (1972).
44. Convention No. IV Respecting the Laws and Customs of War on Land pmbl., Oct. 18, 1907, 36 Stat. 2227, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 69.
45. Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 187, 208 (2000).
46. DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 256 (1987).
47. Oliver Wendell Holmes, *The Path of the Law*, 10 HARVARD LAW REVIEW 457, 460 (1897).
48. STEVEN L. WINTER, A CLEARING IN THE FOREST 202 (2001).
49. HART, *supra* note 28, at 126–27.
50. DUNCAN KENNEDY, LEGAL REASONING: COLLECTED ESSAYS 163–64 (2008).
51. *Id.* at 170.
52. Memorandum from John C. Yoo & Robert Delahunty to William J. Haynes II, General Counsel, Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 38, 39, 50 (Karen J. Greenberg & Joshua Dratel eds., 2005) (“Afghanistan was without the attributes of statehood necessary to continue as a party to the Geneva Conventions, and the Taliban militia like al Qaeda, is therefore not entitled to the protections of the Geneva Conventions”).
53. *Id.* at 44.
54. *Id.* at 46.
55. *Id.* at 46, n.19.
56. Memorandum from William H. Taft IV, Legal Adviser, Department of State, to Counsel to the President, Comments on Your Paper on the Geneva Conventions (Feb. 2, 2002), *reprinted in* TORTURE PAPERS, *supra* note 52, at 129 (emphasis added).
57. *Id.*
58. Memorandum from George Bush to Vice President et al., Subject: Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* TORTURE PAPERS, *supra* note 52, at 135.
59. *Id.* at 134–35.
60. Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).
61. *Reprinted in* Steven Solomon & David Kaye, *The International Law of Hamdan v Rumsfeld*, 8 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 179, 199 (2005).
62. A point advocated by Secretary of State Colin L. Powell in Memorandum from Colin L. Powell to Counsel to the President & Assistant to the President for National Security Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), *reprinted in* TORTURE PAPERS, *supra* note 52, at 122 [hereinafter Powell Memorandum].
63. See Stuart Taylor Jr., *Order on the Court; Kagan may be to the right of Stevens on war powers. Why that won't matter much*, NEWSWEEK, July 5, 2010, at 44.

64. Powell Memorandum, *supra* note 62, at 123.

65. Typical of the broadness of this concept is the Australian declaration upon ratification of GP I, *supra* note 8, which stated:

In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the “military advantage” are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term “military advantage” involves a variety of considerations including the security of attacking forces.

Available at <http://www.icrc.org/ihl.nsf/a/10312b4e9047086ec1256402003fb253?opendocument> (last visited July 13, 2010).

66. HPCR MANUAL COMMENTARY, *supra* note 14, Rule 22(a), states that “[t]he ‘nature’ of an object symbolizes its fundamental character. Examples of military objectives by nature include military aircraft . . . ; missiles and other weapons; military equipment; military fortifications” The commentary on the rule registers a disagreement between the majority of experts who drafted the Manual and International Committee of the Red Cross (ICRC) representatives on an extended range of objects that by their “nature” could also qualify as military objectives, including factories, lines and means of communication, energy-producing facilities, etc. The majority thought these could constitute military objectives by their “nature” depending on circumstances ruling at the time, whereas the ICRC representatives considered that “nature” indicated a permanent condition. *Id.* at 109, n.261.

67. The war-fighting/war-sustaining criteria for rendering an object liable to attack is a position reflected in US manuals. See, e.g., The Commander’s Handbook, *supra* note 13, ¶ 8.2, which states, “Military objectives are those objects which, by their nature, location, purpose or use, effectively contribute to the enemy’s war-fighting or war-sustaining capability.” Contrast this to GP I, *supra* note 8, Article 52(2), which is narrower in its focus, stating that “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action.”

68. See, e.g., UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 13.47a (2004), which provides,

Merchant vessels flying flags of neutral states may only be attacked if they fall within the definition of military objectives. They may, depending on the circumstances, become military objectives if they . . . are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search, or capture.

69. *Id.*, ¶ 13.67 reflects the international rule that “[a] blockade must be effective. The question whether a blockade is effective is a question of fact.” In view of the ability to attack vessels that breach a blockade, it becomes paramount to determine whether in “fact” a blockading belligerent’s military assets are capable of reducing access to a geographic area. Similarly, in the air warfare context, the HPCR MANUAL COMMENTARY, *supra* note 14, at 293, in commenting on Rule 154 provides a greater level of clarity by distinguishing between air supremacy and air superiority when determining that a “sufficient degree” of the latter may suffice for demonstrating “effectiveness” but refrains from providing any greater specificity on the criteria that would establish “effectiveness.” Since it is these criteria that would allow for the application of lethal force and qualifies an attack as not a grave breach, such criteria are of critical importance.

70. HPCR MANUAL COMMENTARY, *supra* note 14, Rule 8, provides, “There is no specific obligation on Belligerent Parties to use precision guided weapons. There may however be situations in which the prohibition of indiscriminate attacks, or the obligation to avoid—or, in any

event, minimize—collateral damage, cannot be fulfilled without using precision guided weapons.” While undoubtedly a correct statement of the law, it demonstrates, again, how case-specific “judgment” is the decisional criterion.

71. Professor Dinstein notes that there has always been a fundamental disconnect in balancing military considerations against civilian losses, because they are “dissimilar considerations.” YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 122 (2004). Similarly, Major General Rogers notes that “[t]he rule is more easily stated than applied in practice.” A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 20 (2d ed. 2004).

72. DAVID KENNEDY, *OF WAR AND LAW* 144 (2006).

73. Holmes, *supra* note 47, at 61 (“the object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts”).

74. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 *BRITISH YEARBOOK OF INTERNATIONAL LAW* 360, 382 (1952).

75. DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 284 (2004).

76. Roger Normand & Chris af Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 *HARVARD INTERNATIONAL LAW JOURNAL* 387 (1994).

77. Charles J. Dunlap Jr., *Lawfare: A Decisive Element of 21st Century Conflicts?*, 54 *JOINT FORCE QUARTERLY* 34 (2009) (“What was the U.S. military’s most serious setback since 9/11? Few knowledgeable experts would say anything other than the detainee abuse scandal known as ‘Abu Ghraib.’ That this strategic military disaster did not involve force of arms, but rather centered on illegalities, indicates how law has evolved to become a decisive element—and sometimes *the* decisive element—of contemporary conflicts.”).

78. Roger Boyes, *Angela Merkel on Defensive after Afghan Tanker Attack Blunder by German Forces*, *TIMESONLINE* (Sept. 9, 2009), <http://www.timesonline.co.uk/tol/news/world/europe/article6826088.ece> (“It was the end of Germany’s ‘Don’t Mention the War’ election campaign. In an impassioned parliamentary session yesterday Angela Merkel, the Chancellor, was forced to fight off her critics and try to persuade a sceptical nation that German troops should stay in Afghanistan.”).

79. David Kennedy, *Modern War and Modern Law*, 36 *UNIVERSITY OF BALTIMORE LAW REVIEW* 173, 177 (2007).

80. KENNEDY, *supra* note 72, at 96–97.

81. David Kennedy, *Getting Beyond Modern War and Modern Law* 5 (Paper presented in Cambridge, United Kingdom, Feb. 2010) (on file with the author).

82. See generally THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

83. See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE LAW JOURNAL* 2599 (1997); Harold Hongju Koh, *Transnational Legal Process*, 75 *NEBRASKA LAW REVIEW* 181 (1996).

84. Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 437, 440–43 (2003).

85. *Id.*

86. *Id.* at 449.

87. Dencho Georgiev, *Politics or Rule of Law: Deconstruction and Legitimacy in International Law*, 4 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 1, 13 (1993).

88. *Id.* at 14.

89. Oscar Schachter, *International Law in Theory and Practice, General Course in Public International Law*, 1978 *RECUEIL DES COURS* 9, 45 (1982).

90. Frits Kalshoven, *The Respective Roles of Custom and Principle in the International Law of Armed Conflict*, 2 ACTA SOCIETATIS MARTENSIS 48, 59 (2006).
91. *Id.* at 67.
92. See generally Brian Leiter, *American Legal Realism*, in PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson eds., 2005).
93. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 93–96, 126–34 (1997).
94. Joe Klein, *The Return of the Good Soldier*, TIME, July 1, 2010, at 28.
95. HEADQUARTERS, DEPARTMENT OF THE ARMY & HEADQUARTERS, MARINE CORPS COMBAT DEVELOPMENT COMMAND, FM 3-24/MCWP 3-33.5, THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL xxi (University of Chicago Press 2007) (2006) [hereinafter COIN MANUAL].
96. *Id.* at 48, ¶ 1-149.
97. *Id.* at 49, ¶ 1-153.
98. *Id.* at 48, ¶ 1-150.
99. *Id.* at 48–49, ¶ 1-151.
100. *Id.* at xxv (“[t]he real battle is for civilian support for, or acquiescence to, the counterinsurgents and host nation government. The population waits to be convinced. Who will help them more, hurt them less, stay the longest, earn their trust?”).
101. MNF-I Commander’s Counterinsurgency Guidance (June 21, 2008), reprinted in THOMAS E. RICKS, THE GAMBLE 369 (2009), available at http://www.mnf-iraq.com/images/CGs_Messages/080621_coin_%20guidance.pdf.
102. COIN MANUAL, *supra* note 95, at 247–48.
103. *Id.* at 249.
104. A random sample includes Gavin Reynolds, *Embracing Complexity: An Adaptive Effect Approach to the Conflict in Iraq*, AUSTRALIAN ARMY JOURNAL, Summer 2006, at 129; John Kiszely, *Post-Modern Challenges for Modern Warriors*, AUSTRALIAN ARMY JOURNAL, Winter 2008, at 177; Roger Noble, “Beyond Cultural Awareness”: *Anthropology as an Aid to the Formulation and Execution of Military Strategy in the Twenty-First Century*, AUSTRALIAN ARMY JOURNAL, Winter 2009, at 65. A more strategic military/diplomatic view that adopts a constructivist model of international relations theory is Mark Hinchcliffe, *Soft Power and the Role of the ADF in Shaping the Australian Security Environment*, AUSTRALIAN DEFENCE FORCE JOURNAL, July–Aug. 2009, at 4.
105. Joseph William Singer, *Legal Realism Now*, 76 CALIFORNIA LAW REVIEW 467 (1988).
106. Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STANFORD LAW REVIEW 959, 984 (2000) (reviewing STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999)).
107. *Id.*
108. *Id.* at 980
109. BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS 150 (2009).
110. *Id.* at 148.
111. *Id.* at 144.
112. MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 16–37 (1998).
113. *Id.* at 17.
114. *Id.* at 16.
115. Ottawa 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.
116. KECK & SIKKINK, *supra* note 112, at 27.

117. Michael Hatfield, *Fear, Legal Indeterminacy, and the American Lawyering Culture*, 10 LEWIS AND CLARK LAW REVIEW 511, 521 (2006).
118. David Graham, *A Long, Hard Fall from the Pedestal*, 54 JOINT FORCE QUARTERLY 30, 31 (2009).
119. *Id.*
120. Goldsmith, *supra* note 106, at 985.
121. See generally Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE LAW JOURNAL 621 (2004).
122. Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POLITICS 324, 326 (1998); see also Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STANFORD LAW REVIEW 1749, 1752; Goldsmith, *supra* note 106, at 965.
123. Goodman & Jinks, *supra* note 122, at 1755.
124. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 518 (Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000).
125. Referenced in Corfu Channel (U.K. v. Alb.), 1949 I.C.J., 4, 22 (Apr. 9); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 112 (June 27); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 95 (July 8).
126. Kalshoven, *supra* note 90, at 67.
127. Vaughn Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 207–26 (Michael Byers ed., 2000).
128. Jeffrey T. Checkel, *International Institutions and Socialization in Europe: Introduction and Framework*, 59 INTERNATIONAL ORGANIZATION 801, 810 (2005).
129. Goodman & Jinks, *supra* note 121, at 638.
130. RICHARD MYERS, EYES ON THE HORIZON 203 (2009).
131. MARK OSIEL, THE END OF RECIPROCITY 335 (2009) (“In conversations among themselves, JAGs sometimes speak in candidly guild-like terms. ‘Who owns the law of war?’ rhetorically asks former My Lai prosecutor William Eckhardt at one such gathering. ‘We do: the profession of arms,’ he immediately answers. ‘It’s time to take it back,’ he adds, alluding to the Office of Legal Counsel’s temporary, recent hijacking of the field.”).
132. Richard Price & Nina Tannenwald, *Norms and Deterrence: The Nuclear and Chemical Weapons Taboos*, in THE CULTURE OF NATIONAL SECURITY 114–52 (Peter Katzenstein ed., 1996).
133. Th. A. van Baarda, *Moral Ambiguities Underlying the Laws of Armed Conflict: A Perspective from Military Ethics*, 11 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 17 (2008).
134. OSIEL, *supra* note 131, at 352.
135. *Id.* at 329–61.
136. *Id.* at 344 (quoting Sharon Krause).
137. *Id.* at 371.
138. *Id.* at 359.
139. *Id.* at 334.
140. *Id.* at 330 (words of Lieutenant Commander Charles Swift, Salim Ahmed Hamdan’s defense counsel).
141. COIN MANUAL, *supra* note 95, at 252.
142. See generally Michael Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 481 (2003).
143. KENNEDY, *supra* note 72, at 168–69.
144. DINSTEIN, *supra* note 71, at 17.