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# Counterinsurgency and Stability Operations: A New Approach to Legal Interpretation

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Dale Stephens\*

### *Introduction*

**W**e live in the postmodern era of warfare,<sup>1</sup> where small-scale, intra-State conflict is increasingly becoming the norm. While the modern era conceived of war and warfighting as a large-scale, inter-State conflict waged between massed professional armies,<sup>2</sup> the postmodern era perceives conflict as “war among the people”<sup>3</sup> where technological advantage, massive firepower and physical maneuver can count for little in the struggle for ascendancy.<sup>4</sup> It turns out that such conflict can be as deadly and as strategically significant as conventional warfare.

The US military in its recent reconceptualization of how such wars are to be effectively engaged (and how victory is to be meaningfully measured) has embraced the realities of the emergent postmodern style of warfare. The recently published *U.S. Army/Marine Corps Counterinsurgency Field Manual*<sup>5</sup> and its companion volume, *The U.S. Army Stability Operations Field Manual*,<sup>6</sup> portray a somewhat counterintuitive model for prevailing in these postmodern conflicts. Significantly, the methodologies these manuals espouse are written against the background of bitter experience of conflict in Iraq and Afghanistan. Indeed, partially through necessity, these doctrines emerged from reflection about these conflicts and took

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\* Captain, CSM, Royal Australian Navy. All views expressed in this article are solely those of the author and do not necessarily reflect the views of the Australian government, Department of Defence or Royal Australian Navy.

account of “counterinsurgency best practice.”<sup>7</sup> The tactics and doctrine reflected in these manuals worked to stave off near defeat, especially in the Iraq theater of operations during the 2007 “surge.”<sup>8</sup>

Paradoxically, while military doctrine has managed a self-conscious leap in perspective regarding means and methods of warfare, there has been a correlative lack of innovation within established mainstream legal thinking, at least in the prevailing literature.<sup>9</sup> A formalist methodology of interpretation and a continued commitment to the attritional focus of the law of armed conflict (LOAC) remain the prevalent orthodoxy, notwithstanding that such binary thinking has proven to have had limited utility within counterinsurgency (COIN) and stabilization operations. There is plainly a need for renewed thinking, or at least an appreciation of the direction warfare is going, so that interpretative techniques employed in LOAC may be reimagined and recalibrated in order to remain relevant to operational realities. This paper seeks to facilitate that process.

Part I of the paper will survey the themes contained in the counterinsurgency/stability operations manuals and will contrast these to the prevailing intellectual framework which underpins LOAC. Part II examines the key principles of “distinction” and “proportionality” under LOAC and argues that a reconceptualized interpretative approach to implementing these principles is required. A particular emphasis will be placed on the rules/standards dichotomy in order to better reveal the limits of formalist thinking. Finally, Part III will canvass the challenges and choices available to an operational legal advisor when operating during COIN/stability operations consistently with revised doctrine.

### *Part I. COIN and Stability Operations: A New Doctrinal Paradigm*

#### **Counterinsurgency Doctrine**

The strategic-political realities of the Cold War prompted preparation for large-scale, inter-State “industrial” warfare.<sup>10</sup> Technology, firepower and maneuver were key elements in designing effective and efficient combat for massed professional armies. Rationalist strategizing provided the necessary gestalt and the “tools of modernity”<sup>11</sup> were expected to deliver operational success. According to Lieutenant General Sir John Kiszely, it was a model that relied upon “more advanced technology, firepower, lethality, speed, stealth, digitization, logistics, network-centric warfare [and] hi-tech ‘shock and awe.’”<sup>12</sup> These features still underpin the requirements of fighting conventional warfare. Indeed, conventional warfare still occurs, but is not the likely anticipated scenario for future warfighting.

The reality of postmodern warfare is what has been occurring in “post-conflict” Iraq and Afghanistan in recent years. Such conflicts are mostly non-international

in character and are typically manifested as small internecine warfare where non-State actors employ asymmetric means against State military forces. The environment in which this warfare is undertaken is one of mixed peace and war. The deployment of armed State forces within such conflicts has been difficult to reconcile with “first order” conventional warfare training and preparation. Such conflict has been variously described as, *inter alia*, “military operations other than war” (MOOTW), peacekeeping, peace enforcement, “wider peacekeeping,” low intensity conflict and “gray area operations.”<sup>13</sup> These terms are not interchangeable, as they differ according to legal and doctrinal authority and the nature of the deployment, but they all share common elements which separate them from conceptions of conventional warfare. These operations have required different and more nuanced skills, though it was thought that conventional warfare training could be “ratcheted down” to apply to such operations.<sup>14</sup> Such assumptions were not well placed.

The US *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 is intended to be “paradigm shattering.”<sup>15</sup> Within the first paragraph of the introduction, the point is forcefully 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.”<sup>16</sup> The manual provides that while all insurgencies are *sui generis*, there are common characteristics that apply to all and there are patterns of operational response that have been proven to be effective. The manual evidently borrows from classic counterinsurgency works relating to the British experience in Malaya<sup>17</sup> and the French experience in Algeria,<sup>18</sup> and it also updates the work that had been undertaken during the Vietnam conflict.<sup>19</sup> Most significantly, it draws upon contemporary experience in Iraq and Afghanistan in detailing a number of principles labeled “paradoxes of counterinsurgency operations”<sup>20</sup> that provide a conceptual framework for operational planning.

In very clear terms the manual outlines the elements of an insurgency and identifies the requirements that must be met in order to prevail. The doctrine is confrontational and counterintuitive to that which is required for conventional warfare. The manual painstakingly describes that an insurgency is fundamentally a political struggle, where the center of gravity is the population, which remains “the deciding factor in the struggle.”<sup>21</sup> It is asserted that insurgents invariably use unlawful means to intimidate the population and discredit the legitimate government. Such unlawful means are designed to bring about an overreaction by counterinsurgent forces. Violence is the currency of an insurgency and destabilizing the legitimacy of the host-nation government and its supporting counterinsurgent forces a strategic goal.<sup>22</sup> Provoking violation of counterinsurgent ethics and values in reacting to an insurgency is a means to secure that goal. This perspective is highlighted

by counterinsurgent specialist David Kilcullen when describing the operational *modus operandi* of Al Qaida in Iraq as one that relies upon provocation, intimidation, protraction and exhaustion, and drawing the majority of its strength from the “backlash engendered by counter-insurgent overreaction rather than genuine popular support.”<sup>23</sup> The *COIN Manual* describes that “[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?”<sup>24</sup> Thus the primary purpose of a counterinsurgency is “securing the civilian, rather than destroying the enemy.”<sup>25</sup>

In countering an insurgency, traditional thinking regarding combat and the application of overwhelming force acts as a negative factor. “Cartesian or reductionist”<sup>26</sup> logic that is so ingrained in military staff training as the primary means for problem solving offers little assistance. The temptation to act, “to do something,”<sup>27</sup> is likely the wrong response; rather, the better solution in a tactical sense may be to exercise patience, “to do nothing.”<sup>28</sup> Such an approach is challenging to the military ethos; Sir John Kiszely notes that counterinsurgency “requires . . . warriors to acquire some decidedly un-warrior-like attributes, such as emotional intelligence, empathy with one’s opponents, tolerance, patience, subtlety, sophistication, nuance and political adroitness.”<sup>29</sup> The battle is not conceived in the ordinary “formulaic and mechanistic”<sup>30</sup> sense but rather is more conceptual, relying heavily upon sociological and psychological inputs. Kiszely reinforces the need to work smarter rather than harder when conceptualizing the counterinsurgency strategy, noting in tandem with the *COIN Manual* that depriving the insurgents of popular support and winning it oneself is the key objective:

[T]he contest takes place not on a field of battle, but in a complex civilian environment . . . . Nor is it a primarily military contest . . . . The war, is in large part a war of ideas, the battle largely one for perception, and the key battleground is in the mind—the minds of the indigenous population, and the minds of regional and world opinion.<sup>31</sup>

Kiszely approvingly cites classic counterinsurgency expert David Galula’s estimation of effort in battling an insurgency as “twenty percent military, eighty percent political [as] a formula that reflects the truth.”<sup>32</sup> The psychological imperatives are reiterated in General Rupert Smith’s analysis in *The Utility of Force* when he observes that “[w]ar amongst the people is different: it is the reality in which the people in the streets and houses and fields—all the people, anywhere—are the battlefield.”<sup>33</sup> Kilcullen notes more pragmatically that “[i]n [a] population-centric strategy, what matters is providing security and order for the population, rather

than directly targeting the enemy—though this type of strategy will also effectively marginalize them.”<sup>34</sup>

The implications of the revised COIN doctrine are far-reaching. The manual lists a number of contemporary counterinsurgency imperatives that should guide planning and execution.<sup>35</sup> These principles have been replicated in operational guidelines within Multi-National Force–Iraq (MNF-I) protocols<sup>36</sup> and have, in fact, become operationalized over the past few years. Their import is significant with respect to both military ethos and public expectation, and, as will be demonstrated *infra*, also with respect to classic legal reasoning under LOAC. The principles of legal relevance recognized within the manual include the following contemporary “paradoxes”:

- “Sometimes, the more you protect your force, the less secure you may be,”<sup>37</sup>
- “Some of the best weapons for counterinsurgents do not shoot,”<sup>38</sup>
- “Sometimes, the more force is used, the less effective it is,”<sup>39</sup> and
- “The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.”<sup>40</sup>

It is evident that COIN doctrine does knowingly place greater physical risk on counterinsurgent forces. It concedes that choices will need to be made that will result in higher counterinsurgent casualties. These truisms necessarily test resolve,<sup>41</sup> as well as public expectation. The questions of insurgent targeting and the formulation of collateral/incidental damage/injury assessments in this new intellectual environment play a pivotal part of the COIN strategy. Significantly, they do so in a manner that reverses expectations and conventional reasoning. As will be discussed *infra*, a revised interpretative lens must be applied when grappling with these legal tests. Such analysis reconfigures the current self-contained ethical certainties currently underpinning traditional LOAC reasoning.

### **Stability Operations**

Stability operations are incorporated into modern COIN<sup>42</sup> and form part of the so-called “full-spectrum operations” operational design. COIN and stability operations are likely to be conducted conjointly but emphasize different aspects of the continuum. Stability operations doctrine shares the COIN aversion to kinetic operations though it is more dedicated to broader capacity building.<sup>43</sup> Stability operations are defined within US joint doctrine as follows:

[Stability operations encompass] various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide

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essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.<sup>44</sup>

Despite the overwhelming emphasis previously placed upon conventional warfare preparation, the *Stability Operations Manual* notes that the US military has, in fact, only been involved in eleven conventional conflicts during its entire history.<sup>45</sup> Conversely it has been involved in hundreds of operations that may be identified as stability operations. Significantly, since the fall of the Berlin Wall alone, the manual notes that US forces have been involved in fifteen stability operations.<sup>46</sup> The *Stability Operations Manual* represents a decisive “moment” where such operations are squarely addressed and where doctrine is both tailor-made and comprehensive.

Stability operations are principally concerned with post-conflict operations. The (in)famous phase IV element of the Operation Iraqi Freedom campaign plan, for example, was not accorded a particularly high priority during the planning and execution phases of the Iraqi conflict,<sup>47</sup> and yet was supposed to deal with stabilization. The failure to implement a comprehensive stabilization policy self-evidently represented a significant strategic failure. As a result of that experience, and the recalibration of enlightened doctrinal thinking, stability operations have been formally accorded a high priority within the planning framework. US Department of Defense Directive 3000.05 stipulates that

Stability Operations are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations and be explicitly addressed and integrated across all [Department of Defense] activities including doctrine, organizations, training, education, exercises, material, leadership, personnel, facilities, and planning.<sup>48</sup>

Stability operations are predicated upon the strategic proposition that in the contemporary environment, US security is threatened more by weak and failing States, which can act as sanctuaries for multinational terrorist networks, than by traditional strong nation-State entities.<sup>49</sup> The institutional design that underpins stability operations is the creation in a post-conflict State of an environment that facilitates reconciliation; establishes the development of political, legal, social and economic institutions; and facilitates transition to a legitimate civil authority operating under the rule of law.<sup>50</sup> It does deal with capacity building (indeed, embracing the previously maligned notion of “nation building”) and procedurally adopts an interagency focus.<sup>51</sup> Doctrinally, the US military’s role in stability operations is to assist the US Department of State, which is to lead in these efforts,<sup>52</sup> but also principally to provide the necessary security to permit these conditions to manifest.

The stability operations doctrine has, not surprisingly, been dismissed as utopian in design.<sup>53</sup> The doctrine's precepts of providing "basic public services, physical reconstruction, the hope of economic development and social amelioration"<sup>54</sup> have been criticized by commentators such as Edward Luttwak, who query whether models of Western liberal democracy (and the efforts required to create such societies) are really the only political structures that will provide sufficient stability for US security interests.

Notwithstanding these criticisms, stability operations doctrine and the integral capacity-building elements have been strongly identified by counterinsurgency experts as being a critical factor in effectively combating an insurgency. In describing the factors that contributed to the success of the 2007 Iraq "surge," for example, Kilcullen notes, "[W]e conducted operations to support the rule of law, which helped deal with 'accelerants,' and we introduced what we might call 'decelerants' such as political reconciliation and building competent, nonsectarian governance and national institutions, which helped slow and reduce the intensity of the violence."<sup>55</sup> Indeed, Kilcullen criticizes the prevalent thinking that underpinned the original Operation Iraqi Freedom planning for failing to anticipate the military leverage required to facilitate Iraqi governmental capacity to ameliorate sectarian tendencies: "[B]ecause our focus was on transition rather than stabilization, on getting ourselves out no matter what the situation was on the ground, we lacked the presence or relevance to generate that leverage."<sup>56</sup>

Like the COIN doctrine, the *Stability Operations Manual* implicitly acknowledges that there is a finite limit in the ability of military force to achieve societal outcomes. It has become a necessary feature of postmodern conflict today that such recognition of the limitations of force is indispensable to strategic success. These lessons are learned over and over and yet have been demonstrated to achieve success in the context of multiple UN peace operations where stability-type functions have formed a core element of Security Council peace-keeping/peace-enforcement mandates.<sup>57</sup>

There remains considerable debate on the meaning of "rule of law" within the academic literature and how it may be measured. Some perceive it as the external indicia of a functioning legal system—that is, the establishment of police forces and stations, courthouses and prisons—namely an institutionalist perspective,<sup>58</sup> whereas other more substantively based conceptions equate rule of law success to the acquisition of internal values within the society and especially the power elites.<sup>59</sup> This too may draw the critique of imperialism, especially in its emphasis upon international human rights (HR) standards being externally imposed upon a prevailing culture.<sup>60</sup> Notwithstanding these critiques, the implementation of a rule of law program is seen, under stability operations doctrine, as a fundamental feature in

building host-State legitimacy,<sup>61</sup> though as will be subsequently addressed, it is not without its own operationally significant difficulties.

***Part II. The Law of Armed Conflict: Interpretative Paradigms in COIN/Stability Operations***

The law of armed conflict reflects an amorphous panoply of historical influences. Sovereignty is represented in its preeminent, as well as disaggregated, forms, as are the humanitarian impulses that act as a counterbalance to sovereign military rights. In form, it displays a jumble of sharp distinctions, positivist freedom, humanitarian obligations and, of course, the perennial interpretative interplay between rules and standards.

The interdependence of rules and standards and between law and policy forms the foundational structure and the basic intellectual framework for tackling the paradoxes of restraint and freedom under the law. In discerning the correct interpretative valence of the law of armed conflict either in conventional warfare or under the more attenuated circumstances of COIN/stability operations, it is especially critical to investigate the well rehearsed “dialectic”<sup>62</sup> reasoning that is employed when reconciling the advantages and disadvantages of employing rules and standards and their respective modalities.

The purpose of this Part, therefore, is to survey interpretative techniques under the framework of the rules/standards dichotomy as applicable to the law of armed conflict. As the previous Part has demonstrated, there is a decisive shift in reimagining the way the law should be applied in COIN/stability operations in order to achieve definitive military goals. Rules necessarily carry with them a level of rigidity that potentially resists incorporation of “policy,” whereas standards have always been open to a more intuitive application of socio-legal norms. In the COIN environment these traditional approaches have been upended somewhat, especially in relation to the LOAC concepts of distinction (a rule) and proportionality (a standard). This author will argue that in shaking these *prima facie* perspectives, the COIN doctrine has created a fissure that reveals the limits of the traditional certainties concerning interpretative valence. Simultaneously, however, we get an extremely insightful glimpse into the policy/legal interplay that underpins all international law and which offers a unique opportunity for a more normatively based and savvy approach to interpretation.

**Rules and Standards**

In his seminal article “Form and Substance in Private Law Adjudication”<sup>63</sup> Duncan Kennedy provides an illuminating account of the jurisprudence of rules and

standards. Kennedy notes that such jurisprudence is “premised on the notion that the choice between standards and rules of different degrees of generality is significant, and can be analyzed in isolation from the substantive issues that the rules or standards respond to.”<sup>64</sup> Dealing first with rules, Kennedy identifies particularly the dimension of “formal realizability,”<sup>65</sup> which acts to give rules their “ruleness.”<sup>66</sup> Hence a rule may be construed as a directive that is issued in language that directs action in a determinate way to test factually distinguishable situations.<sup>67</sup> Standards, on the other hand, are more fluid and refer to directives that relate directly to one of the substantive objectives of the legal order. Kennedy notes that examples of standards are found in principles of “good faith,” “due care,” “fairness,” etc.<sup>68</sup> Thus, when dealing with a standard, a judge is required to “both discover the facts of a particular situation and to assess them in terms of purpose or social values embodied in the standard.”<sup>69</sup> This process is plainly a more freewheeling exercise where underpinning values intentionally play a bigger role in the *ex post* reasoning that is required under this regime. It also allows for a more instrumental application of the law.

Pierre Schlag offers a similar, if more fused, explanation, identifying both rules and standards as directives comprised of two parts, namely a “trigger” and a “response.”<sup>70</sup> The “trigger” may be empirical or evaluative.<sup>71</sup> A rule paradigmatically comprises a hard empirical trigger and a hard determinate response; hence he offers that a rule may be stated as follows: “sounds above 70 decibels shall be punished by a ten dollar fine.”<sup>72</sup> In contrast, Schlag defines standards as having a soft evaluative trigger and a soft modulated response, identifying an example of a standard as “excessive loudness shall be enjoined upon a showing of irreparable harm.”<sup>73</sup> Rules and standards may both be general or particular, may be conditional or absolute, narrow or broad, weak or strong.<sup>74</sup> Rules are thought to be more costly in terms of their development with legislators or courts, employing greater work in anticipating future variables they wish covered, and are perceived to be less cost intensive in their application. Standards, on the other hand, offer a reverse cost/benefit symmetry, being less costly to develop and more costly to apply in each instance, requiring greater analysis and appreciation of both particular and surrounding circumstances.<sup>75</sup>

The acknowledged benefits of rules are that they encourage certainty and guard against official arbitrariness.<sup>76</sup> Individuals may thus plan their affairs more confidently knowing the boundaries of permissible and forbidden conduct. This may, however, permit “close sailing” to social limits by canny individuals who are able to more precisely order their activities to follow, but not exceed, strict limits.<sup>77</sup> This may, in turn, foster more socially suspect behavior as a “fixed cost” of doing business.<sup>78</sup> Standards, on the other hand, require individualized judgments about

substantive compliance/violation that permit endorsed policy considerations to play a significant role in the balancing that invariably takes place.<sup>79</sup> Conversely, the ambiguity about where the limits may lie within a standard can have a “chilling effect” upon individuals, who may desist from socially useful or desirable activities because of self-imposed margins of appreciation to assumed limits.<sup>80</sup> Standards lack the certainty of rules and determinations having little precedential value are usually the result.

Because rules can also be general, judges (and other decisionmakers) may end up providing ad hoc exceptions and variations to their interpretations that act over time to seriously undermine the certainties anticipated.<sup>81</sup> There may be other rules that are more particular in character and which act to contradict general rules, or at least carve out specific areas of independent operation. Indeed, the historic positivist/realist debate revolves around the very choices permitted when interpreting rules. H.L.A. Hart’s “soft positivism,” for example, anticipates a broad settled “core” of meaning in the interpretation of rules and a smaller “penumbra” of debatable meaning.<sup>82</sup> Legal realists find Hart’s assertions to be somewhat overstated, at least in the context of appeal cases, and, while equally relying upon the positivist frame of rules as having determinative effect, find greater discretion within legal culture when applying particularized canons of interpretation to reach socially cognizable outcomes.<sup>83</sup>

### **The Law of Armed Conflict Interpretative Structure**

Evidencing its evolutionary historical development, the modern law of armed conflict displays ample evidence of both hard empirical rules and more fluid evaluative standards within its structure. These were products of different historical attitudes toward questions of sovereignty and more recently reflect questions of legitimacy.<sup>84</sup> Given the historical longevity of this body of law, fulsome positive freedoms are invariably argued in favor of military discretion and the prevailing treaty rules, especially those from the nineteenth and early twentieth centuries, tend to accommodate such advocacy. It needs to be recalled that a great proportion of the modern law of armed conflict was fashioned at a time when international jurisprudence was reluctant to presume limitations upon sovereignty.<sup>85</sup> Against this backdrop it is not altogether surprising that humanitarian advocates modified their strategy in the post–World War Two environment to introduce a new narrative to the substance of the law. The incorporation of standards into the LOAC lexicon was anticipated to better achieve humanitarian outcomes within orthodox interpretative attitudes.<sup>86</sup> Moreover it seemed to permit greater partnership with military voices in exercising statecraft.<sup>87</sup>

Mainstream LOAC literature tends toward a classic “soft positivism” in its interpretative valence. Language is parsed carefully and the pedigree of legal norms assessed very carefully.<sup>88</sup> It has largely been a “closed system” of interpretative analysis, where there are exclusive relationships between legal ideas<sup>89</sup> and where language and its syllogistic interpellation play a key role in divining legal meaning. Under this theory, legal practitioners and judges alike are able to skillfully employ these interpretative techniques to arrive at the “correct” legal answer in each case. Of course, it axiomatically reflects the “Hartian” themes of interpretation. It is this author’s contention that such a methodological view has its unacknowledged limitations especially in the context of COIN/stability operations. This article examines the key LOAC principles of distinction and proportionality under the aegis of the new doctrinal orientation applicable to postmodern warfare and will make a case for acknowledging a revised measure of interpretative approach.

### **The Principle of Distinction**

The principle of distinction has been described as a “cardinal” principle of the law of armed conflict by the International Court of Justice (ICJ).<sup>90</sup> Indeed, the principle as reflected in Additional Protocol I to the 1949 Geneva Conventions (GPI)<sup>91</sup> is titled the “Basic Rule” in Article 48, which states:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Violation of Article 48 is deemed a “grave breach” by virtue of Article 85(3)(a) of GPI,<sup>92</sup> and under Article 85(5) is further defined as a “war crime”<sup>93</sup> that “High Contracting” parties have a duty to repress and for which they have a duty to ensure appropriate penal and disciplinary consequences are imposed. These obligations extend to both subordinates and superiors who come within the ambit of command responsibility.<sup>94</sup> Given the central place of the principle of distinction in the LOAC firmament, it is not surprising that it has been accorded such stature.

The terms of Article 48 appear clearly to be a “rule.” Invoking Kennedy’s criteria, it is clear that there is a high degree of formal realizability in its terms. A distinction “at all times” is to be made between “combatants” and the “civilian population,” as well as “military objectives” and “civilian objects,” and parties are obliged to “direct operations only against military objectives” and, by implication, “combatants.” The directive plainly contains the hard empirical trigger and hard determinative response. Combatants and military objectives only may be attacked

and civilians and civilian objects may not. Violation of this “Basic Rule” is deemed both a “grave breach” and a “war crime.”

As with all generally stated directives, this rule is both under- and over-inclusive.<sup>95</sup> The operation of other provisions within GPI<sup>96</sup> (as well as Additional Protocol II (GPII) for non-international armed conflict<sup>97</sup>) make an exception for the rule against attacking civilians in the case of those civilians who take a “direct part” in hostilities, for “such time as they take a direct part.”<sup>98</sup> International dialogue on the issue of direct participation in hostilities (DPH) has, over recent years, mapped out a series of functional categories for those civilians who may lose their immunity.<sup>99</sup> The consensus view would seem to be that DPH extends down the causal chain from primary “shooter” or “bomb layer” to include (among others) civilian planners and tactical facilitators, at least in relation to organized armed groups whose members assume a “continuous combat function” in non-international armed conflict.<sup>100</sup> Such expansion exceeds what the original drafters of the GPI seemed to anticipate,<sup>101</sup> though the expansion does reflect emergent operational realities and associated State practice. Current perspectives have nonetheless set what appear to be policy limits on the breadth of the loss of immunity (despite the logic of “continuous combat function” extending down the causal chain). Hence financiers and those inciting such participation through propaganda are not considered to come within the DPH rubric,<sup>102</sup> notwithstanding that such activity has great strategic and operational significance on sustaining a conflict, especially in an insurgency.<sup>103</sup> Thus, by virtue of a combination of legal construction and the artifice of applied policy, certain civilians lose their immunity and others don’t under the DPH formula. Some determinations are based upon a logical deduction from what “direct participation” connotes, and others are based upon policy reasons which seek to exclude those who might otherwise be caught by logically assessing their functional impacts in inciting or sustaining an insurgency.<sup>104</sup> These categories have been relatively clearly defined and articulated, and have been subject to close superior court scrutiny in at least one domestic legal system.<sup>105</sup> They may also be reasonably appreciated in any “kill-capture” targeting methodology undertaken by an opposing military force. It is, to paraphrase Kennedy, a relatively classic application of a list of distinguishable factual criteria that allows intervention in a determinate way. One is able to compile a “list” from a review of authoritative legal materials and can verify via this list whether an individual’s function puts him/her inside or outside the veil of immunity.

Accordingly, there appears to have been the development of a rule that, while still relatively general, permits a confident appreciation of boundary. Military action based upon this directive may be executed to the limits tolerated by the law and, of course, canny military/legal planning may indeed permit “close sailing”

while still purchasing the “moral absolutism” that “complying with the law” provides.

While providing a firm lawful basis for the conduct of “kill-capture” operations, the law itself is predicated upon a different theoretical model from that which applies in the context of COIN/stability operations. Accordingly, as a template for military action its assumptions may lack the necessary operational acuity for postmodern success. The primary corpus of modern LOAC was developed in the immediate aftermath of the Second World War. The law, as comprised in the four 1949 Geneva Conventions, complemented the pre-existing Hague Law, which dealt mostly with “means and methods.” This collective body of law anticipated State-on-State “industrial” warfare<sup>106</sup> to be the prototypical norm, where attrition is the primary means by which to defeat military adversaries. The subsequent Vietnam conflict provided significant impetus to the development of the 1977 Additional Protocols that acted to partially fuse Geneva and Hague law with a more contemporary relevance. Nonetheless, there was still a significant emphasis placed upon a linear conception of warfare between sovereign equals and the model for military triumph was still most assuredly one of attrition. Admittedly, GPI expressly recognizes particular non-State fighters participating in conflicts relating specifically to colonial and alien domination and against racist regimes in their exercise of self-determination.<sup>107</sup> However, they were not treated in any original manner; rather such fighters were “elevated” in status akin to that of soldiers within State forces. Similarly, while non-international conflicts were specifically dealt with under GPII, the preeminent model was one that anticipated organized dissident armed forces controlling territory and exercising State-like powers with respect to that territory in order to implement the Protocol, as well as exercising “responsible command” over such forces in order to conduct “sustained and concerted military operations.”<sup>108</sup>

The framework for engaging in conflict during COIN/stability operations eschews these norms. The strategies and tactics for COIN/stability operations are profoundly more nuanced than what the law provides. The COIN doctrine counsels greater restraint when confronting and targeting individuals who come squarely within the criteria of DPH targeting. It has become clear that functional categorization of individuals and the validity of the norm are not the complete answer for lawful targeting—just as it has become clear that a state cannot kill its way out of an insurgency. The success of the Iraqi surge in 2007 was dependent on an extremely nuanced and politically aware strategy of engagement, where efforts were made to reconcile with those who were otherwise targetable under the DPH formula. The COIN guidance applicable to MNF-I makes it clear that discretion is to be carefully exercised with respect to the application of force. Non-kinetic

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options have a decisive strategic role; hence under the point titled “Promote reconciliation” the MNF-I guidance notes:

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, kinetic 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.<sup>109</sup>

The guidance for who may be “reconcilable” within the policy is not defined with any great clarity. The criteria nonetheless require greater consideration of individual identity and broader sociopolitical considerations relating to the individual and the sectarian/tribal/regional connections he/she may be entwined within. Kilcullen identifies such potentially “reconcilable” persons as “accidental guerillas,”<sup>110</sup> individuals who find themselves manipulated into insurgent activity but without the hard-core ideological drive. “Reconcilables” are also plainly those persons who may be turned against their terrorist sponsors and who may offer both intelligence and cooperation with the counterinsurgency effort. The turning of the “Sons of Iraq,” predominantly within Al Anbar province during the surge, for example, has been identified as a key outcome in addressing the insurgency.<sup>111</sup>

When the objective of a successful COIN/stability operation campaign is to “win the population,” rather than “kill-capture” the insurgents,<sup>112</sup> a different orientation to legal interpretation is required. In reflecting on his experiences in Iraq, former MNF-I Commander General David Petraeus acknowledged that when engaged in COIN a sophisticated risk/benefit calculation is mandated when dealing with the consequences of targeting. He implicitly acknowledges that such an analysis may transcend traditional LOAC thinking in terms of determining who may be targeted when he notes:

[W]e should *analyze costs and benefits of operations before each operation* . . . [by answering] a question we developed over time and used to ask before the conduct of operations: “Will this operation,” we asked, “take more bad guys off the street than it creates by the way it is conducted?” If the answer to that question was, “No,” then we took a very hard look at the operation before proceeding.<sup>113</sup>

In reinforcing this point, General Petraeus refers to lessons learned by previous US commanders, commenting that

[i]n 1986, General John Galvin, then Commander in Chief of the U.S. Southern Command (which was supporting the counterinsurgency effort in El Salvador),

described the challenge captured in this observation very effectively: “The . . . burden on the military institution is large. Not only must it subdue an armed adversary while attempting to provide security to the civilian population, it must also avoid furthering the insurgents’ cause. If, for example, the military’s actions in killing 50 guerrillas cause 200 previously uncommitted citizens to join the insurgent cause, the use of force will have been counterproductive.”<sup>114</sup>

The law of armed conflict doesn’t deal well with these questions. With respect to the principle of distinction, it requires consideration of whether the person is targetable, not whether the person should in fact be targeted and what such targeting will do in the broader strategic environment. How do we rationalize this? It may be that formalist conceptions of legal interpretation under LOAC are not indicted under this new doctrinal focus and the principle of distinction may still retain its binary certainty. One might regard considerations of individual “reconcilability” and cost/benefit analysis as mere “policy” overlays. A conscientious lawyer will therefore guard against crossing the line, will ensure that he/she carefully stays within the confines of “the law” and will know where the seam of true legal advice must end. To do so, though, seems a bit disingenuous. The policy overlay that is mandated by the COIN/stability operations doctrine requires consideration of variables concerning individual identity, of affiliation and role, and of sociopolitical context. It does so because it has been proven to work in achieving the military goals sought. A responsible lawyer must take these things into account when dispensing meaningful legal advice. Once these elements are put into the balance, the rule regarding distinction becomes less an empirical exercise and more of an evaluative process. The rule begins to transform into a standard. On the one hand is the requirement to determine whether or not the person is in fact targetable under the general DPH formula and then on the other is the issue of individually specific criteria to determine whether or not the person is “reconcilable” or his targeting otherwise has greater operational implications. Under this standard, the responsible lawyer is permitted to have broader regard to the purposes and social values the doctrine is propagating. Thus, in undertaking this exercise the role of policy becomes heavily implicated in the interpretation of the “rule.” This in turn shapes the quality of legal advice that must be reached. The issue is equally attenuated when dealing with the cognate principle of proportionality, which will now be addressed.

### **The Principle of Proportionality**

The principle of proportionality as outlined in GPI is provided in the following relevant recitation of Article 51(5)(b) under the heading “Protection of the civilian population.” Article 51(5)(b) prohibits indiscriminate attacks, defined as “[a]n attack which may be expected to cause incidental loss of civilian life, injury to

civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The principle is also contained in Article 57(2)(b), which is listed under the chapeau of “Precautions in attack.”

The principle plainly introduces a standard whose factors concerning collateral damage to property and incidental injury to civilians need to be balanced and weighed against concrete and direct military advantage. The principle is one that has not easily been reconciled. Professor Dinstein notes, for example, that there has always been a fundamental disconnect between balancing military considerations against civilian losses, as they are “dissimilar considerations.”<sup>115</sup> Major General Rogers poignantly notes that “[t]he rule is more easily stated than applied in practice.”<sup>116</sup>

Numerous States parties to GPI have made declarations seeking to assure a more expansive (and militarily advantageous) formalist architecture, including, for example, declarations that the security of the attacking force may be a factor that may be taken into account when balancing against “excessive” civilian loss and that proportionality assessments should be undertaken with respect to the “attack as a whole” and not individualized aspects of the attack.<sup>117</sup> Dinstein notes the criticism leveled at the principle as elaborated within GPI as permitting possibly too great a subjective assessment by military commanders when undertaking the balancing requirement.<sup>118</sup> As with the principle of distinction, a somewhat linear formulation of assessment is undertaken. Hence civilians and civilian objects are accorded a “value” and an exchange is processed along consequentialist lines, whereby an attack may proceed on the basis that “anticipated concrete and direct military advantage” outweighs, by even the smallest of margins, the expected civilian loss.

Against this background the *COIN Manual* signals a self-conscious revision of the application of the proportionality principle in accordance with its stated “paradoxes” of counterinsurgency. Hence 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. But 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.<sup>119</sup>

The commentary subsequently notes that the principles of discrimination and proportionality may have an additional sociopolitical significance, 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.”<sup>120</sup>

The formulation of military advantage and express reference to the political and social implications of the use of force aren’t easily reconciled with classic recitations of the parameters for assessing military advantage over civilian cost. The *COIN Manual* commentary cited above focuses on the individual identity of the insurgent, requires assessment of future potential harm such a person may inflict (harm that the insurgent “could do”) and seeks to measure that against potential civilian loss in terms of civilian reaction in relation to ongoing support for the insurgency and the associated risk of alienation. Such prescriptions plainly fit within a model of “winning the population” under the COIN strategy by designing a sociopsychological “barrier” between the population and insurgents, but do not seem to square with the commentary offered on this principle arising out of the negotiations that produced the Additional Protocols. Thus the International Committee of the Red Cross (ICRC) *Commentary* to the negotiations notes that the proportionality principle is to be viewed in the tactical context, not strategic, commenting that the military advantage should be “substantial and close”<sup>121</sup> and that advantages that “would only appear in the long term should be disregarded.”<sup>122</sup> Similarly, the ICRC *Commentary* rejects any notion of “political” advantage as coming within a formalistic reading of what the term “military advantage” anticipates.<sup>123</sup> This is not the type of calculation that the *COIN Manual* mandates.

The ICRC *Commentary* naturally presumes that the balancing anticipates that incidental loss of civilian life is to be weighed (and sacrificed) against military advantage and seeks to impose finite humanitarian limits on that equation. The COIN orientation of this formula, however, ends up conflating minimization of incidental civilian loss with military advantage. Ganesh Sitaraman concludes his analysis of this phenomenon by stating that there is a unification of both humanitarian concerns and strategic self-interest.<sup>124</sup> As a standard, the proportionality principle more openly permits recourse to social purposes as an interpretative tool. The ICRC *Commentary* reinforces this perspective by invoking the standard-like obligations of “good faith”<sup>125</sup> and “equity”<sup>126</sup> as criteria that must apply to decision making under the proportionality principle. Has, in fact, the COIN direction to assess second- and third-order effects under the proportionality equation rendered the proportionality standard more “rule-like” with respect to weighing the humanitarian side of the equation? Certainly, the trend in international tribunal decision making has been to continually highlight humanitarian interests in LOAC<sup>127</sup> and this author has argued elsewhere that the ICJ has

proposed a formula for proportionality that does accord a perceptible weighting for humanitarian requirements.<sup>128</sup>

A military decisionmaker is obliged under the COIN doctrine to assess the civilian loss occasioned by an attack in broader operational and strategic terms. This is not mandated under the terminology of Articles 51 and 57 of GPI but nonetheless from the perspective of the military decisionmaker is a norm that now has authoritative effect. Akin to the status of a domestic law “regulation” the revised *COIN Manual* has definitive de facto impact. A strict formalist approach to this issue may disregard such doctrine as mere “policy.” As discussed previously, however, it would be a foolish military lawyer who would adopt such a posture. The COIN doctrine has an empirical rigidity that necessarily influences the manner in which the principle of proportionality is applied. As Sarah Sewall emphasizes:

[I]n this context, killing the civilian is no longer just collateral damage. The harm cannot be easily dismissed as unintended. Civilian casualties tangibly undermine the counterinsurgent’s goals . . . [T]he fact or perception of civilian deaths at the hands of their nominal protectors can change popular attitudes from neutrality to anger and active opposition.<sup>129</sup>

Indeed, so strategically significant is the issue of incidental injury in the COIN context that the commanding general in Afghanistan recently issued a directive detailing very limited and prescribed circumstances under which close air support and indirect fire can be undertaken in residential areas.<sup>130</sup> Such circumstances start to resemble a “list” approach to when incidental injury may be occasioned. The fact of incidental injury, however justified under formalist recitations of the law, has proven to be a strategically intractable problem. Military policy has imposed a high value on civilian loss that effectively weights the proportionality formula in favor of the humanitarian side, not because it is the “nice” thing to do, but rather as Kilcullen notes, “our approach was based upon a clear-eyed appreciation of certain basic facts”<sup>131</sup> concerning the nature and quality of fighting an insurgency.

### **Rules/Standards and Legal Reasoning**

The law of armed conflict sets, throughout its structure, the principles of military necessity and humanitarian considerations in equipoise.<sup>132</sup> The humanitarian strategy of relying upon both rules and standards to advance humanitarian priorities under this body of law is a considered, and a not-so-surprising, outcome. We find hard empirically based rules to ensure a firm separation between combatants and civilians under the principle of distinction and a more evaluative standard for undertaking proportionality calculations where incidental injury is anticipated. As

we have seen, under prevailing canons of interpretation, rules provide a requisite level of certainty and objectivity, whereas employment of standards mandates that “all perspectives”<sup>133</sup> be taken into account, making “visible and accountable the inevitable weighing process that rules obscure.”<sup>134</sup> The proportionality standard thus requires that an express incorporation and open balancing of civilian lives be made in the decision-making calculus.

As previously discussed, the COIN doctrine has inverted these truisms by rendering the principle of distinction more standard-like and the principle of proportionality more rule-like. It seems ironic that the purpose of this inversion is to actually advance humanitarian considerations, albeit under a self-interested strategy of ensuring military success. Should this be a problem? It would seem to be problematic from a formalistic perspective. Focusing solely upon military (and political) effect under the law rather than upon traditional functional categories has the potential to obscure the integrity of the “equipoise” established under the law. The evolution of “effects-based targeting” methodology, for example, which similarly applies a much more instrumentalist approach to targeting decisions, has been resisted by international legal scholars because of its potential to undermine the traditional legal distinctions between civilian and combatant.<sup>135</sup> The fear is that if military effectiveness becomes a viable benchmark for confidence then civilian protection will be progressively eroded.

There remains a strong professional adherence to the existing formalist tenor of the law of armed conflict, even when deviation from its terms can actually increase the probability of humanitarian outcomes. Gabriella Blum has, for example, surveyed a range of case studies where utilitarian reasoning under the law would lessen humanitarian risk, though she has also demonstrated powerful resistance to the employment of such reasoning.<sup>136</sup> Her review of the “early warning procedure” decision by the Israeli Supreme Court in the case of *Adalah v. IDF*<sup>137</sup> is particularly instructive. The case concerned the use of Palestinian civilians by the Israel Defense Forces (IDF) to provide early warning of an imminent arrest in order to facilitate potential surrender and evacuation of innocent persons. Empirical evidence adduced by Blum tends to support the conclusion that use of such volunteers has reduced casualties of both military and civilians when undertaking such arrests, though concomitantly the use of such procedures is *prima facie* contrary to a number of provisions of LOAC. The Israeli Supreme Court unanimously rejected IDF use of this technique, holding that this procedure was contrary to the law of armed conflict, reiterating “the IHL prohibition on using the civilian population for the military needs of the occupying army, and also the obligation to distance innocent civilians from the zone of hostilities.”<sup>138</sup> It appears that the

pragmatic humanitarian outcomes that the IDF policy sought to optimize weren't significant enough to obviate the risk of forensic violation of LOAC principles.

Unlike the choices faced by the Israeli Supreme Court in the *Adalah* case, the reasoning applied under the COIN/stability operations doctrine doesn't constitute a direct affront to the existing humanitarian principles underpinning the LOAC; rather it demands a variegated reasoning process. Such reasoning can exist within traditional categories by providing a narrower band of who may be targeted (distinction) and when incidental injury is permissible (proportionality) and may thus meet with less resistance. These goals are certainly consistent with humanitarian priorities but they demand a more policy/political-oriented interpretative approach in individual cases, and, of course, they serve specific military ends. If nothing else it demonstrates yet again the indeterminacy of the law and the artificiality of formalist legal reasoning. H.L.A. Hart himself acknowledged that principles, policies and purposes can inform reasoning within the penumbral region of rules and the more open context of standards. He remained adamant that such "law making" occurred only at the "fringe"<sup>139</sup> with respect to rules and was nonetheless still subject to "indisputable" measures of correctness with respect to standards.<sup>140</sup> This marginalization of principles, policies and purposes to inform legal reasoning has been at the center of jurisprudential debate for many years. It was Hans Morgenthau who advocated a more direct assimilation of policy and law over sixty years ago. His functionalist advocacy required "precepts of international law" to be interpreted in the light of "ethico-legal principles"<sup>141</sup> with a strong reference to "social"<sup>142</sup> context if law was to escape its formalistic orientation and become more relevant to international discourse. In the COIN doctrine we see the realization of this concept. Doctrine applies to reshape rules and standards alike, such modification being consciously directed under specific means/ends rationality. It remains to be seen whether this development is accepted for what it is, or whether it will be reconciled and explained away within existing canons of interpretation, no matter how artificial and unsatisfying that explanation. In representing an affront to interpretative approaches to rule formalism, it may also be resisted for what it presages. Conflating military effectiveness with humanitarian protection is surely sound but, as in the *Adalah* case, the acceptance of this proposition strikes deep into judicial sensitivities and runs the perceived risk of opening the door to accepting a deeply instrumentalist approach to the law that risks elevating military effectiveness as an interpretative benchmark.

Alternatively, the combination of rules and standards methodologies under COIN/stability operations doctrine can operate to better inform ethical judgment. In his critique of the principle of LOAC's concept of distinction, David Kennedy queries whether the purpose of the classic rule is "ethical distinction" or

“instrumental calculation.”<sup>143</sup> The same critique may, of course, apply to the principle of proportionality. According to Kennedy, the combination of invoking a formalist style of interpretation in conjunction with an underlying utilitarian orientation allows for a “proceduralization” of bloodshed that permits the avoidance of any real sense of personal responsibility.<sup>144</sup> The new COIN/stability operations doctrine, which demands sociopolitical analysis in any targeting solution under the law, meets these criticisms. However, it carries with it a particular cognitive risk. Once individuals are assessed on criteria of “reconcilability” rather than on the more formulaic DPH criteria, it animates both cognitive and emotional processing of information. Thus, from an emotional perspective, whether a targeting action is an instance of lawful engagement or “murder” has the potential for initiating significant cognitive dissonance. It is an omnipresent feature in individual decisions under the law and the “firewall” between such concepts is adequately maintained through a functional DPH category approach. The requirement for individual assessment based upon socio-legal considerations, even when a person comes within the DPH criteria, threatens to unravel this ethical “distance” that the existing law establishes.

In warfare, military lawyers effectively undertake the judicial decision-making role. Military lawyers will provide a multitude of interpretations and advice to commanders on what always seem to be cascading legal problems. This advice is always time sensitive and always undertaken in the shadow of the law. The COIN/stability operations policy approach to questions of targeting imposes a definitive high “value” on civilian life that is heavily weighted on achieving advantageous militarily strategic outcomes. This policy can in fact be reconciled with existing formulations of distinction and proportionality, but we should be aware of the way this policy is guiding selection of legal canons of interpretation. The malleability of interpretative devices, of turning rules into standards and vice versa, exposes the apparent structural “certainties” of formalism and threatens incorporation of the traditional risks of arbitrariness, subjectivity and inflexibility associated with the rules/standards dichotomy in a compounded manner. It would be wrong to read too much into this phenomenon, however. Indeterminacy is more of a feature of the law than we might like to think. The realist movement and its “critical legal studies” successors have long been dedicated to ascertaining the inchoate policy preferences of judicial decision making. Here, ironically, the role of humanitarian considerations has been “imposed” as an express preference in the interpretation of the principles of distinction and proportionality. It is both an ethical distinction and an instrumental calculation. It also speaks the language of legitimacy, which is fast becoming the currency of the law of armed conflict but, as stated, is not without its cognitive risks.

*Part III. Legal Plurality in COIN/Stability Operations*

The COIN/stability operations manuals emphasize the critical need for intervening forces to assume a particularized form of ethical orientation, one that displays demonstrable compliance with the law and its underlying humanitarian ethos and also accepts greater risk in achieving the military goals that have been set. Acting with “rectitude” has become a key theme in establishing the necessary legitimacy to underpin COIN/stability operations.<sup>145</sup> The role of “soft power” has been highlighted as a fundamental tenet of success. In this regard Kilcullen notes, “America’s international reputation, moral authority, diplomatic weight, persuasive ability, cultural attractiveness, and strategic credibility—its ‘soft power’—is not some optional adjunct to military strength. Rather, it is a critical enabler for a permissive operating environment.”<sup>146</sup> In the working environment of COIN/stability operations this throws up numerous legal conundrums. The perennial question of the interplay between LOAC and human rights law within a conflict zone is one of these. Another is the choice between invocation of the full conventional apparatus of the law of armed conflict when dealing with, for example, “irreconcilables,” as against resort to law enforcement measures and associated criminal justice procedures to be undertaken primarily by domestic national forces.

The dilemmas facing the legal advisor in a “post-conflict” conflict are multifaceted and perhaps more challenging than in a straightforward conventional war context. At what point, for example, does the LOAC framework give way to human rights norms and the application of domestic criminal law standards? Is it a sliding scale? Are there particular categories of actor or context where the break is more abrupt? COIN and stability operations doctrine makes it plain that counterintuitive principles are critical to success, though conventional LOAC interpretative methodologies still have their place. The challenge is discerning when one is to be preferred over the other. In all post-conflict societies where intervening military forces are operating, there is a strong will for emerging national institutions to assert their understandable desire for sovereign independence. Concomitantly, a stated counterinsurgency “paradox” principle is “[t]he host nation doing something tolerably is normally better than us doing it well.”<sup>147</sup> Establishing the legitimacy of domestic institutions is a key factor in COIN/stability operations doctrine, though what if the probable cost of forbearance is the loss of life in one’s own forces? Moreover, what if complying with civil law processes (warrant-based arrests, for example) will likely result in greater casualties for your forces though resort to available LOAC avenues of action to “kill-capture,” which minimize that risk, are equally available? Which legal option is the right one to take? Post-conflict societies are often in a mixed state of war and peace, and the reality of complying with civil law enforcement measures

is not like that in Western democratic societies. When is the assumption of greater risk, which COIN/stability operations doctrine mandates, not appropriate, especially when other legal regimes that mitigate that risk (though not without some cost to legitimacy) are equally applicable and equally valid?

### **The Interaction of LOAC and International Human Rights Law in COIN/Stability Operations**

The interaction of the law of armed conflict and international HR law, which is so much a staple of contemporary mainstream academic debate, has its operationalization in the very contexts that COIN and stability operations doctrine anticipates. This requires practical disentangling on the ground. While the framework established by the ICJ in the *Nuclear Weapons* advisory opinion<sup>148</sup> for reconciling these questions makes plain that LOAC (referred to by the Court as international humanitarian law (IHL)) and HR law can both apply during a time of armed conflict, the maxim of *lex specialis* will determine the content of prevailing obligation. In that instance, dealing with the right to life and the prohibition of arbitrary deprivation, in issuing its advisory opinion the Court found that IHL represented the *lex specialis*.<sup>149</sup> The ICJ's subsequent pronouncement in the 2004 *Wall* advisory opinion<sup>150</sup> provided less than exacting guidance when determining that "some rights may be exclusively matters of IHL; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."<sup>151</sup>

The question of resolution between these two bodies of international law may, however, be more prosaically tackled. Rather than a mighty clash of strategic principle where one body of law *in toto* trumps the other, there appears to be a more nuanced assimilation that is occurring in practice. For certain coalition partners either policy or domestic legal directives will directly or indirectly apply human rights norms to their operational activities. They are rarely formally expressed at the ground level as being one or the other and to the soldier on the ground the distinction is of little import. Hence, with respect to detention operations, which are plainly a significant component of COIN operations, it is evident that the influence of domestic law, such as the UK Human Rights Act (which in turn incorporates the European Convention on Human Rights) will continue to have application for activities occurring during armed conflict. As the *Al-Skeini* case<sup>152</sup> has established, these norms can have decisive legal application in a conflict so as to compel observance by particular forces with respect to particular fact circumstances.<sup>153</sup> While courts will invariably rely upon a careful recitation of facts and circumstances when formulating such standards, government and military policy will usually provide for a broader degree of "margin" to ensure lawful and socially legitimate/acceptable behavior. Hence the impact of this UK legislative authority (as judicially

interpreted) has an assimilative effect in terms of standard operating procedures (SOPs) written for such operations, ones that other coalition partners are required to respect and observe when engaging in combined operations. Whether the guidance derives from LOAC or HR law, from domestic or international law, the impact upon operations on the ground and the indirect policy do influence behavior and act as socializing agents between forces acting in concert. Thus in the event of COIN operations within Iraq or Afghanistan, should non-UK forces wish to utilize UK detention facilities there is a requirement for compliance with UK legal and policy preferences. Given the specificity of such obligations the question of *lex specialis* becomes, in effect, one of HR obligations providing definitive guidance.

### **The Orientation of Legal Advice**

Grappling with the reality of legal plurality within an operational context, especially when looking at both the horizontal and vertical planes of interaction in a COIN environment, provides unique challenges. Lawyers are used to compartmentalizing legal concepts and applying time-tested forensic skills and “disciplined, intuitive”<sup>154</sup> legal reasoning to the resolution of problems. The law of armed conflict provides a particularized intellectual structure. Counterinsurgency inverts most of the truisms associated with such formalist thinking. When defeat was staring the coalition in the eyes in Iraq in 2007, a radical new strategy was developed that recognized the need for a more careful and judicious application of force (“We cannot kill our way out of this endeavor”). Classic legal prescriptions under LOAC don’t quite match the objectives being sought, or at least don’t synchronize with the new “means” as easily, except in the pressing case of targeting “irreconcilables.”

The legal advisors in both Iraq and Afghanistan over the past few years have been dealing with the classic “three-block war” concept.<sup>155</sup> In these instances, the forces were engaged in antiterrorism, as well as counterinsurgency, while simultaneously trying to build capacity and ensuring compliance with the multifaceted rule of law foundation that COIN/stability operations doctrine demands.<sup>156</sup> Legal problems in these contexts are not so easily compartmentalized; these issues are too deeply interconnected. Choices need to be made holistically with the net result possibly being the loss of one’s own soldiers through compliance with what appears to be abstract and aberrant policy. It is clear, though, that the new doctrine reflected in the COIN/stability operations is actually working in the strategic sense.

Doctrine plays a decisive role in military decision making and there is evidence that operational planning teams have socialized the new directions mandated in effectively fighting this postmodern warfare. As previously mentioned, there is not a lot of evidence that the legal community has been as ready to internalize these fundamental changes. Lawyers have a tendency to interpret factual problems in

accordance with extant legal prescriptions and prevailing models, and seek to manipulate facts to ensure a sense of legal integrity when dispensing advice. Perhaps the dissociative mechanism of distinguishing between law and policy that lawyers readily employ to temper challenges to formalist orthodoxy in the area of operational law will again prevail. Perhaps the law of armed conflict will retain its perceived ideational integrity, though stepping back from this, there is something unsettling in trying to conform postmodern approaches into a legal framework that predominantly dates back to the post–World War Two era (in fact, back to the nineteenth century). It seems to set the stage for legal marginalization. The better accommodation may be one that retains the substance of the law but is more open to a modified interpretative valence.

#### *Part IV. Conclusion*

The body of the modern law of armed conflict is “the result of an equitable balance between the necessities of war and humanitarian requirements.”<sup>157</sup> Through the mechanism of hard-line empirical rules, as well as flexible evaluative standards, this fundamental military/humanitarian balance is in perpetual creative tension. The adoption of a shared vocabulary within the law has allowed an intersection of dialogue between military professionals and humanitarian advocates that has, in fact, empowered both camps. It is of no small measure, for example, that the principle of proportionality may be celebrated as a desirable union of both military economy and humanitarian restraint. The principle provides a moral and political convergence: only “direct and concrete military advantage” and non-“excessive” civilian loss are permitted. Yet, the simple mechanics and elegant mathematical confidence of the proportionality principle seem to permit avoidance of broader ethical questions. As David Kennedy has observed, mechanically complying with the law can allow the avoidance of “ethical jeopardy” and the minimization of personal responsibility.<sup>158</sup> The recognition of the specifics of individual identity and anticipating the second- and third-order effects of a “proportionate attack” are not matters that have occupied much legal time in any planning analysis, and yet, as we have seen in COIN, they can have enormous strategic policy significance.

The postmodern era of warfare challenges old legal orthodoxies. Concepts such as avoiding incidental civilian injury in terms that far exceed legal limits and requiring greater precision in targeting than merely verifying the relevant civilian/combatant categories of privilege (and its loss) represent a powerful transformative approach to conducting operations. The COIN/stability operations doctrine predicates are largely counterintuitive and at odds with traditional approaches to legal interpretation. When, for example, has “emotional intelligence,” as General Kiszely

identifies,<sup>159</sup> ever been relevant to disciplined legal analysis? It is evident that the weight of operational doctrine and increasing assimilation of human rights norms into multi-splintered SOPs require a reconsideration of prevailing approaches to interpretative valence. Perhaps issues such as human rights norms applying to operations and the conflation of military advantage with preserving civilian lives under age-old formulas may be rationalized and distinguished as “mere” policy. Perhaps legal advisors can continue to insist on a “Hartian” template for interpretative rectitude and can answer all the relevant constituencies “out there” with a robust assertion that it “is the law” that justifies and rationalizes actions, and as lawyers we must be vigilant to remain strictly within its boundaries. Or perhaps not. Could it be that policy has always infiltrated legal reasoning in ways that are not openly acknowledged? Perhaps the American realists of the interwar period<sup>160</sup> did have it right and legal analysis can be much more flexible and accommodating of policy inputs than what we might want to admit and, moreover, may do so without impugning the integrity of the law. Perhaps the law of armed conflict still retains all we need to ensure military success, we just need to be mindful of what we mean by such success and be conscious of how we can get there. Either way, a real revolution in military affairs is under way and it does implicate the law in fundamental ways. The coming storm offers a rare opportunity to recalibrate the interpretative valence of the law in a spirit of self-awareness made all the more ironic by the fact that it is operational pragmatism that has sparked this phenomenon.

### Notes

1. John Kiszely, *Post-Modern Challenges for Modern Warriors*, AUSTRALIAN ARMY JOURNAL, Winter 2008, at 177.

2. *Id.* at 178.

3. RUPERT SMITH, *THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD* 5 (2007).

4. Kiszely, *supra* note 1; COIN Manual, *infra* note 5, at iii.

5. 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* (University of Chicago Press 2007) (2006) [hereinafter COIN Manual].

6. HEADQUARTERS, DEPARTMENT OF THE ARMY, FM 3-07, *THE U.S. ARMY STABILITY OPERATIONS FIELD MANUAL* (University of Michigan Press 2009) (2008) [hereinafter Stability Operations Manual].

7. DAVID KILCULLEN, *THE ACCIDENTAL GUERRILLA* 129 (2009).

8. *Id.* at 128–54.

9. Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VIRGINIA LAW REVIEW 1745, 1747 (2009) (“despite counterinsurgency’s ubiquity in military and policy circles, legal scholars have almost completely ignored it”).

10. SMITH, *supra* note 3, at 5.
11. Kiszely, *supra* note 1, at 179.
12. *Id.*
13. There has been a strong sense of ad hoc doctrinal “catch-up” to synchronize with these non-conventional operations especially during the 1990s. *See, e.g.*, Peter Viggo Jakobsen, *The Emerging Consensus on Grey Area Peace Operations Doctrine: Will It Last and Enhance Operational Effectiveness?*, INTERNATIONAL PEACE-KEEPING, Autumn 2000, at 36; Michael Stopford, *Peace-Keeping or Peace-Enforcement: Stark Choices for Grey Areas*, 73 UNIVERSITY OF DETROIT MERCY LAW REVIEW 499 (1996); INTERNATIONAL & OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S SCHOOL, OPERATIONAL LAW HANDBOOK ch. 23 (2001).
14. Kiszely, *supra* note 1, at 185–86.
15. COIN Manual, *supra* note 5, at xxxv.
16. *Id.* at xxi.
17. *Id.* at 234–35.
18. *Id.* at 13 & 252 (“Lose Moral Legitimacy, Lose the War”).
19. *Id.* at 11–14.
20. *Id.* at 47–51.
21. *Id.* at xxv.
22. *Id.* at 37–39, 42–43, 49–50; Stability Operations Manual, *supra* note 6, at 1-29.
23. KILCULLEN, *supra* note 7, at 30–34.
24. COIN Manual, *supra* note 5, at xxv.
25. *Id.*
26. Kiszely, *supra* note 1, at 182.
27. *Id.*
28. COIN Manual, *supra* note 5, at 49.
29. Kiszely, *supra* note 1, at 184.
30. *Id.* at 179.
31. *Id.* at 180.
32. *Id.*
33. SMITH, *supra* note 3, at 6.
34. KILCULLEN, *supra* note 7, at 129–30.
35. COIN Manual, *supra* note 5, at 44–47.
36. 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](http://www.mnf-iraq.com/images/CGs_Messages/080621_coin_%20guidance.pdf) [hereinafter MNF-I Guidelines].
37. COIN Manual, *supra* note 5, para. 1-149, at 48.
38. *Id.*, para. 1-153, at 49.
39. *Id.*, para. 1-150, at 48.
40. *Id.*, para. 1-151, at 48.
41. “Resolve” is identified in many accounts of COIN as being the key counterinsurgent vulnerability. *See, e.g.*, Jim Molan, *Thoughts of a Practitioner*, AUSTRALIAN ARMY JOURNAL, Winter 2008, at 215, 220.
42. COIN Manual, *supra* note 5, at xxiii.
43. Given the natural interaction between COIN and stability operations doctrine, I will be referring to both as COIN/stability operations. The main point is that they are doctrinally distinct from conventional warfare.
44. Stability Operations Manual, *supra* note 6, at viii.
45. *Id.* at 1-1.

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46. *Id.* at 1-3.

47. See DONALD P. WRIGHT & TIMOTHY R. REESE, ON POINT II: TRANSITION TO THE NEW CAMPAIGN, THE UNITED STATES ARMY IN OPERATION IRAQI FREEDOM MAY 2003–JANUARY 2005 ch. 2 (2008), available at <http://www.globalsecurity.org/military/library/report/2008/onpoint/index.html>, where the following is stated:

Clearly, the PH [phase] IV planning efforts by ORHA [Office of Reconstruction and Humanitarian Assistance], the Joint Staff, and CENTCOM attest to the fact that many within the US Government and the DOD community realized the need to plan for operations after the fall of the Saddam regime. . . . Nonetheless, as in the planning process for Operation JUST CAUSE, the emphasis within the major US commands, as well as within the DOD, was on planning the first three phases of the campaign. As stated earlier in this chapter, the Office of the Secretary of Defense focused the CENTCOM and CFLCC [combined force land component commander] staffs on these phases. The CENTCOM staff spent a greater amount of time on the preparation for the staging of forces in Kuwait and initial offensive operations than it did on what might happen after the toppling of the Saddam regime. At the CFLCC level, Benson, the chief CFLCC planner, asserted that he was not able to induce McKiernan to spend a significant amount of time on the planning for stability and support operations. . . . Not surprisingly, Benson felt somewhat overwhelmed by the task of PH IV operations given the lack of resources he had. He underlined the problem created by Army planners who gave most of their attention to conventional operations, saying, “We were extraordinarily focused on Phase III. There should have been more than just one Army colonel, me, really worrying about the details of Phase IV.”

48. Stability Operations Manual, *supra* note 6, at ix.

49. *Id.* at vii.

50. US Department of Defense policy is as follows:

Stability operations are conducted to help establish order that advances U.S. interests and values. The immediate goal often is to provide the local populace with security, restore essential services, and meet humanitarian needs. The long-term goal is to help develop indigenous capacity for securing essential services, a viable market economy, rule of law, democratic institutions, and a robust civil society.

US Department of Defense, Directive 3000.05, Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations para. 4.2 (Nov. 28, 2005), available at <http://www.dtic.mil/whs/directives/corres/pdf/300005p.pdf> [hereinafter DoD Directive 3000.05].

51. Stability Operations Manual, *supra* note 6, at 1-22, 1-23.

52. National Security Presidential Directive/NSPD-44 (2005), available at <http://www.fas.org/irp/offdocs/nspd/nspd-44.html>; Stability Operations Manual, *supra* note 6, para. 1-66, at 1-22. DoD Directive 3000.05, *supra* note 50, para. 1-73, at 1-15, emphasizes, however, that military force “will assume responsibility” for stability operations tasks even in the absence of civilian capacity or preparedness to undertake such activities.

53. William Easterly, *J'accuse: The US Army Development Delusions*, AID WATCH, June 18, 2009, available at <http://www.press.umich.edu/pdf/9780472033904-review1.pdf>, where the author states: “The 2009 US Army Stability Operations Field Manual is remarkably full of utopian dreams of transforming other societies into oases of prosperity, peace, and democracy through the coordinated use of military force, foreign aid, and expert knowledge.”

54. Edward Luttwak, *Dead End: Counterinsurgency Warfare as Military Malpractice*, HARPER'S MAGAZINE, Feb. 2007, at 33, available at <http://www.harpers.org/archive/2007/02/0081384>.

55. KILCULLEN, *supra* note 7, at 143.

56. *Id.* at 126.

57. See S.C. Res. 1272, para. 2, U.N. Doc. S/RES/1272 (Oct. 25, 1999), which provided that the mandate of the United Nations Transitional Administration in East Timor was comprised of the following elements:

(a) To provide security and maintain law and order throughout the territory of East Timor;

(b) To establish an effective administration;

(c) To assist in the development of civil and social services;

(d) To ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance;

(e) To support capacity-building for self-government; [and]

(f) To assist in the establishment of conditions for sustainable development.

58. Tonya Jankunis, *Military Strategists Are from Mars, Rule of Law Theorists Are from Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MILITARY LAW REVIEW 16, 41–42 (2008).

59. *Id.* at 42.

60. Dan E. Stigall, *The Rule of Law: A Primer and a Proposal*, 189 MILITARY LAW REVIEW 92, 97–98 (2006).

61. Stability Operations Manual, *supra* note 6, at 1-40–1-46.

62. Pierre Schlag, *Rules and Standards*, 33 UCLA LAW REVIEW 379, 383 (1985).

63. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARVARD LAW REVIEW 1685 (1976).

64. *Id.* at 1687.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1688.

69. *Id.*

70. Schlag, *supra* note 62, at 381.

71. *Id.* at 382.

72. *Id.* at 383.

73. *Id.*

74. *Id.* at 381–82.

75. See generally Louis Kaplow, *Rules versus Standards*, 42 DUKE LAW JOURNAL 557 (1992).

76. Kennedy, *supra* note 63, at 1688.

77. Schlag, *supra* note 62, at 379–80.

78. *Id.* at 385.

79. Kennedy, *supra* note 63, at 1688.

80. Schlag, *supra* note 62, at 385.

81. Kennedy, *supra* note 63, at 1701.

82. H.L.A. HART, THE CONCEPT OF LAW 134 (2d ed. 1994).

83. Brian Leiter, *American Legal Realism*, in PHILOSOPHY OF LAW AND LEGAL THEORY 64 (Martin P. Golding & William A. Edmundson eds., 2009).

84. DAVID KENNEDY, OF WAR AND LAW 134–38, 156–57 (2006).

85. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
86. DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 267 (2004).
87. KENNEDY, *supra* note 84, at 104.
88. *Id.* at 91.
89. RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 434–46 (1990).
90. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 78 (July 8) (“The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack . . .”) [hereinafter Nuclear Weapons case].
91. 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 GPI].
92. *Id.*, art. 85(3)(a), provides that “the following acts shall be regarded as grave breaches of this Protocol, . . . (a) making the civilian population or individual civilians the object of attack.”
93. *Id.*, art. 85(5), provides that “[w]ithout prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.”
94. *Id.*, art. 86(2), provides that  
[t]he fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility . . . if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach . . .
95. Kennedy, *supra* note 63, at 1695.
96. GPI, *supra* note 91, art. 51(3), states that “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”
97. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 91, at 483 [hereinafter GPII]; GPII’s Article 13(3)’s terms are substantively identical to those in GPI, *id.*
98. GPI, *supra* note 91.
99. The International Committee of the Red Cross (ICRC), in conjunction with the TMC Asser Institute, has, since 2003, engaged in an ongoing study of the “direct participation in hostilities” concept with a number of experts in the field and through this process has made a valuable contribution to the ongoing debate with its successive yearly release of reports of proceedings. See also Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 511 (2005); and Dale Stephens & Angeline Lewis, *The Targeting of Civilian Contractors in Armed Conflict*, 9 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 25 (2006).
100. Based on the study of “direct participation in hostilities,” the ICRC recommended that the LOAC be interpreted as follows: “In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’); and commented that “[t]hus, individuals whose continuous function involves the preparation, execution or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.” NILS MELZER, INTERPRETIVE GUIDANCE

ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 16, 34 (2009), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report\\_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf) [hereinafter ICRC Interpretative Guidance].

101. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 1659, at 516 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter ICRC Commentary], states that “[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.”

102. The Supreme Court of Israel expressly excluded financiers from its determination of persons who directly participate in hostilities. HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, Judgment, para. 35 [Dec. 13, 2006] (not yet published), *available at* [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf). *See also* ICRC Interpretative Guidance, *supra* note 100, at 51–52.

103. Sitaraman, *supra* note 9 (“A civilian engaged in spreading propaganda may be highly effective in contributing to the defeat of the counterinsurgents, even though his actions are not intended to cause harm to physical forces”; and he observes, “A television or radio station is a much greater force multiplier for an insurgency than a few additional recruited combatants”).

104. INTERNATIONAL COMMITTEE OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 2 (Sept. 2003), *available at* [http://www.icrc.org/Web/ara/siteara0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_Sept\\_2003\\_eng.pdf](http://www.icrc.org/Web/ara/siteara0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_Sept_2003_eng.pdf); and NILS MELZER, THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: SUMMARY REPORT 17–36 (Oct. 2005), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2005\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf).

105. Public Committee against Torture in Israel, *supra* note 102.

106. SMITH, *supra* note 3, at 5.

107. GPI, *supra* note 91, art. 1(4).

108. GPII, *supra* note 97, art. 1.

109. MNF-I Guidelines, *supra* note 36.

110. KILCULLEN, *supra* note 7, at 38.

111. RICKS, *supra* note 36, at 264.

112. Sitaraman, *supra* note 9, at 1777 (“Counterinsurgency is defined by a win-the-population strategy for victory, not a kill-capture strategy for victory. It shifts the goals of war from destroying the enemy to protecting the population and building an orderly, functioning society”).

113. David H. Petraeus, *Learning Counterinsurgency: Observations from Soldiering in Iraq*, AUSTRALIAN ARMY JOURNAL, Winter 2008, at 57, 63 (2008).

114. *Id.*

115. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 122 (2004).

116. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 20 (2d ed. 2004).

117. *See, e.g.*, the following declarations:

Australia: 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.

United Kingdom: In relation to paragraph 5(b) of Article 51 and paragraph (2)(a)(iii) of Article 57, that the military advantage anticipated from an attack is intended to refer

to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

The complete text of all reservations and declarations is available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P#res>.

118. DINSTEIN, *supra* note 115, at 122.
119. COIN Manual, *supra* note 5, at 247–48.
120. *Id.* at 249.
121. ICRC Commentary, *supra* note 101, para. 2209, at 684.
122. *Id.*
123. *Id.*, para. 2218, at 685 (“there can be no question of creating conditions conducive to surrender by means of attacks which incidentally harm the civilian population”).
124. Sitaraman, *supra* note 9, at 1781 (“proportionality, a principle that in counterinsurgency unifies humanity and strategic self-interest”).
125. ICRC Commentary, *supra* note 101, para. 2208, at 683.
126. *Id.*, para. 2206, at 683.
127. See, e.g., the International Court for the former Yugoslavia’s judgment in *Prosecutor v. Kupreskic*, Case No. IT-95-16-T (Jan. 14, 2000), where both the Martens clause (para. 527) and human rights law (para. 529) are cited to signal the “profound transformation of humanitarian law” to permit the imposition of more humanitarian standards. For a contextualized analysis of these factors, see Gabriella Blum, *The Laws of War and the “Lesser Evil,”* 35 YALE JOURNAL OF INTERNATIONAL LAW 1 (2010), where the author identifies a structural resistance by courts/tribunals to permit military forces to depart from the terms of IHL’s formalist terms even where a greater humanitarian outcome would be anticipated from such departure.
128. See Dale Stephens, *Human Rights and Armed Conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 6 YALE HUMAN RIGHTS AND DEVELOPMENT LAW JOURNAL 1, 14–15 (2006).
129. COIN Manual, *supra* note 5, at xxv.
130. Headquarters, International Security Force, Tactical Directive (July 6, 2009), available at [http://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf).
131. KILCULLEN, *supra* note 7, at 145.
132. Michael N. Schmitt, *The Vanishing Law of War: Reflections on Law and War in the 21st Century*, HARVARD INTERNATIONAL REVIEW, Spring 2009, at 64, available at <http://www.entrepreneur.com/tradejournals/article/200271861.html>.
133. Kathleen Sullivan, *Foreword: The Justice of Rules and Standards*, 106 HARVARD LAW REVIEW 22, 69 (1992).
134. *Id.* at 67.
135. See Dale Stephens & Michael W. Lewis, *The Law of Armed Conflict—A Contemporary Critique*, 6 MELBOURNE JOURNAL OF INTERNATIONAL LAW 55, 82–83 (2005), available at [http://mjil.law.unimelb.edu.au/issues/archive/2005\(1\)/03Stephens.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2005(1)/03Stephens.pdf).
136. Blum, *supra* note 127.
137. H CJ 3799/02 *Adalah v. GOC Central Command* [2005] (not yet published), English trans. available at [http://elyon1.court.gov.il/Files\\_ENG/02/990/037/a32/02037990.a32.pdf](http://elyon1.court.gov.il/Files_ENG/02/990/037/a32/02037990.a32.pdf).
138. Blum, *supra* note 127, at 17.
139. HART, *supra* note 82, at 133.
140. *Id.* at 131.
141. Hans Morgenthau, *Positivism, Functionalism and International Law*, 34 AMERICAN JOURNAL OF INTERNATIONAL LAW 260, 269 (1940).
142. *Id.* at 270.

143. KENNEDY, *supra* note 84, at 117.
144. *Id.* at 169.
145. MARK O'NEILL, *Back to the Future: The Enduring Characteristics of Insurgency and Counterinsurgency*, AUSTRALIAN ARMY JOURNAL, Winter 2008, at 41, 53 (2008).
146. KILCULLEN, *supra* note 7, at 14.
147. COIN Manual, *supra* note 5, at 49–50.
148. Nuclear Weapons case, *supra* note 90.
149. *Id.*, para. 25.
150. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 1009 (2004).
151. *Id.*, para. 106, at 97. The Court also determined that the application of the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child also adhered to occupied territory (paras. 111, 112 & 113).
152. Al-Skeini & Others v. Secretary of State for Defence [2007] UKHL 26.
153. In this instance, the House of Lords determined that UK forces could be held accountable for the violation of rights of detainees when held by them in a UK military installation abroad under the UK Human Rights Act, even during a time of armed conflict, on the basis of a constructive territoriality.
154. Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEXAS LAW REVIEW 35, 57 (1981).
155. Kiszely, *supra* note 1, at 185. The concept of the “three-block war” was promulgated by General Charles Krulak when he was Commandant of the Marine Corps, from 1995 to 1999. He used the phrase in the realization that on the modern battlefield Marines could be called upon to perform very different missions simultaneously. *See* Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINES MAGAZINE, Jan. 1999, at 3, *available at* [http://www.au.af.mil/au/awc/awcgate/usmc/strategic\\_corporal.htm](http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm).
156. KILCULLEN, *supra* note 7, at 152 (“prosecuting the campaign demands an agile mixing of counterinsurgency, counterterrorism, border security, nation-building, and peace enforcement operations”).
157. ICRC Commentary, *supra* note 101, para. 2206, at 683.
158. KENNEDY, *supra* note 84, at 169.
159. Kiszely, *supra* note 1, at 184.
160. Referring generally to 1918–39, the period between the end of World War One and the beginning of World War Two.