

ARTICLE

Controlling the Use of Power in the Shadows:
Challenges in the Application of *Jus in Bello* to
Clandestine and Unconventional Warfare Activities

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Introduction

For centuries, states have used military, diplomatic, and intelligence personnel, as well as surrogates, to engage in clandestine activities and unconventional warfare (“UW”) to further their national security and foreign policy interests.¹ Since its earliest days, the United States has also used these unconventional statecraft tools, increasingly doing so in its current conflict with al Qaeda.² While states continue to conduct clandestine

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¹ See, e.g., MAX BOOT, *INVISIBLE ARMIES: AN EPIC HISTORY OF GUERRILLA WARFARE FROM ANCIENT TIMES TO THE PRESENT* (2013); 1 ROBERT B. ASPREY, *WAR IN THE SHADOWS: THE GUERRILLA IN HISTORY* (1975); 2 ROBERT B. ASPREY, *WAR IN THE SHADOWS: THE GUERRILLA IN HISTORY* (1975).

² See generally GARY BERNTSEN, *JAWBREAKER: THE ATTACK ON BIN LADEN AND AL QAEDA: A PERSONAL ACCOUNT BY THE CIA'S KEY FIELD COMMANDER* (2005); MARK BOWDEN, *THE FINISH: THE KILLING OF OSAMA BIN LADEN* (2012); STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* (2004); DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* (2012); JOSEPH WHEELAN, *JEFFERSON'S WAR: AMERICA'S FIRST WAR ON TERROR, 1801–1805* (2003); BOB WOODWARD, *VEIL: THE SECRET WARS OF THE CIA, 1981–1987* (1987); see also Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT'L SEC. J. 349, 353 (2014). The term “[u]nconventional statecraft .

and UW activities,³ the international legal environment in which those activities take place has changed greatly. An expansive body of international treaty law now governs state conduct in both peacetime and times of armed conflict.⁴ For example, international human rights treaties,

. . . refers to activities designed to coerce, disrupt, or overthrow a government or occupying power by operating with or through a resistance movement or insurgency in a denied area.” *Id.* As used by Schmitt and Wall, it refers to external support by one state to insurgents, and it is also used in situations where no international armed conflict exists between those states. *See id.* (quotation marks omitted).

³ *See generally* Sam Judah, *Russian Site Recruits ‘Volunteers’ for Ukraine*, BBC (Mar. 4, 2014), <http://www.bbc.com/news/blogs-trending-26435333> [<http://perma.cc/XN22-UW83>]; DAVID CRIST, *THE TWILIGHT WAR: THE SECRET HISTORY OF AMERICA’S THIRTY-YEAR CONFLICT WITH IRAN* (2012); JOHN W. TURNER, *CONTINENT ABLAZE: THE INSURGENCY WARS IN AFRICA 1960 TO PRESENT* (1998); MAJOR ISAAC J. PELTIER, *SURROGATE WARFARE: THE ROLE OF U.S. ARMY SPECIAL FORCES* (2005), handle.dtic.mil/100.2/ADA436109 [<http://perma.cc/7JFX-DM3T>].

⁴ The number of international agreements governing state conduct during armed conflict has increased significantly since the end of the Second World War and includes, for example, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter the First Geneva Convention]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter the Second Geneva Convention]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter the Third Geneva Convention]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter the Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflict, June 8, 1977 (Protocol I) [hereinafter AP I]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977 (Protocol II) [hereinafter AP II]; Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954; Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction, Apr. 10, 1972, Washington, London, and Moscow; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, Oct. 10, 1980 (CCW); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, Oct. 10, 1980 as amended on May 3, 1996; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, Oct. 10, 1980; Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995; Protocol on Explosive Remnants of War (Protocol V), Nov. 28, 2003; Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on Their Destruction, Paris, Jan. 13, 1993 (CWC); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997. State conduct toward citizens and treatment of citizens is also now governed by international agreements such as the International Covenant on Civil and

such as the International Covenant on Civil and Political Rights, limit how states treat their own citizens by recognizing certain individual rights and by prohibiting cruel, inhuman, and degrading treatment.⁵ A growing body of customary international law now also covers the conduct of states during times of peace and armed conflict, including when fighting insurgencies within their own borders.⁶

This robust body of law, firmly rooted in the Westphalian system,⁷ governing relationships between states as well as between a state and its citizens, is now confronted with an ever increasing number of transnational terrorist and criminal organizations, non-state armed groups, and super-empowered, networked individuals challenging and threatening the national security and foreign policy interests of sovereign states.⁸ Not only do these entities and individuals pose a threat to states by pursuing their own interests, they are also used as surrogates by other states to covertly further their interests across the globe. These individuals and organizations—with

Political Rights, Dec. 16, 1966, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987.

⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966.

⁶ See generally 2 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2009), <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-ii-icrc-eng.pdf> [<http://perma.cc/8H8N-DV2R>]; John B. Bellinger III & William J. Haynes II, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 INTERNATIONAL REVIEW OF THE RED CROSS, 443, 443–71 (2007), www.icrc.org/eng/assets/files/other/irrc_866_bellinger.pdf [<http://perma.cc/PZT3-QP96>].

⁷ The Westphalian system is a term that arose after the Treaty of Westphalia in 1648 that ended the Thirty Years War and refers to a system of sovereign nation-states exercising a monopoly control over their own territories and domestic spheres within which there is no role for external agents. See Daud Hassan, *The Rise of the Territorial State and The Treaty of Westphalia*, 9 YEARBOOK OF NEW ZEALAND JURISPRUDENCE 62, 63–64 (2006), available at

<http://epress.lib.uts.edu.au/research/bitstream/handle/10453/3289/2006006060.pdf?sequence=1> [<http://perma.cc/YF7U-7VKQ>].

⁸ See THOMAS L. FRIEDMAN, LONGITUDES AND ATTITUDES: EXPLORING THE WORLD AFTER SEPTEMBER 11 5 (2002). The term “super-empowered individual” appears to have been first used by Thomas L. Friedman to describe individuals who are able to act directly, and powerfully, on the world stage, transcending national borders. *Id.* See National Intelligence Council, *Nonstate Actors: Impact on International Relations and Implications for the United States* 2 (2007), http://www.fas.org/irp/nic/nonstate_actors_2007.pdf [<http://perma.cc/RR2-W6FS>]. A National Intelligence Council report on non-state actors defines “super-empowered individuals” as persons who have overcome constraints, conventions, and rules to wield unique political, economic, intellectual, or cultural influence over the course of human events. *Id.*

the support of their state sponsors—gather intelligence, engage in UW, and conduct other clandestine activities across the spectrum of international relations and legal regimes. This wide range of activities and locations where they are conducted, coupled with the secret nature of those activities, makes a comprehensive analysis of the legal issues raised by these activities challenging.

This Article will attempt to shed some light on only a small fraction of the use of power in the shadows, that being the application of *jus in bello* to a state's use of surrogates to conduct clandestine and UW activities.⁹ Current *jus in bello* principles governing the conduct of activities and status of individuals during an armed conflict were developed during an era of state on state conflict.¹⁰ Since 9/11 there has been much written on the challenges of applying *jus in bello* to the use of force by a state, including clandestine activities, against non-state actors. The targeting of non-state actors outside declared theaters of active combat has generated many headlines, and much scholarship, on whether such individuals are lawful military targets and, if so, when they may be targeted. The principle of distinction and its application to the targeting of members of non-state terrorist organizations has been richly examined, with most scholarship focusing on whether membership in al Qaeda alone makes an individual a lawful military target or whether such members may only be targeted when directly participating in hostilities.¹¹ The detention of members of al Qaeda

⁹ The term *jus in bello* is used to refer to the body of international law that governs the use of force by and conduct of combatants during an armed conflict, while the term *jus ad bellum* refers to the body of international law governing when States may resort to the use of force. For a detailed discussion of the relationship between *jus ad bellum* and *jus in bello* see Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE JOURNAL OF INT'L LAW 47 (2009).

¹⁰ The law of armed conflict as we now know it was formed primarily from the experiences of traditional armed conflicts between opposing state forces in the late nineteenth century and first half of the twentieth century. Attempts to control the use of force by states against non-state actors emerged only after the wars of national liberation and other non-international armed conflicts in the years after the Second World War. AP I; AP II. For a discussion of the changing political nature of warfare and development of the law of armed conflict, see DAVID KENNEDY, *OF WAR AND LAW* (2006).

¹¹ The principle of distinction stands at the very heart of the law of armed conflict and is universally accepted as being a norm of customary international law. The principle of distinction consists of two separate but related duties. First, combatants must distinguish themselves from the civilian population. Second, combatants may only attack lawful military targets such as opposing combatants and military objects. Thus, civilians may not be made the object of attack unless, and only for so long as, they are directly participating in the hostilities. AP I art. 48, 51, and 52; AP II art. 13.

has generated much debate over the status of those individuals as combatants, civilians, or some other category, and their prosecution before military commissions has led to several U.S. judicial opinions on whether their activities were violations of international law.¹²

The challenges of applying *jus in bello* to the use, and sponsorship, by states of non-state actors for clandestine and UW activities continues to remain largely in the shadows. Are non-state surrogates conducting clandestine and UW activities combatants or civilians under the law of armed conflict? What clandestine and UW activities may be conducted by non-state surrogates and which are prohibited by the law of armed conflict? What are the possible consequences for surrogates conducting prohibited activities? What activities might render an otherwise civilian surrogate a lawful military target? These questions are just a few that have remained largely unexamined. This Article will discuss these questions and attempt to provide greater understanding of the challenges in applying *jus in bello* to clandestine and UW activities.

This Article will begin with a brief overview of relevant terminology and definitions. Using historical examples and modern U.S. UW doctrine, it will then describe clandestine and UW activities and actors, as well as the international political environment in which those activities take place, so as to give context for later analysis. Before beginning the substantive analysis, the Article will briefly discuss the applicable legal regimes and provide a framework for the analysis that follows.

The substantive analysis will begin with an examination of the status of surrogates under the law of armed conflict. This will include an analysis of whether surrogates are combatants entitled to the combatant's privilege or if, and under what circumstances, they lose that protection. This Section will also examine when surrogates who are members of an organized armed group could be targeted with armed force. Lastly, the Article will move on to examine the *jus in bello* principle that presents the greatest challenges of application to clandestine and UW activities: distinction.

¹² See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

I. Terminology and Definitions

Perhaps in no other area does greater confusion exist than with regards to the various terms used to describe the “secret” operations and activities conducted by states. The terms “covert action,” “clandestine activities,” and “special activities” are often used interchangeably by both states and scholars when referring to these “secret” activities. To further the confusion, the activities included in these various definitions often overlap, which creates a challenge in precisely defining the range of operations that are encompassed by any one term. Even within the U.S. government, these terms have often been used interchangeably despite their precise definitions in statute and doctrine.

This is particularly the case with the terms “covert action” and “covert operations.” Although these terms are often used interchangeably, they are given different definitions by the U.S. government. The term “covert action” is statutorily defined in 50 U.S.C. § 3093¹³ as “an activity or activities of the United States Government to influence the political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly”¹⁴ A “covert operation” is defined by the U.S. Department of Defense as “an operation that is so planned and executed so as to conceal the identity or permit plausible denial by the sponsor.”¹⁵ While the definitions of these terms are facially very similar, there is a very large practical distinction in that a “covert action” must comply with the requirements of 50 U.S.C. § 3093.¹⁶ The term “covert activities” is also often used, although it is not defined by statute, regulation, or doctrine.¹⁷

¹³ Title 50, Chapter 15 of the U.S. Code was reclassified by the Office of Law Revision Counsel on May 20, 2013. This reclassification did not make any substantive changes but was rather only an administrative reorganization. As a result, 50 U.S.C. § 413b became 50 U.S.C. § 3093. Office of the Law Revision Counsel United States Code, *Editorial Reclassification Title 50, United States Code*, <http://uscode.house.gov/editorialreclassification/t50/index.html> [<http://perma.cc/5QNC-RKQP>]. Despite this change being almost a year old, many practitioners still refer to the covert action statute by its former numeric designation.

¹⁴ National Security Act of 1947, § 503(e) (2006).

¹⁵ DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JOINT PUBLICATION 1-02, Nov. 8, 2010, as amended through Dec. 15, 2013, http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf [<http://perma.cc/CH7G-P3WU>].

¹⁶ National Security Act of 1947, § 505, 50 U.S.C. § 3093(e) (2006). Making matters even more confusing, the statute excludes traditional military activities (“TMAs”) from the definition of covert action. Many of these TMAs appear, on their face, no different from

To add further confusion, the terms “covert” and “clandestine” are often used interchangeably despite the different applied definitions given to them by the U.S. government. The Department of Defense defines clandestine operations as “an operation sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment.”¹⁸ Thus, as defined by the Department of Defense, a clandestine operation seeks to conceal the operation itself, while a covert operation seeks to conceal the sponsorship of the operation. Operations can be clandestine and covert if both the operation and the sponsor of the operation are to be concealed. As evidenced by the numerous media reports on covert drone strikes by the Central Intelligence Agency (“CIA”), it is difficult to conceal an explosion caused by a missile strike; however, it may be very important to conceal who conducted that strike or who was responsible for ordering it.

The campaigns in which covert and clandestine activities take place, or which covert and clandestine activities are intended to support, are often popularly referred to—interchangeably—as guerrilla, revolutionary, unconventional, irregular, unrestricted, or asymmetrical warfare.¹⁹ While

covert action, but, due to the Congressional oversight structure imposed by 50 U.S.C. §3093, approval and reporting requirements are different for TMAs and covert action. See Andru E. Wall, *Demystifying the Title 10 – Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT’L SEC. J. 85, 123–40 (2011), for a further discussion of this issue.

¹⁷ Until July 2008, Executive Order 12,333 used the term “special activities” to describe activities in which “the role of the United States Government is not apparent or acknowledged publicly.” This term was changed by Executive Order 13,470 to “covert action” and given the same definition as that in 50 U.S.C. § 3093(e). Executive Order 12,333 as amended by Executive Orders 13,284 (2003), 13,355 (2004), and 13,470 (2008) ¶ 3.5(b). Exec. Order No. 13,284, 3 C.F.R. 102 (2003); Exec. Order No. 13,355, 69 Fed. Reg. 53,593 (2004); Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (2008).

¹⁸ JOINT PUBLICATION 1–02, *supra* note 15, at 38.

¹⁹ *Id.* at 113, 137 (defining “guerrilla warfare” as “[m]ilitary and paramilitary operations conducted in enemy-held or hostile territory by irregular, predominantly indigenous forces” and as a subset of UW; defining “irregular warfare” as “[a] violent struggle among state and non-state actors for legitimacy”; and stating that UW is a subset of irregular warfare); see QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE 1–5 (1999), <http://www.cryptome.org/cuw.htm> [<http://perma.cc/LP5Y-5B2Z>] (originating the term “unrestricted warfare” and explaining this new way of warfare that, rather than “using armed force to compel the enemy to submit to one’s will,” can be described as “using all means, including armed force or non-armed force, military and non-military, and lethal and non-lethal means to compel the enemy to accept one’s interests”); David L. Buffaloe, *Defining Asymmetric Warfare*, 58 THE LAND WARFARE PAPERS (2006), http://www.ausa.org/SiteCollectionDocuments/ILW%20Web-ExclusivePubs/Land%20Warfare%20Papers/LWP_58.pdf [<http://perma.cc/8CQY-5Z25>]

these terms are often used to describe the same or very similar activities, each of them also carries with it attributes that may be geographically or temporally unique. Even within the U.S. Department of Defense, there has been a long-term debate over what constitutes UW.²⁰ The Department of Defense currently defines UW as “activities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied area.”²¹

While this definition might help to focus planning and operational efforts, it does not adequately describe the range and types of activities that are typically conducted by surrogates or the environments in which they are conducted. A majority of these activities and operations will take place during peacetime or in other environments that do not rise to the level of an armed conflict.²² Referring to these as “warfare” is misleading and could lead to an improper categorization of both the activities and the applicable legal principles. Additionally, the goal of many of these activities is not to “coerce, disrupt, or overthrow a government or occupying power” but rather to merely gather intelligence, establish contacts, and set conditions for potential future operations. As in recent U.S. operations against al Qaeda and associated forces, these activities may also be directed toward non-state groups as opposed to a government or occupying power.²³

A previous Department of Defense definition of UW is more useful in describing the breadth of both the types of activities conducted and the environment in which they are conducted. This definition stated that UW is:

A broad spectrum of military and paramilitary operations, normally of long duration, predominantly conducted through, with, or by indigenous or surrogate forces who are

(indicating that “asymmetric warfare” is not precisely defined but is used to refer to a wide range of activities, capabilities, and operations); HEADQUARTERS, DEP’T OF THE ARMY, ARMY SPECIAL OPERATIONS FORCES UNCONVENTIONAL WARFARE FM 3–05.130 3–6 (Sept. 2008) (indicating that “paramilitary operation” is yet another term often used but is simply defined as “[a]n operation undertaken by a paramilitary force”); MAJOR KELLY H. SMITH, SURROGATE WARFARE FOR THE 21ST CENTURY 9–15 (2006), available at <http://govwin.com/knowledge/surrogate-warfare-for-21st-century/14087> [<http://perma.cc/GV6G-TVMM>].

²⁰ Mark Grdovic, *Developing a Common Understanding of Unconventional Warfare*, 57 JOINT FORCES QUARTERLY 136, 136–38 (2010).

²¹ JOINT PUBLICATION 1–02, *supra* note 15.

²² FM 3–05.130 *supra* note 19, at Glossary-12.

²³ *Id.* ¶ 3-90.

organized, trained, equipped, supported, and directed in varying degrees by an external source. UW includes, but is not limited to, guerrilla warfare, subversion, sabotage, intelligence activities, and unconventional assisted recovery.²⁴

This definition more accurately describes the missions that these surrogates, by their very nature, are most suited to accomplish. These activities may also be conducted as part of hostage rescue and capture/kill counter-terrorism missions.

This Article will use the term clandestine activities as defined by Joint Publication 1–02; that is, clandestine activities are those activities “sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment.”²⁵ This will include those activities conducted by surrogates on behalf, or with the support, of a sponsoring state, as well as those activities conducted by members of the sponsoring state’s armed forces and intelligence services.

This Article will use the term “unconventional warfare” to refer to a broad spectrum of clandestine and/or covert activities and operations conducted by, with, and through surrogate forces, who are sponsored and supported in varying degrees by an external source and directed against opposing state and non-state actors. These operations and activities are described in more detail below.

II. An Overview of Clandestine and Unconventional Warfare Activities: Modern U.S. Unconventional Warfare Doctrine

The United States has a long history of engaging in UW, including the use of surrogates, to further its foreign policy and national security interests. Although the exact parameters of these activities have evolved over time, the core concept has remained the same: “working by, with, or through irregular surrogates in a clandestine and/or covert manner against opposing actors.”²⁶ Those opposing actors might be armed forces, security

²⁴ Grdovic, *supra* note 20, at 136.

²⁵ Such activities will also likely be covert, in that the identity of the state sponsor will be concealed. In order to avoid confusion with the term covert action, as defined by 50 U.S.C. § 3093(e), the term covert will not be used. As this Article focuses on the application of *jus in bello* to these activities, the oversight and reporting requirements contained in 50 U.S.C. § 3093(e) are not relevant.

²⁶ FM 3–05.130, *supra* note 19, at 1–2.

personnel, and governmental institutions of an adversarial state, terrorists and their supporters, transnational criminals, or any number of a variety of non-state actors.²⁷ These activities take place across the spectrum of international affairs—during peacetime, international armed conflicts, and non-international armed conflicts—and may be conducted in support of a resistance movement, an insurgency, or conventional military operations.²⁸ These activities may also be the main effort in a campaign targeting non-state actors operating in unstable and ungoverned areas or within the borders of a state unwilling or unable to take action against such actors on their own.²⁹

Despite the wide range of locations, actors, and activities that make up UW, “the classic centerpiece is the introduction of military advisors into hostile and denied territory to organize, train, equip, and advise armed irregulars.”³⁰ The U.S. Army has developed doctrine that incorporates traditional as well as updated tactics, techniques, and procedures to aid in the planning of UW operations across this spectrum.³¹ A brief examination of this doctrine will help shed some light on the activities and actors involved in UW operations.

U.S. Army Special Operations doctrine for UW is organized into seven phases: preparation, initial contact, infiltration, organization, buildup, employment, and transition.³² These phases do not always occur in the same order and may take place simultaneously or not at all in some situations.

A. Preparation

The preparation phase of a UW campaign is not unlike that of conventional operations. In fact, clandestine and UW activities often play an important role in the preparation for planned and potential conventional military operations. During the preparation phase, forces must gain as complete an understanding as possible of the environment in which they will be operating. This is accomplished through activities referred to as “preparation of the environment,” or “PE.” Preparation of the environment is “[a]n umbrella term for operations and activities conducted by selectively

²⁷ *Id.* at 3–5.

²⁸ *Id.* at 1–2.

²⁹ *Id.* at 3–20.

³⁰ *Id.* ¶ 5-1.

³¹ *Id.*; HEADQUARTERS, DEPARTMENT OF THE ARMY, SPECIAL FORCES UNCONVENTIONAL WARFARE TC 18–01 ¶ 1-44 (Nov. 2010).

³² FM 3–05.130, *supra* note 19, ¶¶ 5-2–5-36.

trained special operations forces to develop an environment for potential future special operations” and consists of intelligence activities and operational activities designed to “shape” the environment to make it conducive for future operations.³³

An important element of PE is referred to as “operational preparation of the environment,” or “OPE,” and is defined as “[t]he conduct of activities in likely or potential areas of operations to prepare and shape the operational environment.”³⁴ OPE has been described as having three key operational components:

[O]rientation activities (OA) aimed at providing area familiarization and developing plans, information, and operational infrastructure that enable future operations; target development which seeks to acquire real-time target-specific information to facilitate potential target prosecution; and preliminary engagement of the target to find, fix, track, monitor, or influence the objective prior to conduct of operations.³⁵

The gathering of information during OPE differs from traditional intelligence gathering in that information collected is based on, and supports, operational requirements.³⁶ The gathering of intelligence during OPE may be done using human intelligence (“HUMINT”) activities, including the use of sources.³⁷

PE activities are generally ongoing wherever planning for potential U.S. military operations has been approved.³⁸ The success of these activities depends on having trained personnel who know the language, culture, and

³³ JOINT PUBLICATION 1–02, *supra* note 15; FM 3–05.130, *supra* note 19, ¶ 4-27.

³⁴ See JOINT PUBLICATION 1–02, *supra* note 15. PE and OPE are different but related concepts. PE includes a broader range of activities with OPE being a subset within PE. *Id.*

³⁵ See MAJOR MICHAEL T. KENNY, LEVERAGING OPERATIONAL PREPARATION OF THE ENVIRONMENT IN THE GWOT 1 (2006), <http://www.fas.org/man/eprint/kenny.pdf> [<http://perma.cc/ABQ3-AYGF>]. The development of operational infrastructure may include identifying locations for safe-houses, caches, and possible surrogate partners. *Id.* at 9.

³⁶ Wall, *supra* note 16, at 137.

³⁷ MICHAEL S. REPASS, COMBATING TERRORISM WITH PREPARATION OF THE BATTLESPACE 17–18 (2003), *available at* <http://www.fas.org/man/eprint/respass.pdf> [<http://perma.cc/A9UP-79J6>].

³⁸ FM 3–05.130, *supra* note 19, ¶ 4-26; see REPASS, *supra* note 37, at 8.

environment, and who live and work in the areas where they operate.³⁹ It simply takes too long to wait to deploy and begin these activities until after the crisis begins.⁴⁰ Those forward-deployed personnel conducting PE will also be preparing for the follow-on UW phases by establishing contacts, building relationships, and influencing the local population, as well as preparing to assist follow-on forces should they be deployed.⁴¹ These activities may take place not only during the preparation phase of a UW campaign, but also during the initial contact and infiltration, as well as other phases, often serving as a bridge between phases.

Surrogates, because of their inherent access and cultural acumen, are also often used to support these early phases of a UW campaign as well as other clandestine military operations that will be conducted primarily by U.S. personnel.⁴² They may be recruited to help U.S. military and intelligence personnel gain access to otherwise denied areas, serve as guides, assist in evacuating injured or isolated personnel, and provide logistical support such as safe-houses, transportation, and food.⁴³ Of course, such support is important not only during the initial contact and infiltration phases but also throughout a UW campaign or other clandestine military operation in a denied area.⁴⁴

B. Initial Contact

The initial contact phase is perhaps the most sensitive and dangerous phase during the UW campaign.⁴⁵ It is dependent upon intelligence collection and analysis, as well as the preparation of the environment that has taken place during the preparation phase, and it is often during this preparation of the environment that the initial contact is made with the

³⁹ DEPARTMENT OF DEFENSE, IRREGULAR WARFARE JOINT OPERATING CONCEPT (Sept. 11, 2007), at 22–23, <https://www.fas.org/irp/doddir/dod/iw-joc.pdf> [<http://perma.cc/E8UU-PKE4>], [hereinafter IW JOC].

⁴⁰ See U.S. SPECIAL OPERATIONS COMMAND, SPECIAL OPERATIONS FORCES (SOF) TRUTHS, <http://www.socom.mil/Pages/SOFTruths.aspx> [<http://perma.cc/UH8C-XN5U>] (“Competent SOF cannot be created after emergencies occur”).

⁴¹ IW JOC, *supra* note 39.

⁴² While there is no official U.S. Department of Defense definition of the term surrogate, Army Field Manual 3–05.130 defines a surrogate as “[o]ne who takes the place of or acts on behalf of another.” ARMY FIELD MANUAL 3–05.130, Glossary–12 (Sept. 30, 2008).

⁴³ *Id.* at 31; REPASS, *supra* note 37, at 17.

⁴⁴ Denied area is defined as “[a]n area under enemy or unfriendly control in which friendly forces cannot expect to operate successfully within existing operational constraints and force capabilities.” JOINT PUBLICATION 1–02, *supra* note 15, at 70.

⁴⁵ FM 3–05.130, *supra* note 19, ¶ 5-6.

potential surrogate force. The pilot team making the contact must be comprised of individuals with language and cultural expertise, as their goal will be to establish and establish rapport with the potential surrogate force. During this phase, the pilot team will assess the capabilities of the surrogates and, once further development is approved, will plan and coordinate the operations to occur in follow-on phases.⁴⁶

C. Infiltration

The infiltration phase is just that: the infiltration of forces that will be advising and working with the surrogates conducting UW operations. Successful infiltration is dependent upon the initial planning and preparation of the environment, particularly the identification of and contact with the initial elements of the surrogate force. Depending on the method of infiltration used, surrogates may be used to locate and identify landing or drop zones for air infiltration, beach landing sites for water infiltration, and the location of border posts and patrols for land infiltration. Surrogates may also be needed to serve as local guides as well as to supply animals and indigenous vehicles, provide safe houses, and establish caches with food, clothing, weapons, or other equipment and material.⁴⁷

D. Organization and Buildup

During the organization and buildup phases, military and/or intelligence personnel will develop the organization and capability of the individual surrogates or group appropriately to meet mission requirements.⁴⁸ This capability may be a classic UW activity such as sabotage or guerrilla warfare, but might just as likely be information operations, civil-military relations, intelligence activities, or any one of the necessary support functions.⁴⁹ Thus, these phases consist largely of recruiting, training, equipping, and sustaining the surrogate force. Depending on the overall mission and the local conditions, forces may have to work with surrogates to establish bases for operations, training areas, communication systems, logistics and transportation infrastructure, and intelligence networks and capabilities.⁵⁰

⁴⁶ *Id.* ¶¶ 5-6-5-7.

⁴⁷ *Id.* ¶¶ 5-8-5-12.

⁴⁸ *Id.* ¶ 5-6.

⁴⁹ *Id.* ¶ 4-31.

⁵⁰ *Id.* ¶ 5-30.

Most importantly, forces will have to develop and/or improve the surrogates' capability and capacity to perform those basic functions and operations required to achieve the state's UW objectives.⁵¹ These include:

- Providing security and intelligence systems;
- Operating communications systems;
- Operating administrative systems;
- Operating logistical support systems;
- Providing training programs;
- Planning and executing combat operations (violent activities);
- Planning and executing political activities; and
- Expanding the irregular organization and its constituent elements.⁵²

The exact size and capability related to each of these functions will, of course, need to be tailored to the national security and foreign policy objectives being pursued through the UW mission.⁵³ Forces will also have to assist the surrogates in obtaining required resources such as “weapons, munitions, medical supplies and services, internal and external support for rations, as well as an expanded intelligence apparatus to ensure force protection and targeting abilities.”⁵⁴

E. Employment

After the organization and buildup phases, the surrogates are ready to be employed. While the iconic UW image is that of Special Operations forces advising and assisting surrogates in conducting sabotage, raids, and ambushes, not all surrogate operations actually involve direct combat.⁵⁵ Other activities that may be carried out by surrogates include establishing “safe areas, sites, and procedures as part of an unconventional, assisted-recovery mechanism,”⁵⁶ as well as other classified “holistic warfare” activities against state and non-state actors.⁵⁷ When UW operations are

⁵¹ *Id.* ¶ 5-30.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* ¶ 5-35.

⁵⁶ Unconventional assisted-recovery mechanisms are those tools and capabilities that assist in the evasion and recovery of special operations and conventional personnel, such as downed pilots, who are isolated from friendly forces. JOINT PUBLICATION 1-02, *supra* note 15, at 275.

⁵⁷ FM 3-05.130, *supra* note 19, ¶ 5-32.

conducted in support of conventional military operations, surrogates may assist by providing security of transportation routes and rear areas, conducting reconnaissance, and supporting civil-military operations with the local population.⁵⁸ Regardless of whether the UW operation is stand-alone or in support of a wider, conventional military operation, perhaps the most important capability established will be that provided by the surrogate intelligence network.⁵⁹

F. Components of UW Operations and Surrogate Personnel

U.S. UW doctrine separates the individuals participating in UW into three separate categories: guerrillas, underground, and auxiliary.⁶⁰ These categories are based on classic UW doctrine and may not be directly applicable to the broader use of surrogates in clandestine and UW activities conducted today. However, a brief overview of these categories is helpful if for no other reason than to look at the functions each group typically performs as these are still relevant and will be examined later.

Guerrillas are the most recognized group in UW operations and are “organized along military lines to conduct paramilitary operations”⁶¹ Depending on the organization, activity, and operational environment, such forces will likely be considered combatants and may be treated as lawful targets at all times.⁶² While identifying and distinguishing these individuals from civilians may be challenging, their activities in the UW operational area fit squarely in those governed by the law of armed conflict and *jus in bello* principles.

The next category is the underground. The underground “is responsible for subversion, sabotage, intelligence collection, and other compartmentalized activities.”⁶³ This includes conducting psychological

⁵⁸ *Id.* ¶¶ 5-1–5-3.

⁵⁹ *Id.*

⁶⁰ *Id.* ¶¶ 4-37–4-41. In addition to these three groups, an insurgency will be comprised of an area command and a mass base. While these elements are an important component of UW operations in support of insurgency, they overlap the other three groups and the broader activities conducted with them are not relevant for the purposes of this Article. *Id.* ¶¶ 4-34–4-35, 4-42.

⁶¹ *Id.* ¶ 4-37.

⁶² As members of organized armed groups who conduct attacks and other military operations against opposing personnel and objects, guerrillas would be considered combatants under the law of armed conflict. This concept is discussed in detail in sections VI and VII below.

⁶³ *Id.* ¶ 4-38.

operations (“PSYOP”), information operations, and counter-intelligence operations. Members of the underground, who may often be the stereotypical shopkeeper by day, insurgent by night, present many of the most difficult challenges in the application of *jus in bello* to UW activities and remain the subject of great debate in international humanitarian law circles.⁶⁴

The final category is the auxiliary, which is the “primary support element of the irregular organization.”⁶⁵ Members of the auxiliary may support the irregular organization by providing logistics, safe-houses, security, and intelligence, conducting PSYOP, or recruiting personnel.⁶⁶ These activities also present challenges in the application of *jus in bello* principles.

III. An Overview of Clandestine and Unconventional Warfare Activities: Historical Examples

General George Crook was a main proponent of employing Native Americans during the “Indian Wars” in the West during the U.S. period of expansion, and in 1866, his lobbying was rewarded when the U.S. War Department authorized the commissioning of up to 1,000 Native Americans as Scouts.⁶⁷ Beyond using them as scouts in conjunction with his regular army units, Crook also used Native Americans as a surrogate force to track down “renegade” bands of Native Americans. Crook understood that he was not fighting a conventional war and successfully leveraged seasoned and capable warriors from the culture against which he was charged with fighting. In this way, Native Americans in his employ who knew the culture, the land, and the mindset were able to reduce the resistance that Crook was charged with overcoming.⁶⁸

This pattern would be successfully repeated. In 1898, U.S. Army officers in the Philippines raised the company of “Macabebe Scouts,” an indigenous group of surrogates that knew the Philippine countryside, could gather intelligence, and access areas that U.S. troops fighting the

⁶⁴ *Id.*

⁶⁵ *Id.* ¶ 4-41.

⁶⁶ *Id.*

⁶⁷ Though the U.S. Scouts were finally deactivated in 1939, their crossed arrows symbol was adopted by the corps of Special Forces operators who considered themselves the successors to the Scouts’ legacy. The symbol was formally adopted in April 1987 when General Order Number 35 made the Special Forces a separate branch of the Army.

⁶⁸ PELTIER, *supra* note 3, at 5.

Philippines insurgency could not. This group, which eventually grew to become the Philippine Scouts, was ultimately incorporated into the regular U.S. Army. Before they were, though, the Macabebe Scouts successfully masqueraded as Philippine Republican Army troops, allowing them to locate and infiltrate Emilio Aguinaldo's hidden headquarters and capture the charismatic and elusive rebel leader where American troops could not.⁶⁹

The United States used similar tactics in 1942 in the Burma Theater of World War II. Unable to move through the jungles of Burma without immediately alerting Japanese agents, the U.S. Office of Strategic Services recruited Kachin tribesmen to form Detachment 101. Detachment 101 helped Americans navigate the territory and form guerrilla groups, in addition to rescuing downed airmen, collecting local intelligence, and conducting sabotage and guerrilla warfare against a Japanese army that was required to dedicate increasing amounts of force to counter them.⁷⁰ Along the way, the American advisors learned the subtleties of jungle operations from their surrogates. In the end, Detachment 101 had a disproportionate impact against the much larger Japanese occupying forces, disrupting their operations and forcing them to patrol numerous areas at once.⁷¹

Another of the indigenous fighters facing the Japanese forces was the Hmong mountain tribesman Vang Pao, who eventually rose to General in the Royal Lao Army and commanded the U.S.-funded-and-directed Hmong surrogate army that resisted the Vietnamese communists during the 1960s and 1970s. The Hmong also rescued downed U.S. aircrews, gathered intelligence, sabotaged the Ho Chi Minh trail, protected secret U.S. radar sites in Laos, and engaged North Vietnamese forces in combat.⁷² The Hmong lost as many as 17,000 personnel during the war, up to 10% of their population, and were persecuted for years after the Washington-backed Royal Lao government fell in 1975. The communist government in Laos jailed thousands of Hmong, executed possibly thousands more, and

⁶⁹ JAMES D. CAMPBELL, *MAKING RIFLEMEN FROM MUD: RESTORING THE ARMY'S CULTURE OF IRREGULAR WARFARE* 9 (2007).

⁷⁰ GERALD ASTOR, *THE JUNGLE WAR: MAVERICKS, MARAUDERS AND MADMEN IN THE CHINA-BURMA-INDIA THEATRE OF WORLD WAR II* (2004).

⁷¹ PELTIER, *supra* note 3, at 6–7.

⁷² JANE HAMILTON-MERRITT, *TRAGIC MOUNTAINS: THE HMONG, THE AMERICANS, AND THE SECRET WARS FOR LAOS, 1942-1992* (1993).

sentenced Vang—who by then had escaped to the United States—to death in absentia.⁷³

There are many reasons to use surrogates, from both a strategic military and political point of view. The primary advantage of a surrogate force, especially in the areas in which the United States finds itself conducting modern counterterrorism operations, is their culture and ethnicity. This is partially because it allows the surrogates to know friend and foe in a murky battlespace where allegiance is not immediately visible to foreign eyes.⁷⁴ More importantly, the surrogates' ability to speak the language better than foreign translators hired by the United States, their ability to understand cultural nuance and subtle gestures, and their ability to blend in with the local population all give surrogates access to areas that foreign personnel will never have.⁷⁵ Even the best-trained, most culturally-sensitive American official from the Department of State, the Department of Defense, or the Intelligence Community will never have the kind of entrée a locally-born, locally-raised fighter naturally possesses. Considering the U.S. involvement in conflicts in Iraq, Afghanistan, the Philippines, the Horn of Africa, Yemen, and a litany of other countries where people of European heritage stand out, this access becomes increasingly important, especially considering the United States' likely increased reliance on surrogate operations in the future.⁷⁶ Major Kelly Smith writes:

The most significant contribution of a surrogate may be their [sic] ethnicity, language or culture. Conflict in the 21st century is increasingly likely to involve ethnic or cultural

⁷³ Zachary Roth, *Arlington Burial for Vang Pao, Chief of CIA-Backed Secret Army?*, YAHOO NEWS, (Jan. 11, 2011), <http://news.yahoo.com/blogs/lookout/arlington-burial-vang-pao-chief-secret-cia-backed-20110111-155533-449.html> [<http://perma.cc/AL8W-W52R>].

⁷⁴ See BRIAN MCALLISTER LINN, *THE PHILIPPINE WAR 1899–1902* 260 (2000). In 1900, Brigadier General Frederick Grant recorded that the Macabebe Scouts were “loyal servants who can be depended on to pick out of a crowd of natives, however large, all the insurgents masquerading as ‘amigos’ and the culprits from other provinces.” *Id.*

⁷⁵ See D. Jonathan White, *Legitimacy and Surrogate Warfare*, 09–3 JOINT SPECIAL OPERATIONS UNIVERSITY REPORT (2009). White writes that using an Arabic interpreter from Basra (or from the United States) with a unit operating in Mosul “may limit his effectiveness if his accent and word choice give away his place of origin . . . surrogate Iraqi forces, however, will speak Arabic fluently. Indeed, their knowledge of local dialect is frequently superior to U.S. contract interpreters who may speak Arabic just as well, but will speak it with a different accent, drawing attention to the fact that they are foreigners.” *Id.*

⁷⁶ U.S. JOINT FORCES COMMAND, *THE JOINT OPERATIONAL ENVIRONMENT: THE WORLD THROUGH 2020 AND BEYOND* 4–10 (Aug. 2005).

disputes in regions of the world vastly different than the western culture of the United States. The ability to use surrogates to connect with the populations and gain their support, as well as provide a better understanding of the culture, is an important reason to consider surrogate warfare as a military option.⁷⁷

Likewise, James D. Campbell writes of Afghan surrogates that the:

. . . critical factor is human intelligence, which supplies a knowledge of local geography, culture, language and personality that no outsider can ever hope to gain without such cooperation with immediately neighboring forces. Such human intelligence was the very asset provided by the Seminole, Apache, Macabebe Scouts, and others. The [Afghan Security Force] were an invaluable source of local intelligence, one that even the Afghan National Army or police could not provide, since they were nationally recruited forces without the local or sometimes even provincial connections possessed by the ASF.⁷⁸

There are other reasons to use surrogates. The use of surrogates reduces the number of U.S. troops that must be used or even that must be present in a country at all. This avoids the large scale, long-term U.S. military involvement that Americans traditionally resent.⁷⁹ As force multipliers, surrogates reduce both the actual monetary cost and the sometimes much higher political cost of sending in large numbers of U.S. troops.⁸⁰ Brigadier General S.B.M. Young recognized the two above attributes—a cheaper, more effective local fighting force—when he wrote: “I have no doubt that a regiment of Macabebes would be more effective than a regiment of volunteers, and would only be about half as expensive”⁸¹

Finally, an important reason to use surrogates is that they lend political legitimacy to operations that would be suspect—emotionally, if not

⁷⁷ Smith, *supra* note 19, at 42; see BRIAN L. THOMPSON, *SURROGATE ARMIES: REDEFINING THE GROUND FORCE* 3 (2002).

⁷⁸ Campbell, *supra* note 69, at 20.

⁷⁹ Smith, *supra* note 19, at 47.

⁸⁰ *Id.* at 42.

⁸¹ Campbell, *supra* note 69, at 9 (quoting an October 16, 1899 memo from Brigadier General Young, Commander of the Provisional Cavalry Brigade, to Captain Matthew Batson, who had raised the Macabebe volunteer regiments).

legally—to a local population;⁸² in military terms, they put “a local face” on operations. This has been especially true recently for the United States during operations in Afghanistan, a country famous for its resentment of foreign invaders⁸³ and a point Taliban and al Qaeda insurgents exploit in their propaganda. The use of local surrogates to prosecute these groups denies the enemy that argument and remains a critical part of classic counter-insurgency strategy.

The above discussion leads one to ask important questions: notwithstanding the United States’ long history of using surrogates, is their employment permissible under the law of armed conflict? What activities may they lawfully perform? More to the point, are surrogate forces lawful combatants?

IV. What Law Applies?: Identifying the Applicable Legal Regime

Clandestine and UW activities take place across the spectrum of political and international relations. These activities may take place in times that most think of as “peace” and in times of heightened tension such as during the Cold War when the U.S.-U.S.S.R. conflict was routinely waged using proxies. Of course, clandestine and UW activities also take place during both international and non-international armed conflicts and often play an important role in supporting conventional military force. Clandestine and UW activities are conducted by state military forces and intelligence services, non-state armed organized groups, and individuals sponsored and supported by state actors.

This wide range of operational environments, activities, and personnel conducting these activities makes it difficult to provide a comprehensive analysis of the legal issues raised by clandestine and UW activities. Each of these variables would in turn determine whether those activities would be constrained by the domestic law of the state where the activities are occurring, the domestic law of the sponsoring state, international human rights law, international criminal law, international treaties, or *jus ad bellum*, as well as *jus in bello* applicable to both international and non-international armed conflicts.

⁸² Smith, *supra* note 19, at 42.

⁸³ *Many Afghans Resent Foreigners’ Presence*, THE ASSOCIATED PRESS (May 30, 2006), <http://www.e-ariana.com/ariana/eariana.nsf/allDocs/7AF527DE679CFF528725717E006D9F3A> [http://perma.cc/WEG5-BP84].

Even after identifying the geographic location, activity, and actors involved, reaching an agreement on which legal regime controls the issue at hand would likely prove challenging. As experienced over the course of the last twelve years, there is still not an international consensus on which legal regime controls the United States' conflict with al Qaeda. Whether those activities are taking place in a non-international armed conflict or are peacetime security and law enforcement activities continues to be debated. Outside of an international armed conflict, it is probable that legal scholars and policymakers around the globe will be unable to reach an agreement on the legal classification of the situation in which many clandestine and UW activities are taking place.

Many, if not the majority, of clandestine and UW activities will take place in environments that do not constitute an armed conflict. These activities may be conducted prior to the commencement of an already planned and approved armed conflict or in an attempt to contain a conflict and deter or avert the outbreak of an armed conflict. Clandestine and UW activities may also be the focus of the crisis or competition, limiting these activities to surrogates in order to deliberately avoid an armed conflict between states. Using the term "peace" to describe these situations is neither accurate nor helpful.

While at first glance those covert and clandestine activities where the application of *jus in bello* principles are required might appear to be quite small, given that a great many of these activities will take place outside of armed conflict, *jus in bello* does, in fact, play a broader role in governing UW activities. Although, strictly speaking, *jus in bello* would only apply to those activities conducted in an armed conflict, it is U.S. policy to apply the principles of the law of armed conflict to all military operations regardless of how they are characterized.⁸⁴ Thus, at least for U.S. military forces engaged in clandestine and UW activities, those activities would have to comply with *jus in bello* principles even in operations that do not rise to the level of an armed conflict.

This Article focuses on only a very small segment of this much larger legal problem. Specifically, this Article will examine the status of surrogates and the principle of distinction under *jus in bello*. It addresses the status of those surrogates who are members of armed organized groups

⁸⁴ Department of Defense Directive 2311.01E, DoD Law of War Program, ¶ 4-1 (May 9, 2006), <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf> [<http://perma.cc/9M9Q-MHS2>].

during both international and non-international armed conflicts. The Article examines the characteristics of these armed organized groups and identifies those surrogates who would not be members of such groups. What follows is an examination of the concept of direct participation in hostilities as a model for analyzing which activities surrogates may conduct during an armed conflict.

V. Status of Surrogates Conducting Clandestine and UW Activities

The challenge posed by non-state actors who participate in an armed conflict has generated many headlines and much scholarship in the years following 9/11. The focus of attention has been primarily the issue of status of non-state terrorists under the law of armed conflict. Are they civilians who lose their protection while directly participating in hostilities, or are they unlawful combatants who lose their protected status under the law of armed conflict by virtue of their membership in an organized armed group? While the question of the status of non-state terrorists has been mostly directed at determining when such members may be targeted with lethal force and who may be preventatively detained pursuant to the law of armed conflict, the more important issue for the purposes of this Article is whether a member of a non-state organized armed group may lawfully engage in hostilities. The answer to this question will largely depend on the nature of the conflict and the way in which the group is organized and operates.

The trend and history of the law of armed conflict demonstrates that surrogates are a legitimate method of warfare. Surrogates, though trained and equipped by a sovereign different from their own nationality, are fighting for a cause shared with their benefactor, a cause in which they presumably believe.⁸⁵ Indeed, some state that the key factor in the success of a surrogate operation “is the existence of a commonality of interests between the United States and the surrogate force”⁸⁶ This shared aim makes them partners instead of simply armed employees.

⁸⁵ Travis L. Homiak, *Expanding the American Way of War: Working “Through, With, or By” Non-U.S. Actors*, Research Paper, United States Marine Corps School of Advanced Warfighting (2006), reprinted in CONTEMPORARY SECURITY CHALLENGES: IRREGULAR WARFARE AND INDIRECT APPROACHES, JOINT SPECIAL OPERATIONS UNIVERSITY REPORT 09–3 (Feb. 2009).

⁸⁶ White, *supra* note 75, at 90.

A. Surrogates as Combatants in International Armed Conflict

Lawful combatants are entitled to the combatant's privilege in the course of their operations, which grants them "combatant immunity." This means immunity from prosecution for death or injury to persons carried out in the lawful course of their duties, and from the destruction of property that occurs during lawful acts in combat. In an international armed conflict, Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War⁸⁷ (the Third Geneva Convention) states that combatants are those armed forces of a state that have a legal right to engage in combat. Combatants may carry out lawful attacks on enemy personnel but remain lawful targets to the enemy at all times. If captured, lawful combatants are entitled to prisoner of war status and humane treatment, and may only be punished for violations of the law of war following a fair and appropriately composed trial.⁸⁸

A private citizen who violates this code by taking a direct part in hostilities is therefore not entitled to combatant immunity and if captured may be prosecuted for engaging in unlawful combat.⁸⁹ Maurice H. Keen states that such unlawful combatants were to be considered "marauders and freebooters" and treated as war criminals.⁹⁰ Professor Francis Lieber called such men "robbers and pirates." Lieber's initial determination of who was a lawful combatant remains relevant; Article 57 of General Order Number 100 states that "[s]o soon as a man is armed by a sovereign and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."⁹¹

Lieber broke those persons engaging in combat but not as part of the regular armed forces of a state into two categories: partisans and guerrillas. Lieber felt that partisans enjoyed an association with a government and its military forces, while guerrillas were self-appointed groups of armed men "without commission." For Lieber, guerrillas were those "who are not part and portion of the organized hostile army" and who commit hostilities "without sharing continuously in the war." Therefore, to Lieber, partisans

⁸⁷ 12 Aug. 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135.

⁸⁸ W. Hays Parks, *Combatants*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, 85 INTERNATIONAL LAW STUDIES 261–62 (Michael N. Schmitt ed., 2009).

⁸⁹ *Id.* at 263, 266.

⁹⁰ MAURICE H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 50 (1993).

⁹¹ Instructions for the Government of Armies of the United States in the Field (Lieber Code), Apr. 24, 1863, Art. 57, <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> [<http://perma.cc/C9QS-S47C>].

were lawful combatants and guerrillas were not. As such, partisans and combatants were granted different privileges under the Lieber Code. For instance, Article 81 sanctions combatants with the right as “soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making in roads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.” However, Article 82, as mentioned above, condemns as “robbers and pirates” those groups of armed men “without commission” who conduct hostilities intermittently and who “divest themselves of the appearance of soldiers” when it suits them.⁹²

So are surrogates “partisans,” lawful combatants, as above or are they “robbers, pirates or marauders?” We must examine not only the Geneva Conventions of 1949 but also the Second Hague Convention and the provisions adopted by Additional Protocol I to the Geneva Conventions.

The Second Hague Convention, adopted by the 1899 Hague Peace Conference, contained the conditions which codified Professor Lieber’s initial take on other armed forces on the battlefield that were associated with but not attached to the regular armies. Annex 1, Article 1 required “militia and volunteer corps” to:

- Be commanded by a person responsible for his subordinates;
- To have a fixed distinctive emblem recognizable at a distance;
- To carry their arms openly; and
- To conduct operations in accordance with the laws and customs of war.⁹³

Article 1 went on to say that in countries where militia or volunteer corps constitute the army, or form a part of it, they are included under the denomination “army.” This is important, as it gives surrogates—who must be under the control of a state—their legitimacy. Noted law of war scholar W. Hays Parks writes:

Entitlement to lawful combatant and prisoner of war status for organizations other than the regular forces of a nation was provisional. It was dependent upon the forces acting

⁹² *Id.* art. 81–82.

⁹³ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, Annex 1, Article I, <http://www.icrc.org/ihl.nsf/FULL/150> [<http://perma.cc/GMK2-J266>].

under government authority and complying strictly with the four conditions listed . . . Individuals acting unilaterally outside an organization were not entitled to the combatant's privilege.⁹⁴

These protections were echoed in the Ninth Hague Convention of 1907, and adopted again after World War II in the Third Geneva Convention. Paragraphs 1 and 2 of the Third Geneva Convention, Article 4(A), address members of militias and volunteer corps. Paragraph 2 specifically lists the four conditions a militia or volunteer organization must fulfill (the original four conditions of: a responsible superior, a fixed distinctive symbol, carrying arms openly, and adherence to the laws of war) and notes that these members of a militia or "other volunteer corps" are entitled to prisoner of war status (implying combatant's privilege stemming from lawful combatant immunity) whether those volunteers are operating in or outside their own territory, even if the territory is occupied, and "including those members belonging to organized resistance movements belonging to a party to a conflict."⁹⁵

Parks suggests that in light of the Western powers' experiences in World War II, this provision should be read to give only organized resistance movements that operate under government authority combatant status under the law of war. Whether or not this provision only applies to resistance movements, it is certain that the Third Geneva Convention firmly fixed "the distinction between organized, state-sponsored *partisans* and private *guerrillas* made by Francis Lieber during the American Civil War . . . [and] . . . declined to provide lawful combatant or prisoner of war status to private citizens acting without government authority."⁹⁶

The 1977 Additional Protocol I to the 1949 Geneva Conventions ("AP I") further supported this concept.⁹⁷ AP I attempted to expand the protections of the Third Geneva Convention to additional armed militia groups. Pictet specifically addresses this in his commentary on Article 44, which defines just who are lawful combatants, and when they are entitled to status as prisoners of war: "It is aimed at increasing the legal protection of guerrilla fighters as far as possible, and thereby encouraging them to apply

⁹⁴ Parks, *supra* note 88, at 265.

⁹⁵ Third Geneva Convention art. 4(A)(1) and (2).

⁹⁶ Parks, *supra* note 88, at 269.

⁹⁷ AP I art. 51(3). The United States is not a party to AP I but generally supports the Protocol's prohibition against taking no quarter and the principle that prisoner of war status should apply to all persons entitled to combatant status.

with the applicable rules of armed conflict.”⁹⁸ Pictet goes on to point out that as long as members of militias conduct their operations in accordance with the laws and customs of war, they remain “the armed forces of a state” under the expanded definition in Article 43 of AP I. He summarizes the conditions required to allow militia groups to lawfully conduct hostilities according to Article 43; they are almost identical to the conditions we have tracked from the Lieber Code through the Hague treaties, and are:

- The group possesses a “military character;”
- The group is led by a “responsible command exercising effective control over the members of the organization;”
- The group respects the law of armed conflict; and
- The group is “*subordinate to a ‘Party to the conflict’ which represents a collective entity which is . . . a subject of international law.*”⁹⁹

It is this requirement to be subordinate to a party to a conflict, a party that is a subject of international law, which gives surrogates their legitimacy (legitimacy an international terrorist group, for example, would lack). This relationship with the state sponsor also ensures that the surrogate forces comply with “the laws and customs of war.” Without this compliance, a surrogate force loses its combatant status. However, the surrogate force maintains its combatant status through compliance and state sponsorship.

It should be noted that although the United States treats certain portions of AP I as customary international law, it is not a party to AP I, and the official documents regarding the United States’ position on AP I are classified. However, then-Department of State Deputy Legal Adviser Michael J. Matheson spoke about the United States’ position to the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law in 1987. This speech has helped guide assessments of U.S. policy towards AP I. In his speech, Matheson noted that the United States agrees that persons with combatant status should be entitled to treatment as prisoners of war (thereby supporting the contention that Articles 43 and 44 grant legitimacy to surrogate forces). However, he expressed the United States’ concern over the expansion of this protection

⁹⁸ INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1789–1814 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

⁹⁹ *Id.* (emphasis added).

to all irregular forces, suggesting that such recognition is potentially dangerous to civilians, since it would grant combatant status to certain “irregular groups” who did not distinguish themselves from the civilian population.¹⁰⁰ Moreover, Matheson (referring to Judge Abraham D. Sofaer, Legal Adviser to the Department of State, who also spoke) expressed concern that AP I would legitimize terrorist groups who lacked state sponsorship and therefore could not be held accountable for their actions. Matheson, however, went on to clarify that the United States’ objection concerns the recognition of irregular armed groups during wars of national liberation. This is a longstanding U.S. objection based on the difficulties of identifying the responsible “government” supporting the armed group, as well as the Soviet Union’s perceived practice of using surrogates to overthrow legitimate governments in an attempt to expand communism.¹⁰¹

B. Status of Surrogates in Non-International Armed Conflict

Members of non-state organized armed groups meeting the criteria discussed above are not afforded combatant status in a non-international armed conflict.¹⁰² States fighting an insurgency or resistance within their borders are loath to recognize or give legitimacy to those individuals and groups who have taken up arms against them. While Common Article 3 of the 1949 Geneva Conventions guarantees a minimum standard of treatment if captured, their participation in attacks against opposing forces is unlawful and may be prosecuted under the domestic law of the state in which the conflict occurs even if those acts are otherwise lawful under the law of armed conflict.¹⁰³ It then becomes necessary to ask who is a member of an organized armed group and under what conditions may that member be targeted. Although the answers to those questions are unsettled, they are to

¹⁰⁰ Martin D. Dupuis, et al., *Report of the Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INTL. L. & POL’Y 415, 425–26 (1987), <http://www.auilr.org/pdf/2/2-2-2.pdf> [<http://perma.cc/V8AK-RLUG>].

¹⁰¹ Ted Galen Carpenter, *U.S. Aid to Anti-Communist Rebels: The “Reagan Doctrine” and Its Pitfalls*, 74 CATO POLICY ANALYSIS (1986), <http://www.cato.org/pubs/pas/pa074.html> [<http://perma.cc/P5X5-QY8D>].

¹⁰² The exception being those who are engaged in an armed conflict with a state that has afforded them belligerent status or those who meet the criteria of, and are in an armed conflict with a State Party to, Additional Protocol II.

¹⁰³ First Geneva Convention art. 3; Second Geneva Convention art. 3; Third Geneva Convention art. 3; Fourth Geneva Convention art. 3.

be found in the law of armed conflict applicable to non-international armed conflicts.¹⁰⁴

Those involved in a non-international armed conflict may generally be divided into three groups: armed forces, organized armed groups, and civilians.¹⁰⁵ Just as in an international armed conflict, those civilians who do not directly participate in hostilities are to be protected and may not be made the object of attack.¹⁰⁶ The problem becomes one of identifying the members of the organized armed groups and distinguishing between them and the civilian population, (a “positive identification” problem, in military circles).¹⁰⁷ Neither AP II nor Common Article 3 defines “combatant,” and this problem is further complicated by the difficulty of determining who is a member of an organized armed group, and when those members may be attacked—a question that continues to be debated.¹⁰⁸

Before one may be a member of an organized armed group, such a group must exist. The criterion for when a group reaches a sufficient level of organization also continues to be debated, but must include at least the capability of “planning and carrying out sustained and concerted military operations”¹⁰⁹ This would include having some structure so as to be able to exercise a measure of control over the members, such as the ability to “collect and share intelligence, communicate among members, deconflict operations and provide logistic support.”¹¹⁰

¹⁰⁴ MICHAEL N. SCHMITT, *THE STATUS OF OPPOSITION FIGHTERS IN A NON-INTERNATIONAL ARMED CONFLICT*, 88 INT’L L. STUDIES 119, 121 (2011) [hereinafter Schmitt, *Opposition Fighters*].

¹⁰⁵ *Id.* at 120, 126. This Article will not discuss the status or involvement of dissident armed forces as an independent group. Although members of dissident armed forces may be used as surrogates when they are used as such, their activities, and analysis of those activities, will not differ substantially from that of other organized armed groups.

¹⁰⁶ The issue of what constitutes direct participation in hostilities is discussed in the section below.

¹⁰⁷ Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5, 14 (2010) (“[T]he concept of civilian status is the greatest source of controversy. . . .”) [hereinafter Schmitt, *Interpretive Guidance*].

¹⁰⁸ See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 31–36, 71–73 (2009) [hereinafter INTERPRETIVE GUIDANCE]; Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 648–58 (2010).

¹⁰⁹ COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 98.

¹¹⁰ Schmitt, *Opposition Fighters*, *supra* note 104, at 129–30.

Unless the state sponsor attaches itself to a mature and well-developed organization, it is unlikely that, in the initial stages of the UW operation, the surrogate force will meet this requirement. It is this very organization and capability that the advisors from the sponsoring state will be attempting to develop during the organization and build up phases of a UW operation. Individuals affiliated with this group who carry out attacks or otherwise directly participate in hostilities may still be targeted for such time as they are directly participating, but would not be members of an organized armed group until that group has reached this threshold of status. At what point in time the surrogate members of this organization cross that line is unclear, but it is unlikely that the opposing state or group will hesitate long before turning to force.

Once a group is sufficiently organized, how is membership determined? Unlike state armed forces, where membership is determined by domestic law and the wearing of a uniform, or other distinctive emblems, membership in a non-state armed group is not determinative on any such concrete, subjective factor.¹¹¹ As membership in such groups is informal and often fluid, distinguishing between members of such groups and civilians is extremely difficult.¹¹² In an attempt to clarify membership in organized armed groups, the ICRC in the *Interpretive Guidance on the Notion of Direct Participation in Hostilities (Interpretive Guidance)* “adopted a further guidance for distinction: the ‘function’ criterion, or what is termed as the ‘continuous combatant function.’”¹¹³ This continuous combatant function essentially states that those individuals who are integrated into the organized armed group “acting as the armed forces of a non-state party to an armed conflict” and performing acts that reach the level of direct participation in hostilities should be considered members of the group.¹¹⁴

The past approach had insisted that targeting of such individuals is permitted only for such time as they are directly participating in hostilities. The ICRC recognized that this approach skewed the law of armed conflict in favor of non-state groups stating:

[I]t would contradict the logic of the principle of distinction to place irregular armed forces under the more protective

¹¹¹ Watkin, *supra* note 108, at 654.

¹¹² INTERPRETIVE GUIDANCE, *supra* note 108, at 33.

¹¹³ *Id.* at 33–35; Watkin, *supra* note 108 at 655.

¹¹⁴ INTERPRETIVE GUIDANCE, *supra* note 108, at 34.

legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war.¹¹⁵

While this test is a significant development, there are many who believe it is still too restrictive.¹¹⁶ These critics believe that developing a test that differentiates between membership in the state's armed forces and members of non-state groups does not recognize the reality of modern warfare and continues to afford too much protection to these groups.¹¹⁷ Thus, in their view, the better approach is to treat members of all organized armed groups—both state and non-state—the same. Members in either organization involved in an armed conflict could be targeted at any time and at any place consistent with the other provisions of the law of armed conflict.¹¹⁸

In the authors' opinion this is the better approach and would give greater clarity to those planning and conducting UW operations. Those members of the surrogate force that provide combat support and fulfill combat service support roles would be lawful targets, and therefore obligated to accept the responsibilities that combatant status entails. This would not, however, necessarily make surrogates outside the organized armed group targetable at all times. Careful consideration would have to be given to the organization and structure of all elements of the organized armed surrogate force as well as those outside the group. Those activities which may be performed by individuals outside the armed group, while remaining in a civilian status, will still be limited by the notion of direct participation in hostilities. Of course, surrogate forces are always agents of the state that sponsors them, and a state sponsor is always responsible for the foreseeable actions of their surrogates. It is possible a state sponsor could provide so much funding, training, equipment, and—most importantly—operational direction that a surrogate force might become indistinguishable from that state's uniformed armed forces, but that would defeat the purpose of raising the surrogate force in the first place.

¹¹⁵ *Id.* at 22.

¹¹⁶ Watkin, *supra* note 108, at 684–88; Schmitt, *Opposition Fighters*, *supra* note 104, at 137.

¹¹⁷ Watkin, *supra* note 108, at 689.

¹¹⁸ *Id.* at 690.

VI. Surrogates: Direct Participation and Permissible Activities

One of the key elements in planning clandestine and UW operations is determining what activities surrogates may lawfully conduct. While surrogates have been used in every conceivable clandestine and UW role, the legal consequences of those activities will differ according to the operational environment. Thus, when analyzing the lawfulness of the proposed surrogate activities, one must identify not only the activity but also where that activity will occur, who will conduct it, and the applicable legal regime.

As discussed previously, the majority of clandestine and UW activities will take place outside of an armed conflict. In those situations, the domestic laws of the state in which the activities will take place will certainly prohibit surrogate activities on behalf of a foreign state. If the foreign policy interest being pursued is of great enough value, however, those domestic laws will almost certainly be disregarded. The domestic law of the state supporting the surrogates may also limit certain activities. Additionally, limitations may be placed on the activities of surrogates based on policy rather than on legal requirements.¹¹⁹ An examination of which activities would be prohibited by policy, domestic law, or by international law outside of the law of armed conflict is outside the scope of this Article.

For those activities that will be conducted during an armed conflict, the law of armed conflict also provides little specific guidance for those planning and conducting those activities.¹²⁰ Unfortunately there is no authoritative list or international treaty that sets forth those actions by surrogates that are specifically prohibited or permitted. Those portions of the law of armed conflict that specifically prohibit surrogate activities are limited to those activities that are prohibited to all participants in an armed conflict. Obviously, surrogates and their state supporters must comply with the standards of conduct applicable to all those involved in hostilities, such

¹¹⁹ See Exec. Order No. 12,333, 3 C.F.R. § 2.12 (1981), <https://www.fas.org/irp/offdocs/eo/eo-12333-2008.pdf> [<http://perma.cc/93MR-V9JS>] (“No element of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order”). For example, policy makers may limit the use of surrogates because of ties to criminal activity or allegations of human rights abuses.

¹²⁰ This is a question not limited to the use of surrogates. See generally Geoffrey S. Corn, *Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 J. NAT'L SECURITY LAW & POL'Y. 257 (2008) (continuing the debate over what activities may lawfully be conducted by contractors and other civilian augmentees).

as giving quarter, caring for the wounded and sick, treating prisoners humanely, not engaging in perfidy, as well as other obligations imposed by customary international law. State supporters of surrogates would also have to comply with the obligations imposed by any international treaties to which they are a party.

This may not be an easy standard, since, as discussed earlier, the surrogate force shares a desire to defeat an enemy with the employing state. Furthermore, without focused training, full communication, and careful control, the surrogate force may be motivated to violate the laws of armed conflict by cultural norms, longstanding feuds, or a simple desire to utterly destroy an enemy. Outside of those obligations applicable to all who participate in hostilities, the law of armed conflict provides little in the way of specific guidance on what activities surrogates may or may not perform. One of the principles of the law of armed conflict that would apply, and possibly limit, surrogate activities, would be the principle of distinction.

A. Distinction and Clandestine Activities

Perhaps the most serious *jus in bello* challenge in clandestine and UW operations (and one that would somewhat limit surrogate activities) is the principle of distinction. The principle of distinction consists of two separate but related duties. First, combatants must distinguish themselves from the civilian population.¹²¹ This is accomplished primarily by combatants wearing uniforms and by separating military personnel and objects from the civilian population.¹²² Second, combatants may only attack lawful military targets such as opposing combatants and military objectives.¹²³ Combatants wear uniforms or distinctive emblems so that opposing combatants know whom they may lawfully target. Non-

¹²¹ U.S. DEP'T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, ¶ 5.3.2 (July 2007), <http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M> [<http://perma.cc/LT3D-7TMQ>] [hereinafter NWP 1-14M].

¹²² See W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 514 (2003). Although the wearing of uniforms is the typical means by which combatants distinguish themselves from the civilian population, it is not the only means. Combatants may also distinguish themselves through carrying arms openly and wearing a distinctive emblem or sign. *Id.* at 516-17; see INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK, Ch. 2, at 13 (MAJ William Johnson ed., 2013), http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2013.pdf [<http://perma.cc/GWR7-AR5H>] [hereinafter OPERATIONAL LAW HANDBOOK].

¹²³ OPERATIONAL LAW HANDBOOK, *supra* note 122, at 13.

compliance with the first duty makes it infinitely more difficult for opposing forces to comply with the second duty, ultimately putting civilians at risk.

The principle of distinction stands at the very heart of the law of armed conflict and appears, on its face, to be irreconcilable with clandestine and UW operations. Protecting innocent civilians from suffering the ravages of warfare is predicated on the ability to identify those civilians and distinguish them from those who may lawfully be killed. Success in clandestine and UW operations depends on surrogates and their state sponsors blending in with the local civilian population so that they may conduct their operations unnoticed by opposing forces and government officials. When surrogates conduct clandestine and UW activities from within the civilian population and out of uniform, they will not necessarily violate the principle of distinction. Those surrogates who are not members of an organized armed group would violate this principle only if their activities were deemed to be direct participation in the hostilities.

The law of armed conflict anticipates and supports certain deceptions. A “ruse of war” that causes the enemy to act recklessly or unwisely is acceptable. However, those deceptions that tend to impact the principles of distinction are unlawful because they erode the protection of civilians that are at the heart of the law of armed conflict itself. Those types of unlawful deceptions are known as “perfidy,” defined by Article 37 of AP I and the U.S. Army Commander’s Handbook as those deceptions “designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence.”¹²⁴

The misuse of the white flag, carrying out attacks while disguised as a civilian, feigning injury, or using a marked ambulance to transport fighters or weapons to the battle are all examples of perfidious conduct, and are violations of the law of armed conflict, because they put future ambulances, civilians, and injured persons at risk. The Commander’s Handbook goes on to state that “[s]imilarly, attacking enemy forces while posing as a civilian puts all civilians at hazard. Such acts of perfidy are punishable as war crimes. It is also prohibited to kill, injure, or capture an adversary by feigning civilian or noncombatant status.”¹²⁵

¹²⁴ NWP 1–14M, *supra* note 121, ¶ 12-1.

¹²⁵ *Id.* ¶¶ 12-2–12-3.

The challenge in identifying who is a lawful target stems not only from combatants who fail to distinguish themselves from the civilian population but also, as a practical matter, from civilians who participate in the hostilities. While civilians are normally protected from attack, they may lose this protection “for such time as they take a direct part in hostilities.”¹²⁶ This, of course, begs the question: what constitutes “direct participation in hostilities?”

B. Direct Participation in Hostilities by Surrogates

Determination of whether a specific activity constitutes direct participation in hostilities is highly fact specific and requires a case-by-case analysis.¹²⁷ This approach, described as “know it when you see it” by one scholar, gives little guidance to commanders and operators tasked with the planning and implementation of surrogate operations.¹²⁸ One U.S. military manual addressing the issue of direct participation by civilians issues the following guidance: “[c]ombatants in the field must make an honest determination as to whether a particular person is or is not taking a direct part in hostilities based on the person’s behavior, location and attire, and other information available at the time.”¹²⁹ Further complicating the matter, there has been no generally agreed upon framework to guide the direct participation analysis.¹³⁰ Thus, the determination is truly one where you have to “know it when you see it.”

This approach, although still lacking clarity, is adequate for after action reports. It serves, barely, when making an after the fact determination for criminal prosecution purposes.¹³¹ However, it provides insufficient

¹²⁶ AP I, *supra* note 97, art. 51(3); AP II, *supra* note 102, art. 13(3).

¹²⁷ Michael N. Schmitt, *Deconstructing the Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 705 (2010) [hereinafter Schmitt, *DPH*]; NPW 1–14M, *supra* note 121, ¶ 8.2.2.

¹²⁸ See Schmitt, *DPH*, *supra* note 127, at 699.

¹²⁹ NWP 1–14M, *supra* note 121, ¶ 8.2.2.

¹³⁰ Schmitt, *Interpretative Guidance*, *supra* note 107, at 26.

¹³¹ Courts routinely make after-the-fact determinations during criminal prosecutions; however, these determinations are conducted using well-established legal standards. This process has not fared as well when military courts-martial have had to determine whether a civilian who was killed by a soldier was directly participating in hostilities. See Charlie Savage and Elisabeth Bumiller, *An Iraqi Massacre, a Light Sentence and a Question of Military Justice*, N.Y. TIMES (Jan. 27, 2012), http://www.nytimes.com/2012/01/28/us/an-iraqi-massacre-a-light-sentence-and-a-question-of-military-justice.html?_r=0 [<http://perma.cc/F69L-PFQW>]; see also DEFENSE LEGAL POLICY BOARD, REPORT OF THE

guidance to commanders and their legal advisors who must plan and conduct these operations.¹³² A judge advocate who was to respond with “I’ll know it when I see it” when asked which surrogate activities would cross the line into direct participation would likely find him or herself with a new job. This approach has, however, provided a fertile field upon which scholars have opined.¹³³

The ICRC has attempted to clarify what constitutes direct participation in hostilities in its *Interpretive Guidance*.¹³⁴ This report was published after a series of meetings held over the course of five years where experts on the law of armed conflict analyzed and discussed issues related to three key questions: “who is considered a civilian for the purposes of the principle of distinction?” “What conduct amounts to direct participation in hostilities?” And, “what modalities govern the loss of protection against direct attacks?”¹³⁵ While the *Interpretive Guidance* has been met with much criticism for certain aspects of its analysis and conclusions, it does provide a framework for reviewing activities to determine whether they constitute direct participation in hostilities, as well as discussion of several examples that can be used when analyzing those activities.¹³⁶ In addition to the

SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES 17 (2013) (“[N]on-combatants’ look like and can be perceived by ground forces as acting like combatants”).

¹³² See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 616 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (“[I]t is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time.”).

¹³³ See Schmitt, *Opposition Fighters*, *supra* note 104; Schmitt, *Interpretive Guidance*, *supra* note 107; Watkin, *supra* note 108; Eric Christensen, *The Dilemma of Direct Participation in Hostilities*, 19 J. TRANSNAT’L L. & POL’Y 282 (2010).

¹³⁴ Schmitt, *Interpretive Guidance*, *supra* note 107.

¹³⁵ *Id.* at 8, 12–13. The experts participating varied from meeting to meeting, ranging in number between forty and fifty, and were not identified by name in the accompanying reports. Which expert rendered a specific opinion was similarly not identified in the accompanying reports. Thus, expert opinions referred to in this Article and which cite one of the ICRC Interpretive Guidance Expert meetings refer to those unnamed experts who took part in those meetings.

¹³⁶ For a description of the contentious points and disagreement with the final report, see Schmitt, *Interpretive Guidance*, *supra* note 107. See generally W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010); Watkin, *supra* note 108; Bill Boothby, “*And for Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010). Those experts who participated in the meetings failed to reach a consensus, and many asked that their names be removed from the final report.

Interpretive Guidance itself, the reports of the experts' meetings, the rich critiques written in response, prior ICRC Commentaries to the Additional Protocols, and state practice as evidenced by military doctrine and manuals, are all useful in providing further guidance for those who must review and plan clandestine and UW operations.¹³⁷

This Section will examine the second of the three questions above in so far as how it would address activities conducted by surrogates in clandestine and UW operations. The standard of direct participation in hostilities is a law of armed conflict targeting provision that was developed to implement the principle of distinction. Specifically, it aims to help in the application of the principle of distinction regarding civilians who have become participants in the armed conflict. Thus, it is not a standard for determining which activities are permissible for civilians to perform during hostilities.¹³⁸ Although not exact, examining which surrogate activities could be considered direct participation in hostilities sheds light on which of those activities would require those conducting them to distinguish themselves from the civilian population and make them lawful military targets.

In attempting to clarify what conduct constitutes direct participation in hostilities, the *Interpretive Guidance* sets forth a three-part cumulative test. For an activity to constitute direct participation in hostilities it must meet all three criteria. Those criteria are:

¹³⁷ See U.S. DEP'T OF DEF., DIR. 3020.41, OPERATIONAL CONTRACT SUPPORT, Enclosure 2 ¶ 1(a)(2) (Dec. 20, 2011), <http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf> [<http://perma.cc/Q24T-QZBA>]. Those activities in which civilian contractors may engage in support of U.S. military contingency operations include "communications support; transporting munitions and other supplies; performing maintenance functions for military equipment; providing private security services; providing foreign language interpretation and translation services, and providing logistic services such as billeting and messing." *Id.* These activities are those that would not rise to the level of direct participation in hostilities. The Directive goes on to say that "[e]ach service to be performed by contractor personnel in applicable contingency operations shall be reviewed on a case-by-case basis in consultation with the cognizant manpower official and servicing legal office to ensure compliance with . . . relevant laws and international agreements." *Id.* Thus, it appears that the U.S. Department of Defense takes the approach suggested in this article in determining which activities may be performed by civilian contractors when supporting military operations. Of note, there is also no distinction made as to whether those operations are part of an international or non-international armed conflict.

¹³⁸ INTERPRETATIVE GUIDANCE, *supra* note 108, at 995–96.

1. [T]he act must be likely to adversely affect the military operations or military capacity of a Party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack, and
2. [T]here must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part, and
3. [T]he act must be specifically designed to directly cause the required threshold of harm in support of a Party to the conflict and to the detriment of another.¹³⁹

These three requirements have been referred to as the threshold of harm, direct causation, and belligerent nexus requirements.¹⁴⁰ In the case of examining surrogate activities, the first two requirements provide the most guidance and, accordingly, will be discussed below.

For an act to meet the threshold of harm requirement it must be either an act that is harmful to the enemy or one that is harmful to protected persons and objects.¹⁴¹ An act that is harmful to the enemy is one that is “likely to adversely affect the military operations or military capacity of a Party to an armed conflict.”¹⁴² A current example is the destruction of NATO trucks and supplies, staged for operations in Afghanistan, by Taliban militants.¹⁴³ Clearly, the classic UW examples of partisans ambushing opposing military forces on patrol, snipers targeting senior military officers, and guerrillas conducting acts of sabotage against bridges and railroads

¹³⁹ Schmitt, *Interpretive Guidance*, *supra* note 107, at 46.

¹⁴⁰ *Id.*; see Schmitt, *DPH*, *supra* note 127, at 712–13.

¹⁴¹ Schmitt, *Interpretive Guidance*, *supra* note 107, at 47–50. For an act to reach the threshold of harm, the harm does not actually have to materialize, but there must be an objective likelihood that the act will result in the required harm. The harm need not be realized but must reasonably be expected to result from the act. Thus, acts that are thwarted or fail may still constitute DPH. *Id.* at 47; Schmitt, *DPH*, *supra* note 127, at 713–14.

¹⁴² Schmitt, *Interpretive Guidance*, *supra* note 107, at 47.

¹⁴³ Jane Perlez, *Militants in Pakistan Destroy NATO Trucks*, N. Y. TIMES (Feb. 7, 2008) http://www.nytimes.com/2008/12/08/world/asia/08pstan.html?_r=0 [<http://perma.cc/KG6S-7P8H>].

used for military purposes would also constitute direct participation in hostilities.¹⁴⁴

However, acts need not cause death or injury of military personnel, or physical destruction of military objects, in order to constitute direct participation in hostilities.¹⁴⁵ This concept of harmful acts extending beyond those that cause death and physical destruction is not one that merely appears in the *Interpretive Guidance* but rather is also referenced in Additional Protocol I and its Commentaries.¹⁴⁶ The *Interpretive Guidance* gives several examples of types of activities that neither rise to the level of an attack nor amount to overtly hostile acts, but would, nevertheless, be harmful to the enemy and would constitute direct participation in hostilities. These include:

- Armed or unarmed activities restricting or disturbing deployments, logistics, and communications;
- Capturing or otherwise establishing or exercising control over military personnel, objects, and territory to the detriment of the adversary, including denying the adversary the military use of certain objects, equipment, and territory, guarding captured military personnel of the adversary to prevent them from being forcibly liberated;
- Clearing mines placed by the adversary;
- Electronic interference with military computer networks; and
- Wiretapping the adversary's high command or transmitting tactical targeting information for an attack.¹⁴⁷

According to one of the participants in the *Interpretive Guidance* discussions, these examples were uncontroversial among the experts.¹⁴⁸ Several other uncontroversial examples were discussed in the expert meetings leading up to the publication of the *Interpretive Guidance*, including civilians attacking or trying to capture members of the enemy's

¹⁴⁴ NWP 1–14M, *supra* note 121, ¶ 8–3 (“‘Attacks’ means acts of violence against the adversary, whether in offence or in defence.”); AP I, *supra* note 97, art. 49.1.

¹⁴⁵ Schmitt, *Interpretive Guidance*, *supra* note 107, at 47–48; Schmitt, *DPH*, *supra* note 127, at 715–16.

¹⁴⁶ AP I, *supra* note 97, art. 13(1), 65(1), 42(2), and 41(2); COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 98, at 1605; Schmitt, *DPH*, *supra* note 127, at 714–15.

¹⁴⁷ Schmitt, *Interpretive Guidance*, *supra* 107, at 48; *see* Schmitt, *DPH*, *supra* note 127, at 716.

¹⁴⁸ Schmitt, *DPH*, *supra* note 127, at 716.

armed forces or their weapons, equipment, or positions; civilians laying mines; and civilians sabotaging lines of military communication.¹⁴⁹

Using this threshold of harm standard and the examples discussed during the development of the *Interpretive Guidance* does show several typical surrogate activities that would clearly be considered direct participation in hostilities. Surrogates who sabotage, either by physically destroying or damaging or by using other means, such as electronic and cyber measures to interfere with military communications and computer networks, infrastructure, such as roads, railways, and bridges that are used for military deployments and logistics, would be directly participating in hostilities. Both the clearing of mines placed by opposing forces as well as emplacing mines to be used against opposing forces would also constitute direct participation in hostilities. Using surrogates to capture personnel, weapons, and equipment, even when that action would be undertaken via stealth rather than through an attack, would likewise be direct participation in hostilities.

As mentioned above, acts which are harmful to protected objects and persons may also meet the threshold of harm requirement and constitute direct participation in hostilities.¹⁵⁰ As direct attacks against civilians and other protected objects are already prohibited under the law of armed conflict during both international and non-international armed conflicts, this particular element need not be discussed in detail.¹⁵¹ The significance of this element being included in the *Interpretive Guidance* discussion of direct participation is that it clarifies that civilians who attack protected persons and objects lose their protected status and may be attacked themselves.¹⁵² Thus, attacks against civilians and civilian objects by surrogates, such as using snipers or improvised explosive devices (“IEDs”) to target civilians or the destruction of civilian homes, food stocks, water purification facilities, electrical stations, roads, and other infrastructure that

¹⁴⁹ INTERNATIONAL COMMITTEE OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 2 (2003), <http://www.icrc.org/eng/assets/files/other/2003-03-report-dph-2003-icrc.pdf> [<http://perma.cc/YZE4-GHXL>].

¹⁵⁰ Schmitt, *Interpretive Guidance*, *supra* note 107, at 47–50; Schmitt, *DPH*, *supra* note 127, at 713–14.

¹⁵¹ AP I, *supra* note 97, at art. 48, 51; AP II, *supra* note 102, at art. 13; Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 25, <http://www.icrc.org/ihl/INTRO/195> [<http://perma.cc/MR5P-AJEM>].

¹⁵² Schmitt, *Interpretive Guidance*, *supra* note 107, at 49–50.

serve no military purpose would both constitute direct participation in hostilities and would also be a violation of the law of armed conflict.¹⁵³

However, it is important to note that for acts directed at protected persons and objects to constitute direct participation in hostilities, they must be likely to cause death, injury, or destruction.¹⁵⁴ Therefore, other acts which may be harmful to civilians in a nonphysical sense, such as directing propaganda at them, temporarily detaining them during operations, or questioning them for information would neither meet the required threshold of harm nor constitute direct participation in hostilities.¹⁵⁵ Other reasonably foreseeable surrogate activities directed toward the civilian population, such as the setting up of checkpoints to search and question local civilians, the temporary interruption of electricity, water, or food supplies, the appropriation of cars and fuel, or the manipulation of computer networks for information or propaganda purposes, while certainly violations of domestic criminal law, would not be considered direct participation in hostilities.¹⁵⁶

While a great number of activities may harm the opposing party's overall war effort, for an act to qualify as direct participation, it must adversely affect the opposing party's military operations or capacity.¹⁵⁷ Disseminating propaganda, creating instability in financial markets, providing funding, training, and logistics support to opposition political parties and candidates, and other activities that undermine the opposing party's control and support of its civilian population would not rise to the level of direct participation. In the 2005 meeting of experts discussing the *Interpretive Guidance*, it was agreed that depriving the enemy of financial assets or other war-sustaining assets or resources would not constitute direct

¹⁵³ *Id.* at 49.

¹⁵⁴ *Id.*

¹⁵⁵ See NWP 1–14M, *supra* note 121, ¶ 8.11.3 (“PSYOPs that do not entail the risk of physical injury or death to protected persons or damage to their property may be targeted at noncombatants and civilians.”).

¹⁵⁶ Schmitt, *Interpretive Guidance*, *supra* note 107, at 50 (explaining that the experts participating in the ICRC *Interpretive Guidance* discussions agreed that the legality or illegality of an act under a state's domestic law is irrelevant for its qualification as direct participation in hostilities); NILS MELZER, ICRC, FOURTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES SUMMARY REPORT 49–50 (2006), <http://www.icrc.org/eng/assets/files/other/2006-03-report-dph-2006-icrc.pdf> [<http://perma.cc/GQ7V-MPP2>] [hereinafter FOURTH EXPERT MEETING REPORT].

¹⁵⁷ Schmitt, *DPH*, *supra* note 127, at 716–17.

participation in hostilities.¹⁵⁸ This position is not universally accepted, and the United States would likely take a different position, particularly on acts resulting in widespread economic instability.¹⁵⁹

As one expert notes, this requirement, limiting direct participation in hostilities to acts which adversely affects the enemy's military operations or capacity, is under inclusive in that it ignores those acts that enhance one's own capacity.¹⁶⁰ Thus, while constructing defensive positions, repairing an airfield, or emplacing defensive sensors that would alert personnel to approaching forces would not amount to direct participation in hostilities, those activities would likely give one side a military advantage.¹⁶¹ The line between activities which merely enhance one party's military capacity and those which degrade its opponent is not always clear. The *Interpretive Guidance's* second criterion, direct causation, was intended to guide the analysis in such cases.

Surrogate activities are not limited to those which aim to harm the opposing party, but include activities that sustain or support both the surrogate and supporting state's UW effort. The majority of these activities may "build up or maintain the capacity of a Party to harm its adversary or . . . only indirectly cause[] harm."¹⁶² It is in this gray area of "war-supporting" and "war-sustaining" activities where the largest disagreements lie, and also where the majority of surrogate activities will likely fall.¹⁶³ Are the civilian surrogates conducting those activities directly participating in hostilities, or are they merely providing indirect support?¹⁶⁴

The *Interpretive Guidance* states that for an act to constitute direct participation in hostilities "there must be a direct causal link between a

¹⁵⁸ NILS MELZER, ICRC, THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 15 (2005), <http://www.icrc.org/eng/assets/files/other/2005-09-report-dph-2005-icrc.pdf> [<http://perma.cc/GK5C-8Y52>].

¹⁵⁹ See NWP 1–14, *supra* note 121, ¶ 8.2.5 ("Economic objects of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.").

¹⁶⁰ Schmitt, *DPH*, *supra* note 127, at 719–20.

¹⁶¹ *Id.*

¹⁶² Schmitt, *Interpretive Guidance*, *supra* note 107, at 53.

¹⁶³ Although guerrilla-style attacks and acts of sabotage are the most common images that come to mind when one thinks of UW, the majority of surrogate activities will be non-violent, support activities such as intelligence gathering and preparation of the environment. For a more detailed discussion of what these activities are, see *supra* Section III.

¹⁶⁴ Schmitt, *DPH*, *supra* note 127, at 717–18.

specific act and the harm likely to result either from that act, or from a coordinated military operation of which that acts constitutes an integral part.”¹⁶⁵ It “is neither necessary nor sufficient that the act be indispensable to the causation of harm,” but the link between the act and the harm must be more than merely an uninterrupted causal chain of events.¹⁶⁶ To further explain the concept of direct causation, the *Interpretive Guidance* states, “the distinction between direct and indirect participation in hostilities must be interpreted as corresponding to that between direct and indirect causation of harm.”¹⁶⁷ While the spatial and temporal proximity of the act to the harm is relevant when analyzing whether causation is direct or indirect, closeness in time and location are not independently sufficient.¹⁶⁸

The United States has used a similar standard when explaining its view of what constitutes direct participation in hostilities in the past. In its Declaration and Reservations attached to the ratification of the Optional Protocol to the Convention on the Rights of the Child, on the issue of involvement of children in armed conflict, the United States stated that direct participation in hostilities means “immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy.”¹⁶⁹ Further, the United States stated that direct participation in hostilities “does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment”¹⁷⁰

In the meetings leading up to the issuance of the *Interpretive Guidance* the experts discussed several examples in detail, debating whether those activities would directly cause harm to the enemy’s military operations or capacity, thereby constituting direct participation in hostilities, or whether those activities were an indirect cause of such harm, thereby constituting only indirect participation.¹⁷¹ There was agreement among the

¹⁶⁵ Schmitt, *Interpretive Guidance*, *supra* note 107, at 51.

¹⁶⁶ *Id.* at 54.

¹⁶⁷ *Id.* at 52.

¹⁶⁸ Schmitt, *DPH*, *supra* note 127, at 732.

¹⁶⁹ Optional Protocol to the Convention on the Rights of the Child, Declarations and Reservations, U.N. Doc. No. A/RES/54/263 (May 25, 2000), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en#EndDec [<http://perma.cc/92PX-QYJ9>].

¹⁷⁰ *Id.*

¹⁷¹ See INTERNATIONAL COMMITTEE OF THE RED CROSS, OVERVIEW OF THE ICRC’S EXPERT PROCESS (2003–2008) 3–4, <http://www.icrc.org/eng/assets/files/other/overview-of-the-icrcs-expert-process-icrc.pdf> [<http://perma.cc/A6UC-SVSQ>].

experts that civilians preparing and providing food and clothing to combatants would not be directly participating in hostilities even though military operations are dependent on such support.¹⁷² There was also general agreement that activities such as political, economic, and media activities which support the general war effort; the production of agricultural or non-military industrial goods; and providing supplies and services such as electricity, fuel, construction material, finances, and financial services, only constituted indirect participation, in that they “merely maintain or build up the capacity to cause such harm.”¹⁷³

Based on these examples and the discussion of direct causation in the both the *Interpretive Guidance* and its critiques, it is clear that many of the typical surrogate activities conducted during clandestine and UW operations do not constitute direct participation in hostilities. Surrogates operating safe houses and providing non-lethal logistical support, such as food, clothing, medical supplies, and vehicles, would be indirectly supporting the hostilities by maintaining or building up UW capacity. Similarly, fundraising, providing financial services, providing media services, as well as developing and disseminating propaganda would be permissible as it falls outside of direct participation in hostilities.¹⁷⁴ Where the UW operation consists of both armed and political wings, those individuals who fill a purely political function would also be providing only indirect support.¹⁷⁵

There were, however, many examples discussed by the experts during the development of the *Interpretive Guidance* where the line between direct and indirect participation was not quite so clear or easy to identify. For those activities—such as the design, production, and shipment of weapons and military equipment; the recruitment and training of personnel; the collecting and providing of intelligence; and the providing of security—whether or not they rose to the level of direct participation

¹⁷² INTERPRETIVE GUIDANCE, *supra* note 108, at 54.

¹⁷³ *Id.* at 51–53.

¹⁷⁴ This would include producing and disseminating propaganda that builds and maintains support for the surrogates’ cause as well as that which undermines support for the opposition.

¹⁷⁵ See FOURTH EXPERT MEETING REPORT, *supra* note 156, at 22. According to one expert, “the Irish Republican Army (IRA) in Northern Ireland would have to be regarded as an organized armed group, making its members legitimate military targets, whereas the Sinn Fein party supporting the IRA was a political party, whose members remained protected against direct attack and were subject to law enforcement measures only.” *Id.*

depended on their relationship to a specific operation or hostile act.¹⁷⁶ In analyzing whether such activities would directly or indirectly cause harm to the enemy's military operations or capacity, one would have to look at not only the spatial and temporal relationship but also the nature of the activities. That is, the more tailored the activity is to a specific target or operation, the more likely it is that the activity would be considered direct participation in the hostilities.

A classic example is that of the civilian driving a truck loaded with ammunition.¹⁷⁷ This example is often used since it is a common role filled by civilian contractors and augmentees on the modern battlefield. The common approach is that, although the civilian driver himself is deemed to not be directly participating in the hostilities, he is at risk of death and injury as the truck and ammunition being transported are both military objects and may lawfully be targeted.¹⁷⁸ Although the same conclusion as to the nature of the truck and other objects was reached, the discussion of the experts provides more detail as to when, under certain circumstances, the driver himself would be considered as directly participating in hostilities.

In this example, the closer in time and location the driver was to the hostilities, the more likely he would be considered a direct participant in those hostilities. The civilian truck driver supplying a firing position with ammunition would be an integral part of the operation of firing from that position and, therefore, would be directly participating in hostilities. Likewise, the driver who accompanies invading forces as they cross the border, in order to supply them with ammunition as they invade, would be an integral part of that ongoing invasion and, therefore, would be directly participating in hostilities. However, the civilian truck driver who delivers ammunition to a store house, where it was not going to be immediately used but rather further transported to a firing position at some future time, would only be involved in an intermediate transport not amounting to direct participation in hostilities. As mentioned above, both his truck and the store house would remain military objectives, thereby placing him at risk due to his proximity to these lawful targets but not depriving him of his protected status.¹⁷⁹

¹⁷⁶ INTERPRETIVE GUIDANCE, *supra* note 108, at 51–52.

¹⁷⁷ DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, *supra* note 149, at 3; THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES, *supra* note 158, at 33.

¹⁷⁸ *Id.*

¹⁷⁹ FOURTH EXPERT MEETING REPORT, *supra* note 156, at 48.

Sadly, this protected status might be academic to the enemy in areas where surrogates would most often operate.¹⁸⁰ It is a sobering fact that a surrogate captured by an al Qaeda terrorist or a Taliban group can expect no mercy, regardless of the laws of war. Extremists—unimpressed by the protections guaranteed to all personnel under Additional Protocol I, Article 75—are not going to change their behavior depending on who they believe has legitimate combatant status under international law. However, the distinction is an important one. Who is and is not directly participating in hostilities drives their status and the types of operations that can lawfully be conducted against them.

This example provides some additional clarity regarding the use of surrogates to provide lethal material logistical support. A typical clandestine surrogate activity is the emplacing of caches. While these may contain non-lethal support such as food, clothing, and medical supplies, they may also contain weapons, ammunition, and explosives. These caches are generally intended to be used for a future operation or merely to establish and maintain the capability of forces to conduct future operations. In such cases, this activity would not be considered direct participation in hostilities as it is merely maintaining or building up the force's military capability. The explosives, weapons, and other material being emplaced in the cache would remain a valid military objective and could be targeted just like the truck, ammunition, and store house above.

The construction of IEDs by non-state actors is an even starker example of how difficult determining whether an activity common to the modern battlefield would directly cause harm to a party's military operations or capacity.¹⁸¹ The successful execution of an IED attack is dependent on the occurrence of a successful uninterrupted causal chain of events.¹⁸² Components must be purchased, transported, and stored to await assembly. Individuals must be trained in how to assemble the devices. Once the necessary components have been collected and given to a trained individual, the devices have to be assembled and stored until they are used. Individuals also have to be trained in how to employ the devices, a target must be selected, intelligence has to be gathered on the target, and the device has to be transported to the target site. All of these activities may

¹⁸⁰ Amos Harel and Arnon Regular, *Palestinian Militants Kill Suspected Collaborator*, HAARETZ (Dec. 6, 2004), <http://www.haaretz.com/news/palestinian-militants-kill-suspected-collaborator-1.142688> [<http://perma.cc/ENJ7-XQT8>].

¹⁸¹ INTERPRETIVE GUIDANCE, *supra* note 107, at 53 n.123.

¹⁸² *Id.* at 54.

take place days, weeks, months, or years prior to the actual attack and all must be successful before the harm to the opposing force's military operations or capacity occurs.

At what point in the chain of events then does the activity become direct participation in hostilities? Even within the analytical framework developed through the *Interpretive Guidance* there was no consensus. The ICRC, in the *Interpretive Guidance*, states that despite being "connected with the resulting harm through an uninterrupted causal chain of events" the "assembly and storing of an IED in a workshop, or the purchase or smuggling of its components" would not constitute direct participation in hostilities as those acts, unlike the planning and detonation of that device, do not cause harm directly.¹⁸³ This view was opposed by one of the experts who argued "it would be inadequate to describe the widespread construction of [IEDs] in Iraq as mere 'weapons production' not amounting to direct participation in hostilities."¹⁸⁴

Yet another expert argues that this approach fails to adequately consider military necessity in light of current threats and that the assembling of IEDs should constitute an integral part of operations as "given the clandestine nature by which such devices are emplaced, an immediate attack may be the only option for foiling a later operation employing the device."¹⁸⁵ He goes on to state that, while "[t]he recruitment of suicide bombers and the purchase of materials in order to build suicide vests" would only be considered as indirectly causing harm within the framework of the *Interpretive Guidance*, capacity building activities that "can be linked to specific operations, or types of operations, that are relatively imminent" should also be considered direct participation in hostilities.¹⁸⁶ Considering capacity building activities that are linked to imminent operations as direct participation in hostilities would better recognize current military requirements and allow for the further development of international norms.¹⁸⁷

Surrogates, directed by their state sponsors, conduct their activities in support of a broad range of clandestine and UW operations. Many of

¹⁸³ *Id.*

¹⁸⁴ FOURTH MEETING OF EXPERTS REPORT, *supra* note 156, at 49–50.

¹⁸⁵ Schmitt, *DPH*, *supra* note 127, at 731.

¹⁸⁶ *Id.* at 727.

¹⁸⁷ Schmitt, *DPH*, *supra* note 127, at 11 ("As only states make international law . . . IHL necessarily takes account of state's military requirements on the battlefield. Indeed, norms that unduly hamper military operations have little hope of emerging.").

those activities will not, on their own, directly cause requisite harm necessary to constitute direct participation in hostilities. Such acts, however, may still meet this requirement of direct causation where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.¹⁸⁸ Some of the examples discussed in the meetings of experts and given in the *Interpretive Guidance* include an individual serving as a lookout during an ambush, the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and training and assistance given to combatants for the execution of a specific military operation.¹⁸⁹

A particularly helpful example that helps shed light on activities that, by themselves, may not be considered direct participation, but when coordinated and integrated into a specific operation could be considered as such are that of an unmanned aerial vehicle (“UAV”) attack. Such an attack “involves a pilot remotely operating the UAV, another person controlling the weapons, a communications specialist maintaining contact with the craft, and a commander in overall control.”¹⁹⁰ However, such an attack would have also required personnel to maintain, fuel, and arm the UAV as well as intelligence analysts who located and identified the target. Other than the person who launches the weapon, the activities of the other individuals involved in the operation of the UAV, while integral to the entire operation, would not be categorized as directly causing the harm suffered by the target of the attack. In this scenario, the attack would not occur but for each actor’s participation.

It is clear in the previous example that each of those acts, though not directly causing the resulting harm, was nonetheless indispensable in conducting the attack. Many of the activities conducted by surrogates will not be so obviously linked to the success of an operation. Intelligence, training, communications, transportation, and security alone may not be indispensable to an operation, but may still be such an integral component of that operation so as to make those individuals conducting those activities direct participants in the hostilities. Analyzing the links between certain such activities that, on their face appear to be indirect, and specific, imminent military operations becomes important in determining whether an act that would not be indispensable nevertheless constitutes an integral part

¹⁸⁸ INTERPRETIVE GUIDANCE, *supra* note 108, at 54–55.

¹⁸⁹ *Id.* at 55.

¹⁹⁰ Schmitt, *DPH*, *supra* note 127, at 31.

of a military operation, thereby making the actor a direct participant in hostilities.¹⁹¹

Thus, the initial recruitment of personnel to join the surrogate organization and effort, whether that is the guerrilla force, the underground, or auxiliary, would be removed far enough in time from actual operations so as to not be an integral component of a specific operation. The recruitment of individuals to conduct a specific attack or participate in a specific operation, however, would likely constitute direct participation. Similarly, providing non-lethal training such as medical, religious, or political training, as well as basic military type training would not be an integral component of an operation that directly causes harm, while training to carry out a specific military operation would.¹⁹² Whether surrogates serving as lookouts or guards are directly participating in hostilities would likewise depend on the relationship between those activities and the timing and location of a specific military operation. Individuals providing force protection or security for safe houses, supply depots, training sites, and other individuals would likely not be considered an integral component of a specific military operation reaching the required threshold of harm.¹⁹³ However, those individuals serving as a lookout for an ambush or other specific military operation would meet this requirement.¹⁹⁴ As mentioned above, personnel guarding captured enemy forces would be considered direct participants as, by preventing the escape or forcible release of the combatants, they are harming the enemy's military capability.¹⁹⁵

One of, if not the, primary activity conducted by surrogates in clandestine and UW operations will be that of providing intelligence. These activities will span the spectrum of UW phases, operations, and topics. Surrogates will be tasked with providing information on everything from infiltration routes and cache sites to enemy organization, movements, and

¹⁹¹ Those individuals conducting the same activities with regards to an unarmed UAV that is merely collecting intelligence would likely not be considered direct participants given that the overall operation would not result in the required threshold of harm. The outcome of this analysis, however, would be different if the collection of intelligence via the unarmed UAV were an integral component of operations reaching the required threshold of harm, such as a UAV participating with other armed UAVs in an attack or providing intelligence directly to a ground force engaged in offensive military operations.

¹⁹² Schmitt, *DPH*, *supra* note 127, at 729–30; THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES, *supra* note 158, at 35.

¹⁹³ As in the example of the truck driver above, they would be at risk due to their proximity to military targets.

¹⁹⁴ NWP 1–14M, *supra* note 121, ¶ 8.1.

¹⁹⁵ See *supra* note 145.

capabilities.¹⁹⁶ They will also be tasked with providing the tactical intelligence required for targeting and other offensive military operations. These operations would not be possible without this intelligence, making collecting, analyzing, and disseminating this intelligence in support of a specific attack or military operation that will meet the required threshold of harm an integral component of such an operation. Those intelligence activities falling outside of this connection to a specific military operation should be considered indirect support.¹⁹⁷

Conclusion

An appreciation of UW, and of the surrogates' place in *jus in bello* norms, is vital as the world attempts to manage the small, simmering conflicts around the globe. Like it or not, the types of small wars states find themselves required to fight—in which surrogates play an increasingly vital role—are on the rise.¹⁹⁸ The overt use of military power is often counterproductive due to the high cost of deployment and operations, the strategic consequences of having a large number of U.S. forces operating within a sovereign country, international opposition, lack of international support, and lack of domestic political support. Deployments of small numbers of U.S. forces operating by, with, and through surrogates do not raise the same concerns and are more politically palatable.¹⁹⁹ Additionally, due to the overwhelming military superiority of the United States, it is more likely to face asymmetric threats, from states as well as non-state actors, instead of from direct use of military force.

Ongoing Russian activities in the Crimea highlight the potential successful use of surrogates in the modern national security environment. Russian military and intelligence forces, working by, with, and through

¹⁹⁶ See FM 3–05.130, *supra* note 19, ¶ 4-21.

¹⁹⁷ See THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES, *supra* note 158, at 22. Several experts were of the opinion that only intelligence gathering that has a direct connection to attack or defense should be regarded as part of the hostilities. *Id.*

¹⁹⁸ U.S. JOINT FORCES COMMAND, THE JOINT OPERATIONAL ENVIRONMENT: THE WORLD THROUGH 2020 AND BEYOND 4–10 (2005), www.dtic.mil/futurejointwarfare/strategic/joe_050805.doc [<http://perma.cc/7FS2-A5V7>]; See PELTIER, *supra* note 3, at 36. Isaac Peltier likewise points out that operations involving surrogates “suggest what future operations in the war on terror may resemble.” *Id.*

¹⁹⁹ See JOINT CHIEFS OF STAFF, CAPSTONE CONCEPT FOR JOINT OPERATIONS: JOINT FORCE 2020 7 (Sept. 10, 2012), http://www.defenseinnovationmarketplace.com/resources/JV2020_Capstone.pdf [<http://perma.cc/WP3N-EGR7>] [hereinafter JCOS Concept].

local Crimean “self-defense forces” have bloodlessly neutralized Ukrainian military forces and seized power within the region.²⁰⁰ Those same surrogates, with the assistance of their Russian supporters, have also created a factual narrative building support for and justifying those actions, at least in the minds of ethnic Russians in Crimea and a majority of the Russian population itself.²⁰¹ While the role of the Russian military is currently fairly overt, it is highly unlikely that their use of local surrogates only began with the recent change in governments in Kiev.²⁰² From the fairly rapid appearance of well-armed, organized, and disciplined militia forces, it is highly probable that Russian forces had been organizing, training, and equipping surrogates prior to the beginning of the current political unrest.²⁰³ This interaction would also have likely involved using those surrogates to collect intelligence, establish logistical support, and organize political activities. While the role of the Russian military is more overt in this case than would otherwise be the norm, similar activities on a reduced, and less visible, scale will likely be used by States in pursuit of their national security and foreign policy interests.

Many observers and scholars argue that states’ use of surrogates increases the likelihood and number of law of armed conflict violations and gives those surrogates a license to conduct warfare with impunity.²⁰⁴ Critics commonly argue that surrogates operate as they please, engaging in violence with no responsibility for its consequences and no repercussions against the state sponsor. The state gets what it wants, keeps its hands relatively clean, and maintains plausible deniability. One scholar has even called for states’ use of surrogate forces to be “included in the prohibition against mercenarism.”²⁰⁵ They further maintain that this lack of responsibility and oversight of surrogate forces increases levels of violence, resulting in even greater suffering among the civilian population.

²⁰⁰ Andrew Osborn and Natalia Zinets, *Confrontation in Ukraine as Diplomacy Stalls*, REUTERS (Mar. 10, 2014), <http://www.reuters.com/article/2014/03/10/us-ukraine-crisis-idUSBREA1Q1E820140310> [<http://perma.cc/G55B-G8SL>].

²⁰¹ Dan Murphy, *Russia’s Plan for Crimea Were Long in the Making*, THE CHRISTIAN SCIENCE MONITOR, (Mar. 11, 2014), <http://www.csmonitor.com/World/Security-Watch/Backchannels/2014/0311/Russia-s-plans-for-Crimea-were-long-in-the-making-video> [<http://perma.cc/HR2B-76SV>].

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 773 (2008).

²⁰⁵ *Id.* at 808.

While this may be the stereotype, it is not necessarily always true. The use of surrogates by a state may also decrease violence and increase the protection of the civilian population. The use of surrogates generally leads to a smaller military presence overall in the target country.²⁰⁶ The use of surrogates to gather intelligence in denied areas can lead to greater precision in targeting, allowing for the identification of lawful targets with more accuracy, confirming those targets, tracking them, and leading to strike at a time and place that will avoid or lessen civilian casualties. This intelligence may also lead to information that contradicts a prior targeting decision or the identification of a target, thus avoiding an attack that would have been mistaken. The use of surrogates may also deter aggression or threatening behavior that may have otherwise led to armed conflict. Thus, the use of surrogates may assist in preventing armed conflicts or a greater use of force.

Certainly, this is not always the case. Surrogates must be carefully vetted and monitored to ensure they are not engaging in other unlawful acts.²⁰⁷ A state cannot control all of their actions and runs the risk of being responsible for their unlawful actions.²⁰⁸ There is always a risk of this when operating by, with, or through surrogates. This risk can never be eliminated and will have to be carefully weighed and managed.

As history has shown, states have used, and will continue to use, surrogates in pursuit of their national security and foreign policy interests. A scheme of determining and formalizing the status of surrogates is therefore vital. The law of armed conflict must reflect the reality of modern military operations and anticipate all personnel operating in the battlespace.²⁰⁹ Examining and understanding the law of armed conflict implications raised by UW activities is essential in ensuring that those activities are lawful. Furthermore, the requirement for a firm combatant status consistent with *jus in bello* norms for surrogates is essential to continued operations. The need for legitimate protections for surrogates under the law of armed conflict will continue to grow as more states openly

²⁰⁶ FM 3-05.130, *supra* note 19, ¶ 3-43.

²⁰⁷ *Id.* ¶¶ 3-42-3-45.

²⁰⁸ See Gregory R. Bart, *Special Operations Forces and War Crimes By Guerillas*, 5 HARV. NAT'L SEC. J. 513 (2014).

²⁰⁹ JOINT CHIEFS, CAPSTONE CONCEPT, *supra* note 199, at 3 ("Notions of who is a combatant and what constitutes a battlefield in the digital age are rapidly shifting beyond previous norms.").

http://www.defenseinnovationmarketplace.mil/resources/JV2020_Capstone.pdf
[<http://perma.cc/3VXA-C6G6>].

employ them. As UW and surrogate operations move out of the shadows, the operations they encompass must withstand scrutiny in the light of day.