

ARTICLE

Teaching an Old Dog New Tricks:
Operationalizing the Law of Armed Conflict in New
Warfare

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Gone are the days of soldiers facing each other across large battlefields, tanks shelling tanks, and fighter jets engaging in dogfights. War, or armed conflict, to use a more precise legal term, now takes place *everywhere* — in cities, refugee camps and other historically non-military areas — and involves or affects nearly everyone in the area. These changes have a powerful impact on the conduct of hostilities. The law of armed conflict (“LOAC”), also known as the laws of war or international humanitarian law (“IHL”),¹ was developed and codified in times of more traditional state-state conflicts. It must now adapt to these new and more complicated conflicts, which we call new warfare. More important, re-categorizing or re-defining the ever-expanding variety of individuals who participate in and are affected by hostilities in new warfare is a critical next

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¹ We will generally use the term law of armed conflict because that is the term favored by militaries — the key players we focus on here — and when referring to IHL, will do so interchangeably with LOAC.

step. These multiple categories of participants pose great challenges to the implementation of LOAC on the ground.

The law of armed conflict governs the conduct of both states and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.² New warfare poses extraordinary dilemmas for the application of two key humanitarian law principles: the principle of distinction and the principle of proportionality. The principle of distinction requires soldiers to differentiate between people they can target and people they are obligated to protect from harm. The principle of proportionality requires soldiers to not attack a target if the expected innocent casualties are excessive in relation to the anticipated military advantage gained. Applying these two principles in new warfare brings us to the fundamental question: who can be lawfully targeted, when, and how often?³

The essence of new warfare is that states are engaged with non-state actors.⁴ In traditional conflicts between states, which pit soldier against

² See International Committee of the Red Cross (“ICRC”), *International Humanitarian Law in Brief*, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section_ihl_in_brief. The law of armed conflict is set forth primarily in the four Geneva Conventions of August 12, 1949, and their Additional Protocols. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted by Conference* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted by Conference* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

³ See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INTL. REV. RED CROSS 991 (2008) (adopted by ICRC Assembly Feb. 26, 2009), *available at* <http://www.cicr.org/web/eng/siteeng0.nsf/html/review-872-p991> [hereinafter *Interpretive Guidance*].

⁴ New warfare also includes conflicts between and among non-state actors, but in this article we will focus solely on conflicts in which states are engaged with non-state actors.

soldier, the categories were clear; in what we define as “new warfare”, the categories are, at best, blurred. Simply put: the clear-cut traditional military paradigm is largely a relic of the past. As we write these lines, the following is a sample of contemporary conflicts demanding this issue be addressed candidly, if not resolved:

- United States, British, and other NATO soldiers are engaged with the Taliban and other insurgent groups in Afghanistan;
- United States Predator drones are regularly attacking Taliban and al-Qaeda targets in Pakistan; and
- United States forces are under attack in Iraq outside the major cities.

In each of these three conflicts, military forces face a disturbing lack of clarity⁵ regarding *both* the operational mission and the identification of the enemy.

Some argue that LOAC is inapplicable or simply cannot work in new warfare;⁶ others contend that, while still relevant, LOAC needs new

⁵ This lack of clarity can contribute to an increase in civilian casualties. In Afghanistan, for example, the United Nations reports as follows: “As the conflict intensifies and spreads, it is taking an increasingly heavy toll on civilians, as the growing civilian death toll registered by UNAMA (United Nations Assistance Mission to Afghanistan) Human Rights each year since 2007 indicates. In the first six months of 2009, UNAMA recorded 1013 civilian deaths, compared with 818 for the same period in 2008, and 684 in 2007 This represents an increase of 24% of civilian casualties in the first six months of 2009 as compared to the same period in 2008. Both anti-government elements and pro-government forces are responsible for the increase in civilian casualties. UNAMA Human Rights figures indicate that more civilians are being killed by [Anti-Government Elements (“AGEs”)] than by [Pro-Government Forces (“PGF”)]. In the first six months of 2009, 59% of civilians were killed by AGEs and 30.5% by PGF. This represents a significant shift from 2007 when PGF were responsible for 41% and AGEs for 46% of civilian deaths.” UNITED NATIONS ASSISTANCE MISSION TO AFGHANISTAN, HUMAN RIGHTS UNIT MID YEAR BULLETIN ON PROTECTION OF CIVILIANS IN ARMED CONFLICT I (2009), <http://unama.unmissions.org/portals/unama/human%20rights/09july31-unama-human-rights-civilian-casualties-mid-year-2009-bulletin.pdf> [hereinafter UNAMA REPORT].

⁶ See, e.g., Dan Belz, *Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?*, 7 THEORETICAL INQ. L. 97 (2006); Rosa E. Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 706 (2004); cf. Gabor Rona, *International Law Under Fire: Interesting Times For International Humanitarian Law: Challenges from the “War on Terror”*, 27 FLETCHER F. WORLD AFF. 55

treaties or protocols to be effective.⁷ Indeed, one of us has recently advocated for a re-articulation of international law,⁸ while still reinforcing that until principles are replaced or re-articulated, commanders must comply with pre-existing conventions and obligations.⁹ However, present application of LOAC does not provide sufficient guidance for commanders facing extraordinarily complex *new* operational dilemmas.

When those who are fighting (insurgents, guerrillas, terrorists or comparable terms) melt into the civilian population and persons who appear to be civilians periodically engage in hostilities, determining who is a legitimate target becomes nearly impossible. Commanders on the ground face a growing tension as they seek simultaneously to fulfill their operational mission and to uphold LOAC, particularly because doing so requires them to apply traditional legal concepts to complex and ever-changing circumstances. At the most basic level, commanders need to train troops under their command to make a critical set of determinations, day after day: (1) who and when can they shoot, (2) who and when can they detain, and (3) who do they have to protect?

To find answers to these questions, commanders need more relevant and specific categories of individuals than the ones LOAC currently uses. For LOAC to have continued merit and effectiveness, those responsible for its “on the ground” application must both respect it and find it relevant. The two are not the same — even if commanders respect the law, they will

(2003) (explaining that to the extent the “war on terror” constitutes an armed conflict, humanitarian law applies); Andrew Buncombe, *Change Obsolete Rules of Warfare, Says Bush Envoy; Geneva Conventions, Legal Foundation for the Red Cross, Has Helped Maintain Humanity and Dignity in Combat for 140 Years*, THE INDEPENDENT, Feb. 22, 2002, at 2; Robert J. Delahunty & John C. Yoo, Op-Ed., *Rewriting the Laws of War for a New Enemy*, L.A. TIMES, Feb. 1, 2005, at B11; Thomas Harding, *Reid Urges Review of Geneva Convention*, DAILY TELEGRAPH, Apr. 4, 2006, at 2; Avril McDonald, *The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation in Hostilities* 1 (Univ. of Teheran & Harvard Univ. Humanitarian Law Research Initiative on the Interplay Between Int'l Humanitarian Law & Int'l Human Rights Law, Working Paper, 2004), http://www.asser.nl/Default.aspx?site_id=9&level1=13337&level2=13379&textid=34447.

⁷ Marshall J. Breger & Marc D. Stern, *Symposium on Reexamining the Law of War: Introduction to the Symposium on Reexamining the Law of War*, 56 CATH. U. L. REV. 745 (2007); Peter Wallstein, *Geneva Convention Overhaul Considered*, L.A. TIMES, Jan. 7, 2005, at A24.

⁸ See Amos N. Guiora, *Anniversary Contributions, Use of Force: International Law: Where Have We Been; Where Are We Going?* 30 U. PA. J. INT'L L. 1323 (2009).

⁹ For further discussion, see Amos N. Guiora & David Luban, *An Exchange on Law and Israel's Gaza Campaign*, 31 ABA NAT'L SEC. L. REP. 1, 12 (2009).

be hard-pressed to apply it in new warfare if doing so exacerbates their challenges instead of facilitating solutions. To ensure LOAC's continued relevance, we must examine the role of multiple participants in state versus non-state conflict: commanders, innocent civilians, and the many types of legitimate targets.

First, we re-frame the traditional combatant-civilian paradigm to reflect the realities of new warfare and meet the operational realities of commanders on the ground more effectively. Commanders view the zone of combat in terms of friend or foe, innocent civilians or legitimate targets. An *innocent civilian* is a person who takes no part in hostilities¹⁰ and is therefore immune from attack. A *legitimate target* is a person or object that can be lawfully targeted. In new warfare, the range of persons who fall into the latter category is expanding rapidly. This expansion requires two critical adjustments in how we approach "open fire" determinations: greater sensitivity among both policy-makers and commanders to *new* and more carefully defined sub-categories of hostile persons; and development of a more conduct-specific checklist of factors for commanders to determine if an individual can be targeted. We define and analyze each of the following key sub-categories in the body of this article:

- *Legitimate subjects of detention* provide some assistance to those who are fighting but do not participate directly in hostilities. They cannot be targeted.
- *Transitory targets* participate in hostilities one or two times or with no regularity. They can only be targeted when directly participating in hostilities.
- *Recurring targets* follow a pattern of participation in hostilities on a recurring and frequent basis, returning to civilian pursuits in between their hostile acts. They can only be targeted when directly participating in hostilities, unless the frequency and regularity of their participation rises to the level of more continuous participation.

¹⁰ For the purposes of this article, we define direct participation in hostilities as acts intended to harm the enemy or the civilian population in a direct or immediate manner. See *infra* Section II.B.

- *Permanent targets* participate in hostilities on a continuous basis. They can be targeted at all times.

We approach this subject from different perspectives but with a similar focus. Our purpose is to operationalize the law of armed conflict to give military commanders the tools to meet twin goals: fulfilling their operational missions while protecting their soldiers and innocent civilians alike. This two-fold objective is extraordinarily complicated; it is also an absolute necessity.

In Section I, we highlight the challenges new warfare creates for the implementation of LOAC on the ground. To do so, we define key concepts and provide insights into the commander's perspective and dilemmas before setting forth the limitations of LOAC's traditional approach. Section II analyzes how to operationalize LOAC, focusing on a new framework for identifying and distinguishing among legitimate targets. Highlighting four sub-categories, we analyze the full (and expanding) range of legitimate targets and develop conduct-specific factors to help commanders better distinguish between innocent civilians and legitimate targets during conflict. Section II also provides critical guidelines to help commanders meet their legal and operational obligations. Finally, Section III offers recommendations for the application of LOAC to new and as yet unforeseen challenges from newer and ever more complex conflicts.

I. The Challenges of New Warfare

In recent years, concerns about the applicability of the Geneva Conventions and LOAC to new warfare have grown into a steady drumbeat. These arguments range from serious concern about how to implement and enforce critical principles of LOAC in the face of new warfare realities¹¹ to the claim that some provisions within the Geneva Conventions are "quaint" and "obsolete."¹² The Geneva Conventions and other LOAC conventions and protocols were indeed drafted and codified before the advent of new warfare. However, to suggest that LOAC cannot apply to new warfare and is therefore of no consequence is ultimately to suggest that contemporary conflicts allow for no protection for civilians and

¹¹ See articles cited *supra* note 6.

¹² Draft Memorandum from Alberto Gonzales, White House Counsel, to George W. Bush, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban* (Jan. 25, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* at 119 (Karen Greenberg & Joshua Dratel eds., 2005).

place no obligations on those who are fighting, whether soldiers or other participants. In fact, the nature of new warfare demands exactly the opposite conclusion. Existing codifications and applications of the laws of war may prove difficult to implement, but the fundamental principles remain as important as — if not more important than — ever *precisely* because of the increased danger to participants and non-participants alike.

Many practitioners and scholars have defined terms relevant to conflict;¹³ others have analyzed rules applicable in new warfare.¹⁴ Although very helpful in advancing general understandings of the law, these analyses rarely address the needs of the commander on the ground. We take a different and more practical approach designed to meet these needs. To those who question whether LOAC's principles and goals are flexible and adaptable enough to be effective in new warfare, the answer must be yes. The alternative would essentially leave entire conflicts unregulated and entire categories of individuals unprotected, a choice neither LOAC nor commanders can countenance.

Humanitarian law has always been a living, breathing body of law

¹³ See, e.g., DIETER FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 45, 76 (2d ed. 2008); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (2004).

¹⁴ Joseph P. “Dutch” Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1 (2004); Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025 (2004); Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISR. L. REV. 46 (2009); Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants”*, 85 INT'L REV. RED CROSS 45 (2003), available at

[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/\\$File/irrc_849_Dorman.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/$File/irrc_849_Dorman.pdf); ICRC, *INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS* (2003),

<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5xrdcc>; Paul E. Kantwill & Sean Watts, *Hostile Protected Persons or “Extra-Conventional Persons”: How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681 (2005); Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INT'L REV. RED CROSS 149 (2005), available at

[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p149/\\$File/irrc_857_Pfanner.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p149/$File/irrc_857_Pfanner.pdf); Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1 (2005); Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1 (2008); K.W. Watkin, *Combatants, Unprivileged Belligerents and Conflict in the 21st Century*, 1 ISR. DEF. FORCES L. REV. 69 (2003).

rather than a static set of concepts and has repeatedly adapted to uncertainties and changing circumstances. As Jean Pictet wrote in 1985:

The international Conventions contain a multitude of rules which specify the obligations of states in very precise terms, but this is not the whole story. Behind these rules are a number of principles which inspire the entire substance of the documents. . . . They serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of dissemination.¹⁵

When unforeseen situations have demanded new answers, LOAC's basic principles have guided interpretations and helped find solutions to preserve and protect the law's core values. As we examine the challenges commanders and their soldiers face, it is clear that overly technical reliance on prescriptions in conventional and customary law simultaneously handicaps the decision-maker and undermines civilian protections.

International courts and tribunals have used this approach when confronted with new issues relevant to armed conflict. In the 1996 *Advisory Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict*, the International Court of Justice emphasized that the development of new means of combat, such as nuclear arms, does not "call[] into question the longstanding principles and rules of international law."¹⁶ The spirit and purpose of IHL was equally relevant during the International Criminal Tribunal for the former Yugoslavia ("ICTY"). *Prosecutor v. Dusko Tadic* involved abuses by Bosnian Serbs against Bosnian Muslims, so that the victims appeared to have the same nationality as the perpetrators and thus could not, based on a technical reading of the law, be considered protected persons and merit additional protection under the Fourth Geneva

¹⁵ JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 59 (1985).

¹⁶ *Legality of the Threat and Use of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 226, 256 (July 8). The ICJ found that the laws of war contained no express provision regarding the use of nuclear weapons. *Id.* at 247. In particular, after finding no conventional or customary rules applicable to nuclear weapons, the Court specifically stated that it would "now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict . . ." *Id.* at 256.

Convention.¹⁷ The tribunal, however, relied on the object and purpose of the Fourth Geneva Convention and fundamental principles of IHL to find that allegiance, rather than nationality, was the crucial test for determining protected person status.¹⁸

In new warfare, the blurring of civilian and fighter, of military objective and protected object, make application of the principles of distinction and proportionality very difficult. But that difficulty is not cause for abandoning the law and its key principles.

A. Key Concepts

1. New Warfare

New warfare describes the new types of conflict that presently prevail worldwide. These conflicts generally involve a state engaged in combat with non-state forces, combat characterized by fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects. As one news article recently reported on the conflict in Afghanistan,

[t]he elusive insurgents blend easily into the population, invisible to Marines until they pick up a weapon. They use villagers to spot and warn of U.S. troop movements, take up positions in farmers' homes and fields, and attack Marines from spots with ready escape routes. The Marines, under strict rules to protect civilians, must wait for insurgents to

¹⁷ GC II, *supra* note 2, art. 4(1), defines protected persons as “those who, at a given moment and in any manner whatsoever, find themselves . . . in the hands of a Party to the conflict . . . of which they are not nationals.”

¹⁸ Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgment, ¶ 166 (July 15, 1999) (“[I]n modern inter-ethnic armed conflicts . . . the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict, and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.”). In *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, ¶ 266 (Nov. 16, 1998) (citing Theodor Meron, Editorial Comment, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout*, 92 A.J.I.L. 236, 239 (1998)), the ICTY Trial Chamber took a similar approach, emphasizing that “in interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals.”

attack and then attempt to ensnare them. Limited in their use of airstrikes and artillery — because of the danger to civilians and because aircraft often frighten the Taliban away — Marine riflemen must use themselves as bait and then engage in the riskier task of pursuing insurgents on foot.¹⁹

Although civilians have historically been the victims of war, new warfare is fundamentally different from previous conflicts because of the active involvement — in fact engagement — of civilians in hostilities. Rather than remaining in the traditional role of passive victim, civilians (or those who were once understood to be civilians) are actively participating in hostilities in new warfare. Understanding when these individuals cross the line from innocent civilians deserving protection to hostile persons justifying the application of force is the key question new warfare poses for commanders on the ground.

2. Distinction

Distinction is at the heart of humanitarian law.²⁰ It requires that any party to a conflict distinguish between those who are fighting and those who are not, and direct attacks only at the former.²¹ The purpose of distinction is emphasized in Article 51 of Additional Protocol I to the four Geneva Conventions, which states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.”²² In addition, Article

¹⁹ Ann Scott Tyson, *In Afghanistan, A Test of Tactics Under Strict Rules to Protect Civilians, Marines Face More Complex Missions*, WASH. POST, Aug. 13, 2009, at A6.

²⁰ Legality of the Threat or Use of Nuclear Weapons, *supra* note 16, at 257 (distinction is one of the “cardinal principles” of humanitarian law and one of the “intransgressible principles of international customary law”).

²¹ AP I, *supra* note 2, art. 48, sets forth what is known as the “basic rule”: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

²² *Id.* art. 51. See also AP II, *supra* note 2, art. 13 (emphasizing the principle of distinction in non-international armed conflict: “Protection of the civilian population. 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.”).

51 prohibits indiscriminate attacks,²³ extending the obligation to protect civilians beyond a prohibition on directly targeting innocent civilians. The Statute of the International Criminal Court criminalizes attacks on civilians and other persons *hors de combat* in both international and non-international armed conflicts.²⁴ The jurisprudence of the ad hoc international criminal tribunals reinforces the centrality of this principle as well,²⁵ emphasizing that the principle of distinction is customary international law applicable in both international and non-international armed conflicts.²⁶

²³ AP I, *supra* note 2, art. 51(4) (“Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”).

²⁴ Rome Statute of the International Criminal Court art. 8 ¶ 2, July 17, 1998, 27 I.L.M. 1999 (“For the purpose of this Statute, ‘war crimes’ means: . . . (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; . . . (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; . . . (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.”).

²⁵ See Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, ¶ 45 (Dec. 5, 2003) (“The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives.”); see also Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 524 (Jan. 14, 2000); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 616 (Sept. 2, 1998).

²⁶ Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 111, 127 (Oct. 2, 1995) (citing U.N. General Assembly Resolution 2675, which states: “Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: . . . 2. in the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations”); see also Jean-Marie Henckaerts, *Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 179 (2005) available at

3. Proportionality

If distinction is the primary means of protecting civilians from the ravages of war, proportionality is its alter ego, the mechanism to implement distinction in practice. Proportionality's fundamental premise is that the means and methods of attacking the enemy are not unlimited.²⁷ To protect innocent civilians from the effects of war and minimize undue suffering, LOAC prohibits disproportionate attacks in two ways. First, before launching an attack, commanders must examine whether the expected loss of civilian life or damage to civilian property from an attack will be excessive in relation to the anticipated military advantage gained from the attack.²⁸ If the attack is likely to have a disproportionate effect, it must be canceled.²⁹ International courts and national military manuals use a "reasonable commander" standard based on the circumstances of the time to determine

[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/\\$File/irrc_857_Henckaerts.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/$File/irrc_857_Henckaerts.pdf); cf. *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc.6 rev. ¶ 177 (1997) ("[C]ustomary law principles applicable to all armed conflicts require the contending parties to refrain from directly attacking the civilian population and individual civilians and to distinguish in their targeting between civilians and combatants and other lawful military objectives.").

²⁷ AP I, *supra* note 2, art. 35 ("1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.").

²⁸ *Id.* art. 51(5)(b) ("Among others, the following types of attacks are to be considered as indiscriminate: . . . an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").

²⁹ *Id.* art. 57 (Parties must "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."); *id.*, art. 57(2)(b) ("[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").

International tribunals have reinforced that all parties, including non-state parties, have this obligation. In *Prosecutor v. Norman*, the Special Court for Sierra Leone declared that "it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties." Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, ¶ 22 (May 31, 2004). See also Christopher Greenwood, *Scope of Application of Humanitarian Law*, in FLECK, *supra* note 13, at 45, 76.

proportionality. In *Prosecutor v. Stanislav Galic*, for example, the defendant was charged with the crime of deliberate and indiscriminate attacks on civilians. The ICTY explained that “[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”³⁰

Second, commanders must take steps necessary to minimize civilian losses when targeting a military objective. Even if a target is legitimate according to the laws of war, failure to take the requisite precautions will make the attack unlawful.³¹ In *Isayeva v. Russia*, the European Court of Human Rights held that the Russian aerial assault on the Chechen village of Katyr-Yurt violated the right to life guaranteed in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms because the aerial bombardment of the village and its outskirts continued even as the civilians tried to leave via a safe passage corridor.³² Although the attack may have been against a legitimate target — insurgents entrenched in the village — it was unlawful because the Court found no evidence that “it was planned and executed with the requisite care for the lives of the civilian population.”³³

4. Operationalize

Operationalizing international law requires that LOAC be adapted

³⁰ *Galic*, Case No. IT-98-29-T, Judgment, ¶ 58. See, e.g., THE CANADIAN LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVEL, 4–5 (1992), available at [http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20\(13%20Aug%2001\).pdf](http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20(13%20Aug%2001).pdf) (explaining that “consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made” and emphasizing that any analysis of the proportionality test must be based on “what a reasonable person would do” in the circumstances).

³¹ See, e.g., *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, ¶ 524 (Dec. 5, 2003).

³² *Isayeva v. Russia*, 41 Eur. Ct. H. R. 847 ¶ 17 (2005).

³³ *Id.* ¶ 200; see also *Ergi v. Turkey*, 1998-IV Eur. Ct. H.R. 1751, ¶ 81 (1998) (finding that the Turkish security services had not taken sufficient precautions to protect civilians when engaging the Kurdish Workers Party (PKK) in and around a village in response to the killing of two suspected collaborators).

to the realities of new warfare; otherwise, the commander will be in the “twilight zone”, which poses extraordinary dangers to soldiers, innocent civilians, and others alike. From the commander's perspective, operationalizing LOAC requires both new training regimes and different operational guidelines.

In the classic military paradigm, the conflict was easily explained to those who were fighting because the enemy was obvious and the role of civilians as passive victims of war was generally clear.³⁴ The objective — to defeat a clearly identified enemy — was easily articulated; the means — military hardware — were obvious; and the outcome, from a military perspective, was black and white — one side surrendered. Opposing soldiers openly carrying weapons posed dangers that led to concise and precise “open fire” orders. The rules of engagement (“ROE”) in the traditional context were uncontroversial and simple to interpret: soldiers killed soldiers³⁵ and protected innocent civilians and others *hors de combat*. In that sense, the rules of yesterday's battles were obvious.

In the contemporary and future paradigm, the overwhelming majority of armed conflicts will involve soldiers operationally engaged with non-state actors.³⁶ The commander is required by law to distinguish between an innocent civilian and an individual who, although dressed in civilian attire, may pose an immediate threat and is therefore a legitimate target. In addition, the commander must assess whether and when to target manifestly hostile persons deliberately hiding among the civilian population. Respect for LOAC is the essence of command; therefore, what we call operationalizing LOAC focuses on providing guidelines for how to distinguish among persons. When neither hostile persons nor members of armed groups wear uniforms or carry their arms openly, commanders face a tension between respect for IHL and protecting the unit — the fundamental

³⁴ Traditional wars do, however, offer well-documented examples of civilians picking up arms, such as Yugoslav partisans under Tito's control in World War II and the French resistance under Nazi occupation in the same war.

³⁵ Tennyson's famous line: “Theirs not to reason why/ Theirs but to do & die” is a tragically apt description of the life of an infantryman locked in battle with another infantryman. LORD ALFRED TENNYSON, *THE CHARGE OF THE LIGHT BRIGADE* (1854), available at <http://etext.lib.virginia.edu/images/modeng/public/TenChar/TenChar1.jpg>. For a description of traditional warfare, see MICHAEL HOWARD, *WAR IN EUROPEAN HISTORY* (Oxford University Press, 2009) (1976).

³⁶ See generally, THOMAS X. HAMMES, *THE SLING AND THE STONE: ON WAR IN THE 21ST CENTURY* (2004).

challenge in new warfare. In a word, both sets of persons appear to be innocent civilians, but the rules are a source of controversy and uncertainty. Operationalizing LOAC gives commanders the tools to determine when civilians are not innocent, knowledge that is key to protecting soldiers and civilians.

B. The Commander's Perspective

In early 2006, the Multi-National Corps – Iraq (“MNCF”) began compiling statistics about the number of escalation of force incidents in Iraq.³⁷ Escalation of force incidents are primarily situations in which civilians “unwittingly drove too close to convoys or checkpoints and triggered a reaction in gunners who considered them a threat.”³⁸ During the first two months of 2006, MNCF recorded an average of ten escalation of force incidents per day; of those incidents, “about 5 percent resulted in an Iraqi civilian’s death [and e]ven percent resulted in an Iraqi injury.”³⁹ Some estimates concluded that over 1000 Iraqi civilians were killed in escalation of force incidents between 2003 and early 2006.⁴⁰ The British Army’s statistics showed that forty-nine Iraqi civilians died in similar incidents with British forces between May 2003 and March 2004.⁴¹ Preplanned attacks can also result in large numbers of civilian deaths when the lines between legitimate target and innocent civilian are blurred. In Pakistan, where U.S. drones attack al Qaeda and Taliban leaders, rough estimates claim that “more than 600 civilians are likely to have died from the attacks”, approximately ten civilians for every militant killed.⁴² These statistics illustrate the fundamental question a commander confronts in combat: whether and when an “open fire” order can be given. To meet standard ROE requirements, the commander must be satisfied both that he has identified a legitimate target presenting an immediate threat *and* that opening fire is the only way to neutralize the threat.

³⁷ Nancy Montgomery, *U.S. Seeks to Reduce Civilian Deaths at Iraq Checkpoints*, STARS & STRIPES, Mar. 18, 2006, available at <http://www.stripes.com/article.asp?section=104&article=35816>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Al Skeini v. Sec’y of State for Def.*, [2004] EWHC 2911, ¶ 46 (Eng).

⁴² Daniel Byman, *Do Targeted Killings Work?*, FOREIGN POLICY ONLINE, June 14, 2009, http://www.foreignpolicy.com/articles/2009/07/14/do_targeted_killings_work.

The fact that hostile persons are indistinguishable from innocent persons in new warfare requires both new training methods and new understandings of operational dilemmas. Military training for new warfare is extraordinarily complex: militaries train soldiers to shoot (and if necessary, to kill) but at the same time require them to wait an additional second precisely to verify that the individual they face poses an immediate threat and is therefore a legitimate target. In the “zone of combat” — which has replaced the traditional battlefield — an extra second can literally be the difference between life and death. If the soldier waits that extra second and the individual was not an “innocent”, then in all probability, the soldier will be killed. Conversely, if the soldier does not wait and, failing to evaluate the threat presented thoroughly, fires at an innocent individual, the resulting death or injury of a person who was not a legitimate target may escalate the never-ending cycle of violence and human tragedy. Training 19-year-old soldiers to wait is counter-intuitive from all logical perspectives. From a command perspective, however, the very nature of new warfare makes it an essential principle.

In addition, the commander faces the basic operational reality of 19-year-old soldiers: they are scared, sometimes actively dislike what they are doing, and possess a fully loaded weapon with hundreds of bullets. If the requirement to wait is unclear in training, operational realities make understanding this demand infinitely more complex and dangerous. The following examples illustrate the dilemma faced by commanders on the ground:

- A battalion commander ordered to target three suspected terrorists plans a military operation that will minimize damage to innocent civilians while engaging the suspected terrorists. As the commander approaches the “zone of combat”, he receives reliable and credible intelligence information that hundreds of children are in the immediate vicinity. Although there is no doubt about the mission’s legality, the children’s presence raises significant operational dilemmas for the commander. If he decides to “go forward”, there is a more than reasonable chance of greater than minimal collateral damage. If he aborts the mission, the unit’s retreat in full view of the local community may negatively affect the state’s deterrent effect. The commander must decide whether to adopt a tactical approach (predicated

on the “here and now”) or a strategic perspective (target the terrorists in the future provided they are not planning an immediate attack).

- An on the ground commander reports that he has been attacked from a particular position and requests air support against the individual he has identified as the shooter. The helicopter pilot responds that he cannot determine with sufficient certainty that the individual the commander identified is indeed the shooter. The commander and the pilot each have a similar goal — to kill the actual shooter — but their differing perspectives on how to use the information available to them (what they saw/believed they saw) lead them to fundamentally different conclusions that directly affect how they carry out their legal obligations and operational missions.
- A commander receives a single source report regarding individuals presenting an immediate threat to his unit but concealed in a crowd of civilians. The commander conveys that report to air support but does not have specific identifying information and is not able to pinpoint the individuals’ location within the crowd. Although the pilots cannot positively identify the individuals, they nevertheless fire into the crowd, killing numerous civilians. They may have killed the reported perpetrators, but they have no way to confirm if they did.

In all three examples, the presence of individuals dressed in civilian clothing is the complicating variable. Some are hostile persons disguised as civilians; others are innocent civilians in the wrong place. But the immediate dangers the former pose and the obligations created by the latter are unclear. Without more focused guidelines for commanders to help them understand the conduct of the erstwhile civilian, new warfare’s inherent ambiguity will result in the continued tragic loss of innocent lives.

C. Limitations of the Traditional Framework

Applying the principles of distinction and proportionality in armed conflict requires specific and clear definitions of who is a legitimate target

and who is an innocent civilian deserving protection from attack.⁴³ LOAC traditionally classifies individuals as either combatants or civilians and fits all persons within one of these two categories.⁴⁴

1. The Combatant-Civilian Paradigm

The Geneva Conventions use the term combatant to denote a particular status in international armed conflicts. All members of the regular armed forces of a state involved in an international armed conflict are combatants.⁴⁵ In addition, members of armed groups or militia belonging to a state party in an international armed conflict will qualify as combatants if, as a group, they fulfill four conditions: operate under a responsible command, wear a fixed distinctive sign, carry arms openly, and respect the laws of war.⁴⁶ Civilians taking up arms in a *levée en masse* attain combatant status as well.⁴⁷ Combatants have a right to participate in hostilities and have immunity from prosecution — known as combatant immunity — for lawful acts taken in the course of combat. In addition, all combatants are lawful targets at all times except when they are *hors de combat* because of sickness, wounds, detention, or other causes.⁴⁸ All combatants are obligated to distinguish themselves from the civilian population; failure to do so will result in forfeiture of combatant immunity for acts taken during such time.⁴⁹

⁴³ INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1911 (Yves Sandoz, Christophe Swinarki & Bruno Zimmerman eds., 1987) [hereinafter PROTOCOL COMMENTARY] (“As we have seen, the principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons. In view of the latter principle, it is essential to have a clear definition of each of these categories.”).

⁴⁴ DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, *supra* note 13, at 113.

⁴⁵ *See* GC III, *supra* note 2, art. 4(1).

⁴⁶ *See id.* art. 4(2).

⁴⁷ *See id.* art. 4(6). Article 4 of GC III includes two other categories of combatants for the purposes of POW status: civilians accompanying the armed forces and members of the merchant marine and civil air crews. *Id.* art. 4(4)–(5).

⁴⁸ *See id.* arts. 3, 13, 23; GC I, *supra* note 2, art. 12; Hague Convention No. IV, Respecting the Laws and Customs of War on Land art. 23(c), Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.

⁴⁹ It is important to note, however, that AP I introduced a new and still controversial description of combatant status, declaring that members of armed groups *will* retain their status as combatants as long as they carry their arms openly during each military engagement and during such time as they are visible to the enemy while preparing for an

LOAC defines civilians as all persons in an international armed conflict who are not combatants.⁵⁰ In non-international armed conflict, civilians are all persons who are not members of armed forces or armed groups.⁵¹ An important corollary for the purposes of distinction is that when there is doubt about a person's status, he is to be considered a civilian.⁵² As discussed above, civilians are immune from attack and are to be protected as much as possible from the effects of conflict. Civilians who take up arms, however, lose their immunity from attack during the time they are participating in hostilities — whether permanently, intermittently, or only once — and become legitimate targets.⁵³ One of the critical questions, which we address below, is whether that lost immunity is “transitory”, depending on the individual's action at a particular moment in time, or is a permanent change in status. Even though these persons are

attack. AP I, *supra* note 2, art. 44(3); *see, e.g.*, President Ronald Reagan, Letter of Transmittal, Protocol Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, Concluded at Geneva on 10 June 1977, Jan. 29, 1987, S. TREATY DOC. NO. 100-2, *reprinted in* 81 A.J.I.L. 910, 910–12 (1987).

⁵⁰ AP I, *supra* note 2, art. 50. *See also* DEP'T OF ARMY, THE LAW OF LAND WARFARE, FM 27-10, http://www.aschq.army.mil/supportingdocs/Fm27_10.pdf; *Interpretive Guidance*, *supra* note 3, at 995 (“For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”). In addition, persons who are combatants under GC III or AP I but are *hors de combat* are not civilians, but retain their combatant status. *See* Prosecutor v. Martić, Case No. IT-95-11-T, Trial Chamber Judgment, ¶ 55 (June 12, 2007); Prosecutor v. Blaskić, Case No. IT-95-14-A, Judgment, ¶¶ 110–14 (July 29, 2004).

⁵¹ *See* PROTOCOL COMMENTARY, *supra* note 43, ¶ 4789.

⁵² AP I, *supra* note 2, art. 50; *see also* PROTOCOL COMMENTARY, *supra* note 43, ¶ 1920 (“[P]ersons who have not committed hostile acts, but whose status seems doubtful because of the circumstances . . . should be considered to be civilians until further information is available, and should therefore not be attacked.”); Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 50 (Dec. 5, 2003) (“A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status.”).

⁵³ AP I, *supra* note 2, art. 51(3); *see also* PROTOCOL COMMENTARY, *supra* note 43, ¶ 1942 (“The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts.”); HCJ 769/02 Public Comm. Against Torture v. Gov't of Israel [2006] ¶ 26, *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf; Prosecutor v. Kupreskić, Case No. IT-95-16-T, Judgment, ¶¶ 522–23 (Jan. 14, 2000) (“In the case of clear abuse of their rights by civilians, international rules operate to lift that protection which would otherwise be owed to them.”).

involved in hostilities, they retain their civilian status because they do not fit the definition of combatant.⁵⁴ The term “civilians” is therefore confusing because it includes persons who are legitimate targets and persons who are protected.

In new warfare, a conservative approach to distinguishing between innocent civilians and legitimate targets — in which troops err heavily on the side of civilian status in making determinations — creates a significant problem. Most persons in new warfare would fit into a traditional category of civilians because they are not members of non-state armed forces or the regular armed forces of a state. Many of these individuals may engage regularly in hostile acts but — because they are traditionally categorized as civilians — will be legitimate targets only when meeting the specific test for directly participating in hostilities; that is, they attack at will but can only be attacked at very specific and limited times.⁵⁵ Rather than join an organized armed group, which would make them legitimate targets at all times under a traditional analysis, these persons fight on their own or through proxy groups. In doing so, they undermine traditional efforts at categorization and gain a measure of protection they otherwise would not have, enabling them to act with near impunity. The law’s traditional mandate that any doubts be resolved in favor of civilian status therefore effectively acts as a free pass.

The multitude of terms courts and commentators currently use to describe this category of individuals participating in hostilities — unlawful combatant, unprivileged belligerent, enemy combatant, to name a few⁵⁶ —

⁵⁴ LOAC does not contemplate a category of persons who can fight but not be attacked, or who can be attacked but may not fight back — such a category of “quasi-combatants” would undermine the entire fabric of humanitarian law. See Public Comm. Against Torture, HCJ 769/92 at ¶ 28 (“It is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions*.”). The mere fact that a person “fights” does not make him a combatant. See Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 269 (Nov. 16, 1998) (“While it is apparent that some of the persons detained in the Celebici prison-camp had been in possession of weapons and may be considered to have participated to some degree in ‘hostilities’, this is not sufficient to render them entitled to prisoner of war status.”).

⁵⁵ See Public Comm. Against Torture, HCJ 769/02 at ¶ 40.

⁵⁶ *Interpretative Guidance*, *supra* note 3; Public Comm. Against Torture, HCJ 769/02; John Rikou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 174 (2005); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 519 (2005); Watkin, *supra* note 14, at 73; JENNIFER ELSEA, TREATMENT OF “BATTLEFIELD

offers no insights to help commanders make effective and lawful operational decisions regarding their treatment (i.e., target, detain, protect). Tarring all hostile persons with the same brush ignores the critical distinctions that affect operational decision-making and leaves commanders lacking specific and relevant guidelines for action.

2. *Distinction and Proportionality: Principles Under Fire*

New warfare's complexities confound the classic bifurcation between combatants and civilians in LOAC. A distinct asymmetry between the military and technological capabilities of the state and non-state parties and the intermingling of civilians and hostile persons predominate in new warfare. Both challenge the effective application of LOAC. First, the "disadvantaged party has an incentive to blur the distinction between its forces and the civilian population in the hope that this will deter the other side from attack."⁵⁷ For example, during Operation Iraqi Freedom, Iraqi insurgents commonly wore civilian clothing when approaching United States and British forces in order to get closer without seeming to present a threat.⁵⁸ According to the Pakistani military, Taliban leaders have bought children to serve as suicide bombers, recognizing that "[t]he young suicide bombers may be able to reach targets unnoticed."⁵⁹ Once soldiers face attacks from legitimate targets posing as innocent civilians, they will be more likely to engage persons who appear to be civilians (some of whom truly are innocent civilians) in order to protect against surprise attacks. The effect: uncertainties and unforeseen dangers that undermine the very protections for innocent civilians inherent in the principle of distinction.

Second, the great fluidity between hostile persons and innocent civilians and the conscious blending of hostile persons into the civilian

DETAINEES" IN THE WAR ON TERRORISM, CRS REPORT FOR CONGRESS, RL 31367 (2005), available at <http://www.fas.org/irp/crs/RL31367.pdf> (last visited Mar. 31, 2010).

⁵⁷ Michael N. Schmitt, *The Impact of High Tech and Low Tech Warfare on the Principle of Distinction*, in INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY'S CONFLICTS: CHANGES AND CHALLENGES 169, 178 (Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005).

⁵⁸ *Id.* Similarly, Afghan militants have posed as women to escape from firefights without being identified. See *Official: Afghan Militants Fled Dressed as Women*, CNN, July 6, 2009, <http://www.cnn.com/2009/WORLD/asiapcf/07/06/afghanistan.marine.standoff/index.html>.

⁵⁹ Nic Robertson, *Pakistan: Taliban Buying Children for Suicide Attacks*, CNN, July 7, 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/07/07/pakistan.child.bombers/index.html>.

population makes a soldier's task nearly impossible.⁶⁰ For example, a soldier manning a checkpoint sees a jeep speeding towards him. It could be civilians seeking aid or fleeing from danger, or it could be insurgents bent on driving the vehicle into the checkpoint as a suicide bomb. The soldier who reacts too soon and fires on the jeep risks killing innocent civilians; the soldier who waits too long to make a positive identification risks dying in a fiery explosion.⁶¹ Neither choice is acceptable from a tactical or legal standpoint. Insurgents take advantage of this dilemma every day to gain an edge over the superior fighting capabilities of state forces. In Afghanistan, for example, the Taliban regularly "use a tactic of engaging coalition forces from positions that expose Afghan civilians to danger."⁶² This tactic is designed to force U.S. troops to either hold their fire in the face of an attack or endanger innocent civilians, a lose-lose situation.

The nature of combat in new warfare also demands a more nuanced understanding of the factors to include in a proportionality analysis and how to weigh those factors. In particular, the expanding range of persons involved in conflict and the great difficulty in identifying and distinguishing among individuals has complicated the application of proportionality. Persons who participate in hostilities, or assist those who do so, should be counted as legitimate collateral damage, even if they could not be targeted directly at the moment of an attack, and therefore should not factor into the proportionality analysis as civilian casualties. If a commander cannot determine who is a legitimate target, who constitutes legitimate collateral damage, and who is an innocent civilian, however, his ability to make the

⁶⁰ Amos N. Guiora, *The Role of the Legal Advisor in Armed Conflict*, in MISSION IMPOSSIBLE (Yoel Elitzur, ed., pending submission).

⁶¹ See, e.g., *Suicide Bomber Attacks Afghan Army Base*, N.Y. TIMES, Aug. 15, 2009 (describing how a suicide car bomber tried to drive into the army base, was stopped at the gate and then detonated his explosives at the gate, killing one soldier and wounding five other people); see also Amos N. Guiora, *Teaching Morality in Armed Conflict: The Israel Defense Forces Model*, 18 JEWISH POL. STUD. REV. 1, 3 (2006).

⁶² Jim Garamone, *Directive Re-emphasizes Protecting Afghan Civilians*, AM. FORCES PRESS SERV., July 6, 2009, available at <http://www.af.mil/news/story.asp?id=123157435>; see also UNAMA REPORT, *supra* note 5, at 12 ("In several cases investigated by UNAMA, it is apparent that important traditional codes of hospitality and power imbalances inhibit the ability of villagers living in areas with a strong [anti-government element] presence to refuse shelter to an [anti-government element] commander or his men. Information indicates that [anti-government elements] take advantage of these factors to use civilian houses as cover, to deter [pro-government force] raids, or to increase the likelihood of civilian casualties if raided by [pro-government forces], potentially violating international humanitarian law.").

necessary proportionality assessments is severely handicapped. These difficulties will correspondingly undermine his ability to carry out his mission within the bounds of the law.

Current strategy in Afghanistan starkly illustrates the extraordinary challenges commanders face and how these challenges have in turn affected strategic and tactical approaches. Revised U.S. tactical doctrine in Afghanistan now identifies the protection of civilians⁶³ — from both Taliban attacks and the effects of U.S. counterinsurgency operations — rather than the number of enemies killed as the primary goal of the mission.⁶⁴ In issuing the new directive, General McChrystal announced that

bombs could be dropped only when *solid* intelligence showed that high level militants were present or U.S. forces were in imminent danger [and] made it clear he would rather allow a few rank-and-file Taliban fighters to get away than to flatten a house whose occupants might include women and children.⁶⁵

Thus, U.S. rules now limit airstrikes on residential compounds to “the most clear and critical cases.”⁶⁶ The following description of the two primary types of airstrikes U.S. forces employ emphasizes the dilemmas U.S. forces encounter in balancing the protection of civilians with the use of force against the enemy:

NATO and the U.S. military use both preplanned and spontaneous air strikes based on combat conditions. Largely

⁶³ The language used here illustrates the problem of the traditional category of civilian — which civilians are supposed to be protected? All civilians, including hostile persons, or just innocent civilians?

⁶⁴ See HEADQUARTERS, INTERNATIONAL SECURITY ASSISTANCE FORCE, KABUL, AFGHANISTAN, TACTICAL DIRECTIVE OF JULY 6, 2009, http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (“Gaining and maintaining [the support of the population] must be our overriding operational imperative. . . .”); see also Garamone, *supra* note 62; Alan Silverleib, *U.S. Strategic Shift: Win, Hold Afghan Territory*, CNN, July 6, 2009, <http://www.cnn.com/2009/POLITICS/07/06/afghanistan.strategic.shift/index.html> (describing McChrystal’s philosophy as “measuring success by the number of Afghans protected, not bad guys killed”).

⁶⁵ Rajiv Chandrasekaran, *Pentagon Worries Led to Command Change*, WASH. POST, Aug. 17, 2009, at A1 (emphasis added).

⁶⁶ *Id.*

due to increased intelligence, strikes planned in advance have caused zero civilian casualties in the past two years. . . . A “pattern of life” analysis — an assessment of who lives in a particular structure or area — is also required prior to calling in an air strike. The daily activities of suspected militants are tracked and analyzed to ensure that civilians are not mistakenly targeted.

The second type of air strike is a result of “troops-in-contact.” This generally occurs when a small number of troops confront militants and, after an initial exchange of fire, call in an air strike. During impromptu strikes, there is not sufficient time to complete a formal collateral damage assessment, resulting in property damage, injury, and death of innocent Afghans. *In 2006 and 2007, almost every civilian casualty caused by NATO was a result of this type of incident.* The increase of insurgent tactics that include firing from homes and other populated areas has significantly boosted civilian casualties. Instead of calling in troops-in-contact air strikes, soldiers are increasingly being encouraged to withdraw and disengage when confronted by overwhelming force.⁶⁷

Tactical goals of reducing or eliminating civilian casualties in Afghanistan have led the United States to forego the balancing inherent in a proportionality assessment in favor of a mandate to protect civilians at all costs.

II. Operationalizing LOAC: Targeting Parameters

When the lines between combatants and civilians are already blurred and civilians often alternate between civilian pursuits and engaging in hostilities, the principle of distinction faces its greatest challenge. If soldiers

fire at enemy civilians *simply suspected* of somehow planning or conspiring to plan military attacks, or of having planned or

⁶⁷ J. ALEXANDER THIER & AZITA RANJBAR, KILLING FRIENDS, MAKING ENEMIES: THE IMPACT AND AVOIDANCE OF CIVILIAN CASUALTIES IN AFGHANISTAN 2 (2008), *available at* http://www.usip.org/files/resources/USIP_0708_2.PDF.

directed hostile actions, the basic foundations of international humanitarian law would be seriously undermined.⁶⁸

If soldiers hold their fire, however, they risk being blown up by a suicide bomber disguised as an innocent civilian. Soldiers can no longer simply distinguish between combatants and civilians because that leaves open the question of which civilians are targets and which are innocent. They must also therefore distinguish between innocent civilians who take no part in hostilities — and deserve protection from attack — and hostile persons who participate directly in hostilities and are therefore legitimate targets. Existing applications of LOAC do not help, however. To make LOAC effective, the first key step is to identify several new categories of hostile persons, each of which requires unique operational assessments and responses. Commanders then need a checklist of conduct-specific factors to guide decision-making.

A. *A New Framework for New Warfare*

On first glance, categorizing individuals in conflict as either *innocent civilians* or *legitimate targets* may seem unorthodox; after all, the law of armed conflict provides detailed prescriptions for identifying persons as combatants, volunteer militia, protected persons, participants in a *levée en masse*, and others. When assessing the rights and obligations of persons, these traditional categories and the distinctions among them are crucial. However, to provide relevant and focused guidance for commanders and troops on the ground in conflict zones, only one distinction is important: the distinction between those who can be attacked and those who cannot.

1. *Innocent Civilians*

We use the term *innocent civilians* to refer to only those persons who retain their immunity from attack at all times. Persons who actively participate in hostilities are legitimate targets and therefore do not belong in the same category as innocent civilians even though LOAC traditionally places both groups within the same broader civilian category. Here we depart fundamentally from LOAC's traditional approach: we divide the traditional category of civilians into those who are immune from attack (innocent civilians) and those whose conduct makes them legitimate targets. Most importantly, we re-define the category of persons who are legitimate

⁶⁸ ANTONIO CASSESE, INTERNATIONAL LAW 421 (2005) (emphasis added).

targets and emphasize the need for a narrower, conduct-specific analysis of such persons, thus reconfiguring how we — and, in particular, the commander — classify individuals in conflict.

2. *Legitimate Targets*

A *legitimate target* is an individual (or object) that may be lawfully attacked during hostilities. We must then differentiate among the numerous categories of individuals who fit the definition of legitimate target because not all may be targeted at all times. One category of legitimate target is combatants and members of organized armed groups.⁶⁹ The latter primarily includes individuals who fight on a regular and recurring basis on behalf of a non-state party in any type of conflict.⁷⁰ Commanders on the ground may be able to identify these targets by evidence of their status, such as a distinctive sign or other identification. In many new warfare situations, however, members of organized armed groups purposely intermingle with civilians and disguise themselves by concealing themselves within the civilian population. For example, in April 2003, Iraqi troops in civilian garb used women as scouts to lure U.S. Marines into a firefight, leading to the death of twelve innocent Iraqi civilians, including women and children.⁷¹ The Marines were fooled into believing that the Iraqis were innocent civilians and were therefore caught off guard because they could not determine whether the Iraqis intended to commit hostile acts.

In these situations, commanders cannot distinguish members of organized armed groups by their status, but must analyze their conduct instead to determine whether they present a threat. As one U.S. Marine in Afghanistan asked, “What does a Taliban or Al Qaida fighter look like? Can you determine the enemy’s identity by the equipment they use?”⁷² When they can be identified, members of armed groups are legitimate

⁶⁹ See PROTOCOL COMMENTARY, *supra* note 43, ¶ 4789 (“[T]hose who belong to armed forces or armed groups may be attacked at any time.”).

⁷⁰ See YORAM DINSTEIN, CHARLES H. B. GARRAWAY & MICHAEL N. SCHMITT, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: WITH COMMENTARY 4 (2006) (“[F]ighters are members of armed forces and dissident armed forces or other organized armed groups, of taking an active (direct) part in hostilities.”).

⁷¹ Elizabeth Neuffer, *City Battles Will Boost Growing Civilian Toll*, BOSTON GLOBE, Apr. 7, 2003, at A25.

⁷² CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ — VOLUME I: MAJOR COMBAT OPERATIONS, 11 SEPTEMBER 2001–1 MAY 2003 98 (2004).

targets at all times⁷³ — as long as the requirements of proportionality and collateral damage assessments are met. Whether a commander chooses to engage will depend on whether the person poses a threat at that moment and the likelihood of mission success.

We focus here primarily on other hostile persons, those who would traditionally fall within the category of civilians but are taking part in hostilities. However, the factors commanders use to identify and distinguish among the four sub-categories below will be equally useful when conduct-specific factors are necessary to identify members of armed groups as well.⁷⁴ For operational purposes, conduct-specific factors — as detailed below — promote the principle of distinction by focusing on the essential question of who can be targeted rather than leaving soldiers and commanders to be handicapped by the inability to distinguish among persons in the zone of combat.

B. A New Understanding of Who is a Legitimate Target

Direct participation in hostilities separates persons who can be lawfully targeted from innocent civilians.⁷⁵ In recent years, courts and commentators have struggled to define the concept of direct participation in hostilities and develop parameters for understanding when civilians — as the term is traditionally used — become legitimate targets by dint of such participation.⁷⁶ We will not engage in a thorough analysis of these efforts

⁷³ *Interpretive Guidance*, *supra* note 3, at 1001–02.

⁷⁴ For example, in early August 2009, International Security Assistance Force (“ISAF”) forces encountered four insurgents carrying weapons and plastic jugs (a common means of transporting explosives). Believing the insurgents were preparing to plant IEDs, the ISAF forces attacked them with rockets and small arms fire from a helicopter, killing all four. ISAF’s report on the incident demonstrates that the insurgents were targeted because of their hostile conduct — preparing to plant explosives — rather than merely because of their status. *See* Press Release, NATO, ISAF Forces Engage Insurgents in Southern Afghanistan (Aug. 5, 2009), *available at* <http://www.nato.int/isaf/docu/pressreleases/2009/08/pr090805-563.html>. Although the report clearly identifies the individuals as insurgents (a status), it specifically relies on their behavior to justify the attack (i.e., their conduct).

⁷⁵ AP I, *supra* note 2, art. 51(3) (“Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.”).

⁷⁶ *See, e.g., Interpretive Guidance*, *supra* note 3; HCJ 769/02 Public Comm. Against Torture in Israel v. Gov’t of Israel [2006] ¶ 26, *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf; Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgment, ¶ 616 (July 15, 1999); JEAN-MARIE HENCKAERTS ET AL., *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005); Callen,

here. For the purposes of this article, we define direct participation in hostilities as acts intended to harm the enemy or the civilian population in a direct or immediate manner. We also address persons who provide some lesser type of assistance to those who are fighting — although their acts do not meet the definition of directly participating in hostilities, these individuals are no longer innocent civilians and must fit somewhere within the commander's framework for operational decision-making. To analyze and differentiate among persons in the zone of combat, commanders must consider the type of participation or activity, the level of such participation, and the degree of intensity involved.

1. *Categories of Legitimate Targets*

We re-categorize and re-define these persons into several sub-categories.⁷⁷ Using these categories, we operationalize the law of armed conflict for new warfare, providing commanders with effective tools to distinguish among persons in the zone of combat. When discussing who is a legitimate target, it is important to remember that in all cases commanders must also assess whether alternatives to targeting exist, such as detention, because targeting and open fire orders should be a last resort. Commanders can then determine whom (and how) to target, whom to detain, and whom to protect — the only way to meet the twin goals of mission success and protection of innocents.

a. *Legitimate Subject of Detention*

An emerging actor in conflict — particularly prevalent in new warfare — is the individual who provides some type of assistance or support to those who are fighting. One example is the farmer in Afghanistan who allows Taliban militants to fire missiles from his land a single time. The

supra note 14; Derek Jinks, *The Changing Laws of War: Do We Need a New Legal Regime after September 11?*, 79 NOTRE DAME L. REV. 1493 (2004); Jann K. Kleffner, *From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities — On The Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT'L L. REV. 315 (2007); Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1 (1990); Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, *supra* note 55, at 171–72, 181; Watkin, *supra* note 14.

⁷⁷ Existing analyses of direct participation in hostilities generally focus on how to define the discrete act that constitutes participation and have not analyzed the different levels of participation or the different types of participants in a way that is effective and relevant for commanders on the ground. See e.g., *Interpretive Guidance*, *supra* note 3, at 1012–19.

commander will certainly want to detain this person and question him for information about others providing assistance or engaging in hostilities. This person is not participating directly in hostilities because he is not actively engaging in acts causing harm to the enemy or the civilian population and is therefore *not* a legitimate target. However, he is providing a measure of support to the Taliban militants and should no longer be judged an innocent meriting protection, meaning that if U.S. forces open fire on the Taliban militants and the farmer is killed, he is legitimate collateral damage. Operationally, the commander must recognize the conduct of a person who falls within this category for three reasons: first, this person is not a legitimate target and may not be the subject of an open fire order; second, this person does not need to be protected from the effects of military operations designed to neutralize the militants using his property; and third, this person is a *legitimate subject of detention* and interrogation.

b. Transitory Target

Persons who directly participate in hostilities a single time or intermittently are legitimate targets only when they are preparing for, engaged in, or returning from hostilities. When not engaged in hostilities, these *transitory targets* may be detained and prosecuted for their acts. Suicide bombers and persons who plant roadside bombs are transitory targets — they are legitimate targets only when they are on their way to or from their mission — as are those who provide logistical support to these bombers. Another type of transitory target is the financier of terrorist attacks — his wiring of funds for the attack is the direct participation in hostilities justifying a targeting decision.

c. Recurring Target

Some transitory targets participate in hostilities with sufficient frequency and regularity that they become *recurring targets*. Whereas transitory targets engage in hostilities one or two times with no pattern or regularity, recurring targets participate on a regular and frequent basis.⁷⁸ For example, a recurring target might be the mailman who picks up his gun every Tuesday and Friday night to go out and shoot at U.S. patrols.

⁷⁸ In HCJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel [2006] ¶ 40, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf, the Israeli Supreme Court, sitting as the High Court of Justice, specifically mentioned the problem of the “‘revolving door’ phenomenon”.

Similarly, the farmer who allows his property to be used for firing missiles or launching attacks on a regular and frequent basis will, over time, be directly participating in hostilities by dint of his recurring assistance. He will therefore become a recurring target as well. In these circumstances, before acting to detain or neutralize this target, the commander will need intelligence to determine whether the farmer is being coerced to provide this regular assistance or whether he is voluntarily providing such support. As with transitory targets, recurring targets are only legitimate targets when directly engaged in hostilities and only if no other viable alternatives exist. The distinction between transitory targets and recurring targets — who in the moment appear to be engaged in the same or similar activity — will most often be based on available intelligence regarding past activities and future threats.

d. Permanent Target

In new warfare, a variety of persons who are neither soldiers nor members of armed groups play a continuous role in hostilities. This level of direct participation makes them *permanent targets*, meaning that they are legitimate targets at all times. Operationally, however, the need to consider viable alternatives before issuing an open fire order means that commanders can target these permanent targets when they are engaged in hostilities but should seek to detain them if feasible when they are not actively participating in hostilities.⁷⁹ Examples of permanent targets include the maker of improvised explosive devices (“IEDs”), the supplier and maker of suicide bomber belts, and the planner of terrorist attacks. In certain circumstances, recurring targets may participate with such regularity and frequency that their level of engagement becomes more akin to a permanent target, an analysis that will be fact-specific and dependent on intelligence information.

2. Distinction in Practice: A Checklist of Conduct-Specific Factors

Recognizing these sub-categories and the differences between them is critical in new warfare. Understanding how and why to distinguish

⁷⁹ See *PRI's The World: Interview with Amos N. Guiora* (NPR radio broadcast July 15, 2009), available at <http://www.theworld.org/2009/07/15/targeted-killings> (last visited Mar. 31, 2010) (discussing how these permanent targets should only be operationally targeted at all times if there is intelligence suggesting that they are planning for or engaged in future attacks).

among them is one of the most important tools a commander needs — and a key skill he must impart to his troops. The following questions provide a checklist of conduct-specific factors to use in determining whether a person is a legitimate target and, more important, in which sub-category he belongs. A wide array of actors, including the commander on the ground, the legal advisor, the individual soldier, and even more senior commanders, can use this checklist. The checklist thus facilitates rapid implementation of the appropriate response to a threat by providing a framework for assessing information on the spot and enabling actors to know exactly which variables and intelligence information are critical for decision-making.

1. *The Act:*

- Is it a direct act?
- Is it mere assistance?
- If yes, is it voluntary or coerced?

2. *Regularity:*

- Is the act or assistance occurring on a regular or recurring basis?
- Has the quality and nature of the act or assistance escalated?
- Has the person done the act or provided the assistance before?
- Is there information about future plans to repeat the act?

3. *Source/Intelligence:*

- Is the source (if human intelligence) defined as reliable by the intelligence community?
- Is the information valid, viable, and credible and has it been corroborated?
- Did the commander or soldiers positively identify the target “in the act”?
- If there was prior intelligence, does the unit's visual identification “match” the intelligence?

4. *Intelligence Value:*

- Is the person acting or providing assistance considered an important intelligence asset if detained and questioned?

C. *The Commander's Top Ten: Guidelines for New Warfare*

The Commander's Top Ten gives the commander the additional tools he needs to apply LOAC effectively in new warfare. These tools were not in his predecessor's toolbox, a toolbox that has proven inadequate to the challenges of new warfare. While the conduct-specific checklist above provides specific guidance for understanding, identifying, and distinguishing between and among different persons in the zone of combat, the Top Ten is a broader set of guidelines and tools for commanders to operationalize LOAC fully in new warfare. The guidelines below, along with the necessary operational capabilities, are the key to understanding and respecting LOAC and must therefore be included in the contemporary commander's toolbox. Without them, neither the commander nor the troops under his command will fully operationalize LOAC.

1. *Demand clear mission articulation from senior command, including conditions for aborting or altering the mission*

If they fail to provide clearly articulated mission objectives, senior command and national policymakers do junior commanders a fundamental disservice. Although one of us raised that concern in the context of the United States's engagement in Iraq,⁸⁰ it is at least as — if not more — relevant in Afghanistan. Changing the mission's purpose fundamentally confuses soldiers and commanders alike, and endangers those on the ground.⁸¹ While missions invariably change — an operational reality — the core purpose must be consistent and cannot be akin to a yo-yo. A commander must demand this clarity and consistency from his superiors; without it, both his leadership and his unit's discipline will be significantly at risk.

⁸⁰ Amos N. Guiora & Martha Minow, *National Objectives in the Hands of Junior Leaders*, in 1 COUNTERING TERRORISM IN THE 21ST CENTURY: INT'L PERSPECTIVES: STRATEGIC AND TACTICAL CONSIDERATIONS 179–89 (2007).

⁸¹ See Ann Scott Tyson, *Less Peril for Civilians, But More For Troops*, WASH. POST, Sept. 23, 2009, at A1 (explaining that as the United States mulls over future strategy in Afghanistan, "American service members are facing greater risks under a new strategy that emphasizes protecting Afghan civilians.").

2. *Provide clear mission articulation to soldiers*

From a practical perspective, each operational mission — from targeting a specific individual to a regular foot patrol — must have an articulated purpose. For missions targeting a specific individual, commanders must brief their soldiers regarding who the target is and why he is a target; how they can identify him; when and whether they are to detain or open fire; and any circumstances that would change the ROEs. Patrols require a different approach. While patrols, the most routine of duties, reflect a show of force and demonstrate presence, their numbing routine also makes them inherently dangerous. It is the commander's responsibility to fully brief soldiers participating in the patrol with respect to both potential targets they may encounter and the relevant ROEs specific to each of those targets. Unlike a specific targeting mission, a patrol is not intended to engage a specific individual; however, the range of legitimate targets the patrol may encounter necessitates that each soldier be fully briefed on how to identify these distinct threats, how to distinguish among them, and the different operational responses required for persons in the categories outlined in this article.

3. *Train soldiers to be “operational” for the mission*

One of the single most difficult aspects of new warfare is training a soldier to identify a legitimate target — particularly when that target is dressed no differently from an innocent civilian.⁸² Identifying a legitimate target relies on a combination of several factors:

- 1) The individual's specific behavior, including dress, body language, activity, and verbal communications;
- 2) Intelligence information about that individual; and
- 3) Intelligence information about a broader threat when the individual 'fits' the intelligence information.

Training must emphasize to soldiers the fundamental requirement to avoid generalizations, profiling, and collective punishment. It is essential —

⁸² See Guiora, *supra* note 61 (describing the preparation and implementation of training software for soldiers addressing an eleven-point code of conduct, including conduct with respect to a civilian population).

particularly in the context of new warfare — that any operational response be person-specific in both specific targeting missions and routine patrols.

We have, throughout this Article, suggested four primary sub-categories of legitimate targets. To meet the needs of new warfare, future military training must focus on these four sub-categories to maximize the operational impact on non-state actors while minimizing collateral damage. A combination of ROEs and the specific threat an individual poses form the basis for any operational response. Discerning the threat — and not acting either too soon or too late — depends on training that minimizes that ambiguity by teaching soldiers to develop and use a checklist for distinguishing between innocent civilians and legitimate targets and differentiating among the various types of legitimate targets.

4. *Demand rules of engagement that specify when open fire orders may be issued for previously- and individually-identified legitimate targets*

A previously-identified target is an individual, such as a bomb maker, who is identified as a legitimate target based on intelligence information. An operational plan to target this individual requires clear ROEs specifying when soldiers can open fire and when they must stand down. Soldiers undoubtedly prefer concise and precise ROEs, but ROEs must reflect operational reality. If the warfare is ambiguous, ROEs will — unfortunately — not be precise and concise. The key to operationalizing LOAC effectively in new warfare is to still provide useful guidelines for soldiers in the midst of this ambiguity. First, these guidelines must give soldiers the means to identify the target — in essence, to match him to the intelligence information they were given. Second, these guidelines must help soldiers determine when they can target the individual, based on the key LOAC principles of proportionality, military necessity, alternatives, and collateral damage.

5. *Demand clear rules of engagement that define legitimate targets*

Soldiers also need clear ROEs for identifying when and whether persons they encounter, such as a suicide bomber or IED planter, are legitimate targets even when not previously identified as such. ROEs for these individuals are person- and conduct-specific and operational realities mean that these ROEs are less precise and subject to greater interpretation than those for a previously-identified target. Discretion is an essential aspect

of individual conduct-based threat determination; determining whether an individual is a threat at a specific moment (and therefore a legitimate target) depends on a number of variables, including field conditions, the threat presented, the number and type of people in the vicinity, and the events of the previous few days. Although we can determine many of these variables in advance, their application is situation-dependent. Clear ROEs that specify who is a legitimate target and how to react will minimize the need for on the ground discretion and, in ambiguous situations, give soldiers the tools to exercise their discretion in accordance with both LOAC and the mission's purpose.

6. *Include soldiers who speak the local language and are experts on the local culture in each unit*

Including a soldier who speaks the relevant local language and understands the culture greatly enhances a patrol commander's ability to communicate with local populations. Not only does this improved communication serve an important public relations purpose, but — just as important — it also has the operational benefit of enabling the commander to collect information about the community directly. With language and cultural skills and an understanding of how to identify the different types of legitimate targets, this soldier can give the commander information otherwise unavailable through indirect communication. For example, in the immediate aftermath of an attack on the unit, the commander needs the most accurate information possible to make critical operational decisions. In real time and in the “fog of war”, commanders need to identify and distinguish between targets and innocent civilians and give effective warnings to the latter before taking action.⁸³ Language and cultural skills in the unit give the commander the tools to fulfill these legal and operational obligations.⁸⁴ In addition, the soldier can obtain more effective information from any detainees for the commander to use in future operations. By lessening dependence on external sources, such as villagers, and increasing

⁸³ AP I, *supra* note 2, art. 57(2)(c), (requiring that “effective advance warning . . . be given of attacks which may affect the civilian population, unless circumstances do not permit”).

⁸⁴ See NATO INTERNATIONAL SECURITY ASSISTANCE FORCE – AFGHANISTAN & U.S. FORCES – AFGHANISTAN, COMMANDER'S INITIAL ASSESSMENT, Annex E-2 (Aug. 30, 2009), available at http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf (“Furthermore, although ISAF has refined and enhanced the warnings that are issued, many Afghans do not understand them and consequently fail to comply.”).

reliance on intelligence information, the commander's operational efficiency and ability to respect LOAC improves significantly.

7. *For international and multinational forces, ensure full integration of ROEs and mission articulation and, if possible, conduct joint training sessions*

International and multinational operations add another layer of complexity to the already ambiguous situations inherent in new warfare. Although part of a unified command structure, each country's forces naturally have different military and political cultures and considerations that inform their operational choices. The September 4, 2009, airstrike on the Taliban-hijacked fuel tankers near Kunduz, Afghanistan, offers an example of these problems. After receiving reports that the tankers were hijacked and were stuck in the riverbed, the commander of the German army base nearby ordered an airstrike by two United States F-15 fighter jets that ultimately killed more than thirty civilians.⁸⁵ Subsequent reports and investigations revealed serious failures of operational procedures and raised questions about the German commander's ability to determine who was present at the scene, the decision to use air power instead of a ground operation given those uncertainties, and the apparent failure to consult with ISAF headquarters before ordering the airstrike.⁸⁶ At a more systemic level, the incident unearthed confusion and uncertainty regarding the appropriate use of force as part of the larger mission. In the past, U.S. and other coalition forces in Afghanistan had urged the German forces to take a more aggressive approach to the conflict with the Taliban.⁸⁷ Now, in the aftermath of the International Security Assistance Force's new tactical directive placing protection of civilians as the mission's highest priority and drastically limiting the use of airstrikes, the German action appears far too aggressive.

This brief example demonstrates the need for greater integration of mission articulation among international and multinational forces — both the broader mission purpose and the objectives of specific missions. Each

⁸⁵ Yochi J. Dreazen, *NATO Says U.S. Airstrike in Kunduz Killed 30 Civilians*, WALL ST. J., Sept. 17, 2009, at A8.

⁸⁶ *New Allegations Against German Officer Who Ordered Kunduz Air Strike*, SPIEGEL ONLINE INT'L, Sept. 21, 2009, <http://www.spiegel.de/international/world/0,1518,650200,00.html>.

⁸⁷ *See id.*; Joshua Foust, *Germany is ISAF's Weakest Link*, ATLANTIC COUNCIL, Sept. 9, 2009, http://www.acus.org/new_atlanticist/germany-isafs-weakest-link; Elizabeth Pond, *Germany's Combat Revival*, CHRISTIAN SCIENCE MONITOR, Aug. 7, 2009, at 9.

national component of an international force must not only share the same broader mission goals, but — most importantly — must share the same operational plan for achieving those goals. Different understandings of specific mission objectives lead to different definitions of legitimate targets, which can only create confusion and inconsistency in targeting and engagement decisions. To achieve better operational consistency, international and multinational forces must incorporate integrated training in how to identify and how to react to legitimate targets, and how to distinguish among the various categories of legitimate targets for operational purposes. Without training to implement broad and specific mission goals on the ground, coordination at the highest levels will lose out to confusion and ambiguity on the ground.

8. Request establishment of field detention centers

Planning for detention centers before an operation begins is an integral aspect of new warfare. Otherwise, on the ground commanders — whose primary mission is engaging the enemy and protecting civilians — will be forced to address questions with which they have minimal familiarity and for which they are not operationally trained, including detainee rights, interrogation, and detention conditions. Commanders need a detention center nearby to take any detainees as quickly as possible, minimizing soldiers' contact with the detainees and maximizing unit energies on the core operational mission. U.S. patrol units, for example, receive training in the five “S’s and T” of detainee handling — Search, Segregate, Silence, Speed, Safeguard, and Tag.⁸⁸

The Israel Defense Force’s March 2002 Operation Defensive Wall highlighted the problems that arise when detention centers are not an integral aspect of operation planning.⁸⁹ Thousands of Palestinians were arrested daily without adequate advance arrangement and the initial screening was done in temporary — and not suitably prepared — facilities at brigade headquarters.⁹⁰ Criticizing the last minute arrangements, the Israeli Supreme Court stated that

⁸⁸ DEP’T OF ARMY, FM 3-19.40, INTERNMENT/RESETTLEMENT OPERATIONS ¶ 3-7 (2001).

⁸⁹ Prof. Guiora analyzed and prepared the IDF’s Judge Advocate General’s Corps “lessons learned” after Operation “Ebb and Flow”.

⁹⁰ HCJ 3278/02 Center for the Def. of the Individual v. IDF Commander in the West Bank [2002] ¶ 26, *available at* http://elyon1.court.gov.il/files_eng/02/780/032/A06/02032780.a06.pdf.

the need for minimal detention conditions was a natural result of the goals of the operation. There was no surprise in the matter. There was the possibility of preparing appropriate divisions with suitable detention conditions. What was done a number of days after the beginning of the operation should have been done several days before it began.⁹¹

9. *Reduce unknown variables*

To minimize loss of life among soldiers and innocent civilians alike, commanders need comprehensive intelligence information about both the innocent civilian population and potential legitimate targets. In particular, commanders need up-to-the-minute information regarding all aspects of the relevant civilian community: meeting places, modes of transportation, gathering locations, religious observance patterns, cultural celebrations, school locations and hours of educational activity, hospital and health facility locations, and facilities for individuals with special needs. This knowledge helps minimize the unknown, which in turn will enhance target-specific military action, protect innocent civilians from mistaken targeting, and limit collateral damage. Intelligence gathering and analysis is central to reducing unknown variables in new warfare; without it, commanders will be unable to identify legitimate targets accurately and protect the innocent civilian community.

10. *Articulate the distinction between detainable targets and legitimate targets*

To implement LOAC effectively, commanders need intelligence-, threat-, and category-dependent guidelines and criteria for deciding when to detain and when to engage. In addition, the requirement to consider alternatives necessitates that any decision to engage, per ROE, is a last resort and that soldiers understand the range of alternatives available given the nature of the target. Distinguishing among persons in this way is the essence of LOAC; it is also the essence of effective military command.

⁹¹ *Id.*; see also HCJ 3239/02 Marab v. IDF Commander in the West Bank [2003], available at http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.pdf; Amos N. Guiora & Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51, 61 (2005).

Failure to distinguish violates LOAC and is also — tragically — too “easy” when under fire, one of the realities of the new warfare. Commanders are under enormous strain to engage at the same time that they are also under enormous pressure to ensure person-specific engagement. The four sub-categories we identify specifically seek to address the tension between these two pressures. Mistakes happen and will continue to happen, making articulation and implementation of distinctions essential.

The previously mentioned dilemma regarding “waiting an additional second” is, operationally, the manifestation of distinguishing between legitimate subjects of detention and the other three categories of targets. A permanent target (bomb maker) or transitory target (suicide bomber) is a legitimate target; a farmer who infrequently allows his land to be used for firing weapons is not, even though he is unquestionably detainable. This approach meets LOAC’s requirements and is equally important from an operational perspective because a legitimately detained individual can provide — through lawful interrogation — important information that would perhaps otherwise be unavailable to the commander and his superiors. Using this information, the commander can then more accurately determine which other targets are “targetable”, which are “detainable”, and, in certain cases, when changing operational circumstances make a “detainable” person now “targetable”.

III. Future Recommendations and Analysis

Our new framework and guidelines for commanders operationalize the law of armed conflict to address the challenges of new warfare. But these guidelines cannot necessarily tackle unforeseen challenges from unknown new types of future conflicts. To do so, LOAC needs to be more agile. Agility means that the law can adapt to changing circumstances and meet the needs of policymakers and commanders on the ground alike. It means that the law must allow room for new ways of thinking that uphold the law’s goals and principles precisely when they are under fire. Agility means that when old approaches are not working, the law helps us find the answers.

As new warfare became a prevalent, and now predominant, form of conflict, the law did not adapt appropriately to the complicated scenarios new warfare presented. The international community continued to focus on traditional visions of combatants and civilians, notwithstanding the

disconnect between that framework and the reality on the ground in new warfare. Most criticisms of the law argued that the law could no longer apply, when, in fact, such critiques simply did not examine how it could apply in a more agile way.

We focus on maximizing that agility to enable LOAC to meet the demands of new warfare while still preserving the principles and goals that form the law's foundation. The steps we take here are precisely the steps that must be taken in future situations that pose existential challenges to LOAC:

First, we analyze why new warfare creates grave difficulties for LOAC as traditionally applied. LOAC requires that commanders distinguish between those who are fighting and those who are not, but the traditional legal framework offers few clues for how to do so in new warfare. As an example, future conflicts are almost certain to involve significantly greater use of cyber-warfare and technological capabilities we cannot predict. In these situations, delineating between military and civilian objectives may prove to be almost impossible without new understandings of these legal terms that are relevant to future conflicts.

Second, we identify the key legal principles at risk in new warfare: distinction and proportionality. When new warfare makes distinguishing between persons extraordinarily complicated, fulfilling the obligations of distinction and proportionality becomes equally difficult. Future conflicts may pose unforeseen challenges for other legal obligations and principles whose application seems straightforward today; only by zeroing in on the specific principles can we maximize LOAC's adaptability in the future.

Third, we use the basic goals of the legal principles at issue to create a new, more workable framework. Distinction and proportionality rely on the ability to classify and distinguish among persons in conflict, so we created new sub-categories to sharpen commanders' ability to distinguish and to respond accordingly. This third step is critical to making LOAC agile — if we cannot find ways to adapt how we apply the law, we will be left only with the claims that the law can no longer work, an unacceptable result.

Fourth, we turn the new framework into operational, on-the-ground guidelines that make LOAC relevant and useful for commanders and policymakers. The conduct-specific checklist and the Commander's Top

Ten above give commanders concrete steps to use the law effectively in training their troops, preparing for missions, and fulfilling these missions. With these new tools, commanders can distinguish between innocent civilians and legitimate targets and, just as important, distinguish among the various types of legitimate targets to find the best and most appropriate operational response for each situation.