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**NONCOMBATANTS IN THE LONG WAR:
THE END OF INNOCENCE?**

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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Abstract

Even before the tragic events of September 11, 2001 thrust the United States into the Long War, legal analysts, political commentators, and members of the armed forces recognized the need to re-examine the Law of Armed Conflict (LOAC) and its impact on military operations. Most popular interpretations of this body of law seem to place undue restrictions on the use of military force in modern warfare, particularly in an environment where America's enemies are increasingly difficult to identify. This paper argues that international law's current definitions of "combatants" and "non-combatants" are obsolete in the modern world. It begins with a brief look at the origins of international law as it relates to combatants and non-combatants. Then, it examines the nature of war in the 21st century, focusing on the increasing role of "lawfare" and the rising incidence of "concealment warfare" and their effect on the legal distinction between civilians and terrorists. The paper concludes by offering a new, more modern and practical interpretation of the distinction between combatant and non-combatant to help operational planners and targeteers better employ military force against enemies who routinely work to blur the line between them.

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INTRODUCTION

*The prime characteristic of the military is not that they use violence . . . it is that they use that violence with great deliberation.*¹

Even before the tragic events of September 11, 2001 thrust the United States into the current Long War, many legal analysts, political commentators, and members of the armed forces recognized the need to re-examine the Law of Armed Conflict (LOAC) and its impact on military operations. Following NATO's intervention to end the Kosovo crisis in 1999, most popular interpretations of this body of law seemed to place undue restrictions on the use of military force in modern warfare. The nature of the battlespace in today's war makes a reconsideration of the rules of war even more imperative, since America's enemies are increasingly difficult to identify. This paper argues that the current definitions of "combatants" and "non-combatants" extant in international law are obsolete in the modern world. While humanitarian law has long sought these distinctions to limit the effects of the violence inherent in war, strict adherence to these ideas, as they are currently codified in the Geneva Conventions and widely interpreted today, may actually serve to increase suffering among the truly innocent. Therefore, a new, more modern and practical interpretation of the distinction between combatant and non-combatant is needed to help operational planners and targeteers better employ military force against enemies who routinely work to blur the line between them.

That is not to say that the LOAC and, more generally, international humanitarian law are no longer necessary. Rather, warfare in the 21st century demands new interpretations if this body of law is to continue to regulate the legitimate, deliberate use of force. Today's Long War is characterized by two developments that have significant implications for the law of armed conflict. By its very nature, a terrorist enemy will employ "concealment warfare," in order to actively hide among and exploit the civilian population for shielding,

sanctuary and deception.² Concealment warfare makes distinguishing among combatants and non-combatants problematic, thus complicating military operations. Taking advantage of legal distinctions such as these is an important means by which an adversary can engage in “lawfare” against the United States and its allies. Lawfare describes a method of warfare where law is used as a means of realizing a military or political objective.³ These developments significantly alter the landscape on which today’s war is being fought, and international law must change with it to remain applicable.

This paper begins with a brief look at the origins of international law as it relates to combatants and non-combatants. It continues by examining the nature of war in the 21st century, specifically focusing on the increasing role of lawfare and the rising incidence of concealment warfare. Together these factors have a major effect on the legal distinction between civilians and terrorists needed to deal with today’s conflict. Within this context, the study turns to an analysis of the meaning of “combatant” in the Long War. It will demonstrate that the traditional definition, as it is interpreted by most contemporary scholars, is inadequate in today’s environment. The paper concludes by offering a new definition that will provide more reasonable guidelines for targeting adversary combatants. While the issue of “collateral damage”—the inadvertent death or injury of civilians or damage or destruction of civilian objects—is closely related to a discussion of this definition, it is beyond the scope of this paper. The focus here is on developing a framework within which military (vice law enforcement) means may be used against terrorists in the context of international law. Indeed, far from eschewing any restrictions on the military use of violence, this analysis embraces the need for rational guidelines to shape its application in future operations. And it

is with the goal of enhancing the deliberation with which force is used that this study is undertaken.

PROTECTING THE INNOCENT

*Wars have never hurt anybody except the people who die.*⁴

Many of the provisions of the law of armed conflict seek to spare the civilian population from the scourge of war. In fact, in 1996, the International Court of Justice held that the distinction between civilians and belligerents was one of the “intransgressible principles” of international humanitarian law.⁵ Since this has not always been the case, how did this law evolve?

There has been for some time a widely shared interest in the world community (and especially the West) to use law to make the conduct of war as humane as possible. There have even been those who have sought to use it to prevent war itself. In 1874, the Brussels Convention first defined “who should be recognized as belligerents, combatants, and non-combatants.”⁶ The appalling experience of World War II resulted in the Geneva Conventions of 1949 that form the core of today’s LOAC. A principal focus of that effort was to spare noncombatants the adverse effects of war, based on a commitment to the principle that there was a place, even in war, for humanity and forbearance, and that international law should protect civilians from intentional targeting.⁷ The International Committee of the Red Cross, the keeper of the LOAC, summarizes this “essential rule” of international humanitarian law, declaring that, “the parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property. Neither the civilian population as a whole nor individual civilians may be attacked.”⁸

Two Additional Protocols to the 1949 Geneva Conventions continued the evolution of these rules in 1977. Protocol I reinforces the fundamental tenet of the obligation to

distinguish between persons who take part in hostilities and those who do not. The principle of distinction is not only central to the definition of the two privileged classes, combatants and civilians, but also in the Protocol's limitation of attacks to "military objectives," that is, certain people and objects with some inherent military value. Although several countries, including the United States, have not ratified Additional Protocol I, the targeting provisions are generally accepted as part of customary international law.⁹

Thus, humanitarian law establishes the right for combatants to participate directly in hostilities. By definition, "combatants" are immune from prosecution for killing they carry out in accordance with the law, and are legitimate targets of attack themselves.

"Noncombatants", on the other hand, are those "who formed no part of an enemy country's armed strength and made no contribution to it," and therefore are not legitimate military objectives.¹⁰ These "civilians" are separated from combatants in accordance with the fundamental humanitarian law principle of distinction.¹ They are further protected by the requirement that any use of force must be controlled to ensure that it is used intentionally only against valid military objectives.¹¹ However, while the provisions of international law generally prohibit the targeting of civilians and civilian objects, they say nothing about military targets, and seem to accept the possibility of unrestricted use of force, as long as the target is a proper target.

Over the years, however, the definition of noncombatant has been liberally reinterpreted, and the "protections" afforded civilians expanded to the point that some observers have been driven to decry the "myth of noncombatant immunity," that enjoys wide popularity today.¹² The reality is, however, that civilians have always suffered the most in

¹ While not legally identical, the terms "civilian" and "noncombatant" are used interchangeably in the narrow context of this paper.

war, and “the record shows that the ratio of civilians to military personnel killed in armed conflicts has, in fact, increased since the Conventions of 1949.”¹³ Despite this fact, the traditional laws of war (*jus in bello*¹⁴) that began with the broad principles of discrimination and proportionality are viewed by many today as strict regulations that seem to suggest that, “zero civilian casualties and no collateral damage are not only attainable outcomes in modern combat, but that these should be the norm.”¹⁵ While this view represents an admirable goal—protecting “innocents”—it is somewhat naïve and sets an unrealistic standard that jeopardizes virtually all efforts to legitimately employ military force.

Furthermore, industrialization and the rise of mass armies have made the traditional distinction between combatant and noncombatant obsolete, as modern war efforts came to depend less on the soldier in the field than on the moral and materiel support of the state he represents. As more and more people are needed to “contribute to the country’s armed strength,” where is the line between belligerent and civilian? Likewise, in many recent conflicts, large segments of civilian populations have been mobilized or intimidated to join the ranks of the combatants. In cases involving ethnic cleansing such as Rwanda and Kosovo, traditional, legal distinctions between combatants and noncombatants have little salience.¹⁶ And what happens when the enemy does not represent a state at all, much less its armed strength, like the adversary in the current Long War? In order to adequately answer these questions and develop a new definition of combatancy, one must first examine the realities of warfare today.

21ST CENTURY LAWFARE

*The law aims to minimize aggression, yet allows for (and arguably even stimulates) aggression if it is done for the right cause.*¹⁷

Unfortunately, despite the genuine concern for making war more humane which animated the parties in Brussels and Geneva, or even the humanitarian rhetoric that echoes in

a number of political and legal circles today, international humanitarian law has, from the beginning, been used as a tool to score political points.¹⁸ One prominent expert has described this use of the law of armed conflict as “lawfare,” or a method of warfare where law is used as a means of realizing a military objective.¹⁹ Through the use of lawfare, international law has the potential to weaken the ability of the U.S. to conduct effective military operations, and its effects have been evident in recent military operations, particularly NATO’s intervention in Kosovo and in the current operations in Afghanistan and Iraq.

Lawfare is increasingly effective because the increase in the level of global governance through multilateral institutions has led to changes in the role international law plays in contemporary world politics. According to many observers, the trend is that,

In specific, well-defined areas of international law, states have begun to recognize the authority of international consensus over individual state consent as the foundation of legal obligation. Specifically, states have begun to develop a consensus around the control of “excess state violence,” defined as a level of violence exceeding that which international political actors consider to be legitimate for pursuing national interests. This includes crimes against humanity, genocide, and grave breaches of the laws of war. In a major shift from twentieth-century practice, states are increasingly recognizing this body of international law as having universal applicability considered binding on all states regardless of whether they are parties to specific treaties.²⁰

Such a trend constitutes a real threat to U.S. national interests, since such an assault on state sovereignty weighs disproportionately against a strong power like the United States.²¹ This trend has encouraged the increasing manipulation of international law by states and others in the international system to achieve a variety of goals.

On the surface, one would expect that lawfare would result in less suffering in war. In practice, however, it too often produces behavior that jeopardizes the protection of the truly innocent.²² For example, one of the most effective techniques of lawfare is to use civilians as human shields.²³ By incorrectly claiming that the civilians placed near militarily

significant targets are protected from attack (whether they are there voluntarily or involuntarily), adversaries like Saddam Hussein and Slobodan Milosevic sought to thwart the U.S. military's use of force against them. Illegal and immoral acts such as these are a "cynical manipulation of the rule of law and the humanitarian values it represents," and very often serve to increase the risk of harm to civilians.²⁴

Another important aspect of lawfare springs from the distinction between *jus ad bellum* and *jus in bello*. The very concept of a "just war" raises the possibility that combatants might be zealots or fanatics, rather than soldiers simply serving their nations' interests. The perceived "justness" of the cause can excuse, at least in the perpetrators' minds, the use of excessive means. Crusaders bent on liberating Jerusalem or Islamic extremists working to create a new Caliphate have little concern for man-made limits on their behavior. Religious zealots inspired by the promise of a blissful eternity may be reluctant to accept the restrictions imposed by distinction and proportionality, particularly if those limits make paradise that much harder to reach. In the Kosovo and Iraq examples mentioned above, it was this kind of "just cause" that rationalized the cynical manipulation of the law and the increased harm to civilians. With *jus ad bellum* on one's side, who needs *jus in bello*? (Except, of course, when it applies to the enemy.)²⁵

CONCEALMENT WARFARE

*Concealment warfare challenges western strategy, technology, ideology, morality and resolve . . .*²⁶

The second major evolution in the nature of warfare in the 21st century is the increased use of "concealment warfare." Concealment warfare is best understood as a form of asymmetric warfare in which a weaker adversary seeks to apply strategy where its stronger foe cannot effectively respond in kind.²⁷ It involves the employment of civilians and civilian objects in the battle space to achieve a strategic advantage, so concealment warfare works

best when combined with lawfare. Concealment warfare's objective, and its greatest strength, is that it creates a dilemma for the forces it is used against in their observation of the humanitarian principles of LOAC. An enemy first violates the provisions of LOAC to gain a military advantage by concealing military assets with civilian objects, wearing civilian clothes, or commingling with the civilian population. When the engagement of both civilians and the adversary is justified to achieve a military advantage, it nullifies the fundamental protection afforded civilians by the LOAC, allowing the adversary to again exploit the law by accusing the attacker of violating humanitarian principles through an attack on civilians. In the court of public opinion, if not international courts of law, the enemy exploits the loss of civilian life resulting from a legitimate attack in order to further his own ends.²⁸

Belligerents in wars have often used the tactic of concealing military personnel and equipment with civilians and civilian objects. The practice seems to have become more widespread, however, since the end of the Cold War. During Operation DESERT STORM, for example, "the Iraqi strategy [of concealment warfare] was problematic to operations, creating a high potential for civilian casualties and increasing stress on U.S. forces instructed to spare civilian life when engaged."²⁹ Likewise, during Operation ENDURING FREEDOM, Taliban forces in Afghanistan did not mount any significant military challenge, but several collateral damage incidents suggest U.S. forces had some difficulty in distinguishing civilians and civilian objects from combatants.³⁰ In both of these cases, the U.S. faced weaker adversaries who sought to gain an advantage through the use of asymmetric means.

The fact that the U.S. embraces the fundamental principles of LOAC that are designed to protect civilian populations presents its enemies with an attractive center of

gravity they can exploit to further their own ends. This center of gravity is the product of the law of war itself:

The rules of war largely created by western society over generations of conflict have resulted in a false sense of principle and moral superiority that translates into a key center of gravity for adversaries to exploit. The more effort made to comply with LOAC's principles and to achieve the moral high ground, the greater the strategic advantage to potential adversaries . . . The basic strategy is that one party fights by the rules while another does not.³¹

A state like the U.S. that adopts a military doctrine consistent with LOAC must be prepared to face enemies who will try to take advantage of this commitment to achieve their own strategic goals. The problem is that, in many respects, a state's value for LOAC and the humanitarian principles supporting it can be central to their adversary's success.³²

This brief description of the changed nature of warfare in the 21st century reveals a serious weakness for the United States. Because it embraces the principles enshrined in the LOAC, the U.S. will find its operations complicated by concealment warfare, and its strategic goals challenged by the use of lawfare. In an effort to help mitigate these effects, this paper now turns to an examination of how to define combatants in the current conflict and beyond.

IDENTIFYING COMBATANTS IN THE LONG WAR

*. . . 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.*³³

-Geneva Conventions (Protocol I), 1949

Lawfare and concealment warfare are largely responsible for the erosion of the traditional legal boundaries on which the LOAC depends. Legal scholars and human rights advocates are equally and justifiably concerned about the consequences of this, since

the existence of reasonably clear boundaries between conflict and nonconflict, combatants and noncombatants, and "lawful" and "unlawful" belligerents is what allows us to determine which legal rules apply in different situations, and, even more critically, allows us to identify people and rights meriting protection.³⁴

The result is that the legal rules that were designed to protect basic rights and vulnerable groups have lost much of their analytical and practical force. As this analysis has shown, even the boundary between civilians and combatants, “one of the oldest and most hallowed distinctions in the law of armed conflict,” has been breached.³⁵

The traditional definition of a combatant or lawful belligerent first appeared in of the Brussels Convention of 1874 which was the first attempt to codify more than two centuries of legal thought about the rules of war and the protections which should be afforded the participants in armed conflict. In addressing the question of “who should be recognized as belligerents, combatants and non-combatants?” Article 9 states:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.³⁶

By virtue of their status as the armed strength of a state, combatants have combatant immunity and may be legitimate targets of attack.³⁷ Conversely, noncombatants make no contribution to a country’s armed strength. They include the sick and wounded and prisoners of war, as well as the civilian population as long as it is not engaged in direct hostilities against the enemy. Noncombatants enjoy special protection from attack, so military forces are required to properly identify their potential targets and weigh the military necessity of an attack against the likelihood of harm to the protected persons.

The implicit assumption underlying this definition is that war will always be conducted by the “armies” of states, and civilians will make only minor contributions to a war effort. While there have always been some civilians participating in hostilities, the conferees in Brussels considered them to be relatively few in number and that their direct involvement in hostilities would not affect their legal status. However, once a civilian

became involved he lost the protection of that status and could be targeted just like his combatant counterparts.³⁸ By this logic, the principle of distinction was principally concerned with distinguishing between combatants (legal or otherwise) and those civilians who do not take a direct part in hostilities. But today's armies are different from those of the nineteenth century, and civilians frequently support the war efforts of states in a variety of ways not considered by international law. According to one legal scholar,

In modern conflicts . . . civilians not only produce the foods and supplies that keep armies going, they also create and maintain the technologies of war. They may vote for politicians who favor particular wars or wartime policies, or give money to support such policies. Civilian computer technicians thousands of miles away from battlefields may work side by side with uniformed soldiers to program and troubleshoot missile guidance or military communication systems. And with modern technologies such as long-range missiles and unmanned missile-bearing planes, the distance between the "front" and the "rear," if such terms remain meaningful at all, may be half the globe.³⁹

Clearly, the traditional definition falls short when applied to these "modern conflicts".

The problem is complicated further by the fact that the involvement of non-state entities in the use of military violence is not explicitly addressed in the LOAC. This is particularly relevant when one considers operations against a non-state enemy like al-Qaeda, whose members are difficult to distinguish from civilians.⁴⁰ Its forces are integrated into civilian communities, and do not fall under a responsible command that conducts operations in accordance with the LOAC. They do not wear uniforms, nor do they carry their arms openly. According to the traditional definition of combatants, these terrorists would be entitled to the protections afforded civilian noncombatants except when they are firing weapons or otherwise posing an immediate threat. When not so engaged, they would be protected from attack by military means.⁴¹ This interpretation is designed to maximize the protection of civilians not directly involved in hostilities, but it actually erodes the humanitarian shield extended to civilians under the LOAC. By creating a kind of "revolving door" of protection, it allows terrorist groups to hide behind this protection when not bearing

arms or overtly conducting operations.⁴² This puts civilians at risk by clouding the distinctions legitimate military forces rely on for targeting decisions.

As fewer “combatants” meet the conditions set forth in the existing law, the issue of whether or not it offers any meaningful targeting guidance must be addressed. The next section examines some alternatives for dealing with the apparent shortcoming in order to provide commanders with a definition they can use in the conduct of their operations.

“COMBATANT” REDEFINED

*Reinventing the law of armed conflict in the age of terror will not be easy, but it is better to face the challenge directly than to pretend it does not exist.*⁴³

Based on the analysis above, a new definition of combatants is needed to account for the changes lawfare and concealment warfare have brought to war in the 21st century.

However, some commentators question the obsolescence of the traditional definition outlined above.⁴⁴ They have argued that the law of armed conflict already contains adequate provisions to deal with members of “illegitimate” non-state organizations like al-Qaeda. They would hold that armed groups such as this are technically “unlawful combatants” and, as a result, should be accorded civilian status. But since these particular civilians fulfill the same function as combatants, they would be subject to targeting under the same provisions of international law.⁴⁵ The danger in relying on a nuanced legal argument like this is that it further perpetuates the use of lawfare; this time in reverse. In addition, claiming that the targets of an operation are civilians, even a special category of civilians, will not resonate with the public, at home or abroad, and therefore does nothing to alleviate the harmful constraints of lawfare on military action.

Another view is that terrorists should be classified as *hostes humani generis*, or “the common enemies of humankind.”⁴⁶ This is a category of actors who are not aligned with any state, and whose acts are generally considered criminal by the international community as a

whole. If terrorists, like pirates, are considered *hostes humani generis*, the entire international community is obliged to destroy the threat they pose, wherever it exists, in order to maintain international order.⁴⁷ The problem with this definition is that it is unlikely to be universally accepted. The adage that “one man’s terrorist is another man’s freedom fighter,” demonstrates the subjectivity inherent in the concept generally, and the overwhelming lack of consensus regarding U.S. actions in the current war is evidence that a substantial part of the world does not view al-Qaeda as a “common enemy” at all. Thus, this interpretation fails as well.

Existing law does not adequately address concealment warfare, and lawfare requires that a legal solution to the problem be developed. The traditional distinction between civilians and combatants is based exclusively on their status. It assumes that uniformed combatants may be targeted because their sole and inherent professional purpose is to cause harm to the enemy, while civilians cannot be targeted since they cause no harm to opposing forces or, at most cause only indirect harm.⁴⁸ A new formulation must acknowledge the increased role civilians play in warfare and move beyond status as the sole determinant. Similarly, it must address the principle of distinction to account for the widespread involvement in hostilities of actors who neither wear uniforms nor carry weapons openly. Rather than focusing on one’s status alone to determine whether or not he is a combatant, it is more appropriate to examine his behavior as well. In fact, it would be best to make combatant status a purely functional question, one that does not rely on legal technicalities, but on a person’s actions and their consequences.⁴⁹

The determination of a person’s status as a combatant or noncombatant must be based upon the degree to which that person is directly, actively, and primarily involved in willfully

and intentionally planning or carrying out acts of violence within the context of a conflict that rages with sufficient intensity that it can be fairly recognized as an “armed conflict” so that the LOAC would normally apply. This definition has the advantage of being evolutionary, that is, it remains substantially within the existing body of international law. It places primary importance on the acts of violence perpetrated by the persons under scrutiny to determine whether or not they are combatants, but eliminates the fine distinction of whether military or law enforcement means may be used against them. Most importantly, it is a more humane approach because it allows for targeting of those responsible for violence, even if they do not happen to wear military uniforms. Destroying armies may still be necessary from time to time, but this new definition gives military forces more latitude to target others who engage in the use of violence in war.⁵⁰

Applying the definition to current operations against al-Qaeda, its power is evident. First, the members of al-Qaeda have conducted a series of attacks with considerable severity and have publicly stated that they are at war with the United States. Therefore, the Long War can be considered an “armed conflict” for the purposes of international law. Clearly the “soldiers” of al-Qaeda; the hijackers, bombers, and gunmen; are combatants because of their direct participation in violence. Likewise, the members of the organization who build the bombs, plan the operations, and train others to carry them out are certainly “directly, actively, and willfully” involved in the violence, making them combatants as well under this definition. Fundraisers and those involved in the information operations or propaganda arm of the organization would, however, not be considered combatants if their activities did not stray beyond these supporting functions. They would have to be considered civilians and pursued by civil, not military, means. Family members and associates, too, would still be

classified as civilians, so the military necessity of any action against a member of the organization determined to be a combatant would have to be assessed against the risk to these civilians

Arguably, this new definition would do little to change the way the United States military conducts operations. Targeting procedures routinely used today already minimize civilian casualties through a rigorous analysis that weighs military necessity against civilian suffering.⁵¹ U.S. targeteers and planners are well-schooled in the methods of analysis that allow them to reduce the levels of anticipated civilian impact while still achieving the desired military objectives. As the preceding discussion has shown, the strict compliance with LOAC that permeates the U.S. targeting process can foster predictable operations and tactics.⁵² But the reality is that, at least in the West, considerable restraints are already inherent in the organized use of force. It is just that these restraints are not overwhelmingly legal in nature.⁵³ American values and standards of human decency constrain military behavior much more than international law does. Whether in massive aerial bombing campaigns or the actions of an individual infantryman, the American way of war puts tremendous emphasis on hitting the right target

The fact that adversaries of the U.S. will invariably engage in lawfare means that there must be a legal response with which to counter their efforts. It is for this reason that a new definition is imperative. Recognition of the ubiquity of concealment warfare in 21st century conflicts coupled with a concerted attempt to address that reality in the LOAC will do much to preserve the relevance of international law by acknowledging the legitimacy of the targets of military operations without the attendant legal debate that has become the norm in recent years.

CONCLUSION

“Humanitarianism” and “war” would appear to be mutually exclusive but in fact the combination makes sense when one considers “law” in the equation.⁵⁴

While it is in the interest of the United States, and the West more generally, to accept limits on the harm military action inflicts on civilians, the goal is far from universal. Indeed, it has been argued that, “the perpetrators of international terror therefore lack any commitment to international law in general, and to the laws of war in particular.”⁵⁵ The American military, however, understands all too well the need for LOAC and limits on the use of force. Exclusively charged with the responsibility of exercising the legitimate use of violence in the international arena, the United States armed forces recognize that

The intentional taking of human life is and should be an emotional issue, as humanity maintains the protection of the right to life as a fundamental tenet in both peace and war. Thus, any decision to take a life should be subjected to a clear normative framework and, where appropriate, the strictest scrutiny.⁵⁶

Over the years, the U.S. military has developed such procedures to ensure that adequate deliberation informs any application of violence it undertakes.

The sad truth is that law is not, and can never be, the mechanism to alleviate the horror of war to the degree its past advocates had hoped and many today still seem to expect.⁵⁷ But the law can (and must) provide guidance to help strike a balance between humanity and military necessity, since “humanitarian law has become a permanent fixture on the modern battlefield. Those who ignore this reality do so at their own risk.”⁵⁸ Redefining the notion of combatancy as it has been outlined here is an important first step toward accepting this reality and completely modernizing the law of armed conflict. Regardless of whether the international community has the will to undertake such an endeavor, the scrupulous use of the procedures the U.S. military has developed over the last decade and a half, will allow planners and targeteers to ensure that operations involving the application of

military violence are conducted with the deliberation expected of the armed forces of the United States of America.

NOTES

¹ Michael Howard, "Temperamenta Belli: Can War be Controlled?" in *Restraints on War: Studies in the Limitation of Armed Conflict*, ed. Michael Howard (1979); Quoted in Jan Klabbers, "Off Limits? International Law and the Excessive Use of Force," *Theoretical Inquiries in Law* 7, No. 1 (December 2005). <http://proquest.umi.com/pqdweb?did=975900401&sid=5&Fmt=2&clientId=18762&RQT=309&V>. Accessed: April 21, 2006.

² This paper uses the concept of concealment warfare as defined in 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," *The Air Force Law Review* 56 (2005). <http://proquest.umi.com.ezlib.nwc.navy.mil/pqdweb?index=2&did=855226751&SrchMode=3&sid=1&Fmt=4&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=114676888&clientId=18762&aid=1>. Accessed: March 29, 2006.

³ Charles J. Dunlap, Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts," paper presented at Humanitarian Challenges in Military Intervention Workshop, Carr Center, Harvard University, November 29-30, 2001. <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>. Accessed: March 27, 2006.

⁴ Salvador Dali, http://www.quoteland.com/topic.asp?CATEGORY_ID=152. Accessed: May 7, 2006.

⁵ Jan Klabbers, "Off Limits? International Law and the Excessive Use of Force," *Theoretical Inquiries in Law* 7, No. 1 (December 2005) <http://proquest.umi.com/pqdweb?did=975900401&sid=5&Fmt=2&clientId=18762&RQT=309&V>. Accessed: April 21, 2006.

⁶ Project of an International Declaration Concerning the Laws and Customs of War. Brussels, 27 August 1874, Article 9. <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>. Accessed: March 27, 2006.

⁷ Kenneth Watkin, "Controlling the Use of Force: A Role For Human Rights Norms in Contemporary Armed Conflict," *The American Journal of International Law* 98, No. 1 (January 2004). <http://proquest.umi.com/pqdweb?did=617760401&sid=1&Fmt=4&clientId=18762&RQT=309&VName=PQD>. Accessed: March 27, 2006.

⁸ International Humanitarian Law: The Essential Rules <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList104/50AD26AD3A89D082C1256F3C002CCC98>. Accessed: May 2, 2006.

⁹ Watkin.

¹⁰ Geoffrey Best, *War and Law Since 1945* (Oxford: Clarendon Press, 1994; paperback ed. 1997), 258-259; Quoted in Charles J. Dunlap, Jr., "The End of Innocence:

Rethinking Noncombatancy in the Post-Kosovo Era,” *Strategic Review* 14 (Summer 2000): 10.

¹¹ Watkin.

¹² Phillip S. Meilinger, “Air War and Humanitarian Concerns,” paper presented at Humanitarian Challenges in Military Intervention Workshop, Carr Center, Harvard University, November. 29-30, 2001, <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Meilinger2001.pdf>. Accessed: March 27, 2006.

¹³ Geoffrey Parker, *Cambridge Illustrated History of Warfare* (Cambridge University Press, 1995), 369, quoted in Dunlap, “Law & Military Interventions,” 7.

¹⁴ *Jus in bello* consists of rules relating to *law in war* (such as proper and improper kinds of weapons and military tactics, rules relating to the treatment of prisoners of war and civilians, etc.). *Jus ad bellum*, in contrast, involves the *law of war*, relating to when it is proper to resort to armed conflict, a question now governed mainly by the U.N. Charter.

¹⁵ David B. Rivkin, Jr., and Lee A. Casey, “The Rocky Shoals of International Law,” *The National Interest* (Winter 2000-01): 39.

¹⁶ Rosa Ehrenreich Brooks, “War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror,” *University of Pennsylvania Law Review* 153, No. 2 (December 2004): 675 <http://proquest.umi.com/pqdweb?did=847697501&sid=1&Fmt=2&clientId=18762&RQT=309&VName=PQD>. Accessed: April 21, 2006.

¹⁷ Klabbers.

¹⁸ Stephanie Carvin, “Caught in the Cold: International Humanitarian Law and Prisoners of War During the Cold War,” *Journal of Conflict & Security Law* 11, No. 1 (Spring 2006): 67. <http://proquest.umi.com/pqdweb?did=1008636291&sid=5&Fmt=2&clientId=18762&RQT=309&VName=PQD>. Accessed: April 11, 2006.

¹⁹ Dunlap, “Law & Military Interventions,” 11.

²⁰ Bruce Cronin, “International Legal Consensus and the Control of Excess State Violence,” *Global Governance*. 11, No. 3 (July-September 2005): 311. <http://proquest.umi.com/pqdweb?did=884766731&sid=2&Fmt=2&clientId=18762&RQT=309&VName=PQD>. Accessed: April 21, 2006.

²¹ Rivkin and Casey, 35.

²² Dunlap, “Law & Military Interventions,” 13.

²³ *Ibid.*

²⁴ Ibid, 11.

²⁵ Klabbers.

²⁶ 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," *The Air Force Law Review* 56 (2005). <http://proquest.umi.com.ezlib.nwc.navy.mil/pqdweb?index=2&did=855226751&SrchMode=3&sid=1&Fmt=4&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1146768888&clientId=18762&aid=1>. Accessed: March 29, 2006.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 48 <http://www.icrc.org/ihl.nsf/WebART/470-750061?OpenDocument>. Accessed: May 8, 2006.

³⁴ Brooks.

³⁵ Ibid.

³⁶ Project of an International Declaration Concerning the Laws and Customs of War. Brussels, 27 August 1874, Article 9. <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>. Accessed: March 27, 2006.

³⁷ Combatant immunity or "combatant's privilege" means that the combatant is immune from prosecution for lawful combat activities. For a more detailed discussion, see Joseph P. Bialke, "Al-Qaeda & Taliban: Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict," *Air Force Law Review*, (Spring 2004). http://www.findarticles.com/p/articles/mi_m6007/is_55/ai_n8585592. Accessed: May 7, 2006.

³⁸ Watkin.

³⁹ Brooks.

⁴⁰ Michael H. Hoffman, "Rescuing the Law of War: A Way Forward in an Era of Global Terrorism." *Parameters* 35 (Summer 2005): 18 – 36. <http://proquest.umi.com/pqdweb?did=848971001&sid=1&Fmt=3&clientId=18762&RQT=309&VName=PQD>. Accessed: April 11, 2006.

⁴¹ Reynolds.

⁴² Watkin.

⁴³ Brooks.

⁴⁴ For a thorough, if not entirely convincing, summary of the arguments against the need to change the LOAC, see Joel Rosenthal, "New Rules for War?" *Naval War College Review*. 57 (Summer 2004): 91. <http://proquest.umi.com/pqdweb?did=771487821&sid=1&Fmt=3&clientId=18762&RQT=309&VName=PQD>. Accessed: April 11, 2006.

⁴⁵ Watkin.

⁴⁶ Bialke.

⁴⁷ Reynolds.

⁴⁸ Brooks.

⁴⁹ Ibid.

⁵⁰ Ralph Peters, "In Praise of Attrition," *Parameters* 34 (Summer 2004): 24-33.

⁵¹ For a detailed description of the process used by military planners, see Dunlap, "Law & Military Interventions," 13-26.

⁵² Reynolds.

⁵³ Klabbers.

⁵⁴ Pablo Antonio Fernández-Sánchez, ed., *The New Challenges of Humanitarian Law in Armed Conflicts; In Honour of Professor Juan Antonio Carrillo-Salcedo* (Leiden: Martinus-Nijhoff, 2005), ix.

⁵⁵ Belz.

⁵⁶ Watkin.

⁵⁷ Dunlap “Law & Military Interventions,” 6.

⁵⁸ Schmitt, Michael N. “Targeting and Humanitarian Law: Current Issues,” *Israel Yearbook On Human Rights* 34 (2004): 60.

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