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# COUNTERINSURGENCY, THE WAR ON TERROR, AND THE LAWS OF WAR

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*SINCE the wars in Afghanistan and Iraq, military strategists, historians, soldiers, and policymakers have made counterinsurgency's principles and paradoxes second nature, and they now expect that counterinsurgency operations will be the likely wars of the future. Yet despite counterinsurgency's ubiquity in military and policy circles, legal scholars have almost completely ignored it. This Article evaluates the laws of war in light of modern counterinsurgency strategy. It shows that the laws of war are premised on a kill-capture strategic foundation that does not apply in counterinsurgency, which follows a win-the-population strategy. The result is that the laws of war are disconnected from military realities in multiple areas—from the use of non-lethal weapons to occupation law. This Article also argues that the war on terror legal debate has been somewhat myopic. The shift from a kill-capture to a win-the-population strategy not only expands the set of topics legal scholars interested in contemporary conflict must address, but also requires incorporating the strategic foundations of counterinsurgency when considering familiar topics in the war on terror legal debates.*

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## INTRODUCTION

Counterinsurgency is the warfare of the age. Past eras have had their own forms of warfare and their own theories of war.<sup>1</sup> In the 18th century, armies lined up on expansive battlefields in rigid formation. In the 20th century, the age of total war, entire populations mobilized and contributed to the war effort—and at the same time were made vulnerable to devastating attack. Today, it has become common, even trite, to announce that the nature of warfare is changing. Insurgents do not look like the soldiers and warriors of the past. They are not amassed in great armies; they do not confront their enemy on the battlefield; they may not even be affiliated with a state. To be sure, insurgency is not a new form of warfare; America has been fighting wars against insurgents for well over a century.<sup>2</sup> But never before has insurgency been so central to national and international security. Today military strategists believe that contemporary national security threats are best described as a global insurgency, and they expect that counterinsurgency operations will be the likely wars of the future.<sup>3</sup>

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<sup>1</sup> See *Makers of Modern Strategy: From Machiavelli to the Nuclear Age* 3–8 (Peter Paret ed., 1986).

<sup>2</sup> See Max Boot, *The Savage Wars of Peace*, at xiv–xvi (2002).

<sup>3</sup> See *infra* text accompanying notes 102–128.

Yet despite counterinsurgency's ubiquity in military and policy circles, legal scholars have almost completely ignored it.<sup>4</sup> The only exceptions are in the peripheral fields of constitution-making<sup>5</sup> and tort compensation.<sup>6</sup> This is a serious mistake. The laws of war<sup>7</sup> were created with an assumption that conventional war's strategy—kill or capture the enemy—was the route to victory. The war on terror, despite tactical innovations such as the absence of uniforms and a networked enemy structure, retains the same strategy: to win, simply kill or capture all the terrorists. Counterinsurgency emphatically rejects the kill-capture strategy. Instead, counterinsurgents follow a win-the-population strategy that is directed at building a stable and legitimate political order.<sup>8</sup> Winning the population involves securing the population, providing essential services, building political and legal institutions, and fostering economic development. Killing and capturing the insurgents is not the primary goal, and it may often be counterproductive, causing destruction that creates backlash among the population and fuels their support for the insurgency.<sup>9</sup> Counterinsurgency's strategy is thus starkly dif-

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<sup>4</sup> David P. Fidler's brief article merely summarizes the Army's counterinsurgency field manual and rule of law handbook. David P. Fidler, *Counterinsurgency, Rule of Law Operations, and International Law*, 11 *Am. Soc'y Int'l L. Insights* (Sept. 19, 2007), <http://www.asil.org/insights070919.cfm>.

<sup>5</sup> See Note, *Counterinsurgency and Constitutional Design*, 121 *Harv. L. Rev.* 1622, 1622–25 (2008).

<sup>6</sup> John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 *Loy. L.A. L. Rev.* 1455, 1455–58 (2008).

<sup>7</sup> The terms laws of war, laws of armed conflict, and international humanitarian law (IHL) are now often used synonymously, though they have different emphases. Historically, “war” implied conflict between states. “Armed conflict” expands the scope to lesser hostilities. IHL emphasizes a particular purpose of law. See David Wippman, *Introduction: Do New Wars Call for New Laws, in New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts* 1, 1 n.1 (David Wippman & Matthew Evangelista eds., 2005).

<sup>8</sup> I proceed using the counterinsurgency strategy that the U.S. Military has recently adopted, U.S. Dep't of the Army, *The U.S. Army/Marine Corps Counterinsurgency Field Manual* (2007) [hereinafter *Field Manual*], in addition to works by contemporary strategists whose thought can be taken as doctrine because they either wrote the *Field Manual* or worked as counterinsurgency strategists in Iraq and Afghanistan. Some disagree with the strategy and prefer kill-capture operations. See Edward N. Luttwak, *Dead End: Counterinsurgency Warfare as Military Malpractice*, *Harper's Mag.*, Feb. 2007, at 33, 33–34, 42. But the mainstream view—and more important, the official military doctrine—embraces the *Field Manual's* approach.

<sup>9</sup> *Field Manual*, supra note 8, ¶ 1-128.

ferent from the strategy that undergirds the laws of war and the debates on legal issues in the war on terror.

This Article evaluates the laws of war in light of modern counterinsurgency strategy. It takes seriously the win-the-population strategy as the primary driver of military operations, rather than the kill-capture strategy that defines conventional warfare and the war on terror. In doing so, the Article has two aims. The first is to examine the relationship between counterinsurgency and the laws of war. In particular, it demonstrates a significant disconnect between counterinsurgency and the laws of war and roots that disconnect in the strategic differences between counterinsurgency and conventional warfare. In short, the laws of war are premised on a strategic foundation that no longer applies, rendering many of its rules problematic for the age of counterinsurgency. Second, it argues that the debate on legal issues related to the war on terror has been somewhat myopic and misplaced. Legal scholars have missed a tectonic shift in military circles: military strategists have rejected the war on terror approach and now interpret global threats as an insurgency that requires a win-the-population strategy for success. This shift in framing not only expands the set of topics legal scholars interested in contemporary conflict must address, but also requires incorporating the strategic foundations of counterinsurgency when considering familiar topics in the war on terror legal debates.

The results of this investigation are significant. First, the considerable attention paid to war on terror legal issues, such as detention and interrogation, is somewhat misplaced. These issues are important, but occupation law and victim compensation, which receive comparatively little attention, are just as important. Moreover, the laws of war are poorly tailored to the realities of counterinsurgency. In some cases, such as occupation law, the laws of war are unduly constraining to the point of preventing strategically necessary initiatives that would also improve humanitarian goals. In other cases, such as civilian compensation, the laws of war could perhaps place greater humanitarian duties on military forces. Finally, the standard story of compliance with the laws of war—reciprocity between parties—completely fails in counterinsurgency because the prerequisites are absent. Yet counterinsurgency strategy may itself suggest an alternative. Strategic self-interest—a principle of exemplarism—enables a self-enforcing foundation for

compliance with the laws of war, even for legal provisions that are commonly justified as humanitarian.

Highlighting the disconnect between the laws of war and military strategy may seem instrumental rather than humanitarian, but every age has its own laws of war, based on the warfare dominant at the time. The positivists of the 19th century saw war as an extension of national policy and therefore conceived the laws of war in contractual terms. In the wake of the total wars of the 20th century, international lawyers envisioned war as human tragedy, and in the process reshaped the laws of war to protect civilians and innocent populations. In the face of today's challenges—in this age of counterinsurgency—the laws of war must continue to keep up with the realities of war or else become increasingly irrelevant and potentially ignored.

To show the disconnect between the laws of war, the war on terror, and counterinsurgency, this Article proceeds in five parts. Part I briefly reviews the foundations of conventional warfare, the kill-capture strategy. It then traces the history of the modern laws of war from the Lieber code in the 19th century to the Geneva Conventions of 1949 to demonstrate that the laws of war are built on the assumption that warfare involves a kill-capture strategy. It shows that the central principles and most important provisions of the laws of war—military necessity, discrimination, reciprocity, and inviolability—are all based on the kill-capture strategy.

Part II argues that the war on terror assumes, like the laws of war, that national security policy requires a kill-capture strategy. Although many have noted the tactical innovations of terrorists and have responded with different legal interpretations, it demonstrates that all three of the main camps in the war on terror legal debates nonetheless assume a kill-capture strategy. Part II then shows that the war on terror framework has been rejected in military circles for strategic and operational purposes, and that insurgency and counterinsurgency have taken center stage instead.

Part III outlines counterinsurgency's strategy for victory: winning over the population. It discusses how this strategy manifests itself, including securing the population, building the rule of law, establishing economic capacity, and supporting political institutions. It also shows that counterinsurgents reject some of the prin-

cial tenets of conventional warfare, such as the centrality of military means.

Part IV shows the disconnect between the laws of war and counterinsurgency. It first addresses some specific areas within the laws of war: the principle of distinction, occupation law, detention policy, non-lethal weapons, and compensatory norms. The areas of law discussed by no means exhaust the laws of war; rather they provide examples of the significant legal consequences that follow from the strategic shift from kill-capture to win-the-population. In each case, the Article describes the current law, the disconnect between the law and counterinsurgency's theory of victory, and potential revision that would better fit the realities of counterinsurgency. Part IV then considers the nature of compliance with the laws of war—the principle of reciprocity—and shows that the prerequisites for reciprocity do not apply in counterinsurgency, thus requiring a new way of thinking about compliance. It suggests that strategic self-interest, a principle of exemplarism, might provide that mechanism.

The disconnect between the laws of war and counterinsurgency strategy raises important practical and conceptual questions: Should the laws of war be revised, and if so, how? What is the relationship between law and strategy? It is far beyond the scope of this Article to provide a comprehensive proposal for revising the laws of war or to provide a theory of the relationship between law and strategy, but Part V identifies some of the more important factors for future scholarship in this area.

## I. CONVENTIONAL WAR, THE KILL-CAPTURE STRATEGY, AND THE LAWS OF WAR

The laws of war have not been developed in the abstract, absent connection to the realities of warfare and strategy.<sup>10</sup> For over a century, the laws of war have assumed that the central strategy for victory in war is destroying the opponent and therefore that warriors seek to kill and capture their enemies. After outlining conventional warfare's strategy as the kill-capture model, this Part shows how

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<sup>10</sup> Strategy can exist at many levels, from technical details and operations to political goals. See Edward N. Luttwak, *Strategy* 87–91 (2001). I use strategy to indicate an overall approach, encompassing particular operations.

the kill-capture approach has inspired the framework of the laws of war from its modern origins in the Lieber Code through the Geneva Conventions. Kill-capture is manifested in the central principles of the laws of war: military necessity, discrimination, reciprocity, and inviolability. Recognizing conventional war's influence on the laws of war is necessary for understanding the divergence between the laws of war and counterinsurgency.

### *A. Conventional War and the Kill-Capture Strategy*

The central focus of conventional warfare is the destruction of the enemy. This framework can be termed the “kill-capture” approach to victory because in a specific battle, destruction of the enemy is defined by killing or capturing the enemy's forces until the enemy is vanquished or gives up.<sup>11</sup> Not surprisingly, this approach was common to the military strategists of the era immediately preceding the codification of the laws of war. Frederick the Great argued that the objective of war was the “entire destruction of your enemies,”<sup>12</sup> and the Swiss theorist Antoine-Henri Jomini, whose contribution to military strategy was linking territorial conquest and victory, believed that “[t]he destruction of the enemy's field armies was the new military aim.”<sup>13</sup>

The most famous modern strategist, Carl von Clausewitz, also envisioned a strategy for victory based on a kill-capture approach. For Clausewitz, the “overriding principle of war” was the “[d]estruction of the enemy forces,”<sup>14</sup> which can be accomplished by “death, injury, or any other means.”<sup>15</sup> Clausewitz coined the term “center of gravity” to define the “hub of all power and movement, on which everything depends.”<sup>16</sup> The center of gravity

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<sup>11</sup> Indeed, even when the enemy gives up, it does so from fear of destruction. See Carl von Clausewitz, *On War* 227 (Michael Howard & Peter Paret eds., Princeton Univ. Press 1976) (1832).

<sup>12</sup> Frederick the Great, *Military Instruction from the Late King of Prussia, to his Generals* 119 (Major Foster trans., London, J. Cruttwell 4th ed. 1797).

<sup>13</sup> Azar Gat, *The Origins of Military Thought from the Enlightenment to Clausewitz* 115 (1989).

<sup>14</sup> Clausewitz, *supra* note 11, at 258; see also *id.* at 577 (“[T]he grand objective of all military action is to overthrow the enemy—which means destroying his armed forces.”).

<sup>15</sup> *Id.* at 227.

<sup>16</sup> *Id.* at 595–96.



in war was the source of strength for the opponent, and it was the central objective against which force should be directed.<sup>17</sup> For Alexander the Great, Gustavus Adolphus, and Frederick the Great, Clausewitz argued, the center of gravity was the army,<sup>18</sup> and therefore the central feature of warfare was battle against the army.<sup>19</sup> That killing and capturing would define the battle was obvious, for the character of battles, he said, was “slaughter.”<sup>20</sup>

Beyond the centrality of battle, Clausewitz also provided the groundwork for the total war theories of the 20th century in which kill-capture expanded beyond soldiers to the broader population. Clausewitz argued that war involved the interplay of three actors: the people, the military, and the government.<sup>21</sup> The will and power of this trinity would determine the strength of each side. In the early 20th century, strategists realized that a state’s economic and military power were linked. That fact, coupled with development of devastating technologies and air power, refocused military strategy from the enemy’s military to its population and government.<sup>22</sup> Total war required mobilization of the entire society and its resources.<sup>23</sup> Giulio Douhet, an Italian military strategist, perhaps put it best: total war required “smashing the material and moral resources of a people . . . until the final collapse of all social organization.”<sup>24</sup>

### *B. The Laws of War and the Kill-Capture Strategy*

The conventional war model focused its attention on the destruction of the enemy—on killing and capturing enemy forces, and

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<sup>17</sup> The military’s definition of center of gravity is “[t]he source of power that provides moral or physical strength, freedom of action, or will to act.” Dept. of Def., Joint Publication 1-02: Dictionary of Military and Associated Terms 81 (2001) (as amended through Oct. 17, 2008).

<sup>18</sup> Clausewitz, *supra* note 11, at 596.

<sup>19</sup> *Id.* at 258.

<sup>20</sup> *Id.* at 259; see also *id.* at 260.

<sup>21</sup> *Id.* at 89.

<sup>22</sup> William C. Martel, *Victory in War: Foundations of Modern Military Policy* 52 (2007).

<sup>23</sup> The German strategist Erich Ludendorff described total war as involving the entire territory, requiring the population to mobilize the economic power of the state, supporting their morale, preparing before the war, and having a single leader. *Id.* at 53.

<sup>24</sup> *Id.* at 71.

in the age of total war, on destroying the population's will to support the national war machine. This approach to warfare inspired the laws of war.<sup>25</sup> Significantly, the centrality of the kill-capture approach to warfighting has resulted in the laws of war taking two inextricably linked trajectories: the laws of war have limited violence in light of humanitarian necessity, and at the same time, they have enabled violence.<sup>26</sup> In essence, the laws of war are a blueprint for the architecture of legitimate warfare,<sup>27</sup> whose design assumes a kill-capture military strategy.

The modern laws of war can be traced back to the Lieber Code, promulgated by Abraham Lincoln in 1863 as "Army General Orders No. 100."<sup>28</sup> Lieber's contribution was the doctrine of military

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<sup>25</sup> Some international law scholars have noted the kill-capture nature of warfare. Professor Frédéric Mégret argues that the laws of war are necessarily based on "war," which is a social construction "beyond which humanitarian lawyers feel they cannot go." Frédéric Mégret, *Non-Lethal Weapons and the Possibility of Radical New Horizons for the Laws of War: Why Kill, Wound and Hurt (Combatants) at All?* 9, 18–19 (July 1, 2008) (unpublished manuscript, available at <http://ssrn.com/abstract=1295348>); see also Mark Weisburd, *Al-Qaeda and the Law of War*, 11 *Lewis & Clark L. Rev.* 1063, 1071 (2007) ("[B]elligerent states attempt to prevent their adversaries from causing future harm by destroying their military forces; obviously, killing or capturing the members of an adversary's forces will destroy those forces. If one could not kill members of the opposing military on sight, or capture members of enemy armed forces without going through time-consuming procedural steps, the delay imposed on military operations could be significant and the risks of defeat greatly increased.").

<sup>26</sup> This is the conventional approach: international humanitarian law is a "compromise between humanity and military necessity." Marco Sassòli, *Targeting: The Scope and Utility of the Concept of "Military Objectives" for the Protection of Civilians in Contemporary Armed Conflict*, in *New Wars, New Laws?*, supra note 7, at 181, 183–84. The foundational importance of kill-capture applies even if other approaches are followed. Eric Posner has argued that the laws of war seek to limit costly military technologies, thus freeing resources for production and consumption. Eric A. Posner, *A Theory of the Laws of War*, 70 *U. Chi. L. Rev.* 297, 297 (2003). Given the primacy of military technology to Posner's theory, his approach also grounds the laws of war in the kill-capture strategy.

<sup>27</sup> See Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 *Colum. J. Transnat'l L.* 1, 4–5 (2004).

<sup>28</sup> General Orders No. 100, in Richard Shelly Hartigan, *Lieber's Code and the Law of War* 45 (1983). With volunteers filling the ranks of the Civil War Army, ignorance about the laws and customs of war was widespread; the Lieber Code was a way to professionalize the Army and spread both legal and warfighting principles. Burruss M. Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 *Am. J. Int'l L.* 213, 214 (1998). The Code inspired similar codes over the next three decades and influenced the 1874 Brussels Declaration and Hague Law starting in 1899. See Hartigan, supra, at 22; Grant R. Doty, *The*

necessity as a limitation on violence,<sup>29</sup> though necessity enabled violence as much as it curtailed it. Under the Code, military necessity comprised “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>30</sup> Military necessity did not allow cruelty,<sup>31</sup> but it permitted expansive kill-capture operations, including

all direct destruction of life and limb of armed enemies, and of other persons whose destruction is incidentally unavoidable . . . it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of particular danger to the captor; it allows of all destruction of property and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy.<sup>32</sup>

Military necessity even permitted starvation.<sup>33</sup> Lieber himself thought harsh and violent tactics would lead to shorter wars.<sup>34</sup>

Another significant early codification likewise recognized the kill-capture nature of warfare. In the early 1860s, Czar Alexander II called an international meeting in St. Petersburg to address the recent invention of exploding bullets. The 1868 St. Petersburg Declaration<sup>35</sup> prohibited use of these projectiles but is notable for its description of the relationship between strategy and the law. The Declaration stated its goal as “fix[ing] the technical limits at which the necessities of war ought to yield to the requirements of humanity.”<sup>36</sup> It then went further: “the only legitimate object which States

United States and the Development of the Laws of Land Warfare, 156 *Mil. L. Rev.* 224, 230 (1998); Theodor Meron, Francis Lieber’s Code and Principles of Humanity, 36 *Colum. J. Transnat’l L.* 269, 279 (1998).

<sup>29</sup> Carnahan, *supra* note 28, at 213.

<sup>30</sup> General Orders No. 100, *supra* note 28, at art. 14.

<sup>31</sup> *Id.* at art. 16.

<sup>32</sup> *Id.* at art. 15.

<sup>33</sup> *Id.* at art. 17.

<sup>34</sup> Meron, *supra* note 28, at 271.

<sup>35</sup> 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 18 *Martens Nouveau Recueil* (ser. 1) 474, *reprinted in* Documents on the Laws of War 53 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

<sup>36</sup> *Id.* at 54.

should endeavour to accomplish during war is to weaken the military forces of the enemy; [t]hat for this purpose it is sufficient to disable the greatest possible number of men.”<sup>37</sup> The St. Petersburg Declaration thus acknowledged that killing is necessary in war even as it established the principle of unnecessary suffering. The Declaration thus both empowered and restrained killing and capturing.

In 1899 and 1907, the international community codified laws of war during two conferences at The Hague.<sup>38</sup> A review of even a few provisions demonstrates the importance of the kill-capture approach. Article 1 of the Regulations appended to Hague Convention IV of 1907, for example, establishes one of the central principles in the laws of war,<sup>39</sup> the principle of distinction between combatants and civilians.<sup>40</sup> As one commentator has noted, “[t]o allow attacks on persons other than combatants would violate the principle of necessity, because victory can be achieved by overcoming only the combatants of a country.”<sup>41</sup> The principle therefore establishes that battle against combatants is the central feature of warfare and justifies killing and capturing the enemy.

Other provisions in the fourth Hague Convention’s Regulations follow. Under Article 20, prisoners of war must be repatriated to their home countries, indicating that a belligerent may hold captured enemy forces for the duration of hostilities.<sup>42</sup> Other Regulations announce that the means of warfare are not unlimited,<sup>43</sup> that poison, actions that result in unnecessary suffering, and assaults on unarmed and surrendered persons are forbidden,<sup>44</sup> and that armies

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<sup>37</sup> *Id.* at 55.

<sup>38</sup> Adam Roberts & Richard Guelff, Introduction *to Documents on the Laws of War* supra note 35, at 5.

<sup>39</sup> *Id.* at 10; see also L.C. Green, *The Contemporary Law of Armed Conflict* 47, 113, 192 (2d ed. 2000).

<sup>40</sup> Under Article 1, the “laws, rights, and duties of war” apply to armies, militia, and volunteer corps that are commanded by a person responsible to subordinates, that show a distinctive emblem, that carry arms openly, and that follow the laws and customs of war. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex art. 1, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter *Hague IV Annex*].

<sup>41</sup> Sassòli, supra note 26, at 202.

<sup>42</sup> *Hague IV Annex*, supra note 40, at art. 20.

<sup>43</sup> *Id.* at art. 22.

<sup>44</sup> *Id.* at art. 23.

shall not attack undefended towns, under the assumption that they can be occupied without bloodshed.<sup>45</sup> The common thread throughout these Regulations is that warfare necessitates killing and capturing and that the laws of war can humanize that process, preventing extreme suffering. Hague law also features the principles of symmetry and reciprocity.<sup>46</sup> Symmetry makes a rule self-enforcing because neither party gets a relative gain from the regulated practice.<sup>47</sup> A related feature is reciprocity: if a belligerent violates the rule, the other side can retaliate in kind.<sup>48</sup> Fundamentally, the hope of symmetry and reciprocity is that neither side will have an advantage in the battle by using more destructive means.

After the slaughter of World War II, nations saw war less as a matter of national interest and more as “human tragedy” and gathered to protect the victims of war.<sup>49</sup> The four Geneva Conventions of 1949 each protect people from the destructive violence that a kill-capture strategy requires. They protect wounded and sick in the field;<sup>50</sup> wounded, sick, and shipwrecked at sea;<sup>51</sup> prisoners of war;<sup>52</sup> and civilians.<sup>53</sup> Yet even as the Geneva Conventions protect, they also enable violence. As the International Committee of the

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<sup>45</sup> *Id.* at art. 25.

<sup>46</sup> For example, 1999 Hague Declaration 2 Concerning Asphyxiating Gases, July 29, 1899, 26 *Martens Nouveau Recueil* 998, *reprinted in* Documents on the Laws of War, *supra* note 35, at 59, 60–61, banning the use of projectiles to spread asphyxiating gases, states that the Declaration is “only binding to the contracting Powers.” Such rules were derived from the contractual approach to the laws of war that emerged in the 17th century. See Stephen C. Neff, *War and the Law of Nations* 147–51 (2005); see also Eric A. Posner, *Terrorism and the Laws of War*, 5 *Chi. J. Int’l L.* 423, 427–30 (2005).

<sup>47</sup> See Posner, *supra* note 46, at 428.

<sup>48</sup> *Id.* at 429.

<sup>49</sup> Neff, *supra* note 46, at 340; see also Documents on the Laws of War, *supra* note 35, at 195 (“The central concern of all four 1949 Geneva Conventions is thus the protection of victims of war.”).

<sup>50</sup> 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].

<sup>51</sup> Geneva Convention for the Amelioration of the Condition of the 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].

<sup>52</sup> 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].

<sup>53</sup> 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].

Red Cross (ICRC) commentary puts it, “it is only the soldier who is himself seeking to kill who may be killed.”<sup>54</sup> The Geneva Conventions, inspired by humanitarian aims, thus also illustrate the core assumption that war’s central feature and strategy is killing and capturing the enemy.

This brief history of the laws of war shows that the central principles underlying the laws of war—military necessity, distinction, reciprocity, and inviolability of civilians—and the most important provisions of the conventions and declarations themselves assume that war is defined by a kill-capture strategy. As a result, the laws of war have sought both to enable and to constrain violence in light of humanitarian goals.

## II. WAR ON TERROR OR COUNTERINSURGENCY?

Since September 11, 2001, and the wars in Afghanistan and Iraq, lawyers and scholars have worked to determine how the laws of war apply in the war on terror. Terrorism has allowed legal scholars to see significant divergences between contemporary conflict and the conventional mode of war: terrorists do not wear uniforms, they do not fight in pitched battles on defined battlefields, and they operate globally. Despite this substantial step forward, legal scholars have not gone far enough. Debates on the laws of war in the war on terror consider these tactical shifts seriously, but they still work within the kill-capture strategy.

What the legal debates on the war on terror have missed is a shift in military strategy—one with significant implications for law. As early as 2003, military strategists started shifting away from the war on terror framework, instead characterizing contemporary security challenges as counterinsurgency. The shift is more than semantic. The war on terror framework assumes the primacy of a kill-capture strategy for victory. The counterinsurgency framework instead insists on a win-the-population strategy for victory. The win-the-population strategy for victory changes the center of gravity of military operations from the enemy’s military prowess to the civilian population and expands the field of operations from kill-

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<sup>54</sup> Jean S. Pictet, ICRC, Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 136 (Jean S. Pictet ed., 1952).

capture operations to security, political, legal, economic, and social operations. Recognizing this shift is necessary for thinking through the laws of war in the modern era.

### A. *Tactical Innovation and the War on Terror*

Many have described the disconnect between the war on terror and conventional war. Rosa Ehrenreich Brooks' work provides a representative example.<sup>55</sup> Brooks outlines the breakdown of boundaries upon which the laws of war rely: The categories of international and internal armed conflict do not precisely apply to global terrorist networks, which are neither states that can be party to international conflict nor solely internal actors in one country.<sup>56</sup> The paradigms of crime and conflict are challenged by acts defined as crimes under law but having the scope of violence common to war.<sup>57</sup> Geographical limitations to a single battlefield are rendered meaningless by global actions.<sup>58</sup> The temporal boundary of war and peace is undermined because, "by its nature, the war on terrorism is unlikely ever to end."<sup>59</sup> The distinction between civilians and combatants is blurred by the obsolescence of pitched battles and the role of supporters and sympathizers.<sup>60</sup> As a result, the line between national security and domestic affairs is obscured, since greater intrusion into the lives of individuals is necessary to identify terrorists.<sup>61</sup> Notably, the war on terror's innovations share a

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<sup>55</sup> See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L. Rev. 675, 711–43 (2004); see also Adam Roberts, *The Laws of War in the War on Terror*, in *International Law and the War on Terror* 175, 182–84 (Fred L. Borch & Paul S. Wilson eds., 2003).

<sup>56</sup> Brooks, *supra* note 55, at 714. But see *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006); Derek Jinks, *September 11 and the Laws of War*, 28 *Yale J. Int'l L.* 1, 39–41 (2003) (arguing that non-international armed conflicts extend not just to internal conflicts but to transnational conflicts on a fortiori grounds of creating a comprehensive system).

<sup>57</sup> Brooks, *supra* note 55, at 715–20.

<sup>58</sup> *Id.* at 720–25.

<sup>59</sup> *Id.* at 726 (emphasis omitted).

<sup>60</sup> *Id.* at 729–36.

<sup>61</sup> *Id.* at 736–43.

common feature: they are developments in the tactics and operations of the opponents.<sup>62</sup>

These changes have sparked extensive debate as to the extent to which the laws of war apply in the war on terror, and commentators can be divided into three groups. The first group believes that the laws of war do not apply in the war on terror. For simplicity, call this the Bush Administration approach. In a 2002 memo, President Bush linked the nature of the war to the legal regime structuring warfare: “[o]ur Nation recognizes that this new paradigm—ushered in not by us but by terrorists—requires new thinking in the law of war.”<sup>63</sup> For the Bush Administration, the law of war was less relevant than this declaration perhaps suggested. Former U.S. Deputy Assistant Attorney General John Yoo believed the nation was at war with Al Qaeda, but he was imprecise as to whether that war was an international armed conflict described in Common Article 2 of the Geneva Conventions or a non-international armed conflict, described in Common Article 3.<sup>64</sup> The Bybee Memo declared that the war on terror fit neither category because international armed conflicts were limited to states, and non-international armed conflicts had to occur within one state.<sup>65</sup> Thus, only customary international law applied. The new paradigm of a global war on terror, in then-White House Counsel Alberto Gonzales’ view, “renders obsolete Geneva’s strict limitations . . . and renders quaint some of its provisions.”<sup>66</sup> As William Taft, another legal advisor, announced, “[n]othing in the law of war re-

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<sup>62</sup> One challenge Brooks does not discuss—the absence of reciprocity from terrorist groups—does not have this feature. For a discussion of reciprocity in the war on terror, see Derek Jinks, *The Applicability of the Geneva Conventions to the “Global War on Terrorism,”* 46 *Va. J. Int’l L.* 165, 190 (2005). Reciprocity is addressed in more detail *infra* text accompanying notes 399–440.

<sup>63</sup> Memorandum from President George W. Bush on Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

<sup>64</sup> See John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 *Va. J. Int’l L.* 207, 209–15 (2003).

<sup>65</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep’t of Def. 4–10 (Jan. 22, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf>.

<sup>66</sup> Memorandum from Alberto R. Gonzales, White House Counsel, to President George W. Bush (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>.



quires a country to charge enemy combatants with crimes, provide access to counsel absent such charges, or allow them to challenge their detention in court.”<sup>67</sup>

The Bush Administration approach clearly expresses the kill-capture strategy. In their vision, the war on terror will continue until terrorists around the globe are captured or killed, thus ending the threat. As President Bush declared, “[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”<sup>68</sup> Government must therefore “maximize its own ability to mobilize lethal force against terrorists.”<sup>69</sup> That the laws of war do not explicitly cover the global nature of terrorism is, on this reading, fortunate, because it enables the kill-capture strategy to go forward unhindered.

The second group in the debate argues that the laws of war and criminal law are each adequate to handle contemporary global terrorism. Call this the legal doctrine approach. Gabor Rona, for instance, notes that “[h]umanitarian law is basically fine,” and that “[t]here is little evidence that domestic and international laws and institutions of crime and punishment are not up to the task when terrorism and the War on Terror do not rise to the level of armed conflict.”<sup>70</sup> If each package of laws is coherent and effective,<sup>71</sup> then the only remaining question is determining which laws to apply. One set of analysts suggests that terrorism must be treated as a crime because terrorists are not a state and therefore cannot be belligerents under the laws of war.<sup>72</sup> A second set of scholars un-

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<sup>67</sup> William Taft, *Guantanamo Detention is Legal and Essential*, *Fin. Times* (London), Jan. 12, 2004, at 19.

<sup>68</sup> President’s Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 *Pub. Papers* 1140, 1141 (Sept. 20, 2001) [hereinafter *President’s Address*].

<sup>69</sup> David Luban, *The War on Terrorism and the End of Human Rights*, *Phil. & Pub. Pol’y Q.*, Summer 2002, at 9, 10.

<sup>70</sup> Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 *Fletcher F. World Aff.*, Summer/Fall 2003, at 55, 69.

<sup>71</sup> Luban, *supra* note 69, at 12.

<sup>72</sup> See Christopher Greenwood, *Essays on War in International Law* 431–32 (2006) (“In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals.”); Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 *Hum. Rts. Q.* 323, 323 (2002) (arguing that terrorism is a criminal act and

derstands the laws of war as applying in the war on terror; they argue that Al Qaeda and other terrorist groups can be understood as triggering either a non-international armed conflict as described in Common Article 3 of the Geneva Conventions,<sup>73</sup> or if they are working with a state, an international armed conflict under Common Article 2.<sup>74</sup> For this group, the laws of war as currently written are applicable, and there is nothing “quaint” or “obsolete” about Geneva. A third set of commentators have acknowledged that placing terrorism within Geneva is a challenge, but have seen no need to revise the substantive laws; rather, they hope to clarify the threshold determination of which law applies.<sup>75</sup> At least some adherents to the legal doctrine approach have adopted this position partially because of fear of conceding ground to the Bush Administration approach. Recognizing any gaps or holes in the framework of relevant laws would enable exploitation, and ultimately, legal violations.<sup>76</sup> Others are concerned that a hybrid form of law, merging elements of the laws of war and criminal law, would be unprincipled and thus undermine human rights.<sup>77</sup>

Like the Bush Administration approach, the legal doctrine approach sees the kill-capture strategy as central to the war on terror. The difference is fear that the terrorists’ tactical innovations will provide governments with the opportunity to undermine the laws of war’s constraints. Adherents to this approach follow directly in the tradition of the laws of war—acknowledging the kill-capture nature of warfare and seeking to restrain war’s horrors. Professor

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should be addressed via international criminal law); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 *Notre Dame L. Rev.* 1335, 1340–43 (2004); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 *Yale J. Int’l L.* 325, 326 (2003) (arguing Al Qaeda is not a state, so war is impossible); Jordan J. Paust, *There is No Need to Revise the Laws of War in Light of September 11th*, at 3–4 (ASIL Task Force Paper, Nov. 2002), available at <http://www.asil.org/taskforce/paust.pdf>.

<sup>73</sup> Jinks, *supra* note 56, at 45–49; see also Anthony Dworkin, *Military Necessity and Due Process: The Place of Human Rights in the War on Terror*, in *New Wars, New Laws?*, *supra* note 7, at 53, 55.

<sup>74</sup> Jinks, *supra* note 62, at 177–78.

<sup>75</sup> Kenneth Roth, *The Law of War in the War on Terror*, *Foreign Aff.*, Jan.–Feb. 2004, at 2, 7.

<sup>76</sup> Rona, *supra* note 70, at 58; see Wippman, *supra* note 7, at 8; Brooks, *supra* note 55, at 681; Roth, *supra* note 75, at 2.

<sup>77</sup> Luban, *supra* note 69, at 12.

Luban expresses the more fearful side of this group. He worries that “the real aim of the war [on terror] is, quite simply, to kill or capture all of the terrorists—to keep on killing and killing, capturing and capturing, until they are all gone.”<sup>78</sup> For Luban, the concern is that

even if al Qaeda is destroyed or decapitated, other groups, with other leaders, will arise in its place. It follows, then, that the War on Terrorism will be a war that can only be abandoned, never concluded. The War has no natural resting point, no moment of victory or finality. It requires a mission of killing and capturing, in territories all over the globe, that will go on in perpetuity.<sup>79</sup>

In a state of perpetual war, particularly one with the unconventional features of the war on terror, the threat to civil liberties and human rights is considerable.

The third group of scholars acknowledges that the war on terror challenges the laws of war, but instead of finding them inapplicable, these scholars seek to adapt the laws of war to fit contemporary conflict better. For shorthand, call this group the legal innovators. These scholars recognize that the laws of war were designed for a different kind of warfare—the conventional war model of massive armies waging war on distinct battlefields.<sup>80</sup> According to the legal innovators, applying the laws of war to the war on terror and assuming a perfect fit is “anachronistic” because of developments “never even imagined by the drafters of the Geneva Conventions.”<sup>81</sup> Some in this group go even further, historicizing the laws of war as responding to their particular context. After all, they note, the laws of war have been revised every twenty-five to thirty

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<sup>78</sup> *Id.* at 13.

<sup>79</sup> *Id.*

<sup>80</sup> Brooks, *supra* note 55, at 706.

<sup>81</sup> *Id.* at 745; see also Pierre-Richard Prosper, War Crimes at Large Ambassador, Address at the Royal Institute of International Affairs in London (Feb. 20, 2002), *quoted in* Roberts, *supra* note 55, at 225 (“[T]he war on terror is a new type of war not envisioned when the Geneva Conventions were negotiated and signed.”); Sean D. Murphy, Evolving Geneva Convention Paradigms in the “War on Terrorism”: Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants,” 75 *Geo. Wash. L. Rev.* 1105, 1106 (2007) (noting that the international/non-international armed conflict distinction does not fit the transnational nature of global terrorism).

years since their first codification in the 1860s.<sup>82</sup> On that timeline, since the last major revision—the Additional Protocols of 1977—another thirty years has passed and perhaps a revision is due.

The leading scholars in this camp have focused on the failure of the crime and war paradigms.<sup>83</sup> For the legal innovators, the goal is to develop a hybrid model of law, between war and crime, that is better tailored to terrorists' tactics. Judge Richard Posner's approach is paradigmatic. Judge Posner believes that the threat of terrorism is different from traditional internal and external threats such as criminals and foreign states.<sup>84</sup> Because terrorists fit neither the crime nor war models, pragmatic judges and legislators must balance and evaluate the effects a particular safety measure has on the values of security and liberty.<sup>85</sup> Although the conflict is not a conventional war, there is a strong enough security interest to modify criminal law because the enemy leverages the scope and destructive capacities of total war.<sup>86</sup>

Professor Bruce Ackerman has also rejected war and crime as appropriate models, preferring instead “emergency” to describe terrorism's threat. Terrorism is a “product of the free market in a world of high technology,”<sup>87</sup> and even with peace and democracy around the world, fringe groups would still have the capability to undertake acts of terrorism.<sup>88</sup> The war model is inaccurate because terrorism is not an existential threat<sup>89</sup> and because war allows presidents to use rhetoric to “batter down judicial resistance to their extreme efforts to strip suspects of their most fundamental rights.”<sup>90</sup> The crime model is inaccurate because terrorism, unlike

<sup>82</sup> Wippman, *supra* note 7, at 6; see also Weisburd, *supra* note 25, at 1080, 1085.

<sup>83</sup> See, e.g., Wippman, *supra* note 7, at 4; Noah Feldman, Choices of Law, Choices of War, 25 *Harv. J. L. & Pub. Pol'y* 457, 457–58, 470 (2002) (concluding that “terrorist attacks on the United States, planned from without, cannot definitively be categorized as either war or crime. They are crime from the perspective of provenance, war from the perspective of intentionality, probably crime from the perspective of identity, and very possibly war from the perspective of scale”); Ronald J. Sievert, War on Terrorism or Global Law Enforcement?, 78 *Notre Dame L. Rev.* 307, 308–10 (2003).

<sup>84</sup> Richard A. Posner, Not a Suicide Pact 5 (2006).

<sup>85</sup> *Id.* at 31–32.

<sup>86</sup> *Id.* at 72, 147–48.

<sup>87</sup> Bruce Ackerman, Before the Next Attack 13 (2006).

<sup>88</sup> *Id.* at 14.

<sup>89</sup> *Id.* at 89, 171.

<sup>90</sup> *Id.* at 38.

normal criminal operations, challenges the “effective sovereignty” of the state.<sup>91</sup> It does so only momentarily, since terrorists are not trying, on Ackerman’s theory, to occupy or govern the state, only to destabilize it.<sup>92</sup> Professor Ackerman prescribes an Emergency Constitution—a statute that would provide for declaration of an emergency after a terrorist attack and would provide heightened security measures to protect against a second strike.<sup>93</sup> This statute would expire if not reauthorized frequently by escalating supermajorities.<sup>94</sup>

Many others have sought to find the appropriate balance between civil liberties and national security. Brooks uses human rights law as inspiration for providing a baseline to apply in the context of terrorism.<sup>95</sup> Monica Hakami suggests an administrative approach.<sup>96</sup> Allison Danner looks to tribunals.<sup>97</sup> Benjamin Wittes wants the proceduralism of Congressional and Presidential agreement to establish a balanced regime.<sup>98</sup> Others advocate for a category of extra-state hostilities.<sup>99</sup> And Noah Feldman notes that the absence of a clear hybrid model actually results in a flexible, ad hoc model that incorporates components of each approach.<sup>100</sup>

Although the legal innovators recognize that terrorism differs from both crime and conventional war, they simply assume that the kill-capture strategy is the primary, or even only, way to increase security and defeat terrorism. Take Judge Posner: he assumes an unimpeded military could find, kill, and capture the terrorists, preventing terrorism and providing security. But he also acknowledges a conflicting value in constitutional rights and liberties. The law’s role is to protect rights when the cost of protection outweighs the marginal security gains of a particular safety proposal. Professor

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<sup>91</sup> Id. at 42.

<sup>92</sup> Id. at 172.

<sup>93</sup> Id. at 1–9.

<sup>94</sup> Id. at 4.

<sup>95</sup> See Brooks, *supra* note 55, at 746–47.

<sup>96</sup> Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 *Yale J. Int’l L.* 369, 373 (2008).

<sup>97</sup> Allison Danner, *Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism*, 46 *Va. J. Int’l L.* 83, 87–88 (2005).

<sup>98</sup> Benjamin Wittes, *Law and the Long War 1–17* (2008).

<sup>99</sup> Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 *N.Y.U. J. Int’l L. & Pol.* 1, 3–4 (2004).

<sup>100</sup> Feldman, *supra* note 83, at 477.

Ackerman reaches a similar conclusion through different reasoning. Ackerman believes terrorists have no broad ideological or political agenda, so kill-capture is the only way to stop them. Yet kill-capture and liberty-protecting laws are in conflict. Instead of a balancing test, as Judge Posner suggests, Professor Ackerman advocates for a category of emergency that has a fixed set of provisions that balance security and liberty and would operate for a short period of time. The basic assumption in both cases is that the kill-capture strategy is the central feature of the war on terror and that law gets in its way.

In addition to assuming that the war on terror is defined by a kill-capture strategy, the balancing approaches seem unsatisfying as a comprehensive way to think about law in the age of terrorism. The balancing approach merely tacks greater procedures onto the kill-capture approach. Moreover, when the legal innovators attempt to use a principled approach, the outcomes are often vague or one-sided. Human rights advocates, for example, admit their approach is incompetent to address difficult cases of military necessity.<sup>101</sup> Finally, the balancing approaches also seem narrow in scope. They have a tendency to focus on domestic law when the problem is global. They also focus inordinately on detention, interrogation, and similar issues. From a review of the literature on the war on terror, one would think that these are the primary, perhaps even only, places where law interacts with 21st century conflict.

If we are to devise a legal regime for contemporary conflict, it must be based on the right understanding of the strategic challenge. Although the war on terror model has enabled legal scholars to see the tactical shifts in modern conflict, attempts to address contemporary conflict have thus far assumed that the central strategy for victory is a kill-capture strategy. But, as the next Section will show, the kill-capture approach is not the predominant military strategy for addressing contemporary security challenges.

### *B. From the War on Terror to Counterinsurgency*

What the legal debates on the war on terror have missed is the fact that between 2002 and 2008, military strategists have reconceived the contemporary national security framework from a war

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<sup>101</sup> Brooks, *supra* note 55, at 751.

on terror to counterinsurgency. The shift is significant because counterinsurgency rejects the kill-capture strategy for victory, instead embracing a win-the-population strategy. The importance of the shift to a counterinsurgency strategy has been noted with sustained attention from popular commentators,<sup>102</sup> with the most attention paid to the publication of The U.S. Army/Marine Corps Counterinsurgency Field Manual in 2007.<sup>103</sup> This focus on counterinsurgency in Iraq and Afghanistan, however, has not made a significant impact in the legal literature.<sup>104</sup>

There are stark differences between the terrorism and insurgency frameworks.<sup>105</sup> Terrorists are seen as unrepresentative and abnormal outliers in society. Insurgency is the manifestation of deeper, widespread issues in society. Terrorism isolates terrorists from negotiation or constructive engagement. Insurgency is premised on winning hearts and minds. Terrorists' methods and objectives are condemned. Insurgents' methods are condemned but their objectives might be reasonable if pursued through political means. Terrorists are seen as psychologically defective—seeking violence for its own sake. Insurgents see violence as part of a broader political-military strategy. Terrorism is seen as either a law enforcement or military problem, rooting out a few bad apples. Insurgency is a social problem, requiring mobilization of all elements of government power. Counterterrorism is tactical, focusing on catching particular terrorists. Counterinsurgency is strategic, seeking to undermine the insurgent's strategy and envisioning capture as

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<sup>102</sup> See, e.g., Spencer Ackerman, *The Rise of the Counterinsurgents*, Wash. Indep., July 27, 2008, <http://washingtonindependent.com/426/series-the-rise-of-the-counterinsurgents>. Prominent counterinsurgency strategist John Nagl even appeared on Comedy Central's *The Daily Show with Jon Stewart*. *The Daily Show with Jon Stewart: Interview with Lt. Col. John Nagl* (Comedy Central television broadcast Aug. 23, 2007), available at <http://www.thedailyshow.com/watch/thu-august-23-2007/lt-col-john-nagl>.

<sup>103</sup> See, e.g., Douglas Jehl & Thom Shanker, *For the First Time Since Vietnam, the Army Prints a Guide to Fighting Insurgents*, N.Y. Times, Nov. 13, 2004, at A12.

<sup>104</sup> The only significant articles on the topic are Note, *supra* note 5, and Witt, *supra* note 6.

<sup>105</sup> Professor Robert Sloane has argued that terrorism is different in kind from traditional insurgency but for different reasons; namely, terrorists reject noncombatant immunity and are structured in networks instead of hierarchies. Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 Mich. L. Rev. 443, 450 (2007). Military strategists more precisely see terrorism as largely fitting *within* the concept of insurgency—as a tactic used by insurgents.

secondary.<sup>106</sup> In essence, terrorism is subordinate to insurgency. Terrorism is a particular tactic. Insurgency is the rejection of a political order.<sup>107</sup>

The shift from the war on terror framework to the counterinsurgency framework proceeded roughly in three phases, as military strategists shifted focus from tactical innovations to the strategic goal of political order. During the first few years after September 11, national strategy envisioned the security challenge as the war on terror and focused on killing and capturing terrorists. In his address to Congress on September 20, 2001, President Bush announced that the September 11 attacks were an “act of war” and declared that the “war on terror begins with Al Qaida,” but will not end until “every terrorist group of global reach has been found, stopped, and defeated.”<sup>108</sup> In eradicating the world of terrorists, the United States would “drive them from place to place, until there is no refuge or no rest.”<sup>109</sup>

Between 2004 and 2006, however, there was significant flux in how to describe the global conflict. David Kilcullen, one of the world’s leading counterinsurgency strategists, wrote in a far-ranging article in 2004 that the “present conflict is actually a campaign to counter a globalised Islamist insurgency,” and offered counterinsurgency as a superior alternative to counterterrorism.<sup>110</sup> Kilcullen sharply distinguished between insurgency and terrorism:

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<sup>106</sup> David Kilcullen, *Countering Global Insurgency* 17–18 (Nov. 30, 2004), <http://smallwarsjournal.com/documents/kilcullen.pdf> [hereinafter Kilcullen, *Countering Global Insurgency*]; see also David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*, at xv (2009) [hereinafter Kilcullen, *The Accidental Guerrilla*].

<sup>107</sup> Professor Philip Bobbitt makes this point, but curiously prefers to refer to “terrorists” and “states of terror.” What defines terrorists, he says, is that they attack civilians and that they are opposed to the constitutional order of the era. See Philip Bobbitt, *Terror and Consent* 27 (2008). Precision suggests distinguishing between these elements and referring to insurgents as those who oppose the constitutional order by violent means, whether as terrorists, guerrillas, or counterstates. This distinction also suggests terrorism can exist apart from insurgency. Where insurgency and terror overlap, political claims of insurgents can often be channeled into political mechanisms. The residual cases of pure terrorism will be few and can be addressed through conventional means.

<sup>108</sup> President’s Address, *supra* note 68, at 1140–41.

<sup>109</sup> *Id.* at 1142.

<sup>110</sup> Kilcullen, *Countering Global Insurgency*, *supra* note 106, at 1; see also Robert M. Cassidy, *Counterinsurgency and the Global War on Terror*, at vii (2006).



insurgency is “a popular movement that seeks to change the *status quo* through violence and subversion, while terrorism is one of its key tactics.”<sup>111</sup> In 2005, Stephen Hadley, the National Security Advisor, seemed to agree, writing in the *New York Times* that “military action is only one piece of the war on terrorism” and that while terrorists must be “hunted, captured or killed,” “all of the tools of statecraft” would be necessary for victory.<sup>112</sup>

At the time, President Bush rejected the defense establishment’s wavering and reiterated that the “war on terror” continued.<sup>113</sup> But by 2007 and 2008, a momentous shift had taken place.<sup>114</sup> In 2007, the Counterinsurgency Field Manual was published and became official Army and Marine Corps doctrine for operations in Iraq and Afghanistan. In Britain, the government decided to stop using the phrase “war on terror.”<sup>115</sup> Army Lieutenant General William Boykin, serving as Deputy Undersecretary of Defense for Intelligence commented: “If we look at it [sic] as terrorism, we have a tendency to think that the solution is to kill or capture all the terrorists. That’s a never-ending process. . . . We’ll never be successful, we’ll never get there, if we think that’s the primary solution, . . . [b]ut if we approach it from the perspective of an insurgency, we use the seven elements of national power”—diplomacy, military, economy, finance, law enforcement, information, and intelligence.<sup>116</sup> Other officials agreed. Secretary of State Condoleezza Rice stated that “[l]eading security experts are increasingly thinking about the war on terrorism as a kind of global counterinsur-

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<sup>111</sup> Kilcullen, *Countering Global Insurgency*, supra note 106, at 15.

<sup>112</sup> Stephen J. Hadley & Frances Fragos Townsend, *Op-Ed.*, *What We Saw in London*, N.Y. Times, July 23, 2005, at A13.

<sup>113</sup> Richard W. Stevenson, *President Makes it Clear: Phrase is ‘War on Terror,’* N.Y. Times, Aug. 4, 2005, at A12.

<sup>114</sup> See generally, e.g., James S. Corum, *Fighting the War on Terror: A Counterinsurgency Strategy* (2007) (recommending a counterinsurgency strategy to address security challenges in Iraq and Afghanistan).

<sup>115</sup> Philip Johnston, *Ministers Ditch ‘War on Terror’ to Avoid Glorifying Terrorists*, Daily Telegraph (London), Jan. 17, 2008, at 2.

<sup>116</sup> John J. Kruzal, *U.S. Should Use Counterinsurgency Methods in War on Terror, General Says*, American Forces Press Service, Feb. 28, 2007, <http://www.defenselink.mil/news/newsarticle.aspx?id=3218>.

gency,”<sup>117</sup> and Secretary of Defense Robert Gates argued that “[w]hat is dubbed the war on terror is, in grim reality, a prolonged, world-wide irregular campaign—a struggle between the forces of violent extremism and moderation. . . . [O]ver the long term, we cannot kill or capture our way to victory.”<sup>118</sup>

Perhaps most authoritatively, the National Defense Strategy of 2008 does not use the phrase “war on terror” once.<sup>119</sup> Instead, the National Defense Strategy names the conflict the “Long War,”<sup>120</sup> and transforms the strategic imperative from kill-capture to broader, “full-spectrum” counterinsurgency operations. Instead of hunting, killing, and capturing terrorists, the conflict

is a prolonged irregular campaign, a violent struggle for legitimacy and influence over the population. The use of force plays a role, yet military efforts to capture or kill terrorists are likely to be subordinate to measures to promote local participation in government and economic programs to spur development, as well as efforts to understand and address the grievances that often lie at the heart of insurgencies. For these reasons, arguably the most important military component of the struggle against violent extremists is not the fighting we do ourselves, but how well we help prepare our partners to defend and govern themselves.<sup>121</sup>

The strategy, in essence, is not limited to kill-capture and is not even *primarily* kill-capture, as the war on terror framework implied. Rather, the “essential ingredients of long-term success include economic development, institution building, and the rule of law, as well as promoting internal reconciliation, good governance, providing basic services to the people, training and equipping in-

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<sup>117</sup> Condoleezza Rice, Sec’y, U.S. Dep’t of State, Remarks on Transformational Diplomacy at Georgetown University (Feb. 12, 2008) (transcript available at <http://2001-2009.state.gov/secretary/rm/2008/02/100703.htm>).

<sup>118</sup> Robert M. Gates, Sec’y, U.S. Dep’t of Def., Speech at National Defense University, (Sept. 29, 2008) (transcript available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=1279>).

<sup>119</sup> U.S. Dep’t of Def., National Defense Strategy (June 2008), <http://www.defenselink.mil/pubs/2008NationalDefenseStrategy.pdf>.

<sup>120</sup> *Id.* at 7.

<sup>121</sup> *Id.* at 8.

digenous military and police forces, strategic communications.”<sup>122</sup> By December 2008, the Department of Defense had declared that irregular warfare, including counterinsurgency, was “as strategically important as traditional warfare.”<sup>123</sup>

Counterinsurgency operations are not a new development of the 21st century, but they have never before seemed so central to the future of warfare. The national security establishment today believes counterinsurgency wars will be the likely wars of the future.<sup>124</sup> Secretary of Defense Gates has argued that enemies have realized they cannot challenge the military supremacy of the United States and therefore have turned to asymmetric insurgency. “[A]symmetric warfare,” he notes, “will remain the mainstay of the contemporary battlefield for some time.”<sup>125</sup> Secretary of State Rice agreed and projected that America will remain in this conflict “for many years.”<sup>126</sup> And the *U.S. Government Counterinsurgency Guide* states forthrightly that “[i]nsurgency will be a large and growing element of the security challenges faced by the United States in the 21st century.”<sup>127</sup> To be sure, it is unlikely that the United States will invade another country, engage in regime change, and conduct a full-scale counterinsurgency operation. But as Secretary Gates has stated, insurgency is still the future of conflict. The American role may be indirect—“building the capacity of partner governments and their security forces”—but counterinsurgency operations will nonetheless take place.<sup>128</sup>

If the military is correct that the likely wars of the future will be insurgencies, local and global, then applying the wrong strategy would be disastrous. For international and national security lawyers, relying on an outmoded notion of strategy for constructing a

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<sup>122</sup> *Id.* at 17.

<sup>123</sup> U.S. Dep’t of Def. Directive 3000.07, at 4(a) (2008), available at <http://www.dtic.mil/whs/directives/corres/pdf/300007p.pdf>.

<sup>124</sup> I take the phrase “the likely war” from Vincent Desportes, *La Guerre Probable* (2007).

<sup>125</sup> Robert M. Gates, Sec’y, U.S. Dep’t of Def., Remarks at the Association of the U.S. Army (Oct. 10, 2007) (transcript available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=1181>).

<sup>126</sup> Rice, *supra* note 117.

<sup>127</sup> Eliot A. Cohen, Preface to U.S. Gov’t Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide* (Jan. 2009), available at <http://www.state.gov/documents/organization/119629.pdf>.

<sup>128</sup> Gates, *supra* note 118.

legal regime might lead to substantial disconnects between military operations and law that are over- or under-constraining, potentially ignored, or if revised, are based on faulty premises. Rethinking the legal regime thus requires understanding the strategy with depth and precision.

### III. COUNTERINSURGENCY'S STRATEGY FOR VICTORY

The significance of the shift from the war on terror to counterinsurgency lies in a shift in the strategy for victory: from kill-capture to win-the-population. Counterinsurgency's win-the-population approach differs from kill-capture in two ways. First, although counterinsurgency has a place for killing and capturing enemies, kill-capture is not the primary focus. Because insurgents gain strength from the acquiescence of the population, the focus of counterinsurgency is building the population's trust, confidence, and cooperation with the government. Second, counterinsurgency is not limited to military operations. It includes political, legal, economic, and social reconstruction in order to develop a stable, orderly society, in which the population itself prevents the emergence or success of the insurgency.

Insurgency is defined as a "protracted struggle conducted methodically, step by step, in order to attain specific intermediate objectives leading finally to the overthrow of the existing order."<sup>129</sup> In the modern era, insurgency often "follows state failure, and is not directed at taking over a functioning body politic, but at dismembering or scavenging its carcass, or contesting an 'ungoverned space.'"<sup>130</sup> The central issue in an insurgency is political power because "each side aims to get the people to accept its governance or authority as legitimate."<sup>131</sup>

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<sup>129</sup> David Galula, *Counterinsurgency Warfare* 4 (1964) (emphasis omitted); see also Field Manual, *supra* note 8, ¶ 1-2 ("[A]n insurgency is an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control.").

<sup>130</sup> David Kilcullen, *Counter-insurgency Redux*, *Survival*, Winter 2006–07, at 111, 112.

<sup>131</sup> Field Manual, *supra* note 8, ¶ 1-3.

Insurgencies are social systems that grow organically in local society but can link globally with other insurgencies.<sup>132</sup> Success in an insurgency depends on the support, or at least the acquiescence, of the population.<sup>133</sup> To win support or submission, insurgents use disorder to undermine the counterinsurgent's power and legitimacy,<sup>134</sup> and they mobilize support locally and globally.<sup>135</sup> Among other things, insurgents advocate ideologies,<sup>136</sup> pay individuals to conduct operations,<sup>137</sup> employ violence and intimidation,<sup>138</sup> and exploit local grievances such as communal or sectarian conflicts.<sup>139</sup> Insurgents may have fewer resources than counterinsurgents, but success in the early stages of insurgency only requires "sowing chaos and disorder anywhere; the government fails unless it maintains a degree of order everywhere."<sup>140</sup> If successful in disrupting the counterinsurgent's ability to govern, some insurgents, like Hezbollah in Lebanon, may develop a "counterstate" that provides security and essential services.<sup>141</sup> The creation of a counterstate solidifies the insurgent's support amongst the population when the government is impotent and the insurgents can meet the population's needs.<sup>142</sup>

A counterinsurgent's task differs considerably from a conventional warrior's because the enemy is embedded in the local community, focused on developing popular support or submission, and committed to disrupting a legitimate, stable political order. Counterinsurgency can be defined as the "military, paramilitary, political, economic, psychological, and civic actions taken by a govern-

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<sup>132</sup> Kilcullen, *Countering Global Insurgency*, *supra* note 106, at 22–23, 26–27.

<sup>133</sup> Galula, *supra* note 129, at 7–8.

<sup>134</sup> *Id.* at 11.

<sup>135</sup> Kilcullen, *The Accidental Guerrilla*, *supra* note 106, at 9.

<sup>136</sup> Field Manual, *supra* note 8, ¶ 1-75.

<sup>137</sup> Kilcullen, *supra* note 130, at 119.

<sup>138</sup> Field Manual, *supra* note 8, ¶ 1-28.

<sup>139</sup> Kilcullen, *Countering Global Insurgency*, *supra* note 106, at 37. The word "grievance" is not used exclusively in this Article to connote, as it does in political science, a grievance created by ethnic or religious difference or lack of political rights. See James D. Fearon & David D. Laitin, *Ethnicity, Insurgency, and Civil War*, 97 *Am. Pol. Sci. Rev.* 75–76, 79 (2003). Neither counterinsurgents nor these political scientists focus solely on these grievances, though they recognize that such grievances can be produced by wars and can challenge peaceful resolution. *Id.* at 88.

<sup>140</sup> Field Manual, *supra* note 8, ¶ 1-9.

<sup>141</sup> *Id.* ¶ 1-33.

<sup>142</sup> Peter R. Mansoor & Mark S. Ulrich, *Linking Doctrine to Action: A New COIN Center-of-Gravity Analysis*, *Mil. Rev.*, Sept.–Oct. 2007, at 45, 48.

ment to defeat insurgency.”<sup>143</sup> Success in counterinsurgency operations “depends on the people taking charge of their own affairs and consenting to the government’s rule.”<sup>144</sup> Because insurgents derive their support from the local population, only when the local population turns against the insurgency and actively embraces a burgeoning order can the insurgency be defeated.

Even at this level of abstraction from operational details, it is immediately obvious that counterinsurgency is not centered on a kill-capture strategy. As the Counterinsurgency Field Manual states, “killing insurgents . . . by itself cannot defeat an insurgency.”<sup>145</sup> The first problem is that it is impossible to kill every insurgent.<sup>146</sup> Insurgents are embedded into the population, indistinguishable from civilians. Just as important, an insurgency is made up not only of those who engage in combat, but also of active and passive supporters.<sup>147</sup> Seeking to kill or capture all insurgent supporters would require targeting much of the nation. Moreover, conducting kill-capture operations against insurgents—whether participants or supporters—may be counterproductive, resulting in negative feedback loops.<sup>148</sup> “[I]t risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge.”<sup>149</sup> Instead, counterinsurgents focus on separating the insurgency from its resources and popular support.<sup>150</sup>

Counterinsurgency thus follows a win-the-population strategy. The people, not the enemy, are the center of gravity in counterinsurgency.<sup>151</sup> They are the source of strength for both the insurgents and counterinsurgents. The central causes of the conflict—for example, local grievances, poor governance, insecurity—are socio-political.<sup>152</sup> Addressing the root causes removes the population’s reasons for actively or passively supporting the insurgency, and will

<sup>143</sup> Field Manual, *supra* note 8, ¶ 1-2.

<sup>144</sup> *Id.* ¶ 1-4.

<sup>145</sup> *Id.* ¶ 1-14.

<sup>146</sup> *Id.* ¶ 1-128.

<sup>147</sup> *Id.* ¶¶ 3-84 to -88.

<sup>148</sup> *Id.* ¶ 1-128.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> David W. Barno, Fighting “The Other War”: Counterinsurgency Strategy in Afghanistan, 2003–2005, *Mil. Rev.*, Sept.–Oct. 2007, at 32, 34.

<sup>152</sup> See Mansoor & Ulrich, *supra* note 142, at 46–48.

result in a withering insurgency. As a result, “all energies should be directed at gaining and maintaining control over the population and winning its support.”<sup>153</sup> In other words, “[c]ounterinsurgency is armed social work, an attempt to redress basic social and political problems while being shot at.”<sup>154</sup>

Counterinsurgency operations can be easily categorized: securing the population; ensuring essential services; establishing governance structures; developing the economy and infrastructure; and communicating with the population.<sup>155</sup> Securing the population involves ensuring civil security and training host nation security forces.<sup>156</sup> Ensuring civil security involves combat operations against insurgent fighters “who cannot be co-opted into operating inside the rule of law.”<sup>157</sup> Operations are often small-scale and designed to avoid injuring innocent people both for humanitarian reasons and to win the population’s support for the counterinsurgency.<sup>158</sup> Training host nation security forces gives the population a stake in counterinsurgency and develops their capacity for providing security. Ensuring essential services guarantees that the population has the basic necessities of life: water, electricity, schools, transportation, medical care, and sanitation (trash and sewage).<sup>159</sup> The importance of essential services is not to be underestimated. One influential review showed a direct correlation between insurgent activity in the Baghdad neighborhood of Sadr City and poor provision of power and sanitation.<sup>160</sup> Infrastructure projects employ people, provide basic services, and place a wedge between insurgents and passive supporters.<sup>161</sup>

One of the “most important” activities is establishing governance structures because effective governance will address social

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<sup>153</sup> *Id.* at 46.

<sup>154</sup> David Kilcullen, “Twenty-Eight Articles”: Fundamentals of Company-level Counterinsurgency, *Mil. Rev.*, May–June 2006, at 103, 107.

<sup>155</sup> See Field Manual, *supra* note 8, fig.5-1.

<sup>156</sup> See *id.* fig.5-2; ¶¶ 5-36 to -41.

<sup>157</sup> *Id.* ¶ 5-38.

<sup>158</sup> *Id.* ¶¶ 5-38 to -39.

<sup>159</sup> See *id.* fig.5-4.

<sup>160</sup> Peter W. Chiarelli & Patrick W. Michaelis, *Winning the Peace: The Requirement for Full-Spectrum Operations*, *Mil. Rev.*, July–Aug. 2005, at 4, 9 fig.3; see Bing West, *The Strongest Tribe: War, Politics, and the Endgame in Iraq* 79 (2008).

<sup>161</sup> Chiarelli & Michaelis, *supra* note 160, at 10–12.

problems better than externally provided services.<sup>162</sup> Developing governance includes establishing or strengthening local, regional, and national departments and agencies, creating a justice system, and working to secure fundamental human rights.<sup>163</sup> Ensuring fair and transparent political processes enables self-government and provides a non-violent path for political expression. Guaranteeing a fair system of justice grants legitimacy to the state's more coercive actions. In some cases, these systems may not exist or function and counterinsurgents will need to "establish legal procedures and systems to deal with captured insurgents and common criminals."<sup>164</sup> Economic and infrastructure development is also necessary to counterinsurgency because an effective economy gives the population a stake in society. Poor economic conditions provide an opportunity for insurgents' false promises to gain active and passive supporters.<sup>165</sup>

Finally, information operations are central to counterinsurgency and affect each of the prior operations. Every action is part of the information environment, particularly given the speed with which information travels on the internet and through television.<sup>166</sup> Successful information operations requires dialogue between soldiers and the population, a forum for dialogue with the opposition, and avenues for the population to voice its opinions.<sup>167</sup> Transparency is also central to establishing trust and legitimacy; thus, counterinsurgents must publicize treatment of detainees, allow for host nation leaders and media to tour detention facilities, and even speak and eat with detainees.<sup>168</sup> Effective information operations can neutralize insurgent propaganda and goes a long way toward winning the population's support.<sup>169</sup>

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<sup>162</sup> Field Manual, *supra* note 8, ¶ 5-45.

<sup>163</sup> See *id.* ¶¶ 5-54 to -55, D-38.

<sup>164</sup> *Id.* ¶ D-39.

<sup>165</sup> *Id.* ¶ 5-48. Economic aid has been found to decrease violence in counterinsurgency. See Eli Berman, Jacob N. Shapiro & Joseph H. Felter, *Can Hearts and Minds be Bought? The Economics of Counterinsurgency in Iraq* 37 (Nat'l Bureau Econ. Res., Working Paper No. 14606, 2008), available at <http://www.nber.org/papers/w14606>.

<sup>166</sup> Field Manual, *supra* note 8, ¶¶ 5-19, -28.

<sup>167</sup> *Id.* tbl.5-1.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* ¶ 5-19.



As much as counterinsurgency stresses non-military operations, it is vital to understand that killing and capturing still takes place. Counterinsurgency is war. The need to protect the population from violent insurgents requires not only a robust defense of the civilian population but also the careful and aggressive hunting of insurgents. The goal is to distinguish between reconcilables and irreconcilables. The reconcilables can be won over; the irreconcilables must be killed or captured.<sup>170</sup> The importance of the shift to a win-the-population strategy is not that it eviscerates the need to kill or capture, but rather that it substantially shifts the focus of military operations, the mindset and strategy of the military, and the default position from which the military begins. Destruction and killing is not undertaken lightly and when it does take place, the military is as concerned with its effects on the population as it is on the targets themselves.

Thus far, the discussion of counterinsurgency strategy has been focused on insurgency in one country. What is needed, however, is a strategy for countering *global* insurgency. After all, insurgency is not limited merely to Iraq or Afghanistan; some insurgents seek to transform the entire world by creating a Caliphate uniting the Muslim world and expanding the realm of Islam to all of human society.<sup>171</sup> Countering global insurgency requires a global strategy. One possible strategy is a collective security approach that uses an international actor such as the U.N. Security Council as the global counterinsurgent.<sup>172</sup> The problem is that successful counterinsurgency requires considerable interagency cooperation—between political, military, police, administrative, economic, cultural, and other actors. No international organization has such power, nor is the emergence of such an actor likely. Another strategy, relying on one nation to act as the global counterinsurgent would solve this problem, but that country would face a substantial legitimacy problem, and legitimacy is crucial to winning over the population in counterinsurgency operations.<sup>173</sup>

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<sup>170</sup> See Media Roundtable with Gen. David H. Petraeus, Commanding Gen., Multi-Nat'l Force Iraq, in Iraq (Sept. 4, 2008), available at [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=22229&Itemid=131](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=22229&Itemid=131).

<sup>171</sup> Kilcullen, *Countering Global Insurgency*, supra note 106, at 15.

<sup>172</sup> *Id.* at 20.

<sup>173</sup> *Id.*

In response to these challenges, David Kilcullen has derived a strategy for countering global insurgency from the nature of the global insurgency itself. Global insurgency is not hierarchical nor even networked, but organic and complex.<sup>174</sup> Global insurgency is the set of transnational systems (such as propaganda, logistics, recruitment, and financing) and geographically defined insurgent systems that interact and collectively amount to the global counterstate that opposes the global order.<sup>175</sup> The power of the global counterstate derives not from the specific elements in any particular system but “from the links in the system—energy pathways that allow disparate groups to function in an aggregated fashion across intercontinental distances.”<sup>176</sup>

This understanding of global insurgency as a system of systems<sup>177</sup> that derives its strength from its interconnections leads directly to a strategy of disaggregation—a strategy of de-linking and dismantling the various parts of the system, preventing cooperation and connectedness.<sup>178</sup> Disaggregating the global insurgency results in “a series of disparate local conflicts that are capable of being solved by nation-states and can be addressed at the regional or national level without interference from global enemies.”<sup>179</sup> Disaggregation requires denying linkages between regional or global actors and local actors; interdicting transmission of information, finance, materials, and persons between theatres; minimizing outputs like casualties and destruction; and denying sanctuary or ungoverned spaces.<sup>180</sup> Within a particular theatre, disaggregation looks like counterinsurgency as described earlier: conducting political, economic, and other operations,<sup>181</sup> and tailoring action to local conditions.<sup>182</sup> Disaggregation thus confronts the global nature of the

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<sup>174</sup> Id. at 22–25.

<sup>175</sup> Id. at 27.

<sup>176</sup> Id. at 2.

<sup>177</sup> An analogy to the human body may be helpful. The body has many internal systems—the cardiovascular system and the nervous system, for instance—and the person participates in a social system and an environmental ecosystem. Id. at 22.

<sup>178</sup> Id. at 37.

<sup>179</sup> Id.

<sup>180</sup> Id. at 37–38, 40.

<sup>181</sup> Id. at 38.

<sup>182</sup> Id. at 43–44; see also Note, *supra* note 5, at 1636–38.

threat not by applying a global solution, but rather by preventing the globalization of insurgency.

From the perspective of traditional warfare, counterinsurgency strategy is radically unconventional. The *Counterinsurgency Field Manual* has captured some of the counterintuitive elements of counterinsurgency as paradoxes. Five are worth noting. “Sometimes, the more you protect your force, the less secure you may be.”<sup>183</sup> Traditional warfare encourages protection of one’s forces and allows self-defense actions by military forces. In counterinsurgency, a protected military will lose contact with the people and have little understanding of their needs and conditions. Counterinsurgents must instead be embedded in the society—even if they assume greater risks.<sup>184</sup> “Sometimes, the more force is used, the less effective it is.”<sup>185</sup> In conventional war, total annihilation would guarantee victory because the enemy force was the center of gravity. Technology and economics thus worked together to develop ever more destructive weapons. In counterinsurgency, greater force means collateral damage and mistakes, which might result in the population losing faith in the counterinsurgent and supporting instead the insurgency. “Sometimes doing nothing is the best reaction.”<sup>186</sup> Conventional war allowed for reprisals, retaliation, and even preemptive self-defense. But insurgents seek to provoke the counterinsurgent into overreacting and to exploit those errors in propaganda. The counterinsurgent thus may often determine that an otherwise permissible action may cause more harm than good. “Some of the best weapons for counterinsurgents do not shoot.”<sup>187</sup> Counterinsurgency is not limited to or even primarily dominated by military means. “[T]he decisive battle is for the people’s minds,” which means that “dollars and ballots will have more important effects than bombs and bullets.”<sup>188</sup> Finally, “the host nation doing something tolerably is normally better than us doing it well.”<sup>189</sup> Conventional strategy focuses on one’s own military. Counterin-

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<sup>183</sup> Field Manual, *supra* note 8, ¶ 1-149.

<sup>184</sup> *Id.* ¶ 1-149.

<sup>185</sup> *Id.* ¶ 1-150.

<sup>186</sup> *Id.* ¶ 1-152.

<sup>187</sup> *Id.* ¶ 1-153.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* ¶ 1-154.

surgency suggests that building capacity in others is better than acting for oneself. Thus, whenever the host nation's forces can be embedded or included, they should be; and whenever they can undertake operations themselves, they should do so.

These paradoxes demonstrate how different counterinsurgency is from conventional war. Counterinsurgency is defined by a win-the-population strategy for victory, not a kill-capture strategy for victory. It shifts the goals of war from destroying the enemy to protecting the population and building an orderly, functioning society. It expands the scope of operations for purely military operations to a broad set of operations including security, essential services, governance, economy, and information. And it holds that while security is essential, sustainable victory is dependent more on the other elements than on military prowess.

#### IV. THE LAWS OF COUNTERINSURGENCY WARFARE

As this Article has shown, the laws of war are based on the assumption that warfare is driven by a kill-capture strategy for victory, a strategy in which each side tries to destroy the other. Despite the tactical innovations of terrorism, the war on terror framework likewise follows this strategy for victory. Developments in military strategy in the period from 2002 to 2008, however, have begun to replace the war on terror framework with a counterinsurgency framework. Importantly, counterinsurgency's strategy for victory is not kill-capture but win-the-population.

The shift to counterinsurgency requires reassessing the laws of war in light of the win-the-population strategy. This Part undertakes that task, first considering the legal implications of the win-the-population strategy for the principle of distinction, occupation law, detention policy, the use of non-lethal weapons, and civilian compensation and then reassessing compliance with the laws of war under the principle of reciprocity. To be sure, not all the principles or doctrines in the laws of war need to be rethought, and the goal of this section is neither to evaluate comprehensively every principle or doctrine nor to argue that the laws of war need to be rewritten or replaced. Rather, the goal is to assess how well some rules fit with counterinsurgency.

Some of the results may be unconventional and perhaps even controversial. The laws of war appear disconnected from counter-

insurgency in three ways. In some cases, the laws of war have not gone far enough in enabling humanitarian operations. The internalization of the combatant's privilege, for example, has left civilians injured as a result of collateral damage with no legal recourse or remedy, when, in fact, civilian compensation would both provide humanitarian relief and strengthen the counterinsurgents' posture with the public. In other cases, the laws of war render necessary and beneficial operations illegal: occupation law prohibits political and social reform, but such reform may be indispensable to counterinsurgency. The use of non-lethal weapons, often illegal, would undoubtedly save lives and assist counterinsurgency. At times, the laws of war appear to be largely superfluous, as strategic self-interest pushes counterinsurgents to operate in accordance with humanity as much as possible. The principle of distinction thus looks very different when counterinsurgents are determining targets to attack. In addition to these disconnects, taking counterinsurgency seriously changes some of the conventional approaches to the "war on terror" policies. Counterinsurgency recommends that not all questions be resolved at the global level. The disaggregation strategy, for example, challenges the global detention regime. Moreover, counterinsurgency suggests that the "war on terror" has focused myopically on detention and related areas to the detriment of other fields such as occupation law and the use of non-lethal weapons.

### *A. Rethinking Doctrine*

#### *1. The Principle of Distinction*

Perhaps the most important principle in international humanitarian law, the principle of distinction holds that armies must distinguish between combatants and civilians, military objects and civilian objects, and must not attack civilians and civilian objects. Undergirding this principle is an assumption that war is driven by a kill-capture strategy and an understanding that idealized warfare is fought in pitched battles by armies of professional soldiers. Modern counterinsurgency fits these basic assumptions poorly. Even more than conventional conflict, insurgencies are social systems, fueled and sustained by non-combat personnel and operations. The win-the-population strategy requires securing the population from

insurgents who do not distinguish themselves and involves disrupting the insurgency's lines of support. But embracing the blurring line between civilians and combatants and the concomitant discretion of armies to determine their targets need not eviscerate humanitarian ends. In fact, a broader interpretation of distinction giving more discretion to counterinsurgents would still offer considerable protections through a robust principle of proportionality, a principle that, in counterinsurgency, unifies humanity and strategic self-interest.

The principle of distinction holds that "parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."<sup>190</sup> Distinction's importance cannot be underestimated. It has been called a "cardinal principle" of humanitarian law,<sup>191</sup> the "single most important principle for the protection of the victims of armed conflict,"<sup>192</sup> and it is said that "[h]umanitarian law contains no stronger doctrine."<sup>193</sup> Despite its foundational status within humanitarian law, distinction actually grew out of a shift in military strategy. As Vattel noted,

in former times, and especially in small States, as soon as war was declared every man became a soldier; the entire people took up arms and carried on the war. Soon a choice was made, and armies were formed of picked men . . . . At the present day, the custom of having regular armies prevails almost everywhere.<sup>194</sup>

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<sup>190</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, 1 Customary International Humanitarian Law 3–8 (2005); see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) [hereinafter *Nuclear Weapons Opinion*] ("The first [principle constituting the fabric of humanitarian law] is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.").

<sup>191</sup> *Nuclear Weapons Opinion*, supra note 190, at 257.

<sup>192</sup> Helen Duffy, *The 'War on Terror' and the Framework of International Law* 228–29 (2005).

<sup>193</sup> Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 *Int'l L.* 733, 733 (2005).

<sup>194</sup> Green, supra note 39, at 103 (quoting Emmerich de Vattel, 3 *Le Droit des Gens* §§ 9–10 (Charles G. Fenwick trans., 1916)).

The shift to professional armies provided the necessary elements for distinction—a clear line of demarcation between those who fight and those who do not. Notably, the principle of distinction provides protections and restrictions on both combatants and civilians: the latter are protected from conflict but cannot engage in conflict; the former are protected from civilians attacking them but cannot attack civilians.<sup>195</sup>

The principle manifests itself throughout the laws of war. Additional Protocol I declares that parties to a 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.”<sup>196</sup> To expand on the definition, the laws of war describe what fits in each category. The Hague Conventions applied the laws of war to armies, militias, and volunteer corps as long as they had responsible command, wore a distinctive emblem, carried arms openly, and conducted operations in accordance with the laws of war.<sup>197</sup> The Geneva Conventions followed suit, providing the same criteria for distinguishing combatants and civilians, though in slightly different terms.<sup>198</sup> Additional Protocol I loosened these requirements somewhat, given the conditions of decolonization and guerrilla warfare, requiring only that combatants carry arms openly during engagements and preparations for launching an attack.<sup>199</sup> Civilians are defined as any persons who are not combatants.<sup>200</sup>

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<sup>195</sup> Cf. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 Colum. J. Transnat'l L. 1, 43 (2004) (describing how the possible justifications for granting POW status include protection of civilians and soldiers).

<sup>196</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API].

<sup>197</sup> Hague IV Annex, supra note 40, at art. 1.

<sup>198</sup> Geneva uses “fixed distinctive sign” instead of emblem. See GC I, supra note 50, at art. 13; GC II, supra note 51, at art. 13; GC III, supra note 52, at art. 4; GC IV, supra note 53, at art. 4.

<sup>199</sup> API, supra note 196, at art. 44(3). This weaker approach does not change the general state practice of using uniforms to establish distinction. See *id.* at art. 44(7).

<sup>200</sup> See API, supra note 196, at art. 50. The provision defines civilians as any person not belonging to any of four categories: armed forces, persons meeting four criteria similar to those in the Hague Convention, unrecognized government armed forces, and participants in a *levée en masse*. See GC III, supra note 52, at art. 4(A)(1), (2), (3), (6).

The “war on terror” has not changed the debate over the principle of distinction. Both prior to September 11 and since, the debate has turned on the fact that it is often difficult to tell whether a person is a civilian or combatant and whether an object is civil or military.<sup>201</sup> Is the civilian that takes up arms each day only to return home each night a civilian or combatant?<sup>202</sup> Is a television station spreading enemy propaganda a military object?<sup>203</sup> The laws of war address these challenges through two provisions. First, civilians are protected “unless and for such time as they take a *direct part in hostilities*.”<sup>204</sup> Second, military objectives are those objects whose “destruction, capture or neutralization, in the circumstances ruling at the time, offers a *definite military advantage*.”<sup>205</sup> Elsewhere, the Additional Protocols require consideration of the “*concrete and direct military advantage* expected.”<sup>206</sup> Each provision has two prongs—the military character of the operations and a direct relationship between the operations and the actor or object—and each is subject to considerable debate.

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<sup>201</sup> See, e.g., Brooks, *supra* note 55, at 729–36 (arguing that the war on terror blurs the line between civilian and combatant).

<sup>202</sup> See Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 *Chi. J. Int'l L.* 511, 535–36 (2005) (describing the revolving door problem).

<sup>203</sup> See ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 39 *I.L.M.* 1257, 1277 (2000).

<sup>204</sup> API, *supra* note 196, at art. 51(3) (emphasis added); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(3), June 8, 1977, 1125 *U.N.T.S.* 609 [hereinafter APII]. The “unless and for such time” language reveals the tension between status- and conduct-based forms of distinction. Under this provision, conduct matters; thus the revolving door combatant, fighting by day and a civilian by night, is protected at night because her conduct is civilian. See ICRC, *Commentary on the Additional Protocols* ¶ 1944 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter *AP Commentary*] (“Once he ceases to participate, the civilian regains his right to the protection.”); *id.* ¶ 4789 (“as he no longer presents any danger for the adversary, he may not be attacked”). The discomfort with this approach comes from the idea that ongoing involvement, like conscription, gives a status of combatant that should not disappear when a person drops his weapon. See Schmitt, *supra* note 202, at 535–36.

<sup>205</sup> API, *supra* note 196, at art. 52(2) (emphasis added).

<sup>206</sup> API, *supra* note 196, at art. 51(5) (defining as indiscriminate attacks whose humanitarian consequences are disproportionate to the military advantage gained) (emphasis added). Proportionality is discussed at greater length *infra* text accompanying notes 237–243.



The military/hostilities prong turns on what counts as “military” or “hostilities.” One approach includes preparations for attacks and returning from attack, even though those are not, strictly speaking, military activities or hostilities.<sup>207</sup> A more extreme form of this argument even considers civilian support for the war effort as a military activity.<sup>208</sup> On this reading, “military” or “hostilities” includes anything that seeks “to adversely affect the enemy’s pursuance of its military objective or goal.”<sup>209</sup> Another approach, however, interprets the provision as requiring the use of force<sup>210</sup> or “military activity” directed against the enemy.<sup>211</sup> Some narrow interpretations even exclude objects that are obviously military in nature. As Marco Sassoli has noted,

[t]aken literally, the separate requirement that the attack must offer a definite military advantage means that even an attack on an objective of a military nature would not be lawful if its main purpose is to affect the morale of the civilian population and not to reduce the military strength of the enemy.<sup>212</sup>

More familiar to legal analysis is the debate on what constitutes “direct” participation. One line of thought, expressed in the ICRC Commentaries, reads the directness requirement strictly, seeking a “direct causal relationship between the activity engaged in and the

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<sup>207</sup> See AP Commentary, *supra* note 204, ¶ 1943 (finding hostilities includes “not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon”); see also Daphne Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 *Cath. U. L. Rev.* 1001, 1022 (2007).

<sup>208</sup> See Michael Walzer, *Just and Unjust Wars* 146 (1977); James A. Burger, *International Humanitarian Law and the Kosovo Crisis: Lessons Learned or to be Learned*, 82 *Int’l Rev. Red Cross* 129, 132 (2000), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQCS>; J.W. Crawford, III, *The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems*, 21 *Fletcher F. World Aff.* 101, 101–02 (1997).

<sup>209</sup> ICRC, *Summary Report, Third Expert Meeting on the Notion of Direct Participation in Hostilities*, Geneva, Switz., 22 (Oct. 23–25, 2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2005\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf).

<sup>210</sup> See Jean-François Quéguiner, *Direct Participation in Hostilities Under International Humanitarian Law 2* (Nov. 2003) (unpublished manuscript, available at <http://www.ihlresearch.org/ihl/pdfs/briefing3297.pdf>).

<sup>211</sup> ICRC, *supra* note 209, at 23. Of course, “military activity” does little to clarify the meaning of hostilities.

<sup>212</sup> Sassoli, *supra* note 26, at 186.

harm done to the enemy at the time and the place where the activity takes place.”<sup>213</sup> Direct causal relationships exist when acts are “intended to cause actual harm to the personnel and equipment of the armed forces.”<sup>214</sup> The resultant view finds “a clear distinction between direct participation in hostilities and participation in the war effort.”<sup>215</sup> The ICRC’s recent interpretive guidance on the direct participation in hostilities thus declares that a specific act must have a “direct causal link” between the act and the harm that involves only one causal step between the action and the harm.<sup>216</sup> For example, those who build improvised explosive devices (IEDs) would fail to meet the ICRC’s direct participation in hostilities test because they do not cause the harm within one causal step, unlike the insurgent who plants the device.<sup>217</sup>

The other line of thought is less restrictive, permitting as targets objects that “*indirectly but effectively* support and sustain the enemy’s war-fighting capability.”<sup>218</sup> This “American” approach<sup>219</sup> follows Clausewitz’s insight that war involves the total capacity of society—munitions factories are thus as important a source of military strength as the army itself.<sup>220</sup> Under this approach, status as a member of the warfighting apparatus is enough, making direct participants even out of those “who have laid down their arms.”<sup>221</sup> Although some have acknowledged the similarity to proximate cause in tort theory,<sup>222</sup> “a unanimous interpretation of this legal concept does not exist.”<sup>223</sup>

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<sup>213</sup> AP Commentary, *supra* note 204, ¶ 1679; see also *id.* ¶ 4787 (direct participation in hostilities “implies that there is a sufficient causal relationship between the act of participation and its immediate consequences”).

<sup>214</sup> AP Commentary, *supra* note 204, ¶ 1942.

<sup>215</sup> *Id.* ¶ 1945.

<sup>216</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 51, 53 (2009).

<sup>217</sup> *Id.* at 54.

<sup>218</sup> Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 *Yale Hum. Rts. & Dev. L.J.* 143, 149 (1999).

<sup>219</sup> See W. Hays Parks, *Air War and the Law of War*, 32 *A.F. L. Rev.* 1, 113–45 (1990).

<sup>220</sup> See Walzer, *supra* note 208, at 146.

<sup>221</sup> Richemond, *supra* note 207, at 1022–23.

<sup>222</sup> ICRC, *supra* note 209, at 29.

<sup>223</sup> ICRC, *Summary Report, Direct Participation in Hostilities under International Humanitarian Law* 11 (Sept. 2003), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/)

Understanding counterinsurgency strategy helps clarify what is problematic about these contending interpretations. Focusing narrowly on “hostilities” or “military advantage” is problematic in counterinsurgency. Insurgencies are social systems, deriving their strength from social dynamics in the population. Targeting only narrowly defined military objectives and/or hostile insurgent forces will not result in victory. As Professor Oberschall has noted:

In unconventional warfare, many people in non-combat roles are part of the clandestine infrastructure of the insurgency: they shelter and supply the combatants with food, funds and other resources; provide intelligence, lookouts, messengers, weapons caches [sic] and transport, and safe places, including religious buildings, hospitals, and schools. Some activists are women, children, older people, clergy. Without such a supportive covert organization, insurgency is not possible.<sup>224</sup>

In the context of this war amongst the population, counterinsurgency operations require preventing insurgents from spreading propaganda and developing support within the population. In order to win over the population, the counterinsurgent must separate the insurgents from the population.

A brief illustration will be helpful. In April 1999, NATO forces bombed Radio Television Serbia (RTS), killing sixteen and injuring another sixteen.<sup>225</sup> The strike was questioned and criticized as not contributing to the military effort, and was later reviewed by the ICTY<sup>226</sup> and European Court of Human Rights.<sup>227</sup> Although the ICTY found that RTS was being used for military communications and was therefore an acceptable military target, it stated that stopping propaganda to undermine the government’s support or demoralize the population was not sufficient to make RTS a military

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Direct%20participation%20in%20hostilities-Sept%202003.pdf; see Mark David “Max” Maxwell & Richard V. Meyer, *The Principle of Distinction: Probing the Limits of Customariness*, Army Law., Mar. 2007, at 1, 5.

<sup>224</sup> Anthony Oberschall, *How Democracies Fight Insurgencies and Terrorists 11* (unpublished manuscript, on file with the Virginia Law Review Association).

<sup>225</sup> ICTY, *supra* note 203, at 1277.

<sup>226</sup> *Id.*

<sup>227</sup> *Bankovic v. Belgium*, No. 52207/99, ¶ 71 (Eur. Ct. H.R. Dec. 12, 2001), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&source=tkp&highlight=bankovic&sessionId=28563015&skin=hudoc-en>.

target.<sup>228</sup> In the context of conventional war and a restrictive understanding of military targets, this approach perhaps seems natural. But in counterinsurgency, informational operations and the ability to communicate effectively with the population are central to the success or failure of the insurgency. A television or radio station is a much greater force multiplier for an insurgency than a few additional recruited combatants. Confronting these “non-military” sources of power is therefore a key task of counterinsurgency.<sup>229</sup>

In addition, the “direct participation” prong is similarly problematic in counterinsurgencies. The directness prong focuses on how far removed a civilian’s actions are from kill-capture military operations. This approach overvalues military operations. A civilian engaged in spreading propaganda may be highly effective in contributing to the defeat of the counterinsurgents, even though his actions are not intended to cause harm to physical forces. Requiring a narrowly tailored relationship between conventional military action and civilian participation thus prevents targeting many insurgent operations. The IED builder, excluded from targeting on the narrow ICRC construction, is a perfect example. However, if the military operations prong is interpreted more broadly to incorporate insurgent support systems, such as propaganda and other lines of support, then the directness approach becomes almost irrelevant. Almost any action could be seen as directly related to the expansive reading of military advantage, because military advantage would be coextensive with counterinsurgency’s broad scope.

From the perspective of counterinsurgency, Common Article 3 of the Geneva Conventions, which focuses on persons taking an “active part in hostilities,” provides a less problematic approach.<sup>230</sup>

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<sup>228</sup> ICTY, *supra* note 203, at 1278.

<sup>229</sup> This is not to argue that militaries will want to, or should, attack such facilities. As the rest of this Subsection suggests, the strategic and legal analysis is more involved. The point here is to see that seemingly “non-military” objects play a crucial role in insurgencies, perhaps even greater than conventional military objects.

<sup>230</sup> Many understand “active” and “direct” to refer to the “same quality and degree of individual participation in hostilities,” particularly since the French texts of the Geneva Conventions and the Additional Protocols use the same phrase, “participant directement.” See Melzer, *supra* note 216, at 43. But there is disagreement. See Maxwell & Meyer, *supra* note 223 at 5; ICRC, *supra* note 209, at 29; see also Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 *Am. J. Int’l L.* 48, 52 n.18 (2009). As an interpretive matter, as discussed here, the distinction between “active”

Counterinsurgency distinguishes between active and passive support.<sup>231</sup> Active support consists of individuals or groups joining the insurgency, logistical and financial support, providers of intelligence, hosts of safe havens, medical assistance, transportation, and other operations on behalf of insurgents.<sup>232</sup> Passive support, while benefiting insurgents, is not material support. Passive supporters “allow insurgents to operate and do not provide information to counterinsurgents.”<sup>233</sup> Passive support is acquiescence or tolerance.<sup>234</sup> This distinction is much more tractable from the perspective of counterinsurgency. Instead of focusing on the distance an action has from military consequences, the active/passive distinction focuses on a difference in kind between actions. It separates those who are not actively supporting the insurgency—and therefore need to be protected under the win-the-population strategy—from those who may need to be confronted by traditional military means. Distinction is not jettisoned: passive participation would be fully protected, but active participation could potentially result in a loss of protection.

A counterinsurgency approach might therefore consider *taking an active part in the insurgency* as the appropriate interpretation of the principle of distinction. This approach, however, is subject to the criticism that it reduces, even undermines, the humanitarian ends of the laws of war. Focusing on active involvement in insurgency operations would mean that bankers, propagandists, even farmers and cooks, could be targeted for kill-capture operations, regardless of whether they ever held a weapon. Allowing the targeting of those who indirectly participate in hostilities risks justifying the eradication of entire populations under the guise of counterinsurgency, especially given that these persons can simply be detained if they are a threat to security.<sup>235</sup>

Moreover, this approach seems misaligned with counterinsurgency’s strategy of winning over the population. Counterinsur-

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and “passive” may prove more practically effective than that between “direct” and “indirect.”

<sup>231</sup> See Field Manual, *supra* note 8, ¶¶ 3-84 to -88.

<sup>232</sup> *Id.* ¶ 3-87.

<sup>233</sup> *Id.* ¶ 3-88.

<sup>234</sup> *Id.*

<sup>235</sup> See Goodman, *supra* note 230, at 55–57.

gency operations are not primarily focused on kill-capture operations, so even if the butcher and baker are active insurgents, it may not be in the strategic self-interest of the counterinsurgent to target them. Kill-capture operations can cause backlash and fuel the insurgency, rather than stamp it out. Particularly with the rise of instant communication and publicity, any kill-capture operation could easily be found to be unreasonable by domestic and international opinion, reducing the legitimacy of the counterinsurgent and its ability to win over the population. As one commentator notes, counterinsurgency “counsels greater restraint when confronting and targeting individuals.”<sup>236</sup>

For this reinterpretation to even be plausible, counterinsurgents’ discretion would have to be evaluated through a strengthened principle of proportionality. The relationship between distinction and proportionality is simple. Distinction asks whether or not the targeted object can be attacked under the laws of war. Civilians, for example, cannot be attacked. If the object can be attacked, proportionality asks whether the collateral or incidental damage from attacking the target is disproportionate to the gain from the attack.<sup>237</sup> If the damage is disproportionately high, then the attack must not take place—or else it will be deemed an excessive attack in violation of the Geneva Conventions.<sup>238</sup> Proportionality, therefore, involves the exercise of discretion by the attacking force.<sup>239</sup> Shifting the focus to proportionality in counterinsurgency operations does not require targeting all active supporters of the insurgency, and it may in fact prohibit targeting them if the attack’s consequences would be disproportional to the gain.

Significantly, the conventional balancing test for proportionality also does not align with counterinsurgency—counterinsurgency suggests *greater* protection against excessive kill-capture operations. Under the conventional proportionality analysis, the military

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<sup>236</sup> Dale Stephens, *Counterinsurgency and Stability Operations: A New Approach to Legal Interpretation 17* (unpublished manuscript, on file with the Virginia Law Review Association).

<sup>237</sup> Schmitt, *supra* note 218, at 150.

<sup>238</sup> API, *supra* note 196, at art. 51(5).

<sup>239</sup> To be sure, the principle of distinction, because of the difficulty of applying it in practice, also requires discretion. See Maxwell & Meyer, *supra* note 223, at 5; see also 2 Henckaerts & Doswald-Beck, *supra* note 190, at 121–22; W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, *Army Law.*, Dec. 1989, at 4.

weighs two heterogeneous factors: the “concrete and direct” military benefits and the humanitarian costs.<sup>240</sup> In conventional warfare, in which kill-capture is the strategy for victory, the military and humanitarian goals are in direct opposition. Killing enemies and destroying facilities will always contribute to victory under the conventional approach. Not attacking to spare civilians was therefore a constraint against self-interest, enforceable through reciprocity. In counterinsurgency, this balancing act is different. Protecting the population is central to the counterinsurgent’s strategy. Attacks resulting in collateral damage are not likely to gain popular support for the counterinsurgent. Even attacks that kill only insurgents may have the effect of sparking protests, creating the desire for vengeance by a family member or tribal relative, and fueling the insurgency further.<sup>241</sup> These indirect and often non-military effects render the benefits of a military attack necessarily less certain and likely weaker than in the conventional model, which emphasizes the “concrete and direct military advantage anticipated.”<sup>242</sup>

In counterinsurgency, the military side of the proportionality balancing test is thus handicapped by the fact that any attack may cause backlash.<sup>243</sup> As a result, counterinsurgency might interpret proportionality not as military benefits versus humanitarian costs but rather as a cost-benefit analysis, in which humanitarian and strategic interests operate on both sides of the scale and incorporate direct and indirect effects. Most important, military action appears both as a cost and a benefit, not just as a benefit: killing civilians and even legitimate targets might be costly in terms of winning over the population if it could result in substantial backlash. Counterinsurgency’s proportionality test therefore places a thumb on the scale against military action. As a result, proportionality in counterinsurgency is likely to be far more humanitarian in its orientation than was proportionality in conventional warfare.

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<sup>240</sup> See API, *supra* note 196, at art. 51(5); see also Schmitt, *supra* note 218, at 151.

<sup>241</sup> See Stanley McChrystal, ISAF Commander’s Counterinsurgency Guidance 2 (Aug. 26, 2009), [http://www.nato.int/isaf/docu/official\\_texts/counterinsurgency\\_guidance.pdf](http://www.nato.int/isaf/docu/official_texts/counterinsurgency_guidance.pdf).

<sup>242</sup> API, *supra* note 196, at art. 51(5).

<sup>243</sup> See, e.g., Sarah Sewall, Introduction *to* Field Manual, *supra* note 8, at xxv–xxvi; Field Manual, *supra* note 8, ¶ 1-141.

## 2. *Civilian Compensation*

One of the central tenets of the laws of war, undergirded by the kill-capture strategy, is that soldiers are privileged combatants, afforded the right to attack, injure, and even kill the enemy without legal redress.<sup>244</sup> The laws of war, however, have gone further, recognizing more as a matter of pragmatics than principle that some civilians may in fact be harmed despite the protections afforded them by the principle of distinction.<sup>245</sup> The pursuit of military objectives, necessary for destroying the enemy and winning the war, may result in harm to civilians. Recognizing this tragic reality, the laws of war provide that the collateral damage to civilians must not be disproportionate to the military advantage.<sup>246</sup> The result is that privilege extends not only to killing the enemy but also to killing and injuring civilians as long as it is a matter of collateral damage. Civilians harmed under collateral damage therefore have no legal recourse—they have no right to compensation or other remedies for their losses. The war on terror approach does not revise this situation. Concerned primarily with killing and capturing terrorists, that approach sees collateral damage as tragic but necessary to eliminating the terrorist threat and attaining victory. Civilians must simply realize they are, in the long run, being protected from terrorists.

With the application of the proportionality principle in targeting, the attacking army has no further responsibilities to civilians. Perhaps the best example of this limited responsibility is its manifestation in the Foreign Claims Act (FCA).<sup>247</sup> The FCA grants authority to create claims commissions to settle claims against the United States for damage or loss of property of a foreign country or person or for the injury or death of a foreign person caused by the U.S. military.<sup>248</sup> However, the FCA, includes a “combat exclusion,” which excludes any claim that arises “from action by an enemy or

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<sup>244</sup> GC III, *supra* note 52, at art. 99; see API, *supra* note 196, at art. 45; see also Report on Terrorism and Human Rights, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, doc 5 rev. 1 corr. ¶ 68 (2002) (noting that “the combatant’s privilege . . . is in essence a license to kill or wound enemy combatants and destroy other military objectives”).

<sup>245</sup> See *supra* text accompanying notes 190–243.

<sup>246</sup> Green, *supra* note 39, at 185; Schmitt, *supra* note 218, at 150–52.

<sup>247</sup> 10 U.S.C. § 2734 (2006).

<sup>248</sup> *Id.* § 2734 (a).



result directly or indirectly from an act of the armed forces of the United States in combat.”<sup>249</sup> In essence, the FCA internalizes the law of war norm of the combatant’s privilege, allowing compensation for tort and other injuries caused by the U.S. military only as long as those injuries occurred outside combat operations. A looser approach to compensating civilians who are injured is institutionalized through the payment of solatia—“nominal payments made immediately to a victim or the victim’s family to express sympathy when local custom exists for such payments.”<sup>250</sup> Even though solatia provide compensation, they send strong signals that these are not claims of responsibility or compensation for a particular loss.<sup>251</sup> Moreover, the practice is limited to countries that have a custom of solatia, which, according to the Army Regulations, consists of Micronesia, Japan, Korea, and Thailand.<sup>252</sup> In essence, compensation through both the FCA and solatia incorporates the central corollary of the laws of war’s principles of privilege, distinction, and proportionality—that militaries have no responsibility to compensate civilians who are harmed, injured, or killed as a result of legitimate military operations.

In contrast to the kill-capture approach, counterinsurgency’s win-the-population strategy suggests that compensating civilians who are harmed, injured, or killed even during legitimate military operations would be a smart tactic. Condolence payments<sup>253</sup> have the benefit of expressing sympathy to victims and their families, providing humanitarian relief and aid to those who may no longer have the ability to earn a livelihood, and fostering goodwill among the population.<sup>254</sup> Because counterinsurgents must convince the population that they are working in the population’s interest, com-

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<sup>249</sup> *Id.* § 2374 (b).

<sup>250</sup> U.S. Dep’t of Army, Reg. 27-20, Claims, at 108 (Feb. 8, 2008).

<sup>251</sup> For example, solatia are paid through personal and operational appropriations rather than claims. See *id.* ¶ 10-11; *id.* at 108.

<sup>252</sup> *Id.* ¶ 10-11; see also U.S. Dep’t of Air Force, Instr. 51-501, Tort Claims ¶ 4.22 (15 Dec. 2005).

<sup>253</sup> A condolence payment could be defined as “any monetary compensation made by the U.S. military directly to victims, or their survivors, who suffer physical injury, death, or property damage as a result of U.S. military or coalition operations.” See Jonathan Tracy, Campaign for Innocent Victims in Conflict [CIVIC], Condolence Payments 1 (July 2006), <http://www.civicworldwide.org/storage/civic/documents/condolence%20payments%20current.pdf>.

<sup>254</sup> *Id.*

compensation through condolence payments can help the population distinguish the legitimate, credible counterinsurgent. As a result, condolence payments have been called a “non-lethal weapons system”<sup>255</sup> and have been heralded by commentators as an effective way to win the population in counterinsurgency operations.<sup>256</sup>

Indeed, the practice of compensation since the Vietnam War confirms the strategic value of compensation. The Operational Law Handbook notes that the combat exclusion “interferes with the principle goal of low intensity conflict/foreign internal defense: obtaining and maintaining the support of the local populace.”<sup>257</sup> And in every conflict from Vietnam to Somalia, the Army has tried to get around the restrictive nature of the FCA’s combat exclusion in order to pay condolences.<sup>258</sup> In Vietnam, the military got the government of South Vietnam to agree to pay claims; in Grenada, military personnel administered claims procedures but used State Department funds through USAID; in Panama, the United States provided funds to pay claims through a broader program of economic support for the government.<sup>259</sup> Indeed, the conflicts in Iraq and Afghanistan have been no exception—together, the military has provided \$29 million in condolence payments.<sup>260</sup>

Although condolence payments are an effective weapon in counterinsurgency’s win-the-population strategy, recent practice in Iraq and Afghanistan and the laws of war themselves are severely disconnected from the win-the-population strategy. In Iraq and Afghanistan, condolence and solatia payments were prohibited early in the conflict and were coupled with restrictive interpretations of the FCA. The Air Force procedures for the Iraq war stated, “[a]ll [FCA] claims arising within the . . . boundaries of Iraq during the period of the war, are automatically classified as combat activity

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<sup>255</sup> *Id.* at 4.

<sup>256</sup> *Id.* at 4, 10.

<sup>257</sup> Int’l & Operational L. Dep’t, Judge Advoc. Gen. Legal Ctr. & Sch., Operational Law Handbook 152 (2007) [hereinafter Handbook].

<sup>258</sup> *Id.*; see also Witt, *supra* note 6, at 10–11.

<sup>259</sup> Handbook, *supra* note 257, at 152–53.

<sup>260</sup> Gov’t Accountability Off., The Defense Department’s Use of Solatia and Condolence Payments in Iraq and Afghanistan, GAO-07-699, at 1 (May 2007) [hereinafter GAO Report].

claims, and therefore are prohibited.<sup>261</sup> With FCA claims absent, soldiers relied on condolence and solatia. Yet it was not until March 2004 that any condolence payments were made in Iraq and until November 2005 that they were made in Afghanistan.<sup>262</sup> And solatia payments, amounting to a total of \$1.9 million by 2007, were only made in Iraq from June 2003 to January 2005 and in Afghanistan since October 2005.<sup>263</sup> In addition, funding for condolence payments was limited. Condolences are paid out of a commander's emergency response program (CERP) funds, which are also a commander's main source for reconstruction and humanitarian relief projects.<sup>264</sup> Indeed, condolence payments amounted to only 8% of the expenditures from CERP funds in Iraq in 2005 and 5% in 2006.<sup>265</sup> In Afghanistan, they amounted to 1% in 2006.<sup>266</sup> In some cases, the funding available for condolences would be used up, leaving commanders limited or no resources from which to pay claims.<sup>267</sup> The strategic importance of condolence payments suggests that the restrictive interpretation of the FCA, the limited use of condolence payments early in the wars, and the limited funding available for condolence payments were all mistakes.

Even when implemented in Iraq and Afghanistan, the practice of condolence payments has not been as effective a "non-lethal weapon system" as those hopeful about its use might desire.<sup>268</sup> Because the condolence process is discretionary and decentralized to the level of particular commanders, the procedures and application have been inconsistent and largely ad hoc.<sup>269</sup> Payments for similar

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<sup>261</sup> Ctr. for L. & Mil. Operations, Judge Advoc. Gen. Legal Ctr. & Sch., 1 Legal Lessons Learned from Afghanistan and Iraq 179 (2004) [hereinafter CLAMO].

<sup>262</sup> GAO Report, supra note 260, at 2 n.3.

<sup>263</sup> *Id.*

<sup>264</sup> See Tracy, supra note 253, at 6; see also *id.* at 7 (noting that CERP's goal is focusing "on labor intensive and urgent humanitarian relief and reconstruction projects" and directing that "[p]rojects should be implemented rapidly to reinforce a positive perception upon the Iraqi economy and by providing employment opportunities to the Iraqi people").

<sup>265</sup> GAO Report, supra note 260, at 20.

<sup>266</sup> *Id.*

<sup>267</sup> Tracy, supra note 253, at 6 n.8.

<sup>268</sup> See Witt, supra note 6, at 13; CLAMO, supra note 261, at 175; CIVIC, Civilian Claims Act Frequently Asked Questions 2, <http://www.campaign4compensation.org/FAQs.html> (last visited Aug. 20, 2009) [hereinafter CIVIC, CCA].

<sup>269</sup> See Witt, supra note 6, at 13; CIVIC, Adding Insult to Injury: US Military Claims System for Civilians 1-2, available at <http://www.civicworldwide.org/storage/civic/>

injuries are inconsistent over time and places,<sup>270</sup> claims are denied for no particular reason,<sup>271</sup> and in many cases when an FCA claim is denied, the claimant is not referred to the condolence system.<sup>272</sup> The maximum payment for loss of life is \$2500, which prevents claims officers from adequately compensating in the most egregious cases or compensating when someone has lost a breadwinner or livelihood and may be responsible for taking care of an entire family.<sup>273</sup> Finally, because of the ad hoc nature of the program, particular units have established arbitrary interpretative rules, such as placing a three-month statute of limitations on payments and not paying condolences if another unit caused the harm, a particular problem given the migration of people because of violence and the high unit turnover.<sup>274</sup> Standardized rules are not unworkable, since the FCA allows for units to pay claims from damage caused by other units and places a two-year statute of limitations on claims.<sup>275</sup>

In addition to revising statutory and military practice with respect to condolences, the win-the-population strategy also suggests that the structure and principles of international law are in conflict with a robust condolence program. The laws of war, assuming the kill-capture strategy of victory, grant privilege to killing civilians as a matter of collateral damage during legitimate military operations. A win-the-population strategy would reject this privilege, leaving the question of remedy open. Some might go further, arguing a remedy is required. Under this approach, the counterinsurgent must try not to injure civilians and must also compensate those who are injured by military operations. The international community has suggested compensation for victims of war crimes and crimes against humanity,<sup>276</sup> and Additional Protocol I to the Geneva Convention requires parties to a conflict that violate the Con-

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documents/civic%20military%20claims%20white%20paper.pdf [hereinafter CIVIC, Claims].

<sup>270</sup> CIVIC, CCA, *supra* note 268, at 2; see also Witt, *supra* note 6, at 16 (arguing that a table of standardized damage payments would be helpful to address this problem).

<sup>271</sup> Witt, *supra* note 6, at 13.

<sup>272</sup> CIVIC, Claims, *supra* note 269, at 1–2.

<sup>273</sup> Tracy, *supra* note 253, at 6.

<sup>274</sup> *Id.* at 5.

<sup>275</sup> *Id.*

<sup>276</sup> See G.A. Res. 60/147, ¶ 20, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

ventions to pay compensation.<sup>277</sup> One commentator has even called for a “responsibility to pay.”<sup>278</sup> Such a responsibility directly conflicts with the conventional kill-capture approach, which privileges killing civilians as a matter of collateral damage. Though it seems aligned with counterinsurgency strategy, institutionalizing the “responsibility to pay” via direct compensation, however, may be unwise. Compensating a family during conflict may merely make them a target for insurgents who discover their wealth. Any approach must therefore allow in-kind, communal, and other forms of compensation so as not to turn victims into targets.<sup>279</sup>

### 3. *Occupation Law*

In contrast to debates on targeting, detention, interrogation, and torture, the law of occupation has been comparatively ignored in public discourse. To some extent, this is a function of the war on terror framework, whose strategy of kill-capture is not obviously related to occupation and territorial administration. Killing and capturing small bands of terrorists around the globe does not require overthrowing dozens of regimes and building their governments. In contrast, insurgency is driven by grievances in social systems, and counterinsurgency’s win-the-population strategy requires security, basic services, and political, economic, and legal reforms to address and minimize those grievances. With this framework, occupation seems more relevant, if not central. Occupiers might seek to address insurgencies at their root—social and political structures—and in that process may need to reform state institutions. The law of occupation governs these actions and has long expressed a tension between a conservationist principle—in which the occupier maintains the ousted sovereign’s institutions—and a reformist principle—in which the occupier can change institutions for security, humanity, or in its most recent form, self-determination. Seeing contemporary conflict as insurgency and counterinsurgency rather than a war on terror makes occupation

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<sup>277</sup> API, *supra* note 196, at art. 91.

<sup>278</sup> Jonathan Tracy, *Responsibility to Pay: Compensating Civilian Casualties of War*, Hum. Rts. Brief, Fall 2007, at 16, 16–17.

<sup>279</sup> Thanks to Todd Huntley for a helpful discussion along these lines.

law one of the most important areas of the laws of war, and rejects the conservationist approach to occupation law.

Although occupation law has been applied infrequently between the occupations of Germany and Japan and the occupation of Iraq in 2003, it technically applies to a broad set of cases.<sup>280</sup> Under Article 42 of the Hague Regulations of 1907, “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”<sup>281</sup> In fact, the scope of Article 42 is so broad that occupation can occur during the conflict if a territory is under foreign control for even a few hours.<sup>282</sup>

The fundamental, pervasive characteristic of occupation law is a tension between conservation and reform.<sup>283</sup> The conservationist principle arose out of the nature of conventional warfare. The Franco-Prussian War, considered the inspiration for occupation law, provides an example.<sup>284</sup> After the war, Prussia occupied French territory until the peace treaty, under which some of the land was ceded to Prussia. As a model, the Franco-Prussian War had some significant features of conventional warfare: war was fought to achieve limited national goals rather than regime change or expansive conquest, and it was fought between professional armies with no interest in involving ordinary civilians.<sup>285</sup> The goal of occupation was to maintain the status quo prior to the war, until the peace

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<sup>280</sup> See, e.g., Eyal Benvenisti, *International Law of Occupation* 182 (1993) (noting that governments have sought to avoid the distinction of occupant, except for Israel with respect to territories occupied during the 1967 war). For a helpful typology of occupations, see Adam Roberts, *What is a Military Occupation?*, 1984 *Brit. Y.B. Int'l L.* 249 (1985).

<sup>281</sup> Hague IV Annex, *supra* note 40, at art. 42.

<sup>282</sup> Int'l Humanitarian L. Res. Initiative [IHLRI], *Application of IHL and the Maintenance of Law and Order, 2 Military Occupation of Iraq* 2 (Apr. 14, 2003), <http://www.ihlresearch.org/iraq/pdfs/briefing3423.pdf> [hereinafter IHLRI, *Application of IHL*]. Once status as an occupant is triggered, the occupant must follow the law of occupation, which includes articles 42–56 of the 1907 Hague Regulations and articles 47–78 of the Fourth Geneva Convention.

<sup>283</sup> See, e.g., Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 *Am. J. Int'l L.* 580, 580 (2006).

<sup>284</sup> Benvenisti, *supra* note 280, at 27.

<sup>285</sup> See *id.*; see also Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 *IDF L. Rev.* 19, 20 (2003).

treaty was signed and the temporarily-ousted sovereign could re-take control.<sup>286</sup>

Occupation law, on this model, is not focused on territorial administration or long-term peacemaking.<sup>287</sup> It does not provide the occupant with “general legislative competence” and it is “not intended to provide a general framework for reconstruction and law reform.”<sup>288</sup> Any “extensive forcible changes are unlikely to be lawful.”<sup>289</sup> The occupant cannot change internal borders or create new constitutional or government structures<sup>290</sup> because changes in political institutions could have consequences beyond the occupation and therefore undermine the ousted sovereign’s authority.<sup>291</sup> Indeed, the ICRC Commentary to Article 47 of the Fourth Geneva Convention notes that occupier changes during World War II were illegal under Article 43 of the Hague Regulations—even with the cooperation of portions of the population.<sup>292</sup> The occupier is merely a “de facto administrator.”<sup>293</sup>

The Hague Regulations are the clearest example of the conservationist principle. Article 43 states,

[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures

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<sup>286</sup> See Gregory H. Fox, *The Occupation of Iraq*, 36 *Geo. J. Int’l L.* 195, 199 (2005) (“Occupiers are assumed to remain only for the limited period between the cessation of hostilities and the conclusion of a final peace treaty. That treaty determines the fate of the occupied territory, most likely returning it to the ousted de jure sovereign.”).

<sup>287</sup> Carsten Stahn, *The Law and Practice of International Territorial Administration* 115–16 (2008).

<sup>288</sup> See *id.* at 119–20.

<sup>289</sup> Paul Bowers, *Int’l Aff. & Def. Sec., Iraq: Law of Occupation*, 2003, H.C. 03/51, at 18.

<sup>290</sup> See Stahn, *supra* note 287, at 120; Fox, *supra* note 286, at 199; Thomas D. Grant, *Iraq: How to Reconcile Conflicting Obligations of Occupation and Reform*, ASIL Insights, June 2003, at 3, <http://www.asil.org/insigh107a1.cfm>.

<sup>291</sup> Yoram Dinstein, *Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding* 10 (Program on Humanitarian Pol’y & Conflict Res., Occasional Paper Series, Fall 2004).

<sup>292</sup> See Oscar M. Uhler et al., ICRC, *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 273 (Jean S. Pictet, ed.) (1958) [hereinafter *Geneva IV Commentary*]; IHLRI, *International Assistance in Occupied Territory*, 2 *Military Occupation of Iraq* 2 (Apr. 22, 2003), <http://www.ihlresearch.org/iraq/pdfs/briefing3424.pdf> [hereinafter *IHLRI, International Assistance*].

<sup>293</sup> *Geneva IV Commentary*, *supra* note 292, at 273; *IHLRI, International Assistance*, *supra* note 292, at 2.

in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>294</sup>

Even though it allows some reformation of the laws, setting the default rule as respecting the laws in force expresses the conservationist principle underlying occupation law.<sup>295</sup> The Hague Regulations also express this conservationist vision elsewhere. For example, if the occupier collects taxes, it must do so “in accordance with the rules of assessment and incidence in force.”<sup>296</sup>

The conflicting principle in the law of occupation is that of reform: the occupier’s power and authority to change the status quo in the territory. The impetus for reform can be grouped into three categories: security, humanity, and self-determination. The security imperative was built into the Hague Regulations and has remained part of occupation law since. Article 43 allows the occupier to change the “laws in force in the country” in order to ensure “public order and safety.” Article 49 notes that any levy of money “shall only be for the needs of the army or of the administration of the territory in question.”<sup>297</sup> The Fourth Geneva Convention also expresses this principle, allowing the occupant to take “necessary” measures of “control and security in regard to protected persons,”<sup>298</sup> to transfer or evacuate persons for security reasons,<sup>299</sup> and to force the population to work if needed for the occupier’s army.<sup>300</sup>

At the same time, the Fourth Geneva Convention added a humanitarian justification for reforming the laws in force. With that shift, Geneva law transformed the occupier from a disinterested administrator to an administrator with many duties.<sup>301</sup> Article 47 makes the shift, asserting that persons must not be deprived of “the benefits of the present Convention by any change introduced, as the result of the occupation.”<sup>302</sup> The ICRC Commentary demon-

<sup>294</sup> Hague IV Annex, *supra* note 40, at art. 43.

<sup>295</sup> Benvenisti, *supra* note 280, at 13–14.

<sup>296</sup> Hague IV Annex, *supra* note 40, at art. 48.

<sup>297</sup> *Id.* at art. 49.

<sup>298</sup> GC IV, *supra* note 53, at art. 27.

<sup>299</sup> *Id.* at art. 49.

<sup>300</sup> *Id.* at art. 51.

<sup>301</sup> Benvenisti, *supra* note 280, at 28–31; see also Stahn, *supra* note 287, at 117–18.

<sup>302</sup> GC IV, *supra* note 53, at art. 47.



strates the tension this change wrought. On the one hand, Hague Article 43 prohibits “changes in constitutional forms or in the form of government, the establishment of new military or political organizations, the dissolution of the State, or the formation of new political entities,” even if the occupier tries to get the cooperation or assent of part of the population.<sup>303</sup> On the other hand, some changes to political institutions “might conceivably be necessary.”<sup>304</sup>

Geneva’s expansive rights enable this reformist project. Some require little reform: Occupation law prevents forcing the population to divulge information about the enemy’s army or defenses<sup>305</sup> or to serve in the occupier’s armed forces,<sup>306</sup> it prohibits requiring allegiance to the occupier,<sup>307</sup> and it forbids pillage.<sup>308</sup> Others may require considerable reform: protecting “family honour and rights, the lives of persons,” private property, and religious beliefs<sup>309</sup> may require shifting a state’s balance of church and state or reforming a planned economy. The occupier must also ensure food and medical supplies,<sup>310</sup> maintain public health, hygiene, and hospital functioning,<sup>311</sup> and permit religious practice and ministry.<sup>312</sup> It is quite possible that “protecting” these rights would require not disinterested stewardship or administration, but rather the overthrow and reformation of the country’s laws.

United Nations Security Council Resolution 1483, which provided the legal framework for the United States-led occupation of Iraq, introduced self-determination as another justification for reform. Under the conservationist approach, an occupier was unable to promote representative government or facilitate a process of self-determination, as it would directly contradict Hague Article

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<sup>303</sup> Geneva IV Commentary, *supra* note 292, at 273.

<sup>304</sup> *Id.* at 274; see also GC IV, *supra* note 53, at art. 64 (“The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention . . .”).

<sup>305</sup> Hague IV Annex, *supra* note 40, at art. 44.

<sup>306</sup> GC IV, *supra* note 53, at art. 51.

<sup>307</sup> Hague IV Annex, *supra* note 40, at art. 45.

<sup>308</sup> *Id.* at art. 47; GC IV, *supra* note 53, at art. 33.

<sup>309</sup> Hague IV Annex, *supra* note 40, at art. 46; GC IV, *supra* note 53, at art. 27.

<sup>310</sup> GC IV, *supra* note 53, at art. 55.

<sup>311</sup> *Id.* at art. 56.

<sup>312</sup> *Id.* at art. 58.

43, even with Geneva's humanitarian reform principle. But since the Geneva Conventions, many contemporary instruments in international law have enhanced the right to self-determination.<sup>313</sup> By incorporating self-determination, one commentator has argued, Resolution 1483 "invented a new model of multilateral occupation."<sup>314</sup>

Resolution 1483 recognizes the United States and United Kingdom as occupying powers,<sup>315</sup> and grants authority that is in tension with the conservationist approach.<sup>316</sup> Paragraph 4 calls upon coalition authority "to promote the welfare of the Iraqi people through the effective administration of the territory, including . . . *the creation of conditions in which the Iraqi people can freely determine their own political future.*"<sup>317</sup> Paragraph 8 expands on this requirement, authorizing the Special Representative for Iraq to coordinate with the coalition authority to "restore and establish *national and local institutions for representative governance,*"<sup>318</sup> to facilitate "economic reconstruction and *the conditions for sustainable development,*"<sup>319</sup> and to promote "legal and judicial reform."<sup>320</sup> At the same time as the Resolution authorizes radical transformation, it calls upon the authority to "comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."<sup>321</sup> Yet the reforms allowed under Resolution 1483 would violate either of these regimes. Each of these reforms could "take root and have enduring consequences."

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<sup>313</sup> See, e.g., Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 16(1), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/Res/3281 (Dec. 12, 1974); G.A. Res. 3171 (XXVIII), at 52, U.N. GAOR, 28th Sess., U.N. Doc. A/9400 (Dec. 17 1973); Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123–24, U.N. GAOR, 25th Sess., Supp. No. 16, UN Doc. A/8028 (Oct. 24, 1970); see also Benvenisti, *supra* note 280, at 184–87.

<sup>314</sup> Stahn, *supra* note 287, at 143.

<sup>315</sup> See S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg. at 2, U.N. Doc. S/RES/1483 (May 22, 2003).

<sup>316</sup> See Stahn, *supra* note 287, at 144.

<sup>317</sup> S.C. Res. 1483, *supra* note 315, at 2 (emphasis added).

<sup>318</sup> *Id.* at 3 (emphasis added).

<sup>319</sup> *Id.* (emphasis added).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 2.

Resolution 1483's approach can be justified on a variety of theories. Under the traditional doctrine of *debellatio*, when the institutions of state have totally disintegrated, occupation transfers sovereignty. Some commentators have adapted this principle to popular sovereignty and asserted that *debellatio* could justify reform of institutions along the lines of self-determination and representation.<sup>322</sup> Another approach is to understand Resolution 1483 as providing a "carve out" from Hague and Geneva; under this approach, the Security Council can derogate from occupation law, as least as regards non-peremptory norms.<sup>323</sup> Finally, Resolution 1483 could constitute a description of the contemporary state of occupation law: affirming popular sovereignty, requiring the occupant to promote human rights and representative political institutions, and using public resources to those ends.<sup>324</sup>

The conflict between conservation and the reform illustrates an important shift in occupation law, one that has significance for thinking about contemporary insurgency. Under the kill-capture model of conventional warfare, the conservationist approach to occupation law made perfect sense. The occupier's army, having defeated the enemy's army in battle, needed to wait until the resolution of the peace treaty before departing the territory. As such, occupation was temporary and primarily directed at protecting the army as it waited for resolution. Professor Posner's comment that occupation law is often violated because of enforcement difficulties grounded in the absence of reciprocity between the parties makes sense in the context of a defeated power in conventional warfare.<sup>325</sup>

Strikingly, the war on terror approach aligns with the traditional, conservationist approach to occupation law, inasmuch as it finds occupation law relevant at all. First, if the goal in the war on terror is to kill and capture the terrorists, then it is not obvious why occupation is relevant at all. In a globalized conflict between small bands of terrorists who are often not members of a state, occupying

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<sup>322</sup> See Melissa Patterson, *Who's Got the Title? or, The Remnants of Debellatio in Post-Invasion Iraq*, 47 *Harv. Int'l L.J.* 467, 467–68 (2006).

<sup>323</sup> See Grant, *supra* note 290, at 4; Marten Zwanenberg, *Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation*, 86 *Int'l Rev. Red Cross* 745, 763 (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EHY/\\$File/irrc\\_856\\_Zwanenberg.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EHY/$File/irrc_856_Zwanenberg.pdf).

<sup>324</sup> Benvenisti, *supra* note 280, at 29–30.

<sup>325</sup> See Posner, *supra* note 46, at 430.

territory seems like a foolish strategy. It would take up considerable resources in large geographic areas, when a better approach would be to target specific groups in particular areas in many countries. Second, even if a nation following the war on terror approach were to occupy another state, the conservationist approach seems more than appropriate. Massive reforms to the political, legal, and economic structures of the state are unnecessary. At most, the occupier needs to change laws that would assist in the targeting or capture of terrorists. To that extent, the Hague approach of allowing changes for purposes of ensuring security would be sufficient. If the goal is kill-capture, there is no reason to democratize the state, establish a market economy, build the rule of law, or do any of the other things associated with the reformist principle that Resolution 1483 authorizes.

In contrast to the conventional and war on terror approaches, seeing contemporary conflict as insurgency not only emphasizes the importance of occupation law but also rejects the conservationist impulse within occupation law. The counterinsurgency approach to contemporary conflict requires expanding the focus of legal debates from detention, torture, and targeting, on which the war on terror approach has led to considerable debate, to other fields such as occupation law. The win-the-population strategy requires securing the population, guaranteeing basic services, and reforming in political, economic, cultural, and legal institutions. It may therefore be more important to focus on the areas of law that touch on these broader set of concerns, and the law of occupation is one, if not the, central part of the laws of war that treats win-the-population operations. Shifting to counterinsurgency thus requires thinking more seriously and debating more vigorously the contours of occupation law.

Additionally, thinking in terms of counterinsurgency suggests rejecting the conservationist vision of occupation law. Under the kill-capture approach, the background conditions of the social structure are relatively innocuous and hence largely irrelevant, except inasmuch as they prevent the occupying army from securing its own forces or moving around the territory in search of terrorists to destroy. Unlike conventional war and the war on terror, the counterinsurgency framework assumes that part of the problem—the root cause of the insurgency—is related to the status quo in the so-

cial system. The status quo has embedded within it certain grievances that can be political, economic, cultural, or religious, among other things, and they fuel the insurgency, creating active supporters who seek to disrupt or forestall the social structure. The status quo is not a neutral position, disconnected from the causes of armed conflict or the strategy for success. Counterinsurgency's win-the-population approach is centered on addressing the grievances head on, and that may require considerable transformation of state institutions. The reformist vision of occupation better fits the underlying causes of insurgency and the win-the-population strategy of counterinsurgency.

To some extent, the law of occupation as codified by Hague and Geneva goes far to address the strategy of win-the-population, but it does not go far enough. Counterinsurgents may also need to reform constitutional, political, economic, infrastructural, and legal institutions within the occupied state.<sup>326</sup> Under Hague and Geneva, such changes will most likely result in violations of international law. One commentary, channeling the conservationist ideal, argues that the occupier has a responsibility to maintain the infrastructure as it was before the conflict: "The construction of a new hospital or the expansion of the road system would likely fall outside the [occupying power's] mandate as administrator."<sup>327</sup> Assistance, under this interpretation, "should not contribute to projects that alter permanently and in a significant manner the social and physical infrastructure of Iraq before the re-establishment of legitimate competent authorities."<sup>328</sup> But in counterinsurgency, operations with long-term effects are absolutely necessary. Take the example of expanding the road system. After a study of road building in Kunar province, Afghanistan, in which he identified sixteen ways in which road-building had assisted the win-the-population strategy, David Kilcullen concluded that road-building is "a tool for projecting military force, extending governance and the rule of law, enhancing political communication, and bringing economic development, health, and education to the population."<sup>329</sup> The conservationist approach, even with the limited reforms allowed by Hague and

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<sup>326</sup> For one treatment of how constitutions might change, see Note, *supra* note 5.

<sup>327</sup> IHLRI, *Application of IHL*, *supra* note 282, at 2–3.

<sup>328</sup> *Id.* at 3.

<sup>329</sup> Kilcullen, *The Accidental Guerrilla*, *supra* note 106, at 108.

Geneva for security and guaranteeing the population's humanitarian rights, simply does not go far enough. In contrast, under the Resolution 1483 approach, road-building or constitutional and legal reform would be allowed or even mandated.

Embracing the reformist approach to occupation law has important consequences. First, it would provide greater legitimacy for reforms in occupation settings, a necessary element of the counterinsurgent's need to win over the trust of the population. Under a robust reformist approach, for example, the questions surrounding the legitimacy and legality of CPA's actions would have been mitigated if not eliminated.<sup>330</sup> Second, the reformist approach need not imply neocolonialism or de facto annexation. The approach to reform suggested in Resolution 1483 requires a self-determination approach to building representative institutions, a process that is a far cry from de facto annexation or colonialism and one that aligns with counterinsurgency's principle that "the host nation doing something tolerably is normally better than us doing it well."<sup>331</sup> Shifting from conservation to reform therefore not only follows the evolution of occupation law over the century from Hague to Iraq, but also better addresses the causes and strategy of counterinsurgency.

#### 4. *Non-Lethal Weapons*

Since their modern origins in the 19th century, the laws of war have prohibited some weapons and technologies in order to prevent unnecessary suffering. From sociological experience, the laws assumed that military strategy and technological innovation worked in tandem to create weapons of ever greater destruction.<sup>332</sup> As true as the strategy-technology nexus may have seemed in the late 19th and early 20th century, the history of military technology

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<sup>330</sup> For discussion of the various potential sources of legitimacy for the CPA's reforms, see Fox, *supra* note 286, at 246–47. For a skeptical account of CPA's actions, see David Scheffer, *Beyond Occupation Law*, 97 *Am. J. Int'l L.* 842 (2003). For a critique of CPA's actions, see Ctr. for Econ. & Soc. Rts., *Beyond Torture: U.S. Violations of Occupation Law in Iraq* (2004), <http://www.cesr.org/downloads/Beyond%20Torture%20US%20Violations%20of%20Occupation%20Law%20in%20Iraq.pdf>.

<sup>331</sup> Field Manual, *supra* note 8, ¶ 1-154.

<sup>332</sup> For a nuanced account of the relationship between technology and warfare, see Martin Van Crevald, *Technology and War* (1989).

in the late 20th century and the win-the-population strategy in counterinsurgency tell a different story. In recent years, military technology has focused less on massive destruction and more on precision in order to reduce collateral damage and casualties. And counterinsurgency's win-the-population strategy suggests that the technologies of great destruction will be counterproductive. One of the promises of technological innovation is the creation of non-lethal weapons: weapons that incapacitate temporarily or that otherwise fall short of killing the enemy. Yet under the laws of war—inspired by the conventional kill-capture approach to war—many of these technological developments are severely limited, if not banned outright. The laws of war are thus not only disconnected from the strategy of counterinsurgency but also prevent means of warfare that are potentially humane.

In recent years, technological developments have promised the creation of non-lethal weapons (NLWs). NLWs are weapons “explicitly designed and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment.”<sup>333</sup> NLWs come in many forms, including directed energy beams that can prevent people from moving forward, blunt projectiles like rubber bullets and bean bags, calmatives that make people relax or fall asleep,<sup>334</sup> giant webs that trap people, tasers, malodorants that smell like excrement or rotting flesh and may cause vomiting, pepper spray, and anti-traction spray that makes the ground more slippery than ice.<sup>335</sup> They can also include glare lasers

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<sup>333</sup> U.S. Dep't of Def. Directive 3000.3, at 3.1 (1996), available at <http://www.dtic.mil/whs/directives/corres/pdf/300003p.pdf>; see also Ingrid Lombardo, *Chemical Non-Lethal Weapons—Why the Pentagon Wants Them and Why Others Don't*, Center for Nonproliferation Studies, June 8, 2007, <http://cns.miis.edu/stories/070608.htm> (defining NLW as “a weapon or piece of equipment whose purpose is to affect the behavior of an individual without injuring or killing the person. NLW are also intended not to cause serious damage to property, infrastructure, or the environment”); Mégret, *supra* note 25, at 8 (defining NLWs as weapons that “lay claim, in descending order of priority, to (i) not causing death, (ii) not causing injury, and (iii) not causing substantial pain”).

<sup>334</sup> See Joan M. Lakoski, W. Bosseau Murray & John M. Kenny, *The Advantages and Limitations of Calmatives for Use as a Non-Lethal Technique*, Penn State Applied Research Laboratory 2 (Oct. 3, 2000), available at <http://www.sunshine-project.org/incapacitants/jnlwdpdf/psucalm.pdf>.

<sup>335</sup> Lombardo, *supra* note 333.

that cause disorientation as well as acoustic and sonic weapons.<sup>336</sup> With such a broad variety of technologies, the term “non-lethal” is somewhat misleading. Some non-lethal weapons, such as tasers, can cause death. (Though, of course, even “lethal” weapons, such as rifles, may merely leave a person injured.<sup>337</sup>) “Non-lethal” also suggests that the weapons are directed at personnel, but they could just as well be directed toward equipment and materiel.<sup>338</sup> Despite these terminological problems,<sup>339</sup> the defining quality of NLWs, as David Fidler has noted, is that they are “designed not to destroy or kill but to incapacitate.”<sup>340</sup>

Perhaps surprisingly, the laws of war prohibit the use of many non-lethal weapons. The Convention on Certain Conventional Weapons’ Protocol II on mines and booby-traps, for example, makes no distinction between lethal and non-lethal mines.<sup>341</sup> Under a straightforward reading of the Protocol, a mine that sprung a giant web and trapped personnel would be prohibited. Likewise, the Geneva Gas Protocol of 1925 and the Biological Weapons Convention (BWC) undertake an absolute ban on biological weapons. The Gas Protocol prohibits “asphyxiating, poisonous or *other gases*, and of *all* analogous liquids” and bacteriological substances.<sup>342</sup> The BWC prohibits nations from developing, producing, stockpiling, or retaining any “[m]icrobial or other biological agents, or toxins

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<sup>336</sup> See Douglas Pasternak, *Wonder Weapons*, U.S. News & World Rep., July 7, 1997, at 38, 40–41. Other lists of non-lethal weapons are available in Nick Lewer, *Introduction to The Future of Non-Lethal Weapons 2–4* (Nick Lewer ed., 2002); Brian Rappert, *Towards an Understanding of Non-Lethality*, in *The Future of Non-Lethal Weapons*, *supra*, at 54, 54.

<sup>337</sup> David P. Fidler, *The International Legal Implications of “Non-Lethal” Weapons*, 21 *Mich. J. Int’l L.* 51, 55–57 (1999).

<sup>338</sup> James C. Duncan, *A Primer on the Employment of Non-Lethal Weapons*, 45 *Naval L. Rev.* 1, 14–21 (1998); Fidler, *supra* note 337, at 56.

<sup>339</sup> Duncan, *supra* note 338, at 5–6; see also Fed’n Am. Scientists Working Group on Biological Weapons, *Non-Lethal Chemical and Biological Weapons 2* (Nov. 2002) [hereinafter FAS] (“[A] categorical distinction between lethal and non-lethal agents is not scientifically feasible.”), available at <http://www.fas.org/bwc/papers/nonlethalCBW.pdf>.

<sup>340</sup> Fidler, *supra* note 337, at 55.

<sup>341</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Amended Protocol II, 35 I.L.M. 1206, art. 2 (1996).

<sup>342</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.



whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes.”<sup>343</sup> Notably, the BWC is not limited to dangerous or lethal biological weapons, but includes any and all biological agents. Under these prohibitions, an army could not use a sleeping gas. The Chemical Weapons Convention (CWC) is no better at supporting NLWs, since it specifically bans chemicals that cause “temporary incapacitation” unless they are used in law enforcement or for other peaceful purposes.<sup>344</sup> Moreover, it prohibits the use of riot control agents (RCA) in military operations, even though it condones their use in domestic situations.<sup>345</sup> Finally, the prohibition in Additional Protocol I on weapons that cause “superfluous injury or unnecessary suffering” has prompted the Red Cross to define those terms more clearly. The SIrUS Project<sup>346</sup> proposed to define the phrase according to whether the suffering causes

specific disease, specific abnormal physiological state, specific abnormal psychological state, specific and permanent disability or specific disfigurement . . . field mortality of more than 25% or hospital mortality of more than 5% . . . Grade 3 wounds [large wounds] as measured by the Red Cross wound classification sys-

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<sup>343</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction art. 1, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter BWC].

<sup>344</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction art. 2, Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 45 [hereinafter CWC]. There is disagreement as to whether the CWC applies to anti-materiel chemical weapons that might have the effect of death or incapacitation. Compare Fidler, *supra* note 337, at 72 (supporting this reading), with David A. Koplow, Tangled up in Khaki and Blue: Lethal and Non-Lethal Weapons in Recent Confrontations, 36 *Geo. J. Int'l L.* 703, 738 (2005) (rejecting this reading).

<sup>345</sup> By prohibiting RCA in military operations, the CWC has enabled the United States to interpret the treaty as allowing the use of RCA in international operations other than war, such as peacekeeping operations, humanitarian and disaster relief, hostage rescue, and counterterrorist operations. See Fidler, *supra* note 337, at 74; Koplow, *supra* note 344, at 739–40.

<sup>346</sup> SIrUS stands for Superfluous Injury or Unnecessary Suffering.

tem . . . or effects for which there is no well-recognized and proven treatment.<sup>347</sup>

Some of these criteria, in particular the “specific abnormal physiological state” and “effects for which there is no well-recognized . . . treatment” criteria, would exclude non-lethal weapons that cause temporary effects such as disorientation or confusion.<sup>348</sup>

Counterinsurgency’s win-the-population strategy challenges the conventional approach to the ban of non-lethal weapons—and indeed any blanket technological ban. Under the kill-capture strategy, the strategy-technology nexus would result in ever-more-dangerous weapons that needed to be banned for humanitarian reasons. But under counterinsurgency, one would expect less-indiscriminate, more precise, and less-dangerous weaponry. As one of the paradoxes of counterinsurgency asserts: “Sometimes, the more force is used, the less effective it is.”<sup>349</sup> Indeed, the case for non-lethal weapons is that they create fewer fatalities and are particularly useful in situations when military targets are hidden within civilian populations.<sup>350</sup> NLWs seem particularly appropriate in modern warfare, in which collateral damage is generally intolerable<sup>351</sup> and can fuel insurgencies. As one commentator has asked, “[w]hen we really want to stabilize or neutralize something, why incur greater wrath from the community by incinerating or by blowing something up if we don’t have to do that?”<sup>352</sup> Non-lethal weapons also offer the opportunity to transform the use of air power, from dropping bombs that cause great collateral damage to

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<sup>347</sup> Fidler, *supra* note 337, at 87; see also ICRC, *The SIrUS Project: Towards A Determination of Which Weapons Cause “Superfluous Injury or Unnecessary Suffering,”* (Robin M. Coupland ed., 1997), [http://www.loc.gov/rr/frd/Military\\_Law/pdf/SIrUS-project.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/SIrUS-project.pdf).

<sup>348</sup> See Donna Marie Verchio, *Just Say No! The SIrUS Project: Well-Intentioned, but Unnecessary and Superfluous*, 51 A.F. L. Rev. 183, 201–02, 204 (2001). For a critique of the SIrUS project’s suggested criteria, see *id.* at 199–212.

<sup>349</sup> Field Manual, *supra* note 8, ¶ 1-150.

<sup>350</sup> Lombardo, *supra* note 333.

<sup>351</sup> See John B. Alexander, Nat’l Def. Indus. Ass’n, *Putting Non-Lethal Weapons in Perspective 4* (March 2000), <http://www.dtic.mil/ndia/nld4/alexander.pdf>. Some even argue that NLWs should be mandatory in some circumstances. See Mégrét, *supra* note 25, at 5.

<sup>352</sup> Jared Silberman, *Non-Lethal Weaponry and Non-Proliferation*, 19 *Notre Dame J.L. Ethics & Pub. Pol’y* 347, 348 (2005).

spreading non-lethal substances.<sup>353</sup> In essence, counterinsurgency and weapons innovation point to the same goal. “Over time, old stereotypes which infer that killing or destroying the enemy is the only path to victory will be modified . . . . A new stereotype will emerge that recognizes that killing or destroying the enemy is not the only way to defeat him.”<sup>354</sup> If a military seeks to win-the-population, using NLWs to prevent collateral damage seems like a no-brainer.

Despite the value of NLWs to counterinsurgency operations, many believe allowing them is problematic, even dangerous.<sup>355</sup> The first argument against NLWs is that they *can* be lethal. In some cases, such as when the Russians pumped fentanyl into a Moscow theatre to incapacitate hostages and hostage-takers, a NLW can be indiscriminately harmful. In Moscow, 127 hostages died.<sup>356</sup> NLWs are also lethal for certain classes of people who are at higher risk—children, pregnant women, handicapped persons, persons with asthma. Such persons need to be monitored when engaged with pepper spray or anesthetics.<sup>357</sup> Although this concern is factually accurate, the lethality critique of NLWs suffers from the fallacy of using the wrong baseline of comparison. This criticism compares two situations: the use of NLWs with inherent risks, and no military action with certain safety. In reality, however, there is a third situation to consider: the use of lethal force with certain collateral damage. The right diagnosis of the problem requires determining

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<sup>353</sup> See generally Ryan H. Whittemore, *Air-Delivered Non-Lethal Weapons in Counterinsurgency Operations* 4 (Apr. 2008) (unpublished research report, available at [https://www.afresearch.org/skins/rims/q\\_mod\\_be0e99f3-fc56-4ccb-8dfe-670c0822a153/q\\_act\\_downloadpaper/q\\_obj\\_722ffbd4-ac73-4b1c-808d-5980405fa19c/display.aspx?rs=enginespage](https://www.afresearch.org/skins/rims/q_mod_be0e99f3-fc56-4ccb-8dfe-670c0822a153/q_act_downloadpaper/q_obj_722ffbd4-ac73-4b1c-808d-5980405fa19c/display.aspx?rs=enginespage)) (arguing that air power is seen as counterproductive in counterinsurgency because of its collateral damage and arguing that non-lethal weapons might give air forces a greater role than merely advisory or monitoring).

<sup>354</sup> Duncan, *supra* note 338, at 56.

<sup>355</sup> In addition to the perspectives presented here, some have indicated that opposition may be rooted in a “static technological perspective fixated on lethal force,” see David P. Fidler, “Non-Lethal” Weapons and International Law, *in* *The Future of Non-Lethal Weapons*, *supra* note 336, at 26, 35, or as another commentator put it, a “tendency to see conventional weapons as *defining* of war.” See Mégret, *supra* note 25, at 11.

<sup>356</sup> It is worth noting that many of the deaths were due to insufficient medical attention after the hostages were rescued. See Koplou, *supra* note 344, at 769–81.

<sup>357</sup> See Nat’l Inst. Just., U.S. Dep’t Just., *The Effectiveness and Safety of Pepper Spray Research for Practice No. 195739*, at 1, 10–13 (Apr. 2003).

whether in any given case the military would use conventional lethal forces, NLWs, or no force.

Take a case in which there are insurgents in a crowd of people. We must first ask whether a military would use a conventional lethal technology like a missile, would choose not to act against the insurgents at all, or if available, would use a NLW. This creates three scenarios with three different baselines. In scenario one, the military would choose lethal force over no action, but would prefer NLWs to lethal force. In that case, the comparison is between certain collateral damage from bombing the crowd and the risk of lethality from NLWs. The skeptic of NLWs and the counterinsurgent would likely be aligned, preferring the mere risk of lethality to the certainty of collateral damage. Scenario two arises when the military would choose no action over lethal force, and would prefer no action over NLWs. In counterinsurgency, this situation is not unlikely. As the paradox of counterinsurgency recommends, "sometimes doing nothing is the best reaction."<sup>358</sup> Militaries must take into account the adverse consequences of their operations—including the risks inherent in NLWs. In these cases as well, the counterinsurgent and humanitarian are in agreement and there will be no use of NLWs. The final scenario is one in which the military would pick no action over lethal force, but would prefer NLWs to no action. The comparison is between the risk inherent in NLWs and the certain safety of no action. Here the counterinsurgent and the skeptical humanitarian are opposed.

Notice that clarifying the three baseline scenarios has two important consequences. First, substantive disagreement is limited to the cases in which the military would not use lethal weapons and prefers NLWs to inaction. A substantial number of cases are likely to fall outside of this category—and in those cases, the counterinsurgent and the skeptic of NLWs are in agreement. Second, it is not clear whether scenario one or scenario three will occur more frequently. In scenario one, lives are saved in the shift from certain casualties to risk from NLWs; in scenario three, lives are put at risk in the shift from no action to risk of NLWs. It is not clear which option—allowing or preventing NLWs—will save more lives. A counterinsurgency-inspired approach would not shrink from this uncer-

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<sup>358</sup> Field Manual, *supra* note 8, ¶ 1-152.

tainty, but would enable the use of NLWs. NLWs allow the saving of lives in scenario one, and scenario three has built into it the risks of NLWs—risks that a counterinsurgent must take into account as part of the proportionality analysis she undertakes.

Another criticism is that NLWs can be deliberately misused. There are many versions of this critique. Robin Coupland has noted that “the only difference between a drug and a poison is the dose.”<sup>359</sup> Some have argued that nations might use non-lethal weapons to incapacitate soldiers easily, and then kill them anyway.<sup>360</sup> Others believe NLWs could create a slippery slope leading to the redeployment of traditional chemical and biological weapons;<sup>361</sup> malodorous weapons, for example, could be used to mask traditional chemical and biological weapons.<sup>362</sup> There is much truth in these concerns, but they too suffer from a baseline problem of comparison. It is true that NLWs may be misused, but the comparison is not necessarily between the misuse of NLWs and no action on the part of the misusing army. If a military that would misuse NLWs is prevented from using them, it might instead use lethal force, misuse lethal force, misuse non-weapons,<sup>363</sup> or ignore the ban on NLWs and still misuse them.<sup>364</sup> Given this problem, it is not obvious whether allowing NLWs as a general matter will cause greater unnecessary suffering than the alternative. If the misusing state will misuse weaponry regardless of the legal structure, the justification for prohibiting NLWs seems weak. The appropriate use of NLWs, even if only by well-intentioned counterinsurgents, will still alleviate and prevent some death and injury.

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<sup>359</sup> Robin Coupland, “Calmatives” and “Incapacitants”—Questions for International Humanitarian Law Brought by New Means and Methods of Warfare with New Effects, *reprinted in* The Open Forum on the Chemical Weapons Convention: Challenges to the Chemical Weapons Ban 24 (May 1, 2003), <http://www.sussex.ac.uk/spru/hsp/publications>; see also FAS, *supra* note 339, at 3 (arguing that the potential for abuse suggests prevention of weapons in the first place).

<sup>360</sup> See Duncan, *supra* note 338, at 11.

<sup>361</sup> Brad Knickerbocker, The Fuzzy Ethics of Nonlethal Weapons, *Christian Sci. Monitor*, Feb. 14, 2003, at 2.

<sup>362</sup> Lombardo, *supra* note 333.

<sup>363</sup> For example, cigarettes can be used as torture devices. Alexander, *supra* note 351, at 4.

<sup>364</sup> *Id.* at 3.

Finally, some have argued that permitting NLWs will encourage policymakers to deploy troops more frequently.<sup>365</sup> NLWs may lower the cost of civilian casualties and make it easier to wage war with less backlash. In this sense, NLWs reduce the collateral costs to the kill-capture approach. However, in a win-the-population approach to warfare, reducing civilian casualties is necessary but not sufficient. Reducing casualties can prevent fueling the insurgency, but in itself, it is unlikely to win over the population. What is needed is the slow and resource-intensive work of securing the population and providing services and governance. Deciding whether to go to war, in this context, would not likely turn on reduction of civilian casualties, but rather on the ability of the state to undertake serious win-the-population operations.

Despite the problems with the criticisms of NLWs, categorical supporters of NLWs are not completely free from criticism themselves. These supporters often argue that NLWs are superior because when compared to lethal force, non-lethal force is always more humane.<sup>366</sup> On this theory, blinding a person with a laser will always be superior to killing them. Indeed, they seem to believe that because death is permitted, anything less than death is permitted. Neither the laws of war nor counterinsurgency take this view. Rather, they acknowledge that unnecessary suffering and severe injuries can be so bad that they should be prevented. Under a win-the-population approach in counterinsurgency, non-lethal force may not be strategically desirable. In some cases, lethal force may be preferable. To take an extreme example, detaining and torturing insurgents captured in the midst of battle would be strategically problematic: torture creates backlash and fuels the insurgency by creating a grievance for local populations that are seeking protection and order, not ruthlessness and fear. Killing those insurgents in the midst of battle might, in that case, be preferable to the non-lethal option. In other cases, no action may be preferable to NLWs. When “doing nothing is the best reaction,” the risk of adverse consequences of NLWs outweigh projected tactical advantage from NLWs. Under a win-the-population approach, the idea of prevent-

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<sup>365</sup> See *id.*; Duncan, *supra* note 338, at 10; Fidler, *supra* note 337, at 65.

<sup>366</sup> See, e.g., Alexander, *supra* note 351, at 2 (criticizing the fact that incineration is allowed but blinding is not).

ing unnecessary suffering and superfluous injuries is thus centrally important because it prevents the creation of potential grievances.

The counterinsurgency approach to non-lethal weapons would therefore both support a significant restraint on unnecessary suffering and superfluous injury *and* also support the use of non-lethal weapons. But its support for both regimes would be contextual, focused on the actual effects in a particular case rather than on blanket rules. As in the case of the principle of distinction, it would suggest the strengthening of proportionality analysis. Likewise, it would recognize that in certain contexts, otherwise properly used NLWs might cause unnecessary suffering. The use of some gases in cities or villages might be reasonable, but in closed areas like caves or bunkers might cause terrible suffering.<sup>367</sup> The right question in the debate on non-lethal weapons is thus not whether they should be permitted, but how exactly to define unnecessary suffering and superfluous injuring in a manner that can accommodate the rich and varied contexts that animate counterinsurgency.

### 5. Detention Policy

The detention of terrorists and terrorist suspects has perhaps been the most hotly debated topic within the war on terror. The basic arguments, all stemming from the need to balance national security with civil liberties, are well known. One camp believes preventive detention is necessary. They acknowledge that criminal prosecutions and the laws regarding capture and detention on the battlefield are often sufficient, but also recognize that some cases fall between these regimes.<sup>368</sup> Prosecution risks disclosing intelligence sources and operations, evidentiary rules make it impossible to prosecute some terrorists who are captured in far-flung places, and most importantly, prosecution is based on the principle that it is better for a guilty person to go free than an innocent person to be deprived of liberty.<sup>369</sup> In the context of catastrophic terrorism,

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<sup>367</sup> See James D. Fry, Contextualized Legal Reviews for the Methods and Means of Warfare: Cave Combat and International Humanitarian Law, 44 Colum. J. Transnat'l L. 453, 490–518 (2006).

<sup>368</sup> See Wittes, *supra* note 98, at 151–82; Jack L. Goldsmith & Neal Katyal, Op-Ed., The Terrorists' Court, N.Y. Times, July 11, 2007, at A19.

<sup>369</sup> Posner, *supra* note 84, 64–65; Michael B. Mukasey, Op-Ed., Jose Padilla Makes Bad Law, Wall. St. J., Aug. 22, 2007, at A15.

where the risks to so many are so high, society cannot allow terrorists to roam free.<sup>370</sup> Another camp believes that preventive detention is a threat to liberty and may even be counterproductive. Outside the battlefield context, criminal prosecution provides sufficient tools to ensure security and greater protections to personal liberty than a preventive detention system would.<sup>371</sup> Preventive detention may also limit the ability to make future arguments from human rights, enabling dictators to justify quashing dissidents and reducing support from others in the war on terror.<sup>372</sup>

To an extraordinary degree, the debate over detention policy has been shaped by the “enemy combatant” approach made famous by the Bush Administration’s war on terror and use of Guantánamo Bay as a detention facility. Under this approach, Al Qaeda and its affiliates are enemies in an armed conflict. The laws of war, therefore, license the United States to kill or capture these enemies and detain them, as it would detain enemies of a foreign state, for the duration of the hostilities.<sup>373</sup> This approach has two lasting effects: it has globalized detention and it has created a baseline status quo that has framed the debate.

Despite the flexibility that the enemy combatant approach provided, the Bush Administration moved Al Qaeda members and terrorist suspects from Afghanistan and other countries to Guantánamo Bay under a theory that it was a legal black hole, free of the rules of the battlefield and free from the purview of American courts. Moving detainees to Guantánamo Bay can be interpreted as a global response to a global problem: if terrorism exists across boundaries and terrorists are independent entities, detention of terrorists could also be a borderless, global enterprise.

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<sup>370</sup> See Posner, *supra* note 84, at 92.

<sup>371</sup> Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 *Chi. J. Int’l L.* 499, 502 (2005); Kenneth Roth, *After Guantánamo: The Case Against Preventive Detention*, 87 *Foreign Aff.*, May/June 2008, at 9, 12.

<sup>372</sup> Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 *Am. J. Int’l L.* 56, 56–57 (2007); Jennifer Daskal, *How to Close Guantanamo*, *World Pol’y J.*, Fall 2007, at 29, 30–32; Deborah H. Pearlstein, *We’re All Experts Now: A Security Case Against Security Detention*, 40 *Case W. Res. J. Int’l L.* 577, 577–80 (2008) (arguing that even if valid under U.S. and international law, preventive detention schemes are counterproductive).

<sup>373</sup> John B. Bellinger, III, *Legal Advisor, U.S. Dep’t of State, Legal Issues in the War on Terrorism*, Speech (Oct. 31, 2006), available at <http://www.state.gov/s/1/2006/98861.htm>.



Guantánamo Bay thus amounted to the globalization of detention. Detentions that otherwise would have been subject to traditional geographic constraints and their associated legal regimes were now transformed, creating both the assumption and the practice that persons captured in one place in the global war could be moved to other places, detained, and potentially tried and convicted.

The enemy combatant approach has also shifted the baseline status from which debates on detention follow. The natural tendency of all reform efforts, as Professor Matthew Waxman has noted, is to start with the enemy combatant approach to detention and then add procedural protections.<sup>374</sup> Yet doing so, according to Waxman, does not adequately consider the purposes of detention and the role detention plays in an overall strategy.<sup>375</sup>

In addition to clarifying its purpose and strategy, the designers of a detention system must consider the scope of detention and the procedural safeguards provided after detention.<sup>376</sup> The scope of activities triggering detention could be as narrow as direct participation in hostilities or as broad as providing material support to terrorists.<sup>377</sup> Procedural safeguards that could be chosen include provision of counsel, access to information, limits on the fruit of interrogation, increased publicity, and institutions for review of decisions.<sup>378</sup> Focusing on the enemy combatant model threatens to assume a baseline of scope and process that may not be the optimal starting point, given the well-known status quo bias that afflicts decisionmaking.<sup>379</sup>

The globalization of detention and the “enemy combatant” approach, driven by the war on terror framework, suffer from significant problems. The nature of contemporary threats is such that it is

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<sup>374</sup> Matthew C. Waxman, *Administrative Detention: The Integration of Strategy and Legal Process* 27 (Brookings Inst., Counterterrorism and American Statutory Law Series No. 2, 2008), [http://www.brookings.edu/~media/Files/rc/papers/2008/0724\\_detention\\_waxman/0724\\_detention\\_waxman.pdf](http://www.brookings.edu/~media/Files/rc/papers/2008/0724_detention_waxman/0724_detention_waxman.pdf).

<sup>375</sup> *Id.* at 10–12.

<sup>376</sup> Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *Stan. L. Rev.* 1079, 1080–81 (2008).

<sup>377</sup> *Id.* at 1126.

<sup>378</sup> *Id.* at 1127–31.

<sup>379</sup> See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, *J. Econ. Persp.*, Winter 1991, at 193, 194 (1991); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 *J. Risk & Uncertainty* 7 (1988).

not obvious who the enemy combatant is because insurgents and terrorists deliberately blend into civilian populations. The result is a high likelihood of detaining innocent persons, particularly troubling given that the war on terror is potentially infinite in its duration.<sup>380</sup> An equally significant problem is that the globalization of detention has centered the detention debate on the Guantánamo Bay detainees. To be sure, Guantánamo is highly important, but there are other situations to address, such as newly captured insurgents held in facilities in Iraq and Afghanistan. Indeed, courts are currently faced with the decision of whether detainees in Bagram prison, Afghanistan, have a constitutional right to challenge their detentions in U.S. courts.<sup>381</sup> From the perspective of designing a detention policy, simply assuming that the globalization of detention is the appropriate approach is dangerous. The contours of detention, like other legal regimes, are driven by policy choices that integrate political, rights, and strategic concerns. If the strategic foundations of the enemy combatant model of globalized detention are unsound, debate over the particular contours of detention policy might shift significantly.

The strategic shift from the global war on terror to global counterinsurgency provides a helpful critique of detention policy. At a strategic level, global counterinsurgency differs significantly from global counterterrorism. The latter approach, derived from the kill-capture strategy for victory, prescribes finding, killing, and capturing terrorists wherever they exist. It acknowledges the global and borderless nature of terrorism and responds in kind. Global counterinsurgency offers a different strategy: disaggregation. The insurgency framework envisions a global system of interconnections and linkages that provide strength and resilience to insurgent movements. Grievances, materials, and active and passive support in one location can migrate across borders and spark or fuel insurgency in other locations. A globalized counterterrorism strategy is therefore likely to be counterproductive. As David Kilcullen notes, “efforts to kill or capture insurgent leaders inject energy into the system by generating grievances and causing disparate groups to coalesce.”<sup>382</sup>

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<sup>380</sup> See Waxman, *supra* note 374, at 5–6.

<sup>381</sup> See *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 53 (D.D.C. 2009).

<sup>382</sup> Kilcullen, *Countering Global Insurgency*, *supra* note 106, at 43.

In contrast, the strategy of disaggregation suggests de-linking parts of the system, creating a series of “disparate local conflicts that are capable of being solved by nation-states and can be addressed at the regional or national level.”<sup>383</sup> Disaggregation thus has two components: At the global level, it suggests de-linking conflict, grievances, and resources in order to contain insurgent operations to particular states or regions. Within each state or region, it suggests a robust counterinsurgency strategy of winning the population.

Disaggregation implies that the globalization of detention was and remains a misguided approach. In place of globalized detention, disaggregation suggests that detainees should be held and tried in the state in which they are captured. The benefits of disaggregating detention are substantial. First, the capture, detention, and prosecution of insurgents are potential grievances insurgents can use to attract new recruits or motivate existing insurgents. Transferring insurgents is likely to spread grievances across geographic jurisdictions and make receiving states focal points for the insurgency. Guantánamo is an example. Detention policies in Afghanistan and Iraq spark little backlash or protest compared to Guantánamo, and a global insurgency analysis would predict that Guantánamo might inspire more terrorists than it holds. A disaggregation strategy has the potential to limit the spread of the grievances sparked by detention. Detaining and prosecuting insurgents in the territory in which they were captured decentralizes the grievances from the global counterinsurgent state and limits their ability to link to the global insurgency. Shifting the emphasis to particular states allows for the insurgency to be treated at a local, rather than global, level.

In addition to preventing the spread of insurgent grievances, disaggregating detention forces nations to develop their own legal structures for detention, thereby strengthening the rule of law around the world. On this theory, the best way for the United States to support counterinsurgency and state-building in Afghanistan, for example, is not to outsource Afghan detainees and legal problems to American prisons and courts, but instead to help Afghans develop their own detention and legal systems to confront their particular challenges. Under a disaggregation strategy, coun-

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<sup>383</sup> *Id.* at 37.

tries that develop legitimate processes and the rule of law will win the support of their local populations and effectively grapple with dangers within their borders. Those that refuse to adopt legitimate legal regimes will face increased pressure from their constituents—and from insurgents.

Finally, the disaggregation strategy allows for a diverse range of detention policies via their tailoring to the particular conditions within a state. For example, in a state confronted with an active insurgency, such as Iraq or Afghanistan, detention policy might need to have a broad scope and limited procedural safeguards.<sup>384</sup> In a peaceful state without daily attacks from insurgents, such as the United States, detention policy might take on a narrower scope and offer greater procedural safeguards. The value of this diversity of policies across jurisdictions is both principled and strategic. It is principled because it affirms the rule of law and value of liberty rather than embracing a universal, global policy of expansive preventive detention. It is strategic because the win-the-population strategy in counterinsurgency requires developing legitimate governance structures, including legal and judicial institutions. Forcing the United States into a detention regime designed for the threats of Afghanistan does more harm than good to liberty at home. Forcing Afghanistan into American legal and constitutional structures does similar injury to the security and development of a distinctly Afghan government. Diversity enables both security and the rule of law.

Opponents of the disaggregation strategy will raise some important practical criticisms, though a correct understanding of global counterinsurgency strategy can meet each. First, some countries may not provide an expansive enough detention scheme to prevent against catastrophic attacks. A disaggregation approach places pressure and responsibility on the government to provide heightened security to its population, rather than transferring responsibility to a single state responsible for all global detention operations. To the extent that a nation's detention policy falls short of the threat, global diplomatic forces and domestic political forces will

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<sup>384</sup> Along these lines, it could follow the existing approach in the laws of war that allows for the detention of those who are a threat to security but are not direct participants in hostilities. See Goodman, *supra* note 230, at 53.

pressure the under-secured state to change its approach. Second, some countries might torture individuals or engage in other human rights violations. Under the U.N. Convention Against Torture, states must not transfer persons to a state “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>385</sup> The Convention poses no problem for a disaggregation strategy because it suggests keeping detainees where they are captured. And the state violating human rights will inspire backlash, pushing the state to change its policies. Third, some countries might use detention policy as a method to clamp down on political opponents. Politically oppressive states could follow such policies regardless of disaggregation, but will likely face a backlash because of the nature of grievances and feedback loops in insurgent systems. In each case, disaggregation strengthens the responsibility of states towards their citizens with respect to both security and liberty. If the state is incapable of providing either, it will face a heightened insurgency. At the same time, the focus on the state’s responsibility to detain contains potential grievances at the national level, limiting their relevance and spread across geographical boundaries.

In each of these scenarios, effective detention relies both on the feedback effects inherent in counterinsurgency and on what Abram and Antonia Chayes called a “managerial model.”<sup>386</sup> The international community would ensure that each state has a clear understanding of what basic security and legal measures are appropriate and could assist states that have not met those measures but want to meet them. Moreover, networks of government officials, best practices, and technical assistance would help fortify national institutions.<sup>387</sup>

Pursuing the disaggregation strategy to detention requires designing detention policy for a variety of situations, from states with full-blown or active insurgencies to states with limited threats from

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<sup>385</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

<sup>386</sup> Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 3 (1995).

<sup>387</sup> See generally Anne-Marie Slaughter, *A New World Order* (2004) (describing transnational networks of officials).

insurgencies. Focusing on the particular state and its conditions involves considering the role detention plays in the state's overall strategy to address threats. A system of preventive detention, as Matthew Waxman has argued, can have four purposes at its core: incapacitating subjects who are deemed generally dangerous, deterring individuals from joining with radical groups, disrupting specific and ongoing plots or attacks, and enabling the gathering of helpful information.<sup>388</sup> Designing a detention system to incapacitate would focus on proxies for future dangerousness as a way to identify individuals who are generally dangerous.<sup>389</sup> Designing towards disrupting a particular plot would require a functional linkage between a person and a plot.<sup>390</sup> Note that the incapacity and disruption regimes are not necessarily coextensive: a financier may be generally dangerous and require incapacitation, but detaining a financier might not stop an ongoing plot. The financier could not be detained under a disruption regime. On the other hand, a courier may not be generally dangerous but might be transmitting information that will facilitate a particular plot.<sup>391</sup> The courier could not be detained under an incapacity regime. Additionally, detention with respect to a particular plot would imply a shorter duration of detention, since the threat would subside after the plot was disrupted.<sup>392</sup> Detention for purposes of gathering information provides a broad scope, suggesting potential detention of friends and relatives of a suspected person in order to interrogate them. At the same time, such a detention regime poses the considerable risk of alienating the population.<sup>393</sup> Finally, detention for deterrence seems like a blunt instrument, since prosecution or military action, depending on the context, would both seem to be sufficient deterrents.

By considering each of these purposes, detention policy can be tailored to both active and inactive insurgencies. In an active insurgency, such as in Iraq or Afghanistan, detention should seek to incapacitate and disrupt. Insurgencies are driven by violence and fear

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<sup>388</sup> Waxman, *supra* note 374, at 11.

<sup>389</sup> *Id.* at 16.

<sup>390</sup> *Id.* at 17–18.

<sup>391</sup> *Id.* at 18.

<sup>392</sup> *Id.* at 17.

<sup>393</sup> *Id.* at 18–19, 21.

in the population, and the goal of the counterinsurgent is to secure the population and win over passive supporters of the insurgency. To that end, incapacitating active supporters of the insurgency, admittedly a broad category, would be an effective way to secure the population. Likewise, disrupting particular attacks would be necessary to protect the population. An information-based preventive detention policy might appear valuable, since it would provide helpful intelligence, but it would also alienate the population when mere questioning might suffice. Detention for incapacity and disruption in active insurgencies will inevitably sweep in many insurgents, but procedural safeguards should not be abandoned. Indeed, to win the population, the counterinsurgent must build legitimate legal institutions and not over-detain. One answer to this dilemma is a balancing approach that provides discretion to the counterinsurgents.<sup>394</sup> Another answer is a relatively expansive detention program that facilitates rehabilitation and reintegration. In Iraq, for example, many of the U.S. prisons rehabilitate active supporters of the insurgency who are not the most dangerous insurgents: the programs teach them to read and write, provide education in moderate Islam, and then release them.<sup>395</sup> This approach has two benefits: providing security to the population by removing active insurgents from society, and rehabilitating those insurgents so they can reenter society in a peaceful and hopefully productive way.

In an area of inactive insurgency, such as the United States, where the threat is ongoing but not pervasive, a different approach is necessary. The justification for incapacitating potentially threatening persons seems weak given the resources of the state, the availability of surveillance, and the prospect of prosecution for material support of terrorism.<sup>396</sup> In contrast, preventive detention for disruption seems appropriate to provide security to the population. It also requires a nexus between an actor and a plot, a higher standard than general dangerousness, and is limited to a short term. When the plot is disrupted, preventive detention would lapse and

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<sup>394</sup> See Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 *Colum. L. Rev.* 1365, 1387–88, 1391–93 (2008).

<sup>395</sup> See Andrew K. Woods, *The Business End*, *Fin. Times Mag.* (London), June 27, 2008, available at <http://www.ft.com/cms/s/2/71c42ec0-40ca-11dd-bd48-0000779fd2ac.html>.

<sup>396</sup> See Chesney & Goldsmith, *supra* note 376, at 1088–89.

likely give way to a prosecution. Finally, the information and intelligence justification seems inappropriate in a state with an inactive insurgency. Detention for intelligence purposes has high costs to liberty and is largely unnecessary given surveillance capacity.

To be sure, the disaggregation approach will not work in all cases. In a failed state like Somalia, a captured terrorist cannot be turned over to a functioning government or prison system. In some cases, a state's assurances might be insufficient or diplomatic pressure might be inadequate to ensure human rights or security. In these cases, states should individually or cooperatively create backstops that protect against domestic failure.<sup>397</sup> These backstops could follow the globalized detention model, allowing foreign courts to hear cases of prisoners captured elsewhere, or they could follow a collective security model, with the creation of an international body to deal with the limited number of cases in which domestic institutions are insufficient.<sup>398</sup> But as much as possible, captured insurgents should remain where they were found.

The strategy of counterinsurgency and disaggregation cannot provide the details for how a detention policy should be designed. Policymakers will disagree as to the specifics of procedural mechanisms to be imposed, the scope of the threat and the potentially detainable population, and perhaps even the purposes of detention. But counterinsurgency's global strategy of disaggregation does indicate that the globalization of detention—the transfer of insurgents across borders in search of a better forum for detention or prosecution—is a misguided approach. It further suggests that the best approach would be to encourage each state to detain its own suspects and develop its own detention policies. Placing greater responsibilities on states helps minimize linkages and weakens the focal points of a global insurgency.

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<sup>397</sup> Cf. Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 *Harv. Int'l L.J.* 327, 339 (2006).

<sup>398</sup> *Id.* at 340.



*B. Rethinking Compliance: From Reciprocity to Exemplarism*

Reciprocity is one of the central principles of international law and the laws of war.<sup>399</sup> Reciprocity holds that states should be subject to equivalent rights and duties, and that mutuality and equivalence are what enables states to cooperate in an otherwise anarchic, self-interested world. The nature of counterinsurgency, however, demonstrates a significant disconnect between the underlying conflict and the legal structure premised on reciprocity. The asymmetric nature of counterinsurgency undermines reciprocity's equivalence assumption and with it, the theoretical foundation for compliance. But the consequence need not be that the counterinsurgent shed compliance with the law altogether. Rather, counterinsurgency's win-the-population strategy would suggest as a replacement for reciprocity the asymmetric principle of exemplarism, by which the counterinsurgent acts in accordance with law regardless of the insurgent's actions. Exemplarism unites lawfulness and strategic self-interest, rather than placing them in opposition.

The principle of reciprocity is defined as "the relationship between two or more States according each other identical or equivalent treatment."<sup>400</sup> Some commentators have added to this definition a requirement of contingency, the rewarding or punishing of an actor based on her fulfillment of the agreement.<sup>401</sup> But others argue that contingency is not required, distinguishing the practical

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<sup>399</sup> See, e.g., Ingrid Detter, *The Law of War* 400 (2d ed. 2000) ("Reciprocity is at the root of the international legal system itself."); George P. Fletcher, *The Law of War and Its Pathologies*, 38 *Colum. Hum. Rts. L. Rev.* 517, 522 (2007) ("The first principle of the law of war, then, is reciprocity."); Theodor Meron, *The Humanization of Humanitarian Law*, 94 *Am. J. Int'l L.* 239, 243 (2000) ("[R]eciprocity has historically been central to [the law's] development."); Gerald L. Neuman, *Humanitarian Law and Counterterrorist Force*, 14 *Eur. J. Int'l L.* 283, 285 (2003) ("Reciprocity is built into the structure of many IHL norms."); Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 *Cornell Int'l L.J.* 93, 119 (2003) (calling reciprocity a "meta-rule for international law"); see also Michael D. Gottesman, *Reciprocity and War: A New Understanding of Reciprocity's Role in Geneva Convention Obligations*, 14 *U.C. Davis J. Int'l L. & Pol'y* 147, 152 n.12 (2008) (citing other sources to similar effect).

<sup>400</sup> Bruno Simma, *Reciprocity*, in 4 *Encyclopedia of Public International Law* 29, 30 (Rudolf Bernhardt ed., 1992).

<sup>401</sup> See Robert O. Keohane, *Reciprocity in International Relations*, 40 *Int'l Org.* 1, 5-6 (1986); see also Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 *Am. Soc. Rev.* 161, 164 (1960).

ability to enforce from the legal requirement, which is limited to the mutuality of the norm.<sup>402</sup> The essence of reciprocity can be understood through two elements. First, reciprocity enables cooperation between parties in the context of a world system in which states are unwilling to act unilaterally.<sup>403</sup> The cooperative element allows states to constrain their actions and the actions of others, while at the same time channeling energies into other fields or arenas. Second, reciprocity solves the enforcement problem in international affairs.<sup>404</sup> The basic idea is illustrated by a simple prisoner's dilemma. Both parties in the prisoner's dilemma are better off if they cooperate than if they both defect, but if one party shows cooperative behavior and the other defects, the defector gets the most benefit. If played multiple times, however, cooperation becomes rational. A party could defect in the short term, gaining high payoffs, but would face considerable future costs as the other party also defects. Instead, if both parties cooperate, each benefits in the short and long term.<sup>405</sup> Thus, the potential for future defection by the other party provides a check on a party's actions and enforces cooperative action. The principle of reciprocity, then, provides international affairs with a way to enable cooperative action when defection may be more profitable in the short run.

Reciprocity manifests itself in three ways. Specific reciprocity describes "situations in which specified partners exchange items of equivalent value in a strictly delimited sequence."<sup>406</sup> Specific reciprocity is similar to the prisoner's dilemma situation described above and provides enforcement through retaliation. Specific reciprocity can be effective when players have common interests, when future cooperation is appealing, and when there are limited players in the game.<sup>407</sup> However, it can also provoke bilateral feuds,

<sup>402</sup> Simma, *supra* note 400, at 30.

<sup>403</sup> Dan Belz, *Is International Humanitarian Law Lapsing Into Irrelevance in the War on International Terror?*, 7 *Theoretical Inquiries L.* 97, 98 (2006); Keohane, *supra* note 401, at 1.

<sup>404</sup> Keohane, *supra* note 401, at 1; Parisi & Ghei, *supra* note 399, at 93–94; Simma, *supra* note 400, at 29–30. In a centralized system, the central authority can impose and enforce norms; in a decentralized system, reciprocity plays a much larger role. See René Provost, *International Human Rights and Humanitarian Law* 123 (2005).

<sup>405</sup> Robert Axelrod, *The Evolution of Cooperation* (1984); Keohane, *supra* note 401, at 8–9.

<sup>406</sup> Keohane, *supra* note 401, at 4.

<sup>407</sup> *Id.* at 24.

restrict possibilities, and make multilateral action difficult.<sup>408</sup> Diffuse reciprocity “involves conforming to generally accepted standards of behavior.”<sup>409</sup> Each party cooperates in order to maintain a collective norm that it finds valuable. Diffuse reciprocity requires interactions over time to create mutual obligation,<sup>410</sup> but it also can result in the exploitation of cooperative parties when others defect.<sup>411</sup> Indirect reciprocity functions when the retaliatory threat comes not from the reciprocal party but from a third party.<sup>412</sup> In these cases, *A* and *B* may have an agreement, but when *A* violates the agreement, *B* does nothing; instead, *C* retaliates.

The concept of reciprocity has been central to debates on the legal status of terrorists and the application of the Geneva Conventions in the war on terror for the simple reason that terrorists do not follow the laws of war. Thus terrorists are perennial defectors, rendering the enforcement element of reciprocity meaningless. Some have argued that the absence of reciprocity means terrorists cannot claim protection. As Ruth Wedgwood has said: “To claim the protection of the law, a side must generally conduct its own military operations in accordance with the laws of war.”<sup>413</sup> Others have argued that the United States has no duty to follow the laws of war because reciprocity is absent. John Yoo is probably the most prominent advocate for this view: “The primary enforcer of the laws of war has been reciprocal treatment: We obey the Geneva Conventions because our opponent does the same with American POWs. That is impossible with al Qaeda.”<sup>414</sup> Eric Posner explains this approach well. Posner sees the laws of war as premised on self-interest through reciprocity. On his theory, the laws of war come into being when parties find a way to reduce costs and destruction while not providing significant advantage to any of the other par-

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<sup>408</sup> *Id.* at 27.

<sup>409</sup> *Id.* at 4. The distinction between specific and diffuse reciprocity is similar to the distinction between immediate and systemic reciprocity. In the former, a state is bound only if the agreeing state is likewise obligated; in the latter, obligation is tied to “the continued existence of the system.” Provost, *supra* note 404, at 122.

<sup>410</sup> Keohane, *supra* note 401, at 21–22.

<sup>411</sup> *Id.* at 24.

<sup>412</sup> Gottesman, *supra* note 399, at 152.

<sup>413</sup> Ruth Wedgwood, *Op-Ed.*, *The Rules of War Can’t Protect Al Qaeda*, *N.Y. Times*, Dec. 31, 2001, at A11.

<sup>414</sup> John Yoo, *Editorial*, *Terrorists Have No Geneva Rights*, *Wall St. J.*, May 26, 2004, at A16.

ties.<sup>415</sup> Posner argues that the Bush Administration's claim that Common Article 3 did not apply to the war on terror was based on a reciprocity justification. The United States had nothing to gain from adhering to the rules because Al Qaeda would not follow them regardless of what the United States did.<sup>416</sup> Others worry about the failure of reciprocity. Some argue that reciprocity requires giving combatant's privilege to both sides,<sup>417</sup> others that the absence of reciprocity and the resultant violation of law by both sides might lead to the degradation of the laws themselves,<sup>418</sup> and still others think it is simply unsustainable to have law without reciprocity.<sup>419</sup>

Thus far, the responses to these arguments and concerns have pursued two tracks. One response is to argue that the laws of war are not really based on reciprocity but rather on humanitarian principles.<sup>420</sup> The humanitarian approach concedes that there is no interest-based argument for following the laws of war in asymmetric situations. To some extent, there is evidence for this proposition. The failure of occupation law, as Eric Posner has noted, can be understood as deriving from the absence of a reciprocity-based enforcement threat because the opponent has been vanquished.<sup>421</sup> In cases when reciprocity fails, the needs of humanity are a back-stop justification for compliance. The other response is that reciprocity may still provide a justification for adherence to the laws of war despite the asymmetry of compliance between state and non-state actors. As a matter of specific reciprocity, it is unlikely terrorists will comply with the laws of war; however, with defection by the United States, terrorists might act even more ruthlessly than they would have otherwise. The diffuse reciprocity argument, therefore, warns that violating the laws of war will undermine hu-

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<sup>415</sup> Posner, *supra* note 46, at 427–30; see also Belz, *supra* note 403, at 117 (noting that “[u]tilitarian laws will only be found where the reciprocity element is still present, inducing both sides to decrease their aggregate costs”).

<sup>416</sup> Eric Posner, Editorial, *Apply the Golden Rule to al Qaeda?*, *Wall St. J.*, July 15–16, 2006, at A9.

<sup>417</sup> Allen S. Weiner, *Hamdan*, *Terror, War*, 11 *Lewis & Clark L. Rev.* 997, 1007 (2007).

<sup>418</sup> Weisburd, *supra* note 25, at 1086.

<sup>419</sup> Kenneth Anderson, *Who Owns the Rules of War?*, *N.Y. Times Mag.*, Apr. 13, 2003, at 38, 43.

<sup>420</sup> Richemond, *supra* note 207, at 1026.

<sup>421</sup> Posner, *supra* note 46, at 430.

manitarian norms. Indirect reciprocity cautions that U.S. personnel and POWs might be treated poorly in future conflicts given the actions of the United States in this conflict.<sup>422</sup> Thus reciprocity still works and the United States should continue to follow the laws of war.

The trouble with these approaches is that they fail to account for the strategic self-interest at work in counterinsurgency. Reciprocity in the laws of war is based on two premises that are inapplicable in counterinsurgency. First, the opponents are each better off using destructive violence to destroy the enemy, but each side can reduce its costs if both limit certain tactics. Second, if one side defects, the other side is at a disadvantage. Counterinsurgency's win-the-population strategy for victory rejects these propositions. The counterinsurgent is not better off using destructive violence to kill and capture the enemy; rather, the counterinsurgent must win the population by securing the population, ensuring essential services, establishing governance structures, developing the economy and infrastructure, and communicating with the population. These operations require limitations on destructive violence. The reason for the counterinsurgent to limit its actions is not out of reciprocity with the enemy to reduce mutual costs, but pure unilateral advantage. What is important is that the win-the-population strategy does not turn on the operations of the insurgent enemy: whether the insurgent is ruthless and vicious or lawful and humanitarian is irrelevant to the counterinsurgent's strategy.

The fact of asymmetry, of the insurgency's defection from the laws of war, is therefore irrelevant to the counterinsurgent's strategy; in fact, it might be helpful to the counterinsurgent's operations. Because the goal is to win over the population, a counterinsurgent that follows the laws of war may be at an even greater advantage in the context of an insurgency that is ruthless and vicious than in the context of a lawful and humane insurgency. A ruthless insurgent will alienate the population, creating fear and terror. A humane and lawful counterinsurgent, in contrast, gains legitimacy and support of a population that seeks a stable, orderly society, free of violence and fear. The counterinsurgent seeks legitimacy, which is assisted by its adherence to law and humanity

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<sup>422</sup> See sources in Gottesman, *supra* note 399, at 170 n.97.

and by the insurgent's disregard for law and humanity. In essence, asymmetry does not undermine an interest-based justification for adherence to law, but rather supports and deepens it.<sup>423</sup> Instead of interest based on cooperative reciprocity, interest is driven by unilateral advantage. As a result, the counterinsurgency approach rejects the basic tension between humanity and military efficacy<sup>424</sup> and replaces it with the idea that humanity is needed for military success. The reciprocity approach is thus grounded on strategic assumptions about cooperation, compliance, and interest that are inapplicable given the strategic realities of counterinsurgency operations.

Counterinsurgency suggests a different principle: exemplarism.<sup>425</sup> Exemplarism is an inherently asymmetric approach. It holds that a party can be bound to law regardless of the actions of other parties. In doing so, the exemplarist state gains in prestige, legitimacy, and power. Unlike indirect reciprocity, exemplarism does not premise adherence to law on the future threat of direct equivalent retaliation by a third party. And unlike diffuse reciprocity, it does not premise adherence to law based on the future threat of equivalent retaliation by the reduction of a community norm. Importantly, exemplarism is also not based on moral or professional ideals of martial virtue or national self-respect.<sup>426</sup> Instead, exemplarism is based

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<sup>423</sup> Most commentators on asymmetry and the laws of war suggest that asymmetry will lead to greater violations on both sides and to undermining IHL itself. See, e.g., Stefan Oeter, Comment, *Is the Principle of Distinction Outdated?*, in *International Humanitarian Law Facing New Challenges* 53, 56–59 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007); Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in *International Humanitarian Law Facing New Challenges* 11, 47 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).

<sup>424</sup> See, e.g., Provost, *supra* note 404, at 136.

<sup>425</sup> I take this term from Michael Signer, *City on a Hill, Democracy*, Summer 2006, at 33, 34. Signer applies the term to foreign policy, not law. Robert Sloane has recently argued for a unilateral or voluntarist war convention to bind states. Terrorists, he notes, do not share human rights norms, and reciprocity fails because they are structured in networks not hierarchies. Sloane, *supra* note 105, at 477–78. However similar his conclusions, his paradigm remains fixed on the war on terror, and he roots the failure of reciprocity in different sources from this insurgency-based analysis. Sloane focuses on the networked structure of terrorists; I confront directly the strategic foundations of reciprocity: equivalence, cost-reduction, and the benefits of defection.

<sup>426</sup> See Mark Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* 329–90 (2009).

on the strategic self-interest of the party. In essence, exemplary conduct leads to victory.

The self-interested justification for rules in armed conflict provides a non-humanitarian and non-reciprocity justification for following those rules.<sup>427</sup> Military manuals and codes of conduct were some of the earliest restraints on combat and had no reciprocal element.<sup>428</sup> Manuals provided greater internal discipline and war readiness and would sometimes limit damage caused “to facilitate the return to normality after the end of hostilities.”<sup>429</sup> The impetus and success of these measures was tied to their strategic advantage, not humanity or reciprocity. Over time, it is worth noting, some of the principles established in manuals have even become customary law, such as the requirement that superior officers authorize any belligerent reprisals.<sup>430</sup> Exemplarism also provides a new justification for certain norms, to date justified under humanitarian aims. For example, Article 54 of Additional Protocol I bans destroying objects needed by the population, even if destruction would also harm the enemy.<sup>431</sup> The traditional justification is humanitarian,<sup>432</sup> not reciprocal. An exemplarist approach provides a self-interested justification for these rules: harming the population fuels insurgency and spreads the conflict.

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<sup>427</sup> This is distinct from what Professors Posner and Goldsmith call coincidence of interest, “a behavioral regularity among states [that] occurs simply because each state obtains private advantage from a particular action (which happens to be the same action taken by the other state) irrespective of the action of the other.” Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 27–28 (2005). Goldsmith and Posner argue that if coincidence of interest drives state compliance regardless of the other state’s action, there would be no need for codification of international law. *Id.* Agreements driven by coincidence of interest thus must have a “thin” cooperative element. *Id.* at 88–89. Counterinsurgency’s exemplarist groundwork offers no opportunity for even thin cooperation because insurgents will not cooperate. But that does not mean there is no reason to codify agreements in situations driven by purely unilateral self-interest. See *infra* text accompanying note 441.

<sup>428</sup> See Neff, *supra* note 46, at 74.

<sup>429</sup> Provost, *supra* note 404, at 131.

<sup>430</sup> *Id.*; see also W. Michael Reisman & William K. Leitzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, in *The Law of Naval Operations* 1 (U.S. Naval War C., International Law Studies Series No. 64, Horace B. Robertson, Jr. ed., 1991).

<sup>431</sup> API, *supra* note 196, at art. 54.

<sup>432</sup> See René Provost, *Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait*, 30 *Colum. J. Transnat’l L.* 577, 605 (1992).

Instituting the exemplarist principle into law ensures that the feedback effects it relies upon will apply to both well- and ill-intentioned counterinsurgents. Some states may seek to characterize freedom fighters, political opponents, or disgruntled members of the population as insurgents in order to quash them. Indeed, many nations have used the Bush Administration's war on terror theories to clamp down on domestic opposition.<sup>433</sup> Moreover, we cannot assume that all insurgencies need to be overcome. Some may rightfully seek political freedom or independence. Under exemplarism, well-intentioned counterinsurgents will act in accordance with strategic necessity and law, thus retaining their efficacy and adding legitimacy to their operations. At the same time, ill-intentioned counterinsurgents—the dictator seeking to crush domestic political opposition by calling it an insurgency or terrorist group—will be seen as violating the law. The law therefore serves as a baseline for evaluating conduct and as a tool of warfare itself.<sup>434</sup> Legal violations will fuel grievances, spur on insurgency, and undermine international support; legal compliance will help win the population, build international support, and undermine insurgent propaganda. This enforcement mechanism is not based on the reciprocal threat of retaliation. Rather, the exemplarist model creates a standard of conduct based on the strategic foundation of win-the-population. Because victory is tied to the counterinsurgent's behavior, rather than its relation to the enemy, a legal structure that sets a standard for that behavior—even as it enables operations—is internally enforcing. Just as insurgencies are subject to feedback loops, so too are counterinsurgencies. Legitimacy and success build on themselves more than on the destruction of the opponent. Hence the ill-intentioned counterinsurgent will confront a downward legitimacy spiral, with exemplarist laws working against it, and the well-intentioned counterinsurgent will see an upward legitimacy spiral, with the law assisting its operations.

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<sup>433</sup> See Gottesman, *supra* note 399, at 181–82.

<sup>434</sup> See Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts 4* (2001) (unpublished manuscript for the Carr Ctr. for Hum. Rts. Pol'y, available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>) (describing “lawfare”).



One example of how the exemplarist principle would manifest is in removing any thresholds for applying humanitarian norms that are conditioned on the nonstate opponent. As one commentator has noted, the applicability of norms in international armed conflict is currently “conditioned on reciprocity of obligations.”<sup>435</sup> This is not true of internal armed conflict, since Common Article 3 does not have a reciprocity-based threshold for applicability. But Additional Protocol II, which is intended to apply in conflicts between the armed forces of a contracting party and “dissident armed forces,” reintroduced this threshold. It requires that the insurgent forces are “under responsible command, exercise such control over a part of [the country’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>436</sup> Through the requirements of territory and command, the Protocol attempts to ensure equality of the parties as a foundation for reciprocity: the implementation of the Protocol by the insurgents.<sup>437</sup> An exemplarist would reject this condition as driven by the wrong strategic model. Because counterinsurgency does not rely on reciprocity but unilateral self-interest, it is unnecessary to have threshold requirements of rough equality between the insurgents and the state or for the insurgents to follow the humanitarian norms themselves. An exemplarist approach would apply the relevant provisions to the counterinsurgent state regardless of the insurgent’s conduct or degree of organization and territorial control.

The objection to this position is familiar from the debates over Additional Protocol I: reducing the formal requirements for privileged combatants would legitimize and grant rights to terrorists,<sup>438</sup> resulting in a perverse incentive that would encourage terrorism by reducing its costs. While it is true that the costs of insurgency would be reduced, this argument may be misplaced. First, is it not clear that Additional Protocol I’s loosening of threshold rules has resulted in more terrorism or insurgencies. Second, even assuming that there has been an uptick in the incidence of terrorist attacks or insurgencies, it is not clear that the legal change drove that change.

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<sup>435</sup> Provost, *supra* note 404, at 161.

<sup>436</sup> APII, *supra* note 204, at art. 1.1.

<sup>437</sup> See Provost, *supra* note 404, at 161.

<sup>438</sup> See, e.g., Douglas J. Feith, *Law in the Service of Terror—The Strange Case of the Additional Protocol*, *Nat’l Int.*, Fall 1985, at 36, 42–45.

More likely, as Professor Phillip Bobbitt has argued, the extraordinary asymmetry of power has forced those who fight against superpowers to take up unconventional means.<sup>439</sup> Finally, changing one set of rules does not require changing all of the rules. It is possible to decouple the political concern of insurgency from the tactics used by insurgents. The law could recognize as insurgents those who do not meet the classical threshold tests of uniforms, territorial control, or other reciprocity-inspired provisions, and simultaneously could reject providing privilege or legitimacy to tactics such as targeting civilians.<sup>440</sup> It does not follow, for example, that insurgents who place tanks in mosques to protect themselves from attack need to be privileged; rather, that practice can be justly condemned even as the fact of insurgency is recognized and the counterinsurgent is bound by law.

Instead of replacing reciprocity with humanity, exemplarism retains self-interest as a justification for following the laws of war. It also illustrates a self-interested, strategically sound response to the war on terror theorists who assert that counterterrorists have no obligation to follow the laws of war.

## V. STRUCTURING THE LAWS OF WAR

Given the disconnect between counterinsurgency and the laws of war, it is only natural to wonder what course revisions to the laws of war should take. Although counterinsurgency wars are the likely wars of the future, conventional warfare is by no means extinct. Fear of conventional state-on-state violence is pervasive: sources of tension include Russia and Ukraine's gas disputes, India and Pakistan's border and terrorism issues, China and Taiwan's ongoing cold war. In cases of conventional war, the traditional rules of warfare might be more suitable than ones centered on counterinsurgency. The question, simply put, is how to fashion laws of war that can satisfy two different strategic realities: the kill-capture approach to conventional warfare and the win-the-population approach to counterinsurgency warfare.

In some cases, revising the laws of war to accord with the win-the-population strategy of counterinsurgency will have little or no

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<sup>439</sup> See Bobbitt, *supra* note 107, at 130.

<sup>440</sup> See *id.*

negative effect in conventional wars. For example, the ban on non-lethal weapons originated in agreements that were deliberately all-inclusive, fearing the worst of technology based on the kill-capture strategy. Technological innovation, spurred on by the strategic imperatives of counterinsurgency, now produces non-lethal weapons. Rolling back the blanket technology bans in favor of a regime that differentiates between lethal and non-lethal weapons would align with counterinsurgency and cause little trouble for conventional war. For the same reasons as in counterinsurgency, the use of non-lethal weapons in conventional warfare is unlikely to cause more humanitarian suffering, and it may even lead to less suffering. In such cases, where the legal implications of both strategic models coincide, revision is thus unproblematic.

In other cases, however, the legal implications of the two strategic models may collide, and revision becomes more difficult. Take the principle of distinction. In counterinsurgency, a looser construction of the principle may align better with the systemic nature of insurgency, the need to win over the population, and the feedback effects involved. In conventional warfare, however, a narrower reading of the principle of distinction may be desirable to prevent widespread attacking of civilians. Universalizing one rule would result in a regime that poorly fits the reality of the alternative form of warfare—conventional or counterinsurgency.

Some might suggest that in such cases one could adopt the counterinsurgency rule as policy, rather than law, because the strategic self-interest of exemplarism makes law unnecessary. Leaving counterinsurgency-inspired rules to policy, however, will ensure that some laws are broken. A narrow reading of the principle of distinction, for example, would render illegal the counterinsurgent who attacks the IED maker. Moreover, one of the goals in counterinsurgency is itself creating the rule of law within the insurgent territory. As Sir Rupert Smith has written, to “operate tactically outside the law is to attack one’s own strategic doctrine.”<sup>441</sup> Finally, as discussed earlier, legalizing rules enables enforcement of the exemplarist principle against ill-motivated counterinsurgents. Policy alone is thus insufficient.

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<sup>441</sup> Rupert Smith, *The Utility of Force* 378–79 (2005); see also Bobbitt, *supra* note 107, at 152–53.

The obvious solution is to devise, instead, two laws of war: a conventional law of war and a law for counterinsurgency war. Yet this solution creates its own problems: How would one decide which regime applied? In the late nineteenth and early twentieth centuries, scholars debated the right of a participating or foreign state to recognize belligerency or insurgency and the duties that went with recognizing each legal regime.<sup>442</sup> A dualist system for the laws of war would have to establish criteria including who recognizes and what happens in cases of conflicting interpretations. Additionally, it is not obvious that only two laws of war would be needed. In recent years some have suggested that the laws of war add to international and non-international conflict a category of extra-state<sup>443</sup> or transnational armed conflict.<sup>444</sup> Perhaps, then, we must add separate legal regimes for peacekeeping, humanitarian intervention, war against pirates, and other military operations as well. The proliferation of legal regimes would require numerous threshold determinations for applicability and result in considerable conflict over applicable regimes.

There is no simple answer to this problem, and it is not the purpose of this Article to present a comprehensive proposal for revising the laws of war. That work must be left for future scholarship in this area. Still, some might wonder whether revision is necessary at all. Is law merely another tool of the U.S. military, to be changed whenever it conflicts with or constrains strategy? The question raises the larger issue of the relationship between law and strategy—or even law and politics. A full theory is beyond the scope of this Article, but the basic contours of the approach gestured at here are worth mentioning.

The underlying premise is that law and strategy are inextricably intertwined.<sup>445</sup> Law does more than constrain actors; it provides

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<sup>442</sup> See, e.g., Hersh Lauterpacht, *Recognition of Insurgents as a De Facto Government*, 3 *Mod. L. Rev.* 1, 1–2 (1939); Lester Nurick & Roger W. Barrett, *Legality of Guerrilla Forces Under the Laws of War*, 40 *Am. J. Int'l L.* 563, 563 (1946); George Grafton Wilson, *Insurgency and International Maritime Law*, 1 *Am. J. Int'l L.* 46 (1907); see also Neff, *supra* note 46, at 268–73.

<sup>443</sup> Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 *N.Y.U. J. Int'l L. & Pol.* 1, 3–6 (2004).

<sup>444</sup> Sloane, *supra* note 105.

<sup>445</sup> For a magisterial tract that takes this nexus seriously, see Phillip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (2002). For a practical illus-

pathways for action. Because law is at once enabling and constraining, it can shape strategy. The change in laws wrought by the French Revolution allowed the *levée en masse*, providing Napoleon the army needed to dominate Europe.<sup>446</sup> Yet, at the same time, the laws created are dependent on strategy. Czarist Russia, for example, sought bans on new technologies at the Hague Conference of 1899 because it knew it could not compete with other industrializing nations. The upstart American delegates, aware of their growing economic prowess and accompanying military might, counseled against such bans.<sup>447</sup> Their legal positions were shaped by their strategic posture. As Professor Phillip Bobbitt writes, “[t]he legal and strategic choices a society confronts are often only recombinations of choices confronted and resolved in the past, now remade in a present condition of necessity and uncertainty.”<sup>448</sup>

The laws of war, in this story, are not simply a humanitarian constraint on the horrors of war, though they do serve that function. Rather, the laws of war are an expression of political values.<sup>449</sup> They construct and legitimize military activities including violence, channeling them into certain avenues and condemning others. The legal construction of warfare is shaped by strategy: by the characterization of the conflict, the definition of goals, and the plans and operations that will lead to victory. In fact, the goals of a strategic doctrine are not dissimilar from many of the goals of law. Strategic doctrine seeks to influence others, to provide guidance to lower level officials, to inform the public, and to establish neutral and general principles for action across a necessarily varied and contextual set of cases.<sup>450</sup>

To put it another way, the laws of war may have the function of increasing humanitarian aims, but their bounds are defined by the

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tration, see Kelly D. Wheaton, Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level, *Army Law*, Sept. 2006, at 1.

<sup>446</sup> Bobbitt, *supra* note 445, at 5.

<sup>447</sup> Arthur Eyffinger, *The 1899 Hague Peace Conference* 204, 230, 232 (1999).

<sup>448</sup> Bobbitt, *supra* note 445, at 6.

<sup>449</sup> See Walzer, *supra* note 208, at 24–25 (“What is war and what is not-war is in fact something that people decide . . . . As both anthropological and historical accounts suggest, they can decide, and in a considerable variety of cultural settings they have decided, that war is limited war—that is, they have built certain notions about who can fight, what tactics are acceptable, when battle has to be broken off, and what prerogatives go with victory into the idea of war itself.”).

<sup>450</sup> Bobbitt, *supra* note 107, at 437–38.

necessity of compliance by states in an anarchic society.<sup>451</sup> Whether a state agrees to the laws of war and complies with them will depend on the nature of warfare and the strategy the state has adopted. The law, on this approach, can place duties or constraints upon states as long as those duties or constraints are in accordance with the state's strategy. A correct understanding of strategy is therefore essential to shaping the substance of the laws of war.<sup>452</sup> It provides the framework within which legal obligations can be crafted. A misinterpretation of strategy may result in imposing legal obligations that will be ignored, in omitting legal obligations that could create new norms and encourage humane behavior, or in failing to address entire areas of law. The law is always evolving, as scholars have noted and celebrated in other fields.<sup>453</sup> Those changes do not necessarily mean that law is merely at the mercy of expedient politicians, but rather that law must keep up with changes in society. So too with changes in strategy.

#### CONCLUSION

Since the wars in Afghanistan and Iraq began, a renaissance in counterinsurgency strategy has taken place. Military strategists, historians, soldiers, and policymakers have all taken counterinsurgency strategy seriously, making its principles and paradoxes second nature and transforming massive institutions in pursuit of strategic victory. Yet despite counterinsurgency's ubiquity in military and policy debates, legal scholars have spent little time assessing how counterinsurgency and the law align. Many continue to frame debates around legal issues in the war on terror, a frame that not

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<sup>451</sup> See, e.g., Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 1–2 (2006) (“Should nothing be theoretically permissible to a belligerent engaged in war, ultimately everything will be permitted in practice—because the rules will be ignored.”); AP Commentary, *supra* note 204, ¶ 1390 (“[W]ithout these concessions, *which take reality into account*, it would never have been possible to arrive at such detailed texts and at provisions which were so favourable to the victims of war.”) (emphasis added).

<sup>452</sup> As Phillip Bobbitt notes, “[w]ithout legal reform . . . we are in the paradoxical position of putting ourselves at a potentially fatal disadvantage: if we adhere to law as it stands, we disable effective action against terror; if we act lawlessly, we throw away the gains of effective action.” Bobbitt, *supra* note 107, at 395–96.

<sup>453</sup> See, e.g., Bruce Ackerman, 1 *We the People* (1991); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 877 (1996).

only misrepresents the military's conception of contemporary challenges but also omits significant areas of law that require greater discussion. In addition, the laws of war themselves are based on conventional war's strategy for victory: kill or capture the enemy. Counterinsurgency, however, rejects this strategy, embracing instead a win-the-population strategy.

Taking counterinsurgency seriously leads to some notable conclusions, the greatest of which is the significant disconnect between counterinsurgency's strategy and many time-honored provisions and widespread interpretations of the laws of war. The foundational requirement of reciprocity is challenged by the asymmetry of counterinsurgency and its exemplarist approach, an approach that unites strategic self-interest and humanitarian ends. The conventional focus of contemporary national security debates—on detention, torture, interrogation and the like—are insufficient without discussion of civilian compensation and occupation law. The ancient principle of distinction is flawed, even as proportionality looks more humane and strategically effective. The laws of war are excessively constraining, preventing occupying forces from establishing the conditions and structures of sustainable self-government. The laws of war are at times insufficiently humane, entrenching the privilege to destroy, even though the humanitarian policy of civilian compensation aligns better with strategic self-interest. The turn to global solutions can be counterproductive under the disaggregation strategy, as in the case of detention. And the nexus of technology and innovation creating ever-greater destruction appears to be inverted in an age of counterinsurgency, suggesting the use of non-lethal weapons should be permitted.

These are but a few areas within the laws of war. Others too may be poorly tailored to the realities of counterinsurgency. Doctrines concerning protected persons and places may need to be rethought. The role of humanitarian organizations, protecting parties, and transparency and accountability for counterinsurgents might require revision. The centrality of information operations, human intelligence, and surveillance merit serious attention. And questions of borders and migration, POWs, and informational interrogations await reconsideration.

To shape the legal structures that will govern and guide contemporary conflict requires understanding the nature of strategy in

contemporary warfare. It is not too late for legal scholars to join the fray and understand the relationship between counterinsurgency and the law. Counterinsurgency is the warfare of the age. Lawyers and legal scholars should not ignore it.



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