Assessing Revolutionary and Insurgent Strategies

LEGAL IMPLICATIONS OF THE STATUS OF PERSONS IN RESISTANCE

United States Army Special Operations Command

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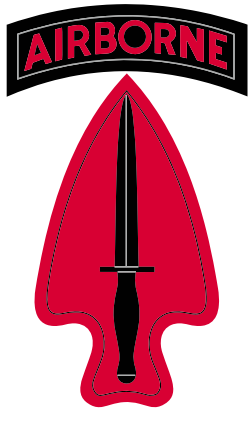

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The Assessing Revolutionary and Insurgent Strategies (ARIS) series consists of a set of case studies and research conducted for the US Army Special Operations Command by the National Security Analysis Department of The Johns Hopkins University Applied Physics Laboratory.

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DISCLAIMER

This document does not constitute legal advice. It is designed to provide an overview of legal information and general analysis on the framework that may be applicable to the status of personnel supporting, countering, or comprising a resistance. It is not designed to provide a comprehensive picture of the law as applied to a specific situation, nor is it designed as a comprehensive assessment of legal issues encountered in the broad context of resistance. Any references to scenarios are for descriptive purposes only to lend clarity to a concept or highlight areas of complexity or unsettled law. This document is intended as a guide to help educate and advance further research. Government counsel will want to ensure that further research accounts for changes in the law after the date of this document. Government counsel should be sought for an interpretation of the law or to provide guidance on a particular course of action.

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LETTER OF INTRODUCTION

Judging by the title *Legal Implications of the Status of Persons in Resistance*, a reader might conclude this monograph belongs on a lawyer's bookshelf. However, were that to happen, unconventional warfare (UW) strategists and practitioners will have missed an excellent opportunity to expand their collective thinking on UW. I submit to the reader and those interested in low-intensity military options that this volume should also have a prominent place on the desks of military commanders, military planners, and national security policy makers.

This monograph examines the legal status of US military members conducting UW in support of a foreign resistance movement. Tackling this subject has been difficult because a US military member's legal status is directly affected by the international legal status or recognition of the resistance movement, which often changes as the movement evolves. The authors' solution is to establish a continuum of resistance movement activities—from nonviolent to violent—that captures the changing nature of any resistance movement and its methods, international recognition, and legal status. This construct allows for a US military member's legal status to be examined at various points during the evolution of a movement.

The authors use this construct to present case studies and operational vignettes, illustrating legal theory with real-world examples and demonstrating the interplay between a movement's violent or nonviolent activities, international recognition of the resistance, and US policy makers' interpretations of international and domestic law. All of these factors influence the US government's consideration of UW as a viable policy option in countries experiencing unrest. These same elements also represent potential operational restrictions on the conduct of a UW campaign and forecast much of the thinking needed for UW campaign development.

Our nation requires a special warfare capability. That capability requires intellectual investment in evolving our understanding of the legal environment and how that environment impacts US policy options and potential UW campaigns. As the legal analysis demonstrates, there will be some cases in which both the person's status as well as US government and international policy toward a resistance movement and its activities will be vague at best. This finding reinforces that strategists and practitioners must anticipate ambiguity in UW campaigns. Readers are encouraged read, analyze, debate, challenge, and consider how this analysis could impact Special Forces' ability to perform its UW mission.

COL Frank Sanders

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CHAPTER 1.

INTRODUCTION

PURPOSE AND STRUCTURE FOR ANALYSIS

The purpose of this study is to provide a synthesis of the prevailing issues and analysis concerning the legal status of persons in resistance. This document refers broadly to resistance and those involved in it, meaning those individuals comprising the resistance element, US personnel supporting or countering the resistance, and the standing government. In alignment with this focus, the document explores the status of personnel particularly in foreign internal defense (FID), counterinsurgency (COIN), and unconventional warfare (UW) operations. When originally conceived, this manuscript was to be an updated volume of the 1961 American University Special Operations Research Office (SORO) study, *The Legal Status of Participants in Unconventional Warfare*. The National Security Analysis Department (NSAD) of the Johns Hopkins University Applied Physics Laboratory (JHU/APL) was asked by the US Army Special Operations Command (USASOC), G-3X Special Programs Division, to review and analyze the historical use of international law, the law of land warfare, and applicable international conventions and update the SORO study accordingly and also include unique legal considerations regarding the status of irregular forces. Because many aspects of both law and policy have changed since the 1961 publication, particularly within the context of US involvement in Afghanistan and Iraq, USASOC requested that this manuscript be a new document to account for these changes, highlight key legal questions, and position these questions within the context of hypothetical scenarios and historical examples.

The study is intended to provide for nonlawyers an assessment of current law and policy regarding the status of persons in resistance and to identify issues where the interpretation or application of the law is unclear or unsettled. A key objective of this work is to present the reader with an understanding of the existing thresholds where status can change on the basis of the nature of the activity and the category of the conflict. It seeks to impart an understanding of the limitations of these thresholds as applied to operationally relevant examples within FID, COIN, and UW. Complex internal hostilities often involving armed and organized nonstate actors are replacing traditional interstate armed conflict. The constituent activities of irregular warfare (IW) may be used to counter or influence these hostilities, which may not have an obvious start or finish and often lack clarity regarding the status of those involved. The actions are unlikely to fall neatly within prevailing definitions of armed conflict—in other words, international

or noninternational (internal)[a] conflicts recognized within international law—yet they exhibit many similarities. There are only a few meaningful distinctions in the law regarding the status of actors in activities outside of declared war. Conflict paradigms are changing, and existing legal instruments, such as the Hague Conventions of 1907 and the Geneva Conventions of 1949, do not adequately account for these changes—for example, nonstate groups engaging in prolonged campaigns of terrorism or states seeking to address these threats outside of traditional warfare. As such, an adaptive framework for applying existing law to these scenarios and understanding the limitations of that adaptation is necessary. For the purposes of this document, the framework for exploring these issues is resistance and the categories of hostilities that fall within it.

As used here, the term *resistance* refers generally to nonviolent or armed opposition to a standing government and all actors that may be components thereof. The characteristics of a resistance and the associated status of persons in resistance can change over time depending on the organization of resistance groups and the intensity and duration of resistance activities. The examination of persons in resistance is done within the frame of a continuum. The continuum marks known and debated thresholds that characterize changes in the legal classification of a resistance and the status of those involved. The continuum categorizes resistance on the basis of identifiable thresholds between nonviolent methods (use of legal processes and illegal political acts, e.g., civil disobedience) and armed forms of resistance, namely rebellion, insurgency, and belligerency.

These categories were selected because they address obvious phases that occur within a resistance and because they most closely align with international legal thresholds, providing a framework for analyzing both distinct cases of movement across the continuum and those that are less clearly within a certain category of activity. Furthermore, this spectrum accounts for the escalation in intensity of more recent resistance movements where elements of IW have been used as tools to compete for government legitimacy. It presents an opportunity to explain the difference in terms from a legal perspective and what they mean for US intervention.

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[a] This document generally uses the word *internal* to refer to conflicts within the boundaries of a state. However, there are circumstances in which conflicts cross the boundaries of numerous states but are not necessarily international conflicts. An example is the US characterization of the conflict with Al Qaeda as noninternational (i.e., internal from a legal perspective, even though the adversary is a non-state actor composed of individuals situated in various states). As Justice Stevens wrote in *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006), "the term 'conflict not of an international character' is used here in contradistinction to a conflict between nations."

Note that the colloquial understanding of the terms used in this study may not have the same meaning as their legal definitions. For example, the American Civil War is generally referred to as a rebellion, and the motive of the action was to secede from the Union. In this sense, all the categories of resistance discussed here are rebellions or rebellious acts because they share the motive rejecting the authority and legitimacy of a standing government. However, the terms are being used to identify the stages of resistance against a state, *of which rebellion is just one category*. While it is indeed a rebellion in the colloquial sense, through the framework of the continuum and in traditional international law, the Civil War is a classic example of belligerency because of the intensity and the duration of the hostilities. As another example, a recent *New York Times* interactive feature on Syria uses the terms *conflict*, *rebellion*, *resistance*, and *insurgency* seemingly interchangeably, or at least generically, to refer to the violence that has overtaken that country since peaceful protests began in 2011.[1] Used in this way, a general meaning attaches to the terms that imply armed opposition, which may or may not be accurate when used to describe other examples of hostilities. From a reporter's perspective, using these terms interchangeably may be inconsequential to the story, but it is exactly the delineation between these terms that is legally relevant to the status of persons in resistance.

A portion of the subtext in the same interactive feature in the *New York Times* indicates that in one attack, government military were killed by "armed gangs."[2] This terminology highlights the political nature of the characterization of resistance. The use of the phrase is almost certainly deliberate, particularly because it was issued by the standing government. The government's reference to a group as an "armed gang" is an attempt to characterize those challenging its legitimacy as criminals. Criminals are not recognized by third parties as legitimate actors, nor are they afforded legal protections outside of domestic criminal law and international human rights law. To describe the actors as domestic criminals is to describe the hostilities as isolated violent acts, something that falls short of an insurgency (a noninternational armed conflict, or NIAC). It is an attempt to communicate to the international community that the government has not yielded any power or legitimacy.

This example serves to underscore an important point. The status of individuals and the categories of resistance are not separable; the latter determines the former. How a state perceives the status of a group and their activities dictates the nature of its interactions with the group. The general thresholds for different categories of resistance and an overview of the accompanying legal status can be found in Figure 1-1.

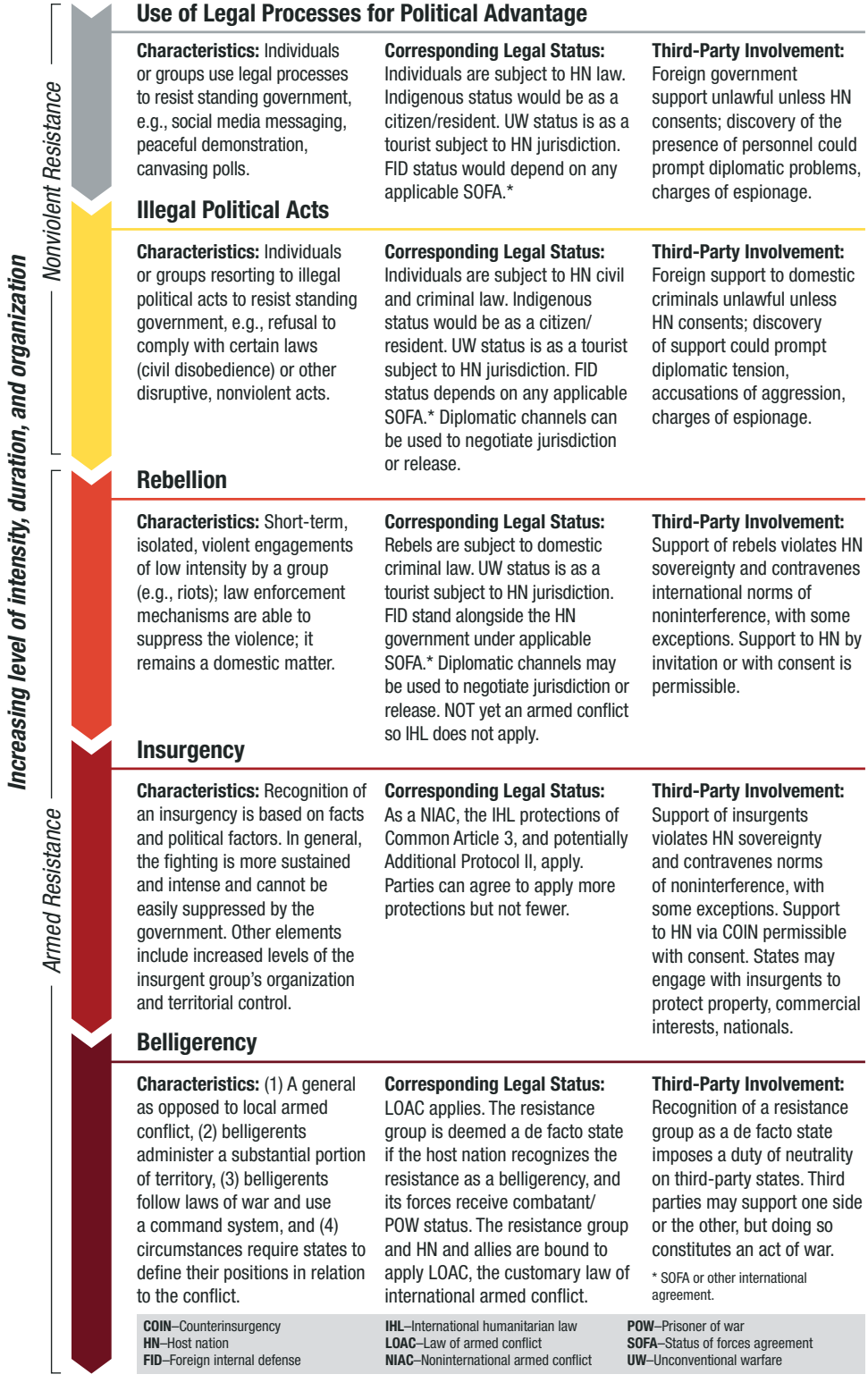

Figure 1-1. Continuum of categories of resistance.

Figure 1-1 represents a high-level assessment of the general characteristics of different categories of resistance. This graphic will be used as a reference point throughout the document to help place the analysis of a given set of circumstances on the resistance continuum. Each category of resistance and the status of persons acting within the particular category are discussed in detail in subsequent sections. The full spectrum of legal protections runs from none under international humanitarian law (IHL) during peacetime to full prisoner of war (POW) status and protections of international humanitarian law during international armed conflict (IAC).

Figure 1-2 illustrates the examples of resistance movements discussed throughout the study and where they reside on the resistance continuum. These historical examples were selected to provide context for the discussion of each category of resistance. In some instances, hypothetical scenarios based on actual events are used to help illustrate specific points of analysis. These scenarios are indicated with a light gray circle on the continuum in Figure 1-2.

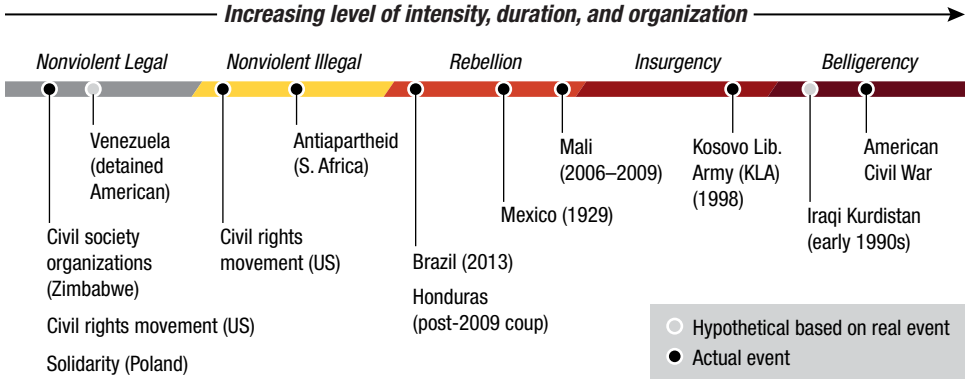

Figure 1-2. Resistance movements on the continuum.

INTERPRETING THE RESISTANCE CONTINUUM

The continuum is a useful tool for compartmentalizing categories of resistance that defy easy categorization, particularly as they move toward rebellion and insurgency because it is difficult to interpret relevant facts on the ground and to determine when hostilities meet the threshold of an armed conflict. Therefore, while it provides an important framework for analysis, it must not be interpreted as oversimplifying the task. As indicated in Figure 1-1, part of what determines the category in which a resistance movement fits is the increase in the

intensity, duration, and organization of the parties.[b] These factors are evaluated in each category within the context of armed resistance and are discussed throughout this document. They are the factors that determine the existence of a noninternational (i.e., internal) armed conflict and, therefore, the application of IHL.

The factors comprise a two-part test: (1) qualified violence (based on intensity, duration, and scope); and (2) identifiable, organized parties.[3] This test comes from international case law interpreting the language and intent of Additional Protocol II's article defining the treaty's scope. Note that its threshold is higher than that of Common Article 3 of the Geneva Conventions, which requires only that the conflict be in the territory of a High Contracting Party and be "not of an international character." Armed conflict within the scope of Additional Protocol II of the Geneva Conventions has a higher threshold, where the armed group or groups opposing the government must "under responsible command, exercise such control over a part of [government] territory as to enable them to carry out sustained and concerted military operations" and to implement this protocol.[4,5,c] It specifically states that "this Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[6,7] On the basis of this definition, a standard emerges in case law, which has interpreted the threshold as having more flexibility for broader application of IHL. Some scholars believe that this flexibility is necessary and that the determination of a NIAC for purposes of IHL application should be available to short-term and even low-intensity confrontations.[d]

There is tension between the threshold as defined in Protocol II and the interpretation by international tribunals of whether that threshold is met through the two-part test identified above. IHL does not apply to riots or short-lived rebellions, even if there is armed engagement

[b] A frequent indicator of increased intensity, duration, and organization is the level of territorial control exercised by the resistance. Control by the resistance over an increasing amount of territory is often instrumental in raising the level of intensity, the duration of the hostilities, and the degree of organization of the group.

[c] The United States is not party to Additional Protocol II, so normally only Common Article 3 protections apply, for instance to the conflict against Al Qaeda. Additional Protocol II applies if its key provisions are customary international law, meaning they apply to all states whether or not they are party to the protocol. The proposition that Additional Protocol II provisions are customary international law is a point of debate.

[d] Dr. Hoerauf[8] argues that because IHL principles are designed to alleviate suffering in war, the bar triggering their application should not be set high, and that Protocol II's definition of armed conflict is so restrictive that "it would exclude most revolutions and rebellions, and would probably not operate in civil war until the rebels were well established and had set up some form of de facto government."[9]

between government forces and the resistance. However, in *Abella v. Argentina*,[10] which involved a single attack by forty-two people on Argentine military barracks lasting thirty hours, the Inter-American Commission on Human Rights determined that the attack met the threshold of intensity and organization to constitute a NIAC, triggering limited IHL protections.[11] In that case, the individuals used their vehicles to storm a barracks, and then proceed to enter it and take over a portion of the stockade. Gunfire and incendiary bombs were used. Twenty-nine of the attackers and several agents of the Argentine government died. The commission determined that the level of planning and execution of the armed attack against a military objective, requiring a military response to subdue the attackers, exceeded the threshold of what would otherwise be an internal rebellious act. Here, the commission did not find the short duration problematic, as it concluded that the intensity and organization of the attack compensated for its brevity.[e] In the context of the continuum, the commission's decision positions the attackers as insurgents.

Nonetheless, it could be argued that a single encounter, however intense, is more properly characterized as an "isolated and sporadic" act of violence, not an armed conflict. The resistance in *Abella* is in the same category as the Kosovo Liberation Army (KLA), which by comparison had uniformed leaders that met with international representatives and engaged in hostilities that involved the resistance taking control of entire villages.[f] The point of the example is to illustrate that the line between a violent internal disturbance (e.g., a rebellion) and the lowest level of an armed conflict may be blurry. The analysis as undertaken in this document does not seek to reconcile these difficulties but, rather, to indicate where they exist and to reveal the limits of these thresholds. These difficulties matter because the category of resistance dictates the status of those acting within it.

Understanding the status of persons in resistance, whether members of a resistance or US personnel supporting or countering a resistance, is significant for several reasons. There is, of course, the baseline need to understand the rights and protections, if any, owed to individuals in certain circumstances. Attached to status is a legal paradigm determined by the nature of the activities, which dictates how individuals must be treated and the acts in which they can lawfully engage. The determination of legal relationships within the context of resistance is

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[e] Hoerauf asserts that "as rather flexible case law of international courts and commissions indicates, one over-fulfilled element of the two-part test . . . can compensate for under-fulfillment of the other."[12]

[f] See *Chapter 5. Insurgency* for a discussion of the KLA in the context of the International Criminal Tribunal for the Former Yugoslavia (ICTY) case *Prosecutor v. Limaj.*

not a simple matter. For one, there are differing interpretations of traditional rules of international law. More significantly, the decision to engage in activities such as FID, COIN, or UW is highly dependent on facts and based on international events and domestic concerns against which foreign policy decisions must be made. The law informs these decisions but is likely not the dispositive factor on which a decision turns in practice.

The recognition of persons in resistance by a state is more a policy decision than a legal one. The decision to recognize a resistance, or to categorize a group as an insurgency for example, carries with it constraints on how the state must subsequently interact with that group. It is a policy determination guided by discernible rules of law given the circumstances on the ground. There is always a risk when engaging the military to achieve foreign policy objectives, whether to the lives of personnel, to strategic objectives, or to diplomatic relations. Determining the legal status of individuals, or at least the elements involved in making this determination, means understanding one aspect of risk related to achieving strategic policy goals through the commitment of military resources.

As the *Abella* example demonstrates, whether the international community agrees with a state's determination is something that comes after the fact through tribunals and commissions but also as expressed through diplomatic interactions. A violation of international law does not feature the same immediate and binding sanctions that characterize domestic law and procedure. Instead, a violation of international law may carry consequences such as the engagement of state responsibility, official disapproval of the action by the United Nations (UN) Security Council or the UN General Assembly, damage to the United States' reputation and image abroad, and reciprocal nonobservance of international law obligations to the United States, short of armed actions, by other states. There is a fundamental interplay of law and policy in these determinations that is unavoidable.

In each phase of the resistance continuum, there are examples of actions that may influence how a resistance is categorized. For example, a UN Security Council resolution serves as a clear indicator that an armed conflict exists and is seen as an endorsement specifying international approval for controversial action. It may serve as an external marker that UN member states recognize a certain group as an insurgency. In the recent situation in Libya, the March 2011 resolution establishing a no-fly zone and allowing "all necessary measures" to protect civilians stood as a powerful indicator not just of international support for humanitarian action but also of recognition of an armed conflict.[13] At the point that outside states were involved militarily in the

protection of civilians, even though the resolution did not permit foreign occupation forces on Libyan territory, it arguably became an IAC. At the same time, there was also a NIAC between the Qadhafi regime and the opposition forces.

In the example of Libya, ascertaining the status of the opposition forces is linked to the intensity, duration, and geographical scope of the hostilities as well as the organization of the nonstate group. It is not disputed that the violence in Libya exceeded the threshold necessary to constitute an armed conflict. However, establishing that there is an armed conflict is only the first step in assessing status. In NIACs, the status of combatant does not exist. The rebels would be considered belligerents, but belligerents are not afforded the same level of protections that lawful combatants carry. In IACs, the distinction is between combatants and civilians. Combatants in IACs are sometimes referred to as privileged belligerents because POW status attaches to them. Libya is an example of a type of armed conflict in which the status of resistance forces changed with the transition from pre-North Atlantic Treaty Organization (NATO) involvement to NATO involvement. Once NATO became involved, the conflict was "internationalized," and the rebels, as they are colloquially referred to, became belligerents entitled to law of armed conflict (LOAC) protections. Libya exemplifies how the status of resistance forces and the type of armed conflict can change when outside states become parties to the conflict. When the armed conflict changes from a NIAC to an IAC, the resistance movement gains the protections of LOAC. Similarly, a former NIAC will revert back when the outside states exit the conflict and the protections for participants revert back to Common Article 3 and potentially Additional Protocol II. The law is not fully settled on when and how a NIAC becomes internationalized into an IAC, but significant indicators of internationalization include operational support and assistance by outside states to the resistance group, as well as operational control by the outside states over the resistance group. Regarding Libya, commentators disagree on whether the introduction of NATO forces into the Libyan conflict internationalized the NIAC between the resistance and Qadhafi's forces or whether it caused two parallel conflicts to occur, a NIAC between the resistance and Qadhafi forces and an

IAC between Qadhafi forces and the participating NATO states.[g] When NATO withdrew, the conflict became internal once again, and the accompanying status also changed to unprivileged belligerents. This type of analysis must be done to assess the status of personnel in any example of resistance.

Libya is but one example of resistance that lends itself to analysis within this framework. El Salvador and Lebanon in the 1980s, Afghanistan, and recent events in Syria illustrate the complexity of the question of status and understanding resistance, as well as the policy decisions related to US intervention. These examples present critical questions relative to IW: What is the status of persons supporting a resistance outside of an armed conflict? What if that individual is, by design, not distinguishable as a member of the military, such as a US military member conducting UW? This study seeks to address these questions. The subsequent chapters are organized to describe each category and accompanying status and analyze how the resistance component and COIN, FID, and UW activities can be interpreted. Where appropriate, cross-references to sections in the appendices are included to provide a basic understanding of fundamental principles that are referenced throughout this study, specifically treaty-based IHL and customary IHL.

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[g] Some commentators argue for a "global" approach, contending that a NIAC is transformed into an IAC by foreign military intervention when the foreign military begins operations against the host nation or the resistance movement acts on behalf of the foreign military. Importantly, the result under the global approach is that the entire conflict becomes an IAC and all participants in it gain full IHL protections. At the other end of the spectrum is a "mixed" or "parallel" approach in which the involvement of a foreign military introduces another conflict, namely an IAC between the host nation and the outside state. The NIAC between the resistance and the host nation remains, and the two conflicts coexist, meaning the participants in the NIAC receive reduced IHL protections and the participants in the IAC receive full IHL protections. Between these two approaches lies a moderate stance. Advocates of this moderate approach accept that a NIAC can be fully converted into an IAC so that full IHL protections apply to all participants, but they require the relationship between the resistance and the foreign military to be more robust than proponents of the global approach require. Specifically, they require that the outside state exercise "overall control" over the resistance movement, comprising two steps: (1) the outside state provides financial and training assistance, equipment, and/or operational support; and (2) the outside state participates in the organization, coordination, or planning of military operations. Only when actions by a resistance movement can be attributed to the outside state will this group of commentators consider the NIAC to be fully internationalized. And there is yet another school of thought: that, like the overall control requirement, there must be a greater connection between the resistance and the outside state than mere involvement by the outside state in the conflict, but that connection can be satisfied by Article 4A(2) of the Third Geneva Convention. International tribunals have not been consistent in which test they use, and so the state of international law remains undecided on this issue, but these are the tests a *post hoc* adjudication would apply.[14,15]

SUMMARY OF MAJOR CONCEPTS

- The legal status of persons in resistance depends on the nature of the activities in which they are engaged and where those activities fall on the resistance continuum. There are existing thresholds where status can change on the basis of the nature of the activities and the category of the resistance.
- The status of persons and the categories of resistance are not separable; the latter determines the former. The status of US personnel engaged in activities abroad depends on who they are supporting (the resistance or the standing government) and under what circumstances they are there. For example, the status of US personnel carrying out a clandestine mission during peacetime differs from their status when engaged in acknowledged operations during an armed conflict. This is true despite the fact that, in both situations, they are acting under the authority of the US military.
- The categories of resistance discussed in this study range from nonviolent resistance (use of legal processes and illegal, nonviolent acts), rebellion, insurgency, to belligerency.
- Not all resistance movements are armed conflicts, even if they are characterized by violence. Insurgency is the first category of resistance that meets the threshold of an armed conflict.
- When individuals or groups engage in resistance against the standing government, domestic or international law (or a combination) will govern how the parties on either side may treat their adversaries. Which body of law applies and the extent of its protections depend on the category of resistance.
- Domestic law will control when the resistance constitutes nonviolent strategies or rebellion, meaning that those in the resistance receive only the protections that exist under domestic criminal law and the host nation's human rights commitments. Protections affiliated with armed conflict, such as Geneva Conventions protections and POW status do not apply. US military personnel authorized to support a resistance through UW will not receive these protections even though they are acting on behalf of the US military. These categories are not conflicts, and US military personnel are subject to the domestic laws of the country in which they are operating unless a status of forces agreement (SOFA) provides otherwise.

- Rebellions feature violent tactics but unorganized strategies that the host nation is able to suppress through normal law enforcement methods. Those in the resistance do not pose a significant threat to the legitimacy or existence of the standing government.

- Insurgencies feature violent tactics and sophisticated strategies carried out by an organized group but through isolated and sporadic operations. They are harder for the host nation to suppress and pose an earnest threat to the legitimacy and existence of the standing government. International law applies when the resistance reaches insurgency because insurgencies meet the threshold of a NIAC. Customary IHL for NIACs will apply, in addition to Common Article 3 of the Geneva Conventions and potentially Additional Protocol II, if certain criteria are met.

- International humanitarian law recognizes two types of armed conflict: IAC and NIAC. IACs are those conflicts that occur between two or more states; NIACs occur between a state and a nonstate group, or between two or more nonstate groups.

- Armed conflicts are defined in IHL by the Geneva Conventions and their Additional Protocols. IACs are governed by Common Article 2 of the Conventions, which states that any declared war or any other armed conflict occurring between two states that are parties to the Conventions, even if one does not recognize the state of the conflict, constitutes an IAC. The intensity of the fighting does not matter. International jurisprudence considers any resort to armed force between two states an IAC. Additional Protocol I extends IACs to conflicts in which peoples are fighting against colonial domination, alien occupation, or a racist regime in the exercise of their right to self-determination (wars of national liberation).

- For NIACs, a distinction is made in IHL between Common Article 3 NIACs and those that come within the meaning of Additional Protocol II. Common Article 3 provides a range of basic humanitarian norms to protect participants in and victims of NIACs. Additional Protocol II expands and develops some of the humane treatment and judicial guarantees mentioned only briefly in Common Article 3, but it applies to a more narrow set of conflicts meeting certain criteria.

- Common Article 3 NIACs are conflicts that are not of an international character and occur within the territory of a party to the Geneva Conventions. Common Article 3 applies to conflicts involving a state and a nonstate actor, or two or more nonstate actors. In order to distinguish Common Article 3 conflicts from lesser levels of violence (e.g., riots), two criteria must be met. The nonstate actor or actors must be parties to the conflict, meaning that they have organized armed forces under a command structure, and the hostilities must be protracted and reach a minimum level of intensity, based on the facts on the ground.

- NIACs within the meaning of Additional Protocol II must meet a higher threshold. Additional Protocol II was created to develop and supplement Common Article 3, and it applies only to conflicts between a state and a nonstate actor, but not to conflicts between only nonstate actors. NIACs under Additional Protocol II occur when the Common Article 3 criteria are met but the armed forces of a nonstate actor are organized enough to exercise control over a part of the state's territory "as to enable them to carry out sustained and concerted military operations and to implement the Protocol" under responsible command.

- Belligerencies feature conflict of a general, as opposed to a local, character, where the belligerents administer a substantial portion of territory as well as follow the law of war under a responsible command system. The circumstances of belligerency require states to define their positions in relation to the conflict. The resistance is treated as a de facto state, making the conflict an IAC. An example is the American Civil War, during which the Confederacy governed and administered a substantial territory as though it were a separate country and waged large-scale armed campaigns under a hierarchical responsible command.

- IHL will apply in full when the resistance reaches the level of belligerency because the doctrine of belligerency internationalizes the conflict. This means that all the Geneva Conventions, Additional Protocol I, and all of customary IHL apply, including POW status.

- Despite seemingly objective criteria in international law and jurisprudence, in practice the recognition of persons in resistance by a state is more a policy decision than a legal one. It is a determination guided by law and a country's strategic objectives given the circumstances on the ground.

- International law and US law are separate for purposes of authorizing military action. Authorization under US law will not constitute authorization under international law, and vice versa.
- There is interplay between international and domestic law, but one is not an adequate stand-in for the other. US law imposes its own set of legal requirements on decisions to commit US military personnel abroad. For instance, the War Powers Resolution creates a deadline for the withdrawal of troops from actual or imminent hostilities unless Congress extends that deadline or independently authorizes that deployment. A UN Security Council resolution authorizing the use of force in a foreign country may indicate that military intervention is internationally lawful, but it does not supersede the need for congressional authorization for ongoing engagements of the US military overseas.

ENDNOTES

1 Sergio Peçanha, Hwaida Saad, and G. V. Xaquín, "The Evolution of Syria's Conflict," *New York Times*, February 10, 2012, http://www.nytimes.com/interactive/2012/02/10/world/middleeast/the-evolution-of-syrias-deadly-conflict.html.

2 Ibid.

3 Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia October 2, 1995); Abella v. Argentina, Case 11.1379, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc.7 rev. ¶ 156 (1997).

4 Protocol Additional to the Geneva Conventions of 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), December 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

5 Protocol II, art. 1(1).

6 Ibid., art. 1(2).

7 Ibid.

8 Dominic Hoerauf, "The Status of Libyan Rebels Under the Laws of War: A Litmus Test for the Lawfulness of NATO's Libyan Engagement Under U.N. Resolution 1973," *Phoenix Law Review* 6 (2012): 97.

9 Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd Ed. (Huntington, NY: Juris Publishing, 2008).

10 Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc.7 rev. ¶ 156 (1997).

11 Ibid.

12 Hoerauf, "The Status of Libyan Rebels Under the Laws of War," 96.

13 S.C. Res. 1973, U.N. Doc. S/RES/1973 (March 17, 2011).

14 Katie A. Johnston, "Transformation of Conflict Status in Libya," *Journal of Conflict and Security Law* 17, no. 1 (2012): 96, 98, 106–107.

15 Kubo Macak and Noam Zamir, "The Applicability of International Humanitarian Law to the Conflict in Libya," *International Community Law Review* 14 (2012): 413, 419–420.

CHAPTER 2.

OVERVIEW OF SOURCES OF LAW

This study frequently refers to various sources of law. A detailed discussion of these laws and accompanying policy issues is included in *Appendix C: Background on International Law and the Law of Armed Conflict*. The most commonly referenced terms are briefly defined here to facilitate an easier understanding of them in subsequent sections.

LAW OF ARMED CONFLICT

For purposes of this document, the term *law of armed conflict* (LOAC) will be used and includes what is sometimes also referred to as *law of war* (LOW). This usage reflects the transition from the term *war* to the concept of armed conflict. It accounts for current military guidance and the field of application of international conventions.

THE GENEVA CONVENTIONS

The Geneva Conventions of 1949 are four international treaties that, along with the Additional Protocols of 1977 and 2005 as well as other major treaties, serve as the cornerstone of international humanitarian law (IHL).[a]

Common Article 2 and Common Article 3

Common Articles refer to several articles in the 1949 Geneva Conventions that are identical across all four treaties. They generally relate to the scope of the provisions and to the obligations of states under the treaties and are considered significant enough to appear in each Convention. Common Articles 1, 2, and 3 are identical in content. Others are substantially alike but in different locations within each treaty (e.g., Articles 11, 12, and 49). Common Articles 2 and 3 are referred to frequently throughout LOAC and deserve a more detailed discussion.

Common Article 2 defines the categories of international armed conflict (IAC) to which the Geneva Conventions apply. It states, "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one

[a] The 1949 Geneva Conventions built on earlier efforts that had resulted in the 1929 Geneva Conventions. While the history of IHL encompasses more than the creation and ratification the Geneva Conventions, the principles embodied in these treaties concerning the treatment of both combatants and noncombatants during armed conflict are fundamental to the analysis of LOAC. For a detailed discussion of the history of the Geneva Conventions, see Solis.[1]

of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

Common Article 3 requires that basic humanitarian norms be given to individuals outside of combat in noninternational (i.e., internal) armed conflicts (NIACs). Common Article 3 does not specify what constitutes a NIAC, but it is understood to apply to conflicts "not of an international character," meaning conflicts in which only one of the parties is a state, or in which the parties are two or more nonstate groups.[2] The commentary to the Geneva Conventions indicates that Common Article 3 was designed to provide minimal protections to nonstate parties in a conflict, and that the "scope of the Article must be as wide as possible."[3] However, it does require that a nonstate actor (or actors) be parties to the conflict, meaning that they constitute an organized armed force under a command structure, and the hostilities must be protracted and reach a minimum level of intensity, based on the facts on the ground.

Additional Protocols

Protocols I and II are supplemental treaties created to provide added protections for victims of war in cases where the Geneva Conventions were deemed insufficient. They add to but do not amend the Conventions. Protocol I expands protections for the civilian population in IACs and codifies many aspects of customary law that are fundamental to LOAC. Protocol II elaborates on Common Article 3 protections and applies to certain types of NIACs.[4,b]

For armed resistance movements that meet the threshold of insurgency or belligerency, IHL protections apply. Under the Conventions, no one involved in an armed conflict is without status, and individual status determines the level of protections that apply. Generally speaking, the analysis as it pertains to the type of conflict can be summarized as follows:

- If it is an IAC (i.e., a Common Article 2 conflict), all four Geneva Conventions are triggered, as well as, for those states that are party to it, Additional Protocol I.
- If it is a NIAC, Common Article 3 applies, and no other part of the Conventions apply. Protocol II may apply if the resistance controls sufficient territory "to enable it to carry out sustained and concerted military operations" under responsible command.[5]

[b] Protocol II applies to NIACs such as insurgencies, but it does not apply to internal disturbances that do not meet the threshold of a conflict, such as riots and demonstrations.

Guide to Applicability of the Geneva Conventions (GCs) Protections		
Armed conflict?	No	GCs do not apply
	Yes	GCs apply but which provisions apply depends on nature of conflict
What type of conflict?	NIAC	Common Article 3 protections apply; Protocol II applies to select NIACs
	IAC	Common Article 2 triggers the main portions of the GCs
If an IAC, what type of person?	Unprivileged belligerent	Customary IHL of IACs and Common Article 3 apply
	Privileged belligerent	All GCs apply and customary IHL of IACs that might fill any gaps in the GCs

Figure 2-1. Overview of application of the Geneva Conventions on the basis of type of conflict. This chart is adapted from Richard M. Whitaker, ed., *Operational Law Handbook* (Charlottesville, VA: The Judge Advocate General's School, United States Army, 1997), 13-2.[c]

There is an emerging view that international human rights law (IHRL) is applicable in peacetime and wartime, meaning that this body of law would apply anywhere on the resistance continuum. IHRL is a body of customary and treaty law that was created to accomplish a range of goals and purposes related to the quality of human life. For this study, they can be summarized as protecting individuals from cruel or unfair treatment by their own governments.[6] The manner in which states treat their citizens was once a purely domestic matter, but IHRL was developed to protect individuals and directly regulates how states treat citizens and noncitizens within their borders. The traditional US view is that LOAC has a distinct triggering mechanism (e.g., armed conflict) and should trump IHRL rather than apply in conjunction with it; the more specific law, IHL, takes over from the more general law, IHRL.[7,d] Others view LOAC and IHRL as complementary and applicable whether on the battlefield or during peacetime.[e]

[c] This chart is intended to provide a simplified assessment of the conventions and how they apply in internal and IACs and is not a substitute for a more thorough analysis of their application in a given situation.

[d] Note that there is no definitive list of human rights that the United States considers fundamental. However, these rights generally include provisions prohibiting cruel, inhuman, and degrading treatment, and the Universal Declaration of Human Rights, Common Article 3 of the Geneva Conventions, and the Restatement (Third) of the Foreign Relations Law are common sources.

[e] For a more complete discussion of the intersection of IHRL, IHL, and LOAC, see *Appendix C: Background on International Law and the Law of Armed Conflict.*

It is worth noting that it is US military policy that special operations forces (SOF) will teach and demonstrate "by word and deed" that protection of human rights is imperative for military success.[8] Of course, whether US personnel will be treated by a foreign government or resistance force within the parameters of IHRL cannot be guaranteed. However, the expectation, supported by policy, is that US personnel will treat all personnel in accordance with at least the fundamental provisions of IHRL, even if it is deemed a nonbinding authority in areas in which LOAC applies. Indeed, judge advocates are advised that IHRL is a nonbinding authority applicable in every category of conflict, from declared war to the scenario involving a "total tourist" (i.e., someone abroad who has no affiliation with the armed services or the government) and training of foreign military under the International Military and Education Training (IMET) program.[9,f]

ENDNOTES

1 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2012).

2 International Committee of the Red Cross, *Commentary on the Additional Protocols to the Geneva Conventions*, eds. Yves Sandoz, Christophe Swinarski, & Bruno Zimmerman (Geneva, Martinus Nijhoff Publishers, 1987), p. 619, ¶ 1351.

3 International Committee of the Red Cross, Commentary, Convention Relative to the Treatment of Prisoners of War, ed. Jean Pictet (Geneva: ICRC, 1960), 36.

4 Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc.7 rev. ¶ 156 (1997).

5 Protocol Additional to the Geneva Conventions of 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), December 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

6 Restatement (Third) of the Foreign Relations Law of the United States § 701 (1987).

7 Richard P. DiMeglio, Sean M. Condron, Owen B. Bishop, Gregory S. Musselman, Todd L. Lindquist, Andrew D. Gillman, William J. Johnson, and Daniel E. Stigall, *Law of Armed Conflict Deskbook* (Charlottesville, VA: United States Army Judge Advocate General's Legal Center and School, 2012), 197–198.

8 Rudolph C. Barnes Jr., "Back to the Future: Human Rights and Legitimacy in the Training and Advisory Mission," *Special Warfare* 26, no. 1 (2013): 45, citing US Special Operations Command, *Training, Human Rights Policy: Directive 350-28cc*, May 11, 2005.

9 DiMeglio et al., *Law of Armed Conflict Deskbook*, 195.

[f] The diagram in the *Deskbook* depicts types of conflict and provides examples, e.g., declared war (World War II), IAC (Colombia), anarchy (Somalia), coerced conflict (Kosovo), agreement between parties (Bosnia), short-term disaster relief, long-term conflict (Korea), and total tourist/IMET. In each category, the diagram indicates fundamental human rights that apply.

CHAPTER 3.

NONVIOLENT RESISTANCE

The resistance continuum begins with nonviolent resistance, which includes activities that leverage legitimate legal processes to try to gain political legitimacy. It also includes, as a next step in the spectrum, nonviolent activities that are illegal, such as acts of civil disobedience. As used here, nonviolent resistance includes what is sometimes termed *nonviolent conflict*. The category simply refers to legal acts, as well as disruptive techniques such as boycotts, petitions, and civil disobedience, to mobilize a population and undermine support for one's enemy. Nonviolent resistance has been a crucial element in every historically significant struggle in the twentieth century.[1]

This type of resistance can be effective if it can demonstrate a regime's inability to legitimately govern. It does this by subverting the standing government's power through refusing to yield to the government's authority by using nonviolent means. It is about "separating governments from their means of control," which, contrary to popular notions, may be a technical, restrained matter rather than an aggressive, haphazard attempt at upheaval.[2,a] By demonstrating that the government is ineffective, a nonviolent resistance can seize the population's support and undermine the ruling authority. This element can be key to the effectiveness of a nonviolent resistance movement against even brutal military and political regimes, "because it [i.e., the nonviolent resistance movement] attacks the most vulnerable characteristic of all hierarchical institutions and governments: dependence on the governed."[4] Nonviolent methods have been used successfully by many resistance movements, including the civil rights movement against segregation and discrimination in the United States, the anti-Communist Velvet Revolution in Czechoslovakia in 1989, the boycotts used to force South Africa's apartheid regime to negotiate with opposition groups, the student-led Serbian Otpor! movement that led to the overthrow of Milosevic, and most recently, the Arab Spring, to name only a few.

Isolated incidents of violence do not transform the nature of a nonviolent resistance into an armed resistance. The key element is that the methods endorsed and used by the resistance are nonviolent. The civil rights movement in the United States involved numerous riots, as well as tragic incidents of murder carried out by police and white supremacist groups, but these acts did not mar the nonviolent legacy of the movement. Put another way, the degree of violence used against nonviolent resisters has no bearing on the nature of the resistance and where it falls on the resistance continuum. The extent that a resistance in this category uses or is associated with more militant elements might

[a] Ackerman and Duval note that "while physically confronting an opponent can be necessary, the true rhythm of effective nonviolent action is less spontaneous than it is intentional . . . it has little to do with shouting slogans and putting flowers in gun barrels."[3]

affect how the resistance is characterized. In the case of the civil rights movement, if the Black Panther Party had resorted more systematically to violence as part of its efforts, the use of systematic violence by this one element arguably could have an affect on whether the entire movement is perceived as nonviolent or would fall under the illegal political acts category. The violence would surpass what could reasonably be described as isolated incidents, and even if the core of the resistance used nonviolent methods, the analysis would need to consider the extent to which associated elements resorted to violence and the impact on the movement overall.

Nonviolent resistance is relevant to status because it is important to understand the legal paradigm that will apply to individuals undertaking nonviolent activities that could be used as part of an unconventional warfare (UW) campaign to coerce, disrupt, or overthrow a standing government. For example, the status of US personnel engaging in nonviolent resistance alongside members of a resistance, potentially out of uniform and in a denied area, presents a particular challenge. The analysis starts with the category of resistance. Nonviolent resistance does not amount to an armed conflict; in other words, it does not involve violence, which alone is not a sufficient condition but is a prerequisite for categories of resistance that would invoke certain international legal protections, in particular treaty-based and customary international humanitarian law (IHL). Therefore, the legal paradigm that applies to nonviolent resistance would be the domestic criminal law of the host nation, as well as international human rights law (IHRL).

THE USE OF LEGAL PROCESSES AS A FORM OF RESISTANCE

The use of legal processes and institutions to oppose a standing government does not immediately raise concerns about the status of persons in resistance. If the acts are legal in the state in which they are occurring—for example, canvasing or producing and disseminating literature about the resistance—then there is little concern for the status of persons in resistance. At this point, their fight for legitimacy is through the existing governmental structure, ostensibly upheld if not created by the standing government. However, the status of US forces that may be supporting or countering these efforts, either openly through legitimate US government initiatives or secretly, is not as straightforward. If the host nation acknowledges the activities, then US personnel may face few problems if their actions fall within whatever arrangement (e.g., a SOFA or other international agreement) the host nation has agreed. US action then would not violate the law as long as the activities by

US personnel did not extend beyond those the host nation agreed to permit. In this circumstance, the personnel are supporting the standing government, and that support aligns with government initiatives. However, if US personnel are present and supporting efforts clandestinely in order to advise and bolster a resistance, discovery by the host nation that members of the US military are present in country and supporting an opposition party could provoke a variety of responses, including allegations that the activities are espionage, constitute a violation of the country's sovereignty, or amount to an act of aggression. The situation would be compounded if the standing government adheres to laws arbitrarily, where acts that are statutorily legal may be suddenly suspended as a way for the sitting government to quash the ability of a resistance to gain momentum through legitimate processes. To provide context in which to analyze the status of individuals in this category of nonviolent resistance on the resistance continuum, it is useful to look at some examples.

Example 1: Use of Existing Legal Processes to Resist the Government

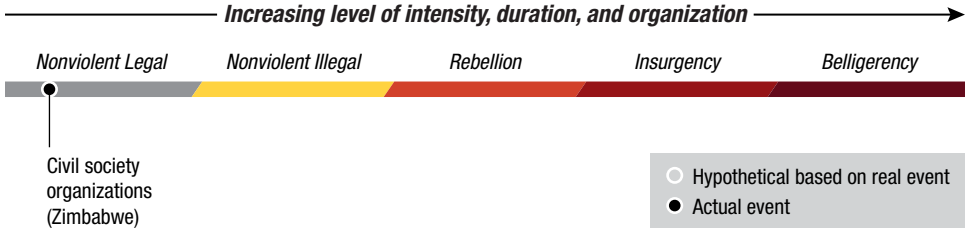
A notable example of a successful nonviolent resistance working within an existing legal structure is the Polish trade union Solidarity.[b] In 1980, a weakening economy prompted the Polish government to increase the price of food. Protests erupted throughout the country, but the Lenin (Gdansk) shipyard became the focal point of the resistance. The group demanded, among other things, free trade unions, the right to strike, and publication of full economic data so that appropriate future reforms could be debated publicly. Solidarity activists were keenly aware that if their actions appeared to shift away from socialism they would face Soviet armed intervention. Therefore, the resistance had to carefully limit its agenda so as not to appear openly threatening to the system.

In December 1981, the government instituted martial law in response to additional protests around the country. The resistance was forced

[b] For a complete discussion of Solidarity, see Crossett and Newton.[5]

underground as a result, with many members being imprisoned but still exerting influence over the movement. The resistance considered whether to begin an armed campaign or continue the tradition of nonviolent protest. The group decided that a nonviolent approach would be most effective, and it persisted to use only nonviolent methods. Martial law was lifted in 1983. By this point, the government had continued to weaken, and Solidarity's leader, Lech Walesa, had been awarded the Nobel Peace Prize, bringing world attention to the cause and sustaining momentum for the resistance. By 1988, Solidarity entered negotiations with the government, allowing the resistance group to put forth candidates in the upcoming elections. As an outcome of the elections, a coalition government was formed and led by Solidarity, with Walesa being elected president of Poland.

Example 2: Interference with the Legitimate Exercise of Political Processes



Civil society organizations (CSOs) in Zimbabwe are statutorily controlled bodies that deal with humanitarian matters and, after independence, democracy and governance.[6] Most resistance efforts opposing the standing government have had their genesis in the CSOs.[7,c] While CSOs are required to register with the government, they are generally authorized to carry out a variety of activities, at least in theory. There are, however, strict prohibitions on speech that criminalize messages critical of anyone in the office of the president. The government can also suspend activities of certain CSOs under the vague and easily abused justification that it is operating against the public interest. Since 2008, there have been pledges to reform the political agenda of the country and make democratic space accessible to CSOs, but instances of repression persist. Even when operating within their lawful charter, ahead of elections, CSOs have commonly been harassed

[c] There are three types of CSOs: private voluntary organizations (PVOs), trusts, and a class called universitas, which is a type of group that exists purely for the benefit of its members and cannot be recognized as a PVO.

and have had their activities suspended.[8,d] Of course, Zimbabwe is a complicated example, as government interference with lawful activity is the least of its repression tactics: the government has accumulated a lengthy record of abuse of opposition supporters, including instances of torture and murder.[9] Nonetheless, this example is useful because it shows the tension and limits of operating within the legal confines dictated by a standing government disposed to corruption. The resistance can operate lawfully until it unexpectedly finds itself either hindered through hastily made administrative hurdles or sudden suspensions or changes in the law. When the opposition makes the rules, it can change the rules to leverage control, meaning that such a resistance may suddenly find itself operating illegally. In corrupt societies, these groups do not enjoy lengthy notice and publication of rule changes, opportunity for public comment, or inquiries by a representative body.

The Status of the Resistance

What complicates the Zimbabwe example and situations like it is the fact that, as the laws are written, both the standing government and the resistance can be deemed technically to be acting in compliance with the law in a strict sense. The resistance members may exercise their will to influence politics through certain types of messaging, aid, and campaigning as permitted by statute. This exercise may make them targets of government harassment, which, albeit undemocratic, may not be illegal or actionable under domestic criminal or civil law. Even if there are laws on the books that criminalize harassment and targeting of this nature, it can be difficult, if not impossible, to successfully pursue a legal remedy because government institutions are not necessarily independent. Courts, for instance, may simply be rubberstamping what the executive branch orders. And yet, the government may try to maintain a modicum of legitimacy in the eyes of the international community by purporting to exercise its will through the use of legal instruments—for example, in the Zimbabwe example, using the broadly written clause that allows the government to suspend CSO activities that run counter to its interests by alleging that the CSO's activities are harmful to the public.

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[d] In particular, in June 2008, the government sought a blanket suspension of all PVOs engaged in humanitarian work, which resulted in the disruption of food aid and assistance to people in need, including orphans and people living with HIV/AIDs. In 2001, a provincial governor ordered all such bodies out of the area for failing to enter into a memorandum of understanding limiting their activities. Administrative interference of this type is designed to limit the ability of organizations to engage in political activity and influence the population against Mugabe's government.

Another troubling aspect of this category is that members of the resistance can be forced to move between legal and illegal political acts, all on the basis of government manipulation of the legal structure. Indeed, manipulation of the law is a tactic that the government can use to maintain control over the opposition, a way of interfering with and delegitimizing the opposition's standing. Resistance members are subject to their country's domestic criminal laws, as at this point no other international body of law applies outside of IHRL. However, a government that fails to fairly apply its domestic law to its opposition is unlikely to abide by its IHRL obligations. While there may be international knowledge of the standing government's practice—for example, in Zimbabwe, numerous nongovernmental organizations (NGOs) observe and report on this behavior to the extent that they can while facing potential ouster and retaliation—the resistance at this point is likely not receiving any formal recognition by outside states.

Even if there were outside recognition of the resistance at this point, unlike other categories of resistance (insurgency, belligerency), with respect to which recognition by a state invokes certain protections related to status of the participants in relation to that state, the value here may be simply to raise awareness of the cause and generate international attention. This is not to say that such recognition has no import for the resistance, as it clearly can. For instance, in apartheid South Africa in the 1960s, the United States recognized the sitting South African government as the legitimate governing authority, continued to increase economic ties with the country, and generally declined to openly criticize the apartheid regime.[e] However, in 1966, US Senator Robert Kennedy accepted an invitation to speak by the National Union of South African Students (NUSAS). On his trip, he met with banned ANC leader Albert Luthuli and visited Soweto, a sprawling township that served as a settling place for black Africans who had been evicted from other areas by state authorities.[11] These gestures were openly defiant of the sitting government, yet they were largely symbolic because they did not serve to change US policy toward the country. Nonetheless, the anti-apartheid struggle was informally acknowledged by a well-known statesman, a one-time US attorney general, and brother of

[e] The Sharpeville massacre in March 1960 is an exception to the US practice of not openly criticizing or commenting on the apartheid government's actions. The African National Congress (ANC) organized several thousand protestors who descended on a police station to oppose increased enforcement of "pass laws" restricting the movement of blacks within the country. In response, the police killed sixty-nine people. The US State Department issued a comment stating, "while the United States, as a matter of practice, does not ordinarily comment on the internal affairs of governments with which it enjoys normal relations, it cannot help but regret the tragic loss of life resulting from the measures taken against the demonstrators in South Africa," outraging President Eisenhower, who saw it as a "breach of courtesy among nations."[10]

a former US president. It underscored the existence of the struggle, despite the fact that US policy toward South Africa would for some time remain driven by economic ties rather than by the denunciation of apartheid. Not until the 1980s did the United States adopt decisive legislation sanctioning the apartheid government.[f]

At this point, a resistance is bound by domestic civil and criminal penalties that may be imposed on their lawful activities. Foreign recognition of a nonviolent resistance may be useful in terms of increasing attention and support for the cause, but it will not change the status of the resistance. Such formal recognition is legally significant to some of the categories of resistance, but not here. However, unacknowledged support through UW activities may have a considerable impact.

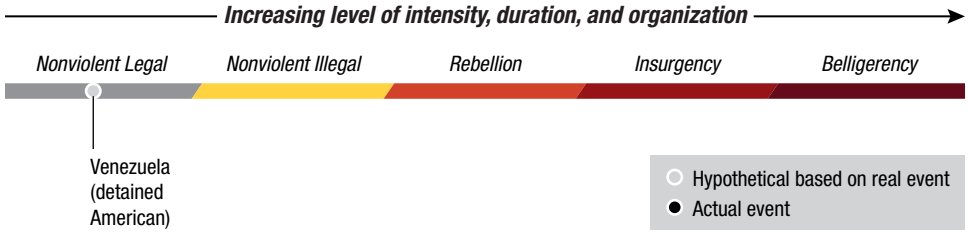
The Status of US Personnel who Support Nonviolent Resistance

The status of US personnel supporting the lawful efforts of a resistance that may be similar to those described in the Solidarity and Zimbabwe examples turns on a critical fact: these activities are conducted in a foreign country outside of wartime in which the United States may or may not already have a military presence. The support is likely unacknowledged, unless personnel are present with the host nation's consent as part of foreign internal defense (FID) operations. Entry into the country by military personnel to conduct activities opposing the standing government, even if authorized under US law, would typically be internationally unlawful as a violation of state sovereignty and an unlawful intervention in internal affairs.[14] Therefore, when US military or other government personnel enter a foreign country, the entry must be justified. A justification under international law includes self-defense, but here it is a peacetime scenario, and there has been no armed attack that would warrant defensive measures and no armed attack is imminent.[g] Moreover, the United States in this example is purposely avoiding open and aggressive acts and would not be able to avail itself of this justification in any case. The flip side is that it is plausible that military personnel discovered in a country could cause the nation to invoke self-defense and prompt the use of force in response, particularly if the

[f] In 1986, Congress passed the Comprehensive Anti-Apartheid Act, which imposed economic sanctions and, as conditions for lifting the sanctions, outlined a time line for the elimination of apartheid laws as well as Nelson Mandela's release from prison.[12,13]

[g] The theory of an "emerging threat" (also known as the Bush doctrine) has been argued as justifying acts of preemptive self-defense, but the facts here do not warrant that analysis.

personnel were to be deemed spies.[h] The use of force in self-defense may not be justified by these circumstances, which fall short of an armed attack, but that determination would be made after the fact. The point is that concern by the country in which US personnel are discovered over whether defensive actions will later be deemed justified under international law may not be enough to deter the use of force. The question of how a member of the US military defends his or her presence if discovered supporting a resistance in a foreign country becomes a delicate matter.



Venezuela's recent detention of a US citizen amid accusations that he was fomenting postelection violence on behalf of the US government pointedly highlights the predicament of personnel in this category.[16] Venezuela accused Tim Tracy, who it was later revealed is a documentary filmmaker, of "paying right-wing youth groups to hold violent demonstrations in order to destabilize the country" after President Nicolas Maduro's narrow win in the election. Tracy was labeled a spy, and Venezuela asserted that it would charge him under its antiterrorism laws.[17] Tracy was released after the United States and Venezuela agreed to work to restore diplomatic ties.[18,i]

For purposes of analysis, suppose the following in the Tracy example:

1. Tracy is actually an un-uniformed member of the US military.
2. He was authorized under US domestic law to enter Venezuela to conduct UW operations by working with youth groups to foment political instability.
3. The intent of the demonstrations being organized were in fact nonviolent, contrary to Venezuela's accusations.
4. News reports indicating that Tracy was arrested at the airport are accurate.

[h] Scott notes that "nations perceive the threat of armed aggression differently, and international law has not attempted to codify precisely the circumstances that justify the use of force in self-defense. Accordingly, particular forms of espionage may give rise to the use of force as well as a response under domestic criminal law."[15]

[i] Tracy's release seems to have been negotiated on the basis of the desire to restore diplomatic ties and to "set a warmer tone" for an upcoming meeting between Secretary of State John Kerry and Venezuelan Foreign Minister Elias Jaua.

From the US perspective, Tracy is a member of the US military carrying out official, authorized activities. His activities are clandestine in the sense that he is not in uniform and is not carrying military identification (because the US government seeks to conceal its sponsorship of his presence).[j] From the perspective of Venezuela, he is a US citizen assisting a group opposed to the government. Due to a history of strained diplomatic relations between the two countries,[k] a US citizen assisting a group with views that oppose those of the sitting government immediately raises suspicion that Tracy is in fact something other than a tourist, filmmaker, or foreign citizen-activist sympathetic to the youth groups' cause. On the basis of the facts available, nothing indicates that the youth groups or Tracy were in fact doing anything illegal. The organization of nonviolent demonstrations itself does not appear to be against Venezuelan law, which is perhaps why the government alleged that they were organizing "violent demonstrations."[l]

From Venezuela's perspective, Tracy is a spy. The assertion that Tracy is a spy is tantamount to asserting that he has no international legal protections. Spies, here meaning civilians as opposed to military personnel conducting espionage, are not recognized members of a sovereign military and are not diplomatic agents.[m] Nations have domestic laws criminalizing espionage within their respective territories, but espionage is not a violation of international law.[n] By alleging that Tracy is engaged in espionage, Venezuela is bringing the matter to an inter-

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[j] A discussion of the distinction between covert and clandestine, as defined by Department of Defense (DoD) policy and statutorily in Titles 10 and 50 of the US Code is discussed in *Chapter 7. Domestic Legal Constraints.* While the statutory authority for such activities is relevant to status, it is not discussed in detail here. For purposes of this example, what is relevant is that Tracy is authorized by the United States to be in Venezuela.

[k] Venezuela has a history of accusing the United States of attempting to destabilize the country. President Maduro has called President Obama "the big boss of the devils" and asserted that he is eager to find a reason to intervene in the country and even alleged that the cancer to which former President Chavez recently succumbed was caused by the United States.[19]

[l] For this example, the assumption is that any activities are nonviolent. If there is a Venezuelan law that criminalizes the act of planning or agreeing to commit an unlawful act (something akin to conspiracy, or if plotted against the state, insurrection), then Tracy and the youth group members could be in violation of the law if the facts support the claim.

[m] Scott states that "all states constantly or occasionally send spies abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognized position whatever according to international law. . . . Every state punishes them severely when they are caught committing an act which is a crime by the law of the land."[20]

[n] Parks notes that "no serious proposal has ever been made within the international community to prohibit intelligence collection as a violation of international law because of the tacit acknowledgement by nations that it is important to all, and practiced by each."[21]

national level, not because the alleged espionage violates international law under which he can be prosecuted but because, otherwise, there is much less of a story to use as leverage. There may be a strategic advantage to drawing international attention to what may be perceived as objectionable acts by the United States. It is a way for the country to continue to build on its anti-American rhetoric and to appear justified in further detaining and trying Tracy under domestic law.

At this point, there is little legal recourse. Tracy is subject to Venezuelan law as if he is a tourist or resident in that country. In terms of the law that applies, there is little if any difference between Tracy the filmmaker and Tracy the soldier. His status may influence how the United States negotiates his release, but at this point, the efforts to secure his release are diplomatic in nature and do not relate to his legal status. There is no advantage for Tracy to admit that he is a member of the US military, because outside of an armed conflict, he will have no additional IHL protections, and outside of an international armed conflict (IAC), he will be afforded no prisoner of war (POW) protections. In fact, asserting that he is a member of the military could make negotiations more difficult because the United States would then be in the position of having to explain why a member of its armed forces is in another country, outside of wartime, assisting a resistance group. In this case, the facts may favor arguing more aggressively that Tracy was not violating any law and that there is no evidence that he was ever seen in the presence of the youth groups, as he was arrested at the airport. His entry into and out of the country was lawful. How a release is negotiated would be carefully constructed at the highest levels of government and be a matter of foreign policy and diplomacy.[o]

[o] Historical examples provide some context for the complexity of these extralegal matters. The release of imprisoned Central Intelligence Agency (CIA) agents John Downey and Richard Fecteau during the Korean War took more than two decades to negotiate. Although they were CIA agents and not military personnel, their story highlights several sensitivities that may influence how an individual's release is negotiated. After their plane was shot down over China in 1952, they were captured and interrogated, and they eventually revealed that they were spies. The CIA did not know that they remained alive for two years after their capture. The CIA's cover story was that both men were Army civilians traveling on a contract aircraft. This story was maintained for almost the duration of their captivity. The US relationship with China made taking forceful action to attempt a rescue of the men difficult if not politically impracticable. Some US officials argued that they should be treated as military personnel shot down over Korea, but the US government worried that treating Fecteau and Downey like military personnel held captive would induce China to simply deny POW status to all. The military personnel were released in 1955 after the United States appealed to the United Nations (UN). In 1971, when relations with China improved and trade restrictions were lifted, the CIA was finally able to negotiate Fecteau's release. Downey was not released until 1973, when President Nixon admitted in a press conference that Downey was a spy and appealed to China to release him on humanitarian grounds after Downey's mother suffered a stroke.[22]

In the Tracy example, the facts surrounding his activities in Venezuela are favorable for constructing a cover story that situates him as a citizen who was not engaged in any unlawful activities. What if the facts made it more difficult to deny a military affiliation? A few months before Tracy's detention, another US citizen was detained in Venezuela and was accused of being a mercenary on the basis that he had military training; carried a passport with recent stamps from Iraq, Afghanistan, and Jordan; and had tried to illegally cross the border between Colombia and Venezuela.[23,p] The individual allegedly tried to tear up a "notebook with coordinates" when he was captured.[24] The US government initially denied being informed through official channels of the individual's arrest but was eventually granted consular access.[25,q] No details regarding the individual were released, but "Western diplomats in Caracas" said that the issue probably arose in Colombia and that the detained citizen was fleeing "some sort of problem there."[26]

Whether any of Venezuela's allegations are true is not clear from the reports. For the purpose of analysis, suppose that this story is in fact about a member of the US military working covertly and trying to cross into Venezuela from Colombia undetected. What is this individual's status, and does it differ in any considerable way from that of Tracy's in the previous example? Here, the facts do not make for as favorable a cover story. To begin with, the US citizen broke Venezuelan law by crossing into the country illegally. Second, the fact that he had material that he attempted to destroy upon capture raises the suspicion that he is a spy or a military operative conducting some type of surveillance. Still, on the basis of the facts available, the Venezuelan authorities found nothing that affirmatively shows his affiliation with the US government beyond mere citizenship. Nonetheless, from the perspective of his status, this individual is no different than Tracy. He is subject to Venezuelan law and may be spared a trial or sentence if US diplomatic intervention proves effective.

One point to note in both examples is that the fact that the individuals were out of uniform does not have the same implications as if they had been out of uniform in an armed conflict. The use of civilian clothes to disguise their activities during peacetime would be considered deceit and, in the eyes of the capturing state, would justify punishment as acts of espionage. Under law of armed conflict (LOAC), there

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[p] The identity of this individual was not revealed. Then-President Chavez announced that his security forces were interrogating him and that the US government was trying to overthrow his regime in order to take control of the country's oil reserves.

[q] The US State Department said that it had not been notified of the arrest but appealed to Venezuela to comply with consular relations treaties and grant US officials immediate access to the individual if Caracas was in fact detaining a citizen.

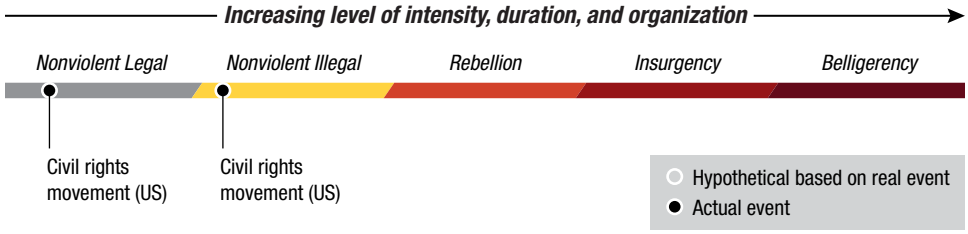
is a general prohibition against engaging in combat while out of uniform. The principle of distinguishing oneself from the civilian population requires that lawful combatants wear distinctive clothing so they can be recognized as lawful military targets. However, this is an armed conflict principle, and the activities in these examples are taking place in peacetime. Even if the individuals were in uniform, they would not be able to benefit from any of the protections that this would impart in terms of status, because they are acting outside of an armed conflict where IHL protections would apply.

Special operations missions by design use unconventional methods in hostile, denied, and politically sensitive areas, and the use of indigenous or civilian dress is common in such missions.[27] In fact, early in the operations in Afghanistan, indigenous forces working with the US military urged US soldiers to wear indigenous attire to reduce their visibility. The point was to reduce the likelihood that the soldiers would be targeted by those seeking collection of the $25,000 bounty the Taliban placed on the head of any uniformed US soldier.[28] Importantly, the intent was not to appear as civilians, where doing so could be seen as placing civilians at undue risk and could violate principles of LOAC (sometimes referred to as "treacherous use of civilian clothing").[29] The issue became the source of debate in Afghanistan because DoD policy is to apply LOAC in any armed conflict, whatever its characteristics.[30] Here, in the Venezuelan example, the point is to emphasize that the circumstances are not those of an armed conflict, and being discovered out of uniform will not, therefore, have the same implications.

RESISTANCE THROUGH ILLEGAL POLITICAL ACTS

A resistance may find working within the law difficult or ineffective. It may decide to deliberately violate the law in a nonviolent way to instigate social change. Commonly referred to as civil disobedience, this method may be direct or indirect.[31] A direct approach focuses on the violation of what is considered an unjust law—for example, Rosa Parks's refusal to comply with the Montgomery segregation ordinance was a protest of the law itself. Indirect civil disobedience refers to acts where the law that is broken is not the object of the protest, but disobedience of the law is a method to bring attention to the demands of

the resistance.[32,r] In either case, the objective of civil disobedience is to break the law in order to further the agenda of the resistance, accepting the fact that breaking the law requires submission to the penalty.[s]



The civil rights movement in the United States made use of both lawful and unlawful nonviolent practices. Through lobbying and lawsuits, organizations such as the National Association for the Advancement of Colored People (NAACP) expanded the rights of blacks and successfully won courtroom battles against the "separate but equal" doctrine.[t] At the same time, "Freedom Riders" were arrested for violating statutes banning them from sitting in the white section of buses,[u] and sit-ins took place at "whites-only" lunch counters across the South, resulting

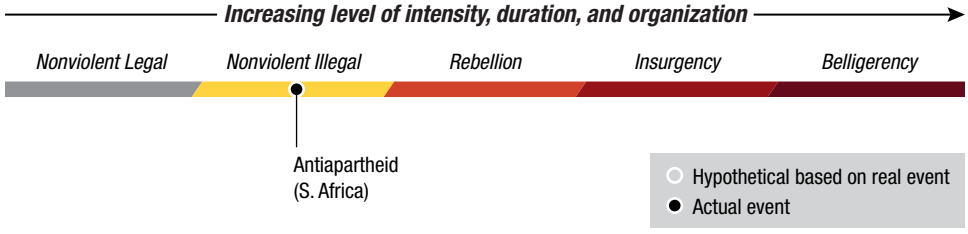
[r] US case law has not always recognized deliberate violation of a law when the law itself is not the target of the protest. In *Walker v. City of Birmingham*, the Supreme Court upheld the conviction of civil rights activists who had violated a court order prohibiting a planned march. The statute at issue was a parade ordinance requiring a permit for mass street gatherings and was not the target of the protest—in other words, the purpose of the march was not to challenge the ordinance as unjust.[33]

[s] Crucial to this decision is the recognition of the lawful penalty. "One who breaks an unjust law must do it . . . with a willingness to accept the penalty . . . an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law."[34]

[t] In *Brown v. Board of Education*, 347 U.S. 483 (1954), the US Supreme Court ruled that segregated public education violated the Equal Protection clause of the Fourteenth Amendment. However, the ruling was not embraced by many in the South, resulting in the targeting and harassment of blacks asserting their individual rights and state-enacted measures aimed at harassing the NAACP, which lost nearly 50,000 members in the late 1950s.[35]

[u] In *Boynton v. Virginia*, 364 U.S. 454 (1960), the Supreme Court held that individuals who had violated the Virginia trespass statute by sitting in the white section of a bus terminal restaurant had a right to sit wherever they chose. The Court found that the law segregating transportation violated the Interstate Commerce Act, given that bus transportation was sufficiently tied to interstate commerce.

in violent reactions from segregationists.[v] The nullification of the "separate but equal" doctrine, the eventual desegregation of schools, and the passage of the Civil Rights Act of 1964 are testaments to the effectiveness of nonviolent resistance. The civil rights movement influenced other concurrent and emerging nonviolent resistance movements, particularly in Africa.[w] Owing to the need to examine the involvement of the US military, an instance of foreign nonviolent resistance that uses illegal acts will serve as a more useful scenario for analysis.[x]



The antiapartheid resistance in South Africa had moments of militancy, but it is categorized as nonviolent because in the end, it utilized diverse nonviolent strategies to overcome the apartheid government rather than relying on violent strategies.[y] Some of the earliest antiapartheid resistance efforts included nonwhite South Africans forming associations, organizing strikes, burning registration cards, and conducting mass illegal border crossings to object to unacceptable living conditions and forced population transfers.[39] These actions were effective in

[v] The "Big Saturday" sit-in in Nashville is an example of a highly coordinated nonviolent resistance involving illegal acts. In this protest, as one person was arrested, organizers promptly replaced his or her vacated seat. Big Saturday was a critical moment for the resistance because white leaders and business owners had believed that violence would force the protestors to submit. Rather, it turned out that they "were stunned to find that protestors were unfazed by beatings and arrests, and they realized they had only two options . . . either step up the violence . . . or try to buy off the students with some sort of concession."[36]

[w] While there were differences in the circumstances of the movements, the common element of racism, and other parallels connected the efforts of the civil rights movement, African anticolonialism, and the antiapartheid movement in South Africa.[37]

[x] The civil rights movement in the United States is mentioned here as an example of a nonviolent resistance involving illegal acts. The US military was used in aspects of the movement, particularly when President Eisenhower sent the Army's 101st Airborne Division to Little Rock, Arkansas, to enforce the integration of public schools after the Supreme Court's ruling in *Brown v. Board of Education*. However, the use of the military for domestic law enforcement is a separate legal issue and does not provide the appropriate facts for analysis of UW activities, partly because the issue would be situated completely within the context of domestic law as opposed to analysis under international law.

[y] Tracing the resistance's early use of legal tactics to nonviolent direct action, Lester Kurtz notes that "the decades of struggle saw the ebb and flow of a wide variety of strategic actions within the anti-apartheid movement. American theologian Walter Wink . . . suggests the movement was 'probably the largest grassroots eruption of diverse nonviolent strategies in a single struggle in human history.' "[38]

getting the government to rescind some of the laws, but only temporarily. The ANC was formed in 1912 and became the main political opposition group representing the interests of the nonwhite population.[z] For several decades, the ANC promoted the use of nonviolent protests, such as the violation of curfews and other laws, until violent riots erupted in 1953 and the government passed more stringent laws, including one authorizing the whipping of protestors. The ANC had tried to garner support from whites as part of its resistance strategy. After the Sharpeville Massacre in 1960, when police killed sixty-nine people taking part in an ANC-organized protest to object to "pass laws" limiting the movement of blacks throughout the country, the ANC and an offshoot of the group called the Pan-Africanist Congress (PAC) were banned.

In response to Sharpeville, the ANC formed an armed wing called Umkhonto we Sizwe, which resorted to bombing government buildings, railroad lines, and power stations. Many ANC members were arrested and imprisoned. Armed uprisings were ineffective against the apartheid government, and ANC and PAC members who remained were forced into exile. For the next two decades, the struggle was characterized by waves of violence. The 1976 Soweto march, where police killed a thirteen-year-old boy, resulted in protestors elsewhere smashing windows and setting fire to government buildings. The government responded by killing more than sixty people in what was eventually known as the Soweto Uprising. Violence begot more violence, with blacks living in squalid townships turning on black councilors and others suspected of being police informants, brutally murdering them.

In the early 1980s, the newly formed United Democratic Front (UDF), which informally aligned with exiled ANC members and the Congress of South African Trade Unions (COSATU), was effective at gaining multiracial support for the cause. The township rebellions were troubling, but the UDF insisted on nonviolent conduct and refused to endorse the violence, even though it was aimed at apartheid leaders and collaborators. The focus on nonviolent methods was effective. Boycotts of white-owned businesses and demands for integrated facilities were so successful that they forced the government to declare a state of emergency. At this point, the resistance had created a number of community-based organizations that began to marginalize official institutions. The 1989 Defiance Campaign culminated in peace marches in cities throughout South Africa and included members of the white establishment and business leaders, setting the stage for formal negotiations with the antiapartheid resistance. In the end, nonviolent resistance, in

[z] Only twenty percent of the population of South Africa was of European descent. Eighty percent comprised black Africans, Indians, and people of mixed descent called "Coloureds."[40]

conjunction with increasing international sanctions, forced the apartheid government to yield.

The Status of the Nonviolent Resistance

The antiapartheid resistance used a range of nonviolent methods—including marches and mass demonstrations, public remembrances of the victims of government violence, boycotts, strikes, and the violation of segregation laws, making it a good example from which to analyze the status of personnel committing illegal acts as part of a nonviolent resistance. Note that even though there were moments of violence throughout the resistance in response to state suppression, the resistance was mostly nonviolent. Violence was often initiated by the government, and in instances where it was not, it was generally initiated in response to force. In any case, after the ANC's failed attempt to introduce an armed element, the resistance condoned only nonviolent methods.

In terms of status, the antiapartheid resistance, a resistance movement using nonviolent, illegal methods, was subject to domestic civil and criminal penalties for their illegal activities. In this example, members of the antiapartheid movement were arrested and in some cases served lengthy prison sentences. As the resistance had no status outside of the country in which it operated, even international pressure may have had little influence on the prosecution and treatment of arrested and detained members. Originally charged with inciting workers' strikes, Nelson Mandela, who, it was subsequently revealed was affiliated with Umkhonto we Sizwe, was charged with sabotage and conspiracy to violently overthrow the government. Despite pressure from international organizations, such as the UN, calling for Mandela's release, he was found guilty and served twenty years in prison before his release at the end of apartheid in 1990.

Nonviolent resistance movements have no recourse outside of their own judicial systems and may not have much hope for defending their actions, particularly if the system is not characterized by the rule of law. In the United States and some other countries, individuals can assert the necessity defense if their actions broke the law but are deemed necessary to prevent the occurrence of a greater harm.[41] The defense has been used in civil disobedience cases, but it is difficult to justify because it can often be argued that there are other lawful means of

protest.[aa] The antiapartheid resistance did not appear to have such a defense available, nor would it have likely been effective given the government's extensive suppression efforts that made the system heavily rigged against nonwhites and those supporting changes to the apartheid regime.

The defense of necessity has been invoked on the basis of international law, with some, but not consistent, success, and mostly in lower courts that by their position in the judicial hierarchy have little effect on other courts' decisions. The German Peace Movement successfully challenged the installation of Pershing missiles in Germany through sustained civil disobedience that appealed to the German constitution as well as international law and the UN Charter's prohibition on the use of force.[43] Individuals in Scotland were acquitted of damage to nuclear submarines on the basis of the judge's assessment that the threat of nuclear annihilation was against international legal principles.[44] However, more recently, nuns charged with pouring their own blood on materials at a military recruitment center in Ithaca, New York, were acquitted of conspiracy but not on the basis that the nuns argued. They asserted that their actions were legal under international law because the US-led invasion and occupation of Iraq was in violation of the UN Charter and treaties that the United States signed after World War II. However, the court determined that the war was irrelevant to their actions.[45, ab] The invocation of international law has generally fared poorly as a defense, and there are significant issues of its applicability

[aa] One case in which defendants successfully asserted a necessity defense involved trespassing and disorderly conduct charges related to protesting CIA activities. During the trial, the judge permitted extensive testimony on CIA activities in Central America, which described murders and assassinations. The defendants alleged that their actions constituted legitimate efforts to prevent additional such crimes and to avert a greater societal harm. One defendant was Amy Carter, daughter of President Jimmy Carter.[42] But other cases have not turned out similarly. Many examples involve the protest of nuclear weapons programs and involve trespass and destruction of property. For instance, *United States v. Dorrell*, 758 F.2d 427 (9th Cir. 1985), held that the defendant's concern about nuclear war and subsequent entry onto an Air Force Base to deface missiles with spray-paint did not constitute a "real emergency," as required by the defense of necessity. Similarly, *United States v. May*, 622 F.2d 1000 (9th Cir. 1980), held that there was no basis for the necessity defense to justify trespass onto a naval base to protest the Trident submarine program). As for defacement instead of trespass, *United States v. Cassidy*, 616 F.2d 101 (4th Cir. 1979), held that throwing blood and ashes on the Pentagon in protest of the US nuclear weapons program did not show the requisite direct causal relationship between the action taken and the avoidance of the harm to justify the necessity defense.

[ab] The nuns were acquitted of conspiracy, and while they found ways to assert international law in testimony, they were not permitted to use international law as a defense or to use the necessity defense because the judge had ruled them irrelevant and ordered that they not be raised or mentioned. They were convicted of lesser charges of trespass and damage to government property.

domestically and whether it even confers rights on individuals to act on its authority.

The Status of US Personnel Assisting Nonviolent Resistance

Based on the example in South Africa, suppose US personnel are working with the antiapartheid resistance. As the focus of this section is on nonviolent resistance, presume first that US personnel are training and assisting the resistance with the implementation of nonviolent illegal acts and that their presence is authorized under US domestic law, but unknown to the South African government. Suppose also that at some point, a nonviolent march orchestrated by the resistance in conjunction with US military personnel turns violent due to police brutality, and US personnel are present, un-uniformed, and involved in violent acts. Two key questions arise regarding status: what is the status of US military personnel supporting the resistance in planning and executing nonviolent illegal acts, and what is their status if they are involved in unanticipated violence?

Much like the Tracy example, US personnel working without host nation consent to support a resistance outside of an armed conflict stand in the same position as tourists. They have no special status, and if the resistance consists of nonviolent but illegal political acts, are engaging in criminal acts against a standing government. Moreover, their presence in-country would be illegal in that it would violate South Africa's sovereignty. Even if they entered legally on a regular US passport, the fact that they are, as members of the US military, agents of the United States present in the host nation with the purpose and mission of UW makes their presence internationally unlawful because it violates the host nation's sovereignty and the norm of noninterference. The South African government can determine that the personnel are spies and try them under its espionage laws.

Continuing with the South African example, beyond espionage, US military personnel could be exposed to a host of violations of South African criminal law for advising the resistance, including whatever analogous laws are in place in South Africa for conspiratorial acts and acts aimed at overthrowing the government, on top of any potentially lesser crimes or municipal regulations the activities may have actually violated—for example, trespass in the case of entering property to march or protest. There would be no advantage for US personnel to admit to being members of the US military, because outside of an armed conflict, they would have no additional IHL protections, and outside of an IAC, no POW protections. Again, doing so may place the US in the difficult position of having to explain why a member of its

armed forces is in another country outside of wartime assisting a resistance group. It is possible that, assuming that the South African government had no indication that the individuals were members of the US military, a cover story could be generated according to which the individuals were, for example, merely sympathetic activists who came into the country to support the resistance on humanitarian or moral grounds and should simply be removed to the United States.

Like the members of the resistance, US personnel would not be able to avail themselves of defenses such as necessity or the protection principles of international law to justify their activities. This is in part due to the difficulty of asserting such defenses in the best circumstances, the irregular recognition of the defenses by courts, and the simple fact that the South African judicial system during apartheid was biased against antigovernment supporters. If they are involved in violence, then the US personnel would be exposed to prosecution for violations of criminal law. Even if acting in self-defense or in defense of members of the resistance, it is unlikely that they would receive a more favorable outcome than members of the local resistance in asserting such a defense. Self-defense would be limited to the criminal context if South Africa recognizes the concept. And the violent nature of the incident would not transform the resistance into an armed conflict where certain actions that would otherwise be crimes would be lawful (e.g., murder would be permissible under LOAC if committed by combatants). The resistance and the personnel would remain criminals; even if they instigated the violence and it could arguably be called a rebellious act, it would not change the status of the US personnel or the resistance members, who would remain criminals.

In circumstances in which a standing government is using force and severely oppressive laws to compel members of society to submit to its will, it is not out of the question to presume that even if the violence amounted only to what would be considered battery, as opposed to, say, murder, personnel could face much more serious charges aimed at punishing the motive of the resistance and deterring future such behavior. Charges such as conspiracy to overthrow the government or sabotage, whether or not warranted given the acts committed, could be levied against US personnel as a punitive measure, especially if the government is interested in more severely punishing noncitizens to whom it may have even less of an obligation to provide judicial process. The fate of US personnel detained under the criminal statutes of a foreign country lies in the diplomatic processes that may be used to create a cover story and negotiate their release or the terms of the SOFA or visiting forces agreement.

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[39] Ackerman and Duval, "A Force More Powerful, A Century of Nonviolent Conflict," 335–368.

[40] Ibid., 337.

[41] Lambek, "Necessity and International Law: Arguments for the Legality of Civil Disobedience," 476.

[42] Mathew L. Wald, "Amy Carter is Acquitted Over Protest," *New York Times*, April 16, 1987.

[43] Frederic Megret, "Civil Disobedience and International Law: Sketch for Theoretical Argument" (working paper, Faculty of Law, McGill University, Quebec, 2008), http://dx.doi.org/10.2139/ssrn.1163270.

[44] "Judges to Examine Trident Case," *BBC News*, January 17, 2000, http://news.bbc.co.uk/2/hi/uk_news/scotland/607232.stm.

[45] Elizabeth Bauchner, "St. Pat's Four Not Guilty of Federal Charges," *The Nation*, September 25, 2005.

CHAPTER 4.

REBELLION

Rebellion is the first category of armed resistance on the continuum. Recall that, on the resistance continuum, factors contributing to the changing nature of a resistance include intensity of the struggle, duration of the conflict, and the organization the resistance exhibits in a territory.[a] Rebellions are traditionally characterized as a group's short-term, isolated violent engagements of low intensity that a state's law enforcement mechanisms are able to suppress.[1] The group may be organized but not sufficiently so to meet the greater threshold of insurgency, where there is more territorial control and a more defined organizational structure. Riots and insurrections are examples of armed resistance that fall within the category of rebellion.

Rebellions do not rise to the level of armed conflict, and therefore individuals involved in rebellious acts are subject to the domestic law of the state in which the acts occur. They are also subject to whichever other applicable international legal commitments the state has made, such as status of forces and related agreements and international human rights law (IHRL). Like those in the category of nonviolent resistance, rebels are still situated within the domestic legal paradigm of the state in which they carry out their activities. The following discussion looks at the legal status of each participant in this category and then analyzes his or her status within the context of certain hypotheticals.

THE STATUS OF THE RESISTANCE

That international humanitarian law (IHL) does not regulate rebellions has been justified on the basis of the noninterference principle, because external assistance would constitute illegal intervention.[b] Common Article 3 and Additional Protocol II provide minimum protections for those involved in an armed conflict that is not of an international character (i.e., an internal armed conflict). These protections, the minimum available under IHL, do not apply until the situation can be deemed an armed conflict. Article 1(2) of Additional Protocol II acknowledges that it "shall not apply to situations of internal disturbances and

[a] As a consequence of increasing intensity, duration, and organization, the level of territorial control a resistance exercises will often also increase. This provides another factor to consider when determining into which category a resistance fits. The greater the territory occupied, controlled, or administered by the resistance, the more likely it is to progress along the continuum.

[b] "States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This [was] clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands."[2]

tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

If IHL does not apply because the situation does not constitute an armed conflict, then the only law left to apply is the domestic law of the host nation subject to the host nation's IHRL commitments.[3,4] The commentary to Common Article 3 notes that the article's threshold was set high enough to answer a hesitation expressed by many states during drafting that the article would hinder states' ability to suppress insurrections. The commentary states that Common Article 3 "does not in any way limit the right of a State to put down rebellion."[5] States possess a sovereign right to defend themselves from threats both external and internal.[6,c] Most, if not all, states have laws prohibiting actions and conspiracies aimed at overthrowing the standing government.[8,9] Therefore, the only protections available to rebels engaged in an uprising that is short of an armed conflict would be those protections embedded in the host nation's criminal and constitutional law, as well as the human rights commitments made by that state.

Rebels commit crimes against the state, and if the rebellion fails, will be subject to criminal prosecution.[10,11] The basis for prosecution may be the violation of laws regarding treason and insurrection, as well as those laws criminalizing activities that would otherwise be lawful on the basis of the combatant's privilege in armed conflict.[d] Those engaging in international armed conflicts (IACs) receive the protection of combatant's privilege,[13] but those engaging in noninternational armed conflicts (NIACs) do not,[14,15,e] and rebellions, by definition, fall below the threshold for armed conflict. Rebels are not combatants, they do not receive the combatant's privilege, and their violent actions during a rebellion constitute crimes. Furthermore, IHL does not oblige states to extend the protections afforded by the combatant's privilege or prisoner of war (POW) status to rebels.[16]

States retain jurisdiction over rebels, which may create an incentive not to recognize them as anything other than criminals. If a state were to recognize rebels as insurgents or belligerents, it would then be constrained by relevant provisions of IHL that applies to those categories. So, while states have discretion whether to recognize a situation as an

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[c] The U.S. Const. art. I, § 8, cl. 15, provides that Congress shall have the power "to provide for the calling forth of the militia to execute the laws of the Union, suppress insurrections, and repel invasions."[7]

[d] The combatant's privilege "is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives."[12]

[e] Protocol II, in Article 6, provides procedures for the prosecution and punishment of criminal offenses related to armed conflicts and encourages the granting of amnesty to direct participants in armed conflict.

insurgency or belligerency,[17] there is an incentive to avoid doing so for as long as possible in order to operate free of IHL restrictions.

THE STATUS OF THE STANDING GOVERNMENT

When a rebellion occurs, a dissident group rises up against the standing or ruling[f] government of a state.[g] Until the rebellion succeeds and displaces the standing government, the government remains the lawful and legitimate embodiment of the state's sovereignty.[19] States have a right to self-preservation, and when faced with insurrection, they can lawfully put down rebellions by means they deem necessary, consistent, of course, with IHRL.[20,21]

In rebellion, the question of a standing government's legitimacy remains one of domestic law. IHL would be implicated only if the rebellion survived suppression efforts and either ousted the government completely or caused it to go into exile. Before that point, however, the standing government remains the lawful, legitimate government of the state experiencing the uprising. As such, the status of government members and personnel is as lawful government officials and personnel with all the rights and duties that accompany their positions. Accordingly, violence against them would constitute crimes as defined by the domestic law of the host nation.

At the stage of rebellion, few, if any, armed forces are typically used by the state to counter the uprising. Instead, the state will most often predominantly use law enforcement personnel until these officers become overwhelmed and the state's armed forces are required.[h] It follows from this that law enforcement and military personnel will receive

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[f] It is important to note that the government against which the rebellion occurs does not have to be the lawful or rightful government of the state, only that it be in charge, so to speak. Meaning, a rebellion rises up against the group that is in power and exercises authority over the majority of the host nation, whether or not that group is recognized as lawful by the citizens of that state or by other governments.

[g] Halleck makes clear in section 5 of chapter 14 that insurrections and belligerencies seeking to change the political order of the state are internal matters and are, therefore, civil wars governed by the same rules as civil wars. Halleck goes on to explain in section 9 of the same chapter that civil wars are governed by the rules of war but that mere rebellions are exceptions, "as every government treats those who rebel against its authority according to its own municipal laws, and without regard to the general rules of war which international jurisprudence establishes between sovereign states."[18]

[h] For instance, in the United States, federal or federalized armed units may not be deployed in a state to enforce state law until that state's legislature requests federal assistance.[22] Thus, in the United States, law enforcement has authority to arrest people during peacetime and the military has authority to use lethal force and to detain people during war or martial law, but those authorities remain separate until the military is granted legal authority to exercise law enforcement functions.[23]

the protections afforded them in their normal course of duty. These protections might include the authority to use force or the power of arrest when confronted with force and the power to use lethal force, when deemed necessary in their discretion, without facing murder or assault charges in accordance with IHRL. However, these protections will not include those based on the law of armed conflict (LOAC), such as those in Common Article 3 or Additional Protocol II.

Many states, including the United States, have laws in place that empower the government to respond to and suppress insurrections.[24] These laws tend to regulate which state agents may be engaged against an uprising and at what point.[25] Additionally, states have an obligation to protect the public and preserve public order, and they are also endowed with the powers necessary to fulfill these obligations.[26] The implication is that state agents enjoy the status of possessing lawful authority to exercise their lawful functions and are immune from prosecution, as well as from being legitimate targets during hostilities (killing them therefore becomes murder). However, government personnel will not be protected when they act outside of their official duties in criminal or injurious ways or when they violate human rights obligations either in pursuit of official business or not.

THE STATUS OF US PERSONNEL

It is generally unlawful for a state to intervene in a rebellion without the consent of the host nation. Article 2(7) of the United Nations (UN) Charter prohibits the UN from intervening in matters that are essentially covered by the domestic jurisdiction of a state.[i] International law restricts, if not prohibits, third-party involvement in states' domestic affairs. For instance, General Assembly Resolution 2131,[27] later reiterated by G. A. Resolution 2625,[28] declares it to be general international law that states may not intervene in the domestic affairs of other states. Additionally, Article 18 of the Charter of the Organization of American States also prohibits states from intervening in the affairs of other states not only by armed force but also by any means that would threaten the personalities of those other states.[29] And the International Court of Justice has clearly stated that "the principle of non-intervention derives from customary international law."[30]

When foreign armed forces enter the territory of another country, they must do so on a legal basis or justification. Otherwise, the simple

[i] Charter of the UN, Chapter I, Article 2(7) states, in pertinent part: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII."

entry of armed forces into another country constitutes an internationally wrongful act and a domestic criminal act because it violates the receiving state's territorial integrity and sovereignty.[31] Each sovereign has exclusive and absolute jurisdiction over its territory and the persons within it.[32] Thus, under customary international law, nations have jurisdiction over all actions taken within their territories, whether by citizens or foreign nationals,[33,34] unless the sovereign expressly or impliedly surrenders its jurisdiction.[35]

Accordingly, in the absence of a negotiated sharing of jurisdiction over armed forces or government agents operating in a host nation, the host nation's domestic law will prevail, whether the foreign armed forces are engaged in assisting the rebels or the standing government. Military personnel or government agents who enter another country without a legal basis, engage in operations, and are caught by the host nation will receive only the protections of the domestic criminal law process and the applicable protections of IHRL. At that point, diplomatic efforts with the host nation will be required to secure more favorable treatment.[36] Such efforts constitute a *post hoc* arrangement for the treatment of foreign personnel caught operating in a country without a legal basis. Many states, including the United States, prefer to put into place in advance a legal instrument that defines the status and treatment of foreign personnel operating in a country.[j]

In the case of US military personnel operating without a legal basis, the internationally wrongful act would be the entry into the state without permission. Any actions taken after that may constitute crimes or offenses under the state's domestic law and, just as a tourist would be, the individual is subject to the full jurisdiction of the host nation.[38] When forces are present in another state with a legal basis, such as an international agreement, their presence is not wrongful, but actions taken while in the host nation may constitute crimes under domestic law or under the law of the sending state. The agreement will define which state is granted jurisdiction in such situations.[39]

Under international law, a few scenarios, such as self-defense, justify service members or government agents of one state operating in another state without the second state's permission. A rebellion, as a domestic matter, does not present grounds for foreign states and their militaries to operate in another country, unlike self-defense, war, and

[j] Status of forces agreements (SOFAs) and their implementing agreements are treaty-like constructs that stipulate the terms of the presence or operations of troops within another country, but they do not justify actions outside the scope of their terms (e.g., engaging in armed conflict).[37]

possibly humanitarian intervention.[k] Therefore, military personnel or government agents will be operating in another country either without a legal basis or with a legal basis manifested in an agreement between the two nations concerned. These personnel and government agents operating in a country experiencing rebellion will assist either the rebels or the standing government. Assistance to a host government for purposes of law enforcement and internal security constitutes foreign internal defense (FID).[l] Assistance to rebels rising up against a host nation's government amounts to unconventional warfare (UW). Each of these categories brings with it its own particular implications for the status of the personnel involved.

Traditionally, the "law of the flag" imputed sovereign immunity to foreign public vessels, including aircraft, as well as ground forces stationed on a base in a host nation.[41,42] The host nation had no jurisdiction over foreign armed forces or individual members. This traditional rule has given way to greater host nation jurisdiction, as in the NATO SOFA signed in 1951.[43,44] The United States recognizes and follows the rule that the host nation retains jurisdiction over US armed forces unless these rights are surrendered.[45,m]

SOFAs are meant to fully define the relationship between visiting armed forces and the receiving state.[48] The time required for negotiation of a "full SOFA" and the expected duration and scale of operations in the host nation, as well as the maturity of the political relationship between the states, may lead to a mini-SOFA or visiting forces agreement instead.[49] These agreements address a multitude of issues, but they predominantly cover entry and exit processes for visiting forces, when and where uniforms may be worn, when and where arms may be carried and used, and criminal and civil jurisdiction.[50] Regarding criminal

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[k] Per the *Operational Law Handbook*: "An exception to general rule of Receiving State jurisdiction is deployment for combat. . . . As the exigencies of combat subside, however, the primary right to exercise criminal jurisdiction may revert to the Receiving State or come under another jurisdictional structure established in a negotiated agreement with the Receiving State."[40]

[l] *Counterinsurgency* would be an inappropriate term here because the hostilities have not yet reached the level of insurgency. Additionally, counterinsurgency often entails direct participation by foreign troops, whereas FID includes predominantly advising, training, providing supplies and technology, and sharing intelligence.

[m] The United States has ratified the NATO SOFA.[46] Technically, the United States can pursue immunities for its personnel by extending the protections provided to embassy administrative and technical staff under the Vienna Convention on Diplomatic Relations to other personnel. Commonly referred to as A&T status, this protection is usually accomplished through an exchange of diplomatic notes or memoranda of agreement executed by the combatant command headquarters or a diplomatic representative. This status usually affords persons under it full criminal immunity and civil immunity limited to actions taken in pursuit of official duties. However, there is no readily available example of this status being extended to individuals involved in FID or operations.[47]

jurisdiction, four paradigms exist: NATO SOFA shared jurisdiction, Visiting Forces Acts, administrative and technical status, and the absence of any agreement between the sending and receiving states.[51]

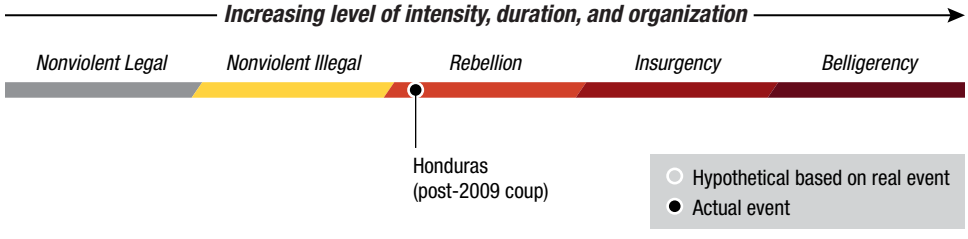
The NATO SOFA distributes jurisdiction between the receiving and sending states on the basis of which state's law is violated and who is the victim. The sending state has exclusive jurisdiction if the conduct violates the law of the sending state but not that of the receiving state.[52] Personnel engaged in FID or UW might violate their military regulations or commit a dereliction of duty. They would be subject exclusively to sending state jurisdiction, and would not be subject to receiving state jurisdiction because they violated a sending state law, not a receiving state law. The receiving state has exclusive jurisdiction for acts that constitute offenses under its own domestic law, even if those acts do not constitute offenses under the law of the sending state.[53] An act that violates the laws of both states engages the concurrent jurisdiction of both states. In these instances, one state receives primary jurisdiction. The sending state receives primary jurisdiction when the sending state or a person from the sending state is the victim.[54] The sending state also receives primary jurisdiction when the act or omission occurs while the actor is on duty and in the performance of official duties.[55] The receiving state possesses primary jurisdiction in all other cases.[56] States can elect to waive jurisdiction, and the NATO SOFA encourages sympathy for requests by the state without primary jurisdiction.[57]

The remaining two paradigms apply when armed forces are sent into another state without an agreement in place. Some countries have Visiting Forces Acts in their domestic laws. These acts require that the sending state be listed according to the domestic law before its protections apply. The protections that would apply are either a shared jurisdiction formula like the NATO SOFA or protections equivalent to limited diplomatic immunity.[58] If the receiving state has no Visiting Forces Act and no international agreement has been reached, then those who enter and operate in the receiving state subject themselves to the full jurisdiction of the host nation. This means that the only protections they will receive will be those provided by local criminal procedure, the IHRL obligations of the receiving state, and the diplomatic efforts of the individual's state of nationality.[59] In the case of the United States, if a US service member ends up under the exclusive jurisdiction of the host nation, the United States will take all possible steps to ensure a fair trial.[60,n]

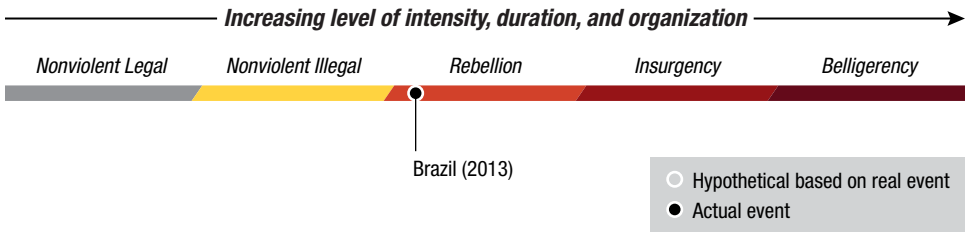
[n] DoD Directive 5525.1 lays out the corresponding detailed provisions.[61] Army Regulation 27-50 implements this directive.[62]

REBELLION IN CONTEXT: HONDURAS, BRAZIL, AND MALI

Within the category of rebellion, the lower and upper thresholds—in other words, the situations that are in the least developed phases of armed resistance versus those that are closer to insurgency—can exhibit very different levels of violence and organization. The 2009 coup in Honduras and the recent violence associated with protests in Brazil are two examples of activities that constitute rebellion at the lower end of the threshold. In contrast to those examples are the activities of the Tuareg in Northern Mali, which are characterized by more sustained and coordinated acts of violence. An interesting point to bear is mind is that, in news reports, the Brazilian protestors engaging in violence are still referred to as "protestors." Indeed, colloquially, this term describes their initial acts and motivations. Nonetheless, their conduct has risen to that of rebellion. So, while the description of the Tuareg may conjure the image of rebels as gun-wielding criminals who plan attacks against the state, they share the category of rebels with the Brazilian protestors who wielded no guns against the state in their unplanned, impromptu rebellious acts. Yet, because they resort to violence, they fall within this category of resistance. These cases highlight the contrasting nature of the thresholds of illegal political acts and insurgency between which rebellion sits.



In June 2009, Honduras experienced a coup d'état through which the military forcibly removed sitting President Manuel Zelaya. The coup began peacefully, but heavy-handed tactics by the military to suppress the resistance incited government opposition, and violent clashes ensued between citizen protesters and the Honduran military.[63] The national police force was responsible for twenty deaths in the immediate aftermath and countless serious injuries in the following weeks.[64] When a large-scale protest gathered at the presidential residence, the military responded to the protesters with riot gear and tactics that included water cannons and tear gas, while the protesters used stones and everyday materials, including flaming trash cans. Protesters in these demonstrations set up makeshift barricades and burned tires, and they attacked soldiers with stones and clubs.[65]

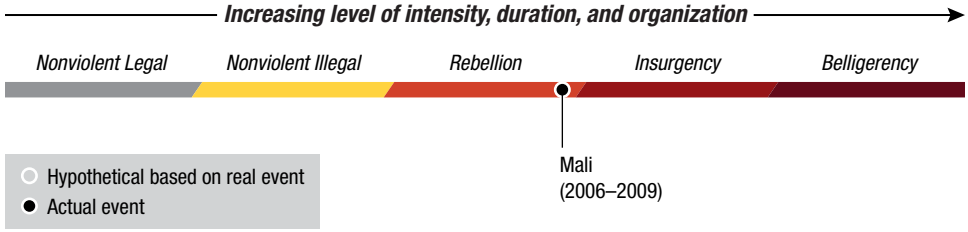


In Brazil, large-scale protests erupted in response to a government proposal to raise transportation fares.[66] After the government retracted the proposal, protests intensified and began to focus on issues in addition to rising transportation fares.[67] These protests were characterized by violence between police and protesters engaging in street fights. Police responded with routine riot gear and riot control tactics, such as tear gas and rubber bullets, but they reportedly were indiscriminate in who they fired against.[68] Protesters have also attempted to storm and infiltrate government buildings, and when prevented from entering, they started fires outside of these buildings.[69,70]

These two examples demonstrate rebellion at relatively mild stages. They feature citizens destroying property, violently engaging government forces, and deliberately acting illegally with specific aims against the standing government. However, their actions are largely unorganized and sporadic, and their means of violence are not sophisticated. In addition, they do not pose a lethal threat to government personnel; body armor and riot gear suffice to secure the public space. The time and place of protests might be somewhat planned or communicated to the masses, but planning falls short of a coordinated strategy. The immense disparity in fire power between protesters and government forces illustrates that the normal power divide remains in place, meaning that the state retains the monopoly on force and the resistance has not begun to challenge that monopoly. Accordingly, these have been matters for law enforcement and constitute domestic unrest that does not rise to the level of a NIAC. Notice also that, in some areas, the military has operated alongside the police, but this factor alone is not determinative of rebellion. It is not uncommon for the military to be used to support police forces in a law enforcement capacity.

To advance on the resistance continuum, rebels would need to acquire and use more lethal weaponry, which would also likely change the organizational character of the resistance. For instance, a rebellion on the cusp of insurgency will typically feature the planned, concerted, and focused use of lethal force against the government, in contrast to the indiscriminate, unplanned, and ad hoc use of violent but not necessarily lethal force against the government. The Tuareg in Northern Mali from 2006 to 2009 are a good example of the upper end of the

rebellion threshold, as many events in Mali began to resemble an insurgency, at least at the lower level of that category.



An initial period in 2006 featured raids by Tuareg rebels, called the Democratic Alliance for Change, which lasted from May until an accord was reached in July.[71,72] A separate Tuareg faction, the Niger-Mali Tuareg Alliance, rejected the accord and attacked garrisons and kidnapped government troops in May 2007.[73] Hostilities continued sporadically, usually consisting of nighttime raids by Tuaregs during which Tuareg rebels stole weapons, kidnapped soldiers, and commandeered resources.[74] The Malian government and Tuareg rebels negotiated a truce in July 2008. The truce failed to include an influential Tuareg leader who splintered off and renewed hostilities in 2009, until the Malian government and his group reached a cease-fire.[75]

This example illustrates the upper end of rebellion on the continuum and provides an example that is the closest to insurgency. Note that the argument can be made that the willingness of the Malian government to engage in negotiations with the rebels, and the rebels' ability to engage the government in negotiations, may indicate a level of organization and intensity of hostilities required to meet the threshold of insurgency. However, the negotiations could also be seen as an attempt by the Malian government to relieve tensions and reduce the likelihood of the rebellion becoming an insurgency.

The Malian rebels raided government posts to steal weapons, kidnap soldiers, and take resources. Still, this type of activity is distinct from the kind of open engagements featured during an insurgency, such as Kosovo Liberation Army (KLA) firefights with the Serbian armed forces. Casualties were suffered by both sides, but a raid is arguably different from an attack that lasts for several hours or days because it is purposefully short term and isolated. In contrast, the armed engagements between the KLA and Serbian armed forces may have been separated by days at a time, but overall, they represented protracted hostilities. Raids, it can be argued, end when the objective is accomplished or when a leader commands retreat; the hostilities are not singular and protracted but, rather, are multiple, distinct, and short term.

The raids also suggest the fractured nature of the Tuareg rebels' organizational structure. The Tuaregs consist of multiple factions

operating independently of each other, and each faction within the Tuaregs may have its own hierarchy, but the question is whether the armed actions and raids are conducted under something like a military command. The KLA had a very clear chain of command to which its members largely adhered. For the Tuareg violence to be considered an insurgency would require making the argument that their internal organizational structure sufficiently mimicked a military command such that one could say that they operated under a responsible command. The Tuareg rebels are commonly characterized as disorganized and splintered. As noted, one group will reach a cease-fire or peace deal with the government, while another will reject it and continue fighting. The reasons for this lack of organization are not relevant to the legal status of members of the rebellion. The relevance to their legal status is the failure of the group to meet the threshold of organizational capacity required for constituting an insurgency and triggering Common Article 3 protections.

In the least intense permutations of rebellion, participation on the side of the rebels would constitute UW, whereas participating with the government would be FID. In the case of Honduras, the United States continued its monetary and materiel aid to Tegucigalpa. This aid was not equivalent to training the Honduran police or military to control the protests or working alongside Honduran authorities to suppress the protests. Were US personnel to work alongside or advise the Honduran authorities, their status while in the country would depend on the agreements reached between Honduras and the United States to provide that assistance and permit US personnel to enter the country. US personnel cannot arrive in Honduran territory without justification because doing so would violate Honduras's sovereignty and interfere in its internal affairs. As discussed, the typical agreements will divide jurisdiction between sending and receiving states depending on which state's law an act potentially violates. Recall that IHL has not yet been triggered, so armed service members may not invoke the combatant's privilege if they use deadly force, and the protesters retain the same rights that they have during peacetime.[o]

Assume that US personnel are present in a country without consent or knowledge of the host nation. If, in this scenario, US military personnel support the rebels, they can be treated in the same fashion as the rebels because there is no provision of IHL yet in place to guarantee

[o] Interim President Micheletti enacted emergency measures that suspended numerous civil rights, including the right not to be subject to indefinite detention without cause. US personnel in that scenario would not detain persons because they have no authority in that territory and their authority is articulated by the agreement, but they could presumably deliver subdued and arrested persons to the native authorities for them to make a decision whether to detain indefinitely.

minimum protections for those resisting the government. Only domestic law would apply, as modified by international law commitments such as human rights and diplomatic treaties and the customary international law equivalents of human rights treaties and diplomatic treaties. Because the combatant's privilege and POW status do not apply in the absence of an international armed conflict, and because there is no armed conflict, these protections do not apply in scenarios like the protests in Honduras or Brazil. If these personnel are arrested and detained by Honduran or Brazilian law enforcement personnel, they would receive the same protections as local protesters unless and until their citizenship is revealed[p] or US diplomatic personnel take proactive steps to protect them or obtain their release.

ENDNOTES

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2 Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 96 (Int'l Crim. Trib. for the Former Yugoslavia October 2, 1995).

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4 Dominic Hoerauf, "The Status of Libyan Rebels Under the Laws of War: A Litmus Test for the Lawfulness of NATO's Libyan Engagement Under U.N. Resolution 1973," *Phoenix Law Review* 6 (2012): 103.

5 International Committee of the Red Cross, *Commentary, Convention Relative to the Treatment of Prisoners of War*, 36 (1960).

6 U.N. Charter, art. 51; Protocol Additional to the Geneva Conventions of 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), December 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

7 U.S. Const. art. I, § 8.

8 "Controversial Russia Treason Law Takes Effect," *Aljazeera.com*, last modified November 14, 2012, http://www.aljazeera.com/news/europe/2012/11/20121114203355680772.html.

9 18 U.S.C. §§ 231, 2101, 2381–2390, 2332, 2332a, 2332b, 2332f, 2332g, 2339A, 2339B, 2339C, 2339D (2006).

10 Rona, "An Appraisal of U.S. Practice Relating to 'Enemy Combatants'," 241.

11 Hoerauf, "The Status of Libyan Rebels Under the Laws of War," 114.

12 Inter-Amer. Comm'n H.R., Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 doc. 5 rev. 1 corr., ¶ 68 (2002).

13 Protocol Additional to the Geneva Conventions of 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I) art. 43(2), December 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol I].

14 Protocol II, art. 6.

[p] See Vienna Convention on Consular Relations Article 36(1)(b), requiring the host nation to inform the individual's consulate of his detention if he or she so requests.[76]

[15] Report on Terrorism and Human Rights, ¶ 70.

[16] Waldemar A. Solf, "The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice," *American University Law Review* 33 (1983–1984): 59.

[17] Robert D. Powers, "Insurgency and the Law of Nations," *JAG Journal* 16 (1962): 57.

[18] Henry W. Halleck, *Halleck's International Law, or, Rules Regulating the Intercourse of States in Peace and War* 1: chap. 14 §§ 5, 9 (New York: D. Van Nostrand, 1861).

[19] Ibid., chap. 3, § 1.

[20] Ibid., chap. 4, §§ 18–19, chap. 14, § 18.

[21] International Committee of the Red Cross, *Commentary, Convention Relative to the Treatment of Prisoners of War*, 36.

[22] Posse Comitatus Act, 18 U.S.C. § 1385 (2006).

[23] 10 U.S.C. § 375 (2006).

[24] U.S. Const. art. I, § 8, cl. 15.

[25] 10 U.S.C. §§ 331–336 (2006); Posse Comitatus Act, 18 U.S.C. § 1385 (2006).

[26] Halleck, *International Law*, chap. 4, §§ 18–19.

[27] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. Doc. A/RES/20/2131 (December 21, 1965).

[28] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), A/RES/25/2625 (October 24, 1970).

[29] Charter of the Organization of American States art. 18, April 30, 1948, 2 U.S.T. 2394.

[30] Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Merits, Judgment, 1986 I.C.J. 14, ¶ 246 (June 27). See ¶¶ 202–209 for the Court's discussion of the contours of this principle.

[31] Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (December 19).

[32] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

[33] Steven J. Lepper, "A Primer on Foreign Criminal Jurisdiction," *Air Force Law Review* 37 (1994): 171.

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[36] Andrew Gillman and William Johnson, eds., *Operational Law Handbook* (Charlottesville, VA: United States Army Judge Advocate General's Legal Center and School, 2012), 121.

[37] Richard J. Erickson, "Status of Forces Agreements: A Sharing of Sovereign Prerogative," *Air Force Law Review* 37 (1994): 139.

[38] Gillman and Johnson, eds., *Operational Law Handbook*, 121.

[39] Ibid., 120.

[40] Ibid.

[41] Lepper, "A Primer on Foreign Criminal Jurisdiction," 170–171.

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[45] Restatement (Third) of the Foreign Relations Law of the United States § 461 cmt. *f* (1986).

[46] Gillman and Johnson, eds., *Operational Law Handbook*, 120.

[47] US Department of Defense, *DoD Status of Forces Policy and Information: DoD Directive 5525.1*, August 7, 1979, *available at* http://www.dtic.mil/whs/directives/corres/pdf/552501p.pdf; R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?* Report for Congress, RL 34531 (Washington, DC: Congressional Research Service, March 2012), 2.

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[49] Erickson, "Status of Forces Agreements," 143.

[50] Gillman and Johnson, eds., *Operational Law Handbook*, 120n.

[51] Ibid., 120–121.

[52] NATO SOFA art. VII(2)(a).

[53] Ibid., art. VII(2)(b).

[54] Ibid., art. VII(3)(a)(i).

[55] Ibid., art. VII(3)(a)(ii).

[56] NATO SOFA art. VII(3)(b).

[57] Ibid., art. VII(3)(c).

[58] Gillman and Johnson, eds., *Operational Law Handbook*, 121.

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CHAPTER 5.

INSURGENCY

Insurgency is the first category on the resistance continuum that triggers the application of international humanitarian law (IHL). Insurgencies are categorized here as having the level of qualified violence (in terms of duration, intensity, and geographic control[a]) and the internal organization within the insurgent body required to meet the threshold of noninternational armed conflict (NIAC). A state's recognition of insurgency constitutes acknowledgement of the factual conditions in another country that meet these criteria, but third-party recognition neither extends additional rights or duties to insurgents, nor grants them international status. Therefore, domestic law of the nation where the insurgency is occurring remains the predominant legal structure, with Common Article 3, and, if applicable, Additional Protocol II protections as an overlay that apply to all parties involved in the insurgency.

Whether an internal conflict constitutes an insurgency depends on whether the conflict has sufficient intensity and the group opposing the standing government has sufficient organization. Whether a person is a civilian or unprivileged belligerent is determined by whether he or she directly participates in hostilities, engages in a continuous combat function, or both. Those who are participating in this way constitute legitimate targets for state forces; however, it should be noted that states interpret direct participation differently. The law of NIAC binds both parties in the conflict, meaning that insurgents and government forces are entitled to minimum protections by the opposing side upon capture. When foreign troops support an insurgency, they subject themselves to losing the combatant's privilege and coming under the jurisdiction of the host nation until the conflict rises to the level of an international armed conflict (IAC). The conflict may become an IAC under two theories: the simple introduction of troops creates an IAC, or the discovery of foreign troops assisting an insurgency leads to hostilities that rise to the level of an IAC. Foreign troops assisting the standing government are equally subject to the domestic law of the host nation unless an agreement between the sending and receiving states dictates otherwise. Nations experiencing insurgency retain their lawful authority, as well as full discretion regarding measures to take against insurgent forces consistent with international law.

[a] As hostilities rise in their intensity and duration, the resistance will likely both acquire greater control over more territory as a result of succeeding and require greater control over more territory from which to operate and within which to organize and administer itself.

FACTORS THAT DETERMINE AN INSURGENCY

The factual characteristics of an insurgency are difficult to determine, in large part because at its lowest level, an insurgency may look much like a rebellion, and in its most intense manifestation, it may look like a belligerency.[1,2,3] Scholars agree that insurgency represents a step above rebellion, with the distinction between these two categories being based on facts on the ground.[b] Unlike a rebellion, the insurgency is organized enough to sustain a certain level of hostilities and the government can no longer suppress the resistance.

International case law defines an armed conflict as occurring "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[6] This demonstrates the threshold for armed resistance to move from rebellion to insurgency.

The test for determining whether an armed conflict exists becomes most relevant at this point, with the two parts of the test comprising (1) qualified violence (based on intensity, duration, and scope), and (2) identifiable, organized parties.[7,c] This test comes from international case law interpreting the language and intent of Common Article 3 of the Geneva Conventions and Additional Protocol II. It is important to bear in mind, however, that Common Article 3 and Additional Protocol II are different types of NIACs and their criteria differ. Additional Protocol II applies only to conflicts between a state and a nonstate actor, but not to conflicts between such nonstate actors themselves (where Common Article 3 does apply). NIACs under Additional Protocol II occur when Common Article 3 criteria are met but the armed forces of a nonstate actor are organized enough to exercise control over a part of the state's territory "as to enable them to carry out sustained and concerted military operations and to implement the Protocol." A Common Article 3 NIAC does not require territorial control of this nature. Nonetheless, the point remains that, in light of both the interpretation

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[b] Falk acknowledges that "almost all that can be said about insurgency is that it is supposed to constitute more sustained and substantial intrastate violence that is encountered if the internal war is treated as a 'rebellion' ";[4] Powers describes repeating factors such as "the size of the armed forces of the rebels, the nature of the potential government they have established, the success of their arms, and the territory they control . . . Equally important is the inability of the parent government to control and suppress the rebellion. If an insurgent force meets with some success so that they can control part of the country, establish a new or counter civil government, and field an armed force that is able to resist the efforts of the recognized government to suppress them, then logic demands that some sort of status be given the rebel forces."[5]

[c] There is support for the idea that abundance in one factor can compensate for deficiency in the other. However, this interpretation has not been consistently applied in case law, and more compelling cases will satisfy both factors.[8]

in the commentary that Common Article 3 applies as broadly as possible and that the object and purpose of IHL is to lessen or remove the suffering of war, the bar for NIACs of either type cannot be as high as that for belligerency. Belligerency raises the conflict to an international level; therefore, insurgencies must be those armed conflicts identified as triggering the IHL of NIACs.

A historical example is the International Criminal Tribunal for the Former Yugoslavia (ICTY)'s finding in *Prosecutor v. Limaj* that an armed conflict existed in Kosovo between the Kosovo Liberation Army (KLA) and the Serbian armed forces. That tribunal determined that, by the end of May 1998, the hostilities amounted to an armed conflict. With regard to intensity, before that time, the hostilities included brief (twenty minutes to a full day) exchanges of fire, planned surprise attacks using heavy weapons and explosives, and skirmishes that resulted in one group taking control of a village or particular physical terrain (in this case a gorge) or valuable infrastructure (in this case two significant roads).[9,d] The defense characterized the events after the end of May 1998 as sporadic, disparate, and geographically diluted,[10] as well as one-sided.[11] The chamber rejected these characterizations in favor of viewing the KLA-Serbian engagements as constant clashes that occurred across a wide swath of territory and over a significant period of time, and to which the KLA was able to offer strong and effective resistance.[12]

Limaj highlights some factors to consider for the threshold of insurgency, including the ability to mount a credible combat threat, the geographic extent and temporal extent of the hostilities, the frequency of engagement in the field, and the purpose of the efforts by the forces of the standing government, although this last factor is informative but not essential to the final determination.[13,e] With regard to organiza-

[d] In *Prosecutor v. Limaj*, in paragraphs 152 through 167, the chamber details the hostilities it determined constituted an armed conflict. The chamber took specific notice that the KLA was in constant armed clashes with substantial Serbian forces across a wide geographic scope (*Prosecutor v. Limaj* at ¶ 172). Additionally, the chamber noted that the Serbian forces used heavy weaponry in a committed conflict directed at controlling and quelling the KLA (*Prosecutor v. Limaj* at ¶ 172).

[e] In fact, the chamber found this factor irrelevant. Indicators of purpose, such as the number of troops and weaponry used, are also relevant for determining the intensity of the conflict.

tion, the KLA progressed from a loose group of leaders with a handful of civilian followers to an organized structure. It established a central command group called the General Staff, as well as decentralized units based on existing geographical and political partitions (which they called zones) and led by designated commanders. The KLA created a command hierarchy that carried orders down from the General Staff to the zone commanders and reported information from the zone commanders up to the General Staff. It instituted positions charged with professionalizing and maintaining discipline through the ranks, issued official statements, and participated in peace/cease-fire/reconciliation negotiations led by third-party states.[14,f]

This elaborate organizational structure was not perfectly implemented, and it was not always adhered to by the KLA. The defense in the case introduced into evidence concerns that the military police never took disciplinary action toward KLA members[15] and that foreign diplomats and visitors expressed confusion about the KLA organizational structure.[16] The chamber found, however, that an imperfectly operating structure and a lack of clarity to outside observers do not of themselves demonstrate the lack of sufficient organization.[17] The point is that insurgent groups need not have a military apparatus as "organized" as a state's military apparatus for the situation of resistance to move from rebellion to insurgency.

RECOGNITION OF INSURGENCY AND THE STATUS OF PARTIES

To recognize an insurgency is to recognize a NIAC, acknowledging an internal war with which the recognizing entity must engage, not out of legal obligation but of practical necessity.[18,19,g] Except for minimum IHL standards, such recognition does not bring with it any legal rights

[f] The chamber highlighted certain discrete factors as particularly indicative of organization: interaction with international representatives, the use of a uniform, the ability to procure arms, the provision of military training to new recruits, the ability to recruit new members, the establishment of rules of discipline and a police force to enforce them, the creation of ranks and defined duties, the promulgation of regulations for organization and conduct, and a chain of command.

[g] "Recognition of insurgency means acknowledgement of the existence of an armed revolt of grave character and the incapacity, at least temporarily, of the lawful government to maintain public order and exercise authority over all parts of the national territory."[20]

or duties for the parties to the conflict or for third-party states.[h] The parameters and terms of the recognition define how the state that recognizes the insurgent group will engage with the insurgent group.[23,24,i] Traditionally, states have not been obligated to extend any legal rights to insurgents.[26,27] Before 1949, states applied the law of war to internal conflicts out of considerations of humanity in order to lessen the harsh impacts of war. Recognition of insurgency does not bestow belligerent privileges such as the combatant's privilege or prisoner of war (POW) status. It triggers the minimum protections of IHL and presents an opportunity for the parties to the conflict, as well as third-party states, to define what rules apply and what relations they will have.

No Impact on State Authority to Suppress Insurgency

States are reluctant to accord belligerent status to insurgents[28,29,30,31,32] because doing so provides them with the combatant's privilege and the presumptive right to POW status.[33] Along with this is that it grants dissident groups license to kill and destroy in the name of a legitimate war.[34,35] On the contrary, insurgent actions represent treasonous acts that foment insurrection; they directly challenge the lawful government without legitimate justification.[36] The drafting process of the Geneva Conventions considered versions of Common Article 3 that would have extended more protections, including the combatant's privilege, to dissident groups.[37] The imperative to uphold sovereignty and fear of the drastic consequences of legitimating insurgents is clear from the last sentence of Common Article 3: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

Accordingly, the commentary makes clear that applying Common Article 3 does not impinge on a state's right to suppress insurrection or infringe on a state's duty to restore or maintain law and order.[38] During insurgency, states retain their powers and rights to prosecute insurgents according to their domestic law.[39,40]

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[h] Lauterpacht states: "Recognition of insurgency creates a factual relation in that legal rights and duties as between insurgents and outside States exist only insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity, and of economic interest.");[21] see also Pictet, clarifying that "no sort of immunity is given to anyone under this provision."[22]

[i] Falk states that "insurgency is a flexible instrument for the formulation of claims and tolerances by third-party states. If it is used to protect economic and private interests of nationals and to acknowledge political facts arising from partial successes by insurgents in an internal war, then it can adjust relative rights and duties without amounting to a mode of illegal intervention in internal affairs."[25]

THE IMPACT OF INTERNATIONAL HUMANITARIAN LAW ON THE STATUS OF PERSONS IN INSURGENCY

The question of what constitutes a combatant becomes particularly important once resistance has reached the level of an armed conflict.

> A combatant is someone who, by virtue of membership in the armed forces or associated militia, possesses a "combatant's privilege." . . . A combatant is immune from criminal responsibility for lawful acts of belligerency but may be prosecuted for war crimes such as targeting civilians or using prohibited means of combat, including biological weapons or rape. In turn, a combatant may be targeted and detained without charge or trial for the duration of the armed conflict, but is entitled to prisoner of war status and treatment in accordance with the Third Geneva Convention.[41]

Common Article 3 does not require that a state be one of the parties to the NIAC, but Additional Protocol II does require that a state be one of the parties to the conflict. Accordingly, in a NIAC within the meaning of Additional Protocol II, only one party to the conflict has armed forces, the legitimate government. Only the members of that armed force receive the combatant's privilege, while those fighting on behalf of the insurgents receive no equal status. This is largely because insurgents have no international status; they have only domestic status.[42,43] It must be remembered that insurgencies have only been partially internationalized; they remain domestic, internal conflicts, governed chiefly by the domestic law of the host nation. What, then, is the status of insurgents?

The Status of Insurgents

The law regulating NIACs does not address combatant status.[44,45] It provides protections for civilians and those placed *hors de combat*, or outside of combat, but there must be a counter-category to civilians if an armed conflict exists and the principle of distinction is to have meaning. Applying the distinction set down in Article 4 of the Third Geneva Convention appeals as a ready and capable answer. However, by the terms of the Convention, it applies only to IACs.

The International Committee of the Red Cross (ICRC) categorizes civilians as members of organized armed groups when they assume a continuing combat function involving direct participation in hostilities.[46] They are belligerents in the sense that they take up arms and

fight. Yet, recall that these groups are not armed forces and, therefore, are not combatants, meaning that they do not receive the same privileges that combatants are afforded. It follows that they are unprivileged belligerents, for they take up arms and fight but they do not receive the same privileges as combatants.[47] However, it is important not to mistake their status as unprivileged for unlawfulness under international law. They have no international status, so if they are prosecuted for their combat activities (e.g., shooting, killing, and injuring government armed forces or destroying government property), they are prosecuted under domestic law for acts for which international law affords no protection or privilege.[48] Acts punishable as violations of international law are those which violate treaty-based IHL and customary IHL, such as terrorism or targeting civilians.[49]

Common Article 3 applicable to NIACs and customary IHL protect persons taking no active part in hostilities, including those placed *hors de combat*. Left unprotected are persons taking an active part in hostilities. Thus, as the ICRC suggests, NIAC belligerents must be persons directly participating in hostilities or assuming a continuous combat function.[50] Three approaches have been put forth for determining whether a civilian becomes a NIAC belligerent through direct participation or a continuous combat function.

One approach, by the International Criminal Tribunal for Rwanda, analogizes a standard from the commentary to Additional Protocol I. Under this approach, to be directly participating or serving a continuous combat function requires acts of war that by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy forces.[51] The ICRC puts forth a second approach in a three-part test: (1) meeting or exceeding a threshold regarding the harm likely to result from the act; (2) a relationship of direct causation between the act and the expected harm; and (3) a belligerent nexus between the act and the hostilities conducted between the parties to the conflict.[52] Finally, the ICTY determines direct participation on the basis of membership in a resistance group.[53]

To reiterate, insurgents remain subject to prosecution for their actions under domestic law, both as acts against the state and as criminal violations.[54,55,56,57] Additionally, as belligerents, they may be targeted.[58,59] And if captured, they are not afforded POW status, but they

are owed the minimum protections afforded by Common Article 3, and, if applicable, Additional Protocol II.[60,61,62,63,j]

Insurgents, then, are unprivileged belligerents in a NIAC, subject to domestic law but protected by Common Article 3 and potentially Additional Protocol II if they are captured and detained. Common Article 3 encourages special agreements between the parties to the conflict to ensure the protections of all or part of the remaining articles, and the commentary encourages the application of all or part of the remaining articles without special agreement.[64,65] States are not obligated to extend protections beyond Common Article 3,[66,67,68] but scholars have recognized it as a powerful tool of propaganda, reconciliation, or both.[69,70]

The Status of Military Personnel Assisting Insurgents—Unconventional Warfare

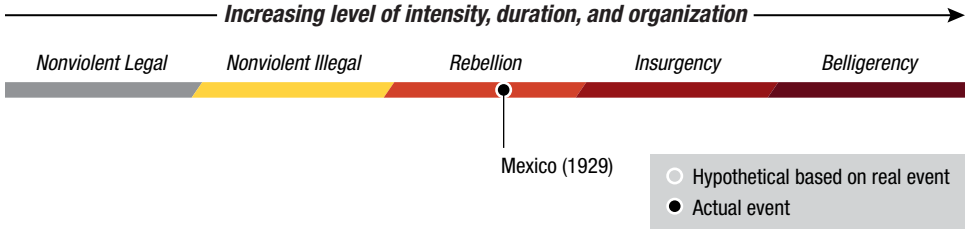
Foreign assistance on the side of insurgents is an internationally wrongful act because it is an impermissible intervention and interference with the host nation's internal affairs and its sovereignty.[71] The wrongful conduct is attributable to the intervening state and will not implicate the status of the service members sent to perform the supporting role unless the acts are unlawful under international criminal law or the criminal law of the nation in which the military intervenes, in which case individual criminal responsibility would attach.[72] SOFAs would normally provide the terms under which individuals would be prosecuted, but in these circumstances, states could decide the SOFA has been breached and its terms null and void, subjecting personnel to host nation prosecution.

Regarding the status of service members supporting insurgents in a NIAC, two theories predominate. The first theory places these foreign troops in the same position as insurgents.[73,74] The rationale follows the same reasoning as applied to private individuals who voluntarily support insurgents in hostilities. Upon entering the territory of the host nation, the individual subjects himself or herself to the laws of that nation, with no protection but its domestic laws, and depending on that nation's stance, either both international human rights law and IHL, or only one of those bodies of law.[75,76] Common Article 3 does not distinguish between native or alien parties in an internal conflict, so it would protect both.[77,78] The individuals would equally be unprivileged belligerents because private citizens of a state cannot gain combatant status and its attendant privileges without joining the armed forces of the state.[79] The first theory considers foreign troops to be in the same position because

[j] Provided, of course, that the host nation has signed and ratified Additional Protocol II. The ICRC reports that only three states have signed Additional Protocol II, and the United States has not yet ratified it. However, the US position is that many of the provisions of Additional Protocol II constitute customary international law and therefore apply without host nation ratification. See the *Additional Protocols I and II* section in the *Appendices* for more detail.

no IAC has triggered the combatant's privilege. Recall that the combatant's privilege that shields soldiers from prosecution for murder and assault operates in armed conflicts to which their state is a party. Thus, as long as the sending state is not in an armed conflict with the host nation, the troops sent are not protected by the combatant's privilege, and the host nation is not bound to accord them POW status.[80]

If the host nation works on the basis of this theory regarding the status of service members supporting insurgents in a NIAC, an additional question exists regarding the level and character of the troops' involvement. This question parallels the distinction made above between civilians and NIAC belligerents. If these troops are directly participating in hostilities and performing a continuous combat function, they will be treated precisely like the insurgents discussed above. Yet, if their activities fall below the standard for direct participation in hostilities or a continuous combat function, then they should be deemed civilians and receive all the protections afforded to civilians under Common Article 3 and, if applicable, Additional Protocol II. However, the host nation may have laws in place regarding aiding and abetting or materially supporting insurgents' crimes.[81] It is unlikely that foreign troops would escape from such charges unless they would receive amnesty either as part of the standing government's postconflict strategy or as a result of diplomatic negotiations.



To take an example, in 1929, before the 1949 Geneva Conventions, Mexico experienced an insurrection in which private US citizens participated of their own volition. US Secretary of State Henry L. Stimson instructed US Ambassador Dwight W. Morrow in Mexico to inform the Mexican government that the United States expected Mexico to treat any US citizens captured while supporting the insurgents as POWs.[82] The stated rationale was to avoid a distressing and unfortunate accident or incident that might prove embarrassing to both governments.[83] Contrasting examples can be found in the requests by the United States to Mexico in 1912 and to Greece in 1935 to grant only fair trials to Americans caught while assisting insurgents.[84]

According to the second theory regarding the status of service members supporting insurgents in a NIAC, the fact of foreign intervention through the assistance of insurgents triggers an IAC and the panoply of

IHL to apply, including Geneva Convention III's Article 4 on POWs.[85,86] This theory hinges on the language of Common Article 2, namely the use of *armed conflict* instead of *war* as being a broader term that encompasses more forms of hostilities. Common Article 2 provides that the Geneva Conventions will apply to any armed conflict that may arise between two or more of the "High Contracting Parties," even if the conflict is not recognized by one of the parties.[87] This theory contends that "any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war."[88] No minimum number of forces or level of slaughter need be met, nor need any fighting take place.[89] All that is required is "for the armed forces of one Power to have captured adversaries falling within the scope of Article 4."[90] Under this theory, troops apprehended by standing government forces would need to be afforded POW status and protections. Diplomatic protections, such as negotiations for release, are not precluded under this theory.

The Status of the Standing Government

Scholars and commentators acknowledge that a government that faces an insurgency retains its sovereign rights and duties to restore law and order, because it, that is the standing government, has not yet in fact been supplanted.[91,92,93,94] At the stage of NIAC, domestic law has not yet been supplanted by the full protections of IHL. The addition of Common Article 3 and Additional Protocol II to the applicable laws in no way impedes the host nation's right or ability to apply its domestic laws.[95,96] Instead, it retains full power and right to address and suppress the insurgency, within the bounds of customary IHL (such as the rule prohibiting the killing of civilians and the destruction of civilian property) and any human rights law to which the state has committed itself.[97] Government officials and operatives who violate IHL, domestic law, customary IHL, or applicable IHRL should be subject to suit. Obstacles to prosecution will include official immunity acts in place in the host nation and the existence and integrity of a tribunal with jurisdiction. Whether postconflict tribunals will have personal and subject-matter jurisdiction, as well as whether official immunity will be a defense in those tribunals, are different questions than those of officials' status during armed conflict. In a NIAC, standing government actors remain government officials, just as they are in peacetime, unless any changes occur because the government enacts emergency measures. Accordingly, their ability to act and the consequences of their actions would be assessed in the same manner as in peacetime.

The Status of Military Personnel Assisting the Standing Government—Counterinsurgency

States are free to request assistance from other states in their internal affairs. Some argue that intervening on behalf of the standing government is a right of third-party states.[98] Again, however, whether the sending of troops to support a counterinsurgency effort in another state violates international law will implicate the state itself, not the troops sent unless the troops' actions violate international criminal or domestic criminal law, for which individuals would be criminally responsible. The troops sent to support counterinsurgency efforts enter the receiving state with the status of tourists, unless and until the sending and receiving states execute an agreement defining the status of those forces, including clarifying which state has jurisdiction in which scenarios.[99,100] As just noted, but worth reiterating, troops abroad are subject to the domestic law of the host nation in the absence of a treaty or agreement establishing otherwise. This concerns only the relation between foreign troops and a host government.

The Status of Individuals Captured by Insurgents

The provisions of Common Article 3 bind insurgents.[101,102] If they capture standing government actors or foreign government agents, they must treat them according to the provisions of Common Article 3. Recall that the language of Common Article 3 binds "each Party to the conflict" and not each party to the Convention. The commentary rests the argument for binding insurgent groups on the fact that their leadership claims to represent the country or part of the country.[103] Insurgents should be incentivized to apply the IHL relevant in NIACs because doing otherwise would only prove that they are mere bandits and common criminals rather than legitimate contenders for the seat of government and depository of sovereignty. Additionally, the application of IHL by insurgents may afford them reciprocity from governments that are less than eager to recognize an insurgency and abide by IHL provisions.

Additional Protocol II poses a more difficult question. It provides for signing, ratification, and accession only by states,[104] thereby precluding insurgent groups from acceding to it. This was not necessarily an oversight. Italy supported this view,[105] and it comports with the law of treaties as traditionally understood.[106] However, Belgium put forward a syllogism according to which Additional Protocol II would bind insurgents by way of Common Article 3: "The entire philosophy of the provisions of Common Article 3 is included in the Protocol. It is implicit

that the same applies to the basic sovereign principle that the obligations of the Protocol are equally binding on both Parties to the conflict."[107] Thus, because the purpose of Additional Protocol II was to develop and supplement Common Article 3, the jurisdiction of Common Article 3 is incorporated into Additional Protocol II, and so under this theory, it applies to insurgents on the same basis as it does to states. One scholar has anchored this argument in the principle of treaty law that creates rights and duties for third parties.[108] Additional Protocol II binding insurgents means that standing government actors and foreign government agents captured by insurgents must receive the protections provided by those instruments. Whether a particular insurgency does in fact comply with these aspects of IHL will depend on each individual scenario. Some insurgent groups have the organization to support compliance, while others do not, and some possess an agenda that does not contemplate IHL at all. If an insurgency does comply with its IHL obligations, it will not be able to pass legal judgment on those it captures because it has no sovereign power, only de facto sovereign capacity.

The Status of the Kosovo Protection Forces

To further analyze the category of insurgency, it is useful to look at the role of North Atlantic Treaty Organization's (NATO) peacekeeping forces, the Kosovo Protection Forces (KFOR), in Kosovo between 1998 and 2000.[109,110] The Kosovo Liberation Army (KLA) was an armed ethnic Albanian resistance that developed after President Slobodan Milosevic of the Federal Republic of Yugoslavia (FRY) revoked Kosovo's status as an autonomous region. Milosevic's government in Belgrade responded with a counterinsurgency campaign using ground operations that resulted in the destruction of villages and the killing of civilians suspected of supporting the KLA. The flight of ethnic Albanian refugees from Kosovo into Western Europe and Albania prompted NATO to act. In September 1998, NATO authorized an activation order for a limited air campaign to stop the systemic ethnic violence in Kosovo. A preliminary agreement with Milosevic that would have halted airstrikes in exchange for a reduction of forces in Kosovo, and an agreement to begin negotiating autonomy for Kosovo, never came to fruition. The United Nations (UN) Security Council adopted a resolution that called for the immediate withdrawal of Serbian forces from Kosovo. Within months, Serbian forces mobilized near the Kosovo border, and the violence against civilian Albanians escalated, prompting NATO to begin airstrikes. The airstrikes were conducted without specific UN endorsement. The September resolution referenced Chapter VII of the UN Charter, which permits the Security Council to authorize the use of

military force to maintain international peace and security, but the resolution did not specifically authorize these NATO airstrikes.

Approximately one year later, a peace settlement was prepared by several countries, including the United States and Russia, at the G-8 economic summit. The settlement called for an immediate end to violence, deployment of an international security force, and withdrawal of all Yugoslav military and security forces from Kosovo. The Yugoslav government accepted the terms, and in June 1999 the UN endorsed the KFOR peacekeeping mission under Chapter VII of the UN Charter. Shortly thereafter, KFOR negotiated a demilitarization agreement with the KLA.

However, the violence between ethnic Albanians from Kosovo and Kosovo-Serbs persisted even after KFOR entered. Except, unlike in the preceding months where the violence was largely committed by Serbians against ethnic Albanian civilians, now much of the violence was aimed at ethnic Serbs and committed by returning ethnic Albanian refugees. The peacekeeping mission was sent to maintain security, ensure the removal of Serbian forces from Kosovo, and disarm the KLA, but KFOR now faced violence by the KLA against ethnic Serbs. Despite the demilitarization agreement with the KLA, KFOR was faced with considerable violence. At one point, news outlets reported concerns that an "insurgency outside Kosovo's border in southern Serbia had sprung up," and that KFOR could end up in an "armed conflict" with ethnic Albanians.[111] This comment raises several significant questions, particularly the following: (1) Did an armed conflict exist at the time NATO conducted airstrikes, and if so, what type and between what parties? (2) Did an armed conflict exist when KFOR entered Kosovo, and if so, what type and between what parties? (3) What was KFOR's status? (4) Did the nature of KFOR's mission as a peacekeeping operation factor into that determination? (5) Did the type of armed conflict change when KFOR encountered new violence by the KLA against Serbs? (6) What was the status of individual members of the US military operating within KFOR?

The ICTY found in *Prosecutor v. Limaj* that an armed conflict existed in 1998 between the KLA and the Serbian armed forces of the FRY. Because Kosovo was only a geographic region and not an independent state, the armed conflict was therefore a NIAC. However, for the period during which NATO conducted airstrikes to compel Serbian forces to retreat from Kosovo, the conflict arguably became an IAC because the NATO airstrikes targeted Serbian forces on behalf of ethnic Albanians, meaning that state forces under NATO became engaged against state forces of the FRY. The NATO airstrikes may have been in support of prior UN decisions calling for an immediate cessation to hostilities, but

the airstrikes themselves were not authorized by the UN Security Council and constituted military intervention against the FRY.

When KFOR entered the country in June of 1999, a peace agreement had been negotiated, but because hostilities continued between the parties, the armed conflict technically had not ceased. An armed conflict may persist beyond the cessation of active hostilities because the general cessation may not signify the end of all aggressive actions. This was certainly the case in Kosovo, with ethnic Albanians and Serbs engaged in violence after the June 1999 peace settlement and in the presence of NATO peacekeeping forces. It was at this point that KFOR's mission to protect ethnic Albanians against Serbian forces confronted the reality that armed Albanians were attacking Serbs.

So, presuming an armed conflict continued to exist, how did KFOR's presence affect whether it was an IAC or a NIAC, and what protections would the national forces comprising KFOR receive? The UN has asserted in the past that peacekeeping forces should not be considered combatants or a party to a conflict because they are not engaged in offensive military actions.[112] However, peacekeeping operations have become more complex and have at times required the assertive use of force under Chapter VII, so it is generally accepted that LOAC will apply to a UN operation (1) if there is an armed conflict (IAC or NIAC) in the area of its deployment and (2) if the UN forces actively engage in the conflict outside of limited self-defense, whether in support of one side or neither side.[113] The argument in such a situation is that the peacekeeping forces become a party to the conflict through the use of force. UN policy in 1999 under Secretary General Kofi Annan supported the broader view that LOAC applied to peacekeeping operations, even when the use of force is permitted in self-defense.[114,k]

In this scenario, KFOR had to use force against both the KLA and Serbian armed forces. From this perspective, it could be argued that it was an IAC because it would feature state forces on both sides of the conflict (i.e., KFOR component forces against Serbian armed forces). If that is the case, then KFOR (and US military personnel within KFOR) would be afforded POW status and LOAC applies. On the other hand,

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[k] In practice, this policy has not been consistently applied to situations on the ground. Notably, UN actions in Ivory Coast in 2011 seem to fulfill these criteria, but LOAC was not applied. A UN press release states that UN forces "undertook a military operation to prevent the use of heavy weapons which threaten the civilian population of Abidjan." The operation involved airstrikes, the point of which was to protect civilians and urge former President Gbagbo to step aside and allow the newly elected President Ouattara to take office, which arguably positioned the UN against Gbagbo, removing its status as a neutral party. However, the secretary general maintained that the circumstances did not create an armed conflict by stating, "Let me emphasize that UNOCI [United Nations Operation in Côte d'Ivoire] is not a party to the conflict."[115]

once the NATO airstrikes ceased, the subsequent conflict between the KLA and the Serbian armed forces was a NIAC, and when KFOR entered in June 1999, the residual hostilities were those stemming from this underlying NIAC. It could then be argued that KFOR's presence as peacekeepers did not alter the nature of the underlying conflict because KFOR entered Kosovo to instill peace by taking neither side. Under this argument, it remained a NIAC until the hostilities between the KLA and the Serbian armed forces completely ceased. Still, KFOR's active engagement in the conflict, whether it was an IAC or NIAC when KFOR actively engaged, would invoke LOAC protections, at least on the basis of the UN policy at that time. If it was a NIAC and KFOR's presence did not create an IAC, then KFOR (and US military personnel within KFOR) would be afforded IHL protections of Common Article 3, but perhaps also those of Additional Protocol II. Given that the KLA was able to carry out sustained and concerted military operations, it is likely the armed conflict would meet the higher threshold of a NIAC within the meaning of Additional Protocol II. However, this question was not addressed by the ICTY in *Limaj*, as the court ruled only that there was an armed conflict. The nature of the armed conflict did not matter for consideration of the specific questions presented for the court's determination.

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CHAPTER 6.

BELLIGERENCY

Belligerency is the final category on the resistance continuum. Once a resistance reaches this category, international humanitarian law (IHL) becomes applicable in full to all parties.[1] Belligerency represents a fundamental shift in the type of resistance because both sides must be given roughly equal rights, whereas in all the previous categories, the rights were largely on the side of the standing government. Traditionally, four criteria serve as prerequisites for the recognition of belligerency: (1) the existence within a state of a widespread armed conflict that extends beyond local unrest (e.g., a civil war); (2) occupation by the resistance of a substantial portion of territory of the state; (3) observance of the law of armed conflict (LOAC) by the resistance acting under an identifiable authority; and (4) the existence of circumstances that make it necessary for third-party states to acknowledge the resistance as belligerents;[a] such circumstances may include economic, commercial, or political interests.

The recognition of the resistance as belligerents provides the belligerents substantive protections as if they were a state, but it does not amount to conferring statehood. Belligerencies are those insurgencies that have reached such a level of organization that they look more like a separate government and society than a dissident movement, and the conflict has reached such a level of intensity that it looks more like an interstate war than an internal disruption.[3] Because recognition of the facts of belligerency acknowledges the de facto prosecution of a war between states, recognition grants de facto statehood to the resistance on a temporary basis.[4] The nonstate party to a belligerency is accorded the rights and duties of a state for as long as the conflict and the recognition last.[5] The rationale for this is that because the conflict so closely resembles an interstate war, the laws that govern international conflicts should also govern belligerencies.[6] Therefore, what was formerly an insurgent group (and now a belligerent resistance) is brought into parity with the state,[7] and the two operate on a level plane with roughly equal rights and obligations.[8]

Belligerencies are wars in the factual sense, as distinguished from formal, declared wars. The concept of belligerency recognizes that the factual circumstances of the hostilities so closely resemble a declared war that LOAC should apply.[9] Since the establishment of the Geneva Conventions, a declaration of war is irrelevant when it comes to the

[a] "These conditions are as follows: first, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency."[2]

legal obligation to apply IHL because the Conventions require its application to hostilities that rise to the level of armed conflicts. The threshold for belligerency is high because it would be contrary to the state-centric system of international law to bestow legal personality, rights, and duties to groups revolting against states unless war undoubtedly exists even in the absence of a formal declaration.

The Confederacy during the American Civil War provides a classic example of belligerency.[10] The conflict persisted across a wide geographic expanse throughout both parties' territories. Fronts existed along relatively clear lines of control that divided not just cities and localities but also regions. The Confederacy governed and administrated the South by enacting new laws, passing judgments on cases, and exercising the normal machinery of a sovereign state. The Confederate government raised and equipped a uniformed army that followed a chain of command and abided by the law of war. The United Kingdom recognized the Confederacy as a belligerent party, and not as mere insurgents. This action meant that the British would remain neutral and neither aid the Confederates nor the US government. Such overt recognition caused resentment on the part of US President Abraham Lincoln.[11]

President Lincoln steadfastly refused to accord recognition of belligerency to the Confederacy because it was paramount that the US government retain its complete sovereign right and authority as the lawful government. Lincoln refused to cede any portion of it, such as the authority to choose whether to prosecute those waging war against the federal government or to grant them amnesty. President Lincoln did grant amnesty, but the important fact is that he, as the head of the US government, granted it as a matter of executive discretion rather than its being granted by operation of law. His decision to exercise this power was a gesture that preserved the integrity and authority of the government and his role as the executive, whereas had it been granted solely on the basis of legal mechanics, it would have removed from the government the power to make that decision. Many argue that Lincoln's blockade of the South's ports constituted an implied recognition of belligerency. Yet, the rules of war that governed those hostilities

were found in the Lieber Code[b] and not in the customary law of war. This case demonstrates that, even when belligerency manifests itself so clearly by satisfying factual criteria, standing governments remain reluctant to accord recognition of belligerency to insurgent groups; they refuse to relinquish their full sovereign rights and authority and instead bestow belligerent rights out of considerations of humanity rather than out of a sense of legal obligation.[c] Even though Lincoln did not recognize the Confederacy's independence or its claim to sovereignty over the territory in the southern states, he eventually determined that the Confederate soldiers should be afforded prisoner of war (POW) status, as if they were belligerents.[14,d] This gesture allowed Lincoln to be humanitarian toward troops fighting on behalf of the South without bestowing legitimacy on the Confederate government. Union soldiers were afforded similar status.[16]

As a belligerency progresses, the number of POWs often increases, creating an incentive to recognize the resistance as a belligerency despite the reticence of the standing government to relinquish any authority. It becomes in the common interest of each party to abide by LOAC to facilitate the fair treatment of their soldiers. Another consideration may be the inability to effectively prosecute belligerents. The standing government may "initially consider treating the insurgent prisoners as treasonous common criminals, but . . . 'may feel compelled to apply the laws applicable to international armed conflict because of

[b] The Lieber Code was a set of instructions signed by President Abraham Lincoln to the Union Forces of the United States during the Civil War. The code proscribed how soldiers should conduct themselves in wartime. It described the rights and duties of POWs in the conflict and how to treat spies and saboteurs, among other things.[12]

[c] Consider, for instance, when Malaya offered amnesty to rebels as part of a propaganda campaign to defeat the rebels. Consider also Congo's general amnesty in 1963 to those fighting in Katanga who opposed the central government.[13]

[d] Note that during the war, the Supreme Court recognized the hostilities between the Union and the Confederacy as essentially a war between two states. The Court's description of the conditions for recognizing war is very similar to its description of the conditions for belligerency. "The parties belligerent in a public war are independent nations. But it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other. . . . A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war."[15]

the impracticability of prosecuting…all the insurgents.' "[17,e] Recall that the status of insurgency does trigger limited protections and duties that apply to those involved in the conflict, but the protections and duties are not equivalent to those triggered by belligerency. Insurgency triggers only those protections under Common Article 3 and, if applicable, Additional Protocol II as well as any further protections that the parties may have agreed to implement, whereas belligerency triggers the full panoply of customary IHL (i.e., all elements of LOAC except for treaty obligations that bind only the actions of signatories toward other signatories).

The concepts of insurgency and rebellion have not significantly changed since their inception. The concept of belligerency as such, however, has fallen into disuse and has been modified by the Geneva Conventions and the framework of the United Nations (UN) system. Debate continues regarding whether the doctrine of belligerency continues today. The traditional international law doctrine of belligerency served to internationalize an internal conflict.[19] In effect, the doctrine constituted the host nation government admitting that the insurgent group was strong enough and sufficiently organized to be considered a state adversary and not just an insurgent group, and so the lawful government thereby agreed to wage the war as though it were between two nations.[20] Before 1949, this option is what existed in the law of war governing internal conflicts. Everything below belligerency was the exclusive province of domestic law;[21] the law of war applied only to international conflicts. With the codification of customary IHL and the addition of new protections, the Geneva Conventions introduced laws applicable to internal armed conflicts, in particular Common Article 3.

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[e] In fact, this is precisely the problem the United States has faced with the prosecution of "unlawful enemy combatants." US policy and legislation promulgated under the Bush administration viewed enemy combatants as outside the scope of US and IHL. They were deemed combatants in the sense that they could be targeted, but as "unlawful combatants" they were arguably subject to unique rules that precluded the application of POW status. The difficulties of prosecuting such combatants played out in US federal courts. In *Hamdan v. Rumsfeld*, the Supreme Court invalidated the military tribunal system that had been created to prosecute the enemy combatants and determined that they were entitled to at least Common Article 3 protections.[18] In that case the tribunal system set up exclusively by the executive through the armed forces failed to satisfy Common Article 3 because it was not a regularly constituted tribunal. In the United States, tribunals are regularly constituted by legislation, so to satisfy Common Article 3 would have required a tribunal established by Congress, not by the executive. Some individuals that would have been subject to military detention or prosecution under the Bush administration's military tribunals were prosecuted criminally (e.g., Ahmed Omar Abu Ali and Zacarias Moussaoui).

The doctrine of belligerency has not been used to describe a conflict since the latter half of the nineteenth century.[22,f] There are two main reasons for its disuse: (1) the flexibility offered by Common Article 3; and (2) the requirement of recognition by the host nation. First, Common Article 3 of the Geneva Conventions was a significant post-World War II innovation, designed to provide some protections under international law for victims of internal hostilities.[g] Some scholars believe that Common Article 3 has supplanted the doctrine of belligerency and that it is the only law relating to internal armed conflicts. Scholars have looked at the commentary on the Conventions to assert that the drafters consciously incorporated the doctrine of belligerency into Common Article 3, thereby limiting the article's application to noninternational armed conflicts (NIACs).[24] However, while it was agreed during the drafting that Common Article 3 would apply only to NIACs, the drafters expressed the sentiment that the rules of IACs continue to govern where an internal conflict is more analogous to an IAC (i.e., belligerency).[25] This view supports the idea that belligerency was left intact as a separate concept. The drafters recognized that should the article be triggered only in internal conflicts if the four criteria of belligerency were met as preconditions, it would greatly weaken the point of applying its substantive protections as broadly as possible because it would rarely apply to any internal conflict. At the same time, the threshold could not be so low as to apply to situations involving rioting and common criminality.[26] Additional support for this interpretation can be found in the final records of the meetings, which express a strong sentiment that the rules of IACs continue to govern where internal conflicts are more analogous to IACs.[27,h] Under this view, the Conventions preserve the doctrine to serve its original purpose and extend the limited protections of IHL to those conflicts that are not of an international character and that fall below the threshold for belligerency; otherwise, it would not regulate these conflicts at all.

However, the commentary on the Geneva Conventions also seems to support the opposite conclusion. The proposal that the preconditions

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[f] The debate whether to grant insurgents belligerent status last arose during the Spanish Civil War of 1936–1939.[23]

[g] The text of Common Article 3 appears in the Appendix, Chapter x. The four treaties of the Geneva Conventions detail protections afforded various groups during international armed conflicts (IACs; as opposed to internal conflicts), e.g., wounded and sick soldiers, POWs, and civilians.

[h] Final Record II-B states in pertinent part, "The second Working Party's proposal was contested, on the grounds mainly that it did not take into account the existence of civil wars which resembled international wars sufficiently close to justify, in the general interest, the application to them of the provisions of the Wounded and Sick, Maritime and Prisoners of War Conventions as a whole."

of belligerency are a threshold for applying Common Article 3 was rejected, but the commentary suggests using the elements of belligerency as a means of measuring and determining whether an armed conflict that is not of an international character exists.[28] The commentary states:

> It must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.[29]

In many cases, each of the parties in such an armed conflict will possess a portion of the national territory, and there will often be some sort of front.[i] This description closely mirrors the definition and nearly all the criteria for belligerency. Therefore, it has been argued that belligerency was acknowledged by the drafters of the Conventions and that they intended Common Article 3 to fully replace the doctrine.

Nonetheless, belligerency as a concept is in disuse, but it is not extinct, and practical reasons may exist to acknowledge it, at least in limited circumstances. Belligerency should arguably be acknowledged for civil wars that resemble IACs, even if these circumstances seldom occur. If an armed conflict exists and the insurgents meet the criteria for belligerency, then by definition, the conflict becomes an IAC, and the broad provisions of LOAC apply, not just Common Article 3. If it does not, then it is an internal armed conflict to which Common Article 3 protections and, if applicable, Additional Protocol II protections apply. State practice shows a preference for alternative methods to accomplish the same objective, not a rejection of the traditional doctrine. For instance, Common Article 3 provides that the parties to the conflict can agree to apply all or some of the provisions of the elements of the Conventions. So, if a host nation refuses to recognize a state of belligerency, then the two parties can negotiate which provisions of customary LOAC or the Geneva Conventions will apply in their conflict. This method was essentially used by the United States during the Civil War with the Lieber Code and the application of elements of the law of war.[30]

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[i] Recall that the Geneva Conventions were developed based on preexisting law. For instance, the commentary's notion of belligerency aligns with case law developed nearly 100 years prior. In the *Prize Cases*, 67 U.S. 635, 673-674 (1863), the US Supreme Court found that the American Civil War, as a belligerency was "…no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force – south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power."

The requirement that belligerencies be recognized presents another obstacle to the application of the doctrine. Recognition is a requirement, because the factual circumstances that indicate the existence of a belligerency do not exist in a void. Whether that recognition comes from the standing governments or third-party states affects whether the full protections apply to those in the conflict. States are reluctant to accord recognition to resistance groups because doing so raises them to a nearly equal status with the standing government.[31] The fact that no authority exists for conclusively settling when a belligerency exists is a further criticism of the doctrine, but in general, the prevailing view is that recognition can be implicit and based on government attitudes about the internal situation.[32] Although recognition by third-party states and international organizations may prove influential, without the standing government's recognition of the insurgents as belligerents, the insurgent group will not be afforded the full LOAC protections.[j]

The disuse of belligerency suggests that states may prefer to recognize resistance movements as insurgencies rather than as belligerencies, and the UN processes that exist allow insurgency (as a concept) to persistently exist below belligerency despite satisfying the factual criteria.[34] The UN system provides options for addressing internal conflicts and the attendant legal protections through three separate chapters of the UN Charter.

Article 35 in Chapter VI of the UN Charter permits any member of the UN to bring before the Security Council any dispute it believes will endanger international peace and security. The Security Council may then investigate the situation and recommend appropriate procedures or methods of adjustment. Actions under Chapter VI, dealing with peaceful settlement of disputes, are commonly known as peacekeeping operations undertaken by the authority of a UN Security Council mandate, and they primarily consist of observer missions tasked with ensuring that IHL is followed. Those mandates need not expressly state that an action falls under Chapter VI authority, and peacekeeping is distinct from peace enforcement operations carried out under Chapter VII authority. Under Chapter VII of the charter, the Security Council has exclusive authority to determine whether a threat to the peace, a breach of the peace, or an act of aggression exists and to take action to mitigate that threat, including the use of armed force. Chapter VIII authorizes regional arrangements or agencies to maintain

[j] Lootsteen notes that "if the *de jure* government does not recognize the insurgency as a belligerency, either tacitly or explicitly, all other forms of recognition would not in fact serve to bestow upon the insurgents any protections to which they would be entitled under the laws applicable during international conflicts. The cases in which an incumbent administration would agree to bestow such safeguards on persons they naturally view as traitorous citizens will be very rare."[33]

international peace and security first by peaceful means and then by enforcement actions subject to authorization by the Security Council. The processes under each chapter require the adoption of resolutions, and each resolution provides an opportunity to articulate the level of IHL that applies between the parties to the conflict.

Modern insurgencies that reach the level of belligerency will rarely receive recognition of belligerency in the old sense (i.e., an official statement, such as by Great Britain during the American Civil War). Instead, the status of the parties to the conflict will more likely be negotiated under the provision of Common Article 3 that encourages parties to a NIAC to agree to apply more protections than required by Common Article 3, so as to keep the conflict a NIAC. Or states will use the mandates and resolutions issued under Chapter VI and Chapter VII of the UN Charter to define the conflict as internal, but once actions are taken under Chapter VII, the conflict is arguably internationalized.

THE IMPLICATIONS FOR PARTICIPANTS

Once a conflict is internationalized through the doctrine of belligerency, LOAC, which includes Geneva Convention protections, applies to each party to the conflict.[35] Note that Common Article 2 requires that the parties to the conflict be High Contracting Parties for the Conventions to apply.[36] As newly recognized de facto states, belligerent groups will most often not be signatories. Further, Common Article 2 also provides that the Conventions will apply between High Contracting Parties, meaning that the Conventions should not bind parties engaged in civil war. Yet, the third paragraph of Common Article 2 also states that "although one of the Powers in the conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

This third paragraph of Common Article 2 distinguishes between the said power as the party to the conflict that has not signed the Geneva Conventions and the powers that are parties to the conflict and that have signed the Geneva Conventions. Accordingly, the phrase "their mutual relations" pertains to relations between High Contracting Parties, not relations involving a resistance that is not a High Contracting Party but that has been recognized as a belligerent. So, that one party to an international conflict is not a High Contracting Party cannot be invoked as justification for other High Contracting Parties to violate the Conventions' provisions in the context of their interactions with other High Contracting Parties. The Conventions can apply

between the High Contracting Parties and the de facto state party (i.e., the belligerent resistance) if the de facto state agrees to and in fact does abide by the provisions in the Geneva Conventions. Therefore, only the customary rules of LOAC will bind the resistance and the standing government in the hostilities unless and until the resistance applies the Conventions' provisions. The customary law of IAC is extensive; many protections come into play for both sides of the conflict, which provide protections for the belligerency's members and supporters.

THE STATUS OF STANDING GOVERNMENT PERSONNEL AND FOREIGN TROOPS SUPPORTING THEM

After recognition of belligerency, little changes regarding the standing government and the supporting foreign forces. Under customary IHL during IACs,[37] lawfully constituted armed forces of states continue to receive combatant status and privileges, POW status with basic rights and privileges, trial before conviction or sentencing when caught conducting espionage, and fundamental guarantees when placed *hors de combat*. These parties are also obligated to continue to distinguish between combatants and civilians, as well as between civilian objects and military objectives, and afford fundamental guarantees to those placed *hors de combat*.

New obligations arise in this context because members of the armed resistance have attained the status of combatants, have attained the status of POWs, and if caught while conducting espionage are owed the due process of a trial before being convicted or sentenced. In addition, it becomes clearer that the belligerents are obligated to abide by these customary laws of IAC. While it is disputed whether the standing government retains the right to prosecute belligerents for crimes against the state, it may certainly now prosecute them for violations of the law of IAC. If and when a belligerent group agrees to and does apply the provisions of the Geneva Conventions, then the standing government will reciprocally be obligated to apply the Conventions in full in their interactions with the insurgent group.

The Belligerents

Under customary IHL, combatant status applies only to members of the armed forces of a party to an IAC.[38] Because the belligerent group is a de facto state for purposes of the conflict, the members of its armed forces receive combatant status.[39] Therefore, they have the status

of privileged belligerents and receive the combatant's privilege,[40,k] as well as POW status upon capture and detention, provided that they distinguish themselves from the civilian population during attacks and in acts preparatory to attacks.[41,l] Recall that being a combatant also makes one a legitimate target during hostilities.[43] Combatant status provides that certain actions that would be unlawful if committed outside of an IAC, such as assault, destruction of property, or homicide, are lawful when committed during an IAC.[44] Forces fighting against belligerents must also distinguish between civilian objects and military objectives, although this rule simply carries over from noninternational conflicts.[45] Belligerents who engage in espionage do not receive POW status but are owed a trial before being convicted or sentenced.[46] Once a privileged belligerent is detained, numerous duties become incumbent on the host nation's detaining authority regarding the treatment of POWs.[47] Such duties do not necessarily arise if the detainee is an unprivileged belligerent. And, when placed *hors de combat*, belligerents receive fundamental guarantees.[48]

The belligerent group may agree to apply the Geneva Conventions, or provisions thereof, but it must also meet the second requirement of actually applying those provisions for those provisions to apply reciprocally to the standing government and any foreign forces supporting the standing government.[49]

Protections for those Supporting Belligerents

To receive combatant status and POW status under customary IHL, an individual must be part of the armed forces of a party to the conflict or a member of a militia or volunteer corps complying with the four conditions set down in Article 4 of the Third Geneva Convention.[50] Foreign troops clandestinely assisting and supporting belligerent groups are not members of the armed forces of a party to the conflict; they are members of the armed forces of a state outside the conflict. In such a circumstance, the sending state remains outside the conflict, and the troops it sends that are not overtly participating in hostilities do not receive combatant status or POW protection because the state is not a party to the conflict.

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[k] The ICRC explains that combatant status exists only in IACs.

[l] In its Customary International Humanitarian Law Database, the ICRC explains that regular armed forces must comply with all four criteria set out in Article 4 of the Third Geneva Convention but that a full uniform is not required so long as the service member is distinguishable as a member of the armed forces at a distance. The ICRC further explains that where armed combatants cannot distinguish themselves while engaged in attacks and military operations, they will remain combatants provided they carry their arms openly. The United States opposes this rule.[42]

If foreign troops are acting overtly, such as during the North Atlantic Treaty Organization's (NATO) actions in Libya, that support internationalizes the conflict.[51,m] Internationalizing a conflict by this method, instead of through recognition of belligerency, triggers the Geneva Conventions, the Additional Protocols, and the customary laws of IHL in full, contingent on the parties to the conflict being High Contracting Parties and not having made reservations to the agreements. In this scenario, it was necessary for NATO and the Libyan rebels to side with one another for IAC IHL to apply to the rebels.[52] Otherwise, the IAC IHL would apply between Libya and NATO only, and the conflict between Libya and the rebels would remain a NIAC. Note that in this situation, the resistance remained an insurgency, the term *belligerency* could not be invoked to internationalize the conflict, and the insurgents are not considered a de facto state. It has been suggested that the standard for siding with a party to a conflict is either formal or informal affiliation through a joint organization or pursuit of the same goals.[53] Affiliation between belligerents and lawful states is unlikely to occur because the insurgent group is a nascent de facto state only and has not had opportunity to enter bilateral or multilateral relations, which the provisional status of its statehood may not permit regardless. Accordingly, foreign forces almost always support insurgent groups because they share operational ends, and not because of a binding agreement. Foreign troops engaging in unconventional warfare (UW) will therefore most likely act clandestinely, which affects how they receive the privileges of combatant status.

Foreign troops may be able to receive these protections on the basis of their efforts on behalf of the de facto state party to the conflict, because support on behalf of a party to an IAC can mean belonging to that party and, therefore, being entitled to IAC protections.[54,n] There remain, however, the obstacles of responsible authority and command and notification. Military manuals and ICRC scholarship indicate that the armed forces of a party include all organized armed groups under a command responsible to that party for the conduct of its subordinates.[55] It is unlikely that foreign troops operating covertly or clandestinely will consider themselves responsible to the insurgent group they are supporting. It is US policy, for instance, to relinquish operational command and control to another state or international organization only and very rarely in instances beyond isolated missions.[56]

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[m] The ICRC states that "foreign military intervention, on the side of either Party to a conflict, transforms a non-international conflict into an international conflict."

[n] Pictet explains that to belong to a party to the conflict does not require formal statements but only a de facto relationship based on for whose advantage operations are carried out.

Furthermore, regular armed forces of a state are presumed to satisfy all the constitutive requirements for combatant status.[57] That foreign troops, like those of the United States, would rarely ever subordinate their own command and control to other states (much less insurgent groups) and that regularly constituted armed forces per se satisfy the criteria for combatants favors categorizing foreign troops as receiving POW status when supporting insurgent groups that qualify as belligerents even when they do not subordinate themselves to the insurgent group.

Traditional international law required parties to an armed conflict to notify the other party or parties of those participating on their behalf.[58] Notification would defeat the purposes of conducting covert or clandestine operations on behalf of a state not party to the armed conflict. However, unlike subordination to responsible command and authority, notification is not a constitutive element of a participant's status, so it is not an element to be satisfied to qualify for combatant status.[59,o]

The preceding discussion assumed that the standing government discovered that the captured personnel were foreign troops and treated them according to that status. However, the troops' revelation that they are part of a foreign military defeats the purposes of covert and clandestine operations. Should the standing government discover that the troops are conducting covert or clandestine operations, this could support the argument that armed conflict exists between it and the state sending the foreign troops.[60] If the standing government does not discover this fact, foreign troops supporting the belligerents will be treated equally with the belligerents. Therefore, foreign troops supporting belligerents, as combatants, are insulated from prosecution for their acts taken in carrying out the conflict as long as they comply with customary elements of LOAC. If captured, these troops will be entitled to POW status, provided that they have distinguished themselves from the civilian population while in operations preparing for and carrying out attacks.[61] Those who are caught conducting espionage will be owed a trial before conviction or sentencing.[62]

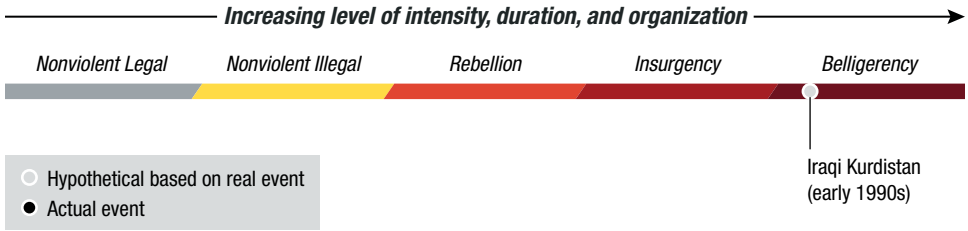
In summary, customary IHL provides the personnel involved in belligerency with combatant status, POW status, protection from summary execution for spying, and fundamental guarantees while detained. These protections and the obligation to provide and respect them apply to both sides to the conflict. Foreign forces that support belligerent groups face the decision of retaining identification as foreign service members

[o] The ICRC states: "While notification is not constitutive of the status of the units concerned, it does serve to avoid confusion and thus enhances respect for the principle of distinction."

and maintaining clear separation between the belligerent group and the foreign forces, or joining the ranks of the belligerent group completely. The former will guarantee Geneva Convention protections but will also implicate the sending state in an IAC, which may be politically and strategically undesirable. The latter avoids such an entanglement while still providing protections of at least customary LOAC and potentially Geneva Convention protections if the belligerency recognizes and in fact applies the provisions to their conduct.

The example of Kurdistan in the late 1990s provides the opportunity to analyze the elements of belligerency, as well as how UN processes change the use of belligerency as a concept.

BELLIGERENCY IN CONTEXT: IRAQI KURDISTAN



Although few examples of recognized belligerencies existed in the twentieth and twenty-first centuries, there have been conflicts that might rise to the level of belligerency even if not recognized as such. Consider the Iraq-Kurdistan conflict in the early 1990s. To qualify as belligerency under the traditional doctrine, this conflict would have to satisfy the following criteria: the conflict is of general, as opposed to local, character; the resistance occupies and administers a substantial portion of national territory; the resistance observes and complies with the rules of war through organized armed forces under a responsible command; and circumstances require outside states to define their attitude toward the resistance.[63]

In the spring of 1991, the Kurds of Iraq revolted against Saddam Hussein by using their military, the peshmerga, only to be brutally suppressed by severe retaliation, with helicopter gunships supporting Iraqi ground forces. This fact exemplifies how Iraq's conflict with the Kurds was of a general character instead of a local character because it featured broad engagement between two armed forces for control across a region, rather than clashes vying for tenuous control of individual municipalities. To protect the Iraqi Kurds fleeing to the north, the United Kingdom, the United States, and France imposed a no-fly zone over northern Iraq, allowing a majority of Kurds to return home and the peshmerga to engage Iraqi ground forces across the region. Although

this no-fly zone, integral to the peshmerga's ability to engage Saddam's forces, was instituted by third-party states, it is unclear whether this fact alone would prevent the conflict from qualifying for belligerency. Strong evidence for finding a belligerency lies in the Iraqi blockade of the Kurdish region.[64] Blockades are permissible under international law only in times of war, to prevent one's opponent from receiving provisions and supplies to further prosecute the conflict.[65] Thus, like during the American Civil War, the use of a blockade strongly indicates the existence of a general conflict approaching, if not already constituting, a belligerency.[66]

Kurdistan offers a classic example of a resistance movement occupying and administering a significant portion of territory. In October 1991, the Iraqi government completely pulled out of northern Iraq, leaving the Kurds to govern over ten percent of Iraq's territory and millions of people.[67,68] The Kurds quickly instituted their own civil government to provide public services and an economic infrastructure, and they held elections in 1992. Compare the Kurdish example with how Syrian insurgents today struggle to govern any portion of Syrian territory. Compare it also with the Confederacy in the American Civil War: both groups elected officials to serve in official offices, raised and supported armies, maintained an economy, and engaged in foreign relations.

Regarding the observance of the rules of war by an organized armed force under responsible command, the peshmerga largely satisfied this criterion. They have constituted an organized and disciplined military force since the 1970s,[69] and in 1991 they carried out the revolt armed with small arms and rocket-propelled grenades.[70] During the ensuing years, they rebuffed Iraqi attempts to retake cities and towns in Iraqi Kurdistan. They are uniformed soldiers under responsible command, so that soldiers are responsible to commanders and commanders are responsible for soldiers' actions. Their compliance with the rules of war can be questioned,[p] but if limited deviations from the rules of war prevent a conflict from becoming a belligerency, then Sherman's March, Camp Sumter, and Camp Douglas would have prevented the American Civil War from qualifying as a belligerency, and the Supreme Court of the United States found that it was a belligerency. Systematic violations could result in a different conclusion, however.

Finally, the Iraq-Kurdistan conflict in the 1990's certainly required other states to define their attitudes to the conflict. Turkey had to respond to an influx of fleeing Kurdish refugees; Iran later supported

[p] For instance, one reporter wrote of his experience witnessing the peshmerga summarily execute dozens of Iraqi soldiers who had surrendered and placed themselves *hors de combat*, constituting a clear violation of the law of war even under Common Article 3.[71]

the Patriotic Union of Kurdistan (PUK); and the coalition of the United Kingdom, United States, and France consistently enforced the safe haven and no-fly zone in northern Iraq while the UN provided humanitarian relief.[72] The most common traditional factors that prompt a state to respond and define its position regarding a conflict internal to another state are commercial interests and the protection of its nationals.[73] After the scourge of World War II, the UN Charter introduced a new overriding factor as well as a new method for states to define their attitudes to conflicts.

The Role of the United Nations System

In response to Iraq's brutal suppression of the Kurdish revolt, the UN Security Council, at the prompting of France and Turkey, adopted Resolution 688, condemning Iraq's actions and demanding that it cease them immediately.[74] The UN further agreed to institute a safe haven in northern Iraq and provided humanitarian aid in that region.[75] This represents the process envisioned under the UN Charter. The charter prohibits states from using force and encourages states to first attempt a peaceful settlement. If those attempts fail, states may then appeal to the Security Council to help resolve the situation if it potentially threatens international peace and security. States not involved in the conflict may also alert the Security Council of a potential threat to international peace and security. It is the Security Council that ultimately decides whether a threat exists and determines the best way to address the threat, under Chapters VI, VII, or VIII. France and Turkey elected to bring the situation to the attention of the Security Council instead of taking unilateral or bilateral actions. The United Kingdom and the United States took the opposite approach.

Separate from this UN process, the United States and the United Kingdom demanded that Iraq remove its military from the area and enforced a no-fly zone over the region until 2003.[76] The unilateral use of force to create the no-fly zone has been argued to go against the UN Charter, but it was defended by the United States and the United Kingdom as being justified under humanitarian necessity. The validity of that justification under international law is a separate question that remains highly debated. The Security Council can authorize the imposition of a no-fly zone, or other uses of force, but it may do so only under Article 42 in the exercise of Chapter VII authority. While explicit reference to Chapter VII or Article 42 in a resolution is not required, it has led to more clarity and less debate about the legality of actions taken on the basis of a resolution. For instance, Resolution 688 was not clear as to the basis for its authority (i.e., it did not state whether it

was passed under Chapter VI or Chapter VII), and it does not mention any type of use of force as a permissible means to accomplish its goals, much less no-fly zones. Accordingly, it is commonly argued that it could not have provided the legal basis for the UK and US no-fly zone.

Contrast this with Resolution 1973 regarding Libya in 2011. This resolution expressly states that the Security Council passed it acting under Chapter VII authority, and it explicitly called for the implementation of a no-fly zone. That no-fly zone therefore stands as undoubtedly lawful under international law, whereas the legality of the no-fly zone in Iraq throughout the 1990's remained debated. Consider also Resolution 678, which authorized states to use all necessary means to bring Iraq into compliance with previous resolutions requiring Iraq to remove its armed forces from Kuwait. Operation Desert Storm, executed on the basis of Resolution 678, therefore stands on more solid international legal ground because the resolution made clear that all necessary means were permissible, including the use of force.

Hypothetical: An American pilot enforcing the no-fly zone is required to eject and lands on the Iraqi side of the thirty-sixth parallel.

Suppose a US pilot who is enforcing the no-fly zone is forced to eject during a flight and parachutes to safety on the Iraqi side of the line. It is reasonable to assume that if the pilot landed on the Kurdish side, he would be safe because the no-fly zone benefits the Kurds, and so they would likely not mistreat US personnel enforcing that zone. In fact, it is known that the US special operations forces and the peshmerga worked together against Iraqi armed forces.[77] Accordingly, the risk lies in the soldier descending to the Iraqi side of the line, and the question is what protections would he or she receive? As discussed, this depends on whether there is an armed conflict, and if there is, what type of conflict it is.

The no-fly zone began because of violence between Iraq and the Kurds. On the basis of what was discussed in preceding sections in this study, that violence qualified as an armed conflict because the Kurds' organization was so high as to be state-like, and the intensity of the violence led to the armed forces of Iraq and the military wing of the Kurdish government engaging openly. As a conflict, it was at least an insurgency, a NIAC. Accordingly, at least Common Article 3 protections applied, as well as any agreements reached between Iraq and the Kurds. But could fuller protections apply?

Consider the argument previously made for classifying this conflict under belligerency. The facts meet all the objective criteria, and the blockade by Iraq can qualify as implied recognition of belligerency, like Lincoln's blockade did during the American Civil War. Such

recognition would trigger customary IHL but not the full terms of the Geneva Conventions unless and until the Kurds accept and abide by the Conventions. The modern disuse of this doctrine, however, requires asking whether the conflict could be internationalized by some other legal mechanism. Two possibilities should be considered. One derives from the UN system, and the other comes out of the ICRC commentary to the Geneva Conventions interpretation of what constitutes an IAC.

The UN system has granted the Security Council authority to determine whether a situation constitutes a threat to international peace and security.[78] Once a situation is found to be a threat, the Security Council has the authority to pass resolutions either stating recommendations for resolving the situation or calling for action by states to resolve the situation. Resolutions that make recommendations are adopted under Chapter VI and do not have legally binding effect.[79] They essentially form a statement defining the attitudes of outside states toward the situation, so the effect of those resolutions is not to internationalize the conflict because recognition by outside states (i.e., not the host nation) defines rights and duties as between the resistance and those outside states only. To invoke full IHL requires recognition by the host nation because only that recognition creates rights and duties between the parties to the conflict, the resistance and the host nation. This can arguably take place through enforcement measures adopted under Chapter VII that have legally binding effect[80] because the "members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the . . . Charter."[81] Accordingly, the host nation is bound to accept the decision that the armed resistance threatens international peace and security. The circumstances that form the basis for the Security Council to find a threat to international peace and security vary, and they do not always satisfy the objective criteria for belligerency. But, if the circumstances relied on and cited by the Security Council for finding a threat to international peace and security meet the threshold for belligerency, one may argue that accepting that finding constitutes recognition by the host nation of belligerency. That would internationalize the armed conflict and trigger the international humanitarian law of IACs because the host nation has then recognized the resistance as a belligerency.

Alternatively, the introduction of another state into a NIAC will internationalize the conflict and trigger the panoply of IHL.[82] Whether an outside state enters an internal conflict with or without authority from a UN Security Council resolution, the ICRC commentary on Common Article 2 suggests that because another state entered the conflict with its armed forces, the conflict becomes international.[83] To provide greater protections, the drafters chose the term *armed conflict* over the

term *war*, and in line with that decision, the commentary makes clear that "any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict. . . . It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of on Power to have captured adversaries falling with the scope of Article 4."[84] Accordingly, the overt use and presence of state armed forces, whatever the underlying reason or justification, in a dispute with another state will require application of LOAC of IAC as between those states' armed forces. Whether the law of IAC will apply between the host nation and the resistance movement will depend on whether the members of the resistance movement can qualify under Article 4.[85]

Consequently, the pilot, as a US armed forces member, can receive full protections under LOAC because the use of US air forces to enforce a no-fly zone over northern Iraq constitutes the use of force in a dispute between states, and the use of state armed forces in a dispute between states qualifies as an IAC regardless of how much actual fighting has taken place. Resolution 688 would not support the full application of LOAC because it was not passed under Chapter VII, was not binding on Iraq and, therefore, cannot force the host nation to recognize a belligerency. Different conclusions might be reached if the pilot was not part of an overt use of the US armed forces and was instead part of clandestine US operations, or if Resolution 688 had been passed under Chapter VII and bound Iraq to recognize the Kurds as belligerents. Recall that if some deficiency in triggering full LOAC arises, the pilot must receive at least Common Article 3 protections because the conflict between the Kurds and Iraq certainly qualifies as a NIAC, an insurgency.

ENDNOTES

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2 Rosalyn Higgins, "International Law and Civil Conflict," in *The International Regulation of Civil Wars*, ed. Evan Luard (New York: New York University Press, 1972), 170–171; Hersh Lauterpacht, *Recognition in International Law* (Cambridge, UK: Cambridge University Press, 1948), 176.

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CHAPTER 7.

DOMESTIC LEGAL CONSTRAINTS

Much of the analysis of persons in resistance thus far has centered on international legal thresholds and the application of relevant international law. Separate domestic legal considerations also exist apart from those under international law. These considerations determine the legality under US law of a given activity when US armed forces are introduced into or initiate hostilities abroad. It is important to remember that an activity can be lawful under domestic law but impermissible under international law. A prime example of this phenomenon is a presidentially authorized covert action that places armed forces in a denied area to conduct activities that the United States does not intend to acknowledge. The conduct of these activities inside the territory of a state without its consent would *prima facie* violate that state's sovereign rights according to international law and would, therefore, be presumptively unlawful according to international law. Exceptions would be actions that fall within Article 51 of the UN Charter authorizing countries' to use force in self-defense in the case of an armed attack, or Article 42 authorizing force by member states to restore international peace and security. Regardless, from a US perspective, the activity is legal and comports with statutory requirements imposed on the executive by Congress. An activity also can be unlawful under domestic law but lawful and supported under international law. For instance, a United Nations (UN) Security Council resolution can serve as authorization under international law for actions of foreign countries inside another sovereign nation, but congressional authorization under domestic law may be required depending on the type of action the resolution sanctions.[a] Consider US involvement in Libya in 2011 under UN Security Council Resolution 1973: the resolution made US involvement internationally lawful, but many argued that US law required further steps for it to be sanctioned domestically. The purpose of this chapter is to summarize some of the statutory sources for authorizing military action under US law.

The fundamental points to understand about domestic authorization for certain activities are the following: (1) there may be different substantive constraints on activities depending on the source of authorization; (2) how an activity is authorized may affect the legal status of personnel; and (3) the authorization may represent a policy position with regard to a resistance and the United States' recognition of that resistance.

[a] Note that UN resolutions are not a prerequisite to action under US law but are often sought as a matter of policy before acting so that US actions are deemed legitimate by UN states. In the case of Libya in 2011, overt US involvement did not occur until after the UN Security Council voted to authorize military action, including airstrikes and a no-fly zone.

The authority to enter hostilities, commonly referred to as war powers, are divided between Congress and the president. Under the US Constitution, Congress has the power to declare war and fund the military, and the president is the commander in chief.[1,b] As commander in chief, the president is authorized to use the armed forces to respond to attacks against the United States. However, whether the president, given this authority, may send the armed forces into hostilities abroad without first obtaining congressional authorization is a controversial issue. While the president may act in self-defense of the nation without such authorization, longer engagements that extend beyond addressing an immediate threat arguably require congressional authorization. The Korean and Vietnam Wars are examples of prolonged, undeclared wars that, even with congressional approval, arguably came to represent examples of the war powers shifting in an unbalanced way toward the executive. In response, Congress passed legislation to ensure that the legislative branch would have more oversight in decisions that may concern the United States becoming involved in war.

THE WAR POWERS RESOLUTION

The Constitution divides authority over the armed forces between the legislative and executive branches, but it does not clarify the precise interrelationship between congressional and presidential authorities regarding war powers. The executive has authority to defend the nation when attacked by outsiders or threatened by an insurrection. However, there is much debate over the extent of executive authority to use force absent an attack on US personnel or property. There is also debate concerning how long the executive authority to use force persists after an attack or insurrection. In addition, the extent to which Congress possesses the authority to limit the executive's actions is not entirely clear. One argument asserts that the executive possesses inherent authority to use force outside of self-defense that Congress cannot curtail. Other arguments maintain that any use of force not directly connected to self-defense can be only temporary until approved by Congress or cannot be undertaken without express approval by Congress. At the center of this debate are the 1973 War Powers Resolution and, more recently, the 2001 Authorization for the Use of Military Force.

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[b] Article I, § 8, states that Congress shall have the power to "provide for the common Defence and general Welfare of the United States" and to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," as well as "provide for organizing, arming, and disciplining, the Militia." Article II, § 2, states that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

In 1973, Congress passed the War Powers Resolution (WPR, also commonly referred to as the "War Powers Act") in an effort to restrict the president's authority to introduce US forces into hostilities abroad without congressional approval.[2,c] The WPR permits the president to introduce US forces into hostilities or imminent hostilities only pursuant to a declaration of war, specific statutory authorization, or a national emergency created by an attack on the United States, including attacks on US armed forces as well as US territory, territories, and possessions.[4] The president is required to consult with Congress in every possible instance before sending US troops into actual or imminent hostilities. Furthermore, the president is to regularly consult with Congress until US troops have been removed or are no longer engaged in hostilities.[5]

The statute contains a reporting requirement when the president sends armed forces (1) into hostilities or situations where circumstances clearly indicate imminent involvement in hostilities; (2) on the territory, airspace, or waters of a foreign nation while equipped for combat, except when it relates solely to the supply, replacement, repair, or training of combat forces; and (3) in numbers that substantially increase the number of US armed forces equipped for combat already located in a foreign country.[6,d] Once a report is filed or required to be filed, a clock begins to run that requires the president to terminate any use of armed forces within sixty days unless Congress (1) has declared war or has enacted a specific authorization for the particular use of force; (2) has extended the sixty-day period by law; or (3) is physically unable to meet because of an armed attack on the United States.[8] Congress also reserved for itself the power to terminate the engagement of US forces abroad by passing a concurrent resolution.[e]

Note that Congress intended for the reporting requirement to apply to situations that fall short of actual armed conflict. The House report on the bill states that "the word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also

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[c] The WPR was passed over the veto of President Nixon, and every president since then has interpreted the legislation as an unconstitutional infringement on the president's authority as commander in chief.[3]

[d] The reports are submitted to the Speaker of the House and the president *pro tempore* of the Senate and must detail the circumstances necessitating the introduction of armed forces abroad, the constitutional and legislative basis for the action, and the estimated scope and duration of the hostilities.[7]

[e] The constitutionality of 50 U.S.C. § 1544 has been called into question by *INS v. Chadha*, 462 U.S. 919 (1983). That case struck down a statutory provision that reserved to Congress the power to overrule a decision made by the executive branch under authority delegated to it by the Congress.

encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict."[9] The report further indicates that Congress anticipated the requirement applying to unconventional warfare (UW) activities, as it states that "a report would be required any time combat military forces were sent to another nation to alter or preserve the existing political status quo or to make the U.S. presence felt."[10,f]

The WPR makes clear that the authority to introduce armed forces into hostilities cannot be inferred from any provision of law or treaty unless it is "intended to constitute specific statutory authorization within the meaning of" the resolution.[12] This particular language was inserted to ensure that congressional authorization for the introduction of troops in a specific circumstance could not be sidestepped by a military appropriations act or treaty. The Vietnam War influenced the creation of the WPR as Congress was concerned about the use of resolutions, such as the Gulf of Tonkin Resolution, to justify extended hostilities with no sunset clause.[g] Despite congressional authorization of the Gulf of Tonkin Resolution, there was a perception that the executive was asserting more authority over the decision to send armed forces abroad than was intended under the Constitution and that, left unchecked, such authority would lead to US engagement in future hostilities without clear objectives or definitive time lines.

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[f] Moreover, 50 U.S.C. § 1547(c) states that "the 'introduction of United States Armed Forces' includes the assignment of member [*sic*] of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities." The Senate Foreign Relations Committee commented in its report that the purpose of this section was "to prevent secret, unauthorized military support activities and to prevent a repetition of many of the most controversial and regrettable actions in Indochina. The ever deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. 'advisers' to accompany South Vietnamese units on combat patrols; and in Laos, secretly and without congressional authorization, U.S. 'advisers' were deeply engaged in the war in northern Laos."[11]

[g] The Gulf of Tonkin Resolution was a joint resolution generally regarded as authorization for the extended US engagement in Vietnam. The resolution was passed on the basis of Vietnamese attacks against US naval vessels "in violation of the principles of the Charter of the United Nations and of international law" and permitted the president, "as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." The expiration language was fairly open-ended, stating that it would terminate "when the President shall determine that the peace and security of the area is reasonably assured or . . . by concurrent resolution of the Congress."[13]

The War Powers Resolution and Presidential Compliance

Opponents of the WPR argue that Congress, through its funding power, always has the authority to terminate US military actions because it can simply refuse to authorize the expenditures required to maintain military engagements. Every president has taken the position that the WPR infringes on the president's inherent authority as commander in chief to send and command troops abroad without interference by Congress. During his first campaign, President Barack Obama stated that the "President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation," which comports with the general thrust of the WPR.[14] However, in late spring 2011, he sent US armed forces to Libya. In response to this action, Speaker of the House Boehner wrote the White House a letter advising that the sixty-day limit was approaching, as Congress had not authorized the actions. The White House responded with a thirty-eight-page report laying out the president's argument that he did not need to comply with the WPR because the activities of US troops in Libya did not rise to the level of hostilities as contemplated by the act.[h] The president further argued that UN Security Council Resolution 1973 concerning the humanitarian threat posed by Muammar Qadhafi provided authority for his actions and ensured international legitimacy for the way the process was managed by the United States.[16] While not dismissing the relevance of the WPR outright, he ultimately referred back to his executive powers and said that the actions in Libya "are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct US foreign relations and as Commander in Chief and Chief Executive."[17]

The president's reference to an authorization in international law (the UN Security Council resolution) as a way of justifying his actions under domestic law is an interesting approach that highlights the interplay between international and domestic law within the US legal system. The international authorization in this case may have made the deployment of US military to Libya less controversial politically, but it was insufficient as domestic authorization in the eyes of Congress. This is one of many examples in which the issue of presidential authority to

[h] The Office of Legal Counsel memorandum concluded that the president could rely on the constitutional power to safeguard the national interest because "at least two national interests that the President reasonably determined were at stake here—preserving regional stability and supporting the United Nations Security Council credibility and authority to order the use of military force" and that the operations in Libya do not amount to a war "in the constitutional sense necessitating congressional approval under the Declaration of War Clause."[15]

deploy forces without obtaining congressional authorization has been raised. Congress has even challenged presidential actions in court. In 1999, President Clinton deployed US forces to the Balkans under UN Security Council resolutions and alongside North Atlantic Treaty Organization (NATO) member states. After the sixty-day time limit passed without congressional authorization to continue the military actions, members of Congress argued that the president's actions violated the WPR. Some members of Congress brought suit in federal court against President Clinton, but the courts found that the members of Congress lacked legal standing to bring the case, meaning that there was no decision on the merits of whether the WPR was violated.[18]

Another example of a dispute between Congress and the executive on the use of the WPR is US intervention in Lebanon in the early 1980s. In 1983, the United States sent Marines to Lebanon as part of a multinational peacekeeping force (MNF) with Italy, France, and the United Kingdom to help bring about the withdrawal of foreign troops from Lebanon. The involvement was authorized under the WPR.[19,i] Congress determined that the entry of US forces into hostilities or imminent hostilities in accordance with the WPR occurred on August 29, 1983, when Marines came under mortar and rocket fire by militia forces, resulting in two deaths and fourteen casualties.[20] President Ronald Reagan made several notable reservations in his signing statement accompanying the resolution.[j] First, he noted that the sixty-day time constraint for authorizing or extending the deployment of US forces abroad was "arbitrary and inflexible" and created "unwise limitations on presidential authority to deploy United States forces in the interests of . . . United States national security."[21] Second, regarding whether the mortar attacks reached the threshold of hostilities that invoke the WPR and trigger the sixty-day notification window, he remarked that "the initiation of isolated or infrequent acts of violence against [US forces] does not necessarily constitute actual or imminent involvement in hostilities."[22] President Reagan also saw the WPR as an encroachment on

[i] Marines had already been deployed to Lebanon for peacekeeping efforts. Reagan filed three reports with Congress under the original resolution, but he did not reference 50 U.S.C. § 1543(a)(1), which would have triggered the sixty-day time limit. The October resolution was a second one initiated after the Marines came under increased fire (the mortar attack) and Congress called for their removal, out of concern that US soldiers would be exposed to additional attacks and become involved in direct hostilities. This fear was realized on October 23, 1983, when US and French barracks in Beirut were bombed, resulting in the death of 241 US soldiers. The October 1983 resolution was the first time that a president signed legislation invoking the WPR.

[j] Presidents use signing statements to draw attention to language that they disagree with in particular laws. Even if presidents assert that certain provisions are unconstitutional, signing statements do not have the force of law and do not modify the language of the statute.

his authority as commander in chief and asserted that he would not cede any such authority—in other words, he would not withdraw troops if Congress failed to authorize an extension.

The same fundamental debate continues today within the context of the war on terrorism, except this context includes a statutory authorization that satisfies the WPR—the 2001 Authorization for Use of Military Force (AUMF). Some in Congress argue that the AUMF is no longer sufficient to authorize executive action, while the US government continues to rely on it in some circumstances to send forces to various places in the world. Accordingly, today's debate centers on the interpretation of the AUMF: what does it authorize the president to do, against whom, and for how long?

The Authorization for Use of Military Force

In response to the terrorist attacks against the United States on September 11, 2001, Congress passed a joint resolution on September 14, 2001, authorizing the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States."[23] The legislation is known as the Authorization for Use of Military Force (AUMF) and specifically states that it constitutes statutory authorization within the meaning of the WPR.[k] The AUMF is unique in that it broadly allows the president to use force against individuals and organizations (as opposed to just states) and does not limit this force to specified groups or actors. However, while the AUMF was broadly written, Congress made sure that it specified that force could be used only against those tied to the 9/11 attacks, basically, Al Qaeda and the Taliban.

The executive branch has relied extensively on the AUMF to authorize a host of actions overseas, including the 2001 deployment of troops to Afghanistan, as well as to detain individuals at Guantanamo Bay and engage terrorists globally and on the high seas.[l] The AUMF has been in place for twelve years without amendment, and it continues to serve

[k] The text of the legislations reads: "Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."[24]

[l] There are at least thirty instances of publicly disclosed reliance on the AUMF to support military actions. Eighteen occurred during the Bush administration and to date twelve have occurred during the Obama administration. It has been used to deploy forces in Iraq, Somalia, Ethiopia, Yemen, Kenya, and Georgia, among others.[25]

as a source of domestic authorization for sending troops into hostilities abroad in certain circumstances. Since Congress was careful to limit the language of the authorization to those responsible for the 9/11 attacks, the ongoing use of the statute has been criticized by some members of Congress. The argument is based on the fact that the Taliban has been removed from power in Afghanistan and the individuals responsible for 9/11 have been captured or killed, so the terrorist threats that are ongoing that are not linked to Al Qaeda are not within the ambit of the AUMF. The US government has subsequently included "associated forces" of Al Qaeda as entities that fall within the ambit of the AUMF.[m] If the AUMF has served its purpose (i.e., it has permitted the effective use of force against those responsible for 9/11), then some feel it is now out of date and not broad enough to support missions that special operations forces (SOF) have performed in places such as Yemen, Somalia, and northern Africa. No definitive action has been taken to amend or repeal the AUMF at this time. Recent Senate Armed Services Committee (SASC) hearings indicate a desire to revamp the joint resolution, but an amendment to the fiscal year 2014 NDAA in the House Appropriations Committee that would have imposed a sunset provision failed.

OTHER AUTHORIZING STATUTES: TITLE 10 AND TITLE 50

Title 10 is a domestic legal source for carrying out certain military activities.[28] It defines the roles and mission of the military. Title 50 contains an array of statutes covering national security and foreign affairs, in particular covert actions. Because of fairly recent operations that have garnered media attention, the statutes have been widely referenced in news outlets as "Title 10/military operations" and "Title 50/

[m] The 2012 National Defense Authorization Act (NDAA) refers to "associated forces" with regard to detention authority. It authorizes the detention of "a person who was a part of or substantially supported al-Qaeda, the Taliban, or *associated forces* [emphasis added] that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."[26] In addition, Jeh Johnson, General Counsel of the Department of Defense later stated in a speech: "We have publicly defined an "associated force" as having two characteristics: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners."[27]

intelligence" (or Central Intelligence Agency [CIA]) operations.[n] This distinction is not wholly accurate because the Department of Defense (DoD) has certain authority under both Title 10 and Title 50 and routinely operates under both. However, the distinction does highlight a relatively complicated issue—namely, does it legally matter whether the CIA or military forces conduct certain operations, who has oversight, and who is accountable?

The categorization and conduct of these operations have implications on individuals involved in such operations. The safeguards provided to military personnel under the Geneva Conventions apply if the persons are conducting traditional military activities, which are discussed later in this chapter. If it is an international armed conflict (IAC), then prisoner of war (POW) status applies if the individuals meet the criteria of Article 4 of the third Geneva Convention. If it is a noninternational armed conflict (NIAC), then there is no POW status, just Common Article 3 protections and the requirements of humane treatment. These safeguards may be forfeited if the particular operation is not a military operation that the government has the option of acknowledging should it be revealed. The agency in command of an operation also affects this analysis. In addition, such operations are occurring outside of a geographically defined theater, potentially without the consent of the host nation. This issue raises legal concerns, particularly with regard to the application of law of armed conflict (LOAC).

Under Title 10, the Secretary of Defense exercises all authority, direction, and control over the DoD, including all subordinate agencies and commands.[30] These commands are mostly geographic but also include US Special Operations Command (USSOCOM).[31] USSOCOM commanders report to the secretary of defense, who reports to the president, and orders flow down from the president to the secretary of defense to the commander of the combatant command.[32] By statute, USSOCOM has authority over UW.[33,o] UW comprises "activities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating by, with, or through

[n] This usage became commonplace after the raid that killed Osama bin Laden. Comments made by CIA Director Leon Panetta likely contributed to the increased use of these terms. He asserted that "since this was what's called a 'Title 50' operation, which is a covert operation, and it comes directly from the president of the United States who made the decision to conduct this operation in a covert way, that direction goes to me. And then, I am, you know, the person who then commands the mission. But having said that, I have to tell you that the real commander was Admiral McRaven because he was on site, and he was actually in charge of the military operation that went in and got bin Laden."[29]

[o] USSOCOM also has the authority to conduct the following activities: direct action, strategic reconnaissance, foreign internal defense, civil affairs, military information support operations, counterterrorism, humanitarian assistance, theater search and rescue, and other activities as may be specified by the president or the secretary of defense.[34]

an underground, auxiliary, and guerrilla force in a denied area."[35] The Armed Services Committees of Congress exercise oversight of operations conducted according to the Title 10 chain of command.

Title 50 governs national security intelligence gathering, analysis, and dissemination.[36] Under Title 50, the CIA collects human intelligence (HUMINT), evaluates intelligence, disseminates intelligence, directs and coordinates the collection of national intelligence outside of the United States, and "perform[s] such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct."[37] The director reports to the director of national intelligence. DoD entities are authorized to conduct intelligence activities under Title 50, but the secretary of defense has exclusive authority over their activities and can be limited only by the president.[38] Executive Order 12,333, which was signed by President Reagan in 1981 to extend the powers of intelligence agencies, directs the secretary to collect, analyze, produce, and disseminate information and intelligence and defense-related intelligence and counterintelligence.[39,p] The secretary is to do this in response to collection and advisory tasking by the director, as well as to the extent required for executing the secretary's responsibilities.

Covert Versus Clandestine

The terms *covert* and *clandestine* have similar meanings in everyday vernacular, but within the context of military and intelligence activities, they are distinct and refer to different activities. In general, *clandestine* refers to the tactical secrecy of the operation itself, while *covert* refers to the secrecy of the sponsor. In a covert action, the acts carried out may be concealed or may be highly visible (e.g., propaganda posters). What remains undisclosed in a covert operation is the sponsorship of the activity. In a clandestine action, the acts are conducted in a way to

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p Executive Order (E.O.) 12,333 also directs all federal agencies to cooperate with intelligence agencies to enhance the ability to collect foreign intelligence. E.O. 13,470 amended E.O. 12,333 by strengthening the role of the director of national intelligence, which was given the responsibility to "serve as the head of the Intelligence Community, act as the principal adviser to the President, to the NSC [National Security Council], and to the Homeland Security Council for intelligence matters related to national security."[40] E.O. 13,470 also created a role for the National Security Council to review covert action and directs the National Security Council to "consider and submit to the President a policy recommendation, including all dissents, on each proposed covert action and conduct a periodic review of ongoing covert action activities, including an evaluation of the effectiveness and consistency with current national policy of such activities and consistency with applicable legal requirements. The NSC shall perform such other functions related to covert action as the President may direct, but shall not undertake the conduct of covert actions."[41]

ensure secrecy, where the focus is on the concealment of the operation. Therefore, an action can be both covert and clandestine.

Title 50 defines "covert action" as

> an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government *will not be apparent or acknowledged* publicly, but does not include—
>
> (1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;
>
> (2) traditional diplomatic or military activities or routine support to such activities;
>
> (3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or
>
> (4) activities to provide routine support to the overt activities (other than activities described in paragraph (1), (2), or (3)) of other United States Government agencies abroad.[42,q]

Title 50 requires a presidential finding and a report to the congressional intelligence committees in order to conduct a covert action.[45] Note that the statute expressly excludes from "covert action" activities primarily for the purpose of acquiring intelligence, traditional counterintelligence activities, traditional military activities, and routine support to traditional military activities, among others.[46] Therefore, any action constituting one of these activities is by definition *not* covert and is exempt from the presidential finding requirement, even if sponsorship of the activity is to remain concealed.

The term *clandestine* is not defined by statute. DoD doctrine defines it as follows:

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q Note that DoD doctrine defines *covert* differently and introduces the term *clandestine* in the definition (which it later defines separately): "An operation that is so planned and executed as to conceal the identity of or permit plausible denial by the sponsor."[43] "A covert operation differs from a clandestine operation in that emphasis is placed on concealment of the identity of the sponsor rather than on concealment of the operation."[44] This definition is helpful in highlighting the distinction between covert and clandestine, but only the statutory definition of covert is legally binding and provides the terms against which activities are evaluated when determining whether or not they are covert.

> An operation sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment. A clandestine operation differs from a covert operation in that emphasis is placed on concealment of the operation rather than on concealment of the identity of the sponsor. In special operations, an activity may be both covert and clandestine and may focus equally on operational considerations and intelligence-related activities.[47]

A statutory definition and requirement of a presidential finding exist only for covert actions; neither exists for clandestine operations. Therefore, there is no need for a presidential finding or a report to the congressional intelligence committees when clandestine operations are conducted. The distinction has been noted by some DoD officials in differentiating between intelligence gathering and activities designed to influence change:

> [Defense officials] contend that DOD conducts only "clandestine activities." Although the term is not defined by statute, these officials characterize such activities as constituting actions that are conducted in secret but which constitute "passive" intelligence information gathering. By comparison, covert action, they contend, is "active," in that its aim is to elicit change in the political, economic, military, or diplomatic behavior of a target.[48]

The distinction between covert and clandestine matters because it potentially effects the question of legal status for persons involved in such operations The operational lead for each may differ and different mechanisms of congressional oversight exist for each. First, the confusing and misleading distinction between an "intelligence/Title 50" operation and a "military/Title 10" operation stems from the fact that, statutorily, the CIA is the default lead agency for covert actions. Title 50 reads:

> Any employee, contractor, or contract agent of a department, agency, or entity of the United States Government other than the Central Intelligence Agency directed to participate in any way in a covert action shall be subject either to the policies and regulations of the Central Intelligence Agency, or to written policies

> or regulations adopted by such department, agency, or entity, to govern such participation.[49,r]

The statute states that the president can designate which department or agency may participate in a covert action, but the lead agency is the CIA. With respect to status, it has been argued that only DoD should engage in clandestine activities because US military personnel presumptively benefit from POW status upon capture.[s] However, clandestine activities may be conducted in support of a covert operation, in which case, the lines between the two may be blurred. General Clapper, Director of National Intelligence, in his testimony before the Senate Armed Services Committee (SASC), attempts to make a distinction between the two but acknowledges that clandestine activities, "which may be conducted, albeit true, under very risky, hazardous conditions," are connected "when you are doing clandestine collection as an enabler, in support of a covert activity."[52] Note that Geneva Convention protections, namely POW status, do not apply simply on the basis of acknowledgment that personnel are members of the military. There must first be an underlying armed conflict in which such protections can be invoked (i.e., a noninternational or an international armed conflict). So whether or not the activities are covert or clandestine, if they are, for example, designed to influence the political stability of a country during peacetime, the protections will not apply.

The question of the practical distinction between a covert and clandestine activity is important, particularly because Title 50 lists certain activities that are not covert, namely traditional military activities and routine support to traditional military activities, both of which can have characteristics that look like covert action. In particular, UW, as defined by DoD as "activities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or

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[r] This language is supported by E.O. 12,333, which states that "the Director of the Central Intelligence Agency shall . . . conduct covert action activities approved by the President. No agency except the Central Intelligence Agency (or the Armed Forces of the United States in time of war declared by the Congress or during any period covered by a report from the President to the Congress consistent with the War Powers Resolution, Public Law 93-148) may conduct any covert action activity unless the President determines that another agency is more likely to achieve a particular objective."[50]

[s] This argument was made by Director Clapper in his answers to prepared questions from the SASC on March 27, 2007. In his testimony, Director Clapper stated that "covert activities are normally not conducted, I don't believe, by uniformed military forces . . . Of course, there is the connection between when you are doing clandestine collection as an enabler, in support of a covert activity. I believe that, to the maximum extent possible, there needs to be a line drawn from an oversight perspective, as well as a risk perspective. The important consideration here is whether if such an activity is revealed inadvertently, or an adversary nation, in which such an activity is being conducted, discovers it, that, in the case of military forces, the Government would have the option of acknowledging that, which then entitles those military forces proper treatment under Geneva Conventions, et cetera; whereas, that is not the case with covert activity as statutorily defined."[51]

occupying power," shares characteristics with covert activities, which are defined as those "activities of the United States Government to influence political, economic, or military conditions abroad." Is UW a covert activity, or is it a traditional military activity, and therefore not covert? And what difference does this make?

Traditional Military Activities and Routine Support

Activities that are "traditional military activities" or "routine support" to such activities are exceptions listed in the statutory definition of covert action (i.e., they are not covert activities and, therefore, do not trigger the notification and presidential finding requirements). Title 50 does not define these terms, but the legislative history of the statute provides insight on their intended meaning:[t]

> It is the intent of the conferees that "traditional military activities" include activities by military personnel under the direction and control of a United States military commander (whether or not the U.S. sponsorship of such activities is apparent or later to be acknowledged) preceding and related to hostilities which are either anticipated (meaning approval has been given by the National Command Authorities for the activities and or operational planning for hostilities) to involve U.S. military forces, or where such hostilities involving United States military forces are ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly. In this regard, the conferees intend to draw a line between activities that are and are not under the direction and control of the military commander. Activities that are not under the direction and control of a military commander should not be considered as "traditional military activities."[54]

This language results in a two-part test.[55] First, the unacknowledged operation must be commanded and executed by military personnel. If the CIA plans and runs the operation, then it cannot be considered a traditional military activity. Second, the unacknowledged operation must be carried out in relation to overt hostilities that are either ongoing or anticipated. Anticipated in this regard means that approval from the National Command Authorities has been given for the activities,

[t] For a detailed account of the legislative history and negotiations concerning the definition of covert action, see Chesney.[53]

operational planning for hostilities, or both. While congressional committees need not be notified, National Command Authority approval refers to Secretary of Defense or presidential approval of the hostilities, the operation, or both.[u] It has been noted that this approval "is a somewhat milder form of decisionmaking rule than the one imposed for covert action . . . it does at least give the option for secretarial rather than presidential involvement," but it "mandates a level of internal executive branch authorization that would preclude, for example, a decision by a combatant commander or anyone lower in the chain of command from engaging in an unacknowledged operation other than during times of overt hostilities."[57]

Routine support to traditional military activities generally means unacknowledged unilateral actions taken significantly in advance of a possible or eventual US military operation. Again, like traditional military activities, the term is not defined, but the legislative history provides important context. The report accompanying the Senate bill states that:

> The committee considers as "routine support" unilateral U.S. activities to provide or arrange for logistical or other support for U.S. military forces in the event of a military operation that is to be publicly acknowledged. Examples include caching communications equipment or weapons, the lease or purchase from unwitting sources of residential or commercial property to support an aspect of an operation, or obtaining currency or documentation for possible operational uses, if the operation as a whole is to be publicly acknowledged.[58]

The report also noted specific examples of activities that are not considered routine, many of which include efforts that may be included in UW activities, such as clandestine attempts to recruit or train foreign nationals to support US forces in the event of a military intervention or clandestine efforts to influence public opinion in a target country

[u] Chesney notes that the agreed-upon language "came with a string attached, in the form of a new decisionmaking rule pursuant to which the President or Secretary of Defense would have to approve the operation in order for the operation to qualify as [a traditional military activity] under the 'operational planning' prong and hence avoid triggering finding-and-notification requirements. The key to understanding all of this is to appreciate just what it means for 'operational planning' to be authorized. This is not demanding in any sort of temporal sense."[56]

where US sponsorship will not be revealed.[v] Unlike traditional military activities, there is no temporal element with respect to determining whether an activity constitutes routine support. Rather, whether it constitutes covert activity depends on whether it is routine.

Whether an action is covert is highly dependent on the nature of the activities. It does not turn on whether those carrying out the acts are with the military or the CIA. As such, whether a UW mission is covert depends on the type of activities that will be undertaken, and as mentioned, it could be both covert and clandestine. A summary of the distinctions is provided in Figure 7-1.

[v] The report states: "The committee would regard as 'other-than-routine' support activities undertaken in another country which involve other than unilateral activities. Examples of such activity include clandestine attempts to recruit or train foreign nationals with access to the target country to support U.S. forces in the event of a military operation; clandestine [efforts] to influence foreign nationals of the target country concerned to take certain actions in the event of a U.S. military operation; clandestine efforts to influence and effect [*sic*] public opinion in the country concerned where U.S. sponsorship of such efforts is concealed; and clandestine efforts to influence foreign officials in third countries to take certain actions without the knowledge or approval of their government in the event of a U.S. military operation."[59]

Covert	Clandestine
• Defined in Title 50 • Goal is to influence political, economic, or military conditions abroad • Role of United States will not be apparent or acknowledged (sponsorship of the activities is undisclosed) • Requires presidential finding and notification to congressional committees	• Defined by DoD doctrine, not statute • Emphasis is on concealment of the operation, not the sponsorship • No congressional reporting or presidential finding requirement • May be conducted in support of a covert action • An activity can be both covert and clandestine
Does not include: • Traditional military activities (TMA) ◊ Not covert by definition—listed as an exception in Title 50 definition of covert ◊ Legislative history indicates intent is that such activities: - Are conducted under the control of a military commander - Precede and relate to anticipated hostilities or - Relate to ongoing hostilities in which US role is or will be acknowledged • Routine support to TMA ◊ Not covert by definition—listed as an exception in Title 50 definition of covert ◊ Legislative history states routine support activities are those that provide or arrange for logistical or other support for US military forces in the event of a military operation that is to be publicly acknowledged ◊ Does not include: clandestine attempts to recruit or train foreign nationals; or clandestine attempts to influence foreign nationals • Activities primarily for intelligence gathering or counterintelligence	

Figure 7-1. Distinctions between covert and clandestine and related activities.

CURRENT ISSUES

An increase in military and intelligence operations has prompted questions, primarily from Congress, about the authority and transparency of these activities and whether they will be carried out indefinitely. The geographic scope in which the activities may be lawfully conducted and whether congressional committees are being kept abreast of the operations in accordance with statutory requirements are two particular concerns. President Obama's administration has taken the position that military and intelligence activities to combat Al Qaeda need not be linked to a battlefield (i.e., a military campaign

in Afghanistan).[w] The House Permanent Select Committee on Intelligence (HPSCI) has accused DoD of labeling its clandestine activities as operational preparation of the environment (OPE) to justify placing them under Title 10 authority and clear of oversight by congressional intelligence committees.

Part of this concern stems from an increased reliance on SOF resources after 9/11. Shortly after 9/11, then Secretary of Defense Rumsfeld worked to expand the tools and capabilities SOF needed to properly operate in Afghanistan and future theaters against terrorist targets.[61] By 2011, the SOF annual budget request for fiscal year 2012 reached $10.5 million, three times as much as its 2001 budget.[62] USSOCOM also doubled in size to 60,000 personnel and gained new authority under President Bush's Unified Command Plan 2004, which designated it the lead combatant commander for "planning, synchronizing, and as directed, executing global operations."[63,x]

That year, Secretary Rumsfeld signed, with President Bush's approval, the classified Al Qaeda Network Execute Order, which significantly increased the authority to attack Al Qaeda anywhere in the world and permitted offensive strikes in twelve states.[65] The order also streamlined the approval process for the military to operate outside designated war zones. Previously, a case-by-case process determined approval for SOF operations.

This increased authority and expanded use of SOF in countries where there currently are no overt military activities has caused

[w] Shortly after the bin Laden raid, John Brennan, while serving assistant to President Obama for Homeland Security and Counterterrorism, stated that "an area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves. That does not mean we can use military force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories."[60]

[x] Section 1208 of the 2005 NDAA further enhances SOF's capabilities by authorizing USSOCOM to spend money on foreign informants, paramilitary recruits, and equipment. Before this change, only the CIA could provide such funds.[64]

Congress to question whether oversight mechanisms are weakening.[y] Oversight of intelligence and military activities is shared by relevant committees, namely the Senate Select Committee on Intelligence (SSCI), the HPSCI, the SASC, and House Armed Services Committee (HASC). Note that Title 10 includes authority for the Secretary of Defense to engage in intelligence and military operations, which means that oversight between the committees is not divided on the basis of the statute under which the activity is authorized and that there can be overlap.[z] The HPSCI is concerned that activities that are actually covert are being conducted as OPE, which is a traditional military activity, thereby avoiding the statutory requirements of covert action.[68] The definition of OPE is no longer available in unclassified US military publications, but it used to refer to nonintelligence activities conducted to prepare for possible military operations under Title 10 authority.[69] The HPSCI has specifically stated that:

> Clandestine military intelligence-gathering operations, even those legitimately recognized as OPE, carry the same diplomatic and national security risks as traditional intelligence-gathering activities. While the purpose of many such operations is to gather intelligence, DOD has shown a propensity to apply the OPE label where the slightest nexus of a theoretical, distant military operation might one day exist. Consequently, these activities often escape the scrutiny of the intelligence committees, and the congressional defense committees cannot be expected to exercise oversight outside of their jurisdiction.[70]

Perhaps in response to this concern, recent legislation has been introduced (in 2013) to amend Title 10 by imposing a notification requirement on the Secretary of Defense for sensitive military operations.[71] It defines a sensitive military operation as any lethal or capture operation undertaken by the armed forces under the AUMF outside of Afghanistan. The notice will be given to the congressional armed services committees along with a report that explains the legal and

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[y] The United States reportedly has military and intelligence operations "in roughly a dozen countries—from the deserts of North Africa, to the mountains of Pakistan, to former Soviet republics crippled by ethnic and religious strife—the United States has significantly increased military and intelligence operations, pursuing the enemy using robotic drones and commando teams, paying contractors to spy and training local operatives to chase terrorists."[66]

[z] The SASC and HASC exercise authority for all DoD matters relating to defense, but the oversight of intelligence committees is more complex, and intelligence committees share jurisdiction with the armed services committees. For a complete discussion of the oversight mechanisms, see Wall.[67]

policy considerations, as well as the process for approving an operation against an individual or group. The bill further requires a quarterly briefing to the committees on counterterrorism operations, an overview of authorities and legal issues, and an outline of interagency activities and any other matters the Secretary considers appropriate.[aa]

Covert Action in Syria

Recent events in Syria provide a case study that illustrates several of the main points in this chapter. After US officials recognized the Syrian government's use of chemical weapons in June 2013, the US government authorized direct military support to the opposition forces. Subsequently, it was reported that the congressional intelligence committees had voted to approve the measure and that President Obama had authorized covert action in Syria.[72] The media noted that "Obama opted to approve the program as a CIA covert action to avoid international law restrictions on military efforts to overthrow another government and the need for wider congressional approval."[73]

While there is an interplay between domestic and international law when it comes to the use of force abroad, one is not a stand-in for another. The fact that President Obama authorized a covert action does not of itself mean that subsequent activities of CIA operatives or US military personnel inside Syria would not necessarily violate Syria's sovereignty under international law. Use of CIA personnel instead of the military does not change this. What could favorably influence the international perception and acceptance of US government activities inside Syria is the general consensus among allied nations that the Syrian government has committed atrocities against civilians and opposition forces and agreement that it used chemical weapons in violation of international law.[74] Even so, having political support does not equate to having international legal authority. Moreover, despite international condemnation of Syria's actions, the UN has reiterated its position that providing arms or exercising force is not an acceptable response.[ab]

Second, the assertion that the authorization of covert action avoids "the need for wider congressional approval" implies that the covert action statute alone is a sufficient source of congressional authorization for military intervention in Syria. If the president seeks to send

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[aa] H.R. 1904 was referred to committee on May 9, 2013, and, according to www.govtrack.us, stands a fifty-nine percent chance of making it past the committee but only a sixteen percent chance of being enacted.

[ab] Secretary General Ban Ki-moon noted in May 2013 that "providing arms to either side will not help: there is no military solution [and] the only sustainable resolution will be through political means," and he endorsed talks to reach a negotiated solution.[75]

military personnel into Syria in anticipation of hostilities, that level of intervention would still require a specific statutory authorization under the WPR. Recall that Title 50 authorizes covert actions, which are activities that the United States undertakes to influence political, economic, or military conditions abroad. It does not authorize broad military intervention. The intelligence committees do not have the authority to formally veto intelligence actions that they are informed of, let alone do they have the power to approve military intervention.[ac] The suggestion that their approval sidesteps the need for broader congressional approval suggests that the president seeks to engage in more than covert activities (i.e., broader military intervention). Otherwise, broader approval would not be required. In any case, their approval is not an exemption for congressional authorization of broader military engagement in hostilities.

Last, the United States' covert action in Syria is quite public, for reasons that are not clear. While the president openly acknowledged the US intent to arm opposition forces, there may be several other activities that are not acknowledged. Still, this openness addresses a final point—that domestic authorization for certain activities may represent a policy position with regard to a resistance. Here, choosing to authorize a covert action and arm the opposition forces (among potentially other activities) is a significant gesture of support for the opposition. It may be that US policy is to show limited support for the opposition and place pressure on the existing regime but not to engage in full military intervention.[78] In this sense, the openness may help further foreign policy goals while limiting political and military risk.[ad]

[ac] The committees' ability to limit funding is, however, a significant power. It was reported that intelligence committees voted on the covert action plan. A formal vote is not generally a prerequisite to approve covert action. News reports have indicated that the approval "allows money already in the CIA's budget to be reprogrammed for the Syria operation,"[76] so the approval may have been related to funding. However, the approval may have been sought for more strategic reasons. One scholar noted that "independent of budget matters, getting formal intelligence committee 'sign off' on a covert action of this significance is an enormously prudent step by the President (if indeed he initiated it), for it strengthens the legitimacy of the covert action *ex post* and puts committee members more on the hook when something goes wrong."[77]

[ad] The Pentagon's assessment is that military intervention in Syria could be extremely risky, where "a campaign to tilt the balance from President Bashar al-Assad to the opposition would be a vast undertaking, costing billions of dollars, and could backfire on the United States."[79]

ENDNOTES

1 U.S. Const. art. I, § 8 & art. II, § 2.

2 War Powers Resolution, 50 U.S.C. § 1541 et seq. (2006).

3 Richard F. Grimmet, *War Powers Resolution: Presidential Compliance,* Report for Congress, RL33532 (Washington, DC: Congressional Research Service, September 2012), 2.

4 50 U.S.C. § 1541.

5 50 U.S.C. § 1542.

6 50 U.S.C. § 1543(a).

7 50 U.S.C. § 1544(a).

8 50 U.S.C. § 1544(b).

9 H.R. Rep. No. 93-287, at 7 (1973).

10 Ibid.

11 S. Rep. No. 93-220, at 24 (1973).

12 50 U.S.C. § 1547(a).

13 Gulf of Tonkin Resolution, Pub. L. 88-408, 78 Stat. 384 (1964).

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APPENDICES

APPENDIX A: ACRONYMS

ANC	African National Congress
AUMF	Authorization for Use of Military Force
CIA	Central Intelligence Agency
CIL	Customary international law
COIN	Counterinsurgency
CSO	Civil Society Organization
CSRT	Combatant Status Review Tribunals
DoD	Department of Defense
FID	Foreign Internal Defense
FRY	Federal Republic of Yugoslavia
GC	Geneva Convention
HASC	House Armed Services Committee
HPSCI	House Permanent Select Committee on Intelligence
HRL	Human Rights Law
HUMINT	Human Intelligence
IAC	International Armed Conflict
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IMET	International Military and Education Training
IW	Irregular Warfare
JHU/APL	Johns Hopkins University Applied Physics Laboratory
KLA	Kosovo Liberation Army
KFOR	Kosovo Protection Forces
LOAC	Law of Armed Conflict
LOW	Law of War
MNF	Multinational Peacekeeping Force
NAACP	National Association for the Advancement of Colored People
NATO	North Atlantic Treaty Organization
NDAA	National Defense Authorization Act
NGO	Nongovernmental Organization
NIAC	Noninternational Armed Conflict
NSAD	National Security Analysis Department
NUSAS	National Union of South African Students
OPE	Operational Preparation of the Environment

POW	Prisoner of War
PUK	Patriotic Union of Kurdistan
PVO	Private Voluntary Organization
SASC	Senate Armed Services Committee
SOF	Special Operations Forces
SORO	Special Operations Research Office
SSCI	Senate Select Committee on Intelligence
TMA	Traditional Military Activities
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHCR	United Nations High Commissioner for Refugees
UNOCI	United Nations Operation in Côte d'Ivoire
USASOC	US Army Special Operations Command
USSOCOM	US Special Operations Command
UW	Unconventional Warfare
WPR	War Powers Resolution

APPENDIX B: GLOSSARY

Armed Conflict: A broad category of hostilities featuring violent engagements between states, or between states and nonstate groups; the drafters of the Geneva Conventions chose this term to define when the Conventions apply because it is broader than *war*; there are two classes of armed conflicts, noninternational and international, see also *Noninternational Armed Conflict* and *International Armed Conflict*.

Additional Protocol I: A multilateral treaty signed in 1977 that supplements the protections available to participants in international armed conflicts under Common Article 2 and noninternational armed conflicts that are considered fights, in the exercise of self-determination, against colonial domination, alien occupation, and racist regimes.

Additional Protocol II: A multilateral treaty signed in 1977 that supplements the protections available to participants in noninternational armed conflicts that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

Belligerency: A category of resistance governed by the international humanitarian law applicable to international armed conflicts; a belligerency features high-intensity violence against the standing government by a highly organized resistance movement.

Belligerent: A person who directly participates in the fighting during an armed conflict. Belligerents can be privileged or unprivileged depending on whether they satisfy the criteria of customary IHL and GC III Article 4. Privileged belligerents receive protections, such as immunity from prosecution for their acts related to the conflict, and are also known as combatants or lawful combatants. Unprivileged belligerents do not receive protections, such as prisoner of war status, because they fail to comply with customary IHL and GC III Article 4 regarding lawful participation in hostilities. Unprivileged belligerents are also known as unlawful combatants, although the term *unlawful combatant* is inaccurate because combatants are by definition lawful participants in an armed conflict.

Common Article 2: One of several articles identical in all four treaties that constitute the Geneva Conventions, referred to as "Common Articles";

Common Article 2 defines when the Geneva Conventions apply: "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

Common Article 3: One of several articles identical in all four treaties that constitute the Geneva Conventions, referred to as "Common Articles"; Common Article 3 provides: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," this article's provisions; it defines the minimum protections available to participants in an armed conflict not of an international character; it does not define an armed conflict not of an international character, but scholars and jurists have determined that it is applicable to the bottom threshold for armed conflicts, and that the threshold depends on the intensity of the hostilities and the organization of the nonstate party.

Counterinsurgency (COIN): Comprehensive civilian and military efforts by a host nation or by another state to assist the host nation to defeat an insurgency and to address any core grievances.

Denied Area: An area under enemy or unfriendly control in which friendly forces cannot expect to operate successfully within existing operational constraints and force capabilities.

Domestic Law: The law of a state that governs the behavior of its citizens, as well as behavior between those citizens and the state itself.

Foreign Internal Defense (FID): The participation of civilian and military agencies of one government in programs used by another government to free and protect the second government's society from subversion, lawlessness, insurgency, terrorism, and other threats to its security.

Geneva Conventions of 1949: Four treaties originally signed in 1949 that define and provide protections for participants in armed conflicts; they have been signed by almost every state.

Host Nation: The state in which the resistance takes place.

Illegal Political Acts: nonviolent actions that violate the laws of the host nation and are used to cause political change.

Insurgency: A category of resistance governed by the international humanitarian law applicable to noninternational armed conflicts featuring intense and organized violence against the standing government.

International Armed Conflict: A class of conflict under international humanitarian law to which the full protections apply, including the Geneva Conventions, Additional Protocol I, and customary international humanitarian law.

The International Criminal Tribunal for the Former Yugoslavia: An ad hoc court established by a statute adopted by a resolution of the United Nations Security Council to investigate and prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

International Human Rights Law (IHRL): The law that governs how states interact with their citizens under their domestic laws and policies.

International Humanitarian Law (IHL): The law that governs both the treatment of persons participating in armed conflicts and the methods and means of waging armed conflicts.

International Law: The law that governs relations between states.

Law of Armed Conflict (LOAC): The body of law formerly known as the law of war and that includes IHL and IHRL; it comprises treaty-based law as well as customary law.

Noninternational Armed Conflict (NIAC): A class of conflict under IHL to which limited protections apply, including at least Common Article 3 of the Geneva Conventions, and possibly Additional Protocol II if the conditions set out in its first article are met; *noninternational* bears its literal meaning of "not between nations," meaning that these conflicts occur between one or more nonstate groups and a state, but not between two or more states.

Rebellion: A category of resistance governed by domestic criminal law and that falls short of an armed conflict but features violence.

Resistance: Opposition to a standing government, its components, or its policies and practices.

Standing Government: The administration exercising authority and carrying out governmental affairs over the majority of the host nation; a standing government need not be the lawful or rightful government,

only the government that is exercising power over the nation and against which the resistance is operating (for instance, the United States did not recognize the Taliban as the lawful government of Afghanistan, but when the United States invaded Afghanistan in 2001, the Taliban exercised authority over the majority of Afghanistan and so constituted the standing government until it was ousted).

Status: The position of an individual or group under the applicable law, including the protections available to the individual or group on the basis of that position.

Status of Forces Agreement (SOFA): A bilateral agreement between a state sending forces to be stationed abroad and the state receiving those forces; it defines what visiting forces are permitted to do and to which state's jurisdiction visiting forces are subject.

Unconventional Warfare (UW): Activities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through, by, or with an underground, auxiliary, and guerilla force in a denied area.

United Nations Security Council: An organ of the United Nations that is given specific authority and power by the United Nations Charter, including exclusive authority over the use of force, except when in self-defense.

US Personnel: Members of the US military.

Use of Legal Processes for Political Advantage: The employment of methods and processes provided or permitted by the law of the host nation for creating or influencing political change.

APPENDIX C: BACKGROUND ON INTERNATIONAL LAW AND THE LAW OF ARMED CONFLICT

Sources of Law

Warfare today is different than it was in the mid-twentieth century. Formally declared wars are no longer the norm, and armed conflicts often lack obvious battlefields or clear enemies. This reality presents unique circumstances that can make the application of existing law difficult. To make matters more complicated, the framework for analyzing conflict activities is an intricate mix of international and domestic law derived from various sources including treaties, custom, legislation, and judicial decisions.

Custom, Treaties, Domestic Law, and Judicial Decisions

Military operations involve complex questions related to international law. International law establishes certain limitations on the scope and nature of command options and creates obligations related to the conduct of US forces. International law is generally formed through the observed custom of states, treaties (meaning international agreements, whatever they might be called), general principles of law accepted amongst so-called civilized nations, the writings of experts and scholars, and international judicial decisions. Customary international law (CIL, or sometimes simply referred to as "custom") and treaties are the two primary sources of the law of armed conflict (LOAC). CIL constitutes those rules that derive from general practice accepted as law, as opposed to written rules. It reflects the acceptance of a practice such that states no longer view compliance as discretionary but, rather, as a legal obligation.[1] CIL includes the law of war (LOW) before they were codified in the Hague and Geneva Conventions.

One complicated aspect of CIL is that acknowledgement by a state of certain norms as custom is not always clear and is often a matter of policy. Recognizing a norm through state practice will bind a state if that norm is already custom. If the norm is not yet custom, then states could be bound by unilateral declarations showing the intent to be bound. For example, the idea that many provisions of the Geneva Conventions are considered custom has gained increasing momentum, which is significant because such provisions bind parties regardless of whether they have become a party to those conventions.[a] For example,

[a] For a more detailed discussion on the Geneva Conventions and their status as CIL, see *The Geneva Conventions* section.

the United States has not ratified Additional Protocols I and II of the Geneva Conventions but has stated that it considers many aspects of Protocol I custom.[b]

According to the Vienna Convention on the Law of Treaties, treaties are formal agreements between two or more states. The US Constitution recognizes treaty obligations of the United States as binding, and the Supreme Court has held that international law, including custom, is part of US law.[2,3] A state may sign but not ratify a treaty, in which case the extent to which the state is bound is limited to not violating the object and purpose of the treaty. Under US law, the Senate must ratify a treaty by a two-thirds vote of approval. In an unorthodox measure, the United States "unsigned" the 1998 Rome Statute creating the International Criminal Court in order to avoid any perceived obligations under that treaty.

Some treaties may require states to adopt domestic legislation that conforms to the terms of the particular treaty at issue. An example of this would be the Rome Statute, which formally assigns jurisdiction to the International Criminal Court. This creates a nexus between domestic and international law that can become jurisdictionally complex. In LOAC, the most significant treaties are the Geneva Conventions and their Additional Protocols, and these were among the first treaties to require states to enact domestic legislation to enforce criminal violations. They require states to enact legislation to prosecute individuals who commit grave breaches and to seek out and try such individuals.[4,c] The United States enforces the provisions of the Conventions against its own soldiers through the Uniform Code of Military Justice. To charge civilians, it created the War Crimes Act of 1996[5] and the Military Extraterritorial Jurisdiction Act.[6] Beyond domestic law, other regulations and guidance relevant to interpreting and enforcing treaty obligations include executive orders, agency policies or missions, and host nation laws that personnel may be subject to under certain circumstances.

In LOAC, decisions of domestic courts, military tribunals, and international courts can clarify the law applied to armed conflicts. Before World War II, there was very little case law relevant to LOAC, but the opinions coming out of the Nuremberg tribunals are significant. Other tribunals, such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia provide additional and more recent interpretations of LOAC and international humanitarian law (IHL). Unlike in US law, judicial precedent is not

[b] For a more detailed discussion of the US position regarding Protocols I and II, see the *Additional Protocols I and II* section.

[c] The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, hereinafter referred to as GC I.

formally binding in international law, and the opinions rendered by international tribunals do not automatically bind US courts.[d]

Terminology: The Relationship Between Law of War, Law of Armed Conflict, International Humanitarian Law, and International Human Rights Law

The sources of law described in the previous section are relevant across international law. There are several specific terms used to describe the body of law applicable to participants in resistance movements. These terms refer to separate areas of law that are related, but the terms are often used interchangeably in a way that does not account for their important differences: *the law of war* (LOW), *the law of armed conflict* (LOAC), *international humanitarian law* (IHL), and *international human rights law* (IHRL). Of the four areas of law, probably the least significant distinction exists between LOW and LOAC, with some scholars arguing that either term is acceptable, mainly because the Geneva Conventions refer to both war and armed conflict.[e] LOW has its origins in rules of the battlefield that have been around for centuries. LOAC is a fairly new construction and is associated with laws for the battlefield, the main difference being that laws have penalties that can be enforced within a specific jurisdiction, and rules provide a standard for conduct that do not necessarily carry consequences if violated.[8] Recognition of a state of war is no longer a prerequisite for the application of LOAC; it is its existence that is determinative. As noted in the commentary to the 1949 Geneva Conventions:

> The substitution of [armed conflict] for the word "war" was deliberate. It is possible to argue almost endlessly about the legal definition of "war." . . . The expression "armed conflict" makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict. . . . It makes no difference how long the conflict lasts, or how much slaughter takes place.[9]

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[d] The relevance of judgments and opinions of international courts has become a politicized issue in the United States and was addressed by the Supreme Court in *Medellin v. Texas*. The Court indicated that consenting to the jurisdiction of international tribunals and being bound by their decisions are two different matters.[7]

[e] 1949 Geneva Convention, common Article 2 states "the present Convention shall apply to all cases of *declared war* or of any other *armed conflict* which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Convention (III) relative to the Treatment of Prisoners of War art. 2, August 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 (emphasis added).

The Army *Law of Armed Conflict Deskbook* is consistent with this notion, and regarding the "war" versus "armed conflict" debate, it states: "Article 2 common to all four Geneva Conventions ended this debate. Article 2 asserts that LOAC applies in any instance of international armed conflict."[10,f] It is clear that not all armed conflicts are wars, but this point is irrelevant because the body of law referred to as LOW or LOAC is triggered by armed conflict, which has a lower threshold than war. For purposes of this document, the term *law of armed conflict* is used. This usage accounts for conflicts that are not formally declared wars, and the term is consistent with current military guidance and usage in international treaties.

Human rights and humanitarian goals have become a part of LOAC, in substantial part because of the influence of the Geneva Conventions and their proscription of certain conduct to protect victims of war. To some, *law of war* and *law of armed conflict* are outdated terms that can readily be replaced with the term *international humanitarian law*, but this reference does not appropriately capture the content of LOAC that includes, for example, the permissible manner in which individuals may be targeted.[12] More accurately, IHL makes up a part of LOAC but does not subsume it. Rather, it refers to treaty provisions and customary norms that are intended to limit the effects of armed conflict for humanitarian reasons. Furthermore, LOAC more broadly includes concepts the primary purposes of which are not humanitarian (e.g., proportionality, where injuries to civilians and damage to civilian objects may not be excessive compared to the anticipated concrete and direct military advantage, but where civilian deaths are not altogether prohibited).

IHL and IHRL are often used interchangeably, which can distort the relationships among LOAC, IHL, LOW, and IHRL. The tenets of IHRL are generally considered the minimum protections due to civilians under any circumstance, including peacetime, unless an exception applies, such as a public emergency that threatens the life of the state. IHL applies in armed conflicts. IHRL concerns the relationship between states and individuals within their territories, although a debate exists regarding the applicability of IHRL obligations of states toward persons outside their jurisdiction. The tenet of IHRL is the general protection of citizens' individual rights against government misconduct, whereas LOAC imposes obligations on states that protect classes of persons (such as civilians and those placed *hors de combat*) during the specific period of an "armed conflict."[13]

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[f] The Army *Law of War Handbook* uses the terms together, referring to the application of the "law of war during all armed conflicts" and stating that the "law of war is triggered by conflict."[11]

States currently have different interpretations of the relationship between LOAC and IHRL. The United States views the two bodies of law as separate systems of protection that apply in different circumstances and adheres to the concept that the more specific rule displaces the more general.[14,g] In this context, LOAC has more specific triggering mechanisms and trumps the application of peacetime IHRL in armed conflict. The European view is that IHRL always applies in conjunction with LOAC on the battlefield.[h] The United States most recently stated in the Fourth Periodic Report to the United Nations High Commissioner for Refugees (UNHCR) that IHRL and LOAC "are in many respects complementary and mutually reinforcing. . . . Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination."[16] This emerging view will likely evolve with the development of additional international case law and any changes in US policy regarding what provisions may be enforceable as CIL. Despite a consensus that there is some overlap, LOAC is triggered by conflict, but no such trigger is required to invoke IHRL.

Policy Note. Current US policy is to apply the law of war (i.e., LOAC) during all operations. DoD Directive 2311.01E[17] requires all members of the armed forces to "comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."

Principles of Law of Armed Conflict

There are four key principles related to LOAC. They generally apply to what is termed "the means and methods," or how the parties conduct themselves once an armed conflict is underway. The "means" refer to the weapons used to fight. The "methods" refer to the tactics of fighting. Put another way, it is the determination of who or what may be targeted and how. The four principles central to that analysis are military necessity, distinction, proportionality, and humanity.

Analyzing conduct within the context of these principles is a complex task that often requires consulting what principles exist as customary law, multiple treaties, case law, rules of engagement, and policy directives, as well as considering coalition and host nation concerns.

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[g] The legal maxim is *lex specialis derogat lex generalis.*

[h] This view has been adopted by the International Court of Justice.[15]

The principles are explained here to provide the reader a general familiarity with the terms.[i]

Military Necessity

Military necessity includes two elements: that (1) there is a military requirement to undertake a certain measure, (2) the measure is not forbidden by LOW. A commander must articulate a military requirement, select a measure to achieve it, and ensure that neither the requirement nor the measure to achieve it violates LOAC.

Distinction

The principle of distinction is sometimes referred to as the "grandfather of all principles," as it forms the foundation for much of the Geneva Tradition of LOAC. The essence of the principle is that military attacks should be directed at belligerents, meaning those who are fighting, and military targets, and not civilians, meaning those who are not fighting, or civilian property. Additional Protocol I, Article 48, sets out the rule: "parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

Proportionality

The test to determine whether an attack is proportionate is found in Additional Protocol I, Article 51(5)(b): if launched, "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" would violate the principle of proportionality. The same standard is echoed in Article 57 of Additional Protocol I. If the target is purely military with no known civilian personnel or property in jeopardy, no proportionality analysis need be conducted. However, this circumstance is uncommon.

Humanity

Sometimes referred to as the principle of unnecessary suffering or humanity, this principle requires military forces to avoid inflicting gratuitous violence on the enemy. It arose originally from humanitarian concerns over the suffering of wounded soldiers and was codified as a weapons limitation: "It is especially forbidden . . . to employ arms,

[i] These definitions are taken from the Army Judge Advocate General's *Law of Armed Conflict Deskbook*.[18]

projectiles or material calculated to cause unnecessary suffering."[19] More broadly, this principle also encompasses the humanitarian spirit behind the Geneva Conventions to limit the effects of war on the civilian population and property and serves as a counterbalance to the principle of military necessity.

THE GENEVA CONVENTIONS

The Geneva Conventions of 1949 are four international treaties that, along with the Additional Protocols of 1977 and 2005, serve as the cornerstone of IHL and LOAC.[j] Every state has ratified the Geneva Conventions of 1949, and many of these treaty provisions are now considered customary law.[k] The purpose of these treaties is to protect victims and participants of war, including combatants and other belligerents, prisoners of war (POWs), the sick and wounded and shipwrecked, and civilians.

Each of the four treaties that forms the Geneva Conventions of 1949 focuses on protections for a specific category of personnel and applies in any armed conflict (hereinafter referred to as GC I, GC II, GC III, and GC IV).[21,22,23,24] The treaties contain an identical Article 3, which extends the protections of the treaties to armed conflicts not of an international character, or noninternational armed conflicts (NIACs), such as armed uprisings and insurrections.[l] Known as "Common Article 3," it has been referred to as "the Convention in miniature" because it requires that a range of basic humanitarian protections apply to participants and civilians during internal armed conflicts.[26] The Conventions also contain a Common Article 2, which makes their provisions applicable in "all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties."[27] The Common Articles and their relevance to conflict status are discussed in *Chapter 5. Insurgency* and *Chapter 6. Belligerency.*

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[j] The 1949 Geneva Conventions built on earlier efforts that resulted in the 1929 Geneva Conventions. While the history of LOAC encompasses more than the creation and ratification the Geneva Conventions, the principles embodied in these treaties concerning the treatment of both privileged and unprivileged belligerents during armed conflict are fundamental to the analysis of LOAC. For a detailed discussion on the development of LOAC and the history of the Geneva Conventions, see Solis.[20]

[k] Not all countries have ratified the Additional Protocols. See the *Objections* section for a discussion on objections to Protocols I and II.

[l] Common Article 3 was included to emphasize the "principle of respect for the human personality" regardless of whether the conflict occurs between two recognized states (i.e., is international in nature). The drafters determined that "the same logical process could not fail to lead to the idea of applying the principle to *all* cases of armed conflicts, including those of an internal character."[25]

In 1977, the four Geneva Conventions were supplemented by Additional Protocols I and II. Additional Protocol I protects civilians during international armed conflicts (IACs), expands on the provisions of the Geneva Conventions, and extends those protections to national liberation movements, namely internal conflicts against colonial domination, alien occupation, and racist regimes. Additional Protocol II first sets a higher threshold than Common Article 3 for its application, and then it expands the protections provided by Common Article 3, such as specific provisions for the protection of children and the protection of "objects indispensable to civilian survival."[28,29] In 2005, Protocol III amended the Conventions to include the red crystal symbol as a protective emblem that may be displayed by those performing humanitarian services such as medics and chaplains.[m] Provisions of the Conventions relevant to individual status are discussed in detail in *Chapter 5. Insurgency* and *Chapter 6. Belligerency.*

Policy Note. The Bush administration originally stated that the Conventions would be respected as a matter of policy but did not apply to detainees held in Guantanamo Bay who were captured during the conflict with Al Qaeda. The Supreme Court in *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006) held that the Geneva Conventions do apply to detainees who were captured during the conflict with Al Qaeda and that Common Article 3 had been violated.

Additional Protocols I and II

Additional Protocols I and II are supplemental treaties that were adopted to provide added protections to victims of war where the Geneva Conventions were deemed insufficient. They add to but do not amend the Conventions. Protocol I expands protections for the civilian population in IACs and codifies many aspects of customary law that are fundamental to LOAC, particularly the concepts of distinction,

[m] GC I recognizes emblems such as the Red Cross and Red Crescent as visible signs of the protected status of individuals performing humanitarian duties and therefore having a neutral status; Protocol III adds the Red Crystal. The emblems serve only as a visual cue to conflict participants. Protected status attaches to these individuals because of the nature of their duties and is not established on the basis of the emblem's visibility.

unnecessary suffering, and proportionality.[30] Protocol II elaborates on Common Article 3 protections and applies them to internal conflicts.[31,n]

Objections

The Additional Protocols have not been universally adopted, and many states have criticized several of their provisions. The United States has not ratified either protocol because of historical objections dating back to the Reagan era. In particular, the Reagan administration felt that Protocol I endorsed terrorism by relaxing GC III's standards for POW status. Under GC III, lawful combatants are to wear a distinctive sign and distinguish themselves from the civilian population. Article 44 of Protocol I states that a combatant must "be given protections equivalent in all respects to those accorded prisoners of war" even if he or she fails to meet the distinction requirement.[32] The United States has also felt that Protocol I introduced subjective elements that could have a politicizing effect because it includes as IACs those conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[33,o] In his Letter of Transmittal of Protocol II to the Senate, President Reagan summarized these objections to Protocol I by stating:

> One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to

[n] Protocol II applies to specific noninternational (i.e., internal) armed conflicts such as civil wars that take place in the territory of a party between its armed forces and a resistance that, under responsible command, exercises enough control over territory in order to carry out sustained and concerted military operations and to implement Additional Protocol II. It does not apply to internal disturbances that do not meet that threshold of armed conflict, such as riots, isolated and sporadic acts of violence, and demonstrations. It only applies to conflicts between a state and a nonstate actor, but not to conflicts between such nonstate actors themselves, unlike NIACs within Common Article 3.

[o] This article is often referred to as the CARs provision (fighting against Colonial domination and Alien occupation and against Racist regimes).

> distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form.[34,35]

Objections to Protocol II by states were fewer. In fact, President Reagan recommended that the Senate ratify Protocol II in January 1987, but the Senate took no action. Its affiliation with Protocol I and the accompanying criticisms made ratification unfavorable. However, Protocols I and II bind nearly every coalition partner. The United States has stated that it considers many aspects of Protocol I and much of Protocol II to be CIL and that US policy is to comply with the protocols whenever possible.[36,37] In 1987, Michael J. Matheson, then deputy legal advisor at the Department of State, commented in his official capacity that many aspects of Protocol I are considered custom.[38] More recently, President Obama urged the Senate to ratify Protocol II and has asserted US support for Article 75 of Protocol I (while maintaining objections to the CARs and POW provisions), which sets forth fundamental guarantees for persons in the hands of opposing forces in an IAC.[p]

Additional Protocol III

Additional Protocol III of 2005 added a four-sided, diamond-shaped red crystal as a neutrality emblem that can be used in lieu of the traditional Red Cross to indicate that the wearer is not a lawful target.[40] Article 3 of the protocol allows a state to include within the center of the crystal an additional interior symbol, if desired.

[p] "Because of the vital importance of the rule of law to the effectiveness and legitimacy of our national security policy, the Administration is announcing our support for two important components of the international legal framework that covers armed conflicts: Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions."[39]

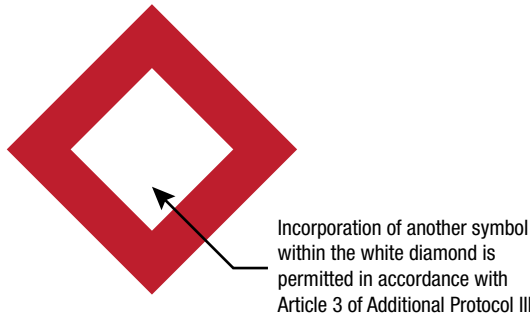

Figure A-1. Red Crescent neutrality symbol adopted in Additional Protocol III.

The United States has ratified Protocol III, but the effect of the protocol is not clear. Some forces are foregoing the use of protective signs out of concern that individuals wearing these signs will actually be targeted. In Iraq and Afghanistan, US medics have not always worn such markings for this reason, and Israel directs its medics similarly.[41]

Summary Points

- The United States has ratified and is bound by the four treaties comprising the Geneva Conventions of 1949.
- The United States has not ratified Additional Protocols I or II, but it is US policy to comply with the protocols when possible, and the Obama administration seeks Senate ratification of Protocol II and has asserted support for Article 75 of Protocol I.
- The United States has acknowledged that many provisions of Protocol I are custom, which means it considers itself bound by such provisions even in the absence of ratification. There is no comprehensive list of which provisions are deemed custom.
- The argument that all of Protocol I has attained CIL status continues to grow, in particular because almost every coalition partner is bound by it as a matter of treaty law, and the US practice has been to follow the protocol when engaged in warfare with states that have ratified it.

Common Articles

The term *Common Articles* refers to several articles in the 1949 Geneva Conventions that are identical across all four treaties. They generally relate to the scope of the provisions and the obligations of states under the treaties and are considered significant enough to appear in each Convention. Common Articles 1, 2, and 3 are identical in content and in their locations within these four treaties. Others are substantially alike but in different locations within each document, e.g., Articles 11,

12, and 49. Common Article 2 and Common Article 3 are referred to frequently throughout LOAC and merit a more detailed discussion.

Common Article 2—International Armed Conflicts

Common Article 2 defines the armed conflicts to which the 1949 Geneva Conventions apply. These include, according to Article 2, "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." They also include "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." It creates a de facto standard for when the Conventions apply, where the intent of the parties is irrelevant, but where the nature of the hostilities drive the determination. Once there is an Article 2 conflict, all four of the Geneva Conventions apply, as well as Protocol I (for those states that have ratified it). Article 1(3) of Protocol I states that it "supplements the Geneva Conventions . . . [and] shall apply in the situations referred to in Article 2 common to those Conventions."[42]

Recall that the United States has not ratified Protocol I, largely because of Article 1(4), which expands the application of the Conventions to conflicts previously considered internal, "in which peoples are fighting against colonial domination and alien occupation and against racist regimes."[43] This article in particular has been criticized (by the United States and others) because terrorists could proclaim themselves part of a national liberation movement and, via Article 96 of Protocol I, unilaterally declare the application and protections of the Conventions and then purposely fail to comply with LOAC.[q] Despite these objections, when a Common Article 2 IAC exists, Protocol I must also be taken into account as a matter of policy, as it has been ratified by many allies to the United States.

Common Article 3—Noninternational Armed Conflicts

Common Article 3 requires that basic humanitarian norms be given to individuals outside of combat in noninternational, i.e., internal, armed conflicts. It reads:

> In the case of armed conflict not of an international character occurring in the territory of one of the

[q] "One of the more preposterous innovations of the Protocol is that, in accordance with Article 96(3), combined with Article 1(4), a group of terrorists proclaiming itself to be a national liberation movement fighting for the right to self-determination may make a unilateral declaration whereby it assumes all the rights and obligations of a Contracting Party, despite the fact that the terrorists themselves fail to observe the laws of armed conflict."[44]

> High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Despite the language limiting the article to internal conflicts, Common Article 3 articulates minimum standards that are considered applicable to both international and noninternational conflicts; the lesser is included within the greater.[45] The International Court of

Justice articulated this view in the case of *Nicaragua v. U.S.*, and the United States has adopted this as policy and expanded its application to nonconflict operations other than war through Department of Defense (DoD) Directive 2311.01E. The first portion of the article refers to a conflict "occurring in the territory of one of the High Contracting Parties." Some have interpreted "territorial clause," as it is known, to mean that Common Article 3 cannot apply to conflicts that are not restricted to a single state. However, the US Supreme Court in *Hamdan v. Rumsfeld* determined that Common Article 3 should be given extraterritorial effect and that the armed conflict with Al Qaeda was at least governed by this article as a matter of US treaty obligation.[46] The court came to this conclusion even though the government argued that the conflict was part of the "global war on terror" and that, because of this, it was neither a traditional IAC governed by the Geneva Conventions, nor an internal armed conflict where Common Article 3 would normally apply in NIACs.[47]

Regardless of this case law and the widely accepted position that Common Article 3 protections are considered the "minimum yardstick" of protections that apply in any conflict, an analysis of the application of Common Article 3 is still necessary to determine whether other portions of the Conventions apply.[48] The application of Common Article 3 protections as policy—but not as a matter of law—is confusing to the point that some argue that the distinction between international and noninternational conflicts is no longer aligned with the movement of IHL toward applying more of the protections available in IACs to NIACs. Nonetheless, the distinction is still recognized, in case law and in practice.[49]

The application of Common Article 3 is difficult to determine because it does not by its terms define "noninternational conflict," and it does not have a mechanism for enforcing its provisions. There is no supranational body designated to decide what constitutes a Common Article 3 conflict. Moreover, even if there were, there is no clear threshold for violence to distinguish between an internal armed conflict and what might "merely" amount to an internal security or crime suppression problem. The delegations present at the drafting of the Conventions expressed this concern and feared that the language was so vague that it could include "any form of anarchy, rebellion, or even plain banditry" and questioned whether, "if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article?"[50] In response to this concern, they came up with four nonbinding criteria to help determine when Article 3 applies:

> (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
>
> (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
>
> (3) (a) That the de jure Government has recognized the insurgents as belligerents; or
>
> (b) that it has claimed for itself the rights of a belligerent; or
>
> (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
>
> (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
>
> (4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
>
> (b) That the insurgent civil authority exercises de facto authority over persons within a determinate territory.
>
> (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
>
> (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.[51]

The International Tribunal for the Former Yugoslavia presented a simplified analysis based on the intensity of the conflict and the organization of the parties. In *Prosecutor v. Tadić*, the court stated that an armed conflict "exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups."[52] Nonetheless, recognition of this state of affairs is not necessarily obvious. The government in power may be reluctant to apply Common Article 3 protections out of

fear of conferring legitimacy to rebels, and insurgents may not have a platform for gaining international recognition to alert others to their cause.

Unlike in IACs, individuals fighting in Common Article 3 conflicts do not have combatant privileges, i.e., they do not receive POW status and can be punished for their acts by the sovereign state in which they are fighting. In this way, the lack of enforcement provisions in Common Article 3 could serve to undermine the purpose for which it exists. A government can still try to punish individuals as criminals under its domestic laws. The domestic laws could impose harsh or inhumane punishment or even death, which is paradoxical, given the intent of the Conventions.

Conflict Status

Under the Conventions, everyone involved in an armed conflict has a particular status, and individual status determines the level of protections that apply. So, to determine what aspects of the Conventions pertain to a situation involves two questions: (1) what type of conflict exists, if any (i.e., international or noninternational)? and (2) what status do the participants have?

The analysis as it pertains to the type of conflict can be summarized in the following way:

- If it is an IAC (i.e., a Common Article 2 conflict), all four Geneva Conventions apply, as well as Additional Protocol I if the state is a party.
- If it is a NIAC (i.e., an internal conflict), customary IHL and Common Article 3 apply, but no other part of the Conventions apply. Protocol II may apply, if the rebels control sufficient territory "to enable them to carry out sustained and concerted military operations" under a responsible command.[53]

Guide to Applicability of the Geneva Conventions (GCs) Protections		
Armed conflict?	No	GCs do not apply
	Yes	GCs apply but which provisions apply depends on nature of conflict
What type of conflict?	NIAC	Common Article 3 protections apply
	IAC	Common Article 2 triggers the main portions of the GCs
If an IAC, what type of person?	Unprivileged belligerent	Customary IHL of IACs and Common Article 3 apply
	Privileged belligerent	All GCs apply and customary IHL of IACs that might fill any gaps in the GCs

Figure A-2. Overview of application of the Geneva Conventions on the basis of type of conflict. Adapted from Richard M. Whitaker, ed., Operational Law Handbook (Charlottesville, VA: The Judge Advocate General's School, United States Army, 1997), 13-2.[r]

It is possible to have a conflict that shifts between a Common Article 2 and Common Article 3. When the United States invaded Iraq in March 2003, it was a Common Article 2 conflict.[s] In May of that year, President Bush announced the end of combat operations, and US occupation began. The Conventions remained applicable because Common Article 2 applies in cases of total or partial occupation. When Iraq regained its sovereignty in June 2004 and control was passed to its interim government, arguably it became a Common Article 3 conflict between Iraq and insurgents, with the United States present to aid Iraq in its fight against the insurgents. Some scholars support this view, where an armed conflict is internal when a foreign state intervenes on behalf of a legitimate government to put down an insurgency.[55] Others consider any hostilities with international repercussions to be international in nature for purposes of applying the Geneva Conventions.[56]

Where a Common Article 2 and Common Article 3 conflict take place simultaneously in the same state is argued by some to be a single hybrid or dual-status conflict, and by others to be two separate conflicts. An example is Afghanistan in 2001, when the Taliban government was involved in an internal armed conflict with the Northern Alliance, and the US-led coalition invaded. Afghanistan and the United States are

[r] This chart is intended to provide a simplified assessment of the Conventions and how they apply in internal conflicts and IACs and is not a substitute for a more thorough analysis of their application in a given situation.

[s] Legal counsel to President Bush asserted that the armed conflict with Iraq began on March 19, 2003, when Bush ordered military forces to invade Iraq.[54]

both High Contracting Parties to the Geneva Conventions, so the invasion initiated a Common Article 2 conflict. It is not necessary that the conflicts merge, so in this instance they were occurring separately but simultaneously.[57]

Note that Afghanistan may initially present a relatively clear example of a dual-status conflict or two simultaneous conflicts, but there is no agreed-upon final determination of exactly what type of conflict exists between Al Qaeda in Afghanistan (and elsewhere) and the United States. In the *Hamdan* case, regarding the validity of the military commissions set up to try detainees, the trial court decided that the conflict in Afghanistan was an IAC;[58] the Court of Appeals determined that it was international but outside of the scope of the Geneva Conventions;[59] and the Supreme Court chose not to make a determination on the merits of that question but said that at least NIAC protections applied.[60]

INDIVIDUAL STATUS ON THE BATTLEFIELD

On the battlefield, there are two types of status: belligerent or civilian. Within belligerent status are those categories of individuals who are considered privileged, meaning they are entitled to take part in hostilities and are, therefore, afforded POW protections if captured. Civilians are a protected group unless and until they directly participate in hostilities, at which point they become belligerents and are subject to attack for such time as they directly participate in hostilities. Belligerents who are not entitled to fight, sometimes called unprivileged belligerents or unlawful combatants, are those individuals who are not recognized under LOAC as having POW protections.

Lawful Combatants/Prisoners of War

Lawful combatants include members of the armed forces of a party to a conflict and any other individuals taking a direct part in hostilities who satisfy the requirements of customary law and Article 4 of the Third Geneva Convention. Article 43(2) of Additional Protocol I states that in IACs, "members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."[61,t] In IACs, lawful combatants are entitled to POW status upon capture and must be treated in

[t] See *Chapter 5. Insurgency* for a discussion on the criteria for "direct participation in hostilities."

accordance with GC III, which is devoted entirely to POWs.[u] They are protected by the "combatant's privilege," which allows them to kill and wound enemy combatants without penalty, assuming they commit no unlawful battlefield act.[v] Lawful combatant status indicates that an individual is entitled to fight, whether or not he/she is engaged in combat at that moment. By extension, these individuals may also be attacked at any time, not only when threatening the enemy.[63] Combatants remain lawful targets of the enemy even if targeted behind the front lines.[w]

The concept of lawful versus unlawful combatant is discussed in more detail in *Chapter 6. Belligerency*. However, international law and US domestic law recognized the distinction even before the end of World War II and the drafting of the 1949 Conventions. In *Ex parte Quirin*, the US Supreme Court upheld the jurisdiction of a US military tribunal established to try German saboteurs. In that case, the court stated:

> Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[65]

There is no requirement that captured unlawful combatants be denied POW status. However, the US position has been to generously apply POW status to irregular forces and others considered unlawful combatants.[66] In some instances, this approach may mean treating individuals as if they were POWs in lieu of actually according them such status as a matter of law. This distinction is important because the

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[u] Recall that POW status occurs only in Common Article 2 IACs.

[v] This is a centuries-old concept, codified in Article 57 of Lieber's Code, which states that upon taking the soldier's oath an individual "is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."[62]

[w] The idea that there is no restriction on the use of force against a lawful opposing combatant has been challenged by some who interpret IHL as restricting the circumstances in which combatants may be targeted.[64]

capturing party would not be obligated to comply with all GC III provisions for POWs for such individuals. However, the United States has not agreed to treat all captured Taliban or Al Qaeda fighters as POWs and has questioned the extent to which any Geneva Convention protections apply to such individuals (see *Chapter 6. Belligerency*).

Example: Outside of Combat or Lawful Combatant? Saddam Hussein was afforded POW status. Did his capture occur during an Article 2 conflict, and when he was captured, was he a combatant? The United States was no longer in an armed conflict phase but was occupying Iraq. However, Common Article 2 states that the Conventions continue to apply during "partial or total occupation." Saddam had commanded the army and often wore a uniform and openly carried arms. Despite being captured in civilian clothes outside of direct combat, he had not surrendered and had not abandoned his role as commander of the Iraqi army. Therefore, he was therefore considered a lawful combatant (and a lawful target) and was afforded POW status.

Combatants may relinquish their status by withdrawing from hostilities and becoming civilians, by becoming outside of combat (*hors de combat*) through surrender, or in the circumstance of getting wounded, sick, or shipwrecked. Combatants who fall into the hands of an enemy while *hors de combat* are generally entitled to POW privileges.[x]

Retainees

Article 28 of GC I refers to "retained personnel," that is, individuals who are entitled to receive the same treatment as POWs upon capture

[x] "The visit was arranged after the Pentagon formally declared Saddam a POW last month because of his status as commander in chief of Iraq's military. As a POW, Saddam is entitled under the Geneva Conventions to certain rights, including visits by the international Red Cross and freedom from coercion of any kind during interrogations."[67]

but who are not combatants.[y] The category of retainees includes chaplains and medical personnel. While part of the armed forces, they are the only members who are considered noncombatants under LOAC. This status is unique because chaplains and medical personnel are subject to capture (unlike a civilian), but they are not POWs and their presence on the battlefield does not require the enemy to alter its military objective (i.e., take special measures to ensure that the attack minimizes casualties if civilians are present).

Medical personnel and chaplains cannot be compelled to do work outside of their medical or pastoral duties.[69] Retainees include members of the armed forces who temporarily perform medical functions such as "hospital orderlies, nurses, or auxiliary stretcher-bearers" when such individuals are trained exclusively for these roles and encounter the opposing forces while performing these functions.[70,71] That personnel in a medical unit maintain arms, or that weapons are present in a medical facility, does not waive this protection.[72] However, they may use those any such weapons only in self-defense or in defense of the wounded and sick.[z] In general, chaplains are not permitted to carry weapons.

If there is no longer a need for retainees to carry out their medical and spiritual duties for POWs also under the control of the adverse party, they must be repatriated, or returned to their own armed forces.[74] Retainees who directly participate in hostilities by taking up arms for purposes other than self-defense lose their protections and become lawful targets. If they are captured by an enemy who honors LOAC, they will be treated as POWs and consequently can be tried for precapture acts.[75]

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[y] The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field states in Article 28: "personnel designated in Articles 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require." Article 24 states that "medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances." Article 26 states "the staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24, are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations."[68]

[z] Article 19 reads: "Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict. Should they fall into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units." These protections are intact even if the medical personnel are armed, as long as they use "arms in their own defence, or in that of the wounded and sick in their charge."[73]

Members of Other Militias and Volunteer Corps

GC III, Article 4(A) affords POW status to "members of other militias and members of other volunteer corps, including those of organized resistance movements." This article addresses the issue of partisans, guerillas, and rebels. To achieve POW status, the members of these groups must meet the following criteria:[76]

1. Be commanded by a person responsible for his subordinates
2. Have a fixed distinctive sign recognizable at a distance
3. Carry arms openly
4. Conduct their operations in accordance with the laws and customs of war

The first requirement exists to exclude from the definition individuals acting on their own. The second condition is required to distinguish the partisan from the civilian population. The identifying sign need not be a uniform but can be an emblem or some type of distinctive sign that must be used by all members of the group. The third requirement of carrying arms openly means that arms must not be concealed when parties are visible to the adversary or before launching an attack. That is, the individual must "abstain from creating the false impression that he is a civilian . . . and carry his arms openly in a reasonable way."[77] The last condition exists so that combatants cannot rely on LOAC only to benefit from its protections. Conduct in accordance with LOAC is a key distinction between lawful and unlawful combatants.

Persons Accompanying But Not Members of the Armed Forces

GC III, Article 4(A)(4), provides that "persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model" are entitled to POW status upon capture. The key element for this classification of status is the authorization of the individual by the armed forces that they accompany. An example would be technical representatives on location to maintain or service aircraft or flight helicopters. If a civilian technician from Boeing were to be captured by insurgents, he or she would be entitled to be treated as a POW.

Levée en Masse

The only time that civilians are permitted to take up arms and not meet all the requirements of lawful combatancy that would otherwise be required for POW status is the case of *levée en masse*. GC III Article 4(A)(6) states that POW status is afforded to "inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."[78] The conditions of a *levée en masse* are those of an emergency where there is no time to organize under a commander or wear a distinctive sign. Because the character of a *levée en masse* is one of last resort to protect a territory not yet occupied by foreign forces, once the attempted occupation has passed, members must be incorporated into the regular armed forces. This is the temporal component, according to which a *levée en masse* can exist only during the actual approach of the enemy within the context of a Common Article 2 conflict. It cannot extend beyond the invasion because either the enemy will be resisted or the situation will stabilize and there will be opportunity for the formal organization of such persons into the armed forces or another category under Article 4 of GC III.

Civilians

Civilians are noncombatants. The simplicity of this statement belies its significance and the complexity of the analysis surrounding that determination. Nonetheless, in simplest terms, civilians are not members of the armed forces.[aa] Civilians are afforded protections during any type of armed conflict, particularly protections from direct attack, meaning they can never be made the object of attack. This notion is embodied in Protocol I, Article 51, and reinforced in international case law.[ab]

[aa] LOAC does not provide a definition of "civilian." However, Additional Protocol I provides a negative definition in Article 50: "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." See *Chapter 5. Insurgency* for a discussion of the definition of civilian and the circumstances in which civilians forfeit protections through direct participation in hostilities.

[ab] "The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law . . . . it is a universally recognized principle . . . that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law."[79]

Relative to civilians, two LOAC concepts are important: distinction and proportionality. Distinction requires that fighters distinguish between belligerents and civilians and between military targets and civilian objects. However, the incidental death of civilians is permitted when the attack is aimed at a legitimate military target, and the concept of proportionality dictates that the loss of civilian life cannot be excessive in relation to the concrete and direct military advantage gained. So, civilian casualties are not necessarily unlawful, but they must not be excessive in relation to the concrete and direct military advantage expected.

Civilians forfeit their protection if they take a direct part in hostilities and for such time as they do so. Whether an individual on or near the battlefield is a civilian is a difficult determination, particularly given that it is commonplace for the enemy to dress as a civilian or compel civilians to carry out hostile acts in current armed conflicts. There are several elements within LOAC and international law more generally that are necessary parts of this analysis. For a discussion of direct participation in hostilities and its impact on civilian status, see *Chapter 5. Insurgency.*

Other Protected Persons

This individual status applies only in Common Article 2 conflicts and applies GC IV protections to individuals who "find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[80] In essence, they are noncombatants that find themselves in the hands of the enemy. For these individuals, GC IV provides greater protections than would otherwise be provided by Common Article 3 (which are nonetheless considerable).

DIRECT PARTICIPATION IN HOSTILITIES

Significance on Status

Under IHL, the civilian population and individual civilians enjoy a general protection from the effects of hostilities. Today, IACs frequently involve at least one organized nonstate armed group in which portions of the civilian population have been converted into members of the fighting forces. Additional Protocol I addresses the issue of increased civilian participation in hostilities with Article 51, which protects civilians "against dangers arising from military operations," including direct attacks and "acts or threats of violence the primary purpose of

which is to spread terror.[81] This is "unless and for such time as they *take a direct part in hostilities*."[82,ac] Neither the protocols nor the Conventions define direct participation in hostilities. However, whether a civilian is directly participating in hostilities is a critical determination, because doing so suspends his or her immunity, thus allowing him or her to be made the object of attack.

The concept of direct participation applies only to civilians, but it is relevant whether the armed conflict is international or noninternational in nature. In an IAC, a civilian is defined as any person who is not a member of the armed forces of a party to the conflict and who is not a participant in a *levée en masse*.[ad] If there is doubt regarding whether an individual is a civilian, he or she is to be considered a civilian and the "presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."[83] In an internal armed conflict, a civilian is someone who is not associated with the military or an organized armed group, and who is not directly participating in the hostilities. The terminology used in the Geneva Conventions and the protocols suggests that an individual is either a member of the armed forces, a participant in a *levée en masse*, or a civilian. By this reading, a civilian is always negatively defined as someone *not* falling into another category.[ae] The determination of whether organized armed groups (who are not considered regular armed forces) are civilians engaged in continuous direct participation has not been settled by state practice or international jurisprudence, but they are generally considered armed forces of a nonstate actor that is party to a noninternational armed conflict and consist of individuals "whose continuous function is to take a direct part in hostilities."[85,af]

The meaning and limit of Article 51 is part of an ongoing debate between academics, practitioners, and operators. Previous commentaries to the Geneva Conventions and the protocols provided some guidance on the definition of direct participation in hostilities, but a more comprehensive report, issued in 2009 by the International Committee

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[ac] Emphasis added.

[ad] Article 50 of Protocol I refers to Article 4(A) of GC III: "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol."

[ae] "As the wording and logic of Article 3 GC I-IV and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict."[84]

[af] The analysis of membership in organized armed groups and the threshold for continuous combat function should be developed through scenarios, particularly analysis of Taliban and Al Qaeda membership.

of the Red Cross (ICRC), reflects a multiyear study by a panel of experts concerning the terminology as used in international law.[86,ag] US experts participated on that panel, but they withdrew their names from the final product in protest over the process by which the head ICRC legal advisor reached the conclusions contained in the study.[88,ah] The ICRC recommendations have been implemented by some allies, and the elements for direct participation in hostilities are discussed an analyzed below. The Army judge advocate general's most recent *Law of Armed Conflict Deskbook* articulates the current US position:

> To date, the United States has not adopted the complex ICRC position, nor its vocabulary. Instead, the United States relies on a case-by-case approach to both organized armed groups and individuals. U.S. forces use a functional [direct participation in hostilities] analysis based on the notions of hostile act and hostile intent as defined in the Standing Rules of Engagement,[ai] and the criticality of an individual's contribution to enemy war efforts. . . . Those designated as hostile become status-based targets, subject to attack or capture at any time if operating on active battlefields or in areas where authorities consent or are unwilling or unable to capture or control them.[93]

Some elements of the US position on direct participation in hostilities are the same as the ICRC analysis—for example, that general participation in the war effort, such as employment in factories or expressing support for the adversary's government, does not constitute direct participation in hostilities. There is also no debate over obvious instances of direct participation in hostilities that justify a response of

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[ag] Previous commentary that provided guidance includes that by Sandoz, Swinarski, and Zimmerman.[87]

[ah] The editors of the *Law of Armed Conflict Deskbook* note that the United States has not issued official guidance, but several experts have published independent responses to the ICRC's guidance. For example, Michael N. Schmitt,[89] W. Hays Parks (Mr. Parks, a retired Marine colonel, was one of the two US experts assigned to the study),[90] and Kenneth Watkin.[91]

[ai] The Standing Rules of Engagement define "hostile act" as "an attack or other use of force against the United States, US forces, and, in certain circumstances, US nationals, their property, US commercial assets, and/or other designated non-US forces, foreign nationals and their property. It is also force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel and vital US Government property." It defines "hostile intent" as "the threat of imminent use of force against the United States, US forces, and in certain circumstances, US nationals, their property, US commercial assets, and/or other designated non-US forces, foreign nationals and their property. Also, the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property."[92]

deadly force, such as openly carrying and firing arms at soldiers (if not part of a *levée en masse*). However, the United States has been faced with armed groups that purposely and illegally use the civilian population to conduct attacks. The United States also relies heavily on civilian and contractor support for battlefield or targeting roles. These scenarios and others present difficult situations in which attacks that are more remote in location and attenuated in time are harder to analyze for determining direct participation in hostilities. Some of these issues are discussed in more detail in *The Impact of International Humanitarian Law on the Status of Persons in Insurgency (Chapter 5).*

International Committee of the Red Cross Criteria for Determining Direct Participation

The analysis for determining direct participation in hostilities can be broken down into two elements: what is meant by "hostilities" and what is meant by "direct participation." The first element refers to collective activities that constitute the means of injuring the enemy, and the second element refers to the individual involvement of a person. In the course of armed conflict, not all conduct constitutes hostilities. Likewise, not all actions of an individual have the quality or degree of involvement that is required to meet the threshold for direct participation.

The ICRC report identifies three cumulative elements for a specific civilian act to constitute direct participation in hostilities:

> "1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
>
> 2. There must be a direct causal link between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
>
> 3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)."[94]

For element 1, threshold of harm, only an objective likelihood that the harm will occur is required. It need not actually materialize. Military harm can be any consequence affecting military operations, such as "sabotage and other armed or unarmed activities restricting

or disturbing deployments," clearing mines placed by the enemy, and wiretapping the adversary's high command.[95] Harm here is not limited to killing or wounding personnel or causing physical damage to military objects. The second clause of element 1 allows violent or deadly acts against nonmilitary targets to constitute direct participation in hostilities. These include attacks against civilians, such as sniper attacks or the bombardment of residential areas.[96]

For element 2, direct causation, the acts can go beyond the actual conduct of armed hostilities and include acts that contribute in a direct way to the defeat of an adversary. An example of this type of activity would be a civilian driving a military ammunition truck to operationally engaged fighters.[97, aj] However, the use of the term *direct* implies there can be "indirect" participation. Indeed, acts that may "even be indispensable to the adversary, such as providing finances, food and shelter . . . and producing weapons and ammunition" are considered conflict-sustaining activities that are not designed to directly bring about the materialization of the required harm.[98] The distinction between producing the ammunition and driving the ammunition to operationally engaged fighters is ostensibly that delivering weapons to those engaged in combat "is carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm."[99] Simply producing ammunition does not meet the causal link requirement because it only maintains or increases the capacity of a party to harm an adversary.

The act need not be indispensable to the causation of harm. Producing weapons may be indispensable to the conflict, but their production is not considered directly causal to the harm. An opposing example may be the person serving as a lookout on an ambush. The contribution may not be indispensable to the causation of the harm once the ambush occurs, but he would almost certainly be considered to be directly participating in hostilities.[100] Causal proximity is different than temporal or geographic proximity. If weapons systems are used that employ a delay mechanism or are geographically remote from the battlefield, the causal relationship between the use of the systems and the resulting harm remains direct regardless of the temporal or geographic proximity.

At the same time, temporal or geographic proximity can indicate that an act constitutes direct participation in hostilities, but this alone is not a sufficient indicator. For example, recall the example of a truck carrying ammunition to engaged fighters. Some experts contend that the proximity of that truck to the front lines (geographic) is relevant

[aj] This scenario is cited as a "frequent classroom example."

to the determination, whereas if it were thousands of miles behind the front lines, it would lack the requisite causal link.[101] This reasoning was used in the case of *U.S. v. Salim Ahmed Hamdan*, in which a military commission found that Hamdan was directly participating in activities "by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to . . . ongoing combat operations."[102] The US and coalition forces had the only air assets against which the missiles might be used, and the Battle of Kandahar was already underway and only a short distance from where the car was stopped. These facts supported the argument that he was directly participating in hostilities against the United States. The Israeli High Court of Justice reached a similar conclusion in 2006, when it stated the following: "if the civilian is driving the ammunition to the place from which it will be used for the purposes of hostilities, he should be seen as taking a direct part in the hostilities."[103]

Note on Direct Participation in Hostilities and Military Targets. In the example of the ammunition truck, the truck is always a legitimate military objective. If as a result of its location or transporting activities (e.g., it is transporting ammunition from a factory to a port for shipping), the truck is not considered a legitimate military objective, the civilian driver would be protected against direct attack. However, an attack at any time against the truck as a military target would be permissible, but the analysis would have to consider the likely death of the civilian driver in the proportionality assessment.

The third element, belligerent nexus, refers to the objective purpose of the act carried out by the civilian. The focus is not on the subjective intent of the individual but is "expressed in the design of the act or operation."[104] As there is no focus on the mental capacity or willingness of the individual, even civilians forced to directly participate in hostilities or children below the recruitment age could be deemed combatants. Only in circumstances in which civilians are completely unaware of their roles or completely deprived of their physical freedom of action will they remain protected. Examples include an individual who is forced to act as a human shield or a driver who unknowingly transports a remote-controlled bomb.[105]

The belligerent nexus element does not include activities that may cause harm but that have nothing to do with the armed conflict, such as an exchange of gunfire between police and a bank robber. The acts must be designed to support a party to the conflict by harming another party. Also excluded from the concept are any harm caused by individual self-defense or defense of others; the exercise of power or authority

over individuals or territory—for example, the lawful exercise of judicial or disciplinary authority (which could include punishment or ill treatment, but which would be violations of IHL separate from the conduct of hostilities); acts of civil unrest against such authority; and inter-civilian violence that does not support a party to the conflict.[106]

UNLAWFUL COMBATANTS

The term *unlawful combatant* does not appear in the Conventions or protocols but has been frequently used by the United States as an individual status. The main characteristic of an unlawful combatant is that he or she is not entitled to POW status upon capture. The status is not universally recognized, and some argue that it is a subcategory of civilian, where the civilian takes up arms without being authorized under LOAC.[ak] The United States provides a definition in domestic legislation according to which an "unprivileged belligerent"[al] is one who "has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; or was a part of Al Qaeda at the time of the alleged offense" and does not qualify as a lawful combatant.[108]

Unlawful combatants can be targeted by the enemy, but they cannot claim POW status if captured. The use of this status has been criticized. One scholar notes that unlawful combatants "are subject to the burdens of combatancy (they can be killed), but they have no reciprocal rights. . . . The phrase unlawful combatant as used today combines the aspect of unlawful from the law of crime and the concept of combatant from the law of war. For those thus labeled, it is the worst of all possible worlds."[109] Unlawful combatants do not acknowledge the requirement to distinguish themselves from civilians, which could constitute an act of perfidy. Perfidy is prohibited in both IACs and NIACs and generally refers to any acts used to gain an enemy's confidence while intending to injure, kill, or capture him.[110] The act of feigning civilian status is one example.[am] Members of the Viet Cong were considered unlawful combatants because they fought at night and purported to be civilian

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[ak] "The distinction between lawful and unlawful combatants is a corollary of the cardinal distinction between combatants and civilians."[107]

[al] The 2006 version of the Military Commissions Act used the term *unlawful combatant*, but it was replaced with *unprivileged belligerent* in the 2009 amendments.

[am] The requirement to distinguish oneself from civilians is applied consistently to lawful combatants. If an otherwise lawful combatant engages in hostilities without a uniform or distinctive sign, he or she becomes an unlawful combatant and is not entitled to POW status upon capture. This underscores the point that at all times combatants must be distinguishable from civilians.[111]

farmers by day. Combatants cannot wear two hats, and if they do, they lose the protections that they would be afforded under either. They are not civilians and not lawful combatants. However, LOAC still applies to unlawful combatants in that they are entitled to the basic humanitarian protections of Common Article 3 upon capture.[an]

Enemy Combatants and Unlawful Enemy Combatants

Like the term *unlawful combatant*, the terms *enemy combatant* and *unlawful enemy combatant*[112] are not defined in international treaties, and there is no agreed-upon definition of these terms. However the United States has used the terms at different points since the terrorist attacks of September 11, 2001, and the general understanding is that they are variations of unlawful combatant status. In traditional usage, the term *enemy combatant* simply means a fighter who is entitled to POW status, but the United States has used the term to refer to unlawful belligerents.

DoD Directive 2310.01E defines an enemy combatant as "a person engaged in hostilities against the United States or its coalition partners during an armed conflict. The term 'enemy combatant' includes both 'lawful enemy combatants' and 'unlawful enemy combatants.' "[113] This definition eventually changed, in part due to the Supreme Court's ruling in *Hamdi v. Rumsfeld*,[114] which required that the individual be engaged in armed conflict, and that a Combatant Status Review Tribunal (CSRT) be held to determine an individual's status as an enemy combatant. The DoD order established CSRTs to consider "an individual who was part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." In 2009, the Obama administration ceased using the term *enemy combatant* and refers instead to such individuals as *detainees*.[115]

Detainees

According to the US military, a detainee is "any person captured or otherwise detained by an armed force."[116] However, DoD Directive 2310.01E provides a slightly different definition, where a detainee is "any person captured, detained, held, or otherwise under the control of DoD personnel (military, civilian, or contractor employee). It does not include persons being held primarily for law enforcement purposes

[an] This position is consistent with DoD Directive 2310.01E, which states that detainees, regardless of their legal statuses, should be treated in accordance with the minimum standards articulated in Common Article 3.

except where the United States is the occupying power."[117] It goes on to state that a detainee may be, *inter alia*, an enemy combatant, lawful enemy combatant, enemy POW, retained person, or civilian internee. According to this definition, any captive would be a detainee. However, this term has not attained international usage.

ENDNOTES

1 Field Manual No. 27-10 (FM 27-10), *The Law of Land Warfare* (with changes) (Washington, DC: Headquarters, Department of the Army, 1956), ¶ 4.

2 U.S. Const. art. VI, cl. 2.

3 The Paquete Habana, 175 U.S. 677 (1900). *Compare with* Roper v. Simmons, 543 U.S. 551, 622-629 (2005) (Scalia, J. dissenting). Oona Hathaway, Sabria McElroy, and Sara A. Solow, "International Law at Home: Enforcing Treaties in U.S. Courts," *Yale Journal of International Law* 37 (2012): 51–106.

4 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, August 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 31 [hereinafter GC I].

5 18 U.S.C. § 2441 (2006) (amended 2006).

6 18 U.S.C. §§ 3261-7 (2006).

7 Medellin v. Texas, 552 U.S. 491, 507 (2008).

8 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2012), 20.

9 International Committee of the Red Cross, *Commentary, Convention Relative to the Treatment of Prisoners of War*, ed. Jean Pictet (Geneva: International Committee of the Red Cross, 1960), 23.

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14 Ibid.

15 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, I.C.J. 136, ¶ 106 (July 9, 2004).

16 U.S. Department of State. "Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights," ¶ 507, December 30, 2011, http://www.state.gov/g/drl/rls/179781.htm.

17 US Department of Defense, *DoD Law of War Program: DoD Directive 2311.01E*, February 22, 2011, ¶ 4.1.

[18] DiMeglio et al., *Law of Armed Conflict Deskbook*, 135–151.

[19] Convention (IV) Respecting the Laws and Customs of War on Land, and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23, October 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.

[20] Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, chap. 3

[21] GC I.

[22] Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked members of the Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II].

[23] Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

[24] Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[25] International Committee of the Red Cross, *Commentary, Convention Relative to the Protection of Civilians in Time of War*, ed. Jean Pictet (Geneva: International Committee of the Red Cross, 1958), 26.

[26] Ibid., 34.

[27] GC I, art. 2.

[28] Protocol Additional to the Geneva Conventions of 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I), December 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol I].

[29] Protocol Additional to the Geneva Conventions of 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) arts. 4, 13, 14, December 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

[30] Protocol I, art. 35(2), 48, 51(5), 57.

[31] Solis, *The Law of Armed Conflict: International humanitarian Law in War*, chap. 5.1.3.

[32] Protocol I, art. 44(4).

[33] Protocol I, art. 1(4).

[34] Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protections of Victims of Non-International Armed Conflicts, S. Treaty Doc. No. 100-2., 100th Cong., 1st Sess., at 111 (1987), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf, reprinted in *American Journal of International Law* 81, no. 4 (1987): 911.

[35] George H. Aldrich, "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions," *American Journal of International Law* 85, no. 1 (1991): 1–20.

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[41] Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 139.

[42] Protocol I, art. 1(3).

[43] Protocol I, art. 1(4).

[44] Yoram Dinstein, "Comments on Protocol I," *International Review of the Red Cross* 37, no. 320 (1997): 469–470, http://www.icrc.org/eng/resources/documents/misc/57jnv5.htm.

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[46] Hamdan v. Rumsfeld, 548 U.S. 557, 630-31 (2006).

[47] Ibid., 629.

[48] Military and Paramilitary Activities in and Against Nicaragua, ¶ 219.

[49] Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 169.

[50] International Committee of the Red Cross, *Commentary, Convention Relative to the Treatment of Prisoners of War*, 35.

[51] Ibid., 36.

[52] Prosecutor v. Tadić, Case No. IT–94–1-T, Opinion and Judgment, ¶ 561 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (quoting Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia October 2, 1995)).

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[54] "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention, Op. Off. Legal Counsel (March 18, 2004) *available at* http://www.justice.gov/olc/2004/gc4mar18.pdf.

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[57] Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 156.

[58] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 160-61 (D.D.C. 2004).

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[61] Protocol I, art. 43(2).

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[72] GC I, art. 22.

[73] GC I, art. 19, 22.

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75 GC III, art. 85.

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