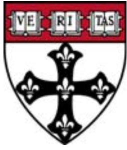

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International Humanitarian Law and Contemporary Conflicts

MULTI-NATIONAL OPERATIONS, UNITY OF EFFORT, AND THE LAW OF ARMED CONFLICT

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Abstract

The debates over the applicability and interpretation of the Law of Armed Conflict (LOAC) are vital to unity of effort as well as clarity of rules in coalition operations. This paper has addressed the key sources of uncertainty underlying how LOAC is and should be applied in coalition operations, focusing first on understanding which legal frameworks apply in particular context of armed conflict. After addressing key current debates over the qualification of conflicts, the paper explores a number of contemporary contexts in which this question of applicability is most salient: intervention in failed state situations and transnational armed conflicts. The paper suggests that resolving this first uncertainty is critical to unity of effort in this increasingly common realm of operations. It then suggests that a number of ongoing questions in the arena of LOAC applicability and interpretation exist where conflicts may be bifurcated and in determining the end of armed conflict. The paper explores the common practice of imposing policy-based LOAC requirements in coalition situations, and how such practices are relevant to detention policies, command responsibility in situations where multi-national forces are acting in concert, debates over direct participation of civilians in armed conflict, and the involvement of civilian support personnel in contemporary conflicts.

- Note on the Working Paper Series -

This and other working papers in the series are to be considered work in progress, distributed with the purpose of widest-possible consultation and discussion among professionals and practitioners working on critical issues in the implementation of International Humanitarian Law (IHL). This present paper, together with others, was commissioned by the Program on Humanitarian Policy and Conflict Research at Harvard University to contribute to the ongoing research and critical thinking on IHL issues of contemporary import and significance. The working papers represent the views of their authors and not necessarily those of the Program, but underline its commitment to foster broad and open discussion around key questions in IHL.

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I. Introduction

This paper discusses the challenges of the applicability and interpretation of the law of armed conflict (LOAC) in coalition/multi-national operations. Given the increasing frequency of such efforts, and the relevance to both operational coherence and protection of civilians, the paper seeks to draw out the key areas of debate and lack of clarity in the application of the law when military forces act in coalitions.

Unity of effort, sometimes referred to as unified action, is a first principle of effective military operations, defined in U.S. military doctrine as follows:

> **Unified action is the synergistic application of all instruments of national and multinational power;** it includes the actions of nonmilitary organizations as well as military forces. This concept is applicable at all levels of command. In a multinational environment, unified action synchronizes and/or integrates multinational operations with the operations of intergovernmental and nongovernmental agencies in an attempt to achieve unity of effort in the operational area.[1]

In the complex contemporary operational environment confronted by military commanders, this principle has never been more important. Today's military operations are defined by rapidly advancing military capabilities, complex weapon systems, unprecedented access to information, and inevitable intermingling of combatant and civilian personnel in the battle-space. Because of these and other operational realities, the principle of unity of effort ensures the synchronization of numerous and complex operational capabilities. Unity of effort is accordingly an essential component of effective national and coalition/multi-national operations.

Implementing the principle of unity of effort is always challenging, but perhaps never more so than during multi-national/coalition operations. These operations, which are an increasingly common aspect of the contemporary strategic and operational landscape, create inherent inhibitors to the achievement of unity of effort. While all multi-national forces may be committed to achieving a common objective, the influence of national interest, culture, capabilities, and limitations can invariably undermine operational unity. The imperative that multi-national commanders and planners recognize these inhibitors and develop solutions to offset them and maximize unity of effort is emphasized in the U.S. doctrine on multi-national operations, Chairman of the Joint Chiefs of Staff Publication 3-16, which indicates:

> The basic challenge in multinational operations is the effective integration and synchronization of available assets toward the achievement of common objectives. This goal may be achieved through unity of effort despite disparate (and occasionally incompatible) capabilities, rules of engagement, equipment, and procedures. To reduce disparities among participating forces, minimum

[1] Joint Chiefs of Staff, *Multinational Operations*, Joint Pub. 3-16 (March 7, 2007), p. III-12 at para. 9(a) (emphasis original).

capability standards should be established and a certification process developed.[2]

One persistent disabler of unity of effort is inconsistent interpretations and application of law of armed conflict (LOAC) obligations and authorities among coalition partners. One cause of this inconsistency is the divergent levels of national commitment to LOAC treaties. However, this is not the exclusive cause. In fact, much of the inconsistency is related more to uncertainty as to the applicable meaning of existing obligations. These uncertainties are problematic for the planning and execution of national military operations, often requiring case-by-case interpretations of existing obligations. However, this problem is magnified in the context of coalition multi-national operations, because partners in the same mission will commonly operate based on differing legal standards.[3] The interest of unity of effort justifies analyzing whether some remedy to reduce or eliminate these inconsistencies and uncertainties is viable. The obvious first step in such a process is to identify the sources and causes of this uncertainty.

The paper first discusses questions related to when LOAC applies, and which thresholds are relevant to determining key legal frameworks of international and non-international armed conflict. It discusses key situations where current uncertainties are most pronounced, such as failed state interventions or transnational armed conflict. An overview of existing and potential legal issues that are raised in these situations focuses on the possibility of conflict bifurcation, the question of determining the end of armed conflict, and the applicability of human rights law alongside or in conjunction with LOAC. The paper presents a number of current models of policy-based LOAC application, and delves in detail into one of the most critical areas of current debate: detention and armed conflict. Finally, the paper addresses a number of areas where questions relating to the applicability and interpretation of LOAC in coalition operations coincide with other key debates in contemporary LOAC.

II. The Applicability of the Law of Armed Conflict

The first area of uncertainty related to coalition operations is the issue of law applicability. It is axiomatic that humanitarian law—or the law of armed conflict—is applicable only to situations of armed conflict. But, like the antecedent axiom that the laws of war are applicable only during times of war, what seems like a simple and logical proposition is deceptively complicated. This is not because of uncertainty related to the purposes of the law, but instead to uncertainty as to what constitutes an armed conflict for purposes of bringing the law into force.

Prior to U.S. military response to the terror attacks of September 11th, 2001, a general consensus existed as to the predicate triggers for application of humanitarian law. This

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[2] *Id.* at p. III-1 at para. 1(c).

[3] *See*, *e.g.*, Timo Noetzel and Sibylle Scheipers, *Coalition Warfare in Afghanistan: Burden-sharing or Disunity?*, pp. 4-5 (Chatham House, Briefing Paper, Oct. 2007) (discussing disparate legal standards employed by coalition forces in Afghanistan and concluding that "[t]he coalition forces' differences concerning the legal framework of the operation in Afghanistan proved disastrous") [hereinafter *Noetzel & Scheipers*].

consensus was based on the law triggering criteria of the four Geneva Conventions of 1949.[4] This law-triggering paradigm was derived from Common Articles 2 and 3 of these four treaties. It evolved from the efforts of the drafters of the 1949 Conventions to provide for genuine *de facto* law applicability in order to address the humanitarian concerns for two particular "types" of armed conflicts that had caused so much suffering in the first half of the Twentieth Century. Accordingly, Common Article 2 defined the triggering event for application of the full corpus of the laws of war: international armed conflict;[5] while Common Article 3 required that the basic principle of humane treatment be respected in non-international armed conflicts occurring in the territory of a signatory state.[6] Although neither of these treaty provisions

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[4] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

[5] Geneva Convention I, Geneva Convention II, Geneva Convention III, and Geneva Convention IV, *supra* note 4, contain an identical Article 2, known as Common Article 2, which states:

In addition to the provisions which shall be implemented in peace time, 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.

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.

Although one of the Powers in 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.

Id. at art. 2.

[6] Geneva Convention I, Geneva Convention II, Geneva Convention III, and Geneva Convention IV, *supra* note 4, also contain an identical Article 3, known as Common Article 3, which states:

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, 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.

explicitly indicated that they were to serve as the exclusive triggers for LOAC application, they rapidly evolved to have just such an effect.

Pursuant to this paradigm, since 1949 LOAC application has been contingent on two essential factors: first, the existence of armed conflict, and second, the nature of the armed conflict. The first factor, the existence of armed conflict, implicates a term undefined by the express language of either Common Article 2 or 3. Nonetheless, over time a customary understanding of this term emerged. In the context of inter-state disputes, armed conflict is understood as hostilities between the armed forces of two or more states.[7] While the short duration or minimal intensity of such hostilities has at times been asserted as a basis to deny the existence of an inter-state armed conflict,[8] the regular nature of state armed forces and the abnormal nature of inter-state hostilities has produced relative clarity in determining when such armed conflicts exist (when they terminate can be a much more complicated question[9]).

In contrast, determining the existence of a non-international armed conflict has been much more complex. This is the result of two realities. First, up until September 11th, non-international armed conflict was understood to be synonymous with internal armed conflict.[10] Second, because unlike in inter-state hostilities it is not abnormal for states to use their armed forces to respond to internal threats that do not rise to the level of armed hostilities, defining the line between such non-conflict uses of armed forces and uses that rise to the level of armed conflict against internal dissident groups had always been difficult.[11] Because of this, a number of analytical factors were included in the International Committee of the Red Cross (ICRC) commentary to Common Article 3 and became widely regarded as the most authoritative and effective criteria for making such a determination.[12] These factors, when considered in any combination or even individually, were proposed to assess when a situation rises above the level of internal disturbance and crosses the legal threshold into the realm of armed conflict.

One of the most useful of these factors was the suggested focus on the nature of the state

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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.

Id. at art. 3.

[7] Geneva Convention I, Geneva Convention II, Geneva Convention III, and Geneva Convention IV, *supra n*ote 4, all at art. 2.

[8] Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271 ¶¶ 155-64 (1997).

[9] *See infra*, Section II.D.

[10] *See*, *e.g.*, Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the DoD, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002), pp. 6-7 (reviewing, among other sources, the drafting history of the Geneva Conventions and contemporaneous commentaries) [hereinafter, *Detainees Memo*].

[11] *See*, *e.g.*, Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271 ¶¶ 155-64 (1997); Khashiyev v. Russia, App. Nos. 57942/00 & 57945/00 (Eur. Ct. H.R. Feb. 24, 2005); Isayeva, Yusupova & Bazayeva v. Russia, App. Nos. 57947/00, 57948/00, & 57949/00 (same); Gül v. Turkey, App. No. 22676/93 (Eur. Ct. H.R. Dec. 14, 2000); Ahmet v. Turkey, App. No. 21689/93 (Eur. Ct. H.R. Apr. 6, 2004).

[12] Commentary, Convention (1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949 (Jean S. Pictet ed., 1960), at 19-23 [hereinafter *Pictet*].

response to the threat: the decision of a state to employ regular (and by "regular," it is fair to presume that the ICRC Commentary refers to combat) armed forces to respond to a situation of internal instability caused by a dissident group provided an objective indication that the situation crossed the threshold from law enforcement to armed conflict. While not resolving all uncertainty related to the existence of non-international armed conflicts, the Commentary criteria proved remarkably effective in practice: resort to the use of regular armed forces for sustained operations against internal dissident groups that cannot be suppressed with only law enforcement capabilities makes it difficult for a state to credibly disavow the existence of armed conflict.

This objective indication of non-international armed conflict was one of the factors relied on by the International Tribunal for the Former Yugoslavia in the first case that tribunal adjudicated when it concluded 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 or between such groups within a State*."[13] However, the Tribunal also placed great significance of the nature of the threat the state was responding to. According to the Court, the existence of non-international armed conflict was contingent upon the non-state opposition group having the capability to engage in sustained and organized military operations.[14]

The second component of the Geneva Convention law-triggering paradigm—the nature of the armed conflict—has caused substantial uncertainty in relation application of the LOAC to contemporary military operations. This consideration links LOAC application to what is defined as the international or non-international character of a given armed conflict. Because there is no defined meaning of "international" or "non-international" in Common Articles 2 or 3, uncertainty developed related to application of this prong of the legal trigger. Because international armed conflict requires hostilities between the armed forces of two states, such conflicts are *ipso facto* "international" in scope, since at least one state's armed forces must act outside its own territory to bring about such a situation. While there have been instances where states have attempted to avoid the Common Article 2 trigger by asserting an absence of a genuine dispute between states underlying the use of armed force (such as the 2006 Israeli incursion into Lebanon and the 1989 U.S. invasion of Panama[15]), because there is no plausible basis to assert a non-state enemy operating transnationally (such as al Qaeda) qualifies as a sovereign state, there is general consensus that operations directed against such non-state enemies are not strictly speaking "international" within the meaning of Common Article 2.[16]

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[13] Prosecutor v. Tadić, Case IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995) (emphasis added).

[14] Prosecutor v. Tadić, Case No. IT-94-1, Opinion and Judgment, ¶ 562 (May 7, 1997) (noting that "[t]he test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law").

[15] *See*, *e.g.*, *Detainees Memo*, *supra* note 10, at 26-27.

[16] *Id.* at 5-10.

Instead, it has been the meaning of "non-international" within Common Article 3 that has produced substantial uncertainty *vis a vis* counter-terror combat operations.

Although the term "non-international" appears broad enough to encompass any armed conflict that does not fall under the definition of "international" within the meaning of Common Article 2—which essentially provided the basis of the U.S. Supreme Court's *Hamdan* opinion[17]—the history of Common Article 3 suggests the meaning of that term was intended to be synonymous only with purely internal (intra-state) armed conflicts. Accordingly, while Common Article 2 was intended to address inter-state hostilities, Common Article 3 was not, as the Supreme Court concluded, created to apply in "contradistinction"[18] to Common Article 2; it was instead developed to respond to the specific problem of intra-state armed conflicts.

When the United States characterized the response to the terrorist attacks of September 11th as an armed conflict, the inter-/intra-state law-triggering paradigm was relied upon as a basis to exclude the al Qaeda enemy from the protections of the Geneva Conventions.[19] Because the conflict was not inter-state, it failed to satisfy the Common Article 2 triggering criteria.[20] However, because the conflict was "global" in scope, it fell outside the scope of Common Article 3.[21] This interpretation of the law became the basis for the determination by President Bush that al Qaeda detainees could not claim the benefit of either prisoner of war protections or Common Article 3.[22] This interpretation rendered the law applicable to U.S. operations directed against transnational terrorist operatives—and particularly to the status and treatment of captured and detained al Qaeda operatives—a true "moving target." Both the military component of the U.S. fight against al Qaeda and the recent conflict between Israel and Hezbollah highlight the reality that substantial uncertainty has resulted from the intersection of treating the struggle against transnational non-state enemies as an armed conflict and the traditional paradigm for triggering LOAC application.

While this strain has produced international and national uncertainty as to the law that applies to the military component of the counter-terror struggle, it has also provided what may actually come to be appreciated as a beneficial reassessment of whether Common Article 3 is indeed restricted to intra-state armed conflicts. In addition, beyond the Common Article 3 applicability question, this strain has also generated consideration of whether there are other fundamental LOAC principles triggered by the mere existence of armed conflict.

In the years following 9/11, it became increasingly apparent that invocation of the LOAC authority without a counter-balance of LOAC obligation was inconsistent with the historic purpose of the law. This led to the understanding that the key factor for determining LOAC applicability must be the existence of armed conflict. Once that threshold was crossed, the application of fundamental LOAC principles was essential for providing a logical

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[17] Hamdan v. Rumsfeld, 548 U.S. 557, 629-31 (2006).

[18] *Id.* at 630.

[19] *Detainees Memo*, *supra* note 10, at 5-10.

[20] *Id.*

[21] *Id.*

[22] *Id.*

regulatory framework for U.S. forces engaged in combat operations. While the characterization of the conflict remained significant for purpose of the application of specific treaty obligations, denying applicability of core LOAC principles merely because a *de facto* armed conflict occurred against a non-state enemy operating outside U.S. territory was operationally counter-intuitive. In short, the war on terror revealed that LOAC applicability must be dictated by the underlying purpose of the law, and that this purpose must not be subverted by a narrow focus on the geographic nature of a non-international armed conflict.[23] In operational terms, this focus is essential to ensure that the implicit invocation of fundamental authorities derived from the LOAC—primarily the authority to kill an opponent as a measure of first resort and the authority to preventively detain a captured opponent—are balanced by legally mandated compliance with humanitarian principles of the law.

The contemporary operational environment has called into question the effectiveness of the Geneva law triggering paradigm. This questioning has diminished the international consensus on the interpretation and effect of the Geneva law triggering paradigm. These challenges are unlikely to abate in the near term, and multi-national operations will be substantially impacted by the way in which law applicability uncertainty is resolved. The following discussion focuses on several specific situations that are the source of this challenge.

A. Intervening in a Failed State Situation

The ICRC Commentary to Common Article 2 indicates that an invasion of the territory of one state by the armed forces of another state, whether or not resisted, qualifies as an international armed conflict.[24] However, the commentary did not seem to contemplate an increasingly uncertain situation: armed intervention in a "failed state." While there is no official definition for "failed state", the term suggests a state without effective government control.[25] The quintessential example of such an armed intervention occurred in 1992 when, pursuant to United Nations Security Council authorization,[26] a coalition force entered the territory of Somalia to establish a safe and secure environment for the delivery of humanitarian assistance. This intervention involved armed hostilities with a variety of local forces controlled by warlords vying for control of Somalia. From the outset of this intervention, the United States asserted that because Somalia was a failed state, the armed hostilities did not fall under the category of international armed conflict. Other coalition participants adopted a different interpretation of the law, asserting that the operation qualified as an international armed conflict pursuant to Common Article 2 as an unopposed invasion.

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[23] The U.S. Supreme Court has emphasized the importance of construing the LOAC with due regard to its underlying purposes. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 624 (2006) (noting, among other things, that "[t]he Government's objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the *purpose* and the history of military commissions" (emphasis added)).

[24] *Pictet*, *supra* note 12, at 19-23.

[25] *See, e.g.*, Daniel Thürer, *The "Failed State" and International Law*, 836 INT'L REV. RED CROSS 731 (1999).

[26] S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

This theory of failed state intervention next emerged at the outset of U.S. military operations in Afghanistan. When U.S. armed forces initiated combat operations against Taliban forces, the Department of Justice issued a legal analysis asserting that because the Taliban was one of a number of warring factions vying for control of Afghanistan, operations directed against these forces did not qualify as an international armed conflict within the meaning of Common Article 2.[27] Accordingly, captured Taliban forces were not even theoretically entitled to qualification as prisoners of war.[28] In an apparent response to internal and international opposition to this interpretation, the United States quickly reversed this position and acknowledged that the Taliban were to be considered as the armed forces of Afghanistan, and therefore the conflict with the Taliban was a conflict between the United States and Afghanistan. However, the fact that this theory was initially adopted indicates continuing uncertainty as to how to characterize such operations. Developing a consensus position on the nature of non-consensual interventions in states lacking effective government control is a critical first step in establishing multi-national force legal positions for such operations.

B. Transnational Armed Conflict?

The nature of national and multi-national military operations directed against transnational non-state actors has raised the very real possibility that in addition to the accepted inter-/intra-state armed conflicts addressed by Common Articles 2 and 3, there is also a category of what might be called "transnational" armed conflict that triggers not only Common Article 3 but also other fundamental LOAC principles essential for the effective regulation of any armed hostilities.[29] Thus, the characterization of armed operations directed against transnational terrorist operatives is another area of significant uncertainty exposed by the coalition military response to the September 11th terror attacks. In fact, there is perhaps no more fundamental area of inconsistency between coalition legal positions than there is for conflict characterizations of military operations conducted under the broad rubric of the Global War on Terror.[30]

Not long after the U.S. decided on a military response to the terror attacks of September 11th, an implied theory of "transnational" armed conflict began to take shape. This was the result of the U.S. conclusion that the nation had embarked upon an armed conflict with al Qaeda, a non-state armed entity that operated throughout the world, creating a non-international armed conflict of transnational scope.[31] As is well known today, this resulted in a conclusion by the U.S. Department of Justice that although the struggle against al Qaeda was an armed conflict, it fell outside the scope of both Common Article 2 and Common Article 3.[32]

[27] *Detainees Memo*, *supra* note 10, at 5-10.

[28] *Id.*

[29] Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A 'Principled' Approach to the Regulation of Counter-Terror Combat Operations*, ISRAEL L. REV. (forthcoming), *available at* http://ssrn.com/abstract=1256380 [hereinafter *Corn & Jensen*].

[30] *Noetzel & Scheipers*, *supra* note 3, at 4-5.

[31] *See generally Corn & Jensen*, *supra* note 29.

[32] *Detainees Memo*, *supra* note 10, at 5-10.

This "gap" in LOAC coverage was, in the opinion of many critics, developed by the United States so it could be exploited to deprive detainees of Geneva protections.[33] This may in fact be accurate. However, what is important for purposes of this analysis is the impact of the traditional interpretation of armed conflict characterization set the conditions for the identification of this gap.

As noted above, Common Articles 2 and 3 came to be understood as the exclusive LOAC triggering standards, applying only to inter- or intra-state armed conflicts. This resulted in an either/or law-triggering paradigm: in order for LOAC regulation to be triggered, an armed conflict had to be either international within the meaning of Common Article 2 (inter-state), or non-international within the meaning of Common Article 3 (intra-state). This "either/or" paradigm did not account for "extraterritorial" non-international combat operations conducted by a state against non-state actors. Any such operation would fail to satisfy the requisite "dispute between states" necessary to qualify as an international armed conflict within the meaning of Common Article 2. And, based on the "internal" understanding of non-international armed conflict—an understanding shared by virtually all scholars and practitioners prior to 9/11[34]—these operations, falling somewhere between an internal armed conflict and an inter-state state armed conflict, would necessarily be excluded from even this limited LOAC applicability. Accordingly, such operations fell into a regulatory gap devoid of a clearly applicable operational framework. The military component of the U.S. fight against al Qaeda, the 2006 conflict between Israel and Hezbollah, and the more recent conflict between Israel and Hamas are all examples of combat operations that states have characterized as falling into this transnational armed conflict realm. All of these operations have strained the traditional LOAC-triggering paradigm and produced uncertainty as to the situations that trigger LAOC application and the nature of LOAC rules applicable to such operations.[35]

A number of conflict classification theories have emerged in response to this uncertainty. These theories fall into four primary categories. The first is a strict adherence to the existing interpretation of Common Articles 2 and 3, with an effort to fit transnational

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[33] Marco Sassòli, *The Status of Prisoners Held in Guantánamo Under International Humanitarian Law*, 2 J. INT'L CRIM. JUST. 96, 102 (2004) (submitting that, "[f]rom a humanitarian perspective, it is dangerous to revive such an easy escape category for the purpose of detaining persons as 'unlawful combatants'. No one should fall outside the law and, in particular, not outside the carefully built protective system offered by the Geneva Conventions. This system constitutes the minimum safety net in that profoundly inhumane situation which is war, where most of the other legal safeguards tend to disappear").

[34] International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law*, Opinion Paper (March 2008), pp. 3-5, *available at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf (surveying relevant treaties, jurisprudence, and scholarship).

[35] *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,* 98 A.J.I.L. 1 (January, 2004) (discussing the complex challenge of conflict categorization related military operations conducted against highly organized non-state groups with trans-national reach); *see also* Kirby Abott, *Terrorists: Combattants, Criminals, or . . . ?*, published in THE MEASURES OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS, AND VALIDITY, Proceedings of the 31st Annual Conference of the Canadian Council on International Law, Ottowa, October 24-26, 2002; CRS Report for Congress, *Terrorism and the Laws of war: Trying Terrorists as War Criminals before Military Commissions,* Order Code RL31191 (December 11, 2001) (analyzing whether the attacks of September 11, 2001 triggered the law of war).

counter-terror combat operations into one of those categories (for example, treating the 2006 Israeli operations against Hezbollah as an international armed conflict between Israel and Lebanon).[36] The second is the "internationalized" Common Article 3 theory, focusing on the plain Common Article 3 language "not of an international character" and thereby treating any armed conflict that is not inter-state as a Common Article 3 conflict (an interpretation adopted by the Supreme Court in *Hamdan v. Rumsfeld*).[37] The third is the concept of "militarized" extraterritorial law enforcement, treating such operations not as armed conflicts but as law enforcement operations ostensibly regulated by the law of human rights. Finally, some experts have proposed a theory of transnational armed conflict, which asserts that a core of LOAC principles apply to all armed conflicts as a matter of custom, and that the Geneva triggering articles operate to bring into force an additional layer of treaty-based regulation for certain types of armed conflicts. The key distinction between this theory and the "internationalized" Common Article 3 theory is that unlike the latter, the concept of transnational armed conflict assumes that in addition to the humane treatment mandate of Common Article 3, additional norms related to the execution of combat operations also apply to these armed conflicts.

While these theories of law applicability differ on the periphery, they all share a common appreciation that armed conflict must be regulated by more than just policy: it must also be regulated by law. In this regard, each proposed theory of law applicability represents much more than a rejection of the Bush administration's selective invocation of LOAC authority; they also represent a recognition that the "either/or" law triggering paradigm that had become such an article of faith prior to 9/11 requires reconsideration. Nonetheless, the fact that so many disparate LOAC applicability options have been proposed further reflects tremendous uncertainty as to how operations directed against transnational non-state actors should or must be legally characterized. Resolving this uncertainty is critical to unity of multi-national operational efforts in this emerging realm of operations.

C. Conflict Bifurcation?

If an armed conflict can exist between a state and a transnationally operating non-state enemy, it produces an even more difficult dilemma: is it possible to bifurcate such a transnational armed conflict from a geographically contiguous international armed conflict? The possibility of such a conflict bifurcation is exposed by certain aspects of U.S. and coalition operations in Afghanistan.

Such a theory of conflict bifurcation has potentially profound consequences. If there was and is only one armed conflict in Afghanistan, then rights and obligations related to al Qaeda operatives must be analyzed under the regulatory regime applicable to this unitary conflict. This would impact a wide array of legal issues, ranging from status of detainees, transferability, command responsibility, and jurisdiction related to criminal sanction for violation of the LOAC. If, in contrast, the conflict between the United States and al Qaeda

[36] U.N. Gen. Assembly, Hum. Rts. Council, Comm'n of Inquiry on Leb., Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1*, ¶ 12, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006).

[37] Hamdan v. Rumsfeld, 548 U.S. 557, 629-31 (2006).

occurring in Afghanistan is treated as distinct from the conflicts related to the Taliban, a far more uncertain legal framework would dictate a distinct package of rights and obligations *vis a vis* al Qaeda. This framework would be, at most, composed of general LOAC principles, perhaps supplemented by policy extension of conventional LOAC provisions.[38]

A theory of bifurcated armed conflict is concededly unconventional. Even if such a theory is viable in the abstract, it is particularly problematic in relation to the conflict in Afghanistan. This is because of the unavoidable reality that operations in Afghanistan directed against al Qaeda are geographically and often operationally contiguous with those directed against the Taliban. Further complicating the theory is that operations conducted *by* al Qaeda were and are often intertwined with those conducted by the Taliban. However, these complicating realities only highlight the ultimate question: does all this mean that the legal character of the armed conflicts themselves *must* be contiguous? It is precisely because the United States has asserted the existence of a distinct armed conflict with al Qaeda that this question must be critically considered.

The characterization of operations conducted against irregular forces in the context of an international armed conflict has traditionally not been complicated. The LOAC, specifically article 4A(2) of the Third Geneva Convention, specifically addresses the status of militia or volunteer corps personnel associated with a state party to an international armed conflict. That article provides that so long as certain conditions are satisfied,[39] such personnel are to be treated as prisoners of war upon capture, suggesting that their status is no different from members of the armed forces. More importantly, this provision has been understood to establish that such militia and volunteer corps personnel are effectively connected to the international armed conflict triggering application of the Convention and article 4.

This provision provides the strongest basis to assert a unified armed conflict theory for Afghanistan. Indeed, this is the conventional approach to addressing the conflict classification issue related to al Qaeda. While this approach is certainly appealing, it has unquestionably been undermined by the emergence of a transnational armed conflict theory. Prior to this development in the law, the presumption that armed groups operating in association with a state party to a conflict were part of that international armed conflict was conclusive, because no alternate theory of armed conflict could apply to such groups. However, if it is conceptually

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[38] *See Corn & Jensen*, *supra* note 29.

[39] Specifically, art. 4(A)(2) states that:

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

Geneva Convention III, *supra* note 4, at art. 4(A)(2).

possible that such groups can be involved in a distinct armed conflict with the state party opposing the forces with which they are associated, this presumption can no longer be considered conclusive, but is arguably better understood as rebuttable.

If al Qaeda was not sufficiently connected to the Taliban in Afghanistan to qualify as operating on behalf of a party to the conflict,[40] then what was the nature of military operations conducted by the United States against al Qaeda forces in Afghanistan? As noted above, the *de facto* conflict nature of such operations indicates that they should be considered to qualify as an armed conflict triggering the basic regulatory framework of LOAC principles. But is such an exclusion from a broader international armed conflict permissible? In light of the confused threat environments multi-national forces are likely to operate within in the future, addressing the viability of conflict bifurcation seems both justified and important.

D. Conflict Termination?

Another complex issue related to contemporary conflict operations is defining the point in time when a conflict terminates. The continuing effect of armed conflict on LOAC obligations and authorities is profound, and identifying conflict termination criteria is therefore essential to provide operational legal clarity to multi-national forces. This is obviously easier in the context of an international armed conflict because of the probability of some type of conflict termination agreement. But with the added complexity of operations conducted pursuant to a United Nations Security Council authorization under Chapter VII of the Charter, this is no longer a given. The experience in Iraq is a prime example. Although a cease-fire agreement was entered into in the closing days of Operation Desert Storm in 1991,[41] several coalition partners asserted the continuing validity of the UNSCR authorizing that armed conflict as a legal basis for continued military action against Iraq for the following twelve years. In fact, the United States cited this UNSCR as a legal basis for the intervention in Iraq in March of 2003.[42] While many issues may be resolved by a cease-fire agreement, developing a coalition consensus on the termination of international armed conflict seems essential to establish a consistent position on these obligations and authorities.

In the context of non-international armed conflict, it is exponentially more complex to identify a conflict-termination date, and this complexity is further exacerbated for those states who assert the viability of transnational armed conflict. While in the purely internal armed conflict context it is not unusual for a conflict-termination agreement to be reached between state and non-state forces, many such conflicts defy a clear demarcation of conflict termination. In the context of extraterritorial non-international armed conflicts (transnational armed

[40] Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 109 (June 27); Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001).

[41] S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991).

[42] *U.S. Secretary of State Colin Powell Addresses U.N. Security Council* (Feb. 5, 2003), *available at* http://www.washingtonpost.com/wp-srv/nation/transcripts/powelltext_020503.html.

conflicts), a clear demarcation of conflict cessation is far less likely. The very nature of the non-state enemy defies the ability to even identify an entity to negotiate such an agreement with. This leaves the determination of the conflict termination point to the discretion of each coalition partner, which could result in the awkward situation where a coalition could be composed of forces with radically different positions on their respective authorities and obligations.

E. A Residual Role for Human Rights Law?

An area of substantial disagreement among the United States and many other potential multi-national coalition partners is whether human rights law has any applicability in the context of armed conflict. The U.S. has and will likely continue to assert a negative answer to this question. In contrast, a number of nations that routinely operate as coalition partners with the United States interpret the role of human rights obligations quite differently, accepting the proposition that these obligations generally operate co-extensively with LOAC obligations.[43]

In some respects, the debate over human rights applicability is more academic than practical. This is particularly true in relation to issues subject to comprehensive LOAC regulation. In fact, in response to criticism for not acknowledging the applicability of human rights obligations in the realm of armed conflict, the United States often points out that at the execution level these obligations are redundant with existing LOAC obligations. However, the increasing prevalence of multi-national intervention in situations of non-international armed conflicts, and the uncertainty related to the appropriate conflict characterization of transnational operations directed against non-state enemies, has pushed the potential operational significance of this issue to a much more prominent position.

Because of these operational realities, the disparity in interpretation of the role of human rights law has a potentially substantial impact on the regulation of multi-national operations. For example, this multi-national disparity has produced significant uncertainty in relation to detention operations in the context of non-international armed conflicts (and other operations not even qualifying as armed conflicts, such as those in Bosnia and Kosovo). Even in the context of international armed conflicts, where LOAC regulation is far more comprehensive, there is an increasingly common call for compliance with complimentary human rights obligations.[44] Nor is the potential impact of this law restricted to issues of detention. As recent decisions of the Israeli High Court of Justice have illustrated,[45] even issues related to targeting opposition personnel may be affected by adopting a "mixed" human rights law/LOAC applicability paradigm.

[43] *Noetzel & Scheipers*, *supra* note 3, at 5 (emphasizing differences in approaches by U.S. and European states with regard to (non)application of the Geneva Conventions, as well as to the explicit reference to international human rights standards in S.C. Res 1386).

[44] Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 116, at paras. 178-80, 216-217 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Territory, Advisory Opinion, 2004 I.C.J. 136 at para. 106 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. at para. 25 (July 8).

[45] HCJ 769/02 The Public Committee Against Torture in Israel v. Government of Israel [2006] (Isr.).

In some ways, the disparity between the U.S. and other multi-national partners is unremarkable. Unlike many of its frequent European allies, U.S. forces and their commanders do not operate under the constant risk of oversight by a human rights tribunal.[46] But this fact alone does not explain the disparity. Instead, the U.S. rejection of human rights law applicability reveals a much more fundamental disagreement regarding whether the LOAC is the exclusive regulatory framework for armed conflicts. Law "for warriors, by warriors" is a common mantra of U.S. experts. What has made this position less tenable, however, is the U.S. treatment of the struggle against transnational terrorism as an armed conflict. Because (as noted above[47]) this reflected an assertion of armed conflict authority alongside a disavowal of armed conflict obligations, it is equally unremarkable that advocates for the protection of fundamental human rights would respond by asserting a role for human rights norms in this context.

This debate is unlikely to end any time soon. Nonetheless, effective execution of multi-national operations would be enhanced by analysis of this issue, and development of a strategy to offset the impact of disparate national positions. Much of this might be accomplished through the development of a multi-national baseline standard of operational conduct (discussed below[48]), which would focus on the implementation level more than the source of obligation level. If a consistent baseline standard could be adopted, it would mitigate the significance of disparate positions on the source of these standards. Of course, some issues may simply defy such consistency, but identifying those issues in advance will at least contribute to the predictability of multi-national operational planning and execution.

III. Policy-Based Application of the Law of Armed Conflict

A common and effective national and multi-national practice to address LOAC applicability uncertainty has been to impose policy-based requirement to comply with LOAC principles during any military operation. Because such uncertainty will almost inevitably be magnified in the context of multi-national operations, due to the disparate interpretations of LOAC triggers among a coalition force, adopting this practice at the multi-national level has significant appeal. In fact, the NATO experience provides compelling evidence that the use of policy directives to ameliorate national legal and operational disparities is an extremely effective method of enhancing unity of effort. The ubiquitous NATO STANAG (Standardization Agreement) has been effective in minimizing the operational impact of these disparities.[49]

Although multi-national policy is a viable technique to mitigate the operational impact of divergent LOAC interpretations, several issues would need to be addressed to ensure an effective impact on LOAC implementation. In this regard, U.S. practice is instructive. For

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[46] Namely, the European Court of Human Rights.

[47] *See supra*, Sections II.A.-B.

[48] *See infra*, Section VI.

[49] Fred T. Pribble, *A Comprehensive Look at the North Atlantic Treaty Organization Mutual Support Act of 1979*, 125 MIL. L. REV. 187, 225-226 (1989) (describing such agreements).

several decades, U.S. armed forces operated under a policy mandate to comply with the law of war during all armed conflicts and principles of the law of war during any other military operation. This mandate has recently been made more uniform, requiring compliance with the law of war during any military operation.[50]

For U.S. forces, this policy-based "default" standard proved remarkably (or perhaps unremarkably) effective, and has provided operational commanders with a consistent and logical regulatory framework for the planning and execution of all military operations. Of equal importance, it has provided operational legal advisors with a source of authority to demand compliance with this framework irrespective of the legal characterization (or more commonly lack thereof) of the various operations they have supported. Based on this experience (which is also mirrored in other national armed forces), it would seem logical to adopt a similar approach for coalition operations. However, three significant issues would require resolution before such an approach could be expected to produce beneficial effects.

The first of these is an issue that has always qualified the effectiveness of these national policies: what LOAC principles does such a broad policy invoke? Three schools of thought have evolved to respond to address this question.[51] The first is to define applicable principles in the policy itself. While this approach seems meritorious, it has never been adopted by the United States, the state with probably the greatest experience operating under such a policy. The reason for this has been a concern that any effort to define substantive content in advance would defeat the purpose of the policy, which is to ensure an operationally contextual analysis of applicable principles. Thus, the second school of thought is that a policy mandate must be general in nature allowing for a case-by-case assessment of applicable principles. While this approach does provide greater operational flexibility, it nullifies the benefit of predictability that ostensibly provides the motive for the policy itself.

The third approach is reflected in the recent amendment to the U.S. policy: to simply require compliance with the LOAC during all military operations, creating a presumption that for regulation purposes every military mission will be treated at the operational level as an international armed conflict. This does not mean that the presumption is irrebuttable. Instead, the presumption of full LOAC applicability is always subject to modification based on the operational situation. What it does suggest is that any such modification must be approved by the level of authority that imposed the policy mandate, which for the U.S. is the Department of Defense. Thus, for example, operational forces could be instructed *not* to treat captured opposition forces "as if" they are prisoners of war during an operation involving an enemy that clearly cannot qualify for that status.

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[50] U.S. Dep't of Defense, Dir. 2311.01E , DoD Law of War Program, (May 9, 2006). The exact language is:

Ensure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.

Id. at par. 5.3.1; *see also* Major Timothy E. Bullman, *A Dangerous Guessing Game Disguised as an Enlightened Policy: United States Laws of war Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152 (1999) (analyzing the potential effect if the U.S. law of war policy could be asserted as evidence of a customary norm of international law).

[51] For a more detailed treatment of this issue, *see generally Corn & Jensen*, *supra* note 29.

Defining the authority of a multi-national commander to impose an analogous policy on national forces is the second issue that would require resolution. At the national level, LOAC compliance policies have the *de facto* force and effect of law for military personnel subject to the policy. It is unlikely a policy issued by a coalition command would have the same proscriptive character. This does not mean that such a policy would have no value—even military orders or directives lacking enforceability create a presumption of compliance. However, it would be useful to consider some mechanism to incorporate a coalition policy into analogous national directives to enhance the proscriptive effect.

This, in turn, raises the third issue requiring resolution: the interaction between coalition and national compliance policies. Based on national experience, it seems clear that a coalition LOAC compliance mandate could be an effective method to nullify the impact of LOAC applicability uncertainty. However, it would be necessary to define the effect such a policy would have on national forces operating under coalition command. Could a coalition commander impose an obligation to comply with LOAC principles during an operation national command authorities determined does not require compliance with those principles as a matter of law? Even when national policy mirrored a coalition policy, would the coalition policy preclude national policy makers from modifying the effect of their national policy? For example, a coalition commander might issue a policy requiring all captured personnel to be treated as if they are prisoners of war. If the national authorities of coalition contingent then decide that compliance with this policy is inconsistent with its analysis of the situation, could a national policy decision trump the coalition policy?

Resolution of these issues, and the broader issue of the proscriptive force of coalition command directives, would be essential in assessing the potential value of a coalition LOAC compliance policy similar to those currently relied on at the national level.

IV. Detention and the Law of Armed Conflict

The authority to detain captured opposition or dissident personnel is a particularly difficult aspect of multi-national coalition operations. During recent operations, uncertainty related to the status and treatment of captured and detained personnel has been a major inhibitor to unified coalition action.[52] While this issue is inextricably linked to the conflict classification discussion above,[53] there are unique aspects that must be addressed.

The varying legal interpretations adopted by national authorities in relation to coalition operations in Iraq and Afghanistan have highlighted the difficulties of unified detention policies and practices. These operations have brought into relatively clear focus the areas of uncertainty related to detention operations. In the realm of international armed conflicts, the primary source of uncertainty relates to the question of whether the law recognizes a detention category for unlawful battlefield combatant that is distinct from the categories of prisoner of

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[52] *Noetzel & Scheipers*, *supra* note 3, at 4-5.

[53] *See supra*, Sections II.A-C.

war under the POW Convention or security detainee under the Civilian Convention.[54] In the realm of non-international armed conflict, the uncertainty is more extensive. First, what standard is applicable to determine when an individual is subject to preventive detention? Second, what standards must be followed to protect individuals from arbitrary or prolonged detention? Finally, while virtually all coalition partners recognized that the humane treatment obligation applies to all detainees, defining the substantive content of that obligation has defied consensus.

A. Determining the Source of Detention Authority During Armed Conflict

Detention is an inevitable aspect of virtually any ground operation. Reaching a consensus on the authority for detention is therefore an essential component of coalition operations. The first step in this consensus-building process must be identification of the basic source of detention authority: is detention authorized pursuant only to positive law? Or is detention of captured opposition personnel authorized (also) by the customary law of armed conflict?

In the context of an international armed conflict, the resolution of this issue will in large measure resolve the subordinate issue of whether the law provides for a special detention category of "unlawful enemy combatant." This issue is addressed in more detail below.[55] However, it becomes viable only based on a predicate conclusion that detention, even in the context of an international armed conflict, need not be based exclusively on positive law. If detention authority is based exclusively on positive law, it leads to the conclusion that these two sources of detention authority provide the comprehensive and exclusive legal basis for detention. However, the conclusion that positive law is not the exclusive authority for detention provides the foundation to assert that a detention authority lacuna exists between the POW and Civilian Conventions where the concept of unlawful enemy combatant can be recognized.

In the realm of non-international armed conflict, this issue is much more complex and carries even greater potential impact. This is because unlike the law of international armed conflict, the law of non-international armed conflict provides no positive detention authority. Thus, in the context of international armed conflict, while a conclusion that detention is permissible only when based on positive authority might eliminate the viability of an "unlawful enemy combatant" detainee category, the LOAC would still provide ample authority for detention in general. In contrast, in the context of non-international armed conflict, concluding that detention is permitted based only on positive authority would prohibit the detention of captured personnel absent a domestic statutory basis or a United Nations Chapter VII mandate. This is particularly problematic for extraterritorial combat operations against non-state enemies, where it is unlikely that the domestic law of the detaining state will apply in the territory where the operation is conducted.

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[54] Peter Jan Honigsberg, *"Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L L. & FOREIGN AFF. 1, 63-66 (2007).

[55] *See infra*, Section IV.B.

There is clearly a disparate treatment of detention between the law of international and non-international armed conflict. Unlike the positive law of international armed conflict, which addresses both authority and obligation, the law of non-international armed conflict is almost exclusively devoted to imposing obligations on parties to the conflict. Because much of this law is devoted to ensuring the humane treatment of detainees, it seems axiomatic that the law acknowledges the inevitability of detentions during non-international armed conflicts. What is unclear, however, is whether the existence of such armed conflicts brings into force customary LOAC principles that authorize detention, or whether the law is simply acknowledging that detentions will be authorized by domestic law during such conflicts.

At a more basic level, the question is perhaps better framed by asking whether the authority to kill implies the authority to detain? If so, it would seem that detention is authorized by the customary principle of military necessity, because as with detention, the law of international armed conflict does not provide positive authority for targeting enemy or opposition personnel. Nor is it likely that the authority to target opposition personnel during non-international armed conflicts will be provided by positive domestic law. Nonetheless, many experts reject this "greater implies the lesser" theory of authority to detain, and insist that the law of non-international armed conflict addresses only the treatment of detainees, while leaving the authority to detain to the sovereign prerogative of states. Reaching consensus on this issue is the essential first step in establishing uniform coalition detention standards.

B. Detentions During International Armed Conflict: The Validity of an Interstitial Enemy Combatant Category?

Of the many controversies generated by the U.S. military response to the threat of transnational terrorism, perhaps none has been more notorious than the designation of captured belligerents as "unlawful enemy combatants."[56] This designation is based on the conclusion that a gap exists between the third and fourth Geneva Conventions for individuals who are *de facto* combatants but who fail to meet POW qualification requirements. Accordingly, it allows for prisoner of war-based preventive detention without acknowledging prisoner of war status. Proponents of this interpretation assert that these unlawful enemy combatants cannot claim the benefit of the fourth Geneva Convention because of their pre-capture conduct. Because they engage in active hostilities as part of an armed military organization in the context of an international armed conflict, they should not be able to claim the status of civilian; yet their failure to comply with the lawful combatant criteria of article 4 of the third Convention excludes these same individuals from prisoner of war status. Thus, in its simplest conception, designation as an unlawful enemy combatant really means an individual is subject to prisoner of war-based detention without prisoner of war protections.

This interpretation of the interrelationship between the third and fourth Conventions has been widely condemned.[57] The alternative interpretation is based on the conclusion that

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[56] Terry D. Gill & Elies van Sliedregt, *Guantánamo Bay: A Reflection On The Legal Status and Rights of "Unlawful Enemy Combatants"*, 1 UTRECHT L. REV. 28, 48-50, 52-54 (2005).

[57] *See, e.g., id.*

there is no gap between these two treaties. As a result, all captured individuals who fail to qualify for status as prisoners of war must be characterized as civilians under the fourth Convention. Of course, this does not mean they are immune from preventive detention. However, such detention is authorized pursuant only to the provisions of the fourth Convention authorizing detention of civilians whose conduct constitutes a threat to the security of the detaining force.[58]

While under either theory individuals who engage in hostilities against coalition forces are subject to preventive detention, there are profound consequences resulting from which of these theories prevails. The most obvious of these consequences is the contrast between the presumptive validity of detention. Enemy combatants are presumed by virtue of their status to pose a continuing threat to the armed forces of a capturing power. As a result, the law establishes a powerful presumption in favor of preventive detention. This presumption is at the very core of the third Convention, which not only expressly authorizes preventive detention (article 21), but is almost exclusively focused on rules related to the treatment of prisoners of war during detention. In accordance with the Convention, the presumption of a continuing threat is so conclusive that detention is authorized based solely on a status determination with no requirement to consider evidence of actual pre-capture or continuing threat.

In contrast, an inverse presumption applies to civilians. Pursuant to the fourth Convention, preventive detention of civilians is a measure of last resort and may be justified based only on an *actual* showing of threat.[59] No presumption of threat is tolerated under the fourth Convention.[60] Furthermore, even when a showing if threat is made, detention is authorized only when a lesser form of liberty deprivation would be ineffective to protect the security interest of the detaining force, and only for so long as the threat remains extant.[61]

Thus, excluding an individual who has engaged in hostilities from the protections of the fourth Convention effectively subjects that individual to a presumption of preventive detention. It also may allow for detention based on membership in an armed or hostile group as opposed to a showing that the individual had personally acted in a manner contrary to the security interests of the detaining armed force. This, as many critics have noted,[62] can reduce the burden of justification for detention because evidence that may be sufficient to establish membership in an organization may not in and of itself provide sufficient evidence of actual security threat. And, by excluding such individuals from the protections of the third Convention, this approach leaves such detainees in a twilight zone of humanitarian protections. At best, the detaining power will acknowledge an obligation to treat such individuals humanely in accordance with Common Article 3 and perhaps article 75 of Additional Protocol I (as did the United States following the decision by the Supreme Court in *Hamdan v. Rumsfeld*);

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[58] Geneva Convention IV, *supra* note 4, at arts. 42 and 78.

[59] Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 380-81 (2005).

[60] *Id.*

[61] *Id.*

[62] *Id.* at 81.

at worst, these individuals will be denied legally mandated humanitarian protection. However, even when the basic principle of humane treatment is applied to these detainees, they remain more vulnerable than individuals falling under either the third or fourth Conventions. This is exemplified by the existence of the Guantanamo Bay detention facility: the mere transfer of detainees from Afghanistan to Guantanamo would arguably have been prohibited if the detainees had been designated as protected civilians pursuant to the fourth Convention. Other aspects of treatment, such as access to a protecting power, registration and accountability, and termination of detention are also profoundly affected by this interstitial categorization interpretation.

Multi-national forces will likely continue to be involved in international armed conflicts, conflicts in which these forces will almost certainly continue to encounter opposition forces that defy neat objective factual designations as members of regular armed forces or associated militia groups. Because of this, resolution of this uncertainty related to the interrelationship of the third and fourth Conventions would enhance the effectiveness of coalition operations that qualify as international armed conflicts, and set the conditions for a consistent treatment of individuals captured by multi-national forces during these operations.

C. Defining the Scope of the Humane Treatment Obligation as it Relates to Detention Operations

Whether based on positive or customary authority, detention operations will inevitably require implementation of the humane treatment obligation. There is no room for debate on the requirement to comply with this obligation, which is applicable to regulation the detention of any individual, in the hands of any state, during any armed conflict.[63] However, acknowledging the universal applicability of the humane treatment mandate is not synonymous with a clear understanding of how the mandate must be implemented. Developing consensus on implementation of the mandate is essential for the effective execution of coalition detainee operations.

Past and ongoing detention operations (to include coalition detention operations) have demonstrated the utility of distinguishing between the procedural component and the substantive component of the humane treatment obligation. Unless consensus can be reached on the scope of both aspects of the obligation, detention will invariably remain a national component specific aspect of multi-national operations. This may be unavoidable, but presents additional uncertainties for coalition commanders. For example, if national contingents engage in detention operations under the auspices of a coalition mission, is the coalition commander accountable for the standards adopted by a each nation? Another example of uncertainty relates to the ability of coalition partners to avail themselves of detention capabilities of other partners. If the implementation of the humane treatment mandate is inconsistent between coalition subordinate commands, are respective commanders prohibited from relying on adjacent command detention capabilities?

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[63] *Corn & Jensen*, *supra* note 29, at 22-29.

The ideal solution to these uncertainties is the endorsement of a baseline definition of procedural and substantive implementation measures. This would facilitate either a true coalition detention operation or national detention operations that could be relied upon by the coalition commander to cross-level detainee populations.

(1) *Procedural Standards.*

Detention in armed conflict involves a deprivation of liberty of indefinite duration, normally without triggering procedural rights associated with detention for criminal prosecution. It is generally accepted that it is inherently inhumane to subject an individual to such a deprivation without some minimal procedural protection against arbitrary state action.[64] In the context of military detention operations, this minimal protection has been effectuated by providing the detainee with notice of the basis for detention, a minimal albeit meaningful opportunity to contest the basis, and a detention decision by an authority somewhat detached from the initial capture. Many states have adopted *ad hoc* procedures to provide for a minimal level of procedural protections for detainees,[65] yet there is little international consensus on a required baseline procedural framework for detention. Nor is there consensus on periodic review requirements or procedures for such review.[66] Such consensus would be necessary to establish a coalition standard that is uniform among all multi-national participants.

(2) *Substantive Standards.*

The substantive implementation of the humane treatment mandate is somewhat less *ad hoc* than the procedural implementation. The specific prohibitions and requirements contained in Common Article 3 of the four Geneva Conventions, article 75 of Additional Protocol I, and article 4 of Additional Protocol II all give substantive content to the broad humane treatment mandate. As a result, there is substantial consensus on core obligations and constraints, such as the protection against physical or mental abuse, provision of essential nutrition and medical needs, respect for religious practices, and access to individual or collective relief. Beyond this core, however, the consensus erodes. Issues such as detainee population transparency (registration and notice of who is detained), ICRC access to detainees, external communications, and permissible disciplinary measures remain ill-defined. In addition, the substantive meaning of "cruel, inhumane, and degrading" treatment, a prohibition central to all of these articles, remains uncertain. Establishing greater consensus not only on the core aspects of substantive implementation, but also on issues somewhat removed from the core would be essential to unified implementation of the humane treatment mandate during multi-national operations.

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[64] *Corn & Jensen*, *supra* note 29, at 22-29.

[65] *Noetzel & Scheipers*, *supra* note 3, at 5.

[66] *Id.*

V. Other Critical Aspects in the Application of the Law of Armed Conflict

A. Related to Command Responsibility

Command responsibility is a critical LOAC compliance mechanism. It is a doctrine of criminal responsibility based on a simple but compelling premise: imposing responsibility on a commander for the misconduct of subordinates when that commander should have known the misconduct would occur is the most effective method to compel commanders to execute their responsibility to ensure fidelity to LOAC obligations. While there remains uncertainty at the periphery of this doctrine and certain inconsistencies in the application of the doctrine between national and international courts, the core logic of the doctrine seems universally embraced.

Extending this doctrine to coalition commanders of multi-national forces seems justified in some respects, and inequitable in others. If the doctrine is intended to enhance probability of LOAC compliance by incentivizing the efforts of commanders to develop a climate of fidelity and to respond rapidly and effectively to subordinate misconduct, it seems logical to apply the doctrine to coalition commanders. Like their national counterparts, coalition commanders bear an obligation to ensure legally compliant operations by subordinate forces. In addition, these commanders possess the capability to establish the "command climate" for the coalition force, which is a critical component in ensuring LOAC compliance. Of equal importance is the evidentiary value of a commander's efforts or lack thereof to establish a culture of compliance in his or her unit when assessing culpability under the command responsibility doctrine. Thus, the effect the doctrine is intended to produce is logically applicable not only to national commanders, but also to coalition commanders.

However, there is a substantial issue related to the equity of extending this doctrine to coalition commanders. It is axiomatic that the imposition of criminal responsibility on a commander for the misconduct of subordinates is based on the assumption that the commander possesses the authority to control subordinate conduct. As a general proposition, coalition commanders lack proscriptive and disciplinary authority over subordinate forces of other nations. While these commanders can issue directives, they inevitably rely on national command authority for the imposition of sanctions for non-compliance with these directives. In this regard, the "command authority" of a coalition commander is never truly analogous to that of a national commander, and is perhaps best understood as precatory.

Any such extension would therefore require analysis of the sufficiency of control over non-national subordinates vested in a coalition commander. The extent of this control would arguably dictate the legitimacy of imputing responsibility for the misconduct of those subordinates to the coalition commander. An aspect of this analysis may include assessment of the ability of the coalition commander to influence the exercise of national disciplinary and criminal authority over subordinate forces. Whether influence alone could ever justify such an extension is uncertain, and may run afoul of criteria for application of the doctrine adopted by the *ad hoc* permanent international war crimes tribunals.[67] Nonetheless, consideration of this

[67] For a brief review of this doctrine, *see* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 203-11 (2003).

possibility seems justified by the overall nature of the relationship between a coalition commander and coalition forces.

B. Related to Unified Standards or State Specific Methods and Means

Treaty-based regulation of the methods and means of warfare has become increasingly comprehensive. In 1977, Additional Protocol I established a comprehensive framework for assessing the legality of target selection, engagement, and destruction. This framework is complimented by a variety of treaties regulating the use of specific means of warfare. Even in the realm of non-international armed conflicts, the law regulating methods and means of warfare has become increasingly comprehensive since 1977, when Additional Protocol II established the first modest positive regulation of such conflicts. This has been primarily the result of the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia[68] and the International Criminal Tribunal for Rwanda.[69] However, it is also a consequence of an increasingly common practice of expressly extending treaties regulating the means of warfare to the realm of non-international armed conflicts.

Because of these developments, it might be tempting to conclude that there is little uncertainty related to implementation of this aspect of the LOAC during multi-national coalition operations. Such a conclusion would be unfounded. Like so many other aspects of LOAC implementation during coalition operations, multi-lateral consensus on such implementation dissipates proportionally with distance from the core of applicable principles. In the context of the regulation of target selection and engagement, what this means is that while there is undoubtedly a consensus that all targeting must comply with the principles of military objective and proportionality, there is far less certainty regarding specific implementation of these principles, and applicability of specific treaty prohibitions on the means of warfare.

This uncertainty in implementation of general principles is the result of several "disablers" in the context of coalition operations. First, the United States is not a party to either of the Additional Protocols of 1977. While the U.S. ostensibly acknowledges the customary international law character of many of the targeting rules of these treaties, there is always some uncertainty as to the scope and extent of the obligations the U.S. will accept as binding.[70] Second, two of the key provisions of the targeting regime of Additional Protocol I—the definition of military objective and the prohibition against indiscriminate attack (the proportionality rule)—have always included an element of subjective interpretation. There is simply no consensus definition of either of these concepts, resulting in variances between

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[68] S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

[69] S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[70] According to the State Department legal adviser, the U.S. recognizes, at a minimum, art. 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, as reflective of customary international law. Willian H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 323 (stating that, "[w]hile the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled").

national component applications of the rules. Third, a number of treaties prohibiting or constraining the use of specific weapons, such as the Ottawa Convention,[71] have not been universally adopted. Finally, there is no international consensus on the definition of what constitutes taking a direct part in hostilities, an issue that is particularly problematic in the context of non-international armed conflict.

This all raises the question of whether it would be feasible and beneficial to develop a coalition baseline standard for targeting operations. In terms of general targeting principles, this would almost certainly require either adopting a comprehensive list of military objectives and an arbitrary quantification of what is and is not proportional collateral damage, or vesting coalition commanders with the discretion to impose binding interpretations of these terms. With regard to inconsistent obligations related to treaties regulating the use of specific weapons, there is no plausible basis to assert that the lowest coalition standard should prevail among all coalition partners. Accordingly, the only viable approach to such inconsistency would seem to be a requirement that all coalition partners to comply with the highest standard.

Of course, such an approach nullifies the sovereign prerogative of contributing states. Perhaps this could be characterized as an acceptable and inevitable cost of the decision to participate in coalition operations. However, if past practice is an indicator, it is highly unlikely coalition partners would accept such an outcome, which has been manifested in the difficult concept of "national caveats" that permeate the planning and execution of multi-national operations.[72]

This rejection of a coalition standard that trumps national standards and the continuing validity of the national caveats produce an additional issue of uncertainty: is it legitimate for a coalition commander to exploit national caveats for tactical or operations advantage? For example, it is not improbable that a coalition may be composed of national contingents subject to different obligations related to the use of anti-personnel landmines or cluster munitions. If the coalition commander is from a nation bound by such a prohibition, may that commander exploit the inapplicability of these treaty obligations to forces under his command? Of equal difficulty is the issue that is raised when that commander is aware that assigning a mission to a subordinate unit may invite the use of a weapon system his nation is prohibited from employing. Another, although arguably less difficult, permutation on this problem is whether a coalition commander whose nation is not bound to a weapons prohibition can compel subordinate forces that are bound to employ the weapon.

All of this suggests that unless common understandings of key targeting principles and common standards of weapon permissibility are developed for coalition operations, the era of the "national caveat" is unlikely to abate. This may ultimately be unavoidable, and has not been debilitating to date. However, even an adoption of minimum standards accompanied by

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[71] Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sep. 18, 1997, 2056 U.N.T.S. 241.

[72] *See, e.g.*, John D. Banusiewicz, 'National Caveats' Among Key Topics at NATO Meeting, American Forces Press Service, Feb. 9, 2005, *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=25938.

acknowledgment that national authorities take precedence of coalition directives would add more certainty to these operations than currently exists.

C. Direct Participation Standard?

Addressing the issue of targeting principles and permissible weapons is a minor challenge compared to establishing a consensus definition of direct participation in hostilities. The significance of such a consensus definition is proportional to the nature of a given armed conflict: the further from conventional inter-state warfare the conflict moves, the greater the significance of this definition. This is because armed conflicts involving non-state actors or other irregular forces produce tremendous stress on the target identification and engagement process. It is a simple reality of contemporary conflicts that identifying the lawful objects of attack is increasingly difficult because of the absence of a clear consensus on what constitutes a direct part in hostilities and when such participation terminates.

Based on the efforts of the International Committee of the Red Cross and the government experts it has recently assembled, there is a possibility that a consensus definition of this term will be reached in the near future.[73] There is, however, also a possibility that the ICRC will produce a definition that will be challenged by many of the states it engaged in the discussion process. In either event, the outcome of this ICRC effort will almost certainly provide the foundation for any effort to develop a coalition consensus on the meaning of this term. Like so many other LOAC principles, consensus on the core meaning of the concept is probable, whereas consensus becomes increasingly elusive as analysis moves from the core to the periphery.

Because direct participation in hostilities results in a loss of immunity from deliberate attack; and because it is rarely feasible to segregate armed non-state actors from innocent civilians, coalition commanders will invariably continue to struggle with this targeting dilemma. Any resolution will require addressing not only what actions constitute a direct part in hostilities, but also whether participation in hostilities can produce a "membership" status resulting in a continuing loss of immunity, and how restoration of that immunity can be achieved by such group "members".

D. Related to Civilian Support

Civilian support personnel are an ever-increasing presence in the contemporary battle space. Armed forces of many nations routinely rely on these civilians to provide a wide array of services in their support. This is not a new phenomenon. Civilians have historically provided operational support to armed forces, a presence that is addressed in the third Geneva Convention grant of Prisoner of War status to civilians accompanying the armed forces in the

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[73] ICRC & TMC Asser Inst., *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, Oct. 23-25, 2005, *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf [hereinafter *Direct Participation in Hostilities*].

field.[74] However, the pressure to maximize the "tooth to tail" ratio for increasingly more prevalent all volunteer forces, coupled with the ever-increasing technological sophistication of modern warfare and the profit potential recognized by the providers of civilian support, have combined to produce what many believe to be a dangerous expansion of operational civilianization.[75] Add to this mix the uncertainty related to the limits imposed by the LOAC on permissible civilian functions on the battlefield, and it becomes almost inevitable that commanders will continue to push civilians increasingly closer to functions historically reserved for uniformed combatants.

The impact of this trend on multi-national coalition operations is obvious: coalition commanders will almost certainly find themselves in *de facto* command not only of multi-national military personnel, but also of the civilians they bring to the battle space to support their efforts. Because the conduct and misconduct of these civilians implicates LOAC compliance, the coalition commander has a genuine interest—and perhaps an obligation—to monitor and perhaps regulate the activities of these civilians.

The LOAC implications related to civilian support personnel can be divided into three primary considerations: first, is a coalition commander accountable for the actions of civilian personnel employed by national contingents? Second, does the LOAC establish limitations on the permissible functions of civilian support personnel, and, if so, what is that limit? Third, what is the most effective mechanism for the coalition commander to ensure the proper execution of civilian support activities in a multi-national context?

The first of these questions is directly related to the previous discussion of command responsibility. As noted above,[76] it is questionable whether pursuant to this doctrine a coalition commander may be held accountable for the LOAC violations of subordinate national forces. The viability of extending responsibility to reach the acts of omissions of civilian support personnel is therefore even more tenuous. It is not at all clear whether even when applied at the national level the doctrine encompasses responsibility for the misconduct of civilian support personnel associated with a military unit. There may be some appeal to subjecting a coalition commander to liability for misconduct of civilians supporting the coalition operation. However, because liability pursuant to this doctrine is linked to the genuine ability of a commander to control the actions of subordinates and sanction misconduct, extending it to a coalition commander with marginal disciplinary power over armed forces associated with his unit and even less power over civilians would raise serious equity concerns.

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[74] Art. 4(A) of Geneva Convention III, *supra* note 4, states that the following persons, among others, constitute prisoners of war when they have fallen into the power of the enemy: "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." *Id.*

[75] *See*, *e.g.* Peter C. Kasurak, *Civilianization and the Military Ethos: Civil-Military Relations in Canada*, 25 CANADA PUB. ADMIN. 108 (2009) (concluding that increasing civilianization could adversely affect the combat readiness of Canadian armed forces).

[76] *See supra*, Section V.

This does not necessarily mean that a coalition commander has no role in addressing the role of civilian support personnel. The inapplicability of the criminal liability doctrine of command responsibility does not mean that coalition commanders are relieved of the obligation to discharge their duties responsibly. Accordingly, some assessment of the scope of this responsibility *vis a vis* the role of national contingent civilian support personnel seems appropriate. Providing a uniform coalition standard for the limits on permissible civilian support functions could fall into this category of responsibility, and is perhaps the most significant measure a coalition commander to take to influence the role of civilian support personnel.

Developing such a standard would be no easy task. While virtually all LOAC experts agree that civilian support personnel are prohibited from taking a direct part in hostilities, the lack of a consensus definition of "direct part in hostilities" results in the reality that there is virtually no consensus on all the functions that could transgress this prohibition.[77] This is partly the result of the fact that the prohibition itself is not derived from an express LOAC prohibition against direct participation, but implied from a LOAC rule of consequence (taking a direct part in hostilities results in the *consequence* of a loss of immunity from attack). What limited consensus exists on what are and what are not permissible civilian support functions is primarily the result of customary practice and understanding. As a result, the increasing pressure to civilianize battlefield functions is rapidly degrading even this consensus.

It should be noted that the vast majority of civilian support functions do not raise LOAC concerns. Therefore, any effort to develop a consensus coalition standard related to civilian support should probably focus initially on defining impermissible functions. Building consensus from the core of impermissibility would aid in reaching consensus on *why* functions are impermissible, which would be the first step in addressing functions further removed from the core, such as interrogation, base and convoy security, personal security, intelligence analysis, UAV operation, and others.

It may, however, be inevitable that the only viable way to address this issue is to simply demand that national contingents ensure effective control of civilian support personnel. This would likely result in divergent determinations of permissible civilian support functions. However, because of the lack of consensus on the LOAC standards for the employment of these civilians, and the force composition pressures confronted by national contingent commanders, such an outcome may be an unavoidable aspect of multi-national force operations. Nonetheless, even if national discretion must be absolute, some coalition oversight in the form of inquiry into allegations of civilian misconduct and recommendations to national contingent commanders based on such inquiries would ostensibly enhance the overall credibility of the role of civilians in support of coalition operations.

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[77] Though, as noted above (*Direct Participation in Hostilities*, *supra* note 73), the ICRC (in conjunction with the TMC Asser Institute) has led recent efforts to define more clearly and comprehensively "direct participation in hostilities."

VI. Conclusion

The debates over the applicability and interpretation of LOAC are vital to unity of effort as well as clarity of rules in coalition operations. This paper has addressed the key sources of uncertainty underlying how LOAC is and should be applied in coalition operations, focusing first on understanding which legal frameworks apply in particular context of armed conflict. After addressing key current debates over the qualification of conflicts, the paper explored a number of contemporary contexts in which this question of applicability is most salient: intervention in failed state situations and transnational armed conflicts. The paper suggested that resolving this first uncertainty is critical to unity of effort in this increasingly common realm of operations. It then suggests that a number of ongoing questions in the arena of LOAC applicability and interpretation exist where conflicts may be bifurcated and in determining the end of armed conflict. The paper then explored the common practice of imposing policy-based LOAC requirements in coalition situations, and how such practices relevant to detention policies, command responsibility in situations where multi-national forces are acting in concert, debates over direct participation of civilians in armed conflict, and the involvement of civilian support personnel in contemporary conflicts.