

The “Incendiary” Effect of White Phosphorous in Counterinsurgency Operations

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I. Introduction

On 15 September 2009 the United Nations (U.N.) Fact Finding Mission on the Gaza Conflict,¹ commonly referred to as the “Goldstone Report,”² was published. The report alleges numerous law of war³ violations by both Israel and Hamas during the military campaign that took place from 27 December 2008 to 18 January 2009 in the Gaza Strip.⁴ Among the noted violations, the report’s condemnation of the Israeli Government’s use of white phosphorous stands out as particularly blunt and critical.⁵

Specifically, the report criticizes Israel not only for how and where white phosphorous projectiles were employed, but also for the very decision to use white phosphorous.⁶ Though the Goldstone Report’s findings are controversial⁷ and the report’s recommendation to severely limit the use of white phosphorous is unsupported under current international law,⁸ the prudent operational law attorney should not dismiss the report as inconsequential or irrelevant. Rather, the Goldstone Report offers a glimpse of the increasingly negative perception of white phosphorous within the international community and the stringent scrutiny placed on the decision to employ white phosphorous.⁹

Denunciation, negative media coverage, and war crime allegations are, as the Goldstone Report clearly indicates, tangible risks associated with the use of white phosphorous.¹⁰ This form of attention, though obviously counter-productive in any military operation, is particularly damaging in counterinsurgency, where the strategic value of securing popular support is of utmost importance.¹¹ It is

¹ The U.N. Human Rights Council established the U.N. Fact Finding Mission on the Gaza Conflict on 3 April 2009 with the express mandate “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009. . . .” Hum. Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict* 5, U.N. Doc. A/HRC/12/48 (15 Sept. 2009) [hereinafter Goldstone Report], available at http://www2.ohchr.org/english/bodies/hrcouncil/specialesession/9/docs/UNFFMGC_Report.pdf.

² Justice Richard Goldstone, “former judge of the Constitutional Court of South Africa and former Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda,” was appointed to lead the mission. *Id.* As a result, his name has become synonymous with the fact-finding mission and is commonly used as the short form for the report. See, e.g., John Bolton, *Israel, the U.S., and the Goldstone Report*, WALL ST. J., Oct. 19, 2009, available at <http://online.wsj.com/article/SB10001424052748704500604574480932924540724.html>; Yitzhak Benhorin, *U.N. Passes Goldstone Report Resolution*, YNET NEWS.COM, Feb. 26, 2010, available at <http://www.ynetnews.com/articles/0,7340,L-3855048,00.html>.

³ The Department of Defense (DoD) defines the law of war as “[t]hat part of international law that regulates the conduct of armed hostilities. It is often called ‘the law of armed conflict.’” U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 3.1 (9 May 2006). The law of war, the law of armed conflict, and international humanitarian law are interchangeable. For the remainder of this article I will use the term “law of war” as this traditional term clearly notates the *lex specialis* that governs during a time of armed conflict. See also MARK MARTINS, PAYING TRIBUTE TO REASON: JUDGMENTS ON TERROR, LESSONS FOR SECURITY, IN FOUR TRIALS SINCE 9/11 (forthcoming 2010) (manuscript at 141, on file with author) (stating “[t]he ‘law of war’ and ‘law of land warfare’ continue to be preferred terms among government lawyers and military professionals.”).

⁴ See generally Goldstone Report, *supra* note 1.

⁵ See *id.* at 14, 247–50; but see State of Israel, *Gaza Operations Investigations: An Update* 32 (Jan. 2010) [hereinafter Israel Update], available at <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf> (“With respect to exploding munitions containing white phosphorous, the Military Advocate General concluded that the use of this weapon in the operation was consistent with Israel’s obligations under international law.”).

⁶ Goldstone Report, *supra* note 1, at 16 (determining that the Israeli use of white phosphorous was “reckless” and that “serious consideration should be given to banning the use of white phosphorous in built-up areas”).

⁷ See Israel Update, *supra* note 5, at ii (“As Israel has clarified before, Israel disagrees with the findings and recommendations of the Report, which reflect many misunderstandings and fundamental mistakes with regard to the Gaza Operation, its purposes, and Israel’s legal system.”); see also H.R. Res. 867, 111th Cong. (2009) (calling “on the President and the Secretary of State to oppose unequivocally any endorsement or further consideration of the ‘Report of the United Nations Fact Finding Mission on the Gaza Conflict’ in a multilateral fora” by a vote of 344-36).

⁸ Compare Goldstone Report, *supra* note 1, at 250, 535, 549 (arguing that white phosphorous should be banned for use in built-up areas, as an obscurant, and possibly altogether), with *infra* Part II (discussing the permissible uses of white phosphorous under international law).

⁹ See Goldstone Report, *supra* note 1, at 14, 173, 247–50, 533–35, 549. The Goldstone Report concludes with a recommendation that the General Assembly conduct “an urgent discussion on the future legality” of white phosphorous use “in light of the human suffering and damage” caused in the Gaza Strip. *Id.* at 549.

¹⁰ Similar to Israel in the Gaza Conflict, the United States has received harsh international criticism for white phosphorous use in recent military operations. See, e.g., FALLUJAH, THE HIDDEN MASSACRE (Italian State Owned Television Station RAI broadcast Nov. 8, 2005) (alleging war crimes, in particular illegal use of white phosphorous munitions, by the U.S. military in Fallujah, Iraq, in 2004).

¹¹ See DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE 4 (Praeger Sec. Int’l 2006) (1964) (noting that the civilian population is the objective for both the insurgent and counterinsurgent); see also U.S. DEP’T OF ARMY, FIELD MANUAL 3-24 / U.S. MARINE CORPS WARFIGHTING PUBLICATION 3-33.5, COUNTERINSURGENCY, at x, 1–4, 5–8

therefore imperative that the use of white phosphorous in contemporary counterinsurgency operations not only comply with international law, but also demonstrate heightened sensitivity to civilian concerns in order to gain both international consensus and local popular support.¹²

To accomplish this recognizably difficult task, it is important to understand the difference between using white phosphorous as a smoke or signaling system versus as an incendiary weapon. Whereas the traditional principles of the law of war¹³ apply when white phosphorous is used as a non-incendiary, a more arduous legal standard, articulated in the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III)¹⁴ of the Certain

(15 Dec. 2006) [hereinafter FM 3-24] (discussing generally the ability of insurgents to “cleverly use the tools of the global information revolution” to “create propaganda that furthers their aims” and thus secure local population support).

¹² See FM 3-24, *supra* note 11, at 1-24 (“Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.”); HEADQUARTERS, INT’L SEC. ASSISTANCE FORCE, TACTICAL DIR. (July 6, 2009) [hereinafter TACTICAL DIR.] (unclassified version), available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf. Referencing on-going counterinsurgency operations in Afghanistan, the tactical directive notes that “[w]e must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people.” *Id.* The directive goes on to state that this is not just “a legal or moral issue” but also an “operational issue” and, therefore, all military actions must be conducted “in a manner which will win” the local population’s support. *Id.*

¹³ The principles of the law of war include military necessity, distinction, proportionality, and unnecessary suffering. Military necessity is “that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.” U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 3.a (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10], available at http://www.loc.gov/nrr/frd/Military_Law/pdf/law_warfare-1956.pdf. Distinction requires “the Parties to the conflict [to] at all times distinguish between the civilian population and combatants and between civilian objects and military objectives” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Proportionality determines whether “an attack . . . may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof [that will] be excessive in relation to the concrete and direct military advantage anticipated.” *Id.* art. 51(5)(b); see also FM 27-10, *supra* para. 39-41. Finally, parties to a conflict are forbidden “to employ arms, projectiles, or material calculated to cause unnecessary suffering.” Convention (IV) Respecting the Laws and Customs of War on Land art. 23(e) Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV]; see also AP I, *supra*, art. 35(2). It is important to note that the United States has not ratified AP I, but finds many portions of the protocol customary international law. See Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419 (1987). For a consolidated summary of the law of war principles, see U.S. DEP’T OF NAVY, NAVAL WARFARE PUB. 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF MILITARY OPERATIONS 5-2 to 5-3 (July 2007) [hereinafter COMMANDER’S HANDBOOK].

¹⁴ Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, 1342 U.N.T.S. 171, 19 I.L.M. 1534 [hereinafter Protocol III]. The U.S. ratification came with a reservation. *Id.* Specifically, the United States “reserve[d] the right to use incendiary

Conventional Weapons Treaty (CCW),¹⁵ applies if used for incendiary purposes.¹⁶ Contrasting the legal requirements for incendiary and non-incendiary white phosphorous use illustrates that the heightened Protocol III requirements place greater emphasis on minimizing harm to civilians and thus more directly comports with the counterinsurgency strategic vision of “not isolating,” “alienating,” or angering the civilian population.¹⁷ Based upon this conclusion, the United States, as a matter of policy and not as a matter of international law, should openly communicate a willingness to voluntarily limit all uses of white phosphorous in counterinsurgency operations to those situations that comply with the heightened legal threshold of Protocol III.

II. White Phosphorous and the Law

Much of the legal confusion concerning white phosphorous is attributable to its various capabilities.¹⁸

weapons against military objectives located in concentrations of civilians” when determined that such use would cause fewer casualties than alternative weapons. *Id.* For a discussion on the logic behind the reservation, see W. Hays Parks, *The Protocol on Incendiary Weapons*, 279 INT’L REV. OF THE RED CROSS 535, 538–41 (Nov.–Dec. 1990).

¹⁵ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW].

¹⁶ Due to its chemical composition, there are those who argue that white phosphorous is also regulated by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction (CWC). See *Q&A: White Phosphorous*, BBC NEWS, Nov. 16, 2005, available at http://news.bbc.co.uk/2/hi/middle_east/4441902.stm (stating “[s]ome have claimed the use of white phosphorus contravenes the 1993 Chemical Weapons Convention”). The applicability of the CWC to white phosphorus has been directly addressed and dismissed by the spokesman of the treaty implementing body of the CWC. See Paul Reynolds, *White Phosphorus: Weapon on the Edge*, BBC NEWS, Nov. 16, 2005, available at <http://news.bbc.co.uk/2/hi/americas/4442988.stm> (quoting Peter Kaiser, spokesman for the Organisation for the Prohibition of Chemical Weapons, as stating, “No[white phosphorus] is not forbidden by the CWC if it is used within the context of a military application which does not require or does not intend to use the toxic properties of white phosphorus”). This position is further supported by the absence of white phosphorus in the CWC’s schedules of toxic chemicals. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45; see also Major Craig Burton, *Recent Issues with the Use of Matching Bullets and White Phosphorous Weapons in Iraq*, ARMY LAW., Aug. 2006, at 21 (concluding “in spite of the obvious fact that WP [white phosphorus] is a chemical, it is not classified as a chemical weapon under the CWC and the Convention’s prohibitions do not apply to its use”).

¹⁷ TACTICAL DIR., *supra* note 12, at 1-2.

¹⁸ See GlobalSecurity.org, *White Phosphorus (WP)*, <http://www.globalsecurity.org/military/systems/munitions/wp.htm> (last visited Mar. 4, 2010) (noting that white phosphorous “is used for signaling, screening, and incendiary purposes. White phosphorus can be used to destroy the enemy’s equipment or to limit his vision. It is used against vehicles, petroleum, oils and lubricants (POL) and ammunition storage areas, and enemy observers. White phosphorous can be used as an aid in target location and navigation.”). See also Mark Cantora, *Israel and White Phosphorous During Operation Cast Lead: A Case Study in Adherence to Inadequate Humanitarian Laws*, 13 GONZ. J. INT’L L. 2, 2 (2009–2010) (“White phosphorus’s dual nature, as both a tactically useful and relatively safe

White phosphorous munitions are primarily intended to act as an obscurant or signaling system, albeit with incidental incendiary effects.¹⁹ However, white phosphorous is at times employed solely because of its “incidental” incendiary effects, thus essentially converting the munition into an incendiary weapon.²⁰ International law regulates smoke munitions differently than incendiary weapons, and understanding the intent for the use of white phosphorous is, therefore, a prerequisite for determining the applicable law.²¹

The white phosphorous use in the Gaza Conflict coincidentally occurred nearly simultaneously with the United States’ ratification of Protocol III of the CCW.²² Though the United States previously adhered to Protocol III as a matter of policy,²³ depositing the instruments of ratification made compliance obligatory as a matter of international law.²⁴ Protocol III contains prohibitions and restrictions on the use of incendiary weapons, which are defined as “any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to

obscurant and illuminant, and as a deadly and destructive incendiary, has made it a controversial substance.”).

¹⁹ See U.S. DEP’T OF ARMY, FIELD MANUAL 3-11.9, POTENTIAL MILITARY CHEMICAL/BIOLOGICAL AGENTS AND COMPOUNDS, at III-16–18 (Jan. 2005) [hereinafter FM 3-11.9] (stating that white phosphorous “is used primarily as a smoke agent” but “can also function as an antipersonnel flame compound capable of causing serious burns”).

²⁰ See, e.g., *Israel Admits Phosphorous Bombing*, BBC NEWS, Oct. 22, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/6075408.stm (confirming that Israel used white phosphorous in Lebanon in 2006 to target Hezbollah members considered to be in “open ground”); Captain James T. Cobb et al., *TF 2-2 IN FSE AAR: Indirect Fires in the Battle of Fallujah*, FIELD ARTILLERY, Mar.–Apr. 2005, at 26 (on file with author) (discussing how white phosphorous was used during operations in Fallujah, Iraq, as an incendiary in “shake and bake” missions to force insurgents out of fighting positions).

²¹ See Int’l Comm. of the Red Cross (ICRC), *Phosphorous Weapons—The ICRC View* (Jan. 17, 2009) [hereinafter *The ICRC View*], available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/weapons-interview-170109> (discussing the different legal standards that apply to white phosphorous munitions dependent upon use).

²² *Compare U.S. Joins Four Law of War Treaties*, DEP’T ST. MEDIA NOTE, Jan. 23, 2009, available at <http://www.state.gov/r/pa/prs/ps/2009/01/115309.htm> (noting that “[o]n January 21, [2009] the United States deposited its instruments of ratification for Protocols III, IV, and V” of the CCW “and for an amendment to that Convention,” and that “Protocol III covers incendiary weapons, Protocol IV covers blinding laser weapons, and Protocol V deals with explosive remnants of war. The Amendment expands the scope of the Convention to non-international armed conflicts.”), with Goldstone Report, *supra* note 1, at 5 (stating that the Gaza conflict occurred from 27 December 2008 to 18 January 2009).

²³ See Dick Jackson, *Law of War Treaties Pass the Senate*, ARMY LAW., Jan. 2009, at 58 (noting that the United States has complied with Protocol III as a matter of practice prior to its ratification and citing *Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 2 (Apr. 15, 2008) (statement of John Bellinger, Legal Advisor for Dep’t of State)).

²⁴ “Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon . . . (b) their deposit with the depositary.” Vienna Convention on the Law of Treaties art. 16, May 23, 1969, 1155 U.N.T.S. 331.

persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.”²⁵ The protocol further states that “[i]ncendiary weapons do not include munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signaling systems.”²⁶ The applicability of Protocol III to white phosphorous thus hinges on whether the munitions’ incendiary capabilities are the primary reason for use.²⁷

When white phosphorous munitions are employed for a non-incendiary purpose,²⁸ the munitions clearly fall outside the definition of an “incendiary weapon” and will not be regulated by Protocol III.²⁹ Instead, traditional law of war principles control, and the legality of the white phosphorous munitions, similar to any other weapon not subject to specific international law,³⁰ is determined by compliance with these base rules.³¹ Fulfilling this legal obligation, therefore, requires the employing actor, prior to the use of non-incendiary white phosphorous, to distinguish civilian and civilian objects from combatants and military objectives,³² to determine the advantage of targeting the military objective,³³ and to weigh whether the incidental³⁴

²⁵ Protocol III, *supra* note 14, art. 1(1).

²⁶ *Id.* art. 1(1)(b)(i).

²⁷ See *The ICRC View*, *supra* note 21 (discussing the applicability of Protocol III to white phosphorous when used as an incendiary).

²⁸ Examples of non-incendiary uses include obscuring movement, marking a target, or signaling a location. See FM 3-11.9, *supra* note 19, at III-16.

²⁹ See *supra* notes 25–26 and accompanying text (defining incendiary weapon and the applicability of Protocol III).

³⁰ See Kathleen Lawand, *Reviewing the Legality of New Weapons, Means and Methods of Warfare*, 864 INT’L REV. OF THE RED CROSS 925, 925 (Dec. 2006), available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/review-864-p925/\\$File/irrc_864_Lawand.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/review-864-p925/$File/irrc_864_Lawand.pdf) (noting that while the traditional rules of “international humanitarian law” apply to all weapons, specific weapons are regulated by particular treaties and customs); see, e.g., Protocol on Prohibitions or Restrictions on the Use Mines, Booby-Traps and Other Devices (Protocol II), as amended May 3, 1996, 2048 U.N.T.S. 133 [hereinafter Protocol II] (regulating landmines and booby-traps); Protocol III, *supra* note 14 (regulating incendiaries).

³¹ See *The ICRC View*, *supra* note 21 (stating “[t]he use of weapons containing white phosphorous is, like the use of any other weapon, regulated by the basic rules of international humanitarian law”). See generally COMMANDER’S HANDBOOK, *supra* note 13, at 8-1 to 8-17 (discussing the law of war as it applies to targeting).

³² See AP I, *supra* note 13, art. 48.

³³ “Attacks shall be limited strictly to military objectives,” see *id.* art. 52(2); thus, “[i]n applying the principle of military necessity a commander should ask whether the object of attack is a valid military objective.” COMMANDER’S HANDBOOK, *supra* note 13, at 5.3.1.

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective military contribution . . . and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage.

adverse effects on the civilian population would be excessive³⁵ compared to the concrete and direct military advantage expected.³⁶ Assuming the employing actor satisfies these obligations and is not using the munitions to intentionally cause suffering or superfluous injury,³⁷ international law would allow for the use of white phosphorous in the vicinity of the civilian population with no further constraints.³⁸

AP I, *supra* note 13, art. 52(2). Combatants may also be targeted as “military objectives.” See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 635 (Yves Sandoz et al. eds., 1987). The Commentary notes that military objectives, though generally limited to objects, include “members of the armed forces.” *Id.* “Armed forces” are generally defined as “combatants” and since these individuals “have the right to participate directly in hostilities,” they may also “be the object of hostile acts.” *Id.*

³⁴ “Incidental” civilian casualties are used in contrast to “intentional” civilian casualties. Intentional targeting of civilians and civilian objects is strictly prohibited under the law of war. See AP I, *supra* note 13, arts. 51(2), 52(2). See also Matheson, *supra* note 13, at 426 (noting that “[c]ivilian populations and individual citizens shall not be the object of acts or threats of violence. . . .”); W. Hays Parks, *Rolling Thunder and the Law of War*, AIR U. REV., Jan.–Feb. 1982, available at <http://www.airpower.au.af.mil/airchronicles/aureview/1982/jan-feb/parks.html> (“The law of war recognizes the inevitability of collateral civilian casualties; what it prohibits is the intentional attack of the civilian population per se or individual civilians not taking part in the conflict . . .”). Another common term often used for “incidental” civilian casualties and damage to civilian objects is “collateral damage.” See COMMANDER’S HANDBOOK, *supra* note 13, at 8.1, 8.3.

³⁵ The term “excessive” is not defined in Additional Protocol I and simply means “exceeding what is proper, normal, or reasonable.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 450 (Houghton Mifflin Co. 1988). Determination whether incidental loss of civilian life or damage to civilian objects is “excessive” is thus driven by the specific facts and circumstances surrounding the weapon employment decision. See, e.g., Goldstone Report, *supra* note 1, at 173. The fact-finding mission determined that the threat to “several hundred civilian lives and . . . civilian property” was disproportionate in comparison to the “advantage gained from using white phosphorous to screen Israeli armed forces” tanks from anti-tank fire from armed opposition groups.” *Id.* Therefore, the Israeli’s violated the principle of proportionality since the risks to “the civilian population and civilian objects in the area under attack were excessive in relation to the specific military advantages sought.” *Id.* at 249. *But see* Parks, *supra* note 34 (stating that “excessive” collateral civilian casualties is a high threshold that requires a number of casualties so vast that it “shock[s] the conscience of the world” and only “acts so blatant as to be tantamount to a total disregard for the safety of the civilian population” are condemned).

³⁶ See AP I, *supra* note 13, arts. 51(5)(b); 57(2)(a)(iii). See also COMMANDER’S HANDBOOK, *supra* note 13, at 5.3.3 (“The principle of proportionality requires the commander to conduct a balancing test to determine if the incidental injury, including deaths to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained.”); FM 27-10, *supra* note 13, paras. 39–41.

³⁷ Hague IV, *supra* note 13, art. 23(e); AP I, *supra* note 13, art. 35(2) (“It is prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”). See also Burton, *supra* note 16, at 22 (“The use of WP [white phosphorous] would be unlawful, even against combatants, were it used specifically to cause suffering rather than for a recognized, valid purpose.”).

³⁸ See Goldstone Report, *supra* note 1, at 534 (“In relation to the weapons used by the Israeli armed forces during military operations the Mission accepts that white phosphorous . . . [is] not currently proscribed under international law. . . . [U]se is, however, restricted or even prohibited in certain circumstances by virtue of the principles of proportionality and

In contrast, when the primary intent of the white phosphorous use is to “set fire to objects or to cause burn injury to persons,” the munition is considered an incendiary,³⁹ and Protocol III will apply.⁴⁰ Supplementing the civilian protections embedded in the traditional principles of the law of war,⁴¹ the specific prohibitions and restrictions on incendiary weapon use found in Protocol III afford civilians and civilian objects additional safeguards from adverse effects.⁴² Article 2 of Protocol III specifically re-emphasizes the existing prohibition on making the civilian population the object of attack⁴³ and bans the use of air-delivered incendiary weapons against a “military objective,⁴⁴ located within a concentration of civilians.”⁴⁵ Additionally, article 2 restricts “incendiary weapons other than air-delivered incendiary weapons” by prohibiting their use against “any military objective located within a concentration of civilians” except “when such military objective is clearly separated from the concentration of civilians and all feasible precautions⁴⁶ are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing” the incidental negative effects on the civilian population.⁴⁷ The

precautions necessary in the attack.”); Israel Update, *supra* note 5, at 32–33 (concluding that international law does not prohibit non-incendiary use of white phosphorous in military operations).

³⁹ See *supra* notes 25–26 and accompanying text.

⁴⁰ See generally Protocol III, *supra* note 14.

⁴¹ As required for all weapons, and similar to white phosphorous munitions used for a non-incendiary purpose, compliance with the traditional law of war principles is mandatory prior to use of white phosphorous for incendiary purposes. See *supra* notes 32–38 (discussing how the traditional principles of the law of war apply to the employment of a weapon).

⁴² See Protocol III, *supra* note 14, art. 2 (protection of civilians and civilian objects).

⁴³ *Id.* art. 2(1). Other than expressly articulating the applicability of this prohibition to incendiary weapons, this is not a change from the strict ban on intentional targeting of civilians or civilian objects that exists in the law of war. See *supra* note 34 (discussing the strict prohibition on intentional targeting of civilians or civilian objects).

⁴⁴ The Protocol III definition of “military objective” mirrors the definition found in Additional Protocol I. Compare Protocol III, *supra* note 14, art. 1(3) (defining “military objective”), with AP I, *supra* note 13, art. 52(2), and discussion *supra* note 33 (explaining and defining “military objective”).

⁴⁵ See Protocol III, *supra* note 14, art. 2(2). “‘Concentration of civilians’ means any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads.” *Id.* art. 1(2).

⁴⁶ “‘Feasible precautions’ are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” Protocol III, *supra* note 14, art. 1(5). The phrase “feasible precautions” is defined the same in Protocol II referencing mines, booby-traps, and other devices, see Protocol II, *supra* note 30, art. 3(10); however, Protocol II goes on to give a non-exhaustive list of circumstances that help determine whether “feasible precautions” have been taken. See *id.* art. 3(10)(a)–(d).

⁴⁷ See Protocol III, *supra* note 14, art. 2(3). Additional Protocol I has similar, but less specific, requirements for those conducting an “attack” to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects.” AP I, *supra*

Protocol III emphasis on protecting “concentration of civilians,”⁴⁸ coupled with the traditional law of war civilian protections,⁴⁹ limits the employment of white phosphorous for an incendiary purpose and, consequently, significantly minimizes harmful effects to the civilian population.

In terms of application, the legal nuance between non-incendiary and incendiary use of white phosphorous may alter the employment decision. For example, assume a commander is leading a unit conducting a military operation in a city where civilians and civilian objects are commingled with combatants and military objectives. If the commander reasonably determines the traditional law of war principles are satisfied, he may use white phosphorous to obscure the unit’s movement through the city despite incidental civilian casualties or incidental damage to civilian objects. However, if the same commander decides to use white phosphorous to burn enemy positions in that same city, any incidental civilian casualties or incidental damage to civilian objects would violate Protocol III. The only discernable difference between these two scenarios is the commander’s reason for employing white phosphorous, yet the consequences are dramatically different and illustrate why operational law attorneys should understand the legal distinction between non-incendiary and incendiary use of white phosphorous.

III. White Phosphorous and Counterinsurgency Doctrine

Regardless of why white phosphorous is employed, incendiary effects are a natural consequence of use.⁵⁰ Though international law may liberally allow white phosphorous use for a non-incendiary purpose in the vicinity

note 13, art. 57(2)(a)(ii). Protocol III, article 2(3) is unique in that it requires a military objective to be separated from the concentration of civilians prior to incendiary weapon use. See Protocol III, *supra* note 14, art. (2)(3). Though the United States has a reservation to Protocol III’s universal prohibition against using incendiary weapons against military objectives located in concentrations of civilians, see *supra* note 14, the reservation would only be invoked in the rare situation that an incendiary weapon could be used to “cause fewer casualties and/or less collateral damage” than an alternative weapon. See Protocol III, *supra* note 14. An example would include using an air-delivered incendiary weapon, instead of a conventional weapon, against a chemical weapons plant in the middle of a densely-populated city to limit civilian casualties. See Parks, *supra* note 14, at 548.

⁴⁸ Protocol III, article 2 also prohibits the use of incendiary weapons against “forest or other kinds of plant cover” except “when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.” Protocol III, *supra* note 14, art. 2(4). Discussion on this prohibition is outside the scope of this article.

⁴⁹ See *supra* note 41 (noting that the law of war remains applicable to incendiary weapons in addition to Protocol III).

⁵⁰ See FM 3-11.9, *supra* note 19, at III-17–18 (“WP [white phosphorous] is a very active chemical that will readily combine with oxygen in the air, even at room temperature. As oxidation occurs, WP becomes luminous and bursts into flames within minutes.”).

of civilians,⁵¹ the heightened protections provided to civilians in Protocol III more closely align with counterinsurgency (COIN) doctrine.⁵² Thematic in COIN doctrine is the overriding importance of providing safety and security to the local population⁵³ and the counter-productiveness of unnecessary force.⁵⁴ With the objective in COIN operations “being the population itself,”⁵⁵ success is not based on conventional metrics,⁵⁶ but rather on popular support for the operation.⁵⁷ As a result, the local population’s perception of both the insurgent and counterinsurgent is the primary concern.⁵⁸

In this unconventional environment, propaganda plays a significant and powerful role in determining the outcome of the conflict.⁵⁹ Not restricted by truth,⁶⁰ insurgents will often

⁵¹ See generally *supra* Part II.

⁵² Compare Protocol III, *supra* note 14, art. 2 (providing additional protections for the civilian population from the effects of incendiary weapons), with GALULA, *supra* note 11, at 83 (discussing the importance of providing safety for the local population as the “counterinsurgent cannot achieve much if the population is not, and does not feel, protected against the insurgent.”), and FM 3-24, *supra* note 11, at 1-23 (“All efforts focus on supporting the local populace . . .”).

⁵³ See FM 3-24, *supra* note 11, at 1-23 (“The cornerstone of any COIN effort is establishing security for the civilian populace.”); GALULA, *supra* note 11, at 8 (noting that the civilian population is often concerned more with safety than the merits of the opposing parties reason for fighting).

⁵⁴ See FM 3-24, *supra* note 11, at 1-25 (“counterinsurgents should calculate carefully the type and amount of force to be applied and who yields it for any operation. An operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents.”); GALULA, *supra* note 11, at 66 (“A soldier fired upon in conventional war who does not fire back with every available weapon would be guilty of a dereliction of duty; the reverse would be the case in counterinsurgency warfare, where the rule is to apply the minimum of fire.”).

⁵⁵ GALULA, *supra* note 11, at 5. See also TACTICAL DIR., *supra* note 12, at 1 (“Gaining and maintaining the support” of the population “must be our overriding operational imperative—and the ultimate objective of every action we take.”).

⁵⁶ See GALULA, *supra* note 11, at 5 (observing “military action remains the principal instrument of the conventional war,” whereas operations in a counterinsurgency conflict are focused on “winning over” the local population and, therefore, “every military move has to be weighed with regard to its political effects”).

⁵⁷ See *id.* at 54 (stating that victory for a counterinsurgent is “permanent isolation of the insurgent from the population, isolation not enforced upon the population but maintained by and with the population”); FM 3-24, *supra* note 11, at 1-23 (“[K]illing every insurgent is normally impossible. Attempting to do so can also be counterproductive in some cases; it risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge.”).

⁵⁸ See GALULA, *supra* note 11, at 70 (discussing the importance of the civilian population’s views on the insurgents and counterinsurgents); FM 3-24, *supra* note 11, at 6-16 (stating “[i]nsurgent warfare is largely about perceptions”).

⁵⁹ See GALULA, *supra* note 11, at 9 (discussing the importance of propaganda, particularly for the insurgent).

⁶⁰ “The insurgent, having no responsibility . . . can lie, cheat, [or] exaggerate.” *Id.* “He is not obliged to prove; he is judged by what he promises, not by what he does.” *Id.*

attempt to mischaracterize, exaggerate, or lie about counterinsurgent actions to garner the support of the local population.⁶¹ Constantly bidding to win sympathy, insurgents will go so far as to “carry out a terrorist act or guerilla raid” in hopes of “enticing counterinsurgents to overreact, or at least react in a way that insurgents can exploit.”⁶² In comparison, the counterinsurgent is “tied to his responsibilities and to his past” and “judged on what he does, not on what he says.”⁶³ These greater expectations place the counterinsurgent at a disadvantage⁶⁴ by forcing him to only use propaganda “to inform and not to fool,” as lying or exaggerating risks permanent loss of credibility with the local population.⁶⁵

Faced with this reality and competing for the support of the local population⁶⁶ with an adversary that continuously attempts to exploit and twist operational facts,⁶⁷ the counterinsurgent’s overemphasis on conventional warfare is a recipe for failure.⁶⁸ To avoid “winning tactical victories” but “suffering strategic defeats,”⁶⁹ the counterinsurgent must diligently mitigate insurgent propaganda by minimizing exploitation opportunities through the judicious use of force.⁷⁰ For this reason, traditional employment of white phosphorous in a COIN environment is ill advised.⁷¹ As the

⁶¹ See *id.*; FM 3-24, *supra* note 11, at 3-23, 5-8.

⁶² FM 3-24, *supra* note 11, at 1-27. Examples of insurgent operations used to trigger disproportionate counterinsurgent responses include “opening fire on a crowd,” see *id.*, or using indiscriminate indirect fire.

⁶³ GALULA, *supra* note 11, at 9.

⁶⁴ See also John A. Nagl, *Foreword* to GALULA, *supra* note 11, at ix. “Counterinsurgency is not a fair fight” as the insurgent is free to “use every trick necessary,” and, therefore, it is important for the counterinsurgent “to fight an even more adroit information war.” *Id.*

⁶⁵ GALULA, *supra* note 11, at 9.

⁶⁶ See Nagl, *Foreword* to GALULA, *supra* note 11, at viii (stating “[a]n insurgency is a competition between insurgent and government for the support of the civilian population”); FM 3-24, *supra* note 11, at 1-27 (“Arguably, the decisive battle is for the people’s minds.”).

⁶⁷ See FM 3-24, *supra* note 11, at 8-5 (noting how insurgent propaganda “can twist” images into evidence of the counterinsurgent’s bad intentions).

⁶⁸ See *id.* at 1-29 (providing a table of unsuccessful practices in a counterinsurgent operation, including overemphasis on killing or capturing the enemy versus securing the local population).

⁶⁹ TACTICAL DIR., *supra* note 12, at 1.

⁷⁰ See FM 3-24, *supra* note 11, at 1-27 (“Using substantial force also increases the opportunity for insurgent propaganda to portray lethal military activities as brutal.”). Another crucial aspect to countering insurgent propaganda is through a comprehensive and widely disseminated information program. See *id.* at 2-2, 5-19.

⁷¹ See Nagl, *Foreword* to GALULA, *supra* note 11, at viii (noting that “[a]lthough protecting the local people clearly requires some kinetic actions against committed insurgents, conventional military forces are too prone to emphasize offensive actions . . . rather than the predominantly political, economic, and security requirements upon which the ultimate defeat of the insurgency depends.”); FM 3-24, *supra* note 11, at 1-25 (“In a COIN environment, it is vital for commanders to adopt appropriate and measured levels of force and apply that force precisely so that it accomplishes the mission without causing unnecessary loss of life or suffering.”).

Goldstone Report clearly illustrates, white phosphorous use in the vicinity of civilian population centers, regardless of legality and reason, will likely result in international condemnation, accusations of indifference towards civilian suffering, and endless, horrendous images.⁷² Providing insurgents with such material allows for a major propaganda victory, and in a conflict “largely about perceptions,”⁷³ endangers the possibility of long-term strategic success.

Instead, a nontraditional employment of white phosphorous, or more specifically, a well-publicized, voluntary adherence to the restrictive Protocol III requirements in all white phosphorous use, can preempt insurgent propaganda while simultaneously demonstrating concern for the local population.⁷⁴ The importance of minimizing civilian casualties and damage to civilian infrastructure in counterinsurgent operations cannot be overstated as “the social upheaval caused by collateral damage from combat can be [a] major escalating factor . . . for insurgencies.”⁷⁵ By recognizing the polarizing and contentious nature of white phosphorous and self-imposing a restrictive employment policy, the proponents of current U.S. counterinsurgency operations can show an understanding of the primacy of civilian support and the ability to adapt to win that support.⁷⁶

IV. Conclusion

Voluntarily choosing to restrain a specific means or method of warfare in furtherance of counterinsurgency strategy has contemporary precedent⁷⁷ and is congruent with established doctrine.⁷⁸ Requiring all white phosphorous use in contemporary counterinsurgency operations to comply with the heightened Protocol III requirements is a clear

⁷² See *supra* notes 5–10 and accompanying text.

⁷³ FM 3-24, *supra* note 11, at 6-16.

⁷⁴ See *id.* at 7-36 (discussing the importance of selecting the appropriate weapon in counterinsurgency operations).

⁷⁵ *Id.* at 1-9.

⁷⁶ See *id.* at 1-27 (“As noted above, the key for counterinsurgents is knowing when more force is needed—and when it might be counterproductive.”); TACTICAL DIR., *supra* note 12, at 1 (“[W]e must respect and protect the population from coercion and violence—and operate in a manner which will win their support.”).

⁷⁷ The tactical directive expressly directs commanders to limit close air support (CAS) in situations where it will likely “produce civilian casualties . . . which in the long run make mission success more difficult and turn the Afghan people against us.” TACTICAL DIR., *supra* note 12, at 1-2.

⁷⁸ “The COIN environment requires counterinsurgents to not only determine the kinds of weapons to use and how to employ them but also establish whether lethal means are desired—or even permitted.” FM 3-24, *supra* note 11, at 7-36. Leaders must “consider not only the first order, desired effects of a munition or action but also possible second- and third-order effects—including undesired ones.” *Id.* This often requires “employing tactics and weapons appropriate to the situation” and possibly “avoiding the use of area munitions to minimize the potential harm inflicted” upon the civilian population. *Id.*

policy decision, versus an international legal obligation, and is best communicated through a supplemental measure in theater-specific rules of engagement (ROE).⁷⁹ Though establishing a policy barrier when international law allows for white phosphorous use may seem a subtle and insidious way to subvert a commander's ability to conduct operations, in the counter-intuitive nature of COIN operations, reducing unnecessary force results in increased local support and

eventual isolation of the insurgency.⁸⁰ Victory comes from this isolation, not from physical destruction of the insurgent;⁸¹ thus, it is a mistake to view the limiting of a highly controversial weapon in counterinsurgency as an infringement upon force protection. Defeating an insurgency requires unorthodox approaches, and only the military force that is "able to overcome" the "institutional inclination to wage conventional war" can be successful.⁸²

⁷⁹ Rules of engagement are defined as "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered." JOINT CHIEFS OF STAFF, JOINT PUB. 1-2, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 408-09 (12 Apr. 2001). In particular, the ROE "establish fundamental policies and procedures governing the actions to be taken by US commanders" during a military operation. JOINT CHIEFS OF STAFF, INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES app. A-1 (13 June 2005). Combining operational requirements, policy, and international law therefore make the ROE more restrictive than the law of war. Supplemental measures, which "enable commanders to tailor ROE for specific missions," are the recognized tool to implement restrictions on the use of force for particular "political and military goals that are often unique to the situation." *Id.* app. I-1.

⁸⁰ FM 3-24, *supra* note 11, at 1-27 (noting that the use of force can be counterproductive); TACTICAL DIR., *supra* note 12, at 2 ("We will not isolate the population from us through our daily conduct or execution of combat operations.").

⁸¹ GALULA, *supra* note 11, at 54.

⁸² FM 3-24, *supra* note 11, at ix.