

## Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage

Commander Albert S. Janin, JAGC, USN\*

### I. Introduction

The belligerents waging intense armed attacks against government armed forces in Afghanistan and Iraq are not agents of a Geneva Convention “high contracting Party,” or any nation-state, or any armed force within the meaning of the law of war. They are non-uniformed “civilians,” as are the militants conducting transnational suicide attacks around the world. This reality has profound operational and legal implications.

A dizzying array of legally charged terms are applied to persons found on or near a battlefield: armed forces, militias, spies, mercenaries, guerrillas, terrorists, revolutionaries, combatants, lawful combatants, unlawful combatants, non-combatants, belligerents, unprivileged civilian belligerents, civilians, protected persons, civilians accompanying the force, contractors, etc. One commentator enumerates those in legal peril on the battlefield—unlawful combatants, saboteurs, guerrillas, spies, mercenaries, and pirates—and states that “[n]one of this sheds much light on the law in relation to terrorism.”<sup>1</sup> He then adds “unlawful belligerent” to the stew in an effort to classify terrorists, and suggests a way to fill a dangerous void in conventional law.<sup>2</sup> Unfortunately, the proposal never acquired the force of law. The threat (e.g., al Qaeda jihadist) or grocer-by-day/sniper-by-night problem must be addressed within the two-classification system of civilian or combatant until the law changes.<sup>3</sup>

“Though non-state combatants are inevitably part of the equation during internal armed conflict, they have almost no place legally in the structure of interstate conflict.”<sup>4</sup> This article assumes an international armed conflict in order to discuss Additional Protocol I and enable the comparison to customary international law. Conflict-characterization and identification of the controlling body of law is complex and often debatable. The Geneva Conventions and Additional Protocol I are not universally applicable.<sup>5</sup>

Infantrymen do not care that the person hiding amongst the civilian population plotting to kill them is labeled an unlawful belligerent, unlawful combatant, terrorist, or a lawful guerrilla fighter. Their worries are (or at least should be) mission accomplishment, legal compliance, and survival with honor. Unfortunately, insurgencies are treacherous,<sup>6</sup> while

---

\* Judge Advocate General’s Corps, U.S. Navy. Presently assigned as Senior Counsel, Police Legal Affairs Combined Security Transition Command – Afghanistan. This article was submitted in partial completion of the Master of Laws requirements of the 55th Judge Advocate Officer Graduate Course, The Judge Advocate General’s Legal Center and School, United States Army, Charlottesville, Virginia. The author would like to thank Major (MAJ) John Rawcliffe, Judge Advocate (JA), U.S. Army, Professor, Int’l & Operational Law Dep’t, The Judge Advocate General’s Legal Center and School (TJAGLCS) for his helpful, expert guidance; and Lieutenant Colonel (Lt Col) Alex Taylor, Adjutant General’s Corps (British Army Legal Service), Director, Coalition Operations, Center for Law and Military Operations (CLAMO), TJAGLCS for his assistance with British military law issues. The errors are all mine.

<sup>1</sup> Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE W. RES. J. INT’L L. 227, 228-29 (2002).

<sup>2</sup> *Id.* at 230 (using a different phrase than the more familiar “unlawful combatant” to highlight that such persons lack legal justification for their attacks under international law, and routinely target non-combatants).

<sup>3</sup> See HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2005] paras. 11, 28 [hereinafter *PCATI v. Israel*], available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf) (last visited Oct. 11, 2007 (denying an Israeli government request to create a hybrid classification to address the “complex reality” of “unlawful combatants,” and stating “[i]t is difficult for us to see how a third category can be recognized in the framework of the Hague and Geneva Conventions”).

<sup>4</sup> Hoffman, *supra* note 1, at 227.

<sup>5</sup> See Lieutenant Colonel (LTC) Paul E. Kantwill & MAJ Sean Watts, *Hostile Protected Persons or “Extra-Conventional Persons:” How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT’L L.J. 681, 722 (2005) (discussing the “bifurcated analysis” taught by the U.S. Army JAG School to determine status at the outset of military operations); see also Lieutenant Commander Kenneth B. Brown, JAG Corps, U.S. Navy, *Counter-Guerrilla Operations: Does the Law of War Proscribe Success?*, 44 NAV. L. REV. 123, 144 (1997) (discussing the “threshold requirement” of analyzing whether the conflict is “international or internal” in the context of counter-guerrilla operations and commenting that the criteria “raises almost as many questions as it solves”).

<sup>6</sup> See Brown, *supra* note 5, at 144 (“[G]uerrilla wars . . . are one of the nastiest forms of violence, where both the ‘guerrilleros’ and those who try to subdue them easily slip into an escalation of uncontrolled brutality.”); but see COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 529 (Yves Sandoz et. al eds., 1987) [hereinafter AP I COMMENTARIES] (“[T]he guerrilla fighter who relies on his civilian attire and lack of distinction to take advantage of his adversary in preparing and launching an attack” will lose combatant and prisoner of war status.).

positive international law can rationally be interpreted to place armed forces<sup>7</sup> engaged in counterterrorism and counterinsurgency operations in an untenable position, subject to an all-too-lethal double standard.

This article uses a hybrid term of civilian-belligerent in order to be consistent and functionally precise. The purpose is not to add yet another term to this body of law but merely to be descriptive. This article will also use the terms guerrillas, insurgents, and terrorists to describe people who physically carry out organized armed attacks, yet are de jure “civilians” according to Additional Protocol I.<sup>8</sup>

The law of war’s “Basic Rule”<sup>9</sup> requires force to be directed at combatants and away from civilians. Unfortunately, contemporary operational realities make implementation of this Basic Rule extremely challenging because many combatants appear to be civilians and base their operations amongst non-combatants.

The lethal problem of civilian-belligerents is now the customary trend in warfare rather than the exception to the rule. Article 51(3) of Additional Protocol I contemplates this phenomenon to a limited extent, and permits the use of force against civilians “for such time as they take a direct part in hostilities.”<sup>10</sup> The United States is not a party to Additional Protocol I, but regards the Basic Rule as a codification of the principle of distinction<sup>11</sup> and invokes the inherent right of self-defense to justify the use of force against civilian-belligerents. Israel is also a non-party and applies a policy similar to the United States.<sup>12</sup> On the other hand, the United Kingdom did ratify Additional Protocol I and is bound by Article 51(3).<sup>13</sup> All three countries have extensive, recent experience with civilian-belligerents. Each of these approaches will be discussed in this article.

This article will discuss the Additional Protocol I and self-defense differences that pertain to the counterinsurgency or counterterrorism operations. Specifically, it will explore the extent to which “direct part in hostilities” and “imminent attack” are related for targeting purposes. An appreciation of the context in which these legal standards will be applied and how the military controls the use of force is essential. Part II discusses insurgencies and counterinsurgencies. Part III covers the criteria that govern force-employment against civilians. Part IV discusses the inherent right of self-defense. Part V pertains to rules of engagement, distinguishes between status and conduct, and provides examples from the conflict in Iraq. Part VI explores targeted killing, the practical point of divergence for Additional Protocol I and self-defense law. Like civilian-belligerents and non-combatants, conventional law and customary law blend together. The article concludes that the legal issue falls within the scope of substantially similar legal standards; as a result pragmatic, not legal, considerations more powerfully restrain indiscriminate force.

## II. Operational Realities in Counterinsurgency Warfare

Insurgencies are long, bloody, brutal, and frustrating. Likewise, every facet of counterinsurgency warfare is complex and uncertain. Rebels in the American Revolution took thirteen years to defeat the British armed forces and adopt the

---

<sup>7</sup> See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict art. 43, adopted June 10, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (“all organized armed forces, groups, or units which are under a command responsible . . . for the conduct of its subordinates . . . subject to internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.”); see also Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

<sup>8</sup> See Additional Protocol I, *supra* note 7, art. 50 (“A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1),(2),(3), and (6) of the Third Convention and in Article 43 of this Protocol.”).

<sup>9</sup> *Id.* art. 48.

Basic Rule: In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

*Id.*

<sup>10</sup> *Id.* art. 51(3).

<sup>11</sup> Memorandum from W. Hays Parks for the Office of The Judge Advocate General, U.S. Army, Law of War Status of Civilians Accompanying Military Forces in the Field (6 May 1999) [hereinafter Civilian Status Memo]. This legal memo pertains to permissible positions for U.S. contractors that would not constitute taking part in hostilities and would maintain prisoner of war status as civilians accompanying the force. This memo is silent with respect to whether certain mission critical civilian contractor positions (e.g., forward deployed weapon system technicians) would be considered lawful targets). *Id.*

<sup>12</sup> See State Parties/Signatories to Additional Protocol I, available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=p> (last visited Sept. 18, 2007) (listing countries that have ratified or acceded to Additional Protocol I).

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

Constitution. American armed forces took seventeen years to pacify the Philippines. British armed forces took twelve years to subdue Malaysian communist guerrillas. Vietnamese insurgents took twenty-five years to defeat Western powers in their country. When not engaged in wars of national survival, Israel has been involved in counterinsurgency warfare since its birth in 1948. After generations of anti-colonial struggle, many African nations continue to endure horrific guerrilla warfare.

Democratically elected leaders can expect difficulty persuading their electorates to maintain resolve during counterinsurgencies. Armed forces can expect difficulty fulfilling their obligation to discriminate amongst targets. Commanders can expect difficulty formulating successful strategies while protecting their forces from unnecessary hazards. "In insurgencies, it is not only difficult to distinguish combatant from noncombatant; it is also difficult to determine whether the situation permits harm to noncombatants."<sup>14</sup> The current conflicts in the Afghanistan and Iraq illustrate the operational realities in brutal detail.

#### A. Insurgents

"Terror, the guerrilla leader's most potent weapon, is used by him not only to demoralize the enemy and extort support of his own people, but also to exact unswerving loyalty from the individual guerrilla."<sup>15</sup> The British-led security mission in the southern four provinces in Iraq encountered such tactics while conducting "patrols, arrests, anti-terrorist operations," and infrastructure protection.<sup>16</sup> From 1 May 2003 until 30 June 2004, approximately 1050 "violent attacks" occurred in the British sector.<sup>17</sup> A British General Officer described the conditions his forces faced:

Iraq is the most volatile and violent place in which I have served. The population as a whole possessed a lot of weaponry, with at least two weapons in most households. In addition, the tribes, criminal gangs, and terrorist groups were very well armed with heavy machine guns, rocket propelled grenades, bomb-making kits and a wide variety of other weapons. The Rule of Law, which normally operates in a civil society, simply did not exist when [the British Army] arrived in Iraq. The police were ineffective, they were not respected, they were corrupt, and they were easily intimidated by the tribes . . . The area was rife with tribal feuds and organized crime. Extortion, kidnapping, carjacking, looting, oil smuggling were the key criminal pursuits. When the criminals were conducting these activities they went heavily armed and they were always ready to shoot at us if we came across them . . . I suspect we had 2 or 3 shooting incidents involving armed criminals every night. Tribal feuds were often extremely violent and dangerous . . . where heavy machine guns were regularly fired at each other . . . Terrorists, who included the former regime extremists, targeted us quite actively. Their attacks ranged from drive-by shootings to bombings . . .<sup>18</sup>

United States armed forces in Iraq experienced even more volatile and bloody confrontations. In Fallujah,

[t]he [M]arines engaged in a series of ferocious close-quarters battles with scores of insurgents thoroughly mixed in with the civilian population. Reports from embedded news correspondents suggest that the [M]arines did not intentionally target [non-combatant] civilians during the offensive . . . . [U]nlike the insurgents, [Marines] went to considerable lengths to protect noncombatants.<sup>19</sup>

Even during the six weeks it took to defeat Saddam Hussein's Iraqi national forces,<sup>20</sup> the U.S. military primarily confronted "irregular fedayeen fighters, not uniformed soldiers."<sup>21</sup> Since then, "the landscape has become increasingly confused"

---

<sup>14</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 7-7 (15 Dec. 2006) [hereinafter FM 3-24].

<sup>15</sup> Brown, *supra* note 5, at 131 (quoting BERT LEVY, GUERRILLA WARFARE 16 (1942)).

<sup>16</sup> The Queen on the application of Mazin Jumaa Gatteh Al Skeini and others v. Sec'y. of State for Defence, [2004] EWHC 2911 admin, para. 43 (U.K.) [hereinafter *Al Skeini Opinion*]. The families of six Iraqis killed by British armed forces in Iraq brought suit in England alleging violations of the European Convention of Human Rights.

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

<sup>18</sup> *Id.* para. 40 (quoting British Brigadier W. H. Moore, Commander, 19th Mechanized Brigade, Basra City, Iraq).

<sup>19</sup> Colin H. Kahl, *How We Fight*, 85 FOREIGN AFFAIRS 94 (Nov.-Dec. 2006) (Marines did not use indirect fire and disapproved the majority of preplanned targets due to concern for civilian casualties.).

<sup>20</sup> See *U.S. Launches Cruise Missiles at Saddam*, CNN, Mar. 20, 2003, available at <http://www.cnn.com/2003/WORLD/meast/03/19/sprj.irq.main/> (U.S. hostilities commenced on 20 March 2003); see also President Bush Announces Combat Operations in Iraq Have Ended, <http://www.state.gov/p/nea/rls/rm/20203.htm> (State Department Bulletin publishing end of major combat operations on 1 May 2003).

because of “the thorough intermingling of insurgents and civilians . . . , the increasing frequency of attacks on U.S. troops by individuals in civilian garb or civilian vehicles, and the insurgents’ intentional use of civilians and civilian objects as shields.”<sup>22</sup> It is readily apparent that guerrilla forces seeking to bleed the United States and United Kingdom into withdrawal are systematically violating the law of war:

Insurgents and militias [in Iraq] have placed [non-combatant] civilians at risk by positioning their forces and arms caches in mosques and hospitals; using homes as shelters; firing mortars and rockets from yards, farms, and fields; and using ambulances, taxis, and other civilian vehicles to transport fighters and weapons. They have launched indiscriminate attacks that were certain to kill large numbers of non-combatants. And as the conflict evolved, Sunni insurgents and Shiite militias have increasingly targeted [non-combatant] civilians, triggering a spiral of sectarian violence.<sup>23</sup>

There were approximately 50,000 Iraqi civilian deaths during the first forty months of fighting.<sup>24</sup> As of 1 May 2003 (the declared end of major combat operations) approximately 2558 Iraqi civilians have been killed in the crossfire. From that point until about mid-summer 2006, U.S. armed forces have killed approximately one Iraqi civilian per day in escalation of force incidents at check points and during convoy operations.<sup>25</sup> That is approximately 1200 civilians. Two unanswered questions are raised. Who killed the other 35,000 civilians, and how many of those civilians were unlawful combatants? Even if twice as many non-combatant civilians were killed by indiscriminate fire as were killed during major combat operations (victims of collateral damage), there are approximately 30,000 intended non-combatant victims of homicide. It can reasonably be inferred that the overwhelming majority of those killings were carried out in accordance with guerrilla doctrine.

The Iraq war is not an aberration, but an historically normative example of the brutality of insurgency warfare. Even the ghastly numbers of civilian deaths in Iraq pale in comparison to the civilian suffering in the Philippine insurrection (seventeen times as many per month) and in South Vietnam during the Viet Cong insurgency (nine times as many per month).<sup>26</sup> No one understands the terrible carnage wrought by insurgency warfare better than the Israelis:

For more than three years now, the State of Israel is under a constant, continual, and murderous wave of terrorist attacks . . . without any discrimination between combatants and civilians or between men, women, and children . . . . [M]ore than 900 Israelis have been killed and thousands of other Israelis have been wounded. . . . In addition[,] thousands of Palestinians have been killed and wounded. For sake of comparison we note that the number of Israeli casualties in proportion to the population of the State of Israel is a number of times greater than the percentage of casualties in the U.S. in the events of September 11 in proportion to the U.S. population.<sup>27</sup>

Organized, well-armed civilian-belligerents present an extraordinary challenge to law of war-compliant armed forces. In 2006, the Multi-National Corps - Iraq commander believed “that the insurgency over time has repopulated itself” in part due to “escalation of force” incidents that result in the unintentional killing or wounding of non-combatant Iraqi civilians.<sup>28</sup> Counterinsurgency tactics, not just the law of war, counsel restraint.

---

<sup>21</sup> Kahl, *supra* note 19, at 95.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 88 (quoting U.S. military sources).

<sup>24</sup> *Id.* at 86 (quoting non-profit organization Iraq Body Count and Iraqi Health Ministry).

<sup>25</sup> *Id.* at 87 (quoting U.S. military sources).

<sup>26</sup> *Id.* at 89 (quoting U.S. military sources).

<sup>27</sup> H CJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2005] para. 17 (quoting the Israeli State Attorney General summary of Second Intifada carnage from September 2000 to January 2004).

<sup>28</sup> Nancy Montgomery, *U.S. Seeks to Reduce Civilian Deaths at Iraqi Checkpoints*, MIDEAST STARS & STRIPES, Mar. 18, 2006, available at <http://stripes.com/article.asp?section=104&article=34944&archive=true> (quoting Lieutenant General Chiarelli, U.S. Army, Commander, Multi-National Corps – Iraq). Lieutenant General Chiarelli’s spokesman agreed with the estimate that 1000 Iraqis were killed or injured in escalation of force incidents since 2003. This article does not make a distinction between proper engagement of civilian-belligerents and non-combatant civilians. What is clear is that the incidents instill Iraqi hatred for the United States.

## B. Counterinsurgents

Armed forces must be “subject to the strictest of discipline when in the field and must receive special training to prepare them for the rigors of this style of warfare” in order to lawfully and effectively combat guerrillas.<sup>29</sup> American gunners in Iraq must make life-or-death, split-second decisions under extreme stress and constant bomb threat.<sup>30</sup> “Suicide attacks by pedestrians and civilian vehicles laden with explosives have continually threatened U.S. forces at checkpoints and temporary roadblocks or driving along supply routes.”<sup>31</sup> Despite these many provocations, there are tactical as well as legal reasons why coalition armed forces must resist the temptation of reprisal. “With few exceptions, history clearly shows that those who rely on brutality and indiscriminate firepower to quash a guerrilla movement will likely only fuel the fire they are attempting to extinguish.”<sup>32</sup>

The keys to successful counterinsurgency are “gaining popular support and establishing legitimacy for the government,” while at the same time “practicing proportionality and discrimination” required by operational, legal, and moral “necessity.”<sup>33</sup> On the other hand, the guerrilla force center of gravity is the brutally enforced silence they enforce upon the unwilling non-combatant shields. The U.S. counterinsurgency manual sums up the challenge:

The most salient difference between war fighting and policing is the moral permissibility of noncombatant and bystander casualties. In war fighting, noncombatant casualties are permitted as long as combatants observe the restrictions of proportionality and discrimination. In policing, bystanders may not be harmed intentionally under any circumstances. Failure to observe this rule undermines the peace - often tenuous in these circumstances - that military action has achieved. In maintaining the peace, police are permitted to use only the least force possible to achieve the immediate goal.<sup>34</sup>

Sound legal arguments, under the penumbra of military necessity, can be used to justify aggressive force employment in areas densely populated by non-combatants. However, legality does not equal effectiveness. The correct tool for counterinsurgency is the surgeon’s scalpel, not the sledgehammer. Insurgents must be excised, not smashed, in order to minimize collateral damage, foster vital civilian cooperation, and prevent regeneration.<sup>35</sup> The law may constrain tactically aggressive courses of action, but less so than the operational environment itself.

## III. Targeting Civilian-Belligerents

The law of war’s “Basic Rule” ties privileges and immunities to status. “[T]he principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons. In view of the latter principle, it is essential to have a clear definition of each of these categories.”<sup>36</sup>

There are two essential privileges, each with a concomitant restriction. Combatant immunity is granted to fighters who obey the law of war, including the requirement to wear a uniform or “fixed insignia recognizable at a distance to help draw

---

<sup>29</sup> Brown, *supra* note 5, at 168.

<sup>30</sup> Montgomery, *supra* note 28.

<sup>31</sup> Kahl, *supra* note 19, at 93.

<sup>32</sup> Brown, *supra* note 5, at 123.

<sup>33</sup> FM 3-24, *supra* note 14, at 7-6.

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained. But in [counterinsurgency] operations, advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained. If certain key insurgent leaders are essential to the insurgents’ ability to conduct operations, then military leaders need to consider their relative importance when determining how best to pursue them. In [counterinsurgency] environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape. If the target is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.

*Id.*

<sup>36</sup> API COMMENTARIES, *supra* note 6, at 610.

fire away from non-combatant civilians.”<sup>37</sup> Fighters granted combatant immunity will not be subject to criminal prosecution for assault, murder, destruction of property, and other acts of violence. Everyone else is granted immunity from being intentionally attacked, provided they do not fight.<sup>38</sup> Additional Protocol I defines anyone who is not eligible for prisoner-of-war status as a civilian,<sup>39</sup> applying a broad, negative definition.<sup>40</sup> The Geneva Conventions and Additional Protocols bifurcate the world into combatants and civilians. This leaves a legal void in which civilian-belligerents can operate:

From the principle of distinction there has arisen an overly simplistic division of individuals into two categories: military personnel, who may be attacked at any time, wherever located, and *civilians, who may not be intentionally attacked so long as they do not take an active part in military operations*. The latter incorrectly are sometimes referred to noncombatants. Combatant and noncombatant are imprecise, undefined terms.<sup>41</sup>

Article 51 does contemplate the phenomenon of civilian-belligerents without creating a third classification. It is entitled “Protection of the civilian population” and sub-section (2) reiterates the “Basic Rule” of distinction.<sup>42</sup> The United States recognizes this specific assertion as customary international law.<sup>43</sup> Indeed, Article 51 “explicitly confirms the customary rule that *innocent civilians* must be kept outside the hostilities as far as possible and enjoy general protection against danger arising from hostilities.”<sup>44</sup> Sub-section (3) temporarily suspends such protection, but fails to adequately address the persistent threat from civilian-belligerent groups.

#### A. Additional Protocol I “Direct Part in Hostilities” Window for Engagement

Article 51(3) addresses the limitations of civilian immunity from targeting. “Civilians shall enjoy the protection afforded by this section, *unless and for such time as they take a direct part in hostilities*.”<sup>45</sup> This “covers not only the time that the civilian makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon. . . .”<sup>46</sup> The engagement window extends to the pre-staging attack phase. However, civilians who work in war-related industries or otherwise sustain combatant ability to wage war are not taking “direct part in hostilities,” and do not lose immunity from being targeted.<sup>47</sup> The breadth of interpretation is the essential issue. But, the engagement window is not open for very long.

Article 51(3) grants civilian-belligerents “light-switch” immunity from targeting. It is turned off briefly and only “for such time as they take a direct part in hostilities.”<sup>48</sup> The commentary to the Additional Protocol describes “direct

<sup>37</sup> See GPW, *supra* note 7, art. 4 (Privileged combatants are armed forces and attached militias who satisfy four criteria that pertain to discipline and distinction.).

<sup>38</sup> Additional Protocol I, *supra* note 7, art. 51(3); see API COMMENTARIES, *supra* note 6, at 618 (“In general, the immunity afforded civilians is subject to a very stringent condition: that they do not participate directly in hostilities, i.e. that they do not become combatants, on pain of losing their protection.”).

<sup>39</sup> *Id.* art. 50 (“A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1),(2),(3), and (6) of the Third Convention and in Article 43 of this Protocol.”).

<sup>40</sup> See API COMMENTARIES, *supra* note 6, at 610.

In the course of history many definitions of the civilian population have been formulated . . . all of these definitions are lacking in precision . . . [t]hus the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces.

*Id.*

<sup>41</sup> Civilian Status Memo, *supra* note 11 (quoting Additional Protocol I, art. 51(3)) (emphasis added).

<sup>42</sup> Additional Protocol I, *supra* note 7, art. 51(2) (“The civilian population as such, as well as individual civilians, shall not be the object of attack.”).

<sup>43</sup> Memorandum from Office of the Secretary of Defense for Mr. John H. McNeill, Assistant General Counsel (International), 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986).

<sup>44</sup> API COMMENTARIES, *supra* note 6, at 615 (emphasis added) (The ICRC commentators describe Art. 51 as “one of the most important articles in the Protocol.”).

<sup>45</sup> Additional Protocol I, *supra* note 7, art. 51(3) (emphasis added).

<sup>46</sup> API COMMENTARIES, *supra* note 6, at 618.

<sup>47</sup> *Id.* at 619 (“There should be a clear distinction between the direct participation in hostilities and participation in the war effort . . . [w]ithout such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless.”).

<sup>48</sup> Additional Protocol I, *supra* note 7, art. 51(3).

participation” in two different and not necessarily consistent ways: acts “likely to cause” and acts “intended to cause actual harm to the personnel and equipment of the armed forces.”<sup>49</sup> After a civilian-belligerent completes the act intended or likely to cause actual harm, he can turn the immunity switch back on under the “for such time as” construct. “It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection . . . against the effects of hostilities, and he may no longer be attacked.”<sup>50</sup>

The commentary further states that “there is *nothing to prevent* the authorities, capturing him in the act or arresting him at a later stage, from taking repressive or punitive security measures with regard to him . . . .”<sup>51</sup> However, no foundation was provided for the assumption that “authorities” would be operating in a permissive environment. Counterinsurgencies are often fought in non-permissive environments where an arrest attempt would place lawful armed forces combatants *in extremis*. Moreover, counterinsurgency campaigns take place in states where non-combatant civilians carry arms (including automatic assault rifles) for personal protection.<sup>52</sup> Carrying arms openly does not offer much help for distinguishing civilian-belligerents from non-combatant civilians. This makes the lawful combatant obligation of wearing a “fixed distinctive sign recognizable at a distance”<sup>53</sup> the most effective means to protect non-combatant civilians from being harmed.<sup>54</sup>

## B. The American Geographic, Functional, and Temporal “Direct Part” Determination

The United States did not ratify Additional Protocol I, taking particular exception to the legitimization of guerrilla warfare because the “the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants.”<sup>55</sup> President Reagan did not send it to the Senate for advice and consent, in large part due to this very reason:

Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war . . . [a]nother provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations.<sup>56</sup>

<sup>49</sup> *Id.* at 618 (both subjective and objective language are addressed).

<sup>50</sup> API COMMENTARIES, *supra* note 6, at 618. *But see infra* note 130 (stating that direct participation is not limited to physical attack but membership in an “armed faction involved in attacks”).

<sup>51</sup> *Id.* (emphasis added).

<sup>52</sup> *See Al Skeini Opinion, supra* note 16, para. 40.

<sup>53</sup> GPW, *supra* note 7, art. 4 (stating the second of four criteria that “organized resistance groups” are required to fulfill in order to be granted combatant immunity and prisoner of war status).

<sup>54</sup> *But see* Additional Protocol I, *supra* note 7, art. 44(3) (describing the controversial “guerrilla compromise” that lowers the criteria for combatant status by granting license to discard fixed distinctive insignia recognizable at a distance in special circumstances, despite the concomitant elevated risk to non-combatant civilians).

In order to promote the protection of civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

*Id.*

<sup>55</sup> Policy Letter from the U.S. Secretary of State to the President of the United States, Advice and Consent of the Senate to Ratification, Protocol II Additional to the Geneva Conventions (Dec. 13, 1986).

Equally troubling is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to “national liberation” movements in general, but in particular to the inhumane tactics of many of them. Article 44(3), in a single subordinate clause, sweeps away years of law by “recognizing” that an armed irregular “cannot” always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway. As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States’ announced policy of combating terrorism.

*Id.*

<sup>56</sup> Policy Letter from the President of the United States to the U.S. Senate, Advice and Consent of the Senate to Ratification, Protocol II Additional to the Geneva Conventions (Jan. 29, 1987).

The United States interprets “direct part” more broadly than the Additional Protocol I signatories, and does so through the prism of self-defense. “A civilian entering the theater of operation in support or operation of sensitive, high value equipment, such as a weapon system may be at risk of intentional attack because of the importance of his or her duties.”<sup>57</sup> The U.S. Department of Defense Law of War Working Group evaluated the role of American civilians accompanying the force and opined that they “may compromise their immunity from intentional attack” if there is: “(1) geographic proximity of service provided to units in contact with the enemy, (2) proximity of relationship between services provided and harm resulting to enemy, and (3) temporal relation of support to enemy contact or harm resulting to enemy.”<sup>58</sup>

In transitioning from a defensive to an offensive perspective, no “bright line” exists to demarcate when a civilian becomes a lawful target.<sup>59</sup> The determination is fact sensitive and framed by the concept of self-defense.<sup>60</sup>

#### IV. The Inherent Right of Self-Defense

A national decision to employ military force in self-defense against a legitimate terrorist or related threat would not be unlike the employment of force in response to a threat by conventional forces; *only the nature of the threat has changed, rather than the international legal right of self-defense.* The terrorist organizations envisaged as appropriate to necessitate or warrant armed response by U.S. military forces are well-financed, highly-organized paramilitary structures engaged in the illegal use of force.<sup>61</sup>

United Nations Charter Article 51 appears simple at first glance: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . . .”<sup>62</sup> However, the meaning of “armed attack,” the impact of Security Council inaction, the problem of non-state actors, and the extent to which the United Nations Charter displaces pre-existing customary international law remain the subject of robust legal debate.<sup>63</sup> “[M]any States, including the U.S., argue that an expansive interpretation of the Charter is more appropriate, contending that the customary-law right of self-defense (including anticipatory self-defense) is an inherent right of a sovereign State that was not ‘negotiated’ away under the Charter.”<sup>64</sup>

Self-defense is recognized as a right of customary international law by the International Court of Justice.<sup>65</sup> Article 51 of the United Nations Charter describes the right of self-defense as “inherent.”<sup>66</sup> This “suggests that the right, which existed as a matter of customary international law before the Charter was adopted, was incorporated into the Charter and continues to exist independently of the Charter.”<sup>67</sup>

---

<sup>57</sup> Civilian Status Memo, *supra* note 11 (discussing potential loss of civilian immunity and prisoner of war status for civilians accompanying the force).

<sup>58</sup> INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, INT’L & OPERATIONAL LAW VOL. II, I-10 (Sept. 2006) (Civilian Protections in Armed Conflict).

<sup>59</sup> See Civilian Status Memo, *supra* note 11 (discussing potential loss of civilian immunity and prisoner of war status for civilians accompanying the force).

<sup>60</sup> See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, 4, 6.

Another unresolved issue concerns which civilians may be regarded as combatants, and therefore subject to lawful attack. While there is general agreement among law of war experts that civilians who participate in hostilities may be regarded as combatants, there is no agreement as to the degree of participation necessary to make an individual civilian a combatant.

*Id.*

<sup>61</sup> *Id.* at 7 (emphasis added).

<sup>62</sup> U.N. Charter art. 51.

<sup>63</sup> See Mark B. Baker, *Terrorism and the Inherent Right of Self-defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT’L L. 25 (1987-1988); see also Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT’L L. & FOREIGN AFF. 331, 339 (2005) (“The Security Council may intervene by taking ‘measures’ which would effectively truncate the exercise of self-defense . . . [but] mere words or rhetoric are insufficient to divest a state of the right to self-help.”).

<sup>64</sup> INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, INT’L & OPERATIONAL LAW VOL. I, C-6 (July 2006) [hereinafter INT’L & OPERATIONAL LAW VOL. I] (Legal basis for the use of force).

<sup>65</sup> Printer, *supra* note 63, at 341 (citing *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14 (June 27)).

<sup>66</sup> U.N. Charter art. 51.

<sup>67</sup> *Id.* at 338 (customary self defense law will always be available because there is no triggering mechanism such as a state of international armed conflict).

All uses of force in international armed conflict are subject to the law of war requirements of necessity and proportionality. Self-defense is no exception.<sup>68</sup> The arguments that justify the use of force make themselves when warships, embassies, and urban centers are attacked by organized suicidal civilian-belligerents who are poised for a re-attack. Justification gets more difficult the more preemptive the use of force. “The key, of course, is determining at what point the requirement of necessity is triggered.”<sup>69</sup> In other words “if the action of the United Nations is delayed or inadequate and the probability of the armed attack becomes manifestly imminent, instant, and overwhelming,” a nation is lawfully entitled to take unilateral action and use preemptive force against the threat.<sup>70</sup>

It is particularly noteworthy that the sole United Nations Article 51 resolution was triggered by an armed attack perpetrated by a non-state actor.<sup>71</sup> Up until this point, it was far from clear that national self-defense could be invoked against civilian-belligerents.<sup>72</sup> However, force must be used to counter a future threat. Referring to the 1998 U.S. counterterrorist missile strikes, one author stated:

International law did not recognize revenge or punishment as justification for military attack, but the customary law of self-defense did sanction such strikes if they were designed to disrupt or preempt an enemy’s ability to carry out future attacks. This principle helped shape the Pentagon’s target list: They would emphasize bin Laden’s ongoing operations, the threat posed to the United States in the future, and his ability to give orders.<sup>73</sup>

In order to credibly claim color of law, it is wise to confine “the use of force to only those situations involving the most serious and dangerous form of threat to international peace.”<sup>74</sup> Just as restraint during counterinsurgency warfare pays dividends with the local population, restraint during global counter-terrorist operations will pay dividends with nation-state actors. “If an aggressive use of force does not rise to the level of an armed attack, a state may pursue traditional criminal sanctions, but may not rightfully respond with military action.”<sup>75</sup>

The law governing the use of force in national self-defense is a macrocosm of the choices to be made at the tactical level of warfare. The rights of nations are delegated to their agents on the battlefield, the combatants, usually by the promulgation of rules of engagement (ROE). “[A]nticipatory self-defense serves as a foundational element in the CJCS [Chairman of the Joint Chiefs of Staff] Standing ROE, as embodied in the concept of ‘hostile intent,’ which makes it clear to commanders that they do not have to absorb the first hit before their right and obligation to exercise self-defense arises.”<sup>76</sup>

---

<sup>68</sup> See Baker, *supra* note 63, at 33.

<sup>69</sup> *Id.* at 44 (discussing anticipatory responses).

<sup>70</sup> *Id.* at 45 (mirroring Caroline Doctrine language established after the 1837 British attack against an American vessel suspected of aiding Canadian insurgents. This incident is internationally recognized to stand for the proposition that use of force in anticipatory self-defense is lawful when the circumstances leading to the use of force are “instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation”); see INT’L & OPERATIONAL LAW VOL. I, *supra* note 64, at C-9.

<sup>71</sup> See Jonathan Ulrich, *The Gloves Were Never On: Defining the President’s Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA J. INT’L L. 1029, 1047 (2005) (quoting U.N. Security Council Resolution 1368).

On September 12, 2001, the UN Security Council passed a resolution which, “recognizing the inherent right of individual or collective self-defense in accordance with the Charter,” condemned the attacks and expressed the Security Council’s “readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism. . . .

*Id.* (quoting UN SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001), available at <http://www.un.org/Docs/scres/2001/sc2001.htm>) (last visited 15 Oct. 2007).

<sup>72</sup> See Printer, *supra* note 63, at 334.

[T]he use of force paradigm as established by the U.N. Charter and extant customary international law, applies to military conflicts between state and non-state actors. In particular, the Charter’s use of force provisions should apply to terrorist groups as a matter of customary law because groups that can carry out armed attacks that threaten global peace and security should be bound by the very provisions that seek to constrain such behavior.

*Id.*

<sup>73</sup> STEVE COLL, GHOST WARS 409 (2004) (discussing U.S. strike planning in 1998 that culminated in cruise missile attacks in Afghanistan and Sudan).

<sup>74</sup> Baker, *supra* note 63, at 33 (discussing U.N. Charter Article 51 interpretation).

<sup>75</sup> Printer, *supra* note 63, at 339.

<sup>76</sup> INT’L & OPERATIONAL LAW VOL. I, *supra* note 64, at C-9.

## V. Rules of Engagement

Rules of Engagement control the use of force. They are designed to coordinate political, military, and legal purposes and “are one of the most effective tools for implementing strategic decisions made at higher levels.”<sup>77</sup> Properly drafted ROE ensure law of war compliance, but they are a command control device, as opposed to a legal one.

The inherent right of self-defense is the backbone of U.S. Standing ROE (SROE). The Joint Chiefs of Staff repeatedly refer to this customary law in the “fundamental policies and procedures governing the actions taken by U.S. commanders and their forces during all military operations and contingencies.”<sup>78</sup> The concept of self-defense is a central, unifying theme throughout the U.S. SROE, whether forces are conducting operations overseas or supporting domestic law enforcement. “Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.”<sup>79</sup>

High-level authorities can also declare a force “hostile” and authorize an offensive use of force. The on-scene tactical action officer or rifleman must follow the ROE and acquire positive identification or “reasonable certainty that the proposed target is legitimate.”<sup>80</sup> Positive identification reiterates the law of war obligation to discriminate between combatants and non-combatants. This works well when the enemy complies with the law of war by wearing fixed insignia recognizable at a distance. It is rarely possible when fighting civilian-belligerents. Counterinsurgency force employment decisions are almost always based on conduct, even when mission-specific ROE declare the enemy insurgent, terrorist, or guerrilla group hostile.

### A. Status-Based Engagement

It is lawful to attack enemy combatants at any time during international armed conflict. The restraint on force is limited only when there would be excessive collateral damage, when enemy combatants are attempting to surrender, or when enemy combatants are out of the fight due to injury.<sup>81</sup> Attacking combatants even when they are not in a position to mount an attack is lawful under any law of war regime: customary international law; the Hague Conventions; and the Geneva Conventions, to include the Additional Protocols. This concept is codified in the U.S. SROE: “Once a force is declared hostile by appropriate authorities, U.S. forces need not observe a hostile act or demonstration of hostile intent before engaging . . . .”<sup>82</sup>

This concept goes from well-established, when the target is a “combatant,”<sup>83</sup> to highly controversial, when the attack is initiated against a civilian-belligerent.<sup>84</sup> The U.S. SROE contemplate this contingency. A “declared hostile force” is “[a]ny civilian, paramilitary, or military force, or terrorist(s) that has been declared hostile by appropriate U.S. authorities.”<sup>85</sup> If the ROE designate a civilian force hostile, the on-scene American servicemember will not have to perform the “direct part in hostilities” analysis. Positive identification as a member of the civilian-belligerent group becomes the issue. Additional Protocol I and the self-defense views converge at this point only because civilian-belligerents rarely distinguish themselves; thus, their status is not revealed until the point of attack.

---

<sup>77</sup> Captain J. Ashely Roach, *Rules of Engagement*, NAVAL WAR COLLEGE REV. 47 (Jan.-Feb. 1983).

<sup>78</sup> JOINT CHIEFS STAFF INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES 1 (13 June 2005) [hereinafter JCSI 3121.01B] (including actions in support of domestic civil authority and routine force protection duties within American territory).

<sup>79</sup> *Id.* at 2-3, A-2 (citing self-defense right in rules of engagement section pertaining to overseas military operations, during civil support and law enforcement actions within the United States; and reiterated in policy section of ROE enclosure).

<sup>80</sup> INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 117 (2006) [hereinafter JA 422] (reprinting the Operation Iraqi Freedom Combined Forces Land Component Commander ROE card promulgated 311334Z Jan 2003). See also CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN & IRAQ, 11 SEP 2001-1 MAY 2003, at 96-99 (2004) [hereinafter OEF-OIF LESSONS LEARNED] (PID is an implicit requirement of ROE and a restatement of the Basic Rule).

<sup>81</sup> See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art.12 Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 (“wounded or sick, shall be respected and protected in all circumstances”).

<sup>82</sup> JCSI 3121.01B, *supra* note 78, at A-2.

<sup>83</sup> See GPW, *supra* note 7, art. 4.

<sup>84</sup> See H CJ 769/02 The Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.* [2005] paras. 4-5 (petitioners unsuccessfully claimed the right of national self defense was inapplicable against civilian-belligerent groups, and in the alternative “that the targeted killings policy violate[d] the rules of international law even if the laws applicable to armed conflict between Israel and the Palestinians are the laws of war.”).

<sup>85</sup> JCSI 3121.01B, *supra* note 78, at A-2 (emphasis added). It is noteworthy that this concept can be found in the unclassified portion of the ROE.

During major combat operations in Iraq in 2003, U.S. forces were issued the following ROE:

On order, enemy military and paramilitary forces are declared hostile and may be attacked subject to the following instructions . . . [p]ositive identification (PID) is required prior to engagement. PID is reasonable certainty that the proposed target is a legitimate military target. If not PID, contact your next higher command for decision . . . .”<sup>86</sup>

Civilians were not to be targeted except in self-defense.<sup>87</sup> Eventually, the U.S. military issued more restrictive ROE that authorized the use of force in response to hostile acts or demonstrations of hostile intent.<sup>88</sup> Policy and tactics shifted to conduct-based engagement. Removing the declared hostile force language from the mission-specific ROE did not change the civilian-belligerent PID challenges, but did help foster a mindset change aligned to the counterinsurgency environment and the desired political end-state.<sup>89</sup> However, “PID in the self-defense context does not require that the actual identity of the threat need be known—e.g. whether the threat is part of a certain enemy force—but rather that the general source of the threat be known.”<sup>90</sup>

## B. Conduct-Based Engagement

The right of self-defense justifies the use of necessary and proportional force to counter an attack (“hostile act”) or a threat of an attack (“demonstration of hostile intent”). A hostile act is “[a]n attack or other use of force” and hostile intent is “[t]he threat of imminent use of force” that is determined “based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.”<sup>91</sup> The attacker’s classification as a combatant or civilian is not relevant because his conduct justifies the use of force.

When overseas and not engaging in offensive operations against a declared hostile enemy, U.S. armed forces are directed to assume a posture of de-escalation, to provide warning, and to allow a threat the opportunity to withdraw “when time and circumstances permit.”<sup>92</sup> However, the U.S. SROE also recognize that “[s]elf-defense includes the authority to pursue and engage.”<sup>93</sup>

### 1. American Force-Employment in Iraq

The U.S. military, now allied with the Iraqi armed forces, is embroiled in a counterinsurgency confronting an enemy force made up entirely of civilian-belligerents. This reality compounds the risk of confusion and collateral damage inherent in war, yet:

[United States] compliance with noncombatant immunity in Iraq has been higher than critics often assert, and adherence has increased over time as the U.S. military has tried to correct its procedures in reaction to instances of noncompliance. Observed through the narrow lens of the laws of war, the U.S. military has gone to commendable lengths to comply with the principles of distinction and proportionality in Iraq.<sup>94</sup>

---

<sup>86</sup> JA 422, *supra* note 80, at 117.

<sup>87</sup> *Id.*

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

<sup>89</sup> See Kahl, *supra* note 19, at 97 (showing that changes in tactics, training, procedures and ROE “have had a positive effect” restraining the use of force that was permissible earlier in the war); see also OEF-OIF LESSONS LEARNED, *supra* note 78, at 98 (showing that most judge advocates agree that “PID requirement did apply to self-defense; for example, a civilian firing a weapon at U.S. forces is committing a hostile act, and seeing the civilian do so constitutes PID of the source of the threat”).

<sup>90</sup> OEF-OIF LESSONS LEARNED, *supra* note 80, at 99.

<sup>91</sup> JCSI 3121.01B, *supra* note 78, at A-4.

<sup>92</sup> *Id.* (satisfying necessity and proportionality).

<sup>93</sup> *Id.* (illustrating that U.S. forces do not have to wait to absorb the first volley; apparent retreat can mean repositioning for the next attack).

<sup>94</sup> Kahl, *supra* note 19, at 98.

There have been criminal deviations from this overall trend. Misconduct and law of war violations “may be especially likely in a prolonged counterinsurgency campaign, due to the inherent stress of combat, the intense fog of war, the frustration of fighting an unseen enemy, the growing estrangement of the civilian population, and purposeful attempts by guerrillas to drive wedges between the counterinsurgent forces and the civilians these are supposed to protect.”<sup>95</sup> United States Marines accused of murdering non-combatant civilians in Haditha is one prominent example.<sup>96</sup>

As the war [in Iraq] transitioned into a counterinsurgency mission and U.S. forces confronted adversaries who were largely indistinguishable from the [non-combatant] civilian population, the criterion [for the employment of force] was status based: U.S. troops must now positively identify a “hostile act” (such as the firing of an automatic weapon in their direction) or a “hostile intent” (such as the brandishing of a rocket-propelled grenade or the planting of an improvised explosive device) before they may fire their weapons.<sup>97</sup>

The current ROE in Iraq “explicitly require U.S. troops to respond to a hostile act or intent with ‘graduated’ force. Under many circumstances, U.S. forces may engage in deadly violence only after warning their targets and trying non-lethal measures against them to no avail.”<sup>98</sup> The mission specific ROE became less aggressive and shifted for tactical reasons back towards the SROE. Counterinsurgency warfare often must constrain force below the proportionality standard under the law of war. “Rather than decide-detect-deliver-assess [targeting process], the [counterinsurgency] process may become detect-decide-deliver-assess. This is because the targets are individuals or groups of people rather than a fixed-enemy order of battle. It is impossible to decide who/what to target without first knowing who/what the targets are.”<sup>99</sup>

The practical and legal constraints of PID make status-based engagements very rare in a counterinsurgency environment. United States armed forces are in a reactive posture. “The Marines say insurgents know the rules, and now rarely carry weapons in the open.”<sup>100</sup> Instead, “they pose as civilians and keep their weapons concealed in cars or buildings until just before they need them. Later, when they are done shooting, they put them swiftly out of sight and mingle with civilians.”<sup>101</sup> The British armed forces face the same challenges. Although bound by Article 51(3) during international armed conflict, “after the end of major combat operations, British ROE shifted from war fighting to those permitted under the law of self-defense, known as card Alpha.”<sup>102</sup> The practical realities make the potential differences between the two legal regimes inconsequential.

## 2. British Force-Employment in Iraq

The British armed forces “Guidance for Opening Fire for Service Personnel” issued during the occupation phase of Operation Iraqi Freedom is similar to, but not as aggressive as, the U.S. SROE. For example, British troops are authorized to “open fire against a person if he/she is committing or about to commit an act likely to endanger life and there is no other way to prevent the danger.”<sup>103</sup>

---

<sup>95</sup> *Id.*

<sup>96</sup> See *U.S. Marines Face Iraq Murder Trial*, BBC, Dec. 22, 2006, available at [http://news.bbc.co.uk/2/low/middle\\_east/619847.stm](http://news.bbc.co.uk/2/low/middle_east/619847.stm) (noting that order to “shoot first and ask questions later” is reprinted on the criminal charge sheet).

<sup>97</sup> Kahl, *supra* note 19, at 93.

<sup>98</sup> *Id.* at 94.

<sup>99</sup> FM 3-24, *supra* note 14, at 28.

<sup>100</sup> C. J. Chivers, *Perfect Killing Method, But Clear Targets Are Few*, N.Y. TIMES, Nov. 22, 2006, at 1.

<sup>101</sup> *Id.*

<sup>102</sup> Interview with Lieutenant Colonel Alex Taylor, AGC (British Army Legal Service), Director, Coalition Operations, CLAMO, TJAGLCS, U.S. Army, in Charlottesville, Virginia (Feb. 21, 2007) [hereinafter Lieutenant Colonel Taylor Interview] (Lieutenant Colonel Taylor served as the Staff Judge Advocate HQMND, East in Basra, Iraq in 2005) (notes on file with author).

<sup>103</sup> *Al Skeini Opinion*, *supra* note 16, para. 45 (describing the U.S. “hostile intent” towards personnel only). Card Alpha states:

1. This guidance does not affect your inherent right of self-defense. However, in all situations you are to use no more force than absolutely necessary. FIREARMS MUST ONLY BE USED AS A LAST RESORT. 2. When guarding property, you must not use lethal force other than for the **protection of human life**. PROTECTION OF HUMAN LIFE. 3. You may only open fire against a person if he/she is committing or about to commit an act **likely to endanger life and there is no other way to prevent the danger**. CHALLENGING. 4. A challenge MUST be given before opening fire unless: a. To do this would be to increase the risk of death or grave injury to you or any other persons other than the attacker(s) **OR** b. You or others in the immediate vicinity are under armed attack. 5. You are to challenge by shouting: “NAVY, ARMY, AIR FORCE, STOP OR I FIRE.” Or

In 2004, the families of six Iraqis killed by British armed forces in Iraq filed suit in England, alleging wrongful deprivation of life under European Convention of Human Rights (ECHR).<sup>104</sup> British troops killed Mr. Al Skeini and four other Iraqis in separate unrelated pre-custodial confrontations.<sup>105</sup> The ECHR states that “[n]o one shall be deprived of his life save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law.”<sup>106</sup> However, the Convention does not prohibit killing in “defence of any person from unlawful violence, in order to effect a lawful arrest . . . [or] for the purposes of quelling a riot or insurrection.”<sup>107</sup>

Although the British court did not make any findings of fact, the record contains detailed after-action accounts that underscore the operational realities associated with counterinsurgency operations. The *Al Skeini* case provides an excellent insight into the realities faced by coalition armed forces in Iraq and descriptions of conduct-based engagements. The first case pertains to hostile intent.

Case 1 . . . the patrol saw and heard heavy gunfire from a number of different points . . . . The intensity of the firing appeared to increase as the patrol approached the area on foot and in darkness. The patrol thought a firefight between rival groups was in progress. When the patrol encountered two Iraqi men in the street, Sergeant Ashcroft opened fire *because the two men were armed and Sergeant Ashcroft considered them to represent an immediate threat* to his life and the lives of the other members of the patrol.<sup>108</sup>

The British sergeant assessed that two men carrying weapons during the course of a firefight were an imminent threat to his patrol. He had no way of knowing what faction the men represented or if they were unaffiliated, well-armed, non-combatant civilians out for a late night walk. The sergeant’s force employment decision was based on only two facts: there was a firefight and the targets were armed. The British Army determined the decision to be reasonable and within the rules of engagement. The second case is another example of hostile intent, only with more compelling circumstantial support.

Case 2 . . . The patrol had received information that a group of men armed with long barreled weapons, grenades, and rocket propelled grenades has been seen entering the house . . . . After the patrol failed to gain entry by knocking, the door was broken down . . . as [one of the British soldiers] entered the second room he heard automatic gunfire from within the house . . . two men armed with long barreled weapons rushed down the stairs towards him. There was not time to give a verbal warning. [The British soldier] believed that his life was in immediate danger. He fired one shot at the leading man (the deceased) and hit him in the stomach. He then trained his weapon on the second man who dropped his gun . . . .<sup>109</sup>

This British soldier decided to fire based on prior knowledge, non-responsiveness, weapons discharge from unseen person(s) in the house, and the presence of an armed man running toward him. Once again, the British Army determined that the use of force was reasonable and within the rules of engagement. Note that the soldier fired a single shot, and, in a remarkable display of restraint, held fire when the second target demonstrated his willingness to surrender. The third case involved a victim of collateral damage.

Case 3 . . . [The deceased] was shot during a firefight . . . [w]hen the area was illuminated with parachute flares, at least 3 men with long barreled weapons were seen in open ground, two of whom were firing directly at the British soldiers. One of the gunmen was shot dead during this exchange of fire with the patrol . . . . The deceased plaintiff (a woman) was found in a nearby building with a gunshot wound to the head, an apparent collateral damage victim.<sup>110</sup>

---

words to that effect. **OPENING FIRE.** 6. If you have to open fire you are to: a. fire only aimed shots AND b. Fire no more rounds than are necessary, AND c. Take all reasonable precautions not to injure anyone other than your target.

*Id.* (emphasis in original).

<sup>104</sup> See *id.* para. 6. Only one of the six plaintiffs was taken into custody. *Id.* This article focuses on the five pre-custodial shootings.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* para. 318.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* para. 58 (emphasis added).

<sup>109</sup> *Id.* para. 62.

<sup>110</sup> *Id.* para. 66.

The soldiers employed force in response to perceived hostile acts. The British Army determined that the patrol's actions were within the rules of engagement. There was no evidence showing whether the victim was shot by the civilian-belligerents or the British soldiers. Collateral damage is never helpful in counterinsurgency warfare, but it is inevitable. In this case, the soldiers were under fire and successfully engaged one of their attackers. This was not an example of indiscriminate fire. The fourth case pertains to hostile intent perceived from non-compliance and erratic behavior at a traffic control point.

Case 4 . . . [the British soldier] became suspicious of a minibus, with curtains over its windows, that was being driven towards the patrol at slow speed with its headlights dipped. When the vehicle was signaled to stop, it appeared to evade the soldiers . . . so [the British soldier] pointed his weapon at the driver and ordered him to stop . . . . The vehicle then stopped . . . . The driver reacted in an aggressive manner and appeared to be shouting over his shoulder to people in the curtained-off area in the back of the vehicle. When [the British soldier] tried to look into the back of the vehicle, the driver pushed him away by punching him in the chest . . . shouted into the back of the vehicle and made a grab for [the British soldier's] weapon. [The British soldier] had to use force to pull himself away. The driver then accelerated away, swerving in the direction of various other members of the patrol . . . [the British soldier] fired at the vehicle's tyres and it came to a halt about 100 metres from the patrol. The driver turned again and shouted into the rear of the vehicle. He then appeared to be reaching for a weapon. [The British soldier] believed that his team was about to be fired on by the driver and others in the vehicle. He therefore fired about 5 aimed shots. As the vehicle sped off . . . fired another 2 shots . . . . After a short interval, the vehicle reappeared and screeched to a halt . . . the driver . . . [had] three bullet wounds in his back and hip area. . . .<sup>111</sup>

In this incident, a British soldier again demonstrated tremendous discipline. He suffered a physical attack and relied on multiple indicators of hostile intent prior to directing aimed fire at the decedent. The last two rounds fired could be challenged as excessive. But, it always will be difficult to assess whether the target is fleeing or repositioning. Room for error is slim, especially when there is a threat of vehicle-borne improvised explosive devices. The British Army determined this force employment decision to be reasonable and within the ROE. The fifth case involves an unambiguous hostile act.

Case 5 . . . The patrol heard a gunshot in the immediate vicinity . . . [the British soldier] illuminated a man (the deceased) standing about 20 metres away. The man was holding an AK rifle and gesticulating with both arms raised. He was also shouting at persons in the courtyard . . . [the British soldier] continued to illuminate the man and shouted warnings at him. The man turned . . . brought down his rifle and fired one round at [the British soldier, who] fired a single shot at the man . . . .<sup>112</sup>

This is a textbook example of proportional use of force in response to a hostile act. The British Army determined this force employment decision was reasonable and within the ROE.

American and British frontline experience supports the assumption that armed forces are reactive and employ force based on conduct. However, this is not always the case. On occasion, human or signals intelligence will enable the employment of anticipatory force. This is particularly true in the case of insurgent or terrorist leadership because they are the subject of intense intelligence collection efforts.

## VI. Targeted Killing: the Extreme Test of Direct Participation and Self-Defense

“Any targeted killing, regardless of whether it is treated as an assassination, must fall within the [the United Nations Charter] Article 51 exception to the Article 2(4) prohibition against the use of force.”<sup>113</sup> Given the widely differing interpretations on a nation's right to self-defense, factual support to justify the scope of application is the key to the perception of legitimacy.

---

<sup>111</sup> *Id.* para. 70.

<sup>112</sup> *Id.* para. 79.

<sup>113</sup> Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L.J. 677, 690 (2005).

## A. “Assassination” in War and Peace

Acting consistent with the Charter of the United Nations, a decision by the President to employ clandestine, low visibility or overt military force would not constitute assassination if U.S. military forces were employed against the combatant forces of another nation, a guerrilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States.<sup>114</sup>

Assassination is illegal under international law.<sup>115</sup> But, it is undefined. “It is virtually impossible to discuss the legal issues surrounding assassination without an acceptable working definition.”<sup>116</sup> There have been attempts to define what assassination is not, just like the problematic negative definition for “civilian.” However, those efforts do not enjoy the force of law but are merely legal commentaries.

Modern definitions often distinguish between peacetime and wartime assassination. Although both are illegal, the criteria for determining each type of assassination are slightly different. Peacetime assassination requires the murder of a specifically targeted person for a political purpose. Wartime assassination, on the other hand, requires the murder of a targeted individual and the use of treacherous means.<sup>117</sup>

If the wartime-perfidy/peacetime-political purposes test is a reasonable reflection of law, status-based engagements of enemy belligerents during international armed conflict and conduct-based engagements of anyone, at any time, would not constitute assassination.

Customary international armed conflict has undergone a transformation. Non-state, transnational organizations with significant personnel, training, and equipment continue to threaten nation states, indeed super powers, to the point that national self-defense can reasonably be invoked.<sup>118</sup> Unlike the “war on drugs” slogan that politicians invoked to rally support for international criminal law enforcement initiatives, the slogan “Global War on Terror” does describe a de facto armed conflict of an international character. Whether or not such a “war” constitutes international armed conflict within the meaning of Common Article 2 is a matter of legal debate.<sup>119</sup> But, no rational person can deny that organized non-state actors are carrying out systematic paramilitary attacks across international boundaries that have necessitated nation-states to respond to the ongoing threat with armed forces. “[A]n entity that elects to use force on the international plane should be treated as an international actor and should be bound by accepted international norms.”<sup>120</sup>

The most cutting-edge aspect of the Global War on Terror is the application of force against non-state actors as opposed to treating the problem exclusively as a matter of international criminal law. “A civilian who undertakes military activities assumes a risk of attack, and efforts by military forces to capture or kill that individual would not constitute assassination.”<sup>121</sup> This justification “has only begun to gain [broader international] acceptance, in light of the tragic events of September 11, 2001.”<sup>122</sup> However, American preemptive use of force against nation-state and non-state actors substantially predates this watershed event.<sup>123</sup>

It is patently obvious that the two main belligerents in the Global War on Terror are the United States and al Qaeda. “[I]t is not clear whether terrorists like those in the al Qaeda network are more accurately characterized as enemy combatants or

---

<sup>114</sup> Parks, *supra* note 60, at 8.

<sup>115</sup> It is also illegal under American law per Executive Order 12,333. This article focuses on the international dimensions of the use of force.

<sup>116</sup> Wachtel, *supra* note 113, at 680.

<sup>117</sup> *Id.* Treachery is a term of art in the law of war. The author further clarifies by referring to the “ruse-perfidy distinction.” *Id.*

<sup>118</sup> See Ulrich, *supra* note 71, at 1047 (stating that U.N. Security Council Resolution 1368 invoked Article 51 in response to al Qaeda’s 9/11 attacks).

<sup>119</sup> See A. P. V. ROGERS, LAW ON THE BATTLEFIELD 46 (2004) (“Even if one could establish that this was a situation to which the law of war applied . . . some leading academics are scornful of the very idea that a ‘war on terrorism’ is a war in the legal sense.”).

<sup>120</sup> Printer, *supra* note 63, at 345.

<sup>121</sup> Parks, *supra* note 60, at 7 (discussing assassination in wartime in a counterinsurgency environment).

<sup>122</sup> Wachtel, *supra* note 113, at 693.

<sup>123</sup> See Parks, *supra* note 60, at 7 (discussing a list of examples of United States’ use of force to protect its citizens from threats originating in foreign countries, from the Barbary pirates in 1804 to the 1986 air strikes in Libya).

criminal suspects. The nature of the threat that they pose—to both military forces and civilian populations—blurs the combatant/criminal distinction.”<sup>124</sup> Nevertheless, responsive use of force should be prompt.

If a state waits too long before invoking its right to self-defense, its use of force might be considered a reprisal. . . . There is a fine line between a legal use of force of self-defense to counter an ongoing threat and an illegal retaliation for a prior act of aggression. . . . The right to use force is therefore always forward-looking . . . because the only permissible justification for using force is ‘protective, not punitive.’<sup>125</sup>

Targeted killing of combatants is not unlawful during international armed conflict. With respect to civilian-belligerents, there is a correlation between the intensity of objection to anticipatory self-defense claims and the location of the strike, to wit: whether the target was engaged inside or outside a recognized theater of armed conflict.

## B. Examples of Targeted Killing

### 1. Targeted Killing within a Theater of Armed Conflict

On 8 June 2006, “U.S. armed forces discovered the location of Abu Musab al-Zarqawi, the leader of al Qaeda in Iraq, and killed him and his companions with two 500 pound bombs.”<sup>126</sup> It appears that U.S. military commanders assessed that attempting to capture Zarqawi (and potentially gain extraordinary intelligence) presented too many risks. This is a relatively rare example of a civilian-belligerent status-based engagement. Yet, this killing did not yield an outcry from the international community. Perhaps this is a sign of acquiescence to state practice.

The United Nations Secretary-General implied approval by stating “of course, we cannot predict that this will mean an end of the violence, but it is a relief that such a heinous and dangerous man, who has caused so much harm to Iraqis, is no longer around to continue his work.”<sup>127</sup> A lawyer with the militant Egyptian Islamists stated: “Zarqawi was a symbol . . . and was the *head of an army* . . . if Zarqawi has fallen, there are others to take his place and *responsibility*.”<sup>128</sup> On the same day, the Washington Post reported that an explosion ripped through a busy outdoor market in Baghdad just a few hours after Zarqawi’s death, and commented that the bombing emphasized “the *threat of continued violence*.”<sup>129</sup> This report aptly captures al Qaeda’s constant menace.

Technically a “civilian,” Zarqawi was also a “general,” who commanded a belligerent group in a recognized zone of armed conflict. Even though he was resting in a house at the time of his death, Zarqawi’s record of carnage, ongoing virulent threats, and paramilitary assets make a self-defense claim credible. An influential U.S. military law commentator described the U.S. view in a presciently tailored scenario seventeen years before this strike:

In the employment of military forces, the phrase “capture or kill” carries the same meaning or connotation in peacetime as it does in wartime. There is no obligation to attempt capture rather than attack of an enemy. In some cases, it may be preferable to utilize ground forces in order to capture (e.g.) a known terrorist. However, where the risk to U.S. forces is deemed too great, if the President has determined that the individual(s) in question pose such a threat to U.S. citizens or the national security interests of the United States as to require the use of military force, it would be legally permissible to employ (e.g.) an air strike against that individual or group rather than attempt his, her, or their capture, and would not violate the prohibition on assassination.<sup>130</sup>

<sup>124</sup> Ulrich, *supra* note 71, at 1055.

<sup>125</sup> Wachtel, *supra* note 113, at 690.

<sup>126</sup> Ellen Knickermeier & Jonathan Finer, *Insurgent Leader al-Zarqawi: Killed in Iraq*, WASH. POST, June 8, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/08/ARZ2006060800114.html> (al-Zarqawi was responsible for “hundreds of bombings, kidnappings, and beheadings in Iraq.”).

<sup>127</sup> *World Reacts to al-Zarqawi Death*, CNN, June 8, 2006, available at <http://www.cnn.com/2006/WORLD/meast/06/08/zarqawi.reax/> (emphasis added). CNN posted select quotes from various reactions from around the world.

<sup>128</sup> *Id.* (quoting Montasser al-Zayyar) (emphasis added). If Zarqawi is not a lawful target, no one is.

<sup>129</sup> Knickermeier, *supra* note 126 (emphasis added).

<sup>130</sup> Parks, *supra* note 60, at 7 n.6.

The Zarqawi strike is an even rarer example of when anticipatory self-defense overlaps with the Article 51(3) “direct part” test—when the target is not physically preparing to engage in an attack. “[D]irect participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”<sup>131</sup> Command of a belligerent group should qualify under any reasonable Additional Protocol I interpretation. An influential British military law commentator holds the view that “[b]ecoming a member of a guerrilla group or armed faction involved in attacks against enemy armed forces” constitutes “taking a direct part in hostilities . . . so long as participation in the activities of the group continued.”<sup>132</sup> The Additional Protocol I community would vary in their interpretation of this point, but apparently not in the case of Zarqawi.

Outside a recognized theater of combat operations, there is a strong presumption that law enforcement is the only proper response. Credible claims that lethal force was necessary in self-defense will require much greater justification.

## 2. Targeted Killing Outside a Theater of Armed Conflict

[President] Bush’s authorization of selective lethal force does not seem to have any geographic or temporal limitations. . . . [It is not clear] when this new war will end, or to what degree it justifies the use of military force in parts of the world which are not internationally recognized theaters of armed conflict.<sup>133</sup>

Claims of preemptive self-defense outside a recognized theater of combat operations present a slippery slope that could indeed lead to abuse of national power. The concern that the war on terrorism could be used as a pretext for unwarranted use of force is rational. Self-defense law requires a strike-by-strike analysis to ensure that force is used to prevent an imminent attack.

[A]n attacked state may rightfully respond militarily if it reasonably believes that force is the only option available to defeat the enemy and to eliminate or reduce the threat of future attacks. However, in the absence of a continuing threat, the principle of necessity would not justify the use of force.<sup>134</sup>

al Qaeda’s threat is persistent. In November 2002, the United States obtained Yemen’s permission to fly a Predator drone into its airspace and kill Qaed Salim Sinan al-Harethi, an al Qaeda leader. “As the first known [post-9/11] use of force against al Qaeda outside Afghanistan, the Predator missile attack was viewed as a move ‘away from law enforcement-based tactics of arrest and detentions’ that the Bush administration had previously employed against terrorist suspects beyond the Afghan theater of operations.”<sup>135</sup> Unlike strikes in Afghanistan and Iraq, “[s]ources both domestically and abroad criticized the strike, aimed at one of Osama bin Laden’s top lieutenants, as an extrajudicial killing or assassination in violation of international law.”<sup>136</sup> Specifically, “[t]he line of reasoning put forth by Amnesty International and the UN Special Rapporteur places the war against terrorism in a strictly law enforcement framework: terrorists are suspects, to be arrested and tried for their crimes.”<sup>137</sup>

In *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, Norman G. Printer, Jr., puts forth cogent reasons why terrorists should not enjoy targeting immunity and argues that “according protected status to terrorists would only create an incentive for noncompliance with the laws and customs of war. If a terrorist could claim a privileged status, he would, in effect, be rewarded for disobeying the rules.”<sup>138</sup>

Mr. Printer counters the claim that the al-Harethi strike was an unlawful extra-judicial killing by asserting that the man and his organization (al Qaeda) were a continuing threat to the United States of America, and at the time of his death he was

<sup>131</sup> API COMMENTARIES, *supra* note 6, at 619.

<sup>132</sup> ROGERS, *supra* note 119, at 11. Note “against enemy armed forces” language; it would be an unjust anomaly if an Additional Protocol I nation could strike a civilian-belligerent who kills their soldiers but not their civilians. *Id.*

<sup>133</sup> Ulrich, *supra* note 71, at 1044.

<sup>134</sup> Printer, *supra* note 63, at 342 (“For instance, in the case of a single terrorist attack without the expectation of another attack”).

<sup>135</sup> Ulrich, *supra* note 71, at 1042.

<sup>136</sup> Printer, *supra* note 63, at 332.

<sup>137</sup> Ulrich, *supra* note 71, at 1057 (discussing the Yemen missile strike).

<sup>138</sup> Printer, *supra* note 63, at 375.

taking direct part in hostilities within the meaning of customary law of war.<sup>139</sup> He goes on to analyze the five dead associates believed to be low level al Qaeda members. However, at the time of the strike it was not possible to positively identify them. Nevertheless “it was reasonable to conclude that the individuals traveling with al-Harethi were not lawful belligerents because as his associates or bodyguards, they enabled al-Harethi to plan and perform terrorist operations in violation of the laws of war.”<sup>140</sup> Even if critics of the al-Harethi strike argue that such an assumption is still indiscriminate, the military necessity of neutralizing a high ranking al Qaeda terrorist outweighs the collateral damage of five dead associates. “In short, a high value military objective may justify the taking of one or more innocent lives.”<sup>141</sup>

The President of the United States authorized lethal force against al Qaeda leadership before 9/11. In response to the al Qaeda suicide bombing attacks on U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania on 7 and 20 August 1998, President Clinton ordered seventy-five Tomahawk missile strikes against jihadist training camps in Zawhar Kili, Afghanistan and thirteen Tomahawk missile strikes against a chemical factory in Khartoum, Sudan associated with Bin Laden and the al Qaeda network.<sup>142</sup> In less than two weeks, al Qaeda and the United States exchanged armed attacks in four separate sovereign nations. At the time of the strike, bin Laden was under indictment for “conspiracy to attack defense utilities of the United States.”<sup>143</sup> Even though arrest was impracticable, the legality and advisability of military strikes was a hot topic of debate in the Clinton Administration.

The classified legal memoranda in which President Clinton authorized covert action against bin Laden were ambiguous, reflecting differences of opinion at the senior advisor-level as well as concern both about failure and collateral damage.<sup>144</sup> Senior American advisors debated how best to approach bin Laden and al Qaeda after the bloody attacks on the U.S. embassies in Africa. Secretary of Defense Cohen “argued that the debate over war versus law enforcement was a ‘false choice,’ [and that] all instruments of American power were required at once.”<sup>145</sup> President Clinton planned for both.

Presidential authority given to the Central Intelligence Agency (CIA) to covertly seek bin Laden’s capture “zigzagged on the issue of lethal force.”<sup>146</sup> Although force in self-defense while attempting to capture bin Laden was permitted, the conditions of certainty required for offensive strike authorization were considered impracticable by counterterrorist operatives.<sup>147</sup> President Clinton put several submarines on alert in the Arabian Sea and made clear that he was prepared to kill bin Laden under the right circumstances. The CIA was trying to fix the locations of bin Laden and al-Zawahiri<sup>148</sup> with the intent to pass the coordinates to the submarines.<sup>149</sup> “[There] was no question [that] the cruise missiles were trying to capture [bin Laden]. They were not law enforcement techniques.”<sup>150</sup>

In 1998, when the President authorized missile strikes against bin Laden and al Qaeda-related facilities inside Afghanistan and Sudan, they were not theaters of armed conflict for the U.S. military. “World reaction” ranged “from praise to condemnation.”<sup>151</sup> However, the use of force was in response to attacks of a magnitude and kind (embassies and a warship) that were textbook acts of war, usually reserved for nation-state actors. India’s external ministry stated that “the

---

<sup>139</sup> Mr. Printer does not discuss Additional Protocol I because the United States is not a party. See State Parties/Signatories to Additional Protocol I, available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=p> (last visited Sept. 18, 2007).

<sup>140</sup> Printer, *supra* note 63, at 372.

<sup>141</sup> *Id.* at 380 (discussing the law of war obligation of proportionality). Note that a strike in the open desert does not raise counterinsurgency tactical concerns. *Id.*

<sup>142</sup> COLL, *supra* note 73, at 411.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 425.

<sup>145</sup> *Id.* at 427.

<sup>146</sup> *Id.* at 428.

<sup>147</sup> *Id.* at 429 (“unless you find him walking alone, unarmed, with a sign that says ‘I am Osama’ on him . . . we weren’t going to attempt an operation”).

<sup>148</sup> al Qaeda second in command. See <http://www.cnn.com/CNN/Programs/people/shows/zawahiri/profile.html> (last visited Sept. 21, 2007).

<sup>149</sup> The status of the CIA operatives under the law of war is an interesting question that could be fairly posed. Using Geneva Conventions Identification Card-carrying members of the U.S. military on direct action missions eliminates this issue.

<sup>150</sup> COLL, *supra* note 73, at 429.

<sup>151</sup> *World Reaction: From Praise to Condemnation*, BBC, Aug. 21, 1998, available at <http://news.bbc.co.uk/2/low/1555885.stm>. Condemnation came from Sudan, Russia, Libya, Iraq, Iran and the Palestinian authority; praise came from Britain, Israel, Germany, Australia, and Japan; with “muted” responses from China and India. *Id.*

international community should develop a global mechanism to deal with the menace of trans-border terrorism.”<sup>152</sup> Until that day happens, the case against al Qaeda under customary international law has been solid since 1998, and the ensuing nine years has done nothing but improve the justification for the use of lethal force. However, there always remains the potential to overreach and stretch the bounds of credulity.

“[T]he indeterminate geographic and temporal bounds of the war on terror demand that some distinction be drawn between the engagement of terrorists within and without a zone of armed conflict. . . . [A] higher standard must govern where it is not clear that the laws of war should.”<sup>153</sup> Once again, the issue here is a question of degree, not kind. Moreover, counterterrorism operations will unfortunately be intergenerational. Maintaining credibility must be a priority for democratic nations. “Although a logical outgrowth of earlier targeting policies, Bush’s targeting of terrorists does present new legal challenges, insofar as it derives its legitimacy from the war on terror and what might be viewed as an indefinitely protracted Article 51 self-defensive action.”<sup>154</sup>

The strategic counterterrorist environment is like the tactical counterinsurgency environment in that they both must employ force in a way that maximizes cooperation. Articulating that the use of force was preventative and that apprehension was impracticable are the keys to persuading other state-actors that a military strike was legitimate (a narrower standard than international law). The Long-Term Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism put forth a standard for targeted killing:

[A]ny authorization of targeted killing outside a zone of active combat must be “justified as necessary to prevent a greater, reasonably imminent harm or in defense against a reasonable imminent threat to the life of one or more persons.” Necessity requires that there be no reasonable alternative, like arrest or capture - that targeting killing is the last resort. “Reasonably imminent” means that there must be “a real risk that any delay in the hope of developing an alternative would result in a significantly increased risk of the lethal attack.”<sup>155</sup>

This proposition is substantially similar to the standard propounded by the Israeli Supreme Court.

### C. Israeli Practice and Legal Position

“In its war against terrorism, the State of Israel employs . . . what it calls the ‘policy of targeted frustration’ of terrorism . . . [targeting] terrorist organizations involved in planning, launching, or execution of terrorist attacks against Israel.”<sup>156</sup> This policy is aggressive, as much for its frequency of execution as it is for the interpretation of anticipatory self-defense. Under the Israeli “active defense” or “accumulation of events” view, “a state may invoke Article 51 to protect its interests if there is sufficient reason to believe that a pattern of aggression exists.”<sup>157</sup>

The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment (PCATI) sued the Israeli government, claiming that their targeted killing policy violated both international and Israeli law. The plaintiffs alleged that by the end of 2005, Israeli security forces had intentionally killed approximately 300 “members of terrorist organizations,” had attempted to kill another thirty suspected terrorists, and had caused approximately 150 non-combatant civilian deaths with hundreds more wounded.<sup>158</sup>

The complaint asserted that “the legal system applicable to the armed conflict between Israel and the terrorist organizations is not the laws of war, [but] rather the legal system dealing with law enforcement in occupied territory.”<sup>159</sup>

---

<sup>152</sup> *Id.*

<sup>153</sup> Ulrich, *supra* note 71, at 1059 (proposing a standard for authorization for targeted killing outside of armed conflict).

<sup>154</sup> *Id.* at 1043.

<sup>155</sup> *Id.* at 1057-58 (quoting Philip B. Heymann & Juliette N. Kayyem, Long-Term Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism, available at <http://www.mipt.org/pdf/Long-Term-Legal-Strategy.pdf>) (last visited 15 Oct. 2007).

<sup>156</sup> HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2005] para. 2.

<sup>157</sup> Wachtel, *supra* note 113, at 693.

<sup>158</sup> HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2005] para. 2. Israel was contending with the second *Intifada*. *Id.*

<sup>159</sup> *Id.* para. 4.

Hence, “suspects are not to be killed without due process, or without arrest or trial.”<sup>160</sup> The plaintiffs asserted in the alternative that targeted killing violates the laws of war because there is no intermediate classification of “unlawful combatant” between “civilian” and “combatant,” and that the former was immune from being targeted.<sup>161</sup>

PCATI did acknowledge the Additional Protocol I, Article 51(3) “direct part” window and urged a narrow interpretation that would make a civilian who took part in hostilities immune from attack “from the time that the civilian returns to his house, and even if he intends to participate again later in hostilities . . . although he can be arrested and tried for his participation in the combat.”<sup>162</sup> The Israeli Supreme Court rejected this position, stating that “[i]t is no longer controversial that a state is permitted to respond with military force to a terrorist attack.”<sup>163</sup>

The Israeli Supreme Court also rejected the government of Israel’s argument that since terrorists “do not differentiate themselves from the civilian population, and since they do not obey the laws of war . . . that a third category of persons—the category of unlawful combatants—should be recognized.”<sup>164</sup> The court took “no stance regarding the question whether it is desirable to recognize this third category” because the issue was “not one of desirable law, rather one of existing law,” and that the court determined there was insufficient grounds for a third category to be “recognized in the framework of the *Hague* and *Geneva Conventions*.”<sup>165</sup>

The Israeli Supreme Court approached the case pursuant to “the customary international law dealing with the status of civilians who constitute unlawful combatants.”<sup>166</sup> It determined that Additional Protocol I, Article 51 codifies customary international law.<sup>167</sup> It is universally agreed that civilians forfeit their immunity from targeting if they take direct part in hostilities.<sup>168</sup> However, interpretation of taking “direct part” in hostilities varies widely. The scope of the “direct part” test application was the crux of the case. The decision parsed Article 51(3), addressing “direct part in hostilities” and the “for such time as” temporal element.

The Israeli Supreme Court did not have uniform international persuasive sources to address the meaning of “direct part in hostilities.” The court first identified the two extreme edges, selling food to unlawful combatants and carrying arms en route to an ambush. It then delved into the purpose of the provision and the impact of a narrow interpretation. “The rationale behind the prohibition against targeting a civilian who does not take direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the *need to avoid killing innocent civilians*.”<sup>169</sup> The court concluded that the “direct character of the part taken should not be narrowed merely to the person committing the physical attack. Those who have sent him, as well, take a ‘direct part.’ The same goes for the person who decided upon the act, and the person who planned it.”<sup>170</sup> The decision cited the Additional Protocol I Commentaries in support, noting the ICRC editors’ observation that “[i]t is possible to take part in hostilities without using weapons at all.”<sup>171</sup>

The Israeli Supreme Court noted the potential for a “revolving door” and refused to interpret the “for such time” element of Article 51(3) in a way that would grant civilian-belligerents light switch immunity.<sup>172</sup> Four considerations relevant to deciding a lawful course of action in “gray” cases were put forth: “well based information is needed” before categorizing a

---

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* para. 5.

<sup>162</sup> *Id.* para. 6.

<sup>163</sup> *Id.* para. 10.

<sup>164</sup> *Id.* para. 11.

<sup>165</sup> *Id.* para. 28 (emphasis in original).

<sup>166</sup> *Id.* Israel, like the United States, did not sign Additional Protocol I.

<sup>167</sup> *Id.* para. 30 (citing the International Criminal Tribunal for the Former Yugoslavia decision in *Struger* and military manuals of many states, including the United States).

<sup>168</sup> *See id.* para. 31 (quoting the Red Cross “Model Manual on the Law of Armed Conflict for Armed Forces”).

<sup>169</sup> *See id.* (quoting Professor Cassese, a respected international law scholar, who ironically testified on behalf of the plaintiffs in this case) (emphasis in original).

<sup>170</sup> *Id.* para. 37.

<sup>171</sup> *See id.* para. 31 (citing the Inter-American Commission on Human Rights, the Commentary to the Additional Protocols, and international academic texts).

<sup>172</sup> *See id.* para. 40.

civilian as a combatant;<sup>173</sup> “a civilian taking direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed”;<sup>174</sup> a “thorough investigation regarding the precision of the identification of the target and the circumstances of the attack . . . is to be performed (retroactively)”;<sup>175</sup> and the attack must be in accordance with the principle of proportionality if there is a risk of collateral harm to non-combatants.<sup>176</sup> Targeted killing that comports with these criteria was deemed lawful.

The Israeli Supreme Court opinion builds a framework for the legitimate use of force that requires positive identification and necessity, while being sensitive to the potential for abuse of sovereign power. However, the record does not lay a foundation that each case of targeted killing met these criteria, perhaps because it was not a “case” as envisioned by U.S. law. In order to maintain legitimacy, governments must meet their burden of factual production. The issue hinges more on the facts than the law.

## VII. Conclusion

Article 51(3) and self-defense law often merge into a marriage of practicability, brought together by civilian-belligerent tactics that channel the different legal constructs onto common ground. Insurgents and terrorists effectively utilize their noncombatant camouflage to attack their uniformed enemies and undermine civilian security.<sup>177</sup>

The two legal regimes are substantially similar when applied to conduct-based engagements. Article 51(3) permits the targeting of civilian-belligerents for “such time as they take direct part in hostilities.”<sup>178</sup> Self-defense law permits the use of force to counter hostile acts or the threat of imminent attack.<sup>179</sup> Counterinsurgent armed forces are usually in a reactive posture and must wait for the civilian-belligerents to reveal themselves by their conduct. Under both standards, armed forces can return fire and use lethal force against civilians who threaten imminent attack.

The *Al Skeini* case provides a detailed record of British use of defensive force triggered by hostile acts or demonstrated hostile intent deemed threatening to human life.<sup>180</sup> In the most aggressive incidents, soldiers shot non-uniformed persons because they were non-compliant at a traffic control point or were armed in the vicinity of a firefight.<sup>181</sup> Deadly force in these confrontations was deemed to be within the ROE. The British troops were serving in “volatile and violent” Iraq.<sup>182</sup> This geographic and temporal construct grants substantial discretion.

Persistent, transnational attacks by civilian-belligerent groups kill and maim thousands of noncombatant civilians every year. Responsive, status-based engagements are comparatively few and far between.<sup>183</sup> As with many controversial subjects, passionate debate rages over statistically marginal possibilities, but appropriately so. Making the controversial legal choice to authorize a status-based engagement is as rare as positive identification.

---

<sup>173</sup> See *id.* para. 40 (this concept is akin to the concept of positive identification).

<sup>174</sup> See *id.* The court further noted that “if a terrorist taking direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.” *Id.* The court referred to the principle of proportionality. *Id.*

<sup>175</sup> See *id.* This is consistent with United States practice in Iraq and Afghanistan. Moreover, this is a requirement for the United Kingdom pursuant the European Human Rights Convention. *Id.*

<sup>176</sup> See *id.*

<sup>177</sup> See, e.g., Eric T. Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT’L L. 209, 248 (2005) (“If soldiers cannot distinguish who the enemy is, and if that enemy attacks from civilian crowds, it is impossible to expect soldiers to not respond in self-defense, thereby putting innocent noncombatants at risk.”).

<sup>178</sup> Additional Protocol I, *supra* note 7, at 51(3).

<sup>179</sup> See JCSI 3121.01B, *supra* note 78, at A-4; see also *Al Skeini Opinion*, *supra* note 15, para 45 (reprinting British ROE card).

<sup>180</sup> *Al Skeini Opinion*, *supra* note 16, para. 45. The British ROE used self-defense language not Article 51(3). *Id.* The British did not see themselves in international armed conflict at this point of the hostilities. Lieutenant Colonel Taylor Interview, *supra* note 103. Hence, Additional Protocol I was no longer triggered. It would be ironic if permissible uses of force could be more robust under customary self-defense than when engaged in “war.”

<sup>181</sup> See *id.* at 58, 71.

<sup>182</sup> See *id.* para. 40.

<sup>183</sup> *But see* HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2005] para. 2. These numbers are despite the allegation that Israel successfully targets approximately 100 civilian-belligerents per year. *Id.*

Status-based engagements represent a possible point of divergence for Article 51(3) and the inherent right of self-defense. But, it is unclear how far apart the two approaches could get. The ICRC Protocol I commentators offer a view into the breadth of the term “hostilities,” stating that it “covers not only the time that the civilian makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.”<sup>184</sup> One commentator posits that civilian immunity from targeting is lost pursuant to Article 51(3) as long as there is membership in “a guerrilla group or armed faction involved in attacks against enemy armed forces.”<sup>185</sup> This describes status and reveals that hostile designation is merely a conduct predetermination. It could also provide an Additional Protocol I justification for targeting al Qaeda leaders.

When targeting terrorist leadership, hostile status is almost certainly accompanied by a conduct-based justification. Indeed, the distinction between conduct and status becomes blurred. When managing rank-and-file civilian-belligerents, the issue reverts back to conduct even if they are declared hostile, as part of a larger group, because they do not distinguish themselves and do not merit their own intelligence dossier. Moreover, given the paramilitary capabilities of many transnational terrorist groups, “[t]he focus should be on the nature of the violence, not on the legal status of the aggressor.”<sup>186</sup>

Turning the Additional Protocol I civilian-belligerent loophole into a noose often requires national leaders to preemptively use force, risking condemnation and counterproductive pressure. Rules of engagement are a blend of legal, policy and military considerations. The allocation needs to be balanced carefully. Targeted killing is least controversial when the target’s geographic, functional, and temporal relevance can be articulated.

[S]elf-defense would be appropriate to [justify] the attack of terrorist leaders where their actions pose a continuing threat to U.S. citizens or the national security of the United States. As with an attack on a guerrilla infrastructure, the level to which attacks could be carried out against individuals within a terrorist infrastructure would be a policy rather than a legal decision.”<sup>187</sup>

If the policy decision is executed outside a recognized theater of armed conflict,<sup>188</sup> the burden of justification<sup>189</sup> should be heightened. The ability to effectuate arrest is presumed.<sup>190</sup> The 1998 Clinton administration capture-or-kill debate over bin Laden reflects this sensitivity. The Israeli Supreme Court recently established the requirement within their jurisdiction to exhaust “less harmful means”<sup>191</sup> before targeting killing would be lawful in their country.<sup>192</sup> Even though there is a contemporary American school of thought, backed by state practice,<sup>193</sup> that “there is no duty to capture or to take an unlawful combatant into possession any more than there is a duty to capture a lawful combatant, provided he or she has not attempted to surrender,”<sup>194</sup> the United States should be prepared to address this issue.

---

<sup>184</sup> API COMMENTARIES, *supra* note 6, at 618.

<sup>185</sup> ROGERS, *supra* note 119, at 11.

<sup>186</sup> Printer, *supra* note 63, at 349.

<sup>187</sup> Parks, *supra* note 60, at 7 n.8.

<sup>188</sup> Civilian-belligerent groups are usually based in war-torn countries.

<sup>189</sup> That is, the burden of justification in the “court” of world opinion. Compare differing reactions to the death of Harethi in Yemen and Zarqawi in Iraq. National actors rarely risk legal accountability.

<sup>190</sup> See Ulrich, *supra* note 71, at 1056 (“The dual nature of the terrorist enemy as combatant and criminal, and the different aims of the fight against it - making arrests, preventing future attacks, and destroying network infrastructure—demand, and have received, a flexible response from U.S. law enforcement, intelligence, and military officials.”).

<sup>191</sup> See HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2005] para. 40.

<sup>192</sup> It is virtually impossible to make an arrest with a Predator drone.

<sup>193</sup> See Knickermeyer, *supra* note 126.

<sup>194</sup> Printer, *supra* note 63, at 370; see also Parks, *supra* note 60, at 7:

[D]ifficulty lies in the determination where the line should be drawn between guerrillas/combatants and the civilian population in order to provide maximum protection from intentional attack to innocent civilians. The law provides no precise answer to this problem . . . [i]f a member of a guerrilla organization falls above the line established by competent authority for combatants, a military operation to capture or kill an individual designated as a combatant would not be an assassination.

*Id.*

The potential for controversy stems more from a lack of factual justification than it does from a question of law. Hostile intent<sup>195</sup> or indicia of taking direct part in hostilities are substantially similar. It is not a stretch to assert that “planners and those who sent the suicide bombers to their death”<sup>196</sup> can be targeted under both legal regimes. As transnational terrorists continue to ply their deadly trade, state practice will continue to inform these legal standards. Many counterterrorist engagements take place outside the context of international armed conflict and Additional Protocol I. It is ironic that self-defense custom can be more robust than rights bestowed to belligerents during war.<sup>197</sup>

---

<sup>195</sup> Propaganda broadcasts like those from al Qaeda, Hamas, Hezbollah, and Jemah Islamiyah on Al Jazeera television serve as a useful record of hostile intent.

<sup>196</sup> See HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2005] para. 40 (Both the Israeli Supreme Court and the ICRC view 51(3) as a principle of customary international law.).

<sup>197</sup> Unlike conventional law of war that must be triggered by a de jure international armed conflict, customary self-defense law will always be applicable. See Additional Protocol I, *supra* note 7, art.1 (“This protocol, which supplements the Geneva Conventions . . . shall apply in the situations referred to in Article 2 common to those Conventions.”).