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ILLUSTRATING ILLEGITIMATE LAWFARE

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Lawfare that erodes the good faith application of the laws and customs of warfare is illegitimate and untenable. This essay outlines the contours of such illegitimate lawfare and provides current examples to guide practitioners. Clearly addressing the terminological imprecision in current understandings of lawfare, this essay is intended to help prevent further erosion of the corpus of jus in bello. Words matter, particularly when they are charged with legal significance and purport to convey legal rights and obligations. When purported legal “developments” actually undermine respect for the application and enforcement of humanitarian law, they are illegitimate and ought to be reevaluated. Although the laws and customs of war create a careful balance between the smoke, adrenalin, and uncertainty of a modern battlefield, and the imperative for disciplined constraints on the unlawful application of force, inappropriate lawfare permits public perceptions to be manipulated. Illegitimate exploitation of the law in turn permits the legal structure to be portrayed as a mass of indeterminate subjectivity that is nothing more than another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices. In this manner, the globalized media can be misused to mask genuine violations of the law with spurious allegations and misrepresentations of the actual state of the law. Illegitimate lawfare is that which, taken to its logical end, marginalizes the precepts of humanitarian law and therefore creates strong disincentives to its application and enforcement. It logically follows that efforts to distort and politicize fundamental principles of international law should not be meekly accepted as inevitable and appropriate “evolution.”

The concept of “lawfare” remains captive to terminological imprecision that threatens to erode its utility as a guiding principle for the pursuit of U.S. strategic and tactical objectives. Illegitimate lawfare is that which clouds the correct state of the laws and customs of war, thereby feeding an undercurrent of suspicion and politicization that threatens to erode the very foundations of humanitarian law. A cursory Google search indicates, even for a layperson, that lawfare is subjected to an array of diametrically oppos-

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ing discourse accompanied by conflicting intellectual and strategic overtones.¹ However, military commanders and their lawyers do not approach the law of armed conflict as an esoteric intellectual exercise precisely because the regime of modern international humanitarian law developed as a restraining and humanizing necessity to facilitate commanders' ability to accomplish the military mission even in the midst of fear, moral ambiguity, and horrific scenes of violence. At the tactical level, lawfare that attempts to impose a system of inappropriate and ill-conceived normative constraints on the application of military power deservedly generates a pejorative taint to the term.

The very purpose of the laws and customs of war would be frustrated if the legal regime for conducting hostilities were successfully co-opted by those seeking to exploit legal ambiguities to serve their military goals. Illegitimate exploitation of the law in turn permits the legal structure to be portrayed as nothing more than a mass of indeterminate subjectivity that is nothing more than another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices. There is therefore a very real danger that the media can be manipulated and used to mask genuine violations of the law with spurious allegations and misrepresentations of the actual state of the law. This in turn can lead to a cycle of cynicism and second-guessing that could weaken the commitment of some military forces to actually follow the law.

On the other hand, every effort to invoke legal processes on behalf of an entity or adversary with potentially hostile goals does not equal illegitimate lawfare. To be more precise, there is a fundamental difference between legal processes and "lawfare" as it is properly understood. Hence, the term "lawfare" should never be automatically conflated with the legitimate use of legal forums to vindicate and validate binding legal norms when they are in danger of being overwhelmed or replaced for the sake of expediency or political convenience. Every use of legal forums cannot be decried with a pejorative sneer as "lawfare" despite the inherent time and cost associated with litigation. After all, the quintessential purpose of law as a constraint on power is readily seen in the daily struggle to develop and defend the rights and prerogatives of individuals, organizations, and other entities against the power of states. By extension, the law itself serves the ends of sovereign states in their mutual relations. The development and enforcement of legal norms represents the ongoing and likely interminable effort to constrain anarchy and substitute societal stability, which is the pre-

¹ See Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 JOINT FORCE QUARTERLY 34 (2009), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA515192&Location=U2&doc=GetTRDoc.pdf> (noting nearly 60,000 internet entries in response to a search for the term lawfare).

condition for the peaceful pursuit of commerce and the protection of human dignity at both the national and international planes. Conversely, the forms and forums for legal debate can on occasion be captured or deliberately exploited to serve the strategic interests of the enemy in an armed conflict. The purpose of this brief essay is to illustrate the contours of such illegitimate lawfare.

In one sense, the struggle to define the contours of the legal regime and to correctly communicate those expectations to the broader audience of civilians caught in the conflict is a recurring problem unrelated to the current evolution of warfare. Shaping the expectations and perceptions of the political elites who control the contours of the conflict are perhaps equally vital. The paradox is that as the legal regime applicable to the conduct of hostilities has matured over the last century, the legal dimension of conflict has at times overshadowed the armed struggle between adversaries. As a result, the overall military mission will often be intertwined with complex political, legal, and strategic imperatives that require disciplined focus on compliance with the applicable legal norms as well as the most transparent demonstration of that commitment to sustain the moral imperatives that lead to victory. In his seminal 1963 monograph describing the counterinsurgency in Algeria, counterinsurgency scholar David Galula observed that if “there was a field in which we were definitely and infinitely more stupid than our opponents, it was propaganda.”² The events at Abu Ghraib are perhaps the most enduring example of what General Petraeus has described as “non-biodegradable events.”³ There are many other examples of events during conflict that strengthen the enemy even as they remind military professionals of the visceral linkage between their actions and the achievement of the mission. The United States doctrine for counterinsurgency operations makes this clear in its opening section

Insurgency and counterinsurgency (COIN) are complex subsets of warfare. Globalization, technological advancement, urbanization, and extremists who conduct suicide attacks for their cause have certainly influenced contemporary conflict; however, warfare in the 21st century retains many of the characteristics it has exhibited since ancient times. Warfare remains a violent clash of interests between

² DAVID GALULA, *PACIFICATION IN ALGERIA 1956–1958* 141 (RAND Corporation 2006) (1963)(copy on file with author).

³ General David H. Petraeus, *A Conversation with General Petraeus at Vanderbilt University, Nashville Tennessee* (Mar. 1, 2010), available at <http://sitemason.vanderbilt.edu/myvu/news/2010/03/01/modern-warfare-complex-but-winnable-petraeus-tells-vanderbilt.108544> (last visited Dec. 6, 2010) See also Uthman Al-Mukhtar, *Local Sunnis Haunted by the Ghosts of Abu Ghraib*, SUNDAY HERALD, Dec. 26, 2010, at 51; Joseph Berger, *U.S. Commander Describes Marja Battle as First Salvo in Campaign*, N.Y. TIMES, Feb. 22, 2010, at A7.

organized groups characterized by the use of force. Achieving victory still depends on a group's ability to mobilize support for its political interests (often religiously or ethnically based) and to generate enough violence to achieve political consequences. Means to achieve these goals are not limited to conventional force employed by nation-states.⁴

In the context of a globalized and interconnected international legal regime, the concept of lawfare originated as a descriptive term to convey the reality noted above that the legal dimension of operations is inextricably linked to the accomplishment of the mission. It is a compound word that conjoins two diverse fields in a way designed to resonate with an audience far wider than either legal professionals or experts in military doctrine. The most common popular understanding of lawfare is that legal norms have become an affirmative method of warfare by which an enemy can pursue a military objective rather than merely serving as a system for controlling the application of violence. The most precise understanding at present is that lawfare has become "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."⁵ In practice, lawfare is widely seen in non-military audiences as an instrument of asymmetric warfare precisely because its use may help leverage the military power of an inferior force. In reality, lawfare has been used to help offset inferior military power as a vehicle for neutralizing superior military might through mobilization of negative political pressure and popular perceptions.

Lawfare originated as an ideologically neutral term despite the negative perceptions it carries for many current observers. Its subsequent morphing into an inappropriate offensive weapon of asymmetric warfare ought therefore to serve as a warning to watchful observers that the legal dimension of operations is increasingly important precisely because of the linkage to the nature of modern warfare. Commenting on the changing nature of conflict, General James Jones (the current National Security Advisor, then serving as the Supreme Allied Commander in Europe) remarked that it "used to be a simple thing to fight a battle . . . a general would get up and say, 'Follow me, men,' and everybody would say, 'Aye, sir' and run off. But that's not the world anymore . . . [now] you have to have a lawyer

⁴ DEP'T OF ARMY, FIELD MANUEL 3-24, COUNTERINSURGENCY Para. 1-1 (MCWP 3-33.5) (Dec. 2006) [hereinafter COUNTERINSURGENCY MANUAL].

⁵ Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 146 (2008). See also Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov't, Harvard U., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

or a dozen. It's become very legalistic and very complex."⁶ Commanders are the critical path to being able to form the fighting organization, and are keenly aware of the linkages between law and operations because their organizations will be most effective—militarily—where they field their organization with the proper control mechanisms.⁷ According to the International Committee of the Red Cross (ICRC), “[t]he first duty of a military commander, whatever his rank, is to exercise command.”⁸ The commander or superior is the decisive actor because inattention to the basic legal duties inherent in a hierarchy of authority undermines the “very essence of the problem of enforcement of treaty rules in the field.”⁹ Mao Tse-Tung put it simply, “[u]norganized guerrilla warfare cannot contribute to victory.”¹⁰

In the modern era, successful operations require that young warriors at all levels are educated and empowered to make important and accurate decisions because their actions often have strategic consequences that are intertwined with the legality and legitimacy of the decisions taken. Illegitimate lawfare can transform appropriate and expected tactical decision-making into another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices. Legal lacunae are deliberately magnified and exploited by an adversary to degrade combat effectiveness. Mistakes are amplified, and law is misused not to facilitate effective operations that minimize civilian casualties and preserve human dignity but to create greater military

⁶ Lyric Wallwork Winik, *A Marine's Toughest Mission*, PARADE MAG., Jan. 19, 2003, (“Now you have to have a contracting officer. You have to have a lawyer or a dozen. It's become very legalistic and very complex.”), http://www.parade.com/articles/editions/2003/edition_01-19-2003/General_Jones. See also Michael A. Newton, *Modern Military Necessity: The Role and Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 869 (2007); Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 CHI. J. INT'L L. 445 (2003). Commenting on the NATO operation Allied Force in Kosovo, Richard Betts opined that One of the most striking features of the Kosovo campaign, in fact, was the remarkably direct role lawyers played in managing combat operations—to a degree unprecedented in previous wars The role played by lawyers in this war should also be sobering—indeed alarming—for devotees of power politics who denigrate the impact of law on international conflict NATO's lawyers . . . became in effect, its tactical commanders. Richard K. Betts, *Compromised Command*, FOREIGN AFF. 129–130 (July/August 2001).

⁷ Michael A. Newton & Casey Kuhlman, *Why Criminal Culpability Should Follow the Critical Path: Reframing the Theory of Effective Control*, 40 NETH. Y.B. OF INT'L L. 3, 52 (2009).

⁸ INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS art. 87, ¶ 3549 (Yvez Sanoz et al. eds., 1987), <http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/36fc92eb9e83fbbec12563cd00437bfb!OpenDocument> [hereinafter ICRC Commentary on Protocol I].

⁹ *Id.* ¶ 3550.

¹⁰ MAO TSE-TUNG ON GUERRILLA WARFARE 45 (Samuel B. Griffith trans., 2000).

parity between mismatched forces. Again, the U.S. counterinsurgency doctrine captures this truism:

Senior leaders set the proper direction and climate with thorough training and clear guidance; then they trust their subordinates to do the right thing. Preparation for tactical-level leaders requires more than just mastering Service doctrine; they must also be trained and educated to adapt to their local situations, understand the legal and ethical implications of their actions, and exercise initiative and sound judgment in accordance with their senior commanders' intent.¹¹

Just as the legal regime serves as an organizing force to extend the commander's authority over all those individuals within his/her effective control, illegitimate lawfare presents the potential for disrupting operations, debilitating military power, and demoralizing the will of the people to sustain hostilities until victory is achieved.

Before considering three specific manifestations of illegitimate lawfare, I should pause to assess the role of lawfare in the larger flow of hostilities. If one accepts the premise that lawfare represents an extension of hostilities by other means, to paraphrase Carl von Clausewitz,¹² then it is only appropriate to consider the application of the Principles of War to the *Practice of Lawfare*. In other words, can the conduct of lawfare be prioritized as a policy matter using the template provided by the Principles of War in much the same way that warriors make tactical and strategic decisions in the midst of planning and waging warfare? Though surprisingly overlooked in the academic literature, the tangible linkages between lawfare and operational success require consideration of the connection between the legal battlefield and larger tactical and political fights in light of the Principles of War. These Principles crystallized as military doctrine around the world around 1800 A.D. and formed the backdrop for the positivist development of the laws and customs of war beginning in the latter half of the nineteenth century.¹³ The accepted principles studied by military strategists and applied with greater or lesser success in every conflict are: Objective, Offensive, Mass, Economy of Forces, Maneuver, Unity of Command, Security, Surprise, and Simplicity.¹⁴ Some of the Principles of War are obviously

¹¹ COUNTERINSURGENCY MANUAL, *supra* note 4, ¶ 1-157.

¹² Davida E. Kellogg, *International Law and Terrorism*, MILITARY REVIEW 50, 51, Sept./Oct. 2005 ("[M]odern terror warfare has set Prussian strategist Carl von Clausewitz's most famous insight on its ear: War is the continuation of politics by other means, but . . . politics . . . [is] the continuation of war by other means.")

¹³ THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 557 (John Whiteclay Chambers III ed., 1999).

¹⁴ *Id.*

inapplicable to the modern legal environment. For example, the abundance of legal forums, tribunals, and transnational dialogues render the precepts of Unity of Command and Surprise meaningless. Skeptics might observe that the Principle of Simplicity is inappropriate to the legal domain due to its inherent complexity. It is conceivable that states could apply the Principle of Mass by concentrating available legal resources at the critical time and place to effect salutary changes to the legal regime, or to prevent its inappropriate erosion.

By extension, policymakers and their lawyers should be clear that they will take the Offensive against illegitimate lawfare. This should not equate into an *a priori* decision to contest every spurious allegation or inappropriate litigation, but those who are the proper guardians of the laws and customs of war should never passively permit their erosion in ways that undermine the pursuit of the military mission. The Principle of Offensive is refined for the purposes of military operations into the “mission statement.”¹⁵ To permit the enemy to shape the legal environment unchecked is to concede that lawfare can adversely shape the battlefield without hindrance from those whose interests are undermined. Hence, it follows that the Objective of U.S. lawfare—and the mission statement for military lawyers and practitioners—should be to proactively engage in legal debates and decisions whose implications could erode American interests or military effectiveness.

As one important and current example of effective offensive lawfare, a critical mass of states has worked in recent years to deny terrorists extended protection from prosecution on the basis of principles derived from the laws and customs of war.¹⁶ Terrorist actors have no legal right

¹⁵ In unilateral operations, the mission statement reflects a relatively linear process of decision-making from the civilian command authorities through military command channels to the tactical force in the field. In multilateral operations, however, achieving consensus on an agreed and refined mission statement is much more difficult and complex. Reflecting this reality, U.S. Army doctrine warns that

[c]ommanders must focus significant energy on ensuring that all multinational operations are directed toward clearly defined and commonly understood objectives that contribute to the attainment of the desired end state. No two nations share exactly the same reasons for entering into a coalition or alliance. Furthermore, each nation’s motivation tends to change during the situation. National goals can be harmonized with an agreed-upon strategy, but often the words used in expressing goals and objectives intentionally gloss over differences. Even in the best of circumstances, nations act according to their own national interests. Differing goals, often unspoken, cause each nation to measure progress differently. Thus, participating nations must agree to clearly defined and mutually attainable objectives.

DEP’T OF ARMY, FIELD MANUAL 100-8, THE ARMY IN MULTINATIONAL OPERATIONS 1-2 (24 Nov. 1997).

¹⁶ See Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terror*, 45 TEX. INT’L L. J. 323, 325 (2009) (“By extension, this dominant consensus

drawn from international law to wage war or adopt means of inflicting injury upon their enemies; this class of person has been synonymously described as non-belligerents, unprivileged belligerents, unlawful combatants, or unlawful belligerents regardless of their ideological or religious motivations.¹⁷ The Additional Protocols to the 1949 Geneva Conventions were negotiated at the apex of the anti-colonial era and therefore attempted to elevate non-state actors to the status of lawful combatants whose acts would be decriminalized and protected under the principle of combatant immunity.¹⁸ The text of Protocol I blurred the lines circumscribing lawful combatants by creating new legal rules without rigorous articulation of the rationale for why such protections should flow to "the category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the criteria" established by the Geneva Conventions.¹⁹ From the United States perspective, the many positive developments in Protocol I failed to outweigh its "fundamentally and irreconcilably flawed" revisions to the classic law of combatancy.²⁰ President Reagan concluded that Articles 1(4) and Article 44(3) of the Protocol would actually undermine its very purposes and would unnecessarily endanger civilians during armed conflicts. The Department of State Legal Advisor declared that, regardless of the time and diplomatic energy spent negotiating a major multilateral instrument, United States approval "should never be taken for granted, especially when an agreement deals with national security, the conduct of military operations and the protection of victims of war."²¹ The Joint Chiefs of Staff unanimously opined that Protocol I would further endanger the lives of United States military personnel, even as its provisions would increase the danger to innocent civilians (in whose midst terrorist "combatants" could hide until the opportune moment to strike.). The United States concluded that the commingling of the regime criminalizing terrorist acts with

led to the modern framework of multilateral conventions obligating states to cooperate together in eradicating terrorism and to use their domestic legal systems to the fullest extent possible in the detection and prosecution of persons involved with the perpetration or support of terrorist activities.").

¹⁷ See *id.* at 374.

¹⁸ See *id.* at 373.

¹⁹ Major R.R. Baxter, *So-Called Unprivileged Belligerency: Spies, Guerillas, and Saboteurs*, 28 BRIT. Y.B. INT'L. L. 328 (1951).

²⁰ Letter of Transmittal from President Ronald Reagan, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess., at II (1987), *reprinted in* 81 AM. J. INT'L L. 910 (1987). See also MARCO SASSOLI & ANTOINE BOUVIER, *HOW DOES LAW PROTECT IN WAR?* 603, 604 (International Committee of the Red Cross 1999).

²¹ Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 AM. J. INT'L L. 784, 787 (1988).

the *jus in bello* rules of humanitarian law would be untenable and inappropriate.²² By rejecting the principles embodied in Articles 1(4) and 44(3) of the Additional Protocol, the United States sought to deny terrorists a psychological and legal victory.

Though that position was soundly criticized as “exceptionalist,” its substantive stance was reinforced over a period of three decades by strong international opposition to efforts to export the Protocol I position into the framework of the multilateral terrorism conventions.²³ Indeed, in the decades since the negotiation of Additional Protocol I, states have overwhelmingly adhered to the substantive preference of the United States by opposing all reservations seeking to blur the line between criminal acts of terrorism and lawful acts inherent in the conduct of hostilities.²⁴ The practice of diplomatic demarche and reaction to treaty reservations and understandings in essence became the battleground for sustained lawfare. In other words, the practice of reservations provides an important mechanism for states to engage in second-order dialogue over the true meaning and import of treaties, which in turn fosters the clarity and enforceability of the text. Though no state has formally acknowledged the wisdom of the U.S. rejection of the most politicized provisions of Protocol I, states’ actions in demonstrating a cohesive legal front to deflect efforts to protect terrorists from prosecution provide implicit acceptance and accolade. Over time, the efficacy of those textual promises has been eroded to a vanishing point by states’ unified and repeated opposition. In the real world, the effort to decriminalize terrorist conduct—so long as it complied with applicable *jus in bello* constraints in the context of wars of national liberation—has run aground on the shoals of sovereign survival. In hindsight, the “exceptional” U.S. position was emulated by other nations as they reacted to reservations designed to blur the distinctions between terrorists and privileged combatants.²⁵ U.S. “exceptionalism,” in actuality, paved the way for sustained engagement that substantially shaped the international response to terrorist acts. This represents successful and wholly appropriate offensive lawfare. This essay will conclude by evaluating three contrasting categories of illegitimate lawfare that require similar sustained focus and engagement.

In the first place, military lawyers must continue to play a central role in the negotiation of new legal norms to provide a bulwark against operationally untenable and impractical formulations. The Official ICRC

²² See Newton, *supra* note 16, at 365.

²³ See *id.* (“While the U.S. rejection of Protocol I has been portrayed as exceptionalist and hypocritical, all nations shared the underlying substantive assessment that terrorists could expect no immunity for acts that undermine the protection of human life and the goal of minimizing damage to civilian property.”).

²⁴ *Id.* at 374.

²⁵ *Id.* at 323, 374.

Commentary on Protocol I notes with somewhat wry understatement that “a good military legal advisor should have some knowledge of military problems.”²⁶ In a similar vein, the law cannot be allowed to drift into an atrophied state in which its objectives are seen as romanticized and unattainable in the operational context. If humanitarian law becomes separated from the everyday experience and practice of professional military forces around the world, it is in danger of being relegated to the remote pursuit of ethereal goals. Thus, military lawyers need to be involved in the negotiation and discussion of emerging legal norms precisely because it is so vital to maintain ownership in the field of humanitarian law. Military commanders must remain aware of current developments and dispatch legal experts to negotiate who possess the requisite breadth of operational experience and depth of expertise in the jurisprudential landscape. Continued ownership of the legal regime by military professionals in turn sustains the core professional identity system of military forces. Failure to keep the legal norms anchored in the real world of practice would create a great risk of superimposing the humanitarian goals of the law as the dominant and perhaps only legitimate objective in times of conflict. This trend could result in principles and documents that would become increasingly divorced from military practice and therefore increasingly irrelevant to the actual conduct of operations.

For example, Article 23 of the 1899 Hague II Convention stated that it was forbidden “[t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”²⁷ This same language showed up in Article 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute of the International Criminal Court.²⁸ Based on their belief that the concept of military necessity ought to be an unacceptable component of military decision-making, some civilian delegates sought to introduce a totally subjective threshold by which to second-guess military operations.²⁹ They proposed a verbal formula for the Elements that any seizure of civilian property would be valid only if based on “imperative military necessity.”³⁰

²⁶ ICRC Commentary on Protocol I, *supra* note 8, ¶ 3347, at 951.

²⁷ Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 877, 896 (2007) (citing Convention (II) with Respect to Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 23, The Hague, July 23, 1899, 32 Stat. 1803.).

²⁸ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), 37 I.L.M. 999, available at http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm [hereinafter Rome Statute].

²⁹ Mike Newton, *Humanitarian Protection in Future Wars*, in 8 INTERNATIONAL PEACEKEEPING: THE YEARBOOK OF INTERNATIONAL PEACE OPERATIONS 349, 358 (Harvey Langholtz et al. eds., 2004).

³⁰ KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 249 (2003).

Such an element would have been contrary to the entire history of the law of armed conflict. The concept of military necessity is ingrained into the express provisions of the law of armed conflict already, thereby permitting the subjective assessments of on-scene actors to provide affirmative legal authority for many actions during armed conflicts. There is not a shred of evidence in the *travaux* of the Rome Statute that its drafters intended to alter the preexisting fabric of the laws and customs of war.³¹ Introducing such a tiered gradation of military necessity as proposed would have built a doubly high wall that would have had a paralyzing effect on military action that would have been perfectly permissible under existing law prior to the 1998 Rome Statute. Moreover, a double threshold for the established concept of military necessity would have clouded the decision-making of commanders and soldiers who must balance the legitimate need to accomplish the mission against the mandates of the law. Of course, any responsible commander and lawyer recognizes that because the corpus of humanitarian law enshrines the principle of military necessity in appropriate areas, the rules governing the conduct of hostilities cannot be violated based on an *ad hoc* rationalization of a perpetrator who argues military necessity where the law does not permit it. Requiring “imperative military necessity” as a predicate for otherwise permissible actions would have introduced a wholly subjective and unworkable formulation that would foreseeably have exposed military commanders to after the fact personal criminal liability for their good faith judgments. The ultimate formulation in the Elements of Crimes translated the 1899 phrase into the simple modern formulation “military necessity” that every commander and military attorney understands. The important point in the context of this discussion of lawfare is that the military lawyers among the delegates were among the most vocal in defeating the suggestion to change the law precisely because the elements for such a crime would have been unworkable in practice.³² The military officers participating in the Elements discussions were focused on maintaining the law of armed conflict as a functional body of law practicable in the field by well-intentioned and well-trained forces.³³ The importance of this role will not diminish in the foreseeable future.

As a necessary corollary to the recurring role of military lawyers in negotiating international instruments, U.S. civilian leaders must remain vi-

³¹ WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 240–241 (2010) (noting that the provisions of the Rome Statute referencing military necessity were “quickly agreed to at the Rome Conference” and that the concept may be invoked only when the laws of armed conflict provide so and only to the extent provided by that body of law).

³² See Michael A. Newton, *The International Criminal Court Preparatory Commission: The Way It Is & The Way Ahead*, 41 VA. J. INT’L L. 204, 211–212 (2000).

³³ *Id.*

gilant to avoid treaty based restrictions that would eviscerate American combat power. Reflexive acceptance of the proposition that U.S. resistance to full acceptance of multilateral instruments flows primarily from a hypocritical desire to enjoy differing standards from the rest of the world is misplaced and superficial. By way of illustration, U.S. delegates to the negotiations leading up to the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction³⁴ sought agreement on a regime that would preserve America's obligations to deter armed conflict along the Korean demilitarized zone, while also advancing the stated purpose to prevent the loss of innocent life caused by unrecovered landmines across the globe.³⁵

The United States refrained from joining the Ottawa Convention not because of a kneejerk exceptionalist mantra or a visceral distrust of multilateral instruments, but because delegates adopted a treaty that disregarded the legitimate strategic equities of the United States. The Chairman of the Joint Chiefs testified to Congress at the time that "[i]n Korea . . . where we stand face-to-face with one of the largest hostile armies in the world, we rely upon anti-personnel landmines to protect our troops."³⁶ It is no coincidence that many of the treaties that the United States has rejected outright have been accompanied by a clause prohibiting reservations.³⁷ The Ottawa Convention does not allow reservations and took a purist posture that wished away the special military interests of a major military power with a substantial troop presence deployed to prevent a numerically superior enemy from crossing an international border clearly recognizable by the high fences, guard towers, and emplaced mine fields.³⁸

Commenting on the unfortunate choice required by a treaty that does not permit reservations yet undermines American interests, President Clinton remarked that

[O]ne of the biggest disappointments I've had as President, a bitter disappointment for me, is that I could not sign in good conscience

³⁴ *Entered into force* 1 Mar. 1999, reprinted in 36 I.L.M. 1507-1519 (1997).

³⁵ Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 92 (2000).

³⁶ *Posture Statement: Hearing on Fiscal Year 1999 Defense Authorization Before the H. Comm. on National Security Fiscal Year 1999 Defense Authorization*, 105th Cong. (1998) (statement of General Henry H. Shelton, Chairman, Joint Chiefs of Staff), available at http://www.globalsecurity.org/military/library/congress/1998_hr/2-5-98shelton.htm.

³⁷ See, e.g., Rome Statute, *supra* note 28, art. 120.

³⁸ Andrew C.S. Efav, *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*, 159 MIL. L. REV. 87, 101 (1999); Phillip Bobbit, *American Exceptionalism: The Exception Proves the Rule*, 3 U. ST. THOMAS L.J. 328, 330 (2005) (concluding that "[n]o realistic conventional force could be protected from such a huge North Korean force without mines . . .").

the treaty banning land mines, because we have done more since I've been President to get rid of land mines than any country in the world by far. We spend half of the money the world spends on demining. We have destroyed over a million of our own mines. I couldn't do it because the way the treaty was worded was unfair to the United States and to our Korean allies in meeting our responsibilities along the DMZ in South Korea, and because it outlawed our anti-tank mines while leaving every other country [sic] intact. And I thought it was unfair. But it just killed me. But all of us who are in charge of the nation's security engage our heads, as well as our hearts.³⁹

Secondly, nations should be alert to oppose any efforts to create or reinforce legal rules that would become tactically irrelevant on modern battlefields. Commenting on the impractical aspects of Additional Protocol I, the eminent Dutch jurist Bert Röling—who served on the bench of the Tokyo International Military Tribunal—observed that treaty provisions ought not “prohibit what will foreseeably occur” because the “laws of war are not intended to alter power relations, and if they do they will not be observed.”⁴⁰ The disconnects between aspirational legal rules and human experience are borne out in operational experience by states that act decisively to protect the lives and property of their citizens, which feeds an undercurrent of suspicion and politicization that could erode the very foundations of humanitarian law. This gap in turn leads to a cycle of cynicism and second-guessing that could weaken the commitment of some policy makers or military forces to actually follow the law. For example, no responsible commander intentionally targets civilian populations, and the law on this matter is clear and fundamental.⁴¹ In the era of mass communications, the media often creates a perception that the normative content of the law is meaningless by conveying an automatic presumption that any instance of collateral damage is based on illegal conduct by military commanders.⁴² This perception is, of course, completely without foundation in humanitarian law or in

³⁹ See Press Release, The White House, Office of the Press Secretary, Clinton Remarks on Comprehensive Test Ban Treaty (Oct. 6, 1999), available at <http://www.fas.org/nuke/control/ctbt/news/991006-ctbt-usia1.htm>.

⁴⁰ GEOFFREY BEST, WAR AND LAW SINCE 1945 391 (1994) (quoting Bert Röling, *Criminal Responsibility for Violations of the Laws of War*, 12 REVUE BELGE DE DROIT INT'L 8, 25–26 (1976)).

⁴¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], available at <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>.

⁴² See, e.g., MICHAEL MANDEL, HOW AMERICA GETS AWAY WITH MURDER, ILLEGAL WARS, COLLATERAL DAMAGE AND CRIMES AGAINST HUMANITY 30–31 (2004).

modern military practice. Left unchecked by the light of the law and the facts, however, it can erode the acceptance of the law in the minds of military professionals who may begin to feel that their good faith efforts to comply with the complex provisions of the law are meaningless and counterproductive in terms of gaining legitimacy and public trust. Indeed, nothing would erode compliance with humanitarian law faster than false reports of what the other side has done, or distorted allegations that permissible conduct in fact represents willful defiance of international norms.

Some scholars have theorized over the development of an international common law that would constrain state actions by affecting the costs and benefits of state action by shaping the expectations of other states rather than on the basis of legally applicable binding judgments.⁴³ If otherwise non-binding international decisions are taken as authoritative and neutral statements regarding the law, they may well shape state expectations and thereby inappropriately affect the conduct of hostilities. Future conduct that is inconsistent with such international common law might be perceived as unlawful and, therefore more likely to result in “retaliation, reciprocal non-compliance, or reputational sanctions.”⁴⁴ According to this view, such international common law helps to overcome the limitations confronted in the evolution of legal norms designed to restrict state prerogatives and powers. Indeed, highly motivated states whose core interests are threatened by illegitimate lawfare can generally frustrate treaty negotiations or specific rules as applied to them. Efforts to inappropriately superimpose human rights principles into the midst of conflict provide an important and recent example of this variety of illegitimate lawfare that the Goldstone Report highlighted.

Given the mandate to investigate legal violations alleged during Israeli operations in Gaza from December 27, 2008 to January 18, 2009, the United Nations Fact Finding Mission on the Gaza Conflict, also known as “The Goldstone Commission,” undertook a review of actions by Israeli Defense Forces (IDF); the Palestinian Authority; Hamas, which governs Gaza; and Palestinian armed groups during “Operation Cast Lead,” the IDF name for its military operations in Gaza.⁴⁵ The five hundred and seventy-five-page report found fault with all sides, but focused its analysis largely on conclusory opinions regarding Israeli conduct and intentions during Opera-

⁴³ Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515, 527 (2009).

⁴⁴ *Id.*

⁴⁵ The number of fatal casualties as a result of Operation Cast Lead varies between non-governmental organizations, which report between 1,387 and 1,417 fatalities; Gaza authorities, which report 1,444; and the Government of Israel, which lists 1,166. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict ¶ 30, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter Goldstone Report], available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf.

tion Cast Lead.⁴⁶ The Goldstone Report found “major structural flaws” with “Israel’s system of investigations and prosecution of serious violation of human rights and humanitarian law” which warranted its contention that the Israeli investigative system is “inconsistent with international standards.”⁴⁷ The Goldstone Report states that “Both international humanitarian law and international human rights law establish an obligation to investigate and, if appropriate, prosecute allegations of serious violations by military personnel whether during military operations or not.”⁴⁸ The report states the uncontroversial conclusion that Israel had the obligation to investigate allegations of grave breaches of the Geneva Conventions,⁴⁹ but goes on to postulate a parallel obligation to investigate actions in the midst of hostilities under international human rights law.⁵⁰ Asserting an unspecified source of international common law, the Report refers to human rights jurisprudence drawn from regional tribunals [which of course is not binding on Israel as a matter of hard law] to assert that the responsibility to investigate “extends equally to allegations about acts committed in the context of armed conflict.”⁵¹

The nature and efficacy of military operational debriefings, which precede formal investigations into allegations of atrocities, provided perhaps the most important fulcrum upon which the Goldstone Commission relied in formulating its penultimate recommendations. In a statement to the United Nations Human Rights Council, Justice Goldstone described Israel’s efforts to investigate alleged international law violations by the IDF during Operation Cast Lead as “pusillanimous” and those of the Gaza authorities in respect to Palestinian armed groups as a “complete failure.”⁵² The Report itself concluded that the use of Operational Debriefings does not satisfy the requirement for an independent and impartial tribunal.⁵³ Quite the contrary, in the view of the Commission, Operational Debriefings actually frustrate a genuine criminal investigation because they often occur only after the passage of some time, often result in destruction of the crime scene,⁵⁴ and they delay the prompt commencement of an independent and impartial

⁴⁶ See generally *id.*

⁴⁷ *Id.* ¶ 1756.

⁴⁸ *Id.* ¶ 1601.

⁴⁹ *Id.* ¶ 1602.

⁵⁰ *Id.* ¶ 1603.

⁵¹ *Id.* ¶ 1608.

⁵² Statement by Richard Goldstone on Behalf of the Members of the United Nations Fact Finding Mission on the Gaza Conflict before the Human Rights Council, Human Rights Council 12th Session 5 (Sept. 29, 2009), http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/OpeningStatement_GazaFFM_290909.doc.

⁵³ Goldstone Report, *supra* note 45, ¶ 1756.

⁵⁴ For example, ballistic evidence is not preserved as weapons used in the incident are not confiscated. *Id.* ¶¶ 1626, 1627.

investigation.⁵⁵ The report drew an artificial and wholly unsubstantiated conclusion that a delay of some six months from the operational debriefing to a full criminal investigation by the Military Police Criminal Investigation Division (MPCID) is excessive and therefore impermissible as a failure of the obligation “to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law.”⁵⁶ Thus,

The Mission holds the view that a tool designed for the review of performance and to learn lessons can hardly be an effective and impartial investigation mechanism that should be instituted after every military operation where allegations of serious violations have been made. It does not comply with internationally recognized principles of independence, impartiality, effectiveness and promptness in investigations. The fact that proper criminal investigations can start only after the “operational debriefing” is over is a major flaw in the Israeli system of investigation.⁵⁷

In his statement to the Human Rights Council, Justice Goldstone reiterated the recommendation from the Report that the United Nations Security Council (UNSC) require that both Israel and Gaza authorities “launch appropriate investigations that are independent and in conformity with international standards, into the serious violations of International Humanitarian and International Human Rights Law reported by the Mission and any other serious allegations that might come to its attention.”⁵⁸ The Israeli response announced on July 6, 2010 revealed that after investigating more than one hundred fifty incidents, of which nearly fifty resulted in formal criminal investigations, military officials decided to take disciplinary and legal action in four cases, including some that were highlighted by the Goldstone report.⁵⁹ The subtlety that was lost on the Goldstone Commissioners is that operational debriefings are an essential aspect of the ebb and flow of tactical operations and an entirely appropriate extension of the commander’s obligations to ensure that operations are conducted in accordance with the intent of the orders given and within the boundaries of the law. The official Israeli response explains that the purpose of a preliminary command investigation is to collect available information related to poten-

⁵⁵ *Id.* ¶ 1756.

⁵⁶ *Id.* ¶ 1620.

⁵⁷ *Id.* ¶ 1628.

⁵⁸ *Id.* ¶ 1766 §§ 1(a), 3 (recommending that a subsequent failure to properly investigate should result in a Security Council referral of “the situation in Gaza” to the Prosecutor of the International Criminal Court (ICC)).

⁵⁹ Israel Defense Fund (IDF) Press Release, IDF Military Advocate General Takes Disciplinary Action, Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead, (July 6, 2010), <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm> [hereinafter IDF Cast Lead Press Release].

tial wrongdoing, emphasizing that the operational debriefings do not replace a criminal investigation, but “serve as a means of compiling an evidentiary record for the Military Advocate General, and enabling him, from his central vantage point, to determine whether there is a factual basis to open a criminal investigation.”⁶⁰ Just as with every modern professionalized military, the advice of a military judge advocate is determinative of the ultimate disposition of a particular case rather than the preliminary commander’s investigation.

This dimension of the Goldstone Report—despite my deep personal respect for Justice Goldstone—represents a pernicious expansion of international common law in a manner that would dramatically undermine military operations. Phrased another way, lawfare that results in tactically irrelevant rules that actually undermine respect for the application and enforcement of humanitarian law is illegitimate and untenable. The Israeli response correctly noted that the Israeli Supreme Court sitting in its capacity as the High Court of Justice charged with protecting and vindicating human rights standards concluded that command investigations are “usually the most appropriate way to investigate an event that occurred during the course of an operational activity.”⁶¹ In fact, the Israeli system is designed to operate effectively even under the smoke, adrenalin, and uncertainty of a modern battlefield, and replicates those of other modern military systems that routinely conduct preliminary command investigations based on reports of misconduct during operations and to make preliminary identification of personnel whose actions warrant full criminal investigations.⁶² Indeed, the essence of command authority is to understand the flow of battle and to take ameliorative actions swiftly when needed. Taken to its logical end-state, the human rights grounded perspective on investigation of alleged wrongdoing during hostilities would paralyze operations and erode the commander’s ability to direct hostilities.

The dismissive approach of the Goldstone Report towards operational debriefings and follow-on commander’s inquiries (known in some circles as preliminary investigations) represents a prime example of illegitimate lawfare. From the lawfare perspective, this approach is deeply flawed and wholly unworkable because it would require international law to bear too much weight. This newly manufactured limitation on the ability of

⁶⁰ *Id.*

⁶¹ *See* *Mor Haim v. Israeli Defence Forces*, HCJ 6208/96 (16 September 1996)(addressing appropriate standards for investigating the circumstances of the death of a soldier during an IDF operation).

⁶² IDF Cast Lead Press Release, *supra* note 59, ¶60. Article 539(A)(b)(4) of the Law on Military Justice nevertheless makes clear that the materials from an operational debriefing will not serve in a subsequent criminal investigation and will remain confidential from the investigative authorities.

commanders to command and to direct resources on the basis of military necessity towards the lawful accomplishment of the mission would have the predictable consequence of causing critics to discount the larger endeavor to regulate conflicts. It is simply ludicrous to suggest that ongoing operations be halted at the slightest suggestion of impropriety to permit ballistics analysis of any weapons that might have been involved in the firefight and to subject all potentially involved personnel to full blown criminal investigations as precondition for compliance with the laws and customs of war. Rather than striving to defeat a superior adversary on the field of battle, the enemy could literally disarm entire units merely by alleging violations on the part of an attacking force. The surge in spurious allegations surely would undermine the credibility of the legal norms in the minds and methodology of attacking forces.

In fact, if every report of possible wrongdoing required operational commanders to freeze the fight, during which an enemy could resupply, refit, and retrench either figuratively or literally, a newly imposed Goldstone inspired human rights based investigative standard would actually create an almost overwhelming disincentive to report and document war crimes. The laws and customs of war are designed to maximize respect for human dignity and humanitarian norms, even as they facilitate the lawful accomplishment of military objectives. The textual requirements of Protocol I already balance the need of the commander to effectively conduct military operations with the overriding duty to ensure compliance with the laws of war or to take appropriate remedial or investigative action.⁶³ Article 86, for example, represented a major development in the field as it gave textual formulation to the historically developed doctrine of superior responsibility.⁶⁴ Paragraph 2 of Article 86 places investigative responsibility on the shoulders of responsible commanders by stipulating that a superior may be criminally liable for the crimes of a subordinate if three criteria are proven: (1) senior-subordinate relationship; (2) actual or constructive notice on the part of the commander of wrongdoing; and (3) failure to take measures to prevent the crimes.⁶⁵ It is the commander's obligation to take all "feasible measures" to prevent or to repress breaches of the laws of war.⁶⁶ Furthermore, the laws and customs of war expressly obligate the commander to

⁶³ See H CJ 6208/96 *Mor Haim v. Israeli Defence Forces* [1996] (addressing appropriate standards for investigating the circumstances of the death of a soldier during an IDF operation).

⁶⁴ IDF Cast Lead Press Release, *supra* note 59; See also Military Justice Law, 5715-1954/55, art. 539(A)(b)(4) (making it clear that the materials from an operational debriefing will not serve as evidence in a subsequent criminal investigation and will remain confidential from the investigative authorities).

⁶⁵ Additional Protocol I, *supra* note 41, art. 86(2); see also ICRC Commentary on Protocol I, *supra* note 8, art. 86, ¶ 3543.

⁶⁶ Additional Protocol I, *supra* note 41, art. 86(2).

prevent and “where necessary, to suppress and to report” violations to competent authorities.⁶⁷ Thus, the *per se* assertion that commanders do not have authority to investigate wrongdoing in their own units and that only full-blown criminal investigations conducted by external authorities are compliant with the international standards would erode the preexisting obligation and authority of the commander and undercut the obligations of humanitarian law. Such an untenable and unworkable extension of human rights principles into the context of conflict is both unwarranted and illegitimate.

Finally, and as an extrapolation of the points made above, illegitimate lawfare is that which erodes the margin of appreciation given to responsible commanders to its vanishing point. International humanitarian law is not a beast that is kept chained and fed with words and conference and good intentions. Quite the contrary, the ideals of humanitarian law (*e.g.* the principles of necessity, distinction, humanity, and reciprocity) are all intended to be achieved in the context of facilitating the accomplishment of the military mission. In fact, the modern law of armed conflict is really nothing more than a web of interlocking protections and specific legal obligations held together by the thread of respect for humankind and a reciprocal expectation that other participants in armed conflict are bound by the same normative constraints. The laws and customs of warfare serve as the firebreak between being a hero in the service of your nation and a criminal who brings disgrace to your nation, dishonor to the unit, and disruption to the military mission. As the backbone of military professionalism, the implementation of legal norms in an operational setting became an indispensable aspect of military legitimacy. The law of armed conflict was historically designed and developed to provide a framework within which responsible commanders can operate.⁶⁸ It was never intended to operate as a tourniquet that cuts off military effectiveness or unduly impedes lawful military operations.

Legal norms continue to form the rallying points of moral and professional clarity that guide soldiers in the midst of incredibly nuanced missions, no matter how tired they are, or how much adrenaline is flowing in the impetus of the moment. Over time, the laws of warfare have become the lodestone of professionalism and the guiding point for professional military forces the world over.⁶⁹ The law of armed conflict provides the standards that separate trained professionals from a lawless rabble. Thus it is not surprising that Article 82 of Additional Protocol I explicitly requires parties to any armed conflict to “ensure that legal advisors are available,

⁶⁷ Additional Protocol I, *supra* note 41, art. 87(1).

⁶⁸ Additional Protocol I, *supra* note 41.

⁶⁹ See generally U.S. ARMY JUDGE ADVOCATE GENERAL'S SCHOOL, LAW OF WAR HANDBOOK (2010); CANADIAN NATIONAL DEFENCE OFFICE OF THE JUDGE ADVOCATE GENERAL, LAW OF ARMED CONFLICT: AT THE OPERATIONAL AND TACTICAL LEVELS (2001).

when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given the armed forces on this subject.”⁷⁰ One eminent commentator referred to the soldier/lawyer who is equipped to fill such a vital operational niche as the “lawyer-in-uniform.”⁷¹ The combination of legal, diplomatic, military, and personal skills needed to effectively advise commanders makes the modern military lawyer an important aspect of proper operational preparation and compliance with the constraints of the law.

However, international humanitarian law balances its laudable goals with the perfectly legitimate need to accomplish the mission. The law explicitly embeds the latitude for military commanders and lawyers to balance the requirements of the mission against the humanitarian imperative. Even the text of Article 82 contains the caveat “when necessary” that permits flexibility and sovereign choices in the conditions for the use, allocation, and location within the military structure of those legal advisors.⁷² Phrased another way, even in this most sensitive area, the law as it is properly understood and implemented entrusts commanders with a wide range of discretion. Thus, legal obligations flowing from the laws of armed conflict are often predicated by such caveats as “to the fullest extent practicable,”⁷³ “to the maximum extent feasible,”⁷⁴ or “as the relevant Party to the conflict may deem necessary.”⁷⁵ Among many other examples, legal duties are described in terminology such as “unjustified act or omission”⁷⁶ or conditioned as follows: “unless circumstances do not permit.”⁷⁷

Any effort to substitute a generalized and arbitrary reasonableness standard in imposing criminal liability on commanders represents illegitimate lawfare. The laws and customs of war deliberately permit commanders a wide range of discretion in implementing their intent within the bounds of good faith application of the law and those decisions must be accordingly be considered from the perspective of the that commander at the time the decision was made. *Post hoc* assessments of the commander’s decision-making must be made through the lens of a particularized reasonableness standard based on military command in the circumstances as they existed at the crucial moments of the operation. The classic statement of this principle derives from the World War II era military commissions pro-

⁷⁰ Additional Protocol I, *supra* note 41, art. 82.

⁷¹ GEOFFREY BEST, *WAR & LAW SINCE 1945* 406 (1994).

⁷² Additional Protocol I, *supra* note 41, art. 82.

⁷³ *Id.* art. 10(2).

⁷⁴ *Id.* arts. 58 & 76(3).

⁷⁵ *Id.* art. 15(4).

⁷⁶ *Id.* art. 11.

⁷⁷ *Id.* art. 57(2)(c).

ceedings against German General Lothar Rendulic.⁷⁸ General Rendulic believed that Russian troops were pursuing his forces along land and sea routes and as a result, ordered a “scorched earth” policy to slow the pace of Russian pursuit.⁷⁹ In evaluating these decisions, the Tribunal held that

There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by exercise of judgment, after giving consideration to all factors and existing possibilities, even though the conclusion reached may have been fault, it cannot be said to be criminal.⁸⁰

The Rendulic Rule is more than a quaint example of an outmoded era. Its equivalent can be readily identified in Article 8(2)(b)(iv) of the Rome Statute which embodies the modern proportionality principle by criminalizing the intentional initiation of “an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage *anticipated*.”⁸¹

Though asserting that it was “not attempting to second-guess with hindsight the decisions of commanders,” the Goldstone Report essentially did just that.⁸² The Report flatly declared that of the eleven specified actions ostensibly directed against civilians “with one exception, all cases in which the facts indicate no justifiable military objective pursued by the attack.”⁸³ The Mission also considered damage to the industrial infrastructure of Gaza, including a flourmill, and without even considering the perspective of the on-scene commander concluded that the damage to the flourmill “suggests that the intention was to disable the factory in terms of its productive capacity.”⁸⁴ In fact, this aspect of the Goldstone Report directly contravenes the latitude given to the military commander at the time of an attack and under the circumstances then prevailing to determine whether a

⁷⁸ XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 757 (1950) (describing the case of *United States v. Wilhelm List* among others, including Lothar Rendulic).

⁷⁹ *Id.* at 1296.

⁸⁰ *Id.*

⁸¹ Rome Statute, *supra* note 28, art. 8(2)(b)(iv) (emphasis added). *See also* Additional Protocol I, *supra* note 41, arts. 51(5)(b) & 57(2)(b).

⁸² Goldstone Report, *supra* note 45 ¶, 588.

⁸³ *Id.* ¶ 43.

⁸⁴ *Id.* ¶ 50.

particular target is lawful in that its destruction “offers a definite military advantage.”⁸⁵

In an even more blatant attempt to superimpose its own rationale and reasoning over that of the commanders’ good faith judgment, the Report developed a wholly unprecedented standard for warning the civilian population in advance of impending attacks. Article 57(2)(c) of Protocol I expressly mandates that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”⁸⁶ This provision is an express obligation that is really just a *lex specialis* application of the larger obligations to “take constant care” to protect civilian lives and objects⁸⁷ and to “do everything feasible” to protect civilians both in the choice of targets and in the means selected to attack targets.⁸⁸ During Operation Cast Lead, IDF warnings in the urban areas of Gaza consisted of: 165,000 telephone calls, 300,000 warning notes on December 28, 2008 alone, 2,500,000 leaflets overall, radio broadcasts and another newly developed tactic involving non-explosive detonations known as “roofknocking.”⁸⁹

The Goldstone Report sets forth several criteria in determining whether a warning is effective:

[I]t must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon.⁹⁰

After detailing the content of the leaflet and radio broadcast warnings, the Report concluded that the warnings did not comply with the obligations of Protocol I because Israeli forces were presumed to have had the capability to issue more effective warnings, civilians in Gaza were uncertain about whether and where to go for safety, and some places of shelter were

⁸⁵ Additional Protocol I, *supra* note 41, art. 52(2).

⁸⁶ Additional Protocol I, *supra* note 41, art. 57(2)(c). *See also* ICRC Commentary on Protocol I, *supra* note 8, art. 86, ¶ 2190 (emphasizing that precautions precedent to attacks on civilians will be of “greatest importance in urban areas because such areas are most densely populated.”).

⁸⁷ Additional Protocol I, *supra* note 41, art. 57(1).

⁸⁸ Additional Protocol I, *supra* note 41, arts. 57(2)(a)(i) & 57(2)(a)(ii).

⁸⁹ Goldstone Report, *supra* note 45, ¶ 498.

⁹⁰ *Id.* ¶ 528.

struck after the warnings were issued.⁹¹ Thus, despite giving more extensive warnings to the civilian population than in any other conflict in the long history of war, the efforts of the Israeli attackers were equated with attacks intentionally directed against the civilian population. This approach eviscerates the appropriate margin of appreciation that commanders who respect the law and endeavor to enforce its constraints should be entitled to rely upon—and which the law itself provides. There is simply no legal precedent for taking the position that the civilians actually respond to such warnings, particularly in circumstances such as Gaza where the civilian population is intimidated and often abused by an enemy that seeks to protect itself by deliberately intermingling with the innocent civilian population. The newly minted Goldstone standard for warning the civilian population would displace operational initiative from the commander in the attack to the defender who it must be remembered commits a war crime by intentionally commingling military objectives with protected civilians. This aspect of the report would itself serve to amend the entire fabric of the textual rules that currently regulate offensive uses of force in the midst of armed conflict.

This, then, is the essence of illegitimate lawfare. Words matter—particularly when they are charged with legal significance and purport to convey legal rights and obligations. When purported legal “developments” actually undermine the ends of the law, they are illegitimate and inappropriate. Legal movements that foreseeably serve to discredit the law of armed conflict even further in the eyes of a cynical world actually undermine its utility. Lawfare that creates uncertainty over the application of previously clear rules must be opposed vigorously because it does perhaps irrevocable harm to the fabric of the laws and customs of war. Illegitimate lawfare will marginalize the precepts of humanitarian law if left unchecked, and may serve to create strong disincentives to its application and enforcement. Knowledge of the law and an accompanying professional awareness that the law is binding remains central to the professional ethos of military forces around our planet irrespective of the reality that incomplete compliance with the *jus in bello* remains the regrettable norm. Hence, it logically follows that any efforts to distort and politicize fundamental principles of international law cannot be meekly accepted as inevitable developments.

⁹¹ *Id.* ¶¶ 499–542.

