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Regulating Hostilities in Non-International Armed Conflicts: Thoughts on Bridging the Divide between the *Tadić* Aspiration and Conflict Realities

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I. INTRODUCTION

The conflict in Ukraine has once again generated concerns that international humanitarian law (IHL) is insufficient to effectively regulate non-international armed conflicts (NIACs). This concern is not unique to Ukraine, but has been an almost constant feature of international reaction to NIACs. Other recent examples including the conflicts in Syria, Libya and Iraq, serve as reminders of what are arguably two axioms of these non-State conflicts. First, they tend to rapidly devolve into a level of brutality that seems to know no rational limit. Second, IHL, developed primarily to regulate inter-State armed conflicts, seems relatively incapable of addressing the realities of these conflicts in a manner that truly effectuates the goal of mitigating the suffering of war.

There has been substantial progress since 1949 in filling what was at that time a quite significant vacuum in the international legal regulation of this historically pernicious category of armed conflicts. Unfortunately, routine images of the carnage associated with contemporary manifestations of such conflicts—in particular the suffering inflicted on civilians—indicates there is much work to be done to ensure that IHL's humanitarian objectives are credibly advanced during NIACs.

There is no simple solution to the immense humanitarian challenge produced by these conflicts. This is merely a reflection of the reality that there is nothing straightforward about NIACs. Each conflict involves its own set of unique strategic, operational and tactical complexities, with an accompanying range of unique humanitarian challenges. However, IHL, like all bodies of regulatory law, should evolve in response to what appear to be consistent sources of regulatory and humanitarian failures associated with these conflicts. While the list of factors that contribute to the gap between humanitarian aspiration and implementation is certainly well populated, one issue that merits particular attention is the challenge of mitigating civilian risk resulting from the use of indirect fires and high-explosive projectiles.

Regulating the use of lethal combat power in order to mitigate risk to civilians and civilian property is at the very core of IHL. And, the "fundamental" or "foundational" rules of IHL developed to regulate the use of combat power apply today across the spectrum of conflict, conflicts that range in nature from widespread hostilities between regular military forces

of multiple States to lower level hostilities between State and non-State forces, and even to hostilities between multiple non-State forces. In fact, this migration of laws developed to regulate inter-State conflicts (international armed conflicts or IACs) to the NIAC domain is frequently and quite appropriately lauded as one of the most significant contemporary advancements in humanitarian law. And yet the world continues to witness NIACs where this migration appears to produce negligible positive effect.

How then can the regulatory and accordant humanitarian impact of this migration be enhanced to better produce on a more consistent basis the positive humanitarian outcomes the law is intended to achieve? The conflict in Ukraine provides the most recent, but by no means unique, lens through which to consider this question. Like so many other similar "internal" armed conflicts, the hostilities in Ukraine involve some of the most common attributes of NIACs: an eruption of violence among groups whose animosities have been brewing for decades; an overall lack of military competence among the belligerents; questionable command commitment to humanitarian restraint; widespread availability of highly lethal combat capabilities; and, most problematically, a situation that incentivizes unrestrained uses of these lethal tools of war in an effort to win at all costs.

This article will focus on the perplexing question of improving the regulatory framework. First, it will consider how the incentives and disincentives inherent in NIACs, like that in the Ukraine, are heavily and problematically weighted against humanitarian restraint. Second, it will propose several approaches that may contribute to more effective NIAC regulation. These proposals—a more effective incentive for IHL compliance, prompt and credible criminal sanction for war crimes, and a more meaningful understanding of the meaning of reasonableness in relation to combat judgments—can build on existing law and regulation. However, they are not suggested as a restatement of existing law, but instead as an evolution of the extant rules to better address the NIAC challenge. Why do I believe such evolution is essential? If conflicts like the one in Ukraine signal one transcendent message, it is that in the context of NIACs, international law has failed to produce a credible balance between the necessity to employ deadly combat power and humanitarian protections for civilians and civilian property. With war an inevitable aspect of human relations, all too unpredictable in its permutations, but tragically all too predictable in its brutality, striving for such advances is as important today as it has ever been.

II. REGULATING NIAC HOSTILITIES: TWO "LONG POLES"[1] IN THE EFFECTIVENESS TENT

In 1996, the International Criminal Tribunal for the former Yugoslavia (ICTY) issued its first judgment in *Prosecutor v. Tadić*,[2] a judgment whose shock effect continues to reverberate to this day. Most of the subsequent attention to the judgment has focused on the Tribunal's methodology for assessing the existence of a NIAC, the oft-cited *Tadić* "elements" test.[3] While this "*Tadić* test" for what qualifies as a NIAC was indeed a vital contribution to the interpretation and implementation of IHL, the Tribunal's methodology for assessing the substantive rules applicable to NIACs was equally, and perhaps even more, significant in its impact on NIAC regulation.

Once the Tribunal determined that Tadić had been involved in a NIAC, it had to assess the substantive IHL rules that applied to that conflict; the rules that proscribed his individual conduct as a belligerent participant in the conflict.[4] In one brief sentence, the Tribunal noted that many of the IHL rules developed to regulate IAC had, over time, "migrated" to the realm of NIAC.[5] As a result, these rules had become binding on participants in *any* armed conflict, even though they were derived from treaties applicable exclusively to IACs. Several armed forces had, prior to that time, extended IAC rules to all military operations through adoption of national IHL-related policies, ostensibly to provide a consistent and logical regulatory baseline for the training, planning and execution of any military operation.[6] However, this was the first time this extension was characterized as a

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1. *See* Definition of Long Pole, MERRIAM-WEBSTER, http://nws.merriam-webster.com/opendictionary/newword_display_alpha.php?letter=Lo&last=50 (last visited May 18, 2015) ("The most important issue or problem that prevents or slows progress, especially on a project. The factor that must be addressed before all others or that has the most far-reaching effects.").

2. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997).

3. *Id.*

4. *Id.*, ¶¶ 580–83.

5. *Id.*

6. *See* Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict,* 40 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 295, 315–20 (2006) (explaining the use of military policy directives to extend LOAC principles to other military operations).

matter of law. In so doing, the ICTY initiated a process assessed by some scholars as the merger of the law of IAC and NIAC.[7]

This merger was both logical and beneficial. NIACs, after all, routinely involve belligerent hostilities of a nature that matched, and at times exceeded, the destructiveness associated with IACs. Common Article 3, while a critically important extension of IHL into the NIAC domain, does not include any provisions that regulated the conduct of hostilities.[8] The 1977 Additional Protocol II does include a very modest foray into the conduct of hostilities field of regulation, but its Article 13 provisions for the protection of the civilian population are modest in comparison to the much more comprehensive IAC conduct of hostilities regime.[9] Furthermore, AP II is not universally applicable to NIACs, but rather applies only after certain triggering conditions are satisfied, most notably control of territory by the party to the conflict (an insurgent or dissident force) challenging the government.[10] Because of this very limited NIAC treaty-based conduct of hostilities regulation, extending IAC rules to NIACs seemed both logical and essential to begin the process of better mitigating the humanitarian suffering produced by NIACs.

But this extension also reflected an important acknowledgment: despite the theretofore inapplicability of IHL conduct of hostilities regulation to NIACs, these armed conflicts involve military operations and hostilities analogous to IACs. Indeed, it was the "intensity and duration" of hostilities that the Tribunal identified as the key indicators that a situation had

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7. See discussion in Andrew J. Norris & Kenneth Watkin, *Preface* to NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY xvii, xxiii, xxxi (Kenneth Watkin & Andrew J. Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies).

8. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter GC I]; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter GC II]; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV].

9. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

10. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987), *available at* http://www.loc.gov/rr/frd/Military_Law/ pdf /Commentary_GC_Protocols.pdf.

crossed the threshold from an internal civil disturbance to an armed conflict.[11] Thus, the *Tadić* decision reflected two critical conclusions. First, NIACs, by virtue of being "armed conflicts," involve uses of combat power. Second, regulation of this combat power necessitates extending rules developed for IACs into the NIAC domain due to the lacunae of applicable treaty regulation.[12]

Today, this unified applicability of IHL regulation—most notably in relation to the use of combat power to engage in hostilities—has become almost axiomatic. IAC-based targeting rules apply to any armed conflict, and provide the foundation for international criminal responsibility in both IACs and NIACs. Yet, the record of humanitarian suffering produced during NIACs has not abated, but appears to be as unfortunate today as it was at the time *Tadić* was decided. NIACs still occur; combat is as intense in these conflicts as ever; civilians and civilian property are routinely caught in the NIAC crossfire; indeed, humanitarian suffering seems to be an intractable problem produced during these conflicts.

This unfortunate reality must become a focal point of IHL evolution. The record of humanitarian suffering associated with NIACs must continue to motivate efforts to better align what might be called the "*Tadić* aspiration" with NIAC reality. If nothing else, proponents of conflict regulation must acknowledge that the gap between humanitarian aspiration and reality continues to be unacceptably wide, and therefore new approaches to regulating NIACs must be considered.

The solution should build on the *Tadić* "rule migration," but must also be realistic. Proposals attenuated from the realities of armed conflict, proposals that fail to account for the fundamental objective of using force to bring an opponent into submission, may be appealing from a humanitarian perspective, but will likely produce negligible positive impact. In contrast, once the causes of this overall failure to align aspiration with reality are better diagnosed, adjusting existing modalities to produce a more positive cure may be feasible. Ultimately, the cure must be aligned with the underlying foundation of IHL itself: providing belligerents realistic legal maneuver space to enable effective execution of military operations while mitigating more effectively the risk to civilians and civilian property.

11. *Tadić*, *supra* note 2, ¶¶ 564–65.
12. *Id.* ¶¶ 566–68.

III. INCENTIVES AND DISINCENTIVES: HOW SOVEREIGNTY DILUTES THE EFFICACY OF LEGAL REGULATION

Armed conflict of any nature involves mortal combat between organized belligerent groups, what IHL characterizes as "parties to an armed conflict."[13] In any such situation, human nature will almost inevitably compel individuals to adopt a "whatever it takes" approach to hostile confrontations. IHL often demands that individuals, when thrust into armed conflict, subordinate this instinctual reaction, and at times even their instincts for self-preservation, to the interests of collective good. This is a simple consequence of rules that require restraint in the conduct of hostilities. Ideally, these restraints will produce a collective military advantage for the military unit as a whole, even when they result in increased tactical level risk. Indeed, the overall benefit derived from imposing such restraints must, to some extent, explain why so many nations have historically been willing to subject their armed forces to IHL obligations.

Unfortunately, military forces and their commanders routinely underestimate the overall advantage that flows from compliance with rules that require tactical and operational restraint. Even among the most sophisticated armed forces, developing combat units that embrace the "force multiplication"[14] effect of IHL compliance is a genuine challenge. It should therefore come as little surprise that armed groups involved in NIACs—groups that often do not benefit from the training and developmental opportunities associated with sophisticated military organizations—are even less likely to embrace IHL compliance based on advancing their own self-interest.

This reality necessitates a more probing assessment of the practical incentives and disincentives for IHL compliance during NIACs. Such an assessment may provide a partial explanation for why the gap between aspiration and implementation remains so problematic, and may perhaps stimulate consideration of techniques to modify this incentive/disincentive equation.

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13. Interview with Kathleen Lawand, Head of the Arms Unit, ICRC, What is a Non-International Armed Conflict? (Oct. 12, 2012), ICRC, https://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm.

14. Raj Rana, *Contemporary Challenges in the Civil-Military Relationship: Complementarity or Incompatibility?*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 565, 567–68 (2004), *available at* https://www.icrc.org/eng/assets/files/other/irrc_855_rana.pdf.

At the most fundamental level, the strategic end state of most NIACs suggests a much more significant disincentive for IHL compliance than exists in the IAC domain. IACs rarely involve a strategic objective of total subjugation of an enemy State, with complete and *permanent* substitution of authority over that State's territory by the opposition force.[15] Instead, IACs, which since 1945 have become fewer and farther between than ever before in modern history,[16] tend to be short-duration conflicts with much more limited strategic objectives. Even when IACs result in the total destruction of an enemy armed force, such as the armed conflicts in Iraq in 2003 and Panama in 1989, there is an almost immediate effort to restore governance to host-nation authorities in order to extricate the victorious military forces of the invading State.

The central strategic objective of IACs is the submission of enemy military resistance.[17] However, this rarely includes the requirement for total destruction of enemy armed forces. And, more importantly, a closely related strategic objective of most IACs is the rapid and efficient restoration of peace, allowing for disengagement of armed forces and a return to peaceful mechanisms for resolving the inter-State dispute. Thus, in a very real sense, IACs have evolved into relatively short duration "flare ups" associated with ongoing inter-State disputes that influence the broader diplomatic dispute resolution process, but rarely completely displace that process.[18]

In order to advance what might be understood as this "de-escalation" objective, humanitarian restraint is essential.[19] Indeed, the dual objectives of defeating enemy military resistance while facilitating a restoration of peace highlights the logic of IHL, which itself seeks to balance military necessity with humanitarian restraint. History demonstrates that infliction of unnecessary and gratuitous suffering—suffering not objectively justified by

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15. Steven Pinker, *The Decline of War and Conceptions of Human Nature*, 15 INTERNATIONAL STUDIES REVIEW 400 (2013), *available at* http://stevenpinker.com/files/pinker/files/intl_studies_review.pdf.

16. Kenneth Watkin, *Humanitarian Law and 21st-Century Conflict: Three Block Wars, Terrorism, and Complex Security Situations*, *in* TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 11 (Susan C. Breau & Agnieszka Jachec-Neale ed., 2006).

17. Kenneth Watkin, *Combatants, Unprivileged Belligerents and Conflict in the 21st Century*, 1 IDF LAW REVIEW 69, 70 (2003), *available at* http://hpcrresearch.org/sites/default/files/publications/Session2.pdf. This article was prepared as a background paper for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, held at Cambridge, January 27–29, 2003.

18. *See id.* at 12–13.

19. *Id.* at 16–17.

military necessity—undermines the ultimate objective of restoring peace while contributing little or nothing to the legitimate objective of defeating enemy forces.[20] It is therefore unsurprising that restoration of peace is identified as one of the primary justifications for IHL compliance in the U.S. Army's 1956 field manual entitled "The Law of Land Warfare."[21]

This closely related interest in rapid military success and restoration of the peaceful *status quo ante* does not seem to extend to the NIAC domain. Instead, the strategic end state of most NIACs is arguably quite different from that of IACs. NIACs are normally fought to either effect a separation of a portion of national territory from central governing authority, or to replace that authority with a new governing authority.[22] Examples of this abound in recent history.[23] Thus, "victory" is not defined in terms of defeating an enemy armed force and quickly withdrawing the victorious forces from the territory as part of a political solution to the inter-State dispute that resulted in the military action. Instead, victory, and the accordant strategic end state, is normally defined in quite different terms. For the rebel or insurgent forces, victory is defined in terms of total subjugation of government forces, leading to independence for a breakaway entity or substitution of the governing authority.[24] For government forces, victory is defined by total nullification of the capacity of the rebel or insurgent group to challenge the governing authority.[25]

Thus, in many cases, the very nature of the NIAC struggle undermines the IHL compliance incentive equation. Unlike in the typical IAC, "peace restoration" with a return to the *status quo ante* will rarely be perceived as a

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20. Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 693, 740–41 (2013).

21. *See* Department of the Army, FM 27-10, The Law of Land Warfare ¶ 451 (1956).

22. *See* Rome Statute of the International Criminal Court art. 28, 2187 U.N.T.S. 90 (1998).

23. *See, e.g.*, Jake Diliberto, *The New War Frontier: Understanding Modern Insurgency Wars and the Syrian Civil War through the Iraq Insurgencies during 2006–2009*, at 4 (APSA 2014 Annual Meeting Paper, 2014) (discussing past military campaigns as a form of political revolt. It further notes Jewish revolts against the Roman Empire, the French and Spanish guerrilla campaigns, Mao Tse-tung's people's revolutions, and the French and British campaigns within the Middle East and African Maghreb as political revolts.).

24. *See generally id.* at 7 (explaining that insurgent groups use violence as one of their tools, but it is not their end goal and that the violence that they employ allows them to gain and maintain political control).

25. Chairman, Joint Chiefs of Staff, Joint Publication 3-24, Counterinsurgency II-21 (2013).

central strategic goal, and therefore humanitarian restraint to contribute to that outcome will be of minimal practical appeal. Because "total victory" will normally be perceived as the essential and almost exclusive strategic end state inherent in the nature of these armed conflicts, restraint will only be perceived as logical if it contributes to that outcome, or if it provides some other benefit for the belligerent parties.[26]

It is true that the negative consequences of unjustified violence—alienation of civilians, increasing the resolve of resisting forces and international condemnation—should, in theory, apply to NIACs, thereby providing independent motivations for IHL compliance. However, the record of these conflicts suggests this is not the common perception. And this can be logically explained by two primary considerations. First, the external international scrutiny of the conduct of hostilities in NIACs seems generally to be less exacting than in IACs.[27] While this may be shifting in a positive direction, there is almost a sense that NIACs by their nature involve greater levels of brutality, and that this expectation results in a higher level of tolerance for IHL non-compliance. Second, because total victory provides parties to these conflicts the maximum protection from accountability for wartime misconduct, there is little to no perceived benefit in complying with any constraints that do not directly contribute to the total victory strategic end state.[28]

International criminal responsibility for IHL violations in NIACs has, to a limited extent, altered this incentive equation. But the impact of international war crimes prosecutions for NIAC misconduct has arguably been negligible. While there have been laudable efforts to ensure accountability for NIAC IHL violations, the continuing propensity of participants in

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26. Geoffrey S. Corn et al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INTERNATIONAL LAW STUDIES 536, 555–56 (2013).

27. Katharine Fortin, *Does the Violence between Boko Haram and Nigerian Security Forces Amount to a Non-International Armed Conflict?*, ARMED GROUPS AND INTERNATIONAL LAW (Dec. 6, 2013), http://armedgroups-internationallaw.org/2013/12/06/does-the-violence-between-boko-haram-and-nigerian-security-forces-amount-to-a-non-international-armed-conflict/ (the Nigerian government had to make changes to its approach due to increasing international scrutiny).

28. Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, ¶¶ 83–86 (Mar. 31, 2011), *available at* http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (eye witness account of heavy shelling resulting in the killing and wounding of a large number of civilians in Sri Lanka where there was no accountability for wartime misconduct).

these conflicts to commit widespread and serious IHL violations suggests that these prosecutions have produced limited deterrent effect.

Enhancing respect for IHL during NIACs requires a major adjustment to this incentive/disincentive equation. That adjustment should focus on three factors. First, international law must provide a more effective—and most importantly immediate—IHL compliance incentive for individual belligerents and the commanders who lead them. It may be that some non-state belligerent groups will never conform their conduct to IHL obligations. However, extending the opportunity to claim combatant immunity to these groups holds the greatest potential for altering the existing compliance incentive equation, and therefore should be considered. Second, the commitment to prompt, credible and effective criminal prosecutions for serious IHL violations must not only be sustained, it must be increased. Finally, in addition to these compliance enhancement measures, more attention should be devoted to providing greater clarity to the assessment of reasonableness in relation to operational judgments—a standard that must frame legitimacy in combat and accountability for alleged unlawful judgments. As will be discussed in Part IV, this touchstone for assessing the lawfulness of operational judgments should be better defined in relation to the use of means and methods of warfare that pose immense risk of civilian harm.

A. Sovereignty, Combatant Immunity and Incentivizing IHL Compliance

Combatant immunity, or the so-called lawful combatant's privilege, is fundamentally connected with the IAC IHL compliance equation. Since the inception of modern treaty-based regulation of inter-State hostilities, international law provided belligerents "qualified" as lawful combatants with the legal privilege to engage in hostilities. That privilege was not, however, absolute. Instead, it was contingent on compliance with certain qualification requirements. Most notably for purposes of this analysis, these included the requirement to belong to an organization that conducts operations in accordance with the laws and customs of war and operates under responsible command.[29] Even when properly qualified so as to "earn" the combatant's privilege, only conduct that complies with IHL falls within this scope of the privilege, resulting in criminal responsibility for conduct that exceeds the legally recognized necessities of war.

29. GC III, *supra* note 8, art. 4A2.

This privilege/immunity construct incentivizes IHL compliance in a number of relatively obvious ways. First, it protects individual belligerents from criminal/punitive sanction for their conduct of hostilities, but only when their conduct complies with IHL. Second, it facilitates deterrence for IHL violations by emphasizing the consequences of crossing the line from justified to unjustified wartime conduct. Third, it imposes an obligation on military leaders to prepare subordinates to conduct IHL compliant operations in order to satisfy the collective qualification requirement of operating under "responsible command." Fourth, it contributes to a collective sense of military professionalism by providing an objective manifestation of the legal sanction for violent wartime conduct, but only conduct that complies with IHL. Finally, and perhaps much more subtly, it provides individual belligerents with a moral touchstone to aid in navigating the brutality of hostilities, thereby contributing to the internalization of respect for IHL. In short, compliance with IHL at the individual and collective unit level provides an objective indication of legitimacy by protecting individuals from accusations of unlawful conduct, whereas non-compliance exposes the individuals and their units to legal condemnation for engaging in illegitimate wartime violence.

This equation is inapplicable to the NIAC domain. In fact, lawful combatant status and its accordant combatant immunity is one of the few remaining aspects of IHL that is limited to IACs. From a humanitarian perspective, this may seem perplexing: why should the nature of the armed conflict dictate applicability of this legal qualification and inherent reward for IHL compliance? The answer seems to be rooted in the prioritization of sovereignty over humanitarian protection. This is a topic I addressed extensively in an earlier writing,[30] but it necessitates a summary here in relation to this discussion of IHL compliance incentives.

Extending lawful combatant status to a belligerent opponent obviously deprives the capturing State of the prerogative of punishing the individual for participation in hostilities. In the context of IACs, this is a compromise of sovereign prerogative States have long been willing to accept. The justifications seem manifold, but ostensibly include enhancing protection for the State's own military personnel, enhancing the likelihood of IHL compliance (due to the compliance qualification requirement) and protecting

30. Geoffrey Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STANFORD LAW & POLICY REVIEW 253 (2011) [hereinafter Corn, *Thinking the Unthinkable*], *available at* https://www.law.upenn.edu/live/files/2147-corn--thinking-the-unthinkable--has-the-time-come.

individual soldiers from sanction for complying with the orders of their sovereign State, orders they rarely have the option to disobey. In short, combatant immunity reflects the recognition that an IAC is a State prerogative, and therefore so long as the individual soldier is acting as an agent of the State and complying with the international laws adopted by the State, international law should shield the individual from punitive sanction for participation in hostilities.

This equation is fundamentally different in the NIAC context. Unlike conflict in the international domain, during NIACs the State claims a monopoly on legal authority to impose its will on its people through the force of arms. This authority is not unlimited, and is qualified and regulated by both the State's domestic law, and international human rights obligations applicable to the State's activities. But unlike an IAC, there is no basis to conclude that a non-State armed opposition group shares a legal authority—and accordant privilege—to engage in hostilities against the State. As a result, extending lawful combatant status and combatant immunity to non-State armed groups would result in a much more significant intrusion into State sovereignty than its application in IACs. From the perspective of the State, these individuals did not take up arms as agents of a sovereign equal, but instead in contravention of the most fundamental duty of citizenship: loyalty to the State. It should therefore be no surprise that States have been unwilling to extend combatant immunity to the NIAC domain, as doing so would deprive the State of the authority to criminally sanction those who take up arms in violation of this obligation.

This presents an odd dilemma: if lawful belligerent qualification and accordant combatant immunity is limited to IACs, what is the legal status of government forces engaged in a NIAC? Some experts have quite properly challenged the assumption that these forces are, like their IAC counterparts, vested with lawful combatant status.[31] These challenges are quite credible, as this status is linked to prisoner of war qualification, which, in turn, cannot exist in NIACs. It is probably more accurate to conclude that government forces are vested with a type of State immunity for lawfully executing the laws of the State, just as police officers are granted a legal privilege to use force within the limits of applicable domestic and international law. Of course, the existence of an armed conflict will necessarily expand the scope of permissible conduct for these State forces beyond that

31. *See, e.g.*, Sean Watts, *Combatant Status and Computer Network Attack*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 391 (2010), *available at* http://www.vjil.org/assets/pdfs/vol50/issue2/VJIL-50.2-Watts.pdf.

normally permissible for police personnel. Thus, so long as State forces act within the framework of the applicable legal regime—in peacetime, domestic law and international human rights law, with an IHL-based expansion during NIACs—they benefit from State derived immunity.

Whether considered lawful combatants or State agents acting within the scope of their legal privilege, government forces obviously stand in a more favorable legal position than their non-State counterparts during NIACs. But the ultimate benefit of their status as State agents is contingent on the government prevailing in the struggle. If the non-State opposition forces prevail and are able to impose their will on the existing government, either by establishing regional independence or by overthrowing government authority, the domestic legal advantage of government forces may be nullified and insurgent forces will reap the benefit of the legal immunity that will almost certainly flow from victory. Thus, unlike IAC participants who benefit from an equitable application of both legal privilege and legal obligation, NIAC participants face a genuine "all or nothing" equation: those belonging to the victorious party will reap practical immunity for their wartime conduct by the governing authority on whose behalf they fought, and the forces of the losing party will face the risk of legal condemnation and punitive sanction for their participation in the hostilities.

IHL and international criminal law have attempted to modify this equation by imposing international criminal accountability upon all parties to NIACs regardless of which party prevailed in the conflict. In fact, accountability efforts have even commenced during the struggle when the outcome of conflict was far from certain. But the impact of these efforts, as noted above, has not seemed to have significantly altered this incentive/disincentive equation. In short, unlike participants in an IAC, armed groups in NIACs have a much more tangible self-interest in total victory: an outcome that will substantially reduce the risk that conduct during the armed conflict will become the subject of legal investigation, prosecution and punitive condemnation. The persuasive impact of potential second- and third-order consequences of IHL violations—alienation of the civilian population, increased resistance among opponents and international condemnation—will therefore be degraded by the compelling incentive for total victory.

At the most basic level, all of this boils down to a simple question: why should a NIAC armed group commit to IHL compliance? Unless such commitment will produce an immediate and obvious contribution to total victory, there is minimal incentive to do so. Even worse, because leaders

and members of such armed groups will often perceive IHL compliance as impeding their ability to achieve total victory—the outcome that provides the greatest probability of immunity for their wartime conduct—compliance will be perceived as illogical. One need only consider the brutality of those groups engaged in the Syrian NIAC to illustrate this point. Incentivizing IHL compliance in NIACs, as in IACs, will never be an easy task; however, the painfully obvious humanitarian risk inherent in NIACs compels reconsideration of the balance between sovereignty and humanity inherent in the inapplicability of combatant immunity during NIACs.

Extending this immunity to NIACs, if linked to requirements that incentivize IHL compliance, could fundamentally alter the existing incentive/disincentive equation. Belligerent forces belonging to all parties to a NIAC, and perhaps more importantly their leaders, would know from the outset of hostilities that IHL respect will reap a significant individual and collective benefit: protection from punitive sanction, no matter what the outcome of the conflict. Perhaps more importantly, the risk of punitive sanction for participation in the conflict will be limited to accountability for IHL violations, potentially enhancing the deterrent effect. Instead of the current situation where sanction is a risk inherent in defeat, the key to legal immunity, and by implication the legitimacy of individual and collective military operations, will be IHL compliance.

As I noted in my earlier writing, extending combatant immunity to NIACs will be no panacea, and its impact on respect for IHL would almost certainly be incremental.[32] But doing so would more effectively and rationally align the benefits of compliance with the consequences of non-compliance by limiting criminal liability to IHL violations. In so doing, such an extension would enhance the symmetry between IHL aspiration and implementation, and would render condemnation for IHL violations more meaningful. This is because these condemnations would, unlike today, be based on an underlying premise that IHL compliance produces an individual reward. Thus, the moral invalidity of IHL violations is exacerbated precisely because IHL would not only provide the legal basis to subject the individual to sanction, but would also provide the legal basis to grant the individual a reward for compliance.

The beneficial impact of extending combatant immunity to NIACs would be contingent on the feasibility and probability that non-State belligerents comply with IHL qualification requirements. As explained in my

32. Corn, *Thinking the Unthinkable*, *supra* note 30, at 263–68.

previous writing, it is likely that this extension may fail to produce an increased commitment to LOAC compliance. The very nature of NIACs suggests that wearing distinctive symbols recognizable at a distance, carrying arms openly and restricting hostilities to lawful objects of attack may all be counter-intuitive to insurgent tactics.[33] But this is not always the case, and at least offering non-State belligerents the *opportunity* to reap the compliance immunity reward would provide non-State group leaders with an incentive to transition into operations that allow for compliance with these requirements. And, as noted above, should they fail to comply, their operations would be discredited in a more meaningful way, precisely because of the benefit offered in exchange for these IHL compliance measures.

Even acknowledging the inherent limitations on how effective such an extension might be for enhancing IHL respect in the NIAC domain, the simple truth is that it would improve, even modestly, the IHL compliance incentive structure that currently exists. The price for such an extension would be the compromise to sovereignty resulting from an inability to punish non-State actors for participating in hostilities against the State.[34] This is not insignificant, and, indeed, has been the primary obstacle preventing this extension when previously proposed.[35] But the evolution of NIAC law since 1949 reflects a continuing shift of priority from protection of sovereignty to humanitarian protection.[36] Accordingly, extending an IAC concept to NIACs in order to prioritize humanitarian protection over the sovereign prerogative to sanction NIAC participants is consistent with this trend. Therefore, more effort must be devoted to extending the IAC *quid pro quo*—exchanging IHL compliance measures for the promise of combatant immunity—to the NIAC domain.

B. Doubling Down on War Crimes Accountability

Extending combatant immunity to NIAC participants will provide a more meaningful incentive for IHL compliance. However, the compliance equation must also be addressed from the other end of the spectrum: enhancing the disincentive for IHL violations. Because of the very real risk that forces

33. *See id.*

34. *See, e.g.*, GC III, *supra* note 8, art. 87.

35. *See* MARCO SASSÓLI, TRANSNATIONAL ARMED GROUPS AND INTERNATIONAL HUMANITARIAN LAW 22–23 (2006). *See also* Corn, *Thinking the Unthinkable, supra* note 30, at 265.

36. *See* Corn, *Thinking the Unthinkable, supra* note 30, at 265–66.

engaged in NIACs will perceive IHL compliance as an impediment to achieving their strategic end state of total victory, the importance of deterring IHL violations through a meaningful risk of criminal accountability is arguably more significant in relation to NIACs than even in IACs.

Unfortunately, it is difficult to ignore the reality that the deterrent effect of criminal accountability for NIAC IHL violations has been undermined by the complexity of bringing these cases to trial.[37] There has certainly been a laudable commitment of substantial resources in pursuit of international accountability for serious IHL violations in NIACs (such as those in the former Yugoslavia, Sierra Leone, Lebanon, Rwanda and Cambodia).[38] However, the record of brutality in contemporary NIACs continues to shock the world. While these efforts have made substantial positive contributions to the general concept of individual criminal responsibility for NIAC war crimes, the cumbersome process of advancing cases from investigation to conviction and punishment has arguably diluted their deterrent effect. Other alternatives, such as hybrid tribunals and reliance on domestic tribunals, represent an improvement to the status quo,[39] although it is yet to be seen if the deterrent effect of the law will be substantially enhanced by these efforts.

Deterrence is not the exclusive purpose of criminal accountability. However, in relation to NIACs, deterrence resulting from a meaningful risk of criminal sanction for IHL violations provides an especially important disincentive to ignore the law. And, when connected with the doctrine of command and superior responsibility, this deterrent effect also offers an important incentive for leaders to discharge their duty to ensure subordinates conduct IHL compliant operations. Reducing the existing disparity between prosecutable IHL violations and ultimate sanction for such violations will enhance the deterrent effect of international criminal law. Because there are so few disincentives for non-compliance with IHL in NIACs, this seems especially important in seeking to enhance the protection of potential war victims.

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37. *See* Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFFAIRS, Summer 1993, at 122, *available at* http://www.foreignaffairs.com/articles/48962/theodor-meron/the-case-for-war-crimes-trials-in-yugoslavia (discussing the complications involved with bringing a case before the ICTY).

38. *See U.N. Documentation: International Law*, DAG HAMMARSKJOLD LIBRARY RESEARCH GUIDES, http://research.un.org/en/docs/law/courts (last updated May 9, 2015) (listing all international courts and tribunals).

39. *See Criminal Justice*, ICTJ, https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice (last visited May 11, 2015).

While a comprehensive discussion of steps that might contribute to achieving this objective is beyond the scope of this article, three seem especially relevant. First, there should be a conscious and deliberate movement away from reliance on international tribunals in favor of national invocation of universal jurisdiction to bring NIAC war criminals to account. Second, the widely held assumption that civilian tribunals are the best, if not exclusive, forum to adjudicate accusations of IHL violations should be reconsidered. Finally, there should be a greater willingness to recognize and accept that acquittals in war crimes prosecutions are not necessarily manifestations of accountability failures or validations of the alleged misconduct.

International criminal tribunals have—and must continue to play—an important role in accountability for war crimes in both IACs and NIACs. However, most likely because of the high profile nature of the establishment and use of such tribunals in the past several decades, there seems to be a tendency to view these tribunals as the forum of choice for war crimes prosecutions. This is not only inconsistent with the International Criminal Court's (ICC) foundational complementarity principle;[40] it is also unfortunate. It is unfortunate because this assumption may be diluting the interest and willingness of individual States to leverage their own legal systems to bring war criminals to account.

Nor is the concept of complementarity—a concept central to the credibility of the ICC[41]—an adequate response to the concern that States are unwilling to leverage their criminal jurisdiction to contribute to NIAC accountability. Complementarity focuses almost exclusively on the interaction of the ICC and States vis-à-vis accountability for their own nationals.[42] While this concept anticipates that States will perceive a substantial interest in utilizing their own legal systems to adjudicate war crimes accusations

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40. *See Complementarity*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, http://www.iccnow.org/?mod=complementarity (last visited May 11, 2015).

> What was envisioned by the drafters of the Rome Statute was not simply a self-standing Court, but rather a comprehensive system of international justice, where the duty on States Parties to investigate and prosecute international crimes is clearly reinforced. Consequently, the International Criminal Court (ICC) is a court of "last resort" and will step in where national jurisdictions have failed to address international crimes.

Id.

41. *See id.*

42. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, THE DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: A MANUAL 119 (2013).

against their nationals, it does not address the broader issue of States exercising universal jurisdiction[43] to contribute to accountability for NIAC war crimes committed by individuals with whom they have no nationality or territorial connection.

Broader commitment to exercising this type of jurisdiction over individuals suspected of committing serious IHL violations during NIACs could contribute—potentially significantly—to mitigating the proverbial "flash to bang" time between violations and accountability. Enhancing prosecutorial efficiency will inevitably contribute to general deterrence, as individuals will perceive a more direct relationship between their wartime misconduct and potential sanction. While exercising universal jurisdiction over such individuals is politically and diplomatically sensitive, the substantial evolution of the internationally accepted scope of NIAC war crimes liability, most notably in the form of the crimes adopted in the ICC Statute, arguably mitigates these concerns. This enumeration supports the credibility of exercising universal jurisdiction by helping limit the potential variance between different States' prosecution of war crimes to matters of procedure rather than the substance of the crimes.[44] And, assuming State criminal process complies with fundamental international human rights obligations, no defendant should be denied a fair trial.

There are also substantial logistical and practical impediments to asserting universal jurisdiction in relation to NIACs that have no connection with the prosecuting State. But when an individual suspected of serious NIAC war crimes is found within the jurisdiction of another State, asserting universal jurisdiction will contribute to general deterrence by signaling to potential war criminals that their future jeopardy is not linked exclusively to the inclination of their own State to hold them to account. In an era when movement of peoples between national borders is more significant than ever before, States should devote greater attention to establishing the necessary domestic legal frameworks for exercising such jurisdiction.

This leads to the second issue: reconsidering the widespread assumption that war crimes should, or even must, be prosecuted by civilian tribu-

43. For an explanation of universal jurisdiction, see William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INTERNATIONAL LAW JOURNAL 907, 913–14 (2002), *available at* http://ir.lawnet.fordham.edu/cgi/view content.cgi?article=1888&context=ilj.

44. *See generally id.* at 918–22 (explaining the evolution of criminal liability for IHL violations committed by non-State actors, using Sierra Leone as an example).

nals.[45] While there is no legal or practical invalidity to the use of civilian tribunals to adjudicate war crimes accusations, there is also no reason to assume that military tribunals are unable to contribute to this accountability effort. Unfortunately, the widespread assumption that military jurisdiction cannot be exercised in a fundamentally fair manner has not only contributed to the assumed necessity of reliance on civilian tribunals, but has also led many States to eliminate military criminal jurisdiction altogether.[46]

This is unfortunate. Military tribunals have played a central role throughout history in war crimes accountability.[47] This is unsurprising, as IHL violations at their core involve breaches of standards of professional, disciplined and honorable military conduct. Military tribunals arguably possess a high level of competence to adjudicate accusations of war crimes precisely because they are composed of members of the profession of arms. When established pursuant to a legal framework that guarantees the accused individual will receive a fundamentally fair trial in adjudicating accusations of internationally accepted criminal proscriptions, these tribunals can make a significant contribution to accountability efforts. Indeed, their competence in the military operational art may actually contribute to greater overall efficiency in the adjudication process, and the credibility of outcomes.

Finally, advancing the interests of both conflict regulation and war crimes accountability means the international community must be more willing to accept acquittals when prosecuting alleged war criminals. There must be increased recognition and acknowledgment that while IHL plays a vital role in both the regulation of hostilities and accountability for war crimes, its function in these two domains is distinct.[48] Standards of compli-

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45. *See, e.g.*, Eugene R. Fidell, *International Commission of Jurists Condemns Pakistani Military Courts Legislation; NYT Coverage*, GLOBAL MILITARY JUSTICE REFORM (Jan. 11, 2015), http://globalmjreform.blogspot.com/2015/01/international-commission-of-jurists.html.

46. *See* Viara Z. Marshall, *Civilian Courts vs. Military Courts in the Democratic State*, NEW INTERNATIONAL LAW (Feb. 21, 2007), https://vzmarshall.wordpress.com/2007/02/21/civilian-courts-vs-military-courts-in-the-democratic-state/.

47. *See generally* LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE., RL32458, MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS (2004), *available at* http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=10339; then follow "English" hyperlink (summarizing the history of military tribunals in America).

48. *See* Geoffrey S. Corn, *Ensuring Experience Remains the Life of the Law: Incorporating Military Realities into the Process of War Crimes Accountability*, *in* THE GLOBAL COMMUNITY: YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE (forthcoming 2015) [hereinaf-

ance in the regulatory domain will not always align with standards to establish criminal culpability in the accountability domain.[49] Hence there will be situations where acts contrary to IHL's regulatory framework do not result in criminal liability. Failing to recognize this legal reality and conflating the function of the law in these distinct domains risks serious negative consequences.

First, prosecutors must be willing to bring hard cases to trial. Establishing guilt beyond a reasonable doubt, especially in relation to complex operational judgments, is a daunting task. If prosecutors and the States they serve are unwilling to accept the risk of acquittals, they will be inclined to gravitate towards only the most blatant war crimes. Because targeting judgments will rarely fall within this category, this may produce an "accountability gap" into which most conduct of hostilities incidents will fall. If enhancing protection against the harmful effects of highly destructive combat power, most notably artillery and other indirect fire systems, is an important objective of IHL compliance, these cases must be pursued when there is credible evidence indicating a violation. However, because evidentiary uncertainty will and must always favor the accused in a war crimes prosecution[50]—an axiomatic consequence of the presumption of innocence and the burden of proof—prosecutors and the broader international community must accept the difficulty in proving such cases and the inherent risk of acquittals.

Second, tribunals must be alert to the risk that the standard of proof to convict might be subtly diluted in order to facilitate outcomes. Proof beyond a reasonable doubt—the internationally accepted standard of proof required to rebut an accused's presumption of innocence[51]—must define the applicability of IHL standards in the criminal accountability domain. Tribunals adjudicating war crimes allegations, especially in relation to complex operational judgments, must be true to this standard and avoid the temptation to substitute a regulatory standard of compliance for this criminal axiom. Conflating the function of the law in these distinct domains risks undermining the credibility of war crimes outcomes, which in turn will undermine the deterrent effect of the law. In short, acquittals based on a failure to meet the high standard of proof beyond a reasonable doubt will

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ter Corn, *Life of the Law*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547328 (manuscript at 9–12).

49. *See id.*

50. *See id.* at 7–8.

51. *See id.* at 8.

contribute more to accountability than convictions based on an implicit dilution of that standard in order to offset the inherent uncertainty associated with operational—and especially targeting—judgments.

In many ways, the ICTY's controversial decision in *Prosecutor v. Gotovina*[52] illustrates these risks. From the perspective of those supporting General Gotovina, the Trial Chamber's determination to convict him led to a substitution of a regulatory standard for the criminal burden of proof of guilt beyond a reasonable doubt.[53] From the perspective of those supporting the Trial Chamber's judgment, the imposition of an acquittal by the Appeals Chamber signaled a problematic endorsement of the manner in which Gotovina employed indirect fires during Operation Storm.[54] There is probably merit in both critiques. Having been closely associated with the defense effort, I continue to believe that the acquittal was a proper application of a *criminal* standard of proof, that the totality of the evidence did not exclude every fair and rational hypothesis other than guilt. However, this should not be interpreted as an endorsement of the overall tactical and operational employment of indirect fires during that operation. From a regulatory perspective, it is relatively easy to identify measures that could have enhanced both the legality and efficacy of the use of these weapon systems. Ultimately, the case ought not to be viewed as a failure of the accountability process, but instead as an example of the complexity of translating regulatory targeting rules into the basis for a criminal conviction. Only by trying cases such as this, with all the inherent risks of acquittal, will complex targeting judgments be subjected to meaningful accountability.

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52. Prosecutor v. Gotovina, Case No. IT-06-90-A, Appeals Judgment (Int'l Crim. Trib. for the former Yugoslavia Nov. 16, 2012), *available at* http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf.

53. *See* Robert Chesney, *Transatlantic Dialogue on Int'l Law and Armed Conflict: Geoff Corn on Battlefield Regulation and Crime*, LAWFARE (Sept. 16, 2014), http://www.lawfareblog.com/2014/09/transatlantic-dialogue-on-intl-law-and-armed-conflict-geoff-corn-on-battlefield-regulation-and-crime/.

54. *See* Gary D. Solis, *The* Gotovina *Acquittal: A Sound Appellate Course Correction,* 215 MILITARY LAW REVIEW 78, 81 (2013), *available at* https://www.jagcnet.army mil/DOCLIBS/MILITARYLAWREVIEW.NSF/0/17ecb457e9eff74285257bf0005a5903/$FILE/By%20Gary%20D.%20Solis.pdf. Solis quotes former ICTY Chief Prosecutor Carla Del Ponte as saying, "I am shocked, very surprised and astonished because it is absolutely unbelievable . . . . I cannot accept that. I am really shocked because this is not justice." *Id.*

IV. ALLOWING CHILDREN TO PLAY WITH BIG KID TOYS—THE USE OF INDIRECT FIRES AND HIGH EXPLOSIVE PROJECTILES IN NIACS

The *Gotovina* case also provided an example of what is emerging as a focal point of NIAC IHL concern: protecting civilians from the effects of artillery and other indirect fire weapon systems.[55] Because NIACs frequently involve combat in densely populated areas, the question of how to enhance protection of civilians exposed to the risk of such methods and means of warfare is indeed particularly urgent. How the law evolves to address the use of these weapon systems in areas placing civilians at risk is therefore likely to increase as a focal point of international legal and public attention. The conflict in Ukraine—most notably destruction caused by the use of rocket artillery[56]—has been particularly significant in focusing attention on this issue.

More effective regulation of indirect fires in NIACs is inevitably complex and multi-faceted. Many observers believe that the status quo must be reconsidered, with an increasing number of experts calling for a complete prohibition against use of these weapon systems in populated areas.[57] Such use by belligerent groups in NIACs has unquestionably raised concerns about the ability of the law to balance the interests of military necessity and humanitarian protection. But a ban is not the solution. Any evolution of the law to respond to the risk to civilians created by indirect fires must be responsive to *both* military and humanitarian concerns; responsiveness that will be central to the credibility and efficacy of this evolution.

Any effort to improve the legal regulation of indirect fires in NIACs must begin with an important, although for many frustrating, acknowledgment: belligerents will always seek to leverage the means of warfare they possess to produce optimal tactical and operational effects. While this might seem obvious, proposals to completely ban the use of indirect fires in population centers reflect a distortion of the central balance of IHL in-

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55. *Id.* at 106.

56. *See* Oleg Orlov, *Ukraine's Forgotten City Destroyed by War*, THE GUARDIAN (London) (Jan. 7, 2015), http://www.theguardian.com/world/2015/jan/07/-sp-ukraine-pervomaisk-luhansk-forgotten-city-destroyed-by-war.

57. *See, e.g.*, Maya Brehm, *Use of Grad Rockets in Populated Areas: What Lessons from* Gotovina*?*, EJIL: TALK! (July 30, 2014), http://www.ejiltalk.org/use-of-grad-rockets-in-populated-areas-what-lessons-from-gotovina/.

terests.[58] No one can dispute the risk to civilians created by such use, but NIACs are an increasingly urban form of warfare for the simple reason that operational centers of gravity are routinely co-mingled with civilian populations.[59] Because of this, belligerents will seek—indeed often must seek—to leverage their combat power against targets mixed among the civilian population. In short, population centers are and will continue to be the tactical focal point of combat operations during both IACs and NIACs. So there is no question that efforts to enhance the civilian protection effect of IHL in relation to the use of indirect fires in population centers are laudable, but advocating for a complete ban is unrealistic and potentially counterproductive. The challenge is how to achieve this goal?

It should already be obvious that proposals to completely ban such use are not, in the opinion of this author, the answer. In fact, such an approach to advancing protection of civilians is so misguided that it risks doing more damage than good. Instead, the focal point of this effort should be on enhancing the efficacy of existing IHL targeting rules, with a particular emphasis on the targeting touchstone of reasonableness. By providing greater clarity to the substantive meaning of this term—especially in the context of NIACs and in relation to the use of indirect fires—commanders will be better informed about the nature of IHL constraints and the broader international community will be better able to credibly critique and, where appropriate, condemn use of these weapon systems.

A. Banning Use of Indirect Fires in Populated Areas

The harm inflicted upon civilians and civilian property by the use of indirect fires in populated areas—the central and decisive issue in the *Gotovina* case[60]—has generated a growing movement to restrict or prohibit such use.[61] This movement is motivated by not only the undeniable destructive

58. *See* Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEXAS INTERNATIONAL LAW JOURNAL 337, 366–70 (2012), *available at* http://www.tilj.org/content/journal/47/num2/Corn337.pdf.

59. *See, e.g.*, Raymundo B. Ferrer & Randolph G. Cabangbang, *Non-International Armed Conflict in the Philippines*, *in* NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 263, 273 (Kenneth Watkin & Andrew J. Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies) ("In their operations, communist guerillas are known to mingle with civilians.").

60. Prosecutor v. Gotovina, Case No. IT-06-90-T, Trial Judgment, ¶¶ 1169, 1172, 1175, 1188–89 (Int'l Crim. Trib. for the former Yugoslavia Apr. 15, 2011).

61. *See* Brehm, *supra* note 57.

effect of high explosive projectiles when used in populated areas, but also by the perception that the existing IHL targeting framework is too vague and uncertain to provide meaningful and effective regulation of these weapon systems.[62] One report proposes to generally limit the use of these weapons in densely populated areas.[63]

A complete prohibition against use of artillery and other indirect fire weapons in populated areas may seem appealing from the perspective of humanitarian protection, but it is unrealistic and potentially counter-productive. Banning the use of weapon systems that are widely available and operationally appealing in a particular context presents immense enforceability problems. Indirect fires offer belligerents immense tactical and operational value in any context. Although it is beyond the scope of this article to address this value in depth, suffice it to say that every military organization in modern history—both State and non-State—has sought to possess these weapons and to leverage their power during conflict; indeed, such weapon systems are colloquially known in the U.S. military as the "King of Battle."[64] This simple reality, coupled with the reality that indirect fire systems are routinely available to even emerging belligerent groups, makes it difficult to imagine how the international community could compel respect for a complete ban.

Enforceability is not the only consideration that undermines the credibility of the total or even partial ban approach. Overall, it is just one of four especially significant flaws with either option. First, unlike other means of warfare that have been subject to complete bans—most notably chemical weapons[65]—a ban on the *use* of indirect fire weapons in only certain contexts will not result in eliminating these weapons from the arsenals of potential belligerents. Instead, armed forces and other organized armed

62. *See* John Borrie & Maya Brehm, *Enhancing Civilian Protection from Use of Explosive Weapons in Populated Areas: Building a Policy and Research Agenda*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 809, 820–21 (2011), *available at* https://www.icrc.org/eng/assets/files/review/2011/irrc-883-borrie-brehm.pdf.

63. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 40–42 (2011), *available at* https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

64. BOYD L. DASTRUP, KING OF BATTLE: A BRANCH HISTORY OF THE U.S. ARMY'S FIELD ARTILLERY (1992), *available at* http://www.history.army.mil/html/books/070/70-27/cmhPub_70-27.pdf.

65. *See* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317.

groups will continue to develop, procure and use these weapons where permissible even if a partial ban were implemented. How would compliance with a "use only" ban be effective when armed forces would constantly have access to a weapon system that offers such immense potential operational advantage in any context? Indirect fires are used to produce effects; where these effects must be produced is always dictated by a range of operational considerations, including friendly capabilities and enemy disposition.[66] Restricting use in certain areas is inconsistent with this most fundamental military logic, because it makes one consideration dispositive and ignores the possibility that the most decisive targets might be located in the most restricted area immune from any other feasible alternative attack option. The proclivity of belligerents engaged in modern conflicts to use indirect fires in *both* populated and sparsely populated areas indicates that effects-based employment cannot turn on arbitrary geographic constraints, and demonstrates ultimately how unrealistic such an expectation is. In short, it is almost impossible to imagine that military commanders are going to forego the advantages offered by indirect fires when the alternatives are operationally ineffective. Instead, their instincts and the pressures of mission accomplishment will compel the exact opposite approach.

Second, a complete prohibition against the use of indirect fires in populated areas will almost inevitably invite disparate application between advanced and less-advanced armed forces, leading to a perception of inconsistent and hypocritical obligations. Modern militaries covet combat capabilities that allow for stand-off precision engagement of enemy targets. It is also a virtual axiom of contemporary asymmetrical warfare that they expect their less competent opponents to utilize every available technique to offset the inherent military advantage offered by advanced weaponry and target acquisition systems, which routinely includes co-mingling vital military objectives among the civilian population. Indeed, the need to effectively strike such targets while minimizing risk to civilians and civilian property has been a primary driving force behind the evolution of precision stand-off strike capability.[67]

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66. *See* Headquarters, Department of Army, FM 101-5, Staff Organization and Operations 5–7 (1997), *available at* http://www.fs.fed.us/fire/doctrine/genesis_and_evolution/source_materials/FM-101-5_staff_organization_and_operations.pdf.

67. Tim Cathcart, *Standoff Ethics: Policy Considerations for the Use of Standoff Weapons*, 2004 JOINT SERVICES CONFERENCE ON PROFESSIONAL ETHICS, http://isme.tamu.edu/JSCOPE04/Cathcart04.html.

Because of this, it is almost inconceivable that States that possess or aspire to these capabilities will be willing to commit to a complete ban on their use whenever they fall into a restricted populated area. Indeed, it is in these areas where the weapon systems will be considered to provide maximum operational advantage. And, based on the recognition that there will never be a limitless supply of precision munitions, coupled with the expectation that future warfare will be increasingly urban in nature,[68] it is equally unlikely that States will commit to even a limited or partial ban on the use of such weapons. However, in the improbable event some restriction on such weapons does gain momentum, it is almost inevitable these States will direct the regulatory focus not on the means of warfare, but the method of use. For example, a more limited approach might seek to restrict the use of "dumb" munitions in a populated area when fires are unobserved, or might seek to restrict the use of "dumb" munitions altogether.[69]

It is apparent, however, that these types of restrictions would favor technologically advanced armed forces. Because of this, other opponents would perceive them as inequitable, undermining the likelihood they would be adopted or respected. Any belligerent group unable to field the type of capability or employ the type of tactics allowing for the use of indirect fires in populated areas in accordance with technologically focused regulation would seek to leverage its more limited capability to achieve, as best it could, tactical and operational parity with the more advanced opponent. This has been a common aspect of contemporary warfare. Ultimately, the efficacy of a total or even partial restriction option is dubious because of these considerations: it is almost inconceivable that States fielding advanced military capabilities will forego the opportunity to employ precision stand-off strike capabilities; and it is equally inconceivable to expect that less advanced opponents will forego leveraging *all* available combat resources to achieve tactical and operational parity in response to a more advanced military opponent.

Implementing and enforcing a total or limited restriction option is the third significant flaw in this approach. Implementation will require clear

68. *See* Borrie & Brehm, *supra* note 62, at 812–17.

69. These types of "method" restrictions are more likely to be tolerable to States that routinely impose similar restrictions on their own forces as a matter of policy, for example through imposition of restrictive rules of engagement (although it must be noted that even these ROE-based restrictions, while common in contemporary conflict, are often qualified by allowing for exceptions when friendly forces are in direct contact and no other viable option is available to protect them).

definitions of both the weapons falling within the constraint and the context in which they are restricted. Starting with the context challenge, what qualifies as a "populated area"? This has always been a difficult question in relation to rules of engagement (ROE) -based restrictions on the use of indirect fires.[70] In the ROE context the military commander imposing the restriction is vested with the discretion to define "populated area" on a mission-by-mission basis,[71] but no such flexibility could feasibly be incorporated into a legal ban or restriction. Instead, that approach would require consensus on the definition of populated or civilian area.

Modern warfare is increasingly urban in nature, and this is especially true in the context of NIACs.[72] Non-State belligerent groups are likely to continue, and perhaps increase, reliance on close proximity to civilian population centers to sustain their efforts.[73] This will produce a high probability that operational centers of gravity in these conflicts will be in areas where civilians and civilian property are located. At what point would the presence of civilians or civilian property in proximity to lawful objects of attack trigger a restriction or prohibition on indirect fires or other high explosive munitions? If the answer is "anytime," the definition would essentially nullify the effectiveness of these weapon systems—when properly employed—to address what are frequently some of the most valuable targets in the conflict. If the answer is anything other than "anytime," it produces an inherent inconsistency, because it tolerates subjecting some civilians to risk while protecting others contingent on where they happen to be located at any given time. Thus, unlike the ROE approach, which tailors restrictions to the variables of mission, enemy, time, resources and overall civilian risk assessment, any complete prohibition would have to be founded on a "populated area" judgment, which will almost inevitably be overbroad and under-inclusive at the same time, including areas where the operational necessity for use of indirect fires objectively outweighs civilian

70. *See* John R. McQueney Jr., *MACV's Dilemma: Changes for the United States and the Conduct of War on the Ground in Vietnam in 1968*, *in* AN ARMY AT WAR: CHANGE IN THE MIDST OF CONFLICT 255 (John J. McGarth ed., 2005) (describing the uncertainty surrounding the definitions of "populated area" and "urban area" within the rules of engagement).

71. *See* INTERNATIONAL & OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 84–87 (2012) [hereinafter OPERATIONAL LAW HANDBOOK], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf.

72. *See* Borrie & Brehm, *supra* note 62, at 812–17.

73. *See id.*

risk based on existing targeting norms, and excluding less populated areas where risk to civilians is still significant.

Enforcement of such a prohibition will present equally complex challenges. As noted above, because such an approach will seek to restrict the use of weapon systems commonly included within the arsenal of most belligerent parties (as opposed to eliminating the weapon systems altogether), there will be immense pressure on commanders and other operational decision makers to employ these systems in response to perceived operational necessity. Expecting belligerents to forego the advantages offered by indirect fires and other high explosive munitions in populated areas is unrealistic, because the expectation fails to account for the military advantage consideration of the utilization equation. Where there is little military advantage to be gained by such use, there is, of course, a higher probability of compliance. But where the advantage lies in using these weapon systems, the temptation to use them will be immense, and compliance far less likely.

Enforcement of such a use prohibition will therefore present significant practical challenges, challenges that will be exacerbated whenever the prohibition is perceived as fundamentally inconsistent with military operational considerations. Compliance with rules related to means and methods of warfare is significantly enhanced when the effect of such rules is aligned with military operational logic. This balance is manifested in numerous provisions of customary and conventional IHL. Examples include military necessity,[74] military objective,[75] proportionality[76] and the authority to preventively detain enemy belligerents.[77] Even humanitarian obligations serve an underlying military utilitarian purpose. These protections are derived from the reasoned judgment of the profession of arms that unnecessary violence, destruction and suffering will ultimately undermine the strategic

74. *See* OPERATIONAL LAW HANDBOOK, *supra* note 71, at 11 ("military necessity justifies the use of force required to accomplish a lawful mission").

75. *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] ("Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.").

76. *See id.*, art. 57 (requiring parties to a conflict to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated").

77. *See* GC III, *supra* note 8.

purpose of armed conflict: restoration of peace. Because armed forces are primarily responsible for effective IHL implementation, IHL compliance will invariably be facilitated where the dictates of the law comport with military operational considerations.

IHL is replete with examples of this symmetry between humanitarian regulation and military operational logic. A quintessential example is the prohibition against the infliction of superfluous injury or unnecessary suffering.[78] This prohibition is a fundamental principle of the law, tracing its roots back to the St. Petersburg Declaration of 1868.[79] By prohibiting the calculated infliction of superfluous suffering or injury, the principle advances not only a humanitarian purpose, but also the military logic reflected in the concept of economy of force. There is no military value in wasting resources for the purpose of exacerbating the suffering of an opponent already rendered combat ineffective, and this principle of law is consistent with such logic. Another example is the rule restricting attacks only to military objectives. While there may be definitional uncertainty on the fringes of the rule when it is operationally applied, the underlying premise is militarily sound: limiting the application of combat power to those persons, places or things that contribute to achieving operational objectives. A resource conscience commander should instinctively avoid wasting resources on targets of no operational or tactical significance, and this rule is consistent with that logic.

Most targeting rules fall within the scope of this symmetry because they facilitate employing combat power in a manner that contributes to the prompt submission of enemy military forces, while restricting the use of such power when the effect will make little or no contribution to that objective. As a result, well-trained commanders and properly led subordinates

78. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 70 (Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering), (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), *available at* https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70 (last visited Jan. 15, 2015) ("The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited."); Institute of International Law, Oxford Manual of the Laws of War on Land art. 9(a) (1880), *reprinted in* THE LAWS OF ARMED CONFLICTS 29 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter Oxford Manual] ("It is forbidden [t]o employ arms, projectiles, or materials of any kind calculated to cause superfluous suffering, or to aggravate wounds . . . .").

79. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 (stating as its object the barring of the "employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable").

are more likely to plan and conduct combat operations in an IHL compliant manner. However, this type of instinctive compliance is far less likely when commanders perceive the impact of an IHL rule to be fundamentally incompatible with basic military logic because it significantly compromises the ability to bring enemy military forces into submission.

A total ban or even significant restriction against the use of indirect fires and other high explosives in populated areas will fall into the latter category, and almost certainly be perceived as attenuated from military logic. This is because use of indirect fires and other high explosives will often be assessed as a weapon system to produce essential—if not decisive—effects against enemy forces. As a result, effective enforcement will be much more challenging than it is in relation to the existing IHL targeting framework. And, considering that the record of compliance with even this framework is less than ideal, the prospects are not good. This will likely shift the implementation focus to post-hoc accountability. But this will only add to the already substantial challenge of reliance on war crimes prosecutions as a primary focal point for NIAC IHL compliance.

The fourth significant flaw in the total or significant ban approach is that it may actually be counterproductive, in fact increasing risk to civilians and civilian property. If such a rule were adopted, it would create a very high probability that operations in populated areas would involve ground maneuver and close combat. FIBUA (Fighting in Built Up Areas) is the current U.S. military doctrinal term for these types of operations, which are also frequently referred to as MOUT (Military Operations in Urban Terrain).[80] It is precisely because such operations pose immense risk to both friendly forces and civilians that commanders are trained to avoid this method of warfare whenever operationally and legally feasible.[81]

Indeed, it is probably no exaggeration to characterize this avoidance principle as an axiom of military operational art. This is because engaging an enemy in built up or urban terrain is considered among the most difficult combat situations a commander may encounter. Such operations cede to the defender the natural advantage provided by the use of the urban ter-

80. Headquarters, Department of the Army, FM 3-21.10, The Infantry Rifle Company, at Glossary-2 (2006), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_21x10.pdf (defining FIBUA); Headquarters, Department of the Army, FM 6-20, Fire Support in the Airland Battle, at Glossary-7 (1988), *available at* http://www.bits.de/NRANEU/others/amd-us-archive/fm6-20(88).pdf (defining MOUT).

81. *See* Chairman, Joint Chiefs of Staff, Joint Publication 3-60, Joint Targeting, at I-8 (2013) [hereinafter Joint Pub. 3-60].

rain for cover, concealment and overall tactical advantage.[82] The built up environment degrades the effectiveness of fires and maneuver.[83] It also creates an extremely high risk to civilians and civilian property in area of hostilities, which adds an undesired element of uncertainty into the target engagement process.[84]

History is replete with examples from which this principle is derived. From Stalingrad to Hue to Fallujah, built up areas have historically been considered the most undesired terrain on which to engage an enemy with ground combat power.[85] Nonetheless, for an attacking commander, there is an unfortunate inverse relationship between built up areas and defensive operations. Because of the difficulty of dislodging forces from such areas, and the proximity to essential resources a defending commander derives from built up areas, defenders obtain a force multiplication benefit from emplacing positions in such areas.

Bypassing such areas is not always feasible, and when absolutely necessary assault into built up areas may have to occur. However, if alternatives to ground assault are viable, a commander would be derelict in not considering and ultimately employing them. For example, a commander may choose to use indirect fire assets to disrupt enemy forces in a built up area during bypass operations, or to fix them in the area so that they cannot endanger friendly forces during the bypass. Or, a commander may need to disrupt command and control and/or sustainment efforts emanating from a built up area while concentrating forces on other objectives outside that area. These are just two simplistic examples of the legitimate military advantage that might result from using fires as an alternative to ground maneuver to target enemy capabilities in built up areas; others abound. Depriving commanders of the indirect fires option will almost certainly result in a significant increase in FIBUA operations. Because of the risk to civilians inherent in this alternative, the proverbial cure may actually be worse than the disease.

While adding a new rule to the existing IHL targeting framework to enhance protection of civilians and civilian property from the effects of indirect fires and high explosives is, therefore, ill advised, the goal of enhancing civilian protection remains valid. A more effective approach is via-

82. *See* Joint Chiefs of Staff, Joint Publication 3-06, Joint Urban Operations, at I-7 (2013), *available at* http://www.dtic.mil/doctrine/new_pubs/jp3_06.pdf.

83. *See id.* at I-6, I-7.

84. *See id.* at I-6.

85. *See id.* at I-3.

ble: enhance the humanitarian effect of the existing IHL targeting framework. And the focal point of this approach is one word: reasonable.

B. Rethinking the Element of "Reasonableness" in the Implementation of IAC-Based Targeting Norms

As noted above, the *Tadić* judgment concluded that many IHL treaty rules developed for the regulation of IACs had over time "migrated" to the realm of NIACs.[86] Because of the overall paucity of targeting regulation included in the NIAC treaty regime—Common Article 3 to the four Geneva Conventions[87] and Additional Protocol II[88]—this conclusion was widely endorsed as a rational and justifiable approach to ensure the effective regulation of methods and means of warfare in the NIAC domain. And this has indeed been a beneficial effect of the decision: the rule migration concept has been instrumental in filling the vacuum of NIAC legal regulation. It also provided support for the International Committee of the Red Cross's conclusion that many IAC-based targeting rules apply to NIAC as customary international law,[89] a foundation for including targeting violations among the ICC offenses applicable to NIACs. The conclusion that these rules apply to NIACs is reflected in other authoritative sources, such as *The Manual on the Law of Non-International Armed Conflicts*.[90]

However, the *Tadić* opinion offered no insight into how the legal standards for targeting decisions should translate from one domain of armed conflict to the other. At the core of lawful targeting is the touchstone of reasonableness, a touchstone that defines the proper application of the specific targeting rules. This is only logical, as these rules almost always involve the exercise of command or leadership judgment within the frame-

86. *See supra* text accompanying notes 2–5.

87. *See* GC I–IV, *supra* note 8, art. 3.

88. *See* AP II, *supra* note 9.

89. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 175, 189 (2005). Some examples of conduct of hostilities rules applicable to NIAC include: prohibitions of attacks on civilians and on objects indispensible to the lives of civilians; prohibitions of starvation and of the forced movement of the civilian population; and certain obligations to the wounded, sick and dead and to women and children. *Id. at* 188.

90. *See* MICHAEL N. SCHMITT, CHARLES H. B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 3 (2006), *available at* http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf.

work of a legal standard: a judgment that a nominated target qualifies as a lawful military objective; a judgment that the use of precautionary measures is not feasible under the circumstances; a judgment that the anticipated military advantage from an attack outweighs the anticipated risk of excessive civilian injury or destruction of civilian property.[91]

Because reasonableness is central to compliance with IHL's targeting rules, providing greater clarity on the substantive meaning of this touchstone will contribute to effective implementation of the law's objectives. Unfortunately, its uncertain meaning continues to undermine the effectiveness of the law two decades after the *Tadić* decision. This uncertainty is especially problematic in NIACs. Unlike IACs, these conflicts often involve belligerent groups that are not extensively trained and organized. Training and organization are central to fielding a disciplined force, which in turn contributes to IHL compliance.[92] Thus, the nature of the groups engaged in NIACs often dilutes IHL compliance confidence. And, because, as noted above, IHL compliance incentives are simply not as significant in the NIAC context as they are in the IAC context, the reduced expectation of compliance competence becomes even more problematic.

IHL compliance in NIACs requires greater clarity on the meaning of reasonableness as it relates to IHL targeting compliance, and the relationship between the reasonableness of weapon employment and the preparation of subordinates for their combat tasks. As I attempted to explain in a previous article, it is insufficient to state simply that targeting judgments must be reasonable;[93] that axiom is beyond question. What is far less certain is what indicates whether a particular judgment is, in fact, reasonable? For example, what quantum of information justifies a reasonable judgment of lawful military objective? Or what level of training justifies a judgment that subordinate forces are reasonably prepared to execute their combat mission in accordance with the law?

This clarity is particularly important in relation to the *Tadić*-based targeting rule migration. Extending IAC-derived targeting rules to NIACs must also involve extending the IAC-based compliance related to these

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91. *See* Joint Pub. 3-60, *supra* note 81, at I-7.

92. *See* Heike Krieger, *A Turn to Non-State Actors: Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood* 9, 12–13 (SFB-Governance Working Paper Series, No. 62, 2013), *available at* http://www.peacepalacelibrary.nl/ebooks/files/371505569.pdf.

93. *See* Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component*, 77 BROOKLYN LAW REVIEW 437 (2012).

rules. It is here where greater attention offers genuine potential to clarify the standard of reasonableness applicable to NIAC targeting decisions, and, in turn, enhance protection of civilians and civilian property from the harmful effects of indirect fires and other high explosives. More specifically, "reasonableness" should include a requirement that NIAC belligerents—most importantly armed group leaders—comply with the same practical aspects of law implementation as their IAC counterparts. This will clarify the expectation of lawful use of highly lethal combat power, and provide a more objective basis for accountability when these standards are ignored.

IAC targeting norms were not developed in a vacuum. Instead, they were informed by the practice of States that contributed to the evolution and adoption of these rules.[94] That practice almost always involved operations by regular armed forces. While levels of training and tactical competence vary widely from one nation to another (and even from one military unit to another), the underlying premise of any national military force is that it is organized, trained and prepared to execute its combat function. The capacity to effectively employ the weapon systems fielded by the State is central to this premise.[95] Indeed, training to develop tactical competence in the use of weapon systems is one of the unifying aspects of all military training.[96]

IAC targeting rules were built upon this expectation. In other words, the rules anticipated that those employing the weapon systems regulated by the law would be at least minimally competent in their use. This is important, because employment competence is obviously linked to compliance with IHL targeting rules. Competence also involves leaders preparing subordinates to execute their tactical mission in accordance with IHL expectations, which, in relation to indirect fires, means training subordinates to mass their explosive effects on military objectives and minimize the collateral effects.

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94. *See* Oxford Manual, *supra* note 78, preface, at 30 ("By [codifying the rules of war derived from State practice], [it is] rendering a service to military men themselves . . . .").

95. *See* JAMES C. CROWLEY ET AL., CHANGING THE ARMY'S WEAPON TRAINING STRATEGIES TO MEET OPERATIONAL REQUIREMENTS MORE EFFICIENTLY AND EFFECTIVELY 1 (2014), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR448/RAND_RR448.pdf ("The ability of soldiers to engage the enemy is fundamental to operational success. As a result, the U.S. Army devotes considerable unit effort and resources to weapon training.").

96. *Id.*

Targeting reasonableness should, therefore, be linked to competence in the tactical employment of lethal weapon systems and the preparation of forces to utilize these weapon systems in an IHL compliant manner. The expectation that lethal indirect fires will be employed in accordance with these conditions should be recognized as a component of reasonableness. Reasonableness is always assessed contextually; it is therefore necessary to consider the context in which targeting decisions are made. But this does not reduce the reasonableness assessment to a purely subjective standard. Instead, commanders are held to an objective standard of reasonable conduct assessed by considering the context in which the judgment was made. This assessment methodology supports imposing IAC-based employment standards on NIAC belligerents. While the unique tactical and operational considerations in each particular conflict will inform the assessment of reasonableness, that assessment must ultimately reflect an objective standard of tactical competence, and, because the rules that frame lawful application of lethal combat power are derived from the law developed in the IAC domain, the IAC objective standard of tactical competence should accompany that migration.

Indeed, evidence that a commander diligently prepared subordinate forces in both tactical competence *and* an understanding of, and commitment to, IHL compliance during mission execution is probative of the reasonableness of the ultimate attack decisions. Unfortunately, the *Tadić* opinion never emphasized that the migration of the IHL rules from one domain of armed conflict to the other necessitated a concurrent migration of IAC standards of reasonableness.[97] Doing so is long overdue.

Considering the training, competence, and preparation of personnel entrusted with lethal combat power as a factor when assessing the reasonableness of targeting judgments provides a rational basis to prohibit the use of indirect fire systems by untrained or poorly trained belligerent groups who have possession of such weapon systems, a common occurrence in NIACs. It will also signal to leaders of these groups that training is an internationally demanded pre-condition to utilization of such weapon systems, and those leaders who authorize employment by poorly or untrained subordinates risk criminal responsibility for breaching their command responsibility. And, because external State sponsors frequently provide these systems to non-State belligerent groups, it might lead these sponsors to devote great effort to train end users on the proper employment of these

97. *Tadić*, *supra* note 2.

weapon systems. Furthermore, it might also enhance international legal accountability for the providing State, especially where it is foreseeable that the recipient group is unprepared to employ the weapon system in accordance with IHL obligations.

Linking reasonableness with IAC-based standards of tactical competence will also significantly contribute to accountability. This is because the objective component of the assessment of targeting reasonableness will be based on IAC competence standards.[98] By subjecting NIAC targeting to these IAC standards, the law will signal to NIAC belligerents that they may only utilize proverbial "grown up" means of warfare when they have developed maturity in competence to employ those weapons in accordance with "grown up" standards. It will also facilitate the critique of lethal targeting in NIACs by providing a more commonly adhered to baseline of objective competence.

Focusing on employment competence will also increase the relevance of military operational expertise in defining and assessing the reasonableness of targeting judgments in NIACs. This will enhance universal recognition and understanding of the substantive scope of regulatory rules. While establishing the legal framework for targeting will always necessitate reliance on legal expertise,[99] assessing compliance with the law must include the contribution of military *operational* experts. The perspective of such experts adds the proverbial flesh to the bones of the legal framework, providing the objective "societal" standard of conduct against which to judge a particular incident.

The relevance and significance of military operational experts in the development and assessment of the concept of reasonableness in relation to lethal targeting has, unfortunately, been generally overlooked. During the past several decades, legal experts have assumed an increasingly central role in this definitional process.[100] However, even when these experts possess some background in military operational art, rarely will they possess a level of expertise analogous to military personnel who have devoted their profession to the practice of military operations. Assessing what qualifies as a reasonable attack judgment within the meaning of IHL targeting law must reflect a synthesis between legal and operational expertise, and

98. *See* Corn, *Life of the Law, supra* note 48, at 9–12.

99. *See* OPERATIONAL LAW HANDBOOK, *supra* note 71, at 377. *See also* AP I, *supra* note 75, art. 82 ("The High Contracting Parties at all times . . . shall ensure that legal advisors are available, when necessary . . . .").

100. *See* Corn & Corn, *supra* note 58, at 342.

providing a more significant role for operational experts will contribute to this objective.

Unfortunately, the lack of clarity on the meaning of targeting reasonableness has contributed to what I have characterized elsewhere as "effects-based analysis."[101] Because the effects of combat operations are much more easily visualized and critiqued than is the combat decision-making process, it is almost inevitable that investigations, and even prosecutions, will increasingly focus on destructive targeting effects. This effects-based focus, however, is inconsistent with fundamental tenets of the law, which demand reasonable combat judgments, which must be assessed contextually, and not based on retrospective analysis. While effects-based critique and condemnation may be an inevitable reality of the intersection of war, media and the public conscience, it must not become the standard by which military decision makers are judged for their operational and tactical decisions. The risk of effects-based adjudications may be mitigated when the alleged war crimes are so blatant that there is no meaningful debate over the objective reasonableness of command judgments. However, as allegations of battlefield misconduct trend away from the blatantly unlawful to complex tactical and operational judgments, this risk is substantially more palpable.

Effects are probative in that they provide circumstantial evidence that is relevant to assess targeting reasonableness. But they are not conclusive. Effects must be considered along with the totality of all other relevant information when assessing targeting legality, such as tactical competence, training, preparation and other indications of good faith commitment to IHL compliance. This aspect of the legality critique is not within the exclusive, or perhaps even primary, domain of international legal experts. Military operational experts are, in contrast, highly competent to offer insight into how these aspects of mission execution reflect on the overall legality assessment. Emphasis on the relationship between these aspects of military operations and the ultimate touchstone of reasonableness will enhance the contributions of such experts, and, over time, provide greater clarity to "what right looks like."

C. The Ukrainian Illustration

Two aspects of the armed conflict in Ukraine illustrate the potential benefit of extending operational practice standards and IHL targeting rules to NI-

101. *See* Corn, *Life of the Law, supra* note 48, at 2.

ACs: the Malaysian Air aircraft shoot down and the use of indirect fires in populated areas.

By most credible accounts, Ukrainian rebels, utilizing an advanced air defense missile system, were responsible for the shoot down of Malaysian Air Flight 17.[102] In the unlikely event any of the responsible actors are brought to trial for this tragedy, they will not be able to credibly assert that they engaged a lawful military target. Instead, it is likely they will respond to any accusation of unlawful attack by asserting they made a reasonable error in judgment: they *believed* the airliner was a lawful object of attack, a belief that, although mistaken, was reasonable under the circumstances due to the use of the same airspace by Ukrainian military aircraft.

There is evidence to support the conclusion that this was a deliberate attack on a known civilian airliner;[103] evidence which could lead to a relatively easy finding of an unlawful deliberate attack on civilians and civilian property. But if the question of reasonable mistake were to arise, the relative tactical competence and preparation of the forces employing the weapon system should play an important role in this assessment. In other words, merely utilizing the system without sufficient training and preparation could itself establish the unreasonableness of the employment judgment. This is because this type of mistake is a foreseeable consequence of fielding advanced combat capability without properly training forces to use that capability in compliance with IHL obligations. And how would the adequacy of the pre-employment preparation be assessed? Ideally by comparing the actual preparation with the preparation utilized by professional military forces engaged in an IAC. Ultimately, the reasonableness of any alleged targeting error should be significantly influenced by the extent of the difference between these two standards.

Use of indirect fires, most notably GRAD missiles, in densely populated areas provides another illustration of the relevance of IAC employment standards in the assessment of targeting legality. Reports indicated that both rebel and government forces have periodically fired GRAD surface-to-surface missiles with high-explosive warheads into densely populated areas.[104] As with the Malaysian Air shoot down, a clear violation of the IHL

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102. Catherine E. Shoichet & Ashley Fantz, *U.S. Official: Missile Shot Down Malaysia Airlines Plane*, CNN (July 18, 2014), http://www.cnn.com/2014/07/17/world/europe/ukraine-malaysia-airlines-crash/.

103. *Id.*

104. *Ukraine: Unguided Rockets Killing Civilians*, HUMAN RIGHTS WATCH (July 24, 2014), http://www.hrw.org/news/2014/07/24/ukraine-unguided-rockets-killing-civilians.

rule of distinction would be established by proof these attacks were deliberately directed at civilians and/or civilian property. It is more likely, however, that they were directed at what the attacking commander determined were military objectives located in the midst of the civilian population. Where this was the case, the assessment of legality will turn on the reasonableness of several critical judgments.

First, there is the judgment that the target would qualify as a lawful military objective.[105] Second, there is the judgment that it would not be feasible to use an alternate means or method of warfare that would reduce civilian risk and achieve the intended tactical effect.[106] Third, there is the judgment that the anticipated incidental civilian harm would not be excessive compared to the anticipated military advantage.[107] And finally, there is the judgment that use of surface-to-surface missiles in that context would not be inherently indiscriminate, i.e., that the weapon could be directed to a specific military target with sufficient precision.[108]

These attacks have caused substantial harm to civilians and civilian property. Indeed, their adverse effects have contributed to the momentum building for completely banning the use of such weapons in populated areas. But as noted above, "effects-based condemnation" may be appealing, but is inconsistent with the IHL targeting regime. Reasonableness must be the critical focal point to assess compliance with this regime. The target identification and engagement procedures and training standards for weapon systems operators used by regular armed forces engaged in IACs provide a useful baseline for this assessment. This baseline is objective, because it is grounded in the practice of armed forces equipped with this type of lethal weaponry. By relying on military *operational* expertise, it is also a feasible baseline to develop during investigations and criminal prosecutions. Finally, it is a credible baseline, because condemnation for use—stemming from an objectively defective judgment related to any of the key legal questions implicated by the use of this weaponry—would be based on deviation from accepted operational practices. Importantly, this would include the reasonableness of unleashing these weapon systems without adequate target legality assessment, training of operators and command oversight of mission execution.

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105. For an overview of the military targeting process and its relationship to LOAC, see Corn & Corn, *supra* note 58.

106. *Id.*

107. *Id.*

108. *Id.*

V. CONCLUSION

Armed conflicts are by their very nature among the most brutal collective endeavors known to human society. But all is not fair in war, and conflict regulation is deeply rooted in international law. During the past century, this law has seen the balance of interests between State sovereignty and protection of humanity shift gradually, yet continuously, in favor of the protection of war victims. And, perhaps because non-international armed conflicts have become the predominant form of warfare, this trend inspired the extension of conflict regulatory norms originally developed for inter-State warfare into this pervasive domain of brutal hostilities.

This extension has been essential to build a foundation for both regulation of these conflicts and accountability for participants whose conduct transgresses international legal standards. Unfortunately, the aspiration behind this extension—to enhance the protection of war victims by demanding respect for core conduct of hostilities rules during any armed conflict—has been frustrated by an overall failure of compliance. The track record of international humanitarian law violations—brutality, excessive uses of force, unlawful targeting and other violations of basic international humanitarian law obligations—associated with these armed conflicts is so pervasive that it almost numbs international reaction. Regrettably, the excesses in the Ukrainian conflict are not exceptional, but just the most recent example of the continuing divide between the NIAC conflict regulation aspiration and reality.

Improving this state of affairs is essential, but the solution is not new law, or arbitrary and unrealistic prohibitions on the use of widely available combat capabilities such as artillery and rocket assets. Instead, incentives for compliance must be reconceived, disincentives for non-compliance enhanced and standards of compliance with conduct of hostilities norms better defined, most notably how compliance with the central touchstone of reasonableness in targeting judgments should be assessed. This article has suggested several approaches along these lines.

New approaches are needed to close the gulf between the aspiration of more effective NIAC regulation that is central to the *Tadić* decision, and the reality of humanitarian suffering that continues to define these conflicts. There is, however, no easy solution to this problem of international law non-compliance during NIACs, and these suggestions are no panacea. Yet they are responsive to the realities of these all-too-common armed

conflicts, and the axiom that it is always error to reinforce failure. If nothing else, it is hoped they will stimulate new ideas that may ultimately produce a reality consistent with aspiration.