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Humanitarian Logic and the Law of Siege: A Study of the *Oxford Guidance* on Relief Actions

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I. INTRODUCTION

It is not widely known that the largest, longest-running military action of the American Revolutionary War was a siege that did not take place in the territory of the future United States.¹ It did not take place in the Western Hemisphere, it was not led by an American general, and it did not involve forces of the American Continental Army.² The distinction belongs to the 1779 siege of Gibraltar at the western entrance to the Mediterranean Sea.³

Eager to avenge and reverse losses of colonial territory, France and Spain recognized American independence and entered the war with Great Britain in 1778 and 1779, respectively.⁴ Both continental powers provided significant arms and financial support to the Americans throughout the conflict. Both also engaged in pitched battles with the British, none as storied as the epic 1,323-day siege of the British Gibraltar garrison.⁵

The siege began in September of 1779 when Spain launched a naval blockade against the British-held outpost. Although he fielded considerable troops and artillery, the Spanish commander resolved to starve rather than to assault the formidable British garrison.⁶ Through October, the Spanish force effectively prevented any major resupply by land or sea.⁷ By the winter of 1779, the garrison's food and cooking fuels ran short.⁸ Scurvy set in

1. ROY ADKINS & LESLIE ADKINS, GIBRALTAR: THE GREATEST SIEGE IN BRITISH HISTORY 335–38 (2017).

2. During the American Revolutionary War, John Jay, in his capacity as Minister Plenipotentiary to the Court of Spain, sent the Virginian, Louis Littlepage to Spain, who reportedly observed a portion of the siege of Gibraltar from a Spanish gunboat. See Virginia Johnson, *General Lewis Littlepage: Soldier, Spy, and King's Confidant, 1762–1802*, LIBRARY POINT (Sept. 5, 2018), <https://www.librarypoint.org/blogs/post/lewis-littlepage/> (citing CURTIS CARROLL DAVIS, *THE KING'S CHEVALIER: A BIOGRAPHY OF LEWIS LITTLEPAGE* (1961)). Although Littlepage later became a general, he did not attend the Gibraltar siege in that capacity or command American military forces there. *Id.*

3. ADKINS & ADKINS, *supra* note 1, at 10.

4. Whether the war between Spain and France on one hand and the British on the other is best characterized as a feature of the American Revolution or a separate armed conflict is a matter of perspective. Hostilities between these European belligerents, of course, preceded the American conflict, most immediately in the Seven Years War from 1756 to 1763.

5. ADKINS & ADKINS, *supra* note 1, at 4.

6. SAMUEL ANCELL, *A CIRCUMSTANTIAL JOURNAL OF THE LONG AND TEDIOUS BLOCKADE AND SIEGE OF GIBRALTAR FROM THE 12TH OF SEPTEMBER, 1779 TO THE 23RD DAY OF FEBRUARY, 1782*, at 9 (Liverpool, Charles Wosencroft 1784).

7. *Id.* at 13.

8. *Id.* at 20.

among the besieged British soldiers and food rationing extended to civilians, including spouses and children trapped with the garrison.⁹

On January 17, 1780, the tide of the siege briefly turned when a relief fleet dispatched from England ran the Spanish blockade.¹⁰ Warships and supply boats poured soldiers and provisions into the garrison through early February 1780.¹¹ The convoy saved the garrison from near-certain surrender.¹² On the relief fleet's departure, however, the siege resumed and extended into summer. Within weeks, physical isolation reduced the garrison to subsistence on salted meat and exorbitantly priced supplies smuggled through the blockade by North African, Portuguese, and even Spanish merchants.¹³ By autumn, the defenders mounted civilian evacuations on perilous runs through the blockade to reduce demand on dwindling supplies.¹⁴ When the besiegers intercepted these efforts, they forced those captured to return to Gibraltar.¹⁵ By the second winter of the siege, deprivation and disease again tormented the defenders and remaining civilians. Desertions mounted among the British force as provisions dwindled and hopelessness set in.¹⁶ By April 1781 Spanish advances finally brought the British garrison into effective artillery range, and the succeeding bombardment inflicted horrendous casualties and damage.¹⁷

In response, London dispatched a second relief fleet.¹⁸ Twenty-nine ships of the line escorted one hundred supply transports into Gibraltar's port, again saving the garrison.¹⁹ The relief fleet withdrew with the majority of Gibraltar's one thousand civilians aboard, greatly extending the remaining defenders' capability to resist starvation. By late 1781 and early 1782, the British depended on Portuguese merchant ships regularly running the Spanish blockade to provide food, as well as intelligence on the surrounding force.²⁰ In conjunction with British raiding sorties against the Spanish siege

9. ADKINS & ADKINS, *supra* note 1, at 155–61.

10. ANCELL *supra* note 6, at 29–30; ADKINS & ADKINS, *supra* note 1, at 108–13.

11. ANCELL *supra* note 6, at 36.

12. F. J. STEPHENS, A HISTORY OF GIBRALTAR AND ITS SIEGES 257 (London, Provost 1870).

13. ANCELL *supra* note 6, at 38–50; STEPHENS, *supra* note 12, at 259.

14. ANCELL *supra* note 6, at 66, 68–69.

15. *Id.*

16. *Id.* at 93, 96, 97, 99, 104, 125, 161.

17. *Id.* at 124.

18. ADKINS & ADKINS, *supra* note 1, at 185–88.

19. *Id.*; STEPHENS, *supra* note 12, at 261.

20. ANCELL *supra* note 6, at 163, 192, 195–96, 199.

works, their support extended the siege significantly.²¹ Still, a passage from the letters of a British officer captures the intensity of the besieged population's suffering:

[Y]ou find Death busy—the lamp of life faintly burns—your friends are absent—the foe shews no tenderness—you sigh, weep, groan, pray, beg, intreat, and in the bitter agonies implore Almighty god to be merciful to a poor sinner—life hangs on a hair—the cordage of your heart cracks, and you drop into an unknown world where the secrets of all hearts are disclosed.²²

Through the history of warfare, human suffering has seldom been more dire than during sieges. Although bombings, envelopments, and other forms of maneuver often deprive civilian populations of life-sustaining support, no military operation does so as drastically, as deliberately, or as systematically as siege. Sieges attempt to achieve through sequestration and deprivation what might otherwise require enormously costly assaults or bombardments. By their very nature, sieges involve a stark, deliberate, and sustained conflict between the interests of humanity and military necessity. The military imperative of effecting and maintaining complete physical, psychological, and, in modern operations, electronic isolation clashes directly with the basic humanitarian needs of civilian populations trapped with besieged forces. It is unsurprising that sieges have produced some of war's harshest and most tragic tales of human suffering.

A comparably harsh legal regime has accompanied siege. Formerly, sieges licensed merciless looting and killing of defeated military forces and civilian populations alike.²³ While the practice of pillage is no longer lawful, modern siege law still tolerates deliberate infliction of extreme deprivation. Besieging forces have also been free to reject passages of humanitarian relief without explanation. States have consented to restraints on their prerogative to deny offers of relief under only the narrowest conditions.²⁴ While all law of war rules and principles reflect a balance between humanity and military

21. *Id.* at 172–79.

22. *Id.* at 101.

23. JOSH LEVITHAN, ROMAN SIEGE WARFARE 205 (2013) (describing “thorough plunder” as the primary activity of the post-siege setting in Roman war); Geoffrey Parker, *Early Modern Europe*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 48 (Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994); MAURICE KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 120–22 (1965).

24. *See infra* text accompanying note 135.

necessity, few skew so drastically to the former as the law of siege. At a time when legal vindication of humanitarian interests during war is ascendant, the conventional law of siege may seem an outlier full of glaring gaps in logic.

Since 2013, organs of the United Nations (UN) have consistently deplored conditions endured by civilians trapped by armed conflicts, especially by siege operations in Syria.²⁵ The UN Security Council has specifically condemned the belligerent parties' unwillingness to permit or facilitate delivery of humanitarian aid to besieged populations.²⁶ Moved by rampant human suffering among encircled and isolated civilians, the UN commissioned experts to report on legal issues associated with humanitarian relief operations. Two Oxford University professors and a consulting group of legal experts studied and analyzed belligerent parties' obligations toward relief actions under international law. Their report combines incontrovertible descriptive truths of human suffering with clever legal interpretations and laudable humanitarian aspirations. Where conventional accounts of the law of siege have portrayed a consent-based system in which belligerents may, for the most part, freely agree to or reject offers of relief,²⁷ the *Oxford Guidance* depicts a regime wherein States may not arbitrarily reject relief actions and must offer reasoned justifications for turning away offers of humanitarian assistance to besieged populations.²⁸

25. See, e.g., S.C. Res. 2401 (Feb. 24, 2018); S.C. Res. 2328 (Dec. 19, 2016); U.N. Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 2139 (2014)*, ¶ 23, U.N. Doc. S/2014/208 (Mar. 24, 2014).

26. S.C. Res. 2139 (Feb. 22, 2014); S.C. Res. 2118 (Sept. 27, 2013); S.C. Res. 2043 (Apr. 21, 2012); S.C. Res. 2042 (Apr. 14, 2012).

27. UNITED KINGDOM MINISTRY OF DEFENCE, MANUAL OF THE LAW OF ARMED CONFLICT ¶ 9.12.1 (2004) [hereinafter UK LOAC MANUAL] (emphasizing that relief to besieged areas is contingent on belligerent consent); U.S. DEPARTMENT OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 44a (1956) [hereinafter THE LAW OF LAND WARFARE] (“The commander of the investing force has the right to forbid all communications and access between the besieged place and the outside.”). *But see* OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 5.20.1 (rev. ed., Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL] (“States . . . *should not* arbitrarily withhold consent.”) (emphasis added); Cedric Ryngaert, *Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective*, 5 AMSTERDAM LAW FORUM 4, 5 (Spring 2013) (observing *ab initio* “without consent, humanitarian actors cannot provide relief” and “a combination of . . . different legal principles *may* yield the rule that states may indeed *refuse* consent, but *not* for arbitrary or capricious reasons.”) (first emphasis added).

28. DAPO AKANDE & EMANUELA-CHARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT (2016) [hereinafter OXFORD GUIDANCE].

The *Oxford Guidance* surely illustrates the potential for law and lawyers to alleviate human suffering. It addresses persistent logical shortcomings of the law and presents a compelling example of how humanitarian logic—reasoned resolutions of legal interpretive dilemmas undertaken to vindicate human welfare—can inform, and perhaps improve, treaty interpretation and the balance between humanity and military necessity.

But is law of war interpretation simply a matter of applying humanitarian logic? The law of war attends carefully to humanity, including rules applicable to relief operations. These rules, when observed, humanize armed conflict and reduce unnecessary suffering in war. Yet careful law of war study reveals that no rule is maximally protective—none extends to the full logical limits of human welfare. Each rule concedes, as it must, to concerns of sovereignty, practicality, and military necessity. As the conventional account maintains, nearly every law of war duty with respect to humanitarian relief is conditioned on the consent of belligerents. Accounts of law of war doctrine require meticulous attention to the conditions and requirements of combat operations. Careful and deliberate consideration of military necessity—the operational imperatives for effective and successful prosecution of war—have proved an essential component of law of war formation and, therefore, of its interpretation and implementation.

Considering its compelling subject, the source of its mandate, and the stature of the institution that produced it, a careful examination of the *Oxford Guidance* from both doctrinal and operational perspectives is essential. Many will find its interpretive attention to results that relieve human suffering a commendable example of progressive, purposive analysis. Yet closer examination reveals an interpretation that inexorably prioritizes humanitarian purposes over plain reading and State intent to support logically appealing, though doctrinally, historically, and operationally troubling conclusions.

Experience with siege operations suggests the *Oxford Guidance* undervalues the role that the military imperative of isolating besieged forces played in the formation of the law. Siege operations past and present—perhaps the epitome of conflict between humanitarian need and military necessity—merit thorough consideration in any account of the law of relief actions. While perhaps out of synch with modern sensibilities toward human suffering, the conventional law of siege may be justified in light of military experience with siege. In its results and methods, the *Oxford Guidance* underappreciates how these experiences informed the balance between humanity and military necessity struck by the States that codified the law of war applicable to relief actions. While the humanitarian logic and regulatory aspirations of

the *Oxford Guidance* are admirable, military logic and military imperatives require equally deliberate attention in formulating the international law regulating the critical matter of humanitarian relief during armed conflict. It is a worthy example of humanitarian logic, but the *Oxford Guidance* effects revisions and legal evolutions better left to formal international law processes that involve States directly.

II. ISOLATION: THE MILITARY IMPERATIVE OF SIEGE

Modern military doctrine increasingly avoids the term siege in favor of the broader notion of encirclement.²⁹ Yet this adjustment to military semantics should not be understood to imply obsolescence. A survey of modern armed conflict reveals sieges to be essential, if operationally undesirable, military actions.³⁰ The demographics of urbanization and the evolution of warfare from contests over territory to contests for control of populations and human capital suggest continued, or even increased, resort to sieges and other operations that entrap or isolate civilian populations. During the last three decades, highly organized, well-equipped, and capable armed forces have been drawn into or resorted to siege operations in several armed conflicts including Lebanon,³¹ Chechnya,³² Bosnia,³³ Iraq,³⁴ and Syria,³⁵ while siege-like conditions quickly developed in Yemen.³⁶ More than mere contests of

29. Lionel M. Beehner, Benedetta Berti & Michael T. Jackson, *The Strategic Logic of Sieges in Counterinsurgencies*, 47 *PARAMETERS* 77, 77 (Summer 2017).

30. See, e.g., HEADQUARTERS, U.S. DEPARTMENT OF THE ARMY, FM 3-06, URBAN OPERATIONS ¶ 6-31 (2006) [hereinafter URBAN OPERATIONS] (cautioning military leaders to avoid attrition tactics during urban operations).

31. See *id.* appendix A (providing military doctrinal analysis of the Israeli siege of West Beirut); see also George W. Gawrych, *The Siege of Beirut*, in *BLOCK BY BLOCK: THE CHALLENGES OF URBAN OPERATIONS* 205 (William G. Robertson ed., 2003) [hereinafter *BLOCK BY BLOCK*]; RASHID KHALIDI, *UNDER SIEGE: P.L.O. DECISIONMAKING DURING THE 1982 WAR* 43–66 (1986) (describing the military situation giving rise to the 1982 siege of West Beirut); David Koff, *Chronology of the War in Lebanon, September–November, 1983*, 13 *JOURNAL OF PALESTINE STUDIES* 127 (1984) (compiling and chronicling events during the late stages of the Israeli siege of West Beirut).

32. See *infra* text accompanying notes 50–54.

33. See *infra* text accompanying notes 55–90.

34. See *infra* text accompanying notes 95–98.

35. See *infra* text accompanying notes 102–04.

36. See, e.g., *Key Facts about the War in Yemen*, AL JAZEERA (Mar. 25, 2018), <https://www.aljazeera.com/news/2016/06/key-facts-war-yemen-160607112342462>.

html. Rebel Houthi forces have placed portions of the city of Taiz under siege, preventing delivery of medical supplies and food to an entrapped civilian population. *Id.* See also Nasser

willpower, sieges have proved keen tests of applied military doctrine, leadership, and combat effectiveness.

Military tacticians and strategists insist that sealing off encircled forces from lines of operation, communication, and logistical support are supremely important during siege.³⁷ Indeed, control of access to a besieged area is the *sine qua non* of siege.³⁸ A U.S. Army field manual identifies physical, psychological, and electronic facets to isolation.³⁹ Each is essential to success in modern siege operations. Physical isolation is easily understood and the most widely practiced form of isolation during sieges. It is the key to material attrition efforts, denying both logistical resupply and reinforcement to the besieged force.⁴⁰ Physical isolation also diverts the efforts of the besieged force from defending against assault to countering the effects of deprivation imposed by isolation.⁴¹ Psychological isolation describes separation of the besieged force from outside political and moral support to reduce the will to resist.⁴² Information and deception operations are important aspects of psychological isolation to impose a sense of hopelessness on the besieged force.⁴³ Finally, electronic isolation has emerged as a critical aspect of modern siege operations.⁴⁴ Network and electronic attacks reduce the besieged force's capacity to plan and coordinate its defense. Electronic isolation also deprives the besieged force of critical outside intelligence sources. In combination, these three facets of isolation have proved decisive during siege operations.⁴⁵

Al-Sakkaf, *Yemen's Displaced in Dire Need of Food*, AL JAZEERA (Feb. 17, 2016), <https://www.aljazeera.com/news/2016/02/yemen-displaced-dire-food-160215115827332.html>.

37. 2 HEADQUARTERS, U.S. DEPARTMENT OF THE ARMY, FM 3-90-2, RECONNAISSANCE, SECURITY, AND TACTICAL ENABLING TASKS 6-1-6-3 (2013) (instructing forces to isolate enemy forces during encirclement operations); URBAN OPERATIONS, *supra* note 30, ¶¶ 6-11, 7-54 (observing "Isolation is essential.").

38. Beehner, Berti & Jackson, *supra* note 29, at 78. The authors define siege as "any attempt by an adversary to control access into and out of a town, neighborhood, or other terrain of strategic significance to achieve a military or political objective." *Id.* This definition omits the element of an entrapped enemy force.

39. URBAN OPERATIONS, *supra* note 30, ¶¶ 6-11-14.

40. *Id.* ¶ 6-12.

41. *Id.* ¶ 7-56.

42. *Id.* ¶ 6-14.

43. *Id.*

44. *Id.* ¶ 6-13.

45. *Id.* ¶ 7-54 ("One key to success in the history of urban operations has been the effective isolation of the threat force.").

History repeatedly confirms the imperative of absolute isolation to successful sieges. In the Second World War, German forces rapidly enveloped the Soviet city of Leningrad in September 1941.⁴⁶ When a determined defense repulsed a final large-scale assault on the city, the Germans reverted to attrition tactics to bring the besieged Russians to submission. Mass starvation resulted. Within a matter of months, thousands of civilians died daily.⁴⁷ Yet heroic determination—as well as dwindling German forces diverted to support offensive operations in southern and central Russia—permitted the Russians to keep narrow lines of resupply open. The siege lasted nearly three-and-a-half years, until it was broken in January 1944.⁴⁸ Ultimately, the Germans' failure to fully isolate Leningrad from outside support, especially via a lake frozen in winter months, is credited with both prolonging the siege and saving the city's inhabitants from total starvation (although as many as a million civilians may have died).⁴⁹

Five decades later, Russian experience, this time as a besieging rather than a besieged force, confirmed the lesson of Leningrad. The Second Chechen War from 1999 to 2000 included a five-month siege of the city of Grozny.⁵⁰ The Russians were determined to avenge a defeat in the 1994–95 First Chechen War, during which poorly led and poorly organized Russian forces never fully isolated Chechen forces defending Grozny and ultimately were repulsed.⁵¹ A Russian after-action review of the first effort cited the inability to seal borders as a contributing factor to failure.⁵² Likewise, a Russian military journal advised that in future operations built up areas must be “unexpectedly, quickly, and completely” sealed off.⁵³

46. PAUL K. DAVIS, *BESIEGED: 100 GREAT SIEGES FROM JERICO TO SARAJEVO* 314 (2003). *See also* HARRISON SALISBURY, *THE 900 DAYS* (1969).

47. DAVIS, *supra* note 46, at 314.

48. *Id.* at 311, 315.

49. *Id.* at 315.

50. Timothy L. Thomas, *The 31 December 1994–8 February 1995 Battle for Grozny*, in *BLOCK BY BLOCK*, *supra* note 31, at 161. Incidentally, Grozny translates as “terrible” or “formidable.” *Id.*

51. DAVIS, *supra* note 46, at 360–63; Thomas, *supra* note 50, at 161 (chronicling Russian urban combat operations); Timothy L. Thomas, *The Battle of Grozny: Deadly Classroom for Urban Combat*, 29 *PARAMETERS* 87 (Summer 1999); Raymond C. Finch III, *Why the Russian Military Failed in Chechnya* 7, 12 (Foreign Military Studies Office, Center for Army Lessons Learned, Paper No. 98-16, 1998).

52. Thomas, *supra* note 50, at 173 (indicating the Russian force did not seal the town until January 15, 1995, nearly a month -and-a half into the siege).

53. *Id.* (citing Oleg Namsarayev, *Sweeping Built Up Areas*, *ARMEYSKIY SBORNIK* (Apr. 1995)).

In their second attempt, as with their first, Russian forces resorted to extensive and indiscriminate bombardment, reducing the city almost entirely to rubble. Indeed, the Grozny campaigns are nearly synonymous with urban tactics of devastation. However, an important and overlooked facet of the 1999 victory was the Russian commander's complete blockade of the city from outside support, including humanitarian aid.⁵⁴ Isolation, as much as willingness to resort to overwhelming (and almost certainly unlawful) force, cured the failures of the Russians' previous effort to take Grozny by siege.

Contemporaneously with the Chechen wars, the lesson of maintaining isolation during siege was made acutely clear in the Balkans. In April 1992, ethnic Serb forces of Bosnian nationality, supported by Serbia, laid siege to the Bosnia-Herzegovinian (Bosnian) city of Sarajevo.⁵⁵ The Serbs' objective was to bisect the city and to force capitulation of the Bosnian government in order to form a breakaway Serb state.⁵⁶

The Serbs enjoyed overwhelmingly superior military forces and tactical positions.⁵⁷ A UN arms embargo on both belligerent parties practically sealed this advantage.⁵⁸ Initial estimates predicted a quick victory for the Serbs.⁵⁹ Yet the siege dragged on for over three years, resulting in one of the longest sieges in modern warfare.⁶⁰ Among many reasons for the siege's duration was the Serbs' inability to isolate the city physically and psychologically. Alt-

54. Beehner, Berti & Jackson, *supra* note 29, at 84.

55. OFFICE OF RUSSIAN AND EASTERN EUROPEAN ANALYSIS, CENTRAL INTELLIGENCE AGENCY, BALKAN BATTLEFIELDS: A MILITARY HISTORY OF THE YUGOSLAV CONFLICT, 1990–1995, at 152–53 (2002) [hereinafter BALKAN BATTLEFIELDS].

56. PETER ANDREAS, BLUE HELMETS AND BLACK MARKETS: THE BUSINESS OF SURVIVAL IN THE SIEGE OF SARAJEVO 26–27 (2008).

57. See Curtis King, *The Siege of Sarajevo, 1992–1995*, in BLOCK BY BLOCK, *supra* note 31, at 235, 246 (describing Serb control of high ground surrounding Sarajevo); see also BALKAN BATTLEFIELDS, *supra* note 55, at 154, 308.

58. S.C. Res. 757, ¶¶ 4–5 (May 27, 1992); S.C. Res. 713, ¶ 6 (Sept. 25, 1991); King, *supra* note 57, at 254 (noting the Bosnians initially lacked an external weapons benefactor such as Serbia was for the Bosnian Serbs).

59. ANDREAS, *supra* note 56, at 25; TIM JUDAH, THE SERBS: HISTORY, MYTH, AND THE DESTRUCTION OF YUGOSLAVIA 194 (2000); JOHN FAWCETT & VICTOR TANNER, THE POLITICAL REPERCUSSIONS OF EMERGENCY PROGRAMS: A REVIEW OF USAIDS OFFICE OF FOREIGN DISASTER ASSISTANCE IN THE FORMER YUGOSLAVIA (1991–1996) 15 (2000).

60. BALKAN BATTLEFIELDS, *supra* note 55, at 307.

though Serbian armed forces encircled the city quickly, their lines proved porous, permitting frequent resupplies of the besieged Bosnian forces and the civilian population trapped with them.

The Serbs failed not only to seal Sarajevo from belligerent Bosnian support; they also failed to seal the city from international actors. The siege provoked, and the Serbs ultimately consented to, enormous international and UN aid efforts, including a costly airlift.⁶¹ By 1995, a UN force of five thousand persons worked from Sarajevo to protect and deliver humanitarian aid.⁶² One estimate indicates that as many as two hundred non-governmental organizations also provided humanitarian relief to Sarajevo.⁶³

Further, one scholar concluded that international involvement perpetuated, rather than terminated, the siege.⁶⁴ In fact, for many actors, including members of the UN protection force, the delivery of humanitarian aid and black-market smuggling may have overshadowed the military aspects of the siege.⁶⁵ It has been observed with more than a little irony that Sarajevo, host to the 1984 Winter Olympics, only became a globally connected city after it was besieged.⁶⁶

By agreement between the parties, Serb officials supervised the manifests and cargo lists of all in-bound flights.⁶⁷ They even secured a concession that nearly a quarter of the aid delivered be diverted to their own besieging forces.⁶⁸ A further thirty percent of aid deliveries, especially those arriving by land, are estimated to have been skimmed off by criminal elements and black marketers.⁶⁹ Still, the Serbs were unable to prevent UN-delivered humanitarian aid intended for the civilian population from being diverted to the Bosnian defenders.⁷⁰ An aid monitor for the UN estimated that more than twenty percent of aid went directly to the defending Bosnian armed forces.⁷¹

61. *Id.*

62. ANDREAS, *supra* note 56, at 7.

63. *Id.*

64. *See, e.g., id.* at ix; BALKAN BATTLEFIELDS, *supra* note 55, at 308.

65. ANDREAS, *supra* note 56, at x, 9.

66. *Id.* at 3.

67. *Id.* at 9.

68. *Id.* at 36.

69. *Id.* at 43.

70. *Id.* at 10.

71. *Id.* at 45.

The UN High Commissioner for Refugees publicly denied that aid supported belligerents, but is reported to have privately acknowledged diversion and skimming as the price of humanitarian access to Sarajevo.⁷²

The Serb efforts to seal the city, admittedly at times half-hearted, were further compromised by the purportedly neutral UN Protection Force (UNPROFOR). According to one account, UNPROFOR convoys regularly charged fees to smuggle Bosnian civilians out of the city in armored personnel carriers.⁷³ UNPROFOR members also arranged for seats for wealthy or well-connected civilians on departing flights and UN forces permitted military material, including decisive anti-tank missiles, ammunition, and communications equipment, to cross the airport tarmac at the edge of the Serb perimeter into Sarajevo.⁷⁴ Meanwhile, Ukrainian and Egyptian troops notoriously sold off their rations and fuel to Bosnian fighters.⁷⁵ Members of high-level governmental delegations reportedly loaded baggage with contraband bound for the black market, including a five-member delegation that arrived with forty suitcases.⁷⁶ Perhaps most significantly, UN officials turned a blind eye to an eight-hundred meter tunnel, a “public secret” complete with rails, which delivered millions of pounds of supplies to the city and its defending forces.⁷⁷ When Serbs shelled the tunnel’s exit, the UN threatened a NATO response.⁷⁸

NATO intervention later materialized in response to a Serb mortar attack on a Sarajevo market for smuggled goods.⁷⁹ NATO air strikes dropped more than one thousand bombs on Serb positions outside Sarajevo and elsewhere.⁸⁰ The attacks shifted the military balance and forced the Serbs to confront the prospect of broader international intervention. Perhaps more significantly, the NATO campaign emboldened the Bosnian Army, encouraging and facilitating offensives in the countryside of Bosnia-Herzegovina. Weapons smuggled past the UN embargoes, often by humanitarian front agencies, were critical to arming the Bosnian offensives and shifting the military balance around Sarajevo.⁸¹ By late 1995, the nationalist Serb movement

72. *Id.* at 10.

73. *Id.* at 47.

74. *Id.* at 54.

75. *Id.* at 47.

76. *Id.* at 49.

77. *Id.* at 62; King, *supra* note 57, at 244, 268.

78. ANDREAS, *supra* note 56, at 59–60.

79. King, *supra* note 57, at 272.

80. *Id.*

81. ANDREAS, *supra* note 56, at 109, 111.

consented to talks that culminated in a negotiated end to the siege and the broader conflict.

The Serbs' precise goals for the siege remain unclear and likely evolved as the situation developed. Although submission of Bosnian forces and political partition were undoubtedly their initial goals, in later stages, especially after international attention, it seems the siege served as a holding environment—a means to prevent foreign military intervention and to distract attention from their military operations and brutal ethnic cleansing campaign carried out in rural Bosnia. It is clear, however, that failure to isolate and seal the city of Sarajevo from outside support, most especially from international humanitarian aid, contributed to the failure of the Serb siege.⁸² In fact, the city and its defenders strengthened as the siege progressed.⁸³

The importance of isolation is illustrated well by contrasting the failure of isolation at Sarajevo with the Serbs' effective isolation at the siege of Srebrenica, an effort now overshadowed by horrific criminal acts of genocide that followed the siege. As early as 1993, Bosnian-Serb forces managed to cut off Srebrenica from the rest of Bosnia.⁸⁴ Only three UN relief convoys entered Srebrenica in the first year of the conflict.⁸⁵ Eventually, the Serbs prohibited all humanitarian aid convoys in violation of a UN Security Council resolution.⁸⁶ And while small groups managed to smuggle supplies through the surrounding forested valleys, no major resupply or relief effort reached the besieged Bosnian Muslims.⁸⁷ The Serbs even blockaded support to the UNPROFOR Dutch peacekeeping battalion stationed near Srebrenica, rendering it “nonoperational.”⁸⁸

While the besieging Serbs never entirely eliminated smuggling and even collusion by their own forces, effective physical and psychological isolation contributed enormously to the fall of the city. The isolation of Srebrenica was calculated and rigorously, if also ruthlessly, enforced. An order from the Bosnian-Serb Supreme Command was clear, “create an unbearable situation

82. King, *supra* note 57, at 273 (noting Bosnian-Serb failure to seal the Sarajevo airport and ground routes entering the besieged city).

83. BALKAN BATTLEFIELDS, *supra* note 55, at 309–10.

84. *Id.* at 321.

85. ANDREAS, *supra* note 56, at 139.

86. BALKAN BATTLEFIELDS, *supra* note 55, at 323.

87. *Id.* at 317.

88. *Id.* at 323.

of total insecurity with no hope of further survival or relief for the inhabitants of Srebrenica and Zepa.⁸⁹ Bosnian Serb sieges of the Croatian cities of Dubrovnik and Vukovar also featured comparatively complete physical isolation both geographically and militarily.⁹⁰

The operational imperative of isolating enemy forces is not restricted to conventional warfare. Recent studies suggest it is equally important to success against insurgent and other unconventional forces.⁹¹ Counterinsurgency strategists increasingly appreciate the relevance, if not the appeal, of siege operations. Noted counterinsurgency theorists have concluded, given urbanization and recent demographic trends, rural and remote areas will give way to cities as the primary battlefields of insurgency.⁹² Rather than engage in costly block-to-block or house-to-house combat to dislodge insurgents, counterinsurgents may find sealing off insurgents a more attractive tactic of urban warfare. Military officers have called for the U.S. armed forces to resurrect and revamp their encirclement doctrine and to emphasize its importance as a distinct form of offensive maneuver warfare—a call inspired by recent counterinsurgency experiences.⁹³

Historical experience is again instructive. In 2002, U.S. forces failed to achieve complete physical isolation of encircled Al-Qaeda and Taliban fighters during Operation Anaconda in Afghanistan's Shahikot Valley, the failure of which contributed to prolonging the armed conflict.⁹⁴ In 2004, U.S. forces laid siege to Fallujah, Iraq, to defeat newly formed insurgent forces.⁹⁵ While U.S. armor and infantry surrounded the city and even erected dirt berms to prevent infiltration, those forces never achieved complete physical isolation.

89. *Id.* at 325 (citing evidence presented by the prosecutor at the International Criminal Tribunal for the former Yugoslavia trial of General Krstić).

90. ANDREAS, *supra* note 56, at 4.

91. See Scott Thomas, Operational Encirclements: Can the U.S. Military Decisively Follow Through? 1–2 (May 21, 2009) (unpublished monograph, School of Advanced Military Studies, United States Army Command and General Staff College), <http://www.dtic.mil/dtic/tr/fulltext/u2/a506229.pdf>. Thomas argues through historical examples that U.S. military doctrine has relied on firepower in operational situations that would have been better served by encirclement operations resulting in more thorough and earlier defeats of enemy forces. See generally *id.*

92. See, e.g., DAVID KILCULLEN, OUT OF THE MOUNTAINS: THE COMING AGE OF THE URBAN GUERRILLA (2013).

93. Thomas, *supra* note 91, at 6.

94. *Id.* at 33–36.

95. DONALD P. WRIGHT & TIMOTHY R. REESE, ON POINT II: TRANSITION TO THE NEW CAMPAIGN: THE UNITED STATES ARMY IN OPERATION IRAQI FREEDOM MAY 2003–JANUARY 2005, at 38–39, 43–44 (2008).

In response to mounting media pressure and with a view toward building goodwill, the United States permitted humanitarian relief convoys to enter Fallujah.⁹⁶ Relief convoys and ambulances were discovered carrying ammunition, anti-aircraft guns, and other weapons.⁹⁷ Rather than pursue effective isolation, the United States abandoned the siege, transferring responsibility to Iraqi units and emboldening the insurgents.

Several months later U.S. forces returned to Fallujah. While unable to seal off smugglers entirely, a stronger effort at isolation preceded the final assault of the city.⁹⁸ This time humanitarian organizations and most media were denied access. In addition, the use of force was far less constrained than previously, with enormously destructive consequences on infrastructure. Yet this second intensified effort in Fallujah achieved the military objectives unmet by the first.

Still, the Fallujah campaign revealed a perilous military paradox in counterinsurgency sieges. While siege tactics can avoid or delay the need for costly and destructive urban assaults, the static and prolonged nature of sieges undermines a central tenet of counterinsurgency doctrine—winning the support of the civilian population. As one study notes, “a siege can lead to strengthening the level of dependency and control a rebel group has on the civilian population.”⁹⁹ In particular, the study identifies smuggling and “aid manipulation” as key contributors to the counterinsurgency siege paradox.¹⁰⁰ Counterinsurgent forces are cautioned to avoid siege operations or to ensure the strictest conditions of isolation to speed capitulation and break insurgent control of civilian populations.¹⁰¹

Given the capacity of insurgent groups to blunt conventional forces’ advantages in resources and firepower, it is not surprising that siege conditions

96. Gerald De Lira Jr., *The Anger of a Great Nation: Operation Vigilant Resolve 11* (May 4, 2009) (unpublished M.A. thesis, United States Marine Corps, Command and Staff College, Marine Corps University), <http://www.dtic.mil/dtic/tr/fulltext/u2/a509044.pdf>.

97. Pamela Constable, *Marines Allowing Emergency Relief Supplies into City*, BOSTON GLOBE, Apr. 13, 2004 (noting that Army military police discovered “antiaircraft guns hidden in a cargo truck full of grain and grenade launchers hidden in ambulances” and “spotted ambulances being used as getaway vehicles for gunmen and for collecting weapons after street battles”).

98. WILLIAM KNARR & ROBERT CASTRO, *THE BATTLE FOR FALLUJAH: AL FAJR—THE MYTH BUSTER* 57 (2009) (describing physical and electronic isolation of Fallujah preceding attack).

99. Beehner, Berti & Jackson, *supra* note 29, at 80.

100. *Id.*

101. *Id.* at 81–82.

have featured prominently in the current hostilities in Syria. Despite substantial aid from Russia, including significant air support, Syrian forces have experienced enormous difficulty dislodging rebel forces from urban areas, including neighborhoods in the capital city of Damascus. In Aleppo, escalation of the Russian intervention ultimately facilitated full encirclement and capitulation of the rebel force in September 2015.¹⁰² The Syrian approach is frighteningly reminiscent of the Russian operation in Grozny. In February 2016, the regime cut the rebel supply lines into Turkey and trapped nearly 300,000 civilians with the rebel force.¹⁰³ The rebels capitulated in December after the regime finally sustained its isolation of Eastern Aleppo from all outside support, including humanitarian aid.¹⁰⁴ Only by resort to widespread indiscriminate aerial bombardments, but perhaps more importantly by perfecting their encirclement and isolation of rebel forces in Aleppo, has the Syrian regime been able to prevail tactically.

These, and many other historical accounts, confirm what has long been understood about the military imperative of isolation during sieges. Absent the military resources and will to prosecute costly and physically destructive assaults against defending forces, siege operations require absolute isolation of the besieged force. As military doctrine increasingly appreciates—and as experience confirms—isolation must extend beyond physical isolation to include psychological and even electronic isolation. Even marginal compromise of any form of isolation reduces the chances of an effective siege. It is clear that isolation stands paramount among military considerations in siege. Just as it has been foremost in the planning and execution of successful siege operations, isolation must be included in evaluations of how law can effectively regulate the conduct of siege. Thus, as the next Part demonstrates, it is unsurprising that at the diplomatic conferences that have codified so much of the law of war, States have jealously guarded their prerogative to control access to besieged areas, retaining nearly unfettered discretion in all but the narrowest circumstances.

102. *Id.* at 79.

103. U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/33/55 (Aug. 11, 2016).

104. Beehner, Berti & Jackson, *supra* note 29, at 83.

III. THE LAW OF WAR AND HUMANITARIAN RELIEF ACTIONS

The law of war applicable to the conduct of hostilities (*jus in bello*) incorporates two strains of regulation. A “Hague tradition” restrains targeting operations and the use of weapons by belligerents, while a “Geneva tradition” regulates treatment of persons under the power of a belligerent during armed conflict, including wounded and sick, prisoners of war, and civilians.¹⁰⁵ *Jus in bello* restraints applicable to military operations that separate civilians from support or find them intermingled with military objectives include rules from both traditions.

Hague-tradition obligations applicable to attacks include duties to spare certain civilian facilities and to mark buildings not used for military purposes.¹⁰⁶ Article 51(2) of the 1977 Additional Protocol I (AP I) to the 1949 Geneva Conventions prohibits attacks “the primary purpose of which is to spread terror among civilians.”¹⁰⁷ Further, Article 51(3) provides that direct participation in hostilities, such as siege defense, deprives civilians of protection from targeting,¹⁰⁸ while Article 51(4) prohibits indiscriminate attacks¹⁰⁹ and Article 51(5) prohibits the conflation of separate targets into a single military objective.¹¹⁰

The most significant Hague-tradition provision relevant to encircled or isolated civilians is found within Article 54 of AP I, as well as its customary

105. Neither tradition offers an especially accurate description of the geography of treaty negotiation and law of war treaty conferences have rarely heeded the Hague-Geneva bifurcation. Nor have the multilateral law of war treaties produced at these conferences reliably confined themselves to their respective subject. Many law of war treaties include both strains of regulation of the conduct of hostilities. *See, e.g.*, Regulations Respecting the Laws and Customs of War on Land secs. II, I, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter 1907 Hague Regulations] (addressing, respectively, targeting and weapons, and prisoner of war and treatment of the wounded and sick); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts pts. IV, III, II, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (addressing, respectively, targeting and weapons, treatment of the wounded and sick, and prisoners of war). Still, the two traditions remain a helpful organizing scheme for law of war study. At a minimum, awareness of the Hague-Geneva bifurcation permits a measure of interpretive and operational consistency within each tradition.

106. 1907 Hague Regulations, *supra* note 105, art. 27.

107. AP I, *supra* note 105, art. 51(2).

108. *Id.* art. 51(3).

109. *Id.* art. 51(4).

110. *Id.* art. 51(5).

law incarnation.¹¹¹ For States Parties to AP I, Article 54 prohibits “starvation of civilians as a method of warfare.”¹¹² While the law of war principle of distinction generally prohibits attacks on civilians, Article 54 regulates beyond attacks, reaching methods of warfare short of attack.¹¹³ In this respect, it adds an important extension of protections from the general conduct of hostilities. Further, Article 54 prohibits destruction of “food-stuffs” and other life-sustaining material “indispensable to the survival of the civilian population.”¹¹⁴

Article 54 likely reflects customary international law; thus, it is binding on non-States Parties to AP I.¹¹⁵ But this assessment should be acknowledged with caution. At present, the precise operational doctrine of the prohibition on civilian starvation is somewhat unclear. For instance, a broad reading of Article 54 might suggest that even military operations that incidentally starve civilians are prohibited. Such a view might conclude that Article 54 requires belligerents to permit the evacuation of civilians incidentally starved by military operations.

It is not difficult to appreciate how such a broad understanding of Article 54 would revolutionize the law applicable to encirclements and consequently the military art of siege. Siege operations have long relied on entrapped civilians to contribute to the depletion of food stores and water that sustain

111. *Id.* art. 54; DOD LAW OF WAR MANUAL, *supra* note 27, at ¶¶ 5.20, 17.9.2 (identifying a customary variant of the rule prohibiting starvation of civilians as a method of warfare).

112. AP I, *supra* note 105, art. 54.

113. See Zen Chang, *Cyberwarfare and International Humanitarian Law*, 9 CREIGHTON INTERNATIONAL AND COMPARATIVE LAW JOURNAL 29, 34–36 (2017) (examining the *jus in bello* threshold of attack as a gateway for applying the rules of targeting).

114. AP I, *supra* note 105, art. 54.

115. The United States is not a party to AP I, however, its recent law of war manual observes, “Starvation specifically directed against the enemy civilian population . . . is prohibited.” DOD LAW OF WAR MANUAL, *supra* note 27, at § 5.20.1. The *Manual* cites AP I, Article 54(1) as support. *Id.* § 5.20.1 n.711. An earlier U.S. Joint Chiefs of Staff review of AP I characterized Article 54 as “a new rule.” Memorandum from the Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, app. 54–56, to Secretary of Defense (May 3, 1985), http://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Joint_Staff/1985_JCSM_152-85_Review_of_GC_AP_I.pdf [hereinafter Memorandum from the Joint Chiefs of Staff]. The Joint Chiefs of Staff deemed it acceptable, however, observing “there is little military need for a modern armed force to retain the option of starving the enemy’s civilian population into submission.” Memorandum from the Joint Chiefs of Staff, *supra* at app. 54.

enemy forces to hasten capitulation.¹¹⁶ Complete physical isolation from outside support and sustenance is the defining feature of siege. Until recently, legal guidance to some armed forces unequivocally authorized forcing civilians to share the resource-deprived fate of encircled enemy forces. For example, a 1956 U.S. law of war manual instructed that civilians fleeing sieges may be fired on to force their return to the besieged area, although the 2016 DoD *Law of War Manual* expressly forbids the use of force to compel civilians to remain in besieged areas.¹¹⁷ The broad interpretation of Article 54 essentially compels besieging forces to alleviate starvation of not only civilians but also of trapped enemy forces. The latter will inevitably consume supplies permitted to enter the besieged area or will be sustained by supplies no longer consumed by civilians allowed to evacuate.

A competing view mitigates the compromised military advantage attendant to the broad view. It limits the prohibition on starvation as a method of warfare to operations specifically directed at civilians.¹¹⁸ Under this view, only military operations undertaken with the *purpose* of starving civilians are prohibited. Military operations undertaken to starve enemy forces that incidentally starve civilians do not provoke Article 54 or applicable custom. This view resorts instead to the law of war principle of proportionality to regulate incidental starvation of civilians during siege. Only civilian starvation on a scale that is clearly excessive in relation to the anticipated military advantage of enemy defeat through encirclement and isolation from support or relief is prohibited.¹¹⁹ Yet even this narrow interpretation of Article 54 and its customary equivalent, greatly limits the militarily essential task of physically isolating enemy forces from life-sustaining supplies when these forces are encircled along with civilians. Proportionality would prove an especially strong limit on physical isolation when civilian presence is numerically significant in relation to enemy military forces and objectives.¹²⁰

116. See generally DAVIS, *supra* note 46 (recounting examples of besieging forces denying civilian evacuation to hasten starvation and surrender).

117. THE LAW OF LAND WARFARE, *supra* note 27, at ¶¶ 44–45. That guidance was supplanted by the 2015 DoD *Law of War Manual*, which expressly forbids the use of force to compel civilians to remain in besieged areas. See DOD LAW OF WAR MANUAL, *supra* note 27, ¶ 5.19.4.1. The UK manual acknowledges forceful return of civilians to besieged areas as an “older customary law practice,” but judges that practice obsolete in light of AP I requirements. See UK LOAC MANUAL *supra* note 27, at 87 n.215.

118. See, e.g., DOD LAW OF WAR MANUAL, *supra* note 27, § 5.20.1.

119. *Id.*

120. For complete treatment of the issue of law of war provisions applicable to sieges, see Sean Watts, *Under Siege: International Humanitarian Law and Security Council Practice concerning*

Alongside Hague-tradition protections from methods of warfare and their effects, the law of war includes significant Geneva-tradition protections to civilians during siege and other operations that isolate civilian populations from vital support. The law of war provisions addressed most directly to humanitarian relief operations are found in the Fourth Geneva Convention of 1949 (GC IV) and the first of two 1977 Protocols.¹²¹ These rules address evacuation of civilian populations and access for humanitarian relief actions.

The Geneva tradition's most significant contribution to the treatment of isolated civilians may be Article 17 of the universally ratified GC IV. Article 17 addresses both evacuation of civilian populations and the delivery of humanitarian relief. With respect to removal and evacuation, Article 17 states that parties "shall endeavour to conclude local agreements for the removal from besieged or encircled areas."¹²² It is important to realize, however, that the duty applies to limited classes of persons.¹²³ In this respect, Article 17 is something of an outlier to Part II of GC IV. As a general matter, Part II applies to the entire civilian population, without regard to age, sex, or nationality.¹²⁴ Yet Article 17 makes clear that it benefits only "wounded, sick, infirm, and aged persons, children and maternity cases."¹²⁵ Thus, healthy adult civilians who are not pregnant or aged are formally outside its ambit of protection and may be compelled to remain in an encircled area by either the besieged or the besieging force.

Urban Siege Operations (Counterterrorism and Humanitarian Engagement Project, Research and Policy Paper, May 2014), <http://blogs.harvard.edu/cheproject/files/2013/10/CHE-Project-IHL-and-SC-Practice-concerning-Urban-Siege-Operations.pdf>.

121. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV]; API, *supra* note 105; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. The Geneva tradition also regulates situations of belligerent occupation. Rules governing the treatment of civilian populations can be found in both the 1907 Hague Regulations and the 1949 Fourth Geneva Convention. The latter Convention includes relief actions in favor of civilians in occupied territory, but its provisions are outside the limited scope of this article. *See* GC IV, *supra*, arts. 59–62, 108–111.

122. GC IV, *supra* note 121, art. 17.

123. *Id.*

124. *Id.* art. 13 ("The provisions of Part II cover *the whole of the populations of the countries in conflict*, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.") (emphasis added).

125. *Id.* art. 17.

The succeeding text of the Article 17 obligation further diminishes its humanitarian effect. While it employs the imperative “shall,” the obligation is merely to make *attempts* to agree to conditions under which the limited class of persons protected by the Article may be removed. The parties are not required to agree to removal or evacuation schemes but merely to *endeavor* to do so. The result is a limited obligation with respect to a narrow class of besieged civilians.

Article 17 also addresses belligerents’ duties with respect to relief operations. Yet, perhaps predictably, these provisions are as limited and conditional as those addressing evacuation and removal. The narrow class of persons protected is identical; only wounded, sick, infirm, aged persons, children, and maternity cases benefit. Moreover, as with its provisions on evacuation, parties to a siege are only required to endeavor to permit relief supply efforts. Crucially, and consistent with its limited scope and effect, the Article refers only to permitting passage of “ministers of all religions,” “medical personnel,” and “medical equipment.”¹²⁶ Food, water, and other life-sustaining supplies are not within the ambit of Article 17.¹²⁷

Article 23 of GC IV complements the narrow Article 17 relief provisions. Also appearing in Part II, Article 23 requires that States admit passage of religious articles, medical supplies, and “foodstuffs, clothing, and tonics.”¹²⁸ But like Article 17, Article 23 does not apply to all civilians, it applies only when those consignments are intended for “children under fifteen, expectant mothers and maternity cases.”¹²⁹ Moreover, it lifts the obligation to admit even these relief supplies when belligerents have “serious reasons for fearing: (a) that the consignments may be diverted from their destination, (b) that the control may not be effective, or (c) that a definite advantage may accrue to the military efforts or economy of the enemy.”¹³⁰

Article 23 also permits belligerents to condition their consent to specified relief actions. It explicitly identifies supervision by a protecting power as a control measure to prevent misuse by enemy forces.¹³¹ Furthermore, the party granting permission may “prescribe the technical arrangements under

126. *Id.*

127. *Id.*

128. *Id.* art. 23.

129. *Id.*

130. *Id.*

131. *Id.* (“The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.”).

which passage is allowed,” including the timing, duration, and scale of the relief action.¹³²

Several States later mitigated the limits of Article 23. For States Parties to AP I, Article 70(1) protects civilians and guarantees relief much more broadly in two important respects. First, it does not limit protection to any sub-category of civilians; the entire civilian population enjoys protection.¹³³ Second, it does not distinguish between forms of humanitarian relief or categories of supply. It only requires that relief efforts be “humanitarian and impartial.”¹³⁴

Still, Article 70(1) does not offer an unfettered guarantee of relief. It concludes with the language, “relief actions which are humanitarian and impartial in character and conducted without distinction shall be undertaken, *subject to the agreement of the Parties concerned in such relief actions.*”¹³⁵ Notably absent from Article 70(1) is the Article 23 requirement that relief actions be permitted absent “serious reasons” relating to abuse of access or misrouting of supplies.¹³⁶ Consent of the belligerent parties appears to be a precondition to deliveries of humanitarian relief under Article 70(1). The authority to withhold consent is unencumbered by the “serious reasons” limit of the Fourth Convention. Non-States Parties to AP I, such as the United States, appear to concur with the precondition of consent to humanitarian relief operations as an aspect of custom.¹³⁷ The logic of qualifying discretion to reject relief actions under Article 23 of GC IV but not under Article 70(1) of AP I may be questioned. Yet it appears States were only willing to abandon the GC IV limited scope of relief and protected persons in exchange for discretion to permit or reject these broader relief actions during siege.

The doctrinal upshot is a stunted—and for many—disappointingly inadequate rule system for humanitarian relief actions in armed conflict. Perhaps as much as any subject of the law of war, the existing rules of relief actions invite debate of the bargain struck between humanity and military necessity. States’ military legal doctrine evinces concern for the harsh effects of denying relief actions. For example, the United Kingdom’s law of armed conflict

132. *Id.*

133. Article 70(1), in providing “children, expectant mothers, maternity cases and nursing mothers,” retains priority of relief, and thus did not abandon the special categories found within Article 23 of GC IV entirely. *See* AP I, *supra* note 105, art. 70(1).

134. *Id.*

135. *Id.* (emphasis added).

136. *See id.*

137. *See, e.g.,* DOD LAW OF WAR MANUAL, *supra* note 27, § 5.19.2.

manual instructs, “There is thus, except for those specific consignments covered by the convention [GC IV, Article 23], no duty to agree to them though there is a duty to *consider* in good faith requests for relief operations.”¹³⁸ Similarly, a privately produced law of war manual completed by the Program on Humanitarian Policy and Conflict Research at Harvard University advises, “The majority of the Group of Experts were [sic] of the opinion that agreement by a Belligerent Party *ought* not to be withheld except for valid reasons.”¹³⁹ Yet, as presently constituted, the *law* reserves extraordinarily broad discretion to reject offers of aid and supports the enormous and historically confirmed military import of imposing and maintaining isolation of enemy forces during siege operations.

IV. THE OXFORD GUIDANCE

In 2013, on directions from the UN Secretary-General, the Office for the Coordination of Humanitarian Affairs (OCHA) commissioned the Institute for Ethics, Law and Armed Conflict and the Martin Programme on Human Rights for Future Generations at Oxford University to host meetings of experts and to produce a report on the law governing humanitarian relief operations during armed conflict.¹⁴⁰ The report was to focus on the narrow issue of withholding consent to offers of impartial humanitarian relief during armed conflict.¹⁴¹ The Oxford experts expanded the project into a broader survey of how general public international law regulates humanitarian relief operations during armed conflict.

In 2016, the authors delivered the *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict (Guidance)*.¹⁴² The authors styled the *Guidance* as “a non-binding restatement of applicable

138. UK LOAC MANUAL, *supra* note 27, ¶ 9.12.3 (emphasis added).

139. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 228 (2010) [hereinafter HPCR MANUAL COMMENTARY] (emphasis added).

140. OXFORD GUIDANCE, *supra* note 28, at 2–3.

141. *Id.*

142. The experts consulted did not agree with all of the conclusions of the *Guidance*. *Id.* at 3. The two authors had written previously on the subject of law applicable to humanitarian relief operations. See Dapo Akande & Emanuela-Chara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, 92 INTERNATIONAL LAW STUDIES 483 (2016).

rules,”¹⁴³ which “seeks to reflect existing law, and to clarify areas of uncertainty.”¹⁴⁴ Its goals and approach are reminiscent of numerous recent legal manuals and projects on other law-of-war subjects. Groups of private legal experts, advocacy groups, and humanitarian organizations have produced restatements and interpretive guidance on a wide range of law of war topics, including non-international armed conflict, cyber warfare, direct participation in hostilities, and precautions in attack.¹⁴⁵ Although most of these products widely disclaim authority to make international law, many have proved enormously influential on popular understandings of the law, lending clarity and refinements to the stubbornly ambiguous work of States.

At its outset, the *Guidance* identifies the scope of humanitarian relief actions considered. It recounts an understanding of relief operations consistent with familiar law of war provisions. Relevant relief operations include impartial efforts conducted without adverse distinction to provide “food, water, medical supplies, clothing, bedding, means of shelter, heating fuel, and other supplies and related service essential for the survival of a civilian population, as well as objects necessary for religious worship.”¹⁴⁶

The *Guidance* then identifies an assortment of international legal bases for States’ responsibility to meet the welfare and needs of civilians generally. Purported sources of these obligations include sovereignty, and various statements and guidelines issued by UN organizations, as well as widely ratified instruments of international human rights law.¹⁴⁷ Significant attention or analysis is not devoted to the differences between how these assorted sources identify and describe belligerents’ responsibilities. The reader is left unsure what remains of general requirements, such as that drawn from the notion of sovereignty, in light of more specific requirements. Precisely how

143. OXFORD GUIDANCE, *supra* note 28, at 3.

144. *Id.* at 8.

145. See TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt ed., 2d ed. 2017); INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009); MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY (2006); HPCR MANUAL COMMENTARY, *supra* note 139.

146. OXFORD GUIDANCE, *supra* note 28, at 8–9 (citing AP I, arts. 69–70; AP II, arts. 18, 23; GC IV, art. 59). It may be noted, and it is acknowledged in the *Guidance*, that AP I Article 70(1) permits relief operations to give priority to relief for children and expectant mothers. OXFORD GUIDANCE, *supra* note 28, at 9.

147. *Id.* at 11.

obligations, such as those found in human rights instruments or the law of war, interact with general obligations of public international law is unclear. In particular, the *Guidance's* authors do not indicate the precise adjustments or accommodations made to general obligations to support civilians during conditions of armed conflict. Accordingly, the general sources cited, and the observations offered, seem ripe for misapplication or selective citation. In this sense, the project may have been better served by the narrower law of war-based mandate of OCHA and the Secretary-General.

The *Guidance* next addresses provisions of the law of war specifically applicable to humanitarian relief operations in armed conflict, stating first that, as a general matter, consent of the belligerent parties is required to conduct humanitarian relief operations.¹⁴⁸ With respect to scope, the bilateral nature of the consent requirement is emphasized; all “Parties concerned” must agree for consent to be effective.¹⁴⁹ The *Guidance* states that the consent requirement applies to the State on whose territory the operation will occur¹⁵⁰ and to parties exercising effective control over foreign territory.¹⁵¹ It is noted correctly, however, that consent is not required in cases of belligerent occupation or where humanitarian relief has been mandated by the UN Security Council.¹⁵²

Turning to the Geneva tradition, the *Guidance* provides Article 23 of GC IV and Article 70 of AP I as the primary law of war sources applicable to relief actions.¹⁵³ It refers to an International Committee of the Red Cross (ICRC) assertion that both provisions reflect customary international law, and are therefore binding on non-States Parties to the latter treaty.¹⁵⁴ It is not clear whether the authors shared this assessment; the *Guidance* merely states these provisions “are considered customary.”¹⁵⁵ Regardless, there is reason to doubt the ICRC conclusion at least with respect to the views of the United States. The 2016 U.S. Department of Defense *Law of War Manual* confines

148. *Id.* at 16 (citing AP I, art. 70(1)).

149. *Id.* (citing AP I, art. 70(1)).

150. *Id.*

151. *Id.*

152. *Id.* at 18 (citing GC IV, art. 59 and assorted UN Security Council resolutions from 1991 through 2014).

153. *Id.* at 34.

154. *Id.*

155. *Id.* at 26 n.55, 31 n.64.

its treatment of relief actions to the obligations of Article 23, with no mention of Article 70.¹⁵⁶

The most important work of the authors, indeed the central query posed to them from OCHA, involves the question of when belligerent parties may withhold their consent to offers of humanitarian relief operations. Put simply, the response of the *Guidance* is that belligerent parties may not arbitrarily withhold consent.¹⁵⁷ It identifies three bases for the prohibition: “(i) the need to provide an interpretation of the relevant treaty texts, which gives effect to all aspects of those provisions; (ii) the drafting history of those provisions; and (iii) practice subsequent to the adoption of the treaties.”¹⁵⁸

The first basis essentially maintains that a textual predicament compels a prohibition on arbitrarily withheld consent. The use of the plural terms “treaty texts” and “provisions” in the *Guidance* may suggest textual tension arising from multiple sources. Yet, with respect to international armed conflict, the alleged textual difficulty does not arise between separate treaty regimes, as is sometimes the case with public international law. Nor does it arise between separate law of war treaties, nor even between articles in a single treaty.¹⁵⁹ The authors of the *Guidance* allege the predicament arises within a clause of a single article, namely Article 70(1) of AP I, which provides in relevant part, “[R]elief actions which are humanitarian and impartial in character and conducted without any adverse distinction *shall be undertaken, subject to the agreement of the Parties* concerned in such relief actions.”¹⁶⁰

The authors maintain that the Article 70(1) simultaneous resort to the term “shall,” and the phrase “subject to the agreement of” provokes an interpretive quandary. It is asserted that to give legal effect to both terms, as accepted canons of interpretation require, “shall” must be regarded as having a limiting effect on the condition of agreement reserved in the latter clause

156. DOD LAW OF WAR MANUAL, *supra* note 27, §§ 5.19.3, 5.19.3.1. The earlier review of AP I by the Joint Chiefs of Staff observed that AP I Article 70 was acceptable subject to the understanding that relief actions could be refused due to “imperative considerations of military necessity.” Memorandum from the Joint Chiefs of Staff, *supra* note 115, at 72–73. That review also noted the president of the United States holds statutory authority to withhold relief supplies that “endanger the Armed Forces of the United States which are engaged in hostilities.” *Id.* (citing 50 U.S.C. § 1702(b)).

157. OXFORD GUIDANCE, note 28, at 16, 20, 21,

158. *Id.* at 21.

159. The *Guidance* identifies a similar textual dilemma with respect to non-international armed conflict arising from Article 18(2) of AP II. *Id.*

160. *Id.* (emphasis added).

of Article 70(1).¹⁶¹ They explain, “use of the word ‘shall’ . . . suggests that acceptance of humanitarian relief is not entirely discretionary.”¹⁶² As understood in the *Guidance*, the term “shall” prevents parties from enjoying full discretion when weighing whether to agree to a relief action or not.

A host of interpretive considerations calls into question whether this reading is compelled or even correct. First, there is reason to wonder whether the textual difficulty presented by Article 70(1) is overstated in the *Guidance*. Other sources that have analyzed Article 70(1) have not dwelled on or remarked significantly on any such internal tension. The quite thorough analysis of an ICRC commentary on AP I does not explicitly identify any such difficulty.¹⁶³ Nor do military legal manuals of States, including States Parties to AP I such as Canada, Germany, and the United Kingdom, identify difficulty reconciling internal textual tension with respect to Article 70(1).¹⁶⁴ States appear to have settled on a meaning that evinces neither concern for textual tension nor compels the elaboration with respect to arbitrariness offered in the *Guidance*. In this respect, the *Guidance* appears something of a “refusal of closure”—a wish to revisit an issue that is, from many appearances, settled.¹⁶⁵

A second concern arises from the sequencing employed in the *Guidance* to resolve the claimed textual predicament. The text “shall” and “subject to the agreement of” appear in that order in Article 70(1).¹⁶⁶ Yet the *Guidance* reverses that order in its effort to interpret those terms, stating:

As already discussed, the last phrase makes clear that consent is required. However, the use of the word “shall” also suggests that acceptance of humanitarian relief is not entirely discretionary. Interpreting the texts in a

161. *Id.* (citing the principle of effectiveness as exercised by the International Court of Justice in Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 I.C.J. Rep. 70, ¶¶ 133–34 (Apr. 1)).

162. *Id.* at 21.

163. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 2790–2822 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

164. CHIEF OF THE GENERAL STAFF (CANADA), B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS (2001) [hereinafter CANADIAN LOAC MANUAL]; FEDERAL MINISTRY OF DEFENCE (Germany), ZDV 15/2, LAW OF ARMED CONFLICT MANUAL (2013) [hereinafter GERMAN LOAC MANUAL]; UK LOAC MANUAL, *supra* note 27.

165. ROWAN WILLIAMS, ANGLICAN IDENTITIES 79 (2004).

166. AP I, *supra* note 105, art. 70(1).

manner which insists on the requirement of consent, but which subjects such consent to some limits, gives effect to both aspects of the provision.¹⁶⁷

Note that the *Guidance* first indicates that Article 70(1) establishes a baseline rule that only consensual humanitarian relief is required. This is not itself objectionable. However, the authors then seek to account for how the term “shall” modifies the discretion to render or withhold consent. One supposes that term might have been interpreted to eliminate parties’ discretion entirely and the compulsory nature of the term suggests as much. Of course, such an understanding would deprive the term “agreement” of its ordinary meaning. Thus, the meaning of “shall” is instead softened, regarding it as eliminating arbitrarily withheld consent. Considered in this sequence—that is, out of the order in which the terms appear—the interpretation set forth in the *Guidance* seems indeed a reasonable compromise or reconciliation of tension.¹⁶⁸ However, neither “agreement” nor “shall” enjoys its full, plain meaning; each is simply accounted for in a manner that best fits that interpretation.

The authors of the *Guidance* adopted a reverse-order interpretation to avoid rendering any part of the text redundant or meaningless.¹⁶⁹ Reading Article 70(1) non-sequentially might be commended or even necessary if a natural sequential reading presented a difficulty with respect to redundancy or rendered any text a nullity. But this is not the case with Article 70(1). A simple, sequential reading and interpretation approaches the terms in precisely the order they appear and gives each term its full meaning. Under that interpretation the term appearing first, in this case the term “shall,” establishes the Article’s general or baseline obligation. The compulsory nature of “shall” indicates a mandatory character. The drafters of Article 70(1) did not leave that term unmodified, however, as the phrase “subject to the agreement of” follows. A plain reading of “agreement” indicates discretion to consent or not to consent is permitted. While the term “subject to” both indicates that affirmative exercise of discretion is required and, more importantly, that any preceding obligations, including any obligations flowing from the term “shall” are conditioned by agreement of the belligerent parties.

167. OXFORD GUIDANCE, *supra* note 28, at 21.

168. The authors introduce their non-sequential reading of Article 70(1) in an article addressing the subject of arbitrary withholding of consent. Akande & Gillard, *supra* note 142, at 489. They explain, “While the last phrase makes clear that consent is required, the use of the word ‘shall’ also suggests that acceptance of humanitarian relief is not entirely discretionary.” *Id.*

169. OXFORD GUIDANCE, *supra* note 28, at 21.

This natural reading does not, as the *Guidance* authors seem to fear, render the term “shall” a nullity. The compulsory meaning of the term is retained if one understands it to mean that the belligerent parties are required to permit relief actions they have approved. That is, parties shall permit those relief actions agreed to between themselves. By this reading, Article 70(1) stands as a sort of guarantee that parties will permit humanitarian relief operations that they have considered to be consistent with the needs of their military circumstances—a sense of *pacta sunt servanda* with respect to humanitarian relief consent. Once a party determines it is willing and able to permit a relief action in its territory or in territory under its effective control, it is bound to support and to allow that action to proceed.

In fact, precisely this understanding of Article 70 appears in a later section of the *Guidance* where it is stated, “[o]nce consent has been granted, parties to an armed conflict *must* allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel throughout the territory under their effective control.”¹⁷⁰ This same natural reading of Article 70(1) appears again in the section concerning medical relief supplies, equipment, and personnel: “Accordingly, provided consent has been granted, parties to an international armed conflict and other relevant states have an absolute obligation to allow and facilitate rapid and unimpeded passage of medical relief supplies and equipment.”¹⁷¹

Rather than provoking textual tension that calls for a non-sequential interpretation and resulting obligation, the “shall” of Article 70(1) simply expresses and reinforces the binding nature of consent rendered to relief actions. Such a guarantee permits relief organizations to rely on the parties’ consent, to undertake preparations for these operations, and to execute these actions during armed conflict. Meanwhile, by this reading, the phrase “subject to the agreement of” retains its essential meaning—that of involving approval or acceptance and the imperative, mandatory meaning of “shall” is simultaneously preserved.

Further doubt may be cast on the *Guidance*’s interpretation of Article 70(1) in light of its regulatory consequences. It is not only an overwrought, non-sequential reading; it is a reading that identifies through implication, rather than through clearly expressed textual consent, a limit on State prerogative and therefore sovereignty. Withholding agreement to relief operations inconsistent with the authors’ interpretation of Article 70(1) is regarded as

170. *Id.* at 26 (emphasis added). Later in the *Guidance*, the passage is reproduced without the reference to territorial control. *Id.* at 29.

171. *Id.* at 34.

an internationally wrongful act.¹⁷² Yet foundational precepts of international law counsel against such analyses. In *S.S. Lotus*, the Permanent Court of International Justice (PCIJ), predecessor of the International Court of Justice (ICJ), cautioned that restrictions on States must not be presumed.¹⁷³ The natural reading of Article 70(1) adheres more closely to the Court's caution in this respect. It avoids generating or implying a new restriction on States, while giving full effect to each term of Article 70(1).

Finally, with respect to the text of Article 70(1), the interpretation offered in the *Guidance* is a clumsy form for States to have expressed a requirement not to arbitrarily withhold consent. It seems highly unlikely that drafters and States expected consumers of Article 70(1) to apprehend such a requirement through plain reading. Moreover, there are certainly simpler ways for States to have expressed what the *Guidance* implies is there. Had States meant to modify or limit their discretion to approve or disapprove relief operations, they could easily have done so. In fact, they did so previously in Article 23 of GC IV with respect to medical and religious supplies for a narrow class of civilians, conditioning refusal of such relief on "serious reasons" to suspect misuse. Article 23 explicitly requires the precise reasoned refusals that the *Guidance* authors contrive for Article 70(1). States adopted an even clearer obligation with respect to humanitarian relief for situations of belligerent occupation. Article 59 of GC IV indicates occupying powers "shall agree to relief schemes on behalf of the [occupied] population."¹⁷⁴

As a second basis for the prohibition on arbitrary withholding of consent, the *Guidance* offers "the negotiating history of the Additional Protocols"—statements made by States' representatives during debates at the diplomatic conference that formed Article 70(1). The *Guidance* asserts the States party to those negotiations understood they would not have complete freedom to withhold consent and could only do so for valid reasons.¹⁷⁵

172. *Id.* at 48 ("Unlawful impeding of humanitarian relief operations is a violation of international humanitarian law and often also of international human rights law that gives rise to responsibility under international law.")

173. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7). In a similar vein, the Permanent Court of International Justice cautioned against interpreting broadly treaty provisions that limit State sovereignty. See JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 379 (8th ed. 2012) (citing Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J. (ser. A) No. 23, at 261 (Sept. 10).

174. GC IV, *supra* note 121, art. 59.

175. OXFORD GUIDANCE, *supra* note 28, at 21.

Resort to negotiating history, or *travaux préparatoires*, to interpret treaties is widely practiced, but it is best understood as a supplementary rather than a primary means of interpretation. For instance, the ICJ does not consult negotiating histories as a matter of routine. It limits resort to negotiating histories to cases of pressing textual ambiguity or to instances where ordinary meanings of treaty text give rise to unreasonable results.¹⁷⁶ The ICJ has observed, “If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.”¹⁷⁷ The Court has rejected calls to consider negotiating history when natural or ordinary readings of treaties render clear understandings.¹⁷⁸

Because the *Guidance* chooses to create textual tension within Article 70(1), it is perhaps unsurprising that the authors resort to the negotiating history of that Article as a means of interpretation. Whether, or the extent to which, one accepts the negotiating history as appropriate to understanding Article 70(1) is then a reflection of one’s opinion of the initial claim in the *Guidance* that the Article is textually ambiguous.

The *Guidance* is not alone in resort to legislative records with respect to Article 70(1). Like the *Guidance*, the ICRC’s Commentary on AP I relies on negotiating history to interpret Article 70(1).¹⁷⁹ Both the *Guidance* and the ICRC *Commentary* emphasize a passage from the *Official Records* of the diplomatic conference by the German delegate Professor Michael Bothe: “[Article 70] did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones.”¹⁸⁰

176. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331. Article 32 states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning . . . when the interpretation [in accordance with the ordinary meaning] . . . leaves the meaning ambiguous or obscure . . .”

Id.

177. Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. Rep. 4, 8 (Mar. 3).

178. *Id.* (rejecting submissions calling on the Court to consider the negotiating history where the Court found, “no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them.”).

179. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 163, ¶ 2805.

180. OXFORD GUIDANCE, *supra* note 28, at 21 (quoting 12 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA 1974–1977, at 336, ¶ 27 (1978) [hereinafter OFFICIAL RECORDS]).

However, Professor Bothe, who would later publish his own commentary on AP I, and, incidentally, was a member of the group of experts that advised the *Guidance* authors, appears to have conceded in his remarks that Article 70 did not limit discretion to reject aid to the extent he had hoped. He indicated that his delegation accepted the Article 70(1) passage requiring agreement of the belligerent parties, “in a spirit of compromise.”¹⁸¹

Other delegations endorsed the German view, including the United States, Netherlands, the Soviet Union, and the United Kingdom, but none was willing to insist on treaty language to that effect.¹⁸² The Swiss representative also indicated his delegation preferred to delete the phrase “subject to the agreement of the Parties.”¹⁸³ Presumably, it was the unfettered discretion to withhold consent indicated by the unqualified term “agreement” that concerned the Swiss. Yet the Swiss delegation ultimately declined to insist on or propose any such measure. And although the meeting considered and adopted other amendments to what became Article 70(1), no State offered any amendment to incorporate Professor Bothe’s understanding or the Swiss preference into the text of the Article. Nor did any State submit an understanding to the effect of the German statement upon ratification.

Further examination of the AP I *Official Records* and earlier records reveals a still more complicated negotiating history. An earlier draft, negotiated at a conference of experts that preceded the diplomatic conference, obliged belligerent parties to accept relief actions “to the fullest extent possible.”¹⁸⁴ A subsequent draft, considered at a second conference of experts, actually dropped the qualifying phrase entirely, expressing an absolute duty, commensurate with the duty attendant to situations of belligerent occupation. It required States accept relief actions and only gave belligerents discretion to prescribe technical arrangements such as timing.¹⁸⁵ Yet at the succeeding diplomatic conference, States rejected both arrangements.

181. *Id.*

182. *Id.*

183. *Id.*

184. INTERNATIONAL COMMITTEE OF THE RED CROSS, 1 REPORT ON THE WORK OF THE CONFERENCE, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, SECOND SESSION, 3 MAY – 3 JUNE 1972, at 161 (1972) (reproducing Draft Article 64 and recording experts’ reactions thereto).

185. INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949: COMMENTARY 78 (1973) (reproducing Draft Article 62 concerning relief actions).

As late as 1976, the third year of the four-year diplomatic conference, the draft of Article 70(1) included an unqualified duty to accept humanitarian relief. For example, the 1973 draft additional protocol prepared by the ICRC and submitted to the diplomatic conference read in relevant part: “the Parties to the conflict shall agree to and facilitate those relief actions which are exclusively humanitarian and impartial in character and conducted without any adverse distinction.”¹⁸⁶ And after a first round of amendments by States, that portion of the draft article read: “each party to the conflict shall agree to, and shall facilitate relief actions which are humanitarian and impartial in character and conducted exclusively for the civilian population without any adverse distinction.”¹⁸⁷

However, States ultimately insisted that the general obligation to permit relief actions be contingent on agreement by the belligerent parties. A working group assigned to address the draft humanitarian relief articles reported a split among delegations. Some delegations advocated a “clearly defined obligation with respect to relief.”¹⁸⁸ Others maintained “such an obligation could not be imposed.”¹⁸⁹ The working group reported that to reconcile these views, the draft of Article 70 was “re-worded to state that relief actions should be carried out in accordance with agreements concluded between the Parties”¹⁹⁰ The result was the condition of agreement in the final version of Article 70(1).

If one is to concede the propriety of resorting to *travaux préparatoires*, selective citations should usually be avoided. A fuller consideration of the *travaux* reveals that the selection of the authors of both the ICRC *Commentary* and the *Guidance* underemphasize the importance to the majority of assembled States of preserving sovereign prerogative during armed conflict and specifically during siege.

The third basis for a prohibition on arbitrary withholding of consent concerns “practice subsequent to the adoption of the treaties.”¹⁹¹ The *Guid-*

186. 1 OFFICIAL RECORDS, *supra* note 180, pt. III, at 20.

187. Amendments to Draft Protocol I, Article 62, in 3 OFFICIAL RECORDS, *supra* note 180, at 282–83. The co-sponsors of this amended version included Austria, Canada, Denmark, Finland, France, Greece, Holy See, Indonesia, Monaco, Netherlands, Norway, Sweden, United Kingdom, and the United States. *See id.*

188. 12 OFFICIAL RECORDS, *supra* note 180, at 333 (reporting on Working Group B of Committee III at the Fourth Session of the Diplomatic Conference).

189. *Id.*

190. *Id.*

191. OXFORD GUIDANCE, *supra* note 28, at 21.

ance asserts “subsequent formulations of the rules of humanitarian assistance” expressly indicate States may not arbitrarily withhold consent.¹⁹² It is true that accepted rules of treaty interpretation include subsequent practice as evidence of meaning.¹⁹³ Usually, such practice is confined to evidence of actual application of the treaty obligation in question.

To the author’s credit, the *Guidance* refers to “practice,” not to State practice, presumably so as not to overstate its significance to the formation of custom. Accordingly, it directs readers to an Institute of International Law resolution, a draft article on disasters by the International Law Commission, and various statements by UN organs, including non-binding observations of the General Assembly, the Human Rights Council, and the Human Rights Committee. None of these sources, of course, constitutes subsequent State practice. Rather, the sources cited in the *Guidance* are, like the *Guidance* itself, pronouncements by private or international organizations and their organs, many addressing situations outside armed conflict. And on closer examination, none of these sources relies in any significant respect on rigorous or systematic effort to discern consistent and substantially uniform State practice that might inform or modify the meaning of any treaty. Accordingly, the subsequent practice offered in the *Guidance* provides thin, if any, primary evidence of application of States’ international obligations with respect to relief actions during armed conflict.

A more orthodox case might have been made concerning subsequent practice by resorting to select States’ military legal manuals. The Canadian manual on the law of armed conflict observes, “The parties to a conflict are obliged to facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel.”¹⁹⁴ Yet on closer examination, it is clear that this passage describes the duty with respect to vulnerable classes of the civilian population set forth in Article 23 of GC IV. The passage includes no citation to Article 70 of AP I, although Canada is a State Party to that instrument.¹⁹⁵ The German manual on the law of armed conflict instructs, “States through which relief supplies are moved may object to the transit for objective reasons only.”¹⁹⁶ However, this passage seems more clearly directed to the case of transit territorial States not party to the conflict than to belligerents. The preceding passage confirms as much, addressing obligations of “a Party to a

192. *Id.* at 22.

193. Vienna Convention on the Law of Treaties, *supra* note 176, art. 31(3)(b).

194. CANADIAN LOAC MANUAL, *supra* note 164, at ¶ 614.7.

195. *Id.*

196. GERMAN LOAC MANUAL, *supra* note 164, at ¶ 526.

conflict” and emphasizing deliveries are “subject to the agreement of the Parties.”¹⁹⁷ The German distinction between the duty of territorial transit States and that of belligerents involved in armed conflict is not clear from the law. It may, however, be premised on the comparatively minimal burden and risk presented to mere transit States not involved in operations to compel an enemy force into submission.

After the case is made for a prohibition on arbitrary withholding of consent to humanitarian relief operations, the *Guidance* offers three indications of arbitrariness for purposes of Article 70(1) when consent is withheld: “(i) in circumstances that result in the violation by a state of its obligations under international law with respect to the civilian population in question; (ii) [that] violates the principles of necessity and proportionality; (iii) that is unreasonable, unjust, lacking in predictability, or that is otherwise inappropriate.”¹⁹⁸

The first indication of arbitrariness points chiefly to other law of war provisions, including the prohibition of starvation as a method of war, parties’ medical treatment obligations, and the prohibition on collective punishment.¹⁹⁹ It also calls for examination of obligations outside the law of war. The *Guidance* states that the internationally wrongful act of arbitrarily withholding consent to relief operations occurs when doing so violates human rights obligations such as bodily integrity, economic, cultural, and social rights, and an adequate standard of living.²⁰⁰

A complicated and contentious body of scholarship and State practice has developed around the fraught question of how international human rights and the law of war interact during armed conflict.²⁰¹ However, substantial agreement has formed around the notion that, although armed conflict does not extinguish human rights obligations, human rights provisions

197. *Id.*

198. OXFORD GUIDANCE, *supra* note 28, at 22.

199. *Id.* at 23.

200. *Id.* It is reasonable to assume this provision with respect to arbitrariness is intended to apply to other international obligations outside the law of war such as those derived from sovereignty and other general international law provisions. *See id.* at 11.

201. *See* Derek Jinks, *International Human Rights Law in Time of Armed Conflict*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 657, 662–65 (Andrew Clapham & Paola Gaeta eds., 2014) (cataloging a wide range of viewpoints on the interface between international human rights law and the law of war); David Kretzmer, Rotem Giladi & Yuval Shany, *International Humanitarian Law and International Human Rights Law: Exploring Parallel Application*, 40 ISRAEL LAW REVIEW 306 (2007) (introducing several papers presented at a conference addressing the interface between human rights and the law of war published in the same volume).

yield to or are informed by more specific regulation by the law of war—the doctrine of *lex specialis*.²⁰² The ICJ applied *lex specialis* considerations when it evaluated claims that nuclear weapon use might constitute a violation of the human right against the arbitrary deprivation of life.²⁰³ The Court advised that, during armed conflict, what constitutes an arbitrary deprivation of life for human rights purposes should be determined by reference to the law of war, specifically the principles of discrimination and humanity.²⁰⁴

Like the ICJ, the *Guidance* authors attempt to reconcile how human rights and law of war rules might operate in a complementary fashion during armed conflict. Specifically, they attempt to account simultaneously for how human rights law and the law of war guarantee human survival and sustenance during siege. But whether by error, or by a clever turn, the comment on arbitrariness departs from the ICJ's application of the doctrine of *lex specialis*. Where the Court, acknowledging the law of war as law specifically crafted for armed conflict, sought to understand a human right through, or by reference to, the law of war, the *Guidance* does precisely the opposite. In the *Guidance*, the authors seek to discern the extent of a law of war provision by reference to assorted human rights norms. More precisely, it is asserted that arbitrariness, for purposes of the law of war applicable to relief actions, is determined by reference to human rights law obligations with respect to bodily integrity, economic, cultural, and social rights, and a standard of living. Where the ICJ limited and qualified a human right by reference to the law of war, the *Guidance* authors expand a law of war prohibition by reference to human rights law.

The approach in the *Guidance* to *lex specialis* not only reverses the application of that doctrine, it also presents a strained narrative of the relationship between human rights law and law of war applicable to relief actions. Article 70(1), adopted *subsequent* to each of the referenced human rights norms, presumably reflects States' judgment that hostilities introduce considerations

202. See David Glazier, Zora Colakovic, Alexandra Gonzalez & Zacharias Tripodas, *Failing Our Troops: A Critical Assessment of the Department of Defense Law of War Manual*, 42 YALE JOURNAL OF INTERNATIONAL LAW 215, 262–63 (2017) (concurring with application of *lex specialis*, however, contesting the United States' broad conception of the doctrine); Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISRAEL LAW REVIEW 648, 655–56 (2007) (discussing various approaches to the operation of the doctrine of *lex specialis*).

203. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (8 July).

204. *Id.*

not accounted for in peacetime regulation of access to humanitarian relief. Had the preexisting human rights rules cited in the *Guidance* been applicable to armed conflict and considered adequate, there would have been little call for Article 70(1). Yet, the *Guidance* has the effect of leveling out the international regulation of relief access in times of peace and times of armed conflict. It effectively incorporates these human rights norms by reference in a way that Article 70(1) might have, but clearly did not. A sounder approach accepts States' apparent judgment that conditions of armed conflict warrant greater discretion for States' decisions to accept or reject offers of relief and require a specific regime of regulation apart from general, chiefly peacetime obligations.

The second indication of arbitrariness in the *Guidance* refers to the principles of necessity and proportionality. It is not entirely clear whether this is meant to refer to law of war principles or principles of general public international law. Necessity and proportionality are expressed in a variety of international legal regimes.²⁰⁵ The possibility of reference to principles of general public international law is at least suggested by a citation to a UN Human Rights Committee communication and a UN Secretary-General report on human rights and deprivation of nationality.²⁰⁶ Blurring somewhat the distinction between the two principles, it is explained that withheld consent that "exceeds what is necessary in the circumstances . . . is thus disproportionate,"²⁰⁷ which, in the view of the *Guidance* authors, amounts to prohibited arbitrariness.

It is widely understood that law of war principles convey specific meaning. For example, the law of war principle of necessity has been defined to permit

205. See Attila Tanzi, *Necessity, State of*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Feb. 2013), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1071> (describing the legal doctrine of necessity under State responsibility); see also Emily Crawford, *Proportionality*, in *supra*, (May 2011), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1459> (describing a "general principle" of proportionality that exists within public international law).

206. OXFORD GUIDANCE, *supra* note 28, at 24 n.52 (citing *A v. Australia*, Comm. No. 560/1993, U.N. Human Rights Committee, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997); The Secretary-General, *Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality, delivered to the General Assembly*, U.N. Doc. A/HRC/25/28 (Dec. 19, 2013)).

207. *Id.* at 24.

a state engaged in armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest moment with the minimum expenditure of life and resources.²⁰⁸

Meanwhile, law of war proportionality includes at least two and perhaps as many as three meanings. The U.S. *Law of War Manual* indicates that proportionality “may be defined as the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive.”²⁰⁹ While the German *Law of Armed Conflict Manual* defines a narrower notion of proportionality applicable to attacks: “attacks on military objectives which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of these, which and would be excessive in relation to the concrete and direct military advantage anticipated are prohibited.”²¹⁰

Each of these meanings, but most especially the *jus in bello* variant of proportionality applicable to attacks, has been refined to account for the unique challenges and circumstances of armed conflict. Even if the *Guidance* is understood as confining an indication of arbitrariness to the law of war principles of necessity and proportionality, it is unclear why the law of war should be interpreted to include a separate legal obligation with respect to arbitrariness when it comes to humanitarian relief. It is especially unclear why the interpretation offered in the *Guidance* should be employed to identify a redundant norm. To be sure, too much should not be made of this observation. The law of war is rife with specific regulations that implement, refine, or give effect to law of war principles. But evidence of such obligations and their acceptance by States should be overwhelmingly clear rather than implied through interpretive dexterity.

The third indication of prohibited arbitrariness identified in the *Guidance* includes withheld consent that is “unreasonable or that may lead to injustice or to lack of predictability, or that is otherwise inappropriate.”²¹¹ This passage gives rise to at least two concerns. First, it is difficult to evaluate justice and predictability as law of war requirements. No law of war instrument

208. UK LOAC MANUAL, *supra* note 27, ¶ 2.2; *see also* DOD LAW OF WAR MANUAL, *supra* note 27, § 2.2 nn.13–15 (offering military necessity definitions from military legal manuals, judgments of tribunals, and scholarly work).

209. DOD LAW OF WAR MANUAL, *supra* note 27, § 2.4.

210. GERMAN LOAC MANUAL, *supra* note 164, ¶ 404.

211. OXFORD GUIDANCE, *supra* note 28, at 25.

elaborates on either as a general requirement of the conduct of belligerents during hostilities. Nor do the military legal manuals of States or other widely consulted sources include significant treatment of justice and predictability as either independent law of war obligations or as bellwethers of sound law of war implementation.

Second, the *Guidance* does not elaborate on either concept and only surmises, “a total failure to provide reasons for withholding consent,” as a possible example of arbitrariness for purposes of Article 70(1).²¹² It is troubling to equate belligerent parties’ silence on military decision making with arbitrariness. A number of considerations, other than arbitrariness of reasoning can explain failure to provide public explanations of military courses of action. The intense pace and changing nature of battlefield conditions often prevent belligerents from regularly offering timely and cogent explanations for their conduct. Belligerents face notorious challenges even coordinating decisions internally and suffer routine failures in this respect, despite best efforts and enormous incentives to improve. These challenges are multiplied and exacerbated with respect to their external communications. It is also well understood that military planning and execution require secrecy to guarantee operational security. And although many armed forces include public affairs organizations, the military organizations that are most privy to the rationales for decisions are rarely the primary outlets for communicating States’ day-to-day legal positions.

Further, there is textually-based cause to doubt the requirement set forth in the *Guidance* that parties must provide reasons for withholding consent. To apply the concern expressed by the authors for the doctrine of effectiveness,²¹³ a distinction should be made between the text of Article 23 of GC IV and Article 70(1) of AP I. As noted above, where the latter is silent as to reasoning for withholding consent, the former explicitly requires “serious reasons,” thus limiting conditions under which belligerents may reject relief.²¹⁴ To imply a reasoning requirement in AP I, where none appears, arguably renders the Article 23 requirement a nullity. That AP I supplements the 1949 Geneva Conventions commends all the more interpreting it with a view to consistency with those Conventions.²¹⁵

The requirement of reasoned refusal raises further concerns of a practical nature. This concern is borne out especially by the following conclusion

212. *Id.*

213. *Id.* at 21 n.38 (citing the legal maxim *ut res magis valeat quam pereat*).

214. See *supra* text accompanying note 130.

215. See AP I, *supra* note 105, art. 1(3).

from the *Guidance*: “Withholding consent without providing any reasons gives rise to a rebuttable presumption of arbitrariness.”²¹⁶ Rebuttal presumptions are familiar and widely accepted in the controlled environment of litigation. However, they have proved controversial in law of war instruments—often for good reason. The burden shifting schemes associated with presumptions and their rebuttal by evidence, while manageable in civil and ordinary criminal litigation, prove enormously difficult in the chaotic atmosphere and aftermath of combat operations. Requiring parties to record and publish their reasons for refusing relief actions introduces a new burden on belligerent parties—likely a cost not anticipated at the time these obligations were negotiated. And it is unclear why the party refusing agreement to a relief action should bear the burden of rebuttal rather than requiring the party alleging an unlawful impediment to make a *prima facie* showing.

Other evidentiary concerns attend the arbitrariness prohibition. It is possible that the standard for refusal of consent was not specified by States because States realized that proof of arbitrariness would be too difficult to enforce. There is a further question whether the refinements in the *Guidance* with respect to arbitrariness merely shift debate from the straightforward question of consent to the more complicated and convoluted question of adequacy of reasoning and sufficiency of proof.

In most cases, the conclusion that a party had arbitrarily withheld its consent only could be determined based on the totality of circumstances. Military decisionmaking, viewed from an outside or non-indoctrinated perspective, might often seem arbitrary. Further, military planning and decision making frequently involve judgments made with imperfect or inadequate information. Relevant circumstances would certainly include observable battlefield conditions. Yet just as relevant—and perhaps even more so—would be facts not available either to opposing parties or the public.

Finally, an evaluation of the *Guidance* requires broader consideration of its place in and impact on the development and methodology of the law of war. While States have made important progress in humanizing war through law, that law remains in important respects incomplete. It is rife with seeming gaps in protection and in logic. Experience in war repeatedly highlights the humanitarian deficiencies of the law of war. Whether these gaps or failings represent invitations to achieve through interpretation and logic what could not be accomplished in negotiations between States or whether they are merely reflections of the limits of international consensus and therefore of

216. OXFORD GUIDANCE, *supra* note 28, at 25.

the prevailing balance between humanity and necessity is a critical consideration for any law of war analysis.

At the end of the nineteenth century and into the opening decades of the twentieth, the law of war experienced a brief golden age of codification. Beginning with a flurry of succinct treaties addressing discrete *jus in bello* subjects, States regulated the initiation, conduct, and termination of hostilities between themselves.²¹⁷ Their enthusiasm for codification, and also it seems for compliance with the international law of war, soon waned. Neither two world wars nor endless internal armed conflicts in the mid-twentieth century managed to inspire States to develop a comprehensive international law of war. The 1949 Geneva Conventions and UN Charter certainly reflect important commitments to international law by States, each prompted in large part by States' experience in armed conflict.²¹⁸ Yet the Geneva Conventions and the UN Charter left important aspects of the conduct of hostilities and resort to force either untreated or underdeveloped.

The closing decades of the twentieth century saw something of a resurgence in codification, perhaps even a second, albeit lethargic and sporadic, golden age. In addition to robust updates to the 1949 Geneva Conventions, the period between 1972 and 2000 saw new *jus in bello* treaties on targeting

217. See Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539; 1907 Hague Regulations, *supra* note 105; [Hague] Convention No. III Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. No. 538; [Hague] Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, 187 Consol. T.S. 459, *reprinted in* 1 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 157 (1907); [Hague] Declaration (IV, 2) Concerning Asphyxiating Gases, July 29, 1899, 187 Consol. T.S. 453, *reprinted in* 1 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT, *supra*, at 155; [Geneva] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 6, 1906, 35 Stat. 1885, 202 Consol. T.S. 144; [Hague] Convention No. III Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. No. 538; [Hague] Convention (II) Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; [St. Petersburg] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, 138 Consol. T.S. 297, 18 MARTENS NOUVEAU RECUEIL (ser. 1) 474; [Geneva] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 129 Consol. T.S. 361.

218. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; GC IV, *supra* note 121; U.N. Charter.

and conventional weapons, as well as underappreciated law of war codifications in the form of war crimes treaties.²¹⁹

But in the opening decades of the twenty-first century, international legal momentum again seems to have stalled. The ICRC, long an initiator of law of war development, presently does not have public plans to sponsor a comprehensive law of war treaty conference. Currently, its most significant legal project is an effort to update and reissue its previous commentaries on the 1949 Geneva Conventions and their 1977 Protocols.²²⁰ Meanwhile, States'

219. See Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 2404 U.N.T.S. 261; Protocol [V] [to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects] on Explosive Remnants of War, Nov. 28, 2003, 2399 U.N.T.S. 100; Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90; Protocol [II amended] [to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects] on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, May 3, 1996, 2048 U.N.T.S. 93; Protocol [IV] [to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects] on Blinding Laser Weapons, Oct. 13, 1995, 1380 U.N.T.S. 370; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955 annex (Nov. 8, 1994), *reprinted in* 33 INTERNATIONAL LEGAL MATERIALS 1598 (1994); Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827 (May 25, 1993), adopting The Secretary-General Report Pursuant to Paragraph 2 of Security Council Resolution 808; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137; Protocol [III] [to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects] on Prohibitions or Restrictions on the Use of Incendiary Weapons, Oct. 10, 1980, 1342 U.N.T.S. 171; Protocol [II] [to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects] on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 1342 U.N.T.S. 168; Protocol [I] [to the Convention on Prohibitions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects] on Non-Detectable Fragments, Oct. 10, 1980, 1342 U.N.T.S. 168; AP I, *supra* note 105; AP II, *supra* note 121.

220. See Jean-Marie Henckaerts, *Bringing the Commentaries on the Geneva Conventions and Their Additional Protocols into the Twenty-first Century*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 1551 (2012).

diplomatic attention is chiefly invested in narrow weapons issues.²²¹ Yet, State support for these contentious regulatory efforts is far short of the universal support enjoyed by the 1949 Geneva Conventions.

If law of war development can be described as fitful, the same cannot be said for its subject. Rapid evolutions and even revolutions in warfare have been a constant.²²² New means, methods, and venues of warfare emerge with regularity. Science and military art continually push conflict in new directions and even into new domains.

The challenge of pairing static law with dynamic conditions of combat is not new. But during hiatuses in law of war development, such as the present, these efforts gain increased importance. Lulls in treaty development involve law of war implementation less as a matter of application and more as a matter of interpretation. The effort, such as that undertaken by the legal experts who participated in the preparation of the *Guidance*, to identify precise rules of conduct for emerging conditions in war becomes more difficult as they grow removed in time and context from the law.²²³ While law of war principles such as distinction and humanity are in some senses timeless, assessing precisely what rules of conduct each principle demands in a new domain or context of warfare or from new military technology is no simple matter.

Alongside efforts to form operative law for conditions of armed conflict, law of war implementation has involved a second, perhaps more subtle endeavor—an effort to reconcile that operative law to the fundamental purposes of the law of war. Law of war analyses, such as the *Oxford Guidance*, reveal not only their authors' preferences and habits of interpretation, they also offer veiled (and not-so veiled) comments on the suitability of the law of war—how well or poorly the extant law vindicates its purposes. That is, law of war interpretation involves both assessments of how the law applies to new conduct in war, as well as appraisals of how well resulting rules of conduct match prevailing senses of humanity and military necessity.

221. See United Nations Office at Geneva, *Background on Lethal Autonomous Weapons Systems in the CCW*, UNOG, [https://www.unog.ch/80256EE600585943/\(httpPages\)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument](https://www.unog.ch/80256EE600585943/(httpPages)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument) (last visited Jan. 14, 2019).

222. See generally MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR: THE MOST RADICAL REINTERPRETATION OF ARMED CONFLICT SINCE CLAUSEWITZ* (1991); *THE MAKERS OF MODERN STRATEGY* (Peter Paret ed., 1986).

223. See, e.g., TALLINN MANUAL ON INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 248–56 (Michael N. Schmitt ed., 2013) (encountering particular difficulty applying early twentieth-century rule of neutrality to cyber operations during armed conflict).

The law of war is widely understood to reflect a balance between these often competing considerations.²²⁴ Thus, each new law of war treaty and each amendment, but also each interpretive gloss, private report, manual, or guidance subtly alters the humanity-military necessity balance. And just as State understandings of law of war rules evolve, so too the desired point of balance between humanity and military necessity shifts over time. The results that States, their armed forces, international tribunals, academia, humanitarian organizations, and civil society expect from the law of war change with the character of war, but also in response to current senses of morality and public conscience.²²⁵ Law of war literature—whether legal manuals, judgments, publications, reports, or even protests—from any of these constituencies reflects not only doctrinal assessments, but also normative assessments of an appropriate balance between humanity and military necessity. Just how greatly military operations can or should be curtailed in the name of humanity, and just how much human suffering should be tolerated to achieve military objectives is a central—though often latent—debate within and between competing law of war works.

If law of war interpretation involves both analysis to discern operative law, as well as to reflect the humanity-military necessity balance, the *Guidance* is a commendable effort to focus attention on a fundamental purpose of the law—to preserve a measure of humanity even in the desperate and dangerous conditions of combat. Despite presenting problematic issues of interpretation, the *Guidance* remains a compelling argument for incorporating humanitarian interests into the law of war.

However, the *Guidance* seems based on a narrow or incomplete understanding of the purposes of the law of war. Its interpretive effort skews almost exclusively to humanitarian concerns at the expense of considerations of military experience and practice. There is no evidence of concerted effort to consult or incorporate military doctrine or the rich historical experience of siege operations or, for that matter, other military operations that involve isolation. Similarly, the *Guidance* includes no assessment of the impact its interpretation would have on military operations.

224. See Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795 (2010).

225. While the nature of war is in many respects constant, the character of war is ever changing—it is determined by policy, technology, and other social phenomena. See COLIN S. GRAY, MODERN STRATEGY 125 (1999). See generally COLIN S. GRAY, CLAUSEWITZ, HISTORY, AND THE FUTURE STRATEGIC WORLD (2003).

The *Guidance* is, at its heart, a subtle attempt to renegotiate the boundaries of the law in the name of humanitarianism. It identifies in the law a concealed plea to humanitarian logic previously unappreciated by States or by two generations of law of war scholarship. The *Guidance* reflects an attempt to accomplish something not found in interpretation but rather in the slow, difficult work of diplomacy and drafting. Undoubtedly with good intentions, the *Guidance* authors refine the law to a greater extent than States apparently wished. But whether specificity is actually desirable should be considered carefully. Ambiguity, while vexing to jurists and academics, is often an essential aspect of international regulation. In some cases, ambiguity reflects important limits of consensus among States. Unclear or seemingly incomplete rules are often compelling evidence of what separates States' views on a subject. Unclear rules can also reflect States' judgment that more precise or logically consistent rules would prove legally unmanageable.

But more than an exercise in *a priori* humanitarian interpretation, the *Guidance* should be appreciated as an alteration in the balance between humanity and military necessity. The law of war reflects balancing points established with respect to discreet issues and battlefield circumstances. For example, nearly absolute protection for hospitals reflects States' judgment that humanity should prevail over all but the most compelling military necessity.²²⁶ Likewise, the previously described limits on a State's right to reject offers of humanitarian relief for children and expecting mothers found in Article 23 of GC IV reflects an instance of humanity prevailing over the military imperative of isolation.

The law of war also involves a meta-balance—an aggregate balancing point at which humanity and necessity are comparatively served by the law of war writ large. Various periods of the law of war attest to different balancing points. The early law of war took relatively little account of humanitarian interests. Entire categories of victims of war were left unprotected and military necessity in targeting was nearly unconstrained. The twentieth century saw States accept greater and greater limits on their conduct in armed conflict in the name of humanity. An empirical assessment of the relative weight presently accorded to humanity and military necessity is difficult to identify but nonetheless, one can certainly discern movement in favor of humanity.

It may be too much to say that the *Guidance* significantly alters this meta-balance. But extrapolation of its interpretive sleights of hand and its resort

226. GC I, *supra* note 218, art. 19.

to humanitarian logic to other law of war subjects and debates could quickly do so. The law of war balance would surely be altered if each law of war ambiguity were resolved exclusively by resort to humanitarian objects or purposes, without equal attention to military necessity as reflected by historical experience and military doctrine. Those preparing the *Guidance* appear to have been unhappy with the prevailing law of war balance with respect to offers of humanitarian relief. It undoubtedly shifts the bargain struck by States with respect to humanitarian relief operations in favor of humanity.

The effort that produced the *Guidance* might have more useful as a project to consult with States to identify the potential for treaty amendments. In particular, a better accounting for the military equities and imperatives of siege might have guided the authors to a sounder interpretation from both doctrinal and normative perspectives. Furthermore, such an approach might have expressed and achieved desirable doctrinal and normative unity on a subject of critical importance. It is perhaps underappreciated in this period of prolific law of war scholarship and interpretation that each dissent, each new view, each fragmentation undermines the law of war as something, sometimes the only thing, which unifies opposing parties. Seeking consensus informed by humanity, as well as military necessity, rather than pushing the boundaries of humanitarian logic, seems a far more promising means to advance humanity.

In sum, the authors of the *Guidance* employed a wide range of sophisticated interpretative techniques to identify an obligation on the part of States not to arbitrarily withhold consent to relief actions during armed conflict. Casual readers may find it a compelling account of international law. Even experienced jurists and law of war practitioners may find its analysis persuasive. Yet, on careful examination, each of its three interpretive arguments suffers difficulty. Its textual construction of Article 70(1) unnecessarily complicates a passage that is clear and settled in its meaning. It then bootstraps that engineered ambiguity to justify resort to a narrow segment of negotiating history that excludes extensive debates and drafts inconsistent with its conclusion. Finally, the *Oxford Guidance* offers subsequent practice drawn not from comprehensive surveys of State practice, but rather from similar efforts by like-minded non-State actors to bolster its findings. The result is an attractive appeal to humanitarian logic, but a nonetheless strained interpretation of States' obligations to accept relief actions during armed conflict. Certainly, no nefarious motive should be attributed to its authors; rather the *Guidance* seems a product of dogged attention to humanitarian interests and logic to the neglect of the military imperatives of its important subject.

V. CONCLUSION

In September 1782, unable to maintain effective isolation of Gibraltar, Spanish forces joined by French troops, abandoned hopes of starving out the British garrison. On September 8, they launched their “Grand Assault,” mustering nearly 50,000 fresh soldiers to the defenders’ 5,000, who were self-described as “feeble as old age for want of succour . . . including sick, wounded, and disabled.”²²⁷ Still, the garrison withstood and returned each bombardment, inflicting particularly costly damage to the blockading fleet’s seaborne artillery barges.²²⁸ By October 12, a British fleet under the command of Admiral Howe arrived, providing reinforcements and distracting the Spanish ships from their bombardment.²²⁹ On February 2, 1783, the new French commander Duke de Crillon ceased hostilities. Although the siege featured fierce and desperate combat, failure to prevent the delivery of relief supplies is credited as the leading cause of the siege’s failure.²³⁰

The Gibraltar siege, like nearly all sieges before and since, is a heart-wrenching tale of human torment. This tragic story of suffering and many others like it have inspired notable efforts by States to codify limits on the conduct of siege. Yet judged from a humanitarian perspective, the law of war applicable to sieges, and especially to offers of humanitarian relief, includes glaring logical flaws and gaps. The urge to correct these flaws or to fill these gaps, especially by resort to humanitarian logic and interpretation is compelling, and in some respects, admirable. The *Oxford Guidance* is an understandable effort to close these gaps by resort to a range of legal interpretive methods, each guided by a compelling humanitarian logic.

Still, law of war development has never been exclusively an exercise in humanitarian logic. Whatever success the law has had at humanizing the conduct of war is attributable at least in part to efforts to account for the realities of armed conflict and to incorporate military imperatives and equities. With respect to siege operations, no military consideration is clearer than the absolute imperative of imposing complete physical, psychological, and electronic isolation. What may appear to some as inadequacies of the law regulating relief actions, including discretion to reject offers of impartial humanitarian relief, may actually be reflections of States’ armed forces’ considerable

227. ANCELL *supra* note 6, at 252–53.

228. *Id.* at 266–76.

229. *Id.* at 279–82.

230. RENÉ CHARTRAND & PATRICE COURCELLE, GIBRALTAR 1779–1783: THE GREAT SIEGE 27 (2006).

military experience with siege. Discretion to withhold consent to offers of humanitarian relief actions is an entirely logical, if potentially cruel, outgrowth of the isolation imperative and operational experience. It is worth considering, contrary to the views expressed in the *Guidance*, that the presently permissive rules for withholding consent to relief actions reflect not inadequacies but rather the presently-operative balance between humanity and military necessity.